

Extending Child Protection Law to the Unborn: Maternal Liability for Unborn Injury in Malaysia

Astrid Sinarti Hassan^{1*} , Noraiza Abdul Rahman² 

¹Department of Medical Ethics and Law, Faculty of Medicine, Sungai Buloh Campus, Jalan Hospital 47000, Sungai Buloh, Universiti Teknologi MARA, Selangor, Malaysia.

Email: astrid@uitm.edu.my

²Faculty of Law, Universiti Teknologi MARA, 40450, Shah Alam, Selangor, Malaysia.

Email: noraizarahman@uitm.edu.my

ABSTRACT

The debate about the value of life is very important in discussions about abortion rights, with one side arguing that unborn children should be completely protected from harm. This view enhances with the widely held belief that pregnant women need strong legal protections to keep both of them and their unborn children safe. In Malaysia, the rights of unborn children are not clearly defined by law. The current laws try to protect pregnant women from harm caused by others but not from their own actions that could harm the unborn child. This lack of clarity leads to many legal, ethical, and social questions, especially concerning the rights of unborn children in cases of criminal acts. This article suggests a detailed legal approach that considers both scientific and medical perspectives. It argues that unborn children should be recognised as victims of crime, even when the crime is committed by their mothers.

CORRESPONDING AUTHOR (*):

Astrid Sinarti Hassan
(astrid@uitm.edu.my)

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Contribution/Originality: This study contributes to the existing literature by examining maternal liability for foetal harm in Malaysia using a doctrinal methodology. It is one of the first study which proposes a novel legal approach to extend child protection laws to include unborn children, addressing the gap in current Malaysian law that protects pregnant women from harm by others but not from self-inflicted harm to the foetus. The paper's primary contribution is finding that clearer legal definitions could enhance protections for unborn children while respecting maternal rights.

1. Introduction

A born child's right to a healthy existence and the protection from unjust abuse and injury is partially served by society's recognition. This however should be extended to those of the unborn as well. Furthermore, these regulations protect expecting mothers and their fetuses from problems like domestic abuse by explicitly making punishable actions that directly cause the death of an unborn child illegal. However, the common law recognised the unborn child as a part of the mother, and only the woman is entitled for compensation

for harm done to the foetus before delivery. 'The unborn child could not be a murder victim unless the child was born alive and subsequently died due to the injuries received prenatally' (Casey, 2005). The never-ending debate on whether or not foetuses have the legal right to 'personhood' and whether they can be considered as 'person' is necessary to confront the conflicting notion that a pregnant woman has the right to terminate her foetus but also at the same time whether she has a 'legal duty' to ensure that the child is born healthy.

2. The Malaysian Position Comparison with the United Kingdom

Under Malaysian law, the status of an unborn child is still unclear. Article 5 of the Malaysian Federal Constitution stated: 'no person shall be deprived of his life or personal liberty save in accordance with law (Federal Constitution, 2010). It is unclear, if a foetus is included in the definition of 'a person'. Although it is desired from an ethical and ideological standpoint for women's constitutional rights, the current Malaysian law implicitly, recognise the rights of the pregnant mother more than those of the foetus even though foetus is of 'something of value' (Thomson, 1971). The Malaysian Penal Code also prescribes punishment for abortion. Section 312 states:

Whoever voluntarily causes a woman with child to miscarry shall be punished with imprisonment for a term, which may extend to three years, or with fine, or with both; and if the woman be quick with child, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine.

A registered physician acting in good faith that the continuation of the pregnancy would put the expectant mother's life at risk or harm her physical or mental health, greater than if the pregnancy were terminated constitutes an exception to this rule. Sections 315 and 316 of the Penal Code specify that any act intended to prevent a child from being born alive, or to cause its death shortly after birth, is considered culpable homicide (Penal Code, 2015). This means that such actions are treated as murder under the law. This law shows that the rights of an unborn foetus are recognised to some extent, even without a definitive status of 'personhood', and the punishments are similar to those for crimes against a living person. However, the law is unclear about whether a pregnant woman can also be charged if she harms her unborn child, given that it's established that a mother might intentionally injure her unborn child (Temkin, 1986). For example, the exemption does not spell clearly to whether the victims of rape can undergo abortion (Rajamani et al., 2018). For example in the case of R v. Bourne, a 15-year-old girl who had become pregnant after being raped was given an abortion by a highly trained surgeon. Justice Macnaghten noted that Mr. Bourne, a reputable and skilled surgeon, conducted the procedure openly in a major hospital, motivated by compassion and a sense of professional duty, without any financial reward. The judge emphasised that Mr. Bourne believed he was doing the right thing and acting in the best interest of the girl. Ultimately, the jury was tasked with determining the legality of the operation. The case underscored the importance of the surgeon's intent and the circumstances under which the abortion was performed, distinguishing it from typical cases of unlawful abortion (R v Bourne, 1938).

Despite the legality of abortion if patient fulfilled the requirement, in the United Kingdom (UK), a foetus is not considered a person at the time of the mother's actions, and thus, is not eligible for compensation. A child must be born alive to claim damages for injuries

received in the womb (Wilkinson et al., 2016). If a child is born alive and can demonstrate that injuries were sustained in utero due to the actions of another, they may have a valid claim for compensation. This principle has been upheld in various cases where medical negligence or accidents have resulted in prenatal injuries. Nevertheless, it can be argued that harm to unborn children is morally significant and might still be justifiable in court, but only after the child is born. If a child is born alive, they are entitled to protection, which may include being taken from their parents if necessary (Wilkinson et al., 2016).

3. 'Foetal Abuse' as a Recognised Crime?

Pregnant women require essential resources and support to ensure a safe and healthy pregnancy. This includes protection from domestic violence. Currently, a foetus does not have legal rights while inside the womb, meaning a mother cannot be legally sued for harming her unborn child during pregnancy (McKoy, 2003). This raises a question: Should 'foetal homicide' laws be expanded to include not only third parties but also pregnant mothers whose actions could directly harm the foetus?

Medical science has increasingly focused on how a mother's lifestyle choices affect her foetus's health. There is strong evidence that a mother's use of substances like amphetamines, marijuana, cocaine, heroin, and methadone can adversely affect the foetus. For example, exposure to these substances during pregnancy has been linked to serious congenital issues such as brain damage, cerebral infarction, organ deformities, and visual impairments, as well as symptoms of drug withdrawal in newborns. These findings highlight the significant impact of maternal behaviour on foetal health (Etemadi-Aleagha & Akhgari, 2022).

Defining 'foetal abuse' and distinguishing it from reckless behaviour by a mother or another party who does not intend to harm the unborn child is complex, especially with the aid of scientific evidence. For instance, both active and passive smoking, as well as alcohol consumption, have been associated with birth defects. Scientific studies show varying levels of risk associated with alcohol, tobacco, and both prescription and over-the-counter medications, all of which can lead to teratogenic effects on the foetus, including brain and skull deformities, intestinal atresia, heart malformations, and limb defects (Hackshaw et al., 2011).

A particularly well-documented risk is the consumption of alcohol during pregnancy, which is linked to foetal alcohol spectrum disorders (FASD). There is evidence suggesting that alcohol, particularly when combined with other substances like illicit drugs and tobacco, can cause significant avoidable damage. One study noted that 25% of children diagnosed with FASD had mothers who consumed high levels of alcohol during pregnancy (Popova et al., 2022). Considering the potential harm, the legal system could classify excessive alcohol consumption and smoking during pregnancy as 'foetal abuse'. This classification would serve to protect the interests of the unborn child while also potentially infringing on the personal rights of the mother, striking a balance between preventing harm and protecting individual rights.

In Malaysia, a foetus does not have legal personhood status until it is born. Generally, a pregnant mother's right to autonomy and freedom takes precedence over the rights of the foetus. In cases where the mother engages in high-risk behaviours, such as substance abuse or excessive alcohol consumption, a policy of mandatory detention could be considered. This policy would aim to provide supportive interventions that promote

healthier choices for the pregnant woman, thereby ensuring a positive pregnancy outcome without infringing on her autonomy. In the United States of America (USA), similar policies have been implemented in approximately thirty-eight states, with the majority of interventions focusing on providing support rather than executing punitive measures (Amnesty International, 2017). Prosecuting a mother after her child's birth for behaviours that jeopardised the child's personhood rights could lead to detrimental outcomes, including the potential separation of mother and child. To prevent such situations, it is crucial for legal authorities to not only refine legal policies but also to enhance healthcare and socio-economic support for pregnant mothers who exhibit high-risk behaviours. This approach helps safeguard the child's welfare while supporting the mother's rights and needs.

4. Legal Reasonings

If specific laws are proposed to address injuries caused by pregnant women to their unborn children, it's possible to develop a legal framework based on a balance of rights and duties within the jurisprudential context. This would involve considering the mother's right to control over her body and lifestyle choices as part of the legal reasoning. Just like any citizen, a pregnant woman has certain duties alongside her rights. This concept is fundamental to societal values globally. Thus, any proposed legislation would need to include legal, moral, and ethical reasoning to ensure a balanced approach that respects both the rights of the mother and the welfare of the unborn child. Based on this, a proposed legal (and to some extent moral and ethical) reasonings would be:

- i. The more severe the harm exposed to the unborn child due to an act, the more compelling for the mother's duty to restrain from such an act.
- ii. A scientific and medical relationship must exist between a specific act and the harm to the unborn child.
- iii. An act proven to be of harm specifically to the stage of the development of the foetus should be refrained by the mother.
- iv. The stronger the risk to the mother's physical and mental health, the weaker will be the claim by the foetus.
- v. The more trivial the reasons for a mother's choice of conduct ranging from convenience to social pressure, the lesser will be the mother's strength to justify such an act.

Thus, it is clear that the 'interest' of an unborn child is the moral and ethical responsibility of the pregnant woman and society. In tandem to our existing children, the obligation to prevent harm to the unborn and our future children requires significant thought, understanding and sacrifices from both parents and society. Our rights to live in this world comes with the duties to protect this world for future generations. The controversy remains in which the foetus should earn more legal rights to protect them from the outside world but not without imposing on the women's rights of her own body. The judicial system charged separately in cases in which there is existence of harm to the foetus leading to the prosecutors recommending more serious charges and harsher penalties for the convicted perpetrators. This 'valuable element' must be given analogous right and due consideration to exist, although not at any cost and within absolute rights. Indeed, 'the right to life consists as not the right not to be killed, but rather in the right not be killed unjustly' (Thomson, 1971).

Introducing a law that clearly outlines protections could help better define legal rights without delving into the contentious issues of violence, mental health, and ethical dilemmas in Malaysia. Some USA states have laws that impose stricter penalties for the murder of a pregnant woman but do not treat the death of the foetus as a separate crime (Ohlheiser, 2015). This approach might offer a way to acknowledge the rights of the unborn child without compromising the bodily autonomy of the pregnant woman. Women who lose their pregnancies due to third-party actions should receive compensation by convicting the perpetrators and acknowledging the suffering endured. While this stance might seem to minimise the broader issue of violence against women, it recognises that pregnant women who are harmed and lose their babies may suffer more extensively, facing higher risks of physical complications like bleeding and infection, as well as mental health impacts such as depression.

Foetal homicide laws, intended to protect pregnant women, often paradoxically prosecute these very women, raising significant constitutional and public policy concerns. The best approach to safeguarding foetal rights ideally involves reducing high-risk behaviours, enhancing access to social support, and cracking down on the use of illicit or unlicensed drugs not prescribed by physicians. Additionally, foetal homicide laws that punish pregnant women for harming their own foetuses fail to make a crucial distinction between violent attacks on pregnant women by third parties and harmful behaviours by the women themselves. It's important to align the legal framework with these distinctions to protect both the rights of the woman and the foetus. This distinction is important because 'the woman has a constitutionally protected right to bodily autonomy, but the third party has no right to terminate the woman's pregnancy' (Tsao, 1998).

5. Conclusion

The text explores the complex legal and ethical issues surrounding foetal rights, particularly in Malaysia and the USA and the UK. It emphasises the tension between a pregnant woman's right to bodily autonomy and the rights of the unborn foetus. Malaysian law ambiguously recognises the foetus as having some value, with severe penalties for actions leading to miscarriage or foetal harm, yet the foetus is not considered a person under the constitution, prioritising the mother's rights. The study argues for the need to balance protecting foetal health against impinging on the mother's rights, suggesting that legal frameworks should differentiate between third-party violence and the mother's potentially harmful actions. It advocates for supportive rather than punitive measures to address high-risk maternal behaviours, aiming to improve foetal outcomes while respecting the mother's autonomy. For mothers and their unborn children, with life come privileges and rights and with privileges and rights, come duties. Despite all the counterclaims, such duties must include legal protection to the most vulnerable and most defenseless forms of humanity i.e. the foetus. The recent legal trend in other countries such as the USA and the UK to extend legal protection to foetus are welcome developments. As long as Malaysia continues to uphold the value to protect the interests of the unborn child, such progress in the local setting is likely to follow the same logical conclusion.

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Conflict of Interest

The authors declare no conflict of interest.

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