Maternal-Foetal Conflict Issues in Caesarean Section Refusal in Saudi Arabia in the Light of Saudi and *Shariah* Law

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Declaration

I declare that this thesis is my own work and has not been submitted in substantially the same form for the award of a higher degree elsewhere.

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Abstract

Obstetricians may encounter challenges due to the unexpected nature of childbirth and a potential conflict of interests between the pregnant woman and her foetus. When a pregnant woman refuses to consent to a caesarean section that is necessary to prevent death to her foetus (referred to as a necessary caesarean section), the likelihood of such a conflict increases. Such a situation raises the possibility of a conflict between a pregnant woman's legal right to autonomy, which includes her right to make her own decisions regarding her childbirth and her right to refuse medical intervention, and a foetus' need to be born safely via a caesarean section and their legal right to life.

This thesis examines the Saudi legal approach towards the possible maternal-foetal conflict in the context of maternal refusal of a necessary caesarean section. Saudi law grants a pregnant woman with capacity a legal right to autonomy in making her own treatment decisions, including her right to refuse a necessary caesarean section. However, the notion of autonomy in *Shariah* law, Saudi law's supreme law, is restricted by an individual's responsibility to comply with the *Shariah* provisions. Since causing death to the foetus is prohibited under *Shariah* law (and Saudi law), the thesis explores whether the religious-based direction placed on autonomy may offer scope for overriding maternal refusal to consent to a necessary caesarean section. Saudi law gives a foetus a legal right to life and to be protected from harmful actions. In light of this, the thesis examines how far the Saudi law on maternal refusal to consent to a necessary caesarean section maintains those rights. The thesis asks whether reform of the law in this regard is needed and whether an alternative approach for dealing with the maternal-foetal potential conflict in necessary caesarean section refusal cases can be developed from within *Shariah* law, the main source of law in Saudi Arabia. Due to the shortage of literature regarding the maternal refusal of necessary caesarean sections, the thesis includes an empirical element in the form of a short questionnaire to explore how the law is implemented in practice by obstetricians/gynaecologists. The empirical study also includes the question of whether participating doctors believe that Saudi law on necessary caesarean section refusals needs to be reformed.

The conclusions reached in this thesis are as follows: (i) while the notion of autonomy in Islam does not accommodate a maternal refusal of a necessary caesarean section as such a decision is considered under *Shariah* law a sinful action, the thesis does not support the argument that justifies an overriding of such a refusal decision based on the restricted notion of autonomy; (ii) the thesis argues that a foetus' legal right to life is not maintained in the current legal position of Saudi law regarding a maternal refusal of a necessary caesarean section; (iii) the thesis, hence, argues, based on doctrinal and empirical considerations, that reform of the law in this regard is needed; and (iv) the thesis shows that different approaches to the maternal refusal of a necessary caesarean section can be developed from within *Shariah* law. The thesis suggests that a 'maxim-based' approach through applying the Islamic legal maxim that severe harm is removed by lesser harm should be adopted for dealing with the possible maternal-foetal conflict in cases of maternal refusal of a necessary caesarean section.

Glossary

Jurist / Scholar: A person who is a learned/expert in *Shariah* law.

Classical Jurist: Jurists who were during the time of establishing the Sunni schools of law and to the thirteenth century.

Contemporary Jurist: Jurists who were in the thirteenth century to the present day.

Mufti: A qualified jurist empowered to give rulings on religious matters in the society he lives in.

Mujtahid: A qualified scholar known for his ability to reach independent personal opinions based on Shariah law's sources.

Shariah's Maqasid: Objectives of *Shariah* law

Kaffara: Expiation

Qhurrah: Blood money

Fiqh: jurisprudence

Fatwas: Contemporary legal responses to controversial issues.

Wajib: Obligatory

Haram: Forbidden / Prohibited

Mustahabb: Recommended / Encouraged

Makruh: Disapproved / Discouraged

Mubah: Permissible / Allowed

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I dedicate this thesis to my little one: Ghassan.

Introduction

- An introduction to Topic and Research Questions

Refusing medical treatment during pregnancy and birth may cause a conflict between maternal autonomy and foetal medical needs, thereby raising matters of legal and ethical significance. There are two main scenarios in which a pregnant woman's decision-making may cause harm to her foetus. First, when she refuses to consent to medical treatment aimed at enhancing foetal well-being or medical recommendations for delivery, such as a caesarean section which is medically necessary in order to avoid a substantial risk that the foetus would die during delivery (referred to hereafter as a ''necessary caesarean section'').[1] The second scenario concerns the pregnant woman's conduct that may cause harm to the foetus, such as smoking and drug-taking. The latter scenario is not within the scope of this research as it is, comparatively, a social issue that, in all probability, needs a broad-based policy discussion. The complexity in the former scenario, however, lies in the possible conflict between the pregnant woman's legal right to autonomy and bodily integrity and the well-being of the foetus. As such, it is of considerable moral and legal importance.

[1] My primary consideration in my thesis is, hence, *not* on cases where a caesarean section is just thought to be *less* risky or the *preferred* method for delivery, but where it is *necessary*. In Chapter 3.3.3, different scenarios in which a caesarean section is seen as a life-saving intervention are presented. In the UK, there have been a number of reported cases in which caesarean sections were deemed medically necessary to save the foetus' life (and the woman's life), such as *Re S (Adult: Refusal of Treatment)* [1992] 4 All ER 671 and *St George's Healthcare NHS Trust v S, R v Collins & Others ex parte S* [1998] 3 All ER 673. In those cases, the foetus' life was to be in real danger if a caesarean section was not performed. It is important, however, to recognise that there is evidence that caesarean sections have been used more than is necessary, which is related to the idea of the medicalisation of birth. Doctors may suggest caesarean sections as the safer option. It is a precautionary approach that can be frequently adopted due to the high risk of litigation in obstetrics. For discussion of caesarean sections without medical reasons, see, for example, Tina Lavender, G Justus Hofmeyr, James P Neilson, Carol Kingdon, and Gillian ML Gyte, 'Caesarean section for non-medical reasons at term' (2012) 3 Cochrane Database of Systematic Reviews.

This thesis is concerned with possible maternal-foetal conflict in the context of maternal refusal of a necessary caesarean section in Saudi Arabia. It will consider the Saudi legal approach and the *Shariah* law's approach to this matter. This is because Islam is the official religion and the main source of law in Saudi Arabia as it is an Islamic state. It follows that the acceptability of the Saudi law approach or any arguments for reform of the law in the matter in question is subject to their acceptability in *Shariah* law. Accordingly, it is essential to study the issue of potential maternal-foetal conflict in necessary caesarean refusal cases from an Islamic perspective in order to understand the Saudi law's stance on this issue. I will also consider how the law is understood and implemented in practice by medical professionals.[2] This thesis, as such, includes doctrinal considerations and empirical considerations.

In this thesis I aim to address four main questions:

(i) Does the notion of autonomy in Islam accommodate a maternal refusal of a necessary caesarean section, and whether the Islamic notion of autonomy can be used to override such a refusal?

(ii) Is the foetus' legal right to life as enshrined in Saudi law maintained in the current position of Saudi law on maternal refusal of a necessary caesarean section?

(iii) Does Saudi law regarding the issue in question need reform?

(iv) Does *Shariah* law offer scope for an alternative approach for dealing with the potential for a conflict between the capacitous pregnant woman's legal right to

[2] For more information about my empirical study, see Chapter 5.

autonomy and the foetus' legal right to life in cases of maternal refusal of a necessary caesarean section?

- Background and Objectives

The potential for a conflict between a pregnant woman's right to make her childbirth decisions and the foetus' need to be safely delivered is one of the main challenges obstetricians may experience.[3] Deshpande and Oxford have argued that the extent to which a decision on the part of a pregnant woman to refuse a caesarean delivery, regardless of the risks to the foetus, must be respected, rests on two conflicting principles: autonomy and the respect for the interests of the foetus.[4]

It is well established, under *Shariah* law, that medical interventions cannot be carried out without either a capacitous patient's consent, or his/her guardian's consent if the patient is deemed to lack capacity.[5] It is also not permissible for a doctor to coerce a patient into agreeing to a medical intervention, even where there is a reason for it, such as pain.[6] In terms of statute, the consent rule is evident in Article 19 of the Saudi Law of Practicing Healthcare Professions 2005, in which it is stated that: 'No medical intervention may be performed except with the consent of the patient, his representative

[3] Kristin Lyng, Aslak Syse and Per E. Børdahl, 'Can Cesarean Section Be Performed without the Woman's Consent?' (2005) 84 Acta Obstetric Gynecologica Scandinavica 39, 39.
[4] Neha A. Deshpande and Corina M. Oxford, 'Management of Pregnant Patients Who Refuse Medically Indicated Caesarean Delivery' (2012) 5 Reviews in Obstetrics and Gynecology 144, 147.
[5] This is supported by a hadith narrated by Al-Bukhari in his book 'Sahih Bukhari'. For more information about this, see Chapter 2.3.
[6] For more information about consent rule under *Shariah* law, see Chapter 2.3

or guardian if the patient is legally incompetent'.[7] This emphasis on the necessity of obtaining the patient's consent prior to any medical intervention shows that the consent rule is well established in both *Shariah* and Saudi law.

The consent rule in the patient-physician relationship follows from the principle of respect for patient autonomy. For example, Tom Beauchamp[8] and Robert Young[9] maintain that consent is equivalent to respect for patient autonomy, and that the latter is the primary ground of consent rule. This stems from their perspective that seeking a patient's consent implies an acknowledgment of their right to self-determination as well as their right to be protected from unwanted medical intervention. However, as I will discuss in chapter two, it should not be assumed that consent is equivalent to autonomy.[10]

There are some examples in *Shariah* law that show respect for a patient's decision. For example, it was reported by Ibn Maajah, a medieval scholar of *hadith*, and at-Tirmidhi, an Islamic scholar and collector of *Hadith*, that 'Uqbah ibn Aamir al-Juhani said: Prophet Muhammad - Peace Be Upon Him (PBUH) - said: ''Do not force your sick ones to eat or drink, for Allah gives them food and drink'''.[11] This *hadith* has been interpreted by

[7] For more information about consent rule under Saudi law, see Chapter 4.3.
[8] Tom L. Beauchamp, 'Informed Consent: Its History, Meaning, and Present Challenges' in Helga Kuhse, Udo Schüklenk and Peter Singer (eds), *Bioethics*: *An Anthology* (3rd edn Wiley Blackwell 2016) 637.
[9] Robert Young, 'Informed Consent and Patient Autonomy' in Helga Kuhse and Peter Singer (eds), *A Companion to Bioethics* (2nd edn Wiley-Blackwell 2012) 531.
[10] There is literature that is critical of the legal focus on consent being equivalent to respecting patient autonomy. For discussion of this, see Chapter 2.3.
[11] Narrated by Ibn Maajah, 'Sunan Ibu Maajah' <http://islamilimleri.com/Kulliyat/Hadis/Hadis/pg_007_0032.htm> accessed 30 June 2019; At-Tirmidhi,

influential jurists to mean that if a patient does not eat willingly, it is not permissible to force them to eat at such a time.[12] According to this, the basic principle is that a patient has a right to make their own decision if they have mental capacity, and that such a decision ought to be respected.[13]

The legal stance in Saudi Arabia to maternal refusal of a necessary caesarean section recognises a capacitous pregnant woman's right to autonomy when making her own decision. This is evident in Resolution No. 173 issued by the Council of Senior Scholars, the highest religious body in Saudi Arabia:

> If it is medically determined by the competent authority that it is necessary to perform surgery for hysterectomy or caesarean section, the woman, if deemed legally competent, is entitled to give consent or refuse to consent to the advised medical intervention.[14]

Thus, only the pregnant woman is entitled to make delivery decisions. As such, although not explicitly stated in this Resolution, a foetus' life does not appear to trump

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'Jami` at-Tirmidhi' <http://islamilimleri.com/Kulliyat/Hadis/Hadis/pg_004_0030.htm> accessed 30 June 2019. "Own translation".

[12] For example, Imam Nawawī, a *Shafi'I* jurist, as cited by Islam Question and Answer, 'He was afraid that his sick father might die because he refused to eat, so he allowed the doctors to force-feed him; is he regarded as disobedient towards his father?' <https://islamqa.info/en/answers/192633/he-was-afraid-that-his-sick-father-might-die-because-he-refused-to-eat-so-he-allowed-the-doctors-to-force-feed-him-is-he-regarded-as-disobedient-towards-his-father> accessed 11 July 2019.

[13] Sahin Aksoy and Abdurrahman Elmali, 'The Core Concepts of the Four Principles of Bioethics as Found in Islamic Tradition' (2002) 21 Medicine and Law 211, 217.

[14] dated [10-09-1992]. ''own translation''.

the capacitous pregnant woman's right to refuse a necessary caesarean section. In the light of this, the law in Saudi Arabia views maternal refusal of a caesarean section from the perspective of the pregnant woman's right to autonomy only. The potential benefit to the foetus of being born safely via a caesarean section, and whether this potential benefit affects the woman's right to refuse the necessary section, is not mentioned.[15]

However, the principle of autonomy, while 'universal', is nevertheless subject to cultural differences influencing how it is interpreted and implemented.[16] It is, therefore, of importance to understand how this principle is interpreted in Islam and to examine whether the Islamic interpretation of autonomy can accommodate maternal refusal of a caesarean section that could save the foetus' life, or protect them (the foetus)[17] from severe injuries. Individual responsibility is emphasised in Islam, as each individual is accountable before Allah for their actions.[18] This emphasis on the individual's responsibility means that 'there is considerable room for personal autonomy in Islam'.[19] However, an individual's actions are expected to be based on *'ilm* (knowledge), which is important in reaching a reasoned decision.[20] Therefore, patients are obliged to act with *knowledge* when making their decision. *Knowledge* here is understood in the sense of an individual's *responsibility* to comply with Islamic rules when making their decisions.

[15] For more information about the Saudi law approach regarding this, see Chapter 4.3.2.1.
[16] WHO, 'World Health Report 2000', as cited in Luis Justo and Jorgelina Villarreal, 'Autonomy as a Universal Expectation: A Review and a Research Proposal' (2003) 13 Eubios Journal of Asian and International Bioethics 53, 53.
[17] A foetus will be addressed as 'they' throughout this thesis, because a foetus in both *Shariah* and Saudi law is considered a human being and is addressed in those jurisdictions as 'they'.
[18] Yassar Mustafa, 'Islam and the Four Principle of Medical Ethics' (2014) 40 Journal of Medical Ethics 479, 482.
[19] Gillon R., *Principles of health care ethics* (Chichester: John Wiley & Sons 1994), as cited by Mustafa (n 18), 482.
[20] Aksoy and Elmali (n 13) 216.

This means that autonomy in Islam is balanced in line with the individual's responsibility to make the religiously ''right'' decision.[21]

As such, it can be said that there are some limits to an individual's autonomy to make their own decisions. That is, if there is a prevailing opinion of the necessity to undergo a medical intervention in order to preserve a patient's life, or protect them from being seriously harmed, the patient would be, from a *religious* sense, obligated to act in accordance with that opinion (i.e., consent to the advised intervention to maintain their life or health).[22] Based on this Islamic notion of autonomy, a question can be raised regarding the extent to which a pregnant woman's right to autonomy is respected when doing so could result in death to the foetus. In other words, does autonomy in Islam accommodate maternal refusal of a necessary caesarean section that could save the foetus' life? This thesis will, therefore, consider the question as to whether this direction placed on autonomy to make the religiously appropriate decision, can lead to more limited autonomy. That is, could it enable a pregnant woman's right to refuse a necessary caesarean section to be overridden if not doing so would endanger the foetus' life?[23]

Alongside the argument that the religious-based direction placed on autonomy may offer scope for overriding maternal refusal to consent to a necessary caesarean section, the technological advances, and developments in the knowledge of foetal physiology,

[21] For more information about the notion of autonomy in Islam, see Chapter 2.3.
[22] Aksoy and Elmali (n 13) 216.
[23] For more information about this, see Chapter 3.3.3.1 and 3.3.3.2.

which enable doctors to treat and assess a foetus' condition *in utero*, have raised issues regarding the moral and legal status of the foetus.[24] The potential benefits of treatment to a foetus and the increased ability to reduce or prevent harms to them using the new technology,[25] have led to the idea of seeing them as an individual patient and separate to a pregnant woman.[26] If this is accepted, then it seems to suggest that a foetus should acquire legal rights,[27] and that harm must be considered in terms of the foetus and not merely the woman as the patient. As such, the idea of a two-patient obstetric model has been introduced.[28] However, such a model necessarily conflicts with a pregnant woman's right to autonomy and bodily integrity, since any treatment or surgery required by a foetus cannot be performed without affecting the physical integrity of the woman's body.

For example, when the pregnant woman and the foetus are seen as two independent patients, the pregnant woman's medical interests, needs and rights may be pushed aside in favour of the foetus.[29] The pregnant woman may, as such, be seen as a 'foetal container'.[30] Thus, the pregnant woman's rights become subordinated to those of the

[24] Susan S. Mattingly, 'The Maternal-Fetal Dyad: Exploring the Two-Patient Obstetric Model' (1992) 22 Hastings Center Report 13, 13 - 14.
[25] Such as, foetal imaging technology like sonography, Nathan Stormer, 'Seeing the Fetus: The Role of Technology and Image in the Maternal-Fetal Relationship' (2003) 289 JAMA 1.
[26] 'The technological limitations of medicine once dictated the treatment of the pregnant woman and her unborn child as a single medical entity. The increasing ability to diagnose and treat the fetus and the greater awareness of the effects of maternal conduct on fetal health, however, have led doctors to perceive the fetus as an individual patient with needs distinct from those of its mother', Editorial., 'Developments in the Law: Medical Technology and the Law' (1990) 103 Harvard Law Review 1519, 1556.
[27] Carl Wellman, 'The Concept of Fetal Rights' (2002) 21 Law and Philosophy 65, 65.
[28] Mattingly (n 24) 13 - 14.
[29] The American College of Obstetricians and Gynecologists, 'Refusal of Medically Recommended Treatment During Pregnancy' (2016) 664 Committee Opinion 1, 3.
[30] George J. Annas, 'Pregnant Women as Fetal Containers' (1986) 16 The Hastings Center 13, 13-14.

foetus. The reverse is also true, that is, considering them as two separate patients may downgrade the weight attached to the foetus' interests in favour of the pregnant woman. Hence, many writers have recognised that the two-patient model was meant to clarify complex issues that occur in obstetrics, but that it instead distorts legal and ethical debates.[31] Moreover, to recognise that the foetus is a patient would mean characterising them as a person, which not everyone would support.[32]

Given this, it is important to consider the legal status of the foetus under *Shariah* law and Saudi law. In Islam, the concept of the infusion of the soul, which is believed to take place 120 days following conception,[33] plays a major role in determining the status and rights of the foetus.[34] At this stage (once the spirit is breathed into the foetus), the foetus becomes a real person and is, thus, granted some legal rights and protections. Two major legal rights granted by the ensoulment are the right to life and to be protected from harmful actions (e.g., exposure to harm or killing).[35] Indeed, all of the four *Sunni* schools of law agree on the prohibition of abortion after ensoulment (i.e., after the 120

[31] Jonathan Herring, 'The Loneliness of Status: The Legal and Moral Significance of Birth' in Fatemeh Ebtehaj, Jonathan Herring, Martin Johnson and Martin Richards (eds), *Birth Rites and Rights* (Hart Publishing, Oxford 2011) 103; Marie Fox, 'Pre-Persons, Commodities or Cyborgs: The Legal Construction and Representation of the Embryo' (2000) 8 Health Care Analysis 171, 171-177; Dunja Begović, 'Maternal–Fetal Surgery: Does Recognising Fetal Patienthood Pose a Threat to Pregnant Women's Autonomy?' (2021) 29 Health Care Analysis 301, 301-318.

[32] Frank A. Chervenak and Laurence B. McCullough, 'An Ethically Justified Framework for Clinical Investigation to Benefit Pregnant and Fetal Patients' (2011) 11 The American Journal of Bioethics 39.

[33] There are different stages of foetal development, and these stages form the legal discussion of the status of the foetus under *Shariah* law. For more information about the different rulings in accordance with these stages, see Chapter 3.2.

[34] Dariusch Atighetchi, 'Aspects of the Management of the Rising Life Comparing Islamic Law and the Laws of Modern Muslim States' (2010) Droit Cultures Paragraph 58 <https://journals.openedition.org/droitcultures/2148?lang=en#tocto1n5> accessed 11 March 2019.

[35] Qur'an [17:33]: 'And do not kill the soul which Allah has forbidden, except by right. And whoever is killed unjustly - We have given his heir authority, but let him not exceed limits in [the matter of] taking life. Indeed, he has been supported [by the law]'. This verse gave an explicit prohibition of killing the forbidden soul and the foetus after the ensoulment is considered a soul.

days).[36] The *Shariah*'s criterion of the infusion of the soul, generally, forms the basis of the law on abortion in Muslim States. Atighetchi notes, however, that *in practice* there are few Muslim States which currently make 'explicit reference' to this criterion, and that the law on abortion varies between Muslim States.[37] In fact, Saudi Arabia is one of the few Muslim States to make *explicit* reference to the different stages of foetal development, defined by the *Shariah*, in regulating its law on abortion.

Article 22(1) of the Implementing Regulations of the Law, includes Resolution No. 140 of the Council of Senior Scholars which gives the provision on abortion with reference to the different stages of foetal development, states:

> 1 - It is not permissible to terminate the pregnancy at any of its phases except for legitimate justification and in very narrow limits.
>
> 2- If the pregnancy is in the first phase, which is forty days, and if there is a legitimate benefit or prevention of expected harm, abortion is permissible. However, terminating the pregnancy, during this period [40 days], because of fear of hardship in raising the children or fear of being unable to pay for their living, education or for their future is not permissible.
>
> 3- It is not permissible to terminate the pregnancy if the foetus is *alaga* [a clot of blood] or *mudgha* [a clump of flesh] unless if it is established by a reliable

[36] For more information about these schools of law, see Chapter 1.4.
[37] Atighetchi (n 34) Paragraph 70.

medical committee that the continuation of the pregnancy threats their mother's *health*, in that her well-being may be severely affected by their continuation. In this case, termination is permissible after exhausting all means to avoid those dangers.

4- After the third phase and after completing four months of pregnancy [i.e., after the 120 days], it is not permissible to terminate the pregnancy unless if it is established by a number of reliable specialists that the survival of the foetus inside their mother's belly would cause the *death* of the mother. This is after exhausting all means to save the foetus' life. The allowance of terminating the foetus under these conditions is based upon the Islamic legal maxim, that severe harm is removed by lesser harm.[38]

Although the Saudi law on abortion protects the foetus' life through the prohibition of abortion, except for in certain circumstances, Al-Alaiyan asserts that the law on abortion cannot be seen to protect the rights of the foetus because abortion is treated differently to murder and it is often treated, under *Shariah* law, as a misdemeanour (leaser offence) rather than a deliberate killing.[39] Abortion is, therefore, predicated on some other basis in which the punishment of the offender would be a *Kaffara*[40] (expiation).[41] A

[38] Council of Senior Scholars, Resolution No. 140 [1987]. ''own translation''. (My emphasis).
[39] Saleh Al-alaiyan, 'An Islamic Legal Perspective on the Status of the Malformed Fetus and the Previable Infant' (2014) 4 Palliative Care & Medicine <https://www.omicsonline.org/open-access/an-islamic-legal-perspective-on-the-status-of-the-malformed-fetus-and-the-previable-infant-2165-7386.1000174.php?aid=25812> accessed 13 March 2019.
[40] A Kaffara is either freeing of a believing slave or a fast of two months consecutively, Qur'an [4:92].
[41] Marion Holmes Katz, 'The Problem of Abortion in Classical Sunni Fiqh' in Jonathan E. Brockopp and Gene Outka (eds), *Islamic Ethics of Life: Abortion, War, and Euthanasia* (University of South Carolina 2003) 28.

Kaffara is a religious act enjoined by *Shariah* to erase a certain sin, so it is intended to address the offender's relationship with Allah.

A key cause of the ambiguity regarding foetal legal status and rights may be that neither the *Qur'an* nor the *Sunnah* directly address them.[42] For example, Verse 31 of Al-Isra states: "Kill not your offspring for fear of poverty; it is we who provide for them and for you. Surely, killing them is a great sin".[43] The reason behind this *Qur'anic* passage was the inclination among people in ancient times to commit infanticide or terminate a pregnancy because they were afraid of poverty. It has been interpreted by some religious scholars to mean that a foetus must not be aborted due to financial difficulties;[44] however, it is generally understood by classical exegetes to refer to already-born children and not to foetuses.[45]

Moreover, the *Sunnah* has given rulings concerning preserving the life of the foetus and forced miscarriages. The story of the woman, who was pregnant because of adultery, is an example of the protective attitude to preserving the life of the foetus when the Prophet Muhammad (PBUH) delayed stoning punishment on her until she gave birth.[46] Additionally, it has been reported that the Prophet (PBUH) gave a ruling on a case of forced miscarriage, whereby a foetus was killed as a result of a fight between two women. The Prophet (PBUH) required a *ghurrah* (blood money) for the killing of the

[42] Ibid, 25.
[43] Qur'an [17:31].
[44] Al-alaiyan (n 39).
[45] Katz (n 40) 26.
[46] Muslim, 'Sahih Muslim: the Book of Punishment' <http://islamilimleri.com/Kulliyat/Hadis/Hadis/pg_002_0031.htm> accessed 11 March 2019.

unborn child.[47] Although these prophetic reports may illustrate the provisions concerning the foetus' rights, they did not address intentional abortion. The fact that these two primary sources of *Shariah* law are not explicit with regard to the foetus' legal status and rights, has caused ambiguity and disagreement amongst the four *Sunni* schools of law as well as the contemporary jurists when dealing with foetal-related issues, such as abortion and maternal refusal of a necessary caesarean section. Foetal legal status and rights are, hence, complex, especially in relation to the pregnant woman.

In this thesis I will explore the foetus' legal status and rights under *Shariah* and Saudi law and present different provisions and interpretations adopted by the four *Sunni* schools of law.[48] This is important as one of my objectives in this thesis is to locate the Saudi law's stance on cases of potential maternal-foetal conflict within the different provisions of the four *Sunni* schools of law. Abortion is highly relevant in this thesis due to the shortage of data around the potential for maternal-foetal conflict in cases involving maternal refusal of a necessary caesarean section, and because foetal legal status and rights are generally discussed in *Shariah* law and Saudi law in the context of abortion.

In this regard, it must be clearly stated that I am not including abortion law to suggest that there are clear parallels between abortion and maternal refusal of a necessary

[47] Al-Bukhari, 'Sahih Bukhari: kitab alddiat (Book of Blood Money)' <http://islamilimleri.com/Kulliyat/Hadis/Hadis/pg_001_0068.htm> accessed 03 May 2019.

[48] For more information about this, see Chapters 3.2 and 4.2.

caesarean section. Abortion regulates the intentional termination of a pregnancy and so, it requires an action, most often by a third party, that is intended to cause the death of a foetus, and it is normally takes place before ensoulment, or viability. By contrast caesarean sections are often only relevant from approximately 22 weeks (154 days, so long after ensoulment) and are intended to deliver a live infant. Where a pregnant woman refuses a caesarean section needed by the foetus, she is not generally doing so with the intention of harming the foetus. Hence, the argument that can be made is that the woman's omission puts the life of the foetus in danger, but she does not intentionally harm the foetus.

However, although abortion and caesarean refusals are two different issues, foetal legal status and foetal legal rights are discussed in *Shariah* law and Saudi law in the context of abortion. This means that abortion law is relevant to my thesis because foetal legal status and legal rights can be inferred from it. This is especially significant because, as I will demonstrate in this thesis (particularly in Chapters 3 and 4), an ensouled foetus' legal right to life and their legal status as an independent person whose rights must be protected are established through abortion law. After exploring this, I will consider my thesis question of whether the current position of Saudi law protects the foetus' legal status and rights when dealing with the potential for maternal-foetal conflict in the context of maternal refusal of a necessary caesarean section.

In this thesis, I will argue that while the notion of autonomy in Islam does *not* accommodate a maternal refusal of a necessary caesarean section as such a decision is considered under *Shariah* law a sinful action, I do *not* support the argument that justifies an overriding of such a refusal decision based on the Islamic notion of autonomy that requires an individual to act in accordance with Islamic rules when making their decisions. I will also argue that an ensouled foetus' legal right to life is *not* maintained in the current legal position of Saudi law regarding a maternal refusal of a necessary caesarean section. Hence, I will argue, based on doctrinal and empirical considerations, that reform of the law in this regard is needed. I will show that different approaches to the maternal refusal of a necessary caesarean section can be developed from within *Shariah* law and will suggest that a *'maxim-based'* approach through applying the Islamic legal maxim that severe harm is removed by lesser harm should be adopted for dealing with the possible maternal-foetal conflict in cases of maternal refusal of a necessary caesarean section.

- Rationale for this Thesis

The above discussion of the *Shariah* and Saudi perspectives regarding the issue of the potential for maternal-foetal conflict in caesarean refusal cases highlights the importance of studying such a topic by showing how the central issue is seen and dealt with in these two contexts. My discussion shows that this issue lies with the possible conflict between the pregnant woman's fundamental right to autonomy and the foetus' need to be born safely via a caesarean section and their legal right to life.

This area of research is complex, and my aspiration is to explore in depth the different legal approaches to the issue of maternal refusal of necessary caesarean sections in *Shariah* law and Saudi law. It is hoped that by doing so, a better understanding of the issues raised will be reached. My aim is also to consider my thesis question of whether reform of Saudi law is needed and whether *Shariah* law offers scope for adopting a different approach to the issue. My consideration of whether Saudi law is in want of reformation is developed in accordance with both doctrinal considerations based on the literature discussed in this thesis and empirical considerations based on the questionnaire responses to my empirical study.[49] If it is concluded that reform is needed, I will make recommendations as to how the law might seek an alternative approach to cases of maternal refusal of a necessary caesarean section. As there is a limited amount of literature on the Islamic and the Saudi legal positions relating to the refusal of necessary caesarean sections, this research can be seen as a starting point for further research on their perspectives.

- Original contribution of this Thesis

The comparison of autonomy in its Western framings with the way in which autonomy is constructed in Islamic medical ethics is one of the main original contributions of my thesis. In much of the Islamic-based bioethics literature, the notion of individualism in which the patient makes decisions without consideration for external interventions, such as those of one's own family or wider society, forms the main difference between a

[49] For more information about the methodology used in my empirical study, see Chapter 5.2. The results obtained from this study are also discussed in Chapter 5.3.

dominant model in Western secular and Islamic autonomy, as this concept is not accepted in Islam. Muslims ought to act in the way already prescribed by Allah and so, they cannot act however they wish for the sake of self-gratification and self-actualisation. This could lead to the assumption that while Islamic autonomy is based on duties/responsibility, Western secular autonomy is rights-based with a strong emphasis on individual rights, such as the freedom of each individual to choose and implement their own decisions, free from deceit, or coercion, and without interference by others. While this is true, engaging with a broader understanding of autonomy in Western framings, as I will discuss in Chapter 2, shows that there are some versions of autonomy in Western bioethics that do take into account factors that form some degree of similarities with the Islamic understanding of autonomy. For instance, relationships and community considerations as considered by principled autonomy and relational autonomy, as well as Kant's account of the duties towards others and oneself, are well-rooted in the Islamic perspective of autonomy. Hence, the conceptualisation of autonomy as being around relationships and with a more focus on obligations and duties rather than rights, as found in some versions of autonomy in Western bioethics, is somehow similar to the Islamic interpretation of autonomy.

Another main original contribution to research is my empirical study, and this is because as far as I know, there is no empirical study on caesarean refusal cases with the focus of the pregnant woman's right to autonomy in relation to the foetus' right to life. To be more specific, the empirical studies that are most related to my topic were focusing on the pregnant woman's legal right to autonomy in consenting or refusing to consent to a

caesarean section without the need for her husband to be legally involved in the decision-making. Hence, the focus of those studies was on assessing the doctors' knowledge of the law in this regard. Whereas my empirical study has this focus *as well as* exploring the approach of doctors to the potential conflict between the woman's right to refuse a surgical intervention and the foetus' legal right to life. In another words, how doctors deal with the instance in which the foetus' life is affected by the refusal decision. Thus, through my study I was able to collect and analyse relevant and original data regarding the application of Saudi law and regarding the perspectives and opinions of medical practitioners regarding whether or not legal reforms are required.

In addition to this, my thesis provides a critical analysis of the Saudi law position regarding a maternal refusal of a necessary caesarean section and the implications of the current legal position of the law on the foetus' legal right to life. I make an argument for law reform through adopting a maxim-based approach using the Islamic legal maxim that severe harm is removed by lesser harm. My suggestion for legal reform can also be seen as an original contribution to research.

- Outline

In order to address my research questions and to achieve the objectives highlighted in the above sections, in Chapter 1, I give an overview of the Saudi legal system and general introduction to *Shariah* law as the latter is the supreme law of Saudi law. Thus, it is essential to have a clear understanding of the concept of *Shariah* as a legal system and sufficient knowledge about its sources. A brief insight into the four *Sunni* schools of

law is also provided in this chapter. In Chapter 2, I discuss the Islamic interpretations of medical ethics that are relevant to the issue of the potential maternal-foetal conflict in caesarean refusal cases, particularly how the principle of autonomy is interpreted from a *Shariah* law perspective. This is because one of my questions in this thesis is to determine whether autonomy in Islam can accommodate maternal refusal of a necessary caesarean section and whether the Islamic notion of autonomy can be used to override such a refusal. These two chapters form the analytical basis for the next chapters.

In Chapter 3, the focus is on the *Shariah* law's stance towards potential maternal-foetal conflict in caesarean refusal cases. My objective in this chapter is to explore the legal status and rights of the foetus under *Shariah* law, and to consider how it approaches the issue in question and other relevant cases, such as abortion. This will involve a discussion of the different interpretations and understandings of relevant provisions of the *Qur'an* and the *Sunnah* amongst the *Sunni* schools of law. I will discuss the different provisions and approaches amongst these schools to illustrate the different rulings and opinions on different maternal-foetal conflict issues. Doing so will provide an answer to the question as to whether autonomy in Islam accommodates a pregnant woman's right to refuse a necessary caesarean section and whether it enables for such a refusal to be overridden. In this chapter, I will also consider my thesis question of whether different approaches to maternal refusal of a necessary caesarean section can be adopted from within *Shariah* law.

In Chapter 4, I will consider the Saudi law's stance on the foetus' legal status and legal rights, and its approach towards maternal refusal of a necessary caesarean section. Saudi law's position on abortion will be relevant here as it can help to determine the foetus' legal status and rights in Saudi law. Relevant Saudi *fatwas* and rulings concerning the potential conflict between the pregnant woman and the foetus in caesarean refusal cases will be discussed. I will also locate the Saudi law's perspective within the different provisions of *Shariah* law discussed in Chapter 3. In this chapter, I will consider my thesis questions of whether foetal legal right to life is maintained under the current position of the law, and whether reform of the law is needed. As legal reform is believed to be required, suggestions for reform will be provided.

In Chapter 5, I will present and discuss the results obtained from my empirical study on the approach of doctors in Saudi Arabian hospitals to different cases of necessary caesarean refusals. This chapter will help me to examine how the law regarding the issue in question is implemented in practice. I will also consider the question as to whether participating doctors believe that Saudi law on necessary caesarean section refusals needs to be reformed. Their suggestions for reform will be presented.

In the Conclusion, my final assertions and a summary of the discussion and proposed way forward will be presented.

- Methodology

The work involves doctrinal and critical analysis, drawing on primary and secondary sources. It also includes an empirical element in the form of short online questionnaires on how obstetricians/gynaecologists in Saudi Arabia have dealt with cases of maternal refusal of caesarean section in practice, how they have interpreted the law in this regard, and their views on whether reform of the law is needed.[50]

As the Saudi legal system is based on *Shariah* law, a discussion of the Islamic perspective on the issue of maternal refusal of a necessary caesarean section is highly relevant. Therefore, relevant verses from the Holy *Qur'an* and the *Sunnah* are reviewed as they are the two primary written sources of *Shariah* law. It is necessary to recognise that Islam is 'not monolithic, and a diversity of views in bioethical matters does exist'.[51] This diversity is the result of the existence of various schools of *Fiqh* (jurisprudence). In Saudi Arabia, *Sunni* Islam followed by the overwhelming majority of Saudi citizens, and it is the official religion,[52] and so I will consider *Shariah* law from the *Sunni* perspective. The interpretation and understanding in relation to the issue of the potential for maternal-foetal conflict are, therefore, based on the four major *Sunni* schools of law: *Hanbali*, *Shafi'i*, *Maliki* and *Hanafi*. In this thesis I will discuss the provisions and approaches taken by these schools to illustrate the different interpretations of *Shariah*

[50] For more information about the methodology used in my empirical study, see Chapter 5.2. The results obtained from this study are also discussed in Chapter 5.3.
[51] Abdallah S. Daar and A. Binsumeit Al Khitamy, 'Bioethics for Clinicians: 21. Islamic Bioethics' (2001) 164 Canadian Medical Association Journal 60, 61.
[52] The percentage of Sunni Muslims is 85-90% of the overall Saudi citizens, according to the CIA's World Factbook <Saudi Arabia - The World Factbook (cia.gov)> accessed 13 December 2022.

law regarding the subject in question. I will, then, locate the Saudi law's perspective within these provisions.

I use *fatwas*, contemporary legal responses to controversial issues, to illustrate the approaches taken to issues such as the foetus' legal status and rights, the maternal refusal of a caesarean where such a refusal would cause death or severe injury to the foetus, and abortion. *Fatwas* are important because they form the legal opinion on emerging issues, in which learned jurists explore the issue in question and reach a legal opinion based upon *Shariah* provisions. The source of the *fatwas* referred to in this research are, mainly, from the Council of Senior Scholars, the highest religious body in Saudi Arabia, and the Permanent Committee for Scholarly Research and *Ifta*, an Islamic organisation in Saudi Arabia. Some of the rulings issued by the International Islamic *Fiqh* (Jurisprudence) Academy are also relevant.[53] These institutions are highly respected in the Muslim world, especially in Saudi Arabia. Their *fatwas* have had direct and indirect effects on laws in Saudi Arabia.[54]

Finally, as there is a limited amount of literature on the Saudi legal perspective on maternal refusal of caesareans and the impacts it has on the foetus' legal rights, and as I intend to examine the Saudi law's stance on this matter, this research includes an empirical element. The aim of this study was to produce in-depth qualitative data by

[53] A well-known Islamic organisation that aims at providing answers and solutions to various of contemporary issues.
[54] For more information about the nature of *fatwas* and the role they play in the formulation of laws, see Chapter 1.5.

engaging, through online surveys, with doctors who were actively involved in the field of obstetrics. I invited doctors from different hospitals in Saudi Arabia to complete a short questionnaire in order to produce original data which helped me to gain understanding of how doctors in Saudi Arabia deal with cases of maternal refusal of caesarean section in practice, and how the law is implemented in practice. I have adopted a qualitative method for my study in the form of a semi-structured questionnaire, which consisted of seven multiple choice questions and six open-ended questions, and have administered it via Qualtrics.[55] This study helped me to evaluate the Saudi law's position towards maternal refusal of caesarean sections and whether reform of Saudi law in this regard is required from the perspective of those who must act in accordance with it: medical practitioners.

[55] For more information about the methodology used in my empirical study, see Chapter 5.2. The results obtained from this study are also discussed in Chapter 5.3.

Chapter 1: An Overview of Saudi Islamic Law

1.1 Introduction

In this thesis I will explore and examine the Saudi law's stance towards the issue of the potential maternal-foetal conflict in caesarean refusal cases, and so it is essential to provide an overview of Saudi law. In section 1.2, I give a brief introduction to the Saudi legal system. Saudi law is based on *Shariah* law and so before discussing its stance on the issue in question, it is important to provide an overview of the concept of *Shariah* law and its sources. This will be the focus of section 1.3.

Islam is 'not monolithic, and a diversity of views in bioethical matters does exist'.[56] This diversity is the result of the existence of various schools of jurisprudence. In Saudi Arabia, *Sunni* Islam is followed by the majority of Saudi citizens and is its official religion,[57] and so I will consider *Shariah* law from the *Sunni* perspective. Accordingly, the interpretation and understanding of the law in relation to the issue of the potential for maternal-foetal conflict, will be based on the four major *Sunni* schools of law: *Hanafi*, *Maliki*, *Shafi'i*, and *Hanbali*. In section 1.4, I will offer a brief insight into these schools. My discussion will then, in section 1.5, clarify the key legal maxims of *Shariah* law and discuss the nature and the role *fatwas* play in legal decision-making.

[56] Abdallah S. Daar and A. Binsumeit Al Khitamy, 'Bioethics for Clinicians: 21. Islamic Bioethics' (2001) 164 Canadian Medical Association Journal 60, 61.
[57] The percentage of Sunni Muslims is 85-90% of the overall Saudi citizens, according to the CIA's World Factbook <Saudi Arabia - The World Factbook (cia.gov)> accessed 13 December 2022.

This chapter will form the analytical basis for the next chapters, which are concerned with the *Shariah* law's position on the potential maternal-foetal conflict in caesarean refusal cases, and the Saudi law's stance on that matter and with whether reform is needed. Before the Saudi law's stance on this issue is considered, an appreciation and elaboration of how *Shariah* law views this issue is required. This cannot be reached without a clear understanding of the concept of the *Shariah* as a legal system.

1.2 Introduction to Saudi Islamic Law

The present Kingdom of Saudi Arabia was established, by King Abdul-Aziz, in 1932 on Islamic values.[58] Since then, the legitimacy of the royal family of Saudi Arabia has rested upon a religious basis, with the Saudi Kings' duty being to maintain the commandments of the Islamic faith, uphold justice and morality, and supervise religious occurrences such as the pilgrimage to Mecca.[59] This duty to apply the Islamic principles has been reaffirmed in the Basic Law of Governance 1992 (''the Basic Law''). Article 1 of the Basic Law declares that Allah's Book (the *Qur'an*) and the *Sunnah* (the deeds and sayings of Prophet Muhammad - Peace Be Upon Him (PBUH)-) are the Constitution of Saudi Arabia. The Basic Law also provides that the Saudi Government's power and all regulations are derived from the *Qur'an* and the Prophet's *Sunnah*.[60] Furthermore, courts must 'apply the provisions of the *Shariah* (the revelation embodied in the *Qur'an* and the *Sunnah*) to cases brought before them, according to the teachings

[58] William Ochsenwald, 'Saudi Arabia and the Islamic Revival' (1981) 13 International Journal of Middle East Studies 271, 273.
[59] Ibid, 274.
[60] The Basic Law of Governance 1992, Article 7.

of the Holy *Qur'an* and the Prophet's *Sunnah* as well as other regulations issued by the Head of State in strict conformity with the Holy *Qur'an* and the Prophet's *Sunnah*'.[61] Finally, under Article 55 of the Basic Law, the King is to 'govern the nation according to the rulings of the *Shariah*'.[62]

Thus, the legislative power under the Saudi legal system belongs to Allah and to Prophet Muhammad (PBUH), while the *Ulama*'s (jurists' / scholars') role is interpreting the *Qur'an* and the *Sunnah* in order to extricate enforceable laws. As such, the *Qur'an* and the *Sunnah* are the major sources of the legal norms applicable in the Kingdom of Saudi Arabia.[63] The relationship between the *Ulama* and the rulers of the Kingdom of Saudi Arabia is, as such, apparent. This explains the establishing of two major religious bodies in 1971, the Council of Senior *Ulama* (the highest religious body in Saudi Arabia) and the Permanent Committee for Scholarly Research and *Ifta*.[64] Their main role is to issue *fatwas* (legal opinions) on all matters referred to them by the ruler and government institutions, such as the Ministry of Health, for their consideration, in order to form an informed opinion that is based on the *Shariah* provisions; as well as issuing

[61] The Basic Law of Governance 1992, Article 48.
[62] The Basic Law of Governance 1992, Article 55.
[63] Dahman Ben Abderrahman, 'A Contribution to the Study of the Koranic Sources of Saudi Arabian Business Law' (1988) 3 Arab Law Quarterly 132, 132.
[64] The royal decree 1971 (A/137); The Basic Law of Governance 1992, Article 45: ''The Law shall specify hierarchical organization for the composition of the Council of Senior Ulama and the Committee for Scholarly Research and *Ifta* and their functions''. ''Own translation''.

fatwas on questions submitted by individuals regarding matters of faith, worship and transactions.[65]

Shariah law, as such, forms the basis of Saudi law. Hence, it is important to provide an overview of the concept of the *Shariah* and its sources, before discussing its stance on the potential for maternal-foetal conflict in caesarean refusal cases.

1.3 The *Shariah*: Its Concept, Scope and Sources

The *Shariah* is the corpus of rules and principles that Allah 'has ordained ... to guide the individual in [their] relationship to God (Allah), [their] fellow Muslims, [their] fellowmen, and the rest of the universe'.[66] It is Allah-given law to people,[67] supplied by Prophet Muhammad (PBUH). The *Shariah* is Islam's functional face,[68] through which Muslims are guided for personal, religious, moral, and legal matters. It gives rules and regulations for personal hygiene, diet and sexual conduct; as well as prescribing specific rules for religious obligations, such as prayers and fasting.[69] It also gives provisions concerning issues of morality, such as the moral and ethical obligation to

[65] General Secretariat of the Council of Senior Ulama, 'the Council of Senior Ulama' <https://www.ssa.gov.sa/هيئة-كبار-العلماء/> accessed 9 November 2019. For more information about the role and nature of *fatwas*, see section 1.5.2 in this chapter.
[66] Hammudah Abd Al-Ati, *The Family Structure in Islam* (American Trust Publications 1995) 13.
[67] The Qur'an [26:192]: ''Indeed this [the Qur'an] is a revelation from the Lord of the Universe''; The Qur'an [42:7]: ''And thus We have revealed to you an Arabic Qur'an that you may warn the Mother of Cities [Makkah] and those around it and warn of the Day of Assembly, about which there is no doubt. A party will be in Paradise and a party in the Blaze''. I have primarily used the English translations of the Qur'an provided by tafheem.net (Quran English Translation and Commentary - Koran Explanation - Tafheem ul Quran) and quran.com (The Noble Quran - Quran.com) for all verses that are translated in the thesis.
[68] Fazlur Rahman, *Islam* (2nd edn University of Chicago Press, London 2002) 100.
[69] Abdullah Saad Alarefi, 'Overview of Islamic Law' (2009) 9 International Criminal Law Review 707, 708.

return a greeting in a better or at least in an equal manner,[70] and issues of law, such as the rulings on inheritance.[71] As such, the *Shariah* (the *Qur'an* and the *Sunnah*) covers all the actions humans perform, whether toward Allah or toward one another. Human acts, in the *Shariah*, are classified into two main categories: devotions and transactions.[72] These two categories outline the scope and the contexts of the *Shariah*.

1.3.1 Classification of Human Acts in *Shariah*

1.3.1.1 Devotions

Devotions refer to acts concerning the relationship between the individual and Allah; that is, worship practices, such as daily prayers, *Hajj* (pilgrimage), and fasting. These acts are known as ''ritual duties'' toward Allah; their purpose is to approach Allah and seek his satisfactions and reward in the Hereafter.[73] If one decided not to perform these acts, secular punishments are not 'always' entailed, and that devotions are not 'usually' enforceable juridically, as the sin is against Allah and not against the state. However, even though devotions are not enforceable juridically and judicially, and so one will not bear legal liability for failing to perform them, Muslims believe that violators of such divine provisions may be punished in the Hereafter.[74]

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[70] The Qur'an [4:86]: ''And when you are greeted with a greeting, greet [in return] with one better than it or [at least] return it [in a like manner]. Indeed, Allah is ever, over all things, an Accountant''.
[71] The Qur'an [4:7]: ''For men is a share of what the parents and close relatives leave, and for women is a share of what the parents and close relatives leave, be it little or much - an obligatory share''. The details of the right to inheritance are stated in the Qur'an [4:11,12].
[72] Baudouin Dupret, *What Is the Sharia?* (Hurst & Company, London 2018) 93.
[73] Abdulaziz Sachedina, *Islamic Biomedical Ethics: Principles and Application* (Oxford University Press 2009) 5.
[74] Mashood Baderin, 'Understanding Islamic Law in Theory and Practice' (2009) 9 Legal Information Management 186, 187.

1.3.1.2 Transactions

Transactions are acts performed to maintain social order, and are known as ‘‘social transactions’’.[75] They cover issues in respect of interpersonal relations, such as family issues (including inheritance, divorce, and arrangements for children post-divorce), criminal matters, contractual questions, and property problems.[76] These transactions have worldly effects on the relationship between individuals, and the courts of law have jurisdiction over them.[77]

The *Shariah* is, thus, comprehensive as it deals with all human conduct, whether it relates to ritual or transactional matters.[78] While the devotions category reflects the *religious* context of the *Shariah*, the transactions category reflects the *legal* context of it.

1.3.1.3 Legal Norms of the *Shariah*

The *Shariah* further classifies devotions and transactions according to five legal norms: *Wajib* (obligatory), *Haram* (forbidden/prohibited), *Mustahabb* (recommended/encouraged), *Makruh* (disapproved/discouraged) and *Mubah* (permissible/allowed). These legal norms help jurists, when encountering prohibitive or imperative language in the *Qur’an* and/or the *Sunnah* (such as, ‘‘Do not do’’ or ‘‘Do’’), to determine to which of these legal norms it belongs.[79] *Wajib* acts are those whose

[75] Sachedina (n 73) 5.
[76] Dupret (n 72) 93.
[77] Sachedina (n 73) 5.
[78] Mahdi Zahraa, ‘Unique Islamic Law Methodology and the Validity of Modern Legal and Social Science Research Methods for Islamic Research’ (2003) 18 Arab Law Quarterly 215, 217.
[79] Wael B. Hallaq, *An Introduction to Islamic Law* (Cambridge University Press 2009) 20.

performance are considered necessary and, thus, not performing them results in punishment (worldly punishment and/or in the Hereafter).[80] Examples include payment of debts and prayer.[81] *Haram* acts are those which have been categorically rejected in the *Shariah*.[82] A commission of a prohibited act, such as theft or breach of contract, demands punishment. These two legal norms (obligatory and forbidden) require punishment for non-compliance.[83]

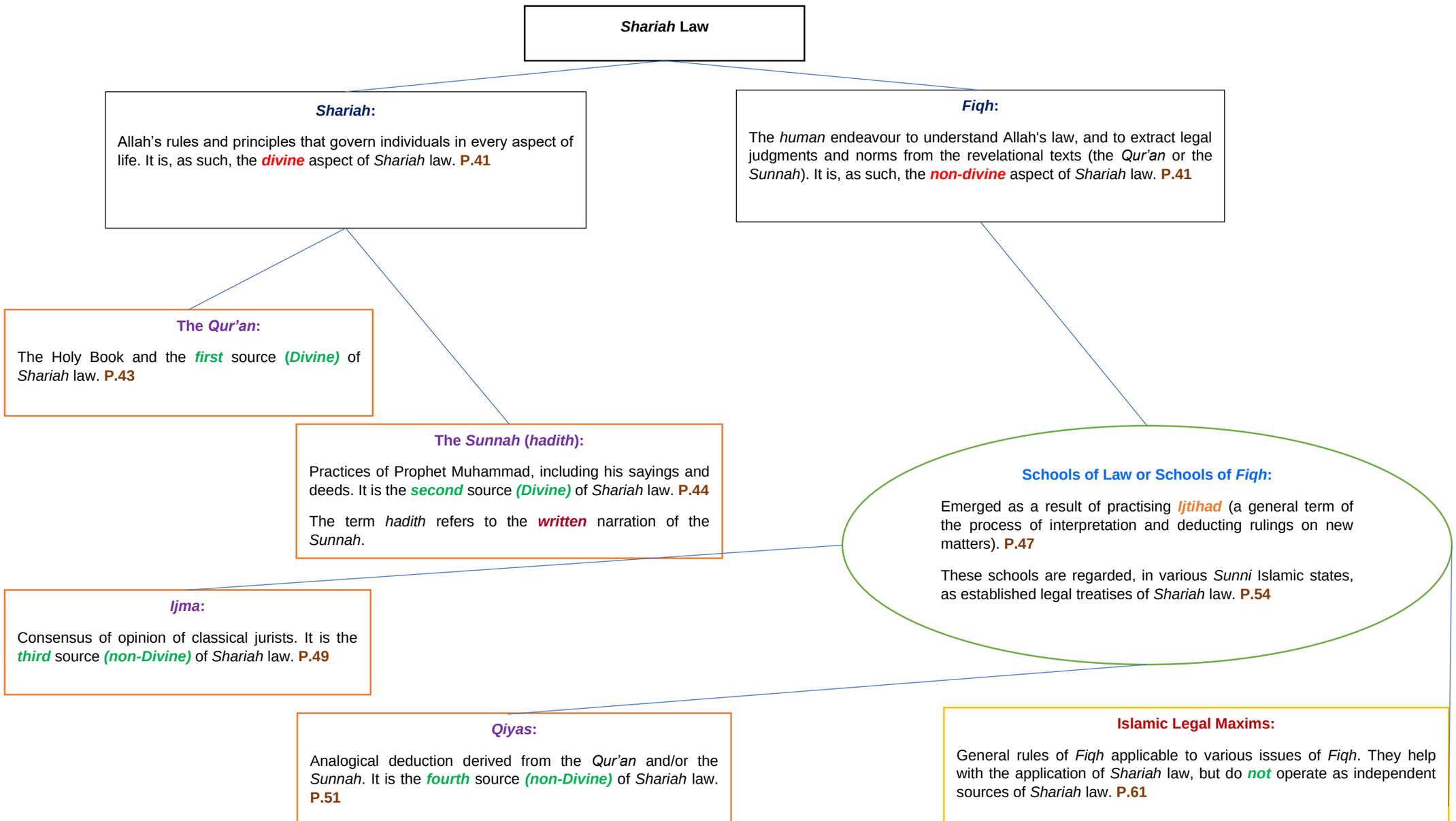
The third legal norm is the *mustahabb*, which are acts ordered by the *Shariah* on the basis of preference.[84] It includes acts that the *Shariah* encourages individuals to do but are not obligatory, such as helping the poor and supererogatory fasts and prayers.[85] In contrast, *makruh* acts are those which the *Shariah* encourages individuals not to do, but it does not prohibit them, such as unilateral divorce by a husband.[86] Non-compliance with these two legal norms does not result in punishment. However, if they are complied with then reward, assumed in the Hereafter, will follow.[87] The final legal norm is the *mubah*, which refers to acts that are neither recommended nor prohibited, such as

[80] Ibid.
[81] The punishment of omission of prayer is assumed in the Hereafter. It is reported that the Prophet (PBUH) said: ''The first deed by which man will be called to account on the Day of Resurrection is his prayer. If it is found to be complete, he will succeed and be safe, but if it is incomplete, he will be lost and fail'', Narrated by Al-Tirmidhi, 'Jami al-Tirmidhi' < http://islamilimleri.com/Kulliyat/Hadis/Hadis/pg_004_0035.htm> accessed 10 November 2019. ''Own translation''.
[82] Hallaq (n 79) 20.
[83] Ibid.
[84] Ibid.
[85] Ibid.
[86] Ibid.
[87] Ibid.

sleeping. Avoidance or performance of such acts does not require punishment or reward.[88]

[88] Ibid.

1.3.2 Divine and Non-Divine Sources of *Shariah* Law **(Figure 1)**



1.3.2.1 The *Shariah* as a Source of Law

Since all human acts are subject to the regulation of the *Shariah*,[89] the *Shariah* is interpreted as a source of law. Having said that, although there is a tendency to perceive *Shariah* law as a completely divine law, it is important to note that there is a human variable aspect of it, which is termed *Fiqh*, or the science of law.[90] *Fiqh* means 'the knowledge regarding the practical rulings of Islamic Shariah that are extracted from their detailed evidence'.[91] If these two aspects (divine and non-divine aspects) of *Shariah* law do not occur, then *Shariah* law may be misrepresented as immutable and inflexible.[92] A distinction between the terms *Shariah* and *Fiqh* must thus be drawn, so as to achieve a proper understanding of the *Shariah* as a legal system.

The term *Shariah*, as I explained above, refers to the rules and principles contained in the *Qur'an* and the *Sunnah*; It is, as such, the divine and immutable aspect of Islamic legal system.[93] In contrast, *Fiqh* is the *human* endeavour to understand and fulfil Allah's law.[94] Accordingly, the latter is the non-divine, non-immutable, *human* jurisprudence derived from the *Shariah* to extract legal judgments, norms, and learned opinions.[95] Any rulings extracted by the *Fiqh* process *must* be based (directly or indirectly) on the

[89] Ibid.
[90] Baderin (n 74) 186; This tendency has been noted by Hammudah Abd Al-Ati: 'The confusion arises when the term shariah is used uncritically to designate not only the divine law in its pure principal form, but also its human subsidiary sciences including *fiqh*', Abd Al-Ati (n 66) 14.

[91] Zahraa (n 78) 230.
[92] Baderin (n 74) 187.
[93] Ibid.
[94] Mohammad Hashim Kamali, *Shariah Law: An Introduction* (Oneworld, Oxford 2008) 40 - 41.
[95] M. Cherif Bassiouni and Gamal M. Badr, 'The Shari'ah: Sources, Interpretation, and Rule-Making' (2002) 1 UCLA J. Islamic & Near E. L. 135, 141.

revelational texts (the *Qur'an* or the *Sunnah*).[96] *Fiqh*, as such, is not legislating but understanding; it is not producing but discovering and formulating an existing law.[97] Thus, legal rulings extracted through the *Fiqh* process may change according to time and circumstances.[98] In fact, the role of *Fiqh* is significant in understanding, interpreting and formulating the *Shariah*, as it discerns what religious conduct is, what the sources of such knowledge are, and what the consequent laws must be.[99] The *Fiqh* process must, therefore, be carried out through a particular Islamic methodology - *Usul Al-Fiqh* (the philosophy of *Shariah* Law).[100] *Usul Al-Fiqh* is best defined as 'the knowledge regarding the rules and research [methods] with the aid of which the practical rulings of Shariah are extracted from their detailed evidence'.[101] It is, as such, a legal methodology or technique by which Muslim jurists and scholars can verify and interpret the soundness and authority of the *Shariah* sources and can extract rulings and norms from them. *Usul Al-Fiqh*, thus, includes the ranking of the *Shariah* sources as well as rules of linguistic interpretation.[102]

Despite these important differences, both terms (*Shariah* and *Fiqh*) are translated into English as Islamic law or *Shariah* law and are often used synonymously, so that they are both used to refer to the sum total of rulings derived from revelation through Islamic

[96] Kevin Reinhart, 'Islamic Law as Islamic Ethics' (1983) 11 The Journal of Religious Ethics 186, 190.
[97] Ibid, 188.
[98] Baderin (n 74) 187.
[99] Reinhart (n 96) 188.
[100] Zahraa (n 78) 223.
[101] Ibid, 230
[102] Bassiouni and Badr (n 95) 142.

jurisprudence or reason, that is, *Fiqh*.[103] There is, in fact, no major practical difference between the term *Shariah* and *Fiqh* because rulings extracted via the *Fiqh* process must not contradict the revelational texts (the *Qur'an* and the *Sunnah*), as elaborated above. This means that these rulings can always be attributed to the *Shariah*, and thereby be recognised in *Shariah* law or (Islamic law). Therefore, in this thesis, I will use the term '*Shariah* law' to refer to the sum total of rulings extracted from both divine sources and non-divine sources, including rulings extracted through human reason.

1.3.2.2 The Divine Sources of *Shariah* law

Sources of *Shariah* law are 'those from which Islamic rulings can be extracted',[104] and the *Qur'an* and the *Sunnah* are the primary sources of *Shariah* law. The *Qur'an* is the root of all the sources of *Shariah* law and is the most sacred one.[105] It is, according to Muslims' beliefs, the divine word of Allah revealed, in the Arabic language, to Prophet Muhammad (PBUH) through the Angel Gabriel.[106] The *Qur'an* contains various religious rulings concerning faith, worship, morality and transactions, and comprises knowledge about how believers should conduct themselves in this world.[107] It also contains a number of legal rules regarding family law, criminal law, and rules about forms of

[103] For example, Zahraa defines the *Shariah* (termed Islamic law) as 'the body of norms, principles, rules and rulings that are extracted from the primary Islamic sources and elaborated on by the individual reasoning of Muslim jurists in the form of Islamic jurisprudence (*Fiqh*)', Zahraa (n 78) 217; The *Shariah* is defined by Al-Khallaf as 'the total sum of legitimate practical rulings which are benefited from its detailed evidences', Abd Al-Wahhab Al-Khallaf, *Ilm Usul Al-Fiqh (Science of Roots of Law*) (2nd edn Al-Nashir Liltiba'ah wa Al-Nashir wa Al-Tawzi, Cairo, n.d.), as cited by Mahdi Zahraa, 'Characteristic Features of Islamic Law: Perceptions and Misconceptions' (2000) 15 Arab Law Quarterly 168, 169.

[104] Salqihim Ibrahim, *Usul Al-Fiqh Al-Islami (Roots of Islamic Law)* (Matbaat Al-Insha', Damascus 1981) 41, as cited by Zahraa (n 78) 230.
[105] Alarefi (n 69) 709.
[106] Zahraa (n 78) 231.
[107] Hallaq (n 79) 16.

contracts, and witnesses.[108] For Muslims, the authenticity of the *Qur'an* is beyond doubt; all Muslims agree on the duty to act according to each ruling contained therein.[109] It is the first source to which the jurists return to know the rule of Allah, and they do not move to other sources except when there is no relevant provision in it relating to the matter at hand.[110]

However, the *Qur'an*, although it is written, is not codified as positive law or a legal system.[111] Accordingly, in many matters, it does not necessarily specify or state the law, but it gives *adillah* (indications) and *ahkam* (rulings), by which Muslim jurists can arrive at a judgement on any given question for which there is no accurate answer.[112] The fact that the *Qur'an* contains general principles enables Muslim jurists to use it flexibly as a living tool that suits different circumstances at various times and places. However, the *Qur'an*'s general rules of worldly and religious affairs are mostly not given in detail. Therefore, there is a need for the *Sunnah*, so as to clarify the broad rules provided by the *Qur'an*.

The *Sunnah*, the second major source of *Shariah* law, works as a clarifier where explanations of the *Qur'an*'s general rules and principles are supplied by the Prophet Muhammad (PBUH). This role is mentioned in the *Qur'an*: '… and We revealed to you

[108] Malise Ruthven, *Islam: A Very Short Introduction* (Oxford University Press 1997) 75.
[109] Reinhart (n 96) 189.

[110] Alarefi (n 69) 709.
[111] Ayoub M. Al-Jarbou, 'Judicial Independence: Case Study of Saudi Arabia' (2004) 19 Arab Law Quarterly 5, 13.
[112] Wael B. Hallaq, 'Was the Gate of Ijtihad Closed?' (1984) 16 International Journal of Middle East Studies 3, 4.

the message that you may make clear to the people what was sent down to them and that they might give thought'.[113] The *Sunnah* encapsulates the sayings and deeds of Prophet Muhammad (PBUH) and what he had tacitly approved. It enjoys divine inspiration as Allah says: 'Nor does he [Muhammad] speak from [his own] inclination; it is not but a revelation revealed'.[114] This Prophetic tradition or teaching is considered to be the practical source of Islamic norms which acquire legal status.[115] The authority of the Prophetic tradition stems from the connection mentioned in the *Qur'an* between the obedience to Allah and obedience to the Prophet. For example, Allah says: 'He who obeys the Messenger thereby obeys Allah';[116] 'O you who have believed, obey Allah and obey the Messenger…'.[117] Allah also makes it clear that whoever disobeys or goes against the Prophet will be punished: 'So let those beware who dissent from the Prophet's order, lest fitnah strike them or a painful punishment'.[118]

In order to compile, classify and verify the reports of the Prophet (PBUH), classical jurists established a unique method called ''the science of *hadith*''.[119] Accordingly, every *hadith* was verified as to the personal qualities and knowledge of each of its narrators, number of narrators, chain of narrators.[120] This verification process has resulted in six major collections of *hadith*, reports that are widely believed to represent the consensus

[113] The Qur'an [16:44].
[114] The Qur'an [53:3-4].
[115] Dupret (n 72) 55.
[116] The Qur'an [4:80].
[117] The Qur'an [4:59].
[118] The Qur'an [24:63].
[119] Zahraa (n 78) 233.
[120] Ibid.

of the *Sunnah*:[121] *Sahih Bukhari*, *Sahih Muslim*, *Sunan Abu Dawood*, *Jami al-Tirmidhi*, *Sunan al-Sughra*, and *Sunan ibn Majah*.[122] The science of *hadith* provides the Prophetic traditions in a written, intact and authentic form based upon which Islamic *Fiqh* has been extracted and formulated.[123]

1.3.2.3 The Need for Non-Divine Sources

The *Qur'an* and the *Sunnah* operate as the two primary sources that form the *Shariah* as a source of law. Ramadan has, therefore, observed that 'the structure of Islamic law - the *Shariah* - was completed during the lifetime of the Prophet, in the Qur'an and the Sunnah'.[124] Hence, the *Mufti*, a qualified jurist empowered to give rulings on religious matters in the society he lives in, and the *Mujtahid*, a qualified scholar known for his ability to reach independent personal opinions based on the sources, refer to the *Qur'an* first and then to the *Sunnah* (*hadith*),[125] in every question or matter raised.[126] However, the language of these two sources are not always unequivocal and clear, and some terms are open to more than one interpretation.[127] The fact that the rules provided by the *Qur'an* and the *Sunnah* are not free from ambiguities makes relying exclusively on

[121] Reinhart (n 96) 190.
[122] *Sunni* Muslims views these six *hadith* collections as being authoritative. The order of their authenticity varies between the four schools of law. Any *hadith* cited in this thesis is from these six collections. For more information about these collections and their authors, see: Islam Question and Answer, 'The authors of the Six Books' <https://islamqa.info/en/answers/21523/the-authors-of-the-six-books> accessed 6 August 2019.
[123] Zahraa (n 78) 234.
[124] Said Ramadan, *Islamic Law: Its Scope and Equity* (Macmillan, London 1961) 26.
[125] The terms *Sunnah* and *hadith* are used interchangeably. The mere difference between them is that the latter is the written or oral narration of the *Sunnah*, whereas the former refers to the actual practice conveyed by the narration in a *hadith*. *Hadith* is, thus, described as the vehicle of the *Sunnah*, Baderin (n 74) 188.
[126] Dupret (n 72) 58.
[127] Hallaq (n 79) 19.

them in law-making insufficient for achieving coherent legal decision-making. This is because whoever would do this would be engaged in 'endless debate about whether some verses have been abrogated by others, as most Muslims believe, and if so, which verses were abrogated by which'.[128] The same applies to the *Sunnah*, as some *hadiths* may seem to contradict others.[129] Therefore, there is a need to develop supplemental sources of the *Shariah*, so that a coherent structure of the law can be reached. This need has resulted in introducing the concept of *Ijtihad* (legal reasoning).[130]

1.3.2.4 The Non-Divine Sources of *Shariah* law

1.3.2.4.1 The Concept of *Ijtihad*

Ijtihad refers to 'the total expenditure of effort in the search for an opinion as to any legal rule in such a manner that the individual senses (within himself) an inability to expend further effort'.[131] It is reported that the Prophet (PBUH) approved this process (*Ijtihad*) when he asked one of his companions, Muadh ibn Jabal, who was sent as a judge to Yemen, as to how would he judge if a judicial matter came before him. Muadh was reported to have said: ''I will judge by the book of Allah (the *Qur'an*)''. The Prophet (PBUH) then asked: ''And if you do not find a clue in the book of Allah?'' Muadh answered: ''Then by the *Sunnah* of the Messenger of Allah.'' The Prophet (PBUH) asked again: ''And if you do not find a clue in that?'' To which Muadh replied: ''I will

[128] Norman Anderson, *Law Reform in the Muslim* World (London, 1976) 178, as cited by Ruthven (n 108) 75.
[129] Ruthven (n 108) 76.
[130] Baderin (n 74) 188.
[131] Sayf-al-Din al-Amidi in Edge, *Islamic Law and Legal Theory* (no date available) 281, as cited by Ruthven (n 108) 81.

exercise my own reasoning (*Ijtihad*)''.[132] The Prophet (PBUH) was reported as being satisfied with Muadh's answers.[133] The importance of *Ijtihad* has increased after the death of the Prophet (PBUH), because the application of the *Shariah* during the Prophet's lifetime was straightforward as his decisions on matters referred to him were accepted as conclusive.[134] *Ijtihad*, which is seen as means of deducing rulings, enabled the classical jurists to regulate new cases that are not expressly covered in the *Qur'an* or the *Sunnah*, and to respond to the changing needs of Muslim societies.[135]

Through the process of *Ijtihad* all essential matters (such as, prayer, fasting, and pilgrimage) had been discussed and answered thoroughly by the four schools of law,[136] and so 'all future activity would have to be confined to the explanation, application, and at the most, interpretation of the doctrine as it had been laid down once and for all'.[137] The door of *Ijtihad* has indeed closed with regard to those essential areas of *Shariah* law since contemporary jurists have come to unquestioningly accept the doctrines of the established schools of law in relation to them.[138] As for those areas of the *Shariah* which are subject to change and which require new rulings (such as contemporary financial dealings, the modern banking system, and rulings related to modern technology in the 21st century), the door of *ijtihad* is open in relation to them.[139]

[132] Baderin (n 74) 188.
[133] Ibid.
[134] Ibid.
[135] Arshia Javed and Muhammad Javed, 'The Need of Ijtihad for Sustainable Development in Islam' (2011) 8 IIUC Studies 215, 216.
[136] Hallaq (n 112) 3. For more information about these schools of law, see section 1.4.
[137] Hallaq (n 112) 3.
[138] Ibid.
[139] Ibid.

The process of *Ijtihad* has introduced two main sources: *Ijma* (juristic consensus) and *Qiyas* (analogical reasoning).[140] Both of them are considered to be supplemental sources derived based on the *Qur'an* and/or the *Sunnah*.[141]

1.3.2.4.2 *Ijma*

Ijma is defined as the unanimous agreement reached by the classical jurists after the death of Prophet Muhammad (PBUH) on a particular situation or matter that is not expressly covered in the *Qur'an* or the *Sunnah*.[142] It is an agreement that bestows on those opinions or judgements subject to it a categorical legitimacy.[143] The binding authority of *Ijma* stems from a number of *Qur'anic* verses which enjoin Muslims to obey those in authority and to hold together as a community.[144] Reference is also made to a Prophetic report speaking of the impossibility of the community as a whole ever agreeing on an error.[145] The basis of *Ijma* is the principle of consultation, a fundamental principle in Islam recommended by the *Qur'an*.[146] If a consensus has been reached

[140] Baderin (n 74) 188.
[141] Dupret (n 72) 76 - 77. Rulings reached through *Ijma* and *Qiyas* are published in the books of *Usul al Fiqh*, Institute of Islamic Banking and Insurance, 'Islamic Jurisprudence [FIQH]' < https://www.islamic-banking.com/knowledge/islamic-jurisprudence-fiqh> accessed 13 November 2019.
[142] Hallaq (n 79) 21.
[143] Ibid.
[144] The Qur'an [4:59]: ''O you who have believed, obey Allah and obey the Messenger and those in authority among you. And if you disagree over anything, refer it to Allah and the Messenger, if you should believe in Allah and the Last Day. That is the best [way] and best in result''; The Qur'an [4:83]: ''And when there comes to them information about [public] security or fear, they spread it around. But if they had referred it back to the Messenger or to those of authority among them, then the ones who [can] draw correct conclusions from it would have known about it. And if not for the favour of Allah upon you and His mercy, you would have followed Satan, except for a few''; The Qur'an [4:115]: ''And whoever opposes the Messenger after guidance has become clear to him and follows other than the way of the believers - We will give him what he has taken and drive him into Hell, and evil it is as a destination''.
[145] Riyaz Punjabi, 'Doctrine of Ijma in a Secular State Paradox or Dilemma' (1984) 26 Journal of the Indian Law Institute 333, 335.
[146] The Qur'an [42:38]: ''And those who respond to their Lord and observe Prayer and whose affairs are (decided by) mutual consultation''.

upon the case subject to it, that judgement would be granted an indisputable authority; thus, raising it to the level of the unequivocal texts in the *Qur'an* and the *Sunnah*.[147]

An example of a rule upon which there is consensus is the prohibition on abortion. All the four *Sunni* schools of law agree on the prohibition on abortion after ensoulment (when the spirit is breathed into the foetus).[148] This consensus was narrated by the *Maliki* jurist, Ibn Juzey: 'It is not permitted to be exposed to semen that has been caught in the uterus; this is especially true if it has been formed. It is also particularly true if the soul has breathed into it, as it is unanimously considered a killing of a soul'.[149] However, it must be noted that the rules reached through consensus are relatively few,[150] for two main reasons. First, the *Shariah* accommodates differences of opinion which can make determining an *Ijma* difficult.[151] The second reason is a practical one, and has resulted from the expansion of the Muslim community all over the different regions, which makes obtaining an agreement of all Muslim jurists difficult organisationally.[152] When *Ijma* cannot be reached on a case subject to it, the opinion of *al-jamhour* (the majority of

[147] Hallaq (n 79) 22.
[148] For more information about these schools of law, see section 1.4 of this chapter. Their reasoning and bases for reaching this ruling will be discussed further in Chapter 3.3.1.2.2, as the purpose here is just to give an example of *Ijma* as a secondary source of *Shariah* law. Saudi law with regard to abortion after ensoulment is influenced by this *Ijma*. For more information about this, see Chapter 4.3.1.2.
[149] Muhammad ibn Ahmad ibn Muhammad ibn Juzey al-Kalbi al-Garnati, *al-qawanin al-fiqhiyyah (Jurisprudence Laws)* (Shamila.ws, no date available) 141. ''Own translation''.
[150] Hallaq (n 79) 22.
[151] Baderin (n 74) 188.
[152] Dupret (n 72) 75.

jurists) would be considered to be more plausible to represent the true Islamic *Shariah* stand.[153]

1.3.2.4.3 *Qiyas*

The second supplemental source of *Shariah* law is *Qiyas*, a form of analogical reasoning by which the jurist decides on legal norms or judgements. *Qiyas* is defined as 'the extension of a *Shariah* value from an original case … to a new case, because the latter has the same effective cause as the former'.[154] As Mohammad Kamali explains, 'the original case is regulated by a given text, and the *Qiyas* seeks to extend the same textual ruling to the new case',[155] due to the equivalence of the causes underlying them.[156] This means, when facing a new matter that is not explicitly mentioned in the two primary sources, the jurist applies an existing provision or principle provided by the revealed texts (either the *Qur'an* or the *Sunnah*) or by consensus on the new case.[157] The rationale for this is the existence of a similar justification for the ruling between the matter regulated by that rule and the new case. *Qiyas*, as such, means a comparison between two matters to establish similarity between them in order to transpose the legal norm of the original case to the new case. The validity of *Qiyas* is proven by the *Sunnah* in which there are many *hadiths* of the Prophet (PBUH) affirming the principle of

[153] Mahdi Zahraa, 'Characteristic Features of Islamic Law: Perceptions and Misconceptions' (2000) 15 Arab Law Quarterly 168, 183.
[154] Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Islamic Texts Society, Cambridge 1991) 197.
[155] Ibid.
[156] Abdulkarim Zidan, *Al-madkhal dirasat al-shariah al'iislamia (Introduction to Study Islamic Shariah)* (5th edn Maktabat alquds, Baghdad 1976) 198.
[157] The Editors of Encyclopaedia Britannica, 'Qiyas: Islamic Law' < https://www.britannica.com/topic/Zaydiyyah> accessed 26 August 2019.

analogy.[158] Based on the definition of *Qiyas* above, it is clear that there are four components of *Qiyas*: the original case, the new case, the ruling of the original case and the common factor that is the reason for that specific ruling.

Drinking beer or whiskey, for example, is forbidden like wine. Here, the original case is wine, the issue on which the revealed text speaks. Wine is prohibited because it is intoxicating, as the Prophet (PBUH) said: ‘‘Every intoxicant is wine, and every intoxicant is *haram* (forbidden)’’.[159] The new case, for which a ruling needs to be transferred to, is drinking beer and whiskey. The common factor in the cases is intoxication and this, allows jurists to transfer the legal norm of the original case (intoxication is forbidden) to the new case.[160] Another matter is whether it is permissible to open the abdomen of a dead woman in order to extract a living foetus. This was a controversial case among the four *Sunni* schools of law.[161] One of the schools reached, using the principle of analogy, a judgement that it was *haram* (forbidden) to open a dead pregnant woman’s abdomen

[158] For example, it has been reported that a woman said to the Prophet that her mother vowed to perform Hajj, but she did not perform Hajj until she died; and so, the woman asked: can I perform Hajj on her behalf? The Prophet said: ‘‘Yes, perform Hajj on her behalf. Don’t you think that if your mother owed a debt, wouldn’t you pay it off? So, pay off the debt owed to Allah, for Allah is more deserving of having debts owed to Him being paid off’’, Narrated by Al-Bukhari, ‘Sahih Bukhari’ < http://islamilimleri.com/Kulliyat/Hadis/Hadis/pg_001_0015.htm> accessed 29 August 2019. ‘‘Own translation’’; In another hadith, the Prophet was asked about making up missed Ramadan fasts: could they be done separately (not one after the other)? He said: ‘‘What do you think, if a man owes a debt to another man, and he starts to pay it off little by little?’’ He said: There is nothing wrong with that. The Prophet said: “And Allah is more generous and easy-going.’’, Islam Question and Answer, ‘Consensus (ijmaa‘) and analogy (qiyaas) and their application in the modern context’ < https://islamqa.info/en/answers/202271/consensus-ijmaa-and-analogy-qiyaas-and-their-application-in-the-modern-context> accessed 29 August 2019.

[159] Narrated by Abu Dawood, ‘Sunan Abu Dawood’ < http://islamilimleri.com/Kulliyat/Hadis/Hadis/pg_003_0020.htm> accessed 30 August 2019. ‘‘Own translation’’.

[160] Zidan (n 156) 199.

[161] For more information about this case, see Chapter 3.3.2. The purpose here is just to give an example of the use of *Qiyas* as a source of *Shariah* law.

to bring out the foetus.[162] One of their justifications was a Prophetic report forbidding fracturing the bone of a dead person: ‘‘Fracturing the bone of the dead is equal to fracturing the bone of the alive in sin’’.[163] The common factor in the two cases is mutilating the deceased and, therefore, they transferred the legal norm (being forbidden) from the original case (fracturing a dead person’s bone) to the new one (opening a dead pregnant woman’s abdomen).[164]

From my discussion of the two sources of *Shariah* law (*Ijma* and *Qiyas*), it should be clear that they are not divine sources. Rather, they are products of human reasoning through which new situations, that are not specifically mentioned in the *Qur’an* or the *Sunnah* can be addressed and regulated.[165] It should also be clear that the authenticity of these two sources stems from the fact that it is the *Qur’an* and *Sunnah* which stipulate that such secondary sources can be legitimately used to extrapolate Islamic rulings. Meaning that jurists did not ‘invent’ these sources (*Ijma* and *Qiyas*), but rather they identified legal bases for them in the *Qur’an* and *Sunnah* and for this reason considered them to be legitimate secondary sources for legal-ethical decision-making. Thus, while the revealed sources of *Shariah* law ended with the death of Prophet Muhammad (PBUH), evolved methods are the vehicle by which *Shariah* law can be transported into the future.[166] As for their ranking, the majority of jurists and scholars

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[162] Mohammed Al-Shankiti, *ahkam aljrahah altibiya w alathar almutaratiba ealayha (Medical Surgery Provisions and their Implications)* (2nd edn Maktabat Alsahaba, Jeddah 1994) 323 - 324.
[163] Narrated by ibn Majah, ‘Sunan ibn Majah’ <http://islamilimleri.com/Kulliyat/Hadis/Hadis/pg_007_0007.htm> accessed 23 September 2019. ‘‘Own translation’’.
[164] Al-Shankiti (n 162) 323 - 324.
[165] Baderin (n 74) 188.
[166] Ibid.

consider *Ijma* as the *third* primary source of the *Shariah*, and *Qiyas* as the *fourth*.[167] Thus, the authenticity ranking of the *Shariah*'s sources is: the *Qur'an*, the *Sunnah*, *Ijma*, and then *Qiyas*.[168]

1.4 An Overview of the *Sunni* Schools of Law

It is clear from the above that the sources of *Shariah* law's provisions, during the life of the Prophet (PBUH), were the *Qur'an* and the *Sunnah* (the primary divine sources), and that the application of *Shariah* law was straightforward since every matter was to be referred to the Prophet (PBUH) and his decisions were to be accepted as conclusive. I have also shown that after the death of the Prophet (PBUH), the need for *Ijtihad* emerged to face the emerging matters that were not covered explicitly in the *Qur'an* and the *Sunnah*. This *Ijtihad* process has resulted in the emergence of different *Sunni* schools of law (also called schools of *Fiqh*). Each school has its own methods and means of extracting and interpreting the *Shariah* provisions from its detailed sources. As a result, each school has its own book of *Fiqh* containing *Ahkam al-Shariah* (jurisprudential rulings). Most of these schools have become extinct, and only four remain: the *Hanafi*, *Maliki*, *Shafi'i*, and *Hanbali* schools. In this section, I will give an overview of the genesis of these schools and the fundamental principles their doctrine is based on. Within this discussion, I will indicate the doctrines that the regime in Saudi Arabia is most influenced by.

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[167] Zahraa (n 78) 230.

[168] Alongside these primary sources of *Shariah* law, there are secondary sources such as *Al-Masiilih Al-Mursalah* (Public Interest), *Istihsan* (juristic preference), *'Urf* (Custom) and *Sad al-Dharai'* (Blocking the Means to Mischief). For a discussion of these sources, see Zahraa (n 78) 238 - 244.

1.4.1 The *Hanafi* School of Law

The *Hanafi* school is the oldest of the *Sunni* schools of law and is named after its founder Imam (leader) Abu Hanafa, an Iraqi scholar of Persian origin (died in 767 C.E.).[169] He was given the title "Imam of the Analogists" due to his frequent use of *Qiyas* as a means to extract the *Shariah* provisions on the matters presented before him.[170] His frequent reliance on *Qiyas* and *ra'y* (independent legal opinion) led to the belief that he neglected to use *hadiths*, and that he preferred *Qiyas* to *hadiths* for decision-making.[171] It is true that Abu Hanafa was the least compared to other Imams in using *hadiths*, but this was not because he was uninterested in *hadiths*.[172] Rather, he required, due to the spread of false reports and many tribulations in Iraq at the time, strict conditions to verify the authenticity of each *hadith* that was reported to him.[173]

Imam Abu Hanafa and his school extracted the *Shariah* provisions by referring to the *Qur'an*, the *Sunnah*, and the sayings of the Prophet's Companions, and if those sources did not give an explicit provision to the matter presented to him, he would practice *Ijtihad* by using *Qiyas*, *ra'y* and *Istihsan* (juristic preference).[174] When doing this, Abu Hanafa would seek consultation and discussion of opinions with his students.[175] This

[169] Ruthven (n 108) 78.
[170] Zidan (n 156) 156.
[171] Ibid, 157.
[172] Ibid.
[173] Ibid.
[174] Ibid, 159. *Istihsan* means the 'abandoning of a judgement in favor of another' for the sake of choosing the one that is more suitable for the situation at hand, Wael B. Hallaq, 'Considerations on the Function and Character of Sunnī Legal Theory' (1984) 104 Journal of the American Oriental Society 679, 683.
[175] Zidan (n 156) 158.

gave his doctrine a characteristic of speculative and progressive mentality, compared to other schools of law.[176]

1.4.2 The *Maliki* School of Law

The *Maliki* school is the second surviving school and it takes its name from its founder Imam Malik ibn Anas, a Medinan scholar of a Yemeni origin (died in 795 C.E.).[177] A key feature of *Maliki* doctrine is the reliance on the Medinan practice (the views and practices adopted in Medina) for decision-making.[178] The justification for this, according to Malik's view, was that as Medina was the origin of the *Sunnah*,[179] only there 'a whole generation were able to transmit from a whole generation who had been alive at the time of the Prophet [...]'.[180] Despite this, there is a common opinion that the Medinan practice is not one of the four sources of the *Shariah* law but is, rather, a local *Ijma*.[181] Therefore, other Imams, such as Imam Al-Shafi'i, disagreed with Imam Malik in the reliance on the Medinan practice as a source for decision-making.[182]

Imam Malik and his school extracted the *Shariah* provisions by referring to the *Qur'an*, the *Sunnah*, *Ijma*, the practice in Medina, and then *Qiyas*.[183] If those sources did not

[176] Dupret (n 72) 82.
[177] Rahman (n 68) 82.
[178] Ibid.
[179] Medina is the first Islamic city and the second holy city in Islam; it is located in Hijaz, Saudi Arabia.
[180] Yasin Dutton, 'The Origins of Islamic Law: The Qur'an, the Muwatta' and the Madinan 'Amal' (1999) 61 Richmond, 36, as cited by Diana Zacharias, 'Fundamentals of the Sunni Schools of Law' (2006) 66 Zaoerv 491, 497.
[181] Zacharias (n 180) 499
[182] Zidan (n 156) 164.
[183] Ibid.

provide an unambiguous solution to the matter presented to him, he would practice *Ijtihad* by considering *Al-Maslihah Al-Mursalah* (the public interest).[184]

1.4.3 The *Shafi'i* School of Law

The *Shafi'i* school of law was founded by Imam Muhammad ben Idris Al-Shafi'i (died in 820 C.E.), born in Gaza and raised in Mecca.[185] He was a close relative of Prophet Muhammad (PBUH).[186] Imam Al-Shafi'i studied *Fiqh* in various Islamic centres of learning of the Muslim world, including Mecca, Medina and Iraq,[187] and this enabled him to learn about Mecca's doctrine, Medina's doctrine (the *Maliki* doctrine), and Imam Abu Hanafi's doctrine. Consequently, a key feature of his doctrine is that it was a combination of, and a mediator between, the *Hanafi* and the *Maliki* schools of law.[188] Imam Al-Shafi'i disagreed with the *Hanafi* doctrine in its use of *ra'y* and with the *Maliki* doctrine in its reliance on the Medinan practice for decision-making. Instead, Imam Al-Shafi'i held that the personal view, the *ra'y*, of a scholar could never be decisive *unless* it was supported by/or did not contradict a *hadith* of the Prophet (PBUH) or the *Qur'an*.[189] He also did not recognise the practice in Medina as a representation of Prophetical traditions.[190]

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[184] Ibid. *Al-Maslihah Al-Mursalah* means 'accepting public interest in the absence of ruling regarding an issue from the Quran or Sunnah', Institute of Islamic Banking and Insurance, 'Islamic Jurisprudence [FIQH]' <https://www.islamic-banking.com/knowledge/islamic-jurisprudence-fiqh> accessed 15 November 2019.
[185] Zidan (n 156) 167.
[186] Ibid.
[187] Zacharias (n 180) 501.
[188] Ibid, 502.
[189] Ibid, 501.
[190] Ibid.

Imam Al-Shafi'i and his school extracted the *Shariah* provisions by referring to the *Qur'an*, the *Sunnah*, *Ijma*, and then the sayings of the Prophet's Companions. If those sources did not give an explicit provision to the matter presented to him, he would practice *Ijtihad* by using *Qiyas*. He did not consider *Istihsan* (juristic preference) to be a source of the *Shariah* law, rather he considered it to be legislation by inclination.[191] *Al-Maslihah Al-Mursalah* (the public interest), in his view, was also not a source of the *Shariah* law,[192] for it not being based on the *Qur'an* or the *Sunnah*.[193] The *Shafi'i* doctrine has many followers in parts of Hijaz in Saudi Arabia.[194]

1.4.4 The *Hanbali* School of Law

The *Hanbali* school is the last of the *Sunni* schools of law, and it was named after its founder Imam Ahmad ibn Hanbal, an Arabian Tradition and legal scholar (died in 855 C.E.).[195] The *Hanbali* school of law is known to be strictly traditionalist and is conservative.[196] This reputation was due to its attachment to Traditions (the *Sunnah*) and its rejection of considering human reasoning, such as *Qiyas*, *Ijma* and *Istihsan*, as sources of *Shariah* law.[197] In Imam ibn Hanbal's view, the sources of the *Shariah* law are only the divine sources (the *Qur'an* and the *Sunnah*). *Ijma*, according to him, represents the unanimous understanding of the *Qur'an* and the *Sunnah* by the Islamic

[191] Zidan (n 156) 169.
[192] Ibid.
[193] Hanan A. Al-Qudah and Mohammad K. Mansour, 'Munahaj Al'istslah w tatbiqatih fi AL madhhab Al-Shafi'I (Methodology of *Isteslah* and Its Applications in the Shafi'i School)' (2015) 42 Dirasat 1143, 1148.
[194] Zacharias (n 180) 503. Hijaz is the Western region of Saudi Arabia. The area of Al-Ahsaa' in Saudi Arabia has inhabitants that hail from all four schools of law and is one of the few places in the Muslim world where such a phenomenon exists.
[195] Ibid, 504.
[196] Dupret (n 72) 85.
[197] Zacharias (n 180) 504.

community and, thus, is *not* seen as an independent source of law.[198] He also had a cautious position with regard to *Qiyas*, for it could be misused in a way which contradicted rules stipulated by the *Qur'an* or by the *Sunnah*.[199] Therefore, even weak *hadiths* were, in his opinion, preferable to *Qiyas*.[200] As such, the *Hanbali* doctrine does not recognise *Ijma* and *Qiyas* as sources of *Shariah* law, but as acknowledged principles.[201] Hence, the use of these rational methods for decision-making is more restricted in this school compared to the other schools of law.[202]

Based on the above, the legal method of Imam ibn Hanbal and his school for extracting the *Shariah* provisions was by referring to the *Qur'an* and to the *Sunnah*.[203] If those sources did not provide an unambiguous solution to the matter presented to him, he would practice *Ijtihad* by considering the sayings of the Prophet's Companions as a *means* for finding judgments,[204] and then by using *Qiyas* in limited circumstances.[205] The *Hanbali* school is not dominant in any particular territory.[206] However, it was picked up by the Wahhabi movement in the Arabian Peninsula;[207] as a result, the regime in Saudi Arabia is inspired by the *Hanbali* doctrine.[208]

[198] Ibid.
[199] Ibid, 505.
[200] Ibid.
[201] Ibid, 506.
[202] Ibid, 505.
[203] Zidan (n 156) 171.
[204] Zacharias (n 180) 504.
[205] Zidan (n 156) 172.
[206] Dupret (n 72) 85.
[207] Rahman (n 68) 82.
[208] Zidan (n 156) 173. For more information about how Saudi law is generally influenced by the *Hanbali* doctrine, see Chapter 4.3.1.

My discussion of the four major *Sunni* schools of law has shown that the main difference between them is the ranking and the binding effect of the sources of *Shariah* law. While they all consider the *Qur'an* and the *Sunnah* to be the fundamental sources, they differ with regard to the degree of approval and application given to other sources and methods, such as *Ijma* and *Qiyas*. They also have different interpretations and understandings of relevant provisions of the *Qur'an* and the *Sunnah*. Consequently, differences of opinion and judgement on legal and bioethical matters, such as abortion and operating on a dead woman to deliver a living foetus, exist amongst these schools.[209] The schools' jurisprudential rulings contained in their books of *Fiqh* are not divine, nor are they immutable; however, they are regarded, in various *Sunni* Islamic States, as established legal treatises of *Shariah* law.[210] In this regard, it is rightly observed that:

> the invariable basic rules of Islamic law are only those prescribed in the Shariah (Qur'an and Sunnah), which are few and limited. Whereas all juridical works during more than thirteen centuries are very rich and indispensable, they must always be subordinated to the *Shariah* and open to reconsideration by all Muslims.[211]

[209] For more information about the existence of differences of ruling regarding these matters, see Chapter 3.3.1 and 3.3.2.
[210] Baderin (n 74) 189.
[211] Ramadan (n 119) 26.

As such, these schools form the basis of legal decision-making for various legal and ethical issues and have a great influence on many *Sunni* Islamic States' laws. Regardless of the differences of opinion between these schools of law, they have the same binding status.[212] Hence, a believer, when having a question about the *Shariah*, can turn to any of these schools of law, and is not bound to follow the school, which predominates in their geographic region. Today, when scholars want to issue a *fatwa* (a technique of consultation to obtain a legal opinion)[213] regarding a legal issue presented to them, they often explain, in their legal opinion, the different positions of all schools of law, and then they give their view on which is the most suitable one.

1.5 An Overview of Key Legal Maxims of *Shariah* Law and the role of *Fatwas*

After discussing the divine and non-divine sources of *Shariah* law and their different degrees of approval amongst the four *Sunni* schools of law, my objective in this section is to give a short explanation of the relevant *Al-Qawaid al-Fiqhiyyah* (Islamic legal maxims or principles of *Shariah* law) that guide the practical application of the *Shariah* sources and methods. This will include citing examples regarding the application of these maxims in a medical setting. I will, then, provide a discussion of the nature and the role *fatwas* play in legal decision-making. This is because, in this thesis, I refer to *fatwas* to

[212] Zacharias (n 180) 507.

[213] This technique is used to deal with emerging issues that require contemporary legal responses. lexically, the *fatwas* are an authoritative clarification or explanation of an issue, in which a person or the state presents the learned jurist with a question. The latter explores the issue in question and reaches a legal opinion based upon the *Shariah* provisions, Oren Asman, 'Abortion in Islamic Countries - Legal and Religious Aspects' (2004) 23 Medicine and Law 73, 76 - 77. For more information about the role and nature of *fatwas*, see section 1.5.2 in this chapter.

illustrate approaches taken to different maternal-foetal potential conflict issues, such as abortion and maternal refusal of a necessary caesarean section, and because of the key influence they have on the formulation of laws.

1.5.1 The Key Legal Maxims of *Shariah* Law

Al-Qawaid al-Fiqhiyyah (Islamic legal maxims or principles) are the general rules of *Fiqh* that can be applied to various issues of *Fiqh* in order to deduce legal decisions or solutions for the cases in hand.[214] They are, thus, used to ensure a logical application of *Shariah* law, which, ultimately, helps to maintain consistency between the theory and practice of *Shariah* law.[215] The Islamic legal maxims 'refer to a body of abstract rules which are derived from the detailed study of fiqh (jurisprudence) itself'.[216] In a similar definition, al-Zaraq defined legal maxims as 'the general *fiqh* principles which are presented in a simple format consisting of the general rules of *Shariah* in a particular field related to it'.[217] These legal maxims were developed and refined over time by the classical jurists of the *Sunni* schools of law, and what gives them binding authority is the fact that they are derived from rulings of the *Qur'an* or the *Sunnah*.[218] There are five leading maxims and each comprises several sub-maxims. The five leading maxims are: *al-Umur bi Maqaṣidiha* (''Acts are judged by the intention behind them''),[219] *Al-adah*

[214] Buerhan Saiti and Adam Abdullah, 'The Legal Maxims of Islamic Law (Excluding Five Leading Legal Maxims) and Their Applications in Islamic Finance' (2016) 29 Journal of King Abdulaziz University-Islamic Economics 139, 140.
[215] Baderin (n 74) 189.
[216] Kamali (n 94) 143.
[217] Mustafa Ahmed al-Zarqa, *Sharh al-Qawa'id al-Fiqhīyah (Explanation of Legal Maxims of Fiqh)* (Dar al-Qalam, Damascus 2007), as cited by Saiti and Abdullah (n 214) 140.
[218] Saiti and Abdullah (n 214) 140 - 141.
[219] This legal maxim means a person is judged according to their intentions and objectives. A relevant example for this maxim is the distinction between murder committed on purpose and murder committed

muhakkamah (‘‘Custom is the basis of judgement’’),[220] *Al-yaqin la yazul di ash-shakk* (‘‘Certainty is not overruled by doubt’’),[221] *al-Mashaqqah Tajlib al-Taysir* (‘‘Hardship Begets facility’’), and *Ad-darar Yuzal* (‘‘Injury or harm must be eliminated’’). Since there is no scope to discuss all of these leading maxims and their associated sub-maxims, I will only focus on the last two because they are the ones that are most relevant and applicable to the potential maternal-foetal conflict cases.

1.5.1.1 *Qaidat al-Mashaqqah Tajlib al-Taysir* (‘‘Hardship Begets Ease or Facility’’)

This maxim is one of the five leading maxims that have a high degree of inclusiveness according to all jurists of the *Sunni* schools of law.[222] Essentially, it means that whenever there is a hardship or necessity, prohibited things can be permitted.[223] For example, in Islam wine is forbidden; yet, when there is nothing else but it, and you fear that you will die of thirst, drinking wine becomes permissible. The maxim of hardship begets ease is supported by both the *Qur’an* and the *Sunnah*.[224] However, this maxim is restricted to two main conditions, which are interpreted as two of its sub-maxims:[225]

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accidentally, Islamic University of North America, ‘*Al-Qawaid Al-Fiqhiyyah* (Legal Maxims of Islamic Jurisprudence): A Translated Compilation)’ (2013) Mishkah 1, 52 – 54.

[220] This legal maxim means that customary obligations are treated as though they were contractual obligations. Custom only has an impact where it is of regular occurrence or where it is widely accepted. Custom is resorted to when faced with a question or a case to which there is no solution in *Shariah* law, Islamic University of North America (n 219) 123 - 124.

[221] This legal maxim means that a matter that is certain cannot be changed until there is compelling evidence, and it cannot be changed or revoked based just on suspicions, Islamic University of North America (n 219) 68.

[222] Islamic University of North America (n 219) 4.

[223] Khaleel Mohammed, ‘The Islamic Law Maxim’ (2005) 44 Islamic Studies 191, 203.

[224] The Qur’an [2:173]: ‘‘He has only forbidden to you dead animals, blood, the flesh of swine, and that which has been dedicated to other than Allah. But whoever is forced [by necessity], neither desiring [it] nor transgressing [its limit], there is no sin upon him. Indeed, Allah is Forgiving and Merciful’’; the Qur’an [6:119]: ‘‘He has explained in detail to you what He has forbidden you, excepting that to which you are compelled’’. From the *Sunnah*, the Prophet (PBUH) said: ‘‘Facilitate things to people (concerning religious matters), and do not make it hard for them and give them good tidings and do not make

Al-Darurat Tuqaddar bi Qadriha (necessities have limits that should not be exceeded) and *Ma Jaz le Udhr Batal be Zawalih* (should something become legal by necessity, it becomes illegal when that necessity is removed).[226] This means that necessity is estimated in accordance with its level of severity and the permission that is allowed by it is revoked when that necessity is removed.[227] Hence, what becomes permissible on the basis of necessity can be done *only* to the extent of removing that necessity. For instance, in the case of choking, you can drink forbidden drinks, such as wine, to swallow food but you can only drink the amount that keeps you alive.[228]

A hardship, in a medical setting, can be defined as 'any condition that will seriously impair physical and mental health if not relieved promptly'.[229] This means necessity can justify undertaking prohibited medical interventions and the temporary violation of a patient's rights.[230] Sterilisation, for example, is prohibited in Islam, but if it is believed that a potential pregnancy threatens the woman's life, it may become permissible (if she accepts it).[231] Similarly, the necessity imposed by an emergency where there is a life-threatening situation requiring an immediate intervention can be another example in

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them run away (from Islam)'', Narrated by Al-Bukhari, 'Sahih Bukhari' <https://sunnah.com/bukhari/3/11> accessed 13 October 2019.

[225] Mohammed (n 223) 204.

[226] Ibid.

[227] Ibid.

[228] Islam Question and Answer, 'Permissibility of haraam things in the case of necessity and the conditions governing that' <https://islamqa.info/en/answers/130815/permissibility-of-haraam-things-in-the-case-of-necessity-and-the-conditions-governing-that> accessed 13 October 2019.

[229] Ghaiath MA Hussein and Omar Hasan Kasule, 'How to resolve ethical issues in Clinical Practice' in Ware J. and Kattan T. (eds), *Professionalism and Ethics Handbook for Residents: A Practical Guide* (Saudi Commission for Health Specialties, Riyadh, Saudi Arabia 2015) 195.

[230] Ibid.

[231] Yassar Mustafa, 'Islam and the Four Principles of Medical Ethics' (2014) 40 Journal of Medical Ethics 479, 480.

which medical interventions without obtaining the patient's consent can be justified, in order to save their life or organs. This is one of the approaches adopted for dealing with a maternal refusal of a necessary caesarean section, in which the situation is considered an emergency, allowing for the pregnant woman's refusal to be overruled, by necessity provisions, to save her life and/or the foetus' life - This approach will be discussed in Chapter 3.3.3.2. From these examples, it should be clear that the extent of justifying prohibited actions by necessity is to protect the patient's life and/or their organs from deterioration. Therefore, once the necessity is removed, the patient's rights must be restored in due course, and the temporary legalisation of prohibited medical action ends.[232]

1.5.1.2 *Qaidat Ad-darar Yuzal* (''Injury or Harm Must be Eliminated'')

This maxim is also one of the five leading maxims that are considered by the *Sunni* schools of law to have legal force.[233] It means that harm should be relieved and, as such, provides the justification for medical interventions.[234] This maxim is evident in both the *Qur'an* and the *Sunnah* as the rationale of many rulings contained therein is the avoidance of harm.[235] However, if faced with two medical interventions that are both harmful and a choice has to be made, the sub-maxim of *Idha Ta'arad Mafsadatan*

[232] Ibid.
[233] Islamic University of North America (n 219) 51.
[234] Hussein and Kasule (n 229) 194.
[235] The Qur'an [2:233]: ''No mother should be harmed through her child, and no father through his child''; the Qur'an [2:231]: ''And when you divorce women and they have [nearly] fulfilled their term, either retain them according to acceptable terms or release them according to acceptable terms, and do not keep them, intending harm, to transgress [against them]. And whoever does that has certainly wronged himself''. From the *Sunnah*, the Prophet said: ''No harming nor reciprocating harm''; and in another Hadith, the Prophet said: ''whoever harms others, Allah harms him, and whoever places others under difficulties, Allah places him under difficulties''. Both Hadiths are narrated by ibn Majah, 'Sunan ibn Majah' <http://islamilimleri.com/Kulliyat/Hadis/Hadis/pg_007_0014.htm> accessed 24 October 2019. ''Own translation''.

Ru'aiy A'zamahuma Darar be Irtikab Akhffahuma (''among evils, the lesser harm is committed or severe harm is removed by lesser harm'') should be opted for, in order to prevent greater harm.[236] This sub-maxim is used to justify operating on a dead woman to deliver a living foetus, as will be discussed in Chapter 3.3.2. Abortion is another case in which this maxim can be used to legalise the termination of an ensouled foetus if continuing pregnancy threatens the life of the woman, as the termination of the foetus' life is considered to be the lesser harm.[237]

From the above short discussion of the two Islamic legal maxims that are most applicable to maternal-foetal conflict issues, it should be clear that they play an important role in the application of *Shariah* law, and that they have a considerable degree of adaptability to cover a range of complex ethical and legal issues. Jurists of all *Sunni* schools of law consider them as the basis of the *Shariah* provisions.[238] This poses an important question as to the extent to which the Islamic legal maxims can be used as evidence to be invoked in issuing rulings or *fatwas*. It is accepted that the Islamic legal maxims do *not* operate as independent sources of *Shariah* law; however, if they are directly or indirectly derived from the primary sources of *Shariah* law (i.e. the *Qur'an*, *Sunnah*, *Ijma* and *Qiyas*), they can be used to support a judgment or a *fatwa*.[239] The legal maxims I have discussed in this section are derived from the *Qur'an* and/or the *Sunnah* and, thus, they have legal value.

[236] Mustafa (n 231) 480.
[237] Hussein and Kasule (n 229) 198. This is the approach of the Saudi law as will be discussed in Chapter 4.3.1.2
[238] Mohamad Yunus, 'The Position and Application of Islamic Legal Maxims (Qawaaid Al-Fiqhiyyah) in the Law of Evidence (Turuq Al-Hukmiyyah)' (2019) 13 Fiat Justisia 43, 43.
[239] Islamic University of North America (n 219) 32 - 33.

1.5.2 The Role and Nature of *Fatwas*

A *fatwa* is a formal ruling on an issue, or an interpretation on a point of *Shariah* law, issued by a qualified Islamic jurist with a specific level of knowledge and virtue regarding *Shariah* law (known as a *mufti*).[240] *Fatwas* are usually issued in response to questions or matters presented by individuals, the Islamic State or Islamic courts.[241] *Fatwas* are resorted to when obtaining an Islamic judgment on an issue is crucial due to the significant religious and moral sensitivity of the matter for Muslims, and when reaching an Islamic judgment is difficult because of the complexity of the situation.[242] For example, when a continuation of pregnancy endangers the woman's life and therapeutic abortion is an available option, the Muslim woman or her doctor seeks relevant *fatwas* on the situation.[243] The purpose of doing so is to know whether abortion is ethically and religiously justified under the circumstances, and whether it is ethically and religiously right to prioritise the life of the woman over the life of the foetus.[244]

Fatwas are, hence, important in the field of medicine especially as new biomedical legal and ethical issues keep emerging over time for which there are no clear and straightforward provisions in the *Qur'an*, *Sunnah, and Fiqh*. The validity of religious practice and the resultant solution of bioethical issues is dependent upon the rulings

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[240] The Editors of Encyclopaedia Britannica, 'Fatwa: Islamic Law' <https://www.britannica.com/topic/fatwa> accessed 30 August 2021.

[241] Ibid. For example, the Saudi government sought a *fatwa* - during the Iraq invasion to Kuwait in 1991- with regard to the permissibility of using military aid from non-Muslim government to fight the ruler of Iraq, Imam Bin Baz, the Grand Mufti of Saudi Arabia from 1993 until his death in 1999, 'After the Gulf War' < حكم الاستعانة بغير المسلمين في قتال طاغية العراق (binbaz.org.sa)> accessed 2 September 2021.

[242] Hamideh Moosapour and others, 'General Approaches to Ethical Reasoning in Islamic Biomedical Ethics Discourse' (2018) 11 Journal of Medical Ethics and History of Medicine 1, 5.

[243] Ibid.

[244] Ibid.

offered by qualified scholars of *Shariah* law,[245] through certain institutions that have significant influence.[246] These scholars and religious institutions must rule upon where actions fall within Islam's five ethical and legal norms: *Haram* (forbidden), *Makruh* (discouraged), *Mubah* (permissible/allowed), *Mustahabb* (recommended), or *Wajib* (obligatory).[247] In order to respond to new medical technology and medical issues (or for this purpose), Islamic jurists, informed by technical and medical experts, hold regular conferences where emerging issues are explored and consensus is sought.[248] *A* key source, via which the morality of and the Islamic rule on an action can be determined, is thus the *fatwas* issued by recognised institutional bodies or by a *mufti*.[249] Among the medical issues in which *fatwas* played a role in determining their rulings are organ transplants, brain death and euthanasia.[250]

Although *fatwas* are deemed authoritative, they are generally not viewed as legally binding.[251] *Fatwas* have had direct and indirect effects on laws in Muslim-majority

[245] Hassan Chamsi-Pasha and Mohammed Ali Albar, 'Western and Islamic bioethics: How close is the gap?' (2013) 3 Avicenna Journal of Medicine 8, 9.
[246] Examples of institutions that play an influential role in the Muslim world include Al-Azhar University, the committee of senior scholars in Al-Azhar. In Saudi Arabia, the Council of Senior Scholars, and the Permanent Committee for Scholarly Research and *Ifta* have significant influence in extracting rulings regarding the matter at hand. For more information about the role these institutions play in Saudi Islamic law, see section 1.2 in this Chapter.
[247] Chamsi-Pasha and Albar (n 245) 9.
[248] Daar and Al Khitamy (n 56) 61.
[249] Berna Arda and Vardit Rispler-Chaim, *Islam and Bioethics* (Ankara 2012) 16.
[250] See, for example, the Senior Ulama Council of Saudi Arabia, 'Organ Transplantation' fatwa No. 99 [1982]; the International Islamic Fiqh Academy, 'Brain Death' No. 17 (5/3) [1986] < مجمع الفقه الإسلامي الدولي - قرار بشأن أجهزة الإنعاش (iifa-aifi.org)> accessed 2 September 2021; The Kuwaiti Council of Fatwa, 'Organ Transplantation' [1979], as cited in Ministry of Health Malaysia, *Organ Transplantation from the Islamic Perspective* (Malaysia 2011) 24; The Egyptian Dar Al Ifta, 'Euthanasia' fatwa No. 639 [2004] < الفتاوى - القتل الرحيم (dar-alifta.org) > accessed 2 September 2021.
[251] Moosapour and others (n 242) 5.

States.[252] They can be made into law by order of the executive office.[253] For example, Saudi laws regarding abortion and female patients' legal right to consent to or refuse to consent to a medical intervention are based on *fatwas* issued by Council of Senior *Ulama*.[254] Moreover, when faced with a legally or ethically complex medical issue, about which the national laws are silent, Muslim healthcare providers and Muslim patients follow the relevant *fatwas* in order to obtain the Islamic provision on that issue.[255]

1.6 Conclusion

This chapter has given an overview of Saudi Islamic law. The discussion made it clear that the Saudi legal system derives from *Shariah* law and that Allah and Prophet Muhammad (PBUH) hold the legislative authority under Saudi law, with the *Ulama*'s (jurists') function consisting of interpreting the *Qur'an* and the *Sunnah* to derive enforceable laws. This indicates that the acceptability of the Saudi law approach or any arguments for reform of the law regarding maternal refusal of a necessary caesarean section is subject to their acceptability in *Shariah* law. Hence, providing sufficient knowledge about the concept of the *Shariah* as a legal system through this chapter is essential, as it serves as a foundation for Chapter 3 which is concerned with the *Shariah* law's approach regarding the issue in question, and for Chapter 4 which is

[252] Ibid.
[253] Muhammad Hisham Kabbani, 'Understanding Islamic Law' <http://www.islamicsupremecouncil.org/understanding-islam/legal-rulings/52-understanding-islamic-law.html> accessed 17 November 2019.
[254] For more information about those *fatwas* and how they influence Saudi laws, see Chapter 4.3.1 and 4.3.2.1.
[255] Moosapour and others (n 242) 5.

about the Saudi law's stance towards maternal refusal of a necessary caesarean section.

I have showed that the *Qur'an* and the *Sunnah* operate as the two divine primary sources that form the *Shariah* as a source of law. However, it has been revealed that the *Qur'an*, although it is written, is not codified as positive law or a legal system. Accordingly, in many matters, it does not necessarily specify or state the law, but it gives *adillah* (indications) and *ahkam* (rulings), by which Muslim jurists can arrive at a judgement on any given question for which there is no accurate answer. The fact that the *Qur'an* contains general principles enables Muslim jurists to use it flexibly as a living tool that suits different circumstances at various times and places. The discussion has also revealed that rules provided by the *Qur'an* and the *Sunnah* are not free from ambiguities, which makes relying exclusively on them in law-making insufficient for achieving coherent legal decision-making. This fact is very relevant to my research topic because, as I will discuss in Chapters 3 and 4, the lack of an explicit reference to foetus' legal status and rights has caused some ambiguity and disagreement amongst the four *Sunni* schools of law as well as the contemporary jurists when dealing with foetal-related issues, such as abortion and maternal refusal of a necessary caesarean section.

I have clarified the key legal maxims of *Shariah* law that guide the practical application of the *Shariah*'s sources and methods. It was demonstrated that they play an important role in the application of *Shariah* law, and that they have a considerable degree of

adaptability to cover a range of complex ethical and legal issues. It was, also, shown that they do *not* operate as independent sources of *Shariah* law; however, if they are directly or indirectly derived from the primary sources of *Shariah* law (i.e., the *Qur'an*, the *Sunnah*, *Ijma* and *Qiyas*), they can be used to support a judgment or a *fatwa*. The discussion of the key legal maxims of *Shariah* law is fundamental to my thesis, particularly with regard to my thesis questions as to whether reform of Saudi law is needed and whether *Shariah* law offers scope for an alternative approach for dealing with maternal refusal of a necessary caesarean section. As I will discuss in Chapter 3.3.3.2, one suggested approach to the issue in question is based upon these legal maxims. My argument for reform, also, relies on one of those legal maxims, as I will show in Chapter 4.4.

Thereafter, I have focused on the nature and the role *fatwas* play in legal decision-making. I have showed that *fatwas* play an important role in dealing with new biomedical legal and ethical issues that are not covered by the sources of *Shariah* law. Although a decision reached through a *fatwa* is not legally binding, they can be made into law by order of the executive office. This shows the importance of *fatwas* for ethical-legal decision-making. *Fatwas* are significant to my research topic as they illustrate the approaches taken to issues such as the foetus' legal status and rights, the maternal refusal of a necessary caesarean section, and abortion - this will be explained in Chapters 3 and 4. In fact, the laws in Saudi Arabia regarding maternal refusal of a necessary caesarean section have been impacted by *fatwas*, as I will demonstrate in Chapter 4.3.2.1.1. They, hence, play a major role in exploring the approach currently

taken by Saudi law to the issue in question, and in assisting the extent to which a foetus' legal rights are maintained, which is one of my thesis questions.

This chapter has provided necessary knowledge about the concept of the *Shariah* as a legal system and the *Sunni* schools of law, and it has discussed the key Islamic legal maxims and *fatwas*. This chapter - and the next chapter - are important as they form the analytical basis for my chapters and for addressing my thesis questions. In this thesis, the term '*Shariah* law' will be used to refer to the sum total of rulings extracted from both divine and non-divine sources, including rulings extracted through human reason. The following chapter will focus on Islamic interpretations of medical ethics that are relevant to the issue of the potential maternal-foetal conflict in caesarean refusal cases, particularly how the principle of autonomy is interpreted from a *Shariah* law perspective.

Chapter 2: Islamic Medical Ethics

2.1 Introduction

In this chapter, I will discuss Islamic interpretations of medical ethics that are relevant to the issue of the potential maternal-foetal conflict in caesarean refusal cases, particularly how the principle of autonomy is interpreted from a *Shariah* law perspective. here is because one of the main tensions in caesarean refusal cases is the extent to which the pregnant woman's right to autonomy should be respected. As one of my thesis' questions is to determine whether autonomy in Islam can accommodate maternal refusal of a necessary caesarean section, and whether the Islamic notion of autonomy can enable for such a refusal to be overridden, a proper understanding of the notion of autonomy in Islam is essential. In this chapter, I will, thus, explore the scope of the notion of autonomy in Islam and Islamic medical ethics. In doing so, I will include a brief discussion of the principle of autonomy on the basis of different interpretations outlined in secular western bioethical literature, such as relational understandings of autonomy, Beauchamp and Childress's interpretation of autonomy in their principlism model, principled autonomy, and Kantian autonomy. This is because making a brief comparison may help to gain a better understanding of Islamic medical ethics, especially for a non-Muslim audience or readers. It could also help to provide a sense of how the principle of autonomy is interpreted in secular and Islamic models. Secular western bioethics is one aspect of my comparison because of the diversity of religious

bioethics,[256] and the prevalence of secular western bioethics in the western bioethical literature.[257]

2.2 Islamic Medical Ethics

Medical ethics can be defined as 'the analytical activity in which concepts, assumptions, beliefs, attitudes, emotions, reasons, and arguments underlining medico-moral decision making are examined critically'.[258] Islamic medical ethics is defined as:

> the methodology of defining, analysing, and resolving ethical issues that arise in health care practice or research; based on the Islamic moral and legislative sources (*Qur'an*, *Sunnah*, and *Ijtihad*); and aimed at achieving the goals of Islamic morality (i.e., preservation of religion, soul, mind, wealth, and progeny).[259]

These definitions indicate that medical ethics serve two main purposes: (i) to address ethical concerns related to health care provision, and (ii) to provide guidance for ethical

[256] Christian ethics and Jewish ethics are two examples of the diversity of religious bioethics. Due to the diversity of religious bioethics and my lack of knowledge of them, comparisons between different religious-based bioethics are not within the scope of my thesis.
[257] The authority of secular western bioethics is derived from the assumption that it is both neutral and supersedes previous theological, or religious perspectives. This makes it suitable for the purpose of my comparison, Yusuf Lenfest, 'Medicine and Ethics: Religious or Secular?' < Medicine and Ethics: Religious or Secular? | Bill of Health (harvard.edu)> accessed 17 December 2022.
[258] Raanan Gillon, *Philosophical Medical Ethics* (1st edn John Wiley & Sons, England 1986) 2.
[259] Ghaiath MA Hussein, 'Introduction to Medical Ethics' in Ware J. and Kattan T. (eds), *Professionalism and Ethics Handbook for Residents: A Practical Guide* (Saudi Commission for Health Specialties, Riyadh, Saudi Arabia 2015) 7.

and legal decision-making. However, paths and frameworks of medical ethics differ significantly between a philosophical or secular model and Islamic model.

Generally speaking, medical ethics, in a philosophical or secular model, place a greater emphasis on human reason and experience in determining what action is right or wrong.[260] In Islamic intellectual discourse, this development is not parallel.[261] Islamic ethics is *faith*-based.[262] While it is influenced by a variety of philosophical traditions, it still has a religious worldview and relies heavily on religious texts (*Shariah* law) for its resources.[263] Hence, the distinction between medical ethics in the contexts of the philosophical or secular model and the Islamic model lies in that the former starts with:

> the psychological constitution of man's nature and the obligation laid on him (like the 'four principles' [of Beauchamp and Childress]) as a social being, but in Islamic Ethics the basic assumption is faith in Allah and morality is the attempt of each individual as well as society to approach Him as far as possible.[264]

Hence, Islamic ethics stem from what are called 'Divine Command Theories', which consider the commands of Allah to be the reference for determining what is right or

[260] Hassan Chamsi-Pasha and Mohammed Ali Albar, 'Western and Islamic bioethics: How close is the gap?' (2013) 3 Avicenna Journal of Medicine 8, 8.
[261] Ibid.
[262] Yassar Mustafa, 'Islam and the Four Principles of Medical Ethics' (2014) 40 Journal of Medical Ethics 479, 482.
[263] Chamsi-Pasha and Albar (n 260) 8.
[264] Sahin Aksoy and Abdurrahman Elmali, 'The Core Concepts of the Four Principles of Bioethics as Found in Islamic Tradition' (2002) 21 Medicine and Law 211, 215.

wrong in human conduct.[265] As such, Sahin Aksoy and Abdurrahman Elmali state that Islamic ethics 'lies in giving a religious basis to morality'.[266] Consequently, there is no means to separate the basis of morality and ethics from *Shariah* law.[267] In other words, Islamic ethics do not comprise a separate element of Islam. Rather, ethics are the central aim of Islam because they exemplify the exemplary characteristics that the Prophet Muhammad (PBUH) said he has come to perfect.[268] This is addressed in the *Hadith* narrated by Malik, that he had heard that the Messenger of Allah said 'I was sent to perfect good character'.[269] Moreover, Allah, in characterising the Prophet (PBUH), opted to highlight the best of his attributes, saying 'And indeed, you are of a great moral character'.[270] These quotes illustrate that Islamic ethics are inherently connected with *Shariah* law.

In this regard, Islamic jurists, by relying on both the *Qur'an* and the *Sunnah*, have devised a system of aims that align with the objective of Islam to convey the *Shariah*'s spirit to humanity.[271] This system of aims or legal doctrine is known as '*Maqasid*'.[272] The term '*Maqsid*' (plural: *Maqasid*) refers to an intended outcome. In the context of *Shariah* law, *Maqasid* refer to the goals and principles that underlie legal and ethical

[265] Ghaiath MA Hussein, 'Principles of Western & Islamic Approaches to Bioethics' in Ware J. and Kattan T. (eds), *Professionalism and Ethics Handbook for Residents: A Practical Guide* (Saudi Commission for Health Specialties, Riyadh, Saudi Arabia 2015) 15.
[266] Aksoy and Elmali (n 264) 215.
[267] Mustafa (n 262) 479.
[268] Ali Al-Qaradaghi, 'Formulating Ethical Principles in Light of the Higher Objectives of Sharia and Their Criteria' in Mohammed Ghaly (ed), *Islamic Perspectives on the Principles of Biomedical Ethics* (World Scientific Publishing, UK 2016) 320.
[269] Ibid.
[270] The Qur'an [68: 4].
[271] The Egyptian Dar Al-Ifta, 'The Higher Objectives of Islamic Law: Maqasid Al-Shari'ah' < The Higher Objectives of Islamic Law (dar-alifta.org) > accessed 17 June 2021.
[272] Ibid.

decisions.[273] Specifically, this system is a general approach that identifies the rationales and the aims underlying the corpus of rulings (*al-ahkam at-tashri`iyyah*) found in the *Qur'an* and the *Sunnah*.[274] The aim of this doctrine is to categorise the 'higher objectives of *Shariah* law' (*Shariah*'s *Maqasid*) in order to create a broad philosophy of *Shariah* law amenable to be used in the creation of the legal rulings, *fatwas*, and Islamic ethics.[275]

Islamic jurists have agreed five main objectives which are deemed to be the *Shariah*'s *Maqasid*.[276] These are the preservation of religion (*din*), soul (*nafs*), mind (*'aql*), offspring (*nasl*), and money (*mal*).[277] All of these *Maqasid* are derived from the sources of *Shariah* law.[278] They are regarded as the Islamic standards for determining the morality (and legality) of human actions and any medical interventions, whereby any action must fulfil one of these *Maqasid* if it is to be considered ethically (and legally) acceptable.[279] Ethics in Islam are, thus, calibrated in accordance with these five *Maqasid* as embodied in the *Shariah*.[280] Imam Abu Hamid al-Ghazali (d.111) has stated that:

> The *Shariah*'s purposes of the creation are five: to preserve their religion, their souls, their mind, their offspring and their money. So, everything that includes preserving these five principles is considered a *maslaha* (interest). And

[273] Ibid.
[274] Ibid.
[275] Ibid.
[276] Ibid.
[277] Hussein (n 265) 16.
[278] Jasser Auda, *Maqasid Al-Shariah as Philosophy of Islamic law: A System Approach* (1st edn International Institute of Islamic Thought, London 2008) 8.
[279] Hussein (n 265) 16 - 17.
[280] Al-Qaradaghi (n 268) 323.

> everything that results in failure of these principles is a harm that should be fought and tuned to an interest. The prohibition of failing or restraining these five principles has always been included in all religions and *Shariah*, as *Shariah* comes for the interest of humankind.[281]

Thus, the *Shariah* exists to ensure conformity to the five *Maqasid* upon which all the legal rulings embodied in the *Shariah* are based.[282] The following two paragraphs provide examples that demonstrate this.

Belief and worship are obligations and have been made mandatory by Allah to safeguard the strength of religion. There is a legislative underpinning to decisions relating to the obligatory learning and the conveyance of the religion, with the purpose of ensuring the continuance of Islam.[283] The immorality (and illegality) of abortion in Islam is, in part, due to its violation of the Islamic goal of preservation of soul.[284] Another example of preserving the soul is the prohibition of killing and the Law of *Qisas* (law of retaliation), i.e., killing the murderer.[285] The aim of this is to preserve the sanctity of life through the introduction of a deterrent since a potential murderer would be aware that killing would result in their own death.

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[281] As cited in the Egyptian Dar Al-Ifta, 'The Higher Objectives of Islamic Law: Maqasid Al-Shari'ah' < The Higher Objectives of Islamic Law (dar-alifta.org) > accessed 17 June 2021.
[282] Ibid.
[283] BBC, 'Sharia' < BBC - Religions - Islam: Sharia> accessed 21 June 2021.
[284] Hussein (n 265) 17.
[285] The Qur'an [2:179]: 'There is security of life for you in the law of retaliation, O people of reason, so that you may become mindful of Allah'.

For the preserving of the mind (*'aql*), Allah has directed that all people should preserve the soundness of their minds since this is the foundation for the moral and legal responsibility that all humans must observe. Hence, alcohol and all other forms of intoxication are forbidden (*haram*).[286] The exchange or the donation of ova and sperm is ethically (and legally) unacceptable in Islam for the protection of offspring.[287] This is because the involvement of a third party in the dyad of legal husband and wife, even if it is a sperm, an ovum, an embryo, or a uterus, leads to confusion of lineage.[288] Prohibitions on theft, deception, treason, the unjust consumption of wealth, and the earning of interest (*riba*) are encompassed within the *Shariah*, alongside their respective punishments.[289] The purpose of these rulings is the preservation of money.

The Islamic system of the *Shariah*'s high *Maqasid* (objectives) is regarded as a significant intellectual tool through which rulings, *fatwas*, and Islamic reform can be manifest.[290] This is because it is a methodology from *within* the Islamic scholarship that addresses Islamic issues, thereby giving it a unique significance for dealing with matters

[286] The Qur'an [5:90]: 'O you who have believed, indeed, intoxicants, gambling, [sacrificing on] stone alters [to other than Allah], and divining arrows are but defilement from the work of Satan, so avoid it that you may be successful'.
[287] Hassan Chamsi-Pasha and Mohammed Ali Albar, 'Islamic medical jurisprudence syllabus: A Review in Saudi Arabia' (2017) 5 Med J Malaysia 278, 280.
[288] Ibid.
[289] The Qur'an [5: 39-40]: 'As for male and female thieves, cut off their hands for what they have done—a deterrent from Allah. And Allah is Almighty, All-Wise; But whoever repents after their wrongdoing and mends their ways, Allah will surely turn to them in forgiveness. Indeed, Allah is All-Forgiving, Most Merciful'; The Qur'an [83: 1-3]: 'Woe to the defrauders! Those who take full measure when they buy from people but give less when they measure or weigh for buyers'; The Qur'an [25: 63 and 67]: 'The true servants of the Most Compassionate are those who walk on the earth humbly [...]; They are those who spend neither wastefully nor stingily, but moderately in between'.
[290] Auda (n 278) 8 - 9.

that are not overtly covered in sources of *Shariah* law (*Qur'an*, *Sunnah*, *Ijma* and *Qiyas*).[291] For example, there are many contemporary issues that are not explicitly addressed in the primary sources of *Shariah* law. These include, but are not limited to, surrogacy, genetic testing, cosmetic surgery, assisted reproduction, and euthanasia.[292] The absence of precedent or jurisprudence in these areas means that Islamic jurists are obliged to confront novel ethical and legal challenges.[293] Therefore, Islamic jurists have sought guidance from the *Shariah*'s *Maqasid* in making legal and ethical decisions.[294] For example, the International Islamic Fiqh Academy formed their decision on the prohibition of human cloning based on the *Shariah*'s *Maqasid*.[295]

Whether directly or indirectly, the five *Maqasid* of the *Shariah* are integral to many areas and aspects of medicine.[296] Anything that protects the five *Maqasid* (objectives) is deemed desirable, whereas any action that contributes to the detriment of the five *Maqasid* is unethical and must be averted.[297] These *Maqasid* (objectives) alongside the Islamic legal maxims discussed in section 1.5.1., offer Islamic jurists an acceptable ethical and legal framework for determining the rights and wrongs of various medical issues, because they can be applied to unforeseen concerns.[298] For example, the issue

[291] Ibid.
[292] Mustafa (n 262) 479.
[293] Ibid.
[294] Ibid.
[295] For more information about this, see the International Islamic Fiqh Academy Resolution No. 94 (2/10) (1997) < Human Cloning – International Islamic Fiqh Academy – OIC (iifa-aifi.org)> accessed 15 February 2022.
[296] Mustafa (n 262) 480.
[297] Ibid.
[298] Al-Qaradaghi (n 268) 317; Mustafa (n 262) 480.

on whether what is so-called 'herd immunity', also known as 'population immunity',[299] can be used to achieve protection against COVID-19. It was held that it is not permissible to rely on herd immunity by allowing people to be exposed to the pathogen that causes the disease (COVID-19). This is because this would result in the deaths of vulnerable people such as the elderly, which violates the higher objective of the preservation of the soul.[300]

The four principles of justice, beneficence, non-maleficence, and autonomy exist in Islamic ethics.[301] However, as will be explained below, the principle of autonomy has a different interpretation in Islam to that in the contemporary biomedical ethics models introduced by secular western bioethical literature, such as a relational understanding of autonomy, Beauchamp and Childress's interpretation of autonomy, principled autonomy, and Kantian autonomy. In the context of Islamic ethics, this principle appears to be the most controversial one of the four principles, and some researchers have spoken of 'Islamic autonomy' versus 'Western autonomy', with there being major distinctions between these two types of autonomy.[302]

[299] 'Herd immunity' or 'population immunity' refers to 'the indirect protection from an infectious disease that happens when a population is immune either through vaccination or immunity developed through previous infection', World Health Organisation, 'Coronavirus disease (COVID-19): Herd immunity, lockdowns and COVID-19' < Coronavirus disease (COVID-19): Herd immunity, lockdowns and COVID-19 (who.int)> accessed 20 June 2022.

[300] International Islamic Fiqh Academy, 'The new Coronavirus and Related Medical Treatments and Legal Rulings' < توصيات الندوة الطبية الفقهية الثانية بعنوان «فيروس كورونا المستجد وما يتعلق به من معالجات طبية وأحكام شرعية» – مجمع الفقه الإسلامي الدولي (iifa-aifi.org)> accessed 20 June 2022.

[301] Mustafa (n 262) 482.

[302] Mohammed Ghaly, 'Deliberations within the Islamic Tradition on Principle-Based Bioethics: An Enduring Task' in Mohammed Ghaly (ed), *Islamic Perspectives on the Principles of Biomedical Ethics* (World Scientific Publishing, UK 2016) 34.

2.3 Understandings of Autonomy within Western and Islamic Perspectives

The principle of autonomy refers to the recognition and respect for each individual's entitlement to hold opinions, make decisions, and act in accordance with their beliefs and value systems, as long as this does not cause harm or infringe on the rights of others.[303] Over the past 40 years, this principle has become a key concept in the field of medical ethics. The principle of autonomy was affirmed in a court decision in the United States in 1914, which states:

> Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault, for which he is liable in damages. This is true except in cases of emergency where the patient is unconscious and where it is necessary to operate before consent can be obtained.[304]

This principle has resulted in a revolution from a paternalistic model of medical decision-making – where treatment decisions are made by doctors, rather than patients – to an autonomy-based approach, which empowers patients with capacity to make their own

[303] John Stuart Mill, 'On Liberty' (1863) in Mary Warnock (ed), *Utilitarianism, On Liberty and other Essays*, (Fontana, London 1962) 189, as cited in Onora O'Neill, *Autonomy and Trust in Bioethics* (Cambridge, Cambridge University Press 2002), 31.
[304] *Schloendorff v. Society of New York Hospital* [1914] 211 N.Y. 125 105 N.E. 92 (Justice Benjamin Cardozo).

treatment decisions.[305] However, despite the significance of the principle of autonomy, along with the other principles of beneficence, nonmaleficence, and justice, presented by Beauchamp and Childress as the theoretical framework for their model of biomedical ethics, there is still considerable debate about its nature and value. Some of the well-known understandings of the principle of autonomy alongside that within Beauchamp and Childress' principlism reflect the relational perspective, deontological perspective, and principled perspective.[306]

The concept of 'respect for autonomy' is used by Beauchamp and Childress to indicate that an individual has the ability for self-rule and that others should behave in a certain way in response to that capacity.[307] This means that a patient with capacity has the right to accept or refuse certain medical interventions or treatments and that a physician ought to respect the decision made by the patient. Beauchamp points out that in much of the bioethics literature, the principle of respect for autonomy has been deeply misrepresented and has been linked with 'individualism'.[308] As such, it has been interpreted to mean that an individual has the right to live their life as they wish and to take whatever actions they wish.[309] Beauchamp states that the principle of respect for

[305] Imogen Goold and Jonathan Herring, 'General Ethical Theories' in *Medical Law and Ethics* (Palgrave 2014) 10.
[306] There are other interpretations of the principle of autonomy, such as the utilitarian perspective. Presenting *some* interpretations of the principle of autonomy may help to gain a sense of how it is viewed from a secular perspective which can help to better understand the Islamic notion of autonomy.
[307] Tom L. Beauchamp and James F. Childress, *Principles of Biomedical Ethics* (7th edn, Oxford University Press 2013) 88.
[308] Tom L. Beauchamp, 'The Principles of Biomedical Ethics as Universal Principles' in Mohammed Ghaly (ed), *Islamic Perspectives on the Principles of Biomedical Ethics* (World Scientific Publishing, UK 2016) 95.
[309] Ibid, 96.

autonomy has 'nothing to do with individualism'.[310] Rather, it requires healthcare professionals to disclose information, probe for and ensure understanding and voluntariness, and encourage adequate decision-making.[311] True respect for the patient's autonomy requires more than mere non-interference.[312] Personal autonomy means self-rule free of controlling interferences by others and freedom from limitations that prevent meaningful choice.[313] Therefore, there are two basic conditions of autonomy: free will (the absence of controlling influences) and capacity (the ability of a capacitous adult to take intentional action).[314]

Another misconception of the principle of respect for autonomy is that it has priority over Beauchamp and Childress' other principles.[315] This is an 'incorrect' interpretation of their four-principles approach; no priority is given to the principle of autonomy, nor does any other principle in the four-principles approach have priority.[316] So while respect for autonomy emphasises the philosophy of *individual rights*, it is not excessively individualistic, and nor is it an overriding or ranked principle.[317] Thus, the principle of respect for autonomy is *not* absolute. In fact, Beauchamp has said that he and Childress 'defend a limited paternalism in physician care of the patient'.[318] In this regard, Beauchamp has stated that:

[310] Ibid.
[311] Ibid, 95.
[312] Ibid.
[313] Ibid, 94.
[314] Ibid.
[315] Ibid, 96.
[316] Ibid.
[317] Ibid.
[318] Ibid.

> Many kinds of competing moral considerations can validly override respect for autonomy under conditions of a contingent conflict of norms. For example, if our choices endanger the public health, potentially harm innocent others, or require a scarce and unfunded resource, exercises of autonomy can justifiably be restrained or overridden.[319]

According to many authors, respect for personal autonomy has protected patients from paternalism and from unwanted interference in their decisions,[320] with the exception of situations when refusal may cause harm to others, such as in the case of a contagious disease. Patients are empowered when their values, beliefs, and interests are at the centre of health care decisions.[321] Despite these positive achievements, this concept has received many critiques from different theoretical standpoints, some of which are the argument for reconceptualising the principle of respect for autonomy from a relational perspective, and a principled perspective.[322]

[319] Ibid.

[320] Nicola Grignoli, Valentina Di Bernardo, and Roberto Malacrida, 'New perspectives on substituted relational autonomy for shared decision-making in critical care' (2018) 22 Critical Care 260; Jennifer K Walter and Lainie Friedman Ross, 'Relational autonomy: moving beyond the limits of isolated individualism' (2014) 133 Pediatrics 16 - 23; Ho Mun Chan, 'Sharing Death and Dying: Advance Directives, Autonomy and the Family' (2004) 18 Bioethics 87-103.

[321] Carlos Gómez-Vírseda, Yves de Maeseneer, and Chris Gastmans, 'Relational autonomy: what does it mean and how is it used in end-of-life care? A systematic review of argument-based ethics literature' (2019) BMC Medical Ethics 1.

[322] Ibid, 2; Onora O'Neill, *Autonomy and Trust in Bioethics* (Cambridge, Cambridge University Press 2002).

The individual's freedom of choice from unwanted interference in their decisions is protected under the Beauchamp and Childress concept of autonomy. Non-interference extends to relatives as well.[323] From this perspective of autonomy founded on concepts of independence, control, and self-sufficiency, individuals are isolated from others by boundaries that can only be crossed by their voluntary consent.[324] However, under the relational theory of autonomy, the inherent meaning of personal relationships is acknowledged, and this includes aspects such as intimacy, peculiarity, community, sensitivity, non-consensuality and favouritism.[325] Moreover, the theory also recognises the importance of social relationships in shaping individual identity and one's capacity to make decisions. It is assumed that health and sickness related decisions involve multiple parties and not just the patient, which makes such decisions important interpersonal and family events.[326]

The conceptualisation of autonomy as independence has also been criticised from a principled perspective of autonomy, on the basis that it threatens and stands in the way of relationships based on trust.[327] O'Neill explains why this reading of autonomy as independence has negative impacts on relations of trust:

[323] Grignoli, Bernardo, and Malacrida (n 320) 3.
[324] Ibid.
[325] Ibid.
[326] Ibid, 4.
[327] O'Neill (n 322). See also, G M Stirrat and R Gill, 'Autonomy in medical ethics after O'Neill' (2005) 31 J Med Ethics 127.

> Trust is most readily placed in others whom we can rely on to take our interests into account, to fulfil their roles, to keep their parts in bargains. Individual autonomy is most readily expressed when we are least constrained by others and their expectations. Trust flourishes between those who are linked to one another; individual autonomy flourishes where everyone has 'space' to do their own thing. Trust belongs with relationships and obligations; individual autonomy with rights and adversarial claims.[328]

Hence, those who support principled autonomy believe that autonomy as a matter of independence cannot serve as an adequate or persuading foundation for medical ethics. They believe that autonomy should be centred in the context of relationships and community. Autonomy, in their view, should be interpreted 'in action whose principle could be adopted by all others'.[329] In this sense, it aligns with the deontological perspective of autonomy, particularly Kantian autonomy.

This is because in Kant's first formulation of the categorical imperatives, the universal law, the permissibility of a certain maxim (the reason or principle underlying the action) is determined by two different tests. The first test looks at whether the maxim can be put into a universal law with no contradiction, and the second test asks if it is possible to will this maxim to become a law that applies to all.[330] In other words, before performing an

[328] O'Neill (n 322) 25.
[329] Ibid, 85. See also, Stirrat and Gill (n 327) 127.
[330] Friedrich Heubel and Nikola Biller-Andorno, 'The contribution of Kantian moral theory to contemporary medical ethics: A critical analysis' (2005) 8 Medicine, Health Care and Philosophy 5, 7-8.

action, one should ask themselves two questions: can this action be made universal? Will I want my actions to be accepted by everyone? In this sense, Kant views autonomy from a different perspective, relating it more to will and practical reason, instead of self-determination.[331]

Kant's perspective of autonomy holds that human beings are regarded as rational beings and so, they are autonomous provided their action is guided by moral principles.[332] Thus, Kantian autonomy is, as O'Neill describes, 'a matter of adopting law-like principles that are independent of extraneous assumptions that can hold only for some and not for other agents'.[333] Another fundamental feature of Kantian theory is separating duty from inclination.[334] According to Kant, an action can only be morally justified if its motivation comes from a sense of duty, not from inclination, which is based on desire and is therefore subject to change.[335]

However, this sense of duty adopted by Kant does not mean that he does not give any account to self-determination and rights. Indeed, his second formulation of the categorical imperatives (always treating others as an end and never merely as means to an end), promotes the principle of respect for autonomy as self-determination which

[331] Heubel and Biller-Andorno (n 330) 7.
[332] Tom L. Beauchamp and James F. Childress, *Principles of Biomedical Ethics* (6th edn, Oxford University Press 2009) 346.
[333] Onora O'Neill, 'Autonomy: The Emperor's New Cloths' (2003) 77 Aristotelian Society Supplementary Volume 1, 16.
[334] Julia Driver, *Ethics: The Fundamentals* (Oxford: Blackwell 2007) 84.
[335] Ibid.

involves acknowledging one's decision-making rights.[336] This is because this formulation means that individuals should be treated with respect and as an end in themselves, not as merely means. Hence, not only does this prohibit the use of others as a means to one's ends without that person's consent, but it also requires one to make other people one's ends.[337] According to Kant, it is a violation of an individual's autonomy to treat them only as a means, without taking into account their goal.[338] This formulation has greatly influenced medical ethics, developing many principles such as informed consent and patient autonomy.[339]

Returning to O'Neill's principled autonomy, she views rights and duties as structurally connected to one another, with priority given to obligations.[340] Meaning, rights are linked to their counterpart obligations and so, a right only has an impact in connection to the obligation to which it relates: it has no independent value.[341] In this sense, autonomy, from a principled perspective, should be accompanied by a sense of obligation, tipping the scales in favour of obligations and respect that we owe to others rather than rights.[342] This focus of duties as adopted by Kantian autonomy and principled autonomy forms some level of similarity with the Islamic interpretation of autonomy, as I will discuss in section 2.3.1 below.

[336] Beauchamp and Childress (n 332) 346.
[337] Heubel and Biller-Andorno (n 330) 9.
[338] Beauchamp and Childress (n 332) 103.
[339] Ibid, 345.
[340] O'Neill (n 322) 78.
[341] Ibid, 79 - 80.
[342] Ibid, 73 - 85; Stirrat and Gill (n 327) 127.

Autonomy might also be tempered by human dignity or what has been called 'human dignity as empowerment'. In this regards, autonomous choices are promoted by respecting human dignity, as the latter entails acknowledging humans as individuals capable of planning and controlling their future.[343] However, it has been argued that human dignity can restrict a person's autonomy and choices rather than empowering them.[344] This argument is commonly used by those who contend that some controversial medical interventions, such as assisted reproduction and men bearing children, are against human nature and are, thus, contrary to human dignity.[345] This is because dignity is assigned to human beings by virtue of being human, making it an essential part of human nature. Hence, any interventions that go against human nature are seen as a violation to human dignity.[346] Moreover, it has been argued that there is a difference between autonomy and human dignity. Suzy Killmister suggests that dignity involves upholding individual's principles and values in a way that avoid feelings of humiliation and shame.[347] The difference between autonomy and human dignity is that respecting an individual's autonomy requires respecting their self-governance, whereas respecting an individual's dignity requires respecting their self-worth.[348]

By looking at the different versions of autonomy outlined in western bioethics, such as the ones discussed above, we can see how autonomy protects the interests of the

[343] Joseph Raz, *The Authority of Law* (OUP, Oxford 1979) 221.
[344] Deryck Beyleveld and Roger Brownsword, *Human Dignity in Bioethics and Biolaw* (OUP, Oxford 2001).
[345] Ibid.
[346] Ibid.
[347] Suzy Killmister, 'Dignity: Not such a Useless Concept' 36 Journal of Medical Ethics 160, 4.
[348] Ibid.

individuals, but also it can protect other considerations like dignity. Whilst it is thus clear that varied interpretations of the principle of respect for autonomy exist in western jurisdictions, such as England and Wales, it remains one of the fundamental ethical and legal principles of modern medical practice. At law, a connection is drawn with autonomy and it receives recognition and protection through the concept of consent.[349] Judicial decisions have confirmed that adults with capacity have the absolute right to refuse treatment with or without reason and regardless of its rationality,[350] even if their refusal is not in their best interests.[351] However, there is extensive debate regarding the legal focus on consent being *equivalent* to respecting patient autonomy. For instance, O O'Neill argues that consent and autonomy are in actual fact two different concepts, because the former seeks to promote non-deception and non-coercion rather than autonomy. She contends that the requirement to seek consent before performing any medical intervention provides a patient with a reasonable level of assurance that he or she 'has not been deceived or coerced'.[352] Natalie Stoljar argues that the concept of consent is one of 'opportunity,' but the concept of autonomy is one of 'exercise'.[353] As a result, she believes that consent reflects a patient's options on what is possible for them

[349] William J. Sullivan and M. Joanne Douglas, 'Maternal autonomy: ethics and the law' (2006) 15 International Journal of Obstetric Anesthesia 95, 95.

[350] *Re T (Adult: Refusal of Treatment)* [1993] Fam 95, *per* Lord Donaldson at 102: 'An adult patient who… suffers from no mental incapacity has an absolute right to choose whether to consent to medical treatment, to refuse it… This right of choice is not limited to decisions which others might regard as sensible. It exists notwithstanding that the reasons for making the choice are rational, irrational, unknown or even non-existent'.

[351] *Airedale NHS Trust v Bland* [1993] AC 789, per Lord Mustill: 'If the patient is capable of making a decision on whether to permit treatment, … his choice must be obeyed even if on any objective view it is contrary to his best interests'; In relation to a pregnant woman's right to refuse a medical intervention, Butler-Sloss LJ states: 'A mentally competent patient has an absolute right to refuse to consent to medical treatment for any reason, rational or irrational, or for no reason at all, even where that decision may lead to his or her own death', *Re MB (An Adult: Medical Treatment)* [1997] EWCA Civ 3093, para. 17.2.

[352] O O'Neill, 'Some Limits of Informed Consent' (2003) 29 Journal of Medical Ethics 4, 5.

[353] Natalie Stoljar, 'Informed Consent and Relational Conceptions of Autonomy' (2011) 36 Journal of Medicine and Philosophy 375.

to do, what is available to them to do, and whether to exercise these options. According to her, consent - the process of forming preferences - is not sufficient to ensure that the patient *exercises* their preference formation (autonomy), because the decision-making process is likely to be influenced by factors like cultural norms, the attitude of the patient's family, and the patient's race and class.[354]

Yet, in contrast, Tom Beauchamp and Robert Young each maintain that consent reflects the ethical principle of autonomy, and that the latter is the primary ground of a consent rule (referring to a patient's right to consent before being touched).[355] This is because seeking a patient's consent implies an acknowledgment of their right to self-determination, as well as their right to be protected from unwanted medical intervention. Considering this debate over whether consent is equivalent to autonomy, consent may be seen as an expression of autonomy, albeit that this expression is legally constructed and confined. Consent at law does not, in and of itself, recognise the richer dimensions of autonomy that approaches such as principled autonomy seek to capture. However, the legal requirement of consent can also be seen to protect bodily integrity and human dignity. In a medical setting, the need to obtain informed consent is significant because it is a reflection of the importance attached to patient autonomy in modern medicine and the retreat from paternalism.[356]

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[354] Ibid.

[355] Tom L. Beauchamp, 'Informed Consent: Its History, Meaning, and Present Challenges' in Helga Kuhse, Udo Schüklenk and Peter Singer (eds), *Bioethics*: *An Anthology* (3rd edn Wiley Blackwell 2016) 637; Robert Young, 'Informed Consent and Patient Autonomy' in Helga Kuhse and Peter Singer (eds), *A Companion to Bioethics* (2nd edn Wiley-Blackwell 2012) 531.

[356] Margaret Brazier and Suzanne Ost, *Bioethics, Medicine and the Criminal Law: Volume 3, Medicine and Bioethics in the Theatre of the Criminal Process* (Cambridge University Press 2013) 237.

In Islam, various *Qur'anic* passages show that human beings are given a degree of autonomy:

> There shall be no compulsion in [acceptance of] the religion. The right course has become clear from the wrong. So, whoever disbelieves in Taghut (i.e., devils and false Gods) and believes in Allah has grasped the most trustworthy handhold with no break in it. And Allah is Hearing and Knowing.
>
> The truth is from your Lord, so whoever wills - let him believe; and whoever wills - let him disbelieve.[357]

Allah said to the Prophet Muhammad (PBUH) 'And had your Lord willed, those on earth would have believed - all of them entirely. Then, [O Muhammad], would you compel the people in order that they become believers?'.[358] These *Qur'anic* verses clearly order freedom of faith, and freedom to either accept or reject the divine command. In addition, individual responsibility is emphasised as each individual is accountable before Allah for their actions.[359] All of this means that 'there is considerable room for personal autonomy in Islam'.[360]

[357] The Qur'an [2:256]; the Qur'an [18:29].
[358] The Qur'an [10:99].
[359] Mustafa (n 262) 482.
[360] Gillon R., *Principles of health care ethics* (Chichester: John Wiley & Sons 1994), as cited by Mustafa (n 262) 482.

If accepting religion, which is the most important thing for humans, cannot be by force, then accepting medication or surgery is also not to be by force.[361] Hence, the general rule is that coercion, intrusion, or even pushing to accept or refuse any type of medical intervention are not permitted. The *Sunnah* provides some examples that show respect for a patient's decision. For example, it was reported by Ibn Maajah, a medieval scholar of *Hadith*, and at-Tirmidhi, an Islamic scholar and collector of *Hadith*, that 'Uqbah ibn Aamir al-Juhani said: Prophet Muhammad (PBUH) said: ''Do not force your sick ones to eat or drink, for Allah gives them food and drink'''.[362] This *Hadith* has been interpreted by influential jurists to mean that if a patient does not eat willingly and is not growing weak due to lack of food, it is not permissible to force them to eat at such a time.[363] According to this, the basic principle is that a patient has a right to make their own decision if they have mental capacity, and that such a decision ought to be respected.[364] However, in cases where the patient's refusal to eat would place their life at risk, force-feeding in this situation may be permissible.[365] I will discuss in section 2.3.1 below how a patient's autonomy to make their own decision is restricted in certain situations and will also discuss the question as to whether non-consensual intervention is permitted in critical and life-saving cases in section 2.3.2 below.

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[361] Mohammed Ali Al-Bar and Hassan Chamsi-Pasha, *Contemporary Bioethics: Islamic Perspective* (Springer International Publishing, London 2015) 89.

[362] Narrated by Ibn Majah, 'Sunan Ibu Majah' <http://islamilimleri.com/Kulliyat/Hadis/Hadis/pg_007_0032.htm> accessed 30 June 2019; At-Tirmidhi, 'Jami` at-Tirmidhi' <http://islamilimleri.com/Kulliyat/Hadis/Hadis/pg_004_0030.htm> accessed 30 June 2019. "Own translation".

[363] For example, Imam Nawawī, a *Sunni Shafi'I* jurist, as cited by Islam Question and Answer, 'He was afraid that his sick father might die because he refused to eat, so he allowed the doctors to force-feed him; is he regarded as disobedient towards his father?' <https://islamqa.info/en/answers/192633/he-was-afraid-that-his-sick-father-might-die-because-he-refused-to-eat-so-he-allowed-the-doctors-to-force-feed-him-is-he-regarded-as-disobedient-towards-his-father> accessed 11 July 2019.

[364] Aksoy and Elmali (n 264) 217.

[365] Ibid.

Furthermore, it is well established that medical interventions cannot be carried out without a capacitous patient's consent, or their guardian's consent if the patient is deemed to lack capacity. Interference without a patient's consent is considered a transgression act which entails punishment. This is evident in a *Hadith* narrated by Aisha:

> We poured medicine into the mouth of Allah's Messenger (PBUH) during his illness, and he pointed out to us intending to say, ''Don't pour medicine into my mouth.'' We thought that his refusal was out of the aversion a patient usually has for medicine. When he improved and felt a bit better he said (to us.) ''Didn't I forbid you to pour medicine into my mouth?'' We said, ''We thought (you did so) because of the aversion, one usually has for medicine.'' Allah's Messenger (PBUH) said, ''There is none of you but will be forced to drink medicine, and I will watch you, except Al-`Abbas, for he did not witness this act of yours.[366]

Imam Ibn Qudamah,[367] one of the most influential jurists of the *Hanbali Sunni* school of law, has said that in relation to the requirement to obtain the patient's or guardian's consent before carrying out a medical intervention:

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[366] Narrated by Al-Bukhari, 'Sahih Bukhari' < Sahih al-Bukhari 6897 - Blood Money (Ad-Diyat) - كتاب الديات - Sunnah.com - Sayings and Teachings of Prophet Muhammad (صلى الله عليه و سلم)> accessed 7 July 2022. ''Translated by sunnah.com''.

[367] He is Imam Abū Muḥammad Abdullah Ibn Aḥmad Ibn Qudamah al-Maqdīsī, often referred to as Ibn Qudamah.

> if a young boy is circumcised without the permission of his guardian, or if a part of an adult's body was cut without his/her consent, or from a young boy without his guardian's permission, this intervention is a crime because it is an unauthorised cut. Whereas, if such an intervention is done with the individual's or guardian's consent, it will be legitimate because consent has been obtained.[368]

It is also not permissible for a doctor to coerce a patient into agreeing to a medical intervention, even where there is a reason for it, such as pain. Imam Al-Khatib Al-Sherbini,[369] a well-known *Shafi'i* scholar, has said that if a person has pain in his tooth and experts have said that the pain will only disappear with the extraction of the tooth, any intervention can only be done with the person's consent and 'if [the decayed tooth] cannot be cured, and he refused to have his tooth extracted, he ought not to be coerced to do so'.[370] This emphasis on the necessity of obtaining the patient's consent prior to any medical intervention shows that the consent rule is well established in *Shariah* law and, hence, patient autonomy is acknowledged.

Under *Shariah* law, there are a number of conditions for a consent to be valid: (i) it has to be given by a capacitous patient or their guardian if they lack mental capacity, (ii) it

[368] Ibn Qudamah, *Al-Mughni*, as cited by Mohammed Al-Shankiti, *ahkam aljrahah altibiya w alathar almutaratiba ealayha (Medical Surgery Provisions and their Implications)* (2nd edn Maktabat Alsahaba, Jeddah 1994) 109. "Own translation".

[369] He is Imam Shams Al-Din Muhammed Al-Sherbini Al-Khatib.

[370] Al-Khatib Al-Sherbini, *Mughnī al-Muḥtāj ʾilā Maʿrifat Maʿāniy ʾAlfāẓ al-Minhāj (the Enricher to Find the Right Path)* (1st edn Dar El-Marefah, Beirut- Lebanon 1997) 434. "Own translation".

must be free of coercion, (iii) it has to be an informed consent in which the patient is given information to enable them to consent to a treatment or procedure, and (iv) consent ought to be for a legitimate procedure (that is a procedure which does not result in a violation of *Shariah* law) and so,[371] consent is not to be recognised if it is for a *haram* procedure, such as sex change surgery.[372] This indicates that a patient's autonomy to make their own decisions has some sort of limitations, which I will discuss below.

2.3.1 Limits of Autonomy in Islam

While the fundamental core of an individual's autonomy is intrinsic to *Shariah* law, the ultimate concept of a human being's subservience to Allah differs dramatically from the philosophical or secular model of autonomy.[373] Accordingly, differences in the application and interpretation of the principle of respect for patient autonomy occur.[374] In Islam, an individual's actions are expected to be based on *'ilm* (knowledge), which is important in reaching a reasoned decision.[375] The root of this can be found in the *Qur'an*,[376] which puts 'its trust in the rational power of human beings to distinguish

[371] More information about the *Shariah* provisions regarding the permissibility of medical procedures, see section 2.2.1 in this chapter.
[372] Fahad Al-Rashudi, 'Medical Consent' in Abdullah Al-Omrani, Mishaal Al-Askar, Muhammad Al-Alfi, Mansour Al-Haidari, Khaled Al-Muhanna, Khaled Al-Omair, and Abdulaziz Al-Tamimi (eds), *Qadha (Judiciary)* (The Saudi Judicial Scientific Association, Riyadh 2019) 588 - 590; World Health Organization, Regional Office for the Eastern Mediterranean, 'International Islamic Charter of Medical and Health Ethics' (2005), Articles 14 and 18.
[373] Mustafa (n 262) 482.
[374] Hamideh Moosapour, Jannat Mashayekhi, Farzaneh Zahedi, and Others, 'General Approaches to Ethical Reasoning in Islamic Biomedical Ethics Discourse' (2018) 11 Journal of Medical Ethics and History of Medicine 1, 4.
[375] Aksoy and Elmali (n 264) 216.
[376] For example, the Qur'an [3:190]: ''Indeed, in the creation of the heavens and the earth and the alternation of the night and the day are signs for those of understanding''; the Qur'an [17:70]: ''And We have certainly honoured the children of Adam and carried them on the land and sea and provided for

between truth and falsehood'.[377] An explanation of this is given by Ebrahim: 'Reason was given to man so that he may be in a position to freely accept the Law and obey Allah, or not to do so at all', and 'If he would not be free, the burden of responsibility and morality would not have been placed upon him'.[378]

Therefore, patients are obliged to act with *knowledge* when making their decisions. Knowledge here is understood in the sense of an individual's *responsibility* to comply with Islamic rules and teachings when making their decisions. The knowledge of the rightness or wrongness of an action is provided in the divine commandments in the *Qur'an* and *Sunnah, as well as in the books of Fiqh.*[379] As Aksoy and Elmali assert, in Islam 'absolute knowledge is predominant over individual autonomy. Islam does not permit man to act as he wishes but limits him with certain rules'.[380] This means that Muslims can only act in the way already prescribed by Allah. In this regard, Bommel has argued that unconditional autonomy is 'very rare', as there will be a feeling of responsibility towards Allah, and the desire for social cohesion, in which family members are permitted to take an active role in decision-making, outweighs

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them of the good things and preferred them over much of what We have created, with [definite] preference''. Interpreters of the Qur'an have different statements about the basis of the (honour) meant in this verse. Ibn Abbas, a cousin of Prophet Muhammad (PBUH) and one of the early Qur'an scholars who was well-known for his critical interpretation of the Qur'an, said: the honour refers to the rational power of man to reason.

[377] Van Bommel A., 'Medical Ethics from the Muslim Perspective' (1999) 74 Acta Neurochir Suppl Wien 17–27, as cited by Anna E. Westra, Dick L. Willems and Bert J. Smit, 'Communicating with Muslim Parents: The Four Principles are not as Culturally Neutral as Suggested' (2009) 168 Eur J Pediatr 1383, 1385.

[378] Ebrahim A., 'Islamic Ethics' in Ebrahim A. (ed), *Biomedical ethics: Islamic perspective* (Nordeen, Kuala Lumpur 2003) 11 – 21, as cited by Westra, Willems and Smit (n 377) 1385.

[379] Jawed Akhtar Mohammed, 'The Ethical System in Islam – Implications for Business Practices' in Christoph Luetge (eds), *Handbook of the Philosophical Foundations of Business Ethics* (Springer, Dordrecht 2013) 873 - 874.

[380] Aksoy and Elmali (n 264) 216.

unconditional autonomy for Muslim patients.[381] Consequently, Westra, Willems and Smit argue that under *Shariah* law, 'personal choices are only accepted if they are the 'right' ones'.[382] This means that autonomy in Islam is balanced in line with the individual's responsibility to make the *religiously* 'right' decision. As such, there are some limits to an individual's autonomy to make their own decisions.

This Islamic interpretation of autonomy - which requires an individual to comply with Islamic rules - stems from a position that emphasises man's value as Allah's vicegerent on earth, the belief that human bodies belong to Allah and that each individual is fully responsible for ensuring that their body is not intentionally harmed.[383] This conviction translates into an obligation to care for one's body, in which the treatment of illness is, in some cases, obligatory on the patient (and on the physician).[384] Thus, the importance attached to the concepts of independence, control, and self-sufficiency is less in the Islamic model of autonomy than in the prominent individualised notion of autonomy such as that commonly found in secular Western bioethics. Here, I am not going as far as to say that the Islamic conceptualisation of autonomy is less selfish, but to highlight that it places less emphasis on an individualised conceptualisation of patient autonomy, since the patient is obligated to comply with Islamic rules when making their decisions.

[381] Bommel (n 377), as cited by Westra, Willems and Smit (n 377) 1385.
[382] Westra, Willems and Smit (n 377) 1385.
[383] Hanan A. Sultan and Joyce C. Harper, 'Legalization and Islamic Bioethical Perspectives on Prenatal Diagnosis and Advanced Uses of Preimplantation Genetic Diagnosis in Saudi Arabia' (2012) Journal of Clinical Research Bioethics 1, 2.
[384] The obligation to seek treatment will be discussed below.

Moreover, the Islamic notion of autonomy places an emphasis on public benefits and prioritising, in which the collective interest takes precedence over the individual's interests and the family as the decisive unit for any personal decision.[385] On the one hand, there are several Western philosophical perspectives of autonomy (i.e., the relational perspective) that share similarities with the Islamic perception, in that they recognise the importance of social reality in decision-making processes. On the other hand, there are other Western philosophical readings of autonomy (i.e., the individualistic conception of autonomy) that contradict this Islamic notion of autonomy, including the need to consider family values. To be more precise, under the individualistic interpretation of autonomy, familial influences on a patient's decisions are considered to be key examples of undesired pressure and paternalism.[386] This is because under this conception, decisions made by the individual are expected to be made independently of outside influences.[387]

In this regard, much of the Islamic-based bioethics literature, when discussing the difference between Western secular and Islamic autonomy, explains the difference as being because the former is centred around the notion of individualism, which is not accepted in Islam.[388] For example, some authors believe that a secular type of autonomy emphasises individualism (despite Beauchamp's view that this is not the case), in which the patient makes decisions without consideration for external

[385] Sultan and Harper (n 383) 2.
[386] Jonathan Breslin, 'Autonomy and the Role of the Family in Making Decisions at the End of Life' (2005) 16 Journal of Clinical Ethics 11 - 19; Anne Donchin, 'Autonomy, Interdependence, and Assisted Suicide: Respecting Boundaries/Crossing Lines' (2000) 14 Bioethics 187, 188.
[387] Breslin (n 386) 11.
[388] Mustafa (n 262) 482; Al-Bar and Chamsi-Pasha (n 361) 107 - 117.

interventions, such as those of one's own family or wider society.[389] In light of this, the health professional acts as a 'by-stander' who merely provides data.[390] Such an interpretation of autonomy marks a significant difference with the Islamic notion of autonomy because Islam does not uphold the notion that an individual can act however they wish for the sake of self-gratification and self-actualisation - because Muslims ought to act in the way already prescribed by Allah. In the light of this, while Islamic autonomy is based on *duties/responsibility*, individual autonomy, which continues to play a dominant role in Western bioethics, is often *rights*-based with a strong emphasis on individual rights, such as the freedom of each individual to choose and implement their own decisions, free from deceit, constraint, duress, or coercion, and without interference by others.[391]

However, engaging with a broader understanding of autonomy in Western framings, as I have discussed above, has illustrated that there are some versions of autonomy in Western bioethics that do take into account factors that the more individualistic versions do not. For instance, relationships and community considerations are valued in the relational and principled perspectives of autonomy. Under such perspectives, the conceptualisation of autonomy as being centred around individualism and independence is no longer dominant among bioethicists and rather it is associated with

[389] Ibid.
[390] Chamsi-Pasha and Al-Bar (n 361), as cited in Ghaly (n 302) 22.
[391] Mohammad Yousuf Rathor, Mohammad Fauzi Abdul Rani, Azarisman Shah Bin Mohamad Shah and Others, 'The Principle of Autonomy as Related to Personal Decision-Making Concerning Health and Research from an 'Islamic Viewpoint'' (2011) 43 JIMA 27, 28.

ideas of character from the 20th century.[392] Additionally, my discussion above demonstrated that autonomy, according to some versions of western bioethics such as Kantian autonomy and principled autonomy, should be tempered by obligations and duties that we owe to others rather than rights, forming some sort of similarities with the Islamic interpretation of autonomy. For example, Kant's account of the duties towards others (that is, to act legally, helpfully, and respectfully)[393] is well-rooted in the Islamic perspective of the duty to help others, if it is within one's ability:

> In Islamic law, a person is obliged to act, if the action is in his capacity. […]. If someone dies in a neighbourhood due to hunger or cold, the people of the neighbourhood who are able to take care of him are held responsible and are punished for this 'inaction or 'non-action'. It is especially important when it is a matter of life and death.[394]

This obligation to help others stems from a number of *Quranic* verses and *prophetic hadiths*.[395]

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[392] Breslin (n 386) 11; O'Neill (n 322) 23.

[393] Heubel and Biller-Andorno (n 330) 12.

[394] Sahin Aksoy, 'Some principles of Islamic ethics as found in Harrisian philosophy' (2010) 36 Journal of Medical Ethics 226, 227.

[395] For example, Allah says: 'Cooperate with one another in goodness and righteousness, and do not cooperate in sin and transgression.', the Qur'an [5:2]; From the Sunnah, the Prophet (PBUH) said: 'If anyone relieves a Muslim believer from one of the hardships of this worldly life, Allah will relieve him of one of the hardships of the Day of Resurrection. If anyone makes it easy for the one who is indebted to him (while finding it difficult to repay), Allah will make it easy for him in this worldly life and in the Hereafter', Narrated by Muslim, 'Sahih Muslim' < Hadith - The Comprehensive Book - Bulugh al-Maram - Sunnah.com - Sayings and Teachings of Prophet Muhammad (صلى الله عليه و سلم) > accessed 18 December 2023. ''Translated by sunnah.com''.

Moreover, Kantian duties towards oneself (that is, not to damage oneself and to develop oneself actively)[396] are also similar to the Islamic perspective of the duty not to cause harm to oneself and to care for one's body. Hence, I argue that the conceptualisation of autonomy as being rooted in relationships and with a more focus on obligations and duties rather than rights, as found in some versions of autonomy in Western bioethics, is somewhat similar to the Islamic interpretation of autonomy. However, there remains a clear difference between them. Under Kantian autonomy, duties towards oneself, such as not damaging oneself, are not considered legal duties towards oneself, because only actions *between* individuals are subject to juridical law.[397] This means that the requirement to obtain consent is maintained in life-saving cases, which entails that a doctor does not have a duty to save a patient's life *against* the latter's will.[398] This forms a clear difference with the Islamic interpretation of autonomy, in which the duty not to cause harm to oneself is considered a religious obligation, with the consequence that refusing a life-saving treatment is a sinful act from the patient's side and overriding such a refusal may be a *legal* obligation on the physician, as I will discuss in section 2.3.2 below.

Hence, Islamic autonomy is based on *duties/responsibility* with a strong emphasis on prevention of harm,[399] particularly the obligations to preserve life and seek treatment and to follow Allah's commands.[400] This accords with the elevated and sacred status

[396] Heubel and Biller-Andorno (n 330) 12.
[397] Ibid.
[398] Ibid, 13.
[399] Sultan and Harper (n 383) 2.
[400] Ibid; Rathor, Abdul Rani, Shah and Others (n 391) 29.

enjoyed by all forms of life within Islam. Life is not created by chance or by man. It is, rather, a gift. If life is to be valued, it must be preserved. That is the essence of the duty to preserve life, which has implications for autonomy. This obligation is best illustrated in the following *Qur'anic* passage:

> whoever kills a soul - unless as a punishment for murder or mischief in the land - it is as if they had killed all of humanity; and whoever saves a life, it is as if they had saved all of humanity.[401]

The obligation to preserve life refers to a person's physical body, including all internal and external organs.[402] The physician and the patient ought to prevent any malice or harm from coming to the patient's life, as well as seeking to promote the patient's welfare and interests.[403] Consequently, it is considered unethical to use any medication, treatment, or experiment, that harms or does not help one's body, organs, or internal systems.[404] Both the physician and the patient are, from a religious perspective, prohibited from using it.[405] This is because, according to Islam, a person's life, organs, internal systems, and any other part of their body do not belong to them, but to Allah.[406]

[401] The Qur'an [5:32].
[402] Al-Qaradaghi (n 268) 325.
[403] Ibid, 325 - 326.
[404] Ibid, 326.
[405] Ibid.
[406] Ibid.

Although Muslims believe that healing comes from Allah,[407] they have a duty to seek a treatment and a right to receive one – as will be discussed below. There are many *Hadiths* containing instructions to seek treatments, including 'Allah has sent down the disease and the cure, and has made a cure for each disease',[408] and the Prophet's (PBUH) response to the Bedouin who inquired if disease should not be treated, to which the Prophet (PBUH) said: 'Seek treatment, for Allah has not created any disease for which He has not also created the cure'.[409] The obligation to seek and consent to a treatment is viewed in the context of the specific circumstances. Thus, the provisions governing this obligation differ according to the situations and people involved, as indicated in this Resolution:

> - It is obligatory [*wajib*] in cases where not giving medication could cause death, disability, or the loss of a limb, or where the sickness is bound to spread if not treated, as in contagious diseases.
>
> - It is encouraged [*mustahabb*] in cases where not giving medication may weaken a person physically, and it is not as bad as the cases mentioned above. [i.e., where treatment or medication can prevent a patient deteriorating, it would be encouraged].

[407] Prophet Abraham (PBUH), a role model for Muslims, says in the Qur'an: 'And when I am ill, it is He [Allah] who cures me', The Qur'an [26:80].
[408] Narrated by Al-Bukhari, 'Sahih Bukhari: Book of Medicine' < كِتَابُ الطِّبِّ - صحيح البخاري (islamilimleri.com)> accessed 3 August 2021. ''Own translation''.
[409] Narrated by Abu Dawood, 'Sunan Abu Dawood: Book of Medicine' < كِتَاب الطِّبِّ - سنن أبي داود (islamilimleri.com)> accessed 3 August 2021. ''Own translation''.

- It is allowed [*mubah*] in cases which are not covered in the two preceding categories.

- It is discouraged [*makruh*] in cases where the treatment could lead to complications that are worse than the original complaint.[410]

In some situations, seeking a treatment or receiving a specific sort of treatment may be *haram* (prohibited).[411] For example, any medication containing alcohol or any intoxicating drink and the use of pork or porcine material.[412] *Haram* medication is, however, permitted only when there is no alternative medication, and when it is a life-saving case.[413] Hence, a patient, from a religious perspective, ought to give their consent where the treatment or intervention falls under the category of *wajib*. In section 2.3.2 below, I will discuss the effect of this on the patient's right to refuse a critical or life-saving intervention, and will address the question as to whether a physician is authorised to override such a refusal.

[410] International Islamic *Fiqh* Academy, 'Resolution on Medical Treatment' < مجمع الفقه الإسلامي الدولي - قرار بشأن العلاج الطبي (iifa-aifi.org) > accessed 4 August 2021. ''Translated by Islam Question and Answer, 'Ruling on giving medication and seeking the patient's permission' < Ruling on giving medication and seeking the patient's permission - Islam Question & Answer (islamqa.info) > accessed 4 August 2021''. For more information about the meaning of each category, see my discussion in Chapter 1.3.1.3.

[411] The Prophet (PBUH) said: 'Allah has sent down both the disease and the cure, and He has appointed a cure for every disease, so treat yourselves medically, but use nothing *haram* (unlawful)', Abu Dawood, 'Sunan Abu Dawud: Medicine (Kitab Al-Tibb)' <Medicine (Kitab Al-Tibb) - Sunnah.com - Sayings and Teachings of Prophet Muhammad (صلى الله عليه و سلم)> accessed 25 March 2022.

[412] Mohammed Ali Albar, 'Seeking Remedy, Abstaining from Therapy and Resuscitation: An Islamic Perspective' (2007) 18 Saudi Journal of Kidney Diseases and Transplantation 629, 633.

[413] Ibid. The decision on the use of *haram* medication in such a situation can be authorised by religious bodies. In Saudi Arabia, such a situation would be brought to the Council of Senior Scholars to determine whether it is permissible to use *haram* medication.

As mentioned in the Resolution above, an individual's decision not to accept treatment or guidance that might imperil the entire community can be overruled. According to Mohammed Ali Albar, these circumstances allow a Muslim government to make quarantine obligatory and to compel treatment because otherwise public health would be at threat.[414] It is also accepted that, on occasion, the restoration of health may require the acceptance of a lesser evil.[415] Thus, for example, although minor side effects are associated with COVID-19 vaccinations, they have been proven to protect against serious illness, reduce the need for hospitalisation and intensive care treatment, and avoid mortality. As per the principle that accepting a lesser harm is permissible to ward off a greater threat, and for the preservation of soul (*nafs*) (one of the *Shariah*'s *Maqasid*), Muslims can accept the COVID-19 vaccination even if it may cause them to briefly become unwell.[416] In fact, the International Islamic Academy issued a Resolution, in 1992, that 'The Muslim leader has the right to force medication in certain situations, such as a case of contagious disease, or the giving of vaccines or inoculations'.[417] In accordance with this, in March 2021, the Ministry of Health in Saudi Arabia announced that only those who had been vaccinated against COVID-19 would be permitted to attend the *Hajj* in 2021.[418] This guidance has remained the same for the 2022 *Hajj*.[419] In

[414] Albar (n 412) 632.
[415] Ibid, 630.
[416] International Islamic *Fiqh* Academy, 'The emerging coronavirus and related medical treatments and legal rulings' < توصيات الندوة الطبية الفقهية الثانية بعنوان «فيروس كورونا المستجد وما يتعلق به من معالجات طبية وأحكام شرعية» – مجمع الفقه الإسلامي الدولي (iifa-aifi.org)> accessed 14 March 2022.
[417] International Islamic *Fiqh* Academy, 'Resolution on Medical Treatment' < مجمع الفقه الإسلامي الدولي - قرار بشأن العلاج الطبي (iifa-aifi.org) > accessed 6 August 2021. ''Translated by Islam Question and Answer, 'Ruling on giving medication and seeking the patient's permission' < Ruling on giving medication and seeking the patient's permission - Islam Question & Answer (islamqa.info) > accessed 6 August 2021''.
[418] The Ministry of Health, 'Health Protocols for the 1441 AH Hajj Season to Prevent Covid-19 Disease during the Hajj and Umrah Period' < البروتوكولات الصحية للحرمين الشريفين للوقاية من مرض كوفيد-19 خلال فترة الحج و العمرة – الوقاية من كورونا (covid19awareness.sa)> accessed 14 March 2022.
[419] The Ministry of Health, 'The Mandatory Vaccinations for Pilgrims' < الأسئلة الشائعة عن الحج - ماهي التطعيمات الإلزامية للحجاج من خارج المملكة؟ (moh.gov.sa)> accessed 14 December 2022.

those instances, the autonomy of the patient/individual who does not wish to comply with the treatment or guidance is disregarded.

My discussions show that the principle of autonomy is evident in both Western secular and Islamic medical ethics, but that there are significant disparities in how the principle is interpreted and used. This backs up the World Health Organization's assertion in the World Health Report 2000 that the expectation of autonomy is 'universal', while acknowledging the fact that cultural differences influence how it is interpreted and implemented.[420] Furthermore, the sense of responsibility in making decisions that accord with *Shariah* law makes the Islamic notion of autonomy somewhat limited. This is because a patient who is reasoning from a religious perspective is more likely to have a strong normative view on whether a treatment or medical intervention is acceptable or not.[421] Taken together, this means that, in comparison to Western secular medical ethics, Islamic medical ethics places less emphasis on patient autonomy.[422]

2.3.2 How the Patient's right to Refuse an Intervention is Affected by Limited Autonomy in Islam

I have, in the previous subsection, explained the *Shariah* provision on *seeking* treatment in general and how it affects the requirement of consent. Here, I will address whether a patient has an absolute right to *refuse* treatment or an intervention that is believed to be

[420] World Health Organization, 'World Health Report 2000', as cited in Luis Justo and Jorgelina Villarreal, 'Autonomy as a Universal Expectation: A Review and a Research Proposal', (2003) 13 Eubios Journal of Asian and International Bioethics 53, 53.
[421] Emily Jackson, 'An Introduction to Bioethics' in *Medical Law: Text, Cases, And Materials* (4th edn, Oxford University Press 2016), 10.
[422] Ibid, 7; Mustafa (n 262) 482.

necessary to save their life or to prevent serious implications to their health (e.g., disability, or the loss of an internal or external organ). In particular, I will address the impact of the limited protection of autonomy on a patient's right to make decisions about life and death, and how the consent rule is affected by any limitations placed on a patient's autonomy. I will also examine whether a medical practitioner can override a patient's refusal of treatment in order to protect their life or health, or compel them to take treatment or undergo a medical intervention. This section might not be directly relevant to my specific focus in my research questions as it discusses refusal of life-saving treatment of *the patient*, rather than a woman's refusal of a treatment that is deemed necessary to save *the foetus'* life. However, it is still relevant in setting the legal background of refusing a life-saving intervention. I can then, in Chapter 3.3.3.1, focus more specifically on the issue of a maternal refusal of a necessary caesarean section and whether autonomy in Islam can accommodate such a refusal.

The *Shariah*'s provision on *refusing* to consent to a medical intervention that is believed to be necessary to save the patient's life or their health from deterioration, was the subject of debate among Muslim scholars.[423] There is a minority opinion from classical jurists that it is *not wajib* (not obligatory) to take medication in this case and that refraining from consenting is not considered a sin.[424] Their justification is that there is no certainty that the benefit from the treatment will be obtained and, therefore, consenting

[423] Al-Shankiti (n 368) 256.
[424] Abdulrahman Ahmad Al-Jarai, *abhath mueasirat fi alfiqat altibiyi (Contemporary Research in Medical Jurisprudence)* (Al-Waei Al-Islami, Kuwait 2020) 97.

to the treatment cannot be made *wajib* from the patient's side.[425] This justification is believed to be based upon what medicine was like in their time, as most of the medicines were primitive and did not give an effective result in most cases.[426]

The prevailing opinion of most classical and contemporary jurists[427] is that the patient, from a religious perspective, must consent to a medical intervention if it is believed, by a qualified doctor, to be necessary for saving their life or health, and that if the patient refuses to consent in such a case, their decision would be wrong according to their religion. In support of this view, they cite the statements of some *Shafi'i* scholars that 'if healing by the advised treatment is confirmed, consenting to that treatment is obligatory'.[428] This view is consistent with *Qur'anic* and *Prophetic* evidence, because Allah says 'do not throw yourselves with your [own] hands into destruction [by refraining]'.[429] In refraining from consenting to a life-saving intervention, a patient is throwing themselves and/or their health to perdition or damage.[430] It has also been reported that the Prophet (PBUH) said 'If you get news of the outbreak of a plague in a

[425] Ibid.
[426] Ali Muhammad al-Muhammadi, 'hakam al-tadawi fi al-islam (Ruling on medication in Islam)' (1991) 9 Journal of College of Sharia & Islamic Studies 133, 145. It should be acknowledged that this claim is arbitrary and evidence would be required to back it up. It may in fact be the case that the medical system in their time was more advanced than the medical system in our time from a number of perspectives.
[427] For example, Sheikh Ibrahim Yacoubi. See his book: *Shfa'a Altbarih Wala'dwa'a fi hkm altshrih wnkl ala'a'dha'a (Healing the Affliction and Medicines: Ruling on Anatomy and HealthTransplantation)* (maktabat Alghazali, 1986) 85 - 86; Sheikh Jad Al-Haq Ali, see his *fatwa* published in Egyptian Fatawa number 10/3499, as cited by Al-Shankiti (n 368) 258.
[428] Al-Shankiti (n 368) 258. ''Own translation''.
[429] The Qur'an [2:195].
[430] Al-Shankiti (n 368) 259.

land, do not enter it'.[431] Not entering the plagued land is a means of protecting a person's health and, hence, it is *not* permissible to enter such a land. Consenting to a life-saving intervention is a means of protecting the patient's health and so, doing otherwise is a means of destroying their health.[432]

Based upon the above, it is *wajib* (obligatory) for a patient to consent to a life-saving intervention and refusing to consent in such a case is *haram* (forbidden).[433] This means that a patient would, from a *religious* perspective, be obliged to consent to an intervention to maintain their life or health, as doing otherwise will be considered a sin for which they will be accountable before Allah in the Hereafter.[434] This ultimately indicates that the Islamic notion of autonomy does *not* grant a patient an absolute right to make their own decisions about life and death, nor is their right to *refuse* such a treatment/intervention absolute, at least from a religious perspective. Meaning, a Muslim patient *has* a right to consent or refuse a treatment or a medical intervention that falls in the categories of *mustahabb* (encouraged), *mubah* (allowed), and *makruh* (discouraged).[435] Nonetheless, they do *not* have a right to refuse a treatment or medical intervention that is *wajib* (obligatory), which applies to life and death interventions. This is, as such, at odds with a secular notion of autonomy which acknowledges that adults

[431] Narrated by Al-Bukhari, 'Sahih Bukhari' <http://islamilimleri.com/Kulliyat/Hadis/Hadis/pg_001_0057.htm> accessed 1 December 2019. ''translated by Encyclopedia of Translated Prophetic Hadiths''.
[432] Al-Shankiti (n 368) 259.
[433] Ibid, 260.
[434] Aksoy and Elmali (n 264) 216.
[435] For more information about the provisions governing the obligation to seek treatment, see Resolution issued by the International Islamic *Fiqh* Academy in section 2.3.1 above.

with capacity have an absolute right to consent or refuse treatment, even if doing so is contrary to their best interests.[436]

Given this, can a medical practitioner be permitted to override a patient's refusal decision in life-or-death interventions? In this regard, perspectives range from allowing non-consensual interventions to be performed, to considering them prohibited and disapproving of them. According to Aksoy and Elmali, if there is a prevailing opinion that it is a matter of necessity to undergo a medical intervention in order to preserve a patient's life or to protect them from being seriously harmed, the physician should legally be authorised to act accordingly to protect health and life.[437] In the same vein, Westra, Willems and Smit argue that the notion of autonomy in Islam accommodates an overriding of the patient's refusal to protect them from their harmful decisions.[438] This argument is supported by the fact that Islam places a significant focus on health promotion and disease prevention, making it obligatory for a Muslim physician to dissuade activities that are harmful to one's or society's health.[439] Among those who take this opinion is Muhammad Adnan Saqqal who holds that:

> When there is an agreement on a particular medical opinion from a number of specialised doctors, then there must be laws condemning patients who do not comply with the medical opinion and cause the occurrence of unfortunate

[436] For more information about this secular notion of autonomy, see section 2.3 above.
[437] Aksoy and Elmali (n 264) 216.
[438] Westra, Willems and Smit (n 377) 1385.
[439] Rathor, Abdul Rani, Shah and Others (n 391) 27.

> consequences [...], is this different from the one who throws themselves into the fire intent to commit suicide with the difference in intent, goal, crime and psychological situation?[440]

This argument means that the Islamic notion of autonomy can be used to support overriding a patient's autonomy, since their legal and ethical right to autonomy can be restricted on the basis that their refusal that could cause severe harm or death to themselves is *not* in line with Islamic rules to refrain from making harmful decisions (that form part of the Islamic notion of autonomy). This would, thus, mean that when qualified doctors agree that there is a need to perform a certain medical intervention for the sake of protecting a patient's life or health from severe deterioration, their intervention ought not to be restricted by the consent or refusal of the patient. In my opinion, this argument is quite paternalistic as it indicates that doctors 'know best' what the patient's best interest is and, thus, life-saving decisions ought to be made by them, rather than the patient.

Moreover, if medical practitioners are permitted to override refusals that would endanger a patient's life or health on the basis that their refusal is, from a *religious* perspective, wrong, then this would be an interference with a patient's relationship with Allah. This would counter the general Islamic rule that emphasises an individual's responsibility for their actions before Allah. I, hence, argue that, ethically, a patient

[440] Muhammad Adnan Saqqal, 'Medical treatment' <https://al-maktaba.org/book/8356/14930#p1> accessed 25 September 2020. ''own translation''.

should not make a religiously wrong decision, but that no-one can interfere to prevent them from doing that.

A patient's values and choices must be carefully considered and accepted, and thus some authors have, rightly, argued that overriding a patient's refusal of life-or-death interventions should legally be rejected (so long as the patient is capacitous when making this decision). For example, Muhammad Al-Bar highlights the importance of obtaining consent from the patient before any medical intervention or treatment can be carried out. He also asserts that capacitous patients have the right to refuse such interventions if they so wish.[441] Compelling an individual to accept medical treatment is regarded to be a transgression, even if it is carried out with good intentions (i.e., to treat their illness).[442] He maintains that so long as a patient is capable of making their own medical decisions, it is from a legal perspective *not* permissible to disregard their decision.[443]

In line with this argument, Hani Al-Jubeir maintains that the fact that withholding consent to a critical or life-saving treatment or a medical intervention is, from the patient's position *haram* (prohibited), does *not* overrule the consent rule.[444] In other words, the need to obtain a capacitous patient's consent ought not to be affected by the fact that

[441] Muhammad Ali Al-Bar, 'Medical Treatment: Patient Consent and Treatment of Terminal Cases' <https://al-maktaba.org/book/8356/14855> accessed 27 September 2020.
[442] Ibid.
[443] Ibid.
[444] Hani Al-Jubeir, 'Consent to Conduct Medical Operations: Its Provisions and Effects' < http://almoslim.net/node/82178> accessed 23 June 2020.

consent on the part of the patient is *wajib* (obligatory).[445] He adds that medical practitioners have no authority to carry out interventions and treatment without receiving consent from a capacitous patient, irrespective of the negative effects that this may have on their life or health.[446] This belief is further supported by Abdulrahman Al-Jarai, who points out that a patient's religious obligation to consent to treatment or an intervention in life-or-death situations, refers *only* to the patient being held accountable before Allah for their refusal decision.[447] Therefore, from a religious perspective, being required to give consent does not imply that the capacitous patient should be forced to either take medication or undergo medical interventions.[448]

In the view of some jurists, overriding a capacitous patient's decision to refuse treatment or interventions in life-threatening situations falls under the category of *makruh* (disapproved). For example, according to Zakariyya al-Ansari, a well-known ***Shafi'i*** jurist, 'it is *makruh* (disapproved) to force him [the patient] to take medicine in cases where … it is thought that not taking it may lead to death'.[449] Concurring with this opinion, Mohamed El-Sherbini and Ibn Sharaf Al-Nawawi hold that it is *makruh* (disapproved) to compel a patient to receive treatment or to undergo a medical

[445] For more information about provisions of seeking and consenting to a treatment, see my discussion of the Resolution issued by the International Islamic Fiqh Academy, section 2.3.1 above.
[446] Hani Al-Jubeir, 'Consent to Conduct Medical Operations: Its Provisions and Effects' < http://almoslim.net/node/82178> accessed 23 June 2020.
[447] Al-Jarai (n 424) 101.
[448] Ibid, 101 - 102.
[449] Zakariyya al-Ansari, *ad-Durar al-Bahiyyah fi Sharh al-Bahjah al-Wardiyyah*, as cited in Islam Question and Answer, 'Ruling on giving the patient medicine without his knowledge' <https://islamqa.info/ar/answers/286408/حكم-اعطاء-المريض-الدواء-دون-علمه> accessed 22 December 2019. ''Own translation''.

intervention.[450] This is because it interferes with the patient's own choices and desires, which is considered to be wrong because a capacitous patient has the right to make decisions regarding what happens to their own body.[451] Considering compelling the patient to receive treatment is *makruh* (disapproved) means that, although not recommended, a patient's refusal decision can be overridden if they may die if the intervention is not carried out. This is because *makruh* acts are those in which the *Shariah* encourages individuals *not* to do them but it does *not* prohibit them.[452]

Ali al-Muhammadi adopts an interesting perspective, holding that a patient's consent is the basis for any medical intervention or treatment, as long as the patient does not reach a state of danger, in which there is no need to obtain their consent.[453] He justifies his opinion by saying that it is in accordance with the Islamic legal maxim of 'necessities permit prohibitions', and with one of the *Shariah*'s five main objectives - to protect the soul and the body from perishing.[454] The International Islamic *Fiqh* Academy issued a Resolution (No. 184) excluding life-or-death situations from the consent rule (referring to a patient's right to consent before being touched) and from the right to refuse medical interventions.[455] Accordingly, operating without a patient's consent is legally permitted to

[450] As cited in Muhammad Nasser Al-Masaad, *Alqararat Al-jinayat Al-tibiyat Lihayyat Kibar Aleilma'i (Medical Criminal Decisions of the Council of Senior Scholars* (Published Masters' Thesis, Naif Arab University of Security Sciences, 2003) 169.
[451] Ibid.
[452] For more information about the Legal Norms of the *Shariah*, see Chapter 1.3.1.3.
[453] al-Muhammadi (n 426) 161.
[454] Ibid.
[455] The International Islamic Fiqh Academy, 'Resolution No. 184: Ruling on Consent for Urgent Medical Operations', issued in 2009 < http://www.iifa-aifi.org/2314.html> accessed 16 August 2021. This Resolution is discussed in more details in relation to maternal refusal of a necessary caesarean section in Chapter 3.3.3.2.

protect their life.[456] The Academy's decision is made in conformity with the *Shariah*'s provisions of necessity.[457]

The suggestion that a patient's right to refuse treatment should be overridden based on *Shariah* provisions of necessity and soul preservation is rejected by Al-Jarai, who argues that capacitous patients have the right to decide whether they wish to provide or withhold consent to medical treatments, even in cases where medication/interventions are critical in saving the patient's life.[458] He argues that while it is acknowledged that, in a life-or-death situation, medication is necessary to save a patient's life from death, deciding on whether to give or withhold consent is entrusted to the capacitous patient and not to others.[459] Therefore, the doctor's obligation is to explain to a patient the importance of the treatment or medical intervention, as well as the implications of refusing it.[460] The decision is then left to the patient whether to consent, without coercion or compulsion. If the patient refuses, their refusal should be documented.[461] The argument put forward by Al-Jarai is largely in line with secular perspectives on autonomy, in that it upholds the rights of capacitous adults to refuse treatment if they so wish, irrespective of the perceived rationality of this decision and even if the decision is not in their best interests.

[456] Ibid.
[457] Ibid.
[458] Al-Jarai (n 424) 99.
[459] Ibid.
[460] Ibid, 101.
[461] Ibid, 102.

In contrast to this perspective, Fahd Al-Rashudi explains that the right to consent related to the objective of soul preservation is not a sole right of the patient, but rather it is shared between the patient and the creator (Allah).[462] This is because seeking medication in life-threatening cases is *wajib* (obligatory) as it relates to the risk of losing one's soul and it is generally believed that Allah's rights take precedence over those of the patient.[463] Therefore, when a patient fails to provide consent, they are agreeing to give up their right to treatment.[464] However, they have no right to forfeit Allah's right to soul preservation.[465] In line with this, Al-Rashudi argues that the preservation of the soul - being one of the *Shariah*'s high *Maqasid* - is one of the rights that cannot be forfeited since it is a right of Allah.[466] He thus asserts that medical practitioners have an obligation to perform critical medical interventions regardless of consent in order to preserve the patient's life.[467]

Given all of the accounts discussed above, it is clear that there are different perspectives when it comes to the rule of consent and overriding a capacitous patient's refusal, and how the rule of consent is impacted by the more limited recognition of autonomy in Islam. Several researchers believe that a patient's choices should be accepted at all costs (even if it results in the loss of life), so long as they are considered capacitous, because they have the right to autonomy over their own body. However, several other researchers disagree with this perspective, as they believe that limited

[462] Al-Rashudi (n 372) 598.
[463] Ibid, 603 - 604.
[464] Ibid.
[465] Ibid.
[466] Ibid.
[467] Ibid, 604.

autonomy and the provision of necessity can be employed to override refusal decisions in life and death situations. Others believe that the right to decide between life and death, as well as the right to preserve the soul, lie solely with Allah and thus no other human being has the authority to override the rights of Allah, not even the patient themselves and so, medical practitioners are obligated to interfere even without a patient's consent.

2.4 Conclusion

My aim in this chapter has been to shed light on Islamic medical ethics by examining interpretations of autonomy and highlighting any differences between Islamic and Western, predominantly secular medical ethics. The purpose has been to address issues directly related to the potential conflict surrounding caesarean refusal cases and a pregnant woman's right to autonomy. Thus, there is a manifest need for more clarification on the concept of autonomy as it relates to the issue in question.

I have shown that Islamic medical ethics is *faith*-based as it considers *Shariah* law to be its foundation for determining what is ethically (and legally) right or wrong in human conduct. By contrast, in a Western secular model of medical ethics, human reason and experience play a major role in determining what is right and wrong action. Moreover, I have discussed the *Shariah*'s five higher *Maqasid* (objectives) and showed that this Islamic framework is recognised as a crucial intellectual tool via which rulings, *fatwas*, and Islamic reform can be evident. I have also discussed the roots of the Islamic legal

and ethical doctrine that the autonomy of the patient should be respected, and have explored how this differs from secular concepts of autonomy. In some Western interpretations of autonomy, such as individualistic versions, autonomy is to be predicated upon the notion of rights, particularly in regard to the individual. Under this rights-based model, an individual is at liberty to choose and apply their own choices after being provided with sufficient information and without being subjected to undue pressure, compulsion, or control.

By contrast, Islamic bioethics is based on concepts of duty and responsibility, such as the need to adhere to Allah's commands. This sense of obligation to Allah limits pious Muslims' personal decisions because it requires acknowledgement of the fact that certain conduct is prohibited (*Haram*), thereby subjecting autonomy to the idea that individuals are obligated to make choices that are religiously correct. This illustrates that, in comparison to a secular model of autonomy, the Islamic model of autonomy places less emphasis on the ideals of independence, control, and self-sufficiency. This indicates that patient autonomy is less emphasised in Islamic medical ethics compared to Western secular medical ethics. I have, however, shown that some Western readings of autonomy, such as the Kantian autonomy and principled autonomy, do have this focus on autonomy as being centred around duties and obligations rather than rights, forming some similarities with the Islamic interpretation of autonomy.

I have then discussed how the consent rule in life-threatening situations is affected by the limited autonomy in Islam, and whether a patient's refusal to consent to such life-

saving interventions can be overridden by the fact that consent to such interventions is *wajib* (obligatory). It has been shown that there is a difference of opinion amongst researchers in this regard. This chapter provides necessary background knowledge regarding the principle of autonomy in Islam. It therefore offers a backdrop to the next chapter in that it assists in addressing my thesis' questions regarding whether autonomy in Islam can accommodate maternal refusal of a necessary caesarean section that could save the foetus' life. Is a pregnant woman's right to autonomy to be respected when doing so could result in death or serious injury to the foetus? How does the Islamic concept of autonomy apply to the potential for maternal-foetal conflict in the context of necessary caesarean section refusal? Can the restricted Islamic notion of autonomy be used to overrule a maternal refusal of a necessary caesarean section? These and other important matters will be discussed in the next chapter.

Chapter 3: The *Shariah* Law on Potential Maternal-Foetal Conflict in Caesarean Refusal Cases

3.1 Introduction

As I have suggested in Chapter 1, in order to understand the Saudi law's stance on potential maternal-foetal conflict in caesarean refusal cases, an appreciation and elaboration of how the *Shariah* views this issue is required. My objective in this chapter is to explore and evaluate the legal status of the foetus under *Shariah* law, and to consider how it approaches the potential for maternal-foetal conflict in the context of refusal of necessary caesarean section and other relevant cases. This chapter will provide an answer to the thesis question of whether the notion of autonomy in Islam accommodates maternal refusal of a necessary caesarean section, and whether the Islamic notion of autonomy can be used to override such a refusal. It will also provide a response to the thesis question of whether different approaches to the issue in question can be adopted from within *Shariah* law.

To achieve these aims, in section 3.2 I will focus on the legal status of the foetus based on the four *Sunni* schools of law and will explain the different stages of foetal development and their implications for determining the foetus' legal status. This is necessary because these stages provide the basic terminology that form the discussion of the law regarding the status of the foetus among the four *Sunni* schools of law. I will, then, in section 3.3, explore and examine the *Shariah* law's stance on potential maternal-foetal conflict cases, such as abortion and operating on a dead pregnant

woman in order to deliver a living foetus. This will involve a discussion of the different interpretations and understandings of relevant provisions of the *Qur'an* and the *Sunnah* amongst the *Sunni* schools of law. I will discuss the provisions and approaches adopted by these schools to illustrate the different rulings and opinions on those matters. I will also highlight and consider contemporary *fatwas* and rulings that are concerned with maternal refusal of necessary caesarean sections.

3.2 Stages of Foetal Development and their Implications for the Legal Status of the Foetus in *Shariah* Law

3.2.1 Stages of Foetal Development

Classical and contemporary jurists, unanimously, understand foetal development through several *Qur'anic* passages. One key passage is as follows:

> And certainly did We [i.e., Allah] create man from an extract of clay. Then We placed him as a sperm-drop (*nutfa*) in a firm lodging. Then We made the sperm-drop into a clinging clot (*alaqa*), and We made the clot into a lump of flesh (*mudgha*), and We made [from] the lump, bones, and We covered the bones with flesh; then We developed him into another creation (*khalqan akhar*). So blessed is Allah, the best of creators.[468]

[468] The Qur'an [23: 12-14]. Another example is: 'O People, if you should be in doubt about the Resurrection, then [consider that] indeed, We created you from dust, then from a sperm-drop, then from a clinging clot, and then from a lump of flesh, formed and unformed - that We may show you. And We settle in the wombs whom We will for a specified term, then We bring you out as a child', the Qur'an [22:5].

The different phases of foetal development are further elaborated in a *Hadith* specifying the time frame given for each phase:

> For every man, the components of his creation are gathered together in his mother's womb for forty days; then he remains a clot of blood (*alaqa*) for the same period; then he is a clump of flesh (*mudgha*) for the same period. Then, Allah sends an angel who is commanded regarding four things: his deeds, his share of sustenance, his term of life, and his felicity or damnation [in the Hereafter]. Then the spirit is breathed into him [...].[469]

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[469] Narrated by Al-Bukhari, 'Sahih Bukhari' <http://islamilimleri.com/Kulliyat/Hadis/Hadis/pg_001_0042.htm> accessed 2 February 2020. ''own translation''. There is another *Hadith* narrated by Huzaifa Ibn Aseed which says: 'When forty-two nights pass after the semen gets into the womb, Allah sends the angel and gives him shape. Then he creates his sense of hearing, sense of sight, his skin, his flesh, his bones, and then says: My Lord, would he be male or female? And your Lord decides as He desires and the angel then puts down that also and then says: My Lord, what about his age? And your Lord decides as He likes it and the angel puts it down. Then he says: My Lord, what about his livelihood? And then the Lord decides as He likes and the angel writes it down [...]', narrated by Muslim, 'Sahih Muslim' < Sahih Muslim 2645a - The Book of Destiny - كتاب القدر - Sunnah.com - Sayings and Teachings of Prophet Muhammad (صلى الله عليه و سلم)> accessed 15 July 2022. ''Translated by sunnah.com''. From a human biology or obstetric perspective, the formation of the embryo's organs or organogenesis is calculated to occur at the 4th and 8th week of conception. At the 42nd day, the embryo will be at zenith along with the gender being determined. But prior to this, the embryo possesses a gonad where the gender has yet to be formed. Prior to the 20th week, the brain is still at development stage with the absent of synapses with the lower centres within the cerebral cortex. The time period is calculated based on the woman's last menstrual period, which is at 120 days from fertilization or conception. During the Conference on Ethics of Organ Transplantation that took place in Ottawa, Canada for 4 days from 20th to 24th August 1989, Dr. Koren J presented a paper pertaining to foetuses being dissected due to abortion. The research has shown that the higher and lower centre of the cerebrum do not function until it reaches the 20th week of pregnancy. It is evident that both sayings of Prophet Muhammad (PBUH) (the *Hadith* of 42 days and that of 120 days) refer to various stages of the foetus' CNS development (congenital central nervous system). The *Hadith* of 42 days is relevant to the brain stem's function and development, while the *Hadith* of 120 days is about the higher centres and their control over the lower ones in the CNS. It is evident that the *Hadith* of 120 days refers to the ensoulment or when the spirit enters the foetus's body, Mohammed Ali Al-Bar and Hassan Chamsi-Pasha, *Contemporary Bioethics: Islamic Perspective* (Springer International Publishing, London 2015) 165 - 166. Due to my lack of knowledge about human biology, the question of how biology and religion sit/fit together regarding foetal development is not within the scope of my thesis's research questions.

In explaining this *Hadith*, Al-Hafiz bin Rajab says that:[470]

> This *hadith* indicates that the foetus passes, during 120 days, through three phases, in every forty days of them they are in a phase; so they are in the first forty days *nutfa*, then in the second forty days *alaqa*, then in the third forty days *mudgha*. Then, after the 120 days, the angel breaths into them the spirit […].[471]

From these *Qur'anic* and *Prophetic* passages, it is clear that there are four stages of foetal development: the *nutfa*, *alaqa*, *mudgha*, and then the bone and flesh stage, which is also called *khalqan akhar* (the infusion of the soul stage). These stages provide the basic terminology that form the determination of the legal status of the foetus in *Shariah* law. The *nutfa* is a drop of the mixture of male and female fluids (the sperm and ovum) in the uterine or the Fallopian tubes.[472] It is described as the 'zygote' (fertilized egg),[473] and this stage covers the period from fertilisation to implantation.[474] According to the *Hadith* noted above, this stage lasts for 40 days before the fertilised egg implants itself in the uterus, where this stage ends and the second stage begins. The foetus during the

[470] He is Imam Zayn al-Din Abd al-Rahman Ibn Rajab al-Hanbali, a *Hanbali* jurist well-known as Al-Hafiz bin Rajab (died 1392 C.E.).
[471] Imam Zayn al-Din Ibn Rajab al-Hanbali, 'The Compendium of Knowledge and Wisdom', in Shoaib Al-Arnaout and Ibrahim Bajis (eds) (Al-Resala Foundation Publishers, Beirut 1999) 155 - 156. ''own translation''.
[472] Sabiha Saadat, 'Human Embryology and the Holy Quran: An Overview' (2009) 3 International Journal of Health Sciences 103, 105.
[473] Esmail Zadeh Mahdi, Farhadi Abolfazl and Shah Ghasemi Hamid, 'Developmental Biology in Holy Quran' (2012) 3 Journal of Physiology and Pathophysiology 1, 2.
[474] Saadat (n 472) 105.

alaqa stage (days 41-80) takes the shape of clotted blood that hangs to the lining of the uterus.[475] Cell growth and organogenesis (formation of organs in the embryo) takes place during this stage and continues during the next stage.[476]

They, then, develop into a lump, *mudgha*. During the *mudgha* stage (days 81-120), the rapid growth of cells and intense activity with regard to the foetus' organogenesis takes place within 40 days,[477] and some of their organs begin to appear, such as the lips, tongue and the eyes.[478] As I explain in sections 3.2.2 and 3.3 below, the viability of a foetus makes no legal difference because the concept of ensoulment determines their legal status and forms the legal discussion of the potential maternal-foetal conflict cases.

Following these stages, the *Qur'an* states: '[…] and We made [from] the lump, bones, and We covered the bones with flesh; then We developed him into another creation (*khalqan akhar*)'.[479] The bone and flesh stage or the infusion of the soul stage (days 121-birth) is characterized by the bone and flesh formation which, gradually, transforms the foetus from the image of *mudgha*, which has no clear distinguished human structure, to the image of the skeleton which gives the foetus the human shape.[480]

[475] Mahdi, Abolfazl and Hamid (n 473) 3.
[476] Al-Bar and Chamsi-Pasha (n 469) 165.
[477] Mahdi, Abolfazl and Hamid (n 473) 4.
[478] Mona Saeed Taha Al-Aliwa, *Al'ahkam alfaqhiat altibiyat alkhasat bialjinin waltfl: dirasatan faqahiat almuqarana (Medical Jurisprudence Rulings on the Foetus and Child: A Comparative Jurisprudence Study)* (1st edn Alayaser, Saudi Arabia 2017) 78.
[479] The Qur'an [23: 12-14].
[480] Mahdi, Abolfazl and Hamid (n 473) 4 - 5.

According to the *Hadith*, during this stage, the infusion of the soul takes place and their future is established by Allah. Accordingly, the foetus becomes a person in a legal sense and is, thus, granted some legal rights and protections,[481] as I will explain in section 3.2.2.2 below.

A significant feature of this stage is the interpretation of the phrase '[…] then We developed him into another creation (*khalqan akhar*)'.[482] Interpreters of the *Qur'an* have differed on the meaning of this, with the majority opinion interpreting this phase as referring to the transformation of the foetus from the three stages during the first 120 days, where they are spiritless and have no features of the human shape, to the fourth stage where the soul has been breathed into the foetus and they develop into a human being and their organs, fingers and external genitalia are distinguished.[483] Others, however, have interpreted the phrase as meaning the foetus after birth.[484] Although this seems to be a marked disagreement, the prevailing opinion is that represented by the majority opinion of the *Qur'an*'s interpreters, which emphasises the significance of the infusion of the soul into the foetus after they were spiritless.[485] This is because the majority opinion of classical jurists/ *Qur'an*'s interpreters in *Shariah* law is considered to be more plausible to represent the true Islamic *Shariah* stand/stance and, hence, is

[481] Ibid, 4.
[482] The Qur'an [23: 12-14].
[483] Islamweb.net, 'The Interpretation of Al-Tabari' < https://islamweb.net/ar/library/index.php?page=bookcontents&idfrom=3446&idto=3446&bk_no=50&ID=3470> accessed 8 February 2020.
[484] Ibid.
[485] Ibid; Al-Aliwa (n 478) 79.

given more weight.[486] The infusion of the soul to the foetus, hence, plays a significant role in determining their legal status and rights, as I will now explain.

3.2.2 The Implications of the Foetal Development Stages for the Foetus' Legal Status

The stages of foetal developments show that the foetus is recognised in two ways, one as a human being (which is when the foetus reaches the ensoulment stage) and the other as not a human being (which is the foetus before the ensoulment stage). Before discussing the implications of these stages for the legal status of the foetus, three key legal terminologies need to be explained, *Ahliyyah*, *Ahliyyah Alwujub* and *Ahliyyah Alada*, because they are related to the concept of capacity and legal personality in *Shariah* law.

Ahliyyah (capacity) is defined as 'the fitness of a person to enter into obligation, that is, to bind and be bound'.[487] Based on this definition, *Ahliyyah* refers to the eligibility for obligation and the ability to exercise rights and duties. Hence, there are two types of *Ahliyyah*: *Ahliyyah Alwujub* and *Ahliyyah Alada*, both of which are important elements of legal personality.[488] *Ahliyyah Alwujub* (legal capacity) is, in a legal sense, concerned with the ability of a person to acquire rights and assume duties.[489] The basis for

[486] For more information about this, see Chapter 1.3.2.4.2.
[487] Dawoud S. El Alami, 'Legal Capacity with Specific Reference to the Marriage Contract' (1991) 6 Arab Law Quarterly 190, 191.
[488] Mahdi Zahraa, 'The Legal Capacity of Women in Islamic Law' (1996) 11 Arab Law Quarterly 245, 246.
[489] Abdulkarim Zidan, *Al-madkhal dirasat al-shariah al'iislamia (Introduction to Study Islamic Shariah)* (5th edn Maktabat alquds, Baghdad 1976) 313.

Ahliyyah Alwujub is the living status. Every living human, as such, enjoys it;[490] therefore, it 'starts at birth and ends at death'.[491] *Ahliyyah Alwujub* can be classified as full or complete where the person has the ability to acquire all rights and duties that are related to transactional matters, examples of which are adults and children at all ages.[492] It can also be classified as restricted or incomplete where only certain rights can be acquired by the person, example of which is the foetus.[493]

Ahliyyah Alada (mental capacity) is that which 'qualify the person to execute actions/transactions that are considered able to produce their legal effects',[494] and to bear their associated legal implications, such as the conclusion of contracts.[495] The main feature of *Ahliyyah Alada* is, therefore, the existence of a sound mind and the ability to discriminate (i.e. the ability to understand and comprehend one's actions/transactions and to distinguish between beneficial and harmful).[496] Hence, while *Ahliyyah Alwujub* refers to the ability to *acquire* rights and bear obligations, *Ahliyyah Alada* is concerned with the ability to *exercise* rights and duties. *Ahliyyah Alada* can be classified as full, which is assigned to those who have attained the age of maturity and discernment (i.e. generally 18) and their mental development is not affected by any

[490] Ibid, 312 - 313.
[491] Zahraa (n 488) 246.
[492] For more information about transactions as a category of human conduct in *Shariah* law, see Chapter 1.3.1.2.
[493] Imran Ahsan Khan Nyazee, *Theories of Islamic Law: The Methodology of Ijtihad* (2nd edn Center for Excellence in Research, Islamabad 2016) 91.
[494] Mustafaa Al-Siba'ie and Abd Al- Rahman Al-Sabouni, *Al-Ahwal Al-Shakhssiyyah Fi Al-Ahliyyah Wa Al-Wassiyyah Wa Al-Tarikat (the Personal Status in Legal Capacity, Bequest and Inheritance)* (5th edn Al-Matba'ah Al-Jadidah, Damascus 1978) 13, as cited by Zahraa (n 488) 247.
[495] Zidan (n 489) 313.
[496] Zahraa (n 488) 247.

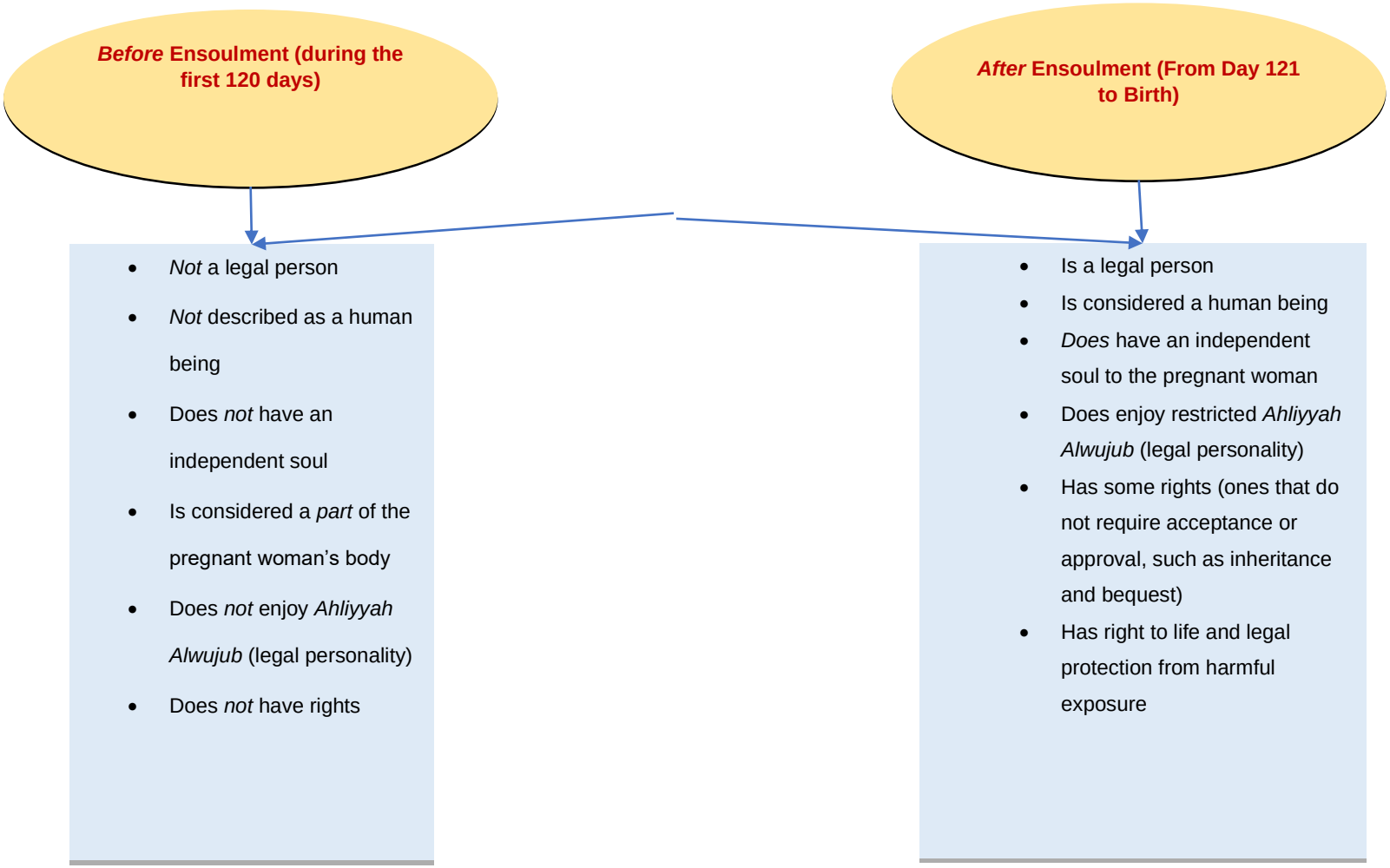
hindering, such as insanity.[497] In other words, adults are presumed to have full *Ahliyyah Alada* and, thus, full legal capacity, unless proven otherwise.[498] Those who have reached the age of discernment, such as children above the age of seven,[499] but have not yet reached the age of maturity are presumed to have restricted *Ahliyyah Alada*.[500] *Ahliyyah Alada* is not assigned in cases where the person has no discretion at all (i.e. has no ability to reason), examples of which are the insane and children under seven.[501]

Although both concepts are key elements of legal personality, *Ahliyyah Alwujub* is considered the *core* of legal personality; thus, a person can be deemed to have legal personality without having *Ahliyyah Alada* but legal personality cannot exist without *Ahliyyah Alwujub*.[502] This is a particularly significant for the legal status of the foetus, because, as I will discuss in section 3.2.2.2, it allows the foetus to be endowed with legal personality, and hence acquire rights, even though they lack the ability to exercise those rights.

[497] Ibid, 248.
[498] Zidan (n 489) 316. Examples of the impediments to adults' legal capacity are insanity, drunkenness, and intellectual disability.
[499] Children above 7 are expected to have limited ability to discriminate, according to *Shariah* law.
[500] Zahraa (n 488) 248.
[501] Ibid, 247.
[502] Ibid, 246.

3.2.2.1 The Legal Status of the Foetus *Before* Ensoulment

Figure 2: The Legal Status of the Foetus and their ‘‘rights’’



The foetus *before* ensoulment (during the first 120 days) is *not* a legal person, nor are they recognised as a human being, in spite of the fact that they have involuntary growth and movement.[503] Therisa Rogers has suggested that the *Qur'anic* passages noted above,[504] make 'it incontrovertible that Allah creates humans in stages and that before the final stage they are not humans'.[505] Similarly, Munawar Ahmed Anees has stated that the foetus before ensoulment is not a human being, but is a 'biological being (may be taken as an equivalent of the animal stage of development)', and that they become a human 'when the spirit is infused into that biological being'.[506] The foetus at these stages derives life from the pregnant woman and is dependent on her during the foetal formation.[507] They are, thus, considered to be a part of her body as they have no independent soul.[508] As such, the foetus before ensoulment does not enjoy *Ahliyyah Alwujub* and so does not have rights.[509] There is, however, disagreement amongst jurists as to whether a foetus before ensoulment has a *potential* right to life in the case of elected or criminal abortion– as will be discussed in section 3.3.1.2.1.

3.2.2.2 The Legal Status of the Foetus *After* Ensoulment

As I explained in section 3.2.1, *after* ensoulment (post-120 days), the foetus becomes a legal 'person' and is considered, under *Shariah* law, to be a human being with a legal

[503] Al-Aliwa (n 478) 79 - 80.
[504] The Qur'an [23: 12-14].
[505] Therisa Rogers, 'The Islamic Ethics of Abortion in the Traditional Islamic Sources' (1999) LXXXIX The Muslim World 122, 125.
[506] Munawar Ahmed Anees, *Islam and Biological Futures* (Mansell Publishing, London 1989) 177.
[507] Abi Obaidah Ratib Abdul Rahim Al-Zghoul*, albayan fi marahil waeanasir khalaq al'iinsana: alruwh waljisd walhayat walealaqat bayn alqalb waleaqla (Manifestation in the stages and elements of human creation: soul, body, life, and the relationship between the heart and the mind)* (1st edn Dar Al-Mamoun, Amman 2012) 16.
[508] Ibid.
[509] Zidan (n 489) 314.

right to life. Accordingly, an ensouled foetus enjoys *Ahliyyah Alwujub* (legal personality) as they have an independent soul to the pregnant woman.[510] Their *Ahliyyah Alwujub* is, however, restricted as they only acquire some rights with no duties imposed on them.[511] The type of rights the ensouled foetus enjoys are the ones that do not need proof of acceptance, such as bequest, inheritance and parentage.[512] The foetus obtains these rights but cannot enforce those rights until they are actually born alive.[513] By contrast, a foetus is not eligible for *Ahliyyah Alada* (mental capacity) because this is linked to mind and discernment, which the foetus lacks.[514]

As a legal person, the ensouled foetus has the right to life and to be buried in a Muslim cemetery and to be protected from harmful exposure that can cause harm or death to them.[515] For instance, there is some element of flexibility regarding performing religious obligations, in which there is a possibility of being exempted from certain religious obligations, such as the obligation of fasting, for anybody depending on their health status, but it is particularly notable that for pregnant women at any stage of pregnancy that there is this exemption; and in this situation, the exemption is because of the fact that they may endanger the life or health of the *foetus*.[516] In addition to this, rulings concerning preserving the life of the foetus are evident in the *Sunnah*. For example, the Prophet Muhammad (PBUH) delayed the stoning punishment of a woman who was

[510] Ibid.
[511] Nyazee (n 493) 91.
[512] Zidan (n 489) 314.
[513] Ibid.
[514] Rogers (n 505) 123.
[515] Ibid.
[516] Ghodrati Fatemeh and Akbarzadeh Marzieh, 'The Rights of the Fetus: Ensoulment as the Cut-Off Point Legislation on Abortion' (2015) 10 Health Science Journal 1, 3.

pregnant because of adultery, until she gave birth in order to protect and preserve the life of the foetus.[517] Furthermore, in case of divorce, a husband is obligated to provide *nafaqh* (maintenance) to his pregnant ex-wife so as to maintain the life and health of the foetus, but this would not be the case if she was not pregnant.[518]

These examples illustrate that *Shariah* law promotes the foetus' health and their right to life. Such a right is mainly what has led to the prohibition of abortion after ensoulment, as I will explain in section 3.3.1. Having said that, a fundamental question that may help in examining the *Shariah*'s views on potential maternal-foetal conflict issues would be to what extent the rights of the foetus are preserved in cases where there is a potential conflict between the pregnant woman's right to autonomy and bodily integrity and those of the foetus? Terminating a pregnancy, operating on a pregnant dead woman to deliver a live foetus, and maternal refusal of a necessary caesarean section may be controversial matters in which maternal-foetal conflict may occur. In section 3.3 below, I will discuss the different approaches taken by classical jurists within the four *Sunni* schools of law when addressing these matters, and that taken by contemporary jurists if any.[519] This will help to achieve my objectives of examining how *Shariah* law

[517] Narrated by Muslim, 'Sahih Muslim: the Book of Punishment' <http://islamilimleri.com/Kulliyat/Hadis/Hadis/pg_002_0031.htm> accessed 11 March 2019. I am not using this example of the delayed capital punishment to suggest that there are parallels between this scenario and a necessary caesarean section for the benefit of the foetus, but just to illustrate how foetal life is protected in this specific scenario.

[518] Islam Question and Answer, 'What Maintenance the Husband is Required to Provide on his Divorced Ex-wife During Pregnancy and on the Infant' <https://islamqa.info/ar/answers/146851/ما-يلزم-الزوج-من-النفقة-على-مطلقته-اثناء-الحمل-وعلى-الرضيع> accessed 20 March 2020. For a summary of the foetus legal status, see Figure 2 on page 131.

[519] Classical jurists are those who were during the time of establishing the *Sunni* schools of law to the thirteenth century. Contemporary jurists are those who were in the thirteenth century to the present day,

approaches such potential maternal-foetal conflict cases. This is required to achieve the objectives of my next Chapter where I will be exploring Saudi's law position towards the issue in question, since the *Shariah* is its main source. Moreover, it will help in locating the Saudi's law perspective within the different provisions of the four *Sunni* schools of law, which will, then, enable me to consider whether its approach reflects or matches with the *Shariah*'s view on this matter.

3.3 The *Shariah* Law on Potential Maternal-Foetal Conflict Cases

3.3.1 Abortion

The term 'abortion' in *Shariah* law refers both to the unintentional and intentional termination of a pregnancy before the estimated due date.[520] It includes terminating a pregnancy before or after the ensoulment of a foetus, as well as miscarriages and induced terminations. Miscarriages do not incur legal responsibility or criminal liability, because they occur naturally and are not caused by the will and purpose of the pregnant woman.[521] By contrast, the general rule in *Shariah* law is that all intentional abortions are *haram* (prohibited).[522] There is, however, a distinction drawn in *Shariah* law between necessary or therapeutic terminations, and elected or criminal terminations

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Islamweb.net, 'Classical and Contemporary Approaches' <https://www.islamweb.net/ar/article/171859/بين-مناهج-المحدثين-المتقدمين-والمتأخرين> accessed 14 June 2020.

[520] Mohammad Abdullah Muhammadan, *Abortion from an Islamic Jurisprudence Point of View: A Fundamental Study* (Naif Arab University for Security Sciences, Muscat 2006) 6.

[521] Ibid, 9.

[522] Mutaz Al-khatib, 'Nahw Qira'a Manzumia Akhlaqia Ilfqh: Al'iijhad Nmwdhjan (Towards an Ethical Systemic Reading of Jurisprudence: Abortion as a Model)' (2018) 2 Journal of Islamic Ethics 1, 8; Al-Aliwa (n 478) 205.

– noting that there is some disagreement about these terminations, as I will now explain. (See Tables 1 and 2 below for a summary of the different views on abortion).

<table>
<tr><th colspan="4">Table 1: Abortion Before Ensoulment</th></tr>
<tr><th colspan="2">A) Therapeutic Abortions</th><th colspan="2">B) Elected or Criminal Abortions</th></tr>
<tr><th>Classical Jurists</th><th>Contemporary Jurists</th><th>Classical Jurists</th><th>Contemporary Jurists</th></tr>
<tr><td>Permitted</td><td>Permitted</td><td><u>Hanafi</u> <u>School:</u>

makruh (disapproved) and becomes permissible if there is a valid reason

<u>Grounds:</u>

The foetus does not yet have a human shape, nor do they have a soul.</td><td><u>Minority Opinion:</u>

Advocate the Hanbali’s school approach.</td></tr>
<tr><td colspan="2"></td><td><u>Shafi’i</u> <u>School:</u>

Two opposing positions:

(1) Permissible without restriction

(2) Prohibited because it is a crime against an existing being</td><td rowspan="2"><u>Majority Opinion:</u>

Advocate the Maliki’s School approach.</td></tr>
<tr><td colspan="2"></td><td><u>Maliki</u> <u>School:</u>

Prohibited

<u>Grounds:</u>

Nutfa, alaqa and mudgha stages represent the beginning of the foetus’ creation and, hence, their potential right to life ought to be protected.</td></tr>
</table>

***Hanbali* School:** Permitted in the *nutfa* stage and prohibited in the *alaqa* and *mudgha* stages. Grounds: The foetus during the *alaqa* and *mudgha* stages implanted themselves in the uterus, forming the beginning of their creation.	

Table 2: Abortion *After* Ensoulment

A) Therapeutic Abortions		**B) Elected or Criminal Abortions**	
Classical Jurists	**Contemporary Jurists**	**Classical Jurists**	**Contemporary Jurists**
Prohibited Grounds: It falls under the general prohibition of killing a soul and, thus, it is not permissible to sacrifice a soul to save another soul	Permitted Grounds: Islamic legal maxim, severe harm is removed by lesser harm and, thus, saving the pregnant woman's life takes priority	Prohibited by all of the four *Sunni* schools of law	Prohibited

3.3.1.1 Necessary or Therapeutic Abortions

A necessary or therapeutic abortion is defined in *Shariah* law as the deliberate termination of the foetus before the estimated due date for the sake of saving the

woman's life.[523] This occurs in cases where it is believed by a number of physicians that continuing the pregnancy would threaten the life of the woman,[524] and the only way to protect her life is by ending the pregnancy. This situation is, as such, different to the example I cited in 3.2.2.2 above regarding not stoning the woman while she was pregnant and so protecting the foetus. The difference is that that situation, as I explained before, was concerned with imposing a *punishment* which was delayed by order of the Prophet (PBUH) for the sake of the foetus. In other words, the foetus was not to be blamed for the mother's criminal actions (i.e., committing adultery). For classical jurists, a necessary or therapeutic termination is permitted before ensoulment;[525] as for the ensouled foetus (after 120 days), it comes under the general prohibition of abortion in *Shariah* law.[526] Ibn Najim,[527] for example, states:

> If a pregnant woman is facing death, it would be permissible to terminate the foetus (to save her life) if the foetus was already dead in her belly. If the foetus was alive, terminating them would be *haram*, because saving a soul by killing another soul is not included in *Shariah* law.[528]

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[523] Muhammadan (n 520) 10.

[524] Some Islamic countries, such as Algeria, Morocco, and Jordan, authorise terminating a pregnancy where it causes a threat to a woman's physical and mental health. Others, such as Iran, Oman, and Egypt, only permit terminations where the pregnancy causes a threat to the woman's life. For a discussion of these different approaches, see Oren Asman, 'Abortion in Islamic Countries - Legal and Religious Aspects' (2004) 23 Medicine and Law 73, 81 - 87. I will discuss the Saudi Arabia perspective on this matter in Chapter 4.2.1.

[525] Centre of Excellence for Research in Jurisprudence of Contemporary Issues, *Almawsueat Almiasarat fi Fiqh Alqadaya Almueasira (the Facilitated Encyclopedia of Fiqh (Jurisprudence) of Contemporary Issues: Medical Fiqh Issues)* (1st edn Imam Islamic University, Riyadh 2014) 18.

[526] Al-khatib (n 522) 8; Al-Aliwa (n 478) 205.

[527] He is Imam Zainuddin Ibn Najim al-Hanafi, a well-known *Hanafi* jurist (died 970 AH).

[528] Zainuddin Ibn Najim al-Hanafi, *The Clear Sea Explaining the Treasure of Minutes* (Dar Al-Kotob Al-Ilmiyah, Lebanon 2013) 375 - 376. ''own translation''. Muhammad Ibn Abideen, a well-known *Hanafi* jurist

The basis for this approach is that necessary or therapeutic terminations of the ensouled foetus fall under the explicit prohibition of killing the soul contained in the *Qur'an*: 'And do not kill the soul which Allah has forbidden, except by right'.[529] Hence, it is not permissible to sacrifice a soul to save another soul. This comes in line with a consensus agreement amongst classical jurists that it is *haram* to kill another person in order to save yourself from being destroyed.[530]

From their justifications, it is evident that the approach taken by classical jurists within the four *Sunni* schools of law in this matter is that the prohibition of killing the soul is not overruled by a therapeutic necessity, nor does it fall under the Islamic legal maxim among evils, the lesser harm is committed. This indicates that they do not perceive the case of therapeutic abortion of an ensouled foetus as an issue of potential maternal-foetal conflict, because they treat the ensouled foetus as the already born child in terms of protecting their right to life.[531]

By contrast, the majority of contemporary jurists have taken a different approach in that, as an exception to the general prohibition of abortion, necessary or therapeutic

(died 1252 AH), stated that: 'If the foetus is alive and it is feared that the mother may die if the foetus did not be aborted, then it is not permissible to terminate the foetus; Because the death of the mother by preserving the foetus is delusional and so, it is not permissible to kill a human being (the foetus) in such a situation', Muhammad Ibn Abideen, *Hashiyah Radd Al-Muhtar* (Mustafa Al-Babi Al-Halabi Press, Egypt 1966) 238. ''Own translation''.

[529] The Qur'an [17:33].

[530] Al-Aliwa (n 478) 205.

[531] Ibid, 206.

terminations are permitted on the basis of the Islamic legal maxim, that among evils, the lesser harm is committed.[532] Where the woman's life is at risk, it becomes permissible to terminate the foetus (regardless of whether they are dead or alive), because the termination of the foetus' life is considered to be the lesser harm. The pregnant woman is, as such, seen as the *root* and the foetus as an *offshoot* and, therefore, protecting her life takes priority.[533] I agree with the reasoning of this approach which shows that the issue of therapeutic abortion is dealt with, by the majority of contemporary jurists, as a case of potential conflict between the pregnant woman and the foetus, and that when a decision has to be made to save one of them, priority is given to the life of the pregnant woman.

3.3.1.2 Elected or Criminal Abortions

An elected or criminal abortion is defined in *Shariah* law as the deliberate termination of the foetus before the estimated due date by any means for the purpose of terminating the pregnancy, and not because the woman's life is at risk.[534] Common reasons for this type of abortion include an unplanned pregnancy or pregnancy outside marriage.[535] In

[532] Al-khatib (n 522) 8. For more information about the Islamic legal maxim, that among evils, the lesser harm is committed, see Chapter 1.5.1.2. This approach was evident in a number of Islamic conferences, including the Childbearing Symposium, which was held in Kuwait in 1983. There it was concluded that 'the foetus is a human life […], which ought not to be assaulted with termination except by strict medical necessity', as cited in Muhammadan (n 520) 21. ''own translation''. Contemporary jurists have regular conferences at which new issues are explored and rulings/opinions are given, and majority opinion and minority opinion are determined. For more information about this, see Chapter 1.5.2.

[533] Abdallah S. Daar and A. Binsumeit Al Khitamy, 'Bioethics for Clinicians: 21. Islamic Bioethics' (2001) 164 Canadian Medical Association Journal 60, 63.

[534] Muhammadan (n 520) 11.

[535] Al-Aliwa (n 478) 203. Pregnancy outside marriage refers to cases of adultery as well as rape. It is unanimously agreed by jurists that the foetus created following rape is not to be blamed for the crime committed against the woman when the foetus reaches the ensoulment stage, and that rape itself does not fulfil any of the terms which justify an abortion, Vardit Rispler-Chaim, 'The Right Not to Be Born:

Shariah law, the elected termination of a foetus less than 120 days old is treated differently from that of an older foetus, as I will discuss in the following sections.

3.3.1.2.1 Aborting a Foetus *Before* Ensoulment

There is a disagreement among the *Sunni* schools of law over the ruling on aborting a foetus before ensoulment (i.e., during the *nutfa*, *alaqa* and *mudgha* stages). The relied-upon position in the *Hanafi* school is that abortion before ensoulment is *makruh* (disapproved), unless there is a valid reason, such as to protect the woman's health or if her milk stopped after the onset of pregnancy and she fears that this may cause weaken her infant.[536] In such cases, abortion becomes permissible and the allowance of the conditional abortion is that a foetus during these stages lacks both a human shape and a soul.[537] In the *Shafi'i* school, there are two opposing positions which both represent the relied-upon position in the school. The view of Al-Ramli,[538] is that abortion before ensoulment is permissible without restriction, while the view of Ibn Hajar[539] and Al-Ghazali[540] is that it is prohibited, because it is a crime against an existing being.[541]

Abortion of the Disadvantaged Fetus in Contemporary Fatwas', in Jonathan E. Brockopp and Gene Outka (eds), *Islamic Ethics of Life: Abortion, War, and Euthanasia* (University of South Carolina 2003) 81.

[536] Muhammad Ibn Abideen, *Hashiyah Radd Al-Muhtar* (Mustafa Al-Babi Al-Halabi Press, Egypt 1966) 6/429.

[537] Ibid.

[538] He is Shahabuddin Al-Ramli, a well-known *Shafi'i* jurist (died 957 AH).

[539] He is Ibn Hajar Al-Haytami, a well-known *Shafi'i* jurist (died 974 AH).

[540] He is Abū Ḥāmid Muḥammad Al-Ghazali, a well-known *Shafi'i* jurist (died 505 AH).

[541] Wahba Al-Zuhaili, *Islamic Jurisprudence and its Evidence* (Dar Al-Fikr, Damascus 2009) 2648; Organization of the Islamic Conference, 'Journal of the Islamic Fiqh Academy' < ص426 - كتاب مجلة مجمع الفقه الإسلامي - تنظيم الأسرة في المجتمع الإسلامي الاتحاد العالمي لتنظيم الوالدية إقليم الشرق الأوسط وشمال أفريقيا - المكتبة الشاملة (shamela.ws)> accessed 3 March 2023.

The relied-upon position of the *Maliki* school is considered to be the strictest one as it prohibits abortion during all stages of pregnancy.[542] One of the main justifications for this is that although the infusion of the soul does not take place before 120 days, during that time the foetus is being created and formed. It is, therefore, not permissible (*haram*) to cause harm to them or to terminate a pregnancy, because their potential right to life ought to be protected.[543] As for the *Hanbali* school, it takes a moderate position between permissibility and prohibition, as it permits abortion in the *nutfa* stage and prohibits it in the *alaqa* and *mudgha* stages.[544] The key difference between these stages is that the foetus in the *nutfa* stage is seen as nothing since they have not yet been implanted in the uterus, and so aborting them is permitted.[545]

As for contemporary jurists, the minority opinion is similar to that of the *Hanbali* school - an elected abortion of a foetus is only permitted in the *nutfa* stage.[546] However, the majority of contemporary jurists advocate the approach of the *Maliki* school in that an elected abortion is not permissible from conception as this stage forms the beginning of foetal development and so, there is a prospect of another life that ought to be protected, except for medical necessity.[547]

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[542] Al-Aliwa (n 478) 207; Al-Zuhaili (n 541) 2647.
[543] Al-Aliwa (n 478) 209.
[544] Al-khatib (n 522) 6.
[545] Al-Aliwa (n 478) 212 - 213.
[546] Examples of those who take this view are Muhammad Ramadan Al-Bouti and Mohamed Salam Madkour, Muhammad Ramadan Al-Bouti, *mas'alat tahdid alnasl: wiqayat wa eilajaan (The Issue of Birth Control: Prevention and Treatment)* (Al-Farabi Library, 1976) 87 - 89; Mohamed Salam Madkour, *altaeqim wal'iijhad min wijhat nazar al'islam (Sterilization and abortion from the point of view of Islam)* (Rabat 1971), as cited by Al-Aliwa (n 478) 214.
[547] Examples of those who take this view are Wahba Al-Zuhaili, Yousif Al-Qardawi and Ahmed Sahnoun, as cited by Al-Aliwa (n 478) 214 – 215; Al-Zuhaili (n 541) 2647.

From the above discussion, it is clear that the majority of classical jurists (across all four schools of law) as well as the majority of contemporary jurists take a restrictive approach towards an elected abortion of a foetus before ensoulment, either prohibiting it completely or allowing it only in restricted circumstances. Such a position generally means that a capacitous pregnant woman's right to exercise her autonomy is conditional on the seriousness of her reasons for requesting an elected abortion. For example, if it is medically proven that the foetus is severely ill or has an abnormality, the pregnant woman's mental health among other things (such as financial burden of treatment for the child, if born, and the burden of care) can be considered as justifications for allowing an elected abortion before ensoulment.[548] This means that a foetus' potential right to life is maintained, except when there are serious justifications for not doing so. It can be, hence, argued that such a provision provides balance and respect a pregnant woman's right to have an elected abortion and the foetus' potential right to life.

3.3.1.2.2 Aborting a Foetus *After* Ensoulment

In section 3.2.2.2 above, I explained that once the spirit is breathed into the foetus, they become a legal person and is granted some legal rights and protections. One such right

[548] The Resolution from the International Islamic Fiqh Academy in 1990 can be a good example to illustrate how these considerations are acknowledged: 'Before the passage of one hundred and twenty days from the beginning of the pregnancy, if it is proven and confirmed by a medical committee composed of trustworthy specialist doctors, and based on tests with diagnostic equipment and methods, that the foetus is severely deformed in a way that is not receptive to medical treatment, and that if the pregnancy continues to term and the child is born, his life will be difficult and painful for him and his family, then in that case it is permissible to abort the pregnancy, in response to the parents' wishes', as cited and translated by Islam Question and Answer, 'Ruling on Aborting a Foetus Affected by Thalassaemia' < https://islamqa.info/en/answers/110492/ruling-on-aborting-a-foetus-affected-by-thalassaemia> accessed 23 August 2020.

is the right to be protected from harmful actions, including exposure to harm or death. Committing such are acts punishable by Allah and *Shariah* law:[549]

> And do not kill the soul which Allah has forbidden, except by right. And whoever is killed unjustly - We have given his heir authority but let him not exceed limits in [the matter of] taking life. Indeed, he has been supported [by the law].[550]

There is thus an explicit prohibition on killing the soul, and the foetus after ensoulment has a soul. All of the four *Sunni* schools of law and the contemporary jurists thus agree on the prohibition of abortion after ensoulment on the basis that an ensouled foetus is granted a legal right to life.[551]

Although there is a unanimous agreement on the prohibition of abortion after ensoulment, Saleh Al-Alaiyan asserts that the law on abortion cannot be seen to protect the right of the foetus because abortion is treated differently to murder and it is often treated as a misdemeanour (lesser offence) rather than a deliberate killing.[552] This is

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[549] Rogers (n 505) 123.
[550] The Qur'an [17:33].
[551] This consensus between the four *Sunni* schools of law was reported by the *Maliki* jurist, Ibn Juzey: 'It is not permitted to be exposed to semen that has been caught in the uterus; this is especially true if it has been formed. It is also particularly true if the soul has breathed into it, as it is unanimously considered a killing of a soul', Muhammad ibn Ahmad ibn Muhammad ibn Juzey al-Kalbi al-Garnati, *al-qawanin al-fiqhiyyah (Jurisprudence Laws)* (Shamila.ws, no date available) 141. ''own translation''; Al-Aliwa (n 478) 205.
[552] Saleh Al-alaiyan, 'An Islamic Legal Perspective on the Status of the Malformed Fetus and the Previable Infant' (2014) 4 Palliative Care & Medicine <https://www.omicsonline.org/open-access/an-islamic-legal-perspective-on-the-status-of-the-malformed-fetus-and-the-previable-infant-2165-7386.1000174.php?aid=25812> accessed 13 March 2019.

evident in the disagreement among classical jurists over the sort of punishment imposed on whoever performed the elected abortion of an ensouled foetus (i.e. the pregnant woman or someone else with/without her permission – both will be referred to as the offender). Some classical jurists treat aborting a foetus after ensoulment as a deliberate killing, and so the offender would be subject to *alqisas* (the Law of Retaliation).[553] This means that blood relatives would be entitled to ask for either the death penalty for the offender, blood money or to a waiver of retribution.[554]

The majority of the classical jurists, however, consider that aborting a foetus after ensoulment is a misdemeanour (lesser offence), which entails two punishments: a *kaffara* (expiation) and a payment of *ghurrah* (blood money).[555] Performing such an abortion would not come under *alqisas*, the Law of Retaliation, but rather it would be either a wrongful death or quasi intentional killing.[556] This is because actions for causing death to the foetus can only occur through touching the pregnant woman's body.[557] The fact that a foetus is not directly accessible given their *location* inside the woman's body, means that actions towards them do not reach the level of certainty required for

[553] Al-Aliwa (n 478) 227.

[554] Examples of those who take this view are Ibn al-Qasim, Ibn al-Jawzi, and Ibn Hazm. When asked about the punishment for a woman who deliberately causes the death of her foetus, Ibn Hazm staid that 'If the soul had breathed into the foetus, [...] and she deliberately caused death to the foetus, she will be subject to *alqisas* because she deliberately killed a soul; and so it is a soul for a soul. The foetus' relatives have the choice of either retribution or blood money', Abu Muhammad Ali bin Ahmed bin Hazm, *Al-Muhalla bil-athar* (Dar al-Fikr, Beirut no date available) 31, as cited in Aref Ali Al-Qarah Daghi, *Masayil Shareiah fi Qadaya Almaria (The Shariah perspective on Women-related Issues)* (IIUM Press, Malaysia 2010) 165. ''own translation''. Ibn Hazm was a well-known jurist, known as Ibn Hazm al-Andalusi (died in 1064). Similarly, Ibn al-Jawzi, a well-known *Hanbali* jurist (died in 1116) stated that 'If she deliberately aborts her foetus after the soul is breathed into them, it would be like killing a person', as cited in Daghi (n 554) 164.

[555] Al-Aliwa (n 478) 228.

[556] Ibid.

[557] Ibid.

intentional killing.[558] Furthermore, they consider that the foetus is not a complete soul, but is 'a soul in one aspect but not in another'; they are a soul in terms of them being a human being with an independent soul, but does not count as a soul as they are not separated from the pregnant woman.[559] The majority of classical jurists, correctly, hold that the application of *alqisas* (the Law of Retaliation) can only be between two persons who enjoy full *Ahliat Alwujub* (legal personality), which the foetus does not enjoy.[560]

However, these justifications for not imposing the law of retaliation have been criticised on the ground that what is considered a key element in intentional killing is the criminal intention, and this is achieved in elected or criminal abortions.[561] With regard to the idea that the foetus is not a complete soul because they are not separated from the pregnant woman, it has been argued that the life of the foetus remains independent in existence and soul even if they are not separated from the pregnant woman.[562] Mamoon Al-Refae, therefore, believes that the sound opinion is that of those who consider committing an elected or a criminal abortion to be a deliberate killing and to come under *alqisas* (the Law of Retaliation).[563]

[558] Marion Holmes Katz, 'The Problem of Abortion in Classical Sunni Fiqh' in Jonathan E. Brockopp and Gene Outka (eds), *Islamic Ethics of Life: Abortion, War, and Euthanasia* (University of South Carolina 2003) 28.
[559] Mamoon Al-Refae, 'Abortion in Islamic Criminal Legislation: its Pillars and Punishment: Comparative Fiqhi Study' (2011) 25 Al-Najah University Journal 1398, 1422.
[560] Al-Aliwa (n 478) 228 - 229.
[561] Al-Refae (n 559) 1424.
[562] Ibid.
[563] Ibid.

Regardless of this difference of opinions, the established approach is that, unlike the intentional killing of a born person, the offender of an elected or a criminal abortion would be subject to a *kaffara* and a *ghurrah*.[564] A *kaffara* is a religious act enjoined by *Shariah* to erase a certain sin. It is intended to address the offender's relationship with Allah. The *kaffara* for causing death to an ensouled foetus is either freeing a Muslim slave,[565] or a fast of two consecutive months.[566] Classical jurists agree that the *ghurrah* for killing a foetus is half of one-tenth of the *diya* (blood money) imposed for killing a born person (this is equal to 212.5 grams of gold) paid to the foetus' kin.[567] They also agree that if the offender is one of the foetus' kin, they would be deprived of the *ghurrah*.[568] Hence, if the offender was the pregnant woman, she would pay the *ghurrah*, and then be deprived of it, the *ghurrah* would go to the foetus' kin such as their father.[569] This is on the grounds that whoever rushes the inheritance is punished by being deprived of it.[570]

A key cause of this difference of opinions and approaches may be that neither the *Qur'an* nor the *Sunnah* directly address *intentional* abortions.[571] For example, Allah

[564] Katz (n 558) 28.
[565] Owning slaves was an established practice before Islam. Freeing slaves is an expiation for certain misdeeds, according to the Qur'an. The Qur'an [4:92]: 'And never is it for a believer to kill a believer except by mistake. And whoever kills a believer by mistake - then the freeing of a believing slave […]. And whoever does not find [one or cannot afford to buy one] - then [instead], a fast for two months consecutively, [seeking] acceptance of repentance from Allah. And Allah is ever Knowing and Wise'.
[566] Ibid.
[567] Islamweb.net, 'The blood-money of the foetus and those who is entitled to it' <https://www.islamweb.net/ar/fatwa/198239/> accessed 26 February 2020.
[568] Al-Aliwa (n 478) 242.
[569] Ibid.
[570] This is according to a *Hadith* in which the Prophet says ''The murderer does not inherit'', narrated by Al-Tirmidhi, 'Jami al-Tirmidhi' <http://islamilimleri.com/Kulliyat/Hadis/Hadis/pg_004_0031.htm> accessed 31 August 2019. ''own translation''.
[571] Katz (n 558) 25.

says: 'Kill not your offspring for fear of poverty; it is we who provide for them and for you. Surely, killing them is a great sin'.[572] The reason behind this *Qur'anic* passage was the inclination among pre-Islamic Arabian people to commit *wa'd* (infanticide) or terminate a pregnancy because they were afraid of poverty.[573] Although it has been interpreted by some religious scholars to mean that a foetus must not be aborted due to economic hardship,[574] classical exegetes generally interpreted this *Qur'anic* passage as referring to already-born children and not to foetuses.[575] Some classical jurists, such as, Ibn Taymiya,[576] interpret an abortion of a foetus as a category of *wa'd* and is hence included in the *Qur'anic* passages concerning the prohibition of 'killing children'.[577] There is a complex exegetical situation among classical jurists regarding the application of the *Qur'anic* prohibitions against 'killing children' to foetuses.[578] This complexity may have contributed to the existence of different approaches and opinions regarding the foetus' legal rights in the context of abortion.

The *Sunnah* as well does not directly address the issue of intentional abortion, although, as I have shown in section 3.2.2.2, it gave some rulings concerning preserving the life of the foetus. It has also been reported that the Prophet (PBUH) gave a ruling on a case of

[572] The Qur'an [17:31]; another example, 'O Prophet, when believing women come to you and pledge to you that they will not associate aught with Allah in His Divinity, that they will not steal, that they will not commit illicit sexual intercourse, that they will not kill their children, [...] then accept their allegiance and ask Allah to forgive them. Surely Allah is Most Forgiving, Most Compassionate.', the Qur'an [60:12].
[573] Rogers (n 505) 124.
[574] Saleh Al-alaiyan, 'An Islamic Legal Perspective on the Status of the Malformed Fetus and the Previable Infant' (2014) 4 Palliative Care & Medicine <https://www.omicsonline.org/open-access/an-islamic-legal-perspective-on-the-status-of-the-malformed-fetus-and-the-previable-infant-2165-7386.1000174.php?aid=25812> accessed 13 March 2019.
[575] Katz (n 558) 26.
[576] He is a well-known *Hanbali* jurist (died in 1328 C.E.).
[577] Katz (n 558) 26.
[578] Ibid.

a killing of a pregnant woman, where the pregnant woman and the foetus were killed as a result of a fight between two women. The Prophet (PBUH) required a *ghurrah* for the killing of the foetus and a *diya* for the killing of the pregnant woman.[579] Requiring the *ghurrah*, which is half of one-tenth of the *diya*, indicates that the foetus was granted some legal protections but is not a 'full-fledged human being'.[580] Although these prophetic reports may illustrate the provisions concerning the foetus' rights, they did *not* address the instances where a pregnant woman is seeking an intentional abortion. It seems to me that the absence of an explicit ruling in the *Qur'an* and the *Sunnah* regarding intentional abortion and their provision of general principles instead (i.e., the prohibition of killing the soul and the *ghurrah* ruling), has opened up the possibility of accommodating different approaches to abortion within *Shariah* law. This is reflected in the legalisation of abortion in some Islamic countries, which vary between adopting conservative, permissive, and liberal approaches.[581]

My discussion of abortion and the associated potential for conflict between the pregnant woman's right to autonomy (and her right to life where continuing the pregnancy threatens her life) and the ensouled foetus' right to life and to be protected from harmful

[579] Narrated by Al-Bukhari, 'Sahih Bukhari: kitab alddiat (Book of Blood Money)' <http://islamilimleri.com/Kulliyat/Hadis/Hadis/pg_001_0068.htm> accessed 03 May 2019.

[580] Katz (n 558) 28.

[581] Asman (n 524) 81. Examples of the diversity in abortion laws across Islamic countries: Egypt, Syria and Indonesia are examples of Islamic countries whose laws on abortion are conservative, as abortion is permitted only where the life of the pregnant woman is threatened. Algeria and Malaysia adopt a permissive approach to abortion, in which abortion is permitted where the pregnancy threatens the physical and mental health of the pregnant woman. Abortion law in Tunisia and Turkey is liberal, in which abortion is permitted 'on request'. These examples are according to a study done by Gilla K Shapiro, 'Abortion law in Muslim-majority countries: an overview of the Islamic discourse with policy implications' (2013) 29 Health Policy and Planning 483, 489 - 490.

actions, has revealed the complexity of this matter. This is evident when the different approaches taken by the classical jurists of the four *Sunni* schools of law are considered, as well as those taken by contemporary jurists regarding the permissibility of therapeutic and elected abortions. Even where there is agreement on the prohibition of elected or criminal abortion after ensoulment, because it is unanimously considered a killing of a soul, it is treated differently to murder, and it was often treated as a misdemeanour (lesser offence) rather than a deliberate killing. This means that, unlike the deliberate killing of a born person, *alqisas* (the Law of Retaliation) would not be implemented.

My discussion of abortion has also revealed that *Shariah* law acknowledges legal personality to the ensouled foetus before birth, and that foetal legal rights (their right to life and to be protected from harmful actions) are also well recognised. This was evident through the prohibition of an elected abortion after ensoulment, and for some jurists, from conception. Thus after ensoulment, the foetus' rights take precedence over the pregnant woman's right to autonomy unless a therapeutic abortion is in issue. In that case, and according to the majority of contemporary jurists, the pregnant woman's life is prioritised and her right to autonomy is respected. As such, it can be argued that as regards abortion, *Shariah* law has 'adopted a moderate rule, i.e. it opposes unconditional freedom of abortion but at the same time it does not absolutely rule out abortion'.[582]

[582] Fatemeh and Marzieh (n 516) 4.

3.3.2 Operating on a Dead Pregnant Woman in order to Deliver a Living Foetus

Operating on a dead woman to deliver a living foetus was a contested issue among the four *Sunni* schools of law, and there was a difference of opinion as to whether this was permissible. This matter is no longer contested because the justification of mutilation, which is the main reason for the prohibition according to some of the classical jurists, has disappeared in our present time. Cutting the abdomen in this situation is no longer considered by the people as mutilation, so there is nothing left that rules out extracting the living foetus through opening a dead woman's abdomen.[583] Although there is no likelihood of any challenge to the now accepted position, I will discuss the key positions and their justifications, to illustrate how different approaches have been taken when dealing with cases of potential maternal-foetal conflict. This case is relevant to my thesis because it demonstrates how well a foetus' legal right to life is protected in *Shariah* law. When a pregnant woman has died and the foetus is still alive, the maternal-foetal conflict in this scenario is with the need to transgress and mutilate the deceased woman's body in order to preserve the life of the foetus. In using this example, I am not saying that this relates to the maternal refusal of a necessary caesarean section. That is not the purpose of examining this here. My purpose is to show how the Islamic legal maxim of severe harm is removed by lesser harm worked in practice, which was in the context of its use to support the permissibility of operating on a dead woman to deliver a living foetus. Since my suggested approach for reform with regard to a maternal refusal

[583] Muhammad bin Saleh Al-Uthaymeen, *almuntaqaa min farayid alfawayid (The Choice of the Unique Benefits)* (Al-Watan Publishing, Riyadh 2003) 174; Islam Question and Answer, 'What happens to a baby when a pregnant woman dies' < What Happens to a Baby When a Pregnant Woman Dies - Islam Question & Answer (islamqa.info) > accessed 11 March 2023.

of a necessary caesarean section is based on *this* legal maxim, it could be beneficial to include this case to illustrate how this legal maxim has been used.

Classical jurists differed on this issue into two views: while some took the view that it was *haram* (forbidden) to open a dead woman's abdomen to deliver the foetus, the majority concluded that it was permissible to do so.[584]

3.3.2.1 Those Who Said It Was *Not* Permissible to Open the Abdomen of a Dead Woman to Deliver a Living Foetus

This was the prevailing opinion in the *Hanbali* and *Maliki* schools of law, and these jurists said that it was *haram* (forbidden) to open a dead woman's abdomen to deliver a living foetus, but that midwives should manually try to extract the living foetus.[585] If that could not be done, then the woman should not be buried until the foetus had died too.[586] Cutting the abdomen was, in their opinion, mutilation and could only be justified if the foetus was partially born and alive because, in that case, the cut was made to enable the delivery of the rest of them.[587] In reaching this opinion, they used the principle of analogy (*Qiyas*),[588] and quoted a Prophetic report that 'Fracturing the bone of the dead

[584] Al-Aliwa (n 478) 242 – 243.
[585] Ibid, 243.
[586] Islam Question and Answer, 'If a woman dies and there is a living foetus in her womb' < https://islamqa.info/en/answers/121278/if-a-woman-dies-and-there-is-a-living-foetus-in-her-womb> accessed 5 March 2020.
[587] Ibid.
[588] For more information about *Qiyas*, see Chapter 1.3.2.4.3.

is equal to fracturing the bone of the alive in sin'.[589] The rationale for this prohibition was that fracturing the bone of the dead was mutilating the deceased. This was applied to the question of cutting a dead woman's abdomen, resulting in the same ruling - prohibition.[590] In addition to this, they argued that as the foetus' life was still 'potential', it should not outweigh the dead woman's 'certain' right not to be mutilated by cutting.[591]

3.3.2.2 Those Who Said It *Was* Permissible to Open the Abdomen of a Dead Woman to Deliver a Living Foetus

Contemporary jurists, as well as the majority of the classical jurists in the *Hanafi*, and *Shafi'i* schools, and some in the *Maliki* school, have justified cutting a dead woman's abdomen to deliver a living foetus,[592] by citing a *Qur'anic* passage where Allah said:

> Whoever kills a soul unless for a soul or for corruption [done] in the land - it is as if he had slain mankind entirely. And whoever saves one - it is as if he had saved mankind entirely.[593]

This *Qur'anic* passage encourages the preservation of the human soul, and the way to preserve the soul of the living foetus whose mother is dead is through cutting her

[589] Narrated by ibn Majah, 'Sunan ibn Majah' <http://islamilimleri.com/Kulliyat/Hadis/Hadis/pg_007_0007.htm> accessed 23 September 2019. ''own translation''.
[590] Mohammed Al-Shankiti, *ahkam aljrahah altibiya w alathar almutaratiba ealayha (Medical Surgery Provisions and their Implications)* (2nd edn Maktabat Alsahaba, Jeddah 1994) 323 - 324.
[591] Al-Aliwa (n 478) 245 - 246.
[592] Ibid, 242.
[593] The Qur'an [5:32].

abdomen so as to rescue it.[594] Moreover, they used the Islamic legal maxim, that is among evils, the lesser harm is committed.[595] This is because this case involves competing rights: the dead woman's right not to be mutilated, and the living foetus' right to have their life saved. Relying on this maxim, many classical and contemporary jurists have concluded that operating on a dead pregnant woman for the sake of the living foetus is justified as it is the lesser harm.[596]

Furthermore, cutting the abdomen of a dead pregnant woman is not seen as a violation of her right not to be mutilated, because it was not intended to mutilate her but to save the foetus' life from being destroyed.[597] This is in accordance with *Shariah* law, as one of the five *Maqasid* (purposes) of it is the preservation of the soul.[598] Based on this, it was concluded that it is *wajib* (obligatory) to operate on a dead pregnant woman in order to deliver the living foetus, *if* there is a high chance of the foetus' survival outside the womb (that is when the foetus is 7-above months old).[599] Operating becomes *mustahabb* (recommended) if the foetus is likely to be able to live outside of the womb (that is when the foetus is 6 months old),[600] and if the foetus' chance of survival outside

[594] Al-Aliwa (n 478) 243.
[595] For more information about this Maxim, see Chapter 1.5.1.2.
[596] Al-Shankiti (n 590) 323.
[597] Ibid, 325.
[598] Ibid. For more information about the five *Maqasid* of *Shariah* law, see Chapter 2.2.
[599] Ibid, 156.
[600] Al-Aliwa (n 478) 246.

the womb is low (that is when the foetus is less than 6 months old), then operating becomes *mubah* (permissible).[601]

Operating on a dead woman to deliver a living foetus is no longer a contested issue, but I have included it to illustrate how different approaches have been taken when dealing with cases of potential maternal-foetal conflict. While some classical jurists took the view that it was *haram* (forbidden) to open a dead woman's abdomen to deliver the foetus, as this would be mutilation of the deceased, the majority concluded that it was permissible to do so since they did not consider it as a violation of the deceased's right not to be mutilated. Rather, it was required to preserve the soul of the living foetus, which is one of the five purposes of *Shariah* law. In addition to this, classical jurists relied on the Islamic legal maxim, that is among evils, the lesser harm is committed and, thus, operating on a dead pregnant woman for the sake of the living foetus was justified as it is the lesser harm. This case showed the importance of the foetus' life in *Shariah* law, such that their life ought to be saved in this scenario.

3.3.3 Potential Maternal-Foetal Conflict in Necessary Caesarean Section Refusals

Regardless of the method of delivery, childbirth by its very nature poses potential risks for both the woman and the foetus.[602] The risks associated with caesarean birth include risks from 'anesthesia, blood loss, infection, a longer recovery period and potential for a

[601] AbdurRahman.Org, 'The Ruling Concerning Performing a Cesarean Section – Shaykh ibn Uthaymeen' <https://abdurrahman.org/2011/05/24/the-ruling-concerning-performing-a-cesarean-section/> accessed 07 May 2020.
[602] American College of Obstetricians and Gynecologists, 'Safe Prevention of the Primary Cesarean Delivery' (2014) 1 Obstetric Care Consensus 1, 1.

higher risk of postpartum depression'.[603] Caesarean sections are also associated with a higher risk of complications like blood clotting.[604] Hence, caesarean birth appears to carry a higher risk of maternal morbidity and mortality than vaginal delivery for the majority of low-risk pregnancies.[605] Caesarean births also carry potential risks for the foetus.[606] This is because the foetus during a vaginal birth goes through a process that prepares their lungs, which are stuffed with fluid in the uterus, to breathe oxygen after birth. Because they do not have the chance to go through this process, babies born through caesarean section may have respiratory problems with extra fluid in their lungs at birth.[607] Moreover, babies born vaginally receive a boost of beneficial bacteria as they pass through the birth canal. This could strengthen the baby's immune system and protect the intestinal tract.[608]

However, caesarean sections, in high-risk pregnancies, can prevent injury and can even be life-saving for the foetus, the woman, or both.[609] Common indications for primary caesarean section include abnormal or indeterminate foetal heart rate tracing, multiple gestation, foetal malpresentation, suspected foetal macrosomia, and labour dystocia.[610] Caesarean sections are also considered medically necessary in cases where the woman's pelvis is too small to allow the passage of the foetus' head or body

[603] Cleveland Clinic, 'C-Section vs. Natural Birth: What Expectant Moms Need to Know' < Weighing C-Section Against Vaginal Birth – Cleveland Clinic > accessed 11 March 2023.

[604] Ibid.

[605] American College of Obstetricians and Gynecologists (n 602) 1-2.

[606] Cleveland Clinic, 'C-Section vs. Natural Birth: What Expectant Moms Need to Know' < Weighing C-Section Against Vaginal Birth – Cleveland Clinic > accessed 11 March 2023.

[607] Ibid.

[608] Ibid.

[609] Ibid; American College of Obstetricians and Gynecologists (n 602) 1.

[610] American College of Obstetricians and Gynecologists (n 602) 4.

(cephalopelvic disproportion), and when the woman is haemorrhaging, and vaginal birth becomes dangerous, and when there is a concern about the foetus' arrhythmia.[611] In such critical conditions, it is well-established that caesarean delivery is the safest delivery method.[612]

Thus, it follows that in situations where it is considered to be safer not to deliver the foetus vaginally, not carrying out a caesarean section may cause harm or death to the pregnant woman and/or to the foetus. A pregnant woman may refuse to consent to a necessary medical intervention, and this could result in a 'conflict' between her legal right to autonomy and bodily integrity and the foetus' need to be safely delivered and their legal right to life. There are many reasons a woman may prefer to refuse a doctor's recommendation for a necessary caesarean section. They can be reasons related to fear of postoperative pain, harm, and death for both woman and foetus; and a desire to avoid repeat caesarean births.[613] They can also include financial concerns of cost and hospital fees, and a lack of understanding of the seriousness of the situation.[614]

In situations where a significant risk of serious harm to a foetus (death or serious disability for the foetus) could be prevented via a caesarean section and a pregnant woman refuses to consent to the operation, two fundamental questions raises: first, to

[611] Mayo Clinic, 'Caesarean Sections' < قسم الولادة القيصرية - Mayo Clinic (مايو كلينك) > accessed 5 October 2022; Jane Weaver, 'Court-ordered Caesarean Sections', in Andrew Bainham, Shelley Day Sclater and Martin Richards (eds), *Body Lore and Laws* (Hart Publishing, Oxford 2002) 230.
[612] American College of Obstetricians and Gynecologists (n 602) 1.
[613] Neha A. Deshpande and Corina M. Oxford, 'Management of Pregnant Patients Who Refuse Medically Indicated Caesarean Delivery' (2012) 5 Reviews in Obstetrics and Gynecology 144, 145.
[614] Ibid.

what extent does a pregnant woman with capacity, under *Shariah* law, have the right to refuse a caesarean section that could save the foetus' life or protect them from severe injuries (thereafter this will be referred to as a necessary caesarean section)? In other words, does the notion of autonomy in Islam accommodate such a refusal? Secondly, can maternal refusal of a necessary caesarean section be overridden for the sake of saving foetal life or health, or can the restricted Islamic notion of autonomy be used to override such a refusal? I will consider these questions below and will provide provisions and approaches, if any, that are adopted in *Shariah* law in such a case. This will show whether different approaches to the issue in question can be adopted from within *Shariah* law. It ought to be stated, however, that there is no clear provision on the sort of approach that should be taken in cases of refusal of necessary caesareans by the classical jurists of the *Sunni* schools of law. Such a situation, perhaps, did not occur during that time (up to thirteenth century). Hence, the questions as to whether a pregnant woman has a legal right to refuse such a necessary intervention and whether her refusal can be overridden will be addressed in light of contemporary jurists and *Fiqh* councils.

3.3.3.1 Does a Pregnant Woman with Capacity Have a Right to Refuse a Necessary Caesarean Section?

I have discussed, in section 2.3, that the principle of autonomy is well established in *Shariah* law, and the imposition of unwanted treatment on a capacitous patient without their consent is not permitted. Thus, under *Shariah* law a pregnant woman with capacity is granted a right to make childbirth decisions and is protected from being coerced into

agreeing to a medical intervention. However, as I have shown in section 2.3.1, the principle of autonomy is restricted by an individual's *responsibility* to comply with Islamic rules and teachings when making decisions. In addition, causing harm or death to oneself or to an ensouled foetus is unanimously prohibited under *Shariah* law,[615] and so a pregnant woman, from a *religious* perspective at least, *ought* to consent to a caesarean section *if* she knows that it is necessary to protect her life/health, the foetus' life/health, or both.[616] If she refuses to consent in this situation, it will be considered a sin for which she will be accountable before Allah in the Hereafter.[617] Based on this, the Islamic interpretation on autonomy does *not* accommodate maternal refusal of a necessary caesarean section, because consent to the procedure in such situation falls under the category of *wajib* (obligatory). In other words, the Islamic interpretation of autonomy, which is restricted by the obligation to comply with *Shariah* provisions, would mean that, while a pregnant woman with capacity has a legal right to refuse a medical intervention under *Shariah* law, her exercise of this right, in necessary caesarean cases, would cause her to breach her religious duty.

As far as consent to a caesarean section needed to save the foetus's life is concerned, there is a perspective under *Shariah* law that believes that consent from the foetus' father is to be recognised based upon his status as father of the foetus. Hence, where

[615] For more information about the prohibition of causing harm to oneself, see Chapter 2.3.1, and for more information about the Islamic ruling on causing harm or death to the ensouled foetus, see sections 3.2.2.2 and 3.3.1.2.2 of this chapter.
[616] The International Islamic Fiqh Academy, Resolution No. 184, Article 2. I will discuss this resolution with more details in sub-section 3.3.3.2 below; Islamweb.net, 'hal yjb ealaa almar'a alluju' lilwiladat alqaysariat aistijabatan li'amr altabib (Is a Pregnant Woman Obliged to Consent to a Caesarean Section in Response to the Doctor's Recommendation?)' < https://www.islamweb.net/ar/fatwa/171911/> accessed 13 April 2020.
[617] The International Islamic Fiqh Academy, Resolution No. 184, Article 2; Al-Shankiti (n 590) 258 - 260.

the woman refuses to give her consent, the operation can be performed to save foetal life with the consent of the foetus' father. This will be discussed in section 3.3.3.2 below.

3.3.3.2 Can Maternal Refusal of a Necessary Caesarean Section Be Overridden for the Sake of Saving Foetal Life or Health?

I have discussed, in section 2.3.2, the question as to whether it is permissible to override a capacitous patient's refusal decision in life-or-death interventions based on the more restricted or limited notion of autonomy in Islam. I have shown that different opinions exist, with some saying that a capacitous patient's decision should always be respected (even if this results in a patient's death) and others arguing that the restricted notion of autonomy and the provision of necessity can be used to overrule refusal decisions in life and death situations. Here, I will outline provisions and approaches adopted in *Shariah* law on the question as to whether restricted / limited autonomy enables a pregnant woman's right to refuse a necessary caesarean section to be overridden if not doing so would endanger the foetus' legal right to life.

Contemporary jurists have discussed the question of whether a forced caesarean section can be permitted if not doing so would cause foetal harm or death. In a contemporary *fatwa*,[618] it was held that a pregnant woman is obligated to comply with an advised medical intervention to prevent harm or death to the foetus, and that this

[618] [22-1-2009], Jurist Khalid Al-Bulahid. A *fatwa* is not legally binding; however, it can be made into law by order of the executive office. It is important because it form the legal opinion of emerging issues, in which learned jurists explore the issue in question and reach a legal opinion based upon the *Shariah* provisions. For more information about the nature of *fatwas*, see Chapter 1.5.2.

obligation stems from the Islamic legal maxim *Ad-darar Yuzal* ('Injury or harm must be eliminated').[619] Following such medical advice would also come under her obligation to maintain foetal life in compliance with the Islamic *Maqsid* of preservation of the soul.[620] The *fatwa* concluded that the removal and protection of foetal harm and life comes under the pregnant woman's *responsibility* towards the foetus. Maintaining foetal health and life is the duty of a capacitous pregnant woman, and so it was held that it is *not* permitted for a medical practitioner to carry out the necessary caesarean section without her consent, regardless of the harm her refusal may cause to herself or to the foetus. The *fatwa* was justified on the grounds that it is not permitted for a patient's body to be exposed to any medical intervention without their consent, as this would be a violation of the consent rule established in *Shariah* law. The *fatwa* advised that a medical practitioner should try to obtain a pregnant woman's consent, by persuading her of the need to follow the necessary medical intervention in order to prevent harm or death to herself or to the foetus. Performing a necessary caesarean section without her consent would be a sinful act, for which a medical practitioner would be accountable if they performed a non-consensual intervention.[621]

Taking a similar position, Muhammad ibn al-Uthaymeen,[622] when asked about the permissibility of a forced caesarean section to protect foetal life, issued a *fatwa* stating that it is not permissible for a medical practitioner to perform a non-consensual

[619] For more information about this Islamic maxim, see Chapter 1.5.1.2.
[620] For more information about this Islamic *Maqsid*, see Chapter 2.2.
[621] Jurist Khalid Al-Bulahid, 'Ruling on Performing a Caesarean Section without the Patient's Consent' <https://www.saaid.net/Doat/binbulihed/f/233.htm> accessed 17 April 2020.
[622] An influential scholar and a former member of the Council of Senior Scholar in Saudi Arabia.

caesarean section for the sake of protecting foetal life, and that a pregnant woman should only be persuaded to give her consent to the necessary intervention. In justifying his view, ibn al-Uthaymeen holds that the pregnant woman has nothing to do with the critical condition the foetus is in because it is an act of Allah and so, a forced caesarean section for the sake of protecting the foetus' life would constitute aggression on the pregnant woman's bodily integrity.[623]

It is clear from these *fatwas* that in situations where vaginal birth is not safe for the foetus, the prevention of foetal harm or death becomes a duty placed on the capacitous pregnant woman, and not the medical practitioner. The duty of the latter seems to be informing the pregnant woman of the outcomes of not consenting to a necessary caesarean section. This approach, thus, seems not to consider an ensouled foetus as a separate patient. Rather, maintaining their interests by consenting to a necessary caesarean section, comes under the *responsibility* of the pregnant woman. She can choose between complying with the *Shariah* provisions of the preservation of soul and prevention of harm (and hence consent to the necessary caesarean section), or not to follow the Islamic rules and be accountable before Allah for foetal harm or death caused by her refusal. This means forced caesarean sections for the foetus' sake are *not* permitted so long as the pregnant woman is deemed to have capacity. It also means that a capacitous pregnant woman's refusal to consent to the necessary caesarean

[623] Muhammad ibn al-Uthaymeen, 'Fatwa on Forced Caesarean Section for Protecting Foetal Life' < حكم العملية القيصرية إجبارا بسبب أن الجنين في خطر ؟ العلامة ابن عثيمين رحمه الله | حكم العملية القيصرية إجبارا بسبب أن الجنين في خطر ؟ العلامة ابن عثيمين رحمه الله | By فتاوى الرَّاسِخُونَ في الْعِلْم | Facebook> accessed 6 March 2023.

section cannot be overruled by the fact that the notion of autonomy in Islam is restricted by adherence to *Shariah* provisions.

The approach of these *fatwas* represents a clear tendency towards respecting the autonomous decision of the capacitous pregnant women. I agree with the approach of these *fatwas* with regard to not undermining the autonomy of a capacitous pregnant woman on the basis that her refusal decision is, from a religious perspective, wrong. This is because it could open the scope for overriding any harmful decisions that pose a threat to the patient's life or health, as well as being an interference in a patient's relationship with Allah. However, what I do not agree with is the lack of consideration or reference to the *legal* status of the ensouled foetus under *Shariah* law, which grants them some legal rights and protection (e.g., their right to life and to be protected from harmful actions). This approach is clear within these *fatwas* as maintaining the foetus' interests in a necessary caesarean section is seen as a *religious duty* of a pregnant woman and is *not* seen from the perspective that the ensouled foetus *does*, in fact, have some legal rights and protection. As such, it seems to me that this approach promotes the one-patient model, meaning that the case of maternal refusal of a caesarean section needed by a foetus is not seen as an issue of potential maternal-foetal conflict. Thus, these *fatwas* fail to address the potential harm to a foetus' legal rights as a result of a pregnant woman's refusal of a necessary caesarean section. Returning to al-Uthaymeen's stance, one can argue that it is not reasonable to say that a doctor should not intervene on the basis that if a pregnant woman refuses a necessary caesarean section, the foetus's death as a result of her refusal is an act of Allah, not the pregnant

woman. This is because it can be argued that what she wants is not necessarily a reflection of what Allah's will would be.

I believe that the interests of an ensouled foetus in a necessary caesarean section should be given more weight considering the legal protection given to them under *Shariah* law. This legal protection is considered in Resolution No. 184 of the International Islamic *Fiqh* Academy regarding consent for urgent medical operations.[624] The resolutions issued by this Islamic organisation are not legally binding, however because it is an organisation that a number of Islamic countries are members of, its resolutions have a key role in influencing the law in these countries. Resolution No. 184 gives a number of exceptions to the consent rule (i.e., obtaining consent before being touched), as well as to the right to refuse medical interventions, and under it, operating without a patient's consent can be permitted in certain circumstances. These are cases in which 'urgent medical attention' is required. Article 1 of the Resolution defines urgent medical cases as:

> medical conditions that require medical treatment or surgical work without any delay, given the seriousness of the health condition that the patient suffers from in order to save their life or to prevent severe damage to their health.[625]

[624] A well-known Islamic organisation aims at providing answers and solutions to various of contemporary issues.
[625] The International Islamic Fiqh Academy, 'Resolution No. 184: Ruling on Consent for Urgent Medical Operations', issued in 2009 < http://www.iifa-aifi.org/2314.html> accessed 25 April 2020. ''own translation''.

The Resolution provides examples of such cases, including cases requiring a caesarean section to save the life of the woman, the foetus, or both, due to uterine rupture during childbirth or the foetus being in a breech position (i.e. lying bottom or feet first and not in a head-down position).[626] Article 2 of the Resolution states that if a patient is deemed to have capacity and has the ability to retain and understand the information that is relevant to the decision and to make decisions without coercion, and medical practitioners decide that their condition is *urgent* and that their need for a therapeutic or surgical procedure becomes necessary, giving their consent to the advised medical intervention becomes, from a religious perspective, obligatory and not giving it would be a sin. Accordingly, a medical practitioner is permitted to perform the necessary medical intervention to protect the patient's life or health in accordance with the provisions of necessity in *Shariah* law.[627] The International Islamic *Fiqh* Academy, further, states that where a pregnant woman refuses to consent:

> If caesarean surgery is necessary to save the life of the foetus or the woman or both of them and the couple (the pregnant woman and her husband) or one of them refuses to give consent to do so, this refusal is *not* recognised and the right to do so is transferred to a competent authority (such as court and health authority) in performing this surgery.[628]

[626] The International Islamic Fiqh Academy, Resolution No. 184, Article 1(A).
[627] The International Islamic Fiqh Academy, Resolution No. 184, Article 2. For more information about the legal maxim of necessity, see Chapter 1.5.1.1.
[628] The International Islamic Fiqh Academy, Resolution No. 184, Article 4. ''own translation''. My emphasis.

On the basis of this Resolution, a husband can give consent for his wife's necessary caesarean section even if she refuses it. The International Islamic *Fiqh* Academy has also addressed instances where a caesarean section is needed *only* by the foetus, because otherwise they might die or suffer from serious health issues and a pregnant woman refuses to consent to the operation. It concludes that where the life or health of a patient (even if *before* the birth) is at risk, medical intervention does *not* depend on consent from the pregnant woman, as this will always be interpreted as an emergency case. The right to consent is, in this situation, forfeited by order of the court if the guardian (i.e., the pregnant woman) fails to assume their responsibility to protect the foetus, and the right is transferred to other legal guardians (such as, the husband / father of the foetus) who will consider their interest - I will explore this matter further below.[629] This means that women in labour (and their husbands) can only consent to the necessary caesarean section so as to protect the foetus' life/health. A sensible justification for this is that a guardian is obligated to act in accordance with what is best for whoever they have a guardianship over (here, the foetus) and so, it is always permitted to override the guardian's refusal if respecting their refusal would not be in the best interests of the foetus.[630] This is supported by a *hadith* in which the Prophet (PBUH) says 'He who does not look after his subjects with goodwill and sincerity, will be deprived of the *Jannah* (Heaven)'.[631]

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[629] Muhammad Ali Al-Bar, 'Al'iidhn Bialeamal Altaby: Iidhan Almarid w Iidhan Alshsharie (Consent to Medical Intervention: the Patient's Consent and Sharia's Permission)' in The International Islamic Fiqh Academy (eds), *Journal of International Islamic Fiqh Academy* (Islamic world Union, Mecca 2005) 268.
[630] Muhammad Al-Sahli, 'Medical Permission in Emergencies: A Comparative Jurisprudence Study' (2016) 31 (4) Mksq Journal 1794, 1823 - 1824.
[631] Narrated by Al-Bukhari, 'Sahih Bukhari' < الدرر السنية - الموسوعة الحديثية - شروح الأحاديث (dorar.net)> accessed 5 November 2022. ''Translated by sunnah.com''.

This detailed Resolution clearly takes into account the legal status of the foetus, as it considers the foetus as an independent human life that ought to be saved from death or serious harm. It, therefore, replicates the status that the foetus enjoys under the *Shariah* law. The approach adopted in the Resolution also considers the foetus to be an independent patient and *not* just as part of a religious duty owed by the pregnant woman. The Resolution relies on two legal bases or grounds for depriving a pregnant woman of her legal right to refuse medical intervention and not to be coerced. First, it considers a necessary caesarean section to be an *emergency* case that requires an *immediate* medical intervention and, thus, operating without her consent is always permitted, on the grounds of the Islamic legal maxim of *necessity*. Secondly, a pregnant woman's refusal of a necessary caesarean section is considered to be a harmful decision that has a negative impact on *others* (i.e., the foetus' life or health), and this results in forfeiting her right to refuse the necessary medical intervention.

While I agree with this Resolution in that a foetus' legal right to life should be considered in such a situation, and consider them an independent life whose rights should be protected by law, I disagree with authorising an override of a pregnant woman's refusal on the basis that her decision is a sin from a religious perspective, or because the Islamic notion of autonomy is restricted. This is evidenced in Articles 2 and 4 of the Resolution stated above, which imply that a pregnant woman must, from a religious perspective, give her consent in life-and-death situations, and permit a medical practitioner to override her refusal decision and intervene, whether to save the pregnant woman's life or that of the foetus, or both. This implies that the fact that a patient's right

to autonomy in Islam is restricted by adherence to *Shariah* provisions of preservation of soul and prevention of harm can be used to support an override of their refusal decision.

I also disagree with the reliance of the Islamic legal maxim of necessity to override the maternal refusal of a necessary caesarean section, because it would allow for the non-consensual intervention to be carried out in *all* critical circumstances (i.e., whether the caesarean section is needed only by the pregnant woman, the foetus, or both). Moreover, I disagree with the husband having the power of giving consent for his wife's necessary caesarean section even if she refuses it. Such an approach disregards any account of the pregnant woman's legal right to autonomy.

In line with this exception to the consent rule, Muhammad Al-Sahli states that respecting a patient's right to autonomy through obtaining their consent is not an 'absolute' right, but is 'restricted' by bringing benefits and preventing harms to the patient; and providing medical treatment / intervention in emergency cases, such as a necessary caesarean section, promotes the patient's well-being.[632] Hence, it is always permitted to override the consent rule and override a patient's refusal in such an urgent situation.[633] Although this compulsory medical intervention is considered coercion, it is seen, in urgent medical cases, as an 'acceptable' coercion, in which a medical practitioner is authorised to compel a patient to the necessary medical intervention in order to protect their life or

[632] Al-Sahli (n 630) 1831.
[633] Ibid.

health.[634] Al-Sahli's perspective supports the Resolution's approach in that a patient's refusal decision in life-and-death situations can in fact be overruled by the restricted notion of autonomy in Islam.

To justify overriding a capacitous patient's refusal in specific urgent medical cases, this approach requires a number of conditions, which are set out in the Resolution:

> (A) That the physician explains to the patient or his guardian the importance of medical treatment, the seriousness of the disease, and the consequences of his refusal, and in case of insistence on refusal, the physician documents this.
>
> (B) That the physician makes a great effort to persuade the patient and their family to refrain from refusing to consent to avoid the deterioration of their condition.
>
> (C) A medical team consisting of no less than three consulting physicians, provided that the attending physician is not one of them, is appointed to confirm the diagnosis of the condition and the proposed medical intervention/treatment for it, with a record prepared of it and signed by the team, and the hospital administration is informed thereof.
>
> (D) That the medical intervention / treatment is free of charge, or a neutral agency estimates the cost.[635]

[634] Islamweb.net, 'Ruling on Forcing a Patient to Take Medication - Types of Coercion' < https://www.islamweb.net/ar/fatwa/27996/حكم-إكراه-المريض-على-تناول-الدواء-أنواع-الإكراه> accessed 24 June 2020.

These conditions show that overriding a patient's refusal becomes permissible *after* exhausting all means to obtain their consent, and when the necessary medical intervention is recommended by a number of physicians. In other words, while there should be no coercion, intrusion, or even pushing for consent to or refusal of a compulsory medical intervention, urgent medical cases are excluded provided those conditions are met.

Some researchers argue that the father of the foetus can be involved in the decision to have a caesarean section performed in order to save foetal life or health.[636] Hence, in cases where a pregnant woman refuses to consent to the operation, but the father of the foetus does, her refusal would not be recognised.[637] This is because an ensouled foetus has a legal right to life and because they argue that a decision of undergoing a caesarean section in such a situation is a shared decision between the father of the foetus and the pregnant woman.[638] As the decision of the father represents the foetus' medical best interests, his consent is what would be considered.[639] Where both the pregnant woman and the father of the foetus refuse to consent to the necessary caesarean section, both refusals would not be recognised, and the right to give consent will pass to a competent authority (such as a court) who will consider the foetus' medical

[635] The International Islamic Fiqh Academy, Resolution No. 184, Article 5. ''own translation''.
[636] Abdulrahman Ahmad Al-Jarai, *'abhath mueasirat fi alfiqat al'iislamii* (*Contemporary Research in Medical Jurisprudence)* (Al-Waei Al-Islami, Kuwait 2020) 91 - 92.
[637] Ibid.
[638] Ibid.
[639] Ibid.

best interests.[640] This argument, as such, seems to assume that both the pregnant woman and the foetus' father have guardianship over the foetus; as a result, the operation would only need the consent of whichever party acts in the foetus' medical best interests.[641] As I mentioned above, I disagree with the husband (the father of the foetus) having this power of giving consent as this would disregard any account of the pregnant woman's legal right to autonomy.

My discussion of the *Shariah* law's stance on potential maternal-foetal conflict in necessary caesarean section refusals has shown that the general rule is that a pregnant woman with capacity *is* granted the right to autonomy, and while this right gives her a legal protection not to be coerced or 'prodded' into agreeing to any medical intervention, maternal refusal of a necessary caesarean section is a complex issue. This is demonstrated by the fact that, despite the fact that the Islamic notion of autonomy does not accommodate such a refusal because it is a sinful act, opinions are divided regarding the question as to whether this restricted / limited autonomy can be used to override a pregnant woman's right to refuse a necessary caesarean section if not doing so would endanger the foetus' life or health. This is evidenced by the opinion adopted in the above-mentioned *fatwas* and that in the Resolution giving two different approaches on how to deal with cases of maternal refusal of a necessary caesarean section. While the *fatwas* prioritised the pregnant woman's legal right to autonomy in refusing the

[640] Ibid.

[641] The involvement of the husband (the father of the foetus) in accepting certain surgical procedures, such as a necessary caesarean section, was a common practice in Saudi Arabia, with some evidence indicating continuous such illegal practice. For more information about this, see Chapter 4.3.2.1.2 and 5.3.3.

necessary caesarean section, regardless of the risk it may cause to the ensouled foetus' legal right to life, the Resolution considered a necessary caesarean section to be a case requiring an *immediate* intervention. As such, it restricted a woman's right to refuse necessary caesarean section, for the provisions of necessity as well as because of the possibility of causing harm or death to the ensouled foetus (or to herself).

Accordingly, the approach adopted in the *fatwas* does *not* authorise overriding maternal refusal of a necessary caesarean section, so long as the pregnant woman is deemed to have capacity. This is because operating on a patient's body without their consent is a violation of the consent rule.[642] The Resolution, however, authorises, as an exception to the consent rule, a pregnant woman's refusal to be overridden for the sake of saving foetal life or health. Those contradictory approaches within *Shariah* law show that the issue of maternal refusal of a necessary caesarean section is not clear in *Shariah* law. They can also reflect the flexibility of *Shariah* law as different approaches can be adopted from within it. I contend that the approach of the Resolution is more appropriate as it does not dismiss the legal status of the ensouled foetus. It is also in line with the general approaches taken in the cases of abortion and operating on a dead woman to deliver a living foetus, in which the ensouled foetus is treated as an *independent* human life who ought to be preserved, and not as a *duty* placed on the pregnant woman. I do not, however, agree with the approach of the Resolution in restricting a pregnant woman's refusal decision on the basis that the Islamic notion of autonomy does not accommodate such a refusal because it is a sinful act, nor do I agree with the

[642] Al-Khatib Al-Sherbini, *Mughnī al-Muḥtāj ʾilā Maʿrifat Maʿāniy ʾAlfāẓ al-Minhāj* (1st edn Dar El-Marefah, Beirut- Lebanon 1997) 434.

involvement of the husband in authorising a necessary caesarean section to be performed for his wife. Rather, I would prefer authorising the overriding of the pregnant woman's refusal to be based on the Islamic legal maxim that severe harm is removed by lesser harm.[643]

3.4 Conclusion

In this chapter I have explored and discussed the Islamic legal perspective on the legal status of the foetus, as well as on potential maternal-foetal conflicts in the context of abortion, operating on a pregnant dead woman to deliver a live foetus, and maternal refusal to consent to a necessary caesarean section. My aim has been to examine how *Shariah* law approaches and deals with such potential maternal-foetal conflicts cases, as this is necessary to understand and evaluate the position of the Saudi's law on these issues, which will be the focus of my next chapter. This is because *Shariah* law is the main source of Saudi law.

The concept of ensoulment, which takes place after 120 days, determines the legal status of the foetus. A foetus after ensoulment is considered to be a human being and a 'person' in a legal sense. They are, thus, granted some legal rights and protections (e.g., their right to life and to be protected from harmful actions). By contrast, the foetus before ensoulment is not described as a human being, nor are they considered to be a

[643] For more information about my suggested approach in how to deal with the potential maternal-foetal conflict in necessary caesarean section refusal, see chapter 4.4.2.

legal person. Rather, they are seen as a part of the pregnant woman's body as they have no independent soul and are dependent on her as they form.

I, then, explored the extent to which the rights of the foetus are preserved in cases where there is a potential for conflict between the pregnant woman's right to autonomy and bodily integrity and those of the foetus (their right to life and to be protected from harmful actions). I critically explored this matter in the context of three scenarios: abortion, operating on a pregnant dead woman to deliver a live foetus, and maternal refusal of a necessary caesarean section. My discussion of the first two matters showed an acknowledgment of legal personality to the ensouled foetus before birth and a recognition of foetal legal rights. I then focused on the issue of maternal refusal of a necessary caesarean section. My aim was to answer my thesis questions regarding whether the Islamic notion of autonomy allows for a capacitous pregnant to refuse to consent to a caesarean section that could save the foetus' life or protect them from severe injuries (referred to as a necessary caesarean section), and whether it can be used to overrule such a refusal. I have also addressed the thesis question of whether *Shariah* law provides scope for accommodating different approaches for dealing with the issue in question.

I have shown that the Islamic interpretation of autonomy does *not* accommodate maternal refusal of a necessary caesarean section, because consent to the procedure in such situation falls under the category of *wajib* (obligatory). In terms of whether this

can enable a pregnant woman's refusal decision to be overridden, two main approaches to whether a non-consensual caesarean section can be permitted, if not doing so would cause foetal harm or death, were discussed. Under the first approach, this is not permitted as it is a violation of the consent rule established in *Shariah* law. This approach, as such, promotes a capacitous pregnant woman's right to autonomy, regardless of the potential conflict her refusal may cause with the foetus' legal rights to life and to be protected from harmful actions. I criticised this approach for not giving any consideration to the legal status of the ensouled foetus under *Shariah* law.

Thereafter, I discussed the Resolution No. 184 of the International Islamic Fiqh Academy, which excluded a necessary caesarean section from the consent rule because it classified it as a case requiring an immediate medical intervention. This ruling considers the foetus as an independent patient and, hence, maternal refusal of a necessary caesarean section is a harmful decision that has a negative impact on the foetus. This means that she forfeits her right to refuse such a medical intervention. Non-consensual intervention is, thus, justified. I have argued that this approach is more appropriate in that it is in line with the legal protection given to the ensouled foetus under *Shariah* law. It is also in accordance with the general Islamic stance on issues such as abortion, in which harmful actions against the ensouled foetus are prohibited. However, I have criticised this approach for (i) enabling a pregnant woman's refusal decision to be overridden on the basis of it being a sinful act; (ii) recognising the husband's consent for the operation to be performed even if the woman refuses, which would dismiss any consideration of the pregnant woman's legal right to autonomy; (iii)

and for the use of the Islamic legal maxim of necessity, which would allow for non-consensual intervention in all critical circumstances.

The existence of different approaches and difference of opinions to the maternal refusal of a necessary caesarean section from within *Shariah* law shows that it offers scope for adopting different approaches to the issue in question. A key reason for this is the fact that neither the *Qur'an* nor the *Sunnah* provides a clear answer on how to deal with instances where maternal-foetal conflict may arise. They did, however, provide a number of general principles (i.e., the prohibition of killing the soul and the *ghurrah* ruling) which enabled jurists to form their judgements on various matters, such as those discussed in this chapter.

In the next chapter I will explore and locate the Saudi law's approach on cases of potential maternal-foetal conflict within the different provisions of the four *Sunni* schools of law discussed in this chapter. I will consider whether its approach reflects the *Shariah* law's approach on this matter, whether foetal legal rights are maintained, and whether reform is needed. If reform is required, I will suggest an alternative approach towards the potential maternal-foetal conflict in the context of maternal refusal of a necessary caesarean section.

Chapter 4: The Saudi Law on Potential Maternal-Foetal Conflict Issues in the Context of Caesarean Section Refusal

4.1 Introduction

In Chapter 3, I discussed the *Shariah* law's position on the legal status of the foetus and its stance towards the potential for maternal-foetal conflict in the context of refusing a necessary caesarean section and other related cases. In this chapter, my objectives are fourfold: (i) to examine Saudi law's stance on cases of potential maternal-foetal conflict; (ii) to locate its perspective within the different provisions of the four *Sunni* schools of law discussed in Chapter 3; (iii) to consider whether Saudi law approach reflects the *Shariah* law's stance on this matter; and (v) whether reform of the law is needed, and whether an alternative approach for dealing with the maternal refusal of a necessary caesarean section can be suggested.

To achieve these objectives, in section 4.2 I will explain the foetus' legal status and their rights in Saudi law. I will then, in section 4.3, discuss how Saudi law approaches not only maternal refusal of necessary caesarean sections, but also other relevant cases, such as abortion. This is because there is limited literature on maternal refusal of caesarean sections in relation to Saudi. The inclusion of abortion law can help to examine how issues of potential maternal-foetal conflict are approached and how well a foetus' rights are preserved. In section 4.4, I will discuss the implications of the current legal position of the law on the foetus' legal right to life, followed by my presentation of

an argument for adopting an alternative approach for dealing with the maternal refusal of a necessary caesarean section.

This chapter will address my main research question regarding whether the Saudi approach to the potential for maternal-foetal conflict in necessary caesarean section refusal is appropriate. It also addresses my thesis's question as to what extent the foetus' legal right to life is maintained under the current position of Saudi law on maternal refusal of a necessary caesarean section. Moreover, this chapter will, along with the following chapter, cover the question as to whether a reform of the law is needed; and if so, can an alternative approach for dealing with the issue in question be developed from within *Shariah* law, being the main source of Saudi law?

4.2 The Foetus' Legal Status and Rights in Saudi Law

There is no single Saudi law regarding the legal status and rights of the foetus. There are, however, a number of laws and *fatwas* that give a sense of how the foetus is viewed and protected.

The Child Protection Law 2014 defines a child as 'every human being less than eighteen years of age'.[644] The Executive Regulation of this law explains that the age of the 'human being' is proven by 'birth certificate, national ID, family register, or any other

[644] The Child Protection Law 2014, Article 1(1). ''own translation''.

official document: if the official identification documents are not available, the age is estimated by one of the accredited medical authorities'.[645] This definition of a child refers to a child *after* birth and so a foetus is not included. The Child Protection Law 2014 only expressly addresses the foetus in Article 14, which states that 'it is prohibited to perform any medical intervention or procedure for the benefit of the foetus except for an interest or medical necessity'.[646] Article 14(1) of the Executive Regulation of the Child Protection Law 2014 specifies that this exception ought to be 'in accordance with the provisions of Practicing Healthcare Professions Law 2005 and its Implementing Regulations, and the Law of Fertilization, Infertility Treatment Units', and I discuss how 'interest' and 'medical necessity' are interpreted in sections 4.3.1 and 4.3.1.2 below.

When scholar Abdul-Aziz bin Baz, a former Grand *Mufti* of the Kingdom of Saudi Arabia,[647] was asked about how a foetus should be treated after a miscarriage, he stated in a *fatwa* that:

> If an aborted foetus was five months old or more, the foetus would be considered a human being and would be treated in the same way as a child; meaning, they should be named, washed, shrouded, and buried.[648]

[645] The Executive Regulation of the Child Protection law 2014, Article 1(5). ''own translation''.
[646] ''own translation''.
[647] Abdul-Aziz bin Baz was a well-known Saudi Arabian scholar and was the *Mufti* of Saudi Arabia from 1993 until his death in 1999. A *Mufti* is a qualified jurist empowered to give rulings on religious matters in the society he lives in.
[648] Abdul-Aziz Al-Sheikh, *Fatwas Almutaealiqat Bialtabi w 'ahkam almardaa (Fatwas Related to Medicine and Patient Rulings)* (3rd edn General Presidency for Scholarly Research and Ifta, Riyadh 2014) 277. ''own translation''.

Although the *Mufti* did not make a reference to the concept of ensoulment and whether it was the reason for considering the foetus to be a human being, his legal opinion is in line with this concept since the infusion of the soul to the foetus takes place after 120 days of pregnancy (that is, when the foetus reaches five months old and above).[649] The *fatwa* does not explicitly consider whether a foetus, as a human being, also has complete or limited legal personality. This contrasts with *Shariah* law where such a reference is made.[650] Moreover, *Shariah* law explicitly recognises a foetus before ensoulment as a *part* of a pregnant woman's body, and after ensoulment they are seen as an *independent* human being to the pregnant woman and as having limited legal personality.[651] Saudi law, by contrast, does not explicitly make such differentiations.

The Saudi law position of not explicitly addressing the legal status of the foetus does not, however, mean that it is not governed. As I explained in Chapter 1, Saudi law is governed by the rulings and principles of *Shariah* law – Saudi Arabia's supreme law.[652] The fact that the *Shariah* provisions regarding foetal legal status and rights are *not* codified in statutes means that their interpretation and application is for each individual judge and the Council of Senior Scholars, who have 'significant discretionary power in deciding cases'.[653] The lack of codification of *Shariah* provisions on those matters may

[649] For more information about the implication of ensoulment on the foetus' legal status, see Chapter 3.2.2.2.
[650] For more information about the legal personality of the foetus in *Shariah* law, see Chapter 3.2.2.
[651] Ibid.
[652] The Basic Law of Governance 1992, Article 1. For more information about Saudi Islamic law, see Chapter 1.2.
[653] United Nations Entity for Gender Equality and the Empowerment of Women, 'Spring Forward for Women Programme: Saudi Arabia' < https://spring-forward.unwomen.org/en/countries/saudi-arabia> accessed 21 July 2020.

have contributed to Saudi law being seen as being unclear about the foetus' legal status and the effect of ensoulment on the foetus' legal status and legal rights.[654]

This holds true especially because foetal status and rights are not explicitly addressed in the *Qur'an* and the *Sunnah*, the two primary divine sources of *Shariah* law.[655] While the broad rules and principles (that is, the prohibition of killing the soul, the *ghurrah* ruling, and the different stages of foetal development), provided by these divine sources offer some flexibility around foetal status and rights, they can also lead to different interpretations or approaches being adopted. There is, therefore, a need for codification to set a clear legal stance within these different approaches and different jurisprudential rulings of the *Sunni* schools of law around foetal status.[656]

[654] Adel Muhammad Saqqa, 'Codification of Civil and Criminal Shariah Provisions' *Okaz* (Jeddah, Saudi Arabia 24 November 2017) < https://www.okaz.com.sa/citizen-voice/na/1592426 > accessed 27 October 2021; Ali Mazeed, 'Codification of Laws' *Asharq Al-Awsat* (London 21 February 2021) < تقنين القوانين | الشرق الأوسط(aawsat.com)> accessed 27 October 2021; Fahd Al-Suwaidan, 'The Judicial System in the Kingdom' *Al-Jazirah* (Riyadh, Saudi Arabia 15 January 2019) < النظام القضائي في المملكة(al-jazirah.com)> accessed 27 October 2021.

[655] For more information about these two primary divine sources of *Shariah* law, see Chapter 1.3.2.2.

[656] In fact, codifying *Shariah* provisions has been a subject of debate in Saudi Arabia. There are aspects of Saudi law where this issue (not codifying *Shariah* provisions) arises. For example, personal matters, such as marriage, divorce, descent, ownership, inheritance, and maintenance, are now governed by the new Personal Status Law 2022. This is the first Personal Status Law in Saudi Arabia, through which *Shariah* provisions regarding personal matters are codified. Before, the interpretation and application of *Shariah* law regarding personal matters were up to the individual judges who had significant discretionary power in deciding cases. One of the objectives of codifying *Shariah* provisions regarding personal matters is to control the judicial authority of judges to reduce disparities in rulings in this regard, Saudi Press Agency, 'The Personal Status Law 2022' < عام / سمو ولي العهد بمناسبة موافقة مجلس الوزراء على نظام الأحوال الشخصية: مشروع نظام الأحوال الشخصية استمد من أحكام الشريعة الإسلامية ومقاصدها وروعي في إعداده أحدث التوجهات القانونية والممارسات القضائية الدولية الحديثة ومواكبة مستجدات الواقع ومتغيراته وكالة الأنباء السعودية(spa.gov.sa)> accessed 16 August 2022. The civil transactions law has recently been introduced in 2023; and the penal code of discretionary sanctions is also expected to be codified in the near future.

Furthermore, there is a clear adoption in Saudi law of *Shariah* law, in, for example, the sort of rights that are granted to the foetus (that is, rights to life, to health care, and rights that do not need proof of acceptance, such as bequest, inheritance and parentage).[657] For example, Article 3(1) of the Law of the General Commission for Guardianship over Property of Minors and Persons of Similar Status 2006 states that the General Commission has 'guardianship over the property of minors and unborn children who have no guardian or custodian'.[658] This Article shows that a foetus has a right to ownership through inheritance and bequest, for example, and so in the absence of a guardian or custodian, the General Commission is responsible for protecting their property.

In addition to this, in 2006, Saudi Arabia ratified the Covenant on the Rights of the Child in Islam, which was adopted during the 32nd session of the Organisation of Islamic Cooperation 2005.[659] This Covenant stated that it aimed to incorporate and affirm the *Shariah* provisions and rulings with regard to children's rights.[660] It can, hence, be said to 'codify' the *Shariah* provisions that are related to children, providing an additional or

[657] For more information on the sort of rights granted to the foetus under *Shariah* law, see Chapter 3.2.2.2.
[658] ''own translation''. 'Persons of similar status' refers to adults lacking capacity. The General Commission is an organisation which saves and manages for the funds of minors and others. For more information about the General Commission, see: Saudi Arabia's National Unified Portal for Government Services, 'General Commission for the Guardianship of Trust Funds for Minors and their Counterparts' <https://www.my.gov.sa/wps/portal/snp/pages/agencies/agencyDetails/AC378/!ut/p/z0/04_Sj9CPykssy0xPLMnMz0vMAfljo8zivQIsTAwdDQz9LQwNzQwCnS0tXPwMvYwNDAz0g1Pz9L30o_ArAppiVOTr7JuuH1WQWJKhm5mXlq8f4ehsbG6hX5DtHg4AzEr6jA!!/> accessed 17 July 2020.
[659] 'The Organisation of Islamic Cooperation (established in 1969) is the second largest organization after the United Nations with a membership of 57 states spread over four continents. The Organization is the collective voice of the Muslim world', Organisation of Islamic Cooperation, 'History' <https://www.oic-oci.org/page/?p_id=52&p_ref=26&lan=en> accessed 17 July 2020.
[660] Organization of the Islamic Conference (OIC), 'Covenant on the Rights of the Child in Islam' (2005) OIC/9-IGGE/HRI/2004/Rep.Final < Refworld | Covenant on the Rights of the Child in Islam> accessed 19 October 2021, p.2.

separate legal basis.[661] Under Article 6(1) of this Covenant, a foetus' legal right to life is recognised as it says that 'the child shall have the right to life from when he is a foetus in his/her mother's womb or in the case of his/her mother's death […]'. The same Article also recognises the foetus' legal right to 'descent, ownership, inheritance and child support'. It is, thus, clearly acknowledged that, under Saudi law, a foetus has *some* legal rights.

The Covenant on the Rights of the Child in Islam, as such, does not differentiate between the legal status of a foetus *before* ensoulment, and that of an *ensouled* foetus. This is evident as it gives legal protection and recognition to the foetus' legal right to life throughout the entire period of pregnancy. This means that the concept of ensoulment (120-day point) has no bearing on the recognition of a foetus' right to life. This is in contrast to *Shariah* law, which recognises a distinction between the legal status of a foetus before and after ensoulment. Here, there is a *consensus* between jurists that the right to life is acknowledged to a foetus *after* ensoulment, but *before* ensoulment, the majority opinion is that the legal right to life is *not* acknowledged to the foetus because they have no soul.[662]

[661] A full copy of this covenant is available in Justice Magazine - Ministry of Justice, 'the Covenant on the Rights of the Child in Islam' < وزارة العدل - مجلة العدل(moj.gov.sa)> accessed 19 October 2021. This Covenant was issued by the Saudi Council of Ministers Resolution No. 213 on 25-8-1427 AH (19-9-2006) and was enshrined by Royal Decree No. M/54 on 27-8-1427 AH (21-9-2006), which makes it effective.
[662] For more information about the legal status of the foetus before and after ensoulment in *Shariah* law, see Chapter 3.2.2.

The Covenant, as such, seems to adopt a position that is similar to the view of the *Maliki* school which acknowledges a *potential* right to life to the foetus during all foetal stages and from conception. This is similar to the approach adopted by the majority of contemporary jurists, who advocate the *Maliki* school's approach and, hence, recognise a potential right to life to the foetus from conception.[663] Interestingly, however, even though Saudi law acknowledges a right to life to a foetus from conception and without differentiating between before and after ensoulment, the Saudi law on abortion relies on the *Shariah* provisions of ensoulment. This means that there is a difference between the status of the foetus before and after ensoulment. Thus, while the concept of ensoulment is *not* evident in regulating Saudi laws regarding a foetus' legal status and rights, it *is* evident in regulating Saudi law on abortion. In section 4.3.1, I will discuss this further, as well as the significant role the concept of ensoulment plays in the Saudi abortion law in the context of maternal refusal of caesarean sections.

Furthermore, Article 15 of the Covenant on the Rights of the Child in Islam acknowledges that the foetus has a right to health care. According to this Article, a foetus' health care rights are achieved through 'providing care for the mother since the onset of pregnancy […]',[664] and through 'lessening work assignments of a nursing and pregnant woman and reducing their working hours',[665] in order to maintain the foetus' well-being. The foetus' health is, also, indirectly maintained in Article 14(2) of the Executive Regulation of the Child Protection Law 2014, which states: 'The Relevant

[663] Ibid.
[664] The Covenant on the Rights of the Child in Islam 2005, Article 15(1).
[665] The Covenant on the Rights of the Child in Islam 2005, Article 15(2).

Health Care Authorities shall provide appropriate pre-natal and post-natal health care for mothers; to ensure a healthy infant and protect them from pre-natal and post-natal diseases'. These Articles are significant because they require healthcare authorities to provide pregnant women with pre- and post-natal health care in order to maintain a healthy infant and to protect them from disease. This suggests that there is some sort of a role placed on the State to work in collaboration with the pregnant woman in order to help her maintain the best possible maternal environment for the development of the foetus. In this regard, the pregnant woman is encouraged to act in a way that will protect the foetus, but she is not compelled to act in a particular way. Notably, the protection of the foetus' health here is related to the injury or harm to the foetus from disease rather than the woman herself. The position of these articles is similar to the Saudi current position regarding a necessary caesarean section that is aimed at protecting the foetus' life, in which the woman is encouraged to give her consent to the operation, but she is not to be forced to undergo the operation.[666]

In addition, Saudi law protects the foetus' right to life and to health care by allowing a pregnant woman to obtain special treatment under criminal laws. For example, the Law of Imprisonment and Detention 1978 states that 'a prisoner or detained woman who is pregnant ought to be treated well from the onset of pregnancy, especially in terms of food and work assignment, until the 40-days period has passed after birth'.[667] She also has the right to be 'transferred to the hospital when her due date approaches, and to

[666] For more information about the Saudi legal position regarding a maternal refusal of a necessary caesarean section, see section 4.3.2.1 of this chapter.
[667] Article 13. ''own translation''.

remain there until she gives birth, and the doctor authorises her to leave'.[668] Moreover, if the convict is pregnant, postpartum, or breastfeeding, the imposition of the death penalty, amputation, stoning, flogging, or retribution shall be postponed until she gives birth, her postpartum period ends, and her new-born is weaned.[669] These positions of Saudi law reflect the *Shariah* law provisions which grant a foetus a right to delay imposing punishment on the woman while she is pregnant, for the sake of protecting the foetus' health and life.[670]

From the above, it is clear that Saudi laws on foetal legal rights and status are not explicit regarding the key concepts, such as ensoulment and legal personality, that have significant roles under *Shariah* law for determining the legal status and rights of a foetus. It is thus not clear whether these concepts have a role in relation to the legal status of a foetus. While this does not mean that they are not governed by Saudi law since *Shariah* law is the supreme law of Saudi Arabia, the lack of clarity and codification on those concepts may have contributed to different approaches being adopted by Saudi law with regard to maternal-foetal conflict issues, as I will explain below.

4.3 Saudi Law Approaches to Maternal-Foetal Conflict Issues in the Context of Refusals of a Necessary Caesarean Section

[668] The Law of Imprisonment and Detention 1978, Article 14. ''own translation''.
[669] Executive Regulations of Law of Criminal Procedure 2015, Article 157(3).
[670] For more information about the delay of punishment on pregnant women for the sake of the foetus, see Chapter 3.2.2.2.

It is well established, in Article 19 of Saudi law of Practicing Healthcare Professions 2005, that medical interventions cannot be carried out without a capacitous patient's consent, or their guardian's consent if the patient is deemed to lack capacity. That Article specifies the circumstances when a healthcare professional must intervene without the patient's consent:

> As an exception [to the consent rule], a healthcare professional must – in cases of accidents, emergencies or critical cases requiring immediate or urgent medical intervention to save the patient's life or an organ thereof or to avert severe damage that might result from delay, where the timely consent of the patient, his representative or guardian is unattainable- intervene without waiting for such consent.

By requiring that consent is obtained prior to any medical intervention, Saudi law acknowledges a capacitous patient's legal right to autonomy as well as their right to be protected from unwanted medical intervention. Given this and Saudi law's position on the right to life of the foetus from conception, how does the law approach the situation of a capacitous pregnant woman who wants to refuse a necessary caesarean section? Before considering this, I will explore and discuss Saudi law's position on abortion. This is because there is a limited amount of literature on maternal refusal of a necessary caesarean section and its implication for foetal rights. In addition, Saudi law deals with this matter (i.e., maternal refusal of a necessary caesarean section) in the context of *a*

capacitous pregnant woman's right to consent without the need for the husband's consent.[671] In another word, the law deals with the issue from the perspective of the invalidity of the husband's consent to such an intervention. Hence, the law does not explicitly deal with the potential for a conflict between the pregnant woman's right to autonomy and the foetus' right to life in cases of maternal refusal of a necessary caesarean section. Discussion of abortion law may, thus, help with understanding how the foetus is seen and protected in Saudi law and how the potential for a conflict between the woman's right to autonomy and the foetus' right to life is dealt with.

As I previously stated in the introduction of my thesis, I am not including abortion law to suggest that there are clear parallels between abortion and maternal refusal of a necessary caesarean section. Abortion regulates the intentional termination of a pregnancy and so, it requires an action, most often by a third party, that is intended to cause the death of a foetus, and it is normally takes place before ensoulment, or viability. By contrast caesarean sections are often only relevant from approximately 22 weeks (154 days, so long after ensoulment) and are intended to deliver a live infant. Where a pregnant woman refuses a caesarean section needed by the foetus, she is not generally doing so with the intention of harming the foetus. Hence, the argument that can be made is that the woman's omission puts the life of the foetus in danger, but she does not intentionally harm the foetus.

[671] For more information about this, see section 4.3.2.1 of this chapter.

However, although abortion and caesarean refusals are two different issues, foetal legal status and legal rights are discussed in *Shariah* law and Saudi law in the context of abortion. This makes abortion law relevant here because foetal legal status and legal rights can be inferred from it. This is especially significant because, as I will demonstrate below, an ensouled foetus' legal right to life and their legal status as an independent person whose rights must be protected are established through abortion law.

4.3.1 The Saudi Law on Abortion

The *Shariah*'s criterion of the infusion of the soul, which is believed to take place 120 days following conception,[672] generally forms the basis of the law on abortion in Muslim States.[673] Dariusch Atighetchi notes, however, that *in practice* there are only a few Muslim States which currently make 'explicit reference' to this criterion, and that the law on abortion varies between these States.[674] In fact, Saudi Arabia is one of the few Muslim States to make *explicit* reference to the different stages of foetal development, defined by the *Shariah*, in regulating its law on abortion.[675] Article 22 of the Law of Practicing Healthcare Professions 2005 states that:

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[672] For more information about the implication of ensoulment on the foetus' legal status, see Chapter 3.2.2.

[673] Muslim States refer to a form of government which is based on *Shariah* law, and where their legal systems are, wholly or in part, based on *Shariah* law. Examples of these States are Pakistan, Afghanistan, and States of the Arab world, such as Egypt, Algeria, and Saudi Arabia.

[674] Dariusch Atighetchi, 'Aspects of the Management of the Rising Life Comparing Islamic Law and the Laws of Modern Muslim States' (2010) Droit Cultures Paragraph 70 <https://journals.openedition.org/droitcultures/2148?lang=en#tocto1n5> accessed 11 March 2019.

[675] For more information about the different stages of foetal development, see Chapter 3.2.1.

A physician may not perform an abortion on a pregnant woman unless necessary for saving her life. However, an abortion may be performed if pregnancy has not completed four months and conclusively established that the continuation of such pregnancy will have serious consequences on the mother's health, based on a decision by a medical committee formed in accordance with terms and conditions specified in the Implementing Regulations of this Law.

The stages of foetal development and when abortion may be permissible under the Saudi law on abortion, are set out in Table 3 below:

Table 3: Saudi Law on Abortion

Stages of Foetal Development	Permissibility of Abortion	Conditions/Justifications/Exceptions
First phase: *Nutfa* (day 1-40)	Permissible	Upon condition to bring about legitimate benefit, or preventing expected harm, to the woman or the embryo
Second phase: *Alaga* (day 41-80)	Not permissible	Except where the woman's *physical health* is severely affected by continuation of the pregnancy
Third phase: *Mudgha* (day 81-120)	Not permissible	Except where the woman's *physical health* is severely affected by continuation of the pregnancy
Fourth phase: Ensoulment (day 121-Birth)	Not permissible	Except where continuation of the pregnancy will cause *death* to the woman

4.3.1.1 Saudi law on abortion *before* ensoulment

Article 22(1) of the Implementing Regulations of the Law of Practicing Healthcare Professions (IRLPHP) 2005 includes Resolution No. 140 of the Council of Senior Scholars, which gives the provision on abortion with reference to the different stages of foetal development:

> 1- It is not permissible to terminate the pregnancy at all its phases except for legitimate justification and in very narrow limits.
>
> 2- If the pregnancy is in the first phase, which is 40 days, and if there is a legitimate benefit or prevention of expected harm, abortion is *permissible*. However, terminating the pregnancy, during this period [40 days], because of fear of hardship in raising the children or fear of being unable to pay for their living, education or for their future is not permissible.
>
> 3- It is *not* permissible to terminate the pregnancy if the foetus is *alaga* [a clot of blood] or *mudgha* [a clump of flesh] unless it is established by a reliable medical committee that the continuation of the pregnancy threatens their mother's *health*, in that her well-being may be severely affected by their continuation. In this case, termination is permissible after exhausting all means to avoid those dangers.[676]

The Saudi legal position on abortion before ensoulment is similar to the opinion of the *Hanbali* school, which permits an elected abortion in the *nutfa* stage (day 1-40), and

[676] Council of Senior Scholars, Resolution No. 140 [1987]. ''own translation''. (My emphasis).

prohibits it in the *alaqa* (day 41-80) and *mudgha* (day 81-120) stages.[677] Saudi law permits an elected abortion *only* in the *nutfa* stage for reasons of producing a legitimate benefit or preventing foreseen harm to the woman or the foetus (for example, where pregnancy is associated with very dangerous diseases, or in cases of severe threat to the life or health of the pregnant woman or the foetus).[678] The law does not specify or explain what it means by these two reasons; it does, however, state that fear of financial burden is not a valid justification to terminate a pregnancy. The Council of Senior Scholar has, though, issued a *fatwa* stating that if a woman is raped and becomes pregnant, or if 'foetal abnormality' is medically proven,[679] then an elected abortion is permissible during the first 40-day period, as these situations are considered legitimate benefits or preventing expected harm.[680] Furthermore, a necessary or therapeutic abortion is permitted during the second and third phases of pregnancy if it is believed that continuing the pregnancy would threaten the life or health of the woman. While the law is not explicit whether the woman's 'health' includes both her physical and mental health, it appears that, as I discuss below, only physical health is considered.

Furthermore, it is apparent that the Saudi law on abortion before ensoulment relies on different justifications for resorting to an elected abortion between the *nutfa* stage, and

[677] For more information about the approach of the *Hanbali* school, see Chapter 3.3.1.2.1.

[678] Ministry of Health, 'Patient Rights and Responsibilities' < https://www.moh.gov.sa/HealthAwareness/EducationalContent/HealthTips/Pages/001.aspx> accessed 02 November 2021.

[679] Foetal deformity or abnormality refers to conditions that are unusual, unexpected or abnormal in a baby's development during pregnancy. Foetal deformity may also be known as 'congenital anomaly', 'congenital malformation', 'congenital abnormality', Better Health Channel, 'Birth defects explained' < Birth defects explained - Better Health Channel> accessed 14 November 2022.

[680] Council of Senior Scholars, Fatwa No. 2484 [1979], as cited in Sheikh Al-Islam Ibn Taymiyyah.net, 'Abortion of Deformed Foetus' <https://taimiah.net/index.aspx?function=item&id=927&node=2541> accessed 17 August 2020. Anomalies are unlikely to be detected at that very early stage of pregnancy.

the *alaqa* and *mudgha* stages. This is also evident in a number of *fatwas* where the Permanent Committee for Scholarly Research and *Ifta* do not permit an elected abortion of a foetus with abnormalities or severely ill foetus during the *alaqa* and *mudgha* stages, in cases where the pregnant woman's health will *not* be affected by their malformation or illness, unlike during the *nutfa* stage. For example, the Permanent Committee issued a *fatwa* on a case that was brought by the father of the foetus seeking the Permanent Committee's legal opinion on the permissibility of aborting the foetus, as they (he and his wife) both had a genetic condition that resulted in the death of a new-born after, at most, a month or two.[681] They had also lost three of their children due to this genetic condition. He stated that they were suffering mentally and that they were advised that the only treatment was to take a sample from the foetus while in the womb, so as to know whether they were healthy or affected with the same genetic condition.[682] This procedure would take place after the first 40 days and *before* the 120-day period, and if it was proved that the foetus was affected, the foetus would be aborted with the couple's consent.[683]

The Permanent Committee stated that:

> it is not permissible to abort a foetus just because doctors believe that they have a severe disease. Rather, the matter is left to Allah, and that the doctors'

[681] Permanent Committee for Scholarly Research and Ifta, Fatwa No. 18309 [date not available], as cited in Al-Sheikh (n 648) 294 - 296.
[682] Ibid.
[683] Ibid.

> opinions can be wrong and right, and so their opinions should not be relied on in such a serious matter.[684]

The reasonings provided by the Permanent Committee in this *fatwa* are, in my opinion, not sound. It does not make sense to refuse to authorise abortion on the basis that 'the doctors' opinions can be wrong and right, and so their opinions should *not* be relied on in such a serious matter', when Article 22(1)(3) of the IRLPHP 2005 confirms and values medical opinion, as the decision of whether a termination of pregnancy is required ought to be established by 'a reliable medical committee'. Disregarding medical opinion in one context but relying on it in another, related, context, is problematic.

From the above discussion, the legal approach to determining whether an elected abortion during the *nutfa*, *alaqa* and *mudgha* stages is permissible under Article 22(1) of the IRLPHP 2005, as interpreted by the Council of Senior Scholars and the Permanent Committee, can be seen as placing restrictions on the exercise of personal autonomy.[685] This is because abortion is only permitted in very narrow circumstances: the foetus being severely ill, pregnancy following rape, or where the woman's physical health is severely affected by the pregnancy. These provisions, I suggest, indicate that the fact that the foetus has not reached the stage of ensoulment underpins the justification for allowing abortion subject to those conditions. This is because when a foetus reaches the ensoulment stage, no justifications, other than causing *death* to the

[684] Ibid. ''own translation''.
[685] For more information about the principle of autonomy, see Chapter 2.3.

woman, justify terminating the foetus' life, as I discuss in section 4.3.1.2 below. Thus, the foetus' legal right to life in the Saudi law on abortion is linked to the concept of ensoulment, which means that, at least in the Saudi law on abortion, *this concept* marks the starting point of a foetus' legal right to life and their legal status as an *independent* individual to the pregnant woman.[686] However, as I will discuss in section 4.3.2, this concept and the legal status and right given to the foetus do not seem to have an effect on regulating refusal of a necessary caesarean section and I will consider the implications of this.

The legal approach to justifying an abortion in the *alaqa* and *mudgha* stages, as set out in Article 22(1)(3) of the IRLPHP 2005 and the interpretation of it by the Permanent Committee, are also, I argue, indicative of a restrictive approach to abortion *before* ensoulment. This is because they *only* consider the *physical* harm to the pregnant woman's health. As such, they disregard many key considerations, such as the psychological or emotional harm to the pregnant woman caused by carrying a foetus with abnormalities with a low chance of survival. The responsibilities of care and the financial burden of treatment placed on parents if such a pregnancy continues to term and the child is born, are similarly not considered, and neither are the complications and poor quality of life of the foetus after birth, and the resulting suffering that the child would face once born.

[686] For more information about this, see section 4.3.1.2 this chapter.

4.3.1.2 Saudi law on abortion *after* ensoulment

With regard to abortion after ensoulment, Saudi law adopts the approach taken by the majority of contemporary jurists in that termination of an ensouled foetus is permitted *only* for the sake of saving the woman's *life*:[687]

> 4- After the third phase and after completing four months of pregnancy [i.e., after the 120 days], it is not permissible to terminate the pregnancy unless if it is established by a number of reliable specialists that the survival of the foetus inside their mother's belly causes *death* to the mother. This is after exhausting all means to save the foetus' life. The allowance of terminating the foetus under these conditions is based upon the Islamic legal maxim, that severe harm is removed by lesser harm.[688]

Based on the above, malformation and severe illness of an ensouled foetus would *not* be a justifiable reason to resort to abortion, regardless of the negative effect these might have on a pregnant woman's mental or physical health. This is apparent from a number of cases that have been presented to the Council of Senior Scholars or to the Permanent Committee for Scholarly Research and *Ifta* by healthcare practitioners or patients. For example, in a case concerning the termination of a foetus with abnormalities who was of five months gestation, the Permanent Committee concluded

[687] For more information about the approach of contemporary jurists, see Chapter 3.3.1.1.
[688] Council of Senior Scholars, Resolution No. 140 [1987], as included in Article 22(1)(4) of the IRLPHP 2005. ''own translation''. (My emphasis).

that aborting a foetus at that age was not permitted.[689] The attending physicians believed that the foetus was not suitable for survival and strongly recommended terminating the pregnancy. The pregnant woman was informed of the status of her foetus and of the poor quality of the pregnancy, and she consented to ending the pregnancy as soon as possible. The attending physicians stated that she was mentally affected and depressed, and that they could help her psychologically and medically by aborting her pregnancy at that stage. They also raised their fear that if the pregnancy continued, it would result in a caesarean section being performed, which would expose the woman to several complications, including infections and bleeding, which could endanger her life.

Regardless of these considerations, the Permanent Committee concluded that malformation, even if severe, was *not* a valid justification for an abortion if the foetus had reached the ensoulment stage. The Permanent Committee referred to a *fatwa* issued by the Council of Senior Scholars, which said that:

> If the soul has been breathed into the foetus and they have completed 120 days, then it is not permissible to abort them, no matter what the deformity, unless continuation of the pregnancy would put the mother's life in danger. This is because after the soul has been breathed into the foetus, they are considered to be a *person* who must be protected, regardless of whether they are free of

[689] Fatwa No. 15963 [1993], as cited in Al-Sheikh (n 648) 278 - 279.

> disease or not, and regardless of whether there is hope of recovery or not. That is because Allah has a reason for everything that He creates, which many people do not know, and He knows best what is right for His creation.[690]

What is notable in this *fatwa* is that it clearly recognises the status of the ensouled foetus as a *person* independent of the pregnant woman who is entitled to legal protection from any harmful actions, such as abortion. Thus, no physical or psychological justifications are considered lawful to resort to abortion, except when continuing with the pregnancy would cause the *death* of the pregnant woman.[691] There is a difference here in the reasoning and justifications of the Council of Senior Scholars and the Permanent Committee for not authorising abortion *after* ensoulment, than that used for not authorising it *before* ensoulment. Not permitting the termination of a foetus after ensoulment rests on the status of a foetus *as a person* who enjoys legal protection, but the opposite is not said for the foetus before ensoulment. Rather, the Council and the Permanent Committee rely on other justifications such as 'the doctors' opinions can be wrong and right, and so their opinions should not be relied on in such a serious matter', or not meeting the threshold required for permitting an abortion (such as, producing a legitimate benefit or the preventing of foreseen harm to the woman and/or

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[690] Council of Senior Scholars, Fatwa No. 2484 [1979]. ''translated by Islam Question and Answer, 'Abortion of physically deformed foetus' <https://islamqa.info/en/answers/12118/abortion-of-physically-deformed-foetus> accessed 17 August 2020.'' (My emphasis).

[691] It could be argued that the fact that the only justification for the abortion of the foetus after ensoulment is risk to the pregnant woman's life does not actually mean that an ensouled foetus has a legal right to life, but it is a protective law in a way that, for instance, the gradualist approach would protect them (the ensouled foetus). However, this is incorrect because this is not the position of the law. The application of the law clearly shows that beyond the point of ensoulment a foetus *is* a person. Thus, the law does not reflect the principle that with increased gestation, greater protection is afforded to the foetus.

the foetus). The prohibition of an abortion before ensoulment is not related to the foetus' *legal status*, but to the seriousness of the justifications for resorting to an abortion. This suggests that the concept of ensoulment, at least in Saudi law on abortion, *is* in fact the basis, or the starting point of a foetus' legal right to life and legal status. This means that the nature of the legal right to life is that it is borne to the ensouled foetus *personally*. Although, as I discussed in section 4.2 above, Saudi laws acknowledge a legal right to life to a foetus from conception,[692] in abortion, this right is explicitly acknowledged *only after* ensoulment, with an explicit recognition of the ensouled foetus as a person.

The only exception to the prohibition on abortion after ensoulment (that the woman's life is in danger), was referred to in a case of a pregnant woman in her sixth month of pregnancy who was accidentally hit on her back, which caused severe bleeding and placed her life in danger. As she did not benefit from the treatment provided to her, the attending doctors confirmed that the bleeding would not stop until the foetus was terminated. The Permanent Committee issued a *fatwa* permitting the termination of the ensouled foetus, as this was a required intervention to save the woman's life.[693] Muhammad ibn al-Uthaymeen, an influential scholar and a former member of the Council of Senior Scholars, has, however, taken a different opinion, one which *prohibits* the termination of an ensouled foetus *in all circumstances*, even if not doing so would cause death to the woman. In justifying his view, ibn al-Uthaymeen stated that terminating the foetus after ensoulment in such a situation was an unlawful assault on the foetus' life and was killing a person in order to save another person. By contrast, the

[692] The Covenant on the Rights of the Child in Islam 2005, Article 6(1).
[693] Fatwa No. 9453 [date not available], as cited in Al-Sheikh (n 648) 291 - 292.

death of the pregnant woman caused by continuing the pregnancy was an act of Allah and not people.[694] He thus advocated the approach of classical jurists, which does not justify sacrificing a soul for saving another soul.[695]

4.3.1.3 Conditions for allowing abortion (before or after ensoulment) and punishments for performing unlawful abortion

Under Article 22(2) of the IRLPHP 2005, the director of a hospital in which an obstetrics department is located, or their representative, shall form a committee to consider whether a pregnancy should be terminated. The committee should include at least three consultant physicians or specialists, among whom is a consultant or a specialist in the disease for which they recommend terminating the pregnancy.[696] The committee shall explain the risks to the woman's health or life, or to the foetus' health or life, in case the pregnancy continues. In case an abortion is recommended, written consent ought to be obtained from the woman alone if the termination is for the sake of saving the health or the life of the pregnant woman.[697] If the termination is for reasons related to the foetus (for example, if they are severely ill), consent from *both* the pregnant woman and her husband (the foetus' father) ought to be obtained.[698] This is a notable difference to how the law deals with consent in the case of a necessary caesarean section, as I will discuss in section 4.3.2.1. The law also states that in case the father consents to the termination of the foetus and the woman refuses to consent, her decision would be

[694] Binothaimeen.net, 'iisqat aljinin (Abortion)' < https://binothaimeen.net/content/871> accessed 11 August 2020.
[695] For more information on the approach of classical jurists, see Chapter 3.3.1.1.
[696] The IRLPHP 2005, Article 22(2).
[697] Ministry of Health, *Saudi Guideline of Medical Consent* (1st edn Ministry of Health 2019) 20.
[698] Ibid.

respected and termination would not be carried out.[699] The law, however, does not address the alternative; that is, if the father refuses to consent and the woman consents to the termination.

In order to maintain the rights of a foetus, Article 28 of the Law of Practicing Healthcare Professions 2005 states that if a doctor is found guilty of performing an unlawful abortion,[700] they are liable to up to six months imprisonment, a fine of up to 100,000 riyals,[701] or both.[702] Through punishments for unlawfully terminating a pregnancy, as well as the general prohibition on abortion except in certain circumstances, Saudi law on abortion offers *some* legal protection to the foetus from the harmful actions that could place their life or health at risk. The limitation of the penalty to the fine and imprisonment reflects the similarity between Saudi law and *Shariah* law in this regard, as committing an unlawful abortion is not, under either law, considered to be a deliberate killing and so is not subject to *alqisas* (the Law of Retaliation).[703] This again indicates that, under Saudi law, a foetus is granted a legal right to life, but they do not enjoy *full* legal personality.

[699] Ibid.
[700] That is, an abortion that does not meet the conditions specified in Article 22(1) of the IRLPHP 2005.
[701] Equivalent to about £ 20,000.
[702] Law of Practicing Healthcare Professions 2005, Article 28: 'Without prejudice to any severer punishment provided for in other laws, a doctor committing any of the following shall be subject to imprisonment for a period not exceeding six months and a fine not exceeding one hundred thousand riyals, or either punishment: … 7. Violating provisions of Articles…, 22… of this law'.
[703] For more information and justifications of this approach, see Chapter 3.3.1.2.2.

My discussion of Saudi law on abortion shows how the law is largely influenced by the *Shariah*'s provisions on this matter. This is evident in the explicit reference to the different stages of foetal development defined by *Shariah* law, as well as in how it generally approaches the issue of abortion. It is also clear that Saudi law is particularly affected by the views of the *Hanbali* school of law, especially with regard to elected abortion before ensoulment. My discussion also shows the important role that the concept of ensoulment plays in foetal legal rights and their legal status. This is because a foetus after ensoulment is regarded as a person independent of the pregnant woman who enjoys a right to life and legal protection from harmful actions. Saudi law on the refusal of a necessary caesarean section does not explicitly address this concept or how it affects the foetus' legal right to life. Moreover, Saudi law on abortion requires - to perform an abortion for reasons related to the foetus - consent from both the pregnant woman and her husband (the foetus' father), a position which represents a notable difference from how the law addresses consent in the event of a necessary caesarean section. These key observations will be taken forward in the following section.

4.3.2 The Saudi Law on Maternal Refusal of a Necessary Caesarean Section

As I indicated in Chapter 3.3.3, a pregnant woman may refuse to consent to a medically necessary intervention and this could result in a 'conflict' between her right to refuse a caesarean section that could save the foetus' life (referred to as a necessary caesarean section), and the well-being of the foetus and their legal right to life. In this section, I will explore how Saudi law approaches such a scenario followed by a critical discussion of the main implications of the current legal position of the law on the foetus' legal right to

life and an argument for adopting an alternative approach for dealing with the maternal refusal of a necessary caesarean section.

4.3.2.1 How Saudi law approaches maternal refusal of a necessary caesarean section

To explain and summarise how the legal position towards maternal refusal of a caesarean section materialised, see table 4 below.

Table 4: Saudi Law on Caesarean section Refusal

Year	Event
1984	Two cases highlighted the need for an explicit legal position regarding women's right to consent to medical intervention.
1984 - **Resolution No. 119**	An adult woman of a sound mind has a right to consent.
1988 - **The Law of Practicing Medicine and Dentistry Professions**	Includes Resolution No. 119.
1992 – **Resolution No. 173**	Restates the adopted legal position in Resolution No. 119 and explicitly states that a husband's consent is irrelevant.
2005 - **the Law of Practicing Healthcare Professions which replaced the Law of Practicing Medicine and Dentistry Professions**	Includes Resolution No. 119.
2008 to **2017**	Number of survey-based studies and CDAW 2008 report showed misunderstanding of the law.
2019	The Ministry of Health campaigns to raise awareness of the legal position.

4.3.2.1.1 The Saudi legal position

In 1984, a pregnant woman required a caesarean section, but her uterus ruptured while the attending physicians were trying to persuade her husband who refused to consent to it. His consent was sought because it was incorrectly thought that the woman herself was not entitled to consent to the caesarean. The rupture resulted in her death and that of the foetus.[704] Following this incident, the Council of Senior Scholars issued a Resolution No. 119 stating that an adult woman of sound mind is the only one who can provide consent to an operation.[705] In accordance with the stipulations contained in Resolution No. 119, the Law of Practicing Medicine and Dentistry Professions 1988 specifies that 'prior to delivering medical treatment or carrying out an operative procedure, consent should be taken from the patient whether male or female'.[706]

The IRLPHP 2005 includes Resolution No. 119 of the Council of Senior Scholars in Article 19 (1): 'It is not permissible to perform a medical intervention except with the male or female capacitous patient's consent; or with their guardian's consent if the patient is deemed to lack capacity'.[707]

[704] Samia Al-Amoudi, 'The Rights and Duties of Female Health Practitioners: Women and the Medical Sector – Majed Garoub Treaning Center 01/03' (2021).
[705] Council of Senior Scholars, Resolution No. 119 [27 February 1984].
[706] The Law of Practicing Medicine and Dentistry Professions 1988 was repealed by the Law of Practicing Healthcare Professions 2005.
[707] ''own translation''. Saudi law grants full mental capacity to adults of sound mind who are aged 18 or older, while those under 18 have limited mental capacity. Those who lack the ability to understand, retain and balance information presented, are considered to lack mental capacity. If a patient is deemed to have limited mental capacity (e.g., minors who are not 18), or to lack mental capacity, consent must be obtained from a proxy decision maker (the patient's guardian or representative) who must consider the patient's medical best interests (physical and mental), otherwise their decision will not be recognised, Ministry of Health (n 697) 14.

A capacitous pregnant woman's right to make her own birth (and other medical) decisions is thus recognised in Saudi law, and was stated in Resolution No. 173 by the Council of Senior Scholars:

> If it is medically determined by the competent authority that it is necessary to perform surgery for hysterectomy or caesarean section, the woman, if deemed legally competent, is entitled to give consent or refuse to consent to the advised medical intervention.[708]

This Resolution also explicitly states that 'the husband's decision is irrelevant because the harm concerns the patient [the woman] and she knows what is best for her'.[709] Thus, only the pregnant woman, if she is deemed to have mental capacity, is entitled to make delivery decisions.

This means that although it is not explicitly stated in Resolution No. 173, a foetus' need to be safely delivered and the foetus' legal right to life *do not* outweigh the capacitous pregnant woman's right to refuse a necessary caesarean section. Indeed, in line with Resolution No.173, the Ministry of Health states that 'the pregnant woman has the right to consent to, or refuse to consent to any operation (Caesarean or other), and the

[708] Dated [10-09-1992]. ''own translation''.
[709] Council of Senior Scholars, Resolution No. 173 [1992]. ''own translation''.

consent of the guardian is not required'.[710] The Ministry of Health has also specified - in line with the laws in Saudi Arabia - that only women aged 18 years and over have the right to accept or refuse an advised medical intervention.[711] In addition, they have the right to choose a representative to give consent on their behalf, such as a parent, spouse or other relatives - male or female.[712] Where a pregnant woman lacks the mental capacity to make decisions for herself, consent must thus be obtained from her guardian or representative, who must consider her medical best interests (physical and mental).[713]

4.3.2.1.2 Misunderstanding of the Law

From the above it can be seen that the law in Saudi Arabia, with regards to potential maternal-foetal conflict in caesarean refusal cases, is autonomy-based as it respects a capacitous pregnant woman's right to refuse a necessary caesarean section. Recognition of pregnant women's autonomy is essential because a lack of understanding of the law has, according to Samia Al-Amoudi, a consultant of obstetrics and gynaecology, contributed to elevated rates of mortality.[714] This was exemplified by two cases in 1984. The first involved surgical intervention in an obstetric case while the

[710] Ministry of Health, 'Women and Childbirth' <https://www.moh.gov.sa/HealthAwareness/Rights/Pages/22.aspx> accessed 19 May 2019. ''own translation''.
[711] Ministry of Health, 'Patient Rights and Responsibilities' < https://www.moh.gov.sa/HealthAwareness/EducationalContent/HealthTips/Pages/001.aspx> accessed 07 September 2020.
[712] Ministry of Health (n 697) 20.
[713] Ibid, 14.
[714] Samia M. Al-Amoudi, 'Health Empowerment and Health Rights in Saudi Arabia' (2017) 38 (8) Saudi Medical Journal 785, 785.

physician awaited consent being confirmed by the patient's husband.[715] The patient required immediate haemodialysis, but had to wait for seven hours for her husband's consent to be obtained, resulting in the death of the woman.[716] The second case involved fatal uterine rupture following the husband's refusal to allow for the necessary caesarean section to be performed, noted in section 4.3.2.1.1 above. These two cases highlighted to Saudi Arabian officials (Ministry of Health) the need for clarification of the legal position in these situations;[717] specifically, that capacitous pregnant women have the right to consent to or refuse caesarean sections and other surgeries.[718]

Despite this, Al-Amoudi has suggested that many health professionals are unaware of Saudi law on capacitous pregnant women's rights to consent to or refuse medical intervention.[719] She has argued that even though the law is long-standing, some health professionals still believe that a caesarean section must be performed with the husband's consent, and that others ignore the law for fear of coming into conflict with the family.[720] They thus seek consent from the husband to avoid any conflict that could occur if the operation was carried out without his consent. In so arguing, Al-Amoudi was drawing on her personal experiences while training and practising in different hospitals in Saudi Arabia, where husbands were asked to sign consent forms for caesarean

[715] Ibid.
[716] Ibid.
[717] Samia M. Al-Amoudi, 'The Right of Saudi Women to Sign for their Health Care in Saudi Arabia, Fact and Fiction' (2012) 9 Life Science Journal 3143, 3145.
[718] The existing law in Saudi Arabia regarding pregnant women's right to consent is outlined in section 4.3.2.1.1.
[719] Al-Amoudi (n 714) 786.
[720] Al-Amoudi (n 704).

sections, regardless of the patient's opinion.[721] Several survey-based studies have also shown that health professionals and health profession students lack knowledge of the law regarding patients', particularly female patients' health rights in Saudi Arabia.[722] For example, in a 2017 study, only 106 out of 267 (39.7%) of medical students were aware of a woman's right to consent to a caesarean section, while 39 (14.6%) believed that female patients did not have this right, and 122 (45.7%) did not know.[723] A recent study conducted in 2021 – 2022 has also marked the poor levels of awareness of medical law among health professionals, as only 22 out of 750 were aware of the relevant medical law.[724]

Ignorance of pregnant women's rights, not least regarding consent, has led to false representations of the position of women under both *Shariah* and Saudi law. This is evident in the report published in 2008 by the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) regarding Saudi Arabia, which stated that male guardian approval prior to surgical treatment on a pregnant woman

[721] Samia M. Al-Amoudi, 'Women's Empowerment and Women's health Rights in Saudi Arabia' (2019) 2 The Saudi Journal of Obstetrics and Gynecology 1, 3.
[722] See, for example, Saad Abdullah Alghanim, 'Assessing knowledge of the patient bill of rights in central Saudi Arabia: a survey of primary health care providers and recipients' (2012) 2 Annals of Saudi Medicine 151; Samia M. Al-Amoudi, Abdullah A. Al-Harbi, Nasser Y. Al-Sayegh and others, 'Health rights knowledge among medical school students at King Abdulaziz University, Jeddah, Saudi Arabia' (2017) 12 PLoS ONE 1; Salwa B El-Sobkey, Alyah M Almoajel and May N Al-Muammar, 'Knowledge and attitude of Saudi health professions' students regarding patient's bill of rights' (2014) 3 International Journal of Health Policy and Management 117.
[723] Al-Amoudi, Al-Harbi, Al-Sayegh and others (n 722) 3.
[724] Abdullah Bin Shihah, Abdulrahman Alrashed, Khaled Al-Abduljabbar, and others, 'Awareness of medical law among health care practitioners in Saudi Arabia' (2022) 43 Saudi Medical Journal 954, 955.

was required.[725] The CEDAW drew this conclusion following interviews with doctors in Saudi Arabia, which showed that many of them incorrectly believed that consent from husbands, or other male guardians, was required in cases of procedures such as caesarean sections.[726] Hence, the main reason for misconceptions about health rights in Saudi Arabia, particularly with regards to female patients' legal right to autonomy in making their own treatment decisions, is *ignorance* rather than a lack of rules and regulations or a lack of clarity in these rules.[727]

4.3.2.1.3 The Ministry of Health Awareness-raising Campaigns

The misunderstanding of the law means that there is, in fact, an insufficiency of knowledge about female patients' health rights among medical students, and some health professionals too. It is thus important that they are educated about the laws on female patients' health rights. Doing so will maintain women's right to autonomy in making their own treatment decisions. This is particularly important given the Saudi Developmental Vision 2030, which calls for the empowerment of all stakeholders to achieve success and assure sustainability. Many of the recommendations focus on women's empowerment in different sectors, including health.[728]

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[725] The Committee on the Elimination of Discrimination against Women (CEDAW), 'Concluding comments of the Committee on the Elimination of Discrimination against Women: Saudi Arabia' (14 January-1 February 2008).
[726] Al-Amoudi, Al-Harbi, Al-Sayegh and others (n 722) 6 - 7.
[727] The Committee on the Elimination of Discrimination against Women (CEDAW), 'Concluding comments of the Committee on the Elimination of Discrimination against Women: Saudi Arabia' (14 January-1 February 2008): 'The Committee notes with concern that the concept of male guardianship over women (*mehrem*), although it may not be legally prescribed, seems to be widely accepted', p.3.
[728] For more information about women's empowerment in the Saudi Developmental Vision 2030, see United National Platform, 'Women Empowerment' < Women Empowerment in the Kingdom of Saudi Arabia (my.gov.sa)> accessed 20 September 2021.

In line with the goals set out in Vision 2030, Saudi Arabia's authorities have made an attempt to highlight the legal position of women in relation to medical interventions in childbirth, and clarify the question of their autonomy and the general issue of consent. In 2019, the Ministry of Health's official Twitter account harnessed the hashtag "You Have the Right To", in order to summarise situations when pregnant women have the right to make independent decisions, without securing the consent of their husbands. The Ministry spokesperson, Dr Mohammed Al-Abdulaali, emphasised that the Ministry was merely restating the existing legal position, rather than introducing a new stance, in a bid to stress that women do have the right to consent to medical care - a term which encompasses surgical procedures.[729]

The Ministry's intervention was in response to certain hospitals drawing up their own policies regarding consent for female surgical interventions, and insisting on securing the consent of male guardians.[730] Dr Emad Sagr, chairman of the women's health unit at the International Medical Centre in Jeddah, highlighted the previous lack of official guidelines for health professionals, concerning the rights of female patients to give their consent without recourse to a male guardian.[731] He added that the lack of official guidelines could lead to pregnant women finding themselves at risk, for example, if they were advised to have an emergency caesarean section.[732] Finally, Dr Sagr stated that the Ministry had decided to issue this statement, in order to make sure that the legal

[729] Arab News, 'Saudi Health Ministry Provides Clarity on Female Patients' Consent' (2019) < Saudi health ministry provides clarity on female patients' consent (arabnews.com)> accessed 27 May 2021.
[730] Ibid.
[731] Ibid.
[732] Ibid.

position was clearly understood by every party involved. Dr Yassir Kalakitawi, who works as an obstetrician-gynaecologist at the King Fahad Armed Forces Hospital in Jeddah, commented that this Ministry initiative ensured that every hospital would now have to accept consent forms signed by female patients.[733] It is important to stress here that the Ministry of Health campaigns do *not* change the law, rather they just restated and confirmed the law as set out in 1984.

4.4 The Implications of the Current Legal Position of the Law on the Foetus' Legal Right to Life and Scope for an Alternative Approach

4.4.1 Implications of the law on the foetus' legal rights

From my discussion in 4.3.2.1, maternal refusal of a necessary caesarean section is covered by Saudi law, under the law on consent. This is evident as it deals with the issue in question in the context of a capacitous pregnant woman's right to *consent* to a medical intervention, including a caesarean section, *without the need for the husband's consent*. Hence, the law does not explicitly deal with the potential for a conflict between the pregnant woman's right to autonomy and the foetus' right to life and their right to be protected from harmful actions in such a situation (i.e., where a capacitous pregnant woman refuses to consent to a necessary caesarean section). The law's approach to consent could be interpreted to be autonomy-based and deals with cases of maternal refusal of a necessary caesarean section from the perspective of the pregnant woman *only*. No account is taken of the foetus' legal right to life and their right to be protected

[733] Ibid.

from harmful actions. Thus, the law does *not* recognise that there is any potential for conflicts between the rights of the pregnant woman and those of the foetus. This is notable because an ensouled foetus, under abortion law, is considered as an independent human being with a legal right to life.[734] A foetus' legal right to life is also acknowledged under Article 6(1) of the Covenant on the Rights of the Child in Islam.[735] With this legal status of the ensouled foetus as an independent person and their legal right to life, it can be argued that in relation to delivery decisions, an ensouled foetus' legal right to life is not 'protected' from a woman's refusal to follow a necessary caesarean section that would avoid a substantial risk that the foetus would die during delivery. This means that a parental decision may be overridden, in certain circumstances, for a child after birth, but even the strongest evidence of foetal benefit prior to birth would *not* be sufficient to override a capacitous pregnant woman's decision to refuse a caesarean section that is needed by the foetus.[736] In the light of this, Saudi law in regard to maternal refusal of a necessary caesarean section adopts the *birth* rule, which means that foetal rights (and so legal protection) are only enforceable at *birth*.

Saudi law regarding maternal refusal of a necessary caesarean section, hence, adopts the one-patient obstetric model. In this model, a maternal refusal of a medical intervention required by the foetus should raise the question of whether the pregnant woman's needs and values are in fact incompatible with the recommended

[734] For more information about Saudi law on abortion after ensoulment and the recognition of the ensouled foetus as an independent person, see section 4.3.1.2 of this chapter.
[735] For more information about the foetus' legal right to life, see section 4.2 of this chapter.
[736] The American College of Obstetricians and Gynecologists, 'Maternal–Fetal Intervention and Fetal Care Centers' (2011) 2 Women's Health Care Physicians 405, 406.

intervention.[737] A physician's duty is only to encourage her to consent, and paternalistic intervention of a capacitous pregnant woman who refuses to consent is unlikely to be justified.[738] Hence, when a pregnant woman refuses treatment that might benefit the foetus, she is no longer functioning as a suitable proxy, yet a physician is still obliged to respect her rights as a patient.[739] Indeed, the pregnant woman's autonomy cannot be restricted for causing harm to others (the foetus), as on the one-patient model she is only causing harm to herself.[740]

The inconsistency is stark: Saudi law restricts a pregnant woman's legal right to autonomy in relation to abortion after ensoulment and so protects a foetus' legal right to life - except in very limited conditions.[741] Yet, a pregnant woman's legal right to autonomy is respected with delivery decisions, in spite of the possible conflict this may pose with a foetus' legal right to life. The prohibition on abortion following ensoulment (120 days post-conception) may give rise to conflict between protecting the ensouled foetus from harm and the protection of life which, under Saudi law, commences only at the moment of birth. However, the fact that there is a prohibition on abortion beyond a certain stage of gestation (after ensoulment) and a recognition of the ensouled foetus as a person directly contradicts this supposition, giving rise to the potential legal contradiction between the rights of the pregnant woman and the ensouled foetus. Meaning Saudi law gives an ensouled foetus a certain legal status and a legal right to

[737] Susan S. Mattingly, 'The Maternal-Fetal Dyad: Exploring the Two-Patient Obstetric Mode' (1992) 22 (1) The Hastings Center Report 13, 15.
[738] Ibid.
[739] Ibid, 16.
[740] Ibid, 15.
[741] For more information on these limited conditions, see sections 4.3.1, 4.3.1.1 and 4.3.1.2 above.

life through abortion law but does not recognise the same legal status or protect this right in the case of maternal refusal of a necessary caesarean section.

4.4.2 Issues with the current position of Saudi law and the scope for an alternative approach

There is strength in the justifications for adopting an autonomy-based approach to the maternal refusal of a necessary caesarean section. In my opinion, the argument for prioritising the pregnant woman's absolute right to refuse a necessary caesarean section over the interests of the foetus, may have merit, at least from a legal standpoint, *if* the foetus does *not* have *direct* legal rights. For example, in jurisdictions such as in England and Wales, the foetus' lack of legal rights and legal personhood means that no distinction is drawn between the rights of the pregnant and non-pregnant woman with capacity and, thus, an autonomy-based approach in the issue of the maternal refusal of a necessary caesarean section is apparent.[742] As a result, no matter how significant the foetus' 'interests' are in a necessary caesarean section, English courts cannot bestow rights on the foetus before birth, at least against the pregnant woman.[743] Under Saudi law, although there is no single law that says that a foetus has a legal right to life, a foetus does have a *direct* legal right to life based on the different areas of laws, such as abortion law and Article 6(1) of the Covenant on the Rights of the Child in Islam, and is

[742] Rosamund Scott, 'Refusing Medical Treatment during Pregnancy and Birth: Ethical and Legal Issues' in Fatemeh Ebtehaj, Jonathan Herring, Martin Johnson and Martin Richards (eds), *Birth Rites and Rights* (Hart Publishing, Oxford 2011) 115.

[743] Ibid. This is apparent in a number of case law. For example, in *Re F (in utero)* (1988), it was concluded that a foetus has no legal status and hence cannot be made a ward of the court, *Re F (In utero)* [1988] 2 All ER 193; In *Re MB* Lady Justice Butler-Sloss stated: 'The foetus up to the moment of birth does not have any separate interests capable of being taken into account when a court has to consider an application for a declaration in respect of a caesarean section operation.', *Re MB*, 8 Med LR 217 [1997]. (Lady Justice Butler-Sloss).

considered a person.[744] Thus, there is scope for arguing that legal protection for this right is required.

I argue, therefore, that as Saudi law acknowledges that an ensouled foetus has some *legal* rights, the one-patient model approach to potential maternal-foetal conflict in necessary caesarean refusal cases is legally problematic because when a pregnant woman refuses a necessary caesarean section that could save the foetus' life, she is negatively affecting the foetus' legal right to life. Thus, it cannot be said that the harm caused concerns only herself as the patient. It is, thus, from a legal perspective inappropriate to acknowledge to the woman an *absolute* right to refuse such a necessary medical intervention even if this causes death to the foetus. This is because such a right can have negative impacts on the foetus' legal right to life. In this context and given that the ensouled foetus is a person and granted legal rights, the maternal-foetal dyad should be seen as an 'integrated, two-patient ecosystem' with individual components that are not conceptually separate.[745] In the light of this, I argue that there is scope for adopting an alternative approach for dealing with the maternal refusal of a necessary caesarean section. This is through applying the Islamic legal maxim, that severe harm is removed by lesser harm.[746]

[744] For more information about the foetus legal status and rights, see Chapters 4.2 and 4.3.1.2.
[745] Mattingly (n 737) 17.
[746] Islamic legal maxims are general rules of *Fiqh* applicable to various complex ethical and legal issues. Although they do *not* operate as independent sources of the *Shariah*, they can be used to support a judgment or a *fatwa*, so they have legal value. For more information about this, see Chapter 1.5.1.

This Islamic legal maxim is built upon a *Hadith* where the Prophet (PBUH) said: 'No harming nor reciprocating harm'. This has been interpreted by scholars to mean that when presented with a conflict between a major harm and a minor harm, it is preferable to tolerate the minor harm for the sake of eliminating the major harm if there is no way to eliminate both harms.[747] This is because the aim of the *Shariah* is to minimise harm and foster benefit or goodness. Indeed, *Shariah* law was established to eliminate hardship and to safeguard the five *Maqasid* of *Shariah* law 'objectives of *Shariah*': religion, mind, soul, wealth and progeny.[748] Preventing harm and preserving life are, thus, basic precepts of *Shariah* law, which has important implications in obstetric and gynaecological care where the interests of the pregnant woman and the foetus might not coincide.

This Islamic legal maxim has been referred to in a number of cases in both *Shariah* and Saudi law. Abortion and operating on a dead pregnant woman in order to deliver a living foetus are examples. Under Saudi law, 'the allowance of terminating the foetus [after ensoulment] under these conditions [where continuation of the pregnancy causes death to the woman] is based upon the Islamic legal maxim, that severe harm is removed by lesser harm'.[749] By contrast, Saudi law on maternal refusal of a necessary caesarean section does not apply the Islamic legal maxim that severe harm is removed by lesser harm. This means that while causing a threat to a pregnant woman's life is, rightly, a valid justification for terminating a pregnancy (and so overriding the foetus' legal right to

[747] Muhammad Al-Zuhaili, *qawaeid alfiqh watatbiqatih fi almadhahib al'arbaea (Islamic legal Maxims and their applications in the four schools of law)* (1st edn Dar Al-Fikr, Damascus 2006) 219.
[748] For more information about the five *Maqasid* of *Shariah* law, see Chapter 2.2.
[749] Article 22(1)(4) of the IRLPHP 2005. ''own translation''.

life), the foetus' legal right to life is not given the same weight when maternal refusal of a necessary caesarean section causes a threat to their life.

I propose that, in order to protect the ensouled foetus' legal right to life, the Saudi law on maternal refusal of a necessary caesarean section that could prevent death to the foetus, should apply the Islamic legal maxim, that severe harm is removed by lesser harm, where necessary. This *'maxim-based'* approach would provide a sound legal justification for overriding, as an exception to the consent rule, a pregnant woman's legal right to autonomy *only* if her refusal of a necessary caesarean section would affect the foetus' legal right to life. This proposal should *not* be interpreted to mean that a pregnant woman should, in all circumstances, be deprived of her right to make decisions regarding childbirth and that such decisions should be made by doctors instead. It does not also mean that her reasons for choosing not to consent to a necessary caesarean section are not to be considered, or that the foetus' need to be safely delivered ought to be always prioritised regardless of the negative impacts that a caesarean section could cause to the woman's health.

A capacitous pregnant woman's right to autonomy in relation to delivery decisions would be respected in cases where her decision (whether to consent or to refuse the caesarean section) would not affect the foetus' legal right to life (such as in cases where the caesarean section is needed to prevent severe harms or death to the pregnant woman, as in this case the harm of not carrying out the operation primarily concerns

her).[750] Her right to autonomy in refusing a caesarean section would also be respected when performing the operation would severely threaten the pregnant woman's health or cause her to die, as her interests would be prioritised over the interests of the foetus. The Islamic legal maxim, that severe harm is removed by lesser harm, applies only where there is a necessity to perform a caesarean section to protect the foetus' life from being threatened by not carrying out the operation. In such a case, there are two harms (the harm of overriding the pregnant woman's legal right to autonomy and affecting the physical integrity of the woman's body, and the harm to the foetus' legal right to life). The application of the legal maxim means that an assessment of the risks and benefits of the necessary caesarean section upon the woman *and* the foetus must be carried out. Where the risk for the woman is low but they are high for the foetus, a caesarean can be authorised in order to remove the severe harm (causing death to the foetus) by the lesser harm (not respecting the pregnant woman's autonomy and preforming unwanted medical intervention upon her).

In fact, this way of evaluating or weighing the risk and benefits of a medical intervention and prioritising the preservation of life over the principle of autonomy, is already evident in Saudi law on abortion, especially after ensoulment. This is evident through the prohibition of resorting to abortion for the sake of preserving the life of the ensouled foetus, and through the only exception made which is also for the sake of preserving the life of the woman (i.e., when it is believed that continuing with pregnancy could cause death to the woman). This shows that the main priority of the law, when dealing with

[750] For more information about the common indications for a necessary caesarean section, see Chapter 3.3.3.

potential maternal-foetal conflicts and where the life of one of them is affected, is, convincingly, to protect the right to life over patient autonomy.

Significantly, this maxim-based approach for legal reasoning is not supported by the perspective that the Islamic notion of autonomy does not accommodate maternal refusal of a necessary caesarean section because it is a sinful act, but rather it is applied in the light of the higher *Maqasid* (objectives) of *Shariah* law, particularly the objective of preservation of the soul.[751] It does not rely on the Islamic legal maxim of necessity, as this would open more scop for overriding a maternal refusal decision because it would allow a non-consensual intervention whether the risks of not performing the operation concerns only the pregnant woman, the foetus, or both. This would mean that a pregnant woman's refusal to consent to a caesarean section would be not recognised in all critical circumstances, by the rule of necessity. Relying on the Islamic legal maxim of severe harm is removed by lesser harm would limit a non-consensual intervention to narrow conditions, that is when it is medically established that not carrying out the operation would cause death to the foetus, as this would be considered the severe harm that ought to be removed. In fact, the Permanent Committee for Scholarly Research and *Ifta* received a question regarding how doctors should act when a caesarean section is required to save the life of the foetus, but the pregnant woman refuses to consent to the operation. The Permanent Committee for Scholarly Research's and *Ifta*'s response is that doctors must perform the caesarean

[751] For more information about *Shariah* law's higher *Maqasid*, see Chapter 2.2.

section to save the foetus' life, unless doing so could endanger the woman's life.[752] This question was not referred to the Permanent Committee by a government institution.[753] Although this *fatwa* is not legally binding, it represents the possibility of adopting an alternative approach from within *Shariah* law.[754] This is particularly true because this *fatwa* is meant to address the potential conflict between the pregnant woman's legal right to refuse medical intervention and the foetus' legal right to life.

It must be stated, however, that the possible imposition of compulsory caesarean section through the legal maxim of removing severe harm by lesser harm (in cases where the risk for the woman's life is low but they are high for the foetus) brings considerable risks for the pregnant woman. For instance, the use of restraint and force whilst her refusal is being overridden, the psychological impact on the woman after being forcibly anesthetized and cut open, and the impact upon her ability to breast feed and bond with her baby. These are fundamental concerns to the application of this maxim-based approach. Indeed, the maternal-foetal potential conflict in caesarean refusal cases is a complex issue in which it is difficult to find a perfect solution. Moreover, it could be argued that there is the possibility that the doctors could be wrong about the urgent need for a caesarean section and about their prediction of foetal death should the caesarean is not performed. Forced caesarean may, hence, subject women to unnecessary medical intervention. However, errors will, unfortunately, always occur

[752] Permanent Committee for Scholarly Research and *Ifta*, *fatwa* (No issue number available) [12-05-2020].
[753] The Permanent Committee for Scholarly Research and *Ifta*'s main role is to issue *fatwas* (legal opinions) on all matters referred to it by the ruler and government institutions as well as issuing *fatwas* on questions submitted by individuals. For more information about this, see Chapter 1.2.
[754] For more information about the role and nature of *fatwas*, see Chapter 1.5.2.

in medicine. The concern is not whether doctors can be *certain* that a caesarean is necessary, but rather how *reasonable* their clinical judgement is.[755] In certain well-documented circumstances such as complete placenta previa when the placenta detaches from the uterus and causes haemorrhaging that endangers the lives of both the woman and the foetus, for example, caesarean delivery is seen to be life-saving.[756] An argument for compulsory caesareans in such a case using the maxim-based approach can be made.

For the overriding of the woman's refusal to be justified by the legal maxim of removing severe harm by lesser harm, the pregnant woman must first be informed of the critical situation of the foetus (and of herself) and be informed of the negative consequences of her refusal decision on the foetus' life (and hers). Forced caesarean section in this situation becomes permissible after using all means to persuade her to give her consent. If she insists on her refusal, doctors are to make their medical assessment of the risks and benefits of a necessary caesarean section upon both the woman and her foetus. Their medical evaluation of the case and the woman's reasons for refusing to give her consent are to be presented to a legal authority, such as the Council of Senior Scholars, in order to obtain a legal *fatwa* on the permissibility of forced intervention for the sake of saving foetal life (and the woman's life). In fact, the reliance on the decisions made by the Council of Senior Scholars in legally and religiously complex issues is evident in Saudi Arabia. For example, all abortion cases must be referred to the Council

[755] Bonnie Steinbock, 'Maternal-Fetus Conflict' in Helga Kuhse and Peter Singer (eds), *A Companion to Bioethics* (2nd edn Wiley-Blackwell 2012) 157.
[756] Ibid. For more information about the common indications for a necessary caesarean section, see Chapter 3.3.3.

of Senior Scholars to make determination of whether abortion is permissible.[757] In section 4.3.1 of this chapter, I have presented a number of abortion cases where doctors provided their medical opinion and the position of the parents (their wish to have an abortion) and then refer their report to the Council to make determination. Applying this enforcement mechanism to necessary caesarean section refusals would mean that the non-consensual intervention is authorised by a legal authority rather than doctors' decision-making. However, since such situations constitute an emergency, the appropriateness of implementing this enforcement mechanism is subject to the legal authority's ability to respond promptly.[758]

I duly note the argument that according legal protection to the foetus in caesarean refusal cases would have far-reaching consequences on pregnant women's legal right to autonomy and bodily integrity. Hence, it could be argued that any proposal that aims to grant foetuses such protection should be rejected. For example, Margaret Brazier and Emma Cave have suggested that such a proposal could enable obstetricians to overrule a patient's refusal decision, rather than informing them of and persuading them to have obstetric interventions.[759] Further, awareness of the possibility of enforced caesarean sections without the woman's consent may result in them opting out of formal obstetric care, which could negatively affect babies' health.[760] These risks, as

[757] Ministry of Health, 'Patient Rights and Responsibilities' < https://www.moh.gov.sa/HealthAwareness/EducationalContent/HealthTips/Pages/001.aspx> accessed 29 December 2023.
[758] The Council of Senior Scholars has provided different phone numbers on their website through which anyone can contact them for their legal opinion (*fatwas*). An emergency phone number can be set up to deal with medical emergency cases, such as a necessary caesarean section.
[759] Margaret Brazier and Emma Cave, *Medicine, Patients and The Law* (7th edn Manchester University Press 2023) 375.
[760] Ibid, 354.

highlighted by Brazier and Cave, and the question of whether they apply to Saudi Arabia are, due to lack of literature on their application in Saudi Arabia, unclear to me. Hence, I recommend that further research should be carried out to examine these key issues that could feed into recommendations as to reform. One way to do so could be through conducting an empirical study that explores the issue of the potential maternal-foetal conflict in necessary caesarean section refusal cases from the pregnant women's perspective.[761]

While legally protecting the foetus' legal right to life in cases of necessary caesarean refusals restricts a capacitous pregnant woman's right to exercise her autonomy, there are other policies and legislation which overrule patients' autonomy, and where the patient's will is not always complied with. For example, in Saudi Arabia, cases which require treatment or prevention for the sake of protecting the public interest, such as infectious diseases that pose a threat to others, are excluded from the consent rule.[762] Compulsory treatment and detention in such cases may be authorised, even if the capacitous patient refuses to consent to such interventions. There is an obvious difference between this context (the protection of public health) versus the context of safeguarding the life of a being that is situated internally within the woman. However, as the foetus has a legally recognised right to life in Saudi law, a parallel can be drawn here with the situation of a pregnant woman who refuses a necessary caesarean

[761] I have, in Chapter 5, included an empirical study that focuses on how Saudi law regarding the maternal-foetal potential conflict in necessary caesarean section refusal is implemented and how it is perceived by health professionals. The views of pregnant women are, however, not within the scope of my study, due to time and space limitations.
[762] Ministry of Health (n 697) 16.

section, and she knows that her refusal poses a threat to the ensouled foetus' life, or may cause severe injury to them. Her refusal poses a threat to others - the *foetus* - particularly as Saudi law sees, for abortion, the foetus after ensoulment as an independent being.[763] Hence, I argue that it is legally merited to adopt a maxim-based approach when dealing with such a potential conflict of rights.

4.5 Conclusion

This chapter has looked at how Saudi law addresses the issue of the potential for maternal-foetal conflict in the context of maternal refusal of a necessary caesarean section. With the shortage of literature in this area, Saudi law's position on abortion was explored and discussed in order to examine how issues of potential maternal-foetal conflict are approached and how well a foetus' rights are preserved. This chapter provided responses to my research questions regarding: (i) the extent to which the foetus' legal rights to life and to be protected from harmful actions are maintained under the current position of Saudi law on maternal refusal of a necessary caesarean section; (ii) whether reform of the law is needed; and if so, can an alternative approach for dealing with the issue in question be developed from within *Shariah* law, being the main source of Saudi law? It was concluded that the current position of Saudi law does not protect the legal rights of the foetus, that the law needs to be reformed in order to consider those rights, and that *Shariah* law offers scope for adopting an alternative

[763] For more information about Saudi law on abortion after ensoulment, see section 4.3.1.2 of this chapter.

approach for dealing with the potential maternal-foetal conflict issue in necessary caesarean section refusal cases.

The chapter initiated the discussion by outlining the legal status of the foetus and their legal rights. The lack of codification of *Shariah* provisions in terms of the legal status of the foetus and in the impact of ensoulment on the foetus' status and rights, may have contributed to the perception of Saudi law as unclear. In terms of the foetus' legal rights, Saudi law recognises a foetus' legal right to life from conception, without differentiating between before and after ensoulment. In this regard, I have argued that while the concept of ensoulment is *not* evident in regulating Saudi laws regarding a foetus' legal status and rights, it *is* evident in regulating Saudi law on abortion.

Thereafter, the focus was placed on Saudi law on the maternal refusal of a necessary caesarean section. It was demonstrated that a capacitous pregnant woman's right to refuse a caesarean section is legally protected and that autonomy of the woman to make her own birth decisions is respected. It also showed that a foetus needs to be safely delivered and the foetus' right to life does not override the capacitous pregnant woman's right to refuse a necessary caesarean section. I have, then, discussed health professionals' misunderstanding of the law, as it was perceived that the husband's consent was required where procedures such as caesarean sections were proposed. This lack of understanding of the law has contributed to elevated rates of mortality and has highlighted the need for wider understanding of the husband's legal position in

these situations. It has been, rightly, argued that the main reason for misconceptions about health rights in Saudi Arabia, particularly with regards to female patients' legal right to autonomy in making their own treatment decisions, is ignorance rather than a lack of rules and regulations.

I have, then, highlighted the main implications of the current legal position on the foetus' legal right to life. I have explained that Saudi law addresses the potential maternal-foetal conflict in caesarean refusal cases from the perspective of the pregnant woman *only*. The implications of not performing the necessary caesarean section for the foetus' legal right to life are not protected by the law. I have argued that given that a foetus is granted a direct legal right to life, the current position of the law is legally problematic and, thus, reform of the law is needed. I have suggested a *'maxim-based'* approach to the issue in question through applying the Islamic legal maxim, that severe harm is removed by lesser harm. This suggested approach is framed in alignment with the higher *Maqasid* of *Shariah* law, particularly the objective of preservation of soul.

The next chapter, Chapter 5, will explore the manner in which Saudi law functions, in practice, in respect to maternal refusal in cases where a caesarean section is deemed medically necessary from the perspective of medical practitioners. Taking forward the research findings that have been discussed in sub-section 4.3.2.1.2, it will also examine whether the confusion around a pregnant woman's right to make her own decisions

remains, and whether the participants believe that the current law in Saudi Arabia requires reform.

Chapter 5: An Empirical Study on how Obstetricians/Gynaecologists in Saudi Arabia Deal with Cases of Maternal Refusal of a Necessary Caesarean Section in Practice

5.1 Introduction

With the shortage of data regarding how often a necessary caesarean refusal occurs and how it is dealt with in practice, I have included an empirical element to my thesis in the form of short online questionnaires on the experiences of doctors in Saudi Arabian hospitals regarding cases where a pregnant woman has refused a necessary caesarean section. This study is directed towards addressing my research questions regarding: (i) how the potential maternal-foetal conflict in such a case is seen and dealt with in practice and how well the foetus' legal rights are maintained; and (ii) whether reform of Saudi law in this regard is required from the perspective of medical practitioners. More details about the justifications and aims of the study will follow in section 5.2.2 below.

5.2 Methodology

5.2.1 An Overview of my study

My empirical study looks at how obstetricians/gynaecologists in Saudi Arabia have dealt with cases of maternal refusal of caesarean section in practice, how they have interpreted the law in this regard, and their views on whether reform of the law is needed. My study was in the form of an online questionnaire (Questionnaire 1), with

participants being offered the possibility of completing Questionnaire 2. Questionnaire 1 comprised general questions that were concerned with participants' knowledge of the law, how the law is implemented in practice, and their views on whether reform of the law is needed. Questionnaire 2 consisted of one follow-up question based on how the participant had responded to Questionnaire 1. Questionnaire 2 was created in order to gather more detailed information on the participants' responses to Questionnaire 1 and to allow them to expand on their views. More detail about the design of the questionnaires will follow in section 5.2.3.

5.2.2 Justifications and aims of the study

One of the main objectives of my thesis is to examine the Saudi legal position on maternal refusal of a necessary caesarean section aimed at saving the foetus' life, and how the law is implemented in practice. As I have indicated in Chapter 4.3, there is a limited amount of literature on the Saudi position relating to the performance and refusal of caesarean sections. Moreover, in 4.3.2.1.2 I have presented a number of research studies that highlight the issue of misconceptions regarding the relevant medical law. In particular, the Al-Amoudi et al. 2017 study showed poor levels of awareness amongst medical students regarding a woman's legal right to consent to a caesarean section. The Al-Amoudi et al. 2017 study seems to have only focused on medical school students, whereas the focus of this empirical study is on practising obstetricians. My

empirical study has this focus of assessing the doctors' knowledge of the law in this regard, but it adds to that by looking at the issue of caesarean refusal cases where the foetus' life is affected by the refusal decision. Hence, and unlike the studies discussed in in 4.3.2.1.2, my empirical study is not merely focusing on the confusion around the pregnant woman's legal right to autonomy in consenting or refusing to consent to a caesarean section without the need for her husband to be legally involved in the decision-making. Additionally, by examining the perspectives and opinions of medical practitioners regarding the necessity of legal reforms, my empirical study has contributed to the existing knowledge. The shortage of sources available and the lack of empirical research in this area provide the rationale for including an empirical element to my thesis.

The aim of this study was to produce in-depth qualitative data by engaging, through online surveys, with doctors who were actively involved in the field of obstetrics. My discussion in Chapter 4.3.2.1.2 demonstrated that professionals' understanding of pregnant women's right to consent in Saudi Arabia has been confused. The data I collected have helped me to achieve four objectives: a) to examine my participants' knowledge of the legal position regarding caesarean section refusals, b) to explore the

manner in which Saudi law functions, in practice, in respect to cases of caesarean refusal where a caesarean section is deemed medically necessary to save the life of the foetus, c) to examine whether the confusion around a pregnant woman's right to make her own treatment decisions remains, and d) whether the participants believe that the current law in Saudi Arabia requires reform. Their responses to the survey and their views, have helped me when considering whether an alternative approach to maternal refusal of a necessary caesarean section is required.

5.2.3 Methods

A. Procedure for recruiting participants

I invited around 40 doctors, who identified themselves in their profiles on Twitter as specialising in obstetrics and gynaecology, via direct message to participate in this project. Not all the recruited participants accepted or completed the questionnaire. This was not an issue as I was not looking for a representative sample but to understand how Saudi law is viewed and interpreted by health professionals. I chose Twitter as a platform for recruiting participants because it is widely used in Saudi Arabia.[764] The invitation included a link to the study. All doctors were working at different hospitals in Saudi Arabia, and I invited them to complete Questionnaire 1. Some of the

[764] The Ministry of Communications and Information Technology, 'Saudi Arabia Is the Most Twitter-Crazy Country In The World: Business Insider' < Saudi Arabia is the most twitter-crazy country in the World: Business Insider | Ministry of Communications and Information Technology (mcit.gov.sa)> accessed 17 May 2021.

obstetricians/gynaecologists I contacted offered to share the invitation and link to the study with their colleagues, which I gratefully accepted. My recruitment strategy helped me to have control over the specialisms of the participants involved in the study, which was important because of the nature of my study and the questions I was asking.

B. Completion

The participants were volunteers with interest in the subject, and those who were not interested or did not have the time to participate simply refused to participate. Before agreeing to take part in the study, participants were asked to read the participant information sheet (Appendix 1), were given the opportunity to ask me any questions or raise any concerns that they had, and their informed consent was then obtained (Appendix 2). Questionnaire 1 started in October 2020 and was completed in December 2020 when no new responses were received. Questionnaire 2 started and completed in December 2020.

C. Research Design

I adopted a qualitative method, which involves 'empirical research where the data are not in the form of numbers',[765] and takes 'an interpretive, naturalistic approach to its subject matter [...]' in an attempt to 'make sense of, or interpret, phenomena in terms of the meanings people bring to them [i.e., qualitative researchers]'.[766] Adopting a

[765] Keith F Punch, *Introduction to Social Research: Quantitative and Qualitative Approaches* (Sage, London 1998) 4.
[766] Norman K. Denzin and Yvonna S. Lincoln, *Strategies of Qualitative Inquiry* (3rd edn SAGE Publications 2007) 3.

qualitative method was the most appropriate method for achieving the purposes of my study. This is because my aim was to understand and to obtain obstetricians/gynaecologists' viewpoints and interpretations of the approach adopted to the issue of maternal refusal of a necessary caesarean section that could save foetal life. This was in addition to giving the participants an opportunity to share their views on the subject from their experience and viewpoints.

Questionnaire 1 was a semi-structured questionnaire, which consisted of seven multiple choice questions and six open-ended questions administered via Qualtrics (Appendix 3). The purpose of the six open-ended questions was to generate in-depth responses from doctors actively involved in obstetrics and gynaecology. In order to allow for legal reflection/discussion that could help in fulfilling the objectives of this study, as set out in 5.2.2, the questions were designed to address what happens in practice in three different scenarios of refusal of a necessary caesarean section that could save foetal life or health:

Scenario A) The woman refuses consent but her husband grants consent to the attending physician to perform a necessary caesarean section.

Scenario B) The woman grants consent but her husband refuses consent to the attending physician to perform a necessary caesarean section.

Scenario C) Both the woman and her husband refuse consent to the attending physician to perform a necessary caesarean section.

There were also questions about the views and opinions of the obstetricians/gynaecologists involved in the study concerning how they perceive the law on the issue in question, and their suggestions for reform if any (Questionnaire 1).

In order to gain information on their viewpoints and interpretation of the law, participants who agreed were asked one follow-up question based on their responses to Questionnaire 1 in Questionnaire 2 (Appendix 4). I conducted Questionnaire 2 in order to obtain more elaboration regarding the participants' responses to Questionnaire 1, and to give them the opportunity to present and develop their views further. Hence, Questionnaire 2 consisted of an individual question, meaning that each group received a specific question based on their responses to Questionnaire 1. The analysed responses of Questionnaire 1 were mapped into three different groups (Group A, B and C), and participants from each group would receive the same follow-up questions (Questionnaire 2). Hence, the questions in Questionnaire 2 were not the same for all groups. The responses to Questionnaire 2 have provided me with a more in-depth understanding of the justifications/grounds for each approach adopted.

The questionnaires were presented in two languages: Arabic and English. Participants could choose to read and respond in whichever language they felt most comfortable in. As Arabic is my first language, I translated any responses received in Arabic into English. Email addresses of participants and any personal information was treated as confidential, and only known to me. For anonymity and privacy reasons, participants

were not asked for their name, the name of the hospital where they worked, or the city where they worked.

I chose to conduct an online survey for practical reasons. As obstetricians/gynaecologists, potential participants were likely to have a limited amount of time available to be involved in research. Using an online questionnaire made it easier for participants because it offers flexibility in terms of time. Participants could type their responses to the questions at their convenience, and complete and submit the completed questionnaire at a later date. They thus had control over how and when they answered the questions.

D. Study limitations

The data collection approach for the study was confined to online surveys. While it may have seemed preferable to conduct conventional face-to-face interviews, this method was not possible for a number of reasons. If I had conducted face-to-face interviews, I might have had to travel between Saudi Arabia and England and remain in each location for quite some time because it might not have been possible to see all the participants within a set period of time. Moreover, given the fact that this study was conducted during the COVID-19 pandemic when travel restrictions were applied, my ability to undertake face-to-face research was clearly limited, if not entirely impossible. Another limitation on the possibility of conducting face-to-face interviews related to the nature of the work conducted by the potential participants (doctors). Specifically, these

doctors worked in hospitals which would have been a potentially dangerous location for interviews in the midst of a pandemic. Using an online survey offered me the possibility of including potential participants from different regions of Saudi Arabia. If I had limited myself to face-to-face interviews, I would have effectively restricted my participant pool to doctors who were practising in Riyadh, my home city. Travel to other locations would also have been costly, in terms of both money and time. Online questionnaires were also more suitable for me because Arabic is one of the languages used in the study. Therefore, the possibility of having participants responses in writing was appealing because it made the translation process easier for me. In contrast, if I had conducted the interviews in a face-to-face manner, I would have needed to record their responses, transcribe them, and then translate them into English.

Online interviews were another possible option. These are a comparatively recent form of data collection and may well represent a means of circumventing some of the obstacles associated with research during a pandemic.[767] However, not only would this have caused the same translation and transcription problems as face-to-face interviews, it would also have eliminated many of the benefits of the face-to-face method. Specifically, online interviews are commonly acknowledged to eliminate access to more nuanced forms of communication, as evidenced by factors such as naturalness. Inevitably, technical issues, such as disconnects and poor video or audio quality, could have been a concern. It could also raise some anonymity and privacy concerns, as the identity of a participant and their particular view or opinion would directly be disclosed to

[767] Mike Allen, *The SAGE Encyclopedia of Communication Research Methods* (SAGE Publications, London 2017) 1144 - 1145.

me, which could prevent them from opening up and freely expressing their views.[768] In interviews, whether they are conducted online or face-to-face, there is also the possibility that the interviewer could influence the participants' responses.[769]

The online survey is a simplified version of the online interview that is less complex and more anonymous in character. This was really advantageous to me because I wanted to ensure a high level of privacy and anonymity for the participants. However, this form of data collection does have weaknesses. One of the most main disadvantages of the online survey method is survey non-response.[770] Participants may leave the survey and submit only partial information; they could also opt out of answering some questions, both of which may have implications for the current study. While enabling 'forced response' may provide the benefit of removing missing data - in which a participant is unable to go on to the next question until the present one has been answered -, it raises ethical issues.[771] This is because forced responding can be viewed as a violation of participants' rights not to answer specific questions.[772] For this reason, 'forced response' has not been enabled in this study, which resulted in some missing data for some of the questionnaires' questions. Despite these concerns, the online survey method was used because it allowed me to access participants in various regions of Saudi Arabia, particularly medical practitioners who might have been difficult to reach due to work

[768] Caroline Howard, 'Advantages and Disadvantages of Online Surveys' (2019) < Advantages and Disadvantages of Online Surveys | Cvent Blog> accessed 30 November 2021.
[769] Ibid.
[770] Mudavath Siva Durga Prasad Nayak and Narayan K.A., 'Strengths and Weaknesses of Online Surveys' (2019) 5 IOSR Journal of Humanities and Social Sciences 31, 35.
[771] Ibid.
[772] Ibid.

commitments during the pandemic. Also, as noted above, this method allowed the participants to respond to the questionnaires at a convenient time for themselves, which was more expedient than setting appointments for online interviews.

The responses to both questionnaires have provided me with a sense of whether maternal refusal of a necessary caesarean section occurs in practice in Saudi. Furthermore, the questionnaire responses provide an indication of how this matter is approached and where the approaches come from. Importantly, I have also been able to ascertain how Saudi law pertaining to the issue of maternal refusal of a necessary caesarean section has been viewed and interpreted by my participants. The participant responses have also helped me to consider whether an alternative approach to maternal refusal of caesarean sections is required. It is important, however, to stress that this empirical study is limited to a small number of participants. This has implications for the generalisability of the research. Hence, the findings must not be viewed as conclusive evidence of how the issue of maternal refusal of caesarean sections is seen and dealt with in Saudi Arabia in practice. Nevertheless, the research findings can offer an understanding of, and provide insights into, this issue from the perspective of health practitioners. One of the most important findings emerging from the current study is the participants' belief that reform of the law is needed on the issue of maternal refusal of a necessary caesarean section. It may also provide a foundational base for further work on maternal refusals of caesarean sections and its implications for foetal life and health in Saudi Arabia. This is because the results emerging from this study can serve to clarify whether there is still a need for additional awareness

campaigns to improve knowledge of the law pertaining to maternal refusal of necessary caesarean sections amongst health practitioners, and whether a foetus' legal right to life should be legally acknowledged and protected in such cases.

E. Data analysis:

The findings were analysed using computer software called NVivo to explore common patterns in responses and to identify thematic frameworks. Themes were identified using the technique of *word and phrase repetitions.*[773] Thematic analysis is one of the most common forms of analysis within qualitative research and is 'a method for identifying, analysing, and reporting patterns (themes) within data'.[774]

The method used for the thematic analysis of data for my project was deductive/theoretical as informed by Virginia Braun and Victoria Clarke.[775] In this method, themes are described as patterns of common meaning across the qualitative data, underpinned or unified by a central concept, that are essential to the understanding of a phenomenon and relevant to the research question.[776] As a result,

[773] *Word and phrase repetitions* technique is one of the effective methods of qualitative data interpretation which involves 'scanning primary data for words and phrases most commonly used by respondents, as well as, words and phrases used with unusual emotions', Business Research Methodology, 'Qualitative Data Analysis' < Qualitative Data Analysis - Research-Methodology (research-methodology.net)> accessed 14 March 2021.

[774] Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 (2) *Qualitative Research in Psychology*, 6.

[775] Ibid, 12.

[776] Ibid.

the researcher's theoretical or analytic interest in the field will drive coding and theme creation.[777]

I have chosen a thematic analysis because it organised and described my data set in detail, which ultimately helped me with identifying the different/similar approaches adopted by the participants towards my research questions. As such, it enabled me to form my interpretation and discussion of the resultant themes. Deductive thematic analysis was chosen because it allowed me to engage in the analysis process and facilitated the interpretation of the resultant themes and patterns of the adopted approaches.

I have carried out my thematic analysis of the data based on the stages and guidelines provided by certain sources.[778] The first stage was familiarisation with the data. This step entails immersing and intimately familiarising with the data by reading and re-reading it. At this stage, I made notes (codes) of interesting or significant concepts and phrases of the data that might be relevant to answering the research question. At the second stage, generating initial themes, I examined my initial notes in order to generate patterns of meaning that can be transformed into specific potential themes. A theme, according to Braun and Clarke, can be defined as something significant in the data that relates to the research question and represents a level of patterned response or

[777] Ibid.
[778] Braun and Clarke (n 774) 15 - 23; The University of Auckland, 'Thematic Analysis: A Reflexive Approach' < https://www.psych.auckland.ac.nz/en/about/thematic-analysis.html> accessed 19 May 2021.

meaning underpinned by a central concept or idea.[779] This stage involved extracting data relevant to each possible theme so that I could work with it and assess the viability of each potential theme. The data, at this stage, were also given to a technical advisor who helped me in creating a list of common themes from the data.[780] I then discussed the findings with the technical advisor where the appropriateness and validity of each theme were confirmed.

I then reviewed the potential themes to check and determine that the gathered extracts for each theme appear to form a logical pattern. Following this stage, the resultant themes were developed, and each theme was given an informative name - these themes are discussed in section 5.3 below. The final stage was writing up the results and discussions. At this stage, I extracted statements from the raw data to provide evidence of the existence of each theme. Following Braun and Clarke's guidelines, a final analysis of the selected extracts was linked to the research question and relevant literature and legislation, allowing for the creation of a scholarly discussion.[781]

5.3 Findings and Discussions

[779] Braun and Clarke (n 774) 10.

[780] Technical support, provided by thesis-editor.co.uk, was sought as I have limited knowledge on using NVivo for data analysis.

[781] Braun and Clarke (n 774) 23.

5.3.1 Results

Twenty-six medical professionals participated in the study reported here (17 female and 9 male) (See Fig. 3 and Fig. 4 for age range and post-qualification of my participants). Of the twenty-six respondents, all of whom specialise in obstetrics and gynaecology, twenty-four agreed to respond to a follow-up question (Questionnaire 2), though in fact only seven of them did so. The results from Questionnaire 1 reveal three distinct approaches to 'maternal refusal of a necessary caesarean section' (which I mapped into three groups A, B, and C in Appendix 4):

- Acknowledgement of the pregnant woman's right to refuse a necessary caesarean section, despite potential harm to the foetus, and with many attempts to **'**persuade' the pregnant woman to consent - For further details, see section 5.3.3 below
- Overriding the pregnant woman's refusal to consent to a necessary caesarean section in the interest of saving the foetus' life
- Acknowledgement of the pregnant woman's right to refuse a necessary caesarean section when the sole concern is saving the foetus, but this right is overridden when the procedure is deemed necessary to save the woman's life.

These three approaches informed the questions in Questionnaire 2.

The six open-ended questions of Questionnaire 1 focus on three aspects that represent the purpose of my study. These aspects were as follows: participants' knowledge of the

law, their approaches to differing scenarios of necessary caesarean section refusals, and their perspective on whether law reform pertaining to necessary caesarean section refusals is needed. The key findings of my study are:

- Most of the respondents expressed limited understanding of the relevant law pertaining to maternal refusal of necessary caesarean section
- Most of the respondents, despite their limited understanding of relevant law, engaged in medical practices that corresponded to legal statutes, with a few exceptions
- Most of the respondents stated their belief that reform of relevant law would be beneficial to enable, in their view, a better approach to cases of maternal refusal of necessary caesarean section **-** For further details, see section 5.3.4 below

These findings are discussed in detail below.

Figure 3

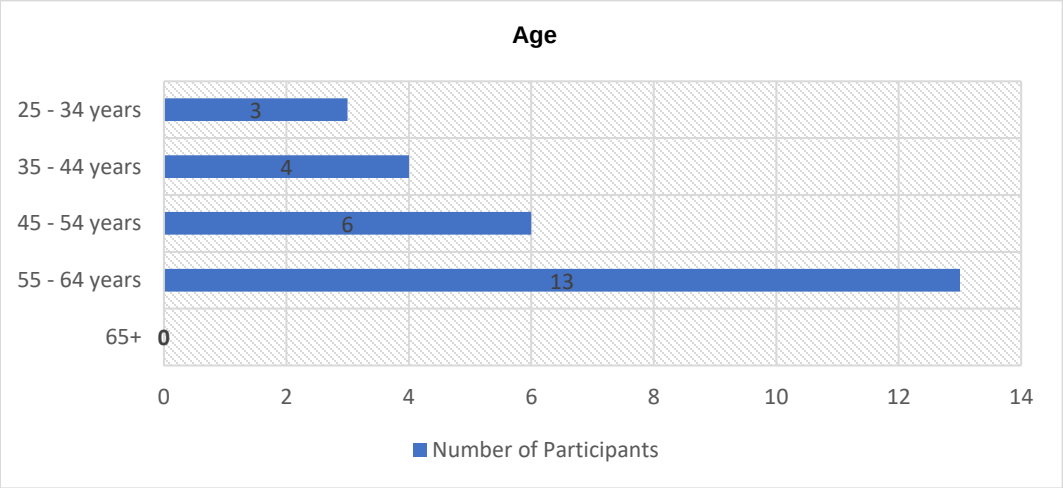
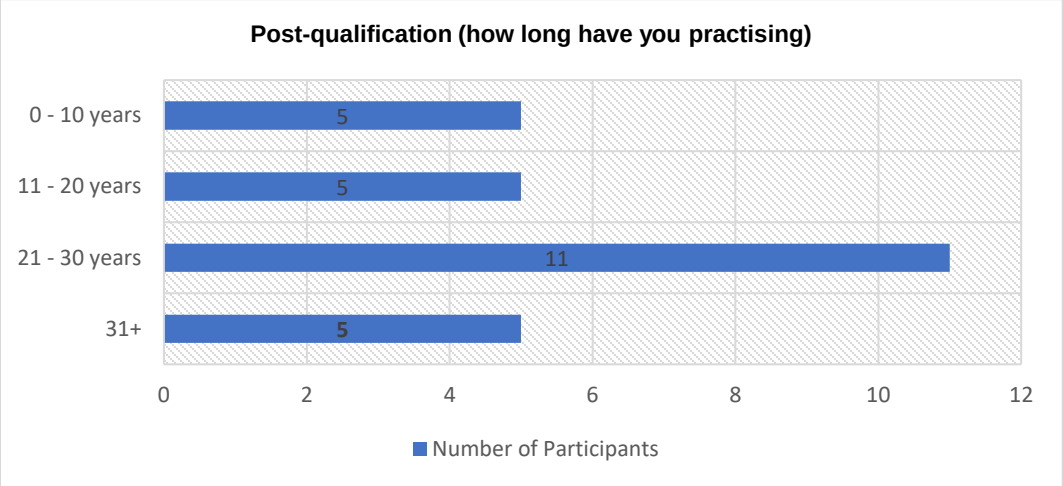


Figure 4



5.3.2 Aspect 1: Respondents' Knowledge of the Law[782]

Respondents were queried as to whether they encountered situations in which a pregnant woman refused to consent to a caesarean section deemed medically necessary to safe the foetus' life (i.e., a necessary caesarean section). Every respondent noted that such situations occasionally transpire (see Fig. 5). Respondents were then asked a follow-up question: Is there a law addressing this issue? Respondents were also asked to report their knowledge of such a law if they affirmed that such a law exists. Sixteen of the twenty-six respondents stated that there is *no* law pertaining to maternal refusal of a necessary caesarean section, whereas ten of the respondents stated that such a law exists but did not name any specific legislation (Fig. 6). Interestingly, however, only seven of those ten respondents indicated understanding

[782] Resolution No. 119 and Resolution No. 173 by the Council of Senior Scholars and the Law of Practicing Healthcare Professions 2005. For more information about these statutes, see chapter 4.3.2.1.

corresponding to the actual position of law in this regard.[783] Given that six of the seven correct responses came from female respondents, it appears that they were more knowledgeable about the position of the law than the male respondents. Three respondents evinced understanding in contradiction to the position of law. For example, Doctor 7 stated: '*The attending physicians do not recognise the woman's refusal of the necessary caesarean section if they believe that her refusal is dangerous (i.e., can lead to serious consequences)*'. Doctor 8 stated: '*In the event that three consultants agree that a caesarean section is necessary to save the foetus, the operation can be performed even without the woman's consent*' (see Fig. 7). These incorrect understandings of the law came from male respondents.

Hence, ignorance of relevant law as well as lack of clarity concerning the rights of women advised by their doctors of the necessity of a caesarean section characterises respondents' replies to the survey questions. This ignorance and the lack of clarity demonstrate the inefficacy of the Saudi Health Ministry's attempts to clarify the right of women, independent of male guardians, to consent to or to refuse medical intervention, including a caesarean section, as reported in Chapter 4, Section 3.2.2.3 of this thesis. Given the current facts as reported in this study, the Saudi Health Ministry should begin to redress this unfortunate situation so that women's rights to autonomy are no longer nullified through the ignorance of attending physicians. One means by which such nullification may be overcome is through implementation of a public campaign

[783] Examples of verbatim responses: Doctor 11: '*The woman has the right to refuse any surgical procedure even after it becomes clear to her that the operation is necessary'*. Doctor 12: '*The woman is entitled to make her own decision and no operation can be performed without her consent'*.

addressing the autonomy right of pregnant women to make their own medical decisions. In addition, as it may be argued that the Saudi Health Ministry's efforts to clarify the current position of the law had limited impact in raising physicians' awareness of relevant law, additional steps ought to be taken. By use of medical conferences, legal experts can effectively draw attention to this matter and educate physicians about the relevant Saudi laws that acknowledge to female patients a right to autonomy in consenting or refusing to consent to a medical intervention, including a necessary caesarean section.

Figure 5

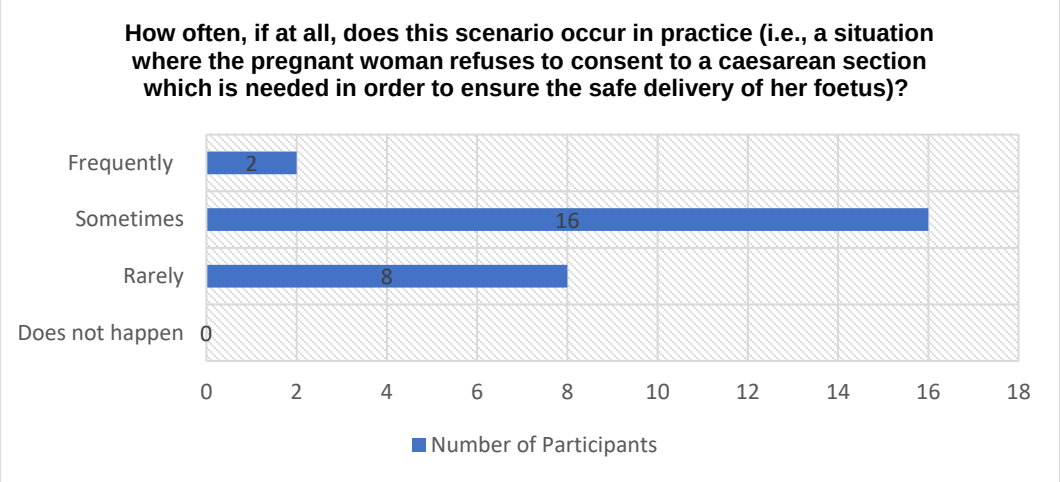


Figure 6

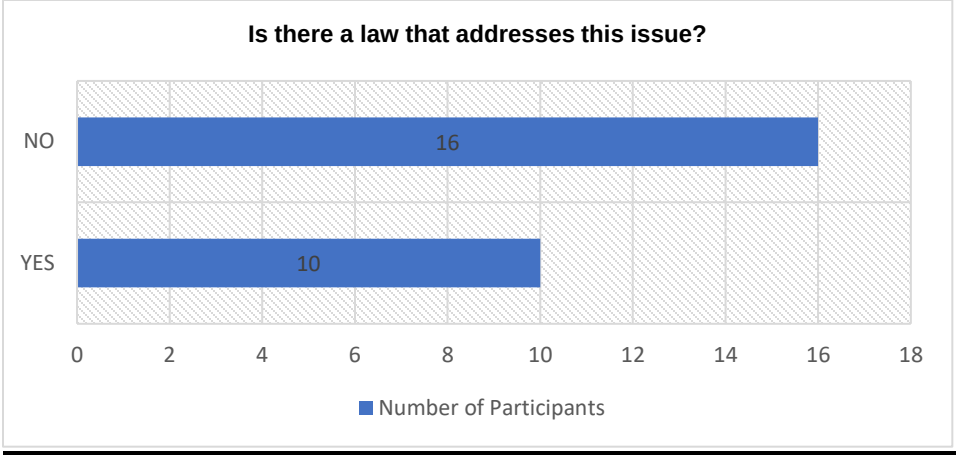


Figure 7

Aspect 1 Code grouped to form Themes	Number of respondents
Respondents' Knowledge of the Law	
Knowledge Contrary to the Position of Law	3
Knowledge in Line with the Position of Law	7

5.3.3 Aspect 2: Approaches to Different Scenarios of Refusal of a Necessary Caesarean Section

Respondents were asked to provide information on how they would approach different scenarios of refusal of a necessary caesarean section (fig. 8 provides responses to each of the scenarios). The rationale for presenting respondents with these different scenarios is two-fold: a) to uncover how physicians engage with caesarean refusals in practice, and b) to determine whether the misunderstanding – as discussed in Chapter 4.3.2.1.2 - of the husband's position in these situations remains (i.e., if the husband's

decision remains paramount in practice, regardless of the fact that, legally, his opinion is irrelevant).

Figure 8

Aspect 2 Code grouped to form Themes	Number of respondents
Approaches to Different Scenarios of Necessary Caesarean Section Refusals	
Scenario A) Mother Refuses and Father/Husband Approves:	
Maternal Consent Required	10
Operation not Performed, But Persuasion and Signing Declaration for Bearing Consequences are Made	6
Maternal Refusal Overridden by Father/Husband's Consent or Doctors' Decision	7
Seeking/using Social Worker	2
Scenario B) Mother Consents and Father/Husband Refuses:	
Maternal Consent is All that is Needed	24
Scenario C) Refusal from Both Mother and Father/Husband:	
Operation not Performed	9
Operation not performed But Attempts of Persuasion and Signing a Declaration of Bearing the Consequences from Both parents are Made	8
Intervention to Save a Life - Overriding Refusal	5

Seeking/using Social Worker	2

5.3.3.1 Scenario A

As shown in Scenario A, sixteen of twenty-four respondents,[784] acknowledged that a woman's refusal of a caesarean section is legally protected and that, as a result, the surgical procedure cannot be performed without the woman's consent:

> Doctor 12: *If the woman refuses to consent to the caesarean section, the father's (the father of the foetus) opinion does not matter.*
>
> Doctor 3: *The woman has a right to refuse to consent to medical intervention. The doctor's task is to explain to her, orally and in writing, the potential complications her refusal could cause to the foetus' health/life and leave the decision for the woman to decide on whether to consent to the procedure or not.*

Six of the sixteen respondents stated that they would not perform the procedure without the woman's consent, though they added that they would attempt to 'persuade' her to provide consent. Were their persuasion to fail, the respondents stated that they would then request that the woman sign a declaration for bearing the consequences of her refusal of a caesarean section:

[784] 24 participants out of 26 answered this question.

Doctor 15: *She is not to be forced to undergo the caesarean section, but an attempt is to be made to persuade her. If she insists on her refusal, her signature is taken and be signed by two consultants.*

Doctor 24: *Potential risks and the foetus' need for the caesarean section would be explained to the pregnant woman in an understandable manner. Her declaration would be obtained and signed by her.*

A number of participants elaborated on what 'persuasion' involved:

Doctor 2: *Explain potential risks to the foetus which include, lack of oxygen, the negative effects to the foetus' brain and sensitive organs such as the heart, kidneys and lungs; as well as the possibility of immediate death to the foetus due to complications of not performing the necessary caesarean section. In addition to this, to remind the woman of the value of pregnancy and the foetus and her obligation to protect her foetus, in order to stimulate sympathy and compassion on the foetus.*

Doctor 6: *Persuasion attempts include the following:*

1- Explaining the medical condition and the potential risks to the foetus, and the alternative delivery methods*, if any.*

2- Listening to the concerns of the pregnant woman and her reasons for her refusal to have the necessary caesarean section and trying to resolve the concerns.

3- Requesting the involvement of her parents and whom the pregnant woman trusts in their opinion (such as her father or mother) to talk to her and try to persuade her to give consent to the medical intervention.

4- Seeking a second opinion of another doctor, whether inside or outside the hospital and present it to the pregnant woman.

5- Seeking help from a social worker to speak with the pregnant woman and to sense the reasons for her refusal decision and try to persuade her.

'Persuasion', in the perspective articulated by these respondents, emphasised the grave risk to the foetus as well as the serious medical implications of refusal of consent to a caesarean section.

These responses demonstrate that maternal refusal of a necessary caesarean section is dealt with in a manner that confirms patient autonomy thereby being in accordance with the capacitous patient's right not to be treated without their consent, as specified in Article 19 of Saudi Law of Practicing Healthcare Professions 2005. However, seven of twenty-four respondents provided responses in contradiction to the position of the law in this regard (see Fig. 6). These respondents stated that maternal refusal of a necessary

caesarean section is rescindable by the husband or even by the attending physician to save the foetus. For example:

> Doctor 19: *The father (the father of the foetus) will sign, and two consultants then caesarean section will be performed*.
>
> Doctor 8: *In the event that more than one consultant agrees that a caesarean section is necessary to save the foetus, the operation can be performed even without the woman's consent. This is the hospital policy.*
>
> Doctor 7: *The attending physicians do not recognise the woman's refusal of the necessary caesarean section if they believe that her refusal is dangerous (i.e., can lead to serious consequences) … The doctor would assess the case and if a caesarean section is needed, neither the refusal of the woman nor of the father would matter.*

Therefore, were the husband to give consent to a necessary caesarean section, his consent could be used to 'coerce' the pregnant woman into giving her own consent:

> Doctor 11: *Attempts are made to persuade the woman of the necessity of performing the caesarean section to save the foetus. Remind her that the fact that the father (the father of the foetus) consents to the operation may expose*

her to legal accountability in the future by the father for the damages the foetus may suffer from as a result of her refusal.

One respondent clarified that the grounds for overriding the pregnant woman's refusal of a necessary caesarean section for the sake of saving foetal life/health stems from his perspective that health professionals have a duty to protect the foetus as an *independent* patient whose interests must be maintained.

It is interesting to highlight that four out of the seven incorrect statements came from male respondents. This is significant, especially because there were only nine male doctors who participated in this study, meaning that almost half of them expressed approaches that are in contradiction to the position of the law. On the other hand, only three out of fifteen female respondents gave incorrect statements, indicating that the majority of them approached this issue (scenario A) correctly.[785] This could therefore indicate that the female doctors who took part in this study were more likely to engage in approaches that are in line with the current position of the law.

Although seemingly in contradiction of Article 19 of Saudi Law of Practicing Healthcare Profession 2005, overriding maternal refusal of consent to a necessary caesarean section - if this were deemed necessary to save the woman's life - is acceptable

[785] Of the twenty-four answers to the scenario A question, fifteen came from participating female doctors and nine from participating male doctors.

practice, according to Doctor 5. This respondent, however, qualified this by further stating that the woman's refusal of consent would be respected if a caesarean section were deemed necessary only to save the foetus:

> Doctor 5: *In case the caesarean is needed to save the foetus and the woman refuses to consent to it, she would be asked to sign on her refusal of the operation and the associated consequences of her decision, the father (the father of the foetus) would be informed of her refusal decision. … If the caesarean section is to save the woman, the operation will be carried out after more than one consultant signs the need to perform the operation.*

This approach (intervene in order to save the *woman's* life) corresponds, in some ways, to authorisation of an abortion to save the woman's life.[786] That is, saving the pregnant woman's life can be interpreted as a legal ground for authorisation of a consensual abortion and of a non-consensual necessary caesarean section. Such an interpretation suggests that, in a practical sense, a necessary caesarean section qualifies as an emergency case. As such, the rescinding of refusal of consent is interpreted as falling under the purview of Article 19 of the Law of Practicing Healthcare Professions 2005, which excludes critical and life-saving cases from the consent rule.

[786] For more information about Saudi law on abortion after ensoulment, see chapter 4.3.1.2.

One respondent clarified the rationale behind this distinction in the approach adopted between the risk to the woman and the risk is to the foetus (that is, allowing non-consensual intervention/overriding the patient's refusal *only* where the risk is to the woman's life):

> Doctor 4: *Firstly, we (health professionals), when faced with a conflict of interests, consider first the 'root' (the pregnant woman) and then the 'offshoot' (the foetus). Secondly, health professionals' duty is to preserve the life of the patient who is the pregnant woman, and the foetus is secondary. Thirdly, in such cases (refusal of a necessary caesarean section), the foetus' life cannot be guaranteed.*

According to this respondent, the foetus is not a patient and so when a potential conflict between the interests of the pregnant woman and the foetus occurs, the interests of the 'root' (the pregnant woman) would always be prioritised, since the foetus' interests are secondary to hers'. This way of perceiving the pregnant woman as the root and the foetus as the offshoot is well-established in *Shariah* law, and it has been employed in several circumstances of maternal-foetal relationship, such as therapeutic abortion.[787] It should be highlighted, however, that this characterization of the maternal-foetal relationship only applies when the lives of both the woman and the foetus are in danger

[787] For more information about *Shariah* law on therapeutic abortion, see chapter 3.3.1.1.

and a decision must be taken to save one of them. In such an instance, the pregnant woman's life is to be preserved.[788] Hence, this conception cannot be used or be grounds to authorise a non-consensual intervention to save the woman's life, nor can it be used to justify harms caused to the foetus by the woman's refusal of consent to a necessary caesarean section. The only scenario where this perception of 'the root and offshoot' would be applicable would be when a caesarean section is deemed necessary to save the *woman*'s life or when performing a caesarean section needed by the foetus threatens the *woman*'s life. As in these cases, her life, being the root, would be prioritised over that of the foetus.

Another issue with this approach (that is, allowing non-consensual intervention/overriding the patient's refusal *only* where the risk is to the woman's life) is that under Saudi law the necessity to perform a caesarean section to avoid an adverse outcome to the life of the pregnant woman and/or of the foetus is *not* seen as an emergency case that justifies, as an exception to the law, an interference without consent, as stated in Article 19 of the Law of Practicing Healthcare Professions 2005.[789] Rather, Article 18 of the Implementing Regulations of the Law of Practicing Healthcare Professions 2005 clearly states the health practitioners' obligations in such a scenario:

[788] Abdallah S. Daar and A. Binsumeit Al Khitamy, 'Bioethics for Clinicians: 21. Islamic Bioethics' (2001) 164 Canadian Medical Association Journal 60, 63.

[789] Under Article 19, non-consensual intervention is allowed in critical and emergency cases where the life of the patient is at risk, provided that doctors were *unable* to obtain the patient's consent (e.g., a patient is unconscious). Hence, when a pregnant woman with capacity refuses to consent to the necessary caesarean section, non-consensual intervention cannot be justified under Article 19.

> After the explanation of the therapeutic or surgical treatment and its effects to the patient, the health practitioner is obligated to inform the patient or their family of the necessity to follow the health practitioner's recommendation and warn them of the seriousness of the consequences that may arise from failure to take the advised medical intervention into account.[790]

In addition, the patient must sign a declaration stating her full responsibility for the consequences of the refusal of consent, and this declaration must then be documented in her file.[791] Hence, if a woman refuses a necessary caesarean section, the medical practitioner is obligated to inform her of the potential outcomes of her decision. The medical practitioner is prohibited from coercing the capacitous pregnant woman to give consent, as doing so would be contrary to the validity of the consent.[792] Thus, while authorising abortion, upon her request/consent, to save the woman's life *is* the legal position of abortion law,[793] the law on caesarean section does *not* make any exception to the necessity to obtain the capacitous woman's consent.[794] As such, overriding the pregnant woman's refusal in order to save her life is *not* in accordance with the law on caesarean section refusal.

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[790] ''own translation''.
[791] Ministry of Health, 'Patient Rights and Responsibilities' < https://www.moh.gov.sa/HealthAwareness/EducationalContent/HealthTips/Pages/001.aspx> accessed 22 November 2020.
[792] Ministry of Health, *Saudi Guideline of Medical Consent* (1st edn Ministry of Health 2019) 21.
[793] For more information about Saudi law on abortion after ensoulment, see chapter 4.3.1.2.
[794] For more information about Saudi law on maternal refusal of a necessary caesarean section, see chapter 4.3.2.1.1.

Many of the respondents in this study acted in accordance with Article 18 of the Implementing Regulations of the Law of Practicing Healthcare Professions (2005). The obligation to ensure that refusals of consent are made when pregnant women are informed of the anticipated consequences of their decisions was reflected in participants' responses, such as:

> Doctor 1: *The attending physicians would explain to the pregnant woman the serious consequences of her refusal on the life of the foetus and would attempt to persuade her to consent to the operation. […] The attending physicians would discuss with the woman the negative impact of the alternative delivery methods on the life of the foetus (e.g., natural childbirth or vacuum extraction 'ventouse'). If the pregnant woman insists on her refusal decision, a signature of her refusal would be taken from her and she would bear the consequences of her refusal decision.*

> Doctor 16: *Communicating with the woman to explain the situation and the potential harms of not consenting to the caesarean section and trying to persuade her to give her consent to the operation.*

As far as 'attempts of persuasion' concerns, two of the respondents stated that they would seek assistance from medical social workers in cases of maternal refusal of consent. Medical social workers operate within a treatment health team. These

professionals, possessing degrees in either social work or sociology, are classified as specialists or higher by the Saudi Commission for Health Specialties.[795] Medical social workers, then, are typically employed in medical facilities.[796] Their medical social service, which is connected with the Ministry of Health, provides assistance to patients in recovery through preventive, curative, and rehabilitative services.[797]

The primary functions performed by medical social workers include: 1) preparing a socio-psychological assessment of the patient in order to provide adequate care and advice to patients with social and psychological problems contributing to a delay in their health status; 2) providing psychological support to relieve stress and anxiety of patients in need of such support; and 3) conveying to the patient the seriousness of their medical status and explaining the consequences of discontinuing treatment or of noncompliance with the advised medical intervention.[798] Medical social workers are empowered to discuss with patients the reasons why they wish to refuse to consent:

> Doctor 10: *In the event that the attending physician believes that the operation must be performed to save the life of a foetus, who is believed to be healthy and free of deformities, Ethics and Social Services will be contacted to discuss their reasons for their refusal decision.*

[795] Ministry of Health, *Medical Social Service Policies and Procedures Manual* (Ministry of Health 2016) 20.
[796] Ibid.
[797] Ibid, 13.
[798] Ibid, 28.

Doctor 1: *The attending physicians would also seek assistance from the social worker to find out the reason for her refusal and try to solve it.*

5.3.3.2 Scenario B

I then asked the participants about the approach followed in instances where a pregnant woman consents to a necessary caesarean section and her husband/father of the foetus refuses to consent to the operation (Scenario B). The legal position was correctly stated by twenty-four of twenty-five respondents, each of whom confirmed that only consent from the woman is needed:

Doctor 10: *The opinion of the father is irrelevant and so, we would carry out the caesarean section. This is according to an official decision from the Ministry of Health.*

Doctor 24: *Her consent is acknowledged, even if the father refuses because she has the right to make her own decision as the situation concerns her body, womb, and foetus.*

Notably, one of the twenty-four respondents suggested that doctors would need protection from the husband/father in order to avoid altercations that might arise in such a situation:

Doctor 3: *The woman has a right to consent or to refuse to consent to medical intervention. If she consents to the caesarean section and the father refuses to consent, the doctor will explain the situation to the father, and the caesarean will carry out since the woman gives her consent to it. In this regard, there must be laws and regulations introduced to protect doctors and health institutions in the case where the father (the father of the foetus) filed a complaint.*

5.3.3.3 Scenario C

As for Scenario C (if *both* the woman and her husband refuse to consent to the necessary caesarean section), seventeen of twenty-four respondents stated that the operation would not be performed. Two of the respondents correctly stated that this was due to the *woman*'s refusal to consent to a necessary caesarean section:

Doctor 15: *No surgical intervention is carried out, but many attempts to persuade the pregnant woman to consent are made […]. It is a matter for the pregnant woman.*

Doctor 12: *The operation is not performed due to the mother not consenting.*

Eight of the seventeen respondents asserted that *both* parents would be asked to sign a declaration stating the likely consequences of foregoing the necessary caesarean section:

> Doctor 1: *The attending physicians will attempt to persuade them and will explain the serious consequences of their refusal on the life of the foetus. The attending physicians will also discuss with them the negative impact of the alternative delivery options on the life of the foetus. In case they insist on their refusal, they will be asked to sign a declaration of bearing the consequences of their refusal decision on the foetus.*
>
> Doctor 13: *They have the option of consenting or refusing to consent and bear the consequences.*
>
> Doctor 14: *The attending physicians would ask the husband to come to the maternity ward, if possible, and explain to both of them the risks of delaying the decision of performing the caesarean section and the consequences of not performing it and leave them to discuss with each other without interfering with the decision. Then, we return to them within minutes if the situation is urgent, and if they refuse to consent to the operation, their refusal is signed by both of them and be documented in the patient's file.*

These respondents' statements are generally in accordance with Saudi law in terms of recognising the right of the woman to refuse a necessary caesarean section. However, respondents' inclusion of the husband/father in documenting the refusal of the medical procedure indicates insufficient awareness of the law, given that the husband/father's position on the matter is legally irrelevant. This is notable as Saudi law explicitly states that decisions pertaining to delivery can *only* be made by the pregnant woman, provided that she is deemed to have mental capacity.[799]

Five respondents expressed approaches in which a non-consensual intervention to save life is authorised. Interestingly, all responses arguing that a caesarean section would be performed to save the life of the *foetus*, regardless of the parents' refusal, were from *male* respondents (4 out of the 5 respondents): Doctor 20: '*The operation would be performed to save life*', and Doctor 18: 'The operation will be performed to save the foetus' life'. Only one female respondent argued that a non-consensual intervention is authorised but only if the operation was to save the woman's life *not* the foetus:

> Doctor 5: *In case the caesarean section is to save the foetus, their refusal will be documented and be signed by them. If the caesarean section is to save the woman, the operation will be carried out after two consultants sign the need to perform the operation.*

[799] For more information about the Saudi legal position, see chapter 4.3.2.1.1.

Of these five respondents, several asserted, erroneously, that consent from outside consultants would provide a legal basis for overriding their refusal of consent to a caesarean section.[800] The fact that four out of the five incorrect responses came from male doctors highlight again that female doctors who participated in this study were more informed about the legal position of the law than the male doctors. These responses may also indicate that**,** compared to participating female doctors, male doctors were more likely to authorise a non-consensual caesarean section when it was deemed necessary to save the *foetus'* life.

Two respondents declared that, in the circumstance that both parents refused consent for a caesarean section to save the foetus, they would seek assistance from a medical social worker to persuade them into compliance:

> Doctor 24: *The situation would be explained to them with emphasising the importance of the operation to the foetus and the resulting danger if operation did not carry out. If they insist on their refusal decision, a social worker is sought, and the hospital management would be informed of the situation.*

Based on respondents' stated approaches to scenarios A, B, and C, the majority of respondents acted in accordance with Saudi law in that these health professionals

[800] Doctor 8: '*Consent from more than one consultant would be sought so as to carry out the caesarean section*'. Doctor 7: '*The doctor would assess the case and if a caesarean section is needed, neither the refusal of the woman nor of the father would matter*'.

recognised the necessity of obtaining consent from the capacitous pregnant woman. Nevertheless, a minority of respondents' stated approaches were not in compliance with relevant Saudi law.

Thus, a fundamental misunderstanding of the law pertaining to a pregnant woman's right of consent persists, given that a number of respondents stated that the conferral of consent by the husband/father of the foetus remains in effect and can be effectively employed to override maternal refusal of a necessary caesarean section. A few respondents even claimed that, in the event that the foetus' life is in danger, the husband/father's consent may be used to coerce the woman into granting consent for the procedure. Non-consensual interventions to save the foetus' life were also evident in a few responses. Hence, it can be argued that Al-Amoudi et al's conclusion, which was based on the 2017 study, is merited, in that some health professionals have limited understanding of Saudi law concerning the pregnant woman's right to consent.[801]

The fact that a number of respondents persist in wrongly acknowledging the validity of the husband/father's consent demonstrates not only that unlawful practices routinely occur but also that such practices result from a misunderstanding of Saudi law. Hence, healthcare providers remain in need of increased awareness training in how to proceed in the circumstance of a capacitous woman's refusal of a necessary caesarean

[801] For more information about the misunderstanding of the law and the reported studies, see Chapter 4.3.2.1.2.

section.[802] However, it should be noted that the majority of respondents stated that they acted in compliance with the applicable law, demonstrating awareness of relevant law concerning the right of a woman to refuse a caesarean section. This is a significant finding that indicates a greater understanding among medical professionals of a pregnant woman's legal right to autonomy in consenting or refusing to consent to a medical intervention, including a necessary caesarean section, as compared to the findings of the 2017 study reported in 4.3.2.1.2.

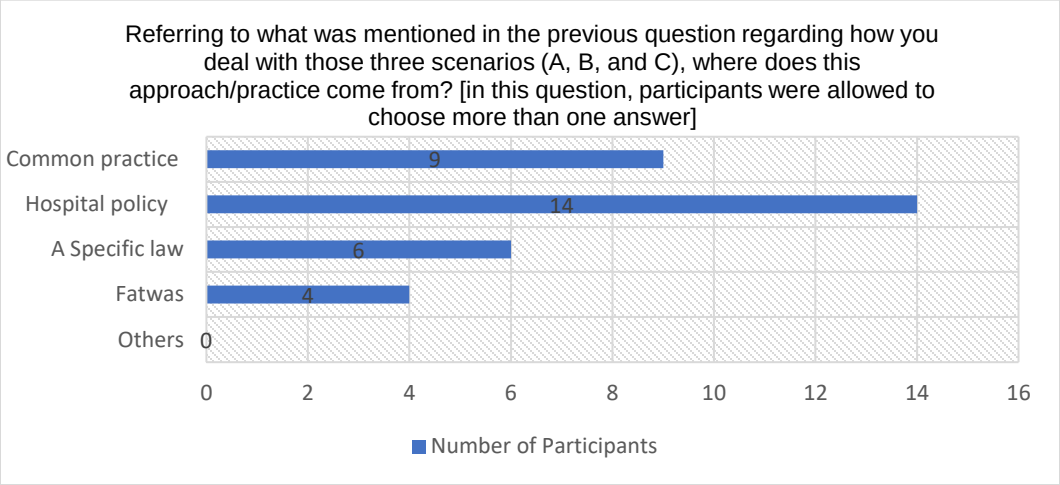
Respondents referred to different sources (see Fig. 9) in providing justification for their approaches to Scenarios A, B, and C. This reliance on different sources likely contributed to variations in their approaches to situations in which a medical procedure is necessary, but consent is not forthcoming. A number of participants cited hospital policy as the source for their approach to caesarean section refusals, and it was evident that some hospital policies in fact were in contradiction to the law pertaining to caesarean section refusals. For instance, Doctor 8 referred to a hospital policy that prioritises a doctor's judgement in such a matter:

> *In the event that three consultants agree that a caesarean section is necessary to save the foetus, the operation can be performed even without the woman's consent. This is the hospital policy.*

[802] For more information about the Ministry of Health's awareness-raising campaigns, see Chapter 4.3.2.1.3.

This assertion by Doctor 8 emphasises the importance of ensuring that hospital policies comply with the law.

Figure 9



5.3.4 Aspect 3: Whether Reform of the Law is Needed

The results indicate that most of the respondents were in compliance with Saudi law. It is interesting, therefore, that eighteen of the twenty-six participants were in favour of reforms to current Saudi law (see Fig. 10). Respondents' recommendations for reform included safeguarding both the rights of the pregnant woman and those of the foetus, bringing practice into line with religious values, and legitimising non-consensual interventions. Only eight respondents supported the present legal position, wherein the potential maternal-foetal conflict in the maternal refusal of a necessary caesarean section is approached solely from the perspective of the pregnant woman. In addition, respondents identified areas in need of improvement: medical education and training for doctors, standardization of policy and procedures across the country, and formation of

committees within health institutions to cope with challenging situations. Thus, this section examines respondents' perspectives regarding the desirability of reforming current law in Saudi Arabia (see Fig. 11).

Figure 10

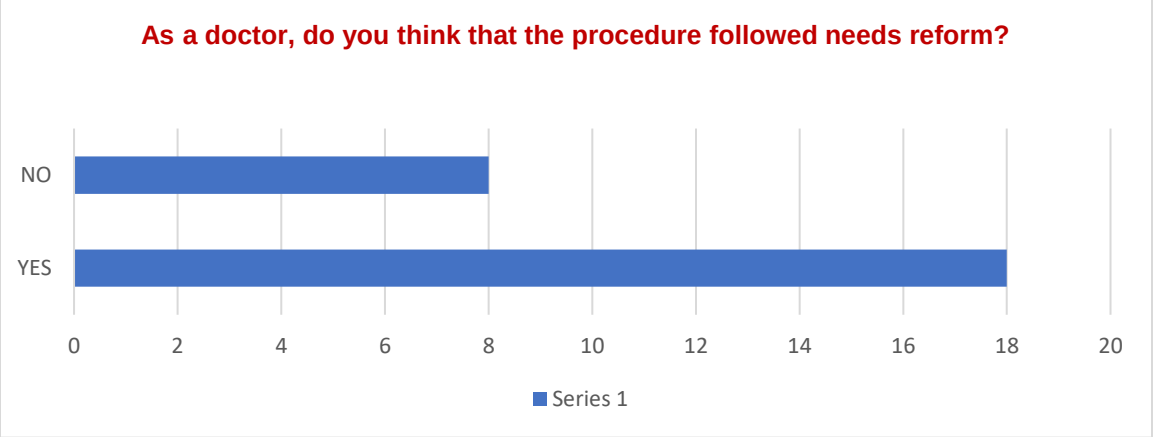


Figure 11

Aspect 3 **Sub-Aspects** **Code grouped to form Themes**	**Number of participants**
Whether a Reform of the Law is Needed	
A) Participants' Opinions of whether a reform is needed:	
Reform is Not Needed for Maternal Bodily Integrity and Autonomy Grounds	8
Reform is Needed to Protect the Rights of Pregnant Woman and that of the Foetus; as well as Protection to Doctors	6
Reform is Needed to Align Practice with Religious Values	4

Reform is Needed to Authorise Non-Consensual Intervention	2
B) Suggested Areas of reform in practice:	
Committee within Health Facility to Make Determinations	2
Increased Education for Doctors and Patients on this issue	3
Policy and Practices should be Consistent across the Nation	5

Eight of twenty-six respondents expressed their support of current Saudi law regarding maternal refusal of a necessary caesarean section. Opinions in favour of the current legal position of the law were evident from both male and female participating doctors, in which they emphasised the need to prioritise the bodily integrity of the pregnant woman as well as her legal right to autonomy. In other words, these doctors suggested that it was necessary to ensure the continued protection of the pregnant woman from unwanted and non-consensual medical intervention. Thus, Doctor 15 commented that:

> *No one should force the woman to take medication or to undergo a medical intervention even if the foetus dies because of her refusing to be treated; and that, in such a case, she is not to be held legally accountable or be criminalised.*

Doctor 2 asserted that current law pertaining to caesarean refusals protected women from unwanted medical intervention and should therefore remain intact:

> *The woman, after informing her of the consequences of refusing to consent to the operation, has the freedom to choose. The doctor should have no authority to perform any surgical procedure for the woman without her consent in cases where the patient has mental capacity.*

These respondents clearly indicated that attending physicians have no obligation regarding the foetus and that they are only obligated to respect the decision of the pregnant woman if she is deemed to have mental capacity. Doctor 25 explains why this is thus and why it should stay that way:

> *The pregnant woman is, from a religious perspective, entrusted with her foetus and so if she refuses to consent to the operation (the caesarean section) and she is fully aware of the expected harm to the foetus, she is fully responsible for whatever may happen to the foetus.*

This opinion suggests that maintaining and protecting the foetus' life are the ethical or religious responsibilities of the pregnant woman and so should not be dealt with by the law. (Doctor 2) interpreted the role of the doctor as that of "*an honest advisor, not a*

decision maker." In other words, these respondents were of the opinion that depriving a capacitous pregnant woman of her right to refuse medical intervention via a forced caesarean section for the sake of preserving the foetus' life would equate to a violation of her right to autonomy and bodily integrity.

Nonetheless, eighteen of twenty-six respondents voiced support for reforms to current Saudi law. Six of these respondents (from both male and female participating doctors) argued for revisions to current law so that the foetus' legal right to life is protected in cases of maternal refusal of a necessary caesarean section:

> Doctor 3: *Health laws and hospitals' policies must be reformulated to guarantee the right of the woman and the right of the foetus. In addition to guaranteeing the right of the doctors so as to protect them during their work, and the right of the health institution.*

According to Doctor 24, liability issues pertaining to the possibility of non-consensual medical intervention could be raised against doctors under current Saudi law. This respondent claimed that reform of the law is needed to ensure the protection of attending physicians and to preclude problems caused by lags in decision making:

> *There are sometimes critical cases that need medical intervention to save the life of the foetus and/or of the pregnant woman. In such cases, the attending*

physician seeks assistance from another consultant and they both sign the need to perform the operation and a caesarean section is performed even if the pregnant woman refuses. This procedure [overriding the patient's refusal decision] is legally dangerous for the physicians and, so there should be a law that protects everyone. There should be a clear law in all hospitals for dealing with maternal refusal of a necessary caesarean section cases, in order to protect the doctors, the foetus and the pregnant woman; and to prevent complications caused by delayed interventions.

Doctor 20 favoured reform designed to protect the rights of the foetus, equating the life of the foetus to that of an infant who has been born and accorded full legal status:

Since there are laws to protect the child, there must be laws to protect the foetus as well.

These respondents' suggestion of safeguarding both the rights of the pregnant woman and those of the foetus foregrounds the issue of reconciling the pregnant woman's legal right to bodily integrity and autonomy with the foetus's legal right to life. Chapters 3 and 4 of this thesis discussed the issue in detail, noting that the position of Saudi law, as set out in Resolution 173, implies that a capacitous woman's right to refuse a necessary caesarean section is not subordinated to the foetus's legal right to life.

Doctor 14's view that Saudi law should more closely correspond to religious opinion exemplified that of a number of respondents:

> *Establishing a law for such a matter and issuing a legal fatwa explaining how to deal with this issue; because suffocation in childbirth and lack of oxygen caused by any delay in the provision of medical intervention may result in the mother giving birth to a disabled child.*

The rationale for this desired alignment of medical practice with religious opinion was that physicians felt obliged to adhere to Saudi law, but prohibited from acting upon personal values. Thus, Doctor 17 commented:

> *Attempts should be made to seek a legal fatwa to determine the right of the foetus to life, because we are obligated to follow the law and not to act upon any personal judgment.*

In fact, Saudi law pertaining to the capacitous pregnant woman's right to consent to or to refuse a caesarean section deemed necessary by the attending physician is based on legal fatwas (Resolutions 119 and 173) issued by the Council of Senior Scholars.[803]

[803] For more information about Resolutions No. 119 and 173, see Chapter 4.3.2.1.1.

No reference is made therein to a foetus's legal right to life or to protection of the foetus from harmful action. Nonetheless, the International Islamic Fiqh Academy (Resolution No. 184) as well as the Permanent Committee for Scholarly Research and *Ifta* stated, in contradiction to the resolutions referenced above, that refusals of necessary caesarean sections *may* be rescinded.[804] The Council of Senior Scholars' deliberations sought to clarify the subordinate role of the husband/father of the foetus in relation to the pregnant woman's decision to refuse or to consent to medical intervention, such as a caesarean section. Although the opinion of the Council is the legal stance of Saudi law regarding caesarean section refusal, it is worth noting that these deliberations were not intended to address the potential conflict between the woman's legal right to autonomy and the foetus's legal right to life. The International Islamic Fiqh Academy (Resolution No. 184) as well as the *fatwa* issued by the Permanent Committee for Scholarly Research and *Ifta*, on the other hand, aimed to address the potential conflict between the rights of the pregnant woman and those of the foetus. Hence, different issues were taken under consideration by these religious bodies. Given the diversity of views of the religious opinions on the issue of the potential for a conflict between a pregnant woman's legal right to autonomy and bodily integrity and a foetus' legal right to life in necessary caesarean section refusal cases, suggestions that the relevant law be reviewed may be merited, if only to acknowledge the legal quandary in which doctors find themselves so as to begin the process of clarifying the issue.[805]

[804] For more information about Resolutions No. 184, see Chapter 3.3.3.2. For more information about the Permanent Committee for Scholarly Research and *Ifta*'s *fatwa*, see Chapter 4.4.2.

[805] In this regard, I have argued that *Shariah* law offers scope for adopting an alternative approach for dealing with cases of maternal refusal of a necessary caesarean section. For more information about this, see Chapter 4.4.2.

A number of respondents were adamant that Saudi law should reflect and prioritise their personal expertise in this sensitive matter. Such an approach for law reform was suggested by both male and female respondents. Doctor 7's statement typifies this group of respondents:

> *Since the doctor knows best and is the most knowledgeable in the medical case, it is he who determines the childbirth method.*

Doctor 19 echoed this sentiment:

> *If it is life-saving case, I think there is no need to obtain permission or consent from the family because their situation and their psychological state will not permit them to make a good decision. So, the final decision it should be made by at least two consultants.*

Both of these respondents unequivocally declared that non-consensual interventions should be authorised when a caesarean section is deemed a life-saving operation. The basis for these respondents' views is that the panic and pain accompanying labour and/or the fear of the operation could compromise the decision making of the pregnant woman. Their view, then, seems to be that the doctor is better qualified to arrive at a decision reflecting the best interest of the patient. The gist of their argument depends on a potential assumption: that the pain of giving birth along with fear of medical

intervention reduces, or even invalidates, whatever capacity pregnant women might otherwise possess, rendering them less autonomous and therefore in need of non-consensual intervention. Thus, according to this view, such intervention by experts (i.e., doctors) should be legalised. Shimon Glick agrees with such a view, arguing that respecting the autonomy of stressed and fearful patients entails risk of their making poor decisions for which they will later express regret.[806] Such patients, Glick contends, may submit to fleeting but heightened emotional stress and, as a result, make choices that they would not otherwise make.[807] He argues that, even when such a patient is deemed to have capacity, her refusal decision should be discounted and potentially overruled by medical experts.[808]

However, it is also argued that, while fear may impair a patient's capacity to understand and weigh the merits of treatment, thereby reducing her rational decision-making ability, this same irrational fear does not prevent patients from *consenting* to treatment.[809] What merits consideration is whether or not the fear experienced by the patient profoundly affects her capacity to understand the situation and to weigh the consequences of her

[806] Shimon M Glick, 'The Morality of Coercion' (2000) 26 Journal of Medical Ethics 393, 394.
[807] Ibid.
[808] Ibid, 394-395.
[809] Sabine Michalowski, 'Court-Authorised Caesarean Sections - The End of a Trend' (1999) 62 Moden Law Review 118. There is case law from England and Wales that clearly establish that a person's decision is respected as long as they are of sound mind, even if their decision appears to irrational. For instance, *Re T (Adult: Refusal of Treatment)* [1993] Fam 95, *per* Butler-Sloss LJ: 'A man or woman of full age and sound understanding may choose to reject medical advice and medical or surgical treatment either partially or in its entirety. A decision to refuse medical treatment by a patient capable of making the decision does not have to be sensible, rational or well considered.'; *Re MB (An Adult: Medical Treatment)* [1997] 2 FCR 541, at 543, *per* Butler-Sloss LJ: 'A competent woman who has the capacity to decide may, for religious reasons, other reasons, for rational or irrational reasons or for no reason at all, choose not to have medical intervention, even though the consequence may be the death or serious handicap of the child she bears, or her own death.'

decision. The issue is not whether the fear can be considered rational or irrational.[810] Those respondents who claim that labour pain and fear of surgical intervention override the pregnant woman's capacity to make delivery decisions engage in an unwarranted paternalistic approach. To use the pain associated with childbirth to impose non-consensual medical intervention denigrates a woman's ability to make choices based on her experience and knowledge.

Ten of twenty-six respondents specified reforms with practical consequences. One reform involved conferring consultant-committees with the authority to make determinations in challenging cases. For example, Doctor 1 recommended not only that patients receive prenatal care incorporating consideration of the possibility of surgical intervention, but also that committees be established to determine cases of maternal refusal and to compel psychological evaluations if required. This respondent stated:

> *Establishing a committee that consists of a health professional, a social consultant, and a medical team to explain (to the patients) the cases in which a caesarean section must be performed before they reach the stage of childbirth or during prenatal care; and in cases where the pregnant woman refuses to consent*

[810] There is case law from England and Wales that supports this conclusion. For example, *Bolton Hospitals NHS Trust v O* [2003] 1 FLR 824, *per* Dame Butler-Sloss P: 'there is a point at which that refusal and irrationality, as others might see it, tips the usually competent person over into a situation where the person, for however long or short a period, is actually unable to see through the consequences of the act, because that capacity to see through those consequences is inhibited by the panic situation in which the patient finds himself, or more particularly in this line of cases, herself', 'I am satisfied that Miss O is temporarily without capacity at the crucial point when she goes down to the theatre for the operation, due … to the overwhelming psychological fear and anxiety. In those circumstances I am satisfied she does not have capacity in the operating theatre to consent or to refuse the surgery that is proposed, or to refuse the anaesthesia that is an essential prerequisite of the caesarean section surgery'.

to the necessary caesarean section, she must be presented to a psychiatrist to explain the rationales underlying her refusal. This is because most of the reasons for refusal focus on fear of the operation.

Doctor 11 also recommended that the issue of surgical intervention be discussed well in advance of childbirth. In the view of this respondent, refusal to consent to surgical intervention should require referral to a committee:

The potential risks to the foetus must be explained to the pregnant woman during her pregnancy appointments and she must be informed of the need to give birth via a caesarean section. If she refuses to consent to the advised medical intervention via which the foetus' interests could be saved, there should be a special committee organised within the health institution for dealing with the woman in such a case.

Several respondents recommended additional training for doctors so that they may be prepared for managing patients who refuse surgical intervention:

Doctor 14: *Training doctors on how to practice conversation and persuasion in such cases.*

The need for a unified approach to caesarean section refusal cases was also appreciated by some respondents:

> Doctor 3: *Lawmakers should unify hospital procedures and policies in all health institutions in the Kingdom of Saudi Arabia so that they be aware of the remit of the applicable law and employ it as a reference in litigation cases in the courts.*

> Doctor 5: *Establishing a clear procedure on how to deal with such an issue from a medical and legal committee that will be circulated to all hospitals.*

Given that a number of hospital policies are in contradiction to the law (see Section 5.3.3 above), the suggestion of a unified approach to a woman's refusal of surgical intervention has merit so as to ensure correct application of the law.

5.4 Conclusion

My study has helped in the examination of my participants' (obs/gynae doctors) understanding of the legal position regarding necessary caesarean section refusals, as well as the exploration of how necessary caesarean refusals are dealt with in practice. It has also assisted in determining whether there is still ambiguity concerning a pregnant woman's legal right to make delivery decisions, as well as whether the participants

believe Saudi Arabia's current law should be amended. My empirical study has, as such, helped in providing additional insights to the answers to my research questions, especially with regard to whether or not there is a need for legal reforms, as well as how the law is applied and perceived by health professionals. My study can, hence, be of significance in formulating recommendations or amendments to the law in future.

Responses varied from ignorance of current Saudi law pertaining to the woman's right of refusal of surgical intervention, misunderstanding of the law regarding the subordinate role of the husband/father, to compliance with the law regarding doctors' obligation to obtain a capacitous woman's consent. Despite respondents' limited understanding of relevant law, most of them engaged in medical practices that corresponded to legal statutes. Nevertheless, there were practices contrary to the position of Saudi law, the main of which were:

1) lack of clarity concerning the role of the husband/father regarding consent to or refusal of medical intervention

2) non-consensual intervention intended to save the life of the woman or the foetus

The overarching conclusions of my empirical study are, thus, that greater awareness of the law pertaining to the right of a capacitous woman to make decisions regarding surgical intervention is needed. The fact that respondents adopted different approaches to maternal refusals supports this conclusion. In fact, most respondents stated that reforms to the law were necessary, although the specifics of such reforms varied.

The fact that the majority of the participants believed that reform of the law is needed gives an indication that there are some issues with either the application of the law or with the position of the law. Some of their suggestions for reform were about improving the application of the law. For example, suggestions to establish a committee within Health Facilities to make determinations for cases of maternal refusal of a necessary caesarean section, and increased education for doctors in how to deal with such an issue. Some made suggestions about authorising forced intervention, and others believed that reform of the law is needed in a way which maintains the importance of religion.

Chapter 6: Conclusion

This thesis set out to examine the Saudi legal approach towards maternal refusal of a caesarean section which is needed to save the foetus' life (a necessary caesarean section). The complexity in this issue lies in the possible conflict between the pregnant woman's legal right to autonomy and bodily integrity and the foetus' legal right to life. In pursuit of this aim, the *Shariah* law's approach to the potential for maternal-foetal conflict in the context of refusal of a necessary caesarean section was included. This is required because Saudi Arabia is an Islamic state, where Islam serves as both the official religion and the primary source of law. As a result, the legitimacy of the Saudi legal approach to the issue in question and any arguments for legal reform of it are dependent on their acceptance by *Shariah* law. Furthermore, a discussion of abortion law was included in some parts of this thesis, particularly in Chapter 3 and 4. This was necessary due to the shortage of data around the potential for maternal-foetal conflict in cases involving the maternal refusal of a necessary caesarean section, and because foetal legal status and rights are generally discussed in *Shariah* law and Saudi law in the context of abortion.

This thesis has answered four main questions:

(i) Does the notion of autonomy in Islam accommodate a maternal refusal of a necessary caesarean section, and whether the Islamic notion of autonomy can be used to override such a refusal?

(ii) Is the foetus' legal right to life as enshrined in Saudi law maintained in the current position of Saudi law on maternal refusal of a necessary caesarean section?

(iii) Does Saudi law regarding the issue in question need reform?

(iv) Does *Shariah* law offer scope for an alternative approach for dealing with the potential for a conflict between the capacitous pregnant woman's legal right to autonomy and the foetus' legal right to life in cases of maternal refusal of a necessary caesarean section?

The following summary of the various conclusions reached in this thesis should clarify these points. The main body of the thesis was divided into six chapters wherein the first two laid down the analytical basis for the discussions carried out in the rest.

Chapter 1 introduced the Saudi legal system, including an overview of the concept of *Shariah* law and its sources, as the latter is the supreme law of Saudi law. It was determined that *Shariah* law is a flexible tool that can adapt to varied situations at various times and places since it comprises general principles and *adillah* (indications). In this Chapter, a discussion of the key legal maxims of *Shariah* law was provided and it was shown that they are crucial to the implementation of *Shariah* law and that they are very adaptable to address a variety of complex ethical and legal issues. Chapter 2 focused upon exploring Islamic medical ethics and the scope of the notion of autonomy in Islam and its limits. It was shown that Islamic medical ethics is faith-based and is based on concepts of duty and responsibility, such as the need to adhere to Allah's commands. Moreover, I have discussed the five higher *Maqasid* (objectives) of *Shariah*

law, namely the preservation of religion (*din*), soul (*nafs*), mind (‘*aql*), progeny (*nasl*), and wealth (*mal*). This Islamic framework, alongside the key legal maxims of *Shariah* law, serves as the Islamic standards for determining the morality (and legality) of human actions and medical interventions. It is also considered to be a crucial intellectual tool that can be used to carry out rulings, *fatwas*, and Islamic reform. As with regard to the notion of autonomy, it was concluded that, in comparison to secular medical ethics, the Islamic framework for autonomy places less emphasis on autonomy, control, and self-sufficiency. This suggested that, as opposed to secular medical ethics, Islamic medical ethics focus less on patient autonomy and that this ethical (and legal) principle is restricted through adherence to *Shariah* provisions.

- <u>Does the notion of autonomy in Islam accommodate a maternal refusal of a necessary caesarean section, and whether the Islamic notion of autonomy can be used to override such a refusal?</u>

Having provided sufficient explanation of the Saudi legal system, the concept of the *Shariah* as a legal system, Islamic medical ethics, and how the principle of autonomy is interpreted from a *Shariah* law perspective, the thesis moved on to address the question as to whether the Islamic perspective of autonomy allows for a capacitous pregnant woman to refuse a necessary caesarean section, and whether the notion of autonomy in Islam can be used to override such a refusal. This took place in Chapter 3 and in order to answer these questions, I first examined the legal status of the foetus at different stages of development under *Shariah* law. It was established that the legal position of the foetus is determined by the concept of ensoulment, which takes place

after 120 days from conception. A foetus after ensoulment is regarded as a human being and a 'person' in the legal sense and is granted some legal rights and protections (e.g., their right to life and to be protected from harmful actions). The foetus before ensoulment, however, is neither described as a human being nor regarded as a legal person. Instead, because they lack a soul of their own and depends on the woman as they develop, they are viewed as a part of her body.

After determining the legal status and rights of the foetus under *Shariah* law, I moved on to elaborate on how *Shariah* law approaches the potential for maternal-foetal conflict in the context of refusal of a necessary caesarean section. I looked at how far the rights of the foetus are preserved when there is a potential that they may conflict with the pregnant woman's legal right to autonomy and bodily integrity. Therein I discussed the issue raised in my thesis, namely whether the Islamic perspective of autonomy allows for a capacitous pregnant woman to refuse a necessary caesarean section, and whether the notion of autonomy in Islam can be used to override such a refusal. It was demonstrated that a pregnant woman with capacity is obligated to give her consent to undergo a caesarean section that is necessary to avoid severe harm or death to the foetus, and that Islam's restricted notion of autonomy does *not* permit a pregnant woman to refuse such an intervention in such a case. Rather, choosing not to comply with the *Shariah*'s provisions about the preservation of soul and prevention of harm would constitute a sin for which she would be held accountable before Allah for any harm or (causing) death to the foetus caused by her refusal. This means that while a pregnant woman with capacity has a legal right to refuse a necessary caesarean

section under *Shariah* law, her exercise of this right would cause her to breach her religious duty.

Nonetheless, it has been shown that *Shariah* law may be flexible enough to consider various perspectives and approaches when it comes to the debate of whether the restricted Islamic notion of autonomy can be used to overrule a maternal refusal of a necessary caesarean section. One approach was that even though a capacitous pregnant woman is, from a religious perspective, obligated to give her consent to the necessary section, overriding her refusal decision in such a situation would violate her legal right not to be touched without her consent (a well-established rule in *Shariah* law). Therefore, under this perspective, such a refusal would not be overruled by the restricted notion of autonomy in Islam. This approach can be criticised for its failure to take into account the ensouled foetus's legal status and rights under *Shariah* law. The International Fiqh Academy took a different approach, supporting the use of the Islamic legal maxim of necessity to exempt a necessary caesarean section from the consent rule and classify it as a situation requiring immediate medical intervention. This approach would always authorise such an intervention to be carried out regardless of the capacitous pregnant woman's refusal decision, as it is necessary to save the life of the woman, the foetus, or both. Under this approach, the foetus is regarded as an independent patient in their own right and thus the woman's decision to refuse a necessary caesarean section is harmful in that it can have a negative impact on the foetus. I have argued that this approach is more appropriate in that it is in line with the legal protection given to the ensouled foetus under *Shariah* law. Nonetheless, I have

criticised the approach for allowing a pregnant woman's refusal decision in critical cases to be always overruled on the grounds of being a sin and for not taking into account the pregnant woman's legal right to autonomy in situations where the harm of not having the operation concerns only her.

- Is the foetus' legal right to life as enshrined in Saudi law maintained in the current position of Saudi law on maternal refusal of a necessary caesarean section?

The thesis, thereafter, focuses on how Saudi law addresses the issue of the potential for maternal-foetal conflict in the context of maternal refusal of a necessary caesarean section, and how well the foetus' legal right to life is maintained in such a case. I have addressed these questions through doctrinal considerations and empirical considerations. The former considerations took place in Chapter 4 and initiated the discussion by outlining the legal status of the foetus and their legal rights under Saudi law. The perception of Saudi law as being unclear may have been influenced by the lack of codification of *Shariah* provisions regarding the legal status of the foetus and the impact of ensoulment on the foetus' status and rights. In terms of the foetus' legal rights, Saudi law recognises a foetus' legal right to life from conception, without making a distinction between before and after ensoulment. In this regard, I have argued that while Saudi laws governing a foetus' legal status and rights do not clearly reflect the concept of ensoulment, Saudi law on abortion does. This is because, under abortion law, an ensouled foetus is a person independent of the pregnant woman, who enjoys a right to life and legal protection from harmful actions. Thus, at least in Saudi law on abortion,

the concept of ensoulment serves as the starting point when determining and identifying the foetus' legal status and rights.

Subsequently, the discussion shifted to focus on the issues raised in the thesis, including whether the foetus' legal right to life is maintained in the current position of Saudi law pertaining to the maternal refusal of a necessary caesarean section. It was demonstrated that a capacitous pregnant woman's legal right to autonomy in making her own birth decisions, including her right to refuse a caesarean section, is legally protected. It has been shown that a foetus' need to be safely delivered and their legal right to life do not overrule the capacitous pregnant woman's legal right to refuse a necessary caesarean section. Although the law recognises a capacitous pregnant woman's legal right to autonomy in making her own birth decisions, my discussion revealed that some misunderstanding of the position of the law exists. The husband's consent was thought – by some health professionals - to be required where procedures, such as caesarean sections were proposed. The increase in death rates caused by this ignorance of the law has brought attention to the need for a greater understanding of the husband's legal position in these situations. It has been, rightly, argued that ignorance, as opposed to a lack of regulations, is the primary cause of misconceptions concerning health rights in Saudi Arabia, especially when it comes to a female patient's legal right to autonomy in determining their own treatment decisions.

Furthermore, I have examined how Saudi law in respect to necessary caesarean section refusals is implemented in practice by medical practitioners. This was discussed in Chapter 5 and has also helped in examining whether there is still confusion around a pregnant woman's right to make her own birth decisions. The findings of my study showed that, with a few exceptions, the majority of the respondents engaged in medical practices that were compliant with legal statutes despite having a limited understanding of the relevant law pertaining to the maternal refusal of a necessary caesarean section. Nevertheless, the law regarding a woman's right to consent continues to be largely misunderstood, as evidenced by responses that indicated that the husband's (or the father of the foetus') consent is still valid and can be used to effectively overrule a maternal refusal of a necessary caesarean section. A few respondents even stated that, when the life of a foetus is at risk, the husband/father's consent may be used to compel the pregnant woman to consent to the procedure. Some responses also showed that non-consensual interventions can be performed if necessary to save the foetus' life.

Even though the majority of responses demonstrated that participants acted in accordance with the relevant law pertaining to a pregnant woman's right to refuse a necessary caesarean section, I came to the conclusion that illegal practices were still occurring. This was manifested in the incorrect affirmation of the legitimacy of the father's or husband's consent as well as in the non-consensual interventions to save foetal life. My thesis also revealed that such practices stem from a misunderstanding of Saudi law. Hence, I have suggested that healthcare professionals remain in need of

increased awareness training on how to proceed when a capacitous pregnant woman chooses not to have a necessary caesarean section.

- Does Saudi law regarding the potential maternal-foetal conflict in necessary caesarean refusal cases need reform?

The primary effects of the current legal position on the legal right to life of the foetus were underlined in Chapter 4. In this chapter, I discussed how Saudi law merely considers the pregnant woman's right to autonomy when addressing the potential maternal-foetal conflict in necessary caesarean refusal cases. At present, the law does not safeguard the foetus' legal right to life and the implications of not performing the necessary caesarean section for the foetus' life. In the light of this, Saudi law with regard to maternal refusal of a necessary caesarean section adopts the birth rule, which states that a foetus' rights (and corresponding legal protection) can only be enforced at birth. Thus, the one-patient obstetric model is adopted under Saudi law. In this model, a maternal refusal of a medical intervention required by the foetus should raise the question of whether the pregnant woman's needs and values are in fact conflict with the recommended intervention. As, under the one-patient model, the pregnant woman is only causing harm to herself, her right to autonomy cannot be restricted for causing harm to others (the foetus).

Chapter 4 demonstrated that the Saudi law takes the position that, while an ensouled foetus is considered to be an independent being entitled to legal protection when it

comes to abortion, this is not the case when it comes to delivery decisions, as the foetus is not 'protected' from a woman's refusal to agree to a caesarean section that is medically considered to be necessary to save the foetus' life. This is problematic because the law recognises the existence of a legal right to life for an ensouled foetus. I argued that, if the foetus did not have direct legal rights, then the autonomy-based approach to maternal refusal of a necessary caesarean section may be relevant, at least from a legal standpoint. However, under Saudi law, the foetus is granted a direct legal right to life based on abortion law and Article 6(1) of the Covenant on the Rights of the Child in Islam, and thus it could be argued that this right should be legally protected. Consequently, I have argued that the one-patient model approach to potential maternal-foetal conflict in necessary caesarean refusal cases can be legally problematic. This is because when a pregnant woman refuses a necessary caesarean section that would save the foetus' life, she is negatively affecting the foetus' legal right to life. Thus, it cannot be said that the harm caused concerns only herself as the patient. In this context and given that the foetus is granted a legal right to life, the maternal-foetal dyad approach is more appropriate, since it enables recognition of the situation as one involving an integrated, two-patient ecosystem with individual components that are not conceptually separate. Hence, I have argued that reform of the law to reflect this model is needed.

The question as to whether law reform is needed was also addressed in Chapter 5, drawing from the perspectives of medical practitioners. Therein, I discussed the results in response to the question of whether the participants thought that there should be

legal reform. In this regard, most of the respondents stated their belief that reform of relevant law would be beneficial to enable, in their view, a better approach to cases of maternal refusal of a necessary caesarean section. The recommendations for reform made by respondents included safeguarding both the rights of the pregnant woman and those of the foetus, bringing practise into line with religious values, and legitimising non-consensual interventions.

- Does *Shariah* law offer scope for an alternative approach for dealing with the potential for a conflict between the capacitous pregnant woman's legal right to autonomy and the foetus' legal right to life in cases of maternal refusal of a necessary caesarean section?

Since reform of Saudi law regarding the potential maternal-foetal conflict in necessary caesarean refusal cases is needed, I have examined whether an alternative approach for dealing with the issue in question can be developed within the boundaries of *Shariah* law, which is the primary source of law in Saudi Arabia. I demonstrated in Chapter 3 that *Shariah* law is flexible in that it accommodates various perspectives and approaches on how to approach maternal refusal of a necessary caesarean section. In Chapter 4, I presented the argument that there is scope for adopting an alternative approach for dealing with the maternal refusal of a necessary caesarean section. This is through applying the Islamic legal maxim that severe harm is removed by lesser harm. This suggested 'maxim-based' approach to the issue in question is framed in alignment

with the higher *Maqasid* (objectives) of *Shariah* law, particularly the objective of preservation of soul.

This ‘maxim-based’ approach can only be used in cases where a pregnant woman’s refusal of a necessary caesarean section would seriously endanger the foetus’ legal right to life. For it is only in such a case, involving a severe and a lesser harm, that this ‘maxim-based’ approach can offer a sound legal justification for overriding the pregnant woman’s legal right to autonomy as an exception to the consent rule. In this regard, I have stressed that my proposed approach for reform should not be interpreted in such a way that a pregnant woman should always be deprived of her right to make decisions regarding childbirth and that any decision related to this should be determined by medical professionals. My proposed approach also does not imply that a woman’s reasons for refusing to have a necessary caesarean section should be ignored or that a foetus’s need to be delivered safely should always take precedence over any potential health risks to the woman from the procedure.

If a capacitous pregnant woman’s decision of whether or not to undergo a caesarean section does not impair the foetus’ legal right to life, her right to autonomy should still be acknowledged (i.e., in cases where the caesarean section is required to save the life of the pregnant woman, and the risk of not performing the procedure primarily affects her). When performing the procedure would seriously endanger the pregnant woman’s health or result in her death, her autonomy and right to refuse the procedure would also be

respected because her interests would take precedence over those of the foetus. The Islamic legal maxim, that severe harm is removed by lesser harm, applies only where there is a necessity to perform a caesarean section to protect the foetus' life from being affected by not carrying out the operation. In such a case, there are two harms (harm of overriding the pregnant woman's legal right to autonomy and affecting the physical integrity of the woman's body, and harm to the foetus' legal right to life). The application of the legal maxim necessitates an assessment of the risk and benefits of the necessary caesarean section upon the woman and the foetus. Where the risks for the woman are minimal but the risks to the foetus' life are high, a caesarean can be authorised in order to remove the severe harm (causing death to the foetus) by the lesser harm (not respecting the pregnant woman's autonomy and preforming unwanted medical intervention upon her).

- <u>The significance and contribution of my research</u>

In this work, it has been shown that the potential maternal-foetal conflict in necessary caesarean section refusal cases is a complicated topic. I examined the various legal approaches employed to approach the issue in question under *Shariah* law and Saudi law in more detail. It is important to examine *Shariah* law specifically because it is the primary law followed in Saudi Arabia. By using this methodology, which includes doctrinal and critical analysis, the conclusions reached, and the suggestions made for reform regarding the potential for maternal-foetal conflict in the context of maternal refusal of a necessary caesarean section are not only applicable to the Saudi legal

system but they may also be extrapolated, with any necessary modification to reflect jurisdictional norms, to any country whose legal system is derived from *Shariah* law.

As far as I am aware, there is a significant lack of research into the potential maternal-foetal conflict in necessary caesarean section refusal cases at present. However, this thesis serves as a foundation upon which future researchers can examine this issue. This is because this thesis carefully considers the pregnant woman's legal right to autonomy and the foetus' legal right to life and to be protected from harmful actions from within *Shariah* and Saudi law. Therein, different approaches to the issue in question were discussed and examined. In turn, this work may pave the way for relevant legal reformations. I carefully considered such reforms whilst also taking into account both doctrinal considerations (as presented in this thesis) and empirical considerations (as discussed in the responses to the questionnaire distributed in my empirical study).

Owing to this empirical element, I have been able to collect and analyse relevant and original data relating to the application of Saudi law regarding the issue in question and how it is perceived by health professionals. However, as previously stated, there is a significant lack of empirical research into the issue of the potential for a conflict between a pregnant woman's legal right to autonomy and a foetus' legal right to life in the context of maternal refusal of a necessary caesarean section. Thus, I believe that the present study fills part of the void in research and can subsequently promote further investigations in this field, which will be crucial if relevant changes are to be

implemented. Moreover, my study was able to produce original data regarding the perspectives and opinions of medical practitioners regarding whether or not legal reforms are required. This is critical in developing recommendations or amendments to the law in future. In this regard, I have made a recommendation for further research to be carried out to examine the issue of the potential maternal-foetal conflict in necessary caesarean section refusal cases from the perspective of pregnant women. In particular, to investigate on their view regarding granting legal protection to the foetus' legal right to life in cases of the maternal refusal of a necessary caesarean section, and the impact it has on pregnant women's legal right to autonomy and bodily integrity. Following any legal reform, further empirical research will also be necessary to ascertain whether the said reform is being implanted in practice. This thesis may be useful for relevant lawmakers and health practitioners who are actively involved in the field of obstetrics.

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The Committee on the Elimination of Discrimination against Women (CEDAW), 'Concluding comments of the Committee on the Elimination of Discrimination against Women: Saudi Arabia' (14 January-1 February 2008)

World Health Organization, Regional Office for the Eastern Mediterranean, 'International Islamic Charter of Medical and Health Ethics' (2005)

World Health Organization, 'World Health Report 2000'

Online Website

Tafheem.net, (Quran English Translation and Commentary - Koran Explanation - Tafheem ul Quran)

Quran.com, (The Noble Quran - Quran.com)

Appendixes

Appendix 1 – Participant Information Sheet

Please take time to read the following Participant Information Sheet carefully before you decide whether or not you wish to take part in this project.

What is the project about?

My thesis is about the potential for conflicts of interests between the pregnant woman and the foetus in caesarean section refusal cases. It looks at the situations where the pregnant woman refuses to consent to a caesarean which is needed in order to ensure the safe delivery of her foetus. In order to examine the Saudi law's stance on this matter, I am interested in gaining an understanding of how doctors in Saudi Arabia deal with cases of maternal refusal of caesarean section in practice. This will help me to evaluate the Saudi law's position towards maternal refusal of caesarean sections and whether it needs reform. My aim is to explore health professionals' understanding of the law relating to maternal refusals of caesarean sections and the foetus' status in Saudi law and to consider whether the Saudi law needs to be reformed.

Why have I been invited to participate?

I have approached you because of the area you are practising in. If you have experienced such a scenario, I would like to know how you dealt with it. If you have not experienced such a case, I would like to know how you think you might deal with it.

I would be very grateful if you would agree to take part in this project.

If I take part, what will I be asked to do if I take part?

If you wish to participate in this research, you can decide to take part in Questionnaire 1 only, or Questionnaires 1 and 2. There is no obligation to participate in any of the Questionnaires. If you decided to take part, this would involve the following: you would complete Questionnaire 1 which consists of 6 short questions about your views on the subject based on your experience and viewpoints. When discussing individual cases, please remember not to name the women you may be thinking of. You will have up to 4 weeks to complete it. It is important for the purpose of this project that you answer the first five questions, while the sixth question is optional. Before answering these questions, you will be asked some general questions (e.g. your gender, age and post-qualification). It is anticipated that answering Questionnaire 1 will take approximately 20 minutes.

Following the completion of Questionnaire 1, I may come back to you with up to 2 follow-up questions (Questionnaire 2) if you agree. This means that you can, if you wish, answer Questionnaire 1 only. It is anticipated that answering Questionnaire 2 would take approximately 10 minutes. There will be a consent section, before both Questionnaires start, for you to confirm that you have understood the instructions and information provided and give your consent if you would like to participate. You will also be asked whether you would like to participate in Questionnaire 2, if you would like to see the results of this project, and if you agree to have your data stored in Lancaster University's data archive (Pure) where other researchers can have access to it. For these three points, you can choose Yes or No, as you wish.

What are the possible benefits from taking part?

Taking part in this project will allow you to share your experiences in this area and your response may help me to evaluate the Saudi law's position towards maternal refusal of caesarean sections and whether it needs reform. You can also see the results of the discussions, if you wish.

What are the possible disadvantages and risks of taking part?

The subject of this research can be viewed as controversial or sensitive. You are at liberty to participate or not to do so. It is unlikely that there will be any major disadvantages to taking part. However, discussing such a topic might be distressing for you as it involves thinking about previous cases that you have been involved in. If you feel upset, I suggest that you contact your family doctor for support. You may also discontinue participation if upset.

Do I have to take part?

No. It is completely up to you to decide whether or not you take part. Your participation is voluntary.

What if I change my mind?

If you change your mind, you are free to withdraw at any time during your participation in this project. If you want to withdraw, please let me know via my email (a.alsheddi@lancaster.ac.uk).

If you withdraw within 3 of weeks of submitting Questionnaire 1, then I will delete any data from or relating to you and not use it within my project. You may still withdraw after this time, but I may still use your data as it may already have been anonymised, pooled together with other participant's data, or analysed.

If you participate in Questionnaire 2, you will have 3 weeks after submitting it to withdraw your data. If you decide to withdraw within this time, any data from Questionnaire 2 will be deleted and not be used. You may still withdraw after this time, but I may still use your data as it may already have been anonymised, pooled together with other participant's data, or analysed.

Will my data be identifiable?

Your identity will be treated as confidential and will only be known to me and to my supervisors.

I will keep all personal information about you (e.g., your age and other information about you that can identify you) confidential, that is I will not share it with others, apart from my supervisors. I will remove any personal information from the written record of your contribution, and I will not include any identifying information in the dissemination of my research.

How will I use the information you have shared with me and what will happen to the results of the research project?

I will use the information you have shared with me for research purposes only. This will include my PhD thesis and other publications, for example, journal articles and blog posts (e.g., Lancaster Law School Student Blog). I may also present the results of my project at academic conferences.

When writing up the findings from this project, I would like to reproduce some of the views and ideas you shared with me. I will only use anonymised quotes (e.g., from my interview with you), so that although I will use your exact words, you cannot be identified in our publications.

How my data will be stored?

Your data will be stored in encrypted files (that is no-one other than me and my supervisors will be able to access them) and on password-protected computers. I will keep data that can identify you separately from non-personal information (e.g., your views on a specific topic). In accordance with University guidelines, I will keep the data securely for a minimum of ten years.

I will, if you agree, store the anonymised data from the project in Lancaster University's data archive (Pure) where other researchers can have access to it. You can choose not to have your responses deposited in this data archive and do not have to give a reason for this.

What if I have any questions or concerns?

If you have any queries or if you are unhappy with anything that happens concerning your

participation in the project, please contact me via my email (a.alsheddi@lancaster.ac.uk). You can also contact my PhD supervisors: Professor Sara Fovargue (s.fovargue@lancaster.ac.uk); Dr Mary Guy (m.guy2@lancaster.ac.uk).

If you have any concerns or complaints that you wish to discuss with a person who is not directly involved in the research, you can also contact the Head of the Law School, Professor Alisdair Gillespie (a.gillespie@lancaster.ac.uk). Or the Health and Support Services, the Saudi Ministry of Health, via their email: 937@moh.gov.sa or you can call them through 937-Service Centre.

Appendix 2 - CONSENT FORM

1. I confirm that I have read and understood the information sheet for the above study. I have had the opportunity to consider the information, ask questions and have had these answered satisfactorily.

- ○ Yes
- ○ No

2. I understand that my participation is voluntary and that I am free to withdraw at any time during my participation in this project and within 3 weeks after I submit it, without giving any reason. If I withdraw within 3 weeks of submission, my data will be deleted and will not be used in the study.

- ○ Yes
- ○ No

3. I understand that any information given by me may be used in future reports, academic articles, publications or presentations by the researcher, but that my personal information will not be included, and I will not be identifiable.

- ○ Yes
- ○ No

4. I understand that data will be protected on password-protected devices and kept secure.

- ○ Yes
- ○ No

5. I understand that data will be kept according to Lancaster University guidelines for a minimum of 10 years after the end of the study.

- ○ Yes
- ○ No

6. I agree that the researcher may come back to me with up to 2 questions (Questionnaire 2) within 4 weeks of my participation.

- ○ Yes
- ○ No

Display This Question:

If 6. I agree that the researcher may come back to me with up to 2 questions (Questionnaire 2) withi... = Yes

***** Please write your email in the box so that I can come back to you with Questionnaire 2.

_____

_____

_____

_____

_____

7. I agree to have my responses deposited in the data archive where other researchers can have access to it.

- ○ Yes
- ○ No

8. I would like to receive a short report about the findings of the project.

- ○ Yes
- ○ No

Display This Question:

If 8. I would like to receive a short report about the findings of the project. = Yes

* Please write your email in the box so that I can provide you with the short report.

_____

_____

_____

_____

_____

9. I agree to take part in the above study.

- ○ Yes
- ○ No

Skip To: End of Survey If 9. I agree to take part in the above study. = No

Appendix 3 - Questionnaire 1

General Questions

Gender:

- ○ Male
- ○ Female

Age:

- ○ 25-34
- ○ 35-44
- ○ 45-54
- ○ 55-64
- ○ 65+

Post-qualification (how long have you practising):

- ○ 0-10 years
- ○ 11-20 years
- ○ 21-30 years
- ○ 31+

My project is about the potential for conflicts of interests between the pregnant woman and the foetus in caesarean refusal cases. It looks at the situations where the pregnant woman refuses to consent to a caesarean section which is needed in order to ensure the safe delivery of her

foetus. In order to examine the Saudi law's stance on this matter, I am interested in gaining an understanding of how doctors in Saudi Arabia deal with cases of maternal refusal of caesarean section in practice. This will help me to evaluate the Saudi law's position towards maternal refusal of caesarean sections and whether it needs reform, and whether the foetus' interests are considered according to Saudi law.

In order to achieve these aims, I would like you to answer the following questions:

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1. How often, if at all, does this scenario occur in practice (i.e. a situation where the pregnant woman refuses to consent to a caesarean section which is needed in order to ensure the safe delivery of her foetus)?

- ○ Frequently
- ○ Sometimes
- ○ Rarely
- ○ Does not happen

---

2. Is there a law that addresses this issue?

- ○ Yes
- ○ No

Display This Question:

If 2. Is there a law that addresses this issue? = Yes

* What is your knowledge of the law regarding this issue?

3. What is the procedure followed when there is an urgent need to perform a caesarean section in order to protect the life/health of the foetus and the following scenarios occurred - and how you think you might deal with them:

A) The woman refuses to consent to the recommended caesarean section and the father agrees to it.

B) The woman gives her consent to have the recommended caesarean section and the father refuses to consent to it.

C) Both the woman and the father refuse to consent to the recommended caesarean section.

4. Referring to what was mentioned in the previous question regarding how you deal with those three scenarios (A, B, and C), where does this approach/practice come from?

- ☐ Common practice
- ☐ Hospital policy
- ☐ A specific law
- ☐ Fatwas
- ☐ Others: _____

5. According to Resolution No. 173 by the Council of Senior Scholars: 'If it is medically determined by the competent authority that it is necessary to perform surgery for hysterectomy or caesarean section, the woman, if deemed legally competent, is entitled to give consent or refuse to consent to the advised medical intervention. The husband's decision is irrelevant because the harm concerns the patient [the woman] and she knows what is best for her'.

As a doctor, do you think that the procedure followed needs reform?

- ○ Yes
- ○ No

Display This Question:

If 5. As a doctor, do you think that the procedure followed needs reform? = Yes

* What are your suggestions for amending/reforming the procedure followed in dealing with such scenarios?

6. Do you have anything more you would like to add on this issue?

Appendix 4 – Questionnaire 2

A Brief Recap of the Research Project:

It is about the potential for conflicts of interests between the pregnant woman and the foetus in caesarean refusal cases. It looks at the situations where the pregnant woman refuses to consent to a caesarean section which is needed in order to ensure the safe delivery of her foetus.

Why have I been invited to participate in Questionnaire 2?

I have approached you to participate in Questionnaire 2 based on your consent for me to come back to you in Questionnaire 1.

What will I be asked to do if I take part in Questionnaire 2?

Questionnaire 2 involves only one question, and it is anticipated that answering it would take approximately 5 minutes. You will have up to 3 weeks to answer it.

Do I have to take part?

No. It's completely up to you to decide whether or not you take part. Your participation is voluntary. Your identity will be treated as confidential and will only be known to me and to my supervisors. Your data will be stored in encrypted files (that is no-one other than me and my supervisors will be able to access them) and on password-protected computers.

What if I change my mind?

If you change your mind, you are free to withdraw at any time during your participation in this project. If you want to withdraw, please let me know via email: a.alsheddi@lancaster.ac.uk.

If you participate in questionnaire 2, you will have 3 weeks after submitting it to me to withdraw your data. If you decide to withdraw within this time, any data from questionnaire 2 will be deleted and not use. You may still withdraw after this time, but I may still use your data as it may already have been anonymised, pooled together with other participant's data, or analysed.

Consent Form

I confirm that I have read and understood the information provided above.

- ○ Yes
- ○ No

I understand that my participation is voluntary and that I am free to withdraw at any time during my participation in this project and within 3 weeks after I submitted it, without giving any reason. If I withdraw within 3 weeks of the submission, my data will be deleted and will not be used in the study.

- ○ Yes
- ○ No

I understand that any information given by me in Questionnaire 2 may be used in future reports, academic articles, publications or presentations by the researcher, but that my personal information will not be included, and I will not be identifiable.

- ○ Yes
- ○ No

I understand that data will be protected on password-protected devices and kept secure.

- ○ Yes
- ○ No

I agree to have my responses in Questionnaire 2 deposited in the data archive where other researchers can have access to it.

- ○ Yes
- ○ No

I agree to take part in Questionnaire 2.

- ○ Yes
- ○ No

(Group A):

Your response to Questionnaire 1 was that when the pregnant woman refuses to consent to the caesarean section that is believed to save foetal life/health, the woman's refusal decision would be respected and regardless of its negative consequences on the foetus, but many attempts to persuade the pregnant woman to consent are made.

Please answer the following question:

What do ''attempts of persuasion'' involve in practice?

_____

_____

_____

_____

_____

(Group B):

Your response to Questionnaire 1 was for the woman's refusal decision to be overridden or disregarded for the sake of saving the foetus' life or health.

Please answer the following question:

On what grounds the pregnant woman's refusal decision is disregarded in such a case? Is it:

☐ Because her refusal decision is believed to be irrational and dangerous and, hence, can be overridden.

☐ Because doctors have a duty to protect the foetus as a separate patient whose interests need to be maintained.

☐ Because the situation is considered an urgent case which require an immediate intervention regardless of whether the patient consents or refuses to consent to the intervention.

☐ Others: _____

Group C:

Your response to Questionnaire 1 was for the woman's refusal decision to be respected if the caesarean is believed to be necessary to save the foetus, and to be overridden if the caesarean is believed to be necessary to save the woman.

Please answer the following question:

Why there is this distinction in the approach adopted between the risk to the woman and the risk is to the foetus? Meaning, why non-consensual intervention/overriding the patient's refusal is only permitted where the risk is to the woman's life?

_____

_____

_____

_____

_____