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Reproductive rights and health issues under Islamic law: Towards enhancing medical law in the 21st century

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ABSTRACT

Reproductive rights and health are intertwined issues concerning women's rights. Most of the legal regimes around the globe recognize their existence either explicitly or implicitly. Islamic law being one of the major legal regimes in the world has provided conditionally for the right to decide when and how to have children as well as the right to have access to health care services during prenatal and postnatal periods. Issues like managing infertility, controlling fertility, prenatal screening and genetic counselling are recognized as the most important aspects of reproductive rights and health in recent times, while their legal and ethical basis remain controversial phenomena within the realm of Islamic jurisprudence. However in this respect, medical personnel remain the key players in the realization and implementation of these issues. Hence they are required to act in accordance with extant laws in carrying out their duties; they should exhibit a high sense of respect for human life and provide a good standard of practice and care. This could be viable only when matters of this nature are streamlined and diligently observed from different perspectives. In view of this therefore the article, using doctrinal methodology, examined the issues associated with reproductive right and health under Islamic law with a view to exploring avenues on how they could be streamlined and effectively utilized to enhance the effectiveness of medical law in the contemporary society. In the end, the paper revealed the relevance of Islamic law to the prospects of medical law in the 21st century. Thus, it recommends for the application of Islamic law alongside conventional medical laws, especially within modern Muslim states.

Keywords: Islamic Law, Reproductive Right, Reproductive Health, Medical Law.

JEL codes: G29, G32.

1. INTRODUCTION

Nowadays women's health and lives are frequently being exposed to danger as a result of denial and lack of access to information about reproductive health and rights issues such as child spacing, unwanted pregnancies, coerced abortion and family planning. This has consequently and adversely affected women's rights including their economic right and social status.¹ Reproductive right and health are important issues to be reckoned with in this contemporary society where women are subjected to various kinds of abuses and discrimination based on cultural ground and/or religious misconceptions. In some Muslim communities for instance, and of course in most secular societies, many people are of the belief that Islamic law does not absolutely provide or guarantee the reproductive right and health of women. This notion has, in recent times hindered a lot of development and as well, generates bottlenecks for smooth implementation of medical laws in the contemporary society. In Islam, when it comes to issue of spiritual rights, both men and women have the same spirit, there is no superiority in

¹ Legal Research and Resource Development Centre (LRRDC), "Reproductive Right as Human Right", *LRRDC Empowerment Newsletter*, Vol. 9 No. 7, October – December, 2001, p 3

the spiritual sense between men and women.² The Almighty Allah has created mankind into different gender without making preference of one gender over another. Thus He said: "O mankind! We have created you from a male and a female, and made you into nations and tribes, that you may know one another. Verily, the most honourable of you with Allah is that (believe) who has *At- Taqwa* (fear of Almighty God)..."³ Notwithstanding the fact that the verse talks about the wisdom behind diversity, it does not encapsulate any question of gender inequality in terms of moral, spiritual duties and acts of worship. However, the requirements of men and women in those regards are the same, except in some cases when women have certain concessions because of their feminine nature, or their health or the health of their babies.⁴ To buttress the point further, for instance, it was reported in a hadith of the Prophet (s.a.w) that the duty of education is incumbent upon every Muslim, male and female.⁵ This implies that male and female are equal in this regard and have same opportunities and privileges. Similarly, from the marital standpoint, the Quran clearly indicates that marriage is not a slavery but mutual relationship between man and woman with the view to becoming mates and partners. To this end, the Almighty Allah says: "Among His Signs is this, that He created for you mates from among yourselves, that they may dwell in tranquillity with them, and He has put love and mercy between your (hearts): Verily in that are signs for those who reflect."⁶

Numerous verses in the Qur'an stipulate about the mutual responsibilities between spouses (husband and wife). However, they might not be identical duties, but the totality of rights and responsibilities are balanced. The Almighty Allah says: "And for women are rights over men similar to those of men over women..."⁷ Women have the same rights (in relation to their husbands) as are expected in all decency from them. In Islam there is absolutely no difference between men and women as far as their relationship to Allah is concerned, as both are promised the same reward for good conduct and the same punishment for evil conduct.⁸ It is therefore on this background that the paper examines the reproductive right and health issues under Islamic law with a view to exploring avenues on how they could enhance medical law. In doing so, the paper first and foremost elucidates the concept of reproductive rights and health under international, regional and some domestic laws; followed by discussions on the concepts of reproductive rights and health under Islamic law. This acts as a precursor for exploring the prospects of medical law in relation to Islamic law perspective on reproductive right and health issues in the 21st century.

2. DEFINITION OF KEY TERMS

2.1 *Islamic Law*

In a bit clear term, Islamic law is used interchangeably with the term "Shari'a" which linguistically means path to be followed.⁹ Technically, it is the whole and entire Muslim life which is not solely limited to legal matters. Thus, according to Abdurrahman I. Doi, the term Islamic law is equivalent to the Arabic word "Shari'a" which literally means the way to a watering place or the path to be followed.¹⁰ However, in the Qur'an, it has been described as the path not only leading to Allah the Most High, but the path believed by all Muslims to be the path shown by Allah, the Creator Himself through his Messenger Prophet Muhammad Peace be Upon Him (pbuh).¹¹

² See Qur'an 4:1: "O Mankind! Be dutiful to your lord, who created you from a single person (Adam), and from him (Adam) he created his wife (Hawwa' [Eve]), and from them both he created many men and women; and fear Allah through Whom you demand (your mutual rights), and (do not cut relations of) of the wombs kinship. Surely, Allah is Ever an All-Watcher over you." In yet another verse: "It is He who has created you from a single person (Adam), and then He has created from him his wife (Hawwa' [Eve]), in order that he might enjoy the pleasure of living with her..." Qur'an 7:189. Similarly, the Almighty Allah says: "The Creator of the heavens and the earth. He has made for you mates from yourselves and for the cattle (also) mates..." Qur'an 42:11

³ Qur'an 49:13

⁴ Islam's Women: Jewells of Islam, Women's Right in Islam, available at http://islamswomen.com/articles/do_muslim_women_have_rights.php, accessed on 21st January, 2019

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⁶ Quran 30:21

⁷ Quran 2:228

⁸ Abdur Rahman I. Doi, Women in the Quran and the Sunnah, in Islam's Women: Jewells of Islam, available at http://islamswomen.com/articles/do_muslim_women_have_rights.php, accessed on 21st January, 2019

⁹ N. Badawi, Introduction to Islamic law, Programme on Humanitarian Policy and Conflict Research (USA, Harvard University, 2009) 2, see also M. Kyari, "Application of Sharia in Borno under the Colonial Rule, (1902-1960)," in M. A. Muazu et al (eds), Perspective in Sharia (Maiduguri, Nigeria, Sakirabe Publishers 2002), p. 188

¹⁰ Abdurrahman. I. Doi, Shari'a the Islamic Law (London, TAHA Publishers, 1984) 2

¹¹ Ibid See also Qur'an 45:18 where the Almighty Allah said: "Then We have put you (O Muhammad PBUH) on a (plain) way (sharia) of our commandment, so follow it and follow not the desires of those who know not"

2.2 Medical Law

Medical law is a branch of law which deals with regulations on practice, procedure and ethics within the medical profession. Although, the term “medical law” differs from “medical ethics” but the relationship between the two is cordial and overlapping in some circumstances. Sometimes what a medical professional should do in order to act lawfully is much the same as what he should do in order to behave ethically.¹² Medical ethics for instance stresses the need to ensure that the patient has given informed consent and medical professionals are also under a legal duty to ensure that the patient is adequately informed before he gives consent.¹³ Whereas at other times, medical ethics is more demanding than law, requiring more of a ‘good’ medical practitioner than simply refraining from harming the patient. Medical law unlike medical ethics, may therefore, seem to require a medical practitioner to act and behave in accordance with the law even if it conflicts with his or her personal morality or beliefs.¹⁴

2.3 Reproductive Right

Reproductive right can be defined as a right to decide whether, when and how to have children regardless of nationality, class, race, age, religion, disability, sexuality, in the social, political and economic conditions that make such decisions possible.¹⁵ From human rights perspective, the term “reproductive right” is inalienable right inseparable from basic rights such as right to food, shelter, health, security, livelihood, education and political empowerment (i.e. socio-economic rights). That is to say, the term is used to refer to human rights pertaining to procreation, including rights that are undermined in the context of population control and development policies. Although these rights are not specified as such in any international legal instruments of human rights, they are implicit in all of them and are defined in a range of non-treaty human rights declarations and action platforms on human rights.¹⁶

2.4 Reproductive Health

First and foremost, the word “health” within the context is defined as a state of a complete physical, mental and social well-being and not merely the absence of disease or infirmity.¹⁷ To this end therefore, reproductive health can be defined as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes.”¹⁸ This implies that on the basis of reproductive right and health, people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so.¹⁹ It is of course on this basis that the World Health Organization (WHO) in 2004 agreed on the definition of reproductive health to also represent sexual health.²⁰

3. CONCEPT OF REPRODUCTIVE RIGHTS AND HEALTH UNDER INTERNATIONAL, REGIONAL AND DOMESTIC INSTRUMENTS

The concept of reproductive right has been conceived out of necessity to effectively guarantee and protect the fundamental liberty of women who are mostly vulnerable in the society. Thus, reproductive right is considered as human rights because of its alienability to and inseparability from other basic rights such as right to life, right to non-discrimination, right of privacy, right to food, right to shelter, health security, livelihood, education and

¹² Emily Jackson, the Relationship between Medical Law and Good Medical Ethics, the London School of Economics and Political Science (LSE), Jackson, Emily (2015) The relationship between Medical Law and Good Medical Ethics, *Journal of Medical Ethics*, 41 (1). p 95-98. Also available at LSE Research Online, December 2015, p 1

¹³ Ibid

¹⁴ Ibid

¹⁵ Benedicta Daudu, “Reproductive Health and Rights Issues in International Law”, P 5, a Paper presented on Capacity Building Workshop for Law Lecturers on Reproductive Health and Rights, Ostra Hotel, Alausa- Ikeja, Lagos, 22nd - 25th July, 2008

¹⁶ Ibid

¹⁷ Emeke Chegwe, “Discussing Reproductive Health as Gender Based Issues in Human Rights”, a Paper presented on Capacity Building Workshop for Law Lecturers on Reproductive Health and Rights, Ostra Hotel, Alausa- Ikeja, Lagos, 22nd - 25th July, 2008

¹⁸ Human Rights Office of the High Commissioner, Women’s Rights are Human Rights, U.N, New York and Geneva, 2014, Pp 50-62

¹⁹ Emeke Chegwe, Op Cit, p 13, See also Rebecca Cook, Bernard M. Dickson and Mahmood F. Fathalla, Reproductive Health and Rights: Integrating Medicine, Ethics and Law, New York OUP, 2002 at p 12

²⁰ Roksana Janghorban, Robab Latifnejad Roudsari, Ali Taghipour and Mahmoud Abbasi, “Sexual Reproductive Rights from Qur’anic Perspective: A Quantitative Content Analysis”, *Asian Social Science*, published by Canadian Center of Science and Education, Vol. 11 No. 3, 2015, p 182

political empowerment.²¹ Others include right to health and right to privacy.²² The UN Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Discrimination against Women have both clearly indicated that women's right to health includes their reproductive health. This informed about the idea that states have obligations to respect, protect and fulfill right related to women's reproductive health. To this end, the Special Rapporteur on the right to health maintains that women are entitled to reproductive health-care services and facilities that are available in adequate numbers; accessible physically and economically; accessible without discrimination; and of good quality.²³

Furthermore, practical realities have shown that maternal health issues are growing by the day, hence increasingly being recognized as one of the human rights issues as the indivisibility of health and rights become clearly articulated. Thus, the International Conference on Population and Development (ICPD – Cairo 1994) supports strongly an integrated approach to health and rights in the area of promoting women's rights.²⁴ The ICPD in its Programme of Action states that everyone has the right to the enjoyment of the highest attainable standard of physical and mental health. States should take all appropriate measures to ensure, on the basis of equality of men and women, universal access to health care services including those related to reproductive health care, which includes family planning and sexual health. All couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have the information, education and means to do so.²⁵ This implies therefore, that women, in addition to right to decide freely and responsibly the number and spacing of their children, should have access to health care services which are necessary for their reproductive health care and motherhood. Thus, the latter (reproductive health), unlike the former (reproductive right) applies only to women.

The following are some of the international, regional and domestic instruments on the concept of reproductive rights and health of women: Universal Declaration on Human Rights UDHR (1948), Convention on the Elimination of All Forms of Discrimination Against Women CEDAW (1981), International Covenant on Civil and Political Rights ICCPR,²⁶ International Covenant on Economic, Social and Cultural Rights ICESCR,²⁷ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, African Charter on Human and People's Rights, Convention on the Right of the Child CRC (1989), The Constitution of the Federal Republic of Nigeria (1999) among others.²⁸

The UDHR treats all people (both men and women) equally without spelling out specific rights for women to the exclusion of men. It does emphasize in many of its provisions that any right granted by it applies to all gender equally. To this end, UDHR provides "All human beings are borne free and equal in dignity and rights".²⁹ In yet another provision "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind such as race, color, sex, language etc."³⁰ However, there are some provisions therein which are specifically targeted to protection of women without any prejudice to male gender. For instance, the UDHR has spelt out an entitlement to special care and assistance for motherhood in the following terms: "Motherhood and Childhood are entitled to special care and assistance".³¹ The provision implies that women, by virtue of being mothers, should be accorded with special care and assistance in respect of matters that bother on their reproductive health. This will enable them realize their state of a complete physical, mental and social well-being. Regarding reproductive right, a provision of UDHR is very clear that people should be allowed to decide without any interference or undue influence on matters relating to their privacy, family and home. The provision provides: "No one should be subjected to arbitrary interference with his privacy, family, home or

²¹ Legal Research and Resource Development Centre (LRRDC), Op Cit

²² Human Rights Office of the High Commissioner, Women's Rights are Human Rights, U.N, New York and Geneva, 2014, Pp 50-62

²³ Ibid

²⁴ Legal Research and Resource Development Centre (LRRDC), Op Cit

²⁵ Benedicta Daudu, Op Cit, p 12,

²⁶ Passed by UN General Assembly Resolution on the 16th December 1966 and in force from 23rd March 1976

²⁷ Ibid

²⁸ Benedicta Daudu, Op Cit, Pp. 6-8,

²⁹ Article 1 UDHR

³⁰ Article 2 UDHR

³¹ Article 25 (2) UDHR

correspondence...³² This may imply that women are entitled to right to decide how and when to reproduce without interference or undue influence or pressure from any person.

The CEDAW not only articulates the rights of women but goes further to proffer concrete measures to be taken by states in order to make these rights realizable. The core elements of these rights cover the broad categories of defense of women autonomy, bodily integrity and personhood which defines the standards by which rights are generally articulated.³³ The significance of CEDAW should not be over emphasized, because the Convention in its wordings expressly mentions family planning as a crucial subject matter to reckon with when dealing with issues of reproductive right and health. That is to say, women do have right to decide how and when to go about it including educational information and access to medical services. To this end, the CEDAW provides that the right of access to specific educational information and advice on family planning shall be guaranteed.³⁴ The Convention further provides that right of women in rural areas to have access to adequate health care facilities including information, counseling and services in family planning is outlined.³⁵ This women's right according to the Convention refers to Women's right to protection of health and to safety in working conditions, including "the safeguarding of the functions of reproduction".³⁶ The CEDAW explicitly codifies the specific right of reproductive choice as follows:

States parties shall take all appropriate measures to ensure on a basis of equality of men and women the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.³⁷

In yet another provision it provides:

State parties to the Convention shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women access to health care services, including those related to family planning.³⁸

The CEDAW, being the most important Convention related to women, guarantees them not only equal rights to men but also rights to decide freely and responsibly as men, on the number and spacing of their children; and to have access to the information and education as well as means to enable them to exercise these rights.³⁹

International Covenant on Economic, Social and Cultural Right (ICESR) is a treaty that is designed to provide legal backing to UDHR. On issues of reproductive right and health, the Covenant urges state parties to grant leave to mothers before and during child birth.⁴⁰ This will enable them have a successful delivery, good health condition and an enjoyment of right. The Covenant equally states that: the state parties to the present Covenant recognize the right to the enjoyment of the highest attainable standards of physical and mental health. The steps to be taken by the state parties to the present covenant to achieve the full realization of the right shall include those necessary for: the provision for the reduction of still birth rate and infant mortality and for the healthy development of the child; the improvement of all aspects of the environment and industrial hygiene; the provision, treatment and control of epidemic, occupational and other diseases; the creation of conditions which would ensure to all medical service and attention in the event of sickness.⁴¹ The rationale behind these provisions and similar others is to urge state parties to guarantee the right to health in general and reproductive health in particular.

Convention on the Rights of the Child (CRC) 1989 provides protection for children against exploitation, trafficking and sexual abuse, which are the bases and catalyst to violation of women's reproductive right and health. In light of the above, the CRC provides that: "state parties strive to ensure that no child is deprived of

³² Article 12 UDHR

³³ See Article 1 CEDAW

³⁴ Article 10 (h) CEDAW

³⁵ Article 14 (b) CEDAW

³⁶ Article 11 (1) (f) CEDAW

³⁷ Article 16 CEDAW

³⁸ Article 12 (3) CEDAW

³⁹ See Article 16 CEDAW

⁴⁰ See Article 10 (2) of the International Covenant on Economic, Social and Cultural Right (ICESCR) of 16th December 1966

⁴¹ Article 12 ICESCR

his or her rights of access to health care services".⁴² The article further provides that state parties agree to ensure appropriate pre-natal and post-natal care for mothers.⁴³ This should not be unconnected with complications involved in issues of reproductive health such as maternal mortality and fertility control.

United Nations Declaration of Human Rights, Cairo 1994 and the fourth UN World Conference on Women in Beijing 1995 brought to the fore front protection and promotion of rights on reproductive health. The Cairo program states as follows: "Reproductive right embraces certain human rights that are already recognized in national laws and other consensus documents".⁴⁴ These rights rest on recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do; and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence as expressed in human rights instruments.⁴⁵

A Protocol on the rights of women to supplement the African Charter on Human and People's Rights adopted in 1981 requires states to "ensure that the right to health of women, including sexual and reproductive health, is respected and promoted."⁴⁶ The rights specifically enumerated include those to determine the number and spacing of one's children; choose any method of contraception; protect one's self, be protected against sexual transmissible infections (STIs) including HIV/AIDs, and be informed about one's health status and the right to have family planning education.⁴⁷ Similarly, states were called upon to provide adequate affordable and accessible health services, establish and strengthen pre-natal delivery and post-natal health and nutritional services for women during pregnancy and while breast feeding and protect women reproductive rights.⁴⁸ The Protocol also requires states to prohibit and condemn harmful practices negatively affecting women's human rights and which are contrary to recognized international standards.⁴⁹

Much as the concept of reproductive rights propagates freedom of reproduction, the reproductive health implies health security, and that women have the ability to regulate their fertility and to practice and enjoy sexual relationships safely. It further implies that reproduction is carried to a successful outcome through infant and child survival, growth and healthy development. It also implies that women can go safely through pregnancy and childbirth, in that fertility regulation can be achieved without health hazards and that people are safe in having sex. Evidences confirm the danger to health presented by pregnancies that come too early, too late, too often and at intervals that are too closely spaced in women's reproductive lives. Similarly, unskilled abortion procedures can endanger life, health and future fertility. Unwanted infertility itself often a consequence of infection resulting from poor health care leads to divorce or abandonment. Fear of sexual relationships leading to unwanted pregnancy, often related to the physical dangers of pregnancy, impairs women's enjoyment of health as defined by World Health Organization.⁵⁰

Part of reproductive rights and health concepts as contemplated in some human rights instruments is to have adequate treatment from all diseases as well as having informed consent to proposed treatment which has two requirements, namely: that choice in health care to be adequately informed; that consent to care be freely given or withheld. The right to informed choice in health services, self-help and preventive health care is related to rights both to education and literacy and to rights to information and freedom of thought and association. To exercise truly informed choice, a woman deciding whether to receive a health service must have sufficient understanding of the proposed intervention; the implications of refusal of that treatment; and alternative forms of management of her circumstances.⁵¹ To this end, Health professionals who provide improper counseling or treatment to individuals and health professionals who wrongly withhold indicated treatment from patients for whom they are responsible, face three primary sources of legal liability, namely: they may be charged with professional misconduct by the authorities that license them to practice and by any voluntary associations to

⁴² Article 24 (1) of the Convention on the Rights of the Child (CRC) of 20th November 1989

⁴³ Article 24 (2) (d) of the CRC

⁴⁴ Paragraph 73 of the United Nations Declaration of Human Rights, Cairo 1994

⁴⁵ Benedicta Daudu, Op Cit, Pp 8-9

⁴⁶ Article 14(1) Protocol to the African Charter on Human and People's Rights, 1981

⁴⁷ Benedicta Daudu, Op Cit, p 13,

⁴⁸ Article 14(2) (a) (b) Protocol to the African Charter on Human and People's Rights, 1981

⁴⁹ Article 5 (a) - (d) of the African Charter on Human and People's Rights, 1981

⁵⁰ Rebecca J Cook , Women's Health and Human Rights: The Promotion and Protection of Women's Health through International Human Rights law, World Health Organization, Geneva 1994, Pp 10-11

⁵¹ Ibid, Pp 19-43

which they belong and whose authority they have accepted to impose discipline for unethical professional behaviour; where they have touched a person in a way that lacks legal authorization, or that exceeds authorization, or that differs from what was authorized, they may be sued for compensation for battery (or unauthorized touching) and/or they may be prosecuted for related crimes of assault; where they have failed to make appropriate disclosures to patients whose informed choices they were required to facilitate and obtain, they may be sued for negligence.⁵² Negligence arises in law where health professionals fail to meet the legal standard of disclosure of information, resulting in their patients suffering injuries they would have escaped had different choices been made.⁵³ Health professionals are often required to provide information relevant to the choices that women have to make especially on issues of reproductive health.⁵⁴

Legal remedies to reinforce duties to treat patients with respect and care often serve no more than symbolic purposes. In many countries, the formal procedures of the law are in fact inaccessible to many people and the mechanisms of health service licensing authorities and professional associations are similarly beyond reach. States themselves may bear responsibility under international human rights law, and be accountable before international tribunals and agencies, if they authorize or permit delivery of health services that are beyond the control of the recipients.⁵⁵ For example in the case of *Alyne da Silva Pimentel Teixeira (deceased) v. Brazil*,⁵⁶ the victim, a woman of African descent, died after a stillbirth and serious postnatal complications. Failures in diagnosing the complications suffered by the victim, delays in treating those complications, delays in referring her to a hospital with superior facilities and failures in the transmission of her records between health facilities, followed by lack of adequate response and redress for these failures, resulted in a finding of violations of the Convention (CEDAW).⁵⁷ Similarly, in *L.M.R. v. Argentina*,⁵⁸ L.M.R. was a minor girl with an intellectual disability, who had become pregnant as a result of rape by her uncle. She was denied legal abortion. The Committee found a violation of article 7 of the Covenant (torture or other inhuman or degrading treatment), since the State's failure to guarantee her right to termination (which in this case would have been in accordance with Argentine law) had "caused L.M.R. physical and mental suffering constituting a violation of article 7 of the Covenant that was made especially serious by the victim's status as a young girl with a disability." The Committee called on the State party to provide the victim with redress, including adequate compensation. In *Karen Noelia Llantoy (K.L.) Huaman v. Peru*,⁵⁹ K.L. was a 17-year-old girl whose foetus was determined to have a condition which would prevent its survival for more than a few days following birth. She requested an abortion, but the service was denied since abortion was legal only to save the mother's life but not in cases of foetal impairment. K.L. had to carry the pregnancy to term and was then made to breastfeed the baby, who died four days after birth. In finding a violation of article 7, the Human Rights Committee found that the depression and emotional distress of the 17-year-old girl were foreseeable consequences of the State's failure to enable her to undergo a therapeutic abortion.⁶⁰ In yet another case of *L.C. v. Peru*,⁶¹ L.C. was a minor girl, victim of sexual abuse, who had attempted suicide when she had found out that she had become pregnant as a result of the abuse. She survived but sustained serious injuries, including to her spine that required urgent surgery. She and her mother requested a legal abortion so that the operation could proceed. This was denied by a hospital, claiming that the victim's life was not in danger. Finally, after three and half months and having miscarried, she had the surgery but she is currently paralysed from the neck down, having regained only partial movement in the hands. The Committee found a violation of her right to health, since the decision on the abortion had not taken sufficiently into account the damage of the decision on her mental and physical health. Her health would have required access to both the surgery and the therapeutic abortion, especially given the circumstances (her age, the suicide attempt and sexual abuse).⁶² However, according to the Committee on the Elimination of Discrimination against Women, in its general recommendation No. 19 (1992), compulsory sterilization or abortion adversely affects

⁵² Ibid

⁵³ Ibid

⁵⁴ Ibid

⁵⁵ Ibid

⁵⁶ Human Rights Committee, Communication No. 17/2008, Views adopted on 25 July 2011 CEDAW/C/49/D/17/2008

⁵⁷ Ibid

⁵⁸ Human Rights Committee, Communication No. 1608/2007, Views adopted on 29 March 2011, CEDAW/C/52/D/1608/2007

⁵⁹ Human Rights Committee, Communication No. 1153/2003, Views adopted on 24 October 2005, CEDAW/C/85/D/1153/2003

⁶⁰ Ibid

⁶¹ Committee on the Elimination of Discrimination against Women, Communication No. 22/2009, Views adopted on 17 October 2011, CEDAW/C/50/D/22/2009

⁶² Ibid

women's physical and mental health, and infringes their right to decide on the number and spacing of their children. Thus, in *A.S. v. Hungary*,⁶³ a doctor in a public hospital performed a forced sterilization procedure on a patient without providing adequate information to gain the patient's consent. The Committee found a violation of the petitioner's right to equality in education, especially regarding information pertaining to family planning, the right to equality in accessing health care and the right to equality in the family, especially regarding the right to decide the number, spacing and timing of children.⁶⁴

4. CONCEPT OF REPRODUCTIVE RIGHTS IN ISLAMIC LAW

Islam is a religion that teaches kindness, righteousness and moral values. It protects the rights of every living creature especially the vulnerable ones such as children and women. Several verses in the glorious Quran have various concepts related to women's rights especially reproductive rights that are relating to either sexual relationships or reproductive choice or prohibition of violence against women.⁶⁵ The glorious Qur'an affirms mutual relationship for husband and wife in their conjugal life. This relationship centres on two major qualities, namely, love and compassion,⁶⁶ with the overall intention of serenity in the marriage and with the view to fulfilling peace and satisfaction in their marital life.⁶⁷ The Glorious Qur'an supports the right to life and prohibits infanticide which was a pre-Islamic practice motivated by financial problems and gender consideration.⁶⁸ To this end, the Almighty Allah said: "And kill 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."⁶⁹ In yet another verse "...kill not your children because of poverty. We provide sustenance for you and for them..."⁷⁰ Notwithstanding, the Qur'an encourages life but it does not oppose the right to choose contraception. Hence it indirectly addresses reproductive right of choice and family planning. For instance, breastfeeding as a natural contraception method has been introduced in the following verse "the mothers shall give suck to their children for two whole years, for those who desire to complete the term of suckling..."⁷¹ In modern Muslim countries, various levels of governments support family planning programs to enable individuals and couples to choose the number and timing of their children.⁷² However, a small number of Muslim jurists and other Islamic groups oppose family planning and contraceptive use generally on two grounds. Firstly, they believe that withdrawal or nay practice that prevents pregnancy is infanticide, which is repeatedly condemned and prohibited in the Qur'an.⁷³ Secondly, they believe that the larger the number of Muslims and the higher their population growth rate, the greater their power.⁷⁴ Therefore according to them, family planning can jeopardize the prospect, development and strength of Muslims. The concept of reproductive rights has manifested several implications and issues such as that of responsibility. Qur'an indicates that each person has responsibility of his or her actions, thus: "Every person is pledge for what he has earned."⁷⁵ So by this, it implies that women should be autonomous, especially concerning matters relating to taking decisions on their reproduction, health and family planning as they are always responsible for their actions.

5. CONCEPT OF REPRODUCTIVE HEALTH IN ISLAMIC LAW

Health generally is a significant aspect of human life and without which the survival tends to be difficult. It does not matter who the person is, he/she needs a good health condition to survive actively. In this regard, Islam

⁶³ Committee on the Elimination of Discrimination against Women, Communication No. 4/2004, CEDAW/C/36/D/4/2004

⁶⁴ Human Rights Office of the High Commissioner, Women's Rights are Human Rights, U.N, New York and Geneva, 2014, Pp 50-62

⁶⁵ Roksana Janghorban, Robab Latifnejad Roudsari, Ali Taghipour and Mahmoud Abbasi, "Sexual Reproductive Rights from Qur'anic Perspective: A Quantitative Content Analysis", *Asian Social Science*, published by Canadian Center of Science and Education, Vol. 11 No. 3, 2015, p 182

⁶⁶ See Qur'an 30:21: "And among His signs is this, that He created for you wives among yourselves, that you may find repose in them, and He has put between you affection and mercy. Verily, in that are indeed signs for a people who reflect."

⁶⁷ Roksana Janghorban, Robab Latifnejad Roudsari, Ali Taghipour and Mahmoud Abbasi, Op Cit, p 184

⁶⁸ Ibid, p 185

⁶⁹ Qur'an 17:31

⁷⁰ Qur'an 6:151

⁷¹ Qur'an 2:233

⁷² Farzaneh Roudi-Fahimi, "Islam and Family Planning", Population Reference Bureau (PRB), Middle-East and North Africa (MENA), Policy Brief, 2004, p 1

⁷³ See Qur'an 17:31 and Qur'an 6:151

⁷⁴ Farzaneh Roudi-Fahimi, Op Cit, p 5

⁷⁵ Qur'an 74:38, see also Qur'an 52:21

does not segregate between male and female. Equality is one of the cardinal objectives of Islam to the extent of placing Muslims men and women on equal participation in aspects of Islamic affairs. Islamic injunctions propound that in the creation of human beings, the male and the female make up their pair. This means that men and women are equally necessary as an essential condition of their creation. Neither one precedes the other. Neither one has priority or superiority over the other.⁷⁶ Notwithstanding the fact that the Qur'an recognizes biological differences between men and women, yet it treats them as individuals in their own rights. Thus, Qur'an provides: "And of everything We have created pairs that you may remember".⁷⁷ In yet another verse, the Almighty Allah describes husband and wife as "Garments": "It is made lawful for you to have sexual relations with your wives on the night of fasts. They are body cover for you and you are the same for them..."⁷⁸ In yet another verse, the Qur'an has described them as "*awliya*" (protecting friends and guardians) thus: "The believers men and women are *awliya*' (helpers, supporters, friends, protectors) of one another..."⁷⁹ What all of the above authorities imply is that marriage should not be seen or considered as an instrument of oppression; neither should any married couples be subjected to any degrading and inhuman treatment in the name of marital ties. Hence women in particular, should be accorded with a state of complete physical, mental and social well-being within the subsistence of their marriage because they are partners but not slaves.

From the Islamic perspective therefore, two issues are considered as basic components of reproductive health, which should always be guaranteed:

(1) Safe motherhood: this refers to a situation in which no woman going through the physiological process of pregnancy and child-birth suffers any injury or loses her life or that of the baby. This includes components and services, parental care, safe delivery, pre-natal and post-natal care, breast feeding, immunization, etc.⁸⁰ Male involvement and implementation of safe motherhood initiatives for effective health care services are in consonance with Islamic teachings as contained in the following verse:

Lodge them (the divorced women) where you dwell, according to your means, and do not harm them so as to straiten them. And if they are pregnant, then spend on them till they lay down their burden. Then if they give suck to the children for you, give them their due payment. But if you make difficulties for one another, then some other woman may give suck for him. Let the rich man spend according to his means; and the man whose resources are restricted, let him spend according to what Allah has given to him. Allah puts no burden on any person beyond what He has given him. Allah will grant after hardship, ease.⁸¹

The above verse implies the Quranic recognition of safe motherhood through the provisions of pre and post-natal care. Husbands are therefore required to be involved in actualizing this reproductive health issue as it is a command from Allah the Almighty, directed to them.

(2) Family planning: current understanding of reproductive health rights includes some issues such as the right to information on all matters relating to reproductive health; sexual and reproductive decision making, including choice of marriage partner, family formation and determination of the timing and spacing of children, and the means to exercise those choices;⁸² equality and equity for women and men to make free and informed choices in fundamental issues of life, free from all forms of discrimination; sexual and reproductive security, including freedom from sexual violence and right to privacy.⁸³ All these issues have direct bearings with issues of reproductive health of women especially in actualizing their state of complete physical, mental and social well-

⁷⁶ United Nations Agency for International Development (USAID), Mobilising Muslim Religious Leaders for Reproductive Health and Family Planning at the Community Level: A Training Manual, p 19

⁷⁷ Qur'an 51:49

⁷⁸ Qur'an 2:187

⁷⁹ Qur'an 9:71

⁸⁰ Farzaneh Roudi-Fahimi, Op Cit, pp 3-5

⁸¹ Qur'an 65: 6-7

⁸² See Qur'an 31:14 "And We have enjoined on man to his parents. His mother bore him in weakness and hardship upon weakness and hardship, and his weaning is in two years..." see also Qur'an 46:15 "And We have enjoined on man to be dutiful and kind to his parents, his mother bears him with hardship, and the bearing of him, and the weaning of him is thirty months, till when he attains full strength and reaches forty years..." see also Qur'an 2:233 "The mothers shall give suck to their children for two whole years (that is) for those parents who desire to complete the term of suckling, but the father of the child shall bear the cost of the mothers food and clothing on a reasonable basis..."

⁸³ Farzaneh Roudi-Fahimi, Op Cit, p 12

being. Of course, they have always been the key players not only for enhancing women reproductive health but also for molding the future of younger generations.

6. THE ISLAMIC LAW PERSPECTIVE ON REPRODUCTIVE RIGHTS AND HEALTH AND THE PROSPECTS OF MEDICAL LAW IN THE 21ST CENTURY

Broadly speaking, medical matters come into interaction with law in the following aspects, namely: legislation and administrative regulations affecting medical practice; court judgments on problematic or controversial ethical issues in medicine; medical matters or personnel may become subjects of lawsuits when issues of medical malpractice or alleged medical negligence arise; and use of medical matters as evidence in courts for other criminal or civil proceedings such as cases of homicide, rape, wounding, workman's compensation, insurance claims and the like. Despite their distinctive roles, medical law and medical ethics overlap in many areas. It is indeed difficult to dissociate the legal and ethical basis of the professional duties of doctors. For instance, both law and medical ethics address the issues of confidentiality, use of dangerous drugs and medical malpractice.⁸⁴ Others include issues of reproductive health such as management of infertility such as artificial insemination and surrogate motherhood; control of fertility such as sterilization and other forms of contraception; right of foetus such as abortion and the question of "maternal-foetal conflict"; prenatal screening and wrongful life, genetic counselling and eugenics; genetic therapy, whether it is to treat the abnormal or to improve the normal; and legal and ethical considerations of human cloning.⁸⁵

Medical law guarantees protection to both medical practitioners and the patients in different ways; for example, the requirement to provide a patient with sufficient information before consenting to a medical treatment.⁸⁶ If a medical practitioner has complied with the requirement of the law in that regard, he has exonerated himself from any criminal and/or tortious liability. But if he acted negligently in defiance of the law, thereby causing physical harm on the patient, he will be liable for his act or omission.⁸⁷ This is based on the fact that he owes his patient the duty of care. One of the fundamental duties of a medical practitioner is to make the care of his patient as a top priority devoid of any legal or ethical issues. Thus, if a patient is seeking a treatment which is lawful, but with which the practitioner disagrees on moral grounds, his primary duty continues to be to the patient.⁸⁸ This of course, remains a concrete position of the law in most of legal regimes around the globe.

In Islamic jurisprudence for instance, issues of medical regulations have been provided for through the basic sources of Shari'ah, namely, the Qur'an and Sunnah (Prophetic traditions) as well as the maxims of Islamic jurisprudence (*al-qawā'id al-fiqhiyyah*) which are drawn on these sources.⁸⁹ Islam is far more than a spiritual tradition, for it also has a societal and mundane dimension. It has been regulated by a sacred law known as "Shari'a", which is principally concerned with five objectives: protecting life, safeguarding the freedom to believe, maintaining the intellect, preserving human honor and dignity, and protecting property.⁹⁰ Islamic law recognizes the concept of medical laws and ethics to guarantee protection of human persons in different manner. For instance, it is unlawful under Islamic *corpus juris* for a doctor to impose medication on a patient except in a special circumstance where refusal of medication will lead to death of the patient or where the refusal will not definitely be of benefit or consequential. In this regard, several prophetic traditions were reported on permission of a refusal of medication. Thus, a Hadith narrated by the authority of Aisha (r.a), the Prophet Muhammad's wife, relating to an incident that took place before Prophet Muhammad's demise, where she states: "We put medicine in one side of his mouth, but he started waving to us not to insert the medicine into his mouth. We said: He dislikes the medicine as a patient usually does. But when he came to his senses, he said: Did I not

⁸⁴ Hau Kong Lung, Law and Ethics in Medical Practice: An Overview, Medical Section, August 2003, Vol. 8, No. 6, pp 4-5

⁸⁵ Ibid, p 6

⁸⁶ In determining whether an inadequate disclosure was negligent, the courts were historically guided by what the reasonable doctor would do. Although tort law has been moving towards a 'reasonable patient' test for disclosure, where the doctor is under a duty to provide whatever information a reasonable person in the patient's position would normally want to know, this is also an objective test which delivers standardized information to all patients, rather than tailoring it to the perhaps idiosyncratic preferences of the individual. See Emily Jackson, Op Cit

⁸⁷ Emily Jackson, the Relationship between Medical Law and Good Medical Ethics, the London School of Economics and Political Science (LSE), Jackson, Emily (2015) The relationship between medical law and good medical ethics. Journal of Medical Ethics, 41 (1). p 95-98. Also available at LSE Research Online, December 2015, Pp 2 - 7

⁸⁸ Ibid

⁸⁹ Mahmud Adesina Ayuba, Euthanasia: A Muslim's Perspective, Scriptura 115 (2016:1), Pp 8-9

⁹⁰ Bishara S. Atiyeh, Mohamed Kadry, Shady N. Hayek and Ramzi S. Musharafieh, Aesthetic Surgery and Religion: Islamic Law Perspective, Aesth Plast Surg (2008) 32: 3-4

forbid you to put medicine (by force) in the side of my mouth..."⁹¹ The above tradition implies the concept of informed consent and choice of medication which is been propagated by the conventional medical laws. However, it has been equally argued by some Muslim scholars on other way round that medication could be imposed on a patient in his best interest.⁹² This is on the basis that he has to exhibit and show a certain level of endurance (*sabr*), for it is always excellent to sustain it as revealed in the Qur'an: "*Fasabrun Jamil*".⁹³

Worthy of note is that discourse on Islamic position on medication has been the subject of debate among the Muslim jurists since the early centuries of Islam. The majority of Muslim jurists (such as Imams Hanafi and Maliki) stated that medical treatment is *mubah* (permitted).⁹⁴ Shāfi'i jurists (such as al-Qadi, and Ibn 'Aqil) and the Hanbalis (such as Ibn al-Jawzi) are of the view that it is *mustahab* (recommended).⁹⁵ However, the Shafii's position of *mustahab* is conditional, and it is recognizable only when there is no certainty as to its benefit. But when treatment is certain to be beneficial then it becomes *wajib* (obligatory).⁹⁶ Notwithstanding the above position, legalization of medication in relation to some reproductive health issues such as management of infertility through artificial insemination, test-tube baby and surrogate motherhood; control of fertility such as sterilization or abortion and other forms of contraception; prenatal screening and genetic counseling; cloning of human being and organ transplantation is very much significant. Consequently, medical practitioners, especially those who practice their profession in Muslim states are required to understand the Islamic legal position on these issues in order that they would not violate the extant laws, as they are always responsible for the consequence of their action.

On the basis of Islamic medical law, the issue of management of infertility such as artificial insemination through test-tube baby and surrogate motherhood is a controversial one as it is in human nature to want to have children. This has been affirmed in the Qur'an that "wealth and progeny are adornments for the life of this world. But the good righteous deeds, that last, are better with your Lord for rewards and better in respect of hope."⁹⁷ Going by this, human beings usually seek two things in life, namely: to have a secure financial future and children, which are considered as sources of comfort here on the earth. To this end equally, it has been described in the Qur'an as one of the prayers of believers to have descendants who can act as their good ambassadors on the earth. The Almighty reveals: "O, Lord, grant us spouses and offspring who will be the comfort of our eyes, and make us leaders of *Muttaqun* (the pious)."⁹⁸ In view of this fact therefore, one can assert that managing or curing infertility is, thus, lawful in the eyes of sharia. There are some scenarios in the Holy Qur'an which help in better understanding of infertility management. These include the story of Ibrahim (a.s) and his wife Sarah (a barren woman) where she (Sarah) offered to her husband (Ibrahim) another wife (Hajar) in marriage, so as to enable him to have children. She was ultimately blessed with a child, Ishaq.⁹⁹ As with the example of Ibrahim's story, Zakaria (a.s) remained faithful and supportive of his infertile wife. In Qur'an Allah says:

"And (remember) Zakaria, when he cried to his Lord: " O my Lord! Leave me not without offspring, though Thou are the best of inheritors." So We listened to him and granted him Yahya (John) . We cured his wife (barrenness) for him. They were ever quick in emulation in good works; they used to call on us with love and reverence, and humble themselves before Us."¹⁰⁰

Therefore, managing or curing infertility does not make one to be ingrate and ungrateful to Allah but just a prayer. Hence, like Zakaria (a.s) who prayed Allah to have a child (a successor), people should beseech Allah for the blessings of offspring. In view of the significance of having children, the Prophet (pbuh) recommends for

⁹¹ Cited in Ibid

⁹² Mahmud Adesina Ayuba, Op Cit

⁹³ Qur'an 12:83, where Allah reveals: "...So patience is most fitting..."

⁹⁴ *Mubah* means something permissible in the eyes of shari'ah, and its commission or omission does not attract any reward or penalty

⁹⁵ *Mustahab* means something recommendable in the eyes of shari'ah, and its commission or omission does attract rewards

⁹⁶ Mahmud Adesina Ayuba, Op Cit

⁹⁷ Qur'an 18:46

⁹⁸ Qur'an 25:74

⁹⁹ Mohammed Ali Al-Bar and Hassan Chamsi-Pasha, *Contemporary Bioethics, Islamic Perspective*, (Springer Cham, New York, 2015), Pp 173-178. See also Qur'an 51: 28=30 where the Almighty Allah says: "...And they (angels) gave him (Ibrahim) glad tidings of a son endowed with knowledge. But his wife came forward clamoring, she smote her forehead and said: A barren old woman! They said: Even so has thy Lord spoken and He is full of wisdom and knowledge."

¹⁰⁰ Qur'an 21: 89– 90

marrying fertile women, thus he said: "Marry the kind and fertile women who will give birth to many children for I shall take pride in the great numbers of my Ummah (Nation)".¹⁰¹

So long as Islam permits managing and curing infertility, it equally frowns at artificial reproduction with no medical justification. For self-imposed single parenthood, as with same-sex married couples longing for children, is a sharp negation of Islamic law injunctions. However, freezing the remaining fertilized ova is considered permissible by some Muslim Scholars provided they are only used in subsequent cycles for the same couple within the subsistence of their marriage.¹⁰² It is also permissible to utilize unused eggs for medical research with the consent of the couple and within the appropriate shari'a guidelines.¹⁰³ Marriage plays a significant role to the acts of procreation through which generations of mankind subsist. Thus, the Almighty Allah says in the Qur'an: "And Allah has given you wives of your own kind, and has given you, from your wives, sons and grandsons, and has made provisions of good things for you. Is it then in vanity that they believe and in the grace of Allah that they disbelieve?"¹⁰⁴

Artificial reproduction, though, not explicitly mentioned in the primary sources of Shari'ah; however, when a reproductive problem is identified by any of the married couples, Islam encourages them or anyone of them to look for the treatment. To this effect, Islam recognizes the duties of physicians to help a barren married couple achieve successful fertilization, conception and deliver babies. Hence, all assisted reproductive technologies are permitted in Islam, if the semen source, ovum source, and the incubator (uterus) come from the legally married husband and wife during the subsistence of their marriage.¹⁰⁵ However, the involvement of a third person (surrogacy) in the equation is totally unacceptable whether this takes the form of a sperm, an ovum, an embryo or a uterus. This is because they are the property of the couples alone and may be transferred to the wife in a successive cycle provided the marital bondage exists.¹⁰⁶

There are two types of surrogacy, partial and complete. In partial surrogacy, a couple will solicit or commission a woman to be artificially impregnated by the husband's semen. The surrogate will then carry the pregnancy to term, and upon birth, give the baby away to the soliciting couple. In this case, the child will have the rearing father as the biological father, a rearing mother, and a biological birth mother. In a complete surrogacy, the commissioning couple will undergo In Vitro Fertilization (IVF). The embryo produced by IVF is transferred then to a surrogate woman. The surrogate gives the baby to the soliciting/rearing couple at birth. In this case, the biological parents are the rearing couple, and the surrogate is the birth mother.¹⁰⁷ Thus, under Islamic law, surrogacy is prohibited. This is the unanimous decision of Sunni Muslim jurists based on the Quranic verse that says: "...None can be their mothers except those who gave them birth..."¹⁰⁸ The statement "those who gave them birth" in the verse implies that even if there is an agreement between the parties, one cannot assume the status of a biological mother except she conceives and gives birth to the child naturally; so that the confusion of lineage, which is inevitable in the surrogacy arrangements will be eradicated. This is therefore one of the major reasons for prohibiting surrogacy in Islamic law. In fact, according to consensus opinion of Sunni Muslim jurists, if surrogacy is still done despite the prohibition, the birth mother remains the "real" mother.¹⁰⁹ However, contrary opinion was upheld by Ali Khamini of Iran, a shi'ites scholar that surrogacy commissioned between the wives of one husband is lawful.¹¹⁰

On the issue of fertility control such as abortion and usage of contraceptives, Muslim jurists upheld different views. Some of the views are linked to the Islamic concept of protection of human right to life, which shall be conceived, and thus extends to the foetus. Though still being part of his mother, the foetus has an independent

¹⁰¹ Muhammad Ibn Isma'il, Sahih Al Bukhari, Kitab an Nikah Book 7, Volume 62, Hadith No. 3 & 4

¹⁰² Mohammed Ali Al-Bar and Hassan Chamsi-Pasha, Op Cit, Pp 173-178

¹⁰³ Ibid

¹⁰⁴ Qur'an 16: 72

¹⁰⁵ Mohammed Ali Al-Bar and Hassan Chamsi-Pasha, Op Cit, Pp 173-178

¹⁰⁶ See Fatawa in support of assisted reproduction treatment but banning third-party assistance upheld by some Muslim countries such as Morocco, Kuwait, Qatar, Saudi Arabia and the United Arab Emirates. It could be recalled that a Conference on Islamic law and medicine was held in 1997 at Casablanca, Morocco under the auspices of the Kuwait-based IOMS; in which a bioethical declaration included recommendations to prevent human cloning and to prohibit all situations in which a third party invades a marital relationship through donation of reproductive material. See Mohammed Ali Al-Bar and Hassan Chamsi-Pasha, Op Cit, Pp 173-178

¹⁰⁷ Mohammed Ali Al-Bar and Hassan Chamsi-Pasha, Op Cit, Pp 173-178

¹⁰⁸ Qur'an 58:2

¹⁰⁹ Mohammed Ali Al-Bar and Hassan Chamsi-Pasha, Op Cit, Pp 173-178

¹¹⁰ Ibid

legal personality and rights. So, if somebody assaults a pregnant woman and aborts her, he would thus be committing two crimes: one for assault, and the other for killing the foetus.¹¹¹ A Hadith narrated on the authority of Abu Huraira that:

“Two women from Hazil were fighting. One threw a stone at the other which killed her and her foetus. People sought counsel from the Prophet who gave the verdict that for the killed foetus the killer should release a male or a female slave, as a ransom, and that the blood money (Diyah) for the woman killed was to be paid by the guardian of the killer (*Aqilatih*), i.e her heirs and her offspring. Then the guardian (Al Nabigha Al- Hazly) said, 'Oh, Messenger of Allah, how could I be fined for that who did not drink, eat, speak or initiate a life? Such a case should be denied. The Prophet said; this man is a brother of the soothsayers, for he rhymes as they do.’¹¹²

The above hadith implies that Islam considers all human life (including unborn child) very important and deserves protection at all times. Hence the foetus' right to life is an absolute value, even if the foetus is illegitimate. This is evident from the incident narrated by Buraida that Al Ghamdiah came to the Prophet saying:

“Oh, Messenger of Allah! I have committed adultery, so purify me.” The Prophet instructed her: “Go until you give birth.” When she gave birth, he said to her; “Go feed him until he is weaned.” When she weaned him, she came to the Prophet (s.a.w) with the boy holding a crumb of bread. The Prophet (s.a.w) gave the boy to a man and commanded people to stone her to death. Then he performed prayer on her, and she was buried.”¹¹³

Generally, Allah has made it clear that killing human beings without a lawful cause is forbidden, as their lives are made sacred by Allah's having created them. There are a lot of authorities in the Qur'an and ahadith on the sanctity of life. Allah says:

Because of that We ordained for the children of Israel that whosoever kills a soul for other than manslaughter or corruption in the land; it shall be as if he killed all mankind, and whosoever saves the life of one, it shall be as if he saved the life of all mankind...¹¹⁴

In yet another verse: “...kill not your children because of poverty, We provide sustenance for you and for them...and kill not anyone whom Allah has made sacred, except for a just cause...”¹¹⁵ This applies to killing anyone, especially killing one's children (including foetus) is forbidden by Allah. Notwithstanding the general rule prohibiting of killing innocent souls and even abortion on the basis of encouraging procreation within matrimony, Islam permits the temporary means of contraception for a lawful cause. Thus, the Prophet (s.a.w) himself allowed his companions to practice “azl,” i.e., coitus interruptus (Onanism).¹¹⁶ This is lawful provided they cause no harm, and are done with mutual consent of the spouses. However, the lawfulness of “azl,” does not include sterilization (surgery to prevent reproduction), which has been declared forbidden except for clear medical indications, where pregnancy would seriously endanger the health or life of the expectant mother.¹¹⁷ Similarly, abortion is allowed only if continuation of pregnancy would endanger the life or health of the expectant mother, or if there is proven serious congenital anomaly in the embryo or foetus. To this effect, Islam allows the performance of abortion to be done within the period of 120 days after conception, which is considered the time of ensoulment (moment at which a human being gains a soul) according to the Hadith (sayings) of the Prophet. However, if the life of the expectant mother is endangered, abortion or pre-term delivery can be performed at any time of pregnancy.¹¹⁸

On issues of prenatal screening and genetic counselling, Islam at all times propagates and encourages Muslim to adhere to the concept of prevention of disease is better than cure. To this end, the Prophet Muhammad (s.a.w) in one of ahadith advised Muslims to choose for their daughters, husbands with good character and free

¹¹¹ Dr. Ibrahim Abdul Hamid Al Sayyad, *Islamic Approach to Medicine, Translated from Arabic to English by Mohammed Abdul hamid Madi*, available at <http://www.islamicmedicine.org>, accessed on 25th April, 2019

¹¹² Sahih Muslim, Hadith No. 1681, p 1309

¹¹³ Sunan Abi Dawud, Hadith No. 4442

¹¹⁴ Qur'an 5:32

¹¹⁵ Qur'an 6:151

¹¹⁶ Mohammed Ali Al-Bar and Hassan Chamsi-Pasha, Op Cit, Pp 163- 164

¹¹⁷ Ibid Pp 164-169

¹¹⁸ Ibid

from physical and social illnesses. He also said: "Choose for your offspring the suitable woman for hereditary plays a role."¹¹⁹

On issues of cloning of human being, organ transplantation and donation, in Islam, the permissibility of organ transplantation and donation is not specifically mentioned in the primary sources of Islamic law, namely, the Quran and Sunnah. This is because organ transplantation and donation are new phenomena and modern developments in medicine. Nevertheless, Islamic scholars have discussed these developments since the middle of 20th century. In some modern Muslim countries such as Malaysia, for instance, the issue of organ transplantation has been deliberated upon since the 1960s as evidenced from the decree (fatwa) issued by the Muft of Perlis (a state in Malaysia) in 1965.¹²⁰ Therefore, the opinions of Muslim scholars regarding organ transplantation are considered as *ijtihad* (independent legal reasoning or efforts), which is primarily based on Islamic legal maxims (*Qawa'id al - Fiqhiyyah*).¹²¹ Basically, organ transplantation and donation are permissible in Islam. This is because of the fulfilment of the requirement, i.e. "the preservation of human life", which is one of the objectives of the Islamic law (*Maqasid Al-shar'iah*).¹²² Organ transplantation is considered lawful based on the Islamic law principle of saving human life which takes precedence over whatever assumed harm. However, in the case of living donor, the principle of doing no harm (*premium non nocere*) shall be invoked. The donor cannot give one of his vital organs, which would end his life. It is an act of homicide or suicide, both of which are considered among the most detestable crimes in Islam. The donation of an organ whose loss would usually cause no harm, or a minimal increased risk to the health or life of the donor, is acceptable if the benefit to the recipient is greater than the harm. Organ transplantation is a new method of treatment that can save many human lives and improve the quality of life for many others. Islam encourages a search for a cure and invokes Muslims not to despair, for there is certainly a cure for every ailment, although we may not know of it at the present time. The donation of organs is an act of charity, benevolence, altruism and love for mankind. The majority of the Muslim scholars and jurists belonging to various schools of Islamic law invoked the principle of priority of saving human life and hence gave it precedence over any other argument.¹²³ On the other hand, cloning of human being is associated with the major problems such as the loss of kinship and lineage due to the unnaturalness of reproduction (mixing of kinship or the loss of it, would be considered haram) (unlawful in Islam) and undermining the concept of reproduction and family (Holy Qur'an 4:1); the social harms, problems of personal identity and the psychological development of a clone and the disregard for human dignity; the unjust eugenics (selecting genetic qualities by selective breeding) and trends towards "designer babies" (superior or inferior, depending upon the motives of the creator); the contradiction of the Islamic belief (God is the only and the best creator); the contradiction of the principle of creation of all beings (human, animal, plants) in pairs (male and female). However, as cloning produces the exact copy of the previously existent individual whether male or female, this leads to a disturbance of the natural existence of pairs, and finally; the contradiction of the principle of diversity of creation of all beings, including human, animals, and plants in various colors and shapes. Therefore, human cloning is forbidden in any method that leads to human reproduction. The International Islamic Fiqh Academy of Organization of Islamic Conferences (OIC-IFA) in Jeddah in its 10th

¹¹⁹ Ibid, Pp 196-205

¹²⁰ Transplantation Unit Medical Development Division, Ministry of Health Malaysia, *Organ Transplantation from the Islamic Perspective*, (Ministry of Health Malaysia & JAKIM, 2011), p 10

¹²¹ The Islamic legal maxims relied upon inter alia: (1) *Al-Umūru Bi Maqasidiha* (Matters Are Determined By Intention) The intention and purpose of organ transplantation is to save the patient's life. Organ transplantation is not performed with the intention of humiliating the deceased. Instead, it is carried out with the intention of saving a life; (2) *Al-Mashaqqatu Tajlib At-Taysir* (Hardship Begets Facility). The maxim "Hardship begets facility" originated from the Qur'an, where the Almighty Allah says: "God intends for you ease and He does not intend to put you in hardship" (Q2:185). There are also several verses in the glorious Qur'an that authorize the application of this legal maxim. Among such verses are: "God does not intend to inflict hardship on you" (Q5:6) "...and has not let upon you in religion any hardship..." (Q2:78) Organ transplantation is a facility made available to mankind as a means to overcome hardship faced by patients with end-stage organ failure. Islamic law permits one who is in an urgent situation to do the unlawful (haram) in order to eliminate the harm he faces, under the condition that there are no other lawful options available; (3) *Al-Dararu Yuzal* (Harm/Injury must be eliminated). This maxim originated from the Hadith of the Prophet (s.a.w.) "*lā darara walā dirār*" (No harm shall be met by harm). denotes no one shall cause any harm to himself, to his kinship, to his property and to others, because this harm is a kind of wrong-doing which is prohibited in Islam. See also Transplantation Unit Medical Development Division, Ministry of Health Malaysia, *Organ Transplantation from the Islamic Perspective*, (Ministry of Health Malaysia & JAKIM, 2011), pp 12-14

¹²² Transplantation Unit Medical Development Division, Ministry of Health Malaysia, *Organ Transplantation from the Islamic Perspective*, (Ministry of Health Malaysia & JAKIM, 2011), p 10

¹²³ Mohammed Ali Al-Bar and Hassan Chamsi-Pasha, *Op Cit*, Pp 213-223

session¹²⁴ explored all the research papers and recommendations of the 9th Medical & Fiqh Seminar held by the Islamic Medical Organization in Casablanca, Morocco, in collaboration with the Council and others and declared thus: Human cloning is forbidden in any method that leads to human reproduction; it is forbidden in all cases to introduce a third party into marriage, be it an egg donor, a surrogate womb, a sperm donor, or a cloned cell.¹²⁵

7. CONCLUSIONS

It has been appraised herein that Islamic law being a divine and complete law contains a couple of provisions on reproductive rights and health issues. This is not unconnected with its nature and compatibility with principles of natural justice, fairness, freedom and equity. It is a golden principle of Islamic law that everything is presumed lawful unless explicitly designated otherwise in the Qur'an and/or Sunnah (the prophetic traditions). In Islam, it has been understood that procreation is not only an integral part of matrimony but also an act of worship. Even the sexual act with one's wife is considered to be an act of charity. As long as reproduction is encouraged in Islam, reproductive rights and health are sacrosanct; hence they form the basis of sustainable procreation here in this world. Thus, Islamic law does not prohibit family planning nor does it forbid abortion unconditionally. However, a prior consent of the spouses, legal justification of their actions and strong medical reason are necessary. Reproductive rights are considered as human rights because of its inalienability to and inseparability from other basic rights despite its implicitness within the human rights instruments. Whereas, reproductive health entails having access to some health care services such as safe motherhood and family planning. Medical law, in ample of ways, guarantees protection not only to medical personnel but also to patients. This is why a medical practitioner at all times has to comply and take into cognizance of extant laws in carrying out his duties. These include managing of patient's infertility, controlling of their fertility and other diagnoses related to reproductive rights and health issues. Islam has laid down some principles associated with reproductive rights and health issues and such principles are applied in most of the Muslim states, hence require much consideration and attention to enhancing the application of medical law in the 21st century. To this end therefore, the article recommends for the application of Islamic law alongside conventional medical laws, especially within the modern Muslim states.

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¹²⁴ Held in Jeddah from 23–28/2/1418H = 28 June – 3 July 1997 CE

¹²⁵ Mohammed Ali Al-Bar and Hassan Chamsi-Pasha, *Op Cit*, Pp 213-223

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