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An Unborn Child's Right to Life: A Study of the Law of Abortion in Pakistan in the light of Shariah*

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Abstract:

Every legal system in the world guarantees right to life. But the right to life of an unborn child is somewhat differently treated as in some respects it is an independent human being whereas in other respects it is still a part of the mother. Termination of pregnancy has always been a controversial issue in societies as well as legal systems. If we look at Islamic law an unborn child's right to life is divine and cannot be taken away by the mother or the state. Islamic law considers a fetus a separate life and allows abortion only in exceptional circumstances. In Pakistan abortion is an offence and is being dealt with in the Pakistan Penal Code 1860. This article will discuss an unborn child's right to life and the law related to abortion in Pakistan. The law of abortion in Pakistan is based on Islamic law especially the *Hanafi* school, so relevant issues will be discussed in Islamic law as well. The methodology used is analytical and comparative. The basic aim of the study is to suggest reforms in law of abortion in Pakistan.

Key Words: Abortion; Legal Capacity; Islamic Law; Pakistani Law.

Introduction:

Termination of pregnancy has always been a controversial issue in societies as well as legal systems. In Pakistan abortion is an offence and is being dealt with in the Pakistan Penal Code 1860. In Pakistani law abortion is not allowed except in the case of risk to the mother's life. The discussion of abortion in Islamic law revolves around rights of the unborn

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child and not much around rights of woman.¹ In Islamic law an unborn child's right to life is divine and cannot be taken away by the mother or the state except in few situations which will be discussed later.²

It is an analytical and comparative study with the aim to suggest reforms in the law of abortion in Pakistan. For this purpose relevant laws will be studied. Despite author's efforts cases directly relating abortion could not be found. The reason is that usually abortions are performed secretly outside the radar of the law. While studying Islamic law effort has been made to study primary sources as well as modern writings to analyse transition (if any) in views of jurists regarding abortion.

In this article we will discuss the law of abortion in Pakistan. As this law is influenced by Islamic law, so relevant issues will be discussed in Islamic law as well. The rights and duties of a human being including right to life emanates from legal capacity. A section of the paper will be devoted to legal capacity of a child before birth, which will be followed by analysis of the law of abortion in Islam and in Pakistan. At the end conclusion will summarise our findings.

Legal Capacity of a Child:

The rights of a child are directly related to its legal capacity. Legal capacity in Islamic law is defined as '*the ability or fitness to acquire rights and exercise them and to accept duties and perform them*'.³ Legal capacity is connected with *dhimmah* which means liability. It is a condition precedent for the existence of legal capacity.⁴ *Dhimmah* is an attribute by which one acquires capacity for acquisition of rights and duties.⁵ It is a covenant between the lawgiver and the subject and it can be assigned to a natural person as well as to an artificial person.⁶

There are two kinds of legal capacity: capacity to acquire rights and duties which is called capacity of acquisition, and capacity to execute these rights and duties which is termed as capacity of execution.⁷ These capacities are called receptive legal capacity and active legal capacity respectively. Because of the capacity of acquisition a person becomes able to acquire rights and liabilities. *Manāt* or basis for the capacity of acquisition is the attribute of being a human. This capacity is inherent in every human being. He/she possesses it even before birth. The capacity of acquisition is of two kinds, complete capacity and deficient capacity. A person having deficient capacity of acquisition possesses only some rights and has no obligations.⁸

The capacity for execution is defined as '*the capability of a human being to issue statements and perform acts to which the law giver has assigned certain legal effects*'.⁹ The basis of the capacity for execution is

intellect and discretion. This capacity is further divided into three kinds: capacity for *jināyāt* or criminal liability, capacity for *'ibādāt* or religious worship and capacity for *mu'āmalāt* or civil transactions. These capacities are based on the fact that the person is capable to comprehend the command or not. Legal capacity for criminal liability is based on the ability of a human being to comprehend the communication related to criminal acts. Legal capacity for *'ibādāt* is based on the capability of an individual to understand the communication related to *'ibādāt*. Legal capacity for *mu'āmalāt* is based on the ability of a subject to understand communication pertaining to transactions.¹⁰

At first we will discuss legal capacity of an unborn child and then of a child after birth. A *janīn* or unborn child possesses deficient capacity of acquisition. An unborn child has only those rights which do not require acceptance.¹¹ Deficient capacity is assigned to an unborn child as the basis of legal capacity is not fully developed yet. An unborn child is not considered an independent human being because it is still a part of the mother. But in other respects the child is considered a separate personality as it has a separate life.¹² As said earlier, a fetus has some rights like inheritance, bequest, parentage, *'itaq* or manumission and rights in *waqf*. These rights would be assigned to a *janīn* only if she is born alive within six lunar months from the establishment of the right.¹³ No obligation can be imposed upon an unborn child as it is not capable of forming an intention. For example, if the guardian of a *janīn* buys something on behalf of the unborn child, the child is not liable for the price. The child after birth acquires capacity for imposition of obligations but this capacity is also of defective character.

In Islamic law a *janīn* is considered a separate legal person. If a fetus is aborted as a result of injury a special indemnity (*ghurrah*) is to be paid and this indemnity devolves on the heirs of the child.¹⁴ *Ghurrah* is usually one twentieth of the *dīyah* (compensation) for death of a person but if the child is aborted alive and dies afterwards then the full *dīyah* is payable.¹⁵ *Ghurrah* is distributed among legal heirs excluding the offender. *Ghurrah* is when woman delivers a dead fetus if it was alive and later died there will be full *dīyah*.¹⁶

There are two verses of the Qur'ān which say that abortion is illegal and there is general agreement among the jurists on their interpretation. Allah says: '*Kill not your children on a plea of want*'.¹⁷ Jurists agree that the purpose of revelation of these verses was to prohibit infanticide and abortion. According to the *Mālikī*, *Shāf'ī*, and *Hanbalī* schools abortion is absolutely prohibited but the *Hanafīs* argue that

abortion is permitted in the first one hundred and twenty days of pregnancy provided there is a potential danger to mother's life or to the life of an infant surviving on the mother's milk.¹⁸ *Hanafī* jurists based their opinion on a *hadīth* reported in *Sahīh Muslim* in which Prophet Muhammad said that human life does not exist in the embryo before the lapse of one hundred and twenty days.¹⁹ Basing their views on a verse in the Qur'ān²⁰ the jurists determined three stages of development of a fetus: *nutfah* (the semen stage), *'alaqah* (the blood clot stage) and *mudghah* (the lump of flesh stage). The duration of each stage is forty days. The fetus is considered a human being after the expiry of one hundred and twenty days i.e. after completion of third stage.

If the organs of an aborted embryo are formed the offender has to pay *ghurrah* whereas if the embryo is unformed he has to pay lesser compensation. According to the *Hanbalīs* and *Shaf'īs* a lump of flesh will be considered an embryo if it has a hidden form which only a midwife or a doctor may testify to. *Hanafīs* don't consider a lump of flesh an embryo on the basis of hidden form. According to them the form of human organs should be clear.²¹ Medical science has proved that the human life exists in the embryo right from the start of conception so abortion should not be legalized in the first one hundred and twenty days of pregnancy. A fetus has a right to life which cannot be infringed by anyone except on the basis of a just reason. On the other hand it can be inferred that all three schools consider a child's legal personality from the time of conception whereas the *Hanafīs* consider a fetus's legal personality as arising only after one hundred and twenty days of pregnancy.

Abortion becomes permissible in the case of risk to the mother's life. This rule is based on the principle when you have to choose between a lesser harm and a greater harm you should choose the lesser harm. The mother is the source of the child and has a full life so to save the mother's life it is permissible to sacrifice the child's life.²² *Fatāwā* have been issued by some Muslim scholars on the legality of abortion in the case of deformity of the fetus, unwanted pregnancy as a result of rape and danger to the mother's life.²³

Now we move to the capacity of a child after birth. Under Islamic law a child possesses complete capacity for acquisition of rights and duties at birth. According to the majority of jurists including the *Mālikīs*, *Shāf'īs*, and *Hanbalīs*, a minor lacks capacity for execution before puberty. The *Hanafīs* are of the opinion that if the child attains some discretion before puberty then it is assigned deficient capacity for execution. For this purpose jurists determine the age of discretion at seven.²⁴ Before the age

of seven a minor is called *sabī ghair mumayyaz* and after seven till puberty the child is called *sabī mumayyaz*. At this age the minor is not liable for criminal acts. A child is exempted from the punishments of *hadd*, *qisās* and *ta'zīr*. For homicide and bodily injury the *'āqilah* (the child's family or tribe) will pay blood money.²⁵ This rule is based on the *hadīth*: 'three people are not accountable for their actions: a child until he reaches puberty; a person asleep until he awakes and an insane person until he regains his sanity'.²⁶ *Ibādāt* (religious duties of worship) are also not imposed on a child at this stage. The deficient capacity for execution is with respect to transactions only. The transactions which a child can make at this stage are divided into three categories.²⁷ In the first category there are transactions which are purely beneficial, for instance, acceptance of a gift or charity. A minor is allowed to make such transactions without ratification of the *walī* or guardian. In the second category there are transactions which are purely harmful or which result in financial loss, for instance, to give charity, loan, or bequest. These transactions are void even if made by the *walī* because he has no authority to enter in such transactions on the minor's behalf. Then there are transactions vacillating between profit and loss such as partnership, sale or any other kind of business. These transactions if made by the minor are only valid after ratification of the *walī* otherwise these will be void. A guardian cannot waive any right of the child on its behalf as it will amount to harming or damaging the child's interests. A guardian is supposed to protect the minor's interests in every situation.²⁸ The judge has authority to supervise the guardian and keep a check on the exercise of powers by him. If a guardian is not protecting the interests of the minor the guardian can be removed by the court.²⁹ As children have capacity of acquisition so they have rights but due to lack of maturity they don't have the capacity of execution so they cannot exercise these rights. Guardianship is an institution which protects children and gives their rights to them which they exercise on their behalf.

Rights And *Maqāsid Al-Sharī'ah*:

Maqāsid is plural of *maqṣad* which means purpose or objective. In Islamic law the term is used to denote the objectives or aims of *Sharī'ah*.³⁰ There are five essential objectives or *maqāsid* of *Sharī'ah*.³¹ *Al-Raysūnī* stated their importance as 'these are things essential for the achievement of human beings' spiritual and material wellbeing.³² Islamic Law is supposed to serve these *maqāsid*. These are following:³³

1. Establishment and Protection of the Religion
2. Establishment and Protection of the Human Body

3. Establishment and Protection of Progeny
4. Establishment and Protection of Intellect
5. Establishment and Protection of Property

The whole system of Islamic law revolves around these objectives. These objectives are definitive and are derived from the Qur'ān and *Sunnah*.³⁴ *Hifz* includes establishment and protection. Establishment means to establish that *maqṣad*'s elements and foundations and protection means to protect it from what damages the aspect of establishment.³⁵ If we take the example of religion, it is established by performing rituals and is protected by obligating *jihād* in certain situations.³⁶ Likewise *Nasl* or progeny is established by institution of marriage and prohibition of abortion whereas it is protected by enforcing punishments for *zinā* and providing *ghurrah* (indemnity) for abortion.

When we use the term 'Islamic state' it means that in that state Islamic law or Sharī'ah is the supreme law of the land. In other words the Islamic state should adhere to strict application of Sharī'ah and to its objectives.³⁷ Most of the rights and duties of the individuals and the state emerge from these *maqāsid*.³⁸ Here we will discuss only the rights and duties related to children. Religion is not a matter of concern for a child because of its immaturity and lack of understanding. The rights which we can derive from these *maqāsid* are the following. Protection of *nafs* gives a child the right to life whether it is a fetus or a child after birth. It also provides a right not to be assaulted or injured which includes prohibition of abortion as well. This is a primary right and gives rise to many accessory rights like right to food, health, shelter, livelihood etc. Accessory rights are the rights, which increase the scope of primary rights. This is the approach of the Pakistani courts as well, in a judgment it is said by the Supreme Court that right to life doesn't mean vegetative or animal life; it means life with those facilities which a civilized person is entitled to enjoy with dignity.³⁹ *Hifz 'alā nafs* also suggests that proper persons should be appointed for the care of the person of the child till the time the child can take care of itself. Protection of progeny or *nasl* gives the right of parentage. It can be said that a child has a right to the status of legitimacy. In Islamic law paternity is established for a legitimate child only. To preserve the identity of parents is a right of the child which it has even in the case of adoption. In Islamic law to take a child into care is allowed but to change a child's lineage is not allowed. A child will always be identified with its real parents. Protection of intellect gives a child the right to get information, education and to express its opinions. It also provides that the child should be brought up in a way that its mental

faculties should be developed. Protection of property gives a child the right to manage its property in a judicious manner. A child because of immaturity and lack of understanding cannot perform this function itself. Islam provides the institution of *wilāyah* (guardianship) to protect the interests of the child in such situations. It is a right of the child that proper persons should be appointed for management of its property.

From these *maqāsid* duties and rights of an Islamic state can also be inferred. It is a duty of the state to establish and protect these objectives. It is a duty of the state to prohibit all acts detrimental to these objectives and to ensure their preservation.⁴⁰

The order in *maqāsid* shows a priority; The first one has priority over the second one and so on. *Dīn* has priority over *nafs*, *nafs* has priority over *nasl*, *nasl* has priority over *'aql* and *'aql* has priority over *māl*. This order functions in the case of a clash among interests or rights. For example Islam delays execution of punishment for a pregnant woman who commits adultery till the birth of the child, as the child's right to life is paramount as compared to the right of the state to punish the offender. The right to life emerges from *Hifz alā nafs* whereas the crime of the mother is from *Hifz 'alā nasl* so *nafs* has priority over *nasl*.⁴¹

The Law of Abortion in Islam:

The discussion of abortion in Islamic law revolves around rights of the unborn child and not much around rights of woman.⁴² The Qur'ān has described the creation of man in the following words:

“We created man of an extraction of clay, then We set him a drop in a safe lodging, then We created of the drop a clot, then we created of the clot a tissue, then We created of the tissue bones, then We covered the bones in flesh; thereafter We transformed it into another creature. So blessed be God, the Best of Creators”.⁴³

The Prophet Muhammad (PBUH) is reported to have said:

“Verily the creation of any one of you takes place when he is assembled in his mother's womb; for forty days he is as a drop of fluid, then it becomes a clot for a similar period. Thereafter, it is a lump looking like it has been chewed for a similar period. Then an angel is sent to him, who breathes ruh (spirit) into him. This Angel is commanded to write four decrees: that he writes down his provision (rizq), his life span, his deeds, and whether he will be among the wretched or the blessed”.⁴⁴

The Qur'ān says ‘whosoever have spared the life of a soul, it is as though he has spared the life of all people. Whosoever has killed a soul, it is as though he has murdered all of mankind.’⁴⁵

According to the majority of Muslim scholars abortion is prohibited. In Islamic law abortion is considered termination of a life hence it is a crime.

According to Imam *Ghazālī*, a *Shāf'ī* jurist, abortion at advanced stages of pregnancy becomes a more serious crime as compared to abortion at early stages of pregnancy.⁴⁶ Abortion can be allowed only in exceptional cases like saving the life of the mother. This is the opinion of the *Hanafīs* and *Shāf'īs*. If according to the expert medical opinion pregnancy can endanger the mother's health or there is extreme deformity in the embryo abortion can be allowed but this, too, should happen within first 120 days of pregnancy. The time period is determined in the light of a *hadīth*.⁴⁷ If the mother's life is at risk abortion can be performed at any stage of pregnancy. This opinion is agreed upon but Muslim scholars have asked to take opinions of three medical experts before deciding about abortion. According to Islamic law *dīyat*, *kafārrah* or *ghurrah* is the punishment for this offence.⁴⁸

Muslim jurists, basing their view on the above mentioned authorities, agree that life is breathed into the fetus 120 days after conception. *Al-Kuzāt* is of the opinion that the soul is breathed into the fetus after forty-two nights after the *Nutfah* has settled down in the womb. The *Nutfah* is considered to be settled when it holds onto the wall of the womb, which happens on the seventh day after conception. It can be said that breathing of the soul occurs after the forty-ninth night, at the beginning of the eighth week. It is difficult to determine the exact time of the ensoulment of fetus as Qur'ān is silent about it and *sunnah* has varying interpretations. But it can be said that it happens between forty and fifty days.⁴⁹

There is difference of opinion among jurists regarding legality of abortion at early stages of pregnancy. According to the *Hanafī* jurists abortion is allowed before the soul is breathed into the fetus provided that the husband or the wife has authorized it. According to the *Mālikīs* abortion is prohibited at whatever stage it is performed. *Al-Ghazālī* differs with other *Shāf'ī* scholars on this subject where he views abortion as prohibited at all stages of pregnancy. The *Hanbalī* jurists are of the view that abortion is prohibited after one hundred and twenty days of pregnancy and differed in the case of abortion before this period. Some of them authorized abortion as long as the fetus has not been created. There is consensus of opinion that after expiry of one hundred and twenty days abortion is prohibited.⁵⁰

Abu al-Fadl, a contemporary scholar, argues that in the case of a pregnancy resulting from rape, abortion is allowed as it is allowed to get rid of the semen before it settles in the womb.⁵¹ According to *Al-Butī*, pregnancy can be terminated in such situations before expiry of 120 days. *Tantāwī* has issued a fatwa legalizing abortion even after expiry of 120

days.⁵² *Sheikh Nizām Mangera* is of the opinion that at the initial stages of pregnancy i.e. before expiry of one hundred and twenty days abortion can be allowed only in cases like rape, incest, fatal deformity of the embryo.⁵³ It is evident from the above discussion that in exceptional circumstances abortion can be allowed but as a general principle abortion is prohibited.

The Law of Abortion in Pakistan:

Every legal system in the world guarantees right to life. Article 3 of the Universal Declaration of Human Rights says: "Everyone has the right to life, liberty and security of person". Article 6.1 of the International Covenant on Civil and Political Rights says that every human being has the inherent right to life and this right should be protected by the law. The Constitution of Pakistan 1973 also guarantees the right to life in Article 9.

After partition Pakistan followed Indian law made by the British. In 1989 in the case of the Federation of Pakistan v. Gul Hasan Khan, PLD 1989 SC 633 the Supreme Court of Pakistan struck down sections 312-316 of the Pakistan Penal Code being inconsistent with the injunctions of Islam. The current sections 338, 338-A, 338-B, 338-C (Criminal Law Amendment Act II of 1997) replaced those provisions which are based on *Hanafi* law.⁵⁴

In Pakistani law abortion is not allowed except in the case of risk to the mother's life. Section 338 of the Pakistan Penal Code 1860 provides that if a fetus whose organs have not been formed is aborted by the mother the punishment is three years imprisonment. If abortion is caused by any other person with the woman's consent the punishment is three years imprisonment and ten years if it is caused without the woman's consent. There are two exceptions to this rule: abortion to save the mother's life and abortion during providing the mother necessary medical treatment.⁵⁵ Section 338-B of the Pakistan Penal Code 1860 provides that if a child, some of whose organs have been formed, is aborted the punishment is a fine equal to one-twentieth of the full *dīyah*⁵⁶ if the child is born dead and full *dīyah* if the child was born alive but died due to the offender's act. The court has authority to order the offender up to seven years imprisonment in such a case. If there were more than one children in the mother's womb the offender will pay separate *dīyahs* and will go through separate punishments for each child. These sections apply to a woman who has herself aborted her child at the stage of pregnancy where the child's organs were formed. In this situation the only exception will be abortion to save the mother's life. This section does not protect the abortion during provision of necessary medical treatment.⁵⁷ As far as *dīyah* is concerned the courts have discretion to fix the quantum of *dīyah* after

taking into consideration injunctions of the Qur'ān and *Sunnah* and the financial position of the offender and the heirs of the victim. The law does not give any maximum value but the minimum value of *dīyah* is fixed as equivalent to the value of thirty thousand six hundred and thirty grams of silver.⁵⁸ One twentieth of this minimum value is equivalent to the value of fifteen hundred and thirty one grams of silver approximately.

In new sections 'necessary treatment' is not defined and no judicial interpretation is available for it. It is not clear whether the Doctor's opinion is compulsory or advisory. Apparently it doesn't seem compulsory. For second stage pregnancy, if limbs are formed, abortion can only be performed to save the mother's life and for this purpose mother's consent is not necessary provided it is performed in good faith.⁵⁹ According to the current law doctors are vulnerable so hesitate to perform abortion. It leaves women with unsafe options like abortion performed by midwives or in some cases nurses. Usually abortions are performed secretly so it is hard to obtain data. Time period can be fixed for first stage and second stage. It is suggested that opinion of two medical officers from a recognized/authorised hospital should be made compulsory. The mother's consent is required for *isqāt e hamal* (she has the power to make decision) and the doctor's consent is required for *isqāt e janīn* (decision is with the doctor).⁶⁰

Causing miscarriage is a case of strict liability, it does not matter whether the blow was intentional or unintentional, and compensation has to be paid in both cases. In the sections *ghurrah* should be made payable by the offender in all cases.⁶¹ Causing miscarriage has been made an offence of strict liability both in Islamic and Pakistani law.⁶²

Conclusion:

Right to life is a fundamental right of every human being but an unborn child's right to life is somewhat differently treated. The reason is that in some respects it is an independent human being whereas in other respects it is still a part of the mother. Termination of pregnancy has always been a controversial issue in societies as well as legal systems. If we look at Islamic law an unborn child's right to life is divine and cannot be taken away by the mother or the state. In Islamic law the discussion of abortion revolves around rights of the child and not around rights of the mother. Islamic law considers a fetus a separate life and allows abortion only in exceptional circumstances. In Pakistan abortion is an offence and is being dealt with in the Pakistan Penal Code 1860. The law of abortion in Pakistan is based on Hanafi school. The rights and duties of a human being including right to life emanates from legal capacity. Islamic law as

well as Pakistani law deals with the offence of causing miscarriage as an offence of strict liability. By restricting abortion the law has left women with unsafe options. It is better if the law makes a transition from restriction towards regulation. The law should differentiate between stages of pregnancy and should clearly mention the exceptional circumstances when abortion will be allowed.

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