

PRINCIPLES OF HUMAN RIGHTS: A COMPARATIVE ANALYSIS OF THE ISLAMIC AND WESTERN LEGAL CONCEPTION OF THE RIGHTS OF AN UNBORN CHILD.

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ABSTRACT

This paper examines the rights of an unborn child from the legal perspectives of both the Islamic and Western ideologies. It contends that since the life of human being begins from conception and as a measure of protection for the unborn child Islam appears to extend more consideration to it than Western legal systems. This perception is based on an exploration of the Islamic and Western ascription of life at various stages of conception. The paper, thus, concludes that an unborn child enjoy some rights that also transcends its existence even if it eventually becomes a stillbirth.

INTRODUCTION

The Islamic conception of human rights generally ascribes authority for the declaration of values as 'rights' to Unborn child. Thus, Unborn child is accorded all human's dignity and honor without distinction; it necessarily follows that they are essentially the same. The differences between human beings are, in Islam, artificial ones as nationality, color, or race and most importantly piety. Thus, all human beings are equal and from one universal community that is united in its submission and obedience to God. God says in the Holy Quran:

O mankind be dutiful to your Lord who created you from a single person (Adam) and from him (Adam) He created his wife (Eve) and from them both He created many men and women; and fear God through whom you demand (your mutual rights)

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and (do not cut the relations of the womb kinship). Surely God is Ever an All-Watcher over you¹.

At the very center of this universal brotherhood is the Islamic confession of the oneness of God that, by extension, includes the oneness and brotherhood of humanity is the fact that an Islamic state may be established anywhere². While the state is geographically limited, the human rights and privileges granted to humanity by God are not. The Qur'an states that these are universal and fundamental, and that all individuals are to enjoy and observe them under all circumstances including war regardless of whether he is living in the geographical confines of an Islamic state or not: "O you, who believe, stand firmly for God and be you securers of justice, witness for Unborn child. Let not detestation for a people move you not to be equitable; be equitable—that is nearer to Unborn child-fearing"³.

Instructively, the efficacy of any legal order is its quality in providing security and sustenance for its citizen rights from the process of coming to the world through a lawful marriage, a lawful sexual intercourse, and a lawful conception to birth. To achieve this, Shariah emphasis the doing of justice without fear or favour, affection or ill will and devoid of any form of discrimination in status, tribe, sex, nationality, religion or vested interest or by reason of affinity and or consanguinity⁴.

¹ Quran 4 verse 1.

² Ambali M.A: *The Practice of Islamic family Law in Nigeria*; Tamaza Publishing Company Limited, Zaria, 2007 295-300 and 317-328.

³ Quran 5 verse 8, in Jahiliyyah period the birth of a female child was considered a great curse and she often buried alive by heartless father. This was eradicated by Islam see Rahim A., *Islamic History*, Lagos, Islamic Publication Bureau, Lagos, 1981, 7

⁴ It is not permissible to oppress women, children, old people, the sick or the wounded. Women's honor and chastity are to be respected under all circumstances. The hungry must be fed, the naked clothed, and the wounded or diseased given medical treatment regardless of their pro- or anti-Muslim sentiments and activities. In Islam, human rights are granted by Unborn child, not by kings or legislative assemblies, and therefore they can never be taken away or changed, even temporarily, for any reason. They are meant to be put into practice and lived, not to stay on paper or in the realm of unenforceable philosophical concepts or United Nation declarations. (Quran 5 verse 44).

The killing of female child during Jahilliyah period was abolished at inception of Islam⁵.

In the middle of the present century, the United Nations, made a Universal Declaration of Human Rights, and passed a resolution against genocide and framed regulations to check it. There are other instruments on the protecting human rights i.e. European Convention on Human Rights and African Charter on Human and Peoples Rights. The various provisions on human rights have some things in common-among which are the universal application and inalienability. Similarly the divinity of human rights provisions in the Holy Quran and Sunnah as against the rights every mankind is entitled is not based solely on the fact that one is a Muslim faithful or non-Muslims but for being human and rationale. This proposition is evidently shown from the fact that Islam is conceived as religion not addressed to a particular section of humanity, but a religion of the whole world as stated in the Quran when God told the prophet that: *"We have not sent you O! Mohammed except as a mercy to mankind..."*⁶

THE ISLAMIC APPROACH TO HUMAN RIGHTS

When we speak of human rights in Islam we really mean the rights granted by God; not any sovereign authority or any legislative assembly or international conventions or national Constitutions. The rights granted by the sovereign authorities or the legislative assemblies, can be withdrawn in the same manner in which they are conferred⁷. The same is the case with the rights accepted and recognized by the dictators. They can confer them when they please and withdraw them when they wish; and they can openly violate them when they like. But since in Islam human rights have been conferred by God, no legislative assembly in the world, or any government on earth has the right or authority to make any amendment or change in the rights conferred by the lawgiver (God). No one has the right to abrogate them or withdraw them. Nor are they the basic human rights which are conferred on paper for the sake of show and exhibition and denied in actual life when the show is over. Nor are they like philosophical concepts which have no sanctions behind them.

⁵ Quran 81 verse 8

⁶ Quran 21 verse 107

⁷ i.e. the Nigerian Constitution contain some limitations to the enjoyment of rights granted therein Section 45

The human rights charters, the proclamations and the resolutions of the United Nations cannot be compared with the rights sanctioned by God; though both are applicable⁸ to every human being, the latter is founded on divinity. Thus, human rights are a part and parcel of the Shariah and every Muslims or leaders who claimed to be Muslims have the obligation to observe, accept, recognize and enforce these rights not the Muslims alone by to the non-Muslims alike.

If leaders failed to enforce the rights guaranteed the unborn child or make amendments and changes in them, or practically violate them while paying lip-service, the judgment of the Holy Quran for such governments is unequivocally stated thus: *Those who do not judge by what unborn child has sent down are the disbelievers*⁹. Similarly the following verse also compliments same that is: *"They are the wrong-doer"*¹⁰; while a third verse in the same chapter says: *"They are the evil-livers"*¹¹. Thus shariah has always being in the vanguard of the struggle for the protection of the rights of mankind. This is evidently and clearly stated in the Holy Quran, where the lawgiver says: *"We have honour the children of Adam...give them for sustenance things good and pure and confer on them special favour above a great part of our creation"*.¹²

Therefore, Human Rights in Shariah is one aimed at protecting the rights of mankind from very stage of conception¹³ till a child is born alive up to the time he shall die. Human rights in shariah are all embracing, encompassing and devoid of any form of discrimination on the basis of ethnicity, religious affiliation, nationality, status or colour. This is evidently shown from the provision of the Holy Quran wherein God says: *"O mankind, we have created you from a single male and a female and we have made you into notions and sub-tribes that you may recognize one another verily the most honorable among you in the sigh of God is he who is the most righteous among you, surely God is al-knowing, al-wise"*.¹⁴

⁸ It is only applicable in a sovereign nations if they are signatory to the treaty; see *Abacha v Fawehinmi* (2000) 2 NSCQR 289

⁹ Quran 5 verse 44

¹⁰ Quran 5 verse 45.

¹¹ Quran 5 verse 47

¹² Quran 17 verse 70

¹³ The process of coming to this world of any human being commences from conception pursuance to a lawful intercourse between a man and his wife (ives). The period unborn child stays in the womb may be nine months.

¹⁴ Quran 49 verse 13

In other words if the temporal authorities regard their own words and decisions to be right and those given by God as wrong they are disbelievers. If on the other hand they regard Unborn child's commands as rights but wittingly reject them and enforce their own decisions against Unborn child's, then they are the mischief-makers and the wrong-doers. The law-breaker is the one who disregards the bond of allegiance, and hypocrite is he who works against the truth. Thus all those temporal authorities who claim to be Muslims and yet violate the rights sanctioned by Unborn child belong to one of these two categories, either they are the disbelievers or are the wrong-doers and mischief-makers. This being the fact that shariah has left no aspect of the life of mankind untouched leaving no room for tyranny to thrive, nor does give room to abhor wickedness, the God lawgiver say: *"And if anyone do evil their face will be thrown heading into fire to you receive reward other than that which you have earned by your deed"*¹⁵.

The rights sanctioned by Almighty God are permanent, perpetual, consistent, adequate and eternal. They are not subject to any alterations or modifications, and there is no scope for any change or abrogation. Muslims have emphatically state their claim that Islam is not only a religion but also a complete way of life. The basis of this claim is supported by the following verse of the Holy Qur'an thus: *Nothing have We omitted from the Book*¹⁶. (Qur'an 6:38)

WHEN DOES HUMAN LIFE BEGIN? ISLAMIC AND WESTERN PERSPECTIVES

The question as to when a human life begins is a profoundly difficult one, with multifarious implications, ranging from abortion rights to stem cell research and beyond. A key point in the debate rests on the way in which we choose to define the concepts of humanity, life, and human life. What does it mean to be alive? What does it mean to be human? Is a zygote or an embryo a life? Is a zygote or an embryo a human being? These are intricate philosophical questions that often incite intense debate, for their answers are used as evidence in the answers to questions about the moral status of a zygote, embryo or unborn child¹⁷.

¹⁵ Quran 27 verse 90

¹⁶ Quran 6 verse 38

¹⁷ Devbio; *When does Human Life Begin; A Companion to Developmental Biology*, 2009 www.dedevbio.com/article/phd_1

Islam treats the unborn child as a human being as soon as forty days have elapsed after conception. It is at that time that the angel breathes the spirit (Ruh) into the fertilized egg of the mother. The Qur'an has presented minute and highly accurate knowledge (confirmed only now by modern embryology) of the stages through which the fertilized egg passes before the human being emerges¹⁸. Consider the following tradition of the Prophet:

One woman struck another woman with a rolling pin killing both her and what was in her womb. So Prophet Muhammad (sallallahu 'alaihi wa sallam) gave judgment that compensation be paid for the (unborn) life which was taken, and it should be a male or a female slave of the best quality, and that the woman who killed should have her life taken¹⁹. Prophet Muhammad (sallallahu 'alaihi wa sallam) also ordered that (funeral) prayers be offered over an unborn child who died before birth, and forgiveness and mercy sought (through prayer) for its parents.²⁰

Islam is a legal system which is based upon divine and immutable revelation. The main authority of Islam, the Qur'an, is not an encyclopedia of how to live one's life, there are several other sources of truth in Islam but it is the Shari'ah that contains the body of legal literature. Muslims believe that the Shari'ah teaches Muslims how to worship according to the Qur'an and the ways of the Prophet Muhammad²¹. However, Islamic law is flexible and is supposed to be analyzed under current times to deal with new problems. To analyze Islam's stand towards stem cell research, once again the status of the embryo must be determined. The Holy Qur'an teaches:

And indeed we have created man (Adam) out of an extraction of clay (water and earth). Thereafter we made him (the offspring of Adam) as a drop (Nutfa, Mixed drops of the male and female) in a safe lodging (womb of the woman. Then we made the drop (Nutfa) a clot (a piece thick coagulated blood). Then we made

¹⁸ Maulana Dr. Muhammad Fazur Rahman Ansari; 2010, *An Islamic Response to Legalized Abortion*, www.imranhosein.org/Islamic-Response-to-Abortion

¹⁹ Muwata Imam Maliki (1980); *English and Arabic Translation*: Vol. 1& 2 Alasela Islamic Publication Lagos. 1980

²⁰ *ibid*

²¹ Maulana Muhammed Ali: *The Religion of Islamic; A Comprehensive Discussion of the Sources, Principles and Practice of Islam*. UAR, National Publication & Printing House, 2009, 713-716

out of the clot a tissue, then we created of the tissue bones, then we covered the bones in flesh; thereafter we produced it as another creature. So blessed be unborn child, the best of creators²².

This verse of the holy Quran has been interpreted to indicate that an unborn child is perceived as a human life, only later on in the biological development because of the Qur'an's use of the words; "thereafter We produced him as another creature." Additionally, many scholars indicated that evolution of the unborn child does not occur until the end of the fourth month of pregnancy (120 days)²³. However, a Hadith reported Abu Abd al-Rahman Abd-God bin Mas'ud (may God be pleased with him) that the Prophet (PBUH) said to us:

Undoubtedly the creation of each one of you takes place when He assembled in his mother's womb; first as a drop of matter for forty days, then it becomes a blood clot for forty days, then in the same way it becomes a mass (piece of flesh) for forty days, and then the angel is sent to it who breathe the spirit (Ruh) into it...²⁴

Shari'ah makes a difference between actual life and potential life, determining that actual life should be afforded more protection than potential life. Islam places an obligation on Muslims to seek out knowledge, scientific knowledge in particular, since it is a part of human nature as created by Unborn child *Ililbul ilma walao kana min zina*. The will of God as contained in the Holy Quran is divine in its character and possesses of nature that cannot be interfered with by human action. Hence, in Islam, research on stem cells made possible by biotechnical intervention in the early stages of life is regarded as an act of faith in the ultimate will of Unborn child as the Giver of all life, as long as such an intervention is undertaken with the purpose of improving human health. There were few laws on abortion in the United States at the time of independence, except the common law adopted from England, which held

²² Quran Chapter 23 verses 12-14

²³ Abdulaziz Sachedina, *Ethical Issues in Human Stem Cell Research, Religious Perspectives*, (The Book of Destiny Qatar, Volume III No 4, 2000)

²⁴ Abdulrahman Doi, *Introduction to Hadith*, Lagos, Islamic Publication Bureau, Lagos, 1970, 43 Hadith Al-Nawawi

abortion to be legally acceptable if occurring before quickening. James Wilson a framer of the United States Constitution explained as follows:

With consistency, beautiful and undeviating, human life, from its commencement to its close, is protected by the common law. In the contemplation of law, life begins when the infant is first able to stir in the womb. By the law, life is protected not only from immediate destruction, but from every degree of actual violence, and, in some cases, from every degree of danger²⁵.

The United States does not have a set definition of when human life begins. Many of the historical and contemporary abortion laws are based on either the opinion that life begins at conception, quickening, or the viability of the unborn child outside the womb. Abortion was also permitted as a matter of public health in America, in an attempt to prevent the loss of lives of women who would be injured when trying to obtain illegal abortions.²⁶ In 1821 Connecticut first enacted abortion laws though abortions of a non-quickened unborn child were often permitted or treated more leniently than others, and were generally permitted to save the life of the mother. The decision of *Roe vs. Wade* in 1973 was based on the survivability of the unborn child outside of the womb²⁷.

There are several different contemporary cultural views regarding when a person acquires humanness. In rural Japan, personhood is obtained when an infant utters its first cry²⁸. In Northern Ghana a child is said to acquire humanness seven days after birth; while for several Native

²⁵ James Wilson, *Of the Natural Rights of Individuals*, (1790-1792) Blackstone, Commentaries 1765: "Life ... begins in contemplation of law as soon as an infant is able to stir the mother's womb." Suzanne M Alford, *Is Self-Abortion a Fundamental Right?* Duke Law Journal 52(1), (2008) 1011, McMillen, Sally Gregory, Seneca: *Falls and the Origin of Women's Rights Movement*, Oxford University Press, 2008, 21-23. Legally ending a marriage required extensive resources....Most women in unhappy marriages had no choice but to remain married, often because they lacked the financial means to survive without a husband....Couples in unhappy marriages often found other ways to cope by leading separate lives.

²⁶ *Roe v Wade* 401 U. S. 410 (1973) and *Planned Parenthood v Casey* 505 U.S. 833 (1992) where right was extended to abortion,

²⁷ *ibid*

²⁸ Morowitz, H. J. and Trefil, J. *The Facts of Life: Science and the Abortion Controversy*. London, Oxford University Press, New York, (1992), 6

American tribes in the Mojave, human life begins for children who live long enough to be put to the mother's breast²⁹.

The genetic view takes the position that the creation of a genetically unique individual is the moment at which life begins. This event is often described as taking place at fertilization, thus fertilization marks the beginning of human life.³⁰ During this developmental event, the genes originating from two sources combine to form a single individual with a different and unique set of genes. One of the most popular arguments for fertilization as the beginning of human life is that at fertilization a new combination of genetic material is created for the first time; thus, the zygote is an individual, unique from all others.³¹

Although the opinion that life begins at fertilization is the most popular view among the public, many scientists no longer support this position, as an increasing number of scientific discoveries seem to contradict it. One of such discovery in the last twenty years is that, research has shown that there is no "moment of fertilization" at all³². Scientists now choose to view fertilization as a process that occurs over a period of 12-24 hours. After sperm are released they must remain in the female reproductive tract for seven hours before they are capable of fertilizing the egg. Approximately ten hours are required for the sperm to travel up to the fallopian tube where they find the egg³³. The meeting of the egg and the sperm itself is not even an instantaneous process, but rather a complex biochemical interaction through which the sperm ultimately reaches the inner portion of the egg. Following fertilization, the chromosomes contained within the sperm and the chromosomes of the egg meet to form a diploid organism, now called a zygote, over a period of 24 hours³⁴. Thus, even if one were to argue that life begins at fertilization, fertilization is not a moment, but rather a continuous process.

²⁹ Ibid; See Section 235 Penal Code Act see also section 232 and 233

³⁰ Grobstein and McLaren., *Science and the Unborn: Choosing Human Futures*. (Basic Books, New York, 1988, p 453

³¹ Grobstein and McLaren., *Science and the Unborn: Choosing Human Futures*. (Basic Books, New York, 1988, p 453

³² Maureen L. C., *When Does Human Life Begin? The Scientific Perspective*, Westchester Institute White Paper Series Vol. 1 No 1 (2007), 1-32

³³ Morowitz, H. J. and Trefil, J. *The Facts of Life: Science and the Abortion Controversy*, P. 12

³⁴ Shannon, Thomas A. and Wolter, Allan B. *Reflections on the Moral Status of the Pre-Embryo* Theological Studies COLO Law Review; Volume 51(1990) p 56

lasting 12-24 hours, with an additional 24 hours required to complete the formation of a diploid individual³⁵.

The most popular argument against the idea that life begins at the moment of fertilization has been dubbed the "twinning argument." The main point of this argument is that although a zygote is genetically unique from its parents from the moment a diploid organism is formed; it is possible for that zygote to split into two or more zygotes up until 14 or 15 days after fertilization. Even though the chances of twinning are not very great, as long as there is the potential for it to occur the zygote has not completed the process of individuation and is not an ontological individual³⁶.

Instructively, the positions among philosophers is the perspective that life begins at the point of gastrulating — that point at which the zygote is an ontological individual and can no longer become two individuals. Gastrulating commences at the beginning of the third week of pregnancy, when the zygote, now known as an embryo, is implanted into the uterus of the mother. The cells are now differentiated into three categories that will give rise to the different types of body tissue³⁷. After gastrulating the zygote is destined to form no more than one human being.

The philosophers who support this position argue that there exists a difference between a human individual and a human person. A zygote is both human and numerically single and thus a human individual. However, because individuality is not certain until implantation is complete, and because Individuality is a necessary condition of personhood, the zygote is not yet a human person³⁸. Shannon and Wolter described this eloquently saying, "An individual is not an individual, and therefore not a person, until the process of restriction is complete and determination of particular cells has occurred. Then, and only then, it is clear that another individual cannot come from the cells of this embryo".³⁹ Be that as it may, it seems to be the global consensus from all discourse that once there is conception there exists a human life in the womb as evidently shown from different perspectives held on the legal right of abortion.

³⁵ *ibid*

³⁶ *ibid*

³⁷ *Ibid* Shannon and Wolter; *Reflections on the Moral Status of the Pre-Embryo*
Theological Studies

³⁸ *Ibid* 45

³⁹ *Ibid* P 46

THE LEGAL STATUS OF THE UNBORN CHILD

The understanding of how shariah and laws from different jurisdictions deal with this problem is to understand how they conceive of the legal status of the child in the womb (unborn child). Broadly speaking, if the unborn child is accorded little or no legal personality, then considerations of maternal autonomy almost invariably trumps foetal autonomy protection in law. However where the unborn child is accorded substantive legal personality then the road is open to a balancing of unborn child independence and maternal autonomy that may be accorded rights, in concrete terms.

For common law jurisdictions, the basic position in relation to the legal status of the unborn child is circumscribed by what is known as the "born alive" rule. This rule ordains that, excluding statute, a person cannot be held responsible for injuries inflicted on a *unborn child in utero* unless and until it is born alive. This position to a limited sense is similar to Islamic principle that is, a child is deemed to be in existence from the point of conception; and the child in the womb is competent to inherit within Islamic law⁴⁰. This is equally evidenced in the Sunnah of the prophet which says: "It was narrated by Yasir that, the prophet said; when a newborn has raise his voice (and then dies) it is treated as heir"⁴¹

On a charge of murder or manslaughter it must be shown that the person killed was one who was in being. It is neither murder nor manslaughter to kill an unborn child while still in its mother's womb although it may be the statutory offences of child destruction or abortion⁴². If however the child is born alive and afterwards dies by reason of an unlawful act done to it in the mother's womb or in the process of birth, the person who committed that act is guilty of murder or manslaughter according to the intent with which the act is done⁴³. Shariah persistently warn against the killing of live which one cannot give this of course includes the child in the womb as evidently buttressed, God says: "...and kill not your children for fear of poverty..."⁴⁴. There was some initial indecision about how the common law would regard the killing or

⁴⁰ Islam, Land & Property Research Series Islamic Inheritance Laws and Systems, United Nations Human Settlements Programme (UN-HABITAT), 2005, h.lim@uel.ac.uk and www.unhabitat.org P 10

⁴¹ Reported by Abu Daud; See Muwatta Imam Malki

⁴² Section 232, 234 and 235 Penal Code Act

⁴³ Halsbury's *Laws of England* (4th edition, 1990) Vol11 (1)

⁴⁴ Quran 6 verse 151

injury of the unborn child *in utero*⁴⁵. This position is mutais mutandis same with Nigerian laws on unborn child.

CONCEPT OF SOCIAL JUSTICE IN SHARIAH IN RELATION TO UNBORN CHILD'S RIGHTS

Man had since embarked on a voyage of discovery of the road map to absolute justice. This has been due to the credence the phenomenon 'justice' had gained in legal philosophy especially when considering the purpose of law itself. In other words, law is not an end itself but a means to an end which is absolute justice⁴⁶.

Generally in Islamic legal philosophy, justice is the guiding light of Islamic social ethics. These have been enjoined in the Holy Qur'an and as complemented by the traditions of Prophet Muahmmmed (PBOH). The establishment of all forms of social justice ranging from the economic and political to moral and legal has been comprehensively enshrined in the primary sources of Islamic law⁴⁷.

O you who believe stand out firmly for justice, as witnesses to God, even though it be against yourselves, or your parents, or your kins, be the rich or poor, God is best protector to both (than you), least you avoid justice; and if you distort your witness or refuse to give, it verily, God is Ever Well-Acquainted with what you do⁴⁸.

In essence, religion is not separated from politics under the Islamic law, hence the imperative of the protection guaranteed to all by God. In fact, one of the secondary sources of Islamic law is *Maslahah* which means public interest. The interest of every citizens be it Muslim and non-Muslim, in an Islamic state is legally protected. There is no second class citizenship status for certain class of people in the state and no immunity for leaders. Everybody is equal in the eyes of the law and in the distribution of essential social economic needs. The Islamic model of social justice was however laid down as a precedent in the proper administration of a state about 1425 years ago during the lifetime of

⁴⁵ Gerard Casey: *Pregnant Woman and Unborn Child: Legal Adversaries?* 2010, www.ucd.ie/philosophy/staff/casey_gerard.htm

⁴⁶ Umar A. O., *Social Justice in the Nigerian Millieu: The Jurist, The Jurist A* Publication of the Law Society, University Ilorin Vol 9 (2004) 180

⁴⁷ *ibid* 187

⁴⁸ Quran 4 verse 135

prophet Muhammad (PBOH). He was the first, in history of the world to establish a Constitutional state being guided by a written constitution. This was the constitution the prophet promulgated with the establishment of Islamic State of Medinah. The Constitution conferred on every citizen of the state, be it Muslim or non-Muslim, right to religion and ownership of property⁴⁹.

When Islamic State was established at Medinah, Prophet Muhammad, as the head of state ensured the equality of all the citizens and the equal access to the benefits and resources of the state; taught them submission to God, peace and tolerance to each other, removed tribal distinctions, blood feud and vices from them and regulated their moral and social life⁵⁰. These without missing words are the basis of Social justice, equality and freedom established long time ago by the Holy Prophet Mohammed (PBUH). The Islamic community generally strives to maintain justice among its members due to the numerous and timeless injunctions in the Holy Qur'an and Hadith which lend credence to the strict observance of social justice. To this end, every Muslim is supposed to be an advocate of social justice and more importantly a civil justice activist. The fundamental Rights guaranteed and protected in Shariah stand over and above the ordinary law of the land and serve as the guarantor of the liberty and freedom of citizen⁵¹ as well as preservation of humanity through the protection unborn child from untimely termination this mutatis mutadis correspond to the naturalist conception of rights. These rights shall be discussed as follows:

Right of Procreation

Becoming a parent is a life-altering event and universal in concept and acceptance. Before a woman gets pregnant she may want to prepare for the emotional and life style changes she will face as a new mother and father. It is important for the woman and her partner to agree on most of the major issues, or begin discussing their differences before she conceive. Pregnancy according to medical calculation is counted from the first day of the mother's last period.⁵² This means that the unborn child is already considered two weeks old at conception. The gestation period is

⁴⁹ ibid P. 188

⁵⁰ Doi A.R, *Islamic History*, (Islamic Publication Bureau, Lagos 1981) 24-26

⁵¹ An-Na'im, Abdullahi Ahmed, *Islam and the Secular State* (Harvard University Press, 2008) P 67

⁵² Qadri A. A., *Islamic Jurisprudence in the Modern World*, (Taj Company, New Delhi, 1986) P. 295

however divided into three trimesters. The first trimester witnesses fetal development in the area of sperm penetrating the ovum. Once fertilized it is called a zygote until it reaches the uterus 3- 4 days later. The embryo may then float freely in the uterus for about 48 hours before implanting. Upon implantation complex connection between the mother and embryo develops to form the placenta. This process takes place by week 4. At week six, a primitive heart is beating; head, mouth, liver and intestine begin to take shape⁵³.

Right of Sexuality

The conception of unborn child is premised on sexuality and in shariah the right of sexuality can be commendable and condemnable.⁵⁴ It is commendable when performed within the ambits of the law, in other words in a legal relation. On the contrary when it is performed outside wedlock it becomes condemnable and punishable.⁵⁵ Though commendable within wedlock, it becomes condemnable when carried out under certain conditions. The Qur'an considers love making and child bearing as signs among other signs of the Divine existence. In that regard God says: "And among His Signs is that He created for you mates from among yourselves; that ye may dwell in tranquility with them, and He has put love and mercy between your hearts. Verily in that are Signs for those who reflect". (Qur'an 30:21)

Relevant portion of the above verse to our discussion is its reference to the right of unborn child which commences from the very right to conjugal relationship with love and mercy. It is significant to note that, the love referred to herein the verse, means sexual intercourse and the mercy, points to product of that intercourse which is a child: The Qur'an goes further to state that husbands and wives should make love whenever they desire it: "*Your wives are as a tilth unto you, so approach your tilt when or how you will*"⁵⁶. In fact sexual desire, pleasure and satisfaction are legitimate rights of both spouses for the purpose of bearing children which began with unborn child.

⁵³ *ibid*; see also Quran 32 verses 6-9, Note the technology advancement which has proved and assisted in conception through artificial insemination without intercourse.

⁵⁴ There must be an existence of legal and valid marriage in Islamic way before the right of sexuality can be established otherwise the parties may be committing the offence of adultery or fornication punishable in law of God.

⁵⁵ Under Islamic doctrine and Christianity it is sin to have children outside wedlock.

⁵⁶ Quran 2 v 223

Pre-marital and extra marital sexual relationships are forbidden and punishable under Islamic and Christian doctrine, this to prevent and unwanted unborn child that can give rise to a bastard. *The Qur'an prohibits these practices as follows: Nor come nigh to adultery, for it is a shameful (deed) and an evil, opening the road to other evils.* (Qur'an 17:32). However, the right of an unborn child still remains unfettered even if the product of the pregnancy is out of wedlock. The sin of the adulterous man and woman will not in Islam be visited on a child in the womb. It is authentically related that 'A'ishah⁵⁷ the wife of the oly prophet said regarding the child born of adultery: "He shares in nothing of the sin of his parents, for 'Allah says: "That no soul shall bear the burden of another and that a person shall have nothing but what he strives for"⁵⁸."

Right to be Conceived (Pregnancy)

The process of childhood is contingent upon conception, the fundamental rights of human being begins with the very fact that the unborn child is protected while in the womb. Information about source of human being, conception, unborn child development and ordeal of pregnant women is provided in the sources of Islam. The Qur'an for example describes conception and the process the unborn child will pass through before coming to live in a number of its chapters and verses⁵⁹. For instance the Holy Quran says:

Have We not created you from a fluid (held) despicable? That which We placed in a place of rest firmly fixed for a period (of gestation) determined (according to need)⁶⁰.

Man We did create from a quintessence (of clay). Then We placed him as a drop of sperm in a place of rest firmly fixed. Then We made the sperm into a clot of congealed blood; then of that clot We made a (fetal) 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 God the Best to create⁶¹.

O mankind if ye have a doubt about the resurrection (consider) that We created you out of dust, then out of sperm, then out of a

⁵⁷ Musannaf 'Abd al-Razzâq (13860,13861)

⁵⁸ Sûrah al-Najm: 38-39

⁵⁹ Qur'an 22 verse 5-6; 23 verses 12-14; 32 verses 6-9; 53 verses 45-46 and 76 verse

⁶⁰ Qur'an 57 verses 20-22

⁶¹ Qur'an 23 verses 12-14

leech like clot then out of a morsel of flesh partly formed and partly unformed in order that We may manifest (Our Power) to you and We cause whom We will to rest in the wombs for an appointed time. Then do We bring you out as babies, then foster you that ye may reach your age of full strength: and some of you are called to die and some are sent back to the feeblest, old ages so that they know nothing after having known (much) and further, thou sees the earth barren and lifeless but when We pour down rain on it, it is stirred (to life) it swells and it puts forth every kind of beautiful growth (in pairs). This is so because God is the Reality. It is He Who gives life to the dead and it is He Who has power over all things.⁶²

The verses describe both the early stage of unborn child as well as a complete description from conception unborn child to delivery. The verses did give duration of each stage of unborn child in the unborn child development; this is also complimented in the Sunnah of the Prophet (PBUH) thus: *"Verily the creation of any one of you takes place when he is assembled in his mother's womb. For forty days (he is) a drop, then he becomes a clot in the same way and then in the same way a mass..."*⁶³. It is worthy to explain that the minimum gestation in shariah is six months. The carrying of a child to his weaning is (a period of thirty months)⁶⁴. This verses also deals with pregnancy (unborn child) and suckling without details about the duration of each of them. This position is complimented by the Hadith of the Holy Prophet (SAW) thus:

An unborn child will be constructed in the shape of sperm for forty days. Then it will be a clinking cloth (to the internal side of the mother's womb) for another forty days. Then the Angel will be sent down to the unborn child to blow soul in it. The Angel (is further) commanded to write the following four items (concerning the future life of the unborn child on the earth) as follows: the (pre-determine) provision of the unborn child, his/her term (duration on earth) and whether he/she is fortunate or unfortunate (while alive on earth)⁶⁵

⁶² Qur'an 22 verses 5-6

⁶³ Abdul, M.O.A., *The Selected Traditions of Al-Nawawi*, Lagos, Islamic Publications Bureau, Lagos, 1976, 26

⁶⁴ Qur'an 46 verse 15

⁶⁵ Bukhari Hadith No 3036

Equality of Mankind

Islam emphasizes equality of mankind particularly in mundane affairs. This element of equality is extended to all sphere of life including the political, economic, social and religious. The only preferential edge which a man possessed over other human beings is piety. This is evidenced as enunciated in the divine Book of the Muslim thus: "O Mankind! We have created you from a male and female, and made you into nations and tribes that you may know one another. Verily, the most honorable of you with Unborn child is that (believer) who is most pious".

What is in focus in the verse is justice and equality among mankind. The nature of man's existence is stated in unequivocal terms, and irrespective of race, tribe, religion, and colour, all human beings are one. A case is made for universal brotherhood of mankind. Since every human being is from the same source, they have been enjoined to be good to one another so that peace will prevail on earth. In a similar vein, prophet Muhammed (PBOH) in his farewell message to mankind gave a death-blow to all the differences of race, nation, caste, and colour.⁶⁶ Muslim is a brother of every other Muslims. You are all equal; you enjoy equal rights and are subject to the same obligations, you are member of the same common brotherhood. It is accordingly forbidden to you to take from your brother save what he gives you of his own free will⁶⁷.

The equation of brotherhood and equal treatment to unborn child is arguably founded on the fact that every single soul is a product the womb without which brotherhood cannot even exist, thus it becomes imperative for unborn child be protected.

It is, of course, a heinous crime and sin for a human life to be taken without just cause. When such an act is committed unintentionally, then the murdered person's family is entitled to compensation. The above incident confirms that the unborn child whose life is taken unintentionally has the same right as others. When a life is taken intentionally, then of course the divine law of equity is that of 'a life for a life'. When a doctor performs an abortion and intentionally takes the life of an unborn 'human being' for no just cause, then the law of equity must also apply. If he is not punished by the unborn childless world, his punishment is sure to be inflicted in the heavens above, and it would be truly terrible⁶⁸. But it is an even greater sin to take the life of a believer without any justification. The

⁶⁶ Doi A. R. Islamic History, 41-43

⁶⁷ Sahih Bukhari and Muslim

⁶⁸ Maulana Dr Muhammed *An Islamic Response to Legalized Abortion*, 4

above is emphatic evidence that the unborn child who died before birth is a human being with rights like all other human beings, to a funeral service. Hence taking the life of an unborn child (i.e., a fertilized egg which has reached the stage of becoming a human being) through abortion for no just cause constitutes an even greater sin and crime -punishment for which would be truly terrible⁶⁹.

It can be concluded that there is no class system or social stratification in an ideal Islamic society and thus within this context is the equality of treatment to unborn child through proper care for the wife to prevent maternal mortality and right to own property when eventually born alive. This is the main reason why there are no special reserved seats for the rich in the Mosques. The rich and the poor, the dignified and the humiliated, the noble and the peasant, members of the society stand toe-to-toe and shoulder-to-shoulder to observe the five daily prayers in congregation. This says a lot about the level of equality the Islamic model maintains.

Right to Life and Dignity

Human's (including unborn child) blood is sacred (God says: and kill not your children for fear of want) in any case and cannot be spilled without justification. Violating this rule is equivalent to killing all of humanity. God is the creator of the universe He is all knowing and mighty in his majesty⁷⁰. The life of human being as one of the creation of God in Sharia is regarded sacred and inviolable except for a just cause thus; the lawgiver made provisions in his divine legislation evidencing the justiceability of a person's right to life and protects it against tyranny, operations and any form of unjust dealing. Under Islamic legal system, many provisions cater for the safety of life and dignity or individual from trespass and aggression⁷¹. For this purpose, the shariah ordains many ordinances and prohibitions. The violations of these ordinances and prohibitions are met with severe punishments to serve as a deterrent. God said: "Let there be no hostility except to those who practice oppression. If anyone transgresses the prohibition against you, transgress you in the like manner".⁷²

⁶⁹ Ibid

⁷⁰ An-Na'im, Abdullahi Ahmed, *Islam and the Secular State*; (Harvard University Press, 2008, 66

⁷¹ Khurshid A (ed), *Islam Its meaning and Messages*, Islamic Foundation Ltd, 1980, 1

⁷² Quran 2 verse 190

The consensus of Muslim jurists is that no punishment is established by the means of subjective opinion of human or analogy. The first and foremost right under Islamic law is the right to life because all other right granted the Unborn child can only be secured when there is life. The Qur'an says: *Whoever kills a human being (without a just cause) it is thought he had killed all mankind*⁷³. The power to kill or take another person's life is vested in the authority which can only be decided by a competent authority. This is unequivocally stated in the Qur'an which reads: *Do not kill a soul which God has made sacred except through the process of law*⁷⁴. Shariah guarantee unborn child's life against any form of unfair treatment and or deprivation of life and liberty, it is beyond debate that, in shariah violation of this rights are meet with severe punishment of the like manner (abortion is prohibited except for a just cause). Akin to the above – explicated elaborated divine protection of Human Right to life and dignity of human person in Shariah, is section 33 of the Nigerian Constitution 1999 (Article 4 of the African charter on Human and Peoples' Rights) the Constitution provides: "Every person has a right to life and no one should be deprived of his life save in execution of the sentence of a court in respect of which he has been found guilty". This goes to explain the fact that right to life of unborn child whether Unborn child's given or protected by government is sacred and inviolable.

The Right to the Safety of Life

Shariah guarantees the sanctity of human life as evidenced from the word of the lawgiver that "...kills not your children for fear of poverty. We shall provide for them as well as for you. Surely the killing of them is a great sin"⁷⁵. Immediately after the verse of the Holy Quran which has been mentioned in connection with the right to life, Unborn child has said: "...And if anyone saves a life, it would be as if he saved the lives of all mankind..."⁷⁶.

It must be noted that there can be many forms and stages of saving lives from death (avoiding abortion and destruction of unborn child is saving of live to be). A man may be ill or wounded, irrespective of his nationality, race or colour. If you know that a pregnant woman is in need of your help especially to protect the child in her womb, then it is your duty that you should arrange for her treatment for ailment. If she is dying of starvation,

⁷³ Quran 17 verses 31-33

⁷⁴ ibid

⁷⁵ Quran 17 verse 31

⁷⁶ Quran 5 verse 32

then it is your duty to feed her so that she can ward off death and that of the unborn child. It must be emphasis the human life is so sacrosanct that it is guaranteed globally, Universal Declaration on Human Right, European Convention on Human Right and African Charter on Human and Peoples' Right.

Right to Own and Acquire Property

Shariah guaranteed individual's right to own property lawfully and prohibit unjust and unscrupulous usurpation of other's property⁷⁷. God said: "And eat not up one another's property unjustly (in any illegal way e.g. stealing, robbing, deceiving, embezzlement and corruption) nor give bribery to the rulers (judges before presenting your case) that you may eat up wrongfully and knowingly eat up a part of property of others sinfully".⁷⁸

It is instructive to state that, the right to own property is neither limited nor exclusive preserved of the well to do people in society alone. Shariah as a legal system enjoy the spread of wealth among all people this account for the establishment of institution of the like of Zakat in Islam⁷⁹. Therefore, shariah guaranteed the right of the poor, the weak, orphan and the needy against discrimination and oppression in acquisition, retention and control of their property. God warned against unjust dealing with other's property in the Holy Quran that: "Verily those who unjustly eat up the property of orphans eat up fire into their bellies and they will soon be enduring a blazing fire".⁸⁰ The shariah goes further to guarantee individual right to acquire and own property by encouraging and regulating increase in acquisition and distribution of property by economic means without infringement on the right of others in society. God says: "O you who believe eat up not your property among yourselves in unjustly except it is trade among you by mutual consent. And do not kill yourself (nor kill one another) surely God is most merciful to you".⁸¹

⁷⁷ Coulson N.J, *Succession in the Muslim Family*. Cambridge University press, London, 1971, 54.

⁷⁸ Quran 2 v 188

⁷⁹ Quadri Y. A, *Survival of the Shariah in Multi Faith Nigeria*, A Lead paper presented at the 22nd Annual National Conference of the Nigeria Association of Teachers of Arabic and Islamic Studies (NATAIS), held in the University of Maiduguri, Maiduguri, 28 August- 2 September 2002.

⁸⁰ Quran 4 verse 10

⁸¹ Quran 2 verse 2

A child in the womb enjoys the right to own property through inheritance if it satisfies the following conditions. (i) The unborn child is proved to be conceived within the minimum of six months gestation period⁸², (ii) The unborn child is born alive and (iii) The unborn child is conceived and given birth in a legal marriage. There is usually the problem as to whether it was born alive or dead when deceased dies. However, the Holy Prophet (PBUH) addressed this problem thus: "It was narrated by Yasir that, the prophet said; when a newborn has raise his voice (and then dies) it is treated as heir".⁸³

Similarly an unborn child acquires property through wasiyyah. Thus if a man should bequest to a unborn child and the birth should take place within six months from the time of the bequest the legacy is valid. All jurists unanimously agree to it; that the right of the unborn child is established upon birth. Thus until then no one can exercise any right on his behalf because of the incompleteness of his capacity (*ahliyyat al-wujub*). The incompleteness is contingent upon his delivery alive; even if it dies immediately after delivery it does not affect the right to wassiyya. However a will in favour of unborn child is void if it is a stillborn⁸⁴.

In the same vein a unborn child conceived out of an unlawful wedlock though in shariah cannot inherit from his alleged father to be⁸⁵. However, the unborn child right to inherit from his/her mother is not altered while the mother with her relations, spouses and descendants can equally inherit him/her vis-vasa. This is contingent upon the delivery of the unborn child alive even should she died immediately after birth but not still born. This is supported by a Sunnah of the prophet:

Hadith. Maliki reported that, it reached him from Urwah bn Zubar that when the son of a cursed woman or bastard should die, his mother would take her share in accordance with the Book of God as well as his maternal brothers, the remainder would go to the master of his mother, if she should have been freed and if she should be an Arab, the balance will accrue to the Muslims⁸⁶.

⁸² Quran 46 verse 15 and Quran 31 verse 14, Neil B.E Baillie: A Digest of Mohammudan Law. (Premier Book House Lahore 1975) p 45

⁸³ Reported by Abu Daud; See Muwatta Imam Malki

⁸⁴ Neil B. E. A Digest of Mohammedan Law; p46

⁸⁵ Al Nawawi Hadith

⁸⁶ Sahihi Bukhari page 466

However if an unborn child failed to meet the above criteria, the portion left for him/her revert back to surviving heirs. It is equally important to note the issue of abortion in connection with the right of an unborn child. There is no explicit Quranic text or Hadith on the issue of abortion however Islamic opinion regarding abortion confirms its sinful nature. Islamic scholars unanimously prohibit abortion in the majority of cases. But, the question about the universality of these religious opinions on abortion is often raised.

Instructively scholars seem to in concurrence that in a case where the mother's life is in danger or is so serious that she might die; or if both the lives of the mother and the child are in danger; or if the mother gives birth there is a serious chance both her and the child will die abortion is permissible. In any or all of the enumerated circumstances abortion is permissible only before emolument even if the pregnancy spells danger to the mother's life, except in the event where carrying on with the pregnancy could prove fatal to both the fetus and the mother, and there is no way to save the baby's life, but it is possible to save the mother's life through abortion.⁸⁷

It is apposite to state therefore that every individual have a divine gift from God, it may be greater than other or unequal, but God assured that providence has allotted them through a scheme by which people receive what they earn.

CONCLUSION

Shariah is very explicit in the quest to guarantee Fundamental Human Rights, as such, mankind is to treat and deal with one another with respect for their liberty, freedom and justice. It must equally observe the principle of equality, this being the reason why the prophet was reported to have said: *None of you is a perfect believer, until he loves for his brother what he loves for himself*⁸⁸.

The unborn child who died before birth has a status with his Lord that is so great that he can even argue with the Lord on behalf of his parents who were consigned to the hellfire, and he can succeed in himself bringing them out of the hellfire with his umbilical cord. If he can do that, what then can he do to a parent, or parents, who cruelly killed him through

⁸⁷ Serder Demirel, Abortion from Islamic Ethical Point of View, (2nd Global conference on Ethics in Public Life, 2010)(

⁸⁸ Al Nawawi, Hadith 13 and *Lateef A. Human rights in Islamic Law*, Journal of Islam Comparative Law, ABU Islamic Comparative Law, Abu Zaria, (1997) 7

abortion? Or to the doctor who performed the abortion? Or the state and government which presided over the legalization of that which God Most High had prohibited?

Muslims have long realized that they cannot prevent the march to unborn childlessness around the world today. True Muslims insist, however, that they do not want to be a part of that unborn childless world. And this is one of the reasons for establishing mechanism to protect human life right from womb and Unborn child-fearing community that will accord every citizen their rights in line the dictate of God. The importance of protecting unborn child is emphasized in the tradition of the prophet that:

No Muslim couple will lose three of their children – born or unborn) by death without God bringing them (i.e., the couple) into Paradise by His great mercy. “He was asked if that applied if they lost two, and he said it did. He was also asked if it applied if they lost one, and he said it did. Then he said, “By Him in whose hand is my soul, the child who was lost before birth draws his mother to Paradise by his umbilical cord when seeks her rewards for him from God”

Throughout history divine and religion law have provided rules, regulations, moral precepts and standard of highest nature to keep human kind along the narrow and difficult path of devotion to Unborn child with moral probity, selfless and kind service to fellow human beings ad respect for the rights of others. It is clear that if the ideals of the Universal Declaration are to be realized, nations and peoples committed to human rights must take it upon themselves to reverse the present trends toward the compartmentalization of rights of all manners including unborn child. Therefore, we should join hands with many Muslim societies and organizations around the world in propagating the Islamic human rights movement and denouncing the unnecessary, unwise, and immoral developments in our society⁸⁹

⁸⁹ Hassan S. K., *Human Right and the Nigerian constitutional Law Perspective from Common and Islamic Laws*, The Jurist, LSS University of Ilorin Journal vol 10, (2005) p 40

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