

# Right Of Fetus (Janīn) In Islam And Western Law A Comparative And Analytical Study

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## Abstract

In addition to stating the rights of the fetus in Islamic law, the rights of the fetus are also defined in Western law. Islam also defines the rights of the fetus as an entity and prescribes its rights and prescribes punishment for those who violate these rights. Just as a living and born child has the right to have his life protected and to have property and to inherit from his heirs, so these rights have been established for a fetus.

Different scholars differ on the different forms of abortion and its permissibility, but everyone agrees on the rights of the fetus. In contrast, according to abortion laws in Western law, a mother can have an abortion whenever she wants, but if a normal person loses the pregnancy, she will be found guilty.

In Islamic law, a pregnant woman has a number of exemptions in order to protect her fetus, such as delaying the issuance of **Hudud wa Qisas** on a pregnant woman until conception. In the same way, there are exceptions to the rules of Share'ah for pregnant women, such as fasting. Under the rights of the fetus, it is made clear that just as it has other rights after birth, so does its lineage. Some financial rights would also be established for the fetus, such as the right to a will and inheritance. After birth, the fetus will receive an equal share of the living person. In Western law, the laws of will and inheritance for the fetus are not clear, but they are also inherited. This article briefly compares the rights of the fetus in Islamic law and Western law. The importance of this has increased in the context of the recent US court ruling on abortion.

**Keywords:** Right, Fetus (Janīn), Islam, Western Law, Comparative

## Introduction

Islam has also given the status of an entity to the fetus, stating its rights and prescribing punishments for those who violate these rights. Just as a living and born child has the right to have his or her life protected, to own property and to inherit from his or her heir, so these rights have been established for a fetus.

Abortion in Pakistan is an illegal act and falls under the category of crime under Section 338 of the Penal Code of Pakistan. This crime can be punished with 10 years of imprisonment. No formal record is made of (legal or illegal) but doctors say that every year women get abortions by the number of lakhs. Among them, about 78 percent are married women and about 24 percent are unmarried girls.

Janin(fetus) is a developing human in mother's womb and it is called Janin because it is a hidden thing in womb and anything which is out of sight is called Janin. The word 'Jin' is also from Janin and Jins are also hidden from our eyes. Similarly, Janin is called Janin as it is in womb and away from human's sight and its plural is اجننه and اجنن. The word 'fetus' and 'embryo' is used in English language for جنين . Usually both are considered as synonymous but there can be a slight difference. Embryo is the developing human in the first eight weeks inside the womb of his mother while fetus is the developing human from ninth week till birth.

The historical context of fetal rights legislation should be of concern to the most ardent advocates of fetal rights—pregnant women. Often, in the past, the expansion of fetal rights has been purchased by diminishing the rights of pregnant women... A fetus's "right" to protection from environmental toxins costs pregnant women their right to good jobs: For nearly a decade before the U.S. Supreme Court ruled against such policies in 1991, companies sold fertile used "fetal protection" policies as a basis for banning women. Taking up high-paying blue-collar jobs that can expose them to mentorship. The fetus's "right" to health and life has cost women their physical integrity (women have been forced to undergo caesarean sections or blood transfusions), their freedom (women imprisoned for harming fetuses through alcohol or drug use), and in some cases their lives (a court-ordered caesarean section likely caused the death of Angela Carder in 1987 , who had a recurrence of bone cancer that had metastasized to his lungs).

. Most recently, a state's attorney has taken up the cudgel for the fetus by charging a woman with murder for her refusal to consent to a cesarean section.

Before describing the rules of the fetus in Islamic and Western law, it is necessary to explain the Fetus:

## Janīn (Fetus)

### Meaning of the fetus:

Literal definition of fetus: A fetus is a child that is in the womb of the mother and the fetus is called a Janīn (fetus) because it is used for a hidden thing and the fetus is also hidden in the womb of the mother. The one who is hidden from you will be called jinn and the one who is hidden from you is called jinn and jinn because they are hidden from the eyes. And the fetus is called a fetus because it is hidden in the womb of the mother and is hidden in the womb.(Ibn Manzūr, 1988)

Ibn Ḥazm Said: "A Janīn (fetus) is an entity that is in the womb after its creation, whether it is in the womb or before the completion of four months or after the completion of four months"(Ibn Ḥazm, 1999).

These two basic definitions prove that the fetus refers to the hidden being in the womb, whether it is a few days old or a few months old.

**The stages of fetal creation:** The stages of the creation of the Janīn have been described in various places in the Qur'an, as well as in the Hadiths in many places, such as: "O people! If you are in doubt about resurrection (after death), then (consider your creation and evolution). In the case of (suspended) then from a (such) lump which seems to be pressed by the teeth, in which the initial creation of some organs has become apparent."(Qura'n 22:5, n.d.) In another place it was said: "And verily We have made the creation of man from the essence of clay, then We have made him a sperm-drop and placed him in a strong place (the womb). We made this sperm (a form of leech inside the womb) a suspended being ..." (Qura'n 23: 12,14, n.d.)

Similarly, it is narrated in the Hadith that each of you stays in the womb of his mother in the form of sperm for forty days, then it becomes a part of it for the same period, then it becomes a part of it for another period. An angel is sent to

him who breathes life into him, then four matters are decided, his sustenance is written, his age is written, his book of deeds is written, and it is written that he is unlucky, will be lucky”(Muslim, n.d.) From all these verses of the Qur'an and the hadiths, the order of the stages of human creation becomes clear.

### **The right of the fetus to life**

#### **Right of Life:**

Ruling on abortion, Abortion occurs in two cases: Before the breath of the soul (i.e. 120 days). - After the breath of the soul (i.e. 120) days According to Islamic law, abortion is Haraam after 120 days have elapsed since the abortion, and abortion is considered to be tantamount to killing a person, and the person who caused the abortion is Ghira (liable), even if he or she is a parent. It is a crime for anyone to have an abortion, and if he does, he will have to abort it.(Ibn 'Abidīn, Muḥammad Amīn ibn 'Uma, 2003) In Qur'an Allah said: “And do not kill the soul which Allaah has forbidden except with the truth.”(Qura'n 17: 33, n.d.)

Ghira (Compensation) is due in the case of destruction of embryo or a fully formed child stillborn as a result of assault suffered by the mother during her pregnancy.

Ghurra originally means the witness which is found on the forehead of the horse; then it is also applied to the fair-complexioned slave or slave-girl. Here it mean the fine quality of slave (shoes price is equal to one twentieth of the **diyat**)

According to Imam Nawawi:

“ This rule applies in case of abortion, but if the child is born alive and then dies it should be full Diyat, one hundred camels for male and fifty for female, and the relatives on the father's side of the woman are required to pay

it and not the offender herself. The Holy Prophet (May Peace be upon him) was unhappy with him because he was confounding the issue by his glib tongue. The child in the making is an asset, since he has to grow into full child. But the person was confusing the matter with the flow of words. Since his argument had no solid basis, his talk was. Therefore, sophisticated and ornamented with rhymed phrases. The holy prophet did not like his artificial style of expression and compared it to that of the soothsayers who expressed themselves in rhymed phrases” (Al-Nawawī, n.d.)

In this regard Prof. Coulson Said:

“Where a child is born dead as the result of an assault upon its mother, Sharia law exacts from the person who made the assault a special kind and amount of blood many known as Ghirra. All the sunnits schools regard this money as belonging to the child itself, and therefore transmission to its own theirs, while the Hanafis further maintain that the child, because its legal existence is assumed by the Ghirra rule, should inherit and pass to its heirs any other property which it would certainly have inherited had it in fact been born alive. Under the Egyptian law, however the child itself does not acquire and pass to its heirs either the Ghirra or, a fortiori, any other property, but

her stillborn child, which is thus regarded as compensation payable for damage to the body of the mother herself' (Coulson, 1971).

Professor Coulson discusses the G-hirra rule:

“As part of the system of compensation payable in cases of homicide and physical injury it is an established rule of Shari'a law that the person responsible for the destruction of a child in embryo is bound to pay over and above any liability he may bear for injury to the mother, a special sum known as ghirra, which amounts to 5% of the blood money normally due in cases of homicide. It is accepted by all schools of law that this ghirra belongs to the stillborn child and must therefore pass to its heirs. The Hanafis and the Ithna Asharis then argue that since blood money is only payable in the case of offences against living persons, this rule must rest on the assumption that the child in embryo was alive prior to the assaults. Accordingly such a child should also be deemed alive for the purpose of any rights of inheritance that may belong to it. The other schools, however do not accept this extension of the ghirra rule and maintain that in this case as in all other cases of children stillborn, there is no evidence of the life of the child sufficient to establish its right to inherit”(Coulson, 1972)

### **Prohibition of abortion:**

Abortion is divided into two stages, the stage before the soul is breathed and the stage after the soul is breathed. There are three opinions of the jurists in this regard: Abortion is absolutely permissible before the soul. - It is permissible to have an abortion before the soul. - Abortion before the soul is haraam.(Ibn 'Ābidīn, Muḥammad Amīn ibn 'Uma, 2003)

According to Maliki's, when a man's semen enters a woman's womb, that is, it begins to form, then it is not permissible to waste it in any way, even if it is before forty days. According to some, abortion is permissible as long as the soul has not yet been breathed into the fetus and it is breathed at the beginning of the fifth month(Mālikī, 1992).

In this regard, the Islamic Jurisprudence Academy has set some conditions:

1. Abortion is not permissible in different stages, but it is permissible for a shar'i reason and that too within very narrow limits.
2. Pregnancy is permissible when it is in its first stage, which is forty days.
3. Abortion is not allowed when the pregnancy is in the second or third stage. It is permissible even if all the medical board and treatment resources have been used.
4. Pregnancy after four months is a risk to the mother's presence, and it is permissible if the necessary treatment has been given.

According to Joseph Schacht: “ The ḡurra rules “ applies to abortion without the father’s consent; in this case the Aiqla of the wife must pay the ḡurra.(Schacht, 1964)

**Status of abortion law in Western countries:** In most countries in Europe and the United States, abortion is legal for certain reasons and for a certain period of time.

**Legal status of abortion in the United States:** 1973 In the US Supreme Court Roe. V. Wede announced his famous decision. Before this decision, abortion was legal in most of the states of the United States, but there were some special laws. Following this decision, abortion was granted legal protection in all US states.

United States Supreme Court ruling Roe.V. Weds 1973: The court ruled in 1973 that anywhere in the U.S:

A woman and her doctor may freely decide to terminate a pregnancy during the first trimester. State governments can restrict abortion access after the first trimester with laws intended to prohibit other abortions.(Borgmann, 2004)

It should be noted that The U.S. Supreme Court issued its ruling in this case on June 24, 2022, taking away the constitutional right to abortion, abandoning almost 50 years of precedent, and paving the way for states to ban abortion(Us Supreme Court Decision - Google Search, n.d.)

**Abortion law in Europe:** In all European countries except for three (the Irish republic, Northern Ireland and Malta) induced abortion is legally available at least for some reasons.

Access to safe abortion services in Europe is legally determined by the character of the law, but not completely. Much depends on the way the law is interpreted by the authorities and service providers.(Abortion Law History and Religion - Google Search, n.d.)

### **Punishment for committing a crime on the fetus**

#### **Islamic Law**

Abortion involves the ḡorra as price of blood for the fetus if brought forth dead in consequence of the crime, without prejudice to the price of blood for the mother, where the abortion causes her death also. It is the same if the fetus appears to be dead in the mother’s womb in consequence of the crime, and cannot be extracted because of her death. If it is a question not of a fetus but of a child brought forth by abortive means, and remaining some time alive without showing signs of pain, its death is presumed to be natural and nothing is due for the abortion; but if the child dies immediately after birth or some time afterwards, but with constant signs of pains, the person causing the abortion owes the ordinary price of blood due in case of homicide. If there are two fetuses there are also two ḡorras. The ḡorra is due in full even where there issues from the womb merely a hand or a piece of flesh virtually containing a human form, according to the midwives; or even, according to some jurists where there remains in the womb a price of flesh which according to the midwives could take a human form.(Nawaw, 1914)

A homicide requires expiation, even where the offender is a minor, a lunatic,

or an infidel subject of a Muslim price; and it makes no difference whether the homicide is premeditated, voluntary, or involuntary. Expiation is even necessary where the victim is still in this mother's womb. (Hnbal, 1973)

To quote Imam Nawawi: "if the sultan, or a judge, etc, sends for a pregnant woman accused of some offence and frightens her so that she has an untimely birth, he is responsible for the abortion" (Nawaw, 1914)

Abu Huraira reported that among two women of the tribe of Hudhail one flung a stone upon the other causing an abortion to her. Allah's Apostle (May peace be upon him) gave judgment that a male or a female slave of bet quality be given as compensation. In further narrated, 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 (may peace be upon him) gave judgment that the diyat (indemnity) of her unborn child is a male or a female and also decided that the diyat of the women is to be paid by her relative on the father's side, and he (the holy prophet) mad her sons and those who were with than her heirs. (Al-Nawawī, n.d.)

**Case of twins:** Where some woman miscarries twins as a result of physical punishment by the offender and one of the babies is born dead and the other is alive but dies soon after as a result of his physical interference in such cases offender is liable to pay ghirra for dead child and full diyat for the alive child. (Sheikh Nizam, 1993)

The Prophet (may peace be upon him) fixed five hundred Dirhams as ghirra, Imam Mahlik and Shafi fixed the amount of six hundred Dirhams in such cases. (Al-Marghīnānī, 1993)

Limitation Period: In Isqat-e-Janeen cases, the ghirra must be paid within one year. This is the view of Hanafi jurists who quote this hadith: "Aqila must pay the ghirra within one year" Whereas imam Shafii fixed the period of three years in such cases the same is the Shia law.

### **Fetal protection in Western law**

America "(a)(1) Whoever engages in conduct that violates any of the provisions of law listed in subsection (b) and thereby causes the death of, or bodily injury (as defined in section 1365) to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense under this section. "(2)(A) Except as otherwise provided in this paragraph, the punishment for that separate offense is the same as the punishment provided under Federal law for that conduct had that injury or death occurred to the unborn child's mother. "(B) An offense under this section does not require proof that "(i) the person engaging in the conduct had knowledge or should have had knowledge that the victim of the underlying offense was pregnant; or "(ii) the defendant intended to cause the death of, or bodily injury to, the unborn child. "(C) If the person engaging in the conduct thereby intentionally kills or attempts to kill the unborn child, that person shall instead of being punished under subparagraph (A), be punished as provided under sections 1111, 1112, and 1113 of this title for

intentionally killing or attempting to kill a human being. “(D) Notwithstanding any other provision of law, the death penalty shall not be imposed for an offense under this section. “(b) The provisions referred to in subsection (a) are the following(United States Congress Victims of Violence Act of 2004 - Google Search, n.d.).

The right to protection in the light of international treaties: In the declaration of the rights of the child the UN declared in 1959 that “The child by reason of his physical and mental immaturity needs special safeguards and care, including appropriate legal protection before as well as after birth.(Silent Subject, The Reflections on the Unborn in American Culture • ABC-CLIO, n.d.)

**Punishment of those who commit crimes against the fetus in the West:** On November 12, a jury in Redwood City, California, convicted Scott Peterson of first degree murder in the death of his wife, 23 year old Laci and second degree murder in the death of his 8 month old unborn son, whom the couple were planning to name Conner. Laci disappeared from the couple’s home in Modesto, California, 23 months ago. The bodies of Laci and Conner later washed up in the San Francisco Bay; near where Scott told police he had gone fishing the day his wife disappeared. Pro-family groups hailed the verdict as a significant and encouraging legal victory for the pro-life movement, upholding California’s “fetal homicide” law and the recently passed federal “unborn Victims of Violence Act”(Case Study, n.d.)

Most serious offense under section 707.8 is “terminating a human pregnancy during the commission of a

forcible felony,” a class “B” felony. Carrying a maximum twenty five years prison sentence, terminating a pregnancy while committing other felonies is a class “C” felony. Intentional termination of her pregnancy is also both class “C” felonies. A class “C” felony results in a maximum ten year prison sentence and a minimum \$ 1,000 fine(Steffens, 2002)

This brief comparative study shows that killing a fetus is a crime and punishable under Islamic and Western law.

**Abortion penalty in Islamic Law:** In order to protect the life of the fetus, the imposition of limitation on the mother of the fetus, i.e. the pregnant woman, will be delayed so that the child is not harmed as a result of the beating. This is only for the protection of the child, because if the concession was intended for the pregnant woman, then the limit would not be imposed on her even after delivery.

As in the hadeeth, when a woman kills intentionally, if she is pregnant, she should not be killed (in qisas) until she becomes pregnant and even if she supports herself. If she commits adultery, she should not be stoned until she has given birth and provided for her child-(Ibn Mājah, 1996) It is clear from this hadith that qisas will be taken from a pregnant woman when she gives birth to a child and the child can stay away from her after drinking milk. In the same way, if a woman becomes pregnant due to adultery, she will not be stoned until her child grows up after giving birth and does not need breast milk.

**Exceptions in Shari'ah rules for pregnant women:** Islam has given leave to the pregnant woman in some of

the Shari'ah rules for the protection and health of the fetus. According to the hadeeth, there is no doubt that Allaah has postponed (the postponement) of the traveler and half of the prayer, and has (temporarily) canceled the fast from the pregnant or breastfeeding woman.

The opinion of the majority of jurists is closer to the spirit of the Qur'an and Hadith because even haraam things become halal in order to save human life, and the jurisprudential rule is that necessities allow haraam things (Suyuti, 2002). Under normal circumstances, it is not permissible to violate the sanctity of the deceased, but according to the Qur'an and Sunnah and this rule of jurisprudence, it is permissible and correct to do so in order to save one's life.

**The issue of the right to life in Western law:** The child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth. (Declaration of the Rights of the Child, 1959, n.d.) The United States Convention on Human Rights recognizes the right to life for all. And it makes it clear that this right is also valid for the child who is still in the mother's womb.

#### Article 4. Right to Life

Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception (American Convention on Human Rights Pact of San Jose Costa Rica - Google Search, n.d.).

In *Webster v. reproductive Health Services*, 492 U.S.490 (1989), the

Supreme Court Declared in a 5:4 decision that a Missouri law was constitutional. It stated that: Human life began at conception, Akron center: In *Ohio v Akron Ctr. For Reproductive Health*, 497 U.S. 502 (1990), the Court ruled 6:3 that a state could require apparent or guardian to be notified before an under aged woman received an abortion. However, a provision must be in place for a judge to bypass this requirement if he/she regards it to be in the best interest of the women.

Casey: In *Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 U.S 833 (1992) the Court ruled 5:4 that Pennsylvania could require: A 24 hour waiting period before an abortion is performed.

That the woman gives her informed consent to the abortion. That parent or guardian be notified before an abortion on a woman who has not reached her 18<sup>th</sup> Birthday. (Steffens, 2002)

#### **A comparative study of Islamic and Western law**

There are contradictions and flaws in Western laws regarding fetal rights. Only a few of its shortcomings are reviewed:

Failure to charge Mothers Who Harm Their Unborn Children There is a contradiction in Western law that those who commit crimes against the fetus have been found guilty by the Unborn Victims (Fetal Homicide) Act in the name of saving the life of the fetus and its right to life. At the same time, the mother is given the option to have

an abortion if she wishes, which is a contradiction.

1. Now it is permissible for a mother to kill her child, that is, to have an abortion
2. If a person commits an act which results in the loss of a child, it is a crime and the person is considered a murderer.

In the criminal context, Iowa is in accordance with almost every other state in not prosecuting mothers for harm they do to their unborn children... 253(Steffens, 2002) Even after the child protection law is passed, the mother can still lose the child.

( c) Nothing in this section shall be construed to permit the prosecution....

1. Of any person for conduct relating to an abortion for which the consent of the pregnant woman, or a person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law;
2. Of any person for any medical treatment of the pregnant woman or her unborn child; or
3. Of any woman with respect to her unborn child(United States Congress Victims of Violence Act of 2004 - Google Search, n.d.).

### **The father does not have the right to prevent the child from being lost:**

The husband cannot prevent his wife from having an abortion because abortion is a woman's right and it cannot interfere with her privacy right even if she is the husband:

Father should have a right to a court order to stop an abortion. Dads should not be excluded by way of legal standing. Currently the father has no rights.

Introduce a two-day “cooling off” period for mothers applying to have an abortion. This has worked successfully in Canberra and parts of America.

Require mothers and fathers to be educated about the process of fetal development.

Just as the father has access rights in custody visits or rights at law with children that have been born, the father must have the right to approach the law to express his views.

The law should recognize the rights of the unborn child.(“Rights of an Unborn Child with Reference to Article 21 of the Indian Constitution,” 2020)

Abortions are carried out in every country in the world today, regardless of the law world-wide. It is estimated that 50 million abortions mainly in the developing world, and nearly one –half take place outside any health care system.(Abortion Law History and Religion - Google Search, n.d.)

**Financial rights of Fetal:** The financial rights of the fetus include the right of will, inheritance and alimony.

**The right to make a will:** A will can be made for anyone who can be called regular person and the fetus is also a person, so it is permissible for him to make a will. The will of the fetus to die will be proved when he is not the heir of the one who died. The evidence for this is the hadith: “Allaah has given every rightful owner his due, so there is no will for the heir.(Tirmizi, n.d.)

**Right of legitimate Children:** For the purposes of succession a child who is

born alive is deemed by law to have been alive, and therefore to have possessed rights of inheritance, from the time of its conception. Accordingly, where a female relative of the preposterous claims to be pregnant at the time of decease with a child who is potentially an heir of the preposterous, provision must be made for the rights of such a child pending the determination of its existence or otherwise. Its existence will subsequently be established if it is born alive within such a period indicates that it was conceived prior to the death of the preposterous,

In the Islamic, as in other systems of law, parentage involves certain rights and obligations. The relation between a father and his child is called paternity; the relation between a mother and her child is called maternity (Fyzee, 1964).

No statement made by one man that another (proved to be illegitimate) is his son can make that other legitimate, but where no proof of that kind has been given such a statement or acknowledgment is substantive evidence that the person so acknowledged is the legitimate son of the person who makes the statement provided his legitimacy be possible. Legitimation per subsequent matrimonies is not known to Muhammadan Law.

Parentage is therefore established in Islam in one of two ways and there is no third:

1. By birth during a regular or irregular (but not void) marriage, or
2. By acknowledgement, in certain circumstances.

### **Presumptions**

In order to understand the present law on the subject, we must first state briefly the rules regarding the presumption of legitimacy according to Muhammadan Law, and then note how far they have been altered by legislation. Islamic law ordains that:

1. A child born within six months of the marriage is illegitimate, unless the father acknowledges it.
2. A child born after six months of the marriage is legitimate, unless the father disclaims it.
3. A child born after the termination of marriage is legitimate if born:
  - Within 10 lunar months in Shiite law;
  - Within 2 lunar years in Hanafi law; and with 4 lunar years in shafi or Maliki law

Baillie thinks that in laying down such long periods, the Sunnite doctors had in view those abnormal conditions which sometimes perplex the most skillful of the medical faculty in Europe (Fyzee, 1964).

### **Acknowledgement**

Acknowledgement (Iqrar) of paternity takes place in Islam as follows:

1. Where the paternity of a child is not known or established beyond a doubt and
2. It is not proved that the claimant is the offspring of zina (illicit intercourse); and
3. The circumstances are such that they do not rebut the presumption of paternity, an acknowledgement of paternity by the father is possible and effective. (Fyzee, 1964)

### **Abortion in Pakistani law**

Whoever causes a woman with child whose some limbs or organs have been formed, to miscarry,

if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, is said to cause Isqat-I Janin.

A woman who causes her to miscarry is within the meaning of this section.

Punishment for abortion (Isqat –i- Janin:

1. Whoever causes ‘ Isqat-I Janin’ shall be libel to :
  - (a) One twentieth of diyat, if the child is born dead;
  - (b) Full diyat, if the child is born alive but dies as a result of any act of the offender; or
  - (c) Ta’zir and punished with imprisonment of either description for a term which may extend to seven years or with whipping not exceeding thirty stripes or with both, if the child is born alive but dies without any act of the offender:

Provided that if there are more than one child in the womb of the women, the offender shall be liable to separate diyat or ta’zir as the case may be, for every such child.

Provided further that if as a result of ‘Isqat-i-Janin any hurt is caused to the woman or she dies, the offender shall also be liable to the punishment provided for such hurt or death as case may be.

2. Where a person caused Isqat-i- Janin by mistake, the diyat shall be paid by his aqilah.

Isqat- i- Haml: whoever causes a woman with child, whose organs or limbs have not been formed, to miscarry, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman is said to cause isqat-i- Haml (abortion).

Explanation ..... A woman who caused herself to miscarry is within the meaning of this section.

Punishment for Isqat-i-Haml: Whoever causes ‘isqat-i- Haml shall be libale to ta’zir and punished with:

- (a) Imprisonment of either description for a term which may extend to three years, if ‘isqat –i- Haml is caused with consent of the woman; and
- (b) With imprisonment of either description for a term which may extend to ten years and with whipping not exceeding thirty stripes, if ‘isqat-i-Hamal is caused without the consent of the woman; Provided that if as a result of ‘isqat-i-Haml any hurt is caused to the woman or she dies, the offender shall also be liable to punishment provided for such hurt or death as the case maybe (Offences Against Human Body (Enforcement of Qisas and Diyat), 1981)

### Finding

An embryo is a person in the completion of law and is therefore possessed of inherent legal capacity, which however, is regarded to have certain rights. The law recognizes its lineage, and it is held to be capable of acquiring rights, such as to inheritance, a legacy and the like. A child in the mother’s womb if born deformed because of assault committed by anyone can sue for compensation. A child in the womb cannot, however, be fastened with liabilities. For instance, if its guardian on its behalf buys something, it cannot be held liable for the price, that is, it cannot be realized from the property belonging to the embryo.

English law, no authority decides whether compensation can be recovered for injuries inflicted before birth through the question has been fuelled discussed in Australia and Ireland and a remedy granted. Whereas it is interesting to know that Islam gives protection of the law against willful or negligent injuries inflicted upon the still-born child. In Pakistan, sections 100-103 of the offenses Against Human body (Enforcement of Qissas and diat) Draft ordinance 1981, Council of Islamic Ideology,

government of Pakistan deal with pre-natal injuries.

The study of this subject in the light of all relevant Fiqh literature both classical (like Kitab –ul-Umm, Al-Muwatta, Musand Ahmad inter alia) and modern (Abdul Qadir’s Tashri-ul-Jani) will certainly be very useful for lawyers, Judges and students of law. Nothing, however, precludes the confiscation of these principles in the general part of a Criminal code, thereby transposing into positive codified law that which is now diffused throughout the writhing of numerous scholars whose works span more than one thousand year.

Thus the importance of the study of above mentioned subject cannot be underestimated especially keeping in view the process Right of fetus (unborn child).

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