

Suliman M. K Ibrahim.

LL.B. (Hons), LL.M (Garyounis University. Libya)

The Moral and Legal Status of the Human Foetus

A Critical Analysis from an Islamic Perspective

A thesis submitted for the degree of Ph.D in Law

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Declaration: 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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I dedicate this thesis to Kariman and my little angels: Sana and Maha.

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ABSTRACT

This thesis aims to ascertain what the status of the human foetus should be in Libyan law where it is currently inadequately determined. Specifically, is the foetus a person, a type of property, or something else, and is humanity significant for such a determination? Additionally, is moral status related to legal status, and if so, how? Also, what implications does this have for foetus-related dilemmas such as abortion and foetal research? These questions will be addressed by examining relevant Western moral and legal arguments and theories from an Islamic perspective, which will provide an assessment of their compatibility with the *Shari'a* based Libyan legal system. This will also help to assess the capability of *Shari'a* to meet challenges posed by new reproductive technologies.

The thesis argues that legal personality, moral personality, and humanity are identical and find their foundations in moral agency, which is understood in *Shari'a* as an attribute residing in the soul. It claims that the foetus acquires ultimate moral agency along with an active potentiality for actualising it, at the twentieth week of gestation, which, according to this analysis, is when ensoulment occurs. At this point the foetus is held to have the attributes of a person, but prior to this the foetus is considered to have a passive potentiality for moral agency, entitling it to respect proportional to its proximity to having ultimate moral agency. Accordingly it is argued that, while non-therapeutic applications harmful to the foetus should be absolutely prohibited after ensoulment, they can be legitimate prior to that if the benefits outweigh the harm.

These conclusions demonstrate that *Shari'a* is capable of tackling the challenges of modern reproductive technologies. They also provide a plausible basis for reforming Libyan law on the status of the foetus, and show that Western moral and legal arguments can be compatible with *Shari'a*. This may pave the way for further studies that incorporate principles from both the West and Islam.

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1 Introduction

This thesis is about the moral and legal status of the human foetus. It discusses what this status is, specifically, whether it is that of a person, that of a species of property, or something else. It also examines whether it is essential to know this status for solving foetus-related moral and legal dilemmas revived or created by new reproductive technologies, such as abortion, foetal research, and the enforceability of prenatal invasive therapy. In dealing with these two questions, the thesis has to tackle other important issues such as that of whether humanity is sufficient or necessary, or neither, for being a person rather than a species of property, and that of whether the moral status and legal status of the foetus are related and, if so, how.¹

The importance of undertaking such research is apparent. The moral and legal status of the foetus is widely and reasonably argued to be the starting-point for solving foetus-related moral and legal dilemmas.² That is to say, it is often argued that solving these dilemmas, and any others involving the foetus requires having a particular understanding about what the foetus is. Is it a subject of rights that others should recognise and respect, or an object of those others' rights? Therefore, by verifying such a claim, the thesis constitutes a first step towards solving these dilemmas. This holds true even if this claim is found implausible, as the thesis should, in such a case, identify alternative approaches to these dilemmas.

In addition, the importance of the current thesis transcends these foetus-related issues. The discussion of other issues is implicit in the discussion of the moral and legal

¹ Detailed explanation of these issues and the importance of discussing them is the theme of Chapter One.

² See 2.1 Foetus-related new technological applications and their associated moral and legal dilemmas.

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status of the foetus, hence the thesis can help with any future discussion of these issues as well. One of these issues is the importance of humanity in conferring and withdrawing moral and legal personality.³ If such a claim is proven plausible, it will be sufficient for the foetus to be human in a morally and legally relevant sense, in order to be a moral and legal person. In addition, if humanity is deemed to be a necessary condition for such a standing, the moral and legal status of non-humans will be greatly affected; animals, for instance, will be deprived of moral and legal personality.⁴

What adds to the importance of examining the moral and legal status of the foetus, is the fact that this status is not adequately determined in Libyan law, which is the law of this researcher's home country. The legal standing of the foetus there is decided in the light of the outdated born alive rule, which deprives it of the status of legal persons.⁵ This thesis, therefore, hopes to influence the understanding of the status of the foetus in Libyan law by ascertaining what this status should be in that law. It will do so by examining moral and legal Western literature on the issue of the status of the foetus from an Islamic perspective. Three points need to be clarified here, namely, why moral literature, why Western literature, and why an Islamic perspective? The reliance on moral literature is based on an assumption, which will be proven plausible later in the thesis, that law should be assessed from and built upon ethics, hence the legal status of the foetus should be examined and re-established according to its moral status. The recourse to moral and legal Western literature is justified by the simple fact that the West's early experience of foetus-related new reproductive technologies, and the associated moral and legal dilemmas, has resulted in early debate over these dilemmas, and in turn has generated rich

³ See 2.2.3 The humanity-personality relationship.

⁴ Besides section 2.2.3 The humanity-personality relationship, see 4.2.2 Basing moral personality on moral agency and how such a criterion, being human-specific, affects the status of animals.

⁵ For a detailed discussion of the born alive rule and the standing of Libyan law, see 4.1.2.3 below.

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and diverse literature on them. The moral status of the foetus, in particular, has been debated in the West since the commencement of bioethics in the late 1960s and early 1970s.⁶ Referring to this literature, therefore, increases the chances of this thesis of reaching a plausible conclusion on the issue.

However, adopting Western arguments and views in an Islamic country such as Libya is not uncontentious. On the one hand, it is repeatedly claimed that, under the umbrella of flexibility, Moslem countries and people should benefit from Western ways of thinking. For instance, S. Mohammed Ghari Fatemi claims that:

The ethical heritage of Muslims clearly indicates that they have balanced products of other normative systems into their own legacy. It is not difficult, for instance, to identify concepts and even arguments of a Neoplatonic moral perspective in Nasir al-Din al-Tusi's *The Nasirian Ethics...or the Aristotelian notion of moderation* in Naraq'i's *Mi raj al-saada...*, both of which are renowned Shiite moral workers [Islamic sect]. The challenge to contemporary Muslims is to maintain a vital link with the great thinkers of the past and approach new moral and moral developments with a similar openness.⁷

On the other hand, other writers such as Ataullah Siddiqui have expressed doubt about the acceptability of new ideas in the Moslem world:

Today, Muslim scholarship is re-examining Muslim history and tradition, looking in depth at how far its flexibility will permit a change within Islamic tradition. They are also examining how far western experiences and western models can be of help and could be accommodated in the contemporary Muslim moral discourse. Muslims are

⁶ Søren Holm, "Going to the Roots of the Stem Cell Controversy," *Bioethics* 16, no. 6 (2002): 493-507, 506. Colin Edwin Hart, "The Moral Status of the Human Embryo and Fetus: A Systematic and Critical Survey of the Discussion in the English-Speaking World between 1960 and 1995 from a Theological Perspective" (University of Manchester, 1998), (unpublished Ph.D thesis), 14, 16.

⁷ S. Mohammed Ghari Fatemi, "Egg and Embryo Implantation: A Comparative Study of Shi'ite Teachings and Kantian Ethics.," *Islam & Christian-Muslim Relations* 16, no. 3 (2005): 297-312, 310.

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cautious about accepting ideas of “new theology”, “new values” and “new philosophy”. They perceive these as “shallow” and unrealistic, and believe these could be fatal.⁸

Therefore, it is important to assess whether arguments and views deployed in Western moral and legal literature on the status of the foetus, in particular, and other bioethics and biolaw issues in general, can be accepted in Islamic countries, specifically Libya. The best way to do that, I believe, is to tackle one of these issues and examine whether Western views and arguments concerning it are applicable in these countries. The moral and legal status of the foetus can be used as a test-case, and conclusions about it can then be generalised with regard to other related issues.

The question that inevitably arises from this is how the adoptability of Western arguments and views in Islamic countries can be assessed, which leads to the third point about the reliance of this thesis on an Islamic perspective. The answer is that *Shari'a*⁹ will be used as the yardstick against which these views and arguments will be measured. In Islamic countries, Islam constitutes the official religion and, in many of them, it is the main source of law, hence the acceptability of any conclusion reached is subject to their acceptability from an Islamic perspective. This is particularly important in Libya where Islam is constitutionally the official religion and *the* source of all laws;¹⁰ suggesting any conclusion for implementation there requires therefore that it be acceptable to Islam.

The reliance on *Shari'a* in examining the moral and legal status of the foetus as present in Western literature should also help to assess its capacity to solve problems

⁸ Ataullah Siddiqui, "Ethics in Islam: Key Concepts and Contemporary Challenges," *Journal of Moral Education* 26, no. 4 (1997), retrieved from <http://search.epnet.com/login.aspx?direct=true&db=aph&an=9418>, at 23/12/2005.

⁹ See 3.2.1 The definition of *Shari'a*.

¹⁰ 'bwdh, al-Kwny 'ly. *Āsāsyāt al-Qānwn al-Wd'y al-Lyby al-Mdkhl lā 'llm al-Qānwn al-Qānwn*. Tripoli: al-Mrkz al-Qwmy ll-Bḥwth w al-Drāsāt al-'lmyt, 2003. 38, 41.

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associated with this issue in particular, and those posed by new reproductive technologies in general. The significance of such assessment derives from the persistent claim that because *Shari'a* dates from the sixth century, it is incapable of dealing with current moral and legal dilemmas, and should therefore be disregarded in favour of secular understandings. Considering such arguments in the light of the fact that *Shari'a* is the main, or the only, source of law in many Islamic countries should make clear the importance of verifying these arguments. It might be suggested that, if its incapability is proven, *Shari'a* should be disregarded from the discussion of these dilemmas, at least the discussion of those concerning the status of the foetus. However, if the reverse is the case, *Shari'a* should be deemed the first reference point for solving them.

Being conducted in this manner, the thesis should be able to reach conclusions regarding the legal personality of the foetus that are not only valid in Libya and other countries whose legal systems are derived from Islamic tradition, but can also be used in England and other legal systems. That is to say, whilst being compatible with *Shari'a* makes these conclusions applicable in the former, being based on philosophical arguments present in Western moral and legal literature makes them valid in the latter as well.

The thesis is designed in a way that should enable it to achieve these objectives. It is divided into four chapters, followed by a conclusion. Chapter One expands on this introduction by citing examples of the new reproductive technologies related to the foetus, and the moral and legal dilemmas that these technologies have provoked or revived. It also explains the controversies surrounding the status of the foetus, and details the main views concerning it as present in Western moral and legal literature. It shows the importance of discussing each controversy, and the effect any conclusion about it has

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on the issue of the status of the foetus. As such, this chapter demonstrates the framework of the thesis, and justifies the way the following chapters are divided.

Chapter Two introduces *Shari'a* as the basis of analysis and assessment in this thesis. It aims to demonstrate the criteria upon which this analysis and evaluation will be conducted, that is, the standards against which the acceptability of ideas and theories can be determined from an Islamic perspective. It focuses, therefore, on *Shari'a*'s definition, nature, and sources. Since the full comprehension of these points requires an understanding of the Islamic view of the nature of human beings, and the rationale behind their creation, these two last points will be explained first.

Chapter Three focuses on the definition of legal personality. It aims to define it and determine the criteria by which it can be conferred, because being a legal person, as opposed to a form of property, is the first possible embodiment of legal status.¹¹ The discussion of the definition and criteria of legal personality is essential for solving the controversy about whether the foetus is a legal person because whatever criteria are chosen will be applied to it in a later chapter. The assumption is that, if the foetus fails to meet the criteria for being a person, it will then be necessary to ascertain whether it can instead be deemed a species of property. The second aim of this chapter is to decide on the controversy concerning the relationship between the moral and legal status of the human foetus, and the third is to determine the relationship between these two types of status on the one hand, and humanity on the other.

To achieve these aims, Chapter Three is divided into two sections. In the first, the two current definitions of legal personality will be explained and evaluated. The first one

¹¹ See page 18 below.

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is the positivist definition that bases legal personality on no extra-legal considerations, and its examination should reveal the plausibility of detaching legal personality from moral personality, hence detaching legal status from moral status. The second current definition of legal personality is that which bases it on humanity as a biological concept. Discussing this should reveal the accuracy of the current legal determination of the status of the foetus since it is adopted, as will be shown in this section, through a rule known as the born alive rule by many laws, English and Libyan laws included.

The second section of Chapter Three is about a suggested definition of legal personality. Based on the analysis of the previous section, it will propose a new definition that will overcome the flaws demonstrated in the existing definitions. In this way, it is also argued that legal personality should be based on moral personality. The latter should, in turn, be based on a criterion of moral agency that is deemed human-specific, that is, one that cannot be met except by human beings. Therefore, it regards the three concepts of legal personality, moral personality, and humanity as interchangeable; all find their foundation, either directly or indirectly, in moral agency. The concept of ensoulment is also proposed as a solution to the problem that with such a highly demanding criterion, moral agency will not be met by some humans which will mean that they will be deprived of personality. It is maintained that, despite the lack of actual moral agency, having it as an ultimate capacity is enough for attaining personality, and that this happens when the soul, as the seat of all ultimate mental capacities, infuses the body.

Chapter Four is about the application of moral agency to the foetus, as the criterion of moral personality and indirectly, legal personality. It attempts to achieve two aims. The first is to determine whether the foetus meets that criterion and hence is a person. The second is to assess the importance of its status in deciding on how it is

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treated. Since in the previous chapter it is argued that moral agency, as the criterion of personality, finds its seat in the soul, in this chapter it is claimed that whether the foetus is a moral agent depends on whether it has a soul infused in its body. Thus, it starts by setting out the principles upon which the ensoulment event, or moment, can be determined. After that, it moves to discuss whether ensoulment occurs during foetal life and, if so, whether the precise timing can be established. Following that, the status of the foetus before and after ensoulment is assessed. The possibility of classifying it as a property species when personality is unattributable will be discussed here, as well as the way it ought to be treated, and whether that treatment should differ in accordance with its status will also be considered.

The final part of the thesis is the conclusion wherein the main arguments will be summarised. In addition, an explanation of whether the aims of the thesis have been achieved, and what the conclusions reached may mean for legal reform in Libya will be provided.

2 Setting the Scene

This chapter introduces the issue of the moral and legal status of the human foetus. In section one, examples of the new technological advances surrounding it, and the moral and legal dilemmas these advances have raised or revived are given. In section two, the view that the moral and legal status of the foetus is essential for resolving related dilemmas is examined. The controversies that arise between the proponents of this view about what status can be attributed to the foetus, and from when, the importance of being human in determining that status, and the relationship between moral status and legal status, will be demonstrated in this section. Section three is devoted to explaining the views that dismiss the moral and legal status of the foetus from the discussions of related dilemmas, their importance, justification, and the alternative approaches to the foetus-related dilemmas they propose.

However, before proceeding any further, it is necessary to clarify the terminology that will be used to refer to the unborn human entity. Several terms are used to denote that entity. While some writers use the term embryo to refer to it during the entire period of gestation,¹² others prefer to use the term foetus in the same sense.¹³ However, another group follows the scientific classification and so refers to that entity from the ninth week until birth as foetus and as embryo before that.¹⁴ The term unborn child is also used to refer to the human entity in its early stages.¹⁵ In this thesis, for the sake of simplicity, the

¹² John Harris, *the Value of Life, an Introduction to Medical Ethics* (London; Boston: Routledge & Kegan Paul, 1985), 117.

¹³ See Hart, "The Moral Status of the Human Embryo and Fetus", 8. Ronald Munson, *Intervention and Reflection: Issues in Medical Ethics*, 6th ed. (Belmont, Calif: Wadsworth, 1999), 78. Francis J. Beckwith, "Abortion, Bioethics and Personhood: A Philosophical Reflection," (2001), retrieved from http://www.cbhd.org/resources/bioethics/beckwith_2001-11-19_print.htm#fn4, at 11/01/2006.

¹⁴ Hart, "The Moral Status of the Human Embryo and Fetus", 8.

¹⁵ See for example the use of this term in *Duval v Seguin*, (1972) 26 DLR (3d) 418, 433.

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term foetus will be used to denote the unborn human¹⁶ entity regardless of the phase of development it occupies since, in this thesis,¹⁷ the scientific distinction between the embryo and foetus has no effect on the moral and legal status. However, the terms used to denote the foetus in the scholarly quotations included will not be altered.

2.1 Foetus-related new technological applications and their associated moral and legal dilemmas

Many foetus-related scientific applications are associated with moral and legal dilemmas. In this section, examples of these applications and the dilemmas associated with them will be given. These examples, for the purpose of illustration, can be divided into two groups: those concerning the foetus when treated as a means, and those concerning it when treated as an end.

2.1.1 Applications concerning the foetus as a means

A clear example of an application where the foetus is being treated as a mere means is the use of embryonic stem cells (ESCs). ESCs have many promising applications such as in the research aiming to discover the causes behind the early failure of pregnancy, the failure of pregnancy in older women where genetic defects in the oocyte appear to be significant, and the possible toxic effects of new drugs.¹⁸ More importantly, they may also be used in developing cell replacement therapies that could be effective in treating diseases such as diabetes, Parkinson's disease, stroke, arthritis,

¹⁶ The adjective human here means nothing more than being born to human parents. Whether the foetus is human in a morally and legally relevant sense is another issue and, as will be explained later, not all foetuses may be called human in this sense. See 4.2 Suggesting a new definition of legal personality.

¹⁷ See 5.2 Assessing the status of the foetus.

¹⁸ Guido de Wert and Christine Mummery, "Human Embryonic Stem Cells: Research, Ethics and Policy," *Human reproduction* 18 no. 4 (2003): 672-682, 672. See also Gulam Bahadur, "The Moral Status of the Embryo: The Human Embryo in the UK Human Fertilisation and Embryology (Research Purposes) Regulation 2001 Debate," *Reproductive BioMedicine Online* 7, no. 1 (2003): 12-16, 13.

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multiple sclerosis, heart failure, and spinal cord lesions.¹⁹ Further potential uses involve making tailor-made organs or parts of organs, cloning damaged parts of the body such as the brain, enhancing the growth of damaged tissues,²⁰ and rejuvenating therapies that are designed to prolong life span.²¹

However, although a number of such uses are currently still in the early stages of development, they are associated with a range of moral and legal problems. For instance, in view of the fact that the destruction of foetuses after generating their stem cells is part of the ESC research procedure, questions have been posed about the legitimacy of the whole procedure.²² In short, using them in this way raises questions about creating foetuses solely for their use as a source of stem cells, or as a subject of research in general. They are treated in such cases as mere means not as ends in themselves.²³ Moreover, heated moral and legal debate has been provoked on the possibility of owning intellectual and actual property rights over human stem cell lines, and the techniques used in producing them.²⁴ Alternatively, but no less controversially, there are, as will be shown presently, other examples of applications in which the foetus is treated as an end.

2.1.2 Applications concerning the foetus as an end

Advances in detecting and treating foetal illnesses exemplify those applications in which the foetus is treated as an end. These advances, such as those in ultrasound

¹⁹ Mummery, "Human Embryonic Stem Cells: Research, Ethics and Policy," 672.

²⁰ Cooper DKC, Lanza RP, Xeno, 2000, *The Promise of Transplanting Animal Organs into Humans*, Oxford: Oxford University Press, as mentioned in S Aksoy, "Making Regulations and Drawing up Legislation in Islamic Countries under Conditions of Uncertainty, with Special Reference to Embryonic Stem Cell Research," *Journal of Medical Ethics* 31 (2005): 399-403, 400.

²¹ Holm, "Going to the Roots of the Stem Cell Controversy," 496, 497.

²² *Ibid.* 496. Roger A. Pedersen, "Embryonic Stem Cells for Medicine," *Scientific American* 280, no. 4 (1999), retrieved from <http://search.epnet.com/login.aspx?direct=true&db=buh&an=1657866>, at 19 January 2006. Emily Jackson, *Medical Law: Text, Cases and Materials* (Oxford: Oxford University Press, 2006), 764.

²³ Mummery, "Human Embryonic Stem Cells: Research, Ethics and Policy," 672, 677.

²⁴ Holm, "Going to the Roots of the Stem Cell Controversy," 493.

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imaging, amniocentesis, and foetal heart monitoring, have helped with the understanding of the reasons behind some of the harm that the foetus faces, and so can be used to help prevent it. They have shown, for instance, the link between such harm and the pregnant woman's behaviour, illnesses, and the medicine she takes. Additionally, they have shed light on the effect of the genetic make-up inherited from the parents of the foetus.²⁵ More importantly, the ability to predict and detect this harm has made it possible to prevent it by, for example, changing the underlying behaviour, or treating it in utero.²⁶

Nevertheless, these advancements have led to heated moral and legal discussions. They have caused significant changes to the perception of the foetus and the way in which it should be treated.²⁷ That is to say, they have indicated the idea of the foetus as a patient separate from the pregnant woman in nature and needs. As stated succinctly by a Harvard Law Review editorial:

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.²⁸

To show the effects on the perception of the foetus caused by the new technology, Marie Fox compares the Parliamentary discussions prior to the Abortion Act 1967, and the Human Fertilisation and Embryology Act (HFEA) 1990.²⁹ According to her, some

²⁵ *Ibid.*

²⁶ C Wellman, "The Concept of Fetal Rights," *Law and Philosophy* 21, no. 1 (2002): 65-93, 65.

²⁷ John Seymour, *Childbirth and the Law* (Oxford: Oxford University Press, 2000), 190. Marie Fox, "Pre-Persons, Commodities or Cyborgs: The Legal Construction and Representation of the Embryo," *Health Care Analysis* 8 (2000): 171-188, 173, 174.

²⁸ "Developments in the Law. Medical Technology and the Law," *Harvard Law Review* 103, no. 7 (1990): 1519-1556, 1556.

²⁹ Fox, "Pre-Persons, Commodities or Cyborgs: The Legal Construction and Representation of the Embryo," 173.

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feminist viewpoints played a role in the former proceedings, hence women's needs for abortion were met. However, the representation of the foetus as a separate entity was dominant in the HFEA discussions, to the extent that it displaced women from the central position in the debate, hence women's needs were only selectively taken into account.³⁰

Recently, in 2004, this same moral and legal controversy about the issue of abortion was again brought to the public attention, when a new ultrasound scanner showed a 12-week-old foetus apparently walking in the womb.³¹ This brought calls for the upper time limit for abortion to be reduced from 24 weeks to 12 weeks;³² yet others objected to such a suggestion.³³ Many medical professionals, in particular, voiced their opposition to any proposal to reduce the abortion time limit even from 24 to 20 weeks.³⁴ This trend has been further indicated in the latest British Parliamentary refusal to reduce the legal limit of abortion from 24 to any of the proposed alternatives: 12, 16, 20, or 22 weeks.³⁵

A further example of the tensions provoked by the advances in technology in this area, is related to the treatment of *in vivo* foetuses. Technology has made it possible to use invasive therapy to save the life of a foetus, or to protect it from serious and irreversible disease, injury, or disability. However, the potential conflict with the pregnant woman's right to autonomy has led to questioning whether such an application

³⁰ *Ibid.*

³¹ BBC, "Viewpoints: Abortion" retrieved from <http://news.bbc.co.uk/1/hi/health/3894245.stm>, at 20/01/2006.

³² *Ibid.*

³³ *Ibid.* See Ellie Lee, "The Abortion Debate Today," in *Human Fertilisation and Embryology Reproducing Regulation*, ed. Kirsty Horsey and Hazel Biggs (London and New York: Routledge-Cavendish, 2007).

³⁴ This was shown in a conference organised in Manchester in 2005 by the British Medical Association, BBC, "Abortion Time Limit Cut Rejected" retrieved from <http://news.bbc.co.uk/1/hi/health/4636991.stm>, at 10/03/2006.

³⁵ BBC, "MPs Reject Cut in Abortion Limit" retrieved from http://news.bbc.co.uk/1/hi/uk_politics/7412118.stm, at 10/06/2008.

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is legitimate.³⁶ In other words, the pregnant woman has a right to take control over her own body, and so make decisions concerning it including that of declining medical treatment aimed at treating the foetus, and physicians in such cases are obliged to respect her choices, and assist her in putting them into effect. As stated in *Re T (Adult: Refusal of Treatment)* by Lord Donaldson:

An adult patient who ... suffers from no mental incapacity has an absolute right to choose whether to consent to medical treatment, to refuse it or to choose one rather than another of the treatments being offered. ... 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.³⁷

However, the potential benefits of the invasive therapy to the foetus, including saving its life, might be said to justify the intervention no matter what conflict it may have with the pregnant woman's right to autonomy.³⁸ This was regarded as a potential complication by Lord Donaldson in the same case:

The only possible qualification [about his previously mentioned acknowledgment] is a case in which the choice may lead to the death of a viable foetus. That is not this case and, if and when it arises, the courts will be faced with a novel problem of considerable legal and moral complexity.³⁹

Not long after *Re T*, courts in the UK started facing this novel problem, and the manner in which they have dealt with it, indicates the complexity that Lord Donaldson mentioned. The first of these cases involving a woman who declined a medically indicated caesarean section, was *Re S*,⁴⁰ which occurred just two months and a half after

³⁶ F A Chervenak and L B McCullough, "Ethical Issues in Recommending and Offering Fetal Therapy," *The Western Journal of Medicine* 159, no. 3 (1993): 396–399.

³⁷ *Re T. (Adult: Refusal of Treatment)*, (1993) Fam 95, 102.

³⁸ Chervenak, "Ethical Issues in Recommending and Offering Fetal Therapy".

³⁹ *Re T. (Adult: Refusal of Treatment)*, 102.

⁴⁰ *Re S*, (1992) 4 All ER 671.

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Re T.⁴¹ It was swiftly followed by *Norfolk and Norwich Healthcare (NHS) Trust v W*,⁴² *Tameside and Glossop Acute Services Trust v Ch (a Patient)*⁴³ and *Re MB*⁴⁴ in all of which caesarean sections were allowed despite the pregnant women's refusal. In *Re MB*, though the Court of Appeal made it clear that the pregnant woman's autonomy should be respected and so no caesarean section could be imposed on her, it allowed such an action in that particular case because the woman was deemed incompetent:

The law is, in our judgment, clear that a competent woman who has the capacity to decide may, for religious reasons, other 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. She may refuse to consent to the anaesthesia injection in the full knowledge that her decision may significantly reduce the chance of her unborn child being born alive. 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 caesarian [sic] section operation. The court does not have the jurisdiction to declare that such medical intervention is lawful to protect the interests of the unborn child even at the point of birth.⁴⁵

However, the court concluded that since, in that particular case, MB temporarily lacked capacity because of her fear of needles, the doctors were permitted to administer the anaesthetic in an emergency if it was in her best interests for them to do so.⁴⁶ Emphasising the pregnant woman's autonomy while allowing, in the end, the caesarean section reflects "[a] continued ambivalence of the courts towards such cases", and ⁴⁷ "...a

⁴¹ J K Mason and R A McCall Smith, *Law and Medical Ethics*, 5 ed. (London, Edinburgh, Dublin: Butterworths, 1999), 265.

⁴² *Norfolk and Norwich Healthcare (NHS) Trust v W*, (1996) 2 F.L.R 613.

⁴³ *Tameside and Glossop Acute Services Trust v Ch (a Patient)*, (1996) 1 F.L.R 762.

⁴⁴ *Re Mb (Caesarean Section)*, (1997) 2 F.L.R 426.

⁴⁵ *Ibid.*, 444.

⁴⁶ *Ibid.*, 438, 439.

⁴⁷ Mason, "Law and Medical Ethics," 139.

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divergence of theory and practice”, as some commentators have rightly said.⁴⁸ Hence, it can be seen as an indication of the possibility of conflict between the pregnant woman’s and the foetus’s interests.

A further conflict that may arise between the interests of the pregnant woman and those of the foetus concerns the prevention of the former from certain behaviour, for example, taking drugs or drinking alcohol, when that is thought to harm the foetus. This potential conflict with the pregnant woman’s right to autonomy has raised moral and legal debates about whether such prevention is legitimate.⁴⁹

The previously mentioned applications such as ultrasound imaging and treating foetuses *in vivo* have led to conceptualising the foetus as an entity distinct from the pregnant woman, and therefore suggesting that new foetal rights should be added to existing legal systems.⁵⁰ It has been proposed, for example, that the foetus should have a right not to be born if expectant life, in the light of genetic defects or medical difficulties, would be “wrongful”.⁵¹ In addition, it has been argued that the foetus should be attributed a right to medical care independent from, but alongside, that of the pregnant woman, and a right not to be subject to parental malpractice.⁵²

One more application regarding which moral and legal dilemmas have arisen is *in vitro* fertilisation (IVF), and some of its aspects such as freezing foetuses. For instance, the possibility of the clash over the use of frozen foetuses between the different parties’ interests, including those of the foetus itself, has attracted heated debate, not only at

⁴⁸ *Ibid.*

⁴⁹ Seymour, *Childbirth and the Law*, 202.

⁵⁰ Wellman, "The Concept of Fetal Rights," 65.

⁵¹ *Ibid.*

⁵² *Ibid.*, See also Nicolette Priaux, "Beyond Health and Disability: Rethinking the 'Foetal Abnormality' Ground in Abortion Law," in *Human Fertilisation and Embryology Reproducing Regulation*, ed. Kirsty Horsey and Hazel Biggs (London and New York: Routledge-Cavendish, 2007).

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academic conferences, but also in court cases such as the American case, *Kass v Kass*.⁵³

The status of frozen foetuses as potential children under the will of their parent(s) when one or both of them die(s) has also been discussed.⁵⁴

Resolving these dilemmas⁵⁵ is claimed by the majority of researchers and authorities to be based on the moral and legal status of the foetus, and in the following section their views will be articulated and discussed.

2.2 *Relying on the status of the foetus in solving its related dilemmas*

Many moral and legal researchers and authorities agree on the importance of the status of the foetus in solving problems related to it in reproductive technology. Their agreement, however, ends when they come to determine the type of status that should be attributed to it, the importance of humanity in such a determination, and the relationship between the moral and legal concepts of that status. Each of these points will be discussed below.

2.2.1 The importance of the status of the foetus

Solving the foetus-related dilemma has been claimed, as will be shown shortly, to be based upon its moral and legal status. With regard to moral discussion, this has been the case since the commencement of bioethics in the late 1960s and early 1970s.⁵⁶ The rationale behind this is that making decisions and judgements about many moral issues in

⁵³ *Kass v Kass*, (1998) 91 NY 2d 554 . In this case, a man refused to let his ex-wife use the cryopreserved foetuses. For a more recent case that was quite similar, see *Evans v the UK* page 38 below.

⁵⁴ Cameron Stewart, "Legal Constructions of Life and Death in the Common Law," *Oxford University Commonwealth Law Journal* 2, no. 1 (2002): 67-91, 77.

⁵⁵ Wherever the phrases 'foetus-related issues' or 'dilemmas' are used in this thesis, they refer to the issues or dilemmas explained in this section.

⁵⁶ Holm, "Going to the Roots of the Stem Cell Controversy," 506. Hart, "The Moral Status of the Human Embryo and Fetus", 14-16.

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health care, requires an opinion about whether the entities whose lives are involved have any moral importance upon which moral rights and obligations can be attributed. Admitting that particular entities have that moral worth implies a series of moral obligations towards them. As Mary Anne Warren says:

[T]he claim that all persons have full and equal moral status implies that we must not murder other persons, assault them, cheat them, torture them, imprison them unjustly, or fail to help them when help is needed and we have the means of providing it. Such minimum standards represent a floor below which we ought not to allow our actions, or those of other moral agents, to fall. When such standards of behaviour are violated, we are justified in protesting, objecting, and sometimes using force to prevent or deter further violations.⁵⁷

Applying this to the foetus affects greatly the conclusions about its related dilemmas. If it is discovered to have the status of a person, any act harming it in its life or body will be deemed immoral unless that act is in its own favour. Terminating its life, for example, will be considered a case of killing that cannot be justified on grounds other than those justifying the killing of born persons such as self-defence.⁵⁸ On the other hand, if the foetus is discovered to lack such a standing, ending its life will not be considered a case of killing and might be justified on less restrictive grounds such as benefiting persons. Furthermore, destroying it might be considered just the same as destroying an appendix.⁵⁹

Similar justification has been given for relying on the legal status of the foetus. The evaluation of any conduct concerning the foetus is said to be built on a clear

⁵⁷ Mary Anne Warren, *Moral Status: Obligations to Persons and Other Living Things* (Oxford; New York: Clarendon Press: Oxford University Press, 1997), 13. In a similar meaning, see John Harris, "The Concept of the Person and the Value of Life," *Kennedy Institute of Ethics journal* 9, no. 4 (1999): 293-308, 294, 295.

⁵⁸ Munson, *Intervention and Reflection: Issues in Medical Ethics*, 78.

⁵⁹ *Ibid.*

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determination of its status.⁶⁰ Being a person, on the one hand, means being able to have rights, assume duties, and enjoy any protection the law offers to its subjects. Its life will be protected by the laws prohibiting offences against persons and so applications such as abortion and embryonic stem cell research will be outlawed; the former might even be considered murder or manslaughter.⁶¹ On the other hand, being categorised as a species of property, means being the object of others' rights and having no rights oneself.⁶² It means being stripped of any legal protection the law offers its subjects. Applications like abortion or foetal research might then be legitimised.⁶³ In the words of Margaret Davies and Ngaire Naffine:

To be visible in law, and thus to have a legal standing, to attract legal rights and to assume legal obligations, one must be a legal person. If a being is not a person in law, she can be treated as a species of property: she can be bought and sold. It is because animals are not legal persons that their owners, almost with legal impunity, can destroy them. The offences against the person are not designed to afford legal protection or dignity to the family pet.⁶⁴

However, the dichotomy of persons and species of property has not been immune from criticism. Its inclusiveness has been questioned since some entities do not readily fit within these categories,⁶⁵ while others can be classified under both at the same time. This is the case regarding corporations that, according to Naffine "... are created as both persons and property and so have a dual status. Thus they can both trade as persons and

⁶⁰ Wieslaw Lang, "The Status of the Human Fetus," *Criminal law forum* 3, no. 3 (1992): 419-440, 421.

⁶¹ Munson, *Intervention and Reflection: Issues in Medical Ethics*, 78.

⁶² Daniel N. Hoffman, "Personhood and Rights," *Polity* 19, no. 1 (1986): 74-96, 74. In his words, "[i]n any policy those who are not recognized as persons are accorded no rights."

⁶³ Seymour, *Childbirth and the Law*, 185.

⁶⁴ M. Davies and N. Naffine, *Are Persons Property?* (Aldershot Burlington USA Singapore Sydney: Ashgate/Dartmouth 2001), 51. In a similar meaning, see Stewart, "Legal Constructions of Life and Death in the Common Law," 67, 69.

⁶⁵ Fox, "Pre-Persons, Commodities or Cyborgs: The Legal Construction and Representation of the Embryo," 184.

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be traded as property.”⁶⁶ In terms of the foetus, the dichotomy has been criticised as being unhelpful since the foetus is often claimed to acquire neither the status of a person nor that of a species of property because it is something in between.⁶⁷

As earlier outlined, in solving foetus related dilemmas, the proponents of the importance of the status of the foetus have differed over the type of status it should be attributed.

2.2.2 The dispute over the status attributed to the foetus

In solving its related dilemmas, the proponents of the centrality of the status of the foetus differ over which status should be attributed to it. With regard to the moral status, significant differences have been raised amongst ethicists about whether the foetus should be granted personality. Firstly, while some of them, as will be presently demonstrated, agree on attributing such status to the foetus, they differ over the stage of development at which that should be done. Examples of the different points suggested are conception;⁶⁸ the fourteenth day as the point at which twinning is no longer possible and the differentiation of the embryonic cells starts;⁶⁹ quickening as the stage at which the pregnant woman feels the foetus’s movements,⁷⁰ or viability as the phase at which the foetus becomes able to live outside the womb.⁷¹ However, other ethicists deny that

⁶⁶ Ngaire Naffine, "Who Are Law's Persons? From Cheshire Cats to Responsible Subjects," *The Modern law review* 66, no. 3 (2003): 346–367, 347.

⁶⁷ Fox, "Pre-Persons, Commodities or Cyborgs: The Legal Construction and Representation of the Embryo," 181 and 184.

⁶⁸ Noonan J T, John, 1970, "an Almost Absolute Value in History, the Morality of Abortion: Legal and Historical Perspectives". Ed. John T. Noonan Jr. Cambridge: Harvard University Press, 1970: 51.59. In Munson, *Intervention and Reflection: Issues in Medical Ethics*, 83.

⁶⁹ See for example Bahadur, "The Moral Status of the Embryo: The Human Embryo in the UK Human Fertilisation and Embryology (Research Purposes) Regulation 2001 Debate," 12.

⁷⁰ In explaining this view, see Hart, "The Moral Status of the Human Embryo and Fetus", 253. The timing of quickening is variously determined. See 198 below.

⁷¹ Lawrence C. Becker, "Human Being: The Boundaries of the Concept," *Philosophy & public affairs* 4, no. 4 (1975): 334-359, 337.

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personality may start at a particular developmental stage. Instead, they believe that it is acquired gradually.⁷²

Other ethicists, while believing in the centrality of the status of the foetus in resolving its related issues, argue that no personality should be attributed to it. For instance, as the foetus meets none of the criteria believed to be essential for having the moral status of persons such as sentience, rationality, and self-consciousness, writers like Peter Singer⁷³ and John Harris⁷⁴ deprive the foetus of such a standing. Other writers including Mary Anne Warren believe that while no actual moral status of person can be attributed to the foetus, it is possible to grant it a potential status on account of what it is going to be in the future, if its development is not interrupted.⁷⁵ However, the idea of potentiality has attracted heavy criticism.⁷⁶

In the same vein, legal researchers and authorities differ over what legal status the foetus should be granted. First, the majority of legal researchers and authorities have declined to grant the foetus any personality. This is what can be understood from the refusal of Australian and English courts to grant injunctions sought to stop pregnant women from performing abortions, on the basis that the foetus has its own legal rights.⁷⁷

For instance, in *Paton v British Advisory Services Trustees*,⁷⁸ the court stated that: “[t]he

⁷² Norman C. Gillespie, "Abortion and Human Rights," *Ethics* 87 no. 3 (1977): 237-243.

⁷³ Peter Singer and Helga Kuhse, "Individual, Humans and Persons: The Issue of Moral Status," in *Embryo Experimentation, Ethical, Legal and Social Issues*, ed. Helga Kuhse Peter Singer, Stephen Buckle, Karen Dawson, Pascal Kasimba (Cambridge: Cambridge University Press 1990), 65-71.

⁷⁴ Harris, "The Concept of the Person and the Value of Life," 305.

⁷⁵ Mary Anne Warren, "On the Moral and Legal Status of Abortion," *The Monist* (1973), retrieved from <http://people.cohums.ohio-state.edu/cole253/Abor.pdf>, at 28/03/2006.

⁷⁶ See for example, Harris, "The Concept of the Person and the Value of Life," 11. Karen Dawson and Peter Singer, "IVF Technology and the Argument from Potential" in *Embryo Experimentation, Ethical, Legal and Social Issues*, ed. Helga Kuhse Peter Singer, Stephen Buckle, Karen Dawson, Pascal Kasimba (Cambridge: Cambridge University Press, 1990). Jackson, *Medical Law: Text, Cases and Materials*, 767.

⁷⁷ Seymour, *Childbirth and the Law*, 145.

⁷⁸ *Paton v British Pregnancy Advisory Service Trustees and Another*, (1979) Q.B 276.

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foetus cannot, in English law ... have a right of its own at least until it is born and has a separate existence from its mother".⁷⁹

Nonetheless, the born alive rule has been heavily criticised.⁸⁰ In addition, the legal authorities depriving the foetus of personality have been criticised for their ambiguity with regard to what the foetus is, if it is denied personality.⁸¹ They have stated, as John Seymour indicates, what the foetus "is not" but not what it "is".⁸² An example of such an ambiguity can be found in the *Attorney General's Reference (No 3 of 1994)*,⁸³ the case in which the House of Lords rejected the view adopted by the Court of Appeal that the foetus is solely a part of the pregnant woman's body; still, the House of Lords gave no precise statement about what it is. In Lord Mustill's words:

I would ... reject the reasoning which assumes that since (in the eyes of English law) the foetus does not have the attributes which make it a 'person' it must be an adjunct of the mother. Eschewing all religious and political debate I would say that the foetus is neither. It is a unique organism. To apply to such an organism the principles of a law evolved in relation to autonomous beings is bound to mislead.⁸⁴

Secondly, in contrast to the view held by the majority, a minority of legal authorities and researchers do grant the foetus personality. This is the position held, for instance, by the State of Missouri where the legislation considers conception as the onset of every human being's life. This was understood to extend the legal definition of person to include the foetus, and as an application of that, a drunken driver was held guilty of manslaughter after colliding with a car driven by a pregnant woman and killing her viable

⁷⁹ *Ibid.*, 279.

⁸⁰ See the discussion of the born alive rule page 108 below.

⁸¹ Seymour, *Childbirth and the Law*, 183. James Richard Grant, "Should the Human Foetus Have Human Rights?" (University of Kent at Canterbury, 2002), (unpublished LLM dissertation), 19.

⁸² Seymour, *Childbirth and the Law*, 183.

⁸³ *Attorney General's Reference (No 3 of 1994)*, (1998) AC 245.

⁸⁴ *Ibid.*, 255.

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foetus.⁸⁵ The other example is that of *Commonwealth v Cass*,⁸⁶ the case in which a woman who was eight months pregnant was attacked in a way that resulted in her being injured, and her baby being stillborn. The majority decided that the law of homicide should be extended to cover that case, and so held that ending the life of the foetus was homicide.⁸⁷ Furthermore, regarding the issue of suing women for using illegal drugs during their pregnancy, in *Whitner v State*⁸⁸ a woman was found guilty of child abuse because she had taken cocaine at a late stage in her pregnancy. In reaching this decision, the Court interpreted the relevant Act's definition of a child as a "... person under the age of eighteen"⁸⁹ as including a viable foetus, a decision that was later upheld by the Supreme Court of South Carolina.⁹⁰

As should be clear from the above discussion, humanity is used to decide on personality, that is, whether and when an entity becomes a human is used to decide on whether and when it is a person. However, the relationship between the two attributes is not always constructed in this way. The different views concerning this issue will be presented as follows:

⁸⁵ *State v Knapp* 843 SW 2d 345 (1992). The Statutory provision was § 1.205, RSMo, as mentioned by John Seymour, "The Legal Status of the Fetus: An International Review," *Journal of Law and Medicine* 10, no. 1 (2002): 28-40, 32.

⁸⁶ 467 NE 2d 1324 (Mass, 1984). As cited by Seymour, *Childbirth and the Law*, 140.

⁸⁷ 467 NE 2d 1324 (Mass, 1984) at 1329. As cited by Seymour, *Childbirth and the Law*, 140. In California, the definition of murder in the Penal Code was amended to be "... the unlawful killing of a human being, or a fetus, with malice aforethought"; however, the foetus was not defined in that law (*Ibid.*, 141). The question asked is, does the definition's mention of 'a human being, or a fetus' reflect a view that the foetus is not a human being? If so, on what basis was the change then made?

⁸⁸ 492 SE 2d 777 (1997). As cited by Seymour, "The Legal Status of the Fetus: An International Review," 32.

⁸⁹ S C Code Ann # 20-7-30 (1985). As cited by Seymour, "The Legal Status of the Fetus: An International Review," 32.

⁹⁰ *Whitner v State*, 492 SE 2d 777 (SC, 1997), as mentioned in Seymour, "The Legal Status of the Fetus: An International Review," 32.

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2.2.3 The humanity-personality relationship

As previously stated, the relationship between humanity and personality, the latter being the first possible embodiment of the moral and legal status of the foetus, is controversial. From a moral perspective, some writers have seen humanity as a sufficient condition for personality, hence they have deemed all humans, persons.⁹¹ However, others, like Mary Anne Warren,⁹² have separated the two concepts and denied that being human is a necessary or a sufficient condition for being a person.⁹³

Two reasons have been given for the preference of the term “person”. The first is that the term “human” is unclear as it is considered a synonym for both “Homo sapiens” and “person,” whereas these terms cannot be synonyms of each other. The second reason is that the term “person” allows the possibility of including non-human entities such as higher animals, extra-terrestrials, and robots within the moral community.⁹⁴ Furthermore, some writers such as John Harris consider it “speciesism”, equal to the other types of discrimination such as racism and sexism, to restrict the moral standing embodied in moral status to human beings. Accordingly, they avoid using the term “human”.⁹⁵

Nevertheless, there is real doubt about the accuracy of the differentiation between personality and humanity. While talking about its meaning and criteria, many proponents

⁹¹ Johannes H C Sun, "Are All Human Beings Persons?," in *The Moral Status of Persons: Perspectives on Bioethics*, ed. Gerhold K. Becker (Amsterdam - Atlanta, GA: Rodopi, 2000). He quotes Loren Lomasky saying that “the question ‘how many persons are there in the room?’ is answered by counting the number of human individuals. So understood, personhood is constituted by membership in the biological species Homo sapiens.” (Lomasky, Loren E. (1992), "Concept of Person." In: Lawrence C. Becker (ed.). *Encyclopedia of Ethics*, Vol. 2, pp. 950-956. New York, London: Garland Publication, Inc. 950). As cited by Sun, "Are All Human Beings Persons?," 29.

⁹² Warren, "On the Moral and Legal Status of Abortion." Harris, *The Value of Life, an Introduction to Medical Ethics*, 22, 25.

⁹³ The significance of this issue is detailed when discussing the definition of legal personality as a humanity-based concept. See page 103 below.

⁹⁴ Hart, "The Moral Status of the Human Embryo and Fetus", 169, 170.

⁹⁵ Harris, *The Value of Life, an Introduction to Medical Ethics*, 9, 10. ———, "The Concept of the Person and the Value of Life," 296, 297.

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of the concept of personality use a ‘humanity’ language. This is apparent in Mary Anne Warren’s discussion of Albert Schweitzer’s view that life *per se* is a sufficient condition for full moral status, hence all living beings should enjoy it equally. As to Mary Anne Warren, the main criticism levelled against this view is that it claims that each living being has a will to live, which necessitates having an ability to experience a desire to pleasure and a fear of pain, i.e. being sentient. Since experiencing such feelings requires having equipment such as a nervous system and a brain processing that system’s input, beings that lack this equipment, such as plants and bacteria, cannot be attributed full and equal moral status.⁹⁶

However, as she herself notices, the standards used to measure the ability of plants and bacteria to experience pleasure and pain are human specific so their plausibility is questioned:

[H]ow can we know that plants and microbes are not sentient? Might they not have pleasant or painful experiences of which we know nothing, but which are as vivid to them as ours to us? Perhaps they even have a conscious will to live. How can we know that they do not, when we cannot experience their existence ‘from inside’, as we do our own?⁹⁷

In spite of this, she concludes that in the absence of an alternative way to measure how sentient such entities are, we should rely on the best available evidence depriving them of such an ability.⁹⁸

⁹⁶ Warren, *Moral Status: Obligations to Persons and Other Living Things*, 34, 36.

⁹⁷ *Ibid.*, 36.

⁹⁸ *Ibid.*, 36, 37.

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Norman Ford justifies relying on ‘humanity’ language while discussing personality-related matters, on the fact that the human being is the paradigm of the person. He argues that:

Our ordinary concept of human persons is based on our understanding of a human being, a human individual. None of us has ever met a person that was not an individual human being. We cannot explain what a person is without reference to our knowledge of human being gained through experience. It is only by analogy that we extend this notion to divine persons or persons by legal fiction, e.g. colleges, corporations, political parties, etc.⁹⁹

Still, building ‘personality’ on ‘humanity’ criteria raises questions about the reality of the differentiation made between them, and the plausibility of the allegation that ‘personality’ is a neutral theory compared to ‘humanity’, which is said to be discriminatory, preferring the human species to others.

Regarding the legal discussion, the relationship between personality and humanity is also debatable. On the one hand, there are legal positivists who deem personality a mere device that lawmakers can use to achieve any purpose they may want. As such, it can be conferred on any being or thing regardless of their intrinsic qualities. Humanity for those thinkers is unimportant in the conferral or withdrawal of personality.¹⁰⁰ However, there are legal writers and authorities who consider humanity as sufficient and even necessary for personality, at least for the real legal personality.¹⁰¹

The other controversy is about the relationship between the moral and legal status of the foetus.

⁹⁹ Norman M. Ford, *When Did I Begin?: Conception of the Human Individual in History, Philosophy, and Science* (Cambridge [Cambridgeshire]; New York: Cambridge University Press, 1988), 66.

¹⁰⁰ See 4.1.1 Defining legal personality as a purely legal concept.

¹⁰¹ See 4.1.2 Defining legal personality as a humanity-based concept.

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2.2.4 The relationship between the moral and legal status of the foetus

The question of the linkage between the moral and legal status of the foetus is, as Lung rightly observes, an initial question entailing a discussion of the relationship between morality and law.¹⁰² It has been suggested that this relationship can take one of three possible forms. Firstly, the law is said to be predominated by morality and so the validation of legal orders and rules depends on how moral they are. The reverse is true, according to the second model: morality is said to be subordinate to the law and so it is the latter that decides what is moral and immoral. In the third model, morality and law are autonomous normative structures each of which has an impact on the other.¹⁰³

An echo of this classification can be found in the three models proposed to form the relationship between the moral and legal status of the foetus. The first model is that the legal status is entirely determined by the moral one, and should be built on it, whilst the second suggests that the moral status is wholly determined by the legal one and should be based on that. The third perspective, however, may be interpreted in two ways: in the first, legal status is a value-free technical term determined arbitrarily by lawmakers without considering moral status, which then has no influence on it. In the second, the moral status and legal status have distinct relations with one another in the sense that each one has an impact on the other. That is to say, granting an entity legal status has consequences that must be considered when deciding whether that entity should be granted moral status, if that status is attributed on consequential grounds.¹⁰⁴

Similarly, Ngaire Naffine states that there are three notions about the nature of the legal personality as the first possible embodiment of legal status.¹⁰⁵ The first one adopts

¹⁰² Lang, "The Status of the Human Fetus," 427.

¹⁰³ *Ibid.*, 427, 428.

¹⁰⁴ *Ibid.*

¹⁰⁵ Naffine, "Who Are Law's Persons? From Cheshire Cats to Responsible Subjects," 349.

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what can be called the idea of purity of a person in law. That is to say, the legal person is a purely artificial legal concept applied without regard to metaphysical presumptions. Accordingly, there is no linkage, and should not be one, between legal personality and non-legal grounds.¹⁰⁶ The second notion claims that the legal person has inherent non-legal characteristics making him morally important in a way that the law should take into account, by attributing legal personality to that entity. Legal personality in this case is rooted in moral considerations.¹⁰⁷ The third notion considers moral agency¹⁰⁸ a precondition for being a legal person. Moral personality, in this meaning, is essential for legal personality.¹⁰⁹

The question that might be asked is which of the above-mentioned models of linkage between the moral status and the legal status should be adopted. The answer to this question is of great importance for the status of the foetus and also, if that status is proven essential in resolving its related issues, for the dilemmas surrounding it. If either the legal status or the moral status is deemed the basis for the other, it is the one that should be established first. The other can be easily determined afterward. If, however, they are shown to be independent of one another, no such reliance, and so, no such establishment, is needed. In this thesis, although the legal status of the foetus is that which is sought, the moral status is extensively studied because it is deemed the basis upon which the former should be based, as will be explained later.¹¹⁰

The second position on the issue of the essentiality of the status of the foetus is one that sidesteps it, while discussing its related issues. This will be discussed in the next section.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*, 349, 350.

¹⁰⁸ See the definition of moral agency page 129 below.

¹⁰⁹ *Ibid.*, 350.

¹¹⁰ See 4.2 Suggesting a new definition of legal personality.

2.3 *Sidestepping the moral and legal status of the foetus*

In both moral and legal discussions regarding issues related to the foetus, there has been a tendency towards disregarding its status. Hence the determination of that status is no longer the aim. It is, rather, the determination of relationships that concern the foetus, or the interests of other parties, as will be shown shortly. Obviously, studying such a trend is of great importance since discovering its accuracy should result in sidestepping the status of the foetus, and emphasising instead the alternative factors suggested by its followers. As outlined in the introduction, this thesis will attempt to ascertain the status of the foetus first, before assessing its significance in determining the way in which the foetus should be treated. In the following paragraphs, the tendency to sidestep the status of the foetus will initially be discussed in relation to the moral discussion, and then with regard to legal discussion.

2.3.1 Moral discussions

The status of the foetus has been excluded from the discussion about its related issues for different reasons. As will presently be shown, it is firstly, claimed to be unimportant in solving these issues, and secondly, though it might be of considerable importance, it is said to be irresolvable, and so it is better to sidestep it. Thirdly, it is claimed that being neutral requires ignoring such a controversial issue.

Judith Jarvis Thomson relied on the first reason in her article entitled "A Defense of Abortion". In contrast to what has been indicated by the proponents of the status of the foetus, she claims that the issue of the legitimacy of abortion can be resolved no matter what the moral status of the foetus. The fulfilment of the pregnant woman's rights and welfare can be used as a basis for legitimising abortion even if the foetus is granted full

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moral status and so, a right to life.¹¹¹ In a similar vein, other feminists criticise approaches that emphasise the moral status of the foetus when tackling the issue of abortion. Instead, they suggest an approach depending on the pregnant woman's right to autonomy since in such an approach, women's needs concerning abortion are more likely to be met.¹¹²

The view that the question of moral status is irresolvable can be found in Mary Warnock's statement on personality, as a suggested embodiment of moral status. According to her, the question of personality seems to imply that it is a question of fact, that is, by examining whether the foetus has particular traits, non-controversial answers can be reached. Nonetheless, she insists, it is a question of value in the same way as the question of when the foetus begins to matter morally. This is so because both need to be answered from a specific moral standing, and so different answers can be given, according to the different moral standings.¹¹³ The two questions, as she indicates, share another feature, which is the difficulty of comprehension, and so the better approach is to sidestep them and directly question whether the foetus can be granted rights of its own, as this is the aim of asking both questions:

[T]he only way out of the difficulty is the short one: to bypass the concept of the person altogether. After all, the notion was introduced only on the grounds that persons are the bearers of rights. Since there seems no separately satisfactory way of distinguishing a person from a non-person, apart from their supposedly having rights, it seems better to take the direct route forward and ask whether or not human embryos have rights.¹¹⁴

¹¹¹ Judith Jarvis Thomson, "A Defense of Abortion," in *The Rights and Wrongs of Abortion*, ed. Thomas Nagel Marshall Cohen, and Thomas Scanlon (Princeton, New Jersey: Princeton University Press, 1974).

¹¹² Hart, "The Moral Status of the Human Embryo and Fetus", 152.

¹¹³ Mary Warnock, "Do Human Cells Have Rights?," *Bioethics* 1, no. 1 (1987): 1-14, 2, 3.

¹¹⁴ *Ibid.*

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However, the question that might be asked here is whether it is possible to attribute rights to the foetus without discussing whether it is a person since personality is claimed to be the basis upon which such rights can be acquired.¹¹⁵

Similarly, but without suggesting any alternative solutions, Søren Holm claims that:

If we believe that our regulation of ES cell research, and all other matters involving embryos, should be consistent with and/or be derived from the correct view of the status of the embryo, then we will either have to wait a very long time for consensus on the correct view to emerge, or we will have to say that the correct view is the view held by the majority, which is rather disappointing interpretation of 'correct'.¹¹⁶

Though Søren Holm is right about the difficulty, or impossibility, of reaching a consensus on the status of the foetus, his view is problematic in implying that views on that status can be classified as 'correct' and 'incorrect'. In other words, this issue, as should be clear from this chapter, has philosophical, moral, and religious roots and so, opinions on it differ from one place and time to another. Therefore, deeming a particular concept of the status of the foetus incorrect seems to be implausible. Views may vary in their plausibility and some may be considered more reasonable than others because of, for instance, their efficiency in resolving practical problems, but considering other views incorrect seems to be far from being precise.

As a consequence of the claim that the issue of the status of the foetus is difficult to solve and so should be sidestepped, the Warnock Committee in the UK did not make a

¹¹⁵ See for instance, Hoffman, "Personhood and Rights," 74. Vardit Rispler Chaim, "The Right Not to Be Born, Abortion of the Disadvantaged Fetus in Contemporary Fatwas," in *Islamic Ethics of Life: Abortion, War, and Euthanasia*, ed. Jonathan E. Brockopp (Columbia, South Carolina: University of South Carolina Press, 2003), 81, 82.

¹¹⁶ Søren Holm, "Embryonic Stem Cell Research and the Moral Status of Human Embryos," *Ethics, Laws and Moral Philosophy of Reproductive Bioethics* 1, no. 1 (2005): 63-67, 67.

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definitive statement about when an individual human being begins, or the precise status of the foetus.¹¹⁷ This has led to ambiguity in the position of the Human Fertilisation and Embryology Act (HFEA) 1990, which is based on the Committee's recommendations, on the issue.^{118 119}

The third view does not deny the significance of moral status in solving foetus-related issues, yet it tries to sidestep the issue on a claim of neutrality. By way of illustration, in the USA, a panel called the National Institutes of Health Embryo Research Panel was created in 1993 to decide on the permissibility of federal funding for experimentation on pre-implanted foetuses. The Panel's main concern was the legitimacy of creating foetuses solely for use in experimentation. It tried to do the task without considering the moral status of the foetus, as this, according to the Panel, is what is required to be independent from any religious or philosophical perspectives.¹²⁰ Yet, the Panel was unable to sidestep the issue and instead concluded that some research on the pre-implanted foetus could be founded on a claim that foetuses do not have the appropriate moral status. The foetus, in their words:

[D]oes not have the same moral status as infants and children "because [it] lacks" developmental individuation ..., the lack of even the possibility of sentience and most other qualities considered relevant to the moral status of persons, and the very high rate of natural mortality at this stage.¹²¹

This tendency to sidestep the status of the foetus has also been shown by legal researchers and authorities.

¹¹⁷ Ford, *When Did I Begin? : Conception of the Human Individual in History, Philosophy, and Science*, 5.

¹¹⁸ Jackson, *Medical Law: Text, Cases and Materials*, 776, 777.

¹¹⁹ For more details, see 42 below.

¹²⁰ National Institutes of Health, "Executive Summary", in *Final Report of the Human Embryo Research Panel* (27 September 1994), as reprinted in *Do the Right Thing: A Philosophical Dialogue on the Moral and Social Issues of Our Time*, ed. Francis J. Beckwith (Belmont, CA: Wadsworth, 1996) 285. As cited by Beckwith, "Abortion, Bioethics and Personhood: A Philosophical Reflection."

¹²¹ *Ibid.*

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2.3.2 Legal discussions

Some legal researchers and authorities have tried to disregard the status of the foetus while discussing its related moral and legal dilemmas. The first example of this is the American Supreme Court in the famous case of *Roe v Wade*,¹²² in which the Court was asked to decide on the legitimacy of abortion, and the authority that States have to prohibit it. The Court claimed that:

[We]...need not resolve the difficult question of when life begins [the point at which the personality of the foetus is claimed to begin]. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.¹²³

According to this logic, the Court should have avoided the legal status of the foetus but this was not the case, as it then conceded a right to abortion to the pregnant woman on the premise that the foetus is not a human person by claiming that: “[i]f the suggestion of personality [of the foetus] is established, the appellant's case, of course, collapses, for the fetus' right to life is then guaranteed specifically by the [Fourteenth Amendment]”.¹²⁴ The Court then, contradictorily to its previous announcement, adopted and built its verdict on, a viewpoint that denies that the foetus has legal personality.¹²⁵

A further example that shows this tendency to sidestep the issue of the legal status of the foetus, is that of negligence law, in which courts have responded to damages claims

¹²² *Roe v Wade*, (1973) 410 U.S. 113.

¹²³ *Ibid.*, 159.

¹²⁴ *Ibid.*, 156. The Fourteenth Amendment says that: “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws protects persons’ right to life as mentioned above”. U.S.C.A. Const. Amend. XIV. S. 1.

¹²⁴ Beckwith, "Abortion, Bioethics and Personhood: A Philosophical Reflection."

¹²⁵ *Ibid*

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concerning prenatal negligence resulting in the birth of injured or disabled children. Instead of considering the legal status of the foetus at the moment when the attack took place, in order to decide whether there had been a duty of care towards the foetus, courts in England, Canada, and Australia have decided to accept such claims on the grounds that one has a duty to take sensible care when one's behaviour is likely to cause harm to a person who is intimately affected by that behaviour. Applying this to the cases concerned requires holding the defendants responsible, because their behaviour was likely to cause harm to a pregnant woman, and result in her foetus being born injured or disabled. However, the courts have insisted that the foetus be born alive as a precondition for accepting the allegations.¹²⁶ In *Duval v Seguin*, the High Court of Ontario judge stated that:

[An unborn child] falls well within the area of potential danger which the driver is required to foresee and take reasonable care to avoid. ... [I]t is not necessary in the present case to consider whether the unborn child was a person in law or at which stage she became a person.¹²⁷

The same approach was adopted by the English Court of Appeal in *Burton v Islington Health Authority; De Martell v Merton and Sutton Health Authority*.¹²⁸

A further example is that related to the position of some courts in the US, on the issue of the possibility of forcing a pregnant woman to take medicine or undergo invasive medical treatment against her will, in order to safeguard the life of the foetus. They have issued decisions ordering pregnant women to undergo caesarean sections, and justified

¹²⁶ Seymour, "The Legal Status of the Fetus: An International Review," 36, 37.

¹²⁷ *Duval v Seguin*, (1972) 26 D.L.R (3d) 418 and 433.

¹²⁸ *Burton v Islington Health Authority; De Martell v Merton and Sutton Health Authority*, (1992) 3 W.L.R. 637.

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that by relying on the state's right to protect the potential human life of the foetus.¹²⁹ John Seymour indicates that the courts in these cases have not generally relied on the legal status of the foetus because the cases of medical treatment have been of an urgent nature, and there has been no time to consider definitional issues such as the legal status of the foetus.¹³⁰

The other important example of discarding the status of the foetus from the discussion concerning its related issues, is that of the European Court and Commission of Human Rights. According to Article 2/1 of the European Convention on Human Rights and Fundamental Freedoms (ECHR),¹³¹ "... [e]veryone's right to life shall be protected by law". The Commission and the Court have been asked whether the foetus is included under that Article, and so be entitled to a right to life protected by the Convention. Neither has given an answer, as was seen in *X v United Kingdom*,¹³² *Paton v United Kingdom*,¹³³ and *Vo v France*.¹³⁴

In *Paton v United Kingdom*, in order to prevent his partner from having an abortion, the applicant claimed that by allowing abortion, United Kingdom law infringed the foetus's right to life protected by Article 2 of the Convention. The Commission stated that though used extensively, the term "everyone" is not defined in the Convention, and in the light of other Articles using the same term, (such as that protecting the right to liberty and security, that protecting the right to a fair trial, and that protecting the right to respect

¹²⁹ Seymour, *Childbirth and the Law*, 154, 155.

¹³⁰ *Ibid.*, 155-156.

¹³¹ Which was included, like the rest of the Convention articles, in UK national law in 2000 by the Human Rights Act 1998, R A McCall Smith's and J K Mason, *Law and Medical Ethics* (Oxford: Oxford University Press, 2006), 43-44.

¹³² *X v United Kingdom*, Judgement dated July 27, 1979, as mentioned in Grant, "Should the Human Foetus Have Human Rights?" 70.

¹³³ *Paton v United Kingdom*, (1981) 3 E.H.R.R. 408.

¹³⁴ *Vo v France* (2005) 40 E.H.R.R.12 259.

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for private and family life), the term could not, except in rare cases, be applied to the foetus as it is linked to rights that could not be enjoyed prenatally.¹³⁵

After that, the Commission moved to examine three alternatives: whether Article 2 gives the foetus no right to life at all, a right to life subordinate to the pregnant woman's right to autonomy, or an absolute right to life. It excluded the third alternative as it would be in conflict with the pregnant woman's right to autonomy, and risk her life if the pregnancy was to continue on account of respecting the foetus's right to life. Regarding the other two alternatives, the Commission avoided giving an answer to whether the foetus has any right to life during the whole period of gestation. Instead, it restricted itself to the circumstances of the case in hand where the woman was ten weeks pregnant, and her physical and mental health were endangered by the continuation of pregnancy. It concluded that the abortion was justified even if the foetus at this early stage has a right to life.¹³⁶ In its words:

The Commission considers that it is not in these circumstances called upon to decide whether Article 2 does not cover the foetus at all or whether it recognises a 'right to life' of the foetus with implied limitations. It finds that the authorisation, by the United Kingdom authorities, of the abortion complained of is compatible with Article 2 (1), first sentence because, if one assumes that this provision applies at the initial stage of the pregnancy, the abortion is covered by an implied limitation, protecting the life and health of the woman at that stage, of the 'right to life' of the foetus.¹³⁷

The Commission drew the same conclusion on the same basis in *X v United Kingdom*.¹³⁸

The other example is *Vo v France*¹³⁹ in which a doctor's negligence caused the applicant to have her five-month foetus aborted. The doctor was cleared of a charge of

¹³⁵ *Paton v United Kingdom*, 410.

¹³⁶ *Ibid.*, 414, 415.

¹³⁷ *Ibid.*, 416.

¹³⁸ Grant, "Should the Human Foetus Have Human Rights?" 70.

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unintentional homicide on the basis that the abortus was not a human person within the meaning of the criminal code that protects against unintentional homicide. This decision was upheld by the highest national court and the applicant then brought her case to ECHR on the basis that France had violated Article 2 of the convention.¹⁴⁰ After mentioning the dispute on the legal status of the foetus in France, as well as in the other European states, the ECHR preferred not to tackle that issue and concluded that even if the foetus was considered a human person and so granted a right to life, France could not be held guilty of the violation of the requirements of Article 2, as it had sufficiently fulfilled them in the present case. It concluded:

[T]he Court is convinced that it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Art.2 of the Convention. As to the instant case, it considers it unnecessary to examine whether the abrupt end to the applicant's pregnancy falls within the scope of Art.2, seeing that, even assuming that that provision was applicable, there was no failure on the part of the respondent state to comply with the requirements relating to the preservation of life in the public health sphere.¹⁴¹

The Court attracted strong criticism for its failure to address the main issue in the case, the legal status of the foetus. In Tanya Goldman's words:

[T]he role of a judge sitting on the ECHR is to interpret the Convention, and that responsibility does not change according to the difficulty or the implications of an issue. In *Vo*, the ECHR judges failed to address the main issue at bar, and in so doing may have side-stepped their judicial role to interpret the language of the Convention.¹⁴²

¹³⁹ *Vo v France* (2005) 40 E.H.R.R.12 259.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*, 295.

¹⁴² Tanya Goldman, "Vo v. France and Fetal Rights: The Decision Not to Decide," *Harvard Human Rights Journal* 18 (2005), retrieved from <http://www.law.harvard.edu/students/orgs/hrj/iss18/goldman.shtml#fn1>, at 13.04.2006.

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Furthermore, some of the judges in that case believed that it was the Court's duty to tackle the issue of interpretation of the Convention's terms, and reach a conclusion on whether the foetus is included in the meaning intended by the Convention's drafters.

Judge Costa declared:

It is the task of lawyers, and in particular judges, especially human-rights judges, to identify the notions ... that correspond to the words or expressions in the relevant legal instruments. . . . Why should the Court not deal with the terms "everyone" and the "right to life" (which the European Convention on Human Rights does not define) in the same way it has done from its inception with the terms "civil rights and obligations", "criminal charges" and "tribunals", even if we are here concerned with philosophical, not technical, concepts?¹⁴³

However, in a more recent case, the Court declined again to clarify its position regarding the issue, but on another account. In the case of *Evans v the UK*,¹⁴⁴ Natallie Evans and her ex-partner Howard Johnston had created foetuses using their own eggs and sperm prior to Ms Evans being rendered infertile by cancer treatment. As her ex-partner refused to let her use the frozen foetuses, and asked for them to be destroyed because he no longer wanted children with her, Ms Evans applied to the UK courts asking to be allowed to use the foetuses without her ex-partner's consent. One of the grounds for her application was the claim that the destruction of the frozen foetuses would breach their right to life. However, the UK courts refused her application and declared, in replying to her last mentioned claim, that the foetus is not a person, and so has no rights including that to life.¹⁴⁵ Evans applied to the ECHR claiming that, by allowing frozen foetuses to be destroyed, when one of the partners withholds his or her consent, UK law infringed their right to life protected by Article 2 of the Convention. As in the previous cases, the ECHR

¹⁴³ *Vo v France* 300.

¹⁴⁴ *Evans v the UK*, (2006) No. 6339/05 E.C.H.R.

¹⁴⁵ *Ibid.*, para. 7-22.

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declined to give a clear indication on its position on that claim, and upheld the UK courts' refusal to grant the foetus personality and a right to life, because the issue is included in "the margin of appreciation," the area within which each State has the authority to apply its own national law. In the Court's words:

The applicant complained that the provisions of English law requiring the embryos to be destroyed once J withdrew his consent to their continued storage violated the embryos' right to life, contrary to Article 2 of the Convention ..., however, ... in the absence of any European consensus on the scientific and legal definition of the beginning of life, the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere. Under English law, as was made clear by the domestic courts in the present applicant's case ... an embryo does not have independent rights or interests and cannot claim—or have claimed on its behalf—a right to life under Article 2. There has not, accordingly, been a violation of that provision in the present case.¹⁴⁶

What can be concluded here is that, in the light of the unwillingness of the Court to resolve the dispute over the meaning of Article 2, the position of the European Convention of Human Rights on the legal status of the foetus remains unclear. It is still controversial whether that Article includes the foetus, as the applicants in the above-mentioned cases claimed, or excludes it, as alleged by the defendants in those cases, some researchers,¹⁴⁷ and the supreme courts in some of the Convention's signatories, such as those in Austria and Norway.¹⁴⁸

The other illustration of the disregard of the legal status of the foetus is that held by John Seymour who distinguishes between two approaches adopted by courts to cases involving the foetus. The first of these is what he calls "the definitional approach", in

¹⁴⁶ *Ibid.*, para. 45-47.

¹⁴⁷ Like Goldman, "Vo v. France and Fetal Rights: The Decision Not to Decide,"

¹⁴⁸ Lang, "The Status of the Human Fetus," 429.

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which the emphasis is placed on defining whether the foetus is a person, a body part, a potential life, or a life, i.e. the legal status of the foetus. This status is, according to this approach, the basis on which the foetus-related cases can be solved. The example he cites for the approach is that some courts in the US have tried to look at whether wrongful death statutes apply to stillbirths, by examining whether the foetus can be considered a person in the meaning intended in those statutes.¹⁴⁹

The second approach is what he calls “the relational approach”, where, instead of the emphasis being placed on the characteristics of the foetus, it is put on principles and concepts of a particular law and the consequences of applying it. In this regard, the foetus is considered a distinct entity with intrinsic values, yet deciding whether a particular law should be applied to it and whether its interests should be protected, depends on the relationships between the pregnant woman and third parties, if there are any. In the light of such relationships, it might be appropriate to protect the interests of the foetus as, for instance, in the case where there is a doctor or a midwife caring for the pregnant woman. It is reasonable to regard these professionals as owing a duty of care towards the pregnant woman and the foetus, and entitle the latter to a damages claim if that duty is neglected. It is the nature of the relationship that makes the law acknowledge the existence of the foetus, rather than the nature of the latter.¹⁵⁰ The practical instance of this approach, according to him, is that the court in the cases of *Merrill*¹⁵¹ and *Gentry v Gilmore*¹⁵² differentiated clearly between allowing the pregnant woman to abort her foetus, and destroying it without her consent. In the first case, the court declared that the state's interest lies in regulating and facilitating the woman's exercise of her right to autonomy,

¹⁴⁹ Seymour, *Childbirth and the Law*, 185.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*, 186. He does not mention the case details.

¹⁵² 613 So.2d 1241 (Ala. 1993). As cited by Seymour, *Childbirth and the Law*, 186.

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whereas in the second case it was found to lie in protecting the pregnant woman and the foetus from the wrongdoing of a third party. Such judgements cannot be reached if the definitional approach is adopted, since the emphasis will be on whether the foetus is a potential life or whether it is a person.¹⁵³

Adopting the relational approach is claimed to imply changing the nature of the issue, because reaching an agreement on the legal status of the foetus is no longer the aim. This is because reaching a consensus on such a matter is unlikely, and insisting on reaching that consensus misconstrues the real problem encountered by the law. That is to say, attributing legal personality and rights and duties associated with it to the foetus is, as the Supreme Court of Canada has declared, a classificatory task aiming towards a certainty that cannot be reached in the light of the normative nature of the law.¹⁵⁴ The relational approach is more suitable because it allows the law to consider relative factors in each case a claim is being made on behalf of a foetus, such as the context, the parties involved, their relationships, and the principles upon which the considered law is based. In such an approach, the inconsistency embodied in the treatment of foetus-related issues in law is acceptable, even desirable, as it allows the law to be flexible while considering whether it should intervene and to what extent, to protect the interests of the foetus. The task that should be dealt with here, John Seymour insists, is the illustration of the principles underlying the variation in the law's response to claims made on behalf of the foetus.¹⁵⁵

A similar approach is held by Hanson, who justifies it on account of the pragmatism of the law in allowing it to deal with problems in a practical way, without

¹⁵³ Seymour, *Childbirth and the Law*, 186.

¹⁵⁴ *Tremblay v Daigle* (1989) 62 DLR (4th) 634, 650, as mentioned in Seymour, *Childbirth and the Law*, 186.

¹⁵⁵ Seymour, *Childbirth and the Law*, 186, 187.

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following a rigid set of ideas. This pragmatism, when applied to abortion, enables the law to permit it, no matter what the status of the foetus:

A lot of ink has been spilt on the status of the foetus. Whilst this raises very interesting philosophical and moral questions, the law deals with this in a wholly pragmatic way. The law is not metaphysical, and the quasi-theological idea of “two persons in one” is not one that the law can take in. This amongst other things enables abortion to be carried out.¹⁵⁶

As explained above, positions concerning foetus-related issues can be divided into two groups: those that regard the issue of the moral and legal status of the foetus as a starting point for tackling its related issues, and those that disregard that issue for different reasons. Nevertheless, some positions, though of paramount importance, seem to be unclassifiable because of their ambiguity. For example, the Human Fertilisation and Embryology Act (HFEA) 1990, which governs foetal research in the UK,¹⁵⁷ takes the position that any research in the UK involving creating, keeping, or utilising foetuses outside the human body must be licensed by the Authority created by the Act,¹⁵⁸ and in order for the Authority to issue such a license, several conditions must be met. First, the research project must be necessary or desirable according to the categories specified in the Act.¹⁵⁹ Second, no license can be issued to research projects involving the prohibited

¹⁵⁶ B, Hanson, 'The Rights of the Individual in Maternity Care' at 'Whose Right is Right? Joint Conference of RCOG/RCM Standing Committee Meeting, 24 June 2002, RCOG. As mentioned in Grant, "Should the Human Foetus Have Human Rights?" 63.

¹⁵⁷ Jackson, *Medical Law: Text, Cases and Materials*, 762.

¹⁵⁸ Human Fertilisation and Embryology Act 1990 Chapter. 37, 5 (1).

¹⁵⁹ These categories according to Schedule 2, paragraph 3(2) of the HFEA 1990 are:

(a) promoting advances in the treatment of infertility, (b) increasing knowledge about the causes of congenital disease, (c) increasing knowledge about the causes of miscarriages, (d) developing more effective techniques of contraception, or (e) developing methods for detecting the presence of gene or chromosome abnormalities in foetuses before implantation. And the there additional categories added by 2(2) of the Human Fertilisation and Embryology (Research Purposes) Regulations 2001 are: (f) increasing knowledge about the development of foetuses; (g) increasing knowledge about serious disease, or (h) enabling any such knowledge to be applied in developing treatments for serious disease.

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activities listed by the Act,¹⁶⁰ and third, explicit consent must be given by the providers of the gametes (ova and sperm). This consent must be given in writing¹⁶¹ for research¹⁶² after the donators have been informed about all the relevant information,¹⁶³ and the consent can be withdrawn at any time before the use of the gametes.¹⁶⁴ The only foetuses that can be used in research are those that are spare following IVF, and those created solely for the purpose of research.¹⁶⁵ Finally, the research must not be undertaken on foetuses of more than 14 days gestation.¹⁶⁶

Such terms and conditions have been given different readings by commentators attempting to grasp the Act's position on the legal status of the foetus. Some researchers such as Steinberg see the protection provided to the foetus by the Act as a basis upon which legal personality might be attributed to it. In Steinberg's words:

[W]hile the Act might not, in itself, establish embryo personhood ... it serves as a powerful basis for extending the embryo 'protectionist' principle that characterises it ... the language used ... creates a legal (precedential) basis for arguing that embryos in or outside the IVF context are legal persons (after implantation).¹⁶⁷

However, some researchers, like Robertson, see the control given over the foetus's fate as an expression of ownership.¹⁶⁸ This ambiguity might be explained by referring to the fact that the Act was based on the Warnock Committee Report 1984, on the embryo research

¹⁶⁰ Examples of these activities, according to Section 13 3 HFEA 1990, are: (a) keeping or using a foetus after the appearance of the primitive streak, (b) placing a foetus in any animal, (c) keeping or using a foetus in any circumstances in which regulations prohibit its keeping or use, or (d) replacing a nucleus of a cell of a foetus with a nucleus taken from a cell of any person, foetus or subsequent development of a foetus.

¹⁶¹ Sched. 3 (1) of HFEA 1990.

¹⁶² Sched. 3 (2) of HFEA 1990.

¹⁶³ Sched. 3 (3) of HFEA 1990.

¹⁶⁴ Sched. 3 (4) of HFEA 1990.

¹⁶⁵ Sched. 2 (1) of HFEA 1990.

¹⁶⁶ S. 3, 3(a), 4.

¹⁶⁷ Steinberg, D.L. (1997) *Bodies in Glass: Genetics, Eugenics, Embryo Ethics*. Manchester: Manchester University Press, 168–169. As in Fox, "Pre-Persons, Commodities or Cyborgs: The Legal Construction and Representation of the Embryo," 176.

¹⁶⁸ JA Robertson, "In the Beginning: The Legal Status of Early Embryos," *Virginia Law Review* 76, no. 3 (1990): 437-517, 454, 455. His statement is fully quoted later in this thesis. See page 227.

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and fertility treatment,¹⁶⁹ which, according to Marie Fox,¹⁷⁰ failed to resolve the issue of the juridical status of the foetus.

In summary, four conclusions can be drawn. The first is that it is controversial whether it is necessary to determine the status of the human foetus in order to resolve its related legal and moral dilemmas, such as abortion and foetal research. That is to say, whilst the majority think that such status is essential for resolving these issues, others oppose this view and suggest alternative solutions like the relational approach adopted by John Seymour.¹⁷¹ The second conclusion reached is that, though agreeing on the importance of the status of the foetus in resolving its related issues, the majority of moral and legal researchers and authorities differ over which status should be attributed. Thirdly, there are moral and legal controversies over the relationship between personality, as the first embodiment of the moral and legal status of the foetus, and humanity. Finally, it is clear that the relationship between the moral and legal status of the foetus is debatable.

One more thing worth mentioning concerns the use of the term status. In the previous discussions, the status of the foetus is perceived to be either that of a person or of a property species, according to the distinction generally adopted by modern law.¹⁷² However, for some writers, like Søren Holm,¹⁷³ the term status implies having moral or legal worth. Therefore, questioning whether the foetus has any moral or legal status means questioning whether it has moral or legal worth. This understanding of the term

¹⁶⁹ Jackson, *Medical Law: Text, Cases and Materials*, 776, 777.

¹⁷⁰ Fox, "Pre-Persons, Commodities or Cyborgs: The Legal Construction and Representation of the Embryo," 171.

¹⁷¹ See 40 above.

¹⁷² Davies and Naffine, *Are Persons Property?*, 51. P. Ducor, "The Legal Status of Human Materials," *Drake Law Review* 44 (1996): 195-260, 198. In the words of the latter, "[T]he distinction between subject of rights and object of rights [the terms he uses to denote persons and property] underlies the existence of and is a prerequisite to every legal system."

¹⁷³ Holm, "Going to the Roots of the Stem Cell Controversy," 497.

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moral and legal status can be found in other writings. For example, after defining moral status as: "... a continuum of values ranging from nothing to that of a normal human adult who is unquestionably a person and a moral agent",¹⁷⁴ Mary Mahowald proceeds to define moral status in the same way as Søren Holm. That is, in order to prove the distinction she holds between moral agency and moral status, she gives an example of an entity that, though it lacks moral agency, has some moral status:

Moral agency is ... distinguishable from moral status or moral standing because the latter concepts are applicable to entities whose personality is questionable or absent. ... Consider, for example, human embryos or profoundly retarded humans. The fact that such entities are not capable of exercising moral agency does not imply that they have no moral status or standing, or that those who are moral agents have no moral responsibility toward them.¹⁷⁵

Regardless of the accuracy of the distinction she attempts to make between moral agency and moral status,¹⁷⁶ it is obvious that Mary Mahowald uses moral status to refer to a particular moral value that contradicts her previous indication that moral status is "... a continuum of values ranging from nothing". Having nothing, or being a species or property, is perceived, in her preceding definition of moral status, to be an entity's status, while that cannot be the case in light of her subsequent example.¹⁷⁷ In this thesis, however, the terms moral status and legal status will be understood as the mere

¹⁷⁴ Mary Mahowald attributes this definition to Summer, L.W (Summer, L.W. 1981, *Abortion and Moral Theory*, Princeton, N.J.: Princeton University Press. As cited by Mary B. Mahowald, "Person" in *Encyclopedia of Bioethics, Rev. Ed.*, ed. W. T. Reich (New York: Simon & Schuster Macmillan, 1995), 1938). However, she apparently supports it. See Mahowald, "Person", 1938.

¹⁷⁵ Mahowald, "Person", 1938.

¹⁷⁶ If moral agency is understood as a necessary condition for the status of persons, associated by an understanding of moral obligations as a transaction between moral agents, that is, from one agent to another, no moral value can be attributed to any entity that lacks moral agency. See Section 4.2.2 Basing moral personality on moral agency.

¹⁷⁷ The probability that the phrase 'legal status' may be understood as an indication of a particular legal standing seems to be the reason behind John Seymour's clarification at the beginning of a chapter entitled 'The legal status of the fetus' that the use of that term has no such implication Seymour, *Childbirth and the Law*, 135.

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description of an entity's standing that might be that of a moral or legal person, i.e. moral or legal worth, or that of a species of property, i.e. stripped of any moral or legal worth.

In summary, this chapter has shown the controversies surrounding the moral and legal status of the foetus as encountered in the relevant Western literature. The importance of the issue in resolving the moral and legal dilemmas provoked or revived by reproductive technologies such as abortion and foetal research, is hotly debated. While it is widely regarded by many legal and ethical authorities and writers as the starting-point for solving these dilemmas, it is sidestepped by others because of its unimportance or irresolvability, as they claim. Furthermore, amongst those believing in its essentiality, the status that should be accorded to the foetus and from when, the significance of humanity in determining it, and the relationship between its moral and legal concepts, are contested. This thesis tackles these controversies as its theme in the way outlined in the introduction and starts by introducing *Shari'a* as the basis for analysis and evaluation.

3 Introducing *Shari'a*

As indicated earlier, the perspective adopted in this thesis is based upon *Shari'a*, which is frequently and misleadingly translated into English as Islamic law.¹⁷⁸ The clarification of this perspective requires an explanation of the concept of *Shari'a*. However, in order to adequately explain this concept and show how it can be relied on in the discussion of the moral and legal status of the foetus, the Islamic concept of human beings must be illustrated. Thus, the latter will be explained first, followed by a discussion of the concept of *Shari'a*.

3.1 *The Islamic concept of human beings*

In Islam, the nature of human beings and the mission they are required to fulfil are inextricably intertwined. The former constitutes the rationale behind choosing human beings by God to fulfil the latter. Therefore, it seems quite plausible to explain the nature of human beings first, and then proceed to elucidate how this nature has come to entitle them to that mission. These two points, as will presently be shown, are, besides being of significance for understanding the concept of *Shari'a* and so clarifying the basis of analysis and evaluation in this thesis, important too in solving several issues related to the determination of the moral and legal status of the foetus.

3.1.1 The nature of human beings

In Islam, human beings are regarded as beings of multidimensional nature: biological and intellectual. This is indicated in the following Qur'anic verses:

¹⁷⁸ Mawil Y. Izzi Deen Samarraï, "Islamic Environmental Ethics: Law and Society," in *Ethics of Environment and Development: Global Challenge, International Response* ed. J. Ronald Engel and Joan Gibb Engel (Tucson University of Arizona Press, 1990), 189.

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Such is He, the Knower of all things, hidden and open, the Exalted (in power), the Merciful. He who has made everything which He has created most good: He began the creation of man with (nothing more than) clay. And made his progeny from a quintessence of the nature of a fluid despised. But He fashioned him in due proportion, and breathed into him something of His spirit. And He gave you (the faculties of) hearing and sight and feeling (and understanding): little thanks do ye give!¹⁷⁹

The body, which is referred to in these verses as clay, is the biological component.¹⁸⁰ It is indicated to be perfect in creation: "... fashioned ... in due proportion," as the previous verses stated, or "... created ... in the best of moulds,"¹⁸¹ as in another verse. It is also believed to be a degree-admitted object, that is, not one that comes into existence as we know it and ceases to exist as such at once, but rather undergoes a series of stages that end in its existence or disappearance. The Qur'an reads:

Verily We created man from a product of wet earth; Then placed him as a drop (of seed) in a safe lodging; Then fashioned We the drop a clot, then fashioned We the clot a little lump, then fashioned We the little lump bones, then clothed the bones with flesh, and then produced it as another creation. So blessed be Allah, the Best of creators!¹⁸²

Despite its perfection in creation, the human body resembles, to some extent, the bodies of other entities, higher animals in particular.¹⁸³ This very fact rules out the possibility that the body might be the distinguishing element of human beings since what

¹⁷⁹ 32: 6, 9. The first number refers to the chapter (*surh* in Arabic) while the second refers to the verse(s) (*āyt/ 'āyāt* in Arabic).

¹⁸⁰ Jamal A. Badawi, "Humanity and Creation, an Islamic Perspective," (paper presented at the International Seminar on Human Genetic and Reproductive Technologies: Comparing Religious and Secular Perspectives, Cairo, 6-9/02/2006 2006), 3.

¹⁸¹ 95: 04.

¹⁸² 23:12-14.

¹⁸³ Hassan Hathout, "Human Genetic and Reproductive Technologies: Comparing Religious and Secular Perspectives, an Islamic Perspective," (paper presented at the International Seminar on Human Genetic and Reproductive Technologies: Comparing Religious and Secular Perspectives, Cairo, 6-9/02/2006 2006), 3.

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distinguishes a thing or a being from other things or beings, must be that which is peculiar to itself not the aspects that it shares with others.¹⁸⁴ As Ibn Miskawaih puts it:

Every existent, be it animal, plant, or inanimate object, as well as their simple elements, namely: water, fire, earth, and air, and also the celestial bodies - every one of these has certain faculties, aptitudes, and actions which make it what it is and distinguish it from everything else, and other faculties, aptitudes, and actions which it shares with the rest. As man is the only existent whose desired end is a praiseworthy character and satisfactory actions, it is necessary that we do not consider at this time those of his faculties, aptitudes, and actions which he shares with the other existents, for this falls within the scope of another art and another science called "Natural Science." As for the actions, faculties, and aptitudes which characterize him as man and by which his humanity and virtues are realized, they are the voluntary matters which are related to the faculty of reflection and discernment.¹⁸⁵

In this way, Ibn Miskawaih indicates that what differentiates human beings from other entities is their existence as intellectual beings. They have rationality, cognition, volition and aesthetic taste, which are referred to in the following Qur'anic verse, "... and He [God] gave you (the faculties of) hearing and sight and feeling (and understanding)."¹⁸⁶ These intellectual faculties are believed to be an expression of a supra-biological component, i.e. the spirit that is attributed to God, "... something of His spirit".¹⁸⁷

¹⁸⁴ Yasin, Mḥmd N'ym. "Hqyqh al-Jnyn w Hkm al-Āntfā' bh fy Zrā'h al-Ā'dā' w al-Tjārb al-'lmyt." In *Abḥāth Fqhyh fy Qḏāyā Tbyh M'āṣrt*, edited by Mḥmd N'ym Yasin, 49-133. Amman: Dār al-Nfā's, 1999. 57.

¹⁸⁵ Ahmad ibn Muhammad Miskawaih, *The Refinement of Character: A Translation from the Arabic of--'S Tahdhib Al-Akhlaq by Constantine K. Zurayk*, trans. Constantine K. Zurayk (Beirut: The American University of Beirut, 1968), 11.

¹⁸⁶ The Qur'an 32: 9.

¹⁸⁷ 32: 9. See Jaafar S. Idris, "Our Humanness Unalterable Essence and Changeable Actuality," (paper presented at the International Seminar on Human Genetic and Reproductive Technologies: Comparing Religious and Secular Perspectives, Cairo, 6-9/02/2006 2006), 11.

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The spirit or the soul ¹⁸⁸ is the metaphysical component of human beings and the trait that grounds their cognitive and voluntary capacities. Being metaphysical makes it virtually impossible to define substantively, in terms of what it is; therefore, many Moslem scholars define it functionally, in terms of what it does. For example, Al-Jurjani in his book of al-Ta'rifat (the Definitions), defines the human spirit as "... that nicety of the human creature which knows and perceives and which is superimposed on the animal spirit derived from the world of ordinance."¹⁸⁹ Abu Hamad Al-Ghazali gives a similar definition when he says that, "[t]he spirit is that aspect of man which acquires knowledge

¹⁸⁸ In the Qur'an and *Sunnah*, there are two terms used to refer to the incorporeal constituent of the human being, viz. 'ruh' and 'nafs', that are translated into English as spirit and soul respectively (See for example, E. E. Calverley, "Doctrines of the Soul (Nafs and Roh) in Islam1," *The Muslim World* 33, no. 4 (1943).). The use of the term 'ruh' or spirit to denote the spiritual part of man can be found in the Qur'anic verse (38:72) when the story of Adam's creation is told, "[a]nd when I have fashioned him and breathed into him of My Spirit [ruh], then fall down before him prostrate". In the same meaning the term 'nafs' or soul is used in the following Qur'anic verses: "... but ah! thou soul [nafs] at peace!", (89:27) "... when the wrongdoers reach the pangs of death and the angels stretch their hands out (saying): deliver up your souls [anfusakum]," (6:93) "... but as for him who feared to stand before his Lord and restrained his soul [nafs] from lust," (79:40) and "[I]o! the soul [nafs] enjoineeth unto evil, save that whereon my Lord hath mercy." (12:53) However, the terms are not always synonymous. In addition to referring to the incorporeal constituent of the human being, each of the terms 'ruh', spirit, and 'nafs', soul, has other uses. Several Qur'anic verses can be cited to show this. Concerning the term 'ruh' or spirit, it is used to mean the Qur'an, (42:52) the inspiration that comes from God to His messengers, (40:15) and command or ordainment of God. The Qur'an read, "[t]hey are asking thee concerning the Spirit. Say: the Spirit is by command of my Lord, and of knowledge ye have been vouchsafed but little." (17:85) The term 'nafs' or soul is utilised to refer to self or person, that is, man as a whole, as in the Qur'anic verse that reads, "When ye enter houses, salute one another [anfusakum] with a greeting from Allah, blessed and sweet", (24:61) and "[e]very soul [nafs] is a pledge for its own deeds." (74:38) Unlike the soul 'nafs', 'the spirit, 'ruh' cannot be used to denote self or person (Ibn Al-Qaiyim, Mhmd bn Aby Bkr al-Dmshqy. *Al-Ruh*. (n.p.): al-Rh̄mh ll-Nshr w al-Twzy' w al-Āntāj, (n.d.)). Incorrectly, Francis T. Cooke attributes Ibn al-Qaiyim to saying that one of the term nafs' uses is the body (Francis T. Cooke, "Ibn Al-Qaiyim's Kitab Al-Ruh," *The Muslim World* 25, no. 2 (1935): 129-144, 143). After referring to all these different uses of the terms 'nafs', soul and 'ruh', spirit, Ibn al-Qaiyim points out that both share the meaning of being the source of life the body enjoys, and concludes that the difference between the two lies in qualities not in essence (Ibn Al-Qaiyim, *Al-Ruh*, 288, 289). Cooke, "Ibn Al-Qaiyim's Kitab Al-Ruh," 143.) Thus, they can be interchangeably used to denote the spiritual part of the human being by which he/she is alive as human in a morally relevant sense. (Ibn Al-Qaiyim, *Al-Ruh*, 288, 289). The same manner will be followed in this thesis, that is, the terms soul and spirit will be used interchangeably. A clarification will, however, be made if either is used to refer to a thing other than the spiritual part of the human being.

¹⁸⁹ A-Ta'rifat (Al-Halabi Publication, 1357 H., 1938 A.D.), p. 99. As cited by Mohammed Na'im Yasin,, "The End of Human Life in the Light of the Opinions of Muslim Scholars and Medical Findings," in *Human Life - Its Inception and End as viewed by Islam* ed. Ali Al-saif Khaled Al-Mazkur, Ahmad Raja'ii Al-Gindi, Abd Al-Sattar Abu Ghuddah (Kuwait: The Islamic Organization for Medical Sciences, 1985b), 379.

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and experiences the sufferings or sorrow and the joys of happiness.”¹⁹⁰ Muhammad Na'im Yasin gives a more detailed description of the spirit in light of its cognitive capacities. The spirit, according to him, is the substance:

[T]hat grasps the various meanings that can be grasped, ... learns the various branches of knowledge, grasps their analytical findings, and deduces details from generalities, generalities from details, and so on. It is also ... [that] that experiences the various emotions of pain, joy, happiness, and sorrow; and it is ... that is pleased and displeased, enjoys and feels miserable, happy or angry, hopes and despairs, loves and hates, knows and denies, etc.¹⁹¹

Besides rational acts, the spirit is also defined as being the seat of all voluntary or autonomous acts.¹⁹²

Being at this level of importance does not deny the soul's need of the body. In spite of the soul being able to perform some functions like "... experiencing the pains of sorrow, grief, and melancholy, and the joys of happiness and pleasure" independently of the body,¹⁹³ the interference of the body is necessary with regard to its other functions.¹⁹⁴ The body is construed here as the servant of the soul that receives and implements its orders and instructions. As Abu Hamed Al-Ghazali puts it, "[t]he organs are vehicles for the spirit. It strikes with hands, hears with ears, sees with eyes, and learns the truth about

¹⁹⁰ Abu Hamed Al-Ghazali, *Ihaya' Ulum Al-Din*, vol. 4 (Beirut: Dar Al-Ma'rifah), p. 494. As cited by Yasin, "The End of Human Life in the Light of the Opinions of Muslim Scholars and Medical Findings", 379.

¹⁹¹ Yasin, "The End of Human Life in the Light of the Opinions of Muslim Scholars and Medical Findings", 379.

¹⁹² *Ibid.*, 380. As he expresses it, "[o]ne of its most important effects [of the spirit] is voluntary movement. Every voluntary activity performed by man is an effect of the spirit. Every human artifact in this world is a result of the effect the spirit has on the body, for human bodies are the machinery and the troops of spirits."

¹⁹³ Abu Hamed Al-Ghazali, *Ihyay' Ulum Al-Din*, vol. 4, Beirut: Dar Al-Ma'rifah, p 494. As cited by Yasin, "The End of Human Life in the Light of the Opinions of Muslim Scholars and Medical Findings", 379, 380.

¹⁹⁴ *Ibid.*

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things by itself.”¹⁹⁵ This concept is crucial in ascertaining the status of the foetus as will be explained later in this thesis.¹⁹⁶

Human beings, then, are viewed in Islam as entities composed of bodies and souls, and distinguished from others by the capacity for cognition and volition that they acquire by virtue of their souls. Determining this nature in this way helps in understanding the rationale behind the selection of human beings to be God’s vicegerents on earth, hence the revelation of *Shari'a* and its nature as the basis of analysis and assessment in this thesis. It also helps solve some important issues related to ascertaining the moral and legal status of the foetus, namely, replying to the criticism levelled at choosing moral agency as the criterion of personality,¹⁹⁷ and determining the timing of the ensoulment event.¹⁹⁸

3.1.2 The human beings’ *raison d’être*

Understanding the rationale behind the creation of the human being is indispensable for understanding *Shari'a* as the yardstick against which ideas and arguments discussed in this thesis are measured. In addition, it is extremely significant in deciding on some issues related directly to the moral and legal status of the foetus, such as the criterion of personality as the first possible embodiment of the moral and legal status of the foetus.¹⁹⁹ This rationale is intimately connected to the Islamic concept of the universe as a teleological phenomenon. Everything in this universe is created to fulfil ends determined by the metaphysical or ethical arms of the Will of God. Regarding the metaphysical part, everything, literally speaking, is believed to be created for an aim

¹⁹⁵ *Ibid.*

¹⁹⁶ See 5.1 Determining the timing of the ensoulment event.

¹⁹⁷ See 4.2.2.4 The nature of being human and the marginal humans dilemma.

¹⁹⁸ See 5.1 Determining the timing of the ensoulment event.

¹⁹⁹ See 4.2.2.2 The justification of the selection of moral agency as the criterion of moral personality.

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whose fulfilment is essential for the existence of others. The existence of the whole universe is, in turn, contingent on the harmony between its mutually dependent parts.²⁰⁰ The Qur'an reads: "... everything We have created and assigned to it its measures, its character and destiny."²⁰¹ In addition: "[c]ertainly, His will be done. To everything He prescribed a measure."²⁰² As Ismail al-Faruqi succinctly states:

From the inanimate little pebble in the valley, the smallest plankton on the surface of the ocean, the microbial flagellate in the intestine of the woodroach, to the galaxies and their suns, the giant redwoods and whales and elephants-everything in existence, by its genesis and growth, its life and death, fulfils a purpose assigned to it by God, which is necessary for other beings.²⁰³

The essence of the metaphysically determined purposes is the absence of freedom in pursuing them. All creatures 'have' by their very nature to fulfil the tasks they have been created to perform because their existence depends on that. As Al-Faruqi puts it, "[the metaphysical] will of God is realized with the necessity of natural law."²⁰⁴ This compliance with the laws of nature, or the metaphysical imperatives, is considered an act of obedience. All creations regardless of whether they are animate or inanimate are believed to be in a continuous state of submission to God for they must all comply with His rules and commandments, i.e. the metaphysical imperatives.

Many verses of the Qur'an demonstrate this point. For example, all are believed to submit to Him. The Qur'an reads: "[d]o they seek for other than the Religion of Allah.- while all creatures in the heavens and on earth have, willing or unwilling, bowed to His

²⁰⁰ Ismail Raji Al-Faruqi, *Al Tawhid: Its Implications for Thought and Life* 3ed. (Herndon, Virginia: International Institute of Islamic Thought, 1995), 55 and 59.

²⁰¹ 54: 49. As translated by Al-Faruqi, *Al Tawhid: Its Implications for Thought and Life*, 56.

²⁰² 65: 3. As translated by Al-Faruqi, *Al Tawhid: Its Implications for Thought and Life*, 56.

²⁰³ Al-Faruqi, *Al Tawhid: Its Implications for Thought and Life*, 55.

²⁰⁴ *Ibid.*, 5.

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Will (Accepted Islam), and to Him shall they all be brought back.”²⁰⁵ Also, all bow down to Him: “[s]eest thou not that to Allah bow down in worship all things that are in the heavens and on earth,- the sun, the moon, the stars; the hills, the trees, the animals; and a great number among mankind?”²⁰⁶ Further, all creatures glorify Him: “[w]hatever is in the heavens and on earth, let it declare the Praises and Glory of Allah, for He is the Exalted in Might, the Wise”,²⁰⁷ and obey Him: “[t]o Him belongs every being that is in the heavens and on earth: all are devoutly obedient to Him.”²⁰⁸

Human beings are no exception. Like all other creatures, they have to obey the laws of their existence. In growing and fulfilling their instinctive needs of food, shelter and sex, for example, they obey imperatives of a metaphysical nature.²⁰⁹ As al-Faruqi puts it, “[m]an equally shares the necessity of natural causation in his vegetative and animal life, in his physical presence as a thing among things on earth.”²¹⁰ However, fulfilling metaphysical imperatives is not the only mission human beings have.

Besides metaphysical imperatives, the divine will has laid down imperatives of an ethical nature that cannot be fulfilled by any entity except human beings. The core of these ethical imperatives is complying willingly with God’s commandments. That is, obeying these imperatives when disobeying them is equally possible.²¹¹ This obedience transcends ritual and devotional acts of worship, extremely important though they are, to cover any act performed purely for the sake of pleasing God within the limits He has set

²⁰⁵ 3: 83.

²⁰⁶ 22: 18.

²⁰⁷ 59: 1.

²⁰⁸ 30: 26.

²⁰⁹ Al-Faruqi, *Al Tawhid: Its Implications for Thought and Life*, 66.

²¹⁰ *Ibid.*, 6.

²¹¹ *Ibid.*, 65, 67.

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out. Life in its ideal form can be a continuous act of obedience or worship.²¹² Hence, the very nature of this obedience necessitates freedom to obey or disobey God, to purify the intention in the manner described, limit oneself to the boundaries set out, and to be accountable for all that. Human beings possess this capacity; indeed, they are the only creatures known to possess it.

In the Qur'an, voluntary obedience and its associated accountability is called 'the vicegerency', and fulfilling it is considered the rationale behind the creation of human beings, their "*raison d'être*."²¹³ However, it is mentioned that appointing them to this position was objected to by the angels because of their capacity for committing evil while the angels, due to of their nature, are not. God, nevertheless, turned down the objection. The Qur'an reads:

Behold, thy Lord said to the angels: "I will create a vicegerent on earth." They said: "Wilt Thou place therein one who will make mischief therein and shed blood?- whilst we do celebrate Thy praises and glorify Thy holy (name)?" He said: "I know what ye know not." And He taught Adam the nature of all things; then He placed him before the angels, and said: "Tell me the nature of these if ye are right." They said: "Glory to Thee, of knowledge We have none, save what Thou Hast taught us: In truth it is Thou Who are perfect in knowledge and wisdom." He said: "O Adam! Tell them their natures." When he had told them, Allah said: "Did I not tell you that I know the secrets of heaven and earth, and I know what ye reveal and what ye conceal?"²¹⁴

The capability of human beings for committing good and evil, which is indicated in the previous verses, is extremely important. Despite proving through the ability of human beings to learn, their capability to be vicegerent, God did not deny the possibility

²¹² Badawi, "Humanity and Creation, an Islamic Perspective", 6, 7.

²¹³ Al-Faruqi, *Al Tawhid: Its Implications for Thought and Life*, 61, 62.

²¹⁴ 2: 30, 33.

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that they may commit the evil mentioned by the angels. The equal possibility that they may fulfil the task and so bring the ethical imperatives of the divine will into actuality justifies the risk. As al-Faruqi puts it:

In cosmic economy, man's capacity for evil is indeed a risk. But this risk is incomparable with the great promise which he may fulfil if endowed with freedom. ... only man may realize ethical value because only he has the freedom necessary therefore; that only he may pursue the totality of values because only he has the mind and vision requisite for such pursuit.²¹⁵

The Qur'an regards the mission of human beings as grave. This is demonstrated through the fact that other imposing creatures were too fearful of its implications to accept it. In other words, the willing obedience, called the trust this time, was offered to the skies, the earth, and mountains but they refused. Only human beings accepted it. In the words of the Qur'an: "We did indeed offer the Trust to the Heavens and the Earth and the Mountains; but they refused to undertake it, being afraid thereof: but man undertook it."²¹⁶

Upon the acceptance of the trust, human beings have entered into a covenant with God to obey Him alone, and be accountable for that. The Qur'an reads:

When thy Lord drew forth from the Children of Adam - from their loins - their descendants, and made them testify concerning themselves, (saying): "Am I not your Lord (who cherishes and sustains you)?"- They said: "Yea! We do testify!" (This), lest ye should say on the Day of Judgment: "Of this we were never mindful. Or lest ye should say: "Our fathers before us may have taken false gods, but we are

²¹⁵ Al-Faruqi, *Al Tawhid: Its Implications for Thought and Life*, 67.

²¹⁶ 33: 72.

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(their) descendants after them: wilt Thou then destroy us because of the deeds of men who were futile?²¹⁷

What is noticeable in this verse, which is called the verse of the covenant, as in that of the trust,²¹⁸ is the insistence on the prominence of worship in the God-human beings relationship and the role that the latter's free will plays in this relationship. The agreement of human beings was essential for holding the trust and entering the covenant.²¹⁹

Three important results follow from the covenant. Firstly, every human being is believed to be born with a primordial monotheistic nature or inherent disposition, *fitrah* as it is called in Islam,²²⁰ to be aware of the existence of God and to be obliged to worship Him.²²¹ Since this nature may be changed because of post-birth external effects, messengers or prophets were sent to remind human beings of the promise they made when entering the covenant.²²²

Another result of the covenant is the endowment of human beings with *dhimmah* or personality. To enable them to join the covenant by which they have become vicegerents, on the one hand, and exercise the stipulations of that covenant, as detailed in *Shari'a*, on the other, human beings have been endowed with a capacity for doing so, that is, with personality. This capability is known in *Shari'a* as *dhimmah*; the term that has been taken from its linguistic meaning of covenant to refer to the covenant human beings

²¹⁷ 07: 172, 173.

²¹⁸ These are the names used to denote the verses in Islamic literature. See W. W. Kadi, "The Primordial Covenant and Human History in the Qur'n", *Proceedings of the American Philosophical Society* 147, no. 4 (2003), 333.

²¹⁹ *Ibid.*, 334.

²²⁰ *Ibid.*

²²¹ Idris, "Our Humanness Unalterable Essence and Changeable Actuality", 5.

²²² Kadi, "The Primordial Covenant and Human History in the Qur'n", 336, 337.

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entered into with God in pre-existence.²²³ As will be demonstrated, the *Shari'a* concept of *dhimmah* or personality is significant in defining personality as the first possible embodiment of the status of the foetus. Being a form of property is the second possible embodiment.²²⁴

As a capacity for acquiring rights and obligations, *dhimmah* is associated with other capabilities. It is firstly associated with *ahliyyat al-wujub*. The term *ahliyyat* in Arabic means ability or capacity,²²⁵ and is used technically to refer to the capacity for acquiring rights and duties.²²⁶ Despite the similarity of definition,²²⁶ *ahliyyat al-wujub* is distinct from *dhimmah*.²²⁷ The distinction lies in that *ahliyyat al-wujub* is a condition that

²²³ Al-Tftāzāny, Ms'wd bn 'mr. Shrḥ al-Tlwyḥ 'lā al-Twḍyḥ. Vol. 2: Mktbh Sbyḥ bmsr, (n.d.), 324.

²²⁴ See 4.2.1 Basing legal personality on moral personality.

²²⁵ Imran Ahsan Khan Nyazee, *Theories of Islamic Law* (Islamabad Islamic Research Institute and International Institute of Islamic Thought, 1994), 75.

²²⁶ *Ibid.*, Zahraa, Mahdi. "The Legal Capacity of Women in Islamic Law" *Arab Law Quarterly* 11, no. 3 (1996): 245-263, 245, 247.

²²⁷ The distinction adopted in this research is my stance on the controversial issue of the relationship of *dhimmah* and *ahliyyat al-wujub*. Being identical in definition (Hsyn, Aḥmd Frāj. *Al-Mlkyh w Nzryh al-'qd*. Alexandria: M'ssh al-Thqāfh al-Jām'yt, (n.d.). 224, Khlāf, 'bd al-Whāb. *'lm Swl al-Fqh*. 12 ed. Kuwait: Dār al-Qlm, 1978. 136, Al-Bkhāry, 'bd al-'zyz bn Aḥmd bn Mḥmd. *Kshf al-Āsrār 'n Aṣwl- Fkhr al-Āslām al-Bzdwy*. Vol. 2. Beirut: Dār al-Ktāb al-'rby, 1974. 237, Al-Zarqā, Mṣṭfā Aḥmd. *Al-Fqh al-Āslāmy fy Thwbbh al-Jdyd*, al-Mdkhl al-Fqhy al-'ām. vol. 2, 7 ed. Damascus: the University of Damascus, 1963. 742, Azbydh, 'l-y Rmqān Mḥmd. *Al-Nzryh al-'āmh ll-Āhlyt*. 1st edition, Tripoli: al-Mnsh'h al-'āmh ll-Nshr w al-Twzy' w al-Ā'lān, 1984. 23, 24) has provoked controversies over the relationship between *dhimmah* and *ahliyyat al-wujub*. While some writers have argued that they are synonyms for each other, (In mentioning these ideas see for example, (Azbydh, *Al-Nzryh al-'āmh ll-Āhlyt*, 25, 26. Rqā, Hsyn Twfyq. *Ahl-yh al-'qwbh fy al-Shry'h al-Āslāmyh w al-Qānwn al-Mqārḥ*. Cairo: (n.p.), 1964. 24), the majority, as Nyazee has reported (Imran Ahsan Khan Nyazee, *Islamic Law of Business Organization Corporations. Islamic Law and Jurisprudence*, vol. 2 (Islamabad: The Islamic Research Institute, 1998), have claimed that they are different in that *dhimmah* is the basis upon which *ahliyyat al-wujub* is conferred, (Al-Bkhāry, *Kshf al-Āsrār 'n Aṣwl- Fkhr al-Āslām al-Bzdwy*, 238.) or the imaginary repository wherein it resides (Nyazee, *Islamic Law of Business Organization Corporations. Islamic Law and Jurisprudence*, 90). In Nyazee's words, "[d]himmah is considered a requisite condition for the existence of the capacity for acquisition [*ahliyyat al-wujub*]." ———, *Islamic Law of Business Organization Corporations. Islamic Law and Jurisprudence*, 90. For me, a distinction should be made between the two concepts but not in this ambiguous way. That is to say, stating that *ahliyyat al-wujub* is based on *dhimmah* while giving them the same definition and providing no practical benefit from the distinction renders it useless. The distinction that should be made is that adopted by some other scholars on the basis that *dhimmah*, unlike *ahliyyat al-wujub*, is indivisible. (Al-Sabouni, Abd Al-Rahman, *Al-Madkhal Lidirasat Al-Fiqh Al-Islami*, Al-Matba'ah Al-Jadidah, Damascus, 4th edn, 1978, vol.

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is required for the acquisition of individual rights or duties. It then varies in accordance with the rights and duties concerned. *Dhimmah*, on the other hand, is a prerequisite for having any right or duty. To put it another way, *dhimmah* is a condition in the entity to whom the right or duty is being attributed, that is, the entity must have *dhimmah*. The capacity for acquisition or *ahliyyat al-wujub*, on the other hand, is a condition in the right or duty concerned, that is, meeting that right's or duty's conditions of acquisition. Within this, we could have equal subjects with different abilities for acquisition or *ahliyyat al-wujub*.

2, pp. 25-26. As cited by Zahraa, "The Legal Capacity of Women in Islamic Law", 246. This is evident in the differentiation established in Islamic jurisprudence between two types of *ahliyyat al-wujub*, full and restricted or complete and incomplete (Zahraa, "The Legal Capacity of Women in Islamic Law", 246. Nyazee, *Theories of Islamic Law*, 76, 77). The full or complete capacity for acquisition enables the subject to have all rights and duties and is acquired by all humans after birth (Zahraa, "The Legal Capacity of Women in Islamic Law", 247. Nyazee, *Theories of Islamic Law*, 76). The incomplete or restricted one is that acquired by foetuses and it allows them to have certain rights (Nyazee, *Theories of Islamic Law*, 76), and some duties, according to some jurists (Zahraa, "The Legal Capacity of Women in Islamic Law", 247). No such a distinction is found regarding *dhimmah* (In mentioning this idea, see Mdkwr, Mḥmd Slām. *Al-Jnyn w al-Āḥkām al-Mt'lqḥ bh fy al-Fqh al-Āslāmy*. 2 ed. Cairo: Mktbh 'bd Allāh Whbh, 1969. 274). Therefore, when the subject lacks the ability to have certain rights or duties, imperfection cannot be attributed to his/her *dhimmah*. It should; rather, be attributed to his/her *ahliyyat al-wujub*.

The foundation upon which this distinction can be established, which has not been specified by the last mentioned jurists, is that since *dhimmah* is based on an inherited quality of humanity that admits no degree: either all-or-nothing, *Dhimmah*, likewise, cannot be divided into complete and incomplete. Nevertheless, deeming the capacity for acquisition or *ahliyyat al-wujub* to be divisible while basing it on *dhimmah* that is indivisible cannot be reconciled. How can a differentiation be made between subjects with regard to the degree of their capacity for acquisition while they equally share the basis upon which that capacity is enjoyed? To put it another way, when two humans by virtue of being so acquire *dhimmah*, there is no basis for attributing different types of *dhimmah* to them. None is more human than the other, and likewise none can have more *dhimmah* than the other. Both qualities are inseparable. The same will be the case regarding the capacity for acquisition or *ahliyyat al-wujub* if we base it on *dhimmah*. There is no ground on which different capacities for acquisition can be assigned. Also, considering as perfect or full the capacity for acquisition held by born humans, contradicts the fact that many humans in many cases lack this capacity regarding certain rights or duties. This is evident in that when a woman is deprived of the right to divorce or that to be a judge, in some schools of thought, she certainly lacks the capacity for acquiring these rights (These examples are cited by Nyazee (Nyazee, *Theories of Islamic Law*, 76, 77., though he, like many writers, has indicated the distinction between the full and restricted types of *ahliyyat al-wujub* that is being criticised above). Her capacity for acquisition or *ahliyyat al-wujub* cannot be attributed to fullness. The same can be said regarding foreigners when being prevented from owning real-estate rights ('bwdh, al-Kwny 'ly. *Āsāsyāt al-Qānwn al-Ŵd'y al-Lyby, al-Mdkhl al-ā 'lm al-Qānwn, al-Hq*. Tripoli: al-Mrkz al-Qwmy ll-Bḥwth w al-Drāsāt al-'lmyt, 1998. 133). The only way out of this dilemma is to adopt the distinction between the two capacities as detailed in the main text above.

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Another related concept that has also been associated with *dhimmah* is *ahliyyat āl-ādā*. *Ahliyyat āl-ādā* in *Shari'a* refers to the ability for executing or exercising rights and duties, and as such, is linked to the faculty of reasoning. Full capacity for execution is assigned to those who reach the age of maturity or discretion unaffected by any deficiency hindering them from being fully mentally developed. Imperfect or deficient capacity, on the other hand, is assigned to those possessing some discretion such as children above the age of seven years. None is attributed when the subject has no discretion at all, like children aged less than seven or the insane.²²⁸

Ahliyyat āl-ādā, then, has nothing to do with the acquisition of rights and duties.²²⁹ One may completely lack *ahliyyat āl-ādā* and still be able to gain rights and assume duties. Exercising them can be done through the guardian or the testamentary guardian.²³⁰ This result is particularly important with regard to the legal status of the foetus as it allows it to be attributed with personality, hence rights, despite its apparent lack of the ability to execute those rights.²³¹ *Ahliyyat āl-ādā*, therefore, should not be confused with *dhimmah* which revolves around the capacity for acquisition.²³²

²²⁸ Nyazee, *Theories of Islamic Law*, 75, 96. Zahraa, "The Legal Capacity of Women in Islamic Law", 247.

²²⁹ Suliman M.K Ibrahim, "*Āltby'h al-Qānwnyh ll-Jnyn*." Benghazi: Garyounis University, 2001. (Unpublished LL.M dissertation), 18, 19.

²³⁰ Zahraa, "The Legal Capacity of Women in Islamic Law", 248.

²³¹ See page 206 below.

²³² However, this has not always been the case. After defining *dhimmah* as the capacity for acquisition Al-Qrāfy (Al-Qrāfy, Aḥmd bn Adrys bn 'bd al-Raḥmān al-Snhājy. *Al-Frwq*. 1 ed. Vol. 3. al-Cairo: Dār Aḥyā' al-Ktb al-'rbyt, 1346 A.H. 230, 231) has claimed that this capacity is subject to special conditions such as reaching the age of maturity, discretion and that no interdiction is being laid down (Al-Qrāfy, *Al-Frwq*, 231). Building on that, he has concluded that a bankrupt will lose his/her *dhimmah* if an interdict preventing him/her from executing his/her transaction rights is issued (———, *Al-Frwq*, 231). This statement, however, contradicts the distinction established by Moslem scholars between *dhimmah*, as the capacity for acquisition, and *ahliyyat āl-ādā* as that for execution. As Mustāfā āl-Zārqā has rightly commented, Al-Qārāfi's statement is far away from the meaning of *dhimmah* and might be due to a special use of the term *dhimmah* in the school that that jurist belongs to, i.e. the Māliqi School (Al-Zarqā, Mṣṭfā Aḥmd. *Al-Fqh al-Āslāmy fy Thwbbh al-Jdyd, al-Mdkhl al-Ānzryh al-Āltzām al-'āmh fy al-Fqh al-Āslāmy*. vol. 2, 3 ed. Damascus: the Syrian University, 1958. 214).

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In addition, besides being used to denote the meaning of the capacity for acquisition, the term *dhimmah* is also used to refer to the supposed or imaginary repository that includes one's rights and duties.²³³ *Dhimmah* in the second meaning is the consequence of the acquisition of *dhimmah* in the first meaning, that is to say, when one is assigned the capacity for having rights and duties, the assignment of a presumed container to include these rights and duties follows.²³⁴ Notwithstanding this connection, the two meanings of *dhimmah* are distinct from one another in the same way capacity is distinct from repository.

Confusing the two meanings of *dhimmah* is noted in the writings of many jurists. For example, while defining *dhimmah*, Mahdi Zahraa has quoted two different definitions without making any distinction between them. In the first definition, *dhimmah* is defined as a repository, that is, "... as a juristic container presumed in a person in order to encompass all its debts and obligations that are related to it."²³⁵ In the second one, in which the meaning of capacity is indicated, *dhimmah* is defined as a "... juristic (*shar'ie*) description that is presumed by the legislator to exist in a human being and according with which [the person] *becomes able to oblige and be obliged*."²³⁶ Similar confusion can be noted in other writings.²³⁷ After mentioning and criticising this confusion, Al-Zarqā has chosen to limit the use of the term *dhimmah* to the meaning of repository and utilise

²³³ Zahraa, M. "Legal Personality in Islamic Law." *Arab Law Quarterly* 10 (1995): 193-206, 203. Wzārḥ al-Āwqāf w al-Sh'wn al-Āslāmyt, *al-Mwsw'h al-Fqhyt*. vol. 39 Kuwait. Al-Mṭrzy, Nāṣr bn 'bd al-Syd abw al-Mkārm. *Al-Mghrb*. (n.p.): Dār al-Ktāb al-'rby, (n.d.). 177.

²³⁴ Zahraa, "Legal Personality in Islamic Law", 203.

²³⁵ This definition is given by Al-Zarqā, Ahmad M., *Al-Madkhal Al-Fighi Al'am*. 6th edn (1959), vol. 2, 738. As cited by Zahraa, "Legal Personality in Islamic Law", 203.

²³⁶ Al-Sabouni, Abd Al-Rahman, *Al-Madkhal Lidirasat Al-Fiqh Al-Islami*, Al-Matba'ah Al-Jadidah, Damascus, 4th edn, 1978, vol. 2, p. 20. As cited by *Ibid.*, 203. (The emphasis is mine).

²³⁷ See for example, Al-Bkhāry, 'bd al-'zyz bn Aḥmd bn Mḥmd. *Kshf al-Āsrār 'n Aṣwl- Fkhr al-Āslām al-Bzdwy*. Vol. 4: Dār al-Ktāb al-Āslāmy, (n.p.), 238.

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the term personality to refer to the capacity for acquisition.²³⁸ He considers *dhimmah*, as well as the two types of *ahliyyat*, as effects of personality.²³⁹ Mahdi Zahraa has followed him in considering *dhimmah* as an effect of personality. In his words: "... the concept of *dhimma* represents that aspect of legal personality which is supposed to contain an account of all the person's rights and obligations whether they are religious or financial in nature".²⁴⁰ Though I agree on the distinction made between the two meanings of *dhimmah*, I have, as will be expanded on later in this thesis,²⁴¹ some reservations about the use of the term personality to denote the meaning of the capacity for acquisition.

The third result of the covenant is the accountability of human beings to God. They have to obey God. If they should break this covenant, they would be held accountable. This accountability reflects the Islamic perception of life as a test. The Qur'an reads: "[b]lessed is He in Whose hand is the sovereignty, and, He is able to do all things. Who hath created life and death that He may try you which of you is best in conduct; and He is the Mighty, the Forgiving".²⁴² Whether human beings will be rewarded or punished in the hereafter depends on the choices they make in the mundane world. The Qur'an reads:

On that Day [Day of Judgement] will men proceed in companies sorted out, to be shown the deeds that they (had done). Then shall anyone who has done an atom's weight of good, see it! And anyone who has done an atom's weight of evil, shall see it.²⁴³

²³⁸ Al-Zarqā, *Al-Fqh al-Āslāmī fy Thwbbh al-Jdyd, al-Mdkhl al-Ānzryh al-Āltzām al-‘āmh fy al-Fqh al-Āslāmī*, 208.

²³⁹ *Ibid.*

²⁴⁰ Zahraa, "Legal Personality in Islamic Law", 203.

²⁴¹ See pages 126-128 below.

²⁴² 67:1, 2.

²⁴³ 99: 6, 8.

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As will be explained, the accountability of human beings to God is significant in deciding on moral agency as the criterion of personality, hence determining the status of the foetus.²⁴⁴

Being God's vicegerent entitles human beings to a special position in the universe. The entire cosmos is seen to be the theatre or field in which they live and struggle to fulfil their responsibilities as vicegerents, "... to prove oneself ethically worthy."²⁴⁵ Other creatures have therefore been subordinated to them. The Qur'an reads: "...it is He Who hath created for you all things that are on earth",²⁴⁶ and, "We have honoured the sons of Adam; provided them with transport on land and sea; given them for sustenance things good and pure; and conferred on them special favours, above a great part of our creation".²⁴⁷ The freedom human beings have been given entitles them to a position higher than that of the angels who never disobey God. This freedom makes their obedience a product of moral struggle rather than mere instinctive nature.²⁴⁸

However, the vicegerency or trusteeship works also to place limitations on the authority of human beings in the universe. Simply put, they are vicegerents while the real owner of everything is God. In the words of the Qur'an: "... praised, therefore, is Allah, in Whose hands is dominion over all things",²⁴⁹ and "... to Him will you all return. Say, O Allah, King of all dominion, Owner of all things".²⁵⁰ As such, all that human beings have

²⁴⁴ See Section 4.2.2.2 The justification of the selection of moral agency as the criterion of moral personality.

²⁴⁵ Al-Faruqi, *Al Tawhid: Its Implications for Thought and Life*, 57.

²⁴⁶ 02: 29.

²⁴⁷ 17: 70.

²⁴⁸ Badawi, "Humanity and Creation, an Islamic Perspective," *Al-Shāf'y*, Hsn. "Krāmh al-Ānsān w Mkānth fy al-Kwn." In *R'yh Asl-āmyh lb'd al-Mshklāt al-Tbyh al-M'āsrt*. Casablanca: al-Mnzmh al-Āslāmyh ll'lwm al-Tbyt, 1999. 210, 211.

²⁴⁹ 36: 83.

²⁵⁰ 3: 26.

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is a right to usufruct²⁵¹ that should be used in conformity with the real Owner's stipulations.²⁵² For example, they are not allowed to misuse their own bodies or commit suicide, as these acts are seen to be in contradiction of God's commandments and so are considered amoral.²⁵³ This is the essence of the vicegerency on which they are being tested.

Then, human beings have been created as free-willed entities and chosen, as such, to bring the imperatives that constitute the ethical arm of God's will into actuality. However, the question posed is how these imperatives can be known. *Shari'a* is the answer.

3.2 *The concept of Shari'a*

Shari'a in this thesis forms the basis upon which the analysis and assessment of ideas and arguments are conducted, hence it is necessary to provide an explanation of its definition, nature, and sources. This explanation is, as outlined earlier, closely connected to the rationale behind the creation of human beings. The previous section explains that, messengers were sent to remind them about the covenant and to show them how to live according to the Creator's will, and so prove themselves morally worthy. According to Islamic doctrine, Mohammad is the seal of those messengers, and Islam is the message that he brought with him. Islam means submission to the ethical arm of the divine will, and trying to implement it into one's life. As Fazlur Rahman puts it, Islam means "... surrender to the Will of God; i.e. the determination to

²⁵¹ The right to usufruct is a Roman law term that means "the right to enjoy the use of another's property short of the destruction or waste of its substance". See "usufruct *n.*" *The Concise Oxford English Dictionary*, Eleventh edition revised. Ed. Catherine Soanes and Angus Stevenson. Oxford University Press, 2006. *Oxford Reference Online*. Oxford University Press. . . . Lancaster University. . . . 9 July 2008 <<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t23.e62651>>

²⁵² Al-Faruqi, *Al Tawhid: Its Implications for Thought and Life*, 57.

²⁵³ Badawi, "Humanity and Creation, an Islamic Perspective," 7, 8

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implement, in the physical texture of the world, the command of God or the Moral Imperative. This implementation is 'service to God (*ibada*).'²⁵⁴

The aim of *Shari'a* can be clarified through its link with Islam. It is the functional face of Islam²⁵⁵ and so, its main objective, as such, is to guide human beings through their voluntary surrender to God, which is the essence of their vicegerency. In the words of the prominent Moslem jurist al-Shātībī: "[t]he primary goal of *Shari'ah* ... is to free Man from the grip of his own whims and fancy, so that he may be the servant of Allāh by choice, just as he is one without it."²⁵⁶ In this statement, the distinction is clear between involuntary obedience, which is laid down by the metaphysical will and shared by all creatures, and voluntary obedience, which is laid down by the ethical will and peculiar to human beings, their vicegerency.²⁵⁷ *Shari'a* is the guideline to the latter. Its definition, nature, and sources are intimately connected to this role.

3.2.1 The definition of *Shari'a*

The definition of *Shari'a*, which is significant in understanding the analytical basis of this thesis, shows an intimate connection with the vicegerency of human beings. Linguistically speaking, it is defined as the way or path.²⁵⁸ This meaning is apparent in its

²⁵⁴ Fazlur Rahman, *Islam* (New York: Doubleday, 1968), 315. In a similar meaning, see S. G. Vesey-FitzGerald, *Muhammadan Law: An Abridgement According to Its Various Schools* (London Oxford University Press Humphrey Milford, 1931), 1, 2. All creatures are believed to be in total surrender to God's metaphysical Will and so are Moslems in this sense. The Qur'an reads, "seek they other than the religion of Allah, when unto Him submitteth whosoever is in the heavens and the earth, willingly or unwillingly, and unto Him they will be returned." [3:83]. However, Islam meant here is surrender to the ethical Divine Will that is subject to the human being's free will. Therefore, Islam in this sense applies only to humans who choose to live in obedience to God commandments. See 3.1.2 The human beings' *raison d'être* above.

²⁵⁵ Rahman, *Islam*, 117.

²⁵⁶ Al-Shātībī, ii, 168, as cited by Nyazee, *Theories of Islamic Law*, 235.

²⁵⁷ See 3.1.2 The human beings' *raison d'être*.

²⁵⁸ Rahman, *Islam*, 117. Hathout, "Human Genetic and Reproductive Technologies: Comparing Religious and Secular Perspectives, an Islamic Perspective," 6. Jonathan E. Brockopp, "Taking Life and Saving Life,

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technical definition wherein it is said to be the way ordained in concrete terms by God, to guide His worshippers in their life of obedience,²⁵⁹ "... the highway of good life," as expressed by some writers.²⁶⁰ *Shari'a* in this sense is the revelation embodied in the Qur'an and Prophetic teachings or traditions.²⁶¹ *Shari'a*, then, is a synonym for revelation; yet, human reasoning plays an important role in understanding and applying this revelation through a process of inquiry called *fiqh*, which is translated into English, quite misleadingly, as jurisprudence²⁶² and sometimes as Islamic law.²⁶³

The definition of *fiqh* shows its role in grasping imperatives embodied in the revelation and applying them in everyday life. In Arabic, the term *fiqh* means understanding or discerning.²⁶⁴ The same is the case regarding technical usages as the term *fiqh* is used to denote the process of reflecting on revelational statements in order to find answers to questions of everyday life.²⁶⁵ This process is subject to highly formulated stipulations outlined in the Science of the Principles of Islamic Jurisprudence²⁶⁶ or the Roots of Law,²⁶⁷ *ūsūl al-fiqh* as it is called in Arabic.²⁶⁸

The distinction between *Shari'a* and *fiqh* is, then, apparent. While the former is the revelation embodied in the Qur'an and the *Sunnah*,²⁶⁹ the latter is the human reason-

the Islamic Context" in *Islamic Ethics of Life: Abortion, War, and Euthanasia*, ed. Jonathan E Brockopp (Columbia, South Carolina University of South Carolina Press, 2003), 10.

²⁵⁹ Rahman, *Islam*, 117. Hathout, "Human Genetic and Reproductive Technologies: Comparing Religious and Secular Perspectives, an Islamic Perspective," 6.

²⁶⁰ Rahman, *Islam*, 117.

²⁶¹ See 3.2.3 The sources of *Shari'a*.

²⁶² Brockopp, "Taking Life and Saving Life, the Islamic Context ", 10.

²⁶³ A. Kevin Reinhart, "Islamic Law as Islamic Ethics", *Journal of Religious Ethics* 11, no. 2 (1983): 186-203, 187.

²⁶⁴ Nyazee, *Theories of Islamic Law*, 20. Reinhart, "Islamic Law as Islamic Ethics", 187.

²⁶⁵ Reinhart, "Islamic Law as Islamic Ethics", 189.

²⁶⁶ M Zahraa, "Unique Islamic Law Methodology and the Validity of Modern Legal and Social Science Research Methods for Islamic Research." *Arab Law Quarterly* 18, no. 3 (2003): 215-249, 223.

²⁶⁷ Rahman, *Islam*, 75.

²⁶⁸ Zahraa, "Unique Islamic Law Methodology and the Validity of Modern Legal and Social Science Research Methods for Islamic Research", 216.

²⁶⁹ For a definition of *Sunnah* and an explanation of its importance as a revelational source, see 74 below.

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based inquiry into that revelation, to extract and formulate detailed rulings governing daily life. In other words, *Shari'a* is the way revealed by God to His worshippers to bring them closer to Him, while *fiqh* is those worshippers' structured efforts to understand and apply in their daily life imperatives laid down in revelation. God is the subject of *Shari'a* while man is the subject of *fiqh*. In fact, since *fiqh* is a highly formulated science, it demands special requirements of those practising it and so it is not open to everybody.²⁷⁰

However, the terms *Shari'a* and *fiqh* are frequently synonymously used. Many writers use both terms to refer to the sum total of rulings extracted from revelation via reason,²⁷¹ which is *fiqh* in the exact meaning of the term. Thus, there are two uses of the term *Sharī'a*. Firstly, the use of the term *sharī'a* to refer to the way ordained by God and communicated to humans through His Prophet. *Shari'a* here is distinct from *fiqh*, which is the process by which *Shari'a* rulings can be extracted and formulated, in the same way the end is distinct from its means. The other use of the term *Sharī'a* refers to the sum total of rulings grasped through *fiqh*.

Nevertheless, the difference between the two uses, as I see it, is largely formal. As will be explained in more detail below, rulings grasped by human reason via *fiqh* procedure must be based directly or indirectly on the revelational sources, i.e. the Qur'an

²⁷⁰ This is apparent from the stipulations set for understanding and applying revelational imperatives. See 3.2.3.3 The principles of understanding and applying revelational statements.

²⁷¹ See for example (Zahraa, "Unique Islamic Law Methodology and the Validity of Modern Legal and Social Science Research Methods for Islamic Research," 217) in which *Shari'a* (termed Islamic law) is defined as "the body of norms, principles, rules and rulings that are extracted from the primary Islamic sources (the Qur'an, *Sunnah* and *Ijmā'* (juristic consensus)) and elaborated on by the individual reasoning of Muslim jurists in the form of Islamic jurisprudence." This is apparent also from the two following definitions in which *Fiqh* and *Shari'a* are given similar meaning, i.e. the one cited above. According to al-Zarqa, *Fiqh* is "the total sum of practical rulings islamically legitimate". (Al-Zarqa', Mustafa Ahmad, *Al-Fiqh Al-Islamī fī Thawbihi Al-Jadīd, Al-Madkhal Al-Fiqhī Al-'Aam*, Dar Al-Fikr Liltibacah, Damascus, 1067, Vol. 1, paras. 1 & 2. As cited by (Zahraa, "Unique Islamic Law Methodology and the Validity of Modern Legal and Social Science Research Methods for Islamic Research," 217), while *Sharī'a* as to al-Khallaf is "... the total sum of legitimate ... practical rulings which are benefited from detailed evidences." (Al-Khallāf, Abd Al-Wahhāb, *Ilm Usūl Al-Fiqh*, Al-Nāshir Liltiba'ah wa Al-Nashr waAl-Tawzī', 2nd edn, Cairo, n.d. [page number is not mentioned] as cited by (Zahraa, "Unique Islamic Law Methodology and the Validity of Modern Legal and Social Science Research Methods for Islamic Research", 217).

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and the *Sunnah*. These rulings, therefore, can always be attributed to *Shari'a*. In fact, this is a prerequisite for them to be islamically recognised. As such, it makes no real difference to term their sum total *Shari'a* or *fiqh* so long as this meaning is borne in mind.

3.2.2 The nature of *Shari'a*

The study of the nature of *Shari'a* is important in clarifying it as the analysis and evaluation basis in this thesis. In addition, it is significant in deciding on some issues directly related to the status of the foetus, namely, the definition of legal personality and its establishment on moral personality.²⁷² This nature is, like the *Shari'a* definition, closely connected to the vicegerency of human beings. Existing to guide human beings to fulfil their vicegerency through living in accordance with the divine will in all aspects of life, *Shari'a* has its character as a trans-religious, moral, and legal system. Religion comprises the basis upon which the whole system is built. As mentioned earlier, *Shari'a* is functional Islam,²⁷³ which is simply a religion. This is, also, apparent from the fact of the subject and aim of *Shari'a*. As such, basic doctrine and devotions occupy an essential part of *Shari'a*, and legal sanctions are normally associated with religious penalties.²⁷⁴

Shari'a also has the features of an ethical system. Indeed, detailing the ethical imperatives human beings have been created to observe is the sole aim of *Shari'a*. This is also apparent in the statement of the Prophet Mohammad in which he described the

²⁷² See 4.2.1 Basing legal personality on moral personality.

²⁷³ Rahman, *Islam*, 117.

²⁷⁴ *Ibid.*, 95. He mentions, as an indication on this fact, that every book about *Shari'a* starts by addressing religious duties.

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message he was sent to convey, Islam or, functionally, *Shari'a*, as bringing ethics or moral standards to their completion.²⁷⁵

Many examples can be cited to support this conclusion but due to space limitations, only a few will be mentioned. Firstly, all humans, as earlier mentioned,²⁷⁶ are believed to be born in a state of *fitrah* whereby they are naturally inclined to know their Creator and act in accord with His commands, that is, to act ethically. All *Shari'a* determinations are believed to be in agreement with this *fitrah* and to translate it into ethical acts.²⁷⁷ Indeed, a consensus on this meaning between the scholars of the Science of the Roots of Islamic Law has been reported.²⁷⁸ As such, the aim of each *Shari'a* determination is to encourage the performance of an act that brings into actuality what is inherited in every human being's *fitrah*.

Intent is another indication of the ethicality of *Shari'a*. When performing an act, intent should be formed purely for the sake of pleasing God. As indicated before, besides sticking to the limits set out by God, this is enough to transform any act including permissive ones into an act of worship,²⁷⁹ which is the essence of human beings' vicegerency.²⁸⁰ As extremely important as intent is, Moslem scholars deem that one must have a valid will to perform it in order for one to be addressed by *Shari'a*, that is, one

²⁷⁵ Ahmad Rajai El-Gendy, ed., *the International Islamic Code for Medical and Health Ethics*. (Kuwait: The Islamic Organization for Medical Science, 2005), 29. 'bdāl Raḥmān, Taha. *Tjdyd al-Mnhj fy Tqwym al-Trāth*. 2 ed. Casablanca: al-Mrkz al-Thqāfy al-'rby, 2005, 113.

²⁷⁶ See page 57 above.

²⁷⁷ Taha 'bdāl Raḥmān. *Tjdyd al-Mnhj fy Tqwym al-Trāth*. 2 ed. Casablanca: al-Mrkz al-Thqāfy al-'rby, 2005. 100.

²⁷⁸ Ibid, 103.

²⁷⁹ For the classification of acts into *Shari'a*, see page 71 below.

²⁸⁰ See 3.1.2 The human beings' *raison d'être*.

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becomes a valid recipient of the communicative act of *Shari'a*, or *khitāb al-tāklīf* as it is known in Arabic.²⁸¹

More importantly, there are five principal ethical values called the intents of *Shari'a*, or *māqāsid al-Shari'a* in Arabic, whose preservation is believed to be the ultimate end of *Shari'a*, viz. religion, self, reason, reproduction, and property.²⁸² The assumption is that every Qur'anic or Prophetic statement aims explicitly or implicitly towards the realisation of one or more of these values.²⁸³ Many examples of the Qur'anic and Prophetic statements in which the ordainment of their judgements is explicitly justified as being a means for the accomplishment of one of these ethical values can be cited. Lack of space prevents the discussion of them all so only two will be considered here. The Qur'an reads: "[r]ecite that which hath been inspired in thee of the Scripture, and establish worship. Lo! worship preserveth from lewdness and iniquity."²⁸⁴ Also: "... take alms of their wealth, wherewith thou mayst purify them and mayst make them grow, and pray for them. Lo! thy prayer is an assuagement for them. Allah is Hearer,

²⁸¹ 'bdāl Raḥmān, *Tjdyd al-Mnhj fy Tqwym al-Trāth*, 101.

²⁸² Aḥmd bn Mḥmd abu Hamed Al-Ghazali, *al-Mstsfā fy 'lm al-Swl*, vol. 1 (Beirut: Dār al-Ktb al-'lmyt, 1413), 173. *Ibid.*, 111. The reason can be seen in the close connection these values have with man's mission on earth. Each one of them leads in some way or another to observing that mission.

²⁸³ The objectives aiming towards preserving the five values vary in degree in accordance with their importance in saving those values. Essential objectives lie at the top and constitute the aim of all determinations directed towards saving the five values from destruction. Complementary objectives are those comprising the aim of determinations ordained to remove any hardships caused to one or more of the five values. Following that, come the amelioratory objectives that form the end of any determinations outlined to enhance and better the preservation of one or more of the five values. The amelioratory objectives are related to the aesthetic sense of humans in realizing these values. In explaining these values and their supplementary objectives see Abd al Majid al Najjar, *The Vicegerency of Man, between Revelation and Reason : A Critique of the Dialectic of the Text, Reason, and Reality*, trans. Aref T. Atari, vol. 2, Islamic Methodology (Herndon: The International Institute of Islamic Thought, 1999), 71. Nyazee, *Theories of Islamic Law*, 214. 'bdāl Raḥmān, *Tjdyd al-Mnhj fy Tqwym al-Trāth*, 111, 114. It is worth mentioning that the five principle values are normally placed within the first category of necessary objectives; however, as some writers have rightly pointed out, this classification may not be accurate and it would be more plausible to regard these values as the principles whose preservation constitutes the aim of all other objectives whether they are necessary, complementary or amelioratory (—, 'bdāl Raḥmān, *Tjdyd al-Mnhj fy Tqwym al-Trāth*, 111, 114).

²⁸⁴ 29:45.

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Knower."²⁸⁵ Even if the ethical value sought is not explicitly mentioned when a determination is being ordained, the assumption is that there must be one or more. Grasping it or them is the role of reason.²⁸⁶ As will be demonstrated with regard to the issue of abortion, considering these ethical values has great impact on decision making in the moral and legal dilemmas surrounding the foetus.²⁸⁷

In addition, the way *Shari'a* classifies actions is another indication of its ethicality. It does not only classify them into required and prohibited actions, it also adds other categories of recommended, permissible, and reprehensible.²⁸⁸ Besides showing the comprehensiveness of *Shari'a*, for they cover all possible judgements of human deeds, these categories represent its moral character. That is to say, when dealing with these categories, especially the last three, the applier is subjected to the ruling of 'resoluteness and relaxation' by which s/he can, according to moral considerations, regard the same action as permissive in some circumstances and non-permissive in others.²⁸⁹

Shari'a also has the characteristics of a legal system. Indeed, the widespread concept of *Shari'a* as such is reflected in translating it as 'Islamic law'. One of the examples of these characteristics is the adherence to legal methodology known as the Science of Roots of Law, *Ūsūl al-Fiqh*, in understanding, authenticating the authority and soundness of *Shari'a* sources, and deriving imperatives from primary sources.²⁹⁰ Another

²⁸⁵ *Ibid.*, 9: 103.

²⁸⁶ See 3.2.3.3 The principles of understanding and applying revelational statements.

²⁸⁷ See page 219 below.

²⁸⁸ Brockopp, "Taking Life and Saving Life, the Islamic Context", 11. Rahman, *Islam*, 95.

²⁸⁹ Rahman, *Islam*, 95.

²⁹⁰ Zahraa, "Unique Islamic Law Methodology and the Validity of Modern Legal and Social Science Research Methods for Islamic Research", 216.

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example is that of forming imperatives extracted into legal enactment,²⁹¹ as well as, prescribing strictly legal sanctions when rulings are broken.²⁹²

However, *Shari'a* cannot be deemed a legal system in the conventional sense of the term, that is, as a code of fixed rulings enforced by the sanctions of a state.²⁹³ In addition to the examples cited above to show the ethical features of *Shari'a*, the following example shows the embodiment of ethics into legally formed imperatives, and the superiority they have over law. Each determination in *Shari'a* has two arms: legal and ethical. The legal arm aims towards the exterior part of the determination. It is associated with a mundane sanction, and conditioned by a coextensive occasion. The ethical arm, on the other hand, concentrates on the interior part of the determination. It is associated with a self-imposed internal punishment, and justified by an ethical end. The ethical arm has superiority over the legal one. This is evident in that the ethical end guides the coextensive occasion. The performance of the act is subject to whether that end can be achieved, and if not, the act should not be performed even if its coextensive occasion is observed.²⁹⁴

Therefore, *Shari'a* cannot be considered law in the conventional meaning. Its widespread translation into English as Islamic law is, as many writers have rightly pointed out, quite misleading.²⁹⁵ In this thesis, the term *Shari'a* will be used in a wider sense, i.e. as the sum total of rulings extracted from revelation, primary sources, through human-reason-based instruments, secondary sources.

²⁹¹ Rahman, *Islam*, 95.

²⁹² *Ibid.*

²⁹³ Vesey-FitzGerald, *Muhammadan Law: An Abridgement According to Its Various Schools*, 1. Brockopp, "Taking Life and Saving Life, the Islamic Context", 10.

²⁹⁴ 'bdāl Raḥmān, *Tjdyd al-Mnhj fy Tqwym al-Trāth*, 106, 108

²⁹⁵ Vesey-FitzGerald, *Muhammadan Law: An Abridgement According to Its Various Schools*, 1. Brockopp, "Taking Life and Saving Life, the Islamic Context", 10. Reinhart, "Islamic Law as Islamic Ethics", 187.

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3.2.3 The sources of *Shari'a*

Its source is the translation of the Arabic term *āsl* that means root²⁹⁶ and is technically used in the plural form to refer to the roots from which *Shari'a* rulings can be derived.²⁹⁷ The discussion of these sources is important in clarifying the position of *Shari'a* as the analysis and evaluation basis of this thesis. In addition, this discussion shows the possibility of relying on human reasoning to know the ethical imperatives laid down by God. Consequently, if interpreted as expressions of this reasoning, arguments and ideas found in Western morals and legal literature on the status of the foetus can be accepted from an Islamic perspective.

Stating the sources of *Shari'a*, their relation to one another, and the weight of each, are subjects of the Roots of the Science of Law, or *Ūsūl al-Fiqh*. These aim to define the rules and methodology by which "... practical rulings of *Shari'a* are extracted from their detailed evidence",²⁹⁸ that is, how they can be moved from the roots to detailed determinations.²⁹⁹ According to this discipline, the sources of *Shari'a* are divided into two main categories: revelational or primary sources, and instrumental or secondary sources. Each will be briefly explained, followed by an explanation of the principles used to extract and apply *Shari'a* rulings.

²⁹⁶ Zahraa, "Unique Islamic Law Methodology and the Validity of Modern Legal and Social Science Research Methods for Islamic Research", 230.

²⁹⁷ Salqīm, Ibrāhīm, *Ūsūl Al-Fiqh Al-Islāmī*, Matba'at Al-Insha', Damascus, 1981, p.41. As cited by *Ibid*.

²⁹⁸ Khallāf, Abd Al-Wahhāb, *Ilm Usūl Al-Fiqh*, Al-Nāshir Liltiba'ah wa Al-Nashr waAl-Tawzī', 2nd edn, Cairo, n.d, p.12 and Salqīm, Ibrāhīm, *Ūsūl Al-Fiqh Al-Islāmī*, Matba'at Al-Insha', Damascus, 1981, pp 4-10, as cited by Zahraa, "Unique Islamic Law Methodology and the Validity of Modern Legal and Social Science Research Methods for Islamic Research," 230.

²⁹⁹ Reinhart, "Islamic Law as Islamic Ethics", 189.

3. Introducing Shari'a

3.2.3.1 Revelational Sources

The revelational sources are the Qur'an and the *Sunnah*. They are also called the primary sources.³⁰⁰ The Qur'an is the record of the very Word of God revealed in Arabic through the Angel Gabriel to the Prophet Mohammad.³⁰¹ It is the most authoritative source and the first to be consulted when any determination is sought.³⁰² It is, as described by Burton:

[A]n unparalleled window into the moral universe. It is a source of knowledge in the way that the entire corpus of legal precedent is for the common law traditions: not so much as an index of possible rulings as a quarry in which the astute inquirer can hope to find the building blocks for a morally valid, and therefore true, system of ethics.³⁰³

However, not all general principles governing religious and worldly affairs are set out in the Qur'an with the same clarity and detail, and so there is a need for another source to work as clarifier and detailer of the Qur'an.³⁰⁴

This explicator is the *Sunnah*. It is the second revelational or primary source, and defined as the record of the Prophet Mohammad's sayings, acts, and tacit approvals.³⁰⁵ The authority of the Prophetic teaching stems from the continuous combination the Qur'an makes between the obedience of God, and that of the Prophet.³⁰⁶ This authority is

³⁰⁰ Zahraa, "Unique Islamic Law Methodology and the Validity of Modern Legal and Social Science Research Methods for Islamic Research", 230.

³⁰¹ Khallāf, Abd Al-Wahhāb, '*Ilm Usūl Al-Fiqh*, Al-Nāshir Liltiba'ah wa Al-Nashr waAl-Tawzī', 2nd edn, Cairo, n.d, p.23 and Salqīm, Ibrāhīm, '*Usūl Al-Fiqh Al-Islāmī*, Matba'at Al-Insha', Damascus, 1981, pp 46-47, as cited by *Ibid.*, 231. Rahman, *Islam*, 25.

³⁰² Reinhart, "Islamic Law as Islamic Ethics", 189.

³⁰³ *Ibid.* he refers to John Burton, 1977, the collection of the Quran. London: Cambridge University Press, 4, 111.

³⁰⁴ Abul Fadl Mohsin Ebrahim, "Islamic Ethics and the Implications of Modern Biomedical Technology: An Analysis of Some Issues Pertaining to Reproductive Control, Biotechnical Parenting and Abortion" (Temple University, 1986), 3.

³⁰⁵ Zahraa, "Unique Islamic Law Methodology and the Validity of Modern Legal and Social Science Research Methods for Islamic Research", 233. Reinhart, "Islamic Law as Islamic Ethics", 190.

³⁰⁶ Rahman, *Islam*, 51, 52.

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understood by Moslems to be a reference to his oral and performative conduct,³⁰⁷ the record of which represents an example of a human being who lived in accordance with Qur'anic teachings and so provides a model through which it can be known how these teachings can be implemented in daily life.³⁰⁸

Both, the Qur'an and the *Sunnah* are considered to be collections of indicators, i.e. material sources, from which scholars can, directly and indirectly, extract and formulate rulings governing all possible actions.³⁰⁹ They form *Shari'a* as a doctrine revealed by God throughout which His divine will is embodied. Understanding and implementing imperatives outlined in them is the role of human intelligence or reason. To that end, procedural or instrumental sources and principles have been established.

3.2.3.2 *Instrumental Sources*

The Qur'an and the *Sunnah*, as stated above, comprise the sources of *Shari'a*. However, not all rulings are outlined in them with equal clearness and detail. Thus, instrumental sources have been designed to help extract these rulings from the primary sources, which are considered to be material ones.³¹⁰ The two main ones, the *qiyās* and *ijmā*, will be discussed here.

The first secondary or instrumental source is *qiyās*. It means analogy in Arabic, and is technically defined as giving the determination of a case outlined in the Qur'an or *Sunnah*, to a case that has no explicit determination in either of them because of the

³⁰⁷ *Ibid.* The *Sunnah* is considered to be of divine origin like the Qur'an. However, while the wording and meaning of the latter are believed to be those of God Himself, only the meaning of the former is attributed to Him. The wording is that of the Prophet. The Qur'an reads, "nor does he [the Prophet] say [aught] of [his] own desire. It is no less than inspiration sent down to him (53: 34)." Najjar, *the Vicegerency of Man, between Revelation and Reason: A Critique of the Dialectic of the Text, Reason, and Reality*, 28.

³⁰⁸ In a slightly different meaning, see Reinhart, "Islamic Law as Islamic Ethics", 190.

³⁰⁹ *Ibid.*

³¹⁰ *Ibid.*

This dependency is noted also with regard to the *ijmā'*. In Arabic it means consensus and is technically defined as the agreement held by an authoritative body on the assessment of an act or practice.³¹³ *Ijmā'* is conditional upon recourse to an indicator from one of the primary sources directly or indirectly, i.e. via *qiyās*, and as such, is clearly of an instrumental nature.³¹⁴

Besides *qiyās* and *ijmā'* there are other instrumental sources such as *istihsān* or Islamic equity, *al-masālih al-mursalah* or public interest, and *urf* or custom.³¹⁵ The use of the instrumental sources in extracting rulings set out in the revelational sources and applying them, is subject to the principles that will be explained presently.

3.2.3.3 *The principles of understanding and applying revelational statements*

The principles governing the use of the instrumental sources can be divided into those related to understanding revelational sources and those related to implementing them.

³¹¹ Zahraa, "Unique Islamic Law Methodology and the Validity of Modern Legal and Social Science Research Methods for Islamic Research", 236. Reinhart, "Islamic Law as Islamic Ethics", 191.

³¹² Reinhart, "Islamic Law as Islamic Ethics", 191.

³¹³ Zahraa, "Unique Islamic Law Methodology and the Validity of Modern Legal and Social Science Research Methods for Islamic Research", 234. Reinhart, "Islamic Law as Islamic Ethics", 190.

³¹⁴ *Wzārḥ al-Āwqāf w al-Sh'wn al-Āslāmyt, al-Mwsw'ḥ al-Fqhyt. "Ijmā"*.

³¹⁵ Zahraa, "Unique Islamic Law Methodology and the Validity of Modern Legal and Social Science Research Methods for Islamic Research", 238, 244.

3.2.3.3.1 The principles of understanding revelational statements

Understanding revelational imperatives seeks to identify the divine intent behind them. For this end, it is subject to stipulations that are designed to keep it objective. These principles are linguistic, circumstantial, intentional and rational. Firstly, revelational statements should be linguistically analyzed. Secondly, circumstances surrounding revealing Qur'anic or Prophetic statements should be considered. The intent or the principal ethical values behind *Shari'a* determinations should also be taken into account. The assumption is that every Qur'anic or Prophetic statement aims towards the realisation of one of these intents or values in their different degrees. Another guideline is that the statement at hand should be understood in the light of other statements, that is, the Qur'an and the *Sunnah* should be taken as a whole. It might be the case that a particular statement is rescinded, expanded on, or restricted by other statements. These guidelines work to help grasp the divine intent behind revelational statements, however, these statements do not denote the same level of certainty.³¹⁶

Revealed statements are divided into conclusive and inconclusive. The former refer to those statements that are definite in narration and denotation, meaning that they are attributed beyond doubt to God, with respect to the Qur'an, and to the Prophet, with respect to the *Sunnah*. As such, all Qur'anic verses and a great number of Prophetic traditions are definite. Being definite in denotation means that the statement concerned is clear in showing the divine intent, and there is only one possible meaning. If this is the case, and it is so with regard to statements that regulate doctrine, ritual acts, prescribed

³¹⁶ Najjar, *the Vicegerency of Man, between Revelation and Reason: A Critique of the Dialectic of the Text, Reason, and Reality*, 45, 52.

3. *Introducing Shari'a*

penalties, prescribed penances and inheritance, the role exercised by reason is restricted to understanding this apparent meaning. Deviating from this meaning is not acceptable.³¹⁷

If, on the other hand, the statement concerned is inconclusive in either narration or denotation or both, the role of reason expands to a greater extent. If the statement is inconclusive in narration, it is necessary to work out whether it is a revealed one, guided while doing so by stipulations outlined in the Science of Prophetic Traditions. If it is inconclusive in denotation, and it becomes so when more than one meaning is conceivable, reason is required to choose the most plausible meaning, in light of the rules of understanding explained above.³¹⁸

An important result follows; understanding reached in the case of conclusive statements cannot be changed across time or space, while that concerning inconclusive ones can be changed according to the variations between those who exercise reasoning in understanding and applying the linguistic, circumstantial, intentional and rational bases.³¹⁹ Grasping the divine intent marks the end of the phase of understanding revelation. The second phase should follow.

3.2.3.3.2 Applying revelational statements

When the ruling embodied in the revelational statement concerned is understood, that is, the divine intent has been revealed, it is time to apply it. This is also a reason-based task. The application of revelational rulings means embodying them into the human being's everyday life; that is, subjecting his or her deeds to them.³²⁰ This requires classifying human deeds under the different categories of revelational rules, which is not

³¹⁷ *Ibid.*

³¹⁸ *Ibid.*, 54.

³¹⁹ *Ibid.*, 55, 58.

³²⁰ *Ibid.*, 69.

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an easy task, as these rules tend to take general forms in order to cover boundless human deeds. Thus, the comprehensive understanding of the revelational rule and the human deed concerned is essential.³²¹ The former has been explained above. Understanding the human deed concerned, or the actualities of life as it is also termed,³²² requires examining it from all aspects: its nature, causes and motives, and short and long-term effects. Relevant disciplines such as psychology, physiology, medicine, or economics should be consulted, depending on the nature of the deed concerned. Failure in classifying human deeds under the right category of revelational rules, just like misunderstanding the divine will behind these rules, results in failure to observe the divine will.³²³ Nevertheless, sticking to the instrumental sources and principles explained earlier should help understand and implement the stance of *Shari'a* on daily life issues.

The previous discussion of the use of the instrumental sources focuses on the role of human reason within *Shari'a*, i.e. in understanding and applying it. However, an important question in terms of the current thesis arises about the role of reason beyond *Shari'a* in knowing autonomously the divine will.

3.2.3.3.3 The role of human reasoning in knowing the ethical arm of the divine will

The question that arises with regard to human reasoning is whether it can be accepted as a means of knowing the divine will when revelation is silent. It has already been shown that revelational statements can be inconclusive in denotation or narrations. There is also a possibility that there are not any revelational statements at all concerning a particular issue. One clear example is the issue of ascertaining the end of human life. As

Yasin puts it:

³²¹ *Ibid.*, 69, 70.

³²² *Ibid.*, 73.

³²³ *Ibid.*, 73, 75.

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Undoubtedly the attempt to determine the moment at which man's life on earth comes to an end in a way that is considered precise from the point of view of Islamic law is ... difficult ... [because] there is no statement, either in the Quran or *Sunnah*, which can be taken as a starting point.³²⁴

Whilst another highly relevant example is the issue of determining the beginning of human life.³²⁵

This question is similar to that posed in connection with the version of natural law theory based upon the belief in God as the lawgiver.³²⁶ The assumption in this theory is that not all God's laws have been revealed. Only those that cannot be reached without the help of revelation have been revealed while others are embodied by God in nature where they are awaiting human discovery. These unrevealed laws are the only ones available for non-believers.³²⁷ They can also be reached by believers prior to receiving revelation.³²⁸

This issue has been hotly debated among Moslem scholars. The starting-point was the question of whether the determinations of goodness and badness are inherently embodied in acts, and so can be known by reason, or whether they are ordainments laid down by God, and so can be known by no means other than revelation. Those who adopted the first perspective believed accordingly that God's laws can be known by human reason prior to revelation, and so humans are bound by them even if no reference to them is found in revelation. That is to say, if an act is discovered to be bad or good via reason, there is an obligation to act upon this discovery even if the revelation is absent. It

³²⁴ Yasin, "The End of Human Life in the Light of the Opinions of Muslim Scholars and Medical Findings", 375.

³²⁵ See for more details, pages 194-197 below.

³²⁶ Nyazee, *Theories of Islamic Law*, 44, 45.

³²⁷ Austin, John, *Lectures on Jurisprudence* (London, 1911) I, 104. As cited by *Ibid.*

³²⁸ Nyazee, *Theories of Islamic Law*, 44.

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follows that laws can be grasped and formulated for acts regarding which no revelational statement has been found.³²⁹

However, the majority of Moslem scholars hold the opposite perspective, that is, no determination can be known except through revelation. Scripture then, is the only source from which God's laws can be identified, and the only role reason can play is to discover and implement them.³³⁰ Nevertheless, all scholars, it is claimed, agree that after revelation no source other than revelation can be used.³³¹

From my perspective, both revelation and reason can be used to know the ethical arm of the divine will. As Al-Faruqi succinctly makes the point:

To know the divine will, man was given revelation, a direct and immediate disclosure of what God wants him to realize on earth. ... Equally, man is endowed with senses, reason and understanding, intuition, all the perfection necessary to enable him to discover the divine will unaided. For that will is embodied not only in causal nature, but equally in human feelings and relations. Whereas the former half takes another exercise of the discipline called natural science to discover it, the second half takes the exercise of the moral sense and the discipline of ethics.³³²

However, the knowledge derived from reason is not as reliable as that derived from revelation; as Al-Faruqi says:

The discoveries and conclusions [through reason] are not certain. They are always subject to trial and error, to further experimentation, further analysis and to correction by deeper insight. But, all this notwithstanding, the search is possible, and reason cannot despair of re-examining and correcting its own previous findings

³²⁹ *Ibid.*, 46.

³³⁰ *Ibid.*, 46, 47.

³³¹ Al-Ghryāny, al-Sādq 'bdāl Raḥmān. *Al-Hkm al-Shr'y byn al-Nql w al-'ql*. 2 ed. Tripoli: Dār al-Hkmt, 1996. 9, 10.

³³² Al-Faruqi, *Al Tawhid: Its Implications for Thought and Life*, 6.

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without failing into scepticism and cynicism. Thus, knowledge of the divine will is possible by reason, certain by revelation.³³³

Therefore, the knowledge derived from revelation should be given priority over that stemming from reason in cases of conflict. However, this is obviously not the case if uncertain knowledge is found in revelation. In this case, recourse to reason to determine the uncertain ethical imperative is inevitable. As mentioned previously, rational bases are amongst those used to determine the denotation of revelation. The role of reason is greater when no knowledge is found in revelation because in such a case, it is the only recourse for establishing the ethical imperatives of the case. This result is of special importance for the present thesis as will presently be explained.

The previous explanation of the definition, nature, and sources of *Shari'a* has been provided in order to demonstrate what is meant by undertaking this research from a *Shari'a*-based perspective. It should have made clear that the standing of *Shari'a* on any issue should be sought through consulting the revelational sources by means of the procedure and principles of understanding and application explained earlier. However, as will be detailed later in this thesis, there is no revelational conclusive statement on the legal and moral status of the foetus.³³⁴ Consequently, both revelation, as embodied in *Shari'a*, and reason will be used to ascertain the status of the foetus. Regarding the former, the relevant inconclusive revelational statements will be analysed to grasp what should be the position of revelation on the issue, guided by the appropriate instrumental sources and means.

³³³ *Ibid.*

³³⁴ See for more details, pages 194-197 below. Mohammed Na'im Yasin, "The Inception of Human Life in Light of Statements of the Quran and Sunnah and the Opinions of Muslim Scholars " in *Human Life - Its Inception and End as viewed by Islam* ed. Ali Al-saif Khaled Al-Mazkur, Ahmad Raja'ii Al-Gindi, Abd Al-Sattar Abu Ghuddah (Kuwait: The Islamic Organization for Medical Sciences, 1985a), 81.

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Reason, on the other hand, will be utilised to ascertain what should be the stance of *Shari'a* on the status of the foetus. For example, scientific knowledge concerning foetal development and the brain's structure and function will be utilised to comprehend the divine will outlined in revelation. In addition, non-Islamic theories, ideas and hypotheses will be used to identify which meaning is more reliable in case more than one is possible, and to determine the ethical imperative in case no definitive one can be derived from revelation. However, this is conditional on not contradicting the spirit of *Shari'a*, or any of its general principles. Furthermore, though *Shari'a* may have a clear position on the issue discussed, an attempt will be made to contrast and compare this position with that of the relevant Western theories. Assuming that the position of *Shari'a* will be adopted in the current research, the comparison and contrast with the position of other theories should make the stance clearer.

4 Defining Legal Personality

As previously explained, ascertaining whether the foetus is a legal person is the first step towards assessing its legal status. In order for this possibility to be examined, the definitions of legal personality and the criterion/criteria they set out should be ascertained. This chapter looks firstly at the current definitions, as this allows for an examination of the current legal status of the foetus: whether it meets the criterion/criteria set out, and so is a legal person. However, personifying or non-personifying the foetus in accordance with whether it meets or fails to meet the currently required criterion/criteria, is not necessarily the right assessment of its status. That is to say, the legal status of the foetus in the positive law sense will need to be changed, if the current definition/s of legal personality is/are discovered to be muddled. As this will be shown to be the case, this chapter moves on to suggest another definition, proposing it to be free from the limitations of the current ones.

4.1 The current definitions of legal personality

The study of the current definitions of legal personality, is the first step towards ascertaining whether the foetus is a legal person. These definitions can be classified in two parts. The first definition treats legal personality as a purely legal concept, and disregards any extra-legal factors when conferring or withdrawing it. The second bases it on a particular meta-legal consideration, namely, the quality of humanity, or being human. Stating this distinction, and describing how courts have found it difficult to differentiate between the two types of definition, a Harvard Law Review editorial says:

Courts have not been able to distinguish cleanly between these two points of view, alternately treating the issue of personality as a commonsense determination of

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what is human or as a formal legal fiction unrelated to biological conceptions of humanity. Furthermore, the expressive dynamic through which law communicates norms and values to society renders impossible a clear divide between the legal definition of “person” and the colloquial understanding of the term.³³⁵

This chapter examines the two definitions. Starting with an examination of the positivist definition, it then moves on to assess the humanity-based one, and argues that both are implausible generally and from an Islamic perspective.

4.1.1 Defining legal personality as a purely legal concept

The first of the current definitions of legal personality is the positivist definition that defines it as a purely legal concept. This section focuses on this definition, and develops an argument that shows that it is implausible. In the following, the meaning of the positivist definition, its supporting points, and implications, especially for the status of the foetus, will be examined, as well as its limitations.

4.1.1.1 The meaning of the positivist definition of legal personality

The positivist definition considers legal personality a purely legal capacity to have rights and duties, and participate in legal relations that the lawmaker confers to fulfil certain purposes.³³⁶ This definition refers to the main dimensions of legal personality as conceived by positivists. It is a purely legal concept in that no extra-legal factors of any kind are considered when it is conferred or withdrawn.³³⁷ According to Ngaire Naffine, positivist legal personality:

³³⁵ Editorial. "Notes: What We Talk About When We Talk About Persons: The Language of a Legal Fiction," *Harvard Law Review* 114, no. 6 (2001): 1745-1768, 1745.

³³⁶ Davies and Naffine, *Are Persons Property?* 52.

³³⁷ Naffine, "Who Are Law's Persons? From Cheshire Cats to Responsible Subjects", 350, 351.

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[H]as neither biological nor psychological predicates; nor does it refer back to any particular social or moral idea of a person and it is to be completely distinguished from those philosophical conceptions of the person which emphasise the importance of reason.³³⁸

In addition, legal personality is seen as no more than the representation of rights and obligations one has, or the totality of these rights and obligations.³³⁹ As Bryant Smith argues, if you strip a person of their rights and duties, you will find nothing left:

To regard legal personality as a thing apart from the legal relations, is to commit an error of the same sort as that of distinguishing title from the rights, powers, privileges and immunities for which it is only a compendious name. Without the relations, in either case, there is no more left than the smile of the Cheshire Cat after the cat had disappeared.³⁴⁰

Further, legal personality is a device utilised to fit particular purposes: "...simplifying legal calculations".³⁴¹ Representing the positivist concept of the role of legal personality Derham claims that:

Just as the concept "one" in arithmetic is essential to the logical system developed and yet is not one something (eg apple or orange, etc), so a legal system (or any system perhaps) must be provided with a basic unit before legal relationships can be devised. The legal person is the unit or entity adopted. For the logic of the system it is just as much a pure "concept" as "one" in arithmetic. It is just as independent from a human being as one is from an "apple".³⁴²

³³⁸ *Ibid.*, 351.

³³⁹ H. Kelsen, "The Pure Theory of Law, Max Knight (Trans.)", (Berkeley: University of California Press, 1970), 172, 173.

³⁴⁰ B. Smith, "Legal Personality", *The Yale law journal* 37, no. 3 (1928): 283-299, 294.

³⁴¹ F.H. Lawson, "The Creative Use of Legal Concepts", *New York University Law Review* 32 (1957): 913-916, 915.

³⁴² David P. Derham, "Theories of Legal Personality," in *Legal Personality and Political Pluralism*, ed. L. C. Webb (Melbourne: Melbourne University Press on behalf of the Australian National University, 1958) 1-5, 5.

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The other dimension of the positivist definition of legal personality is that it disregards any intrinsic qualities the entity concerned may have. The Consideration of such qualities leads to the accusation of bringing external elements into the world of law. The following example may make this point clearer. Defining the way according to which legal personality should be determined, Michoud argues that, “[f]or legal science, the notion of person is and should remain a purely juridical notion. The word signifies simply a *subject of rights-duties*, [*sujet de droit*] a being capable of having the subjective rights properly belonging to him.”³⁴³ In this passage, he clearly adopts a purely legal definition of personality; however, he then proceeds to pronounce what strips his definition of such a label:

To know if certain beings correspond to this definition, it is not necessary to ask if these beings constitute persons in the philosophical sense of the word. It is enough to ask if they are of such a nature that subjective rights may be attributed to them.³⁴⁴

According to John Dewey, considering the nature of the entity personified casts doubt over the purity of legal personality, because extraneous factors are being considered “... under the guise of the necessity of inquiring into the nature of the subjects”.³⁴⁵ In the positivist understanding then, the legal personality should be founded on no extra-legal factors. The bases of this definition will be explained as follows:

4.1.1.2 *The bases of the positivist definition of legal personality*

The positivist definition of legal personality is based on three considerations. The first is a distinction made between the world of fact and the world of law. Each is thought

³⁴³ Michoud, *La Notion. de Personnalité Morale* (1899) 11 *Revue Du Droit Public*, 1, at 8. As cited by J. Marie Dewey, “The Historic Background of Corporate Legal Personality”, *The Yale law journal* 35, no. 6 (1926): 655-673, 659. Emphasis in original.

³⁴⁴ *Ibid.*

³⁴⁵ *Ibid.*

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of as a complete and independent world, and while the existence in the former is physical, it is abstract in the latter. Indeed, a thing or an entity may exist in both worlds, but the two existences are different and distinct. In terms of legal personality, it belongs to the world of law, and is different from human personality that resides in the world of fact and hence should not be confused with it.³⁴⁶

Applying the separation between the two worlds eases the work of lawmakers. Indeed, their work is being hindered rather than facilitated, if they consider physical things while forming legal concepts. The reason for this is the fact that they do not have complete control over physical things, as they do with regard to abstract ones. Accordingly, no assurance can be given about the way the former may work. Thus, it is much better to restrict their work to abstract things. In terms of legal personality, lawmakers should avoid considering human characteristics when conferring it, even when dealing with humans. In this case, they should think of them as types.³⁴⁷

However, in the beginning, the imitation of physical things while inventing their abstract counterparts is not only conceivable, but also desirable. This is because the familiarity with physical things makes it easier for people to comprehend the invented disembodied ones. Still, this imitation should shrink in accordance with the advancement in legal creativity. In terms of legal personality, emulating human characteristics while forming it, is desirable at the beginning. Yet, a more abstract legal personality should gradually be adopted until we reach a stage at which it can be attributed to anything, regardless of whether or not it has any similarity to humans.³⁴⁸

³⁴⁶ Lawson, "The Creative Use of Legal Concepts", 914.

³⁴⁷ *Ibid.*, 923.

³⁴⁸ *Ibid.*, 915.

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The second consideration behind the exclusion of non-legal factors is their instability. Such an attribute may lead to instability and incoherence in the legal concepts built on them. To illustrate this, John Dewey cites the example of the philosophical concepts of the nature of inherent and necessary qualities that are claimed to make an entity a person. History shows, according to him, that these theories have undergone a continuous change that has led to instability in the legal concepts based on them. To make matters worse, the emergence of new philosophical concepts has not been accompanied by the disappearance of old ones. Rather, they have stayed together in a way that has introduced confusion and conflict into legal concepts.³⁴⁹

The other consideration that is claimed to support the understanding of legal personality as a purely legal concept, is the history of law. Historically, legal personality has been conferred on, and withdrawn from, variable entities regardless of any alleged intrinsic qualities, namely, human qualities. Furthermore, it was the family, not the individual, that was first regarded as a legal person. Even when legal personality was eventually conferred on individuals, not all of them were honoured. Children, women, and slaves are examples of those denied legal personality throughout history. As phrased by Christopher D. Stone:

We have been making persons of children although they were not, in law, always so. And we have done the same, albeit imperfectly some would say, with prisoners, aliens, women (especially of the married variety), the insane, Blacks, embryos, and Indians.³⁵⁰

On the other hand, because of the continuous evolution of law, non-human entities such as corporations were assigned legal personality. Clearly, corporations can hardly be said

³⁴⁹ Dewey, "The Historic Background of Corporate Legal Personality", 658.

³⁵⁰ C. D. Stone, "Should Trees Have Standing? Toward Legal Rights for Natural Objects," *Southern California Law Review* 45 (1972): 450-501, 451.

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to have any intrinsic qualities, let alone human ones. Their worth is derived from the value that others such as shareholders and customers confer on them.³⁵¹ This seems to prove that no intrinsic qualities have been required for legal personality to be conferred on an entity.³⁵²

Such an understanding yields important results concerning the conferral and withdrawal of legal personality. Stating these results with particular emphasis on their effect on the legal personification of the foetus is the theme of the following discussion.

4.1.1.3 *The results of the positivist definition of legal personality*

The adoption of the positivist definition of legal personality entails several results that are closely connected to the status of the foetus. First, the conferral and withdrawal of legal personality become subject to the lawmaker's decision regardless of any extra-legal considerations such as the intrinsic qualities of the entity concerned. In the words of Nékám:

Everything ... can become a subject - a potential center - of rights, whether a plant or an animal, a human being or an imagined spirit; and nothing ... [if the lawmaker decides so] will become a subject of rights, whether human being or anything else.³⁵³

³⁵¹ Jens David Ohlin, "Is the Concept of the Person Necessary for Human Rights?" *Columbia Law Review* 105 (2005): 209-249, 227.

³⁵² Jane Nosworthy, "The Koko Dilemma: A Challenge to Legal Personality," *SCU Law Review* 2 (1998), retrieved from http://www.scu.edu.au/schools/lawj/law_review/V2_full_text.htm, at 19/07/2006.

³⁵³ Alexander Nékám, *the Personality Conception of the Legal Entity* (Cambridge, Mass.: Harvard University Press, 1938), 26). A similar conclusion is made by Salmond. He says: "[s]o far as legal theory is concerned, a person is any being whom the law regards as capable of rights or duties Any being that is so capable is a person, whether a human being or not, and no being that is not so capable is a person, even though he be a man". John William Salmond. *Salmond on Jurisprudence*. Edited by P. J. Fitzgerald. (London: Sweet & Maxwell, 1966).

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Accordingly, the foetus will be on the same footing as any other entity or thing in terms of the chance of being attributed legal personality. All is contingent on the lawmaker's edict.

Practically speaking, many courts, as will be presently exemplified, have treated legal personality as a purely legal matter that should be solved with no recourse whatsoever to non-legal factors.³⁵⁴ In the US, the standing of some courts on the issue of whether slaves were legal persons provides a clear example. The courts deemed slaves non-legal persons, since they failed to meet the conditions set out for this standing in law. Their humanity was considered irrelevant to the legal argument. As stated by the Court of Appeals of Kentucky in *Jarman v Patterson*:

Slaves, although they are human beings, are by our laws placed on the same footing with living property of the brute creation. However deeply it may be regretted, and whether it be politic or impolitic, a slave by our code, is not treated as a person, but (negotium), a thing, as he stood in the civil code of the Roman Empire.³⁵⁵

In terms of the foetus, this result means that no recourse to extra-legal considerations, or non-legal literature, can be made when its legal status is being determined. The decision of the Queen's Bench Division in *Paton v British Pregnancy Advisory Service Trustees and Another*³⁵⁶ is a clear example of that. In this case, a man unsuccessfully sought an injunction to prevent his partner from having an abortion. Finding itself required to take a decision on whether the foetus has any rights of its own,

³⁵⁴ Seeing legal personality as a purely legal concept is considered by Adrian Whitfield to be one of the common law basic principles to which courts must conform Adrian Whitfield, "Commentary: A Decision That Stretches the Law Too Far " *BMJ* 314 (1997), retrieved from <http://bmj.bmjournals.com/cgi/content/full/314/7088/1185> at 25/03/2006.

³⁵⁵ *Jarman v Patterson*, (1828) 23 KY. (7 T.B. Mon.) 644, 645.

³⁵⁶ (1979) Q.B 276.

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the Court concluded that, after reviewing the relevant laws, it has none.³⁵⁷ Extra-legal considerations were considered irrelevant:

In the discussion of human affairs and especially of abortion, controversy can rage over the moral rights, duties, interests, standards and religious views of the parties. Moral values are in issue. I am, in fact, concerned with none of these matters. I am concerned, and concerned only, with the law of England as it applies to this claim. My task is to apply the law free of emotion or predilection.³⁵⁸

Similarly, when called upon to decide on whether frozen foetuses can inherit in the case of *In Re the Estate of K*,³⁵⁹ the Tasmanian Supreme Court made it clear that its decision would be built on no extra-legal considerations for they are, in the Court's logic, irrelevant:

The Court is not concerned with any philosophical or biological question of what is life since the question relates solely to the status recognised by law and not to any moral, scientific or theological issue.³⁶⁰

Though the Court ended by granting frozen foetuses the right to inheritance, it did so by analogy with foetuses that have that right through a mere legal fiction. That is to say, the foetuses were deemed alive at the death of the intestate and so entitled to inherit from them, but not because of any metaphysical or biological attributes but via legal assumption. The conferral of the same right on frozen foetuses by analogy with foetuses is, therefore, another legal fiction.³⁶¹

³⁵⁷ *Ibid.*, 279.

³⁵⁸ Per Judge Sir George Baker P for the court, *Ibid.*, 278.

³⁵⁹ *In Re the Estate of K*, (1996) 5 Tas R 365.

³⁶⁰ *Ibid.*, 378.

³⁶¹ *Ibid.*, 381.

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A similar position has been taken by the New York Court of Appeals in *Byrn v New York City Health and Hospitals*.³⁶² While discussing the issue of the status of the foetus, the Court said:

What is a legal person is for the law, including, of course, the Constitution, to say, which simply means that upon according legal personality to a thing the law affords it the rights and privileges of a legal person³⁶³... The process is, indeed, circular, because it is definitional. Whether the law should accord legal personality is a policy question which in most instances devolves on the Legislature, subject of course to the Constitution as it has been 'legally' rendered... The point is that it is a policy determination whether legal personality should attach and not a question of biological or 'natural' correspondence.³⁶⁴

Summing up, the Court said:

There are, then, real issues in this litigation, but they are not legal or justiciable. They are issues outside the law unless the Legislature should provide otherwise.³⁶⁵

The other result of the positivist definition of legal personality is that no difference between legal persons can be claimed, since they are all completely law-made. The classification of legal persons into real and artificial, according to whether or not they are human, becomes implausible. As expressed by Bryant Smith:

The legal personality of a corporation is just as real and no more real than the legal personality of a normal human being. In either case it is an abstraction, one of the major abstractions of legal science, like title, possession, right and duty.³⁶⁶

³⁶² *Byrn v New York City Health & Hospitals Corp.*, (1972) 286 N.E.2d 887.

³⁶³ Here the Court cited some references including Kelsen's General Theory of Law and State, which is an indication on the understanding of legal personality adopted by the Court, i.e. positivism-based understanding.

³⁶⁴ Per Breitel J for the Court *Ibid.*, 889.

³⁶⁵ Per Breitel J for the Court *Ibid.*, 890.

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In addition, regarding legal personality as a mere device makes it possible, even desirable, for lawmakers to vary in attributing it to, or withdrawing it from, a particular entity in accordance with the situation concerned.³⁶⁷ This result is of particular significance for the current thesis because it justifies the inconsistency of treatment received by the foetus. It becomes possible to grant it legal personality and its associated rights and protection in one law, and deprive it of these in another. A useful example of this perspective, is that of the North Carolina Supreme Court's position regarding the protection of foetuses in criminal and civil contexts. In *DiDonato v Wortman*, the Court interpreted the term person used in the state wrongful death statute to allow recovery for the death of a foetus.³⁶⁸ However, later in *State v Beale*, the Court refused to interpret the state murder statute to extend criminal responsibility to the killing of a foetus.³⁶⁹

Another related result is that variation between legal persons becomes acceptable with no need to attribute it to the variation in legal relations.³⁷⁰ This result follows from considering legal personality as a mere device that can be used to fit different purposes. Fitting these purposes may require attributing different types of legal personality. However, as has just been mentioned, the variation becomes unacceptable if it based on intrinsic qualities in the entities concerned, such as the variation between the real legal personality that is attributed to human beings, and the artificial legal personality that is ascribed to other entities.

³⁶⁶ Smith, "Legal Personality", 293. He cites Wiloughby (the Fundamental Concepts of Public Law, 1924, 34) making a similar statement that "[t]he legal personality of the so-called natural person is as artificial as is that of the thing or group which is personified. In both cases the character or attribute of personality is but a creation of the jurist's mind a mere conception which he finds it useful to employ in order to give logical coherence to his thought."

³⁶⁷ Smith, "Legal Personality", 298, 299.

³⁶⁸ 358 S.E. 2d 489, 493 (N.C. 1987).

³⁶⁹ 376 S.E. 2d 1, 2 n.3 at 4 (N.C. 1989).

³⁷⁰ Lawson, "The Creative Use of Legal Concepts", 914.

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The adoption of the positivist definition of legal personality entails the acceptance of these results when assessing the legal status of the foetus. However, this definition is implausible as will presently be shown.

4.1.1.4 The limitations of the positivist definition of legal personality

The positivist definition of legal personality has not been immune from criticism, in particular the criticism that it is practically unattainable. The separation between legal and non-legal relations is virtually impossible in practice, and Wesley Hohfeld admits that. Despite his emphasis on "... the importance of differentiating purely legal relations from the physical and mental facts that call such relations into being", he indicates that there is "... ample evidence of the inveterate and unfortunate tendency to confuse and blend the legal and the non-legal quantities in a given problem."³⁷¹ He cites two reasons for that. The first is the intimate relationship that the law has with other disciplines, and the second is the looseness and ambiguity of legal terminology. Such looseness and ambiguity are the result of borrowing terminology from the physical world, wherein they are used to denote physical things, and bringing them to the world of law where they are used metaphorically to designate legal things.³⁷²

In addition, Naffine specifies two further reasons for the practical unattainability of the positivist definition of legal personality. First, by describing legal personality as the capability to bear rights and duties, this definition invokes the idea of a particular entity naturally endowed with that 'capability' rather than being given it by an external

³⁷¹ Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning " in *Fundamental Legal Conceptions as Applied in Judicial Reasoning* ed. Walter Wheeler Cook (Westport, Conn.: Greenwood Press, 1978), 27.

³⁷² *Ibid.*, 27, 30.

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factor, i.e. a mere dictate of a lawmaker. This is exactly against the understanding of legal personality as a pure abstract that has no link with any pre-law existence.³⁷³

The second reason concerns intelligibility. The positivist definition of legal personality cannot be thought of without being given an empirical content, but each time it has been applied, it has lost part of its allegedly abstract and artificial nature. Accordingly, legal personality has been modelled on a particular understanding influenced by extra-legal considerations of who should count as a legal person. In this particular understanding, legal personality, was withheld from slaves because of historical, social, and political considerations. According to Ngaire Naffine, animals have similarly been denied legal personality though there is nothing preventing them from obtaining one. Women too, in her opinion, are deprived of legal personality, because their interests, while pregnant, are waived in favour of those of their foetuses. Therefore, although it might be theoretically plausible, the positivist definition of legal personality does not stand up in practice. Every time it is applied, it is affected by extra-legal considerations resulting in making it no longer an empty slot that can be filled and refilled with anything. It becomes something that is already filled with a particular content influenced by non-legal factors.³⁷⁴

In addition, even theoretically, the positivist-based definition of legal personality is problematic. The commentators quoted earlier stressing that legal personality must be formed on purely legal bases, are, in fact, among those basing it on non-legal considerations. According to Nékám, for example, the decision of the lawmaker to confer or withdraw legal personality is not arbitrary. It reflects the social importance of that

³⁷³ Naffine, "Who Are Law's Persons? From Cheshire Cats to Responsible Subjects", 355.

³⁷⁴ *Ibid.*, 355, 356.

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being, as seen by society.³⁷⁵ In other words, the lawmaker is bound to confer legal personality on each being the society considers socially important, and so, worthy of legal protection. No other requirements are necessary, not even existing experimentally since society may believe in the importance of imaginary beings:

[T]he only circumstance which makes of something a subject of rights is the fact that it is, in the opinion of the community, an entity having certain interests, real or merely imagined by the community, but always considered socially important enough to need and deserve social protection. As the socially important interests of the entity are conceived, so rights are adapted to it; and so far the entity as it has such rights acknowledged to it does the entity become a legal phenomenon, a subject of rights.³⁷⁶

Obviously, social factors are *per se* exterior to the legal realm, and therefore, when built on them, legal personality is built on non-legal considerations; it cannot be deemed a purely judicial concept.

Furthermore, introducing social evaluation into the conferral of legal personality opens the door to the influence of other non-legal factors, and so, calls the purity of this concept into question. Social evaluation is subject to the influence of other exterior factors embodied in society such as moral, metaphysical, political, and other considerations. Let us assume, for the sake of argument, that in a particular society a certain religion has strong influence, and that this religion happens to give, as is the case of Islam, special importance to human beings as the crown of all creation.³⁷⁷ It would be more than likely that human beings are considered socially important and so given legal personality. In this case, religious belief forms the basis of legal personality, even

³⁷⁵ Nékám, *the Personality Conception of the Legal Entity*, 37.

³⁷⁶ *Ibid.*

³⁷⁷ See 3.1 The Islamic concept of human being.

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indirectly. The same could be said about other factors whenever they play the same role in shaping society's opinions about whom it should count as important for the purpose of the conferral of legal personality.

Inspired by this fact, Jane Nosworthy, a proponent of animal-rights, has suggested that, in order to succeed in granting animals legal personality, effort must be made to influence society's opinions about them. Their similarities with humans should be emphasised to make society believe that the protection offered to the latter via being legal persons should be, by the same virtue, extended to animals:

[I]t seems that we must play upon human emotions in order to obtain the community's support for the legislative conferral of legal personality on animals. The general disapproval of anthropomorphism expressed by many of those engaged in philosophical discussion of animal rights may need to be tempered by pragmatism in order to maximise community support for the extension of personality to animals. Human weakness for animals who exhibit 'human-like' behaviour, such as the use of language by apes, can be used to animal advantage by arousing empathy in human observers.³⁷⁸

Furthermore, the claim that legal positivists put forward for disregarding extra-legal factors from the conferral and withdrawal of legal personality has been called into question. According to Anthony J Connolly, who is himself a positivist, no legal positivist can be held to have such a belief. All legal positivists admit the connection that law has with non-legal factors, and so consider them while forming legal concepts in general, and that of legal personality in particular.³⁷⁹ This is clearly the case with positivists such as Hart who hold a sociological or naturalistic form of legal positivism:³⁸⁰

³⁷⁸ Jane Nosworthy, "The Koko Dilemma: A Challenge to Legal Personality".

³⁷⁹ Anthony J Connolly, "Legal Positivism and Personality", *Australian Journal of Legal Philosophy* 28 (2003): 192-198, 193.

³⁸⁰ *Ibid.*, 196.

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“[f]or Hart, all legal concepts are constructions of (and therefore, necessarily connected to) some or other set of social facts”, Connolly argues.³⁸¹

The same is true of other positivists. For example, though they may not be held to have the same mode of thinking about legal positivism, Kelsen and his adherents recognise the linkage between legal personality and extra-legal factors. According to Connolly, they think of legal personality as a cluster of rights and duties whose content, those rights and duties, consists of human behaviour, which is an extra-legal fact.³⁸² Kelsen is quoted as stating that, “...*human behaviour* is the content of legal obligations and rights.”³⁸³ Then, even if legal personality were considered a purely legal concept, building on the concepts of rights and duties that are based on extra-legal facts would lead to building, even indirectly, legal personality on such facts.³⁸⁴

Moreover, Kelsenian positivists, Connolly claims, do not deny the connection law has with other disciplines in the wider world. Their call to keep legal concepts pure is just an attempt to eliminate any obscurity that might be caused to law by interaction with methodologically different disciplines.³⁸⁵ Kelsen describes the subjects of psychology, sociology, ethics, and political theory as being “...*closely connected with law*”.³⁸⁶ He also says that,

The Pure Theory of Law undertakes to delimit the cognition of law against these disciplines, *not because it ignores or denies the connect*, but because it wishes to

³⁸¹ *Ibid.*, 194. He refers to Hart’s discussion of legal concepts in *Definition and Theory in Jurisprudence* (1954) 70 *Law Quarterly Review* 37 and *The Concept of Law* (1961).

³⁸² *Ibid.*, 195.

³⁸³ *Ibid.* Connolly’s emphasis.

³⁸⁴ *Ibid.*

³⁸⁵ *Ibid.*

³⁸⁶ Kelsen, Hans, *Pure Theory of Law* (1967), p1 in *Ibid.*, (Connolly’s emphasis).

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avoid the uncritical mixture of methodologically different disciplines which obscures the essence of the science of law....³⁸⁷

Then, according to Connolly, there are no positivists who deny that legal personality has any connection with social facts.³⁸⁸ However, there are indeed positivists who deny that legal personality has a necessary connection with a particular set of social facts:

[I]t is quite consistent with the Kelsenian view that legal personality is necessarily connected with *some or other* set of social facts, that it is not necessarily connected with *a particular* set of such facts. On the Kelsenian view, legal personality may attach to any set of human behaviour. It is not limited to some particular set. For Tur and Fitzgerald also, legal personality can attach to anything that can have rights and duties, to any being capable of rights or duties. And if, per Kelsen, any set of human behaviour can bear rights and duties then any set of behavioural or social facts may bear legal personality. Legal personality may be informed by such facts.³⁸⁹

Nevertheless, legal personality is semantically independent from any particular set of those facts:

The ... historical account of the various sets of social facts to which the concept of legal personality has been applied within Western law illustrates the semantic independence of that concept from any particular set of those facts. ... [I]n practice and over given periods of history the concept has taken up specific social content. However, this is a contingent incorporation of such content and not a necessary linking of the concept and that content. ... If it was, [we] ... would not and could not be talking about the same concept over time but would rather be talking about different concepts at different times.³⁹⁰

³⁸⁷ *Ibid.*, (Connolly's emphasis).

³⁸⁸ *Ibid.*, 196.

³⁸⁹ *Ibid.*, 197. (His emphasis)

³⁹⁰ *Ibid.*, 198.

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However, in terms of the discussion of the accuracy of the claim that legal personality is a purely legal concept, it does not matter whether legal positivists are really in denial of any role played by non-legal factors. What matters is that they, at least in practice, do consider such factors. This is indeed a clear indication of the impossibility of the separation claimed between law and other disciplines in general, and legal personality and extra-legal considerations in particular. In terms of this discussion, the argument that legal positivists make a distinction between building legal personality on any set of extra-legal considerations, and building it on a particular one, and approve only of the former is not important. In either case, they admit that legal personality should be built on non-legal factors, and that is enough to refute the definition that aims to exclude such factors, regardless of whether or not this definition can be called positivist.

Furthermore, the current practice of law does not favour legal positivism. According to Michael Moore, basing legal concepts in general, and the concept of legal personality in particular, on non-legal factors, namely, moral ones, is the position law has already held.³⁹¹ He cites several examples to support this claim:

It takes considerable attention to the details of contract law, for example, to show that its doctrines are built upon the moral practices of promise making; or that tort law is built either upon some utilitarian notions of efficient resource allocation or upon some corrective justice views, or upon some accommodations between these competing moral theories; or that property law assigns rights on the basis of either utilitarian or natural (moral) rights theories; or that criminal law doctrines are

³⁹¹ M. S. Moore, *Law and Psychiatry: Rethinking the Relationship*. Cambridge [Cambridgeshire]; New York: Cambridge University Press, 1984, 48, 49. *Shari'a*'s stance on the issue is that no distinction between law and other disciplines should be held, and so, legal personality should be based on non-legal considerations. See 3.2.2 The nature of *Shari'a*.

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simply legal restatements of some moral theory of responsibility, either utilitarian or retributive.³⁹²

The concept of legal personality is no exception:

Because the law is built upon morality in this way it is plausible to suppose that the law's crucial concepts, such as that of personality, action, and intention, are also built upon corresponding moral concept. In this view, an entity is legally a person only if it is morally a person.³⁹³

Furthermore, according to the Editor of the Oxford Companion to Philosophy, in practice, the theory that separates morality from law, legal positivism, has not been followed, and when the law is ambiguous, lawyers and judges rely on moral considerations to support their positions on what the law really is.³⁹⁴ Another indication on the impossibility of separating law from non-legal factors in general, and moral factors in particular, is the legal permissibility of abortion. According to John Harris, this permissibility is based on the law's recognition of moral considerations granting the foetus no moral personality. In his words:

The law of course recognises a distinction between human persons and human non-persons. Embryos and fetuses are human beings but not full persons and permitting abortion would not be coherent unless the law also recognised that moral status of the embryo and foetus is not identical with that of the normal adult human.³⁹⁵

In addition, the intimate linkage between morality and law may be evidenced by the tendency to build legislation on recommendations worked-out by committees

³⁹² *Ibid.*, 48.

³⁹³ *Ibid.*

³⁹⁴ Ted Honderich, ed., *the Oxford Companion to Philosophy* (Oxford: Oxford University Press 2005), 505, 506.

³⁹⁵ John Harris, "Human Beings, Persons and Conjoined Twins: An Ethical Analysis of the Judgement in Re A " *Medical Law Review* 9, no. 3 (2001): 221-236, 234.

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consisting of legal and non-legal experts. The recommendations, therefore, are inevitably built, beside the legal considerations, on moral, philosophical, and/or religious ones. A clear example of this is the Warnock Committee whose 1984 Report framed the Human Fertilisation and Embryology Act (HFEA) 1990.³⁹⁶ Accordingly, the legal status of the foetus, as embodied in this legislation, is heavily influenced by the concept that the Committee's members had concerning its moral status. Indeed, the Committee's following statement precludes any other interpretation:

Although the questions of when life or personhood begin appear to be questions of fact susceptible of straightforward answers, we hold that the answers to such questions in fact are complex amalgams of moral and factual judgments. Instead of trying to answer these questions directly, we have therefore gone straight to the question of *how it is right to treat the human embryo*. We have considered what status ought to be accorded to the human embryo, and *the answer we give must necessarily be in terms of ethical or moral principles*.³⁹⁷

What could be concluded from the previous discussions is that it would be impossible to ignore extra-legal considerations while conferring legal personality. The question still arises about which factor(s) is/are relevant.

4.1.2 Defining legal personality as a humanity-based concept

Unlike the positivist definition of legal personality, the definition discussed in this section transcends the borders of the legal realm, and bases legal personality on a non-legal factor, i.e. humanity or the quality of being human. Though this thesis identifies humanity with moral and legal personality, the meaning it gives to this quality and the

³⁹⁶ See fn. ⁸⁰⁷.

³⁹⁷ Mary Warnock (Chairman). "Report of the Committee of Inquiry into Human Fertilisation and Embryology." (London: Her Majesty's Stationery Office, 1984), 60. 11.15. The first italics are in the original while the second are mine.

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criterion for acquiring it are different from those adopted in the definition examined in this section.³⁹⁸ This definition is, I will argue, unsatisfactory. In the following paragraphs, I will discuss its meaning and results, especially those which concern defining humanity, before moving on to examine its plausibility.

4.1.2.1 *The meaning of the humanity-based definition*

The humanity-based definition of legal personality is adopted by natural law theorists³⁹⁹ such as John Finnis.⁴⁰⁰ It is a view that regards legal personality as no more than a legal expression of characteristics that attach to human beings simply by virtue of their status as human beings.⁴⁰¹ Accordingly, human beings have rights and duties because of who and what they are.⁴⁰² Human beings are “...the paradigmatic subject of rights”,⁴⁰³ while others such as corporations can be deemed artificial subjects of rights or persons only by analogy with them. Unlike others, no fiction is embodied in the conferral of legal personality on them.⁴⁰⁴

Considering humanity as the basis for having rights is apparent in human rights literature. To many human rights lawyers, this is almost a self-evident thing.⁴⁰⁵ Rights are “[i]nherent in the natural condition of being human”, some of them say.⁴⁰⁶ Or, as in the opening statement of the Universal Declaration of Human Rights, the “...recognition of the inherent dignity and of the equal and inalienable rights of all members of the

³⁹⁸ See 4.2 Suggesting a new definition of legal personality.

³⁹⁹ Davies and Naffine, *Are Persons Property?*, 55.

⁴⁰⁰ John Finnis, “The Priority of Persons”, in *Oxford Essays in Jurisprudence: Fourth Series*, ed. Jeremy Horder (Oxford: Oxford University Press 2000).

⁴⁰¹ Davies and Naffine, *Are Persons Property?*, 55.

⁴⁰² *Ibid.*

⁴⁰³ Ducor, “The Legal Status of Human Materials”, 200.

⁴⁰⁴ John Chipman Gray, *The Nature and Sources of the Law*, New York: Macmillan, 2ed, 1921, 30. As cited by Davies and Naffine, *Are Persons Property?*, 55.

⁴⁰⁵ Naffine, “Who Are Law's Persons? From Cheshire Cats to Responsible Subjects”, 358.

⁴⁰⁶ David Kinley, ed., *Human Rights in Australian Law: Principles, Practice and Potential* (Sydney: Federation Press, 1998), 5.

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human family is the foundation of freedom, justice and peace”.⁴⁰⁷ Also, Article 1 of the Declaration asserts that “[a]ll human beings are born free and equal and in dignity”. Dignity here is inherent in the state of being human, as Ngairé Naffine observes.⁴⁰⁸

4.1.2.2 The results of the humanity-based definition

The humanity-based definition entails significant results concerning legal personification in general and that of the foetus in particular. First of all, it becomes necessary, in order to determine whether an entity is a legal person, to determine whether it is a human being. This, in turn, necessitates exploring the meaning of humanity and the conditions of acquiring it. In practice, the beginning and the end of human life then become the markers of the beginning and the end of legal personality. Accordingly, legal personality cannot be deemed a purely legal concept. That is, the exploration into the meaning of humanity and its related issues demands transcending the borders of the legal realm, and going deep into other disciplines that have interest in such issues, e.g. philosophy, ethics, religion, and science.⁴⁰⁹

For this thesis, this means that if a humanity-based definition is adopted, discussing whether the foetus is a human being will be essential for deciding whether it is a legal person. It means also that non-legal literature on the issue such as that concerning the meaning of humanity and its beginning will have to be consulted before a definitive conclusion can be obtained.

⁴⁰⁷ Universal Declaration of Human Rights adopted 10 Dec 1948 and reprinted in 43 Am J International Law Supp 127 (1949). Naffine, "Who Are Law's Persons? From Cheshire Cats to Responsible Subjects", 358.

⁴⁰⁸ Naffine, "Who Are Law's Persons? From Cheshire Cats to Responsible Subjects", 358.

⁴⁰⁹ *Ibid.*: 346–347

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Another consequence is that the terms ‘human’ and ‘person’ can be used interchangeably or synonymously.⁴¹⁰ Indeed, deeming humanity the basis of legal personality inevitably means that all humans must be persons and all persons, in the real sense, must be humans; personality and humanity become the two sides of the same coin. This result is apparent in the writing of proponents of humanity-based definitions such as John Finnis⁴¹¹ who moves, as Ngaire Naffine rightly points out, “... between the terms ‘person’, ‘human person’, ‘human animal’ and human being’ without any clear endeavour to distinguish these terms.”⁴¹²

Furthermore, a distinction between ‘real’ and ‘artificial’ legal persons naturally follows from this understanding. The former are human beings who gain legal personality because of the traits inherent in them, while the latter are those that lack such qualities and are attributed legal personality only by analogy with human beings.⁴¹³ This is clearly shown in the case of corporations. Three theories have been established regarding the legal personality of corporations, viz. fiction or creature, group, and person or reality theories.⁴¹⁴ According to the fiction or creature theory, corporations are deemed legal persons only through analogy with real persons, i.e. human beings, and as they lack the intrinsic qualities entitled humans to be real legal persons, their personality must be considered artificial. Consequently, their rights are limited to those stated in the charter by which they are created.⁴¹⁵ In the words of Chief Justice Marshall:

⁴¹⁰ *Ibid.*

⁴¹¹ Finnis, "The Priority of Persons".

⁴¹² Naffine, "Who Are Law's Persons? From Cheshire Cats to Responsible Subjects", 358. In this thesis, being deemed interchangeable in the suggested definition, the terms moral person, legal person, and human being will be synonymously used. See 4.2 Suggesting a new definition of legal personality.

⁴¹³ *Ibid.*, 357.

⁴¹⁴ S. A. Schane, "The Corporation Is a Person: The Language of a Legal Fiction," *Tulane Law Review* 61, no. 3 (1987): 563–609, 564.

⁴¹⁵ *Ibid.*, 565, 566.

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A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.⁴¹⁶

The group theory starts from the same assumption, that is, since human beings are the natural holders of rights, they can create corporations, upon their right to work together under the same name. Yet, there is no entity existing separately from the members who comprise it, and the rights attributed to a corporation are actually those of its members. The corporation works here merely as a useful label for that collective work.⁴¹⁷ As phrased by Morawetz, “[a]lthough a corporation is frequently spoken of as a person or unit ... the existence of a corporation independently of its shareholders is a fiction; and ... the rights and duties of an incorporated association are in reality the rights and duties of the persons who compose it, and not an imaginary being”.⁴¹⁸

The reality theory seems different from the previous two theories, but it is also formed in a way that clearly shows the effect of the humanity-based definition of legal personality. While it insists that corporations have legal personality and that their personality is as real as the personality of human beings,⁴¹⁹ it assumes that humanity is the natural basis for legal personality, and in order to grant corporations legal personality, it attributes to them what is thought of as the essence of being human. For the proponents of the theory who believe that ‘organism’ is what comprises the human essence, corporations have this, and their members are like the organs of the human body. Those who believe that having a will is that essence, claim that corporations have a common

⁴¹⁶ *Trustees of Dartmouth College v Woodward* (1819) 17 U.S (4 Wheat) 518, 636.

⁴¹⁷ Schane, "The Corporation Is a Person: The Language of a Legal Fiction," 566.

⁴¹⁸ V. Morawetz, *A Treatise on the Law of Private Corporations* 2 (2d ed. 1886) as cited by *Ibid.*

⁴¹⁹ Schane, "The Corporation Is a Person: The Language of a Legal Fiction," 566, 567.

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will.⁴²⁰ As Nékám rightly points out, though the fiction and the reality theories look different, in fact they have lots in common:

They both regard expressly or impliedly the human personality as a natural foundation of legal predicates; and the only point in which they really differ is asking whether this personality, or something substantially the same, really exists in the outside world in the case of groups and associations, or on the contrary, whether in these latter cases such a personality is a mere creation and artificial elaboration of the law.⁴²¹

The other result is that when built on humanity, legal personality must be kept consistent throughout the law. No variation according to each law's aims, principles, and context is acceptable since legal personality is built on an intrinsic trait that does not vary from one law to another.⁴²² Accordingly, if the foetus is discovered to be a legal person on account of being human, its personality will have to be kept consistent throughout the law no matter which relationships it is involved in, or with whom.

As regards the first result, humanity has been given a biological definition, embodied in a dictum known as 'the born alive rule'.

4.1.2.3 *The born alive rule*

As previously established, deeming humanity the basis of legal personality necessitates defining it. This definition has been given a biological meaning represented by the born alive rule. The discussion of this rule is of great importance since it is the one according to which the current legal status of the foetus is determined in many laws, English and Libyan laws included. I maintain that the biological definition in general,

⁴²⁰ Nékám, *the Personality Conception of the Legal Entity*, 55.

⁴²¹ *Ibid.*, 53.

⁴²² In a similar meaning see Editorial, "Notes: What We Talk About When We Talk About Persons: The Language of a Legal Fiction," 1758.

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and the born alive rule in particular are inadequate. In the following section, I will explain (1) the meaning of this rule and its adoption in law in general with particular emphasis on Libyan, English laws, and Islamic jurisprudence; (2) its implications for the legal status of the foetus; (3) justification, and (4) limitations.

4.1.2.3.1 The meaning and the legal adoption of the born alive rule

The born alive rule is the legal translation of a biological definition of a human being. According to this definition, a human being is any human organism that is capable of independent integrated functioning.⁴²³ Other non-biological attributes such as intelligence or sentience are irrelevant.⁴²⁴ This understanding is reflected in the born alive rule; "...live birth [is regarded] as the simplest bright-line rule for determining whether independent integrated organismic functioning was present".⁴²⁵

The born alive rule has been widely adopted so that according to the International Encyclopaedia of Comparative Law, "[p]eople everywhere acquire general legal personality at birth ... all laws establish the self-evident prerequisite that a child must come into the world alive in order to attain legal personality".⁴²⁶ Libyan law is no exception. According to the Civil Code (Article 29), a human being's legal personality starts when s/he is completely delivered alive.⁴²⁷ This requires, according to the commentators, that the newborn be completely separated from the pregnant woman;

⁴²³ C. M. Charles M. Kester, "Is There a Person in That Body?: An Argument for the Priority of Persons and the Need for a New Legal Paradigm," *The Georgetown law journal* 82, no. 4 (1994): 1643-1687, 1644 & 1646.

⁴²⁴ Naffine, "Who Are Law's Persons? From Cheshire Cats to Responsible Subjects", 361.

⁴²⁵ Kester, "Is There a Person in That Body?: An Argument for the Priority of Persons and the Need for a New Legal Paradigm," 1644 & 1650.

⁴²⁶ A. Heldrich and A.F. Steiner, 'Legal Personality' in M.A. Glendon (chief ed), *International Encyclopaedia of Comparative Law Vol 4: Persons and Family* (Tubingen: JCB Mohr, 1995) 3, 4. As cited by Naffine, "Who Are Law's Persons? From Cheshire Cats to Responsible Subjects", 357.

⁴²⁷ Al-Qāānwn al-Mdny al-Lyby, al-Jrydh al-Rsmyh 20/11/1954 nqlā 'n Mwswh al-Tshry' al-Lyby, al-Qānwn al-Mdny, Dār al-M'ārf bmsr, 1965.

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partial separateness, regardless of how big the separated part is, is not sufficient for the initiation of legal personality.⁴²⁸ Several commentators have interpreted the conferral of legal personality upon live birth as an indication that human life starts at that time too.⁴²⁹

The position of Libyan Criminal law is slightly different. While it links the beginning of the protection it offers to persons with the occurrence of birth, it does not require the procedure of birth to be completed. Rather, the protection starts at the beginning of the birth process. This is evident in Article 373 of the Penal Code that equates the killing of a foetus during labour with the killing of a recently born child.⁴³⁰

Another example of the systems adopting the born alive rule can be found in Islamic jurisprudence. The basis of this stance is the Prophetic saying that subjects the right to inheritance to live birth. However, jurists have differed over the meaning of live birth. While Hanafī jurists have argued that the child is born alive when most of its body is expelled from the pregnant woman's body, Maliki, Shafī'a, and Hanbali jurists have asked for a complete delivery.⁴³¹

The other relevant example is that of English law. *In Paton v British Pregnancy Advisory Service Trustees and Another*, the court confirmed that: "[t]he foetus cannot, in English law ... have a right of its own at least until it is born and has a separate existence

⁴²⁸ Al-Sdh, 'bd al-Mn'm Frj. *Aswl al-Qānwn*. Birute: Dār al-Nhḍh al-'rbyt, 1972. 389. However, the severance of the umbilical cord is not necessary. See ('bwdh, *Āsāsīyāt al-Qānwn al-Ḥd'y al-Lyby, al-Mdkhl al-ā 'lm al-Qānwn, al-Hq*, 98.)

⁴²⁹ Bkr, 'bd al-Mhymn. *Al-Qsm al-Khās fy Qānwn al-'qwbāt*. Cairo: Dār al-Nhḍh al-'rbyt, 1977. 544. Zhrt, Mḥmd al-Mrsy. "Āltby'h al-Qānwnyh ll-Jnyn." *Al-Mhāmy* (Kuwait), no. April-June (1990), 92.

⁴³⁰ Bārt, Mḥmd Rmḍān. *Qānwn al-'qwbāt al-Lyby, al-Qsm al-Khās, al-Jz' al-Āwl, Jrā'm al-ā'tdā' 'lā al-Āshkhās*. Misurata (Libya): al-Dār al-Jmāhyryh ll-Nshr w al-Twzy' w al-Ā'lān, 1993. 20, 21.

⁴³¹ Jm'h, Fkry 'bd al-'zyz Mḥmd. *Al-Hmāyh al-Mdnyh l-Nfs al-Sghyr*. Cairo: Dār al-Nhḍh al-'rbyt, 1998. 46, 47.

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from its mother”.⁴³² Similarly, in *R v Tait*, the President of the Family Division said that, “...[t]here can be no doubt, in my view, that in England and Wales the foetus has no right of action, no right at all, until birth”.⁴³³ Live birth occurs, it is held, when the process of birth has been fully completed. As Littledale J directed a jury in *R v Poulton*,⁴³⁴ “...with respect to birth, the being born alive must mean that the whole body is brought into the world; it is not sufficient that the child respire in the progress of birth.” As such, destroying the life of a foetus before the process of birth has been entirely completed is not murder. However, if such an act is committed against a foetus capable of being born alive with intent to destroy its life, this act is punishable with life imprisonment under the Infant Life (Preservation) Act 1929.⁴³⁵

This applies also to common law in general. The Ontario High Court decision in *Dehler v Ottawa Civic Hospital*⁴³⁶ is a clear example. In this case, an injunction was sought to prevent a hospital from performing an abortion. After enquiring about the legal position of the foetus, the Court concluded that, since it was unborn, it had no full legal personality and so no rights of its own.⁴³⁷ In their words:

[T]he law does not regard an unborn child as an independent legal entity prior to birth ... A fetus, whatever its stage of development, is recognized as a person in the full sense only after birth. ... In short, the law has set birth as the line of demarcation at which personhood is realized, at which full and independent legal

⁴³² *Paton v British Pregnancy Advisory Service Trustees and Another* (1979) 1 QB 276, 279.

⁴³³ *R v Tait*, (1989) 3 All ER 682.

⁴³⁴ *R v Poulton*, (1832) 5 C & P 329.

⁴³⁵ For a discussion of the purpose behind this Act and its function in the light of the Abortion Act (1967), see John Kenyon Mason, *Medico-Legal Aspects of Reproduction and Parenthood*, 2nd ed. (Ashgate; Aldershot, Hants, England: Dartmouth, 1998). D. Morgan and R. G. Lee, *Blackstone's Guide to the Human Fertilisation and Embryology Act, 1990: Abortion and Embryo Research, the New Law* (London: Blackstone Press 1991).

⁴³⁶ *Dehler v Ottawa Civic Hospital*, (1979) 101 D.L.R. (3d) 686.

⁴³⁷ *Ibid.*, 695.

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rights attach, and until a child *en ventre sa mère* sees the light of day it does not have the rights of those already born.⁴³⁸

The Supreme Court of Canada approved this ruling in *Tremblay v Daigle*.⁴³⁹

The other issue regarding which the born alive rule has been applied, is that of the possibility of applying laws prohibiting delivering or supplying drugs to women who use illegal drugs during their pregnancy. The courts in the US have, in general, founded their refusal to apply such laws on the basis that the prohibited drug supply is that to another ‘person,’ while the foetus is not a ‘person’.⁴⁴⁰ As Mason states, “...*fundamentally*, the common law sees no personality in the unborn foetus: any personal rights as do exist can mature only at birth.”⁴⁴¹

4.1.2.3.2 The implication of the born alive rule for the legal status of the foetus

The legal status of the foetus in the light of the born alive rule is not as clear and definite as might appear. The apparent meaning of the rule is that the foetus has no humanity, hence no personality or rights whatsoever. However, the legal systems that adopt the rule normally do attribute limited rights to the foetus. Such an attribution has provoked debate about whether it means conferring personality on the foetus in one way or another, since no rights can be attributed without personality.

In Libyan law, after stating the general rule that natural legal personality starts when the child is completely delivered alive, Article 29 of the Civil Code adds that the foetus has rights that the law determines. Commentators understand this addition in different ways. On the one hand, some commentators stick to the apparent meaning of

⁴³⁸ *Ibid.*

⁴³⁹ *Tremblay C. Daigle*, (1989) 62 D.L.R (4th) 634.

⁴⁴⁰ Seymour, *Childbirth and the Law*, 143.

⁴⁴¹ Mason, *Medico-Legal Aspects of Reproduction and Parenthood*, 143. Emphasis his.

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the born alive rule, as embodied in Article 29, and argue that the foetus has no humanity or personality. They argue that legal personality cannot be attributed except to an entity that has some self-subsistence and independence, while the in utero foetus is a part of the pregnant woman depending on her for sustaining its life.⁴⁴²

On the other hand, other commentators interpret the additional statement that the foetus can have rights as conferring personality on it, but, they differ over the nature of this personality. Some of them claim that it is exceptional. Accordingly, it first entitles the foetus to have rights but no obligations, and second, entitles it to have only those rights that the law confers on it.⁴⁴³

To other commentators, however, the personality of the foetus cannot be deemed exceptional. A situation can be considered to be exceptional only when it can be applied to one case or a few cases differently from a general rule that applies to all other cases. If the situation applies to all cases, it cannot obviously be regarded as an exception. This is the case of the personality of the foetus since every born human being was once a foetus, and as such, acquired the personality the law attributes to foetuses. This personality is the same personality this human being currently enjoys, and the ruling of his or her live birth just affirmed it, since it was uncertain during foetal life. There are no human beings whose personality has started at live birth, and others whose personality has started during

⁴⁴² N'mān, Jm'h Mḥmd Khlyl. *Drws fy al-Mdkhl ll'lwmm al-Qānwnyt*. Cairo: Dār al-Nhḍh al-'rbyt, 1977. 402.

⁴⁴³ Ghmyḍ, Sālm 'bd al-Raḥmān. *Al-Mdkhl al-ā 'lm al-Qānwn*. (Gharyan (Libya): The university of al-Jbl al-Ghrby, 1991), 297. Frj, Twfyq Hsn. *Al-Mdkhl ll'lwmm al-Qānwnyt*. (Alexandria: al-Mktb al-Mṣry al-Hdyth, 1971), 297. Zky, Mḥmwd Jmāl al-Dyn. *Drws fy Mqdmh al-Drāsāt al-Qānwnyt*. Cairo: al-Hy'h al-'āmh l-Sh'wn al-Mṭāb' al-Āmyryt, 1969, 401, 409. Shhāb, 'bd al-Qādr Mḥmd. *Asāsyāt al-Qānwn w al-Hq fy al-Qānwn al-'rby al-Lyby*. 1 ed. (Benghazi: Garyounis University Press, 1990), 198.

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their foetal life. All have acquired personality when they were fetuses and so the personality of the foetus cannot be considered exceptional.⁴⁴⁴

What is more, the nature of legal personality implies the understanding of the foetus's personality as being non-exceptional. It is a mere vehicle for acquiring rights rather than an actual acquisition of those rights. Thus, it is enough for one to obtain personality that one has the capacity to have rights, any rights, regardless of their quantity or type. An individual's personality will be equal to that of any other person even if they differ in the rights acquired. In terms of the foetus, there is no doubt that it has the capacity to have rights, succession rights at least, and as such, it has personality. This personality is equivalent to that of any born person despite the fact that the foetus has limited rights.⁴⁴⁵ Similarly, some commentators argue that personality in Islamic jurisprudence begins at the moment when the foetus is created, not from the moment when it is born alive. The role of live birth, according to them, is only to affirm personality after the phase when it was uncertain.⁴⁴⁶

From my perspective, however, the opinion that the born alive rule deprives the foetus of personality is more satisfactory. The rule as embodied in the Libyan Civil Code states clearly that the natural personality of human beings begins when they are born completely alive. The apparent meaning is that there is no personality prior to the complete live birth. Admittedly, the same Code adds that the foetus can have rights determined by law, but this addition means no more than a mere legal assumption to solve certain practical problems. For example, succession rights are attributed to the foetus

⁴⁴⁴ Mnṣwr Mṣṭfā Mnṣwr, *al-Mdkhl ll'lwmm al-Qānwnnyh*. As cited by N'mān, *Drws fy al-Mdkhl ll'lwmm al-Qānwnnyh*, 401.

⁴⁴⁵ *Ibid.* Al-Sdh, *Swl al-Qānwn*, 391. Kyrh, Hsn. *Al-Mdkhl al-ā al-'lwmm al-Qānwnnyh*. Alexandria: Mnsh'h al-M'ārf, 1971. 526.

⁴⁴⁶ Al-Zarqā, *al-Fqh al-Āslāmy fy Thwbbh al-Jdyd, al-Mdkhl al-Ānzryh al-Āltzām al-'āmh fy al-Fqh al-Āslāmy*, 227.

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from the moment of the death of an intestate rather than from the moment when it is born alive, to cover the period between the two events. This attribution is just a mere legal hypothesis, or "fictional construction".⁴⁴⁷ In fact, naming rights attributed to the rights of the foetus cannot be true except metaphorically, due to the absence of an essential condition for the existence of any right, i.e. a right-holder. These rights can only be described, as some commentators plausibly point out, as "legal ghosts".⁴⁴⁸

However, depriving the foetus of personality because of the born alive rule has been rightly criticised since this rule is built on implausible grounds. The justification given for the adoption of the rule will be discussed first, followed by a discussion of the criticism levelled at it.

4.1.2.3.3 The justification of the born alive rule

The born alive rule has been justified on two different grounds. On the one hand, live birth is said to derive its significance from being the time when the foetus physically separates from the pregnant woman; on the other, it is claimed that its importance lies in being the time when the foetus becomes capable of existing independently from the pregnant woman.⁴⁴⁹

The second justification seems more central. This is evident in several cases indicating that it is not enough for the foetus to separate from the pregnant woman's body, as this can happen at any time during gestation; rather, it must be capable of

⁴⁴⁷ *Elliot v Lord Joicey*, (1935) A.C. 209 233. Although in English law, this expression denotes exactly the meaning intended in Libyan law.

⁴⁴⁸ Hjāzy, 'bd al-Hy. *Al-Mdkhl l-Drāsh al-'lwm al-Qānwnyt, al-Hq*. Kuwait: the University of Kuwait, 1970. 374.

⁴⁴⁹ P. A. King, "The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn," *Michigan Law Review* 77, no. 7 (1979): 1647-1687, 1657.

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autonomous survival at the time of separation.⁴⁵⁰ This is exemplified in the American case *Marsellis v Thalhimer*⁴⁵¹ in which the court, after stating the general rule that upon live birth the child becomes eligible for an inheritance, despite being just a foetus at the death of the testator, indicated that the child must be capable of independent existence in order for such a qualification to take place.⁴⁵² In their words:

Although by the civil law of successions, a posthumous child was entitled to the same rights as those who were born in the life time of the decedent, it was only on the condition that they were born alive, and under such circumstances that the law presumed they would survive. ... Children in the mother's womb are considered, in whatever relates to themselves, as if already born; but children born dead, or in such an early state of pregnancy as to be incapable of living, although they be not actually dead at the time of their birth, are considered as if they had never been born or conceived.⁴⁵³

Another example is *State v Winthrop*.⁴⁵⁴ In this case, the issue was whether the killing of a full-term foetus before being completely separated from the pregnant woman constituted the killing of a person or homicide. The trial court concluded that the child was totally separated from the pregnant woman, though the umbilical cord was not yet cut, hence it had independent life and was a human being.⁴⁵⁵ Instructing the jury, it said:

If the child is fully delivered from the body of the mother, while the after birth is not, and the two are connected by the umbilical cord, and the child has independent life, *no matter whether it has breathed or not, or an independent circulation has been established or not*, it is a human being ...⁴⁵⁶

⁴⁵⁰ *Ibid.*, 1658.

⁴⁵¹ 2 Paige Ch.24 (N.Y.1830).

⁴⁵² *Marsellis v Thalhimer*, 40, 41.

⁴⁵³ *Marsellis v Thalhimer*, 40, 41.

⁴⁵⁴ 43 Iowa 519 (1876).

⁴⁵⁵ *State v Winthrop*, 519.

⁴⁵⁶ *Ibid.* (Emphasis in the original)

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However, the Supreme Court of Iowa did not agree with this conclusion. It held that mere physical separation is not indicative of the newborn's independent life. It must also be proven that the newborn had autonomous circulation, breathed on its own, and that the umbilical cord was cut.⁴⁵⁷ Therefore, as King rightly argues, the capability of the newborn for existing independently seems to be the central rationale behind the born alive rule.⁴⁵⁸ However, being based on such rationales has rightly caused the born alive rule to be subject to heavy criticism.

4.1.2.3.4 The evaluation of the born alive rule

The born alive rule is correctly said to be ill-founded. In the first place, new technologies have rendered the rationale behind it invalid because, if it is the separateness from the pregnant woman that makes live birth significant, it has been proven that the foetus is genetically separate at, or near, conception.⁴⁵⁹ If, however, it is the capability for independent existence, as is likely to be the case, it has already become possible for pre-term foetuses to survive apart from the pregnant women if they have reached the age of viability,⁴⁶⁰ which is currently around twenty six weeks.⁴⁶¹ This means that the foetus is

⁴⁵⁷ *Ibid.*, 521, 522.

⁴⁵⁸ King, "The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn," 1661.

⁴⁵⁹ *Ibid.*, 1660.

⁴⁶⁰ *Ibid.*

⁴⁶¹ C. Cameron and R. Williamson, "In the World of Dolly, When Does a Human Embryo Acquire Respect?" *Journal of Medical Ethics* 31, no. 4 (2005): 215-220, 218. The stage at which viability is confirmed is somewhat contentious, but the scientific consensus locates it around 26 weeks. The British Association of Perinatal Medicine considers that "[i]nfants born 22 - < 28 weeks gestation (approx. equivalent to 500-1000g.) have been termed as having "threshold viability", though in developed countries this term is more often used in reference to infants of < 26 weeks." The British Association of Perinatal Medicine (BAPM), "Memorandum: Fetuses and Newborn Infants at the Threshold of Viability a Framework for Practice," (2000), retrieved from <http://www.bapm.org/documents/publications/threshold.pdf> at 20/07/2008. For a discussion of the effect of scientific development on decreasing the age of viability, see Lee, "The Abortion Debate Today", 239, 240.

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capable of existing independently of the pregnant woman long before normal birth, which usually occurs at around thirty-eight weeks of gestational age.^{462 463}

This has caused courts to question the validity of the born alive rule. The American case of *People v Chavez* is a clear illustration of this.⁴⁶⁴ When having to decide whether a woman was guilty of the manslaughter of her newborn child, the court expressed doubts about whether such a conviction required proving that the child had been born alive, in the following long but essential quote:

Beyond question, it is a difficult thing to draw a line and lay down a fixed general rule as to the precise time at which an unborn infant, or one in the process of being born, becomes a human being in the technical sense. There is no much change in the child itself between a moment before and a moment after its expulsion from the body of its mother, and normally, while still dependent on its mother, the child, for some time before it is born, has not only the possibility but a strong probability of an ability to live an independent life. It is well known that a baby may live and grow when removed from the body of its dead mother by a Caesarian [sic] operation. The mere removal of the baby in such a case or its birth in a normal case does not, of itself and alone, create a human being. While before birth or removal it is in a sense dependent upon its mother for life, there is another sense in which it has started an independent existence after it has reached a state of development where it is capable of living and where it will, in the normal course of nature and with ordinary care, continue to live and grow as a separate being. ... There is no sound reason why an infant should not be considered a human being when born or removed from the body of its mother, when it has reached that stage of development where it is capable of living an independent life as a separate being, and where in the natural course of events it will so live if given normal and reasonable care. It should equally be held that a viable child in the process of being born is a human

⁴⁶² "Pregnancy n." *Concise Medical Dictionary*. Oxford University Press, 2007. *Oxford Reference Online*. Oxford University Press. Lancaster University. 28 April 2008 <<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t60.e8141>>

⁴⁶³ About the different methods of calculating the foetus age see fn. ⁶⁶⁶ below.

⁴⁶⁴ *People v Chavez*, (1947) 77 Cal.App.2d 621.

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being within the meaning of the homicide statutes, whether or not the process has been fully completed. It should at least be considered a human being where it is a living baby and where in the natural course of events a birth which is already started would naturally be successfully completed.⁴⁶⁵

Indeed, the futuristic possible application of ectogenesis has made this point clearer. Ectogenesis is "...the development of artificial wombs that can sustain foetuses to term without the need for women's bodies."⁴⁶⁶ It has made possible, theoretically at least, for a foetus to survive outside the pregnant woman's body, regardless of its age. Therefore, live birth, as an indication of the capability of living independently from the pregnant woman, is no longer significant.

However, it may well be argued that the foetus placed in an artificial womb is still incapable of independent existence. It still cannot sustain its own life without a womb, albeit an artificial womb this time. Such an objection is unsound since the importance of the ectogenesis argument lies in the fact that it proves that foetal life can be sustained outside natural wombs. This means that traditional birth is no longer inevitable, hence the born alive rule would no longer be applicable in all cases. However, this objection invites a discussion of the necessity of independent existence for legal personality.

⁴⁶⁵ *Ibid.*, 625, 626.

⁴⁶⁶ A. Smajdor, "The Moral Imperative for Ectogenesis", *Cambridge Quarterly of Healthcare Ethics* 16, no. 03 (2007): 336-345, 337. Artificial wombs are already in use at both edges of gestation. Six-month-old foetuses on the one hand are kept alive in incubators and artificially fertilised eggs on the other are also kept alive in vitro for three and four days before implanting them into a womb. What is needed is just filling the gap via the use of artificial wombs capable of sustaining foetuses to term regardless of their age. Jeremy Rifkin, "The End of Pregnancy: Within a Generation There Will Be Probably Be Mass Use of Artificial Wombs to Grow Babies," *The Guardian* Thursday January 17, 2002. This, according to the most important researchers working on ectogenesis, as Robin McKie wrote in *The Observer*, "will become reality in a few years." ((Robin McKie, "Men Redundant? Now We Don't Need Women Either," *The Observer* Sunday February 10, 2002.) Yosinori Kuwabara, the Japanese scientist who managed to keep goat foetuses alive in an artificial womb for ten days, predicted that that would happen in less than six years. Others, though did not share the same optimism, see as probable the mass use of artificial wombs after quite a longer time. (McKie, "Men Redundant? Now We Don't Need Women Either.") This has led Jeremy Rifkin to state that "[t]he artificial womb seems the next logical step in a process that has increasingly removed reproduction from traditional maternity and made of it a laboratory process." (———, "Men Redundant? Now We Don't Need Women Either.") For more details, see S. Gelfand, *Ectogenesis: Artificial Womb Technology and the Future of Human Reproduction* (Amsterdam-New York: Rodopi, 2006).

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Independent existence, which is the central rationale behind the born alive rule, is in my view, an unsatisfactory criterion for legally defined humanity, and subsequent personality. Independence is unattainable for many people, yet this has not led to weakening their humanity and so their personality. Similarly, the dependence of the foetus, in itself, should not be used to deprive it of any legal standing. As Stanton and Harris ironically point out:

[T]here is a sense in which none of us are capable of [independence] ... and certainly in complex modern societies, most people require assistance and are in some sense dependent. Is the person attached to a heart/lung machine or dialysis machine independent or not? Why is independence of the mother so important?⁴⁶⁷

Similarly, Goldenring sees no reason why an eighty year old patient who, despite being kept alive in an intensive care unit by an external mechanical respirator, is considered alive, as long as s/he has a functioning brain, while an eight weeks old foetus is not, despite the fact that it is "...inside the most advanced intensive care unit ever designed – the uterus ... [and] is being maintained by the most complex extracorporeal respirator known – the placenta", and has a functioning brain.⁴⁶⁸ Making the same point, Catharine MacKinnon argues:

Foetal dependence upon the pregnant woman does not make the foetus a part of her any more than fully dependent adults are parts of those on whom they are

⁴⁶⁷ Catherine Stanton and John Harris, "The Moral Status of the Embryo Post-Dolly", *Journal of Medical Ethics* 31, no. 4 (2005): 221-225, 222.

⁴⁶⁸ John M Goldenring, "The Brain-Life Theory: Towards a Consistent Biological Definition of Humanness," *British Medical Journal* 11, no. 4 (1985): 198-204, 199. It is worth mentioning that this thesis adopts a different perspective about when the brain starts functioning. See Section 5.1 Determining the timing of the ensoulment event.

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dependent. The foetus is a unique kind of whole that, after a certain point, can live or die without the mother.⁴⁶⁹

Besides that, being a biologically based criterion, the born alive rule is subject to the same criticism levelled at basing legal personality on biological criteria. In the following quote, with which I *partially* agree, Naffine states what she considers to be the limitations of the biologically based definition of a legal person:

The reliance of this definition of the person, at least in part, on a biological paradigm of human being means that it is exposed to controversies between biologists, which are in turn influenced by the new medical technologies. It is therefore also vulnerable to biological arguments that human life starts earlier than birth and that death is a process not an event and therefore its timing is indeterminate. It is also vulnerable to social or cultural considerations because the meaning of biology is always socially determined. What counts as a legal biological human is therefore not just subject to medical (which of course are also cultural) determinations about the beginnings and ends of a human being. What it means to be a biological legal human is also influenced by cultural ideas of what it is to be a whole and proper metaphysical person.⁴⁷⁰

While agreeing on the first point, I see no reason for the other two. Indeed, the reliance on biology is implausible because of its changeability. Stability in determining who the subjects of law are is certainly needed.⁴⁷¹ However, criticising biological definitions because they suggest that human life may well begin before birth is not reasonable. Such a suggestion will be an important proposition to examine, if humanity is considered the basis for legal personality. In addition the fact that biological definitions are subject to cultural and social considerations of what it means to be human is not a

⁴⁶⁹ C. A. MacKinnon, "Reflections on Sex Equality under Law", *The Yale law journal* 100, no. 5 (1991): 1281-1328, 1314.

⁴⁷⁰ Naffine, "Who Are Law's Persons? From Cheshire Cats to Responsible Subjects", 359, 360.

⁴⁷¹ Hjāzy, *Al-Mdkhl l-Drāsh al-'lwm al-Qānwnyt, al-Hq*, 387.

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limitation. Actually, it reduces the pure biology of these definitions, and makes them more non-biological. Therefore, seeing the reliance on cultural and social considerations as a shortcoming, is a reminder of the implausible positivist definition of legal personality, wherein non-legal considerations are excluded.⁴⁷² Furthermore, biological factors cannot be completely disregarded. Whilst they should not be the final word on who counts as a legal person, they can, and should, as will be explained later in this thesis, be used to apply the criterion of legal personality.⁴⁷³

The other limitation of the definition of humanity as a biologically based concept is its arbitrariness. As previously indicated, according to this definition, it is sufficient, in order to be a human and so qualify as a legal person, to meet the biological paradigm, regardless of having any intelligence or sentience.⁴⁷⁴ Non-human entities are considered non-persons, despite the fact that some of them are more intelligent or sentient than some humans, such as babies and cognitively impaired adults who are nonetheless deemed to be legal persons.⁴⁷⁵

This is what some writers call speciesism. It is the preference given to the members of one species, namely, the human species, over members of other species, just because of membership.⁴⁷⁶ As Hursthouse indicates, speciesism in this sense is as indefensible as sexism, i.e. preference based on membership of a sex, or racism, i.e. preference based on membership of a race:

⁴⁷² Indeed, Naffine advocates the formal positivist definition of legal personality, that is, as an empty slot that can be filled with any thing. As such, it, personality, can be conferred on anyone or anything regardless of their sex, age, or species; the positivist definition, in such a case, will provide "...the basis of a law for everyone." Naffine, "Who Are Law's Persons? From Cheshire Cats to Responsible Subjects", 366, 367.

⁴⁷³ See 5.1 Determining the timing of the ensoulment event.

⁴⁷⁴ Naffine, "Who Are Law's Persons? From Cheshire Cats to Responsible Subjects", 361.

⁴⁷⁵ *Ibid.*

⁴⁷⁶ Peter Singer, *Animal Liberation*, 2nd ed. (London: Pimlico, 1995), 6.

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Speciesism is just like racism and sexism built on irrelevant moral differences between the preferable entity and others. Like sexists and racists, speciesists consider their category –fellows their equal while excluding others even if those fellows do not meet the requirements claimed to distinguish that category from others. Retarded humans are considered morally important in the same way normal human beings are though they lack the rationality claimed to distinguish humans from animals. They are “the kind of thing” that deserves to be distinguishable as racists and sexists were defending the inclusion of retarded white men while excluding women and non-white men.⁴⁷⁷

For these reasons, it seems fair to conclude that the humanity-based definition of legal personality is problematic. However, this does not mean that humanity should be wholly abandoned as a mechanism for deciding the issue of legal personality. As will be explained presently, the most satisfactory definition of legal personality is one that is based on a moral criterion that is exclusively human, i.e. cannot be fulfilled by entities other than humans.

⁴⁷⁷ Rosalind Hursthouse, *Ethics, Humans and Other Animals: An Introduction with Readings* (London; New York: Routledge, 2000), 122, 123.

4.2 Suggesting a new definition of legal personality

Since the current definitions of legal personality are unsatisfactory, a new definition free from their limitations is suggested. The criterion suggested in this definition will then be applied to the foetus to determine whether it is a person. The first feature of the new definition, as argued in this chapter, is to base legal personality on moral personality. The second one is to base moral personality on a criterion that cannot be met except by human beings, i.e. moral agency. As a result, the concepts of legal personality, moral personality, and humanity become identical to one another.⁴⁷⁸

To justify this definition, four points need to be proven. The first is that legal personality should be based on extra-legal factors in general. The second is that legal personality should be established on moral personality amongst non-legal factors. The third point is that moral agency should be selected as the criterion of moral personality. Lastly, that moral agency is a human-specific criterion, that is, one that cannot be met by non-humans. Since it has already been proven, through the theoretical and practical failure of the positivist definition, that legal personality cannot but be based on extra-legal factors,⁴⁷⁹ the following discussions will focus on the other three points respectively.

4.2.1 Basing legal personality on moral personality

This section is about the relationship between legal personality and moral personality. It contains the proposition that the former should be based on the latter

⁴⁷⁸ Margaret Brazier argues that “the belief in the unique nature of humanity ... can never be established by tangible objective criteria”. See "Embryo' "Rights": Abortion and Research " in *Medicine, Ethics and the Law*, ed. M. D. A. Freeman (London Stevens & Sons Ltd., 1988), 14. However, I argue in this chapter that human beings are unique because they are the only entities known to have moral agency, which is a morally and legally relevant criterion. So, the belief in their uniqueness can be founded on a tangible objective criterion.

⁴⁷⁹ See 4.1.1.4 The limitations of the positivist definition of legal personality.

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because this is the position supported by the concept of personality in *Shari'a*, the yardstick against which the ideas and theories discussed in this thesis are evaluated. There is also a strong argument that this position is the one adopted by law. As this last point has already been shown in this thesis,⁴⁸⁰ the following discussion will focus on the first point.

It is clear that the concept of personality in *Shari'a* advocates basing legal personality on moral personality. This can be shown through recalling the relationship that personality or *dhimmah* has with vicegerency. As previously detailed, human beings have been created to be God's vicegerents on earth. The essence of this vicegerency is bringing the ethical imperatives constituting the ethical arm of the divine will, into actuality. The main explicator of these imperatives is *Shari'a*,⁴⁸¹ whose message is to bring ethics or moral standards to their completion.⁴⁸² As such, the imperatives detailed in *Shari'a* are ethical in essence, though they might be clothed in legal forms and enactments; the latter are used as a means to the former. In this way, the nature of *dhimmah*, which is the *Shari'a* equivalent of personality, is determined. It has been conferred on human beings to enable them to assume and bear their mission as vicegerents.⁴⁸³ As such, it is a capacity for acquiring rights and obligations that are ethical in essence. In other words, since *Shari'a* has the nature of a multidimensional system wherein law is based on ethics, *dhimmah*, as the capacity of acquisition in this system, has that nature too.

⁴⁸⁰ See page 101 below.

⁴⁸¹ The other being human reason. See 3.2.3.3.3 The role of human reasoning in knowing the ethical arm of the divine will.

⁴⁸² El-Gendy, ed., *the International Islamic Code for Medical and Health Ethics*, 29. Taha. *Tjdyd al-Mnhj fy Tqwym al-Trāth*, 113.

⁴⁸³ See page 57 above.

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As a result, it seems implausible to equate *dhimmah* with legal personality as it stands in law. This implausible position has been held by some commentators who have assumed that, since the two concepts have similar definitions,⁴⁸⁴ they are two terms for the same concept.⁴⁸⁵ Accordingly, they have used the term legal personality instead of the term *dhimmah* to refer to the ability to acquire rights and duties in *Shari'a*.⁴⁸⁶ Others, nevertheless, have objected to the identification of legal personality and *dhimmah* and claimed that they differ in two ways.⁴⁸⁷ The first difference concerns their source: while the giver of *dhimmah* is God, it is the state that assigns legal personality. The second objection concerns their ability to encompass rights and duties: while *dhimmah* expands to embrace matters related to the hereafter, legal personality is limited to those connected to this world. In addition, some commentators have refused the use of the term legal personality in *Shari'a* because, they claim, it is unknown to it.⁴⁸⁸

However, the denial of the term legal personality because it is unknown to *Shari'a* is not convincing. The worth of any term is contingent upon its ability to convey the meaning intended, the term has no significance *per se*. Thus, choosing the term *dhimmah*

⁴⁸⁴ See for example, Al-Tftāzāny, *Shrḥ al-Tlwyḥ 'lā al-Twdyḥ*, 323. Hsyn, *Al-Mlkyḥ w Nḏryḥ al-'qd*, 225. Bdrān, *abw al-'ynyn. Al-Shryḥ al-Āslāmyt*. Alexandria: M'ssh Shbāb al-Jām't, (n.d.), 428. Khlāf, *'lm Swl al-Fqh*, 136. Nyazee, *Islamic Law of Business Organization Corporations. Islamic Law and Jurisprudence*, 91. In Nyazee's words *dhimmah* is "...an attribute by which a human being becomes capable of acquiring rights and obligations." ———, *Islamic Law of Business Organization Corporations. Islamic Law and Jurisprudence*, 91.

⁴⁸⁵ Nyazee, *Islamic Law of Business Organization Corporations. Islamic Law and Jurisprudence*, 87. Mdkwr, *Al-Jnyn w al-Āḥkām al-Mt'lqḥ bh fy al-Fqh al-Āslāmy*, 274. Mrqs, *Slymān. Al-Mdkhl ll'lwm al-Qānwnt*. 4 ed. (Cairo: Dār al-Nshr ll-Jām'āt al-Mṣryt, 1961), 553. 'bdāl Raḥmān, *Fāḍl. Aṣwl- al-Fqh*. 2 ed. (Amman: Dār al-Msyrt, 1998), 57.

⁴⁸⁶ Al-Zarqā, *Al-Fqh al-Āslāmy fy Thwbh al-Jdyd, al-Mdkhl al-Ānḏryḥ al-Āltzām al-'āmḥ fy al-Fqh al-Āslāmy*, 276. Abrāhym, "Āltḏbyḥ al-Qānwnyḥ ll-Jnyn", 23, 26. Mṣṭfā Abrāhym al-Zlmy and 'ly Aḥmd Al-Mhdāwy. *Aṣwl- al-Fqh fy Nsyjh al-Jdyd*. (Amman: al-Mrkz al-Qwmy, 1999), 250. Al-Zḥyly, *Whbt. Al-Fqh al-Āslāmy w Adl-th*, vol. 4. 4th edition, (Damascus: Dār al-Fkr. 1997), 2961.

⁴⁸⁷ Nyazee, *Islamic Law of Business Organization Corporations. Islamic Law and Jurisprudence*, 106.

⁴⁸⁸ Al-Hmydāwy, *Hsām 'bd al-Wāḥd Kāzm. "āl-Mwt w Āthārḥ al-Qānwnt*." (Baghdad: Baghdad University Law School, 1999). (Unpublished Ph.D thesis), 202.

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or legal personality should be built on this criterion, not on being known or unknown to one system or another. As will shortly be explained, the term *dhimmah* is more able to express the meaning of the capacity for acquisition in *Shari'a* than the term legal personality.

With regard to the two claimed differences between *dhimmah* and legal personality, while I believe that the first one is implausible, the second has some merit. The claim that legal personality is assigned by the state dismisses the opinion that personality is a quality inherited in humans, and so when observing it, the lawmaker or the state does no more than recognise what already exists.⁴⁸⁹ The real assigner, then, cannot be the state. It is either God or Nature, according to one's belief. The second claim that *dhimmah* is wider than legal personality is indeed plausible. Being the capacity for acquisition in *Shari'a*, the trans-ethical, religious, and legal system, has led to *dhimmah* being wider than legal personality. It embraces rights and obligations related to this world and the hereafter, on the one hand, and rights and obligations of different nature, i.e. ethical, religious, and legal, on the other.

Therefore, it seems reasonable to claim that the term *dhimmah* instead of legal personality should be used to refer to one's ability to have rights and duties in *Shari'a*. Associating the term 'personality' with the adjective 'legal' inaccurately gives the impression that only 'legal' rights and duties can be gained through this ability. Furthermore, this objection can still hold true, in my opinion, even if *dhimmah* is understood as an ability to have 'legal' rights and duties, since legal enactments and procedures are used in *Shari'a* as a means to actualising imperatives of an ethical nature. That is to say, legal rights and duties here are no more than ethical ones clothed in legal

⁴⁸⁹ See 4.1.2.1 The meaning of the humanity-based definition.

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wording.⁴⁹⁰ It might be said that the objection is no longer needed if the term ‘personality’ is used without being associated with the adjective ‘legal’. I would agree on that except there is another reason for the preference given to the term *dhimmah*.

The second reason for the preference given to the term *dhimmah*, when talking about the capacity for acquiring rights in *Shari’a*, is that, unlike the term personality, it evokes the concept’s special origin.⁴⁹¹ In other words, when the term *dhimmah* is utilised, it evokes the idea of being endowed by God, and so it seems more appropriate to use it when talking about the capacity for acquiring rights in *Shari’a*, the way ordained by God. Hence, in this thesis, the term *dhimmah* will be used when talking about that capacity in *Shari’a*; elsewhere, the term personality will be used.

In summary, it seems reasonable to conclude that legal personality should be based on moral personality. The question then arises of the basis on which the latter should be founded.

4.2.2 Basing moral personality on moral agency

Basing legal personality on moral personality is not the end of the inquiry as it is still necessary to determine on which criterion the latter, and indirectly the former, should be based. I hold that the most plausible criterion is moral agency. I will, therefore, define moral agency before going on to give my justification for selecting it as the sole criterion upon which moral personality should be based. Following that, I will address the main criticism levelled at using moral agency as the basis of moral personality.

⁴⁹⁰ See 3.2.2 The nature of *Shari’a*.

⁴⁹¹ See page 57 above

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4.2.2.1 The definition of moral agency

Though I have found no explicit definition of moral agency, I think one can be formulated by studying the different philosophical writings about the capacity. In these writings, the capacity for moral agency is seen generally as being composed of two components: cognition and autonomy. Though these components are differently expressed in these writings, the core meaning is quite similar.

The two constituents of moral agency can be found in the writing of Kant. According to him, the autonomy element, or the capacity to will, means operating in compliance with the concepts of law instead of being inertly subjected to nature's forces.⁴⁹² Acting in such a manner necessitates that one "...be free to follow logic rather than the random fluctuations of brain chemistry, free to make sense."⁴⁹³ Following logic or reasoning leads to establishing purely reason-based universalised moral imperatives.⁴⁹⁴ Will and reason, therefore, are equated with one another; "...will is nothing but practical reason",⁴⁹⁵ in Kant's words.

In Alan Gewirth's writing, the two elements of agency are referred to as purposiveness and voluntariness.⁴⁹⁶ The former embraces the quality of cognition and requires the agents to act for self-related good ends, as they see them.⁴⁹⁷ The

⁴⁹² Immanuel Kant, *Fundamental Principles of the Metaphysics of Morals* 40 (Thomas K. Abbott B. D. trans., 1987) As cited by L. R. Meyer, "Unruly Rights," *Cardozo Law Review*, 22, no. 1 (2000), 5.

⁴⁹³ *Ibid.*

⁴⁹⁴ "Autonomy/heteronomy" *the Oxford Dictionary of Philosophy*. Simon Blackburn. Oxford University Press, 1996. *Oxford Reference Online*. Oxford University Press. Lancaster University. 8 June 2007 <<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t98.e217>>

⁴⁹⁵ See supra fn. ⁴⁹².

⁴⁹⁶ Alan Gewirth, 1978, *Reason and Morality*, Chicago: the University of Chicago Press, 27. As cited by Mahowald, "Person", 1938.

⁴⁹⁷ *Ibid.* In a similar meaning, Michael Moore says, "...an entity is a person in moral theory or legal doctrine only if it is rational and autonomous ... viz., only if it is a practical reasoner." (Moore, *Law and Psychiatry: Rethinking the Relationship*, 49). To him, "[a] person is a rational being, a being who acts for intelligible ends in light of rational beliefs." ———, *Law and Psychiatry: Rethinking the Relationship*, 66.

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voluntariness element requires the agents to perform acts willingly in the light of knowledge of the circumstances surrounding them.⁴⁹⁸ Voluntariness is linked to rationality in a way that rules out the likelihood that acts performed impetuously can be considered purely voluntary.⁴⁹⁹

In a similar analysis, Charles Taylor defines the moral agent as "...a being who encompasses purposes, who can be said to go after, and sometimes attain goals."⁵⁰⁰ Likewise, a person for Michael Moore is "...a rational being, a being who acts for intelligible ends in light of rational beliefs."⁵⁰¹

John Locke's definition of a person is another source through the analysis of which the elements of moral agency can be identified. This is so since being a moral agent is, as Warren rightly concludes, a prerequisite for being a person in this definition.⁵⁰² For Locke, "...*person* stands for ... a thinking intelligent being, that has reason and reflection, and can consider itself as itself, the same thinking thing, in different times and places."⁵⁰³ To be a person, according to this definition, one has to have "...intelligence, and ... [the capacities] for thought, reason, reflection, and self-awareness."⁵⁰⁴ In such a definition, one can be a person without being a moral agent.⁵⁰⁵ However, Locke proceeds to say that a person "...is a forensic term, appropriating actions

⁴⁹⁸ Alan Gewirth, 1978, *Reason and Morality*, Chicago: the University of Chicago Press, 27. As cited by Mahowald, "Person", 1939.

⁴⁹⁹ *Ibid.*

⁵⁰⁰ Charles Taylor, "The Person", in *the Category of the Person: Anthropology, Philosophy, History*, ed. M. Carrithers, S. Lukes, and S. Collins (Cambridge: Cambridge University Press, 1985), 258.

⁵⁰¹ Moore, *Law and Psychiatry: Rethinking the Relationship*, 66.

⁵⁰² Warren, *Moral Status: Obligations to Persons and Other Living Things*, 95. She considers this definition maximalist, that is, a definition that bases moral personality on the acquisition of full moral agency.

⁵⁰³ John Locke, *An Essay Concerning Human Understanding*, ed. A.D. Woozley (London: Fontana library, 1964), 211. (Emphasis in original)

⁵⁰⁴ Warren, *Moral Status: Obligations to Persons and Other Living Things*, 95.

⁵⁰⁵ *Ibid.*

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and their merit, and so belongs only to intelligent agents, capable of a law.”⁵⁰⁶ As such, to be a person, one has to have the capacity for evaluating acts and choosing from them. As a result, individuals can be held accountable, and so be credited or blamed for their actions.⁵⁰⁷ So, once again, the two elements of cognition and autonomy are designated as central to the definition of moral agency.

In addition, cognition and autonomy play important roles in Harry Frankfurt’s concept of will, which, he claims, can distinguish persons from non-persons. According to him, desires that motivate one to act or refrain from acting can be classified into first and second order desires. The first order desires are those that motivate one to do or abstain from doing a particular act. The second order desires are those to have one particular desire as that which motivates, will, or would motivate someone to perform an act. While having desires and an ability to choose between them is essential for being a person, it is, however, insufficient in Harry Frankfurt’s concept of will. In order to be a person, one must be able to form second-order desires, that is, be able to evaluate different first order desires and choose one, or more of them, to be the motive for performing or abstaining from performing an act, and to become someone’s will.⁵⁰⁸

The rationality element of moral agency can be identified here since the evaluation of different desires and the choice that follows, requires one to be rational. In Frankfurt’s words:

⁵⁰⁶ Locke, *An Essay Concerning Human Understanding*, 220.

⁵⁰⁷ Warren, *Moral Status: Obligations to Persons and Other Living Things*, 95. In a similar meaning, see Naffine, "Who Are Law's Persons? From Cheshire Cats to Responsible Subjects", 362.

⁵⁰⁸ H. G. Frankfurt, "Freedom of the Will and the Concept of a Person", *the Journal of Philosophy* 68, no. 1 (1971): 5-20, 6, 7.

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[I]t is only in virtue of his rational capacities that a person is capable of becoming critically aware of his own will and of forming volitions of the second order. The structure of a person's will presupposes, accordingly, that he is a rational being.⁵⁰⁹

The autonomy element is also essential in Frankfurt's theory. Indeed, his theory is entitled "the freedom of will".⁵¹⁰ He differentiates between two types of freedom: that of action and that of will. While the former pertains to the first order-desires and means the freedom to perform whatever actions one wants to perform, the latter relates to second-order desire volitions and refers to the agent's freedom to will what s/he wants to will. This distinction makes it possible to distinguish between persons and non-persons. Although non-persons share with persons the freedom of action because they can be shown to have the ability to do one act instead of another, only the latter (persons) can have the ability to freely form second order desires.⁵¹¹

From these writings, it can be argued that moral agency has two elements, cognition and volition, and can be defined in the light of them as the capability to freely make moral judgments. This involves evaluating the different choices faced, and selecting, out of free will, one or more of them to implement. As such, moral agency is also associated with accountability. That is to say, the exercise of the capacity for moral agency is associated with being morally accountable. When one voluntarily and consciously decides to perform or refrain from performing a particular act while other options are equally possible, s/he should be accountable for his or her choices.⁵¹² This is apparent in the Islamic conception of vicegerency, as outlined earlier,⁵¹³ and in the

⁵⁰⁹ *Ibid.*, 11, 12.

⁵¹⁰ *Ibid.*, 1.

⁵¹¹ *Ibid.*, 14, 17.

⁵¹² In a similar meaning, see Naffine, "Who Are Law's Persons? From Cheshire Cats to Responsible Subjects", 362. C. Cohen, "Do Animals Have Rights?" *Ethics & Behavior* 7, no. 2 (1997): 91-102, 96, 98.

⁵¹³ See 3.1.2 The human beings' *raison d'être*.

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philosophy of Kant who believed that "...moral accountability presupposes freedom and the ability to follow the moral law."⁵¹⁴

The intimate connection between accountability and moral agency is evident in that accountability has been associated with personality, and understood as a moral agency-based concept throughout history. It has been believed that in order to hold an entity accountable for its actions, it must be a person, and to be so, it must be a moral agent. This has been the case even with regard to animals and inanimate things: all were personified before being held accountable for actions caused by them. Similarly, corporate accountability is said to be contingent upon whether companies can be deemed moral agents and persons.⁵¹⁵

In this regard, moral agency is also comparable with the legal principle of *mens rea*. According to this principle, to hold someone responsible for committing a criminal act, they must generally be proven to have committed it deliberately while being aware of its illegal nature. As Cohen puts it, "...in law, an act can be criminal only when the guilty deed, the *actus reus*, is done with a guilty mind, *mens rea*."⁵¹⁶ The cognition and autonomy elements of moral agency are apparent here. As suggested by Brown and colleagues, "[t]raditional criminal legal doctrine constructs a free-willed, intentional, rational, choosing, responsible, individual subject: a subject morally suitable for punishment."⁵¹⁷ In a similar vein, Waller and Williams say that, "...almost the whole of our system of substantive criminal law is based upon the view that a human being is a

⁵¹⁴ G. K. Becker, "The Moral Status of Persons: Introduction " in *the Moral Status of Persons: Perspectives on Bioethics*, ed. G. K. Becker (Amsterdam-Atlanta Rodopi, 2000), 3.

⁵¹⁵ Moore, *Law and Psychiatry: Rethinking the Relationship*, 62, 64.

⁵¹⁶ Carl Cohen, "The Case for the Use of Animals in Biomedical Research", *New England Journal of Medicine* 315, no. 14 (1986): 865-870, 867.

⁵¹⁷ D. Brown, D. Farrier, S. Egger and L. McNamara, *Criminal Laws* (Sydney: Federation Press, 3rd ed, 2001) 24. As cited by Naffine, "Who Are Law's Persons? From Cheshire Cats to Responsible Subjects", 364.

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rational creature, free to choose how to act, and deserving of punishment if she or he chooses to act immorally or wickedly.”⁵¹⁸

A clearer indication of the similarity between the accountability associated with moral agency and the legal concept of criminal responsibility can be found in what Lacey calls the “capacity theory of responsibility” in which:

[I]ndividuals’ criminal responsibility is at root based upon their capacities and opportunities: capacities of cognition or understanding: it is only fair to punish someone who has the capacity to understand what they are doing; and capacities of volition or will: it is only justifiable to punish someone who has the capacity or, in some versions, the fair opportunity to act otherwise than they did.⁵¹⁹

Similarly, Michal Moore argues that:

[W]e hold people retrospectively responsible in law and morals only if they are accountable agents who negligently or intentionally, and without justification or excuse, perform actions that cause some state of affairs they were obligated not to bring about.⁵²⁰

Since accountability is, as should be clear from the previous discussion, of great importance for moral agency, the definition of the latter should mention it. This definition, therefore, should be formed as follows: moral agency is the capability to freely make moral judgments and be accountable for them.

It is clear from the previous discussions that moral agency is a highly demanding criterion. It demands that one be a rational and free-willed agent in order to be a person.

⁵¹⁸ L. Waller and C.R. Williams, *Criminal Law Text and Cases* (Chatswood, NSW: Butterworths, 9th ed, 2001) 258. As cited by Naffine, "Who Are Law's Persons? From Cheshire Cats to Responsible Subjects", 364.

⁵¹⁹ N. Lacey, "In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory," *Modern Law Review* 64, no. 3 (2001): 350-371, 353.

⁵²⁰ Moore, *Law and Psychiatry: Rethinking the Relationship*, 51, 52.

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Hence, choosing it in this thesis as the sole criterion of personality raises a legitimate question about what justification can be offered for that. This point will be discussed in the following paragraphs.

4.2.2.2 *The justification of the selection of moral agency as the criterion of moral personality*

The following discussion concerns the justification for selecting moral agency as the sole criterion upon which moral personality should be based. I contend that this justification can be found in the concept of vicegerency. I also examine another justification based on the concept of a general secular moral community, but I start with my own justification.

Selecting moral agency as the criterion of moral personality in this thesis is justified by the concept of vicegerency. As detailed earlier,⁵²¹ being God's vicegerent on earth requires that one be a rational and free-willed agent, i.e. a moral agent. Put another way, being a moral agent is a prerequisite for being a vicegerent. In turn, being a person is linked to being a vicegerent since *dhimmah* or personality⁵²² has been conferred on human beings to enable them to assume their position as vicegerents and bear any rights and obligations arising out of that. It follows that being a person is connected to being a moral agent. In other words, since (1) moral agency is the criterion of vicegerency and (2) vicegerency is the criterion of *dhimmah*, then moral agency is the criterion of *dhimmah*. Therefore, in research adopting a *Shari'a*-based perspective, it seems necessary to base personality on moral agency. Using the same perspective, the other justification will now be evaluated.

⁵²¹ See 3.1.2 The human beings' *raison d'être*.

⁵²² As explained above (page 57), *dhimmah* is the *Shari'a* equivalent of personality.

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Tristram Engelhardt's project of establishing a general secular moral community provides another justification. According to him, there exist variable moral communities within which binding content-full morality can be found. Each of these communities is based on a common convention that can be religious, such as Christianity, or non-religious, such as capitalism. The belief in this common convention constitutes a precondition for membership of the community concerned. It also makes of the believers "moral friends" to whom the binding content-full morality that exists within that community applies. However, the enforceability of such morality is limited to the members of that particular community, and the outsiders, or "moral strangers", cannot be bound by that particular morality unless they believe in it and cease, therefore, to be strangers.⁵²³

Encompassing those moral strangers cannot be achieved, according to Engelhardt, except in a general secular moral community that transcends the boundaries of different common conventions, which will then be private.⁵²⁴ In the general moral community, no content-full morality is conceivable and its members cannot be bound by an authority derived either from God or from reason, except if they freely agree to it.⁵²⁵ Therefore, as Engelhardt argues, the existence of such a community assumes the existence of moral agents who are interested in establishing it:

The very notion of a general secular moral community presumes a community of entities who are self-conscious, rational, free to choose, and in possession of a sense of moral concern. It is only when such entities are interested in understanding when

⁵²³ H. T. Engelhardt, *The Foundations of Bioethics* (New York Oxford: Oxford University Press, 1996), viii & x.

⁵²⁴ *Ibid.*, viii.

⁵²⁵ *Ibid.*, x.

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they or others are acting in a blameworthy or praiseworthy fashion that moral discourse is possible.⁵²⁶

Having the ability to conduct moral discourse in this way is, therefore, a prerequisite for being a member of the general secular moral community, that is, being a moral agent is a prerequisite for being a person. In the words of Engelhardt:

The principle of permission and elaboration in the secular morality of mutual respect ... concerns only persons, which notion (i.e., being a person) is defined in terms of the ability to enter into this practice of resolving moral controversies through agreement. The morality of autonomy is the morality of persons.⁵²⁷

However, this justification cannot be wholly accepted from an Islamic perspective. The Islamic community is, obviously, a convention-based community, built on a belief in Islam. All of its members are, therefore, moral friends, to use Engelhardt's words. In this community, as in all other convention-based communities, there exists a content-full morality, namely *Shari'a*, that is binding on all members. Indeed, no-one can be a member of that community until they decide freely to be so, by either converting to Islam or consenting to an Islamic state's authority.⁵²⁸ Both ways presuppose contemplation and free will, hence moral agency. However, after joining the community one must adhere to the authority of *Shari'a*. One can remain a member even after disobeying *Shari'a*, but denying its authority cannot be tolerated and losing membership

⁵²⁶ *Ibid.*, 136.

⁵²⁷ *Ibid.*, 139.

⁵²⁸ Non-Moslems can join the Moslem community without accepting Islam as a religion. This can be done though the *dhimmah* contract, as it is known in Arabic. According to this contract, a non-Moslem agrees to live in an Islamic state and enjoy the protection it offers while keeping his/her own belief. Further, s/he, according to this contract, is exempt from implementing Islamic imperatives when they differ from those determined by his/her own religion. For example, eating pork and drinking alcohol are legitimate for non-Moslems living in an Islamic state. See Al-'wā, Mḥmd Slym. "*Nzām Hl al-Dhmh. R'yh Slāmyh M'āsrt.*" Asl-ām Awn L-āyn, retrieved from <http://www.islamonline.net/Arabic/contemporary/2005/07/article01a.shtml>, at 25/06/2008.

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is the immediate consequence of that. Therefore, requiring the individual's consent to be bound by every moral imperative is not plausible from an Islamic perspective.

To sum up, the adoption of moral agency as the criterion of moral personality can be justified by the concept of vicegerency. However, such a viewpoint has been heavily criticised. In the following, I will discuss this criticism and some responses given to it.

4.2.2.3 The criticism levelled at selecting moral agency as the criterion of moral personality

The selection of moral agency as the sole criterion of moral personality has been heavily criticised, as will now be shown. The main criticism has been made by animals-rights proponents, in the argument known as the argument from marginal humans. The responses have been variable but, as I see them, unsatisfactory. In the following section, I will present the main criticism before moving on to address and discuss the responses.

Animals-rights proponents have been strong critics of the selection of moral agency as the sole criterion for moral personality. For them, the exclusion of animals from the class of persons is unjustified since animals meet all morally relevant criteria, such as language and purposeful communication, intelligence, creativity, tool-using, autonomy,⁵²⁹ and self-consciousness.⁵³⁰ The argument of animals-rights proponents is that:

⁵²⁹ See for example, E. B. Pluhar, *Beyond Prejudice: the Moral Significance of Human and Nonhuman Animals* (Durham: Duke University Press, 1995), 46, 47. The belief that the acquisition of the capacities for reason and self-awareness is sufficient for having moral personality makes it reasonable to conclude that many non-human animals may be persons. Warren, *Moral Status: Obligations to Persons and Other Living Things*, 95.

⁵³⁰ Tom L. Beauchamp, "The Failure of Theories of Personhood", *Kennedy Institute of Ethics journal* 9, no. 4 (1999): 309-324, 313.

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Capacities will not succeed in distinguishing humans from the other animals. Animals also care passionately for their young; animals also exhibit desires and preferences. Features of moral relevance-rationality, interdependence, and love are not exhibited uniquely by human beings. Therefore, there can be no solid moral distinction between humans and other animals.⁵³¹

Furthermore, they are held to have some moral agency. Like the other qualities that have just been listed, moral agency is claimed to be a degree-admitted quality or an evolutionary ability, and so can be acquired in its lower degrees by some animals.⁵³²

Questioning the belief that moral agency is human-specific, Evelyn Pluhar says:

Is it really so clear ... that the capacity for moral agency has no moral precedent in any other species? Certain other capacities are required for moral agency, including the capacity for emotion, memory, and goal-directed behavior. ... [T]here is ample evidence for the presence of these capacities, if to a limited degree, in some nonhumans. ... Not surprisingly, then, evidence has been gathered that indicates that nonhumans are capable of what we call "moral" or "virtuous" behavior.⁵³³

However, when taken as an autonomous moral agency, as is the case in this thesis,⁵³⁴ no animal is then claimed to meet the criterion. Admitting this fact, Evelyn Pluhar says:

[O]nly humans are capable of having the mental development sufficient for autonomous moral agency. Nonhumans may have lesser degrees of the relevant

⁵³¹ Cohen, "The Case for the Use of Animals in Biomedical Research", 866. He refers to the following sources, Rollin, BE. *Animal rights and human morality*. New York: Prometheus Books, 1981. Hoff C. Immoral and moral uses of animals. *N Engl J Med* 1980; 302/: 115-8. Jamieson D. Killing persons and other beings. In: Miller HB, Williams WH, eds. *Ethics and animals*. Clifton, N.J.: Humana Press, 1983: 135-46. (no page number(s) specified)

⁵³² Pluhar, *Beyond Prejudice: The Moral Significance of Human and Nonhuman Animals*, 4 & 57.

⁵³³ *Ibid.*, 55.

⁵³⁴ See 4.2.2.1 The definition of moral agency.

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characteristics, but, so far as we know, none can match the capacities of the mature, normal human being.⁵³⁵

In addition, the admission that some animals can, to a lesser degree, have the capacity for moral agency but not autonomous moral agency can be found in Frankfurt's concept of free will where it is asserted that:

Human beings are not alone in having desires and motives, or in making choices. They share these things with the members of certain other species, some of whom even appear to engage in deliberation and to make decisions based upon prior thought. It seems to be peculiarly characteristic of humans, however, that they are able to form ... "second-order desires".⁵³⁶

In another place, he re-emphasises that:

Many animals appear to have the capacity for ... "first-order desires" ... which are simply desires to do or not to do one thing or another. No animal other than man, however, appears to have the capacity for reflective self-evaluation that is manifested in the formation of second-order desires.⁵³⁷

The capacity for autonomous moral agency is, therefore, unattainable by animals. Thus, they can be justifiably excluded from being classed as persons. This has provoked animal-rights proponents to criticise the basing of moral personality on moral agency.

⁵³⁵ Pluhar, *Beyond Prejudice: The Moral Significance of Human and Nonhuman Animals*, 57.

⁵³⁶ Frankfurt, "Freedom of the Will and the Concept of a Person", 6.

⁵³⁷ *Ibid.*, 7. In a quite similar vein, Carl Cohen asserts, "[w]hat makes human special and distinguishable from other animals "is not the ability to communicate or to reason, or dependence on one another or care for the young, or the exhibition of preferences, or any such behavior that marks the critical divide." Animals do exhibit such attribute but that does not make them member of the community of moral agents. "Membership in a community of moral agents nevertheless remains impossible for them. Actors subject to moral judgement must be capable of grasping the generality of an ethical premise in a particular syllogism. Humans act immorally often enough, but only they-never wolves or monkeys-can discern, by applying some moral rule to the facts of a case, that a given act ought or ought not to be performed. The moral restraints imposed by humans on themselves are thus highly abstract and are often in conflict with the self-interest of the agent. Communal behavior among animals, even when most intelligent and most endearing, does not approach autonomous morality in this fundamental sense." Cohen, "The Case for the Use of Animals in Biomedical Research", 867.

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The main criticism that animal-rights proponents provide is that known as “the argument from marginal cases” or “marginal humans”.⁵³⁸ It aims to show the absurdity of basing moral personality on moral agency, and allows for the possibility that some animals be personified. The argument is expressed by Tom Regan as follows:

(1) certain animals have certain rights because these [marginal] humans *have* these rights *or* that (2) if these [marginal] humans have certain rights, *then* certain animals have these rights also. The former alternative represents what might be termed the stronger argument for animal rights; the latter, the weaker.⁵³⁹

As is apparent, the argument depends on the potentially horrific effect the establishment of moral personality on moral agency has on the status of marginal humans. If such establishment is followed to its logical conclusion, the marginal humans will be deprived of moral personality since they lack moral agency. The reply to the argument, its proponents assume, must take one of two forms. First, the proponents of moral agency may prefer to continue holding moral agency as the sole basis of personality, but then they must deny personality to humans lacking moral agency such as infants, those with brain-damage, and the insane, let alone foetuses. As Andrew Linzey argues:

If we accord moral rights on the basis of rationality, what of the status of newly born children, "low grade" mental patients, "intellectual cabbages" and so on? Logically, accepting this criterion, they must have no, or diminished, moral rights.⁵⁴⁰

The result is so horrific that a different reply would be expected. The proponents of moral agency would lower their criterion to grant marginal humans moral personality,

⁵³⁸ J. Tanner, "Marginal Humans, the Argument from Kinds and the Similarity Argument" *Facta Universitatis Series: Philosophy, Sociology and Psychology* 5, no. 1 (2006): 47-63, 47.

⁵³⁹ Tom Regan, (1979) "An Examination and Defence of One Argument Concerning Animal Rights", *Inquiry*, 22, pp. 189-219, at 189. Emphasis his. As cited by *Ibid.*, 51.

⁵⁴⁰ Andrew Linzey, (1976) *Animal rights: A Christian Assessment*. London. SCM Press, at 24. As cited by Tanner, "Marginal Humans, the Argument from Kinds and the Similarity Argument ", 51.

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but in doing so, they would have to grant it to any animals that share the new less restrictive criterion. As Peter Singer argues:

[H]uman beings are not equal; and if we seek some characteristic that all of them possess, then this characteristic must be a kind of lowest common denominator, pitched so low that no human being lacks it. The catch is that any such characteristic that is possessed by all human beings will not be possessed only by human beings.⁵⁴¹

The responses of the proponents of moral agency to the arguments from marginal humans have varied. Some of them such as Frey,⁵⁴² Gauthier,⁵⁴³ McCloskey,⁵⁴⁴ Narveson,⁵⁴⁵ and Michael Moore⁵⁴⁶ continue to hold their original claims and accept the deprivation of personality from marginal humans. According to Moore:

Very crazy human beings are not enough like us in one of our essential attributes, rationality, to be considered persons to whom moral and legal norms are addressed. Crazy people are “excused” from responsibility for the harm they cause for the same reason that young children, animals, stones, and perhaps corporations are excused: None of them has the *status* of being a person, the only kind of entity obligated by moral and legal norms.⁵⁴⁷

Frey argues along the same lines, concluding that experimentations on marginal humans are legitimate.⁵⁴⁸ Similarly, Jan Narveson holds that "...the proper way to deal with them

⁵⁴¹ Singer, *Animal Liberation*, 237.

⁵⁴² Raymond Gillespie Frey, *Rights, Killing, and Suffering: Moral Vegetarianism and Applied Ethics* (Oxford: Basil Blackwell, 1983), 115.

⁵⁴³ David Gauthier, (1977) *Morals by Agreement*. Oxford: Clarendon Press, at 268, 269. As cited by Tanner, "Marginal Humans, the Argument from Kinds and the Similarity Argument", 52.

⁵⁴⁴ H. J McCloskey, (1979) "Moral Rights and Animals", *Inquiry*, 22, pp. 23-54, at 31. As cited by *Ibid.*

⁵⁴⁵ Jan Narveson, (1983) "Animal Rights Revisited" in Miller, Harlan B. & Williams, William H. (eds.) *Ethics and Animals*. Clifton, N. J.: Humana Press, at 45. As cited by Tanner, "Marginal Humans, the Argument from Kinds and the Similarity Argument", 52.

⁵⁴⁶ Moore, *Law and Psychiatry: Rethinking the Relationship*, 65.

⁵⁴⁷ *Ibid.* Emphasis in original.

⁵⁴⁸ Frey, *Rights, Killing, and Suffering: Moral Vegetarianism and Applied Ethics*, 115.

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[MH]⁵⁴⁹ is simply whatever way is dictated by our interest in such things", marginal humans are 'mere things'⁵⁵⁰.

However, others choose to respond differently. They soften the claim that moral agency is a necessary condition for moral personality, and hold it instead as only a sufficient condition. John Rawls is an example of these. To him, being a moral person requires that entities be rational, with their own ends and a sense of justice. However, since many humans lack either one or both capacities, Rawls claims that these capacities do not have to be perfect and equally shared by all persons. They are degree-admitted and it would suffice to have them to a certain degree in order to acquire moral personality.⁵⁵¹ With regard to infants and children, it is enough that they have, instead of the capacities required, the mere capacity for developing them:

[T]he minimal requirements defining moral personality refer to a capacity and to the realization of it. A being that has this capacity, whether or not it yet developed, is to receive the full protection of the principle of justice. Since infants and children are thought to have basic rights (normally exercised on their behalf by parents and guardians), this interpretation of the requisite conditions seems necessary to match our considered judgements.⁵⁵²

⁵⁴⁹ An abbreviation of marginal humans, Tanner, "Marginal Humans, the Argument from Kinds and the Similarity Argument", 48.

⁵⁵⁰ See *supra* fn. ⁵⁴⁵. Similarly, McCloskey has denied that marginal humans have personality upon their being rational entities subject to natural law. In his words, "...that rational beings, being subject to the natural law, have rights, since rights are grounded on the natural law; that infants, lunatics, idiots have rights and are subject to natural law since they are rational beings. Obviously, even if the theory of natural law could be established ... infants, lunatics and idiots are not subject to it as rational agents any more than is an intelligent dog or ape. The natural law is law, and is binding on men because and in so far as it is promulgated through reason. It is not promulgated to infants, idiots and certain lunatics. And, whilst it might be argued that it is promulgated potentially to infants, and hypothetically to idiots, potential and hypothetical promulgation are not promulgation, and to be a potential or a hypothetical possessor of rights is not to be a possessor of potential or hypothetical rights, nor of actual rights." H. J. McCloskey, "Rights", *the Philosophical Quarterly* 15, no. 59 (1965): 115-127, 124.

⁵⁵¹ John Rawls, *A Theory of Justice* (Cambridge, Mass: Harvard University Press, 1971), 12, 508, 510.

⁵⁵² *Ibid.*, 509.

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Nevertheless, this reply is problematic. Firstly, since it relies on potentiality, it will result in personifying, not only infants and children, but also unfertilised eggs and sperm as they all have the potential to develop the required capacities. In addition, it leaves unsolved the issue of those lacking actually and potentially the capacities in question, such as people with severe brain damage.⁵⁵³ Personifying them despite this lack is seriously indefensible and this has led John Rawls to deem moral agency as a sufficient but not a necessary condition for moral personality,⁵⁵⁴ which means that the latter can be obtained via meeting other criteria.

The third reply of the proponents of moral agency sustains it as the sole criterion of personality while personifying marginal humans but not animals. The argument of kind is a clear example of that. Its theme is that the moral status of a being is determined by the capabilities typical of their kind, rather than their individual capabilities. Capabilities are typical of a kind when they are shared by some, most, or all of its members:

If (1) an individual A is a member of some kind K, and (2) some, most or all of the other members of that kind K have some property C, and on the basis of having property C, they have property R, then individual A has property R as well, even though A lacks property C.⁵⁵⁵

This principle is called “the ‘Getting a Property by Association Principle’”,⁵⁵⁶ or the “Derived Properties” principle.⁵⁵⁷

⁵⁵³ Warren, *Moral Status: Obligations to Persons and Other Living Things*, 105. However, the reliance on the concept of potentiality does not necessarily mean personifying gametes as there is a way to keep them dispersonified while conferring personality on marginal humans. See pages 229-231 below.

⁵⁵⁴ Rawls, *A Theory of Justice*, 505. 506.

⁵⁵⁵ Nathan Nobis, "Carl Cohen's 'Kind' Arguments for Animal Rights and against Human Rights", *Journal of Applied Philosophy* 21, no. 1 (2004): 43-59, 53.

⁵⁵⁶ *Ibid.*

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Consequently, since many humans have moral agency, it becomes the distinguishing feature of their kind, and so all this kind's members, including marginal humans, have it.⁵⁵⁸ As Cohen argues:

The capacity for moral judgement that distinguishes humans from animals is not a test to be administered to human beings one by one. Persons who are unable, because of some disability, to perform the full moral functions natural to human beings are certainly not for that reason ejected from the moral community. The issue is one of kind. Humans are of such a kind that they may be the subject of experiments only with their voluntary consent. The choices they make freely must be respected. Animals are of such a kind that it is impossible for them, in principle, to give or withhold voluntary consent or to make a moral choice. What humans retain when disabled, animals have never had.⁵⁵⁹

Roger Scruton⁵⁶⁰ and David Schmidtz⁵⁶¹ make the same point.

⁵⁵⁷ N. Levy, "Cohen and Kinds: A Response to Nathan Nobis," *Journal of Applied Philosophy* 21, no. 2 (2004): 213-217, 214.

⁵⁵⁸ Tanner, "Marginal Humans, the Argument from Kinds and the Similarity Argument", 53, 54.

⁵⁵⁹ Cohen, "The Case for the Use of Animals in Biomedical Research", 866.

⁵⁶⁰ For Scruton, "[o]ur world makes sense to us because we divide it into kinds, distinguishing animals and plants by species and instantly recognising the individual as an example of the universal. The recognitional expertise is essential to survival and especially to the survival of the hunter-gatherer. And it is essential also to the moral life. I relate to you as a human being and accord to you the privileges attached to the kind. It is in the nature of human beings that, in normal conditions, they become members of a moral community, governed by duty and protected by rights. Abnormality in this respect does not cancel membership. It merely compels us to adjust our response. Infants and imbeciles belong to the same kind as you or me: the kind whose normal instances are also moral beings. It is this that causes us to extend to them the shield that we consciously extend to each other and which is built collectively through our moral dialogue." Roger Scruton, *Animal Rights, and Wrongs*, 2nd ed. (London Demos, 1998), 43.

⁵⁶¹ David Schmidtz makes the following statement: "...humanity's characteristic rationality mandates respect for humanity, not merely for particular humans who exemplify human rationality. Similarly, once we note that chimpanzees have characteristics cognitive capacities that mice lack, we do not need to compare individual chimpanzees and mice on a case by case basis in order to have a moral justification for planning to use a mouse rather than a chimpanzee in an experiment. Of course, some chimpanzees lack the characteristics features in virtue of which chimpanzees command respect as a species, just as some humans lack the characteristics features in virtue of which humans command respect as a species. It is equally obvious that some chimpanzees have cognitive capacities of some humans. But whether every human being is superior to every chimpanzee is beside the point. The point is that we can, we do, and we should make decisions on the basis of our recognition that mice, chimpanzees, and humans are relevantly different types". David Schmidtz, "Are All Species Equal?" *Journal of Applied Philosophy* 15, no. 1 (1998): 57-67, 61.

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Kind membership is claimed to be morally relevant for two reasons. The first reason, according to Neil Levy, is that it conforms to our intuition that all humans have personality and rights regardless of having the actual specified capacities.⁵⁶² Kind membership satisfies Rawls's criterion for normative moral theories, he proceeds to say, whereby: "...the correct moral theory is the one that best systematizes our intuitions."⁵⁶³ On the other hand, he claims that moral individualism leads to counterintuitive results by its linking of moral personality to individual or non-relational capacities.⁵⁶⁴ For example, many humans will fall short of qualifying for moral personality if individual non-derivative capacities are required

The second reason for deeming kind membership morally relevant, is claimed to reside in the evolutionary history of human morality. According to Neil Levy, proto-morality came first as a response to our self-interested needs as humans before being replaced by a universalistic and altruistic system of morality. However, selfishness is still present in morality. This is evident in our intuitions to grant our fellow humans moral personality even when they lack the individual capacities required for that: "...our moral emotions, the building blocks of all moral response, are inevitably triggered by conspecifics",⁵⁶⁵ as Levy puts it. Considering these elements of morality leads to recognising "...the best rational systematization of morality,"⁵⁶⁶ he claims.

However, two criticisms have been levelled at the argument of kind. The first criticism, which I think is implausible, is based on the absence of any definition of kind. The two possible explanations are insufficient, Julia Tanner claims. The first one is that

⁵⁶² Levy, "Cohen and Kinds: A Response to Nathan Nobis," 216.

⁵⁶³ *Ibid.*, 216. He refers to J. Rawls (1971) *A Theory of Justice* (Oxford: Oxford University Press, 1971), pp. 54ff.

⁵⁶⁴ *Ibid.*, 213, 214.

⁵⁶⁵ *Ibid.*, 216.

⁵⁶⁶ *Ibid.*

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kind means what is normal. In effect it states that "...most humans are like this."⁵⁶⁷ The problem with this explanation is that what is normal for most humans can change over time. Subjecting moral personality to it can lead, therefore, to dramatic results. Suppose it is claimed that moral personality is based on rationality, and that most humans lost their rationality. The remaining humans would be characterised by the majority's irrationality and treated accordingly. So, all humans would be deprived of personality or rights including those who do have rationality.⁵⁶⁸ The same criticism can be levelled at the other explanation as well.

The second possible interpretation of what is meant by kind is also problematic. Kind can be identified by what is natural, so humans, as a kind, are identified by what is natural for most of them.⁵⁶⁹ The problem is that what is natural is changeable, and therefore subject to the same criticism levelled at the first possible interpretation. Furthermore, the problem does not end if natural is understood as the natural category to which humans belong, i.e. the human species or *Homo sapiens*. *Homo sapiens*, like all other species, is a product of gradual evolution, and as such, it developed from other species. It is difficult to determine, in such a gradual process, how a line can be drawn between the beginning of *Homo sapiens* and the end of the one from which it sprung, i.e. *Homo erectus* "...it would be arbitrary to draw a line as there was no single point at which all the offspring of *homo erectus* were *homo sapiens*."⁵⁷⁰

In addition, a hypothesis based on the concept of evolution can show the type of contradiction the kind argument leads to. Suppose, Tanner argues, that evolution had taken a different course, and led to our species being less rational than other species, we

⁵⁶⁷ Tanner, "Marginal Humans, the Argument from Kinds and the Similarity Argument ", 54.

⁵⁶⁸ *Ibid.*

⁵⁶⁹ *Ibid.*, 55.

⁵⁷⁰ *Ibid.*

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would have attributed moral consideration to our fellow humans in spite of them being less rational, which is contradictory. On the other hand, if *Homo sapiens* had evolved differently and resulted in two different species, one identical to us, as we stand, and a more advanced species, it would have been said that it is the other advanced species, not ours, that matters. She concludes that it would be safer to detach our moral status from the species concept as that would secure it against evolutionary changes.⁵⁷¹

Nevertheless, I think her argument is unsound. Despite the emphasis she puts on the evolutionary concept, I do not think it is a real threat to the kind argument. Assuming that the evolutionary theory regarding human beings is correct, the existence of the human species, as it is known now, must have started a very long time ago, and continued long enough to firmly establish a stable species. A very long time would also have to pass before the human species evolved into another species. Therefore, I think the human species has fairly clear boundaries.

However, the second criticism levelled at the argument of kind is, as I see it, the real challenge. It demonstrates the argument's inability to show the moral relevance of membership in a natural category. In the absence of such a justification, it is reasonable to argue that there is no difference between the preference given to one's own species and that given to one's own sex or race. All of them are types of discrimination based on a morally irrelevant factor, i.e. group membership.⁵⁷²

The two reasons given for considering kind membership as morally relevant are unsatisfactory. The reference made to our intuitions is insufficient since they can often

⁵⁷¹ *Ibid.*

⁵⁷² See page 122 above.

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easily mislead us, as many philosophers believe.⁵⁷³ Sexism and racism could be justified by reference to many people's intuitions.⁵⁷⁴ However, though admitting this fact, Neil Levy concludes that our moral intuitions must be given some *prima facie* weight:

[O]ur moral intuitions must be accorded some *prima facie* weight ... Of course, in the process of reaching reflective equilibrium many intuitions will be modified and some will be rejected. Intuitions are defeasible, but in the absence of defeaters they must be taken seriously.⁵⁷⁵

Yet, this, I think, is also implausible since, as Julia Tanner claims, the kind argument contradicts our intuitions. She claims that we have intuitions that marginal humans have genuine moral consideration not, as the kind arguments' proponents say, a derivative one:

We think it wrong to harm MH [marginal humans] because to do so is to wrong the individuals themselves not some rather vague notion of humanity. It is not because MH are of the human kind that we think they deserve moral consideration; we think they deserve such consideration in their own right and to harm them is to wrong the individuals themselves.⁵⁷⁶

The ambiguity concerning our intuitions, I believe, is a sufficient reason not to rely on them in the important matter of conferring and withdrawing moral personality.

What remains is the recourse to the claimed origin of morality. Levy claims that morality finds its origin in our concern for protecting and promoting our own needs. Though it (morality) overcame this selfishness and became a universalistic and altruistic system, it might be reasonable to attribute the highest moral standing to our own species,

⁵⁷³ Levy, "Cohen and Kinds: A Response to Nathan Nobis," 216.

⁵⁷⁴ *Ibid.*

⁵⁷⁵ *Ibid.*

⁵⁷⁶ Tanner, "Marginal Humans, the Argument from Kinds and the Similarity Argument ", 57.

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regardless of their individual capacities. Our feelings generate our links with other members of our own species.⁵⁷⁷ Without discussing the accuracy of the claim of the origin of morality, it seems unacceptable to rely on such a concept. In the first place, it results in evaluating highly our intuitions towards fellow members of our species when these intuitions are unreliable, as has just been explained. If it is true that morality despite its dark outset, and assuming selfishness to be universally bad, has evolved to become what Neil Levy himself describes as, "...just the universalistic and even altruistic system of thought, feeling and action that moralists hope to find in it",⁵⁷⁸ it seems implausible to call for a return to that origin. For these reasons, the moral relevance of kind membership is unproven. Therefore it would be difficult to rely on this argument to confer moral personality on any entity that fails to meet its criterion.

However, there is a way, I maintain that we can base moral personality on moral agency while attributing it to many so-called marginal humans. This way is finding the seat of moral agency in humans, as the only moral agents, and subjugating the conferral of moral personality to having that seat, regardless of attaining actual autonomous moral agency. Further explanation of this will be given in the next section.

4.2.2.4 The nature of being human and the marginal humans dilemma

As outlined earlier, the solution for the dilemma concerning moral agency as the criterion of personality lies in determining the source from which it is derived. Different views have been held about the trait that can be deemed as the source or seat of moral agency. Examples of them are succinctly stated by Carl Cohen as follows:

⁵⁷⁷ Levy, "Cohen and Kinds: A Response to Nathan Nobis," 216.

⁵⁷⁸ *Ibid.*

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[T]he inner consciousness of a free will (Saint Augustine); the grasp, by human reason, of the binding character of moral law (Saint Thomas); the self-conscious participation of human beings in an objective ethical order (Hegel); human membership in an organic moral community (Bradley); the development of the human self through the consciousness of other moral selves (Mead); ... the unenervative, intuitive cognition of the rightness of an action (Prichard) and ... the universal human possession of a uniquely moral will and the autonomy its use entails [Immanuel Kant].⁵⁷⁹

However, this list does not contain the seat of moral agency as I see it. Self-consciousness, reason, cognition, possession of free will, and autonomy are considered bases for moral agency. Admittedly, these attributes are essential for the existence and exercise of moral agency, as they comprise its cognition and autonomy elements,⁵⁸⁰ but as such, they provide no explanation for why humans rather than nonhumans enjoy the capacity for moral agency. It is not enough to attribute the moral agency that human beings have to their rationality or free will, since these capabilities are elements in the capacity for moral agency. The explanation should transcend these capabilities to demonstrate the source from which they are derived, that is, the quality that makes humans rational and free willed agents. This elucidation can be found, I believe, in the concept of the nature of human beings. In the following paragraphs, the concept of the nature of human beings will be discussed first, followed by an explanation of how it works in solving the moral agency-related dilemma.

⁵⁷⁹ Cohen, "The Case for the Use of Animals in Biomedical Research", 865, 866.

⁵⁸⁰ See 4.2.2.1 The definition of moral agency.

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4.2.2.4.1 The nature of being human

The concept of the nature of the human being adopted in this thesis is dualistic, and, as previously detailed, represents the Islamic stand on the issue.⁵⁸¹ It is also the stand of Cartesianism, being one of the main dualistic theories. Here the human being is perceived as a composite of two elements, namely a corporeal body, and an incorporeal soul or mind.⁵⁸² In spite of being self-subsistent and able to exist independently from one another, the body and the soul or mind must unite in order for a human being, as such, to exist. Upon their union, each will affect the other.⁵⁸³ As in Islamic teaching,⁵⁸⁴ the soul or mind in Cartesianism is believed to be the seat of all mental activities,⁵⁸⁵ including those essential for the exercise of moral agency,⁵⁸⁶ while the body is the means by which these activities are performed.⁵⁸⁷

Furthermore, Thomism, the Philosophy of Saint Thomas Aquinas, as another main dualistic theory, advocates the interaction thesis, though it differs with Islam and Cartesianism about the form of the dualistic nature of human beings. It considers human beings to be a unit of form, i.e. soul, and matter, i.e. materiality or prime matter, resulting firstly in a human body. Thomism, Donceel argues, thinks of human beings as individuals rather than couples, units rather than unions, that is, unions of soul and prime matter that result in them being one thing:

⁵⁸¹ See 3.1.1 The nature of human beings.

⁵⁸² Kenneth Einar Himma, "A Dualist Analysis of Abortion: Personhood and the Concept of Self Qua Experiential Subject," *Journal of Medical Ethics* 31, no. 1 (2005), 48-55, 50. Richard Swinburne, *the Evolution of the Soul* (Oxford: Oxford University Press, 1997), 232. Cartesianists use mind and soul interchangeably. In criticising them for so doing see F. J. Beckwith, "Of Souls, Selves, and Cerebrums: A Reply to Himma," *Journal of Medical Ethics* 31, no. 1 (2005): 56-60, 56.

⁵⁸³ Himma, "A Dualist Analysis of Abortion: Personhood and the Concept of Self Qua Experiential Subject," 50.

⁵⁸⁴ See 3.1.1 The nature of human being in Islam.

⁵⁸⁵ Swinburne, *the Evolution of the Soul*, 232.

⁵⁸⁶ Himma, "A Dualist Analysis of Abortion: Personhood and the Concept of Self Qua Experiential Subject," 51.

⁵⁸⁷ *Ibid.*, 51, 52.

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For Thomas, man is a real unity. He is constituted by the complementary causality of his soul and prime matter. This complementary causality makes him wholly into a person and wholly into a body. I am a person and I am a body.⁵⁸⁸

Another difference between the Islamic concept and Cartesianism on the one hand, and Thomism on the other, is the role of the body. The former, as has just been mentioned, attributes to it an important role in constituting human beings and considering them ontologically self-subsistent. However, the latter, as presented by Donceel, sees it as doing nothing except receiving the soul's acts; as such, none of a human being's positive features can be ascribed to it:

The human body is not a reality in and by itself. Its quantitative, visible features may be said to be rooted in it, to derive from it, only if the body is considered as animated by the soul. These features are not caused by man's material component. Matter, in the sense of prime matter, contributes nothing positive to man; it supplies only receptivity, potentiality. It is nothing but pure potentiality. All man's positive features-not only his intellect and his will, but also his imagination and his memory, his senses and their organs, his character and temperament, his sex, health, and stature-derive totally from the soul.⁵⁸⁹

However, despite this difference in opinion, Thomists agree with the Islamic concept and Cartesianism on the necessity of the body for the performance of the soul's functions. As Donceel says:

Man's higher, spiritual faculties have no organs of their own, since they are immaterial, intrinsically independent of matter. But they need, as necessary conditions of their activities, the cooperation of the highest sense powers, imagination, memory ... [which presuppose] that the brain be fully developed, that

⁵⁸⁸ J. Donceel, "Immediate Animation and Delayed Hominization", *Theological Studies* 31, no. 1 (1970): 76-105, 80.

⁵⁸⁹ *Ibid.*, 80, 81.

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the cortex be ready.⁵⁹⁰ Only then ... matter ... highly enough organized to receive the highest substantial form, the spiritual, human soul, created by God.⁵⁹¹

As will be explained in detail, perceiving the soul-body relationship in this way is crucial in ascertaining the timing of ensoulment and so the status of the foetus.⁵⁹² However, the task now is to explain how this concept solves the dilemma of marginal humans.

4.2.2.4.2 The explanatory power of the nature of being human

The argument being made is that the nature of being human explains how moral personality can be based on moral agency and concurrently attributed to many so-called marginal humans. Human beings, as detailed earlier, are seen as entities of a multidimensional nature: biological and intellectual, and their cognition and volition, which are the two pillars of moral agency, like all other intellectual capacities, find their source in the soul. In this model, the soul is seen as the seat of moral agency. Despite the fact that the soul is an all-or-nothing attribute,⁵⁹³ moral agency, being based on the soul, is not. It admits degrees and undergoes primitive stages before becoming autonomous in the meaning intended, when it is said that moral agency is the basis for personality.

⁵⁹⁰ Understanding bodily readiness as the acquisition of a cortex or cortical brain, as indicated in the quote, is the position held in the current research, and will be explained in detail in the chapter allocated to applying the criterion of personality. See 5.1 Determining the timing of the ensoulment event.

⁵⁹¹ Donceel, "Immediate Animation and Delayed Hominization", 83.

⁵⁹² See the following chapter about Applying the Definition of Legal Personality to the Foetus.

⁵⁹³ In Swinburne's words, "...having a soul is all-or nothing (a creature either has some feeling or awareness and so a soul, or no feeling or awareness and hence no soul); it cannot be measured." Richard Swinburne, *Is There a God?* (Oxford: Oxford University Press, 1996), 84. However, some writers like Walter Glannon dispute that the soul is non-degreed. For him, "...if the soul is identified with the capacity for consciousness, and this capacity is something that we acquire gradually on the basis of the gradual development of the cerebrum and cerebral cortex, then it seems to follow that having a soul is not all-or-nothing but rather something that we possess to varying degrees, at least with respect to the margins of life when we begin to exist and cease to exist." Walter Glannon, "Tracing the Soul: Medical Decisions at the Margins of Life," *Christian Bioethics* 6, no. 1 (2000): 49-69, 57. Personally, I see no contradiction in deeming as non-degreed the soul and consciousness (as an ultimate capacity) on the one hand, and considering the development of such a capacity as degreed when it requires the involvement of the brain. See below for more explanation.

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However, these two facts can be reconciled if seen in the light of the soul-body relationship. In this relationship, the body is perceived as the machinery of the soul that receives and responds to its instructions regarding rational and voluntary functions.⁵⁹⁴ Since this machinery is a developing object, the effectiveness of implementing the soul's instructions depends to a great extent on the phase of development it occupies. This explains why, in spite of the fact that ensoulment takes place at an early developmental stage,⁵⁹⁵ the exercise of moral agency in the proper sense, the sense that justifies holding the agent accountable for his or her deeds, occurs at a much more advanced stage. It is the body, not the soul, that causes the capacity for moral agency to emerge gradually.

Introducing the concept of the faculties of the soul as theorised by James Porter Moreland should make this clearer. According to this concept, the soul has different faculties, each of which consists of related capacities ranged hierarchically. At the top lie the ultimate capacities under which other capacities are arranged in different order. The actualisation of ultimate capacities depends on developing lower ones. The example is that when someone is able to speak English but not Russian, they have second order capacities towards the capacity to speak English and Russian, but only a first order capacity to speak English. The inability to develop lower order capacities has no effect on the existence of higher order ones.⁵⁹⁶ In Moreland's words:

An acorn has the ultimate capacity to draw nourishment from the soil, but this can be actualized and unfolded only by developing the lower capacity to have a root system and then developing the still lower capacities *of* the root system and so on. When something has a defect ... it does not lose its ultimate capacities. Rather, it

⁵⁹⁴ See 4.2.2.4.1 The nature of being human .

⁵⁹⁵ See 5.1 Determining the timing of the ensoulment event.

⁵⁹⁶ J. P. Moreland and S. B. Rae, *Body & Soul: Human Nature & the Crisis in Ethics* (Downers Grove, IL: InterVarsity Press, 2000), 203.

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lacks some lower-order capacity it needs for the ultimate capacity to be developed.⁵⁹⁷

In terms of moral agency, a distinction can be drawn between its ultimate and actual existences. As an ultimate capacity, moral agency finds its seat in the soul and so it first exists when ensoulment takes place. It also continues to exist as long as there is a soul. However, this ultimate capacity cannot be transformed into an actual capacity unless lower capacities, i.e. cognition and volition, develop enough. Since the latter are dependent on bodily development, the existence of actual moral agency becomes reliant on this bodily development as well. As an ultimate capacity, moral agency is not divisible; it is just like its seat, the soul, an all-or-nothing attribute. Nevertheless, as an actual capacity dependent on bodily development, moral agency is a graduated attribute, that is, one that comes into degree in accordance with bodily development.

An important result follows from this distinction. We can distinguish between actual, potential, post, and non-moral agents. Actual moral agents are those who have acquired, besides their ultimate capacity for moral agency, an actual autonomous moral agency. They have developed the lower capacities underlining moral agency as an ultimate capacity. Those are normal adult human beings.

The other type is that of potential moral agents. They are those who, although they have not yet acquired the actual autonomous moral agency due to their bodily development, do have souls infused into their bodies. As such, they have the capacity, in an ultimate sense, along with an active potentiality for developing it into an actual one.⁵⁹⁸ Their potentiality is immune from the weaknesses attributed to the potentiality argument,

⁵⁹⁷ *Ibid.*, 203, 204. Emphasis in original.

⁵⁹⁸ Detailed explanation of active potentialities and passive potentialities will be provided in the following chapter about the application of the personality's criterion.

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that is, it is not open to every object that has a potential for developing into a human being such as unfertilised ova.⁵⁹⁹ Rather, the potentiality here is confined to those who have undergone the ensoulment stage and so acquired the source of moral agency. As will be explained later, the ensoulment takes place long after the point when twinning is possible, and so another criticism levelled normally at potential arguments can be avoided.^{600 601}

The third category is that of post-moral agents. They are those who have lost their autonomous moral agency, such as the insane and those with severe brain damage, but still can show signs, however minimal, of rational and voluntary functions. Obviously, they cannot be fitted under any of the two previous categories. However, their ability to show the signs concerned indicates beyond any doubt that they still have souls. In other words, though their bodies' capability to receive and execute the souls' instructions has been badly damaged, it has not been completely lost. The signs of rational and voluntary functions are conclusive evidence of that. Hence, their souls still penetrate into their bodies providing them with the ultimate capacity for moral agency. It may be possible for their bodily capability to be restored upon scientific advancement and, if so, their actual moral agency will be reclaimed. Like the members of the first two categories, viz. actual, and potential agents, post-moral agents should always be regarded as persons.

However, the case is different with non-moral agents. They are those who fail completely and permanently to show any signs of rational and voluntary functions. The example of these entities is severely brain-damaged babies, as long as the absence of the

⁵⁹⁹ In mentioning this criticism, see Warren, *Moral Status: Obligations to Persons and Other Living Things*, 105.

⁶⁰⁰ For an explanation of this criticism, see Katrien Devolder and John Harris, "The Ambiguity of the Embryo: Ethical Inconsistency in the Human Embryonic Stem Cell Debate," *Metaphilosophy* 38, no. 2-3 (2007): 153-169.

⁶⁰¹ See 5.1 Determining the timing of the ensoulment event.

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signs of rational and voluntary functions is complete and irreversible. Such absence indicates without any doubt that these entities have no souls infused in their bodies and so are not humans. As previously explained, no entity can be considered a human without a soul being present in its body.⁶⁰² As such, non-moral agents lack moral agency in both actual and ultimate senses and, accordingly, should be deemed non-persons.

The question that may arise is over the difference between the argument based on the nature of being human and that of kind, because each of them attributes capacities to so-called marginal humans that they, in actuality, do not possess. The real difference, for me, lies in the introduction of the concept of the soul. The capacities attributed to many so-called marginal humans because of their souls are real and non-derivative, unlike those attributed by proponents of the kind argument. It is the soul embodied in that particular human rather than something found in another fellow human, that justifies endowing him or her with ultimate capacities in the absence of actual ones. Moral agency here is not a derivative attribute but rather an intrinsic and individuated one.

Moral agency, then, can be reasonably chosen as the criterion upon which moral personality is based while avoiding the devastating effect on the status of many humans. Considering that moral personality is the basis of the definition of legal personality adopted in this thesis, moral agency becomes, indirectly, the criterion of the latter as well. Moreover, by considering that non-humans have been shown to lack autonomous moral agency while all humans, because of their souls, possess it in the ultimate sense, it can be concluded that moral agency is a human-specific criterion. As such, it can be concluded that the three concepts of legal personality, moral personality, and humanity are identical. To model it: since (1) legal personality is based on moral personality, and (2) moral

⁶⁰² See 3.1.1 The nature of human beings.

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personality is based on moral agency and (3) moral agency resides in humanity, then (4) legal personality, moral personality, and humanity are identical to one another. It follows that they can be used interchangeably, as will be the case in this thesis from now on. What remains is to apply moral agency as the criterion of personality to the foetus, to determine its status. This is the task that will be tackled in the following chapter.

5 Applying the Definition of Legal Personality to the Foetus

The previous discussion demonstrates that in order for a being to possess personality and humanity and attract rights it must have an autonomous capacity for moral agency. The discussion also shows that this capacity, along with other capacities distinctive of persons and humans, is acquired in an ultimate sense when a being possesses a human soul. Therefore, in order to determine the status of the human foetus in this context, it is first necessary to ascertain the stage at which ensoulment occurs.⁶⁰³

In the following two sections, I will attempt to determine the foetal stage at which the ensoulment event may take place. After that, I will move on to assess the status of the foetus accordingly.

5.1 *Determining the timing of the ensoulment event*

Determining the timing of the ensoulment event is a necessary step towards ascertaining the legal status of the foetus.⁶⁰⁴ Although deciding on this issue is difficult because of the incorporeality of the soul, it is not impossible. There are philosophical and scientific principles that can help to achieve it.⁶⁰⁵ These principles should be combined, as using them separately will not lead to an accurate result. Stating this point Donceel argues:

⁶⁰³ The union of the soul and body is called ensoulment when the latter is seen as being ensouled while it is called embodiment when the former is viewed as being embodied. In the present research, the terms will be used interchangeably. See fn. ⁶¹⁷ below.

⁶⁰⁴ As the legal status is based on the moral one, they will be used interchangeably. See 4.2.1 Basing legal personality on moral personality.

⁶⁰⁵ A detailed explanation of those principles will be presently provided.

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[I]f we ask the scientists at what time this new organism becomes a human person, a being endowed with a spiritual, human soul, no competent scientist will venture an answer. For him, as a scientist, the question makes no sense. The words “person” and “soul” never occur in his scientific system. If we get an answer at all, he will let us know his philosophical views, which are worth exactly, not what his scientific, but what his philosophical, competence is worth. The trouble is that the question can be answered neither by the scientists as such nor by the philosophers as such. Both science and philosophy are needed.⁶⁰⁶

This combination of science and philosophy takes the form of the philosophical principles setting the grounds on which the timing of the ensoulment event can be determined, while the scientific principles apply those grounds.⁶⁰⁷

In this section it is argued that the first fruit of the combination of the relevant philosophical and scientific principles, is that consciousness can be used as a conclusive indication of the ensoulment event. As a result, the timing of this event can be known by determining the beginning of consciousness. In the following, the relevant philosophical and scientific principles will be explained first. After that, the selection of consciousness as an indication of ensoulment will be justified. Following that, the beginning of consciousness, and hence the timing of the ensoulment event, will be stated.

5.1.1 Determining the principles

The previous chapter explained the concept of the human being adopted here. Essentially, it decreed that s/he is a composite of two components, soul or mind and body. It demonstrated that the two components interact with one another so that the body constitutes the machinery of the soul. Effectively, the body is considered the means by

⁶⁰⁶ Donceel, "Immediate Animation and Delayed Hominization", 97.

⁶⁰⁷ Donceel makes the same point, see *Ibid.*

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which the soul performs its cognitional and volitional activities. Two important results, determinative of the timing of ensoulment, follow from this understanding. The first result is that the body must be fit enough to receive and execute the soul's instructions before ensoulment can take place. The second result is that, though the soul is incorporeal and so impossible to detect, its existence can be determined through detecting its functions when performed by the body. The principle of bodily readiness will be discussed first, followed by a discussion of the principle of the indicatory role of the soul-related functions

5.1.1.1 The principle of bodily readiness

The first principle in determining the ensoulment timing is that of bodily readiness or fitness, which means that the body must be fit enough to receive, and maintain, the soul. The following discussion will examine the religious and philosophical bases of this principle, and how they can be understood in the light of science.

There are several religious and philosophical bases for the principle of bodily readiness. From an Islamic perspective, revelational statements can be cited to support it. For example, the Qur'an says:

Verily We created man from a product of wet earth; Then placed him as a drop (of seed) in a safe lodging; Then fashioned We the drop a clot, then fashioned We the clot a little lump, then fashioned We the little lump bones, then clothed the bones with flesh, and then produced it as another creation. So blessed be Allah, the Best of creators!⁶⁰⁸

⁶⁰⁸ 23:12-14.

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The other creation mentioned in the verses as being preceded by bodily formation is the soul.⁶⁰⁹ This is because the body is the vehicle and device that the soul uses to accomplish what it has been created for, and so it should logically be prepared before the creation of its user.⁶¹⁰ Indeed, being the means of the soul is the reason behind the perfection of the human body.⁶¹¹

In addition, the traditions of the Prophet advocate the proposition that ensoulment is preceded by bodily readiness. The Prophet says:

(The matter of the Creation of) a human being is put together in the womb of the mother in forty days, and then he becomes a clot of thick blood for a similar period, and then a piece of flesh for a similar period. Then Allah sends an angel who is ordered to write four things. He is ordered to write down his (i.e. the new creature's) deeds, his livelihood, his (date of) death, and whether he will be blessed or wretched (in religion). Then the soul is breathed into him ...⁶¹²

The breath of the soul into the body is clearly delayed until the formation of the latter is completed.⁶¹³ Therefore, it can be safely concluded that in Islam, ensoulment, and so human life, can never start in the absence of bodily readiness.

This conclusion can also be supported by reference to the Islamic understanding of death as the other end of the spectrum. In this understanding, death occurs when the body becomes incapable of receiving and executing the soul's instructions. That is to say,

⁶⁰⁹ Yasin, "Hqyqh al-Jnyn w Hkm al-Āntfā' bh fy Zrā'h al-Ā'dā' w al-Tjārb al-'lmy", 79.

⁶¹⁰ *Ibid.*, 83, 84.

⁶¹¹ *Ibid.* 57.

⁶¹² Abu Abdullah Muhammad bin Ismail Bukhari. *Sahih Bukhari*. Translated by M. Muhsin Khan. Vol. 4, Book 54, Number 430. Retrieved from <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/054.sbt.html#004.054.430>, at 05/08/2008.

⁶¹³ For further explanation of this tradition, see page 194 below.

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the capability of the body to receive the soul and implement its instructions is required throughout human life. Any deficiency affecting this capability will affect the connection the soul has with the body. However, the soul's departure from the body and so the end of human life is contingent on the complete and permanent loss of the capability concerned.

This understanding is present in many Moslem jurists' writings. For instance, Ibn Qaiyim al-Jawziyah defines the spirit as:

[A]n object different in substance from its tangible body. It is of a luminous, high, light, living, and moving nature. It gets into the essence of organs and penetrates them the same way roses are penetrated by water, olives by oil, and coal by fire. As long as these organs are fit to receive the effects on them of this delicate object, it remains intertwined with them and benefits them with these effects in the form of feeling and voluntary motion. If these organs spoil, due to the predominance of dense humours and are no longer receptive to those effects, the spirit departs from the body and removes itself to the world of spirits.⁶¹⁴

Similarly, Abu Hamed Al-Ghazali explains the role the spirit plays in death as follows:

The meaning of the spirit's departure from the body is that it no longer controls the body, which stops obeying it. The organs are vehicles for the spirit. It strikes with hands, hears with ears, sees with eyes, and learns the truth about things by itself. The failure of the body with death is parallel to the chronic failure of its organs because one of its humours spoils, or to a crisis suffered by the nerves and preventing the spirit from getting to them, which makes the knowing, rational, and perceptive spirit available to, and in control of, some organs, and resisted by others. Death is when all organs resist the spirit. All the organs are machinery used by the

⁶¹⁴ Ibn Al-Qaiyim, *Al-Ruh*, 241, 242. As translated in Yasin, "The End of Human Life in the Light of the Opinions of Muslim Scholars and Medical Findings", 380, 381,

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spirit. Death means the spirit no longer controls the body, which is no longer a vehicle for it. As chronic failure of the hand means it is no longer in use, death is the chronic failure of all organs ...⁶¹⁵

Following the logic embodied in this understanding it is clear that ensoulment must be delayed until bodily fitness is acquired. That is to say, since human life ends when the body becomes entirely and irreversibly incapable of receiving and executing the soul's instructions, it, human life, cannot start unless the body is capable of doing so. Cartesianism, as a main dualistic concept, also supports the principle of bodily readiness or fitness. It requires bodily readiness as a result of considering the soul- or mind-body relationship as intrinsically causal. This causality requires that only when the former is able to implement causal influence on the latter can ensoulment occur.⁶¹⁶ As John Foster puts it:

[A]s the dualist conceives the relation between body and mind, the very notion of embodiment will turn out to be, in part, implicitly causal. An essential part of what makes it the case that a certain mind and a certain body belong to the same subject is that they are causally attached to each other in a special way—a way which equips the body to have direct causal interaction with the mind, and no other, and equips the mind to have direct causal interaction with this body, and no other.⁶¹⁷

However, the stance of Thomism as the other dualistic concept on the issue is controversial. As presented by Donceel, it clearly advocates the notion that bodily

⁶¹⁵ Abu Hamed Al-Ghazali, *Ihyay' Ulum Al-Din*, vol. 4, Beirut: Dar Al-Ma'rifah, p 494. As cited by Yasin, "The End of Human Life in the Light of the Opinions of Muslim Scholars and Medical Findings", 381.

⁶¹⁶ Himma, "A Dualist Analysis of Abortion: Personhood and the Concept of Self Qua Experiential Subject," 51, 52.

⁶¹⁷ John Foster, *the Immaterial Self: A Defence of the Cartesian Dualist Conception of the Mind* (London; New York: Routledge, 1991), 165, 166. Commenting on John Foster's statement, Himma says, "[t]he same remarks, of course, apply to the notion of ensoulment since it is an extensionally equivalent notion: the locution "the body is ensouled" and the locution "the soul is embodied" pick out exactly the same states of affairs." Himma, "A Dualist Analysis of Abortion: Personhood and the Concept of Self Qua Experiential Subject," 52.

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readiness is essential for the ensoulment.⁶¹⁸ Yet, according to other philosophers, while Thomism advocates the proposition that bodily readiness is essential for the actualisation of the soul's ultimate capacities, it requires no such readiness for ensoulment. According to Beckwith, as a clear example of those philosophers:

[T]he human being is an immaterial substance that is not identical to the sum total of the parts of the physical body to which it is uniquely associated. The immaterial substance, sometimes called the soul, is the locus of the self. Thus, mental functions are powers that the soul has by nature that may only be exercised (at least on this side of heaven) by means of the physical entity called the brain.⁶¹⁹

Nevertheless, he claims that the conditionality of the performance of the soul's activities on the brain does not mean subjugating ensoulment to the brain's formation. Human beings as immaterial substance, i.e. soul, come into existence prior to the formation of their bodily parts, including the brain, since these parts are exterior to their reality. They are, and will continue to be, persons even if they lack the organs necessary for exercising activities peculiar to themselves as such.⁶²⁰ In his words:

A human being who lacks the ability to think rationally (either because she is too young or she suffers from a disability) *is still a human person* because of her nature. Consequently, a human being's lack makes sense *if and only if* she is an actual human person.⁶²¹

The different conclusions drawn by Thomists reflect, it seems to me, a difference in understanding Thomas Aquinas' ideas. For example, Donceel denies that

⁶¹⁸ See page 153 above.

⁶¹⁹ Beckwith, "Of Souls, Selves, and Cerebrums: A Reply to Himma," 57. As it will be shortly explained, the acquisition of a brain is what is meant by bodily readiness.

⁶²⁰ *Ibid.*

⁶²¹ *Ibid.* Emphasis in original.

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Thomas's concept of the human being is dualist,⁶²² while Beckwith and Moreland describe it as 'substance dualism'.⁶²³ Also, the soul in Donceel's understanding of Thomism plays the role of the formal cause:⁶²⁴ "...rational soul is ... the form of the body", he says.⁶²⁵ However, in Beckwith and Moreland's understanding, the soul is an efficient cause, that is, it is the originator and guider of all types of growth and development that human beings experience, both biological and mental. Beckwith claims that "...because souls have natures (or essences) they have the teleological function that internally directs the growth and development of the human being."⁶²⁶ "[T]he efficient cause of the characteristics of the human body", Moreland argues, "...is the soul; and various body parts, including DNA and genes, are important instrumental causes the soul uses to produces the traits that arise."⁶²⁷

This belief in the soul as the efficient cause might be the reason behind refusing to delay ensoulment until after bodily readiness, and insisting instead, on timing it with conception. It is the soul, they think, that this originates, and guides bodily development until readiness is accomplished. However, though the discussion of whether these philosophers' understanding represents the right interpretation of Thomism is clearly beyond the scope of my thesis, the discussion of their claim that

⁶²² Donceel, "Immediate Animation and Delayed Hominization", 80.

⁶²³ Beckwith, "Of Souls, Selves, and Cerebrums: A Reply to Himma," 56. Moreland and Rae, *Body & Soul: Human Nature & the Crisis in Ethics*, 121.

⁶²⁴ According to Aristotle, there are four types of causation: material, formal, efficient and final. Taking an example of a statue, the material cause is the material from which it is made while the formal cause is the pattern that determines its shape. The efficient cause is the agent who makes the statue whereas the final one is the aim behind making it. ("causes: material, formal, efficient, final" *The Oxford Dictionary of Philosophy*. Simon Blackburn. Oxford University Press, 1996. *Oxford Reference Online*. Oxford University Press. Lancaster University. 11 October 2007 <http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t98.e378>)

⁶²⁵ Donceel, "Immediate Animation and Delayed Hominization", 84.

⁶²⁶ Beckwith, "Of Souls, Selves, and Cerebrums: A Reply to Himma," 57.

⁶²⁷ Moreland and Rae, *Body & Soul: Human Nature & the Crisis in Ethics*, 206.

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bodily readiness is merely a condition for the soul's function, but not a condition for its embodiment is not.

The question of whether bodily readiness is essential for the soul to infuse the body or merely required for the already existent soul to function, can be answered by reference to the causal nature of the soul-body relationship. As has already been explained, Cartesianists accurately argue that ensoulment is causal in nature, and so cannot occur until a direct causal interaction between the soul and body is possible. Since this direct interaction cannot happen unless the body is organised enough to receive and execute the soul's instructions, ensoulment cannot happen unless bodily readiness is achieved. Put another way, bodily readiness is a prerequisite for ensoulment.

Furthermore, the Thomists' belief that the soul is the organiser and guider of all types of growth and development of the human being, which is apparently the basis of their claim that bodily readiness is a condition for the functionality, rather than the existence, of the soul, cannot be accepted in Islam. In Islam, a distinction is held between two types of life: rational or human life and biological life. While the former finds its source in the human or rational soul as the originator of cognition and volition, the latter finds its seat in another soul called the vegetative soul, the originator and guider of bodily growth and development. The rational soul cannot pertain to a body unless it has already, through the work of the vegetative soul, become organised enough to receive and respond to its effects.⁶²⁸ Therefore, in a thesis based on an

⁶²⁸ See page 176 below.

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Islamic perspective, the Thomists' claim that the human soul is the guider of growth and nutrition cannot be accepted.

Requiring bodily readiness can be justified also by the 'law of complexity-consciousness' as formed by Teilhard De Chardin. According to this law, consciousness is proportional to centro-complexity which is "...the orderly arrangement of an immense number of cells in a closed whole, in which all of them work together for the same purpose."⁶²⁹ As such, there can be no self-consciousness in the absence of a very high degree of centro-complexity.⁶³⁰ Though Teilhard talks about self-consciousness, the fact that such a faculty is linked to the soul makes it plausible, as Donceel rightly argues,⁶³¹ to apply his law to ensoulment.

Moreover, the concept of the hierarchical structure of existence as formed by Maurice Merleau-Ponty can lend support to the conclusion being justified. According to this concept, the spiritual existence of the human being lies at the top of the hierarchical structure of existence and lends new importance to lower levels. Spiritual existence is contingent on the readiness of the lower level to bear it. The argument as summarised by Donceel is that:

[T]here are in man three levels of existence: the physical, the vital, and the spiritual. Each lower level is to the next higher one as the data are to their meaning, as the body is to its soul. Each higher level endows the previous ones with a new significance. The vital level presupposes a certain organization of the physical one,

⁶²⁹ As mentioned in Donceel, "Immediate Animation and Delayed Hominization", 103. He does not reference Teilhard's work.

⁶³⁰ *Ibid.*

⁶³¹ *Ibid.*

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and the spiritual level is possible only as rooted in a vital level which is ready to carry it.⁶³²

Therefore, from an Islamic and philosophical viewpoint, ensoulment can take place only when bodily readiness is achieved.

The role of science with regard to the determination of the timing of ensoulment, is, as outlined earlier,⁶³³ to apply the philosophical principles. In terms of the principle of bodily readiness, the body can be said to be ready to receive the soul when it acquires the organ necessary for actualising the soul-related functions, namely, the cortical brain or cortex. The cortex forms the external stratum of the cerebrum that is the biggest and most greatly developed division of the brain.⁶³⁴ It is the locus of all functions attributed to the soul including one's "...personality, his conscious life, his uniqueness, his capacity for remembering, judging, reasoning, acting, enjoying, worrying, and so on ...",⁶³⁵ and any deep and permanent damage to it normally results in a permanent coma and loss of all of these functions.⁶³⁶ The Oxford Concise Medical Dictionary states that, "[t]he cortex is the seat of all intelligent behaviour".⁶³⁷ It also mentions that it is:

[T]he part of the brain most directly responsible for consciousness, with essential roles in perception, memory, thought, mental ability, and intellect, and it is

⁶³² "Chacun de cea degrés est âme à l'égard du précédent, corps à l'égard du suivant" (La structure du comortement [3rd ed.; Paris, 1953] p.227). As cited by *Ibid*.

⁶³³ See page 161 above.

⁶³⁴ "Cerebrum *n.*" *Concise Medical Dictionary*. Oxford University Press, 2007. *Oxford Reference Online*. Oxford University Press. Lancaster University. 22 October 2007 <<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t60.e1659>>

⁶³⁵ Robert M. Veatch, *Death, Dying, and the Biological Revolution: Our Last Quest for Responsibility* (New Haven Yale University Press, 1976), 39.

⁶³⁶ Plum F. Jennett B, Persistent vegetative state after brain damage: a syndrome in search of a name. *Lancet* 1972; 1:734–7. As cited by Himma, "A Dualist Analysis of Abortion: Personhood and the Concept of Self Qua Experiential Subject," 53.

⁶³⁷ "Cerebrum *n.*" *Concise Medical Dictionary*. Oxford University Press, 2007. *Oxford Reference Online*. Oxford University Press. Lancaster University. 16 May 2008 <<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t60.e1659>>

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responsible for initiating voluntary activity. It has connections, direct or indirect, with all parts of the body.⁶³⁸

In addition, the conclusion that the brain is indispensable for ensoulment is supported by the observation of its electrical activity via the electroencephalograph (EEG).⁶³⁹ While the brain's states are indicated to be the immediate cause of the body's activities, they are shown to correlate with mental states connected with volition.⁶⁴⁰ As Richard Swinburne puts it:

The evidence of neurophysiology and psychology suggests most powerfully that the functioning of the soul depends on the operation of the brain... When direct evidence shows that he is conscious, the electrical rhythm of a man's brain, his EEG, is found to have a certain pattern. The EEG varies with the kind of consciousness—there is one kind of EEG rhythm for intense thought, another kind when a man is mentally inactive but awake, another kind when he is dreaming (as evidenced by his own testimony if woken up shortly afterwards); and there are different rhythms for sleep of different kinds, when the man has no recollection of dreaming (if woken up shortly afterwards). EEG rhythms are thus indirect evidence of consciousness.⁶⁴¹

Therefore, the soul can be considered as the ultimate cause of any bodily activities while the brain is its device for putting them into effect.⁶⁴² The procedure of any act can be modelled as follows: “(1) a volition ‘V’ to do ‘A’ occurs in the soul; (2) ‘V’ causes a

⁶³⁸ "Cerebral cortex" *Concise Medical Dictionary*. Oxford University Press, 2007. *Oxford Reference Online*. Oxford University Press. Lancaster University. 22 October 2007 <http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t60.e1649>

⁶³⁹ EEG is an abbreviation of the name of the machine that records the electrical activity of the brain as well as the name of the drawing it makes. ("EEG *abbrev*" *The Concise Oxford English Dictionary*, Eleventh edition revised. Ed. Catherine Soanes and Angus Stevenson. Oxford University Press, 2006. *Oxford Reference Online*. Oxford University Press. Lancaster University. 15 October 2007 <http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t23.e17667>

⁶⁴⁰ Himma, "A Dualist Analysis of Abortion: Personhood and the Concept of Self Qua Experiential Subject," 52.

⁶⁴¹ Swinburne, *the Evolution of the Soul*, 174, 175.

⁶⁴² Himma, "A Dualist Analysis of Abortion: Personhood and the Concept of Self Qua Experiential Subject," 52.

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brain state 'B' that embodies that volition, and 'B' causes the body to perform the movements associated with 'A'."⁶⁴³ The brain here is held to be "...the locus of the causal connection between the soul and body."⁶⁴⁴ The conclusion that can be drawn from this, is that having a brain is a necessary condition for ensoulment.

Understanding bodily readiness as the acquisition of a brain is upheld in Islamic belief. This is the position that Mohammed Na'im Yasin plausibly advocates:

[T]he living human body, with the brain and other organs, is an intricate complex of vital apparatuses which are interwoven in a miraculous way, placed by the Great Creator in the service of a rational creature breathed by God into that intricate complex and known in Quran and *Sunnah* terminology as the spirit. It ... seems most likely that this spirit controls that living body in this life on earth through the brain, which, operated by it and reacting to its instruction, moves the other organs of the body, sending to them, or through them, the messages which the spirit wants to be received, which allows the spirit to go through what accumulates in the brain and draw conclusions and take decisions in the form of human behaviour.⁶⁴⁵

Indeed, the justification of the adoption of brain death into Islamic jurisprudence revolves around the concept of the brain being the device the soul uses in performing its intentional and rational activities. However, those jurists have not specified clearly, as in my opinion they should, that the cessation of the cortical brain not that of the entire brain is what should matter.⁶⁴⁶

The previous description shows that it is the cortical brain or cortex, rather than the whole brain, which is responsible for actualising soul-related functions. Therefore,

⁶⁴³ *Ibid.*

⁶⁴⁴ *Ibid.*

⁶⁴⁵ Yasin, "The End of Human Life in the Light of the Opinions of Muslim Scholars and Medical Findings", 389.

⁶⁴⁶ See for example, *Ibid.*, 375, 395.

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bodily readiness should be understood as the acquisition of the cortical brain. Yet, the brainstem is claimed to be extremely important for the soul's functions and so should also be considered when the moment of ensoulment is being determined. Indeed, the brainstem is necessary for the ordinary operation of the respiratory and cardiovascular systems that are indispensable for conscious life.⁶⁴⁷ In addition, since the brainstem's role in transferring information between the spinal cord and the cortical brain is indispensable for performing all physical acts, it is said to be necessary for all independent acts.⁶⁴⁸ Furthermore, the brainstem plays a crucial part in the capacity of consciousness *per se*.⁶⁴⁹ That is to say, it regulates a series of wakefulness and sleep, and since the former is essential for the higher operations of conscious life, besides constituting the very state of being conscious, the brainstem is deemed essential for consciousness.⁶⁵⁰ This is also proven through the fact that going into permanent coma is the usual result of any severe injury caused to the area of brainstem responsible for that function.⁶⁵¹

However, though undeniable, the importance of the brainstem for soul-related functions is indirect. As the regulator of cardiovascular operation, its importance is comparable to that of the heart: without the heart no biological life and so conscious life is possible, yet the heart does not give rise to consciousness. The same is true of the role of the brainstem. Likewise, though transmitting information between the spinal cord and higher brain is essential for sense perception and conscious faculties, this function of the

⁶⁴⁷ Himma, "A Dualist Analysis of Abortion: Personhood and the Concept of Self Qua Experiential Subject," 53.

⁶⁴⁸ *Ibid.*

⁶⁴⁹ Though consciousness and soul are not the same thing, they are intimately connected for no consciousness is possible without soul. See Donceel, "Immediate Animation and Delayed Hominization," 103.

⁶⁵⁰ Himma, "A Dualist Analysis of Abortion: Personhood and the Concept of Self Qua Experiential Subject," 53, 54.

⁶⁵¹ *Ibid.*, 54.

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brainstem causes none of these faculties. Furthermore, the brainstem's role in regulating the series of wakefulness and sleep is described as being like that of the light switch: despite being essential for turning the light on, it gives no rise to the light itself. Similarly, while the brainstem operates to switch consciousness on, it, in itself, engenders no consciousness.⁶⁵² Thus, the brainstem's importance for cognition and volition is not comparable to that of the cortical brain.

The previous discussion shows that the cortical brain can be concluded as the immediate cause of cognitive and volitional functions, while the soul is their ultimate cause. As such, bodily readiness for ensoulment should be understood as the acquisition of the cortical brain not just the brainstem. However, despite being necessary for ensoulment, bodily readiness is not sufficient for it. That is to say, bodily readiness means that ensoulment can happen but not necessarily that it actually will happen. In the following, another principle that can help identify when ensoulment occurs will be explained.

5.1.1.2 The principle of the indicatory role of the soul-related functions

As mentioned above, the fact that the body is ready to receive the soul does not necessarily mean that the soul infuses it. Thus, the ensoulment moment cannot be simply equated to the physical stage at which the body is ready to acquire the soul. However, the solution can be found in another principle that can be formed through examining the previous religious and philosophical discussions of the nature of being human. This principle is that since volitional and cognitive functions are the effects of the soul, they can be used as conclusive evidence of its existence. In other words, these functions find

⁶⁵² *Ibid.*

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their seat in the soul and so, when observed, they indicate the existence of the soul. The reverse is also true, so that when complete and permanent, the disappearance of these functions indicates the non-existence of the soul. It follows that, though physically undetectable, the soul can be detected through its functions.⁶⁵³ Accordingly, the first perceived volitional or cognitional activity should be regarded as a sign of the ensoulment moment.

This principle is based on the clear distinction made in *Shari'a* between two types of activities the body performs. On the one hand, there are volitional and cognitional activities that are attributed to the human or rational soul. On the other, there are reflexive activities that are not expressions of the soul, and so have no bearing on determining its existence or non-existence. It is conceivable that the body performs simultaneously both types of activities as in the case of normal adult human beings. It is also equally conceivable that it performs only reflexive functions. If complete and permanent, the absence of the non-reflexive functions is considered definite proof of the absence of the soul. The human being is said to have died if the soul's absence happened after it had existed in the body, while no human being can be said to have existed if the soul has never permeated the body. The mere appearance of non-rational and non-voluntary functions in this case is an expression of life stripped of the description of being human in the moral sense.⁶⁵⁴

⁶⁵³ This is sufficient grounds for me to rely on the concept of ensoulment to ascertain the moral and legal status of the foetus despite the difficulty involved in determining how and when it takes place. Indicating this difficulty, Margaret Brazier says that: "[w]e may not know (and I suspect can never now) when and how that soul enters the embryo." Brazier, "Embryo' Rights": Abortion and Research ", 13.

⁶⁵⁴ Yasin, "The End of Human Life in the Light of the Opinions of Muslim Scholars and Medical Findings", 385, 386.

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The previous discussion suggests accurately that there can be two types of life existing in a human body. Indeed, this possibility is known to Moslem scholars. However, only a life of cognition and volition is regarded as human in the moral sense. One that is stripped of cognition and volition is deemed many things except being morally human.⁶⁵⁵ For example, Muhammad Hasnain Makhoul differentiates between pre- and post-ensoulment life. While he admits the existence of pre-ensoulment-life in entities descendent from human parents, he describes it as being merely a natural life, similar to that of plants, in that the entity is subject to bodily development in both quantity and quality. It is only a life of growth and nourishment. By contrast, post-ensoulment life is one of cognition, discernment, sensation and volition, the qualities that make it human life.⁶⁵⁶

The distinction made in *Shari'a* between the two types of life, human and non-human, is not merely theoretical. Rather, it is applied with regard to what is known as 'joint murder in succession',⁶⁵⁷ which occurs when a victim encounters a lethal attack followed by another attack, from a different person, that speeds up the victim's death. The question posed concerns who is responsible for the murder and so should be subjected to the retaliation, the murderer's punishment.⁶⁵⁸ Scholars have agreed that the murderer is the one who causes the victim to lose entirely and permanently all senses and

⁶⁵⁵ Yasin, "Hqyqh al-Jnyn w Hkm al-Āntfā' bh fy Zrā'h al-Ā'ḍā' w al-Tjārb al-'lmyt," 74. Vegetative, cellular, and animal are examples of descriptions given to the type of life mentioned above. *Ibid.*

⁶⁵⁶ Mḥmd Hsnyn Mkhoul. *Al-Mṭālb al-Qdsy fy Aḥkām al-Rwḥ w Athārḥā al-Kwnyḥ* (Cairo: Shrkḥ Mṣṭfā al-Bāby al-Hlby 1963), 2nd edition, ṭ2, page 95. As cited by *Ibid.*

⁶⁵⁷ Yasin, "The End of Human Life in the Light of the Opinions of Muslim Scholars and Medical Findings", 382, 383.

⁶⁵⁸ Retaliation, or *qisas* as known in Arabic, is similar to the biblical principle of an eye for an eye. In the case of murder, it means the right of the heirs of a murder victim to demand execution of the murderer. See "qisas" *Oxford Dictionary of Islam*. John L. Esposito, ed. Oxford University Press Inc. 2003. *Oxford Reference Online*. Oxford University Press. Lancaster University. 17 August 2008 <<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t125.e1931>>

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voluntary actions. If that one is the first attacker, then he or she must be subjected to the retaliation while the second one should then also be punished, but for disrespecting the deceased.⁶⁵⁹

This understanding is apparent in many Moslem jurists' writings. For example, according to Badr Al-Din Al-Zarkashi:

Stable life is when the spirit, and with it voluntary, not merely involuntary, movement is in the body, as the case of a human being whose intestines are spilled out by a criminal or a beast of prey. No retaliation is carried out against such a criminal. If a human being is stabbed by another and the victim's death is confirmed within an hour or a day, retaliation in this case is the due punishment of the criminal, because the victim's life is stable and he is able to move voluntarily at all the time of the crime ... [this is not the case] if the intestines of the victim are exposed, because respiratory tract is damaged and movement is no longer voluntary. As for life in the "slaughtered person's movement" stage, it is that which has no eyesight, utterance, or voluntary movement ...⁶⁶⁰

Therefore, it can be concluded that volitional and cognitional functions are accepted as conclusive evidence of the soul's existence, and so, when detected, they prove without doubt the existence of the soul. However, it is important to clarify what is meant by volitional or cognitional activity.

As previously established, the soul is the seat of all mental activities including those distinctive of persons, such as moral agency. Hence, its existence can be determined without doubt through the detection of any of these activities, regardless of how rudimentary they are. Therefore, in spite of the fact that the capacity for moral

⁶⁵⁹ Yasin, "The End of Human Life in the Light of the Opinions of Muslim Scholars and Medical Findings", 382, 383..

⁶⁶⁰ Badr Al-Din Al-Zarkashi, *Al-Manthur fi Al-Qaw'ed*; vol. 2, First Edition (Kuwait: Ministry of Endowment Publications, 1402., 1982 A.D. pp. 105 off. As cited by *Ibid.*, 383.

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agency is the chosen criterion for personality, there is no need to detect the existence of any of its precedents even in a primitive sense at this stage. It is sufficient for the aim of determining the timing of the ensoulment event to detect the first mental activity to occur, regardless of its relationship to the capacity for moral agency. This leads to the need to discuss consciousness as a determiner of the timing of the ensoulment event.

5.1.2 Consciousness as the indicator of the timing of the ensoulment event

Choosing consciousness as an indication of ensoulment is a result of combining the previously discussed philosophical and scientific principles. The first principle is that ensoulment cannot take place unless the body becomes ready to execute the soul's functions. Since these functions are of a volitional and cognitional nature, this readiness is achieved when the cortical brain, as the organ responsible for executing such functions, is formed.⁶⁶¹ However, since the acquisition of bodily readiness is a necessary, but not a sufficient condition for ensoulment, the latter cannot simply be equated with the former. Here the principle of the indicatory role of the soul-based functions comes to the fore. According to this principle, these functions indicate without any doubt the presence of the soul, and therefore the first to be detected can be used as an indication of ensoulment. This first one happens to be consciousness.⁶⁶²

The fact that consciousness is the first mental activity to occur is sufficient for using it as the indicator of the ensoulment event. Consciousness has been held for various reasons to be significant in conferring personality. For example, some commentators

⁶⁶¹ See 5.1.1.1 The principle of bodily readiness.

⁶⁶² The type of consciousness meant here is the most basic one, i.e. consciousness as an experience of sensational content. In explaining this type of consciousness and discriminating it from representational consciousness, the latter being more complicated and advanced, see J. A. Burgess and S. A. Tawia, "When Did You First Begin to Feel It?--Locating the Beginning of Human Consciousness," *Bioethics* 10, no. 1 (1996): 1-26, 4, 5.

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have justified this by referring to consciousness as being the capacity that makes life meaningful and worth living, hence, it is the criterion upon which personality is based.⁶⁶³ Others refer to it as being the basis upon which higher order capacities can be enjoyed.⁶⁶⁴ For instance, Himma considers consciousness as a necessary condition for the enjoyment of moral agency.⁶⁶⁵ Nevertheless, I see no need to adopt such justifications. The simple fact that it is, firstly, mental activity and so can be produced only by the soul, and secondly, that it is the first mental activity to occur, is sufficient reason for using consciousness as an indication of the soul's existence. It therefore has no bearing on the plausibility of the forthcoming discussion of the beginning of consciousness that it, consciousness, may turn out to be insignificant for the acquisition of personality or any higher mental capacities.

In addition to the philosophical principles, the use of consciousness as the indicator of the timing of the ensoulment event is justified by scientific principles. As concluded earlier in this chapter, bodily readiness means acquiring the cortical brain or the cortex as the organ necessary for performing soul-related functions. Two results follow from this conclusion. The first is that the structure that must develop before the ensoulment event can take place should be understood as that of the cortex. The second result is that the activity indicative of that event must be cortical. These results are significant in ascertaining the beginning of consciousness, hence the ensoulment timing, as will be presently explained.

⁶⁶³ *Ibid.*, 1, 2. Glannon, "Tracing the Soul: Medical Decisions at the Margins of Life," 53. In his words, "... personhood consists in the capacity for consciousness and mental life."

⁶⁶⁴ In mentioning this idea, see D. G. Jones, "Brain Birth and Personal Identity", *British Medical Journal* 15, no. 4 (1989): 173-178, 173, 174.

⁶⁶⁵ K. Himma, "Artificial Agency, Consciousness, and the Criteria for Moral Agency: What Properties Must an Artificial Agent Have to Be a Moral Agent?" in *Seventh International Computer Ethics Conference* (University of San Diego, USA: Social Science Electronic Publishing, Inc. (SSRN), 2007). Retrieved from <http://cepe2007.sandiego.edu> at 12/11/2007.

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Then, being the first mental activity to occur, consciousness is the best candidate for ascertaining the timing of the ensoulment event. The aim of the following discussion is to determine the beginning of consciousness as a way of determining the timing of the ensoulment event.

5.1.3 Determining the beginning of consciousness

Consciousness, as previously argued, is the first mental activity to occur and so the best candidate for ascertaining the time when the soul, as the ultimate seat of all mental activities, infuses the body. Determining the beginning of consciousness is, therefore, a necessary step towards determining the timing of the ensoulment event. I will propose that the beginning of consciousness, and hence, the ensoulment event, takes place at the twentieth week of gestational age.⁶⁶⁶ With the aim of proving this claim, I will discuss the different methods of determining the existence of conscious experience, and how the previously explained fact that the cortex is the locus of all mental activities can help in this regard. Following that, I will discuss the variable suggested points for

⁶⁶⁶ The age of the foetus can be articulated in different ways. Its age taken from conception onwards is called the gestational age (Burgess and Tawia, "When Did You First Begin to Feel It?--Locating the Beginning of Human Consciousness," 11), or the Conceptional age (W. A. William A. Engle, "A Recommendation for the Definition Of "Late Preterm" (near-Term) and the Birth Weight-Gestational Age Classification System," *Seminars in perinatology* 30, no. 1 (2006): 2-7, 4). The age counted from the day of the last menstrual cycle is called the menstrual age (Burgess and Tawia, "When Did You First Begin to Feel It?--Locating the Beginning of Human Consciousness," 10, 11). In this research, the term gestational age will be used to denote the age of the foetus from conception onwards while the term menstrual age will be used to refer to the age taken from the last menstrual period. The conception timing and so the gestational age is determined through calculating the menstrual age: it is assumed that the menstrual cycle is twenty eight days on average and that ovulation occurs on the fourteenth day. Since ovulation is shortly followed by conception, it is often taken as a proxy for the conception time. So, the gestational age is the menstrual age minus two weeks. (C. D. Lynch and J. Zhang, "The Research Implications of the Selection of a Gestational Age Estimation Method", *Paediatric and perinatal epidemiology* 21, no. Suppl 2 (2007): 86-96, 86, 87. Burgess and Tawia, "When Did You First Begin to Feel It?--Locating the Beginning of Human Consciousness," 11. Engle, "A Recommendation for the Definition of "Late Preterm" (near-Term) and the Birth Weight-Gestational Age Classification System", 4). In this chapter, since the concern is about the development of the foetus and when certain structural and functional elements throughout this development occur, the age of the foetus will be taken as that from conception, i.e. the gestational age. So, the twentieth week mentioned in the text above means the twentieth week after conception.

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allocating the beginning of consciousness, and select the twentieth week of gestational age as the most plausible one. Different philosophical and religious considerations will be used to justify this selection.

The two methods utilised by conventional psychology to identify the existence of conscious experience are a little problematic in terms of ascertaining the beginning of consciousness. The first method takes the form of one's contemplation of their own personal experience and can be called the first person method.⁶⁶⁷ The difficulty associated with this method is that it gives us knowledge about our own current experience while past experience, which is what matters here, can be accessed only via memory. Clearly, the memory cannot be fully trusted since it frequently misleads about recent incidents let alone those that might have occurred during prenatal life. As a result, the earliest remembered conscious experience is not necessarily the very first.⁶⁶⁸

The second method for identifying the existence of conscious experience also has its own inherent problems. It takes the form of observing and interpreting others' behaviour, and can be called the third person method.⁶⁶⁹ Its first difficulty is that the interpretation of others' behaviour can mislead even with regard to adults, let alone foetuses.⁶⁷⁰ The other problem is that it is crucial when interpreting others' behaviour that the interpreter be aware of what it is like to be in their position: how it feels to be an adult or to remember how it felt to be a child. How can they know what it is like to be a foetus

⁶⁶⁷ Burgess and Tawia, "When Did You First Begin to Feel It?--Locating the Beginning of Human Consciousness," 6.

⁶⁶⁸ *Ibid.* Swinburne, *the Evolution of the Soul*, 175.

⁶⁶⁹ Burgess and Tawia, "When Did You First Begin to Feel It?--Locating the Beginning of Human Consciousness," 6. Though Swinburne does not use the terms first person and third person methods, he adopts a similar classification. Swinburne, *the Evolution of the Soul*, 174, 175.

⁶⁷⁰ Burgess and Tawia, "When Did You First Begin to Feel It?--Locating the Beginning of Human Consciousness," 6.

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while the only access to that is through dubious memory?⁶⁷¹ It is also difficult to assess how it might be possible to distinguish between foetal behaviour occurring because of spinal reflexes or brainstem activity, and that resulting from, or engaging, the cortex.⁶⁷² Nevertheless, this does not mean that the foetus's behaviour has no credibility at all as an indicator of consciousness.

It is contended that foetal behaviour can be used to ascertain the beginning of consciousness when observed and interpreted in the light of the relationship between the cortex and mental activity. This relationship is formed by the cortex as the direct locus of all types of mental activity, with the soul being the ultimate one, or, to put it the way Burgess and Tawia do, mental activity is supervenient on the cortex:

([M]ental) facts about human consciousness are supervenient on (physical) facts about the human central nervous system – more specifically, they are (at least largely) supervenient on facts about the cerebral cortex.⁶⁷³

As a result, the mental activity of consciousness is impossible without a functioning cortex. Since this functionality is, in turn, impossible in the absence of the required physical structure, it can be concluded that consciousness is also impossible in the absence of that structure. Accordingly, no foetal behaviour detected while the required structure is absent can be interpreted as being indicative of a conscious state.

As for the cortex, the required structure is the formation and function of the thalamus. It is the part of the brain responsible for transmitting afferent signals between the spinal cord and the other components of the central nervous system, the cortex

⁶⁷¹ *Ibid.*

⁶⁷² *Ibid.*

⁶⁷³ *Ibid.*, 2.

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included. As such, its integrative function is indispensable for sensational consciousness. Such a function, and in turn consciousness, is unattainable before the synapses or connections between the thalamus and the cortex are not only in place but also functioning. Since the earliest time such functioning connections are detected is roughly around the twentieth week, this date could be considered as the earliest stage at which consciousness is possible.⁶⁷⁴ The twentieth week, then, is the threshold from which consciousness is possible, or, put another way, it is the point before which consciousness is impossible. As a result, no foetal behaviour detected prior to that time can be interpreted as being indicative of a conscious state.⁶⁷⁵

However, although it is helpful to exclude confidently any possibility that consciousness may start before the twentieth week, and accordingly dismiss any behaviour detected prior to that time, this does not help identify the date at which consciousness actually starts. The existence of the physical structure *per se* does not mean that any foetal behaviour detected can be interpreted as being indicative of conscious states; structure, after all, is not synonymous with function. Therefore, the question remains about when consciousness begins.

⁶⁷⁴ R. Brusseau and L. Myers, "Developing Consciousness: Fetal Anesthesia and Analgesia," *Seminars in Anesthesia, Perioperative Medicine and Pain* 25, no. 4 (2006): 189-195, 191. In a similar manner, Shannon and Wolter state that "[t]he biological data suggest that the minimal time of the presence of a rational nature would be around the 20th week, when neural integration of the entire organism has been established. The presence of such a structure does not argue that the fetus is positing rational actions, only that the biological presupposition for such actions is present." (Thomas A Shannon and Allan B Wolter. "Reflections on the Moral Status of the Pre-Embryo." *Theological Studies* 51, no. 4 (1990): 603-626, 620.) On a similar basis, J. Korein concludes that "as a lower limit, brain life *can not begin earlier* than the twentieth week." (J. Korein, "Ontogenesis of the Fetal Nervous System: The Onset of Brain Life," *Transplant Proc* 22, no. 3 (1990): 982-983, 983.) (Emphasis his). Similar statements are cited in J. Rubinfeld, "On the Legal Status of the Proposition That "Life Begins at Conception", " *Stanford Law Review* 43, no. 3 (1991): 599-635, 624.

⁶⁷⁵ Foetal movements have been detected through ultrasound about 5.5 weeks of gestation. De Vries J.I.P., Visser G.H.A. and Prechtl H.F.R.: 'The Emergence of Fetal Behaviour. I. Qualitative Aspects', *Early Human Development*, 1982: pp.301-322. As cited by Burgess and Tawia, "When Did You First Begin to Feel It?--Locating the Beginning of Human Consciousness," 10.

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Once again, recalling that consciousness is supervenient on the cortex will help identify when conscious experience first begins. It begins with the initiation of cortical functions, or "...the beginning of 'cortical life,'" as Burgess and Tawia call it.⁶⁷⁶ In other words, the first activity detected in the cortex signifies the first mental activity to occur, i.e. consciousness: "...we first become conscious when the cortical events *on which* consciousness is (largely) supervenient first begin to occur."⁶⁷⁷

However, the term 'activity in the cortex' or 'cortical activity' may be used to denote two different things. First, it may be used to refer to any activity that occurs in the cortex regardless of whether that activity is merely developmental, such as cell division, migration, differentiation, and growth, or electrical activity.⁶⁷⁸ This meaning is, nevertheless, not intended. The second meaning of cortical activity, which is the right one, is that of the same type of activity that the cortical brains of adult human beings perform or, at least, a rudimentary non-differentiated antecedent of that activity.⁶⁷⁹

Nonetheless, the question that arises is how it can be determined whether types of electrical activity detected in prenatal cortices, if there any, are uncontentiously of same type of activity that the cortical brains of adult human beings perform or, at least, a rudimentary non-differentiated antecedent of that activity. The answer lies in the correlation noted by neurophysiologists and psychologists between conscious states and cortical brain activity. Each conscious state is said to correlate with a particular type of electrical cortical activity. Burgess states that "[i]n neuropsychology, it is regarded as

⁶⁷⁶ Burgess and Tawia, "When Did You First Begin to Feel It?--Locating the Beginning of Human Consciousness," 3. Emphasis theirs.

⁶⁷⁷ *Ibid.* Emphasis theirs.

⁶⁷⁸ *Ibid.*, 18. This understanding of the functioning cortex is the main reason, according to them, behind locating the first conscious experience at unacceptably earlier stages. *Ibid.*, 18, 19.

⁶⁷⁹ *Ibid.*, 18.

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uncontentious that there is a link, close enough to amount to supervenience, between genuine behavioural evidence of consciousness and electrical activity in the cortex which can be measured by an EEG.”⁶⁸⁰ This view is widely held and, summing up the evidence, Swinburne argues that:

When direct evidence shows that he is conscious, the electrical rhythm of a man's brain, his EEG, is found to have a certain pattern. The EEG varies with the kind of consciousness—there is one kind of EEG rhythm for intense thought, another kind when a man is mentally inactive but awake, another kind when he is dreaming (as evidenced by his own testimony if woken up shortly afterwards); and there are different rhythms for sleep of different kinds, when the man has no recollection of dreaming (if woken up shortly afterwards). EEG rhythms are thus indirect evidence of consciousness.⁶⁸¹

Foetal behaviour can, then, be used to identify when consciousness first begins when looked upon in the light of cortical EEG readings. The first foetal movement that can be seen as conscious is that which is correlated with an EEG rhythm associated with a conscious state.⁶⁸² As a result, prenatal cortical EEGs should be scrutinised in order to detect the first foetal conscious state.

Using EEGs to identify the beginning of consciousness is constrained by two considerations. The first is that no electrical activity detected before the twentieth week of gestational age can be used as an indication of any conscious states. The reason is that none of these states is thought to be possible before the acquisition of the necessary

⁶⁸⁰ *Ibid.*, 8.

⁶⁸¹ Swinburne, *the Evolution of the Soul*, 175.

⁶⁸² Using EEG readings is an indirect way of identifying consciousness; however, unlike the lack of certainty the description ‘indirect’ may imply, these readings could be used to question and even correct conclusions concerning consciousness drawn by virtue of ‘direct’ methods. For further explanation, see *Ibid.*

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physical structure at the twentieth week.⁶⁸³ The second consideration is that from the twentieth week onwards, EEG patterns should be read and analysed in the light of the knowledge of adult cortical activity, which is paradigmatically indicative of conscious states.⁶⁸⁴

Doing so has led to locating the first cortical activity that can be considered to correlate with a conscious experience at around one of two points, these being the twentieth or the thirtieth weeks. Choosing the twentieth week is the position held by several researchers,⁶⁸⁵ and was the basis for the proposed Unborn Child Pain Awareness Act of 2005 in the US,⁶⁸⁶ which is claimed to be based on scientific facts about sensational consciousness.⁶⁸⁷ Yet, this position has been heavily criticised on the basis

⁶⁸³ See page 182 above.

⁶⁸⁴ Burgess and Tawia, "When Did You First Begin to Feel It?--Locating the Beginning of Human Consciousness," 7.

⁶⁸⁵ Swinburne, *the Evolution of the Soul*, 176. After excluding the possibility that consciousness may start instantaneously after conception due to the lack of the required infrastructure and the absence of any bodily actions indicative of feeling, thinking, or purposings, he concludes that, "[t]he evidence suggests that consciousness originates when the foetus has a brain with the kind of electrical rhythms characteristic of consciousness, viz. about twenty weeks after conception (the time of quickening, the first muscle movements, which are probably connected with the first brain activity)." See also G. B. Gertler, "Brain Birth: A Proposal for Defining When a Fetus Is Entitled to Human Life Status," *Southern California Law Review* 59, no. 5 (1986): 1061-1078, 1067. Brusseau and Myers consider the twentieth week as well as the thirtieth one as the possible starting points of consciousness Brusseau and Myers, "Developing Consciousness: Fetal Anesthesia and Analgesia," 189.

⁶⁸⁶ Unborn Child Pain Awareness Act of 2005, S. 51, 109th Cong. (2005) Retrieved from <http://www.govtrack.us/congress/bill.xpd?bill=s109-51> at 16/12/ 2007. According to this proposed act, which failed to pass ((NRLC), National Right to Life Committee. "National Right to Life Statement on U.S. House Vote on Unborn Child Pain Awareness Act", retrieved from http://www.nrlc.org/abortion/Fetal_Pain/HouseVoteStatement120606.html, at 16/12/07), abortionists would be required to inform women seeking an abortion that their foetuses from the twentieth week onwards feel unbearable pain during an abortion. Under sec. 2 entitled 'Findings', it says, "Congress makes the following findings: (1) At least 20 weeks after fertilization, an unborn child has the physical structures necessary to experience pain. (2) There is substantial evidence that by 20 weeks after fertilization, unborn children draw away from certain stimuli in a manner which in an infant or an adult would be interpreted as a response to pain. Anesthesia is routinely administered to unborn children who have developed 20 weeks or more past fertilization who undergo prenatal surgery. (4) There is substantial evidence that the abortion methods most commonly used 20 weeks after fertilization cause substantial pain to an unborn child." Therefore, the proposed Act dictates abortion providers to inform women seeking abortion about their foetuses capacity to feel pain and the possibility of reducing it via administering anaesthesia and other pain-reducing drugs.

⁶⁸⁷ *Ibid.* Anand KJS: A scientific appraisal of fetal pain and conscious sensory perception. Written testimony offered to the Constitution Subcommittee of the U.S. House of Representatives, U.S. House

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that EEG readings from the cortex at this stage are "...extremely rudimentary and occurs only briefly and intermittently."⁶⁸⁸ This indicates, according to some researchers, the absence of any conscious states,⁶⁸⁹ while it indicates to others that these readings account for nothing but a mere precursor of sleep states, and so the foetus cannot be claimed to be conscious at that time.⁶⁹⁰

The other point at which the first conscious experience is said to be located is the thirtieth week of gestational age. This is claimed to be the time when EEG readings become noticeably more continuous, and precursors of sleep-wakefulness cycles grow.⁶⁹¹ It is also claimed to be the time when readings considered as the first processors of a waking state emerge.⁶⁹² Therefore, this should be chosen as the starting point of consciousness,⁶⁹³ as it is claimed that most researchers have already done.⁶⁹⁴

Of these two points, the twentieth week of gestational age is for various reasons the most plausible one. First of all, the criticism levelled at choosing this point seems unsound. The discontinuity noted in the EEG rhythms detected in fetuses' cortices, is not a sufficient basis for denying their enjoyment of any conscious states. The reason is that similar discontinuity has been noted in the EEGs rhythms of ordinary full-term

Committee on the Judiciary, 109th United States Congress on October 1, 2005. Retrieved from <http://judiciary.house.gov/media/pdfs/anand110105.pdf> at 16/12/2007.

⁶⁸⁸ Burgess and Tawia, "When Did You First Begin to Feel It?--Locating the Beginning of Human Consciousness," 24.

⁶⁸⁹ Himma, "A Dualist Analysis of Abortion: Personhood and the Concept of Self Qua Experiential Subject," 53.

⁶⁹⁰ Burgess and Tawia, "When Did You First Begin to Feel It?--Locating the Beginning of Human Consciousness," 23.

⁶⁹¹ *Ibid.*

⁶⁹² *Ibid.*

⁶⁹³ *Ibid.*, 23, 24.

⁶⁹⁴ Himma, "A Dualist Analysis of Abortion: Personhood and the Concept of Self Qua Experiential Subject," 53.

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children, without being accompanied by any cortical death symptoms.⁶⁹⁵ Obviously, this proves that such discontinuity *per se* has no bearing on the issue of deciding on the existence or non-existence of conscious states. It cannot therefore be used to strip the twentieth week foetal cortical EEG rhythms of their plausibility as determiners of the existence of conscious states.

In addition, the criticism that electrical readings indicative of consciousness at the twentieth week are rudimentary, can be refuted in the light of the soul-body relationship. The soul has, in an ultimate sense, all capacities persons enjoy, including consciousness, and so from the moment of ensoulment the being acquires them. However, actualising these capacities is contingent on the body's development and is proportionate to it. It is understandable, then, that while the soul with all its ultimate capacities is embodied at the twentieth week of gestational age, consciousness, as one of these capacities, is still at a very primitive stage because of the rudimentary developmental stage of the body at that time.

Furthermore, there are non-scientific considerations that can support the choice of the twentieth week as the starting-point for consciousness, and hence the timing of the ensoulment event.⁶⁹⁶ These considerations are mainly based on *Shari'a* as the yardstick

⁶⁹⁵ In mentioning this fact, see Burgess and Tawia, "When Did You First Begin to Feel It?--Locating the Beginning of Human Consciousness," 22.

⁶⁹⁶ The exclusion of scientific considerations is due to the fact that the issue seems, so far, irresolvable from that angle. Citing an example may clarify this claim. When 'the Unborn Child Pain Awareness Act of 2005' was proposed, on the basis of claimed scientific findings that foetuses have the capacity for experiencing pain from the twentieth week onwards, the American Medical Association (AMA) issued in August 2005 a report based on a multi-disciplinary review of foetal pain studies which deduced that a foetus cannot consciously suffer pain before reaching the age of twenty nine to thirty weeks. In their words, "[e]vidence regarding the capacity for fetal pain is limited but indicates that fetal perception of pain is unlikely before the third trimester". S. J. Lee et al., "Fetal Pain a Systematic Multidisciplinary Review of the Evidence", (Am Med Assoc, 2005), 947 & 952. Also, A. A. Wenger, "Fetal Pain Legislation", *Journal of Legal Medicine* 27, no. 4 (2006): 459-476, 460. However, other scientists unsatisfied by the reply criticized it and concluded that "[f]etal development ... provide[s] the substrate and mechanisms for

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against which theories and views discussed in this thesis are being measured. The first of these considerations is the concept of a teleological universe. As previously mentioned, everything, from the Islamic perspective, is seen as being created for an aim that gives it value and meaning.⁶⁹⁷ The human body and soul are no exception; each needs the other in order to realise its meaningful existence. Ensoulment becomes, therefore, inevitable once bodily readiness is achieved and it makes no sense in a teleological world to claim otherwise. This readiness, as earlier established, is achieved at the twentieth week.

Another supporting consideration is the concept known in *Shari'a* as *Haream al-Rouh*, or the sanctity of soul, which has been introduced by some jurists when discussing the legitimacy of abortion. These jurists have argued that abortion should be legitimised up to the time of the ensoulment event because the foetus is not yet a human being. Since this time, according to their understanding of the tradition, is after one hundred and twenty days of gestational age, abortion is regarded as legitimate up to that date. However, they have concluded that abortion should be prohibited forty days prior to that date, i.e. up to eighty days of gestational age, in case of any miscalculation that may occur regarding gestational age and lead to aborting an already ensouled foetus.⁶⁹⁸ This would amount to the killing of a human being, which is equivalent, according to the Qur'an, to the killing of all humanity:

conscious pain perception during the second trimester, but not in the first trimester and before the third trimester of human gestation.” (K.J.S. Anand, *A scientific appraisal of fetal pain and conscious sensory perception* (2005) Written testimony offered to the Constitution Subcommittee of the U.S. House of Representatives, U.S. House Committee on the Judiciary, 109th United States Congress on October 1. Retrieved from <http://judiciary.house.gov/media/pdfs/anand110105.pdf> at 10/01/2008.

⁶⁹⁷ See 3.1.2 The human beings' *raison d'être*.

⁶⁹⁸ Al-Ramli, *Nihayat Nihayat al-Muhtaj*, Matba't al-Babi al-Halabi bi-Miser. Vol. 2. P 416. As cited by Yasin, "*Hqyqh al-Jnyn w Hkm al-Āntfā' bh fy Zrā'h al-Ā'dā' w al-Tjārb al-'lmyt.*" 115.

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We decreed for the Children of Israel that whosoever killeth a human being for other than manslaughter or corruption in the earth, it shall be as if he had killed all mankind, and whoso saveth the life of one, it shall be as if he had saved the life of all mankind.⁶⁹⁹

Therefore, out of caution these jurists have considered the soul to be embodied at the eightieth day and so treated the foetus as a human being from that time.⁷⁰⁰

This way of reasoning is similar to that known as the doctrine of tutorism, which, according to the Concise Oxford Dictionary of the Christian Church, is:

The system of moral theology according to which, in cases of doubt, the 'safer opinion' (i.e. that in favour of the moral principle) must be followed unless there is a degree of probability amounting to moral certitude in the 'less safe opinion' (i.e. that against the principle).⁷⁰¹

Accordingly, whenever there is uncertainty or doubt, one should choose the morally safer course of action. Derived from this tutoristic way of thinking is "the Precautionary Principle" that is widely applied in ethical debates.⁷⁰² Following this way of reasoning with regard to human or personal life requires that "...one should not resolve doubts probabilistically if the life of a (possible) person is at risk. As long as there is doubt, one may not risk taking a human life."⁷⁰³ For example, a hunter has an obligation not to shoot

⁶⁹⁹ 5: 32. In a similar meaning, see Yasin, "*Hqyqh al-Jnyn w Hkm al-Āntfā' bh fy Zrā'h al-Ā'dā' w al-Tjārb al-'lmyt.*" 115, 116.

⁷⁰⁰ Al-Ramli, *Nihayat Nihayat al-Muhtaj*, Matba't al-Babi al-Halabi bi-Miser. Vol. 2. P 416. As cited by Yasin, *Haqiqat al-Janin*: 115.

⁷⁰¹ "Tutorism" *The Concise Oxford Dictionary of the Christian Church*. Ed. E. A. Livingstone. Oxford University Press, 2006. *Oxford Reference Online*. Oxford University Press. Lancaster University. 19 March 008 <<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t95.e5903>>

⁷⁰² Barbara Skorupinski, "Putting Precaution to Debate—About the Precautionary Principle and Participatory Technology Assessment", *Journal of Agricultural and Environmental Ethics* 15, no. 1 (2002): 87-102, 89.

⁷⁰³ Knut W. Ruyter, "Embryos as Moral Subjects and Limits of Responsibility", in *Conceiving the Embryo*, ed. Donald Evans (The Hague, London, Boston: Martinus Nijhoff Publishers, 1996), 181. It is noteworthy that some ethicists have used a tutoristic way of thinking to solve the issue of the status of the foetus. For them, whenever there is reasonable doubt about the status of the foetus, erring on the safe side requires

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if they are in doubt whether the moving thing at the edge of the wood is an animal or a human being.⁷⁰⁴ Likewise, if a pharmacist is uncertain whether the content of a bottle is the medicine indicated on its label, they are obliged to refrain from giving it to a customer.⁷⁰⁵ Both are obliged to follow the most secure course of action to protect human or personal life.

Following this tutioristic or cautious way of reasoning requires choosing the twentieth week of gestational age as the starting point for consciousness, hence the timing of the ensoulment event. Because the twentieth week is accepted as one of the two possible starting points for consciousness, there is a possibility that we might be dealing with a person from that moment on. Therefore, erring on the side of caution requires considering this possibility and adopting the twentieth week datum rather than the thirtieth week. Choosing the latter instead would potentially endanger personal life that might be in existence ten weeks earlier which is an intolerable result.⁷⁰⁶ Therefore, it is safer to choose the twentieth week as the starting point for consciousness and so ensoulment.

What is more, the very rationale behind the concept of *Haream al-Rouh* is still valid and can be used to add a safety margin to the twentieth week datum. Despite the

treating it as a person (Norman, Ford, Ethics, Science and Embryo: weighing the evidence [letter] The Tablet 13 Januray 1990, p. 46. As cited by Ruyter, "Embryos as Moral Subjects and Limits of Responsibility", 182). However, while a detailed discussion of this idea is beyond the scope of this research, it is important to emphasise that no such *reasonable doubt* about the status of the foetus is held in this research and so there is no need to rely on this concept to attribute moral or legal personality to the foetus. The only reasonable doubt is that about the accuracy of calculating the age of the foetus and it is, indeed, taken into account by adding a safety margin to the estimated age (see page 193 below).

⁷⁰⁴ Ruyter, "Embryos as Moral Subjects and Limits of Responsibility", 182.

⁷⁰⁵ *Ibid.*

⁷⁰⁶ There are two assumptions here. First, personality is conferred at the beginning of consciousness, the latter being a proxy for the timing of the ensoulment event and so foetuses prior to that beginning are non-persons. Second, abortion is likely to be legitimised before having personality and its associated rights and protection. See 2.2.1 The importance of the status of the foetus.

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scientific advancement in methods of calculating the age of the foetus, they are still far from being perfect. Summarising these methods and their limitations, Courtney D. Lynch and Jun Zhang say that:

There are three primary methods of gestational age estimation: dating based on last menstrual period (LMP), ultrasound-based dating and neonatal estimates. ... Limitations associated with the use of menstrual-based dating include reporting problems such as uncertainty regarding the LMP date, possibly due to bleeding not associated with menses, as well as concerns about the incidence of delayed ovulation, which can result in invalid estimates of gestation, even for women with certain LMP dates. ... To calculate gestational age with the use of ultrasound, fetal measurements are compared with a gestational age-specific reference. The primary limitation of this method is the fact that the gestational age estimates of symmetrically large or small fetuses will be biased. Further, given that ultrasound references were developed using pregnancies that were dated according to reliable LMP dates, they are potentially biased in the same direction as dates calculated according to LMP. Neonatal estimates of gestational age have been shown to be the least precise dating method.⁷⁰⁷

Therefore, there is still a possibility that a foetus's age might be miscalculated. As put by the ProLife Alliance, "[e]ven with today's sophisticated diagnostic tools we still cannot be 100% accurate in assessing gestational age, with significant margins of error acknowledged as many studies have highlighted."⁷⁰⁸ As one of these studies has shown, "[b]eyond 20 weeks, accuracy of ultrasonic gestational age assessment is limited to \pm 10-

⁷⁰⁷ Lynch and Zhang, "The Research Implications of the Selection of a Gestational Age Estimation Method", 5. For how the age of the foetus from fertilisation is calculated, see *supra* fn. ⁶⁶⁶.

⁷⁰⁸ ProLife Alliance (PLA), "Memorandum 6", in *Scientific developments relating to the Abortion Act 1967 evidence* (London: House of Commons Science & Technology Select Committee, 2007), 37.

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14 days. A fetus deemed to be 22+ weeks may therefore be more mature than expected and viable.”⁷⁰⁹

Erring on the safe side, as in the core theme of the concept of *Haream al-Rouh*, requires considering a safety margin when the age of the foetus is being calculated. This safety margin should be equivalent to the margin of error associated with calculating gestational age. Since the margin of error can be up to two weeks,⁷¹⁰ an eighteen-week-old foetus should be considered as if it were twenty weeks old, that is, it should be treated as a person as this is the standing that should be accorded to the twenty-week-old foetus.

Still, this calculation does not mean relocating the beginning of consciousness, and so ensoulment, beyond the threshold of twenty weeks of gestational age. This datum is the absolute minimum before which no consciousness is possible, and so the eighteen-week-old foetus is undoubtedly non-conscious and so non-ensouled. The extension of the treatment of the twenty-week-old foetus to the eighteen-week-old foetus, simply means protecting personal life that might be in existence. Therefore, the twentieth week will still be considered as the starting-point for consciousnesses, and so ensoulment, while the eighteenth week will be deemed as the point at which the safety margin starts. In addition, whenever the possibility of personal life being in existence is excluded, i.e. the age of the foetus is uncontentiously determined to be less than twenty weeks old, no safety margin should be added, and a clear distinction in treatment between eighteen- or nineteen-week-old foetuses, and twenty-week-old foetuses should be drawn.

⁷⁰⁹ P. Clarke et al., "An Infant Who Survived Abortion and Neonatal Intensive Care", *Journal of Obstetrics and Gynaecology* 25, no. 1 (2005): 73-74, 74.

⁷¹⁰ *Ibid.* Engle, "A Recommendation for the Definition of "Late Preterm" (near-Term) and the Birth Weight-Gestational Age Classification System", 3, 4. Carol Sakala, "Carol Sakalas Letter from North America: An Uncontrolled Experiment: Elective Delivery Predominates in the United States," *Birth* 33 (2006): 332-335, 333. King, "The Juridical Status of the Foetus: A Proposal for Legal Protection of the Unborn," 1678.

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However, the adoption of the twentieth week of gestational age as the starting point for consciousness, and so the timing of the ensoulment event, can be seen to be in direct contradiction to the Prophetic tradition concerning the timing of ensoulment, hence islamically unacceptable. This tradition is widely interpreted to locate the timing of the ensoulment event after one hundred and twenty days of gestational age.⁷¹¹ It says:

(The matter of the Creation of) a human being is put together in the womb of the mother in forty days, and then he becomes a clot of thick blood for a similar period, and then a piece of flesh for a similar period. Then Allah sends an angel who is ordered to write four things. He is ordered to write down his (i.e. the new creature's) deeds, his livelihood, his (date of) death, and whether he will be blessed or wretched (in religion). Then the soul is breathed into him ...⁷¹²

The apparent meaning of this tradition is that the ensoulment event occurs after one hundred and twenty days from conception, i.e. approximately seventeen weeks of gestational age.⁷¹³ Obviously, the previous conclusion that the ensoulment event, can never occur before twenty weeks of gestational age is not consistent with this meaning and so cannot be supported in Islam.

Indeed, some commentators have argued that the previously cited tradition is conclusive in determining the timing of ensoulment after the hundred and twentieth day

⁷¹¹ Yasin has claimed that this position is consensually adopted by Moslem scholars. Yasin, *"Hqyqh al-Jnyn w Hkm al-Āntfā' bh fy Zrā'h al-Ā'dā' w al-Tjārb al-'lmyt,"* 76.

⁷¹² Bukhari, Abu Abdullah Muhammad bin Ismail. *Sahih Bukhari*. Translated by M. Muhsin Khan. Vol. 4, Book 54, Number 430. Available online at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/054.sbt.html#004.054.430>, retrieved at 05/08/2008. This is considered to be the only one of its kind, i.e. the only one to deal with the issue of embodiment timing. (Al-Sāwy, 'bdāl Jwād. " 'thr Bhwth al-'jāz al-'lmy fy b'd al-Qdāyā al-Fqhyt". Mwswh al-'jāz al-'lmy fy al-Qr'ān w āl-Snt. Retrieved from http://www.55a.net/firas/arabic/?page=show_det&id=1250&select_page=2, at 20/12/07. Yasin, *"Hqyqh al-Jnyn w Hkm al-Āntfā' bh fy Zrā'h al-Ā'dā' w al-Tjārb al-'lmyt,"* 79.

⁷¹³ Citing many scholars indicating this understanding, see Yasin, *"Hqyqh al-Jnyn w Hkm al-Āntfā' bh fy Zrā'h al-Ā'dā' w al-Tjārb al-'lmyt,"* 76, 86.

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of gestational age.⁷¹⁴ Accordingly, while they adopt the brain death definition and justify it on grounds similar to those highlighted in this thesis,⁷¹⁵ they claim that there is no reason to rely on those grounds when it comes to the issue of determining the inception of life, as there is a conclusive Prophetic tradition solving this issue.⁷¹⁶ However, while I agree with them about the first claim, I think the second one is unsatisfactory. As will be explained presently, the tradition cited is not conclusive regarding the timing of the ensoulment event, and so setting a different timing in the light of linguistic, scientific, and philosophical grounds is perfectly plausible.

The tradition at hand can be read in a way that reconciles it with the conclusion adopted in this thesis. While the tradition is quite clear regarding the denial of any possibility that ensoulment can take place before a hundred and twenty days, it does not state when exactly it happens. The way the tradition is reported indicates that ensoulment occurs sometime after one hundred and twenty days. This is proven through the use of the adverb ‘*thumma*’, which is translated into English as ‘then’: it indicates as known in Arabic, the language of the tradition, that the ensoulment event happens in a slow sequence.⁷¹⁷ How slow it is, is contentious. While some scholars have said it takes place within the following ten days,⁷¹⁸ others have claimed it happens “... in the fourth forty after a hundred and twenty days,”⁷¹⁹ that is, it can happen up to a hundred and sixty days.

⁷¹⁴ Yasin, "The End of Human Life in the Light of the Opinions of Muslim Scholars and Medical Findings", 375.

⁷¹⁵ *Ibid.*

⁷¹⁶ *Ibid.*, 375.

⁷¹⁷ Yasin, "*Hqyqh al-Jnyn w Hkm al-Āntfā' bh fy Zrā'h al-Ā'dā' w al-Tjārb al-lmyt*," 80.

⁷¹⁸ So the ensoulment can happen up to the nineteenth week of gestation. This view is attributed to Ibn Abbas, the greatest companion of the Prophet. See Al-Qurtubi, *al-Jami' Li Ahkam Al-Quran*, Beirut: Dar Ihya' al-Turath al-'Arabi Vol. 12, p 6. As cited by Yasin, "The Inception of Human Life in Light of Statements of the Quran and Sunnah and the Opinions of Muslim Scholars ", 85.

⁷¹⁹ This means that the ensoulment event can happen up to the twenty third week. This view is attributed to Ibn al-Qiyam, the greatest medieval scholar. See Ibn al-Qiyam, *al-Tibian fi Aqsam al-Qur'an*: 337, 338.

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In view of these different interpretations and different determinations, it can be concluded that while the tradition concerned is conclusive in excluding any possibility that ensoulment can take place before a hundred and twenty days, it is, however, inconclusive regarding when it happens after that day. So then, the previous conclusion that ensoulment happens at the twentieth week of gestational age bears no contradiction to that tradition.

Regardless of this, in the light of this research the seventeenth week, implied by the tradition to be the threshold before which ensoulment can never happen, needs to be changed to the twentieth week. The rationale behind delaying ensoulment as implied by the tradition can help reach this new understanding. This rationale is that the ensoulment event can occur only when the body is ready to receive and execute the soul's instructions, which requires that the body undergo some developmental phases prior to being ensouled. The tradition specifies some phases and accordingly determines the period of time they take to complete as the threshold before which ensoulment cannot occur. I maintain that another developmental phase should be added and, accordingly, a different period of time should be set. This phase is the acquisition of the cortex, which is proven to be necessary for ensoulment, and the period is that which it takes to develop, i.e. twenty weeks of gestational age. The twentieth week of gestational age, rather than the seventeenth week, therefore becomes the threshold before which ensoulment can never occur.

The previous attempt to understand differently the time set out for the developmental phases necessary for ensoulment is not the first of its type. Some

As cited by Yasin, "*Hqyqh al-Jnyn w Hkm al-Āntfā' bh fy Zrā'h al-Ā'dā' w al-Tjārb al-'lmyt*," 84.

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commentators inspired by the embryological facts that indicate that foetal development is completed by forty days, have claimed that the ensoulment event can occur after that time rather than in the traditional one.⁷²⁰ They have used other traditions which, although they do not deal specifically with the issue of the timing of the ensoulment event, detail different times for the formation phases.⁷²¹ This view indicates correctly the importance of the completion of physical development for the ensoulment event. However, adding the other important developmental phase, i.e. the acquisition of the cortex, will lead to setting the timing of ensoulment at twenty weeks rather than at its suggested date, i.e. forty days of gestational age. Therefore, it can be concluded that the adoption of the twentieth week of gestational age as the starting point for consciousness and hence the ensoulment event timing, can be supported by *Shari'a*-based considerations.

Another concept that has been relied on in understanding the beginning of consciousness is quickening. Quickening is "... the first movement of a fetus in the uterus that is felt by the mother."⁷²² It is significant since, it is argued, it initiates awareness of the development of the foetus in both the pregnant woman and doctors, which results in increasing the respect due to the foetus.⁷²³ Quickening is implied by Richard Swinburne to support the adoption of the twentieth week as the time when consciousness first begins:

The evidence suggests that consciousness originates when the fetus has a brain with the kind of electrical rhythms characteristic of consciousness, viz. About twenty

⁷²⁰ Al-Sāwiy, " 'thr Bḥwth al- 'jāz al- 'lmy fy b'ḍ al-Qdāyā al-Fqhyt".

⁷²¹ *Ibid.*

⁷²² "Quickening n." *A Dictionary of Nursing*. Oxford University Press, 2003. *Oxford Reference Online*. Oxford University Press. Lancaster University. 2 March 2008 <http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t62.e7634> accessed 2/3/2008. A similar definition is given by Cameron and Williamson, "In the World of Dolly, When Does a Human Embryo Acquire Respect?" 218.

⁷²³ *Ibid.*, 219.

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weeks after conception (the time of quickening, the first muscle movements, which are probably connected with the first brain activity).⁷²⁴

Nevertheless, this implication is implausible. Quickening as just defined is not the first foetal movement, but rather the first movement to be felt by the pregnant woman. Indeed, foetal movements have been detected by ultrasound at as early as 5.5 weeks of gestational age.⁷²⁵ Put another way, quickening signifies the pregnant woman's perception of her foetus's movements, not the time when these movements first take place. The fact that they take place long before the twentieth week, as the time when the cortex starts functioning, indicates without doubt that they have no link with conscious states. Accordingly, they can have no weight in deciding when consciousness first begins.

Furthermore, the argument about quickening is implausible since its timing is far from being non-contentious. It might be said that quickening can, because of its moral plausibility, lend support to the adoption of the twentieth week; yet, this cannot be the case since the issue of when quickening occurs is as contentious as that of the beginning of consciousness. For example, while some commentators consider its location around the twentieth week to be the typical stance on the issue,⁷²⁶ others, lower this determination to the fifteenth week,⁷²⁷ or sixteenth week.⁷²⁸ As Cameron and Williamson rightly state,

⁷²⁴ Swinburne, *the Evolution of the Soul*, 176.

⁷²⁵ *Supra* fn. ⁶⁷⁵.

⁷²⁶ M. C. Kearl, "The Abortion Issue in the United States", in *Handbook of Death & Dying*, ed. Clifton D. Bryant (California Sage Publications Inc, 2003), 387.

⁷²⁷ Cameron and Williamson, "In the World of Dolly, When Does a Human Embryo Acquire Respect?" 218.

⁷²⁸ "Quickening *n.*" *A Dictionary of Nursing*. Oxford University Press, 2003. *Oxford Reference Online*. Oxford University Press. Lancaster University. 2 March 2008 <http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t62.e7634> accessed 2/3/2008.

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quickening "...is variable in timing between individuals."⁷²⁹ As a result, quickening cannot be used to solve the contentious issue of determining the beginning of consciousness since it is in itself, contentious.

The other considerations explained earlier should be sufficient to adopt the twentieth week of gestational age as the beginning of consciousness and so the timing of the ensoulment event. However, if another point is discovered to be more plausible, e.g. the thirtieth week, this should not be considered to strip the view adopted in this thesis of all of its credibility. That is to say, if it is discovered, after obtaining new scientific knowledge or apparatus for example, that consciousness starts at a time different from that put forward in this thesis, all that is needed is to adopt the new timing. The whole theory about the nature of being human, the soul (or mind) being the ultimate seat of all capacities, and the cortex being the direct seat of those capacities and the soul's means in performing them, need not be changed. In the meantime, the twentieth week is the most plausible point at which the beginning of consciousness and the timing of the ensoulment event can be located, and so it is the one that will be adopted here.

The conclusion reached in this section that is the soul, along with all its capacities including that for moral agency, is embodied at the twentieth week of gestational age, and should be the basis for determining the status of the foetus, which is the theme of the following section.

⁷²⁹ Cameron and Williamson, "In the World of Dolly, When Does a Human Embryo Acquire Respect?" 219.

5.2 *Assessing the status of the foetus*

Now that it has been concluded that ensoulment occurs around the twentieth week it is necessary to ascertain the status of the foetus. This will be discussed in terms of whether it should properly be categorised as a person, a species of property, or, if it does not fit into either category, some other interim status. This status will be assessed both before, and after, ensoulment takes place.

5.2.1 The status of the foetus after ensoulment

The ensouled foetus, I hold, should be attributed moral and legal personality, the latter being based on the former.⁷³⁰ This conclusion can be upheld despite the doubt cast on how the status of actual persons can be attributed to entities lacking those persons' actual capacities. This conclusion can also be legally accepted.

On the first point, the rationale behind the suggestion that the ensouled foetus should be accorded the status of a person, is that s/he meets the criterion of that stance⁷³¹ by acquiring ultimate moral agency along with an active potentiality for transforming it into actual moral agency. Active potentialities are the first category in a classification of potentialities built on whether external intervention is required to initiate the process that will ultimately lead to actualising them.⁷³² If no such intervention is required and the

⁷³⁰ See 4.2.1 Basing legal personality on moral personality.

⁷³¹ See 4.2.2 Basing moral personality on moral agency.

⁷³² M. Tooley, "Personhood", in *A Companion to Bioethics*, ed. H. Kuhse and P. Singer. (Oxford: Blackwell Publishing, 1998). 122. This distinction is also attributed to Aristotle, see M. Massimo Reichlin, "The Argument from Potential: A Reappraisal," *Bioethics* 11, no. 1 (1997): 1-23, 13. He cites, Aristotle, *Metaphysica*, Trans. by A. Platt in W.D. Ross (ed.), *The Works of Aristotle Translated into English*, vol. IX, Oxford: Clarendon Press, 1966. Some, however, think otherwise, that is, potentialities are always the same. As one Supreme Court justice has stated: "[p]otential life is no less potential in the first weeks of pregnancy than it is at viability or afterward. At any stage in pregnancy, there is the potential for human life." *City of Akron v Akron Center for Reproductive Health*, 462 U.S 451, 461 (1983) (dissenting opinion).

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entity can, autonomously and by itself, bring the potentiality it has into actuality, it is then an active potentiality; otherwise, it is passive.⁷³³ Twenty weeks old foetuses exemplify this type of potentiality. They have, by virtue of their very nature as ensouled foetuses, an ultimate capacity for moral agency, along with the ability to realise that capacity. As Reichlin puts it:

Active potencies in a literal sense are those inherent to the nature of the being, whose principle of actualization is the very nature of that being ... Here we do not simply have the capacity to be subject to transformation by an external agent in action, nor the capacity to act in order to specify a tendency, but rather the capacity to express and actualize inherent potentialities towards which the being in question has a natural tendency – i.e. , a tendency which is dependent on its very nature. What we have here is the potentiality to complete oneself, to act in view of one's specific perfection.⁷³⁴

From ensoulment onwards, the foetus starts his/her journey towards actualising his/her inherent ultimate capacity for moral agency, and only a negative causal factor such as abortion can prevent him/her from that.⁷³⁵ Thus, s/he should be deemed a person and

As cited by C. Perry and L. K. Schneider, "Cryopreserved Embryos: Who Shall Decide Their Fate?" *Journal of Legal Medicine* 13, no. 4 (1992): 463-500, 486. (Emphasis his). This, however, is inaccurate as will be explained in the text.

⁷³³ Reichlin, "The Argument from Potential: A Reappraisal," 4. In his words, "...active potentiality ... means a being's inherent capacity to autonomously develop itself." (Emphasis his)

⁷³⁴ *Ibid.*, 14, 15. In *The Oxford Dictionary of Philosophy* there is implicit criticism that the potentiality concept equates fallaciously the potential subject with the future one. It says, "[t]he adjective 'potential' sets a logical trap. A potential x is not a kind of x, but at best a thing of a different kind that is capable of becoming an x (so, for example, the destruction of a potential x is not the same as the destruction of an actual x). ('Potentiality' *The Oxford Dictionary of Philosophy*. Simon Blackburn. Oxford University Press, 1996. Oxford Reference Online. Oxford University Press. Lancaster University. 17 January 2008 <<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t98.e1876>". However, this criticism is not levelled at the active potentiality. Rather, it is true of the passive potentiality as it will be explained below.

⁷³⁵ According to Michel Tooley, the external component required to act upon the subject so it may actualise its potential is called "positive causal factor". It is, however, called "negative causal factor" if the subject is able to actualise its potential, and only that factor can prevent it from so doing. The potentiality is passive in the first case while it is active in the second. M. Tooley, "Personhood," 122. Michael Tooley *Abortion and Infanticide* (Oxford: Clarendon Press, 1983), at 166-8. As cited by Jason Eberl, "The Beginning of Personhood: A Thomistic Biological Analysis," *Bioethics* 14 no. 2 (2000): 134-157, 152, 153.

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accorded all rights enjoyed by virtue of having personality, the right to life and that to bodily integrity included.⁷³⁶

Admittedly, the ensouled foetus needs external factors to actualise his/her actively potential capacities, yet these should not be taken to deprive him/her of personality. The reason is that these factors are not causal, that is, they are needed only for the development of an already existing process of actualising these capacities rather than the initiation of that process. An obvious example of these factors is the womb. It is needed to supply warmth, nutrition, and oxygen so that the ensouled foetus can develop and realise his/her ultimate capacities including that for moral agency. Still, the womb, along with other environmental factors, is necessary for the accomplishment of the process of realising ultimate moral agency that is already in place, not the initiation of the process *per se*. Hence, that capacity can be deemed an active potentiality and so the foetus can still be deemed a person. In Reichlin's words:

The sense in which the embryo is already what it will be is the project which it contains: it has all the information needed in order to accomplish the projected person it is. It is obviously true that this accomplishment is dependent on several external conditions as well. However, these conditions, including a uterus to develop and the oxygen and nutritional support from the mother, are not constitutive of the personal quality of the process: they are necessary conditions for the development of an already existing human vital process, not necessary conditions for the existence of a project of full personal life.⁷³⁷

⁷³⁶ A detailed discussion of the effects of personifying the foetus will be held later in this chapter.

⁷³⁷ Reichlin, "The Argument from Potential: A Reappraisal," 16. Notice that he believes that conception marks the beginning of personality as the foetus, according to him, acquires at that time all that is needed for personality. ———, "The Argument from Potential: A Reappraisal," 22, 23. For me, ensoulment marks the beginning of the foetus' active potentiality for moral agency since before it, it has passive potential only.

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Accordingly, the lack of any of any environmental factor should not lead to weakening the status of the ensouled foetus as a person.

The previous discussion showed that personifying the ensouled foetus is morally founded. This conclusion is also plausible enough to be enshrined in law. The plausibility intended here means practicality. Law is a practical discipline, that is, a discipline that is intended to be applied in everyday life, and there is no point in reaching an impractical conclusion, no matter how theoretically strong it is. However, the conclusion being practical does not mean that it can be readily fitted into the current law, as it is inevitable in a system built on the born alive rule⁷³⁸ that locating personality at the twentieth week of gestational age would require changes. It means, simply, being legally feasible or possible. This remark seems necessary since some commentators⁷³⁹ use the first meaning of practicality to deny the possibility of legally personifying the foetus.⁷⁴⁰

In order for an entity to have legal personality, it must satisfy certain technical requirements. These requirements, as proposed by Wieslaw Lang, are:

1. The entity must as a practical matter be identifiable and labeled or named as a discrete, individual object, distinct from its environment.⁷⁴¹
2. The entity must be amenable to legal procedures; in particular, the rules of evidence must be applicable to it.⁷⁴²
3. Legal actions or decisions must be capable of being taken with regard to the entity, at least through its legal representative.⁷⁴³

⁷³⁸ The conferral of personality in English law is conditioned by being born alive and separated from the mother's body, see page 110 above. In Libyan law, being born alive is also required, see page 109 above.

⁷³⁹ Wieslaw Lang, "The Legal Status of the Human Foetus. A Comparative Analysis" in *Conceiving the Embryo*, ed. Donald Evans (The Hague, London, Boston: Martinus Nijhoff Publishers, 1996), 437.

⁷⁴⁰ See the following discussion for further details.

⁷⁴¹ Lang, "The Status of the Human Fetus", 437.

⁷⁴² *Ibid.*

⁷⁴³ *Ibid.*

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4. Its legal subjecthood considered in practical terms should consist of the legal capacities of the entity qualified as a legal subject.⁷⁴⁴

With regard to the first requirement, the foetus at the twentieth week can easily be identified. The uncertainty surrounding the identification of foetuses at conception is irrelevant here⁷⁴⁵ since the development of the foetus can accurately be monitored through, for example, ultrasound scanning, and so determining whether a twenty-week-old foetus is in existence can accurately be decided.⁷⁴⁶ Still, Lang argues that under current law deeming the foetus a legal person, and so subjecting it to the legal requirements of identification would entail unbearable results:

[C]onclusive proof of pregnancy is not sufficient to qualify the fetus for legal subjecthood since under present law identification of human “entities” is achieved through compliance with local requirements relating to the registration of births. To satisfy the identifiability requirements, then, the fetus would have to be named and pregnancy registered (registration of conception being technically unfeasible) pursuant to appropriate legislation. Such a measure not only would carry enormous social costs but would infringe impermissibly on the fundamental human rights of women and jeopardize the rule of law. That is, creating and enforcing the legal mechanism necessary to put the fetus on a par with living persons with regard to identifiability (so as to qualify for full legal subjecthood) would entail full legal control of the woman’s body on the part of the state.⁷⁴⁷

Nevertheless, this objection is implausible. As concluded here, the twenty-week-

⁷⁴⁴ ———, “The Legal Status of the Human Foetus. A Comparative Analysis”, 251.

⁷⁴⁵ One of the criticisms levelled at choosing conception as the starting point for legal personality concerns the non-identifiability of the foetus at that moment. It is said that the decisive determination of its existence can only be achieved through testing its mother’s blood nine days post conception; prior to that the foetus is unidentifiable. We may extrapolate backward in time to the conception moment and deem the foetus to be in existence as a legal person from that moment on. Still, that does deny the fact that it was unidentifiable. Lang, “The Status of the Human Fetus,” 437.

⁷⁴⁶ See for example, “Ultrasound Imaging,” Microsoft® Encarta® Online Encyclopedia 2008, retrieved from http://encarta.msn.com/encyclopedia_761579899/Ultrasound_Imaging.html, at 11/03/2008.

⁷⁴⁷ Lang, “The Status of the Human Fetus”, 437.

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old foetus deserves to be attributed legal personality because of his/her intrinsic nature and should, accordingly, be treated on the same footing as born persons. That personifying him/her and so subjecting him/her to the rules regulating identification procedures may entail restrictions on another person's rights, i.e. the pregnant woman, is not a sufficient reason to ignore his/her intrinsic nature. In fact, some restrictions in varied degrees on the pregnant woman's rights are inevitable when the protection of the foetus is intended. For example, the pregnant woman's right to autonomy is restricted by the prohibition of abortion even if such prohibition is limited to the last trimester of pregnancy. Admittedly, the fact that the ensouled foetus, unlike born persons, is based inside another person's body should be taken into account when his/her legal treatment is regulated, but this cannot plausibly be taken to strip him/her wholly of personality.⁷⁴⁸

The requirement that the being must be an "... individual object, distinct from its environment"⁷⁴⁹ in order for it to be a legal person is also met by the twenty-week-old foetus. The identity of the foetus as an ontologically distinctive human being starts from ensoulment and is not affected by the fact that s/he is located in a natural or artificial womb and so dependent upon external factors.

The second requirement that the being "... must be amenable to legal procedures; in particular, the rules of evidence must be applicable to it"⁷⁵⁰ is also met by the ensouled foetus or can easily be made so. If the aim is to prove the existence of the twentieth week foetus, this, as has just been explained, can accurately be determined by using reliable scientific methods. If, however, there happen to be detailed rules in specific cases that are

⁷⁴⁸ A detailed discussion of the treatment that should be accorded to the foetus will be undertaken later in this chapter.

⁷⁴⁹ *Supra* fn. ⁷⁴⁷.

⁷⁵⁰ Lang, "The Status of the Human Fetus", 437.

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inapplicable to the ensouled foetus, which is possible in a system built on the born alive rule, these rules should be adapted to accommodate the newly defined legal personality.

The third and fourth requirements are related and can also be satisfied by the twenty-week-old foetus. According to Lang, in order to be a legal person an entity must have a passive capability to acquire rights and an active one to execute them.⁷⁵¹ It must also be possible that legal actions concerning that entity can be taken. Yet, he also admits that the lack of active capability does not affect legal personality since rights can be executed on their behalf by legal representatives, as in the case of children and the comatose.⁷⁵² So, the foetus's apparent lack of active capability cannot be taken as an indication of any lack of personality. However, he proceeds to claim that, unlike children and the comatose, the foetus has "...limited, conditional or relational passive capability," [hence, it does not have] "...the right to be a person before the law."⁷⁵³ To examine this claim a distinction should be made between the law as it stands, and the law as it should be. Indeed, it is the case that the foetus's capability to have rights is, unlike that of children, restricted under current law. Yet, in terms of law as it should be, which is the concern of this thesis, there should be no problem in endowing the ensouled foetus with legal personality and amending the law accordingly. This amendment should take the form of according the foetus a passive capability to have rights, and as in the case of children, attributing the capability to execute those rights to legal representatives such as guardians or testamentary guardians.⁷⁵⁴

⁷⁵¹ Lang, "The Legal Status of the Human Foetus. A Comparative Analysis ", 116.

⁷⁵² *Ibid*

⁷⁵³ *Ibid*.

⁷⁵⁴ See the discussion about *Ahlyiat al-ada* or the capacity for executing rights page 60 above.

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Another reason for not implementing the foetus's moral personality into law is related to the lawmaker's choice. While, according to Stanton and Harris, fetuses can perfectly well be endowed with legal rights, conferring legal personality on them is not preferable since it may bring their interests into conflict with those of existing legal persons:

It is of course impossible for the fetus itself to be able to exercise any rights while in the womb. However, it is perfectly possible to ascribe rights to an embryo, which must then be protected by others. It is the extent of these rights which the law seeks to set out. To date ... English law does not deem an embryo a legal person. One reason for this is that if embryos were afforded legal personhood, this would lead to the existence of competing legal interests. For example, English law respects the right of a competent adult to refuse treatment. Thus, a competent pregnant woman advised to undergo a caesarean section is lawfully entitled to refuse her consent to the operation. If the fetus were to be deemed a legal entity, this would lead to the mother's rights conflicting with the fetus' right to life. To date English law has not wanted to create such a conflict.⁷⁵⁵

Two remarks can be made about this statement. The first is that the undesirable conflict is already possible under the current English law, as has previously been demonstrated.⁷⁵⁶ The second remark is about the plausibility of not personifying the foetus to avoid possible conflict of interests. If the foetus is discovered to satisfy, by virtue of his/her intrinsic nature, the criterion of legal personality, I think it is unsatisfactory to deprive him/her of such a standing because of other persons' interests. Any potential conflict between the interests of the person foetus and other persons can be solved through weighing them up in the light of certain criteria and subordinating some of

⁷⁵⁵ Stanton and Harris, "The Moral Status of the Embryo Post-Dolly", 222, 223.

⁷⁵⁶ See pages 14-16 above.

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them to the others. Depersonifying one party in the conflict seems to be an invalid recourse for solving the problem.

The conflict of rights with regard to abortion is a clear example. Seeing the ensouled foetus as a person should result in subordinating any right to abortion that any party, including the pregnant woman, may claim to have, to the foetus's right to life. Accordingly, absolute prohibition on post-ensoulment abortion should be applied. This is the position upon which all Moslem jurists agree as they see the foetus as a human being, the killing of whom is prohibited except for specific reasons, none of which is applicable to the foetus, e.g. in retaliation to murder.⁷⁵⁷

This position has been recently re-emphasised with regard to the issue of aborting pregnancies resulting from rape. The Grand Mufti of Egypt, as reported in the issue of 4th December 2007 of the *Ahram* newspaper, issued a fatwa allowing such an act at any time during pregnancy even if after ensoulment, which is believed, as previously mentioned,⁷⁵⁸ to occur after 120 days. However, his fatwa was condemned by the scholars for departing from the consensus. They allowed abortion in such a case only before ensoulment, while they prohibited it after that since the foetus becomes a human being the killing of whom constitutes murder.⁷⁵⁹

⁷⁵⁷ Mḥmd N'ym Yasin. "*Hkm al-Ājhād fy al-Fqh al-Āslāmy.*" In *Abḥāth Fqhyh fy Qdāyā Tbyh M'āšrt*, edited by Mḥmd N'ym Yasin, 191-226. (Amman: Dār al-Nfā's, 1999), 194.

⁷⁵⁸ See page 194 above.

⁷⁵⁹ Sbḥy Mjāhd. *Al-Zhr: lā l-Jjhād al-Mgħtṣbh b'd 120 Ywmanā.* 23/12/2007, retrieved from http://www.islamonline.net/servlet/Satellite?c=ArticleA_C&cid=1196786464318&pagename=Zone-Arabic-Shariah%2FSRALayout, at 21/05/08.

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However, the consensus ends when abortion is required to save the pregnant woman's life. Some scholars such as ibn Nujaim al-Hanafi sustain the original position and refuse to allow abortion in such a case:

If a pregnant woman's life is threatened by her foetus and the only solution is to kill it, that is permissible if the foetus is dead while it is not if it is alive because sustaining one life through killing another is not approved by *Shari'a*.⁷⁶⁰

Commenting on ibn Nujaim's statement, Ibn 'Abdeen says:

If the foetus is alive and there are fears for the mother's life if it continues to survive, it is not lawful to abort it, because the mother's death is only suspected. It is not permissible to kill a human being for a probability.⁷⁶¹

However, such justification is unsound. The statement that "...the mother's death [because of the continuation of pregnancy] is only suspected ... [and it] ...is not permissible to kill a human being for a probability" can be easily refuted because it is always possible through medical examination to determine whether the threat is real.⁷⁶² Additionally, though *Shari'a*, as ibn Nujaim argues, does not approve of sustaining one life through killing another, it does, as Yusuf al-Qaradawi says while commenting on ibn Nujaim's statement, approve of committing the lesser harm and lesser evil, the death of the foetus in this case, to avoid the greater harm and greater evil, the death of the pregnant

⁷⁶⁰ Hāshyḥ abn 'ābdyn, al-Jz' al-Āwl, 2nd edition, 1966, Dār al-Tbā'h al-Mṣryt, page 602. As cited by Yasin, "*Hkm al-Ājhād fy al-Fqh al-Āslām*," 194.

⁷⁶¹ *Ibid.* As translated by Osama Muhammad Al-'Abd, "Islamic Law Rulings on Certain Medical Questions the Arguments and the Supporting Evidence," in *International Conference on Islamic Code of Medical Ethics* (Cairo: The Islamic Organization for Medical Sciences [IOMS] 2004). Retrieved from www.islamset.com at 21/05/2008.

⁷⁶² Yasin, "*Hkm al-Ājhād fy al-Fqh al-Āslāmy*." 195, 196.

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woman and the foetus.⁷⁶³ This is the basis upon which post-ensoulment abortion can be legitimised.

Allowing post-ensoulment abortion to save the pregnant woman's life has also been the position of some other scholars. For example, the Legal Opinion (Fatwa) Authority at the Kuwaiti Ministry of Endowments (Waqfs) states that "...if continued pregnancy poses a threat to the mother, preservation of her life should take priority, because she is the source and her life is perceived with absolute certainty."⁷⁶⁴ Other commentators provide different justification for the preference given for saving the pregnant woman's life. They try to justify this preference through giving examples from Islamic jurisprudence showing that the life of the foetus is not treated in the same way as the lives of other human beings are treated. The first justification is the juristic rule that, though the law of retaliation, *qsās* as it is known in Arabic, whereby the death penalty as a punishment similar to the offence in kind and degree ought to be applied in cases of murder, murders committed by ancestors against their descendants are exempt. It is said that since a parent, for example, gave life to their son, they should not be deprived of their own life when murdering this son. This, however, does not mean that they will not be punished; other punishment, less grave than death penalty is due. This logic can help to give a preference to saving the pregnant woman's life: she has given life to the foetus and should not be deprived of her own because of it. The second reason, according to these commentators, is the concept of the status of foetuses as separate persons in one respect but not in another. They are persons in that they have human souls, but they are not in

⁷⁶³ Al-Qrḍāwī, Ywsf 'bd Allāh. Al-Jhād bnā 'lā Tshkhyṣ Mrḍ al-Jnyn. Fatwa published in Arabic, retrieved from http://www.islamonline.net/servlet/Satellite?pagename=IslamOnline-Arabic-Ask_Scholar/FatwaA/FatwaA&cid=1122528600958, at 21/05/2008.

⁷⁶⁴ Al-'Abd, "Islamic Law Rulings on Certain Medical Questions the Arguments and the Supporting Evidence".

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that they are part of the pregnant woman's womb. This concept might be the reason behind the rule that, though their act is forbidden, no retaliation against a foetus's killer is required. This rule can also be used to justify the preference given for saving the pregnant woman's life.⁷⁶⁵

Nevertheless, though agreeing with this opinion, I see the reasons given for it as unsound. Firstly, the two rules cited are not adopted by all scholars. Ibn Hazm, for example, believes that retaliation against the killer of a foetus is required even if the pregnant woman was the person responsible.⁷⁶⁶ In addition, seeing the foetus as part of the pregnant woman's body is not accurate because s/he has already been shown to have his/her own independent existence. The alternative basis for legitimising abortion is, as established above, the juristic rule stating that 'the greater evil should be warded off by the lesser evil', the greater evil being the loss of the lives of the pregnant woman and the foetus while the lesser one is the loss of the life of the foetus only. No other reason is acceptable here. Therefore, abortion should not be permitted if the continuation of pregnancy imperils only the health of the woman. In addition, abortion should not be allowed if an alternative is available. Every effort should also be made to sustain the foetus's life after abortion as if s/he was viable, or the application of ectogenesis has been perfected enough to host the foetus until s/he is able to survive on his/her own.

The foetus, then, should be deemed as a legal person from the twentieth week of gestational age onwards. What remains to be discussed is the status of the foetus prior to ensoulment. This will be tackled in the following subsection.

⁷⁶⁵ Yasin, "*Hkm al-Ājhād fy al-Fqh al-Āslāmy*", 196.

⁷⁶⁶ Al-Qrḍāwy, "*Al-Jhād bnā 'lā Tshkhyṣ Mrḍ al-Jnyn*".

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5.2.2 The status of the foetus before ensoulment

The main question that arises with regard to the status of the foetus prior to ensoulment is whether, since it is not a person, it is a species of property. The answer to this question should, I argue, be in the negative because of the intrinsic nature of the foetus as a passively potential moral agent and person. This nature should grant the foetus a status less than that of a person but higher than that of a property species, i.e. an interim status. In order to justify this answer, the meaning of passive potentialities and the treatment their possessors should be accorded will be explained. Following that, the interim status of the non-ensouled foetus and the treatment it should be accorded will be determined.

The essence of passive potentialities is the indispensability of external causal intervention for the initiation of the process of realising them. That is to say, while the subject by itself cannot realise its relevant potentialities, it has a capacity to undergo changes caused by external causal factors leading to such realisation.⁷⁶⁷ According to Massimo Reichlin, Aristotle sees a passive potentiality as, “extrinsic, in that the principle of actualization comes from outside the body which is transformed ... this meaning of potency is simply the disposition to receive modifications.”⁷⁶⁸

The reliance of passive potentialities on external causal factors makes it plausible to equate them with possibilities and probabilities.⁷⁶⁹ ‘A’ is potentially ‘B’ if there is a

⁷⁶⁷ Reichlin, "The Argument from Potential: A Reappraisal," 4.

⁷⁶⁸ *Ibid.*, 13. He cites, Aristotle, *Metaphysica*, Trans. by A. Platt in W.D. Ross (ed.), *The Works of Aristotle Translated into English*, vol. IX, Oxford: Clarendon Press, 1966.

⁷⁶⁹ It is worth mentioning that Reichlin, whose article is used heavily here, considers the foetus as having an active potentiality for personality from fertilisation, hence, he does not equate its potentialities with possibilities or probabilities and discusses the viewpoints that do so just to refute them. What is passive, according to him, is the potentiality of the gamete for personality (*Ibid.*, 4, 6). However, since this thesis

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possibility that it could be so through the intervention of an external causal factor; ‘B’ is seen as “a possible outcome of a process involving an entity [A].”⁷⁷⁰ A tree is a potential table in that it could be so if subjected to an artisan’s work via which a table can be made, yet it cannot be said to be already a table. Without the external intervention, i.e. the artisan’s work, the potentiality of the tree to be a table cannot be achieved since nothing in its nature can lead to that.⁷⁷¹ A passive potentiality can also be understood as a probability. How likely is it that a subject may develop its relevant potentialities? This possibility or likelihood is contingent on external causal factors and so varies in accordance with them.⁷⁷² The same equation cannot be made regarding active potentialities, since no external causal intervention is required to actualise them; the environmental factors needed have no affect on the ontological nature of the subject.⁷⁷³ The clear example of this is the ensouled foetus that has, by virtue of his/her soul, an active potentiality for autonomous moral agency. The need of such a foetus for a womb to survive and grow, does not affect his/her ontological nature as an actively potential moral agent.⁷⁷⁴

The essence of passive potentialities determines the way according to which their possessors should be treated. The starting point for deciding on the type of treatment that should be accorded to a passively potential subject is the fact that its potentiality is contingent on extrinsic causal factors. As such, it can by no means be treated like the

takes another stance and locates the beginning of personal and human life at ensoulment, which is determined to be at the twentieth week of gestation, the potentiality of the non-ensouled foetus can be classified as being passive and so equated with a possibility and probability (See 5.1 Determining the timing of the ensoulment event).

⁷⁷⁰ *Ibid.*, 2.

⁷⁷¹ *Ibid.*, 13.

⁷⁷² *Ibid.*, 9, 12.

⁷⁷³ *Ibid.*, 11, 12.

⁷⁷⁴ See 5.2.1 The status of the foetus after ensoulment.

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entity into which it may develop. A passively potential subject, thus, has no importance in itself; its importance derives from being a step towards the future entity.⁷⁷⁵

However, this does not mean that no variable derivative importance can be assigned to passively potential subjects in their development towards actualising relevant potentialities. Such a claim has been implied by Massimo Reichlin, who, in terms of passively potential persons, says:

[T]here seems no reason to believe that stopping the process through which a person is formed in a certain moment could be morally more objectionable than in some other moment: if we have a moral duty to pursue the final result, anything preventing it from being accomplished should be equally banned.⁷⁷⁶

This claim is unsound because the potential subject derives its importance from being a step amongst others, that may lead to the future entity, and so such importance should increase in accordance with how close to the future entity that step is. The closer it gets the more importance the potential subject should be accorded. Put another way, the importance should vary in accordance with how possible and probable the actualisation of the relevant potentialities are. Therefore, the importance attributed to passively potential subjects is derivative and degreed.⁷⁷⁷

Seeing the non-ensouled foetus in the light of the preceding discussion, reveals its nature as an entity possessing a passive potentiality for personality. It has the potential for developing into an autonomous moral agent and so becoming an actual person if, *and*

⁷⁷⁵ It is worth mentioning that what is being denied here is that passively potential entities may have importance stemming from the future position. They, however, may have importance stemming from another source. For example, a tree has no intrinsic importance as a future table; still, it has its own importance as a tree.

⁷⁷⁶ Reichlin, "The Argument from Potential: A Reappraisal," 3.

⁷⁷⁷ Eberl, "The Beginning of Personhood: A Thomistic Biological Analysis," 50.

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only if, subjected to external intervention, i.e. the addition of the soul to the foetal body. The addition of the soul is extrinsic in the sense that it requires the intervention of an external agent, i.e. God, as Islamic traditions indicate.⁷⁷⁸ This is supported by the fact that the soul is an extra-biological or incorporeal object that cannot emerge out of the body's development.⁷⁷⁹ Undergoing the act of ensoulment causes a substantial change in the foetus's nature: it transforms it into a human being with an inherent tendency to develop into an autonomous moral agent.

The non-ensouled foetus's possession of a passive potentiality for personality entitles it to a special status. It can neither be deemed a person since it lacks the ultimate capacity for moral agency, nor can it be classified as a species of property since it is the origin of a future person. Considering the future person's interests requires excluding the non-ensouled foetus from the property category. That is to say, whereas the passive potentiality for being a person justifies the exclusion of the non-ensouled foetus from the property category, it cannot justify its inclusion in the person category. The most plausible class, I think, is an interim one wherein it is assigned significance that varies in accordance with how strong the probability of it developing into a future person is. This conforms to the fact that it is just a passively potential person and so has no importance in itself; the only importance it acquires is that it is attributed as a step towards bringing a person into existence.

Admittedly, the interim status attributed to the non-ensouled foetus cannot be given a theoretically clear-cut definition. It is clearly not enough to say that the non-

⁷⁷⁸ See 3.1.1 The nature of human beings.

⁷⁷⁹ Compare Jan Deckers who claims that "[t]he birth of the soul is best understood as a natural event occurring when the right materials ... are placed in the right environment and start to interact with each other by embarking on a path necessary for further development of life." Jan Deckers, "Why Eberl Is Wrong. Reflections on the Beginning of Personhood", *Bioethics* 21, no. 5 (2007): 270-282, 278.

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ensouled foetus enjoys a significance less than that of a person but higher than that of a property species. This has led to the accusation by some commentators that the concept is too vague.⁷⁸⁰ This vagueness, it is claimed, could affect its ability to solve important practical issues, such as the permissibility of creating, freezing, donating, genetically modifying, or utilising the foetus in research, as well as solving conflicts between the parents' choice and the special respect due to the foetus.⁷⁸¹ "The notion ... will seem like empty rhetoric if it leads to no limits at all on what may be done with embryos", they argue.⁷⁸²

However, this criticism is not a valid reason for rejecting the concept. The theoretical ambiguity the concept suffers does not necessarily lead to depriving it of any practical utility. It is possible to set out standards determining how the foetus should be treated in practice. Such standards should be set out in the light of the conclusion that a passively potential subject should be accorded derivative and degreed significance. That is to say, the higher the possibility that it may realise the relevant potentialities and so develop into the future entity, the more importance it gains.

In view of that, variable degrees of significance or respect should be accorded to the non-ensouled foetus in proportion to its development. In this regard, the fourteenth day of gestational age signifies a decisive point in this development. As indicated in the forthcoming statement by Mary Warnock, it is the time when a great deal of development takes place as well as being the stage at which biological individuation of the foetus is determined:

⁷⁸⁰ Kristine E. Luongo, "the Big Chill: Davis V. Davis and the Protection of Potential Life", *New England Law Review* 29 (1995): 1011-1053, 1023.

⁷⁸¹ Robertson, "In the Beginning: The Legal Status of Early Embryos," 449.

⁷⁸² *Ibid.*, 448, 449.

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Fourteen days was decided on as the limit [on research on embryos in the Human Fertilisation and Embryology Act 1990] because of the great change in the development of the embryo heralded by the development of the primitive streak. It is only after that that an individual exists with its own now quickly developing central nervous system, its own limbs, its own brain. Even though before that an embryo has a genetic individuality, it has no pattern of human identity, any more than human tissue has. ... Before that [the development of the primitive streak] there could have been two or three people formed of the same material. It is because of the enormous change that comes at this stage of development that scientists generally prefer to think of the embryo as actually beginning to exist at this stage.^{783 784}

Since these important developmental aspects follow the implantation of the foetus into the womb, C Cameron and R Williamson consider it to be the starting-point for respecting *ex utero* foetuses. In their words:

The most important stage in the development of an embryo created outside the womb, such as a Dolly embryo, is implantation, as without successful implantation the embryo cannot develop into a human being. Its potential to develop is theoretical until it is implanted; on implantation, it becomes real. Upon the successful act of implantation the embryo will begin to acquire respect, because after implantation development takes place (at least in principle) which, if uninterrupted, leads to the birth of a human being. The embryo is also at the stage when the primitive streak appears, the cells begin to differentiate, there is no longer any chance of twinning, and the embryo thereafter develops into a recognisable fetus.⁷⁸⁵

⁷⁸³ Mary Warnock, "Experimentation on Human Embryos and Fetuses," in *A Companion to Bioethics*, ed. Peter Singer and Helga Kuhse (Oxford: Blackwell Publishing, 1998), 390-396, 394.

⁷⁸⁴ It is worth mentioning that while the current research agrees about the significance of the fourteenth day, it disagrees about Warnock's claim that this day is the starting-point for the individual's human identity if it is taken to mean non-biological human identity. The human being's identity, as such, starts at ensoulment.

⁷⁸⁵ Cameron and Williamson, "In the World of Dolly, When Does a Human Embryo Acquire Respect?" 218.

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Nevertheless, this claim is inaccurate. First of all, it is possible, theoretically at least, that an *ex utero* foetus could develop in an artificial womb and would thus never be implanted.⁷⁸⁶ Implantation, therefore, is not a necessary developmental step in each foetus's life. Still, development such as the appearance of the primitive streak and biological individuation can still take place. Therefore, while the increase in respect can be timed at implantation in the case of foetuses placed in natural wombs, similar respect can also plausibly be timed at the fourteenth day in the case of those placed in artificial ones.

Secondly, the difference in the way in which foetuses have come into existence does not justify locating the points at which they begin to attract respect differently. Foetuses can be formed as a result of fertilisation, either in sexual intercourse or by an *in vitro* procedure, or cell nuclear replacement.⁷⁸⁷ In each case, the formation of the foetus marks the starting-point for the acquisition of the passive potentiality for personality, hence the acquisition of an interim status and degreed respect. Thus, it is inaccurate to argue, as Cameron and Williamson do, that fertilisation marks the beginning of *in utero* foetuses' due respect, while implantation is that point with regard to *ex utero* ones.⁷⁸⁸ Implantation, if it happens, is just a point at which the respect that has already begun should start to increase.

Nevertheless, the method of formation can still lead to a variation in the degree of respect that foetuses are owed. This is the case when foetuses are formed outside the body and have not yet been placed in natural or artificial wombs. Though they should be

⁷⁸⁶ Stanton and Harris, "The Moral Status of the Embryo Post-Dolly", 222.

⁷⁸⁷ *Ibid.*

⁷⁸⁸ Cameron and Williamson, "In the World of Dolly, When Does a Human Embryo Acquire Respect?" 218.

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respected, this respect will be less than that due to foetuses already placed within wombs, because their realisation of the relevant potentialities requires an additional factor, i.e. the placing of them into a womb.⁷⁸⁹ Admittedly, this placement is not causal, that is, it does not give rise to a new ontological entity, but it does make the required actualisation more possible.⁷⁹⁰

Another factor in varying the treatment of the non-ensouled foetus is the safety margin added when the age of the foetus is being estimated. As previously explained,⁷⁹¹ the margin of error in calculating gestational age is two weeks and, out of caution, an equivalent margin of safety should be added. A foetus should therefore be deemed twenty weeks old when it is estimated to be eighteen weeks old. Accordingly, the eighteen-week-old foetus should be treated in the same way the twenty-week-old foetus is treated, i.e. as a person. However, this precautionary course of action is contingent on the age calculation being uncertain. So, if this uncertainty is eliminated and so the age is undoubtedly determined to be eighteen or nineteen weeks, no such an action is required and a treatment proportional to being non-ensouled should be accorded to that foetus.

Furthermore, considering these standards, while applying *Shari'a* rules of evaluating benefits and harm, the rules of *masalih* and *mafasid* as known in Arabic, should help determine the treatment of the non-ensouled foetus on a case by case basis. These rules aim to determine the judgement of acts by evaluating their benefits and harm. This evaluation should make clear the outcome of the act concerned: more harm or more benefit, and accordingly, whether it should be allowed. It should be allowed if it is shown

⁷⁸⁹ The theoretical possibility of artificial wombs has been mentioned before, see *supra* fn. 466.

⁷⁹⁰ Detailed explanation of how these standards can be set and applied in the case of abortion will be made later in this chapter.

⁷⁹¹ See page 193 above.

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to generate more benefit than harm, and vice versa. If, however, an act is found to produce equal amounts of harm and benefit, it should be deemed impermissible. The reason is the *Shari'a* ruling that dictates that harm-prevention takes priority over benefit-attainment except when the benefit is greater.⁷⁹²

This evaluation is based on qualitative and quantitative criteria. The qualitative criteria measure harm or benefit according to the effect they have on the five principle values of religion, self, reason, reproduction, and property. As previously explained, the preservation of these values is believed to be the ultimate aim of *Shari'a*.⁷⁹³ This preservation takes three forms; saving the five values from destruction, removing any hardship caused to them, and enhancing and bettering them. In direct proportion to these forms, harm or benefit is classified into three categories; essential, complementary, or amelioratory. For example, saving a human being's life is an essential benefit, while destroying it is essential harm. The quantitative criteria, on the other hand, aim to measure the number of people affected by the harm, or benefit, the act produces. In this regard, *Shari'a* rules that the broader the effect of the benefit or the harm is, the higher the priority for attaining or preventing it, and that if a complementary benefit or harm becomes general, it should then be re-classified as essential.⁷⁹⁴

In the light of these rules, the determination of any act or application concerning the non-ensouled foetus can be decided. Taking the example of pre-ensoulment abortion, the major harm it causes is the destruction of the foetus. In evaluating this harm

⁷⁹² Aḥmd Shrf Aal-dyn. *Al-Āhkām al-Shr'iyh ll-Ā'māl al-Tbyṭ*. (n.p.), 1987, 79, 80.

⁷⁹³ See supra fn. ²⁸³.

⁷⁹⁴ Yasin, "*Hqyqh al-Jnyn w Hkm al-Āntfā' bh fy Zrā'h al-Ā'dā' w al-Tjārb al-'lmyt*," 108.

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qualitatively, the fact that the foetus is not yet a person should be taken into consideration. Accordingly, while ending the life of a person is essential harm, ending that of a non-ensouled foetus is not. It might be classified as complementary or amelioratory according to how strong the possibility that the foetus develops into a person is. The strength of this possibility varies, as earlier mentioned, in accordance with factors such as the developmental phase of the foetus and its location.

The other harm that might result from abortion is that caused to the pregnant woman. It varies in accordance with whether an abortion is performed with or without her consent. Though the assumption is that less harm is expected if she has consented to abortion, there might still be a possibility of future psychological harm. As the psychiatrist Patricia Casey says in her evidence to the British Parliamentary Science and Technology Committee while discussing scientific developments relating to the Abortion Act 1967:

A number of well designed recent studies confirm the view that adverse psychological outcomes occur after abortion and are not just related to prior psychiatric history. A range of disorders including depressive illness, substance abuse and self-harm have been identified. There is evidence for an increase in psychiatric service utilization (in-patient and out-patient) also. Suicide rates are higher in women post-abortion when compared to pregnant women and non-pregnant women. [However, she adds that] ... whether this is due to the abortion or to some preexisting common factor associated with both abortion seeking and suicide (mental illness or impulsivity) is as yet unanswered.⁷⁹⁵

⁷⁹⁵ Patricia Casey, "Memorandum 30" in *Scientific developments relating to the Abortion Act 1967 evidence* (London: House of Commons Science & Technology Select Committee, 2007), 199, 200. Retrieved from <http://www.parliament.uk/documents/upload/SDAevidence.pdf>, at 16/07/2008.

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Abortion is also said to risk the woman's future pregnancies. As John Wyatt, a neonatal physician from University College London says in his supplementary evidence:

There is strong, robust and widely accepted scientific evidence that induced abortion leads to an increased risk of premature birth in subsequent pregnancies. The increased risk of a preterm delivery is between 1.3 and 2.0 and rises with the number of abortions.⁷⁹⁶

Physical harm is also conceivable if an abortion is poorly, or negligently, performed.

Abortion can also result in harming parties other than the pregnant woman and the foetus such as the putative father and society as a whole. Harm caused to the putative father can vary according to different factors, for example, whether he has consented to the abortion and whether he has any other children. The harm caused to him can be deemed essential if he, for example, has become infertile for any reason and so the foetus concerned is his last hope to have a child of his own.⁷⁹⁷

Society as a whole can also be harmed by the act of abortion; after all foetuses are its future individuals and allowing abortion on a large scale may endanger its very existence. Taking the example of the UK, there have been 6 million legal abortions since

⁷⁹⁶ John S Wyatt, "Memorandum 37", in *Scientific developments relating to the Abortion Act 1967 evidence* (London: House of Commons Science & Technology Select Committee, 2007), 242. Retrieved from <http://www.parliament.uk/documents/upload/SDAevidence.pdf>, at 16/07/2008.

⁷⁹⁷ Interestingly enough, as Marion Holmes Katz has rightly noted, some Moslem jurists seem to suggest that the putative father's interest in the survival of the foetus is stronger than that of the mother's. She quotes the following statement from the Fatawa al-hindiyya: "[i]f a woman strikes her own belly or takes medicine to abort the child intentionally, or if she gives a treatment to her vagina so that the child is stillborn, her kin group is liable for the *ghurra**, if she did it without her husband's permission; if she did it with his permission, nothing is due." Al-Fatawa al-'Alamgiriya al-marufa bi'l-Fatawa al-Hindiya (Cairo: Bulaq, 1310 A.H), 6: 35-36. As cited by Marion Holmes Katz, "The Problem of Abortion in Classical Sunni Fiqh", in *Islamic Ethics of Life: Abortion, War, and Euthanasia*, ed. Jonathan E Brockopp (Columbia, South Carolina University of South Carolina Press, 2003), 25-50, 37. (Emphases hers)

* *Ghurrai* in Islamic jurisprudence is "monetary recompense for the death of a fetus". Jonathan E. Brockopp, ed., *Islamic Ethics of Life: Abortion, War, and Euthanasia* (Columbia, South Carolina University of South Carolina Press, 2003), 222.

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1967, a rate that is claimed to have had a greatly harmful impact on the total population and future generations.⁷⁹⁸ In fact, the concern for the welfare of a society that might be harmed by abortion, has been the prime preoccupation of modern Moslem thinkers when discussing the issue of family planning in general, and abortion in particular. As Donna Lee Bowen rightly says:

The second area⁷⁹⁹ where ethics interests with abortion is the concern Muslims demonstrate for community welfare. ... I am speaking about opposition to abortion, ulema [Moslem scholars] first mention the need to protect the community from its danger. Their first concern, which is often implicit, is the need to recognize that respect for life is the basis of all community action. Without a reverence for life, the very existence of the community is endangered. Both ulema and local religious leaders cite the increased use of abortion as a prime factor in increasing social disintegration. Abortion, they claim, jeopardizes the self-evident truth that Islam is predicated upon recognition of the divine spirit in humankind.⁸⁰⁰

⁷⁹⁸ The Maranatha Community, "Memorandum 39", in *Scientific developments relating to the Abortion Act 1967 evidence* (London: House of Commons Science & Technology Select Committee, 2007), retrieved from <http://www.parliament.uk/documents/upload/SDAevidence.pdf> at 16/07/2008, 260, 261. After stating the number of legal abortions since 1967, they ask a question about "what has been the demographic impact of abortion on the total population and what are the projections for the next decade?" Their answer is that "[i]t is beyond doubt that the increase in the abortion rate has contributed to the decline in the birth rate since 1968. For several years after 1968, the shortfall of fertility below replacement level was approximately equal to the abortion rate. However in recent years the abortion rate has exceeded this. Using a mathematical model in order to assess the demographic impact of abortion, "Lost Generations" have been computed to illustrate what the population might have been had there not been legalised abortion. The First Lost Generation is based on abortion numbers, assuming that 90% of abortions could have been live births six months later. The Second Lost Generation is then the children of the First Lost Generation whose fertility follows a birth rate augmented by 90% of the abortion rate. The Third Lost Generation is the children of the Second and grandchildren of the First. The 10% of abortions assumed not to have been possible live births are assumed to have been miscarriages or stillbirths, legal abortions on limited grounds or illegal abortions under the old law had it been enforced after 1968. The absence of the Lost Generations results in the working age population that is 6.07 million (or 6.7%) smaller than it would have been had 90% of the aborted fetuses become live births. As a result of abortion, the working age population in 2017 is forecast to be 10.9% smaller (7.56 million in absolute numbers) than it might have been. The projection for 2027 is a reduction of the working age population of 11.3% (or 9.54 million) than it might have been without abortion."

⁷⁹⁹ The first one is respect for life. Bowen, "Contemporary Muslim Ethics of Abortion", 60.

⁸⁰⁰ *Ibid.*, 66.

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In terms of this thesis, the general prohibition of pre-ensoulment abortion should alleviate such harm. However, if the harm caused to society is less than the benefit attained from a pre-ensoulment abortion, abortion can be legitimised. Society as a whole can benefit from abortion, as will be explained. The decision about this can be made on a case by case basis by applying the qualitative criteria of harm-benefit-evaluation, which have just been explained, and the quantitative criteria that take into account how many people are affected by the harm or benefit that abortion generates.

On the other hand, the benefit sought from abortion should be measured. Qualitatively, the benefit can be essential, complementary, or amelioratory. For example, the use of embryonic stem cells, as an application that requires destroying the foetus, is claimed to have many promising applications. Some of these applications can produce essential, or at least complementary, benefits such as curing diseases like diabetes, Parkinson's disease, stroke, arthritis, multiple sclerosis, heart failure, and spinal cord lesions.⁸⁰¹ However, other applications such as using the stem cells for cosmetic rejuvenation can produce only amelioratory benefit.⁸⁰² Quantitatively, the number of people benefiting from performing an abortion should be measured. For instance, notwithstanding the benefits expected from treatment are greater than those expected from research, research using aborted foetuses would generally have more beneficiaries than would treatment using these foetuses. In the light of these qualitative and quantitative criteria, the strength of the benefit that might be generated from an abortion should be measured.

⁸⁰¹ See 2.1 Foetus-related new technological applications and their associated moral and legal dilemmas.

⁸⁰² E. D. Gol'dberg, A. M. Dygai, and V. V. Zhdanov, "Modern Views on the Problem of Stem Cells and Potentialities of Their Use in Medicine," *Bulletin of Experimental Biology and Medicine* 140, no. 5 (2005): 588-592, 589.

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The determination of the legitimacy of a particular abortion can be ascertained in the light of the assessment of the benefit and the harm. If, after comparing them, the benefit is found to outweigh the harm, abortion can be legitimised and vice versa. This is a general account of how the determination of abortion can be carried out. The specific determination cannot be ascertained beforehand, it depends on the surrounding factors in general, and the status of the foetus in particular. The latter, as previously detailed, varies in proportion to how strong the potentiality for developing into a person is. However, this account should be sufficient to show, on the one hand, the effect of the status of the foetus in solving its related issues, and, on the other, to negate the accusation of vagueness levelled at the concept of the interim status.

However, this way of tackling the issue of abortion is different from that which Marion Holmes Katz attributes to the medieval Islamic jurists. She criticises the way the American debate on abortion is generally conducted. It is overwhelmed by a tendency to base the status of the foetus on its biological development, and an individualistic approach whereby the interests of each individual are weighed against those of another individual. She then cites as an ideal the way followed in the medieval Islamic discussions of the issue that depend on relation-based perspectives. Islamic medieval jurists, according to her, place the foetus, *since ensoulment*, within a complex set of relationships: with its parents, with God, the parents with God, the parents with each other, and all of these individuals with the entire Muslim society. These relationships are taken into account, and weighed against each other while making any decision concerning the foetus's status and any potential abortion case. Biological markers are also used to indicate the timing of ensoulment, the time when the foetus starts its role in the relational web, but the use of these markers is considered with regard to the relational ones. The

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reliance on the latter, according to Katz, helps with evading the individualistic approach embodied in the current American debate on abortion and adopting a sociocentric one.⁸⁰³

Nevertheless, such an opinion is not entirely accurate. I agree that medieval Moslem jurists considered relational factors regarding the foetus while discussing the legitimacy of abortion. However, I believe that this consideration was limited to pre-ensoulment abortion. As previously detailed,⁸⁰⁴ medieval Moslem jurists distinguished clearly, in terms of legitimacy, between pre-ensoulment and post-ensoulment abortion. While subjecting the former to the evaluation of harm and benefits that may result in allowing abortion, they applied absolute prohibition on the latter. Therefore, it seems inaccurate to claim, as Katz does, that those jurists placed the ensouled foetus, from ensoulment, in a web of relationships with God, parents, and the whole society, that might result in legitimising aborting him/her.

However, the consideration of relational factors with regard to pre-ensoulment abortion that this thesis adopts, is different from the relational approach of John Seymour in dealing with moral and legal dilemmas associated with the foetus.⁸⁰⁵ Unlike Seymour's approach, the status of the foetus is still influential in abortion decision making. How close it is to developing into a person affects the harm-benefit evaluation, hence the legitimacy of abortion. In fact, the exclusion of the status of the foetus from the discussion as present in that approach is not justified. It is not sufficient justification to say that such exclusion allows the law to consider relative factors in each case a claim is made on behalf of the foetus, such as the context, parties involved, their relationships, and

⁸⁰³ Katz, "The Problem of Abortion in Classical Sunni Fiqh", 45, 46.

⁸⁰⁴ See page 208 above.

⁸⁰⁵ See page 40 above.

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the principles upon which the considered law is based before deciding whether to interfere. Why is it that the person foetus, (assuming that his/her status as a person is confirmed), but not other born persons, is subject to such an approach? If it is the status of the latter that protects them from such subjection, then it ought to be the same for the foetus.

Another criticism that may be levelled at the interim status concept is that it provides no real alternative to the property one. A reference might be made to the Warnock Committee 1984 that is claimed to regard the foetus as an entity of interim status.⁸⁰⁶ However, the Human Fertilisation and Embryology Act (HFEA) 1990, which is based on the Report of the Committee,⁸⁰⁷ invests progenitors with the right to control their foetuses' fate.⁸⁰⁸ Granting dispositional control over foetuses implies, according to John Robertson, a classification of them as a property species for this is simply the meaning of the term property:

The question of decisional authority is really the question of who owns or has a property interest in early embryos. Applying terms such as 'ownership' or 'property' to early embryos risks misunderstanding. Such terms do not signify that embryos may be treated in all respects like other property. Rather, the terms merely designate who has authority to decide whether legally available options with early embryos will occur, such as creation, storage, discard, donation, use in research, and placement in a uterus. Although the bundle of property rights attached to one's

⁸⁰⁶ Robertson, "In the Beginning: The Legal Status of Early Embryos," 446, 447. He cites Report of the Committee of Inquiry into Human Fertilization and Embryology, 1984, Cmnd. 9314, at 36.

⁸⁰⁷ Jackson, *Medical Law: Text, Cases and Materials*, 776, 777.

⁸⁰⁸ Fox, "Pre-Persons, Commodities or Cyborgs: The Legal Construction and Representation of the Embryo," 178.

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ownership of an embryo may be more circumscribed than for other things, it is an ownership or property interest nonetheless.⁸⁰⁹

Admittedly, the interim status concept is similar to the property concept in endowing persons with dispositional control over the non-ensouled foetus; yet, distinguishing it, the interim status concept, is still possible, and even desirable. As an entity of interim status, the non-ensouled foetus can, unlike if it is seen as a species of property, be accorded respect proportional to its development. It will become immune from all social and legal connotations entailed in categorising an object as a property species. Truly, endowing some parties with decisional authority concerning, for example, creating, storing, discarding, donating, using the non-ensouled foetus in research, or placing it in a womb seems inevitable when decisions regarding these issues are needed. Nonetheless this endowment does not necessarily signify that the decision makers are the owners of the foetus. It merely signifies a response to the pragmatic need for determining who can decide on these practical matters when they occur, as John Robertson himself states in the quote cited earlier. Indicating this meaning, the Supreme Court of Tennessee in the celebrated case of *Davis v Davis* concluded that:

[P]reembryos are not, strictly speaking, either “persons” or “property,” but occupy an interim category that entitles them to special respect because of their potential for human life. It follows that any interest that Mary Sue Davis and Junior Davis have in the preembryos in this case is not a true property interest. However, they do have an interest in the nature of ownership, to the extent that they have decision

⁸⁰⁹ Robertson, "In the Beginning: The Legal Status of Early Embryos," 454, 455. Though Robertson is not talking about the HFEA 1990, his words apply to it as Maria Fox rightly cites them. Fox, "Pre-Persons, Commodities or Cyborgs: The Legal Construction and Representation of the Embryo," 178.

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making authority concerning disposition of the preembryos, within the scope of policy set by law.⁸¹⁰

This practical decisional authority is far from being, as the current understanding of property presumes, "... exclusive, unqualified and individualistic."⁸¹¹

The other important criticism levelled at arguing for potentiality in general, is based on the concept of the transitivity of potentiality. According to the critics, attributing a special status to the foetus because of its potentiality should be extended to the gamete that has it too; yet, they continue, since this entails unbearable consequences, the argument as a whole should be rejected.⁸¹² As summarised by Alfonso Gómez-Lobo:

The potentiality argument is understood as moving backwards in the following way: if a human person deserves respect, then a potential human person ..., i.e., a human embryo, also deserves respect. But ..., by virtue of the transitivity of potentiality, one should take a further step backwards and hold that if a human embryo deserves respect, then the sperm and the ovum also deserve respect. This conclusion and its implication that gametes deserve the same respect as people amounts to ... a perfectly absurd position.⁸¹³

However, this criticism can be plausibly rejected. In the first place, the criticism is unsound with regard to the argument of active potentiality. Personality attributed to the ensouled foetus cannot be extended to the non-ensouled foetus, let alone the gamete, since it lacks the virtue by which such a standing is gained, i.e. an active potentiality for

⁸¹⁰ *Davis v Davis*, (1992) 842 S.W. 2d 588, 597. In commentating on this case, see C. M. Jordan Jr and C. J. Price, "First Moore, Then Hecht: Isn't It Time We Recognize a Property Interest in Tissues, Cells, and Gametes?" *Real property, probate, and trust journal* 37, no. 1 (2002): 151-190, 180.

⁸¹¹ J. Nedelsky, "Property in Potential Life--a Relational Approach to Choosing Legal Categories", *Canadian Journal of Law & Jurisprudence* 6 (1993): 343-365, 353.

⁸¹² A. Gómez-Lobo, "Does Respect for Embryos Entail Respect for Gametes?" *Theoretical Medicine and Bioethics* 25, no. 3 (2004): 199-208, 200, 201.

⁸¹³ *Ibid.*, 200.

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actual moral agency.⁸¹⁴ Yet the case is slightly different with regard to the argument of passive potentiality. The gamete, whether a sperm or an egg, shares the same type of potentiality with the non-ensouled foetus, because the gamete can develop into an autonomous moral agent and so become a person, if subjected to external intervention through sexual intercourse, or an *in vitro* procedure and then ensoulment. So it could be said that the gamete should be accorded the same standing and respect accorded to the non-ensouled foetus. Though this conclusion is not as horrifying as it appears regarding the argument of active potentiality, since the gamete is not claimed to have the same standing and respect due to the ensouled foetus, i.e. actual personality, it is still intolerable. Besides countering our intuition that gametes are different from foetuses,⁸¹⁵ it may entail morally intolerable consequences such as restricting one's ability to dispose of gametes, if that is considered to contradict the respect that they should be accorded because of their passive potentiality for actual moral agency. This may lead to rejecting the argument of passive potentiality as a whole.

Nevertheless, while admitting that the gamete and the non-ensouled foetus share the passive potentiality for actual moral agency, a distinction between them can still be held. This distinction is based on the quality of the passive potentiality possessed. The passive potentiality for personality the non-ensouled foetus has is far more certain than that of the gamete. This certainty derives from two facts: the foetus's acquisition of an active potentiality for the biological structure necessary for ensoulment, and ensoulment being a rule-based intervention.

⁸¹⁴ See 5.2.2 The status of the foetus before ensoulment.

⁸¹⁵ Eberl, "The Beginning of Personhood: A Thomistic Biological Analysis," 153.

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The first fact is based on having the programming necessary for all future biological development. Following fertilisation, the foetus acquires DNA programming wherein all future biological development, including that necessary for ensoulment, is determined.⁸¹⁶ So, if all goes well, the foetus will realise this development and reach the stage at which ensoulment is possible, i.e. the twentieth week of gestational age. In other words, the foetus has an inherent tendency to develop the biological structure of ensoulment, and unless is prevented from so doing by a negative causal factor, it will definitely actualise it. The gamete, on the other hand, lacks such programming, since it has only half of the chromosomes required, i.e. twenty three instead of forty six.⁸¹⁷ Hence there is nothing in its nature that gives rise to the biological development required. Only an external positive causal factor, namely sexual intercourse or an *in vitro* procedure, will endow it with such a capacity. Its potentiality for the structure necessary for ensoulment is, hence, purely passive.

The second fact that confers more certainty on the foetus's passive potentiality for personality is that despite being an external intervention, ensoulment is rule-based.⁸¹⁸ It is external in the sense that it requires that God intervene each time to ensoul the foetal body.⁸¹⁹ However, it is also arguable that this intervention is rule-based: it is an event that occurs regularly at a particular time, i.e. the twentieth week of gestational age, as the time when the condition of bodily readiness for ensoulment is met, and the conclusive indications of the soul's existence are detected.⁸²⁰ Therefore, it can plausibly be argued

⁸¹⁶ *Ibid.*, 154.

⁸¹⁷ Gómez-Lobo, "Does Respect for Embryos Entail Respect for Gametes?" 200.

⁸¹⁸ Cf. Deckers, "Why Eberl Is Wrong. Reflections on the Beginning of Personhood", 277.

⁸¹⁹ See footnotes ⁷⁷⁸ & ⁷⁷⁹ above.

⁸²⁰ See 5.1 Determining the timing of the ensoulment event.

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that God will intervene by ensouling every foetus whose body becomes developed enough to receive the soul.

Therefore, after fertilisation, the foetus commences actualising its inherent potentiality for the biological structure of ensoulment, and if all goes well, will develop it to the required degree at the particular time at which ensoulment is inevitable. This confers more certainty on its passive potentiality for actual moral agency and justifies treating it differently from the gamete.

The other important issue concerning the conferral of an interim status on the non-ensouled foetus concerns the legal plausibility of such a measure. This thesis claims that such a measure is plausible for two reasons. The first is the theoretical merit of the concept as has been previously explained. The other is the fact that this measure has already been the position held by several significant advisory bodies and courts.⁸²¹ For example, in the US the Ethics Advisory Board of the Department of Health, Education and Welfare concluded that "... the human embryo is entitled to profound respect, but this respect does not necessarily encompass the full legal and moral rights attributed to persons."⁸²² In a similar manner, the American Fertility Society concluded that:

The preembryo deserves respect greater than that accorded to human tissue but not the respect accorded to actual persons. The preembryo is due greater respect than other human tissue because of its potential to become a person and because of its symbolic meaning for many people. Yet, it should not be treated as a person,

⁸²¹ It is noteworthy that these bodies, courts, and commentators focused on the status of the embryo, qua embryo, rather than that of the foetus. However, the distinction between the embryo and the disensouled foetus according to their developmental stage has no special significance in the current research since they share the same sort of potentiality.

⁸²² Protection of Human Subjects; HEW Support of Human in Virtue Fertilization and Embryo Transfer: Report of the Ethics Advisory Board, 44 Fed. Reg. 35, 033, 35,056 (1973). As cited by Robertson, "In the Beginning: The Legal Status of Early Embryos," 446.

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because it has not yet developed the features of personhood, is not yet established as developmentally individual, and may never realize its biological potential.⁸²³

Another example is that of the Canadian Royal Commission on New Reproductive Technologies that concluded that:

Commissioners believe that it would be highly undesirable for zygotes or embryos to be characterized as property, with all the social and legal implications such a classification implies. Rather, we think that legal rules relating to the zygote and embryo should be designed to ensure that they are treated with respect as a form of potential life.⁸²⁴

Adopting the concept of the interim status of the foetus has also been the position of some courts, and the clear example of this is the Supreme Court of Tennessee in the celebrated case of *Davis v Davis*.⁸²⁵ The US Supreme Court also claimed to take a similar stance on its decisions concerning abortion including that in the landmark case of *Roe v Wade*.⁸²⁶ So it seems plausible to admit the interim status of the non-ensouled foetus into law.

To sum up, this chapter set out to apply moral agency to foetuses as the criterion upon which personality is based, and to determine their status accordingly. Since moral agency is seated in the soul, the search for whether foetuses have acquired it, in an ultimate sense, was conducted through the search for whether and when they have souls. It was concluded that the timing of ensoulment coincides with the timing of the first

⁸²³ Ethics Committee of the American Fertility Society (AFS), *Ethical Considerations of the New Reproductive Technologies*, 53 *Fertility & Sterility* 37S, 58S (Supp. 2 June 1990). As cited by Perry and Schneider, "Cryopreserved Embryos: Who Shall Decide Their Fate?," 486.

⁸²⁴ Canadian Royal Commission on New Reproductive Technologies, 1993: 627. As cited by Fox, "Pre-Persons, Commodities or Cyborgs: The Legal Construction and Representation of the Embryo," 179.

⁸²⁵ *Davis v Davis*. The case has been previously cited, see *supra* ft. ⁸¹⁰.

⁸²⁶ K. Schaefer, "In-Vitro Fertilization, Frozen Embryos, and the Right to Privacy--Are Mandatory Donation Laws Constitutional?" *Pacific Law Journal* 22, no. 1 (1990): 87-121, 97. She claims also that the interim position appeals to most commentators because it considers all parties' interests. *Ibid*.

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conscious experience, which, in turn, was demonstrated as occurring at the twentieth week of gestational age. In the light of this conclusion, a distinction was drawn between foetuses aged twenty weeks or more, and younger foetuses. The former were attributed the status of persons on account of their acquisition of an active potentiality for moral agency and hence personality. By contrast, it was decided that the latter have not attained such standing. However, non-ensouled foetuses were attributed an interim status because of their passive potentiality for personality.

6 Conclusion

This thesis set out to determine the legal status of the human foetus as it should be in Libyan law. This status is widely and reasonably argued to be the starting-point for solving foetus-related dilemmas revived or created by new reproductive technologies, such as abortion and foetal research. However, as it stands in Libyan law, this status is problematic because it is based on the outdated born alive rule that deprives the foetus of legal personality. Therefore, establishing what the Libyan legal standing on the status of the foetus should be, seems relevant and necessary.

In pursuit of this aim, the thesis examined the Western moral and legal debate on the status of the foetus from an Islamic perspective. The examination of the moral debate was based on the assumption that law should be assessed and reformed, if found to be unsatisfactory, according to ethics. In these circumstances, the problematic standing of Libyan law on the status of the foetus should be reformulated from an ethical viewpoint. In this regard, the relevant Western debate offered, through its richness and diversity, a good starting-point. Indeed, it is within this debate that the born alive rule has been carefully assessed and proven to be no longer satisfactory. However, since the applicability of arguments and views deployed in this debate to Libya was potentially contentious, the thesis chose to assess them from an Islamic perspective, *Shari'a* being *the* source of Libyan law. This also offered the opportunity to examine the capability of *Shari'a* to rise to the moral and legal challenges associated with new reproductive technologies.

Applying this methodology has enabled the thesis to achieve its aim. It has concluded that the human foetus should be accorded the moral and legal status of a

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person from the twentieth gestational week onwards, and an interim status granting it gradual and derivative respect prior to that. The following summary of the various conclusions reached, and how they contributed towards ascertaining the status of the foetus in such a way, should clarify this point. The main body of the thesis was divided into four chapters wherein the first two laid down the foundations for the discussions carried out in the rest. Chapter One focused upon the existing Western moral and legal literature devoted to the subject of the moral and legal status of the foetus, and determined that the main controversies pertaining to this status concern whether the foetus is a person, property, or something else; whether humanity is significant for such determination; whether the moral status of the foetus is related to its legal status, and if so, how; and what the implications of the status of the foetus are for its related dilemmas. Identifying these controversies provided the thesis with a framework from which it became possible to develop its own discussions and arguments in Chapters Three and Four.

Having identified the main controversies pertaining to the issue of the moral and legal status of the foetus in Western literature, the thesis moved on to introduce *Shari'a* as the basis upon which it would examine them. This took place in Chapter Two and started with explanations of the Islamic views on the nature of human beings and the rationale behind creating them, as necessary introductions to understanding *Shari'a*. It was shown that human beings are composites of biological components or bodies, which they share to a great extent with other animals, and intellectual components or souls, that are the seats of the capacities that distinguish them from animals and other entities. These capacities, namely, those of cognition and volition, were concluded to be the rationale behind choosing human beings to be God's vicegerents on earth, that is, to be the entities

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who can, freely and consciously, realise and implement the ethical imperatives that constitute the ethical arm of God's will. These ethical imperatives were shown to be discernible through either divine revelation or human reasoning. *Shari'a*, as embodied in the Qur'an and the *Sunnah* of the Prophet Mohammad, was demonstrated to be a representation of the former. As such, contrary to the widespread understanding of it as law, *Shari'a* was concluded to be first and foremost an ethical system whose core or spirit is the conservation of the five principal ethical values of religion, self, reason, reproduction, and property. However, the law was shown to be important for *Shari'a* as a means of preserving these values. The second way of knowing the ethical divine imperatives was shown to be human reasoning. This means that, whenever *Shari'a* is silent, human reasoning can play an important role in identifying these imperatives. Accordingly, Western theories and arguments could be seen, and adopted, as a method of applying human reasoning in cases where *Shari'a* offers no guidance. However, this is conditional upon not contradicting the spirit of *Shari'a*.

After determining the main issues to examine, and the basis for doing so, the thesis started to ascertain the moral and legal status of the foetus. Since the first possible embodiment of the legal status of the foetus is being a person, it was necessary to define what is meant by legal personality. For this purpose, the thesis examined the existing definitions, namely, the positivist and the humanity-based definitions, and concluded that neither is satisfactory. The first claims that legal personality is a purely legal concept that should not be built on any extra-legal factors, and a device that the lawmaker can deploy to fit certain purposes. As such, it can be conferred on, or withdrawn from, any entities or things regardless of any intrinsic qualities they may have. As a result, the intrinsic quality of being human does not give the foetus, if it is discovered to have it, any privilege. The

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positivist definition, therefore, places the foetus on the same footing as other beings and things in terms of the chance of being attributed legal personality. In addition, being a mere device utilised to fit the lawmaker's purposes means that any personality attributed can vary from one context to another. It is possible, therefore, to attribute the foetus personality in one law, and deprive it of such a standing in another. Such inconsistency may even become desirable because it may fit more properly the lawmaker's purposes. However, the positivist definition was proven unsatisfactory mainly because it is impractical. The conferral or withdrawal of legal personality cannot be undertaken without considering extra-legal factors. More importantly, the definition is based on a separation between law and other disciplines, including ethics, which cannot be accepted by *Shari'a* since this is a system wherein law is founded upon ethics.

Having rejected the positivist definition of legal personality, the thesis moved on to assess the second definition that bases it on humanity. According to this definition, legal personality is a mere representation of what is inherent in human beings. It follows that, in order to be a legal person, or a real legal person, the foetus must be proven to be human. It would then enjoy consistent personality throughout law since it would be founded on an invariable intrinsic trait. However, although the humanity-based definition seemingly gives the foetus stronger chances of being a person, compared to the positivist definition, it was shown to be dominated by a particular understanding of humanity that deprives the foetus of personality. According to this understanding, the human being is any human organism capable of independent integrated functioning. Other non-biological attributes such as intelligence or sentience are irrelevant. This understanding is embodied in the born alive rule whereby legal personality starts upon live birth. This rule

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was shown to be enshrined in many laws and jurisdictions, English law, Libyan law, and Islamic jurisdiction included.

Nevertheless, the humanity-based definition of legal personality was proven to be ill-founded. The first possible basis for this definition is that live birth signifies the moment when the foetus is separated from the pregnant woman, which the analysis in Chapter Three proved to be inadequate since the foetus is biologically separate from around the time of conception. The second basis is that live birth designates the point at which the foetus can exist independently from the pregnant woman, while the necessity of such independence for legally defined personality is strongly questioned. Many human beings are attached to, and so dependent on, heart/lung or dialysis machines or other forms of life support; still, it is generally accepted that they are legal persons. Further, if it is the independent existence from the pregnant woman that matters, the foetus was shown to be capable of that long before being born alive, that is, from the time of viability. Additionally, the perfection of ectogenesis, artificial wombs, which, according to many scientists, is only a matter of time, will make it possible for the foetus be born and separated from the pregnant woman at any stage of pregnancy and kept alive. Furthermore, the biological definition of humanity values the physical component of human beings while it is the intellectual aspect that really matters to their identity as vicegerents. No reason, therefore, justifies the preservation of the born alive rule as the starting point for legal personality.

Having discarded the existing definitions of legal personality, a different definition was proposed, which bases legal personality on moral personality, and equates both with humanity. Basing legal personality on moral personality was justified by the proven inseparability of legal personality from extra-legal considerations, as well as the

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strong argument that many Western legal theories, including that of personality, are, in fact, based on their moral counterparts. More importantly, it was supported by the fact that law is based on ethics in *Shari'a*. Equating moral and legal personality with humanity was a result of basing the former on a human-specific criterion, i.e. moral agency. This establishment was justified by the fact that in *Shari'a* personality is intimately connected to vicegerency, that is, personality has been conferred in the first place on human beings to enable them to bear and fulfil their duties as the only vicegerents. Hence, personality presupposes vicegerency. Since vicegerency, in turn, presupposes moral agency, personality too presupposes it. Put another way, moral agency becomes the criterion of personality.

Regarding the argument that the adoption of moral agency as the sole criterion of moral personality is absurd because it leads to depriving many human beings that lack this capacity, such as infants and cognitively impaired adults, of personality, I utilised the concept of the nature of being human. According to this concept, the soul is deemed to be the seat of all mental capacities, including those necessary for moral agency, while the body is the means used to actualise them. Therefore, while there are human beings who have no actual moral agency because of their bodily inabilities, all human beings do have ultimate moral agency because of the simple fact that they have souls and so are humans. Having ultimate moral agency was deemed sufficient to consider a being a person. Consequently, all human beings, including many of those lacking actual moral agency, were deemed persons.

This argument being made, Chapter Four focused first on whether, and from when, the foetus has a soul, and hence is a moral agent, in the ultimate sense, and a person. Since *Shari'a* was shown to have no conclusive statement on the timing of

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ensoulment, the thesis relied in determining that timing on the general concept of the nature of being human and human reasoning-based arguments as deployed in relevant Western debate. The first of these arguments was the Cartesian causal concept of ensoulment that maintains that a soul cannot pertain to a body unless the soul is capable of influencing that body. This means that ensoulment cannot occur unless the body is sufficiently developed to receive and execute the soul's instructions. This readiness was understood as the acquisition of the cortical brain, being the organ responsible for executing the soul-specific functions, i.e. cognitional and volitional functions.

Upon the potential argument that the acquisition of the cortical brain means merely that ensoulment can happen, but not that it will necessarily happen, and therefore it cannot be equated with the timing of ensoulment, I deployed a principle called the principle of the indicatory role of the soul's functions. According to this principle, because cognitional and volitional functions are exclusively soul-based functions, they indicate its existence beyond any doubt. Hence, the ensoulment timing can be determined through determining the time when these functions first begin. Since consciousness was concluded to be the first of these functions to occur, its beginning was used as an indicator of the ensoulment timing. After discussing its different proposed starting-points, consciousness was concluded to first begin at the twentieth week of gestation. This time was therefore deemed the timing of ensoulment, hence the timing of the acquisition of ultimate moral agency, along with an active potentiality for actualising it, that is, a potentiality that the entity can actualise by itself in the absence of external obstacles. The foetus, consequently, was accorded the moral and legal status of a person from the twentieth week of gestation onwards.

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Prior to that, as the foetus has not yet been ensouled, it cannot be accorded the moral and legal status of a person. However, neither can it be accorded the status of a property species since it has a passive potentiality for moral agency. It is passive because it requires the intervention of an external causal factor to actualise it, namely, the infusion of a soul into the foetal body by God. Being a passively potential moral agent was concluded to give the non-ensouled foetus an interim status, granting it derivative importance that stems from the fact that it is the origin of the future person. In other words, the foetus is important not because of its intrinsic nature, but because of the future person it will become. As such, this significance is graded in proportion to its proximity to having ultimate moral agency: the closer the foetus gets to being an actively potential moral agent, the greater the respect it should be accorded.

This interim status is unattributable to the gamete though it shares, to some extent, the passive potentiality for moral agency. The reason for this is that its passive potentiality is far weaker than that of the non-ensouled foetus, as it requires two causal factors, i.e. sexual intercourse or an *in vitro* fertilisation procedure, plus ensoulment. That of the non-ensouled foetus, however, requires only ensoulment and this was concluded to be a rule-based intervention, that is, it happens regularly whenever the body becomes sufficiently developed to receive the soul, which was concluded to occur at the twentieth week of gestation. This difference in the strength of passive potentialities makes it implausible to accord the gamete the same status and treatment accorded to the non-ensouled foetus.

Having determined the moral and legal status of the foetus, the thesis then proceeded to assess what implications this determination has for dilemmas concerning the foetus. A distinction was made between the status of the foetus before and after

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ensoulment. After ensoulment, the foetus is a person entitled to persons' rights, the rights to life and bodily integrity included, and so, like these persons, his/her life cannot be sacrificed to protect or promote any rights or interests of others, including the pregnant woman. The only possible qualification is that where the latter's life is endangered by the continuation of pregnancy. In such a case, if both the life of the pregnant woman and that of the foetus are threatened, an abortion can be performed on account of the juristic rule stating that 'the greater evil should be warded off by the lesser evil', not as a result of an evaluation between the value or worth of the two individuals' lives.

However, before ensoulment, the case was shown to be different. While the gradual and derivative respect the foetus commands requires that abortion be prohibited, this prohibition is not absolute. It was demonstrated that there are rules whereby any harm or benefit resulting from an abortion are measured qualitatively, i.e. whether the harm predicted or benefit sought is necessary, complementary, or amelioratory, and quantitatively, i.e. how many people will be harmed or benefited by an abortion. If the benefit of an abortion is shown to outweigh the harm, it can be performed. This evaluation should be conducted on a case by case basis, where one of the important qualitative factors to be considered is the developmental phase of the foetus concerned. The more the foetus develops, the greater the harm caused to it becomes. Accordingly, benefits proposed to legitimise a late pre-ensoulment abortion, must be greater than those proposed to legitimise an earlier one. However, the mere fact that pre-ensoulment abortion can be legitimised, compared to post-ensoulment abortion that is subject to absolute prohibition, proves how central the moral and legal status of the foetus is for deciding on any of the foetus-related dilemmas. This status should, therefore, be deemed the starting-point for resolving these issues.

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Though the announced aim of the thesis was to determine the legal status of the foetus as it should be in Libyan law, the conclusion it reached is not limited to the Libyan legal system. On the one hand, the congruence of argument from *Shari'a*, philosophy, and science should make this conclusion valid in any country whose legal system is derived from Islamic tradition. On the other, as developed in Chapters four and five of the thesis, the argument about foetal personality, while influenced by *Shari'a*, is also supported by independent scientific and philosophical arguments and so should be taken into account in England and other legal systems as well.

In terms of Libyan law, the proposed legal status of fetuses should be taken into account when any regulations concerning them are made. Admittedly, as of yet, the legal status of the foetus has not become a significant legal issue as it is the West in general, and the UK in particular, since many foetus-related dilemmas, such as foetal research, have not become reality in Libya yet. Still, this does not deny the need for re-determining the legal status of the foetus because, on the one hand, issues, such as abortion, prenatal invasive therapy, and those associated with IVF, are already in place in Libya, and, on the other, the inadequacy of the born alive rule remains. Indeed, regulating foetus-related issues needs further study, that this thesis was unable, due to time and space limitations, to conduct. Yet, the conclusions that it reached should suffice in solving those dilemmas in general, and paving the way for any future detailed study upon which regulations can be made

Indeed, the research that this thesis carried out could be taken further by study which focuses upon particular applications related to the foetus, such as abortion or foetal research. Certainly, though it is relatively brief, the study of abortion conducted in this thesis showed that pre-ensoulment abortion raises questions of extreme importance, such

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that a separate study seems justifiable, even necessary. Examples of these questions are: what is the standing of Libyan law and *Shari'a* on the powerful right to autonomy that the pregnant woman is generally accorded in the West? If it exists, does that right justify abortion, and to what extent? Does the putative father have any say in abortion decision-making and, if so, does he have a right of veto over the will of the pregnant woman? This thesis, with its unique method of examining Western moral and legal literature from an Islamic perspective, can help, not only with these questions, or even other foetus-related dilemmas, but also with a wide range of bioethics and biolaw dilemmas.

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