

Abortion Under Sharia Law: The Need for The Extension and Expansion of Women’s Right to Privacy in Saudi Arabia

* Dr. Sattam Almutairi,
Sharia and Law College, Law Department, Taif University, Saudi Arabia.

Abstract

The US Supreme Court decision in *Dobbs v Jackson* has led commentators to again interrogate whether the right to an abortion is implicated as part of the spectrum of rights to privacy. The abortion question remains controversial and unsettled across the world, including in Islamic regions. In this article, I examine whether the right to an abortion can be situated within the panoply of privacy rights granted to an individual under Sharia and Saudi law. Saudi law and practice serves as an example of how a modern Muslim majority country views abortion and its place within the individual’s fundamental rights (enumerated or unenumerated). I will attempt to answer the following questions. What is the status of a fetus in Sharia? What is the Sharia’s position on abortion? Is there a possibility of extending a woman’s right to privacy under the Sharia to accommodate her right to have an abortion? Under what circumstances would she lose her right to a choice? Finally, to what extent does Saudi law and practice reflect the Sharia’s position on the subject?

Keywords: abortion, privacy, reproductive rights fundamental Rights, Sharia, Saudi law.

DOI: 10.7176/JLPG/144-03

Publication date: December 30th 2024

1. Introduction

The recent *Dobbs v Jackson*¹ decision rendered by the US Supreme Court represents yet another paradigm shift on whether or not a woman has the right to access a legal abortion in the United States.² The decision favours the view of the opposite camp in the abortion debate, i.e., those opposed to abortion.³ In America, the abortion

¹ *Roe v Wade*, 410 US 113 (1973), the court decided that an individual could have an abortion at any time before the fetus becomes viable; it also ruled that the right to access abortion is protected by the Fourth amendment. In overruling that decision, the court held, in *Dobbs v Jackson* case, that abortion may not be performed if the probable gestation age of the fetus is more than fifteen weeks. The court also ruled that abortion is not a right protected under the US Constitution. See “The *Dobbs v Jackson* decision. Annotated”, (The New York Times, June 24 2022), available at <http://www.nytimes.com/interactive/2022/06/24/uspolitics/supreme-court-dobbs-jackson-analysis-roe-wade.html> accessed 08/10/2022. See also L. Greenhouse, “A Requiem for the Supreme Court” (*The New York Times*, 24 June, 2022), available at <<https://www.nytimes.com/2022/6/24/opinion/roe-v-wade-dobbs-decision.html>. Accessed 08/10/2022

² One comment states that the abortion debate in America has polarized the country for long periods . See A. Merelli, “The Abortion Debate: A split country” (Aspenia Online, May 30 2022), available at <https://aspeniaonline.it/the-abortion-debate-in-the-us-a-split-country/> Accessed 13/07/24; see also, s Weiner, ”Abortion in America: From Roe to Dobbs and Beyond”,(AAMCNEWS, Sept. 21, 2023), available at <https://www.aamc.org/news/abortion-america-roe-dobbs-and-beyond> Accessed 15/07/24

³ 410 US 113 (1973).

debate has literally polarized the society.¹ The *Dobbs* judgment appears to have encumbered the right to legal abortion in the United States.² The Court's decision implies that the states are at liberty to enact their own abortion legislations, since abortion is not a constitutionally guaranteed right.³ Although *Dobbs v Jackson* is only binding on domestic American courts, it nevertheless signals the attitude of the American judiciary with regard to abortion. However, *Dobbs v Jackson* has an extraterritorial significance, based on America's position.

The abortion debate cuts across religious and socio-legal lines. *Dobbs v Jackson* begs the question of how a legal system that is substantially based on religious mores would have approached the question, if the case had been decided in, for example, Saudi Arabia. To investigate how the *Dobbs v Jackson* might have been decided in a Sharia-based legal system such as that of Saudi Arabia, I examine whether, legal abortion may fall under the integral part of a broader entrenched right, namely the right to privacy.

Sharia gives great importance to what elsewhere is called "privacy" and considers it necessary for the personal well-being and development of every individual in society.⁴ Indeed, there are many provisions in the Quran and the Sunnah that address aspects of privacy, for example, privacy of the home, the prohibition of spying, and the prohibition of acts or conduct aimed at exposing hidden weaknesses in others.⁵ These Sharia injunctions suggest, generally, that it is wrong and impermissible under the Sharia to subject the private life of an individual to scrutiny. Under Sharia, individuals have the right to the exclusive control of their personal affairs.⁶ As Eli Alshech notes, the "analysis of various exegetical and legal discussions reveal that Muslim scholars treated privacy, at least in the domestic context, as a legal concept, not a moral one."⁷

A White Paper on privacy rights published by the Centre for Internet and Society notes the difficulties associated with the proper identification and treatment of the different aspects of privacy rights.⁸ Marda et al. conclude that

¹ A Sullivan, "Explainer: How Abortion Became a Divisive Issue in US Politics" (Reuters, June 25, 2022), available at <https://www.reuters.com/world/us/how-abortion-became-divisive-issue-us-politics-2022-06-24/> Accessed 15/07/24. See generally also, "The Abortion debate in Post-Roe America"(2022)3 Global Insight, available at <<https://globalinsight.journal.library.uta.edu/index.php/globalinsight/article/view/55/35>> Accessed 15/07/24

² The most recent case in the abortion controversy in America is Food and Drug Administration v. Alliance for Hippocratic Medicine (FDA v. AHM); on appeal from the 5th Circuit, Alliance for Hippocratic Medicine v FDA, No.23-10362 (5th Cir. 2023); currently at the Supreme Court – FDA v Alliance for Hippocratic Medicine, consolidated with Danco Lab. LLC v Alliance for Hippocratic Medicine, Docket No. 23-235 (pending).

³ The Court affirmed that 'abortion' is not a protected right in the US Constitution, and rejected the view that it could be implied as part of "a broader entrenched right" provided for in the Fourth Amendment, *ibid.*, *Dobbs v Jackson*, Syllabus, pp. 3-5. Available at https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf Accessed 08/10/22.

⁴ S. Almutairi, "The Islamic and Western Cultures and Values of Privacy" *Muslim World Journal of Human Rights* 16:1 (2019): 51-80, at 58.

⁵ *Ibid.*

⁶ See A. Piri, "The Basis of Privacy Right in Islam" (Al-Islam.org), available at <<https://www.al-islam.org/islam-and-rights-privacy-territory-abbass-khajeh-piri/basis-privacy-right-islam>> Accessed 08/10/22.

⁷ E. Alshech, "'Do Not Enter Houses Other than Your Own': The Evolution of the Notion of a Private Domestic Sphere in Early Sunnī Islamic Thought." *Islamic Law and Society* 11, no. 3 (2004): 291–332, at 326.

⁸ See V. Marda *et al.* "Identifying Aspects of Privacy in Islamic Law" (The Centre for Internet and Society, 14 December

the concept is ‘nebulous’,¹ noting the modern inclination to extend the meaning and legal implications of the concept of privacy beyond that outlined by most Muslim scholars. One important example of this is the modern tendency to include within the concept the notion of non-physical intrusion of a private space, e.g., via digital tools.² According to Prosser, aspects of privacy include following: interference with an individual’s solitude or private affairs; the dissemination of embarrassing information about an individual, their veracity notwithstanding; publication of data that is disadvantageous to an individual or that subjects him to public opprobrium; or the unwarranted use of an individual’s image or likeness.³ Marda et al. classify privacy under the following categories: bodily privacy; informational and communications privacy, and territorial and locational privacy. They view bodily privacy as including a guarantee against battery, rape, voyeurism, etc.⁴

Since the fetus inhabits the mother's body (her womb) for its entire gestation, the right to access abortion can be accommodated as an ancillary right of the right to bodily privacy, the first of the categories mentioned above.⁵ We must then examine the feasibility of reconceptualizing the right to bodily privacy, integrity and autonomy as including the right of choice to legal abortion in a Sharia legal system. The question is: Is the extension of the right to bodily privacy, integrity and autonomy reasonable or not.

2. The Right to Privacy Includes the Right of Choice in a Sharia Legal System

Generally speaking, in the West the task of defining and explaining the right to privacy has proved to be a challenging one for legislators, courts and academics.⁶ Judith Jarvis Thompson highlights the challenge in defining the right to privacy; according to Thompson, “the most striking thing about the right to privacy is that nobody seems to have any very clear idea what it is.”⁷ This definitional problem extends to the Muslim world. Neither the Quran nor the Hadith defines privacy. Thus, the term has no widely accepted legal or religious meaning. Similarly, early Muslim jurists did not use the term *al-khuṣūṣiyya*.⁸ The term was used in a select set of circumstances to suggest secrecy, personal space or seclusion.⁹ Early Muslim scholars did use some relating words to *al-khuṣūṣiyya* that have survived into the present, e.g. *sitr*, which signifies a screen/veil, covering, or protection. The verbal noun, *satara*, connotes the act of shielding, hiding or concealing, or covering.¹⁰ A

2014), available at <https://www.cis-india.org/internet-governance/blog/identifying-aspects-of-privacy-in-islamic-law>

Accessed 09/03/24.

¹ Ibid.

² Ibid.

³ W. Prosser, “Privacy”, *California Law Review* 48:3 (1960): 383-423, at 389.

⁴ Ibid. (n.11).

⁵ See J. Herring et al., “The Nature and Significance of the Right to Bodily Integrity,” *The Cambridge Law Journal* 76: 3 (2017): 566–588, at 566-67.

⁶ H Delany & E Carolan, *The Right to Privacy: A Doctrinal and Comparative Analysis* (Thomson Round Hall, 2008), 8.

⁷ J. Thomson, “The right to privacy”, *Philosophy and Public Affairs* 4:4:(1975): 295-314, at 295.

⁸ Ibid. (n.7), 57.

⁹ A. Tahir, “Privacy in Islam: A Sacred Human Right” (2012) 1:2 Al-Baseera, 17, 24. According to Tahir, the central implication of the term privacy is “a right to seclude from others”, *ibid.*, available at < <https://www.numl.edu.pk>. > Accessed 07/03/2024.

¹⁰ See A. Osman. “The Right to be Forgotten: An Islamic Perspective” *Human Rights Review* 24: (2023): 53 – 73, at 62.

common synonym for privacy is *khalwa*, i.e., isolation, solitude or seclusion.¹ *‘Awhrah* ² signifies the intimate parts of the body that the believer must conceal from others, or the prohibition of publishing or disclosing the weaknesses and failings of other people. By implication, these are personal situations and circumstances that individuals are expected to keep concealed from the public.³

The term “*al-khuṣūsiyya*” (privacy) is not reducible to phrases such as ‘*awrah*, *sitr* and *khalwa*. More often than not, however, these words are regarded as synonyms of privacy.⁴ In fact, Arabic dictionaries translate privacy in terms that correspond with the Western notion, such as “secrecy”, “personal” and “secluded”.⁵ Furthermore, early Islamic notions of privacy also included the freedom to make individual choices, for example, regarding the course of an individual’s personal improvement/development of his/her life, reputation or honor – in a sense, an almost absolute right over one’s personal body and private affairs.⁶

The question of whether a woman has the right of control and can make personal/private choices relating to birth control is not clear-cut. Arguably, the general Islamic principles on privacy may deduce rules that will be useful to accommodate a woman’s right to birth control measures and abortion, without government intervention. The doctrine of *maqāṣid al-Sharia* (Sharia goals and intentions)⁷ serves as a doctrinal basis for a right of choice for women. The doctrine teaches that the Sharia is only a general guide to the principles and rules of human social conduct, and that it leaves unstated other duties and rights that should regulate human social conduct.⁸ The doctrine also assumes that whatever is lacking in terms of rules or norms that regulate the social conduct of individuals will be supplied through legislation inspired by the Quran and Hadith, conducted in consultation with other stakeholders (especially religious leaders). The *maqāṣid* doctrine is similar to the modern concept of ‘unenumerated rights’, a doctrine that is a vital source by which new legal rights are inferred from other general constitutionally guaranteed legal rights. Today, the *maqāṣid al-Sharia* can be used as a doctrinal basis for a woman’s right to have access to abortion in some circumstances, as part of the general right to privacy, without government interference.

One example of how the Sharia guarantees the right to individual autonomy while also preventing the state from intervening is an incident involving the caliph ‘Umar b. al-Khaṭṭāb. The caliph was proposing a decree that would regulate the entitlement of women to dowers.⁹ A woman objected to this plan and drew his attention to a Quranic verse which states: “(But if you want to replace one wife with another and you have given one of them

¹ E. Alshech, "Notions of Privacy in Classical Sunni Islamic Thought" (Ph.D. Princeton University, 2004), 195.

² ‘*Awhrah* has two legal meanings. First, it refers to the intimate parts of the body that the believer must conceal from others. Second, it refers to the weaknesses and failings of people, in other words, things that people would wish to keep out of public knowledge. See M. Al-Bagha et al., *Al-Wāfi fi Shārh al-'Arba'in Al-Nawawī*, 17th ed. (Damascus-Beirut: *Dār Ibn Kathīr*, 2007), 303.

³ Ibid.

⁴ S. Reza, "Islam's Fourth Amendment: Search and Seizure in Islamic Doctrine and Muslim Practice," *The Georgetown Journal of International Law* 40:3 (2009): 703-806, at 788.

⁵ Ibid. (n.7).

⁶ Ibid. (n.14), 9.

⁷ M. Maroth, “Human Dignity in Islamic World”, in M. Duwell et al. (eds), *The Cambridge Handbook of Human Dignity* (Cambridge: Cambridge University Press, 2014), 159.

⁸ Ibid.

⁹ Y. Sodiq, *An Insider’s Guide to Islam* (Trafford, 2011), 73.

a great amount [in gifts], do not take [back] from it anything. Would you take it in injustice and manifest sin?'.¹ This verse prohibits placing limits on a dowry. The caliph accepted her argument and dropped the idea, notwithstanding, the fact that many Companions supported the proposal.² This successful campaign led by a woman to resist government intrusion into matrimonial affairs so as to control marriage dowers underpins and supports the view that the right to make important personal decisions should be guaranteed by the state.³

Muslim jurists have held liberal views in relation to birth control. Notwithstanding that childbearing was seen as the key objective of marriage, 'azl (coitus interruptus) was commonly practiced during the life of Prophet Mohammed.⁴ Jābir b. 'Abdullāh reported: "We used to practice coitus interruptus during the lifetime of Allāh's Messenger".⁵ However, some Muslim scholars consider birth control measures to be immoral because they intervene in the process of family formation.⁶

The use of contraceptives pills was not viewed as a moral problem in the Islamic world, although, it may be contrary to the injunction of the Prophet, who was reported to have said, "Marry those who are loving and fertile, for I will be proud of your great numbers before the other nations."⁷ This statement does not justify state interference in a private citizen's personal choice in relation to birth control measures. Some Muslim scholars disapprove of contraceptives pills if used without the consent of the woman's husband. Others regard the use of contraceptives as a sin,⁸ however, these anti-contraceptive sentiments do not warrant government interference or regulation of personal choice relating to birth control measures. There is evidence that contraceptives ('azl) were used during the time of the Prophet, a practice commended by al-Ghazālī (d. 505/1111).⁹ Thus, it appears that a woman's right to birth control methods legitimately falls under the scope of the concept of privacy under the Sharia.

As for abortion, Muslim jurists view the right to life of the unborn child "as an independent and separate human right."¹⁰ It follows that two rights are implicated in the abortion debate: the right of choice of the pregnant woman, and the right to life of the unborn fetus. A position paper published by the Australian National Imams Council affirms that abortion "remains a major sin [in Islam, worthy of repentance and forgiveness from

¹ Q. 4:20.

² Ibid. (n.30).

³ Ibid. (n.23), 155.

⁴ V. Rispler-Chaim, *Islamic Medical Ethics in the Twentieth Century*, 46 vols. (Brill, 2021), 11.

⁵ Ṣaḥīḥ al-Bukhārī, (5208), (5209).

⁶ M. Enright, "Health (Family Planning) Act 1979", in E. Rackley, R. Auchmuty, (eds.), *Women's Legal Landmarks: Celebrating the history of women and law in the UK and Ireland* (Oxford: Bloomsbury Publishing, 2019), 349.

⁷ S. Dawud (2025).

⁸ A. Alṭaḥṭawī, *Al-'Alāqāt al-Zawjiyya fī daw' al-Kitāb Wa-l-Sunna al-Nabawiyyah Wa- Aqwāl al-'Immah* (Beirut: Dār al-Kutub al-'Ilmiyyah, 2016), at 222.

⁹ Al-Ghazālī commended the practice for three reasons: first, it protects the wife from health risks related to childbirth; second, it avoids any additional socio-economic hardships inherent in a large family; finally, it eases the financial burden of an extra mouth to feed. See M. Shaltut, *Al-Qur'ān Wa-l-Mar'ah: Fuṣūl Shar'iyyah Ijtima'iyyah Taḥdīd al-Nāsīl fī al-Sharī'ah al-Islāmiyyah* (Gīza: Wakalat al-Ṣaḥāfah al-'Arabīya, 2000), 63-64.

¹⁰ M. Sabreen, "An Unborn Child's Right to Life: A Study of the Law of Abortion in Pakistan in the Light of the Sharia," Sheikh Zayed Islamic Centre, University of the Punjab (2020) 185.

Allāh]”.¹ The Council advises, however, that abortion may be permissible between 40 and 120 days after conception (pre-ensoulment – before the fetus is blessed with a soul), but not thereafter; and that Islam may still permit it thereafter if a qualified medical expert certifies in a report that the pregnancy poses a grave risk to the life of the pregnant mother; or that the fetus has an abnormality and is expected to have severe disability.²

Does the recognition of the right to privacy in the Sharia suggest that it includes the right to bodily integrity and an exclusive right of choice in abortion matters, for the pregnant woman? The prominence given to privacy rights and personal autonomy points to the centrality of religion in the private lives of Muslims. With regard to Sharia specifically, Mustafa states that in appropriate circumstances, Sharia places a greater premium on ‘beneficence and non-maleficence’ than on personal autonomy.³ This observation applies to decisional autonomy as regards the right of a woman to access abortion in appropriate cases. In [*Shimp v Mcfall*],⁴ the defendant was sued by a relative to compel him to donate his organ to him. The Court held in favour of the defendant. Ingram commented that the judge was right to conclude that legal obligations must be distinguished from moral conflicts and obligations, and that it is the duty of the law to protect an individual’s privacy (including her body) from interference by the state. This decision and the comment vindicates the right to bodily autonomy.⁵

3. Sunni Jurisprudence on Abortion

A woman’s right to terminate a pregnancy is a controversial subject,⁶ The majority of Sunni scholars agree that a woman’s right to an abortion is circumscribed in certain situations, i.e., when there is a legitimate and important reason to prohibit it.⁷ In the Islamic context, it is difficult to establish priority between the conflicting interests of the unborn child and its mother. Sunni jurists assume that the Quran does not include any explicit provision prohibiting abortion, although it does prohibit the murder of a human being. Q. 6:151 states, “...Do not kill the soul which Allāh has forbidden [to be killed] except by [legal] right. This has He instructed you that you may use reason.”⁸ Also, Q.17:31 contains a similar injunction against the killing of children: “[D]o not kill your children for fear of want. We will provide for them and for you. Surely killing them is a great sin”.⁹

Sunni jurists do not regard procuring an illegal abortion (one forbidden by the Sharia) as murder. However, it is deemed a major sin for which the mother must pay *diyya* (blood money) to the father and heirs of the aborted fetus. The mother must also perform a *kaffāra* (granting freedom to a slave; or observing a two-month fast).¹⁰ Consider the following case, a woman who had suffered a miscarriage, was subsequently summoned before the caliph ‘Umar b. al-Khaṭṭāb (who was also implicated in the incident). The Prophet’s son-in-law, ‘Alī b. Abī Ṭālib advised the caliph that although the miscarriage was not intentional, the caliph was responsible for the events that resulted in the miscarriage, and he must compensate the woman. This incident became a precedent

¹ The Australian National Imams Council, “The Islam Position on Abortion” (2019) available at <https://www.anic.org.au/downloads/>. Accessed 08/10/22.

² Ibid.

³ Y. Mustafa, “Islam and the four Principles of Medical Ethics,” *Journal of Medical Ethics* 40:7 (2014): 479-483, at 481.

⁴ *Mcfall v. Shimp*, 10 Pa.D.&C. 3d 90 (1978).

⁵ A. Ingram, (2021), *McFall v. Shimp and the Case for Bodily Autonomy*, *Harvard Undergraduate Law Review*, - Available at: <https://hulr.org/spring-2021/mcfall-v-shimp-and-the-case-for-bodily-autonomy>.

⁶ Ibid.

⁷ M. Alkahtani, “The Rulings of Abortion in Islamic Jurisprudence and the Saudi Regime for the Practicing Health Professionals” *King Saud University Journal* 26:1 (2014): 165-216, at 177-178.

⁸ Q. 6:151.

⁹ Q. 17:31.

¹⁰ M. Al-Bahūfī, *Al-Rawḍ al-Murabba Sharḥ Zād al - Mustaqni`* (Cairo: *Almokhtar*, 2005), 650.

under Islamic law: women who suffer a miscarriage by reason of acts traceable to a specific individual are entitled to compensation from that individual.¹

The lack of express provisions on abortion in the Quran may create an ambiguity with undesirable ramifications as regards how the Sharia responds to this important issue. However, Muslim scholars differentiate between aborting a fetus before it has acquired a soul ('ensoulment'), and aborting it thereafter. According to Ibn Juzayy and al-Dardīr, there is unanimity that a post-ensoulment abortion qualifies as a murder. However, both scholars denounce abortion after ensoulment.²

4. When Does a Fetus Become a Human Being?

Among Muslim scholars and policymakers, there is no agreement on when a fetus becomes a human being.³ For Sunnis, life begins at the moment when the Archangel Gabriel breathes a soul into an embryo in the womb. Sunni schools therefore hold that life begins at ensoulment.⁴ The conviction that a fetus receives a soul from Gabriel that transforms it into a human being is responsible for the view that a fetus becomes an independent human being 120 days after conception. Thus, the majority of Muslim scholars hold that abortion should be considered illegal 120 days after conception.⁵

For example, Hanafī jurists argue that abortion should be permitted so long as there is justifiable reason for it. In fact, Hanafī jurists advocate for abortions without restrictions in cases in which the child might be deformed, or in cases in which the pregnancy resulted from extramarital sex or rape.⁶ The Shāfi'ī and Ḥanbalī schools which prevail in Saudi Arabia and the Gulf, typically argue that abortion must only be allowed during the first 40 days after conception.⁷ Mālikī scholars, by contrast, advocate a blanket ban on abortion.⁸ However, abortion is

¹ A. al-Bayhaqī, *Al-Sunan al-kubrā*, 2nd ed. 9 vols. (Beirut: Dār al-Kutub al-'Ilmīyah, 2003), 123.

² Ibid.

³ By contrast, the question is largely settled in the Western world, whose laws mostly inspire the international norms enunciated by international organizations. International Human Rights treaties that regulate the area of our discourse do not recognize a fetus as a human being. Most international norms assume that the life of a human being begins after birth. For example, Article 1 of the UN Universal Declaration of Human Rights states, *inter alia* "all human beings are born free and equal in dignity and rights." It is noteworthy that protocols preceding the Declaration reveal that the word "born" was used deliberately in order to exclude any prenatal application of the protected rights under the Charter. This conclusion is reinforced by the fact that there was an unsuccessful attempt to pressure the plenary to delete "born" from the final instrument. The proposal was rejected, and the final text states that the rights contained in the Declaration applied from birth only. It is no wonder, then, that the right to life for a fetus remains a controversial and unsettled question across borders, and even within borders. This should naturally invite the question, on what basis does a fetus become entitled to have their legal right to life protected by law? D. Moeckli et al. (eds) *International Human Rights Law* (Oxford: Oxford University Press, 2022), 108.

⁴ U. Ghanim, *Aḥkām al-janīn fī al-fiqh al-Islāmī* (Jeddah: Dār al-Andalus al-Khaḍrā, 2001), 138.

⁵ M. Ghaly, "The Beginning of Human Life: Islamic Bioethical Perspectives" *Zygon: Journal of Religion and Science* 47:1 (2012): 175-213, at 193.

⁶ M. Stodolsky & A. Padela, "Abortion in Hanafī Law", in A. Bagheri, *Abortion: Global Positions and Practices, Religious and Legal Perspectives* (Springer, 2021), 127-136.

⁷ T. Eich, "Abortion: Shāfi'ī Perspective", in A. Bagheri, *Abortion: Global Positions and Practices, Religious and Legal Perspectives* (Springer, 2021), 147-153.

⁸ M. Al-Bar, "Mālikī Perspectives on Abortion", in A. Bagheri, *Abortion: Global Positions and Practices, Religious and Legal Perspectives* (Springer, 2021), 137-145.

considered justifiable if the pregnant mother's life is in grave danger. In such a situation, abortion is the "lesser of two evils", or at all events, a less grievous sin than murder.¹

5. Islamic Views on Abortion

Many Sunni scholars support abortion under so long as it was performed no later than 120 days after conception. However, there is also a competing view, namely, that almost the fetus should not be aborted after ensoulment, generally speaking, such an abortion may be permitted in order to preserve the life of its mother, but not for any other reasons.² Let us now consider the positions of the four Sunni schools on abortion, i.e., the Ḥanafīs, the Mālikīs, the Shāfi'īs, and the Ḥanbalīs. Despite their minor differences, there is consensus that abortion may not be conducted 120 days after conception, i.e., after ensoulment, we may further distill the following Islamic positions:

- i) Abortion is prohibited during the first 40 days after conception:
- ii) Abortion may be permissible during the first 40 days after conception for justifiable reasons:
- iii) Abortion may be permitted within the first 40 days after conception.³

The four Sunni *madhabs* did not comment on abortion resulting from rape or incest.⁴ The relative frequency of the occurrence of such crime nowadays has led to a change of attitude and policy by many Islamic nations. However, the laws of most modern Muslim majority countries (including Saudi Arabia) have tended to be silent in relation to pregnancies resulting from rape: is abortion permissible as a matter of course? or permissible under some well-defined circumstances?⁵ Moreover, the picture is also not clear with regard to the termination of a

¹ M. Al-Bar, "Mālikī Perspectives on Abortion", in A. Bagheri, *Abortion: Global Positions and Practices, Religious and Legal Perspectives* (Springer, 2021), 137-145.

² See Council of *Fiqh*, 1420 AH; the Council of Senior Scholars, Decision No. 140 of 20/06/1407; see also, the Resolution of the 12th Session of the Islamic *Fiqh* Council of the Islamic League, held in Holy Mecca in Rajab 22nd 1420 H, in which the League resolved that abortion must be permitted after 120 days of pregnancy if the purpose was to evacuate a deformed fetus; but also be allowed to avert danger to the mother of the fetus, as long as this purpose has been certified through a medical report issued by a trusted medical committee of expert physicians in the relevant fields. This is also the view in the Report issued by the Kuwaiti Ministry of *Awqāf*, by its Scientific Committee on the issue, see *Fiqh Encyclopedia*, 1407 H.

³ *Ibid.*, (n.47), 182.

⁴ See H. Azam, *Sexual Violation in Islamic Law: Substance, Evidence, and Procedure* (Cambridge University Press, 2015), 61. According to Azam, the moralization of sexual matters occurred during the time of Mohammed through the Qur'an, making some "sex acts licit in the eyes of God", and others were seen as 'transgression', *ibid.* Thus, with sexuality regarded as "a usurpation of symbolic capital, and a violation and blow to the wealth and honor of the violated woman's clan", before the time of Mohammed, according to Azam, *ibid.*, rape would have been deeply frowned at, more than when it became a mere moral question or a breach of interpersonal duties, to be punished only by either Allāh or an individual.

⁵ See F. Dayan et al. "A Medico-Legal Perspective on the Termination of Pregnancies Resulting from Wartime Time- Rape" *Bangladesh Journal Medical Science* 19:3 (2020): 372-385, at 373. The authors noted that except for a few of the legal edicts', most classical and contemporary literature are silent on the termination of pregnancies resulting from rape, *ibid.*

pregnancy in which the fetus is deformed. It must be noted, however, that the availability of modern technology has made it relatively easier to detect a deformed/malformed fetus.

6. Is the Right to Access Abortion in Saudi Arabia an unduly Restricted Right?

As mentioned above, early Muslim scholars appeared not to have given due consideration to issues such as the implications of pregnancies resulting from rape and incest, and whether the pregnant female victims should be entitled to legal abortions if they so wished and under what circumstances. However, there are proximate areas from which the likely attitude to abortion by the Sharia could be extrapolated. For example, the Quran prohibits the killing of children, if the justification is poverty only. This prohibition will justify governmental intervention in an individual's privacy if the issue is connected with infanticide or the killing of children. It follows that if the picture is clear about the status of a fetus, and a fetus is adjudged to be a child, the government will be entitled to intervene (but not otherwise), and therefore a woman's right of choice is thereby either trammled or totally extinguished. The situation with rape is slightly different, because the act of rape is itself a violent act that portends danger, which more likely than not, visits its female victim with physical and psychological harm (trauma). A pregnancy that is sequel to rape places the victim in the position of a traumatized female-victim of a heinous crime, in need of rehabilitation and possibly, reparation, rather than condemnation and retribution.

In such situations, therefore, it is arguable that the victim should not have to go through any further unsavory consequences for a crime, which they neither initiated nor encouraged. Moreover, the consequences of depriving her a right of choice whether or not to keep the baby, has the potential of leaving her permanently scarred for life, if not physically, then certainly psychologically.¹ More importantly, if a woman is constrained to deliver a baby whose pregnancy resulted from rape or incest, the presence of the child would always trigger a traumatic flash-backs to the events that led to such pregnancies. Moreover, publication of this information could cause further sociological harm to the woman; a feeling of social exclusion, because it may discourage eligible male

¹ See U. Adslim et al. "Termination of Pregnancy for a Muslim Rape Victim and [their] Dilemma in a Malaysian Setting: A Case Report." This real-life case featured a 17-year-old pregnant gang-raped victim, who sought a TOP (Termination of Pregnancy). The victim was also diagnosed with a Post-Traumatic Stress Disorder with likelihood of degenerating into a major depression, the victim also suffered insomnia and event flashbacks, as a further consequence of the rape. The victim, her family and health care provider were all Muslims. Since the Malaysian legal regime lacked a clear policy or guidelines with regard to such situations, or even in the general area in question – rape induced pregnancy. The victim's mother was greatly distressed because they anticipated a long winding and emotionally-draining process. Although, the authors reserved their opinion regarding whether or not the distress visited on the victim and her mother outweighed the socio-religious advantages implicated in the Malaysian *fatwa* Committee's recommendation which permitted abortion only if the pregnancy was under 120 days old. The authors were disappointed that the Fatwa was 'silent' on what should happen in the presence of psychological indications, as was present in this case. There is a bit of a puzzle in this case. Given that the Report stated that the pregnancy was seven weeks old at the time. It is submitted that there should have been no controversy with the case. Since the Fatwa Committee recommended a 120 – day limit, which should have easily accommodated a 7 weeks old pregnancy. In that case, there was hardly any need to ask advise from its religious official or the local religious department, since the certification by the medical personnel and the delicate health disposition of both victim and mother should have sufficed to allow the abortion.

suitors from seeking her as their bride.¹ Although the rape and incest situations are quite different from fornication – the latter being a consensual sexual act.

On the other hand, it may be assumed that any sexual act between unmarried couples regardless of their nature, constitute immoral behavior under the Sharia. Such acts are viewed as out-rightly dishonorable (sinful) in Islam; a smear on the woman and her family's name. In the circumstances, a pregnancy resulting from incest will do greater harm and dishonor to the victim and her family name, more than that arising from rape, most probably owing to the absence of consent in the case of rape. Yet, it seems that the immorality implicated in either a rape or incest case is considered lighter than for cases of fornication, as far as Islam is concerned. Ironically, however, it would appear that a woman's right of choice is rather more settled in cases where fornication is implicated than in rape and incest cases.² Regarding this, Imam Mālik was said to have instructed the mother of a prospective bride not to mention the bride's past acts of fornication to her prospective husband.³

The above implies that the *raison d'être* of the protection of privacy as a right in Sharia is the protection of an individual's reputation. The implication from that reality is that a woman should be armed with a legal right that will help her protect her reputation in proper circumstances. In recognition of this fact, Sunni scholars have therefore adopted the 120-day limit as a reasonable time within which a pregnant woman should be able to exercise her right of choice – this being the period before ensoulment. For, after this time, a new life is presumed to have begun, a life upon which inheres all the plenitude of human and natural rights as has its pregnant mother.

From the foregoing discussions, it is clear that the act of fornication is a commonly known example of situations in which the abortion controversy has thrived the most. From the religious perspective, it is also clear that indiscriminate abortion is strictly prohibited in a Muslim majority country like Saudi Arabia, in order to discourage immoral and sinful vices, for example, fornication. Thus, it somewhat begs the question whether an abortion should be allowed in cases where fornication is implicated? This also implicates discussions relating to a related topic: 'honor killing', a known practice in the Arab world. Honor killing is a practice that encourages any male relatives in the family to murder a woman if she was found to have dishonored the family name by engaging in immoral sexual acts (especially fornication), that tarnished the family honor and name, and consequently brings the faith (Islam) into disrepute. The connection here is that an unmarried pregnant female, who had engaged in consensual (immoral) sexual activity, perceived as un-Islamic, should be thinking about how to avoid the sentence of death by virtue of honor killing; rather than theorizing her privacy right to access abortion. Such a woman lives under the constant threat and fear of being murdered by any Muslim relative within her family for indulging in the sinful act that got her pregnant.

A fortiori, the implication is that discussions about any of the situations that could enable her access abortion become moot, for the reason that honor killing as a sentence determines that she must die regardless of what happens to the fetus thereafter. Thus, discussions with regard to whether or not she qualifies to access abortion are useless and irrelevant. For example, whether or not the fetus in the womb is deformed, or the pregnant

¹ Ibid., (n.22), 92.

² The view that a woman could exercise her right of choice in favor of abortion in cases of fornication – within the 120-day period – is gaining wide acceptance among scholars. Proof of this is readily gleaned from the fact that some Mālikī scholars, known to maintain and hold the strictest and most rigid views on abortion concede to permitting the right of choice in such circumstances. It should, therefore, present less difficulties to extend such latitude to victims of rape, especially in times of war and other emergencies when the vulnerabilities of women are exploited the most. Thus, not a few *fatwas* across nation-states, have been issued in the past to redeem this anomaly. A notable case was that decreed to allow Bosnian women who were pregnant from being raped during the Bosnian -Herzegovina war. The fatwa permitted abortion as long as it was within the 120-day period.

³ A. Al- Qurtbī, *Al-Bayān wa-al-taḥṣīl wa-al-sharḥ wa-al-tawjīh wa-al-ta'īl fī masā'il al-Mustakhrajah*, 4 vols. (Dār al-Gharb al-Islāmī, 1984), 262.

woman was facing any dangers to her life as a result of the pregnancy are of no moment. Indeed, if her life is under threat, the prospective honor killer would be elated, rather than seek an avenue for her to live through a successful abortion.

However, it is instructive to note that a respected Imam had (against popular opinion), advocated that abortion should be permitted in pregnancies resulting from fornication. According to al-Ramlī, “If the *nutfā* (sperm-drop) is from fornication, (abortion) is possible. [But], [i]f it is left till the soul is blown, then prohibition is established.”¹This writer advocates that such flexibility if available, should be extended to cases of incest and rape, or in the case of a severely deformed/malformed fetus; these situations have the commonality that they all have the potential to in the long term, visit more hardship on the pregnant woman than fornication. Thus, it seems even more justifiable to grant a right of choice in such cases – in order to save the mother from further physiological or psychological harm – than merely to protect her reputation.²

Based on the above, we may conclude that under the Sharia, the right of choice; Or, on the other hand, the right to life of the unborn child; are all predicated on the question whether or not the period of 120 pregnancy days had elapsed from conception. It would appear that after this period, ensoulment is presumed to have occurred, thus rendering any subsequent abortion illegal. In other words, the lapse of 120-days post- conception is a crucial factor in the determination of whether a woman enjoyed (or had lost) her right to privacy, with regard to her right of choice under the Sharia.

Quite commendably, however, the 120-day-deadline does not apply in cases where abortion is required in order to save the life of the pregnant woman. In such cases, the Sharia views the mother’s right to life as corresponding in all respects to the life of the unborn fetus.³

7. Privacy and Abortion in the Kingdom of Saudi Arabia.

The Saudi Basic Law of Governance (Basic Law) does not contain provisions that allocate the right to privacy to its citizens, However, the right to privacy is apparently implied within its other generally acknowledged Sharia-driven provisions. The constitutional protection of privacy in Saudi Arabia is subsumed under the following important Sharia goals and principles:

- a. The State shall endeavor to strengthen family bonds, maintain its Arab and Islamic values; care for all its members, and provide conditions conducive to the development of their talents and abilities (Article 10);⁴
- b. Dwellings are inviolable. Access is prohibited without the owner’s prior permission. No search may be carried out in private premises except as specified under the Law. (Article 37);⁵
- c. The privacy of telegraphic and postal communications, and telephone and other means of communication is guaranteed. Any confiscation, delay, surveillance or eavesdropping, except in cases provided by Law, is prohibited. (Article 40);⁶

¹ M. Al-Ramlī, *Nihāyat al - Muhtāj ilā Sharḥ al- Minhāj* (Beirut: Dār al-Fikr, 1984), 442.

² *Ibid.*

³ A. Ali, “Controversies and Considerations Regarding the Termination of [a] Pregnancy for Fetal Anomalies in Islam” *BMC Med Ethics* 15:10 (2014), at 3.

⁴ Kingdom of Saudi Arabia, *The Basic Law of Governance*,1992.

⁵ *Ibid.*

⁶ *Ibid.*

d. An individual may not be punished for crimes committed by another person. No conviction or penalty shall be applied without reference to the Sharia or the provisions of the Law. Punishment shall not be imposed *ex post facto* (Article 40);¹

e. Mass media and all other vehicles of expression shall employ civil and polite language; contribute towards the education of the nation and strengthen unity. Acts that promote or incite disorder and discord; or which threaten the peace and security of the state, public order/morality; or which undermine human dignity and rights; are prohibited. The details of such offences and circumstances in which they arise must be specified under the Law. (Article 39).²

The absence of provisions explicitly allocating a right to privacy under the Basic Law does not imply that privacy in Saudi Arabia is only guaranteed under the specific scope of the aforementioned provisions. Instead, Saudi law also provides protection through subsidiary legislation – from which the right to privacy may be inferred – drawing inspiration from the aforementioned general principles enunciated in the above parent legislation. Unsurprisingly, Saudi law has no definition for privacy, since the sharia also does not. It (Saudi law), however, provides a general description of the concept, which makes reference to the protection of a wide range of personal interests and rights, that must be respected by society and individuals. For example, Article 41 of the Saudi Law of Criminal Procedure refers to some aspect of privacy rights. According to the provision, “The privacy of persons, their dwellings, offices, and vehicles shall be protected. The privacy of a person extends to his body, clothes, property, and other personal belongings.”

Similarly, as regards a woman’s bodily integrity and autonomy (i.e., choice), Saudi law also does not expressly acknowledge a woman’s right of choice in abortion situations. Nevertheless, this right may be inferred from the following provisions of the Basic Law. Article 23 (which implements the Sharia); Article 26 (which provides for human rights in accordance with the Sharia).³ The latter article especially, must be taken as subsidiary legislation in the sense of being inferior to Sharia principles that regulate human conduct in any Islamic society. Such legislation should be seen as a residual code to be relied on in the absence of express provisions or guide by the Sharia. Thus, the doctrine of un-enumerated rights must be assumed to apply in the Saudi legal system, because the Sharia having outlined its general objectives (*Sharia maqāṣid*), deliberately leaves enough room to apply the doctrine of un-enumerated rights in order to vindicate some essential but unexpressed rights.⁴ Moreover, the generally accepted principle of the inalienable right of human dignity for every person, could also be a legitimate basis upon which to seek the expansion of a woman’s right to privacy (including the right of choice) in many instances in the Saudi context.

¹ *Ibid.*

² *Ibid.*

³ *Ibid.*

⁴ Defining the objectives of the Sharia in the form of this classification has not met with general agreement amongst scholars, including classical scholars like Ibn Taymiyya, who adopted an even broader definition in which the classification includes anything that promote benefits and prevents harm, whether in mundane or religious matters. This left enough room for modern scholars to include as many rights and values as possible within the ambit the *maqāṣid* classification. See for instance, M. Al-Atawneh, "Wahhābī Legal Theory as Reflected in Modern Official Saudi Fatwās: Ijtihād, Taqlīd, Sources, and Methodology" *Islamic Law and Society* 18:3 (2011): 327-355, at 348-49.

8. The Islamic Underpinnings of Saudi Arabia's Abortion Policy.

Although, the Quran contains no specific or express reference to abortion in whatever context, scholars have extrapolated from the Sunna to arrive at what the approximate Islamic position on the subject should be. The four Sunni *madhabs* differ as to whether abortion was permissible after 40 days (but no later than 120 days);¹ and whether it is permissible in any circumstances after 120 days.

Thus, within the Sunni school itself, there is a lack of consensus with regard to the time limits for permissible abortions to occur. And also the justifiable reasons for such abortions. However, there is virtual unanimous agreement that abortion is prohibited after 120 days, i.e., after ensoulment, when it is assumed another life has begun. On the other hand, the justifiable reasons that make the act permissible before the lapse of the 120-day period has not met with similar agreement. Yet, one of the circumstances that have garnered popular support among Muslim scholars includes that; the fetus is deformed, being afflicted with a severe, untreatable condition, as certified by “an approved medical committee”²

Under the Saudi legal system, which is based on the Hanbali Islamic traditions, women have the right to choose abortion before ensoulment occurs (that is, before the lapse of 120 days), in cases where the pregnant mother's life is at risk; or if the fetus suffers from severe abnormalities³. In 1990, the country's Mecca Islamic jurisprudence Council passed a Fatwa allowing abortion in cases of severe and untreatable conditions, if diagnosed via ultrasound technology, under the supervision of a panel of experienced physicians, and consented to by the parents, so long as the fetus is less than 120 days old.⁴ Nevertheless, Saudi jurists and medical experts continue to debate the situations in which abortion should be allowed based on their exegesis of Quranic texts. One result of these lively debates has been the extension of medical justifications for pre-ensoulment legal abortion to accommodate a situation where the fetus dies in the womb.

9. The Future of Legal Abortion in Saudi Arabia, and Prospects for Expansion or Extension.

The position of Saudi Arabia on abortion inevitably mirrors her disposition to core Islamic values, as an avowed Arab Islamic State. A compelling example of this inextricable mix between State and religion is found in the Saudi Law of Practicing Healthcare Professions, a subsidiary Law made pursuant to Ministerial Resolution-4040489 – 02/01/1439H; which was itself inspired by the Fatwa proclaimed of the Counsel of Senior Islamic scholars.⁵

The influence of core Islamic values and mores on Saudi Law was accorded prominence in the opening provisions of the Basic Law, from the declaration in Article 1 of the Basic Law; which stated that the Kingdom of Saudi Arabia is a sovereign Arab Islamic State; with Islam as its religion, and the Quran, its Constitution.⁶

¹ N. Shameen, “The Future of Abortion Rights in Islam”, (Muslim Institute), available at <https://musliminstitute.org/freethinking/islam/future-abortion-rights-islam> Accessed 06/05/2022.

² There is the added stricture that both parents' approval is also required, See The Islamic World League, 12th Session, 1990 (Mecca).

³ M. Al-Khatib, “Abortion in the Hanbali School of Jurisprudence: A Systematic Ethical Approach”, in A. Bagheri, *Abortion: Global Positions and Practices, Religious and Legal Perspectives* (Springer, 2021), 163-164.

⁴ Ibid.

⁵ The Decision of Senior Scholar No. 140, Riyadh, Dated 20/06/1407H.

⁶ See Art. 1 Basic Law of Governance, (Kingdom of Saudi Arabia, Royal Decree, 1 March, 1992), available at saudiembassy.net/basic-law-governance Accessed 28/06/2022.

Following this tradition, The Law of Practicing Healthcare Professions reflected the Decision of the Council of Senior Scholars' Fatwa, (which the Ministerial Regulation for Health Professions adverted to in Article 22-1), determined *inter alia*; the following:

- i. Abortion is forbidden on a general note except for "legitimate justification" and within very narrow limits;
- ii. A pregnancy of forty days or less may be aborted given the presence of the 'legitimate justification' adverted to above;
- iii. Abortion during the embryonic stage is forbidden until a medical committee adjudges that continuation of the pregnancy poses a serious health risk to its mother;
- iv. Abortion after four months of gestation is forbidden unless a committee of specialists and consultants in the relevant area presenting the health challenge, are of the opinion that sustaining the fetus in the uterus would endanger the mother's life, there being no workable alternatives to saving her life.

It is apparent from the situations outlined above, that abortion is prohibited except for the narrowly-defined "serious health risk" situation adverted to above, the emphasis revolving around the possibility of the mother's health being in jeopardy. The article clearly implies that this exception is what it described as 'legitimate justification.' It follows, therefore, that to seek abortion in the Kingdom for reasons of insuperable financial burdens and other related inabilities is not permissible, and may attract stiff religious/legal sanctions. Perhaps, an interesting question that might invite further research is whether it would be permissible to seek abortion to avoid "honor killing", for instance.

However, it may be reiterated that the Law of Practicing Healthcare Professions mentioned above permits abortion even after ensoulment (after 120 days), subject to a certification that its mother's life is at risk, there being no where the contrary was stated. Thus, if the mother's life is at serious risk, should the pregnancy continue to full term, abortion is permissible, regardless. Moreover, it may be observed that some phrases in the Advisory Opinion (Fatwa), are ambiguous and, hence, so is the Law of Practicing HealthCare Professions that evolved from it.¹ Merely stating that abortion was permissible on a (religiously) legitimate reason, and within "narrowly defined limits", without identifying the specific religious reasons is bound to present problems of delimitation. What is included and what is left out, and what is border-line are uncertain; thus, all become issues that are arguable. Furthermore, aborting a pregnancy in the first phase of gestation (within the first 40 days), could only be based on a religiously justifiable legitimate reason, for example, to avoid some grievous potential harm to the fetus or its mother. Thus, not properly identifying the particular legitimate religious reason(s) or the potential grave consequence(s) (i.e., harm to mother or fetus), renders the Regulation, and the Fatwa before it susceptible to multiple, and possibly unintended private interpretations². Such particularity as just mentioned will also effectively demarcate the religiously sanctioned justifications from those that do not meet the mark; for example, that the abortion is done to avoid poverty or suffering due to inability to provide for a large family.

Based on the foregoing, therefore, we must conclude that abortion in Saudi Arabia, viewed through her Islamic lens, is a highly restricted activity, permitted only within "very narrow limits".³ Similarly, one may wonder whether cases of rape and incest (evidently absent from the Ministerial Regulation's provisions), would fall within cases that religion could provide justification for a legal abortion for. On the whole, we must conclude that although the ministerial Regulations officially recognizes that Saudi Arabia is an Arab Muslim country (as does the Basic Law), and could not permit in any circumstances unrestricted abortions; the permissible exceptions that are gradually crystallizing across other Muslim states would eventually also impact the policy of Saudi Arabia on the subject. This possibility must have led to the use of such exception-creating but deliberately encompassing phrases as "legitimate justification", within "very narrow limits"; or, that when "sustaining the fetus in the uterus would endanger the mother's life".⁴ However, as of the present, it is clear that in Saudi Arabia, a woman may exercise the right to abort where the fetus represents a "serious health risk" to its mother. There is also unanimity permitting abortion in Saudi Arabia in cases of severe congenital malformation of the fetus.

¹ *Ibid.*, (n.43), 184.

² *Ibid.*

³ Art. 22-I Law of Practicing Healthcare Professions, pursuant to Ministerial Regulation 4040489 of 02/01/1439H.

⁴ *Ibid.*

Surprisingly, this concession was not mentioned with regard to pregnant women who are victims of rape, or in incest cases, which is a conspicuous oversight as already observed.¹ Omitting to describe the situations intended for access to abortion to be a possibility means the Law flouts two of the major goals of legislative drafting: lucidity and accuracy.

On the other hand, such exigencies (i.e., rape victims and incest cases)), have been motivating factors in encouraging governments in other Muslim majority countries elsewhere to rethink their policies regarding privacy rights, in particular, the circumstances in which the law could expand the scope of women's privacy rights in relation to their bodily autonomy. This appears to be the general direction of law and policy in these countries, as they gradually but deliberately whittle down and soften previously rigid and strict Islamic codes that rendered abortion illegal and prohibited, whatever the circumstances. For example, exceptions such as those relating to critical and life-threatening situations were introduced to soften the stiff and rigid positions that the Sharia was used to establish and propagate. Such that a woman could exercise the right of choice in exceptional cases such as rape or incest (more for rape than incest, it may be added), as long as ensoulment has not occurred, while allowing such women a reasonable time to decide. For example, the Sudanese (Post Abortion Care – PAC) Law, afford a woman the right to abortion in cases of rape, and when the pregnancy represents a grave health risk to the pregnant mother; it also allows the woman a reasonable time within which to make that decision.² In cases of rape, however, the woman must inform the police immediately, at any rate, within 90 days of the event. The Police would then furnish the victim with Form No. 8, which will help the woman access legal abortion should the act result in a pregnancy. Under the said Law, other types of Post abortion care are also available to women in Sudan.³

Thus, it may be concluded that under the Sharia, there is ample room and opportunity for the expansion of a woman's right to abortion that could easily be exploited by Saudi law. This would warrant that abortion be readily available as of choice, in cases of rape, incest, or in the case of a severely deformed fetus, and possibly, be extended to other cases, as long as the gestation period has not exceeded 120 days; which is a reasonable period within which a woman could conveniently exercise her right of choice. Presumably after this period, the fetal life assumes more importance than the woman's right to privacy and choice; then she would have lost her claim to privacy and bodily autonomy.⁴

In this regard, the Council of Senior Scholars stated that, "If pregnancy is in the first phase, and there is a religious reason/justification to abort, including to avoid a potential grave harm to the woman or her fetus, abortion is possible. However, as mentioned earlier, such religious reasons or justification does not include, fear on the part of the pregnant woman and her male partner that the baby would occasion suffering on the family due to the increased size of the family; or inability to provide welfare (including feeding and education, etc.); in such cases abortion becomes illegal. This view may be interpreted as encapsulating also a woman's right to choose abortion in cases of severe deformities.⁵ With regard to cases relating to the mental or physical health of the pregnant mother in Saudi Arabia, the same view stated as follows; "[a] pregnancy arising from incest or rape might qualify for abortion under the mental health exemption."⁶ According to this commentator, in Saudi Arabia, abortion is allowed in cases of potential risk to a woman's life and to protect her physical and mental health.⁷ Thus, a pregnancy arising from incest or rape might qualify for a legal abortion in Saudi Arabia, based on the mental health exemption.

¹ *Ibid.*

² L. Hessini, "Abortion and Islam: policies and practice in the Middle East and North Africa" *Reprod Health Matters* 15:29 (2007): 75-84, at 80.

³ *Ibid.*

⁴ *Ibid.*, 81.

⁵ *Ibid.*

⁶ See E. Livni, "Saudi Arabia's Abortion Laws are more forgiving than Alabama's", available at <https://qz.com/1628427/saudi-arabias-abortion-laws-are-more-forgiving-than-alabamas/>. Accessed 26/06/22.

⁷ *Ibid.*

10. Conclusion

In this article, I reviewed the Islamic thought and jurisprudence with regard to abortion as an incidental privacy right. The main focus was Saudi Arabia, as an example of a modern Muslim majority country. The findings were as follows: Islamic law does not contain an explicit or express provisions about abortion (neither does Saudi Law); it also does not provide any definition of what constitutes 'private life'. The result is that the philosophy on the subject multiplied according to how the Hadith, traditions, different jurists and classical scholars saw privacy as a right in their exegesis of Islamic thought on private life. Thus, major Islamic schools of thought hold divergent (though, not necessarily opposing) views on the subject of abortion. For example, all Sunni madhabs are convinced that a wide variety of rights fall within the scope of the private life of an individual under general Islamic injunctions protecting private life and bodily autonomy.

These injunctions include, implicitly, a woman's right to abortion. Some Sunni scholars and jurists long held liberal views in relation to birth control and contraception, and assumed – even before Western thought changed in this direction – that a deprivation of these rights, denies an individual the right of choice as regards whether or not to have a baby or start a family. The doctrine of *maqāṣid al-Sharia*,¹ encourages the distilling of further unexpressed and un-enumerated rights from the general rights to private life, autonomy and dignity sanctioned by the Sharia; and hopefully, therefrom, we can tease out a woman's right of choice with regard to abortion. It was also found that lately, there has been a steady convergence and gradual build-up of unanimity amongst scholars, with regard to some underlying principles. First, is that although the Sharia did not explicitly provide for abortion, one way or the other, it placed the highest premium on the sanctity and sacredness of human life and dignity. Unsurprisingly, therefore, the disagreement amongst scholars revolved around the status of a fetus in the uterus, i.e., when is a fetus presumed to have become a human being? Pre, or post ensoulment, and what natural rights attach as a result? Unsurprisingly also, scholars generally agree that a fetus is not a human being. Thus, life (excluding the pre- ensoulment life, i.e., fetus), may not be terminated without legally justifiable reasons. There is also unanimity that abortion is not generally permissible after four months (or 120 days), of pregnancy, unless carrying the fetus to full term and delivery poses a life-threatening risk to its mother.

The Saudi legal system is based on the Sharia, with a strong bias for the Ḥanbalī legal traditions (which justify abortion if the pregnancy poses a serious risk to the pregnant mother). The relevant Saudi legislation does not define privacy. Instead, and while not departing from its Ḥanbalī roots, it describes incidents of privacy, which encompass a wide range of personal rights and interests. As for abortion, the Ministerial Regulation (which was not a well-planned and elegantly crafted policy-oriented legislative enactment), on the practice of the health care profession, is the law that regulates the procurement of legal abortions. Under the Regulation (itself based on the Opinion of Senior Scholars), abortion is permitted within forty days of pregnancy after the embryonic stage; however, abortion is prohibited after four months or 120 days, unless a committee (of three) medical professionals determine that continuation of the pregnancy would endanger the life of the mother. In cases of rape or incest, Saudi law is surprisingly silent with regard to a woman's right of choice. Nevertheless, Saudi law permits abortion in cases of potential serious risks to a pregnant woman's life, and seeks to protect her from any negative physical and mental health issues resulting from the pregnancy, which, it appears may extend to the exercise of her right of choice. This latitude of choice granted to a woman suggests that a pregnant Saudi woman possesses the right of choice, for a pregnancy arising from incest or rape under the general health exemption, as the 120 – day window appears to be an essential factor for women to have access to abortion.

To conclude, I recommend the enactment in Saudi Arabia, of a targeted legislation that will define a woman's rights over her body; and which must clearly state whether such rights overreach the right to life of her fetus. The law must clearly and succinctly provide for the circumstances in which abortion is permissible; including the patterns of health risks that justify it; the age and family background of the pregnant female; whether, and to what extent a pregnancy resulting from non-consensual sexual intercourse, may be terminated; and whether this choice is exercisable co-jointly by the pregnant female and her parent, if a minor (or, with her husband, if an adult). The law must also be explicit about whether it would be permissible to seek abortion for fear of being murdered in pursuance of the practice of 'honor killing'? With regard to penalties in cases of rape, the proposed legislation, while being sensitive to core Islamic values and traditions; must also show sensitivity and awareness of the young female's vulnerable position as a victim who was forced into sexual activity without her consent,

¹ G Bowering et al. (ed), *The Princeton Encyclopedia of Islamic Political Thought*, 1st edn, (Princeton: Princeton University Press, 2013), 435.

which act resulted in a pregnancy. Thus, any prescribed penalties against such a female victim should be nominal, if not nil.