The Journey is Individual; You Are the Shepherd, and You Are the Flock. Towards An Autonomy-Based Model to Underpin the Legal Rules of Informed Consent in Medical Treatment in Saudi Jurisdiction: A Normative Analysis from *Shari'a* Perspective.

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DECLARATION

I declare that this thesis has not been submitted as an exercise for a degree at this or any other university and it is entirely my own work. I confirm that the work has been completed in full compliance with relevant university policies, including the Academic Integrity policy, the Trinity Policy on Good Research Practice, and the guidance on AI and GenAI in Teaching, Learning, Assessment and Research.

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Summary

This thesis contributes to Islamic legal scholarship and presents a normative moral argument grounded in a purely Islamic theological perspective about the relevance of respecting patient autonomy in medical decision-making. It establishes an Islamic model for the principle of informed consent in medical treatment, when patient autonomy is the moral basis underpinning such consent. Thus, this thesis emphasises the importance of reconsidering Saudi Arabia's approach to transitioning from a trust and physician-focused model to a model premised on patient autonomy when it comes to medical consent.

While this thesis considers the Saudi law regarding medical consent, the Saudi legal system is fundamentally influenced by *Shari'a*. Therefore, from a *Shari'a* perspective, the thesis analyses the moral approach of trust that underpins the current Saudi legal rules of medical consent. The thesis identifies that trust in physicians in medical decision-making has shifted into paternalistic practices that undermine the principle of trust in *Sharia* teachings. Moreover, *Shari'a* emphasises the importance of health and places the responsibility of maintaining and promoting good health initially and ultimately on the individual. Accordingly, the thesis analyses the principle of autonomy to underpin the rules of medical consent when the patient's health is concerned, and whether a shift to a patient autonomy-centred model would be compatible with *Shari'a* principles and teachings.

This thesis is divided into four main sections, comprising nine chapters. The first section, which covers *the current law on medical consent in Saudi Arabia* (Chapters 1, 2, and 3), addresses three important background themes. While the analysis of this thesis is entirely grounded on *Shari'a* principles, Chapter One commences with an introduction to *Shari'a* and outlines the essential topics for readers to understand *Shari'a* discussions in the following chapters. In addition, since the legal framework examined in this thesis is the Saudi law, Chapter Two provides a brief overview of Saudi Arabia's legal system. It emphasises that *Shari'a* constitutes the law of the land and governs all affairs of the country, including the legal system of Saudi Arabia. Then, Chapter Three addresses the primary focus of Section One and provides an in-depth review of current national statutes regulating medical consent, the Health Professions Practice Law of 2005 (PHP 2005) and its Executive Regulations of 2017. This chapter also addresses the recently published 2019 Saudi Informed Consent Guidelines and discusses the confusion within this document.

The Second Section (Chapters 4 and 5) addresses *the existing principles grounding the current approach to medical consent in Saudi Arabia*. Chapter Four emphasises that health holds a significant value in *Shari'a*. In this sense, Islamic discussions regarding the high value of health explain the logic of the Saudi legal framework's focus on patient health. Accordingly, Chapter Five analyses the 'trust' approach adopted by the current Saudi law (PHP 2005) to establish the legal rules for medical consent when patient health is concerned. The chapter examines the concept of trust in fellow humans as expressed in the *Qur'anic* narrative and the normative assertions posited by Muslim philosophers, primarily

regarding the moral character of the trustworthy. This is followed by emphasising the patient-physician relationship grounded in trust, as described by the Muslim physician Ibn-Sina in his medical ethics theory. This chapter concludes by stating that the Saudi legal system adopts trust and a physician-focused model to obtain medical consent, resulting in physicians demonstrating paternalistic behaviours in Saudi hospitals. These paternalistic behaviours are fundamentally at conflict with the view of *Shari'a* about the ethics associated with a trustworthy individual in whom others place their trust. Section Two concludes by arguing that genuine medical consent, when its moral importance is recognised in making the best health decisions, can be attained by respecting and maximising the patient's autonomy as God's vicegerent on earth to fulfil their divine duties when the moral decision concerns their health.

Thus, the Third Section, *towards an* autonomy *model* (Chapters 6, 7 and 8), presents the contribution of this thesis on the importance of autonomy in health-related medical decisions. It argues that spiritual and moral outcomes in health can be achieved by respecting and maximising patients' autonomy. Chapter six deals with the Islamic theoretical basis of the concept of autonomy by delving deeply into Islamic theological discussions related to the concepts of dignity and vicegerency, which led to the emergence of the doctrine of *taklif.* In the medical context, *taklif* assigns the patient the role of the moral agent to bear divine burdens related to medical treatment and thus make autonomous and moral medical decisions regarding their health. Therefore, maximising and respecting patient autonomy in medical decision-making is crucial, as it ultimately impacts the patient's moral responsibility. Accordingly, Chapter Seven argues that understanding the Islamic version of patient autonomy in the medical context requires appreciating how morality and behaviour are shaped in *Shari'a*. This chapter, therefore, establishes the moral framework for the autonomy of a *mukallaf* patient seeking medical treatment by investigating the moral value of medical treatment within the divine discourse of *taklif.* Chapter Seven concludes that the moral significance of medical treatment encompasses all five *taklif* rulings: *obligatory, prohibited, recommended, discouraged,* and *permissible*. Hence, the important question is how a *mukallaf* patient can make an autonomous and moral decision about a proposed medical treatment. Chapter Eight identifies the key elements of the principle of informed consent that enable patients to make informed and moral decisions about medical treatment. It establishes an Islamic model for valid, informed consent, adapted from the theoretical framework of the conditions of the theory of *taklif,* which initially generates the principle of autonomy.

Finally, after demonstrating the thesis's argument in the previous Sections (1, 2, and 3), the last Section (Chapter 9) concludes the thesis by presenting *a practical application for moving from a trust to an autonomy model in Saudi Arabia.* Accordingly, the concluding chapter establishes an illustration of a practical legal framework by outlining changes to Saudi law that arise from a shift from a physician-focused to a patient-focused model.

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"Verily, with the hardship, there is relief".[1]

All praise is due to *Allah*, from beginning to end, for His grace, mercy, generosity, guidance, making this path smooth, and making this research possible. Indeed, I have completed this thesis "in the bounty of *Allah* and his mercy- in that let them rejoice."

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[1] *Sura Al-Sharah*:6
[2] *Jami' at-Tirmidhi* (*Hadith* 1954)

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Allah Almighty says: "Do good; *Allah* loves the doers of good."[3], and the Prophet says: "People are *Allah's* witnesses on earth"[4]. I testify that everyone mentioned above is a person of generous benevolence and kindness. *Allah* says: "Is the reward of goodness anything except goodness?"[5]So**,**

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Al-Hamad li-Allah .. Al-Hamad li-Allah

[3] *Sura Al-Baqra*.195
[4] *Riyad as-Salihin* (*Hadith* 950)
[5] *Sura Al-Rahaman*.60
[6] *Sura.AlQasas*.60
[7] *Sura Al-Nisa*.79
[8] *Sura Yuns*:1

Glossary

This thesis includes some terms of Islamic jurisprudence. The English term is used when an English equivalent exists for the Arabic term. However, if the English term does not capture the precise meaning, the Arabic term is kept to maintain the intended meaning. In both contexts, the thesis presents the Arabic term accompanied by its meaning in English.

Adhin	Consent
Ahkams	Rulings
Ahliyyah	Legal capacity
Allah	God
Amana	Trust
Ameen	Trustworthy
Aql	Sanity
Atah	A condition where the mind of a person is diminished
Dharuriyyaat	Necessities
Ed'raak	Grasping
Fatwa	A ruling on a matter of Islamic law given by a qualified Muslim jurist in response to a question posed by an individual, a private and public sector, the court or government
Fiqh	Teachings of Islamic jurisprudence derived from discussion of Muslim jurists
Galabat Al-z*ann*	More likely
Gyer Mulji	Non-compelling coercion
Hajiyat	Needs
Hanbli	A school of thought within Islamic jurisprudence
Hadith	A Prophet's statement
Halal	Pure/ clean
Hanafi	A school of thought within Islamic jurisprudence
Haram	Prohibited
Iffa	Modesty -Decency
Ifta	The act of issuing a *fatwa*
Ijma	A Source of Islamic jurisprudence denoting consensus
Ijtihad	The process to deduce a ruling in Islamic jurisprudence
Imam	An Islamic leadership position
Istihala	Substance transformation
Istishab	Presumption of continuity
Jnnun	Insanity
Karamah	Dignity
Khalifah	Vicegerent
M*ajnun*	Insane person

Makarim Al-Akhlaq	Noble Morals
Makruh	Discouraged
Maqasid Al-Shari'a	The higher objectives of *Shari'a*
Maslaha	Benefit
Maslaha al-amah	Public interest
Malki	A school of thought within Islamic jurisprudence
ma'tūh	A person of diminished mental capacity
Mubah	Permissible
Mufti	A qualified Muslim jurist who issues a *fatwa*
Mukallaf	The moral actor who bears the divine burden
Mulji	Compelling coercion
Mustahb	Discouraged
Najs	Dirty
Qiyas	A Source of Islamic jurisprudence denoting analogical reasoning
Rijs	Dirty/Filth/Impure
Shak	*Doubtful*
Rushd	Sound judgement
Sawwab	Rightness
Shafi	A school of thought within Islamic jurisprudence
Shif'a	Healing
Tahsinyat	Complementary
Tamyiz	Discernment
Tawakkul	Trust in God
Taklif	Divine Burden
Ulama	*Shari'a* scholars
Ummah	Islamic nation
Usual Al-fiqh	Roots of jurisprudence
Wafah	Death
Wajib	Obligatory
Yaqin	Certainty
Zann	Probability

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Introduction

From an Islamic perspective, good health is a great blessing that enables an individual to live a purposeful life and fulfil religious and worldly obligations as a vicegerent of God on earth. Thus, *Shari'a* prioritises protecting and promoting good health at three levels: a commitment to oneself, fellow members of society, and the community's ruler.

In a medical context, it has been argued that the best health outcomes are achieved by placing trust in physicians and granting them the authority to make the best medical treatment decisions for patients.[1] In many cultures, medical practitioners have been the principal decision-makers in hospitals.[2] Trust in physicians as medical decision-makers is often linked with their substantial knowledge, training, and experience in disease pathology, management, and diagnosis.[3] Consequently, medical paternalism has become the accepted dominant approach in healthcare.[4]

In the Islamic world, Sachedina states that "…medical practices persist in being fundamentally authoritarian and paternalistic".[5] Indeed, while Saudi Arabia is the central focus of this thesis, medical decisions are made based on trust in physicians. The Saudi scholarship concerning the medical consent in practice has demonstrated the physicians are the primary medical decision-makers. However, trust in physicians has shifted to paternalism, and thus, paternalism dominates Saudi hospitals.[6]

The term paternalism derives from the Latin term pater, meaning "father," and the patriarchal societies where the father serves as the familial authority, accountable for the well-being of family members and other "subordinates and dependents."[7] The concept of paternalism emerged in the late 19th century as a critique based on the fundamental value of personal autonomy.[8] It is linked to attitudes of excessive safeguarding, typically perceived as an infringement of an individual's free will for protective intentions—paternalism in health care conflicts between patients' demands and excessive social safeguarding and care.[9]

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[1] See generally, Ezkiel Emanuel and Linda Emanuel, 'Four Models of the Physician-Patient Relationship' (1992) 267(16) *JAMA* 2221; 2221; Edmund Pellegrino and David Thomasma, *For the Patient's Good: The Restoration of Beneficence in Health Care* (Oxford University Press 1988)7-8; Troyen Bennan, 'Informed Consent' in Just Doctoring: *Medical Ethics in the Liberal State* (University of California Press 1991) 97.

[2] Mehrunisha Suleman and Arzoo Ahmed, 'Islam, Healthcare Ethics and Human Rights' (The Islamic Tradition, Human Rights Discourse and Muslim Communities Conference, Oxford Centre for Islamic Studies, and Atlantic Council, 2018) 1

[3] Ibid, See also Bennan (n 1) 97.

[4] Tobias Zürcher, Bernice Elger and Manuel Trachsel, 'The Notion of Free Will and its Ethical Relevance for Decision-Making Capacity' (2019) 20(31) BMC Med Ethics, 1.

[5] Abdul-Aziz Sachedina, *Islamic Biomedical Ethics: Principles and Application* (Oxford University Press 2009) 13

[6] This argument will be presented and discussed later in Chapter 4.

[7] Rocío Fernández-Ballesteros, Macarena Sánchez-Izquierdo, Ricardo Olmos, Carmen Huici, José Manuel Ribera Casado and Alfonso Cruz Jentoft, 'Paternalism vs. Autonomy: Are They Alternative Types of Formal Care?' (2019)10 (1460) Front Psychol 1, 1.

[8] Ibid 1.

[9]Thompson Lindsay, 'Paternalism', Encyclopedia Britannica of Social Science (2013) available at https://www.britannica.com/topic/paternalism accessed 25 September 2024.

As a philosophical theory, paternalism is defined as imposing opinions or attitudes on individuals that are contrary to their autonomy.[10] Holland defines paternalism as practices and actions wherein individuals in positions of power disregard the wishes of others, limit their free will, or otherwise seek to influence their behaviour, supposedly for the people's benefit.[11] In line with Holland, Szerletics describes paternalism as driven by benevolence, involving making choices that benefit individuals for their own good.[12]

Paternalism appears the medical practice in a situation in which the physician makes decisions for a patient without the patient's informed consent, based on the belief that such decisions serve the patient's best interest.[13] In this relationship, power resides with the physician, not the patient, much like the authority in a family is held by the parents, not their children. According to Adlan, the paternalistic paradigm permits the physician to determine the information given to the patient regarding the diagnosis.[14] In situations of fatal disease, Al-Fahmi states that patients are occasionally not informed of the true nature of their illness. In certain situations, patients die without being aware of their disease.[15] If the patient is told of the diagnosis, the doctor may suggest the proposed treatment plan as the sole option rather than outlining the alternatives that could be considered.[16] Additionally, if the patient is informed of the options, the physician may discuss the recommended treatment plan as distinctly beneficial, influencing the patient's choice.[17]

In a real scenario, the physician Al-Fahmi states that "during a night shift in a Saudi hospital, the author cared for an elderly female patient who was unaware that she was imminently dying from end-stage colorectal cancer".[18] The doctors hid the facts regarding her illness from the patient (the family was told about the nature of the disease), informing her instead that she had "a treatable colon infection" that could be treated within a few days.[19] The patient's condition worsened due to significant bleeding, and she died despite all resuscitative attempts.[20] The medical team was not ethically criticised for withholding the nature of the disease from the patient. Indeed, physicians are not legally to blame in such instances. The physicians continued in their lives and medical practice, while the patient died, and no one considered that they prevented her from addressing her religious

[10] See generally, David Archard, 'Paternalism Defined' (1990) 50(1) Analysis 36, 6; See also the introduction of Sarah Conly, *Against Autonomy: Justifying Coercive Paternalism* (Cambridge University Press 2012) 3; Bennan (n 1) 98.
[11] Stephen Holland, *Public Health Ethics* (Polity Press 2007) 38.
[12] Antal Szerletics, *Paternalism: Moral Theory and Legal Practice* (Peter Lang Verlag 2015) 24-38.
[13] See generally, E Emanuel and L Emanuel (n 1) 2221; Pellegrino and Thomasma (n 1) 7-8.
[14] See generally, Abdallah Adlan, 'Informed Consent in Saudi Arabia' in R Beran (eds), *Legal and Forensic Medicine* (Springer 2013) 893-907.
[15] See generally, Manal Al-Fahmi, 'Justification for Requiring Disclosure of Diagnoses and Prognoses to Dying Patients in Saudi Medical Settings: A *Maqasid Al-Shariah*-based Islamic Bioethics Approach' (2022) 23(72) BMC Medical Ethics 1.
[16] Adlan (n 14) 893-907.
[17] Ibid.
[18] Al-Fahmi (n 15) 1.
[19] Ibid.
[20] Ibid.

and spiritual matters[21] as she prepared for death or even from saying goodbye to her loved ones.[22]

Based on the definition of paternalism and its applications in practice, it can be argued that paternalism is a philosophical doctrine that restricts individuals' behaviours to enhance their health and interests. This is because, in medical practice, a physician is entitled to hide critical information from a patient and make medical decisions on their behalf. Most importantly, such practice is ethically justifiable to do so. Additionally, paternalism implies that the physician possesses superior knowledge concerning the patient's best interests, suggesting that persons may not be capable of making wise and rational health decisions. In this sense, paternalism assumes the existence of more rational individuals, primarily physicians in healthcare, thereby granting them the authority to dictate to others. Ultimately, paternalism is a philosophy that undermines the person autonomy and free will to make medical decisions grounded in spiritual aspirations and moral values.

During the late 1950s, medicine became increasingly self-aware and critical of paternalistic domination in healthcare, leading to autonomy emerging as a central moral principle.[23] Autonomy, derived from Greek origins, signifies "self-rule or self-governance (auto=self, nomos = judgement or rule)", referring to the capacity to determine one's fate, exercise personal judgement over one's conduct, and develop and implement a plan for one's life.[24]

In Western ethics, the principle of autonomy has been developed based on the philosophical contributions of Immanuel Kant and John Mill.[25] Kant wrote about autonomy, notably the notion of "autonomy of will".[26] In the philosophy of Kant, autonomy manifests as "meaning the self-ruling of practical rationality" [27] and "deliberated self-rule is a special attribute of all moral agents".[28] Kant's perspective on respecting a person's autonomy is primarily utilised as a foundation for modern bioethics discussions.[29] That is because maintaining an individual's autonomy reflects respect for rational self-governance.

In Mill's philosophy, the notion of autonomy is expressed through the terms "liberty" and "the right of a person to be self-governing".[30] Mill presents the notion of a person's liberty within a social framework and argues that a person should be permitted to choose their own way of life ,provided they do not harm others.[31] According to Mill, "the only part of any

[21] For instance, *Shari'a* stresses the significance of writing a will before person's death.
[22] Al-Fahmi (n 15) 1.
[23] Bennan (n 1) 122; Zürcher and Others (n 4) 1.
[24] Fernández-Ballesteros and Others (n 7) 2.
[25] Mary Donnelly, *Healthcare-decision making and the law: Autonomy, Capacity and the Limits of Liberalism* (Cambridge University Press2010) 16.
[26] Mark Komrad, 'A Defence of Medical Paternalism: Maximising Patients' Autonomy' (1983) 9 Journal of Medical Ethics 9 (1) 38, 38.
[27] Michael Quante, 'In Defense of Personal Autonomy' (2011) 37(10) Journal of Medical Ethics 597, 597.
[28] Raanan Gillon, 'Medical Ethics: Four Principles Plus Attention to Scope' (1994) 309 British Medical Journal, 184, 184-185.
[29] Komrad (n 26) 38.
[30] Sheila MacLean, *Autonomy, Consent and the Law*, (Routledge, 2009) 15-16.
[31] John S Mill, *On Liberty* (Longmans, Green and Co,1864) 22.

individual's conduct in which he is subject to society is that which relates to others. That which relates to himself alone is, in truth, his absolute independence".[32] For Mile, maintaining people's liberty enables them to develop their ability to reason, grow, and respond.[33] Thus, individuals can lead fulfilling lives[34] and maximise their well-being.

The significance of autonomy in Western philosophy clarifies its primary position in modern biomedical ethics. This importance is evident in the evolution in the law of informed consent to medical treatment, with a considerable shift from a physician-centred to a patient-focused approach.[35]

In *Shari'a* discourse, as this thesis will analyse in depth, the normative basis for shifting from a physician-centred model to a patient-focused model of consent to medical treatment stems from *taklif* (the divine burden) imposed on a *mukallaf* (a moral agent) to maintain their health. Whereas this thesis mainly centres on *Shari'a* perspective and does not design to provide comparative analysis with the approach of secular jurisdictions, it remains important to note that, over the past century, several such jurisdictions, including the US[36], UK[37], Ireland[38], and Australia[39], have seen parallel developments aimed at prioritising the autonomy and dignity of individual patients. The contemporary emphasis of patient autonomy as the moral ground of the law of informed consent to medical interventions has attracted extensive academic attention. Scholars such as Coggon, Miola, Arvind and McMahon argue that respect for patient autonomy and rights in the law of consent should be substantive and practical.[40] Thus, medical decisions should reflect the patient's values and informed choice and be applied in a way that aligns with those values to ensure their actual interests are met.[41]

In Western jurisdictions guided by the principle of secular neutrality, the justification for informed consent to medical treatment is that it is inappropriate to presume that a physician can know what is in every patient's best interests. Instead, it is the patient through their conception of meaning and purpose in life who alone can make an informed medical decision about what genuinely serves their personal values and interests.[42] In this regard, the meaning of life for individuals is the broader philosophy that underpins the moral relevance of the principle of autonomy, given its role in shaping what makes a person's life

[32] Ibid, 22.
[33] Ibid, 79-80.
[34] Ibid, 83-84.
[35] Tom Beauchamp and James Childress, *Principles of Biomedical Ethics* (Oxford University Press 2001) 101-103.
[36] *Canterbury v Spence* 464 F.2d 772 (D.C. Cir 1972).
[37] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11.
[38] *Geoghegan v Harris* [2000] 3 IR 536; *Fitzpatrick v White* [2002] 2 I.R. 551.
[39] *Rogers v Whitaker* [1992] HCA 58; (1992) 175 CLR 479.
[40] John Coggon and Jose Miola, 'Autonomy, Liberty, and Medical Decision-Making' (2011) 70(3) Cambridge Law Journal 523; T.T Arvind and McMahon Aisling , 'Responsiveness and the Role of Rights in Medical Law: Lessons from *Montgomery'* (2020) 28(3) Medical Law Review 445.
[41] Ibid.
[42] David Resnik and Jonathan Pugh 'Green Bioethics, Patient Autonomy, and Informed Consent in Health Care' (2024) 50(7) Journal of Medical Ethics 489, 491; See the general discussion about autonomy in modern bioethics in Jukka Vareliu 'The value of Autonomy in Medical Ethics' (2006) 9(3) Medicine, Health Care and Philosophy 337.

meaningful.[43] From this perspective, in the medical context, decisions about medical interventions fundamentally constitute a significant part of a person's life. This is because medical matters such as health, well-being, illness, suffering, treatment options and life-threatening medical interventions can all be linked to the concept of what makes a person's life meaningful. To clarify, the following examples illustrate that medical decision-making is shaped by the meaning one attributes to their life. For instance, a patient who finds meaning in life is determined by their creativity through art forms, such as playing a musical instrument or painting. In this instance, the patient may refuse medical treatment that diminishes their ability to play music or paint, despite the treatment's potential health benefits. For this patient, a life without music or painting would be meaningless. Another patient, however, considers that the meaning of life relies on psychological well-being, as reflected in quality of life through good health, not in lifespan itself. For such patients, they might refuse treatment that impairs their vital functions. Naturally, the secular justification for moving from a physician model to one that emphasises patient autonomy could also encompass religious considerations.[44] In a medical setting, this matter is apparent in complex situations where a Jehovah's Witness patient refuses life-saving medical treatment, believing that such a choice best serves their long-term interests in the afterlife.[45]

Thus, in secular jurisdictions, the meaning and purpose of one's life when medical decisions are concerned is the normative assumption underlying the contemporary approach to respecting patient autonomy in consenting to medical treatment. This is because the principle of autonomy allows each patient, drawing on their own personal perspective on the prioritisation of values, to shape their medical decisions based on their commitment to their own values and their understanding of what best serves their interests and gives meaning to their life. Within this approach to autonomy, when a medical decision is at issue, the meaning of a patient's life cannot be assumed to be that the physician knows what is objectively best for each patient, since patients do not share the same values and interests. Accordingly, in Western jurisdictions, there has been an evolution in the law of informed consent to medical treatment, with a considerable shift from a physician-centred to a patient-focused approach.

Although significance is placed on autonomy, Dworkin argues that there is no ultimate and agreed-upon definition of autonomy.[46] Nonetheless, many attempts have been made to define the notion of autonomy. Three primary principles are frequently highlighted in the

[43] For discussions about the meaning of life, see the argument of Kekes. Kekes argues that the meaning of life comes from how individuals choose to live through their engagement in "projects" that are important to them, based on their belief that it is the right course of action. John Kekes, 'Informed Will and the Meaning of Life' (1986)47(1) Philosophy and Phenomenological Research 75, 75; See also the argument of Wolf. The author argues that a meaningful life arises from pursuing projects and activities that an individual genuinely values and finds worthy of love. Susan Wolf, *Meaning in Life and Why It Matters* (Princeton University Press, 2010).

[44] See Thaddeus Metz for consideration of the theories of the meaning of life. The author suggests that some individuals find their best interests through a relationship with God and divine reality. Thaddeus Metz, 'Recent Work on the Meaning of Life' (2022) 112 (4) Ethics 112 781, 78.

[45] But see for example *Pindo Mulla v Spain* [2024] ECHR 773. This example has been developed during a supervisory discussion (Professor Neville Cox, Personal communication 2025).

[46] Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge University Press 1988) 6.

definition of autonomy. The first notion prioritises the rationalist interpretation of autonomy, generally associated with Kantian philosophy.[47] The second notion of autonomy is founded on the structural hierarchy of individual motivation, as articulated by Dworkin: "dignity, integrity, individuality, independence and self-knowledge."[48] The third definition of autonomy emphasises the notion of "self-creation", as described by Raz.[49]Despite the various definitions of autonomy, most highlight two fundamental components: freedom from external influences and the agency to make conscious and intentional decisions.[50]

The significance of autonomy in Western philosophy clarifies its primary position in bioethics. This importance is evident in the development of autonomy as a moral principle in biomedical ethics during the late 1970s.[51] Bioethics principles include four fundamental principles: autonomy, nonmaleficence, beneficence and justice.[52] Personal autonomy is frequently regarded as the most controversial principle in this moral model.[53] Yet, respecting the patient's autonomy is a central principle in modern medical practice. [54]

In modern biomedical ethics, autonomy recognises that a patient is an independent individual with the right to self-determination, through the legal entitlement to obtain all relevant health information, thereby facilitating medical decision-making.[55] In medical practice, the principle of respecting the patient's autonomy is most obviously expressed through the logic of informed consent in medical treatment. The doctrine of informed consent holds that a patient of legal majority and sound mind has a legal and ethical right to actively participate in medical decision-making.[56] That patient must be sufficiently informed about their diagnosis and condition, as well as the available treatment options, including their benefits and risks. Information disclosure enables patients to make an informed, voluntary decision regarding proposed treatment options, based on their values and preferences.[57] Ultimately, the principle of autonomy enables patients can make medical decisions that reflect their values and projects of a meaningful life.

The centrality of the principle of autonomy in modern Western ethics, as the moral ground of medical consent, has been questioned for several cultural reasons. Some moralists argue that an excessive focus on patient autonomy may diminish the field of bioethics.[58] It also may adversely affect other moral standards related to societal considerations.[59]

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[47] See Mark Timmons, *Moral Theory: An Introduction* (2nd edn, Rowman and Littlefield Publishers 2013) 232-233.
[48] Dworkin (n 46) 6.
[49] Ben Colburn, *Autonomy and Liberalism* (Routledge 2010) 5-20.
[50] Tom Beauchamp and James Childress, *Principles of Biomedical Ethics* (Oxford University Press 2001) 101-103.
[51] Ibid.
[52] Ibid.
[53] Sachedina (n 5) 3-21.
[54] Jukka Varelius, 'The Value of Autonomy in Medical Ethics' (2006) 9(3) Med Health Care Philos 377, 377
[55] See generally, Adlan (n 14) 904.
[56] Bryan Murray, 'Informed Consent: What Must a Physician Disclose to a Patient?' (2012) 14 (7) American Medical Association Journal of Ethics 563, 563.
[57] See generally, Zürcher and Others (n 4) 1; Murray (n 56) 563, 563.
[58] See generally, May Thomas, 'The Concept of Autonomy in Bioethics: An Unwarranted Fall from Grace' in James Stacy Taylor (eds), *Personal Autonomy: New Essays on Personal Autonomy and its Role in Contemporary Moral* Philosophy (Cambridge University Press 2005) 299–309.
[59] Ibid.

Furthermore, several physicians argue that prioritising autonomy as the primary moral principle in medical practice may hinder key objectives of medicine, including the restoration of health and the alleviation of suffering. Further critics have outlined other matters concerning the dominant position of autonomy in bioethics, particularly the clash of autonomy with conscientious objection and professional judgement.[60]

Furthermore, there are concerns and reservations concerning the supremacy of patient autonomy, which arose from religious perspectives. For instance, Aldlan, a Saudi physician, argues that autonomy shifts decision-making authority from the physician to the patient.[61] It is a manifestation of a Western moral framework that is inappropriate in Muslim medical settings.[62] The principle of autonomy, which underpins medical decision-making, places many concerns within the Islamic context regarding various issues. For instance, issues of end-of-life care and abortion. Bukhari also maintains that the modern Western culture has developed the principle of respecting patient autonomy.[63] However, when the principle of autonomy is applied in various Muslim countries, it inevitably clashes with religious norms and local cultures. Hence, due to this conflict, the principle of autonomy is deemed incompatible with the cultures of Muslim populations such as Saudi Arabia and is rejected in the field of health care.[64] Al-Mutairi also argues that each nation has a distinct culture that may be significantly influenced by religion, which defines the normative values of individuals or groups, governing acceptable conduct across every aspect of life, including healthcare.[65]

The fact is that autonomy as a central moral principle in contemporary bioethics has been developed and guided by moral considerations and Western ethical values. This is because the formulation of such a moral principle occurred in Western nations, driven by the innovative contributions of modern Western scientists and bioethicists, which resulted in its integration into medical practice aligned with Western cultural norms. Consequently, the notion of autonomy in Western moral philosophy is inevitably shaped by historical, social, and cultural contexts. In this sense, without a unified global understanding and a shared acceptance of autonomy, especially in a culturally diverse world where multiple values and inconsistent moral principles prevail. It is enough to only think about religion to realise that the meaning of moral concepts is inevitably contested. For instance, moral decisions related to medical issues such as treatment, illness, suffering and end-of-life decisions. Moreover, given the lack of active participation from non-Western cultures in the discussions and formulation of the principle of autonomy, it is fair to state that the meaning of autonomy, which originated in a Western setting, may not be suitable for all societies, particularly those based on religious traditions.

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[60] Vincen Barry, *Bioethics in a Cultural Context: Philosophy, Religion, History, Politics* (Cengage Learning 2011) 113.
[61] Adlan (n 14) 906.
[62] Ibid.
[63] Ahmed Bukhari, 'Universal Principles of Bioethics and Patient Rights in Saudi Arabia' (PhD thesis, Duquesne University 2017) 3.
[64] Ibid
[65] See generally, Khalid Al-Mutairi, 'Culture and Language Differences as Barrier to Provision of Quality Care by the Health Workforce in Saudi Arabia' (2015) 36 (4) Saudi Medical Journal 425, 426.

In a culturally diverse world, Almoajel argues that cultural differences considerably shape individuals' morals and attitudes about the ground underpinning the development of rights, encompassing both individual rights broadly and rights in healthcare specifically.[66] Thus, it is natural that views on the moral standards regulating the capacity to make medical decisions vary across nations' policies. The World Health Organisation research team suggests that, due to the varying cultural settings that provide different obstacles to upholding universal bioethical principles, each nation should express its reservations and needs within the framework of its cultural and social needs.[67]

Nevertheless, the thesis argues that Islamic moral discourse acknowledges the significance of autonomy in medical decisions when the health of Muslim patients is concerned. In Islamic discourse, significant precursors to the principle of autonomy originate from theological discussions concerning human dignity and the free will of individuals to determine their fate while bearing moral responsibility for their actions. Following the establishment of the vicegerency on earth "We (God) said: Get down all of you from this place (the Paradise to the earth)"[68], the journey of humankind began to bear *taklif* (divine burden): "We offered the trust [divine burden] to the heavens, and the earth, and the mountains, but they refused to bear it, and were afraid of it, and the human carried it".[69]

From a *Shari'a* perspective, the principle of autonomy as a moral construct originates from the doctrine of *taklif*, derived from the Islamic framework of dignity linked to humanity's vicegerency on earth. In this sense, the concept of autonomy primarily overlaps with the notion of human dignity. The doctrine of *taklif* asserts that the fundamental attributes God bestows upon humanity, whom He has dignified as His vicegerents on earth and entrusted with the *taklif* (divine burden), are rationality, cognitive abilities, and free choice. These attributes enable humans to make autonomous moral choices to fulfil their roles as God's vicegerents, while bearing the divine burden and being morally responsible to God for their actions. This inherent human capacity of free will in choice generates moral obligations. Thus, one should not infringe upon another's capacity for autonomous decision-making. Instead, one should enhance and maximise choice to the greatest extent possible. In the medical field, respect for individual autonomy is demonstrated through the principle of informed consent.

This thesis, therefore, presents a moral claim by providing a normative argument derived from a purely Islamic theological perspective on the significance of autonomy in medical decision-making as a moral concept that underpins the legal framework for informed consent to medical interventions. It establishes an Islamic legal model for the elements of informed consent in medical treatment, whereas the notion of a *mukallaf* autonomy forms the moral basis for such consent. Hence, the thesis proposes a shift from a trust model to

[66] Alyah Al-Moajel, 'Hospitalized Patients Awareness of Their Rights in Saudi Governmental Hospital' (2012) 11(3) Middle-East Journal of Scientific Research 329, 329.
[67] Ibid.
[68] *Sura Al-Baqra*.38.
[69] *Sura Al-Ahzab*.33

an autonomy model, derived from the concept of dignity, and considers the importance of reviewing Saudi Arabia's approach to trust-based doctor-patient relationships.

Accordingly, the thesis research question, from a *Shari'a* perspective, analyses the different moral approaches to the legal rules of medical consent in Saudi Arabia, focusing on the underlying principles of 'trust' and 'autonomy' that underpin these rules. Having identified that trust in physicians in medical decision-making has shifted into paternalistic practices that undermine the principle of trust in *Shari'a,* the thesis analyses the principle of autonomy and whether a movement to an autonomy model would be compatible with *Shari'a's* principles.

To answer the thesis's questions and demonstrate its moral claims, the thesis is structured into four sections and consists of nine chapters. The following outlines the thesis contents:

Section One on *The Current Law on Medical Consent in Saudi Arabia*, which has the following chapters:

The primary focus of this thesis is to analyse the moral approach of trust and autonomy that underpins legal rules of medical consent in *Shari'a*. It argues for the relevance of autonomy in medical decision-making when the patient's health is concerned. Accordingly, it suggests a shift from the physician-centred model to a patient-centred model in the context of informed consent.

While the law of medical consent under consideration is the Saudi law, and the legal system of Saudi Arabia is substantially influenced by *Shari'a*, the entire analysis and discussion of this thesis are grounded in *Shari'a*. Thus, Chapter One begins by providing a brief overview of themes and titles that the readers need to know to grasp the subsequent chapters when *Shari'a* discussions are concerned. One of the main focuses of this chapter is to emphasise that *Shari'a* constitutes a complex moral and legal framework that is difficult to reduce to a single definition. The interpretation of *Shari'a* varies by country, is influenced by numerous schools of thought within Islamic jurisprudence and evolves over time. Nonetheless, the chapter identifies the *Qur'an* and *Sunnah* as constituting the primary sources of *Shari'a* in both *Sunni* and *Shia* sects. However, the corpus of Islamic teachings found in sources such as *ijma* (consensus) and *qiyas* (analogical reasoning) is regarded as foundational to *fiqh.*

While *Shari'a* is the law of the land in Saudi Arabia, and the *Qur'an* and *Sunnah* are declared the state's constitution, *Shari'a* governs all legal affairs of the state. Thus, Chapter Two provides a brief overview of the impact of *Shari'a* on the modern legal system of Saudi Arabia. It highlights the first formal declaration by the founder of the Saudi state, King Abdul-Aziz, that *Shari'a* is the law of the land. This will be followed by a declaration of the *Qur'an* and *Sunnah* as the foundational constitution of contemporary Saudi Arabia. Finally, this chapter concludes with an outline of the categories of legal legislation derived from *Shari'a* in the Saudi legal system.

Having established the meaning of *Shari'a* and the importance of *Shari'a* to the Saudi legal system, Chapter Three reviews the current Saudi legal rules regulating consent to medical treatment. It commences with an in-depth review of the development of these rules in Saudi law. Then, it focuses on the national legislation governing consent to medical treatment, specifically the Practising Healthcare Professions Act and its 2017 Executive Regulations. Based on this review, this chapter outlines the current legal requirements for valid medical consent. Ultimately, the review of the current national law suggests that the Saudi law has adopted the professional physician standard to fulfil the duty of care when obtaining medical consent for medical procedures. This chapter also addresses the recently published Saudi Informed Consent Guidelines of 2019 and discusses the confusion within this document.

Section Two on *The Existing Principles Grounding the Current Approach to Medical Consent in Saudi Arabia*, including the following chapters:

While Section One presents a detailed review of the current Saudi legal rules governing medical consent, Section Two turns to address the primary principles underpinning the current Saudi approach to regulating the legal rules of medical consent. Accordingly, Chapter Four addresses the first principle concerning the significance of health in *Shari'a.* This chapter argues that good health enables an individual to lead a meaningful life and meet religious and worldly responsibilities as God's vicegerents on earth. It reviews various *Shari'a* teachings concerning the promotion and protection of health through three levels of responsibility: the responsibility of the individual, the societal members, and the community's ruler. This Chapter concludes that the great value placed on health in *Shari'a* reflects why the Saudi approach prioritises health and thus adopts a physician-centric model to underpin current legal rules governing medical consent. This is because the trust approach is particularly relevant to the argument that the best health outcomes for patients are achieved when trust is placed in physicians to make the best medical decisions.

Hence, Chapter Five critically assesses the principle of trust adopted by the Saudi law of PHP 2005, which grounds legal rules concerning medical consent when a patient's health is concerned. It begins with an examination of the moral components of trust in fellow humans, as defined in *Shari'a*. This will be followed by focusing on the trust-based patient-physician relationship expressed by the Muslim physician Ibn-Sina in his medical ethics theory. This moral framework of trust, together with Ibn-Sina's philosophy, will serve as a lens for considering the establishment of trust as a theoretical moral foundation that supports contemporary legal rules regarding medical consent in Saudi law, as outlined in the PHP 2005.

Chapter Five concludes by demonstrating that, in practice, the principle of trust resulted in the exhibition of paternalistic behaviours in Saudi hospitals. This claim will be substantiated by showing various empirical studies that have significantly illustrated the evolution of patient-physician interaction in the consent process into a paternalistic model.

Based on the discussions of Chapters Four and Five, Section Two concludes by arguing that genuine consent, if its moral relevance is recognised, can be achieved by shifting from the principle of trust inherent in paternalism to a model that respects patient autonomy. This argument is reinforced, firstly, by the emphasis in Chapter Four that *Shari'a* places the responsibility for maintaining good health initially and ultimately on the individuals themselves. This individual responsibility, as Chapter Four argued, stems from the role of the individual as God's vicegerent on earth. Secondly, the trust-based approach has led to paternalistic practices. These practices inherently undermine principles of trust in *Shari'a* discourse. Hence, such an argument allows for the consideration of the patient's autonomy model as an alternative to underpin the Saudi legal rules on medical consent.

Section Three on *Towards an Autonomy-Based Model*, drawing from the principle of autonomy to do the following chapters:

Based on the conclusion of the Second Section, Section Three presents a normative moral argument derived from Islamic theology. It emphasises the importance of respecting patients' autonomy concerning their health in medical decision-making. Thus, Chapter Six begins by arguing that spiritual and moral outcomes in health are achieved by respecting and maximising patients' autonomy, free from paternalistic interventions and practices. From an Islamic perspective, the fundamental characteristics distinguishing humans, whom God has dignified as His vicegerents on earth, are reason and cognitive abilities. These attributes enable people to make autonomous decisions and fulfil their roles as God's agents on earth. The inherent human capacity to make autonomous moral choices, derived from the theological concept of *taklif,* generates moral obligations. Accordingly, one should refrain from limiting another's capacity for autonomous decision-making; instead, one should promote such decision-making to the maximum extent feasible.

Chapter Six is divided into three main themes to discuss the moral argument of the importance of autonomy. The first theme establishes the theoretical foundation for the notion of autonomy in Islamic philosophy by delving deeply into Islamic theological discussions concerning the concepts of dignity and vicegerency, which generated the doctrine of *taklif*. The second part discusses the three fundamental elements of *taklif*, including a) the imposition of the divine burden by God, b) the granting of autonomy to humankind to choose their actions, and c) the moral responsibility before God. The third theme addresses the theoretical framework of the conditions of *taklif* in making autonomous and moral decisions. The final theme begins with a discussion of the condition of sanity and puberty. It considers the Islamic doctrine of legal capacity that enables an individual to assume and fulfil civil responsibilities. Then, it addresses the necessity of disclosing information regarding divine burdens. In addition, it emphasises the significance of understanding divine burden as a fundamental condition in *taklif*. Further, it highlights the requirement of free will without coercion and provides an overview of coercion in civil actions under Islamic law.

Chapter Six concludes that, from a *Shari'a* perspective, autonomy is regarded as originating from a higher divine authority, namely *taklif* imposed by God. The autonomous individual is the *mukallaf* (competent adult), considered to bear the divine burdens in every aspect of life while recognising a moral responsibility before God for their decisions. Such autonomous behaviours necessitate a moral actor (the *mukallaf*) possessing sanity, cognitive abilities, and free will, devoid of external pressures from other people. In the medical context, *taklif* assigns patients the role of the moral agents to bear the divine burdens concerning medical treatment and thus make autonomous medical decisions related to their health. Accordingly, maximising patient autonomy in medical decision-making is crucial, as it ultimately influences the moral responsibility of the patient.

Having concluded that, from a *Shari'a* perspective, patients' autonomy is significant in medical decision-making, Chapter Seven moves forward to present the argument that, in the medical context, understanding the Islamic version of patient autonomy requires an appreciation of how morality and behaviour are shaped in *Shari'a*. Every act of conduct in *Shari'a* has moral value and may result in rewards or penalties for *mukallafs*. Therefore, this chapter aims to establish the moral framework of autonomy for a *mukallaf* patient seeking medical treatment by investigating the moral value of medical treatment in the context of divine burden under *taklif.* This investigation commences with a review of the moral significance of treatments in the *Qur'an*. It subsequently outlines the stances of classical Islamic jurisprudential schools concerning seeking medical treatments and relevant contemporary *fatwas*, highlighting those issued by the International Islamic *Fiqh* Academy of the Organisation of Islamic Cooperation (IIFA).

This chapter concludes that the moral significance of medical treatment includes all five *taklif* rulings: o*bligatory, prohibited, recommended, discouraged* and *permissible*. Hence, there are two circles of moral significance in the divine discourse regarding medical treatment. The first circle involves *obligatory* and *prohibited* treatments. In this context, the chapter illustrates that *Shari'a* defines specific moral responsibilities in the divine discourse of *taklif* when proposed *obligatory* treatments are neglected or *prohibited* treatments are requested in circumstances other than necessity. On the other hand, the second circle includes *recommended, discouraged* and *permissible* treatments. Under this circle, *Shari'a* has not established moral consequences for neglecting the divine discourse associated with such treatments. Therefore, a *mukallaf* patient faces no consequences for rejecting the *recommended* and *permissible* treatments or obtaining *discouraged* therapies.

Analysing the moral significance of medical treatment in the context of divine burden and its influence on the autonomy of a *mukallaf* patient substantiates the argument that maximising patient autonomy is crucial in medical decision-making. A *mukallaf* patient can only achieve moral and spiritual development or consider the consequences of their medical treatments if their autonomy in decision-making is respected. Ultimately, the *mukallaf's* patient bears moral responsibility before God for the medical interventions they undertake or reject. All healthcare teams, therefore, are morally required to respect this patient's autonomy in medical decision-making. The principle of informed consent is the primary

expression of respect for patient autonomy in contemporary bioethics. Nonetheless, the topic of discussion concerns how a patient could make an autonomous and moral decision regarding medical intervention.

Thus, Chapter Eight addresses the principle of informed consent as a moral construct grounded in the *mukallaf* autonomy, wherein the patient acts as the moral actor within the *taklif* theory in the medical decision-making. Drawing from the discussion of *taklif's* doctrine in chapter six, this chapter discusses in depth two main issues: firstly, the principle against coercion, which maintains that a *mukallaf* patient, defined as one who meets the conditions of legal capacity in *taklif*, must maintain autonomy; hence, no medical treatment should proceed without their consent. Secondly, the principle that such consent must be centred on the disclosure of relevant information and patient understanding of such information. Thus, the primary focus is to determine the amount and categories of information that should be disclosed and how physicians assess patients' understanding of this information.

Section Four on *A Practical Application for Moving from A Trust to an Autonomy Model in Saudi Practice*, which has the following concluding chapter:

Throughout the earlier Sections and Chapters, this thesis demonstrated its core normative moral argument, emphasising the significance of maximising the patient's autonomy in medical decision-making. However, the question remains, in practice, if a shift is made from a trust and physician-focused model to a patient autonomy-focused model, how would the autonomy model impact the Saudi legal rules on medical consent discussed in Chapter Three?

Therefore, the last Section presents an illustration of a practical application of how a patient-focused model can be applied in Saudi practice. This practical example, proposes specific changes that would impact the current Saudi legal rules on medical consent, as previously discussed in Chapter Three. The changes stem from transitioning from a physician-focused to a patient-focused model.

Therefore, Chapter Nine presents a practical legal framework grounded in the model of patient autonomy. It suggests that, in a patient-focused model, a valid informed consent must meet three legal requirements: the consent is given by the person with the legal capacity to make the medical decision; the consent is obtained freely and voluntarily; and the consent must be informed through the disclosure of relevant medical information and ensuring the patient understands such information. The threshold for meeting the duty of information disclosure and evaluating the patient's understanding is established by a *mukallaf* patient standard.

Methodology

Using normative legal methodology, this thesis makes a moral claim from a theological Islamic perspective about the significance of autonomy as a moral construct underpinning

medical moral decisions.[70] It consequently establishes a legal framework for elements of informed consent in medical treatment grounded on the principle of autonomy.

Singer states that normative argument is important in legal studies. Through normative arguments, a moral claim is made and defended.[71] Such normative claims are not just reflections of individual desires but evaluative judgements and moral demands about the moral values the legal system must maintain.[72] Thus, Singer asserts that normative arguments are designed to produce a framework of legal rules and practices consistent with a society's moral standards and values .

In this sense, this thesis formulates and defends its normative claim for the moral relevance of the principle of autonomy, providing normative grounds for why and how autonomy can be justified and validated as a moral construct that appropriately underpins the rules of informed consent, mainly when the Muslim *mukallaf* is the subject of consideration for granting medical consent.

Kavanagh maintains that a normative claim is acknowledged and can be achieved through many methods.[73] For some, normative denotes "critique," wherein the researcher contests a specific perspective and explains its erroneous or misleading nature. Additionally, "normative" signifies "justification"; a normative argument aims to validate or justify a particular perspective. Most often, normative refers to something as "descriptive," in which the research defines what should be done and establishes the legal norms required to embody some normative value.[74]

The approach of this thesis combines such varied distinctions of normative aspects between "critique", "justification", and "descriptive" endeavours. At the initial stages of this thesis, reviewing and analysing the legal rules of medical consent in the current legal framework of Saudi law related to consent is the primary goal. This review encompasses Articles 18 and 19 of the Practising Health Professions Act of 2005 (PHP 2005) and its Executive Regulations of 2017. These legal rules have been comprehensively reviewed to elucidate how trust in physicians can manifest as the moral approach that underpins Saudi Arabia's legal rules regarding medical consent.

The adoption of trust as the core moral principle underpinning the current legal framework of medical consent raises a normative 'critique' concerning the continued recognition of trust as an essential approach in this context. In practice, the adaptation of trust has led to

[70] For normative legal methodology, see generally, Joseph Singer, 'Normative Methods For Lawyers' (2008) Harvard Public Law Working Paper 08-05, 899 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1093338 accessed 28 January 2025; Kariuki Muigua, 'Normative Legal Theory: Its Evaluation and Search For Structure and Unity in Law' (2022) available at http://kmco.co.ke/wp-content/uploads/2018/08/073_Normative_legal_theory.pdf accessed 1 February 2025.

[71] See generally Singer (n 49) 899.

[72] Ibid.

[73] See generally, Aileen Kavanagh, 'Keeping It Real in Constitutional Theory' (2023) 1(2) Comparative Constitutional Studies 244, 260.

[74] Ibid.

physicians exhibiting paternalistic behaviours in Saudi hospitals. The decision-making process, therefore, mainly centres around the physician, who employs a paternalistic approach for obtaining consent. Paternalistic behaviours are fundamentally at conflict with the Islamic standards of ethics associated with a trustworthy individual in whom others place their trust. Despite being portrayed in charitable terms due to their supposedly good intentions, paternalistic actions amount to deception. Deception, regardless of its motives, significantly undermines the principles of trust and the qualities of trust within Islamic ethical standards.

To present the previous normative argument, the concept of trust in human fellows has been investigated by analysing the term *amanah* (trust) in its noun form, as it appears six times in the *Qur'an,* and the adjective form *ameen* (trustworthy), which appears 11 times in the *Qur'an*. The analysis of *Qur'anic* verses concerning the terms 'trust' and 'trustworthy' establishes a theoretical moral framework for the notion of trust in fellow humans, from which four moral components of trust have been developed. The verses of the *Qur'an* have been presented and interpreted by utilising prominent *Qur'anic* exegeses, including those of Ibn-Kathir, Al-Baghawi, Al-Saadi, and Al-Tabari. The analysis of the concept of trust in fellow humans has also been incorporated into the leading theories of *Makarim Al-Akhlaq* (noble ethics) in Islamic philosophy, as presented by Muslim philosophers Ibn Abi Al-Dunya, Al-Mawardi, and Al-Ghazali.

This has been followed by highlighting the theoretical concept of trust in physicians as a moral construct that underpins medical consent, as expressed by the preeminent philosopher and physician Ibn-Sina, regarded as the father of medical science in the Islamic world. Through a strict reading of Ibn-Sina's philosophy, the thesis demonstrates that Ibn-Sina maintains a paternalistic attitude in several aspects of his work. Finally, the thesis has cited numerous empirical studies from Saudi hospitals to substantiate the assertion that trust has evolved into a paternalistic approach. Ultimately, the initial stages of this thesis demonstrate that the paternalistic approach undermines the concept of trust as expressed and explored in the *Qur'anic* narrative.

Such a critique of trust adoption in medical decision-making settings leaves room for normative moral demands related to the importance of autonomy. Accordingly, this thesis presents and defends its moral claim regarding the significance of autonomy through 'justification' and 'descriptive' arguments. Singer asserts that normative claims can only be defended and justified by providing a clear description.[75]

Thus, the thesis contributes to Islamic legal scholarship on autonomy, particularly in the context of informed consent, by providing an Islamic normative justification for the value of the patient's autonomy in medical decision-making and describing vividly what is required to effectively uphold the moral claim of respecting the *mukallaf's* autonomy. To this end, in the Third Section: *Towards an Autonomy-Based Model*, the thesis presents the

[75] Singer (n 49) 909.

theoretical foundation for the principle of autonomy in the Islamic normative tradition by surveying significant precursors in Islamic theological discourse regarding the concept of dignity and the vicegerency of humanity on earth, which led to the doctrine of *taklif.* The theory of *taklif* underpins the autonomy of the *mukallaf* in shaping one's destiny through moral and spiritual decision-making, as well as the associated moral responsibility for such choices and decisions. Theoretically, these notions are not separate, as they evolved together within the Islamic normative heritage. In the context of medical decision-making, the thesis establishes that *taklif* doctrine positions the patient as a moral actor responsible for bearing the divine burden associated with medical treatment, thus empowering patients to make autonomous decisions regarding their health. In this sense, maximising the patient's autonomy in medical decision-making is crucial, as it significantly impacts the *mukallaf* patient's moral responsibility.

In keeping with the moral focus of this thesis, the discussion in subsequent stages addresses the conceptualisation of the principal autonomy in the context of medical decision-making. Thus, this contribution establishes a comprehensive moral framework for the *mukallaf* autonomy through investigating the moral value of medical treatment in the divine discourse of *taklif.* To do so, the thesis begins by reviewing the sources of *Shari'a* and *fiqh* including, a) the *Qur'an* and *Sunnah*; b) the perspective of Islamic schools of jurisprudence including *Hanafi, Hanbali*, *Shafi,* and *Maliki*; and c) contemporary Islamic *fatwas* with a particular focus on the *fatwa* of the International Islamic *Fiqh* Academy (IIFA).

Regarding the *Qur'anic* references, a survey of the verses related to the divine discourse on the moral value of medical treatment was done by searching in Arabic for the term '*shif'a*' (healing), which refers to the process of recovering from illness by treatment and ultimately is the objective of seeking medical treatment. The concept of '*shif'a*' is mentioned in four places in the *Qur'an,* and it is used in three instances to refer to the cure of spiritual diseases. In one place, the *Qur'an* mentions 'honey' as a material medicine to cure physical diseases. The divine discourse of the three references of '*shif'a*' concerning spiritual diseases was excluded from discussion, as it is outside the scope of this thesis. Thus, the discussion explores the moral significance of medical treatment by analysing the honey verse. The honey verse triggered the identification of another verse addressing the subject of '*shif'a*', albeit without explicitly mentioning the term '*shif'a*'. This verse relates to the consumption of 'dates' as a medical method in the story of the childbirth of Lady Maryam for her son. The discussions of the divine discourse in these two verses concerning honey and dates were analysed through prominent *Qur'anic* exegeses, such as Ibn-Kathir, Al-Qurtubi, and Al-Tabari, and substantiated by *hadiths* of the Prophet.

When investigating the divine discourse on medical treatment from the perspective of classical Islamic schools of jurisprudence, this thesis does not restrict itself to the viewpoints of a specific school of jurisprudence. The primary objective is the genuine and earnest pursuit of recognising God's will as it is articulated in His divine discourse, rather than an obsession with a specific school of jurisprudence or the views of a non-infallible Muslim jurist, who may be either right or wrong in their interpretation of God's discourse.

A person familiar with Islamic jurisprudence recognises that it is inherent for jurisprudential opinions to vary and be divided on one matter. Consequently, the method employed to reach the conclusion in the Muslim debates about a matter is *tarjih* (weighting). *Tarjih* is the process of reviewing and examining the diverse perspectives of Muslim jurists on a specific matter to decide which is most closely compatible with the teachings of *Shari'a*. The determination is based on the evidence presented in each opinion, considering both the temporal and spatial context.

Concerning the review of contemporary *fatwas*, given the wide variety of normative *fatwas* that have been issued and the difficulty of providing comprehensive coverage of the entirety of individual *fatwas*, the *fatwas* of IIFA are selected for two significant reasons. The IIFA has a relatively broad thematic scope, as it addresses seeking medical interventions according to the five *taklif* rulings. In addition, IIFA has a vast geographic scope and is classified as a transnational institution because it tends to address different segments of the global Muslim population. This can be argued based on its membership and participation by Muslim scholars from various Islamic states. Muslim scholars from the IIFA represent their countries, which are members of 57 Muslim States and the Organisation of Islamic Cooperation (OIC). Nevertheless, this thesis cites individual *fatwas* issued by Islamic states as relevant in many places.

While investigating the moral framework for a *mukallaf* autonomy in seeking medical treatment in the divine discourse, this thesis considers a Muslim's moral life too complex to be embodied in a single principle. Muslims' moral motivations are too diverse, specific, and conditional to be derived from a single moral principle. Therefore, when conflicts of moral values among Muslims are unavoidable, this thesis draws on a range of jurisprudential foundations to prioritise and determine which values should prevail in particular cases, for example, consent to or refusal of treatment in the case of infectious diseases. The thesis does this by placing the concept of autonomy within a broader context that encompasses divine, collective, and individual factors. In the context of Islamic normative discourse, these factors form a collection of jurisprudential foundations including, the scheme of rights in *Shari'a*; *maqasid al-shari'a* (the higher *Shari'a* objectives); and *al-maslaha al-amah* (public interest).

Once the thesis has formulated the normative reasons that can justify the significance of a patient's autonomy in medical decision making from an Islamic perspective, the final chapter of the second section describes what ought to be done to respect the *mukallaf's* autonomy by defining a legal framework that reflects the assertions and moral demands to uphold the *mukallaf's* autonomy. Thus, the last stage of this study suggests that a patient's autonomy can be respected and maximised through the principle of informed consent. It argues that informed consent is a moral construct that arises from respecting the patient's autonomy, wherein the patient acts as a moral actor in medical decision-making. It subsequently outlines the elements of informed consent. In doing so, the thesis begins with a theoretical investigation of the conditions required for moral decision-making in the

doctrine of *taklif*. Thereafter, the theoretical framework of *taklif's* conditions are applied in the context of informed consent in medical interventions.

While this thesis consistently cites sources of *Shari'a,* specifically the *Qur'an* and *Sunnah*, it is essential to acknowledge that the Arabic text of the *Qur'an* remains identical across all versions; however, the English translations naturally vary. The appropriateness of a specific verse for inclusion in this thesis is determined based on its verbal efficacy or meaning in the Arabic version, followed by its translation into English. The English translation of the King Fahd Glorious *Qur'an* Printing Complex, Saudi Arabia, has been utilised in all citations within this thesis.[76] However, in certain places, some words in the English translation have been altered to ensure that they accurately reflect the meaning and intent of the original Arabic verse. All verses are cited by reference to the name of the *sura* in the Arabic version and its number.

Regarding the Prophetic *hadiths*, the inclusion of *hadiths* is identified based on their verbal efficacy and significance in Arabic before being translated into English. All *hadith* statements cited in this thesis are translated into English based on the English version available on the *Sunnah* website.[77]

Classical Islamic jurisprudence scholarship is frequently cited in its Arabic versions for several reasons, such as maintaining the authenticity of the source. The works of Islamic jurisprudence, particularly the classical texts, are extensive and written in the Arabic language. Thus, citing the sources of Islamic jurisprudence in Arabic undoubtedly strengthens the thesis's argument and discussions, as it allows access to a greater number of original works rather than relying on those translated to English. All Islamic scholarships are available in digital and physical versions identical to the original copy. Both versions have been accessed from many national digital libraries. In general, the digital version has been utilised as it enables access to relevant sections using keywords. Nevertheless, it is important to note that the digital page number could vary from the printed version in some instances.

Furthermore, it is important to make three remarks regarding the scope of this contribution and what the thesis does not do. This thesis presents a moral claim about the significance of autonomy as a moral principle in medical decision-making, particularly when a patient seeks treatment to maintain or recover their health. In other words, it does not claim to establish a comprehensive moral framework for autonomy across all modern bioethical issues. For instances, withdrawal of artificial nutrition, do-not-resuscitate order, euthanasia, and abortion for financial considerations or arising from an illegal relationship, such topics, while overlapping with the principle of autonomy and this thesis discussing its general

[76] King Fahd Glorious *Qur'an* Printing complex, Al Madinah Al Munawwara, Saudi Arabia (trs), The Verses of the *Qur'an,* available at https://qurancomplex.gov.sa/en/kfgqpc-quran-translate/ accessed 7 February 2025
[77] *Sunnah* Website (trs), *Hadiths* of The Prophet Muhammad, available at https://sunnah.com accessed 7 February 2025

lines, are inherently not medical treatment, as the patients who make such request, they do not seek to maintain or recover health.

In addition, this contribution primarily highlights the significance of autonomy in medical decision-making in circumstances of medical treatment seeking involving *mukallafs* (competent adults) capable of making autonomous decisions. Other categories, such as adolescents, people with mental illness, competent adults in unconsciousness situations or coma, are not addressed in this thesis. Addressing these two remarks requires an independent undertaking in advance, and due to the limitations of words and time, this thesis does not claim to present a comprehensive case for all subjects touched by the notion of autonomy.

Furthermore, this research focuses particularly on consent in the context of clinical medical treatment and does not extend to consent in medical research. This limitation arises from the differing nature of the divine burden in each context. In this thesis, consent in clinical treatment is analysed through the lens of the divine obligation associated with an individual's responsibility to maintain their own health. This moral obligation is derived from *Shari'a* sources through the concepts of *shif'a* (healing)**,** which aim to maintain and preserve health, the fundamental purpose of seeking medical intervention. The moral value of clinical treatment is defined through the five moral values in *Shari'a*, including *obligatory, prohibited, recommended, discouraged* and *permissible.*

In contrast, medical research does not necessarily aim to heal or benefit the participant personally. Instead, its primary purpose is to advance scientific knowledge or achieve public health benefits that may serve society at large. Accordingly, the moral value of medical research treatment can be defined solely as the moral value of *permissibility,* as consent in medical research aims to achieve broader societal or scientific benefit and does not place a direct moral burden on the individual. Therefore, the divine burden in consent to research context is grounded in the concept of public interest**,** and the most relevant jurisprudential foundations influencing the moral value of consent to medical research are those related to the maxim of no harm shall be inflicted. This stands in contrast to the jurisprudential principles underpinning clinical treatment, which draw on the *maqasid al-shari'a* (the higher *shari'a* objectives) and the scheme of rights in Islam, particularly the balance between the rights of the individual and the rights of the Creator.

Therefore, the divine burden underpinning consent in clinical treatment cannot be directly translated or applied to consent in medical research. While the former is rooted in an individual's immediate moral obligation to maintain and preserve personal health, the latter is tied to a broader, welfare-oriented responsibility that connects the individual to societal benefit, one that remains conditioned by the maxim of no harm shall be inflicted.

Finally, perhaps before delving into the presentation and analysis of the normative moral argument of this thesis, it is essential to emphasise that Islamic moral approaches are diverse and Islamic practices are varied. Indeed, the pluralism of moral principles is an

inherent aspect of Islamic thought, embedded throughout moral theology and legal theory. Alongside the two major sects of Islam, *Sunni* and *Shia*, each sect encompasses various legal schools that have developed different doctrinal traditions. The observer of discussions on Islamic thought recognises that there is no classical or contemporary Islamic moral theoretical base that cannot be broken or is immune to critique, and that the moral philosophical foundations underpinning normative legal arguments are not uniform within Islamic jurisprudence. Consequently, establishing a singular moral perspective on a particular subject within Islamic jurisprudence is unattainable.

In addition to this theoretical moral diversity, followers of Islam view and practise its principles and teachings variably. The considerable variance among Muslim followers can be seen in the choices Muslim women make to demonstrate their commitment to Islamic ideals about religious modesty and dress rules. This diversity affirms that followers of Islam practise their faith in various ways across the Muslim world.

Incidentally, this vast diversity is not regarded as moral relativism or moral disorder. Such diversity indicates that Islam does not advocate for blind faith or a passive acceptance of a divine will among its followers. God is capable of providing specific divine guidance for Muslims in the sources of divine revelation, and to ensure the agreement of all Muslims on every matter in Islamic law. "And for *Allah* that is not hard or difficult",[78] "He does what He intends (or wills)",[79] "Say, with *Allah* is the far-reaching argument. "If He had willed, He would have guided you all."[80], "Verily, His Command, when He intends a thing, is only that He says to it: Be! and it is!"[81]

However, in many places, God describes the *Qur'an* as a blessed book that is intended for people of reason: "a blessed Book which We have revealed to you [Muhammad], that they [humanity] might reflect upon its verses and that those of reason would be reminded".[82] In the first part of this verse, the term 'blessed' signifies the great goodness that people of reason can grasp in their conceptions. When the *Qur'an* is described in more than one place as 'blessed', suggesting that its divine discourse is capable of revolution, expansion, and gigantism, this capacity is a fact, as many Muslim intellectuals followed in succession in their interpretations of the *Qur'an* from the era of the Companions to the present. Each generation of intellectuals yields novel meanings from the same verse that had not been developed by the scholars of earlier Islamic periods.

The second part of the verse clarifies that individuals of reason recognise the great goodness of the *Qur'an's* meanings. The *Qur'an* is a book that communicates to the mind, specifically directed to people who interact with their minds and think critically. Naturally, people possess varying cognitive abilities, which results in diverse interpretations of divine

[78] *Sura Ibrahim*. 20.
[79] *Sura Al-Buruj*.16.
[80] *Sura Al-Ana'am*.120.
[81] *Sura Ya-sin*. 82.
[82] *Sura Sa'ad*.29.

communication and clarifies the diverse nature of Islamic practices. A reasoning capable at critical thinking, creativity, analysis, reflection, comparison, and equilibrium, which eschews blind imitation, will possess a distinct awareness of the *Qur'anic* concepts compared to those with restricted reflective faculties or those who choose not to engage in reasoning and reflection on the *Qur'an* or adhere to dominant Islamic thought within their community.

Accordingly, God could have drawn clear boundaries with His words and defined all moral principles and divine commands within a unified framework that all followers of Islam would uniformly follow. Nonetheless, He is not bound by his words. Many divine teachings have an objective and abstract existence within the sources of revelation to enable humans' rationality to interact with divine discourse and thus exercise their free will in recognising God's discourse in every human actions, reliant upon individual circumstances, personal motivations for spiritual growth, interactions with the universe and others, and moral aspirations for divine rewards and retributions. Despite the multiplicity and diversity of moral principles and practices across the Islamic world, intellectuals, thinkers, and all Muslims share one objective: to discover God's will and endeavour to please Him, as God is the ultimate goal for every Muslim.

The previous remark suggests that Islamic moral principles are diverse and evolving. Thus, it is essential to acknowledge that Islamic jurisprudence may encompass several moral approaches that underpin informed consent, and the practices of informed consent will continue to evolve and remain open to discussion.

Nonetheless, when presenting the thesis's argument, the readers will find that the principle of autonomy provides a valuable moral claim to underpin the legal rules for informed consent. The moral claim of the relevance of autonomy is solid, grounded in moral reflection and evaluative judgements of Islamic norms and principles regarding doctrines of vicegerency, *taklif* and moral responsibility. Such concepts first and foremost stem from a theological construction related to the purpose of human existence in this life and their moral responsibility related to one's actions while bearing the role of vicegerent of God on earth.

Most importantly, in the *Qur'an,* "and all of them [humans] are coming to Him [God] on the Day of judgement alone"[83], "That no burdened person shall bear the burden of another",[84] "And no bearer of burdens will bear the burden of another".[85] If the verses of the *Qur'an* unequivocally state that 'you' as the *mukallaf* Muslim are God's vicegerent on earth and that 'you' are alone, if you have the reason and cognitive abilities, you bear *taklif* and thus are morally responsible for your actions, how can an external agent be considered to make moral decisions when the medical decision of health is concerned? The reality is

[83] *Sura Maryam*.95.
[84] *Sura Al-Najm.* 38.
[85] *Sura Al-Isra.*15.

that the journey of vicegerency on this earth, while bearing *taklif,* is individual; as a *mukallaf* you are the shepherd, and you are the flock.

SECTION ONE: THE CURRENT LAW ON MEDICAL CONSENT IN SAUDI ARABIA

Chapter 1: An Overview of Islamic *Shari'a*

1.1 Introduction

The primary concern of this thesis is to analyse the moral approaches of trust and autonomy, while arguing for autonomy as a moral construct to underpin the Saudi legal rules to consent to medical treatment. This analysis is entirely grounded on *Shari'a* principles and teachings. This is because the legal system addressed in this thesis, the Saudi, as will be demonstrated in the next chapter, is substantially influenced by *Shari'a.* Therefore, this first chapter begins by explaining the core tenets, themes, and titles relevant to the analysis in the subsequent chapters, particularly when *Shari'a* discussions are concerned.

This chapter comprises three sections. The first section demonstrates the definitions of *Shari'a* by reviewing the endeavours of Muslim scholars to define *Shari'a*, emphasising that *Shari'a* constitutes a complex moral and legal framework that is difficult to reduce to a single definition.

The second section discusses two terms frequently confused in Islamic law literature, *Shari'a* and *fiqh* and addresses the argument that *Shari'a* is a distinct concept from *fiqh*. While the *Qur'an* and *Sunnah* are the sources of *Shari'a*, other sources, including *ijma* (consensus) and *qiyas* (analogical reasoning), are derived from *fiqh*. This part concludes with an outline of the evolution of Islamic jurisprudence schools and their contribution to Islamic jurisprudence scholarship. Further, it will emphasise the various perspectives among these schools arising from their varied methodologies and interpretations of *Shari'a* sources.

The third part discusses what *Shari'a* stands for, emphasising two core Islamic values. It begins by outlining the five rulings in Islam, including obligatory, prohibited, recommended, discouraged, and permissible. In addition, it addresses *maqasid al-shari'a* (the higher objectives of *Shari'a*) by outlining the five necessities that must be considered when establishing a moral and legal ruling in Islamic jurisprudence.

1.2 Defining *Shari'a*

This section offers an introductory overview, beginning with the linguistic definitions of *Shari'a* and how classical Muslim jurists have defined it. It then highlights how the notion of *Shari'a* becomes increasingly complex as legal theory and jurisprudence develop alongside the emergence of various Islamic schools of thought. The section subsequently provides the most contemporary definitions of *Shari'a*. It concludes by emphasising the difficulty of reducing *Shari'a* to a single, comprehensive definition, given the differing *Sunni* and *Shia* perspectives, the diversity of jurisprudential schools, and the varying views on what constitutes the sources of *Shari'a* and *fiqh*.

After presenting the definitions of *Shari'a*, the next sections move to provide a concise overview of the differences between *Shari'a* and *fiqh*, as well as their primary sources. The

discussion then outlines the core values upheld by *Shari'a,* including the five rulings in *Shari'a* and the higher objectives of *Shari'a.*

Shari'a is an Arabic term that lacks a definitive, straightforward, or universal definition.[1] Although there have been extensive attempts to define what *Shari'a* is, defining *Shari'a* is an onerous task.[2] The literal meaning of *Shari'a* refers to a "pathway or clear way to be followed".[3] Originally, *Shari'a* referred to the route leading to the water.[4] This meaning is mentioned in the *Qur'an:* "Then We put you, [O Muhammad], in an ordained way [*Shari'a*], concerning the matter [of religion]; so follow it".[5] Al-Khalil notes that *Shari'a* is what God has established for His followers in matters of religion and commanded them to follow, such as prayer, fasting during Ramadan, and pilgrimage.[6] Al-Khalil defines *Shari'a* in its traditional manifestation, wherein he regards Islamic rituals as an inherent component of *Shari'a*.[7] Although the five pillars of Islam are integral components of *Shari'a* and typically appear in the introductory sections of *Shari'a* literature, *Shari'a* encompasses a broader range of principles and regulations beyond the scope of the five pillars.

Ibn-Hazm attempts to broaden the scope of *Shari'a* beyond that of Al-Khalil. Ibn-Hazm claims that *Shari'a* encompasses the divine commandments created by God and imposed upon people through the Prophet.[8] In this sense, *Shari'a* is a manifestation of God's instructions to Muslims, including a collection of duties that Muslims are obligated to perform based on their religious faith.[9] Reading strictly the definition of Ibn-Hazm, *Shari'a* extends beyond the five pillars, like prayer and fasting in Ramadan. *Shari'a* contains moral principles that followers of Islam are expected to uphold, such as honesty, justice, and forgiveness. *Shari'a,* therefore, regulates an individual's moral conduct and categorises all human actions into five values.[10] For instance, some acts are recommended and discouraged, whereas others are forbidden and obligatory. Consequently, one might deduce that *Shari'a* encompasses more than mere religious practices; it also includes moral duties that direct and shape an individual's conduct.

Ibn Taymiyya associates *Shari'a* with obedience to God and the Prophet. *Shari'a*, as described by Ibn Taymiyya, entails complete submission not only to God but also to the commands of the Prophet in all aspects, situations, and actions.[11] The core of *Shari'a* is

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[1] Baudouin Dupret, *what is the Sharia*? (David Bond tr, Hurst and Co 2018) 154.
[2] Nesrine Badawi, *Introduction to Islamic law* (Harvard University Press 2009) 2.
[3] Irshad Abdal-Haqq, 'Islamic Law: An Overview of Its Origin and Elements' (1996) 1(1) Journal of Islamic Law 27, 33.
[4] Ibid.
[5] *Sura Al-Jathiyah*.18.
[6] Al-Khalil Ahmad Al-Farahidi, *Al-Ae'en* [The Eye: Arabic Dictionary] (Mahdi Al-Khazoumi and Ibrahim Al-Samarrai ed, vol 1, *Dar Maktbt Al-Hilal* [no date]) 253.
[7] Ibid.
[8] Ali Al-Andalusi Ibn-Hazm, *Al-Ehkam Fi Usual Al-Ahkams* [The Accuracy in The Origins of *Shari'a* Rulings] (Ahmed Shaker ed, vol 1, *Dar Al-Afaq* [no date]) 46.
[9] Ibid.
[10] Ibid.
[11] Ahamad Taqi Ad-Din Ibn Taymiyya, *Majmue Al-Fataws* [A Great Compilation *of Fatwas* of Ibn Taymiyya: Book of the Principles and Roots of Islamic Jurisprudence, Monotheism, and Belief, *Hadiths* and Exegeses of The *Qur'an*] (Abdul Rahman Bin-Qasim ed, vol 19, 2nd edn, King Fahd Complex for publication 2004) 309.

adhering to the traditions of the Messenger, and deviating from obedience to the Prophet's teachings is considered a deviation from *Shari'a*.[12]

Based on Ibn-Tamiya's definition, *Shari'a* encompasses all religious practices, including prayer and fasting. It governs every aspect of life, including social, economic, and political matters. The central feature of Ibn-Tamiya's view is that rituals and actions are regulated by both God and the Prophet. Therefore, the scope of *Shari'a* is confined to the teachings mentioned in the *Qur'an* and the *Sunnah* of the Prophet.

Classical Muslim scholars have made numerous attempts to define and determine the scope of *Shari'a*. While they acknowledge that *Shari'a's* nature and scope may be beyond human comprehension, they unanimously agree that *Shari'a* is a comprehensive system of teachings that governs all aspects of human life, from daily transactions to worship. These teachings are considered manifestations of the divine discourse revealed to the Prophet. Therefore, any attempt to define *Shari'a* must be rooted in its primary sources, the *Qur'an* and *Sunnah*. Submission to God is a fundamental requirement of *Shari'a,* and this divine obedience necessitates adherence to the *Sunnah* of His Prophet.

Throughout the Prophet's lifetime, the Prophet addressed legal issues as they arose by interpreting and expanding upon the principles of the *Qur'an*, establishing a legal framework that would continue to be applied even after his death.[13] Following the death of the Prophet, revelation and direct communication of the divine ceased.[14] Over time, Muslim communities encountered novel challenges that necessitated Muslim jurists to address them through their interpretation and analysis of the *Qur'an* and *Sunnah*.[15] Muslim scholars have traditionally had different interpretations of these two primary sources. The various interpretations of sources of revelation have given rise to conflicting perspectives on nearly every subject matter, resulting in the emergence of different schools of Islamic jurisprudence. The primary Islamic schools of thought emerged in distinct historical, social, and cultural circumstances throughout the early centuries of Islam and played a crucial role in shaping what *Shari'a* means.[16]

The intellectual development in Islamic jurisprudence schools complicates the meaning of *Shari'a* and how to define *Shari'a* even further. Considering the point stated at the beginning of this section, defining Islamic *Shari'a* is arduous. This difficulty in defining *Shari'a* is attributed to the nature of the moral and legal system associated with *Shari'a* rules, as well as the diversity and richness of views among schools of Islamic jurisprudence. Badawi notes that the task of defining *Shari'a* is a problematic endeavour.[17] The difficulty is attributed to the complexity of the legal system based on *Shari'a,* and the lack of a single

[12] Ibid.
[13] Mana'e Al-Qitan, *Tarikh Al-Tashri'e Al-Islami* [The History of Islamic Law] (*Maktabt Wahba* Publication 2001) 32.
[14] Ibid.
[15] Ibid 189.
[16] John Esposito and Natana DeLong-Bas, *Shariah: What Everyone Needs to Know* (Oxford University Press 2018) 31
[17] Badawi (n 2) 2.

system agreed upon amongst the various Islamic thought schools.[18] Thus, any definition will exceed or be below encompassed based on the system adopted by the various Islamic jurisprudence schools in this wealthy domain. According to Esposito and DeLong-Bas, the various Islamic schools of thought that have emerged due to different social, cultural, and historical contexts are central to understanding what *Shari'a* is.[19]

Dupret notes that the term *Shari'a* has been the subject of numerous intellectual investigations aimed at defining its precise meaning.[20] These investigations have endeavoured to employ a systematic methodology within a particular field to establish a precise definition of the term *Shari'a* and its sources.[21] For instance, Hallaq argues that *Shari'a* is a distinct and unique entity. Thus, "*Shari'a* is an 'entity' that belongs to a 'genus' and is 'intended' to organise society and resolve conflicts that undermine [its order]".[22] Furthermore, *Shari'a* is a "lawgiver". In this sense, *Shari'a* appears "incompatible" with other entities such as the state, "a particular modern creature that fulfils fairly well-defined functions of governance and dominance".[23]

Despite many efforts to comprehend the essence of *Shari'a*, no definitive meaning is accessible to human comprehension.[24] The major sects in Islam, *Sunni* and *Shia,* agree that the *Qur'an* and *Sunnah* are the primary sources of *Shari'a*.[25] However, the two sects have independently developed a distinct feature called *fiqh*, which reflects their differing interpretations of *Shari'a.*[26] Consequently, Islamic jurisprudence, which is derived from *Sunni* theology, is interpreted differently from *Shia* teachings.[27] Multiple comments and summaries of further Muslim jurists also follow the various interpretations of doctrinal readings in *Sunni* and *Shia* jurisprudence. Simultaneously, the scope of *Shari'a* expands to encompass *fatwas* issued by a qualified Muslim jurist known as a *mufti* to interpret a particular aspect of *Shari'a* and address inquiries from individuals, rulers, or *Shari'a* courts. Such *fatwas* have been collected and documented[28] in extensive volumes. *Shari'a,* with its vast expanse of meaning and indefinite scope, renders it impossible to visit the library and read a single comprehensive book on *Shari'a.*

It is important to note that the definition of *Shari'a* varies considerably among individuals and across different regions of the Islamic world. For one to comprehend *Shari'a*, it is essential to consider the contextual circumstances. For instance, is it the *Sunni* or *Shia*

[18] Ibid.
[19] Esposito and DeLong-Bas (n 16).
[20] Dupret (n1) 331.
[21] Dupret, (n1) 331.
[22] Wael Hallaq, *Shari'a Theory, Practice, Transformations* (Cambridge University Press 2009) 361.
[23] Ibid.
[24] Dupret (n 1) 163.
[25]Abbas Shoman, *Masader Al-Tashari Al-Eslami* [The Sources of Rulings in *Islamic Shari'a*] (*Al-Dar Al-Taqafia* Publication 2000) 35; Mohammad Mozafari, 'The Primary Sources of Shia Jurisprudence' (2015) 35(3) Moja Pari 143,143.
[26] See generally, Muhammad Al-Dhahabi, *Al-Shari'a Al-Islmaia: Dirasa Muqaranat Bayn Madhahib AL-Sunnah Wa Al-Shia'* [Islamic *Shari'a:* A Comparative Study Between Islamic Jurisprudence in *Sunni* and *Shai*] (*Whaba* Publication 2012).
[27] Ibid.
[28] Dupret (n 1) 181.

perspective? Does it align with the *Hanfai* or *Hanbali* school of thought? Throughout history, the interpretation of *Shari'a* has varied based on different geographical and historical circumstances. The position of *Imam* Ibn-Malik may vary compared to the perspective of *Imam* Al-Shafi. Similarly, *Shar'ia* in the Ottoman Empire differs from the *Wahhabi* doctrine.

1.3 *Shari'a* and *Fiqh*

Islamic law or Islamic jurisprudence is a term used commonly in Islamic legal literature. It is an umbrella term that encompasses the entire Islamic moral and legal system, including the fundamental sources of *Shari'a* and the method employed by Muslim jurists to implement *fiqh*.[29] In the Islamic setting, there is an argument that *Shari'a* encompasses all divine teachings concerning beliefs, morality, values, and conduct, mainly established in the *Qur'an* and *Sunnah.*[30] *Fiqh* is the knowledge of practical legal rulings derived from evidence provided in the *Qur'an* and *Sunnah*.[31] Muslim jurists issue these legal judgments to enable Muslims to maintain a close relationship with their Lord.[32] Shoman notes that *Shari'a* is a manifestation of divine teachings transmitted to people through revelation.[33] In contrast, *fiqh* refers to Muslim jurists' efforts to establish legal rulings grounded in *Shari'a* sources, whether real or hypothetical.[34] Hence, there is a distinction between *Shari'a* and *fiqh;* they are not synonymous in Arabic or among Muslim jurists.[35]

The *Qur'an* and *Sunnah* have been accepted as the primary sources of *Shari'a.*[36] This is because the *Qur'an* and *Sunnah* are regarded as legitimate sources derived from divine revelation.[37] However, following the Prophet's death, the Muslim Caliphs were confronted with novel systems, cultures, and behavioural patterns.[38] They found themselves without explicit guidance from the *Qur'an* or instructions from the Prophet to cope with these new situations and matters.[39] Therefore, Muslim jurists established comprehensive systematic methods to address the emerging challenges,[40] including *ijma* (consensus), *qiyas* (analogical reasoning), *urf* (custom), *aql* (intellect), *istihsan* (consider something good), and *aqual al-shabah* (report of companions of Muhammad).[41] Such sources are known as *fiqh* [42]and should not be confused with sources of divine revelation, namely the *Qur'an* and *Sunnah*.

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[29] Dupret (n 1) 202.
[30] Suliman Al-Ashqar, *Nhue Thaqafah Islamiah Asilah* [Towards an Authentic Islamic Culture] (4th edn, *Dar Al-Nafees* for Publishing and Distribution 1994) 179, Nadia Al-Omari, *Adwa Ala Al- Thaqafah Al-Islamiah* [Lights on Islamic Culture] (9th edn, *Al-Rasalah* for Publication 1986) 114.
[31] Ibid.
[32] Ibid.
[33] Shoman (n 25) 6.
[34] Abdal-Haqq (n 3) 36.
[35] Bilal Philips, *The Evolution of Fiqh: Islamic Law and the Madh-Habs* (International Islamic Publishing House 2006) 12
[36] Shoman (n 25) 35; Mozafari (n 25) 143.
[37] Philips (n 35) 13.
[38] Ibid 46.
[39] Ibid.
[40]Shoman (n 25) 85.
[41] Ibid.
[42] Ibid.

Esposito and Delong-Baz argue that the *Qur'an* and *Sunnah* are the primary foundations of *Shari'a*.[43] Padela divides *Shari'a* sources into two distinct types: "material sources" and "formal sources".[44] The material sources are the *Qur'an* and *Sunnah*, while the formal sources are derived from the scholar's endeavours to uncover *fiqh*. The formal sources are categorised as *ijma* and *qiyas.* Philips also agrees with Esposito, Delong-Baz, and Padela's argument that the *Qur'an* and *Sunnah* represent the fundamental pillars of *Shari'a*. Further, Al-Jaman classifies *Shari'a* sources into two categories: a) the divine source, which comprises the *Qur'an* and Prophetic tradition, and b) the supplementary sources, namely *ijma* and *qiyas*.[45] [46]

1.4 Primary Sources of *Shari'a*

1.4.1 The *Qur'an*

The *Qur'an* is the holy book of Muslims and the very word of God.[47] The *Qur'an* was revealed to the Prophet Muhammad through the angel Gabriel over a period of 23 years.[48] There are 30 chapters and 6326 verses in the *Qur'an*.[49] The *Qur'an* encompasses many texts that address a wide range of topics. These verses primarily address worship, Islamic faith, and religious obligations. The *Qur'an* also contains numerous moral and ethical principles, as well as legal rulings regarding criminal and civil matters. Reinhart maintains that "its significance is chiefly that the *Qur'an* is an unparalleled window into the moral universe" and "it is a source of knowledge in the way that the entire corpus of legal precedent is for the common law tradition: 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".[50]

1.4.2 The *Sunnah*

Sunnah is the second primary source of *Shari'a*. It refers to the traditions and way of life of the Prophet and includes all the Prophet's sayings, actions, gestures, and silent affirmations. Hasan notes that *Sunnah* is derived "from … the word, deed, and tacit approval of the Prophet."[51] The relationship between *Sunnah* and the *Qur'an* can be categorised into three primary forms:[52] a) *Sunnah* reiterates and emphasises what is already mentioned in the *Qur'an*; b) *Sunnah* explains the teachings of the *Qur'an;* and c) *Sunnah* provides additional teachings that are not explicitly stated in the *Qur'an*.[53]

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[43] Esposito and DeLong-Bas (n 16) 32.
[44] Aasim Padela, 'Islamic Medical Ethics: A Primer' (2007) 21(3) Bioethics 169, 175.
[45] Muhammad Al-Jaman, *Al-Sunnal Al-Nabawi'a Wa Malantuh* [The *Sunnah* of The Prophet and its Status in *Shari'a*] (King Fahd Complex for Publication 2012) 13.
[46] *Ijma* and *qiyas are* the main supplementary sources in *Sunni* jurisprudence.
[47] John Burton, *The Collection of the Qur'an* (Cambridge University Press 1977).
[48] Aasim Padela (n 44) 175.
[49] Ibid.
[50] Reinhart Kevin, 'Islamic Law as Islamic Ethics', (1983) 11(2) Journal of Religious Ethics 186, 189.
[51] Ahmed Hasan '*Sunnah* as A Source of *Fiqh*' (2002) 39(1) Islamic Studies 3, 7.
[52] Mohammad Kamali, *Principles of Islamic Jurisprudence* (Cambridge 2003) 47.
[53] Ibid.

Since *Sunnah* was recorded after the Prophet's death, it is critical to determine when its legitimacy as a primary source in *Shari'a* began.[54] The legitimacy of the Prophet's *hadiths* as a trustworthy source has been the subject of intense scholarly controversy.[55] Some scholars, notably Schacht, claim that the Prophet's *Sunnah* gained legal merit during the Umayyad Caliphate period (7th century).[56] However, other scholars claim *Sunnah* terminology was "applied by the Prophet as a legal term containing what he said, did, and consented to".[57]

This debate is reasonably simple for two considerations. The *Qur'an* establishes the Prophet's legitimate authority.[58] Several verses of the *Qur'an* emphasise that the Prophetic statements are a source for legislation in *Shari'a* and should be adhered to. In the *Qur'an*: "He who obeys the Messenger (Muhammad), has indeed obeyed God"[59] and 'O you who have believed, obey *Allah* and obey the Messenger".[60] Al-Alwani maintains that *Sunnah* "can stand alone as a source of legislation… upon closer examination, traceable to the universals outlined in the *Qur'an* itself."[61] *Sunnah* is the method by which God's laws are clarified, in the *Qur'an*: "judgement rests with none but God"[62] and "We have bestowed from on high upon you, step by step, this divine writ, to make [Muhmmad] everything clear".[63]

Furthermore, it would be difficult to claim that Muhammad, the most prominent figure in Islam, was not perceived as a significant authority for legal and moral teachings from the inception of Islam. The *Qur'an* notes: "Nor does he speak from [his own] inclination, it is not but a revelation revealed, taught to him by one intense in strength [God]… And he [God] revealed to His Servant [Mohammed] what he revealed".[64] As Muhammad is a source of divine revelation, his *Sunnah* serves as a divine discourse that supplements the *Qur'an.*[65] During the Prophet's lifetime, there was considerable interest in collecting and

[54] The matter of legitimacy does not arise in the context of the *Qur'an* since the *Qur'an* is the divine word of God and the holy book that was revealed to Muhammad through revelation. For Muslims, no single verse can be doubted or further examined in its narration since it was revealed through revelation. The version of the *Qur'an* remains consistent across the Muslim world due to the belief that the *Qur'an* is of divine origin. The structure of its chapters is believed to have been guided by divine instructions through the Prophet. Thus, the legitimacy of the *Qur'an* began with the emergence of Islam and its revelation to Muhammad. See Ibn-Hazm (n 8) 85; Said Ramadan, *Islamic Law: Its Scope and Equity* (1st edn, P.R. McMillan Limited 1961) 31; Al-Qitan (n 13) 39.
[55] Badawi (n 2) 4.
[56] For more details of Schacht's arguments, see generally Joseph Schacht, *The Origan of Muhammadan Jurisprudence* (Oxford University Press 1950); see also Joseph Schacht, 'Pre Islamic Background and Early Development of Jurisprudence' in Wael Hallaq (ed), *The Formation of Islamic Law* (Routledge 2004) 28-57; Wael Hallaq, 'The Authenticity of Prophatic Hadith: A Pseudo-Proplem' (1999) 89 Studia Islamica 75.
[57] Ramadan (n 54) 33.
[58] Al-Jaman (n 45) 15.
[59] *Sura Al-Nisa.*80.
[60] *Sura Al-Nisa.*59.
[61] Taha Al-Alwani, 'The *Qur'an* as Creative Source and the *Sunnah* as Practical Clarification' in *Reviving the Balance: The Authority of the Qur'an and the Status of the Sunnah* (Nancy Roberts ts, International Institute of Islamic Thought 2017) 56.
[62] *Sura Al-An'am.*57.
[63] *Sura Al-Nahl.*89.
[64] *SuraA Al-Najm.*4,5,6,11.
[65] Al-Alwani (n 61) 56-76.

documenting *Sunnah*.[66] However, the Prophet prevented his companions from collecting his statements. Since Islam was still in its infancy, the Prophet was concerned that Muslims might confuse the *Qur'an* with *Sunnah*.[67] [68]

1.5 Sources of *Fiqh*

1.5.1 *Ijma* (Consensus)

Ijma is the consensus of all Muslim jurists on the moral or legal status of a specific action or practice.[69] The practice of *ijma* enables Muslim scholars to formulate judgements on novel issues not explicitly addressed in the primary sources of *Shari'a* by interpreting certain *Qur'anic* or *hadith* teachings.[70]

There has been considerable debate regarding who is in consensus and to whom their agreement is binding. In other words, should the binding consensus occur within a school or encompass the entire *ummah* (Islamic nation). The prevailing perspective is that *ijma* constitutes the agreement of qualified Muslim jurists at a specific time "after the death of the Prophet, on a legal matter".[71]

1.5.2 *Qiyas* (Analogical Reasoning)

Qiyas is a process of logical analogy that involves comparing *Qur'anic* and *Hadith* teachings, adapting an existing concept or rule to a novel situation and new conditions to generate a new ruling.[72] The original meaning of *qiyas* is "to compare" or "to measure", or "to see if it fits.[73]

In practice, *qiyas* relies on applying a specific rule derived from existing texts in the *Qur'an* or *Sunnah,* whereby analogous factors or conditions that influenced the decision in the first case may also apply to the second case at hand. For instance, when a Muslim scholar follows the method of the rule of (A), he arrives at a specific rule of A that has been established by considering the elements and components (q) and (q). When a problem (B) arises, the Muslim scholar must first determine whether any elements are similar or equivalent to (q), enabling him to rule on (B) by analogy with (A).

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[66] Hakim Al-Shamiri, '*Mrahil Tadwin Al-hadith Al-Nabawii Wa Dafe Shibh Al-Mustashriqeen*', [Stages of Collecting and Writing *Hadiths* and A Responses to Allegation of Orientalists] (*Nabawi Warisan* Confernce VIII, Malaysia, 5-6 October 2022) 676.

[67] Ibid 677,

[68] For more discussion about this matter, see Wael Hallaq, in his book, *A History of Islam Legal Theories,* poses a significant inquiry "To what extent, if at all, did first-century jurisprudence draw on these sources [Sunnah]?" The author presents a survey for solid proof that the legitimacy of the *Sunnah* had been established by the mid-first century. During this time, the candidates for the Islamic Caliphate, Uthman and Ali, were asked if they could adhere to the *Sunnah* of the Prophet. Thus, although the legitimacy of the Prophet's *Sunnah* was recognised in the early days of Islam, it was officially documented in collections through the Umayyad era. See, Wael Hallaq, *A History of Islam Legal Theories* (Cambridge University Press 1997) 10; Al-Shamiri (n 66) 679.

[69] Padela (n 44) 175-176.

[70] Abdul-Rahman Al-Shulhoub, *Al-Qanun Al-Ddusturiu Li Al-Mmlaka Al-arbia Al-Saudia: Dirasa Muqarana Bayn Al-Shari'a Wa Al-Qanun* [The Constitutional System of the Kingdom of Saudi Arabia: A Comparative Study Between Islamic *Sharia'a* and Positive Law] (King Fahd Library Press 2005).

[71] Ahmed Yacoub, *The Fiqh of Medicine* (Ta-Ha Publishers Ltd 2001) 25.

[72] Al-Shulhoub (n 70).

[73] Yacoub (n 71) 25.

Multiple methodologies exist for applying *qiyas* to a particular matter. Some Muslim scholars restrict the scope of *qiyas* and enforce it, whereas others expand the criteria and the application of *qiyas*. The various methodologies that regulate *qiyas* to reach a ruling explain significant differences in decisions throughout various Muslim nations on analogous issues.

1.6 Islamic Jurisprudence Schools

As previously stated, *ijma* and *qiyas* are considered sources derived from *fiqh*. The validity of these sources in formulating moral and legal rules entails an implicit acknowledgement of *Shari'a* source's insufficiency in addressing emerging and novel challenges. In daily life, issues will inevitably arise in cases where there are no explicit texts in *Shari'a* or *fiqh* sources. For instance, electronic signatures, smart contracts, and surrogacy represent contemporary challenges. Such novel issues require an Islamic opinion regarding their alignment with *Shari'a* principles. The role of Islamic jurisprudence, thus, is to formulate rules derived from *Shari'a* and *fiqh* sources to address contemporary issues.

Islamic jurisprudence essentially signifies profound comprehension and knowledge of a subject.[74] It refers to intellectual interpretations for an area of study and is, fundamentally, the development of the entire body of Islamic law. Reinhart states that Islamic jurisprudence integrates the four sources—the *Qur'an, Sunnah*, *ijma*, and *qiyas*—with the relevant issue to produce a decision.[75]

Following the death of the Prophet, the foundational phase of Islamic jurisprudence commenced. Islamic jurisprudence evolved gradually via many phases.[76] Throughout the evolution of Islamic jurisprudence, Muslim jurists have employed diverse methodologies to apply their theories and legal principles to the numerous legal challenges faced by the Muslim community. These diverse methods of analysing *Shari'a* and *fiqh* sources have generated numerous Islamic legal, moral, and ethical theories. [77] Hallaq states that Islamic jurisprudence "means that which is followed, and more specifically, the opinion or idea one chooses to adopt."[78] As a result, various Islamic jurisprudence schools, *Sunnah* and *Shia*, have represented the most dominant doctrines. The schools of *Batiniyya, Qadiriyya*, and *Zaidiyyah* are regarded as minority schools.[79] Certain schools, such as *Alzahiri* and *Althawri*, are no longer extant.[80]

During the 8th and 9th centuries, early *Sunni* thinkers established the four schools of Islamic jurisprudence.[81] After the founder's death, scholars from the four classical schools developed their respective philosophies. The four schools are *Hanafi, Maliki, Shafi,* and

[74] Al-Shulhoub (n 70).
[75] Kevin (n 50) 192.
[76] For more information, see generally, Philips (n 35) 14,46.
[77] Ibid.
[78] Hallaq *A History of Islam Legal Theories* (n 68) 150.
[79] Afshin Ellian, 'The Islamic School of Law: Evolution, Devolution, and Progress' (2007) 50(4) Journal of the Economic and Social History of the Orient 571.
[80] Ibid.
[81] See generally, Philips (n 35) 53,60.

Hanbali.[82] The four classic *Sunni* schools assert that Islamic jurisprudence decisions must be derived from one of *Shari'a* sources, mainly the *Qur'an* and *Sunnah.* The jurists of Islamic jurisprudence schools regard *ijma* and *qiyas* also as "fundamental" sources in Islamic jurisprudence.[83] Despite the consensus among the four *Sunni* schools about the sources of *Shari'a*, substantial differences remain in their legal and moral rulings. The various methods employed by jurists may explain the differences in their decisions on a particular subject.[84] The diverse methods employed result in significant disparities in perspectives and views among the four schools of Islamic jurisprudence.

Such division in opinions is a natural and unavoidable consequence of various methodologies in comprehending and interpreting *Shari'a* sources. What matters is that the diverse views and arguments proposed by Muslim jurists strive to clarify God's ultimate intentions regarding the subject matter through varied methodologies and approaches.

Many Muslims now believe that the schools of Islamic jurisprudence are infallible and that individuals must adhere to a specific school.[85] The primary objective of Islamic jurisprudence is to address contemporary issues by formulating moral and legal rulings that align with the teachings of *Shari'a*. Al-Juwayni asserts that such decisions are based on suppositional information, not definite knowledge.[86] Al-Shafi also maintains that rendering judgments in the Islamic jurisprudence school involves attaining relative certainty, as absolute certainty about hidden subjects is solely within God's domain. [87] Consequently, one can deduce that Islamic jurisprudence is the body of knowledge founded on hypothetical reasoning to reveal the concealed. Hence, such perspectives in Islamic jurisprudence are the product of human endeavour to discover God's will and are arguably subject to human error. If the perspectives of Muslim jurists are fallible, how can one claim that persons should adopt a closed mindset and fanaticism towards a specific Islamic jurisprudence school? The Prophet's *hadiths* are the only infallible views requiring faithful compliance with their rulings. Aside from the prophetic teachings, all other perspectives and views relate to jurisprudence and the endeavour to interpret the meaning of *Shari'a* sources.

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[82] Ibid 72,77,8892

[83] Philips (n 35) 99.

[84] For instance, the approach used by a school to interpret the meanings of words in the *Qur'an,* including the adherence to literal versus figurative interpretations, shared literal meanings or grammatical meanings; the criteria for accepting *Hadith* narrations; the legitimacy of *ijma;* the acceptability of particular principles, and the methodology of *qiyas.* For more information, see Philips (n 35) 99.

[85] Philips (n 35) 135.

[86] See generally the discussions of Al-Juwayni about the matter of *tarjih* (weighting) the process of reviewing the opinions *of* jurists if there are various legal perspectives on an issue. Abd-Al-Malik Abdullah Al-Juwayni, *Alburhan fi Usual Alfiqh* [The Proof in Roots of Islamic Jurisprudence] (Abdul-Malik Abo-Al-Ma'ali ed, vol 2 *Dar Al-Kutb Al-Elmia* 1997) 175

[87]Generally, see Al-Shafi's discussions concerning *ijtihad* (the process to deduce a legal ruling) and *Qiyas* (analogical reasoning) which indicates that developing a jurisprudential ruling on various matters requires attaining a degree of possible certaint. Muhammad Idris AL-Shafi, *Al-Risala* [The Letter: The Book of the Treatise on the Principles of Islamic Jurisprudence] (Ahmad M Shaker ed, *Mustafa Al-Bablyi Wawladuh*1938) 476-502.

1.7 What *Shari'a* Stands For: *Shari'a* Values

Summarising and reducing the entirety of *Shari'a* teachings into a few fundamental values is a challenge. However, for the thesis's purposes, this section will provide essential insights into specific *Shari'a* values that will be crucial for the debates in the subsequent chapters. These values encompass the five rulings and the five necessities in *Shari'a*.

1.7.1 The Five *Ahkams* (Rulings)

In Islam, every conduct has a moral value, enabling Muslims to receive either reward or punishment in the afterlife. Therefore, according to the five Islamic values, a Muslim should determine whether the deed will have any virtue or negative merit before performing or refraining from any action.

In *Shari'a*, there is a normative premise: *everything is originally permissible*.[88] This jurisprudence maxim suggests that God bestows liberty of action.[89] This ruling applies to all conduct and can only be overturned if there is solid *Shari'a* evidence to prove the contrary.[90] Such *Shari'a* proof aims to achieve many purposes: to deter and prohibit the behaviour, with penalties for any violations; to encourage compliance with the act, providing rewards for doing so; to obligate the behaviour, imposing punishments for non-performance, and encouraging abandonment of the act while offering rewards for abstaining.

Faruki argues that the fundamental premise regarding the *original permissibility* of *everything* can be redirected to alternative rulings due to "ignorance, greed, laziness, or neglect" as motivating factors for the inherent human propensity to engage in actions that cause harm to oneself or others.[91] Santillana also notes that it is essential to conduct a comprehensive evaluation of every action and behaviour and that restrictions should be established to promote benefits or prevent harm, whether it relates to an individual's interest or the welfare of the entire community.[92] According to Al-Bar and Chamsi-Pasha, Islamic teachings stress the importance of considering the consequences of our actions. Muslims should refrain from engaging in behaviour if there are anticipated negative or detrimental consequences.[93]

Therefore, Islamic jurists attempt to determine the morality and legality of an action by evaluating its moral status based on five fundamental rulings. The concept of "the five values", as defined by Faruki, refers to categorising all human actions and interactions based on their moral value to determine the extent of their moral righteousness or

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[88] Muhammad Al-Rahili, *Al-Qawad Al-fiqhia Wa Tatbiqatuha Fi Almadhib Al-Arbaea* [The Jurisprudential Maxims and their Applications in The Four Islamic Schools of Thought] (vol 1, 1st edn, *Dar Al-Fikr* 2006) 190.
[89] Ibid.
[90] Kemal Faruki, '*AL-Ahkam-AL-Khamsah*: The Five Rules', (1966) 5(1) Islamic Studies 43, 50.
[91] Ibid 44.
[92] David Santillana, 'Law and Society' in Thomas Arnold and Alfred Guillaume (eds) *The Legacy of Islam* (Clarendon Press 1931) 288.
[93] Mohammed Al-Bar and Hassan Chamsi-Pasha, *Contemporary Bioethics Islamic Perspective* (Springer International Publishing 2015) 116.

wrongfulness in *Shari'a* principles.[94] According to Reinhart, Islamic jurists categorise all human activity into five classifications.[95]

The following five categories contain the entirety and fundamental range of moral evaluation in *Shari'a*. [96]

a) *Wajib* (Obligatory): *Shari'a* unequivocally mandates the performance of an act. Thus, a person who omits to do an action will be religiously sinful and punished.[97]
b) *Haram* (Prohibited): *Shari'a* firmly commands refraining from performing a particular act. Thus, someone who performs an act will be religiously sinful and punished.[98]
c) *Mustahb* (Recommended): *Shari'a* indecisively commands to perform an act. Thus, a person who performs an act will be praised and remunerated, while someone who omits to perform an act will not be considered sinful or punished.[99]
d) *Makruh* (Discouraged): *Shari'a* indecisively commands to abstain from performing an act. Thus, a person who performs an act will not be considered sinful or punished, while someone who omits to perform an act will be praised and remunerated.[100]
e) *Mubah* (Permissible): *Shari'a* neither commands the performance of an act, nor commands to abstain from performing an act. In this sense, *Shari'a* does not impose specific moral obligations. Thus, a person who decides to perform an act or abstain from doing so will neither be praised and remunerated nor commit a religious sin nor be punished.[101]

These primary rulings are mainly mentioned in the *Qur'an*, with additional clarification provided in the *Sunnah*. Nevertheless, several rulings mentioned in the *Qur'an* and *Sunnah* have various meanings.[102] In some cases, the matter in question is not explicitly addressed in the sources of *Shari'a*. Hence, the mission of Muslim jurists is to perform *ijtihad,* deducing a legal ruling in a particular matter based on *Shari'a* sources. *Ijtihad* is the process of independent judgment, combined with knowledge of the *Qur'an* and *Sunnah,* to determine a legal decision in a specific matter.[103] This knowledge requires jurists to consider the context, which entails the actual context of the matter in the *Qur'an*, all additional relevant statements in the *Qur'an*, statements in *hadiths*, and potential *ijma* of Muslim scholars.[104] [105]

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[94] Faruki (n 90) 43.
[95] Kamali, *Principles of Islamic Jurisprudence* (n 52) 195.
[96] Muhammad Al-Hassan Al-Hajjawi, *Al-Fikr Al-Sami Fi Tarikh Al-Fiqh Al-Islami* [Supreme Thought in The History of Islamic Jurisprudence] (Ayman Shaban ed, vol 1, 1st edn, 1995) 116.
[97] For instance: if someone borrows money from another person, there is an obligation to fulfil the debt
[98] For instance, murder.
[99] For instance, a donation to a charity.
[100] For instance, eating and drinking while a person is standing up.
[101] For instance, the decision to marry or remain single.
[102] Faruki (n 90) 44.
[103] Muhammad Al-Zuhaili, *Al-Wajiz Fi Usul Al-Fiqh Al-Islami* [The Summary of The Fundamentals of Islamic Jurisprudence] (vol 2, *Dar Al-Khair*, 2006) 275.
[104] Ibid 313.
[105] For instance, a Muslim jurist should consider the verses of the *Qur'an*, relevant material found in *hadiths*, the logical and linguistic contexts in which they develop, the specific occasion on which the verses were revealed, and all the accompanying circumstances. In other words, a specific *Shari'a* text is never considered alone when addressing a

1.7.2 *Maqasid Al-Shari'a* (The Higher Objectives of *Shari'a*)

In Islamic jurisprudence, upholding *maqasid al-shari'a* is crucial when making a legal or moral determination regarding an action. Ariff and Rosly assert that *maqasid al-shari'a* is crucial for establishing the legitimacy and legality of Islamic activity.[106] *Maqasid al-shari'a* signifies objectives, intentions, and principles underpinning the basis of *Shari'a* rulings.[107] The scope of *maqasid al-shari'a* encompasses all activities, such as family matters, financial transactions, donations, and punishments, aimed at fulfilling the worldly interests of people, including physical, psychological, mental, and spiritual needs.[108] Some Muslim scholars use the term "people's interests" as a substitute for *maqasid al-shari'a.*[109]

Al-Shatibi is a prominent Islamic thinker known for his contributions to the theory of *maqasid al-shari'a*. Al-Shatibi maintains that the doctrine of *maqasid al-shari'a* focus on that the interest of human well-being, and the objectives of Islamic rulings are interrelated and that any interpretation of the principles of *Shari'a* must be based on what is termed *maslaha* (benefits) of humans, and that one's understanding of the relevant *Shari'a* texts and the conclusions one draws from them must be based on the principle that the objectives of such texts are to achieve benefits and prevent harm to people.[110] Further, Al-Shatibi maintains that *maqasid al-shari'a* can be viewed from two perspectives. Firstly, *maqasid al-shari'a* derive from *al-shar'e* (the creator of *Shari'a*, God) and must be fulfilled by a *mukallaf* (a person who is morally responsible before God). Secondly, *maqasid al-shari'a* must be determined by the *al-shar'e* (the creator of *Shari'a*, God) rather than by individual preferences and wishes. [111]

Al-Ghazali is also recognised for his contributions to the establishment of the theory of *maqasid al-shari'a,* and he states that "*maqasid* is fundamentally an expression of obtaining benefits or avoiding harm [to people]".According to Al-Ghazali, *maqasid* is not defined by human desires and intentions; instead, it refers to assisting mankind to uphold the purpose

particular issue. However, it is undeniable that every *Shari'a* text is influenced by various circumstances that enable the jurist to determine the most appropriate ruling for the matter at hand. In addition, during the process of *ijtihad,* a jurist must assess if a particular conduct complies with Islamic norms and principles and whether it is deemed virtuous or sinful based on the criteria of righteous and evil actions. Hence, all indications in *Shari'a* texts are considered genuine moral knowledge that enables a Muslim jurist to comprehend God's ultimate intention and objective in human actions. See Rafat Al-Wazna, 'Islamic Law: Its Sources, Interpretation, and the Translation of It into Laws Written in English' (2016) 29 Int J Semiot Law 251, 255; Kevin, (n 50) 192

[106] Mohammad Ariff and Saitful Rosly, 'Islamic Banking in Malaysia: Unchartered Waters' (2011) 6(2) Asian Economic Policy Review 301, 304.

[107]Ahmad Al-Raissouni, *Nazariat Al-Maqasid Eind Al-Imam Al-Shatibi* [The Theory of *Maqasid Al-Shari'a* (Objectives of *Shari'a*) According to Al-Shatibi] (2nd edn, *Al-Dar Al-Alamia* 1992) 6-16.

[108]Ibid 8, 235.

[109] See Muhammad Afridi, '*Maqasid Al-Sharia* and Preservation of Basic Rights Under the Theme: Islamic and its Perspectives on Global and Local Contemporary Challenges' (2016) 4 Journal of Education and Social Sciences 247, 274.

[110] See generally the discussion of Al-Shatibi about theory of *maqasid* [*al-shari'a*] in Ibrahim Musa Abu-Ishaq Al-Shatibi, *Al-Muwafaqat Fi Usual Al-Shari'a* [The Reconciliation of the Fundamentals of Islamic Jurisprudence (Mashhour bin Hassan Al-Salman ed, vol 2, 1st edn, *Dar Ibn Afan* 1997) 7-17.

[111] Ibid vol 2, 7.

of *Shari'a,* and the objective of *Shari'a* is to preserve the interests of humanity, to safeguard religion, soul, mind, progeny, and property. [112]

According to Ibn-Ashor, the essence of *maqasid al-shari'a* contains two central values. The first value is *jalb almasalah* (obtaining benefits and welfare), and the second is *dar'a almafasd* (preventing harm and evil) to mankind.[113] Ibn-Ashur states that these two central values encompass the promotion of welfare, the fight against corruption, the prudent use of land and resources, and the improvement of living standards.[114] Hence, the ultimate objective of *maqasid al-shari'a* is to promote welfare and alleviate suffering and hardship in human existence by fostering cooperation, mutual support, and enhancing individual conduct.[115] In this sense, while *maqasid al-shari'a* safeguard the welfare and benefits of individuals and prevent harm and evil to people, *maqasid al-shari'a* also promote the growth and fulfilment of human existence on earth.[116]

Muslim jurists classify *maqasid al-shari'a* into three categories: *dharuriyyaat* (necessities), *hajiyat* (needs), and *tahsinyat* (complementary).[117]

a. Necessities

Muslim scholars identify five necessities, owing to their crucial importance in human existence. The five necessities are religion, life, mind, progeny, and property.[118] Al-Ghazali argues that any action that ensures the safeguarding of these five necessities serves both individual and public interest and is beneficial and desirable. [119] In contrast, any damage or harm to the five necessities harms both individual and public interests and must be eradicated.[120] Al-Ghazali further states that a lack of regard for the five necessities or a failure to appreciate them will result in significant suffering and harm in this life, as well as potential punishments in the afterlife.[121] Similarly, Al-Shatibi asserts that the objective of *maqasid al-shari'a* is to safeguard these five necessities, which are fundamental to worldly and religious existence. [122] *Shari'a* teachings protect the five necessities in two ways: first, by ensuring their establishment, and second, by ensuring their maintenance.[123]

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[112]Muhammad Abu-Hamid Al-Ghazali, *Al-Mustasfa Min Elm Al-Usual* [The Clarified in Legal Theory of Islamic Jurisprudence] (Muhammad Al-Shafi ed, *Dar Alkutb AlElmia* 1993) 174.

[113] Muhammad Ibn-Ashur, *Maqasid Al*-Sahri'ah *Al-Islmaia* [The Higher Objective of *Shari'a*] (Muhammad A Ibn-Al-Khoja ed, vol 3, Ministry of Endowments and Islamic Affairs of Qatar 2004) 165; See also the conclusion at vol 2, 562.

[114] Ibid.

[115] Houssem Bedoui and Walid Mansour, 'Performance and *Maqasid Al-Shari'ah's* Pentagon- Shaped Ethical Measurement' (2014) 21(3) Science and Engineering Ethics 555; 560.

[116] Ibid.

[117] See generally, Al-Raissouni (n 107) 152, Al-Shatibi (n 110) vol 2, 17; Al-Ghazali (n 112) 174- 175; Ibn-Ashur (n 113) vol 2, 563.

[118] Al-Raissouni (n 107) 152; Al-Ghazali (n 112) 174; Al-Shatibi (n 110) vol 2, 20; Ibn-Ashur (n 113) vol 2, 564.

[119] Al-Ghazali (n 112) 174.

[120] Ibid.

[121] Ibid.

[122] Al-Shatibi (n 110) vol 2, 17.

[123] For example, to safeguard the soundness of the intellect, God forbids substances that corrupt or weaken mental faculties, such as wine. God established penalties to distance persons from wine to guarantee the upkeep and preservation of the mind. See some examples in Al-Ghazali (n 112) 174.

Bedoui and Mansour argue that the government must protect the five necessities by enforcing laws applicable to all governmental and non-governmental bodies.[124] This is because, as Kamali states, the five necessities are considered vital "to survival and spiritual wellbeing of individuals, so much so their destruction or collapse will precipitate chaos and collapse of normal order in society". [125] Idid and Hashi also assert that the "warp and weft of *Shari'a*" is intended to uphold and sustain these fundamental necessities, making the legal legitimisation of any necessary protection measures for such necessities desirable. [126]

In applying the five necessities while making Islamic decisions, Muslim jurists, guided by the values of *maqasid al-Shari'a*, ascertain a ruling on an activity that can safeguard the five necessities. The rule may constitute a command to perform an action or a ban against it. Furthermore, prohibited conduct may be modified to another ruling in the five scales of rulings based on the existence of a necessity. Put simply, under specific circumstances, *maqasid al-Shari'a* mitigates the prohibition of an activity deemed forbidden due to necessity. Hence, the necessity permits performing what is otherwise unlawful in *Shari'a.* However, the relaxation of a ban will be limited entirely to the degree necessary to alleviate the suffering.[127]

b. Needs

Needs refer to the necessary benefits, and their neglect results in hardship for individuals or society; nonetheless, it does not entirely disrupt the interest of daily life on Earth.[128] Consequently, needs are not considered mandatory or fundamental, and human interests could exist without them. [129] Kamali states that "needs" mitigate harshness and suffering in contexts where such conditions do not threaten the regular operation of life.[130] Many needs exist, including but not limited to exemptions related to matters of worship.[131]

c. Complementary

Complementary describes benefits that their manifestation aids in enhancing and attaining desired outcomes.[132] Complementary aims to improve individuals' behaviour and guide

[124] Bedoui and Mansour (n 115) 563.
[125] Mohammad Kamali, '*Maqasid Al-Shariah*: The Objectives of Islamic Law' (1999) 38(2) International Institute of Islamic Thought 193, 195.
[126] Said Idid and Abdurezak Hashi, 'Foundation of Islamic Antidrug Abuse Education'(2012) 27(12) American Journal of Islamic social science 1, 7-8.
[127] An example is the obligation of fasting during Ramadan, which is one of the five Pillars of Islam. Nonetheless, fasting must be terminated for individuals unable to fast due to a genuine concern of illness or significant weakness caused by fasting.
[128] Al-Ghazali (n 112) 175; Al-Shatibi (n 110) vol 2, 21.
[129] Ibid.
[130] Kamali, '*Maqasid Al-Shariah*: The Objectives of Islamic Law' (n 125) 196
[131] For instance, travellers are permitted to abstain from fasting during Ramadan and may shorten the five daily prayers. For further examples of *Haje'at* (Needs), see Al-Ghazali (n 112) 175; Al-Shatibi (n 110) vol 2, 21; Kamali, '*Maqasid Al-Shariah*: The Objectives of Islamic Law' (n 125) 196.
[132] Al-Ghazali (n 112) 175; Al-Shatibi (n 110) vol 2, 22

them towards perfection and ideals.[133][134] Hence, the absence of complementing elements may not undermine the living level but could induce discomfort. [135]

1.8 Conclusion

This chapter illustrates that *Shari'a* encompasses a wide range of topics and is documented in multiple volumes, making it difficult to cover or address all aspects of *Shari'a* within a single chapter.[136] This chapter also highlights that defining *Shari'a* is a challenging endeavour. The interpretation of *Shari'a* varies is influenced by multiple schools of thought and evolves over time. Nevertheless, there is a consensus among the main sects of Islam that the *Qur'an* and *Sunnah* constitute the primary sources of *Shari'a*. In this sense, *Shari'a* encompasses the complete body of Islamic teachings revealed to the Prophet Muhammad and recorded in the *Qur'an* and *Sunnah*. The corpus of Islamic rulings found in sources such as *ijma* and *qiyas* is regarded as foundational to *fiqh* jurisprudence. This is because Muslim jurists interpret and implement Islamic teachings in these sources. While *Shari'a,* derived from the *Qur'an* and *Sunnah*, is immutable and infallible, *fiqh* is not. Thus, Islamic jurisprudence views should not be regarded as infallible. The entire set of *Shari'a* and *fiqh* sources constitutes what is now recognised as Islamic law or Islamic jurisprudence.

This chapter asserts that variances in Islamic jurisprudence are inevitable. Thus, upon reviewing Islamic jurisprudence scholarship, one will encounter a multitude of views on every singular legal issue. Moreover, the development of Islamic jurisprudence is ongoing, and disparities among Muslim scholars are likely to persist.

While *Shari'a* establishes a comprehensive framework for all moral and legal matters in Islamic communities, Saudi Arabia remains one of the few Islamic countries where *Shari'a* is fully integrated into public law.[137] In Saudi Arabia*, Shari'a* is enforced as the law of the state.[138] Since this thesis examines the Saudi law regarding medical consent and the Saudi law itself is fundamentally influenced by *Shari'a*, the next chapter will address the nature of the Saudi legal system and how its structure and sources implement *Shari'a*.

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[133] Kamali, '*Maqasid Al-Shariah*: The Objectives of Islamic Law' (n 125) 197.
[134] For instance, maintaining cleanliness in physical appearance and eschewing extravagance. For further examples of *Tahsenat* (Complementary) see Al-Ghazali (n 112) 175; Al-Shatibi (n 110) vol 2, 22; Kamali, '*Maqasid Al-Shariah*: The Objectives of Islamic Law' (n 125) 197.
[135] Ibid.
[136] It must be emphasised that many *Shari'a*-related subjects remain unexplored in this chapter, such as the five Pillars of Islam, philosophical approaches underpinning Islamic law and the jurisprudential rationale for legal penalties.
[137] Abdal-Haqq (n 3) 45.
[138] Basic Law Governance Act 1992, s 1 art (1).

Chapter 2: The Nature of The Legal System of Saudi Arabia

2.1 Introduction

As discussed in the previous chapter, understanding the meaning of *Shari'a* is essential, as the legal system of Saudi Arabia, the focus of this thesis, is based on *Shari'a.* In Saudi Arabia, *Shari'a* is the law of the land.[1] Article 1 of the Basic Law of Governance Act 1992 (BLG 1992), which is regarded as the constitutional document of the state, states that "The Kingdom of Saudi Arabia is… [an] Islamic State. The Kingdom's religion is Islam, its constitution is the *Qur'an* and the *Sunnah* of the Prophet".[2] In this sense, *Shari'a* is the law of the land, and the legal system of Saudi Arabia is uniquely grounded in *Shari'a,* which serves as the country's constitution. Saudi Arabia does not have legal codes for all areas of law.[3] The courts apply the texts of *Shari'a* sources*,* including the *Qur'an* and *Sunnah,* as well as classical Islamic jurisprudence sources, directly to legal cases. Even the codified legal codes have been formulated in accordance with the principles of *Shari'a*.[4] Accordingly, there is no formal separation between *Shari'a* law and the legal system of the state.

Accordingly, this chapter aims to provide a brief overview of the nature of the Saudi legal system, which is grounded in *Shari'a*. To this end, it begins by highlighting the first official declaration by the founder of the Saudi state, King Abdul-Aziz, that *Shari'a* is the law of the state, followed by the establishment of the *Qur'an* and *Sunnah* as the constitution of modern Saudi Arabia. This chapter, then, will reference the establishment of the Council of Senior *Ulama,* acknowledging the significant impact of *Shari'a* scholars on legal matters.

Finally, the chapter concludes with an outline of the categories of legal legislation derived from *Shari'a* in the Saudi legal system.

2.2 The First Official Declaration of Adherence to *Shari'a* as the Law of the State

In 1902, King Abdul-Aziz, the founder of the Saudi state, declared that *Shari'a* constitutes the primary source for governing every aspect of life and that the ruler's authority to administer the kingdom is directly derived from *Shari'a.*[5] This declaration was formally announced during the recapture of Riyadh: "The judgement is for God and then for Abdul-Aziz".[6]

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[1] This unique relationship between *Shari'a* and the state is the result of historical factors that have contributed to the substantial influence of *Shari'a* in Saudi Arabia. Such historical reasons were crucial for preserving the state's robust religious identity, thereby maintaining the strong influence of *Shari'a* on all aspects of the country, including the legal system. See Tim Marshall, *The Power of Geography* (Elliott and Thompson Limited 2021); Gary Troller, *The Birth of Saudi Arabia:* Britain and the Rise of the House of Sa'ud (Routledge 1976).

[2] Basic Law Governance Act, 1992, s1 art (1).

[3] For more information about the legal system of Saudi Arabia, generally see Sumeyra Yakar and Emine Ensie Yakar, 'Judicial Training in Saudi Arabia: From an Uncodified to Codified System' (2024) 15(12) Religions 1586. 1-6.

[4] Ibid.

[5] Recapture of Riyadh in 1902 is mentioned in Maren Hanson, 'The Influence of French Law on the Legal Development of Saudi Arabia Author' (1987) 2(3) Arab Law Quarterly 272, 282.

[6] This phrase is a Saudi symbol for the establishment of the third Saudi state and reflects the deep belief that sovereignty belongs to God first, and then to King Abdulaziz as a leader.

Due to the Saudis' geographical location and the presence of the holy cities of Muslims, Mecca and Medina, King Abdul-Aziz had to deal with the demands of Muslims, which are far more evolved than those of the *Najdi* Bedouin (the Saudi people).[7] Thousands of Muslims gather annually for *Hajj* (pilgrimage) in the *Hijaz* region (the west of Saudi Arabia). Accordingly, in 1926, King Abdul-Aziz issued a royal decree to declare the constitution for *Hejaz* province, known as the *Al-Talimat Al-Assasiah* (Fundamental Regulations).[8] The *Hijaz* provincial document was the first legislative act in Saudi history. It included 70 articles and declared that the Islamic *Shari'a* system governed the Kingdom of Hijaz.[9] In this document, King Abdulaziz is identified as the ruler and is required to govern the kingdom according to *Shari'a*.[10] In addition, the judicial system must adhere to the *Qur'an, Sunnah*, the traditions of the companions, and the earliest devout generations.[11]

Furthermore, the *Hijaz* province document grants King Abdul-Aziz considerable authority to govern the new state. Yet, the document contains provisions that limit the King's authority. Firstly, the king has a religious duty to enforce *Shari'a* in all aspects of governance and violating *Shari'a* provisions may result in his legal disposal. Secondly, local Bedouin tribes banded together with the king to implement *Shari'a.* These *Najdi* tribes declared loyalty to God and then to the king. Therefore, with this loyalty, the king governed the new kingdom, and to maintain his power as ruler, he must maintain the loyalty of these tribes by implementing *Shari'a*.

2.3 The Declaration of Adherence to *Shari'a* in the Current Constitution of Saudi Arabia

The Kingdom of Saudi Arabia has now entered the twenty-first century, and its path of maintaining consistent legal and political roles has remained consistent in upholding its Islamic *Shari'a* heritage. The *Qur'an* and *Sunnah* are the constitution of Saudi Arabia; thus, *Shari'a* governs the state. The BLG 1929 repeatedly affirms the superiority of the *Qur'an* and *Sunnah*. Additionally, the legal system and courts shall be based on *Shari'a*. Article 1 of BLG 1929 states, "The Kingdom of Saudi Arabia is… [an] Islamic state… its constitution is the *Qur'an* and the *Sunnah* of the Prophet".[12] Article 7 also maintains that "Government in the Kingdom of Saudi Arabia derives its authority from the Book of God and the *Sunnah* of the Prophet, which are the ultimate sources of reference for this Law and the other laws of the state".[13] According to article 67: "The Regulatory authority shall be concerned with the making of laws and regulations which will safeguard all interests, and remove evil from the state's affairs, according to *Shari'a*".[14]

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[7] Hanson (n 5) 283.
[8] Abdullah Ansary, *A Brief Overview of the Saudi Arabian Legal System* (Global Lex, New York University 2008) para 3 available at https://www.nyulawglobal.org/globalex/saudi_arabia.html#_edn3 accessed 10 March 2023.
[9] Kingdom of *Hejaz* Constitution, 1926, s 1 art (2). The name of the Current Saudi Arabia was the Kingdom of *Hijaz* and *Najd*. However, the name of the state was changed to the Kingdom of Saudi Arabia by a Royal Decree in 1932.
[10] Ibid art (5).
[11] Ibid art (6).
[12]Basic Law Governance Act, 1992, s1 art (1).
[13]Basic Law Governance Act, 1992, s 2 art (7).
[14]Basic Law Governance Act, 1992, s 6 art (67).

Further, BLG 1929 maintains that courts have independent authority and are not compelled to apply any legislation that is not compatible with *Shari'a*: Article 46 states that: "The judiciary is an independent authority. The decisions of judges shall not be subject to any authority other than the authority of the Islamic *Shari'a*".[15] Article 48 also maintains that: "The Courts shall apply rules of the Islamic *Shari'a* in cases and according to the *Qur'an* and the *Sunnah*, and according to laws which the ruler decrees in agreement with the Holy *Qur'an* and the *Sunnah*".[16]

Furthermore, the Judiciary Act of 2007 also affirms adherence to *Shari'a*. According to Article 1: "Judges are independent and, in the administration of justice, they shall be subject to no authority other than the provisions of *Shari'a*".[17] Article 11 also highlights that: "The Supreme Court...monitors the implementation of Islamic *Shari'a* provisions and that laws issued by the legislative body do not conflict with Islamic *Shari'a*".[18] Additionally, several laws, such as the Criminal Procedures Act of 2013 and the Procedures in *Shari'a* Courts Act of 2013, expressly state the significance of adhering to *Shari'a*.

Technically, the Saudi legal system is dominated by political and religious authorities. The former authority is within the state's rulers, and *ulama* (*Shari'a* scholars) administer the latter institution. Hence, the legal framework has two distinct aspects: governmental and *Shari'a* authority. The first is formed by royal decrees such as legislation and regulations. Royal decrees are issued directly by the king or his officers, such as ministers. The second is centred on *Shari'a* and heavily influenced by *fatwas*. *Fatwas* are produced by *ulama* who are members of the Council of Senior *Ulama*.

2.4 The Establishment of the Council of Senior *Ulama*

The first official institutional involvement of *Shari'a* scholars in the legal system began with the establishment of the Council of Senior *Ulama* (CSU), a significant religious institution established by royal decree.[19] The CSU is a governmental Islamic religious body that encompasses religious figures from various Islamic jurisprudence schools in the state, headed by the *Mufti*.[20] All members of the CSU are appointed by the King by royal order. The council members express their views and issue *fatwas* on moral and legal matters referred to by the King. They ground their determination in *Shari'a* teachings and principles. They also offer their recommendations on determining the state's general policies.

[15]Basic Law Governance Act, 1992, s 6 art (46).
[16] Basic Law Governance Act, 1992, s 6 art (48).
[17] The Judiciary Act 2007, art (1).
[18] The Judiciary Act 2007, art (11).
[19] Royal Decree (no A/137, 1391 AH [1971]).
[20]Abdul-Rahman Al-Shulhoub, *Al-Qanun Al-Ddusturiu Li Al-Mmlaka Al-arbia Al-Saudia: Dirasa Muqarana Bayn Al-Shari'a Wa Al-Qanun*][The Constitutional System of the Kingdom of Saud Arabia: A Comparative Study between Islamic Sharia and Positive Law] (King Fahd Library Press 2005).

In the 1950s, the *Mufti* held the positions of Grand Head of the CSU and head of the Supreme Judicial Council. However, during the early 1970s, government reforms reappointed the *Mufti*, and he was separated from overseeing the judiciary.[21]

The Permanent Committee for Scholarly Research and *Ifta* is a religious institution interrelated to the CSU. The King selects the committee's members through a royal order. The committee's mission is to conduct research based on *Shari'a* for legal matters, particularly new issues.[22] For example, the committee has researched the legitimacy of test-tube babies and cosmetic surgery under *Shari'a*. The committee also issues *fatwas* in response to enquiries by government agencies such as courts and ministries. Furthermore, the committee members issue *fatwas* for personal matters and respond to individual inquiries about beliefs, worship, and personal interactions.

Since the founding of Saudi Arabia to the present day, incorporating the CSU into the authority has been a feature of Saudi history. The CSU has retained their authority and power over almost all legal and religious matters. The CSU has played a crucial role in establishing and regulating various legal rules by incorporating *fatwas* into the legal system without reservation, through royal decrees.

2.5 The Influences of *Shari'a* on the Current National Law in Saudi Arabia

2.5.1 Sources of Law in Saudi Arabia

The Legal system of Saudi Arabia is mainly founded on Islamic *Shari'a*.[23] Unlike the secular systems, there is no separation between religion and state law. According to BLG 1929, "The Kingdom of Saudi Arabia is… [an] Islamic State… Its foundation is Almighty God's Book, the holy *Qur'an,* and the Prophet's *Sunnah* (Traditions)".[24] Article 7 of BLG also states that "Government in the Kingdom of Saudi Arabia derives its authority from the Book of God and the *Sunnah* of the Prophet, which are the ultimate sources of reference for this Law and the other laws of the State".[25]

Accordingly, all sources of domestic law in Saudi Arabia are derived directly from Islamic *Shari'a*, the *Qur'an* and *Sunnah* and from Islamic jurisprudential sources such as consensus and analogical reasoning[26]. Even codified laws are drafted, interpreted, and applied in accordance with *Shari'a* principles.[27] If a legal rule conflicts with the principles of *Shari'a*, the judge has the authority to refrain from applying it. According to the Act of Judiciary:

[21] Ibid.
[22] Ibid.
[23] Esther E, 'Sharia and National Law in Saudi Arabia' in Jan Michiel Otto (ed), *Sharia In Incorporated: A Comparative Overview of The Legal System of Twelve Muslim Countries in Past and Present* (Leiden University Press 2010) 139.
[24] Basic Law Governance Act, 1992, s1 art (1).
[25] Basic Law Governance Act, 1992, s1 art (7).
[26] Al-Shulhoub (n 20).
[27] Al-Omar A, 'The Legal Status of Regulations as A Source of Legislation in the Saudi Legal System' (2017) 2(18) Journal of King Faisal University 263, 263.

"Judges are independent, and, in the administration of justice, they shall be subject to no authority other than the provisions of *Shari'a*". [28]

All sources of Saudi law are interpreted in light of legal rulings and discussions in Islamic jurisprudence.[29] Judicial precedents are not considered a source for interpreting laws in Saudi Arabia, nor do laws evolve through judicial interpretation of case law or comparisons with the legal systems of other Islamic jurisdictions.[30] However, such sources may be consulted for guidance when appropriate. Legal development and reform occur through the continuous review of Islamic jurisprudence, its interpretations, and scholarly discussions, ensuring that the law remains consistently aligned with the principles of *Shari'a*. The Supreme Court plays a central supervisory role in ensuring that all domestic law complies with the principles of Islamic *Shari'a*. According to the Judiciary Act, "The Supreme Court ... monitors the implementation of Islamic *Shari'a* provisions and ensures that laws issued by the legislative body do not conflict with Islamic *Shari'a*".[31]

The sources of the current national law of Saudi Arabia can be classified into four primary sources: a) *Shari'a* sources, primarily the *Qur'an* and *Sunnah,* b) *Fiqh* (Islamic jurisprudence) sources, including consensus and analogical reasoning, c) Convert *fatwas* to binding law and d) Statutory laws and regulations.

A. Primary Sources of *Shari'a*: the *Qur'an* and *Sunnah*

The sources of *Shari'a*, the *Qur'an* and *Sunnah* (traditions) of the Prophet Muhammad, are the primary sources of laws in Saudi Arabia.[32] The Saudi legal system does not have codified law in all areas. Most of the laws still rely directly on the primary sources of Islamic *Shari'a*, particularly in criminal and civil matters.

Concerning criminal matters, Saudi criminal law is not codified in a written law; the *Qur'an* and *Sunnah* comprehensively define all crimes and punishments. For instance, the prohibition of murder and its punishments is derived directly from the *Qur'an*: "And do not kill the soul which God has made sacred".[33] The punishment for murder is specified in the verse: " O you who have believed, prescribed for you is equal retribution for those murdered".[34] Further, the *Sunnah* of the Prophet clarifies the conditions for implementing the legal punishment of murder, the possibility of pardon by the victim's family, and the

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[28] Judiciary Act, 2007, art (1).

[29] In this regard, there is considerable debate in the literature that the legal system of Saudi Arabia is based on *Shari'a*, as interpreted by only the *Hanbali* school. See, Al-Duraib S, *Judicial Systemization in the Kingdom of Saudi Arabia* (*Hanifah* Press,1982) 313-314; Karl D, 'Islamic Law in Saudi Arabia: What Foreign Attorneys Should Know' (1991) 25(1) The *George Washington Journal of International Law and Economics* 131; Ghammaz A, 'Efforts of the Kingdom of Saudi Arabia in Promoting *Hanbali* School' (2018) 3(34) Islamic and Arabic Studies in Alexandria 331. Nonetheless, Saudi policy has endeavoured to prevent the Saudi legal system from being restricted to the *Hanbali* teachings. See, Al-Sahil's T 'Codifying *Shari'a* Rulings and 'Senior Ulama' Decisiveness or Postponement?' (Middle East 10854, 16 August 2008); Al-Ghadyan A, 'The Judiciary in Saudi Arabia' (1998) 13(3) Arab Law Quarterly 235.

[30] Al-Shulhoub (n 20).

[31] Judiciary Act, 2007, art (11).

[32] Basic Law Governance Act, 1992, s1 art (1).

[33] *Sura AL-Isra*.33.

[34] *Sura Al-Baqra*.178.

acceptance of *diyah* (blood money) as an alternative punishment of equal retaliation.[35] In this sense, the primary sources of *Shari'a,* the *Qur'an and Sunnah,* constitute the main ground for defining the crime of murder and its punishments without a codified statutory law.

Similarly, in civil matters, for instance, inheritance laws in Saudi Arabia are based on *Qur'anic* verses in *Sura Al-Nisa* (verses 7, 8, 11, 12, and 176), which specify fixed shares for heirs, including spouses, children, and parents. In addition, the shares of siblings are determined in the absence of direct ascendants or descendants.[36] The *Sunnah* of the Prophet further clarifies the situation mentioned in the *Qur'an.* For example, *Sunnah* provides guidance on the settlement of the deceased's debts, the priority of debt and wills before distributing the inheritance, the exclusion of a murderer from inheriting from their victim, and the limitation of bequests to one-third of the estate.[37] In this sense, the primary sources of *Shari'a*, the *Qur'an* and *Sunnah,* directly form the governing inheritance law in Saudi Arabia.

B. Sources of *Fiqh* (Islamic Jurisprudence): *Ijma* (Consensus) and *Qiyas* (Analogical Reasoning)

The consensus of *Shari'a* scholars in the Council of Senior *Ulama* (CSU) in Saudi Arabia and analogical reasoning are recognised sources of *fiqh* (Islamic jurisprudence). The two sources serve as formal sources of national law in the Saudi legal system.[38] When the primary sources of *Shari'a*, the *Qur'an* and *Sunnah,* do not provide explicit legal guidance, consensus and analogical reasoning are used to establish binding legal rulings.

For instance, the Saudi law prohibits depicting the Prophet Muhammad and all prophets and messengers in visual representations, such as in stories, theatre, children's books, or films. This legal rule has been established through the **consensus of *Shari'a* scholars of the** CSU**.**[39] Analogical reasoning is also considered a source of law in Saudi Arabia, enabling jurists to extend existing *Shari'a* rulings to new matters. For instance, the personal use of drugs is prohibited in Saudi law by analogy to the consumption of alcohol, as both substances cause intoxication and impair the mind, thus violating a principle in the higher objective of *Shari'a,* the preservation of the intellect.[40] Legal rules established through consensus or analogy do not explicitly state the penalties for their violation in the original rulings. Instead, determining the appropriate penalty is left to the courts' discretion, in line with the general principles of *Shari'a* and taking into account the particular circumstances of each case.

C. Convert *Fatwas* to Binding Law

[35] See *Sunan Abi Dawud* (*Hadith* 1587); *Mishkat al-Masabih* (*Hadith* 4509).
[36] See *Sura Al-Nisa* (7, 8, 11, 12, 176).
[37] See *Musnad Ahmad* (*Hadiths* 347; 348); *Sahih al-Bukhari* (*Hadith* 6763).
[38] Al-Shulhoub (n 20).
[39] The Council of Senior *Ulama* [*Shari'a*] Scholars of Saudi Arabia, Permanent Committee for Scholarly Research and *Ifta*, Ruling on Depicting the Prophet, (Consensus 107, 2-11-1403 [10-08-1983]).
[40] Al-Shulhoub (n 20).

A ***fatwa*** is a ruling issued on a matter for which there is no explicit text in the *Qur'an* or *Sunnah*. It is issued by a qualified *Shari'a* scholar, typically a member of the CSU. A *fatwa* is **not legally binding** unless it is ratified by an official authority, such as a royal decree or a ministerial decision, which then converts it into an enforceable legal rule.[41]

For example, in Saudi Arabia, certain *fatwas* state that opening restaurants to serve food during the daytime, and eating in public places are prohibited during Ramadan.[42] Fasting during Ramadan is a pillar of Islam, and serving food publicly is considered a violation of the sanctity of the month.[43] The Ministry of Interior adopted the ruling regarding restaurant operations, making it legally binding and subject to penalties, including fines for non-compliance.[44] However, the ruling prohibiting public eating has not been officially ratified and therefore remains lawfully non-binding. Individuals who violate this latter ruling are not punished unless their actions breach public order or provoke societal reactions that require intervention by the authorities.

D. Statutory Laws and Regulations

This source comprises statutory laws and regulations that codify the provisions of Islamic *Shari'a* to regulate specific areas of law. These include legislation issued by the King and the Council of Ministers, as well as implementing regulations drafted by ministries and government agencies to ensure the practical application of these laws.[45] Generally, these codified laws cover areas of private law, including commercial, labour, investment, financial, banking, insurance, and other regulatory areas.[46] The drafting of these codified laws follows a comprehensive review of *Shari'a* principles to ensure full compliance with its provisions.[47] Even when reforms or amendments are necessary, they are undertaken with reference to the texts of *Shari'a,* Islamic jurisprudence and its interpretations, and authoritative *fatwas*. This approach ensures that legal updates do not conflict with *Shari'a* principles, thereby maintaining the integration of modern regulatory frameworks with *Shari'a*.

2.6 The State Reformist Agenda

Currently, Saudi Arabia is in a transitional phase of social reforms, followed by considerable progress in reforming the legal system. In 2016, Saudi Arabia announced Vision 2030—the objectives of the 2030 version are to balance reforms and religious conservatism.[48] Locally, the agenda of the 2030 Vision works to return Saudi Arabia to

[41] Ibid.
[42] The Council of Senior *Ulama* [*Shari'a*] Scholars of Saudi Arabia, Permanent Committee for Scholarly Research and *Ifta*, Opening A Restaurant During the Daytime in Ramadan to Serve Meals (Fatwa 17177).
[43] Ibid.
[44] Registration of Restaurant Operating Hours During Ramadan, Saudi Ministry of Interior, (Published 29-80-1441 [23 April 2020]).
[45] Al-Shulhoub (n 20).
[46] See Baker McKenzie, 'What are the Main sources of Regulatory Laws in your Jurisdiction? Saudi Arabia' Resource Hub, available at https://resourcehub.bakermckenzie.com/en/resources/global-financial-services-regulatory-guide/europe-middle-east-and-africa/saudi-arabia/topics/what-are-the-main-sources-of-regulatory-laws-in-your-jurisdiction, accessed (07 December 2025)
[47] Al-Shulhoub (n 20).
[48] Tim Marshall (n 1) 117.

'moderate Islam'. In the past, the previous generation of *ulama* had led the state on the wrong road, and now it is time to correct the path. Religious conservatives are allowed to practice their religion wherever they deem appropriate.[49] However, their influence on the public must be diminished if Saudi Arabia is to continue growing and prospering.[50]

In terms of legal reforms, significant changes are now underway. In line with the goals of Vision 2030, the Saudi strategy for reforming its legal system aimed to combine two priorities: respond to the demands of a changing society and economy while maintaining the values and principles of *Shari'a.* The *Qur'an a*nd *Sunnah* remain the constitutions of Saudi Arabia. However, there is a plan to codify the provisions of *Shari'a* sources in legal codes.[51]

2.7 Conclusion

This chapter provides a brief overview of the nature of the legal system in Saudi Arabia, which is heavily influenced by *Shari'a. Shari'a* is the law of the land of Saudi Arabia, and the *Qur'an* and *Sunnah* are formally declared the state's constitution.

In current legal practice, *Shari'a* law is not institutionally separated from the Saudis' legal system. *Ulama* maintain a significant position within the legal system, and they have been formally incorporated into the administration of legal matters through the establishment of the CSU. The members of the CSU have the authority to interpret *Shari'a* sources and issue *fatwas* concerning legal and religious issues. In exchange, governments are expected to enforce *Shari'a* as defined by *ulama*. On many occasions, royal decrees have converted their *fatwas* into binding law. In addition, courts directly apply the primary sources of *Shari'a* and *fiqh* to legal cases. Furthermore, legal codes and statutory laws issued by royal decrees are derived from the principles of *Shari'a* and Islamic jurisprudence.

The strong influence of *Shari'a* on the legal system of Saudi Arabia demonstrates why it was crucial in Chapter One to explain what *Shari'a* means. Thus, all discussions and analyses of the entire thesis in the upcoming chapters about the moral principles underpinning consent to medical treatment must be grounded in *Shari'a* teachings. This is because the examined consent law in this thesis is the Saudi law, as this chapter demonstrates, the Saudi law must be compatible with *Shari'a* principles and teachings.

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[49] Ibid.

[50] Ibid.

[51] In this regard, the government announced its intention to codify *Shari'a.* Since this plan has been implemented, the legal system has undergone an unprecedented legislative revolution. Recent statutory laws have been enacted, such as the Evidence Act of 2021 and the Family Act of 2022. *Shari'a* has also been supplemented by regulations issued by royal decree covering modern issues such as intellectual property and corporate law. Nonetheless, the legal system still lacks essential laws such as penal law, and judges have complete authority to determine the nature of criminal activities. Furthermore, the Saudi legal system has become more willing to benefit from Western legal practices. In this regard, Saudi Arabia has integrated foreign commercial firms that are vital to its economic growth. Therefore, the Saudi legal system has begun to be informed by the longstanding Western legal experience in drafting domestic legislation, including laws related to commerce, trade, banking, investment, arbitration, customs, and taxation. Yet, the benefit from Western jurisdiction must conform to S*hari'a* teachings.

Having established the relevance of *Shari'a* to the Saudi Legal system in this chapter and explained what *Shari'a* means in the previous chapter, the next chapter addresses the current Saudi law that regulates medical consent.

Chapter 3: The Current Legal Rules of Medical Consent in Saudi Law

3.1 Introduction

The previous two chapters demonstrate that the entire analysis of the moral approaches underpinning the law of medical consent is grounded in *Shari'a.* Yet, before analysing these moral approaches, this chapter reviews the current Saudi law of consent to medical treatment.

To this end, this chapter is divided into three main sections. The first section begins by reviewing the development of the legal rules concerning medical consent in Saudi law. It then focuses on the national legislation governing consent in medical treatment, specifically the Practising Healthcare Professions Act of 2005 (PHP 2005) and its Executive Regulations, which came into force in 2017. It provides a detailed review of the provisions of Articles 18 and 19 related to medical consent. In addition, it references Articles 5 and 26, which establish the standard of due care. In light of this review of the current law, the second section identifies the legal conditions for a valid medical consent and the threshold to which physicians should be held under the current law. Finally, the third section highlights the 2019 Saudi guidelines for informed consent and examines the confusion within these guidelines.

3.2 The Development of the Legal Rules on Medical Consent

The Last Century

The concept of medical consent has a very recent history in the legal system of Saudi Arabia. In the last century, there was a lack of legal regulations governing healthcare, clinics, and the medical profession until the License to Practise Medicine and Pharmacy (LPMP 1928) was enacted in 1928.[1] However, the legal rules of LPMP 1928 did not address the matter of medical consent. Afterwards, in 1935, the Medical Practice Act (MP 1935) was enacted. It also lacked any legal framework that defined medical consent or the duty of physicians to obtain medical consent for medical procedures. Instead, the MP centred on medical qualifications and physician licenses.

In the early 1960s, the term *adhin* (consent) was officially documented for the first time in a court's verdict concerning the death of a patient during cauterisation procedures.[2] The plaintiff (the decedent's heirs) claimed that the doctor was responsible for the patient's death following the doctor's performance of the cauterisation procedure. However, the judge of the first-instance court ruled against the claimant, concluding that the court had not found factors of medical errors of omission. This judgment is based on the facts that firstly, the physician is a specialist in performing cauterisation procedures. Secondly, the test of

[1] Faleh Al-Faleh and Othman Al-Rabiyah, *Al-Nizam Al-sihiy Al-Saudi: Nash'atu , Tatawuruh Wa Al-Tahadiyat alti Tuajihu* [The Healthcare System of Saudi Arabia: its Origins, Development, and the Challenges Face the Healthcare System] (*Dar Aleal* 2010).

[2] Case 444 [28-03-1382 AH (28-08-1962)] Court of First Instance.

medical negligence liability has not been met as the physician made a reasonable effort, as expected of a physician, to heal the patient. This was evident in the report provided by the other practising doctors. Thirdly, the physician treated the patient after obtaining the patient's consent.

The Grand *Mufti*[3] dismissed the plaintiff's appeal and endorsed the decision of the first-instance court. Considering the Grand *Mufti's* dual authority,[4] his endorsement of the court's ruling can be perceived as a proclamation of a judicial principle that 'consent' is a requirement for medical intervention.

Although the MP of 1935 was in force at that time, it made no mention of the patient's consent to medical interventions. Nevertheless, the court decision recognised and emphasised the importance of obtaining a patient's consent as good conduct in sound medical practice. While the court highlighted the value of obtaining the patient's consent, it did not detail the matter of consent. For example, the court's decision did not establish a legal framework for the concept of medical consent, nor did it address the duty of physicians to obtain medical consent for medical intervention. In addition, it is questionable how the judge determined that the patient's consent was valid and whether the physician provided sufficient information to the patient to enable him to provide valid consent. The notion of consent, thus, remained unregulated and vague.

Given the uncertainty around the criteria for valid medical consent in the judicial principle, it was anticipated that this vagueness could leave physicians with challenging scenarios concerning the moral requirements of consent and the culture of Saudi society. Al-Faleh and Al-Rabiyah argue that the absence of rules and guidelines on medical consent has led physicians to rely on their interpretation of *Shari'a* teachings, while also considering the traditions and customs of Saudi citizens.[5]

Consequently, a specific moral issue arose concerning an adult woman's capacity to consent freely to medical interventions. Before the mid-1980s, there was a prevalent mistaken medical practice among doctors that a competent female does not have the authority to give her consent for medical interventions.[6] In this regard, Al-Amoudi states that there was a prevailing assumption and misinterpretation that Saudi females have to obtain consent from their "legal guardian" before seeking medical treatment and signing the consent form for surgical intervention.[7] The miscommunication of denying a woman's right to consent was closely associated with and compatible with the doctors' understanding of Saudi Arabia's male guardianship system. Further, Al-Namlah and others maintain that "an unfortunate

[3] The Grand *Mufti* is the Head of the Council of Senior Scholars in Saudi Arabia.
[4] In the last century, the Grand *Mufti* held the positions of the head of the Council of Senior Scholars and the head of the Supreme Judicial Council. However, during the early 1970s government reforms, the position of the Grand *Mufti* was separated from overseeing the judiciary.
[5] AL-Faleh and Al-Rabiyah (n 1).
[6] Samia Al-Amoudi, 'Health Empowerment and Health Rights in Saudi Arabia' (2017) 38(8) Saudi Medical Journal 785, 786.
[7] Samia Al-Amoudi, 'The Right of Saudi Women to Sign for their Health Care in Saudi Arabia, Fact and Fiction' (2012) 9(4) Life Science Journal 3143, 3143.

common misconception in Saudi Arabia drives healthcare workers to require the approval of the male guardian when treating a female, citing the principle of male guardianship as a justification".[8]

In this practice, a male guardian has the authority to consent to and sign the form for medical intervention instead of the woman.[9] Al-Amoudi attributes this practice to various reasons. For instance, in some cases, health professionals' reluctance to accept a competent adult woman's right to provide her medical consent is justified by claiming the lack of clear legal rules addressing women's right to consent and "unawareness of health rules and the regulations of the Ministry of Health".[10]

In 1984, the Ministry of Health (MoH) requested the King's Office to investigate the issue of patient consent in surgical procedures and establish a binding legal principle regarding the consent of adult patients, including women. This request was prompted by the general confusion in the medical community and the various practices surrounding obtaining consent in surgical interventions, alongside the lack of clear rules concerning women's consent in surgical treatment.[11] The MoH request was forwarded to the Council of Senior *Ulama* (CSU) for consideration and the issuance of their *Shari'a*-based decision.

The CSU's response was as follows:

> "After deliberation and exchange of views, the panel unanimously concluded that it is not legal to perform a procedure on patients, whether they are men or women, without their consent, provided that the patient is sane and has attained puberty and if the patient is a minor or insane, the consent of their [legal] guardian must be obtained".[12]

The consideration of CSU's *fatwa* is grounded on the extensive knowledge of the CSU members in *Shari'a* principles, values, and teachings. In this capacity, the statement of the CSU effectively clarifies and addresses the moral matter surrounding the equal rights of adult females to males in providing consent to medical procedures.

Although the CSU's *fatwa* emphasises the requirement for obtaining medical consent, it does not establish specific standards for what defines a valid consent. All that matters is that consent is a moral requirement and must be obtained from both an adult male and female before surgical treatments. It does not address any further moral requirements for

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[8] Muna Al-Namlah, Sarah Itani, Maram Alqahtani, Alaa Al Abdrabalnabi, Aroub Muammar and Ritesh Meneze, 'Common Medical Ethics Dilemmas: Few Reflections from A Saudi Perspective' (2022) 90 J Forensic Leg Med 102394, 2.

[9] For instance, Al-Amoudi provides two examples of this practice. In the first case, the woman experienced fatal wounds due to her husband's refusal to authorise the medical procedure, while in the second case, the woman suffered a 7-hour delay as the medical team awaited her husband's consent for the medical intervention. For more information, see Al-Amoudi, 'Health Empowerment and Health Rights in Saudi Arabia' (n 6) 785-786.

[10] Ibid 786.

[11] Al-Faleh and Al-Rabiyah (n 1).

[12] The Council of Senior *Ulama* [*Shari'a*] Scholars of Saudi Arabia, Permanent Committee for Scholarly Research and *Ifta*, '*Muafaqat Al-Marid Al-Baligh A-Dhakir Wa Al-Unthaa fi Al-E'jra'at Al-Tibiya*' [Consent of an Adult Male or Female Patient for Medical Procedures] (*Fatwa*19, 26-05-1404 AH [27/02/1984]).

medical consent. This generally suggests that the CSU decision was made in response to a specific inquiry from MoH.
The King has officially endorsed the *fatwa* of the CSU and issued a royal decree.[13] The royal decree elevates the *fatwa* to the position of a legally binding norm, mandating the requirement of obtaining consent before performing surgical procedures.

The Current Century

3.3 Act of Practising Healthcare Professions, 2005 and its Executive Regulations, 2017

Article 19

Since the mid-1980s, the CSU decision was legally binding until the 2005 Act of Practising Healthcare Professions (PHP 2005) was passed. Article 19 of the PHP 2005 is the only provision explicitly mentioning the term 'consent' in medical interventions.

> "No medical intervention may be performed except with the consent of the patient, his representative or the guardian if the [legal capacity of the patient is in doubt]. As an exception, a health practitioner must, in cases of accidents, emergencies or critical cases requiring immediate or urgent medical intervention to save the patient's life or an organ thereof or to avert severe damage that might result from delay, where the timely consent of the patient, his representative or guardian is unattainable– intervene without waiting for such consent."[14]

Article 19 begins with the phrase "No medical intervention," which expressly expands the scope of medical consent beyond surgical operations, as stated in the CSU's *fatwa*, to encompass all medical interventions.

The PHP 2005 outlines that eligible individuals must consent to treatment, including competent patients, legal representatives, and legal guardians.[15] Regulation 19-1 outlines two legal conditions required to determine the legal capacity of a competent patient: sanity and puberty.[16] Yet, the law does not outline the threshold of legal adulthood by a certain age. Individuals reach puberty at different ages. Thus, the question is whether the article suggests that a rational patient who attains puberty at the age of 13 is eligible to provide medical consent, whilst a patient who is 18 is ineligible due to not having reached puberty? Even if an attempt is made to clarify the legal age for medical consent through *Shari'a* teaching, as Chapter Six will discuss, in *Shari'a* there is no agreement on a specific age, and the legal age varies based on the type of responsibility. In turn, this may result in uncertainty in determining the legal age for providing medical consent in practice.

[13]Royal Decree (no 4/2428, 29-07-1404 AH [30-04-1984]) grounded on *fatwa* of the Council of Senior *Ulama* [*Shari'a*] Scholars of Saudi Arabia, See above (n 12).
[14] Practising Healthcare Professions Act 2005, ch2, s2 art (19).
[15] Practising Healthcare Professions Act 2005, ch2, s 2 art (19) reg (1).
[16] Ibid.

In addition, the provisions of Article 19 utilise the broad phrase “their capacity in doubt” to indicate to incompetent patients to consent. The law does not specify the exact circumstances under which a patient lacks the legal capacity to consent; therefore, consent is obtained from the patient's legal guardian. It may appear obvious that the legislator refers to minors. Nevertheless, even this category of patients poses challenges due to the lack of a defined legal age for transitioning from childhood to adulthood.

Yet, given that the law does not consider only the patient's puberty but also their sanity as factors determining their legal capacity, it appears that the legislature intended the expression “their capacity in doubt” to encompass circumstances in which adult patients lack the mental ability to give consent due to conditions such as mental illness or temporary medical conditions. In practice, physicians may encounter cases of unconscious patients, acute diseases, or temporary memory loss. These circumstances will raise questions about the patient's mental competence to consent. Nevertheless, the law fails to establish any specific criteria for determining the mental competence of patients.

Further, Article 19 provides an exemption that allows physicians to perform medical procedures without obtaining consent. The exemption applies in three defined situations involving cases of a) accidents, b) emergencies, or c) critical cases.[17] In each situation, the following criteria must be satisfied:[18] a) the situation is urgent. b) The medical intervention is necessary to save a patient's life or prevent severe harm that may result from a delay in performing the medical procedure. c)The physician was unable to obtain medical consent in a timely manner. The provisions of the PHP 2005 do not go further and define phrases used in the test, such as “urgent”, “severe harm”, and “timely manner”.

More recently, in 2017, the legislator officially codified the *fatwa* of CSU, mentioned earlier in this chapter, into the regulation of Article 19- 1:

> “The consent of *aql* (a sane) patient who *balq* (attained puberty) must be obtained, whether a man or a woman, or his representative or if the patient is legally incompetent before any medical intervention by the content… based on the decision of [the] Council of Senior *Ulama*…”.[19]

The recent addition clarifies that patient includes female and male patients.[20] The new regulation emphasises that this interpretation is based on *Shari’a* teachings, as referenced in the *fatwa* issued by CSU in 1985.[21] Such a recent addition suggests that the misinterpretation of the prevailing understanding of women's entitlement to give medical consent in the previous century continues to the present day. Thus, the law needed to state the obvious when an opposing view prevails and is manifestly morally and religiously wrong.

[17] Practising Healthcare Professions Act 2005, ch2, s 2 arts (19).
[18] Ibid.
[19] Practising Healthcare Professions Act 2005, ch2, s 2 art (19) reg (1).
[20] Ibid.
[21] Ibid.

Finally, although the Article addresses the issue of consent in medical treatment, it fails to indicate how the law regulates the situation when an eligible person refuses to consent.

Article 18

Article 18 establishes legal rules concerning physicians' duty to disclose information while obtaining medical consent.

> "A health practitioner shall be committed to, after explaining the therapeutic or surgical condition and implications thereof, alert the patient or his family to the necessity of following the instructions provided and warn them of the seriousness of the consequences of failing to follow said instructions. A physician may, in cases of incurable or life-threatening diseases, decide, as his conscience dictates, whether it is appropriate to inform the patient or his family of the fact of his disease"[22].

The first part of Article 18 imposes two duties upon physicians: first, to inform patients of the importance of following the doctor's advice and recommendations, and second, to warn them of the seriousness of the consequences if they do not comply with the doctor's instructions.[23] These two duties can be fulfilled after the physicians disclose information about the proposed medical treatment and its effects on the patient's health conditions. Hence, the provisions of this article establish a further duty on physicians to disclose information about the medical intervention.

Considering the formulation of Article 18, in the original Arabic version, the legislator uses the term *yaltazim* (shall be committed) to establish the two duties of care upon physicians. The term *yaltazim* indicates that there is an imperative command. Thus, the two duties of physicians to alert and warn are specific and mandatory. On the other hand, the legislator establishes the disclosure duty by using the word *ba'ed* (after). In Article 18, *ba'ed* is used as a conjunction, meaning that after the physician discloses information, they are obligated to alert and warn the patient about the significance of adhering to the physician's teachings. This formulation of the Article suggests that the legislator's purpose in establishing the duty of medical information disclosure is to urge the patient to adhere to the doctor's instructions, as a physician cannot give effective direction on treatment unless a certain level of information about the condition being treated has been disclosed. The legislator tends to demonstrate a paternalistic approach in formulating these care duties.

The care duties outlined in Article 18 are legal requirements for obtaining valid consent. One factor suggests this interpretation. The legislator establishes the physician's duties concerning disclosure and warning in Article 18. Then, immediately, Article 19 addresses the obligation to obtain consent to medical intervention. The order of the Articles suggests that once the physician discloses information about a proposed medical intervention, the

[22] Practising Healthcare Professions Act 2005, ch2, s 2 art (18).
[23] Ibid.

physician should alert and warn the patient about the importance of the physician's instructions. Then, the physician can proceed to obtain medical consent from the patient.

Concerning the threshold for disclosure duty, the PHP 2005 failed to set any specific standards until the most recent Regulations were passed in 2017. The legislature has lately recognised the need to establish legal standards and has started the process of defining standards of care duty concerning disclosure through the enforcement of Regulation 18-1:

> "A health practitioner shall explain to the patient, his family or a person designated by the patient the possible side effects of the therapeutic or surgical procedure".[24]

Hence, physicians who fail to disclose information concerning "possible side effects" do not fulfil the required disclosure standard stipulated by Regulation 18-1.

Nevertheless, Regulation 18-1 fails to define the type or rate of side effects that should be disclosed. Was it the legislator's intention to provide information about common or rare known adverse effects? Does the regulation include potentially severe risks, such as life-threatening hazards, or does it also encompass any potential minor negative outcomes, such as drowsiness or pain and discomfort following treatment? Furthermore, does the doctor's duty to disclose require them to discuss all potential effects, regardless of their low likelihood of occurrence? Or does the doctor commit to disclosing the significant effects? In essence, the law does not specify a particular standard for identifying potential side effects in terms of their type or the likelihood of their occurrence.

The second part of Article 18 grants physicians a therapeutic privilege to withhold information concerning the nature of the ailment in two cases: incurable diseases and life-threatening diseases.[25] The law does not define what qualifies as an incurable or life-threatening illness. Thus, the determination of such diseases will rely on physicians' opinions.

The law clearly states that the therapeutic privilege allows doctors to withhold information based on their conscience, determining whether it is appropriate to inform the patient about the nature of the illness. Conscience refers to a physician's assessment of right or wrong based on objective information; the doctor's conscience motivates them to take morally correct actions.[26]

The objective information that physicians will consider includes the patient's interests, such as age, health status, and financial situation. Considering these factors, the doctor will assess the potential adverse reactions to the nature of the disease. Therefore, medical privilege applies when the doctor concludes, based on their conscience, to withhold information about the nature of the illness to prevent adverse effects such as neurological

[24] Practising Healthcare Professions Act 2005, ch2, s 2 art (18) reg (1).
[25] Practising Healthcare Professions Act 2005, ch2, s 2 art (18).
[26] For more information about the concept of 'conscience' in medical practice, see generally Muhammad Al-Shanqeeti , *Al-Ahkam Al-Jiraha Al-Ttibiya Wa Alathar Al-Mutaratiba Alayha* [The Legal Provisions of Surgical Procedures and its Outcomes] (2nd edn, Maktabat Al-Shaba 1994).

disorders, heart attacks, or severe emotional distress. Although the legislator may have had good intentions in adopting this therapeutic privilege, which aims to prioritise the patient's feelings, it is overly paternalistic.[27]

Articles 5 and 26

The threshold for disclosing possible side effects of the proposed medical interventions and warning about the potential consequences of not following the physician's instructions is left to the doctors' assessment. Physicians must prioritise what they deem to be in the patient's best interests when making treatment decisions, including providing information concerning side effects and warning them about the importance of adhering to their advice. Article 5 imposes a duty on doctors to consider the patient's best interest in all care duties:

> "[A] health practitioner practices his profession in the interest of the patient and the society." [28]

When assessing whether a physician has met the obligation to safeguard a patient's interests concerning the duty of disclosure of side effects and alerting the patient to follow the doctor's recommendations, the PHP 2005 explicitly adopted the professional physician standard. This standard is confirmed by Article 26:

> "The compliance of a health practitioner governed by this law is a commitment to exert due diligence consistent with recognised scientific principles".[29]

Under the professional physician standard, a physician must disclose adverse consequences of a proposed treatment that another physician with equal training and experience would deem crucial for the patient's best interest.

3.4 Legal Requirements for Medical Consent Under the Current Law

In light of the current national legal rules of PHP 2005, to obtain a valid consent, the physician must meet three conditions:

1. The consent must be obtained from the eligible person.
2. Disclose information about the medical treatment.
3. Provide a warning about the importance of following the physician's instructions.

3.4.1 The Consent Must be Obtained from the Eligible Person

Eligible persons to consent to medical treatment include male and female patients, the legal guardian in circumstances where the patient is deemed incompetent, and the legal representative appointed by the patient.[30]

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[27] It is important to note that Article 18 broadens the scope of those entitled to receive medical information to include the patient's family. In the first part of the article, "alert...the patient or his family", and in the second part ", to inform the patient or his family". The law authorises the patient's family to receive information about the patient's medical conditions and the proposed treatment. The formulation of this article seems to be influenced by a cultural component, particularly the central value of family in Saudi society. However, it raises a moral concern about confidentiality when obtaining informed consent for medical treatment. Yet, addressing this moral issue caused by local cultural influences is beyond the scope of this thesis.

[28] Practising Healthcare Professions Act 2005, ch2, s 1 art (5).

[29] Practising Healthcare Professions Act 2005, ch3, s 1 art (26).

[30] Practising Healthcare Professions Act 2005, ch2, s 2 arts (18) (19).

Legal capacity of the patient

The patient has the legal capacity to consent if they are sane and have attained puberty.[31] A sane patient who has not reached puberty yet is legally regarded as a minor. The legal guardian of the minor will be accorded the right to consent on their behalf. If the patient's mental capacity is "in doubt," medical consent will be obtained from the legal guardian.[32]

Proxy to consent in medical treatment

When a patient delegates their right to consent to another person, the physician is legally bound to obtain the consent from the authorised proxy.[33]

Types of medical treatment

Medical consent generally applies to all types of medical interventions. This will include all medical, surgical, and dental treatment. [34]

Cases of Necessity

In circumstances involving accidents, emergencies, or critical cases where obtaining timely consent from patients, their representatives, or their legal guardians is not feasible, physicians are legally empowered to perform medical interventions even before consent is obtained.[35] The right to undergo a medical procedure without consent is limited to treatments that meet the following criteria: a) the situation is urgent, and b) the treatment is necessary to safeguard life, maintain an organ, or prevent severe harm.[36]

If there is no consent to medical treatment

Physicians who perform a medical intervention without obtaining consent from the eligible person can be sued on the basis that they are committing a criminal offence.[37] The essence of a legal claim based on a criminal offence arises when a physician administers a medical intervention without the person with the authority to consent providing such consent. Consent, thus, acts as a legal defence against engaging in unlawful action.

However, in medical accidents, emergencies, or critical cases, once the legal elements are met, physicians are legally authorised to perform medical interventions without consent and are thus exempt from criminal liability.[38]

[31] Practising Healthcare Professions Act 2005, ch2, s 2 art (19) reg (1).
[32] Practising Healthcare Professions Act 2005, ch2, s 2 art (19).
[33] Practising Healthcare Professions Act 2005, ch2, s 2 arts (18) (19).
[34]Practising Healthcare Professions Act 2005, ch2, s 2 art (19).
[35] Practising Healthcare Professions Act 2005, ch2, s 2 art (19).
[36] Ibid.
[37] Practising Healthcare Professions Act 2005, ch3, s 2 art (28-7).
[38] Practising Healthcare Professions Act 2005, ch2, s 2 art (19).

3.4.2 Disclose Information about the Medical Treatment

The physician is legally obligated to disclose information about the medical treatment to the patient.[39] The only legal standard imposed for information discourse is to provide information about the "possible side effects" that a physician in the same medical professional community would consider material to inform the patient.[40] This aligns with the professional standard established in the PHP 2005.[41]

If the physician fails to disclose information about the possible side effects of medical intervention and harm caused, there may be liability for negligence.[42] The fact that the omission of information on potential adverse effects is legally insufficient by itself for a successful lawsuit unless harm is caused.

Therapeutic privilege

The physician legally has the right to withdraw medical information relevant to the nature of the ailment in two situations, including a) incurable disease and b) life-threatening diseases.[43] The therapeutic privilege applies where the physician, based on their "conscience dictates", concludes that non-disclosure is believed to be in the patient's best interests. The test is objective, and the patient's position and their actions, if informed, are not taken into consideration.[44]

3.4.3 Provide a Warning about the Importance of Following the Physician's Instructions

After the physician discloses the possible side effects of the medical intervention, the physician must: a) alert the patient about the importance of following the physician's advice and recommendations; and b) warn the patient about the seriousness of the effects if they fail to comply with these instructions.[45]

The threshold of the duty to provide a warning

The legal standard requires providing an alert and a warning that a physician in the same medical professional community would consider material to encourage the patient to follow the physician's instructions. This test aligns with the professional standard outlined in PHP 2005.[46]

Where the physician does not provide an alert to the significance of their advice and a warning for the consequences that may arise from not following their instructions, and harm is caused as a result, there could be a liability for negligence. Yet, failing to provide such instructions alone is legally inadequate for a successful claim. The claimant must demonstrate that the failure to alert and warn was the cause of the harm.

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[39] Practising Healthcare Professions Act 2005, ch2, s 2 art (18).
[40] Practising Healthcare Professions Act 2005, ch2, s 1 art (18) reg (1); s 3 art (26).
[41] Practising Healthcare Professions Act 2005, ch3, s 1 art (26).
[42] Practising Healthcare Professions Act 2005, ch3, s 1 art (27).
[43] Practising Healthcare Professions Act 2005, ch2, s 2 art (18).
[44] Practising Healthcare Professions Act 2005, ch3, s 1 art (27).
[45] Practising Healthcare Professions Act 2005, ch2, s 2 art (18).
[46] Practising Healthcare Professions Act 2005, ch3, s 1s art (27).

3.5 Saudi Guidelines for Informed Consent, 2019

More recently, the Saudi Guidelines for Informed Consent (SGIC) were issued in 2019 as an initiative and collaborative effort between the Patient Experience Centre at the Ministry of Health (MoH) and the Saudi Centre for Patient Safety.[47]

The PHP 2005 grants legal force to the medical guidelines developed only by the *Shari'a* Medical Panel in the MoH.[48] The panel of *Shari'a* Medical consists of legal experts, *Shari'a* scholars, and physicians and is chaired by a practising judge.[49] The *Shari'a* Medical Panel has not yet approved the current SGIC. Therefore, SGIC is not legally binding.

In principle, the SGIC document should consider establishing its guidelines based on the existing laws and regulations in the Kingdom. Nevertheless, at first glance, the SGIC appears inconsistent with the PHP 2005. The fact that, as stated in the preamble:

> "As it is the concern of the Ministry of Health in the Kingdom of Saudi Arabia to improve the patient experience… they ensured to take on improvement projects and initiatives based on the global best practices in the healthcare field".[50]

The above statement suggests that the SGIC has been developed in line with the "best global standards" for medical consent. However, the SGIC was supposed to refer to the PHP 2005 as the foundational source upon which the guideline was constructed. The negligence to mention PHP 2005 can be attributed to the fact that all members involved in drafting the SGIC were participants in "a group of physicians, health practitioners, and administrators".[51] *Shari'a* scholars and legal experts were completely absent. This explains the legal force provided by PHP 2005 to guidelines established only by the *Shari'a* Medical Panel, as the Committee consists of legal professionals and judges with both theoretical and practical legal expertise.

Furthermore, the phrase "the global best practice" used in the preamble is also unclear, as the SGIC does not provide insight into how the best practices were determined. The moral approaches that underpin medical consent and consent practices continue to evolve. Although many jurisdictions may have similar practices in medical consent, there is no single universally accepted practice. It may be challenging to establish the "global best practices" statement without clearly defining the criteria for choosing them as the best. In particular, the ideal informed consent cannot be achieved by ignoring each society's religious and cultural dimensions.

The International Scholarship Program of the Ministry of Education and the Ministry of Health has provided thousands of Saudi physicians with the opportunity to obtain medical fellowships and practise medicine in other Western nations, which consider informed

[47] Saudi Guidelines for Informed Consent (2019) 3.
[48] Practising Healthcare Professions Act 2005, ch2, s 1 art (5) reg (2).
[49] Practising Healthcare Professions Act 2005, ch4, art (33).
[50] Saudi Guidelines for Informed Consent (2019) 2.
[51] Ibid 3.

consent a fundamental moral principle in their medical care.[52] The initiative to establish the SGIC appears to be based on the practical observations of physicians. Indeed, this is a positive trend that physicians have recognised the importance of consent as a central feature of contemporary medical practice.

However, attempting to implement knowledge gained from other nations without understanding the current laws and regulations in force in the Kingdom will inevitably lead to a recognition of many issues in the guidelines. For example, the guideline utilises the term "informed consent". Yet, according to the legal requirements for consent outlined in the current national legislation of the PHP 2005, the medical consent cannot be recognised as 'informed'. Even in practice, consent is simply a type of permission and does not fulfil the theoretical notion of informed consent.[53] Essentially, the national legal norms of consent are based on the principle of trust placed in physicians. The principle of trust as the moral approach underpinning the current Saudi legal rules of consent will be obvious when the principle of trust is analysed in Chapter Five.[54]

Nevertheless, the developers of the SGIC have directly translated the term "informed consent" used in Western countries. In legal jurisdictions where consent is considered "informed," it is grounded in the principle of patient autonomy.[55] In such medical practice, autonomy is expressed as the entitlement of competent patients to make informed choices regarding their own medical treatment. Almohaimede and others state that informed consent, grounded in autonomy, is the process of providing patients with medical information about medical treatment in a manner that is understandable to them, allowing the patients to make their own decisions about the intervention voluntarily.[56] The fundamental elements of consent include "voluntarism, capacity, disclosure, understanding".[57] In this sense, moral and legal requirements have been implemented to empower patients to make decisions that can be described as 'informed'. Hence, in the absence of key components of informed consent under the current law of PHP 2005, such as disclosure and understanding consent in the national guidelines, it cannot be expressed as 'informed'.

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[52]In the context of informed consent, the Saudi physician maintains that Saudi physicians "values informed consent and attempt to active it in their own way". However, Adlan emphases that the way in how the physicians implement informed consent may not be consistent with the national legal rules. Adlan also notes that before the establishment of Saudi National Committee for Medical and Bioethics, physicians apply the informed consent obtained from the West. See, Abdallah Adlan, 'Informed Consent in Saudi Arabia' in Beran R (ed) Legal and Forensic Medicine (Springer 2013) 903-904.

[53] This statement will be discussed further and supported by empirical studies in Chapter 5. It is essential to emphasise that the aim of this chapter is limited to presenting the current legal rules governing consent to medical treatment, without discussing the moral approach that underpins these rules.

[54] The principle of trust as a moral approach that underpins the current national legal rules of PHP 2005 will be discussed in detail in Chapter 5.

[55]Geraldine Hastings, 'The Principle of Autonomy...A Basis for Informed Consent?' (2008) 25(1) Journal of Applied Philosophy 19, 19.

[56] Khaled Al-Mohaimede, Rakan Al-Mogheer, Abdulaziz Al-Subaie, Turki Al-Turki, Abdulaziz Al-Muhanna and Jamal Al-Jarallah, 'Informed consent for Invasive Procedures: A Perspective from Saudi Arabia' (2017) 5(1) Merit Research Journals 35, 35.

[57] Ibid.

Requirements of consent under the SGIC

The guideline states that the requirements for the medical consent are:

1. "Consent must be obtained from an eligible person.
2. The person who gives informed consent must fulfil the legal capacity.
3. The consent procedure must be legitimate.
4. The consent shall be in a language that the patient can understand and shall be stated clearly and understandably.
5. The consent is valid until the end of the specified medical procedure.
6. The consent must be given voluntarily, without duress.
7. The consent must be given while the patient is fully aware and conscious."[58]

Despite the SGIC's claim to be based on "global best practices" for consent, the defined requirements do not appear to have evolved through international standards for informed consent. For example, the guideline does not specify the requirement to disclose information concerning the proposed medical intervention. Without this critical condition, consent cannot be considered "informed" or affected by global practices.

In fact, the guideline cannot outline legal requirements that are not imposed by the national law. The legislature is responsible for establishing the legal standards for medical consent by passing laws and regulations, as well as providing guidance through the *Shari'a* Medical Panel. Thus, it seems that while physicians are conscious of the obligation to 'disclose information' in global practices, it is beyond their authority to impose such standards of due care in this specific guideline.

The SGIC was developed to recognise the significance of consent in contemporary medical practice. Yet, in national practice, physicians may encounter moral matters while obtaining consent, which the current regulations have not sufficiently addressed. This is apparent from the specific issues the SGIC addressed. For example, in the first requirement**,** the SGIC agrees with the condition stipulated in the PHP 2005, that the consent must be obtained from the patient, their representative or the legal guardian.[59] The guide provides additional details and outlines delegation procedures.[60] In situations where the proposed medical intervention is dangerous, the patient's authorisation to delegate the consent shall be obtained in the presence of two medical practitioners.[61] This implies that in non-dangerous treatment, doctors accept the patient's delegation without requiring proof of such delegation. The guide also indicates that delegation processes are followed, regardless of whether the representative agent is a family member or another person authorised by the patient.

[58] Saudi Guidelines for Informed Consent (2019) 9.
[59] Ibid 9.
[60] Ibid 13.
[61] Ibid 13.

The guideline defines a competent patient as a "mature adult, mentally competent adult (male or female)".[62] In the absence of a legally defined age of consent, the SGIC establishes that the age of consent begins at 18.[63] However, it appears that the SGIC's developers were uncertain about the consent of patients aged 15 to 18. Thus, they establish that patients' consent within this age range should be obtained from both the patient and their legal guardian.[64] The lack of a consistent age of majority in Saudi law may contribute to this confusion about the consent of minor patients aged between 15 and 18.

Theoretically, when formulating Saudi legal rules and regulations, it does not establish a single uniform age to define the age of majority. For example, the minimum eligibility age to drive is 18 years old. The legal working age is 15 years old. The minimum age to engage in commercial activities is 18 years old. Upon reaching the age of 15, the child is entitled to choose their place of residence with either parent. The custody of the child ceases when the child reaches the age of 18.[65]
The variations in national legislation reflect the reality that the Saudi legal system does not uniformly establish a single age of majority for all civil actions. The difference arises from the fact that Saudi law is grounded on *Shari'a*, which associates the age of majority with various indicators of maturity specific to each conduct. Ultimately, reviewing *Shari'a* traditions to set the majority age for medical consent is the task of legislators, rather than physicians.

Indeed, the review of *Shari'a* tradition by physicians resulted in their confusion over Islamic jurisprudential perspectives on legal guardianship of minors, ultimately leading to defects in this guidance. For example, the SGIC establishes the legal guardianship order for minors, which typically includes the father, grandfather (on the father's side), mother, and the closest male relatives.[66] The matter of *wilaya* (guardianship) of minors in Islamic law is broad and can be categorised into two major types: guardianship of person and property.[67] *Hazana* (custody) of minors is perceived as having a similar meaning to guardianship, but it is different and is governed by various norms in Islamic law.[68] Without delving into the details of guardianship and custody matters, the scheme of guardianship

[62] Ibid 7.
[63] Ibid 13.
[64] Ibid 15.
[65] For the legal driving age, See Ministry of Interior of Saudi Arabia, Riyadh Traffic Department, Driving License (Saudis and Non-Saudis), available at https://www.moi.gov.sa/wps/portal/Home/sectors/publicsecurity/traffic/trafficriyadh/ accessed 15 May 2025; For the legal working age, see Labour Act 2005, ch10, art (162), emphasised in Child Protection Act 2014, ch3, art (8); For legal age to engage commercial activities, see Commercial Act 1931, art (4); For the child custody, See Family Act 2022, ch 4 s2, art (135).
[66] Ibid 11.
[67] See Generally, Nasr Farid Wasil, *Al-Wilaya Al-Khasa:Al-Wilaya Aala Al-Nafs Wa Al-Mal fi Al-Sharia Al-Islmia* [The Private Guardianship: The Guardianship of Person and Property in Islamic law] (1ST edn, *Dar Al-Shrook* 2002); Some Islamic jurisprudence schools categorise guardianship into three types: guardianship of the person, property and both the person individual and property. See, Wahbah Al-Zuhayli, *Al-Fiqh Al-Islami Wa Adlitah* [Islamic Jurisprudence and its Evidence] (vol 9, 4th edn, *Dar Al-Fikr* 1988) 6691; see also types of guardianship in Family Law Act 2022, ch5, s 1 art (138).
[68]For the matter of custody of minors, see Al-Zuhayli (60) vol 10, 7295.

endorsed by the SGIC conflates the issues of guardianship and custody in Islamic law. In addition, it contradicts the current practice in Saudi law.[69] [70]

The SGIC also addresses the matter of the legality of the medical procedure.[71] This condition emphasises the importance of doctors' duty to refrain from performing any forbidden medical procedure, even if the patient consents to it. In the context of unlawful medical interventions, the PHP 2005 only addressed euthanasia.[72] Nevertheless, physicians often encounter situations in which they are uncertain about the legality of medical interventions. Naturally, doctors are cautious to engage in an act that could result in legal consequences. For example, the SGIC addresses the matter of consent to abortion and therapeutic cosmetic procedures.[73] The SGIC specifies that consent to undergo such medical intervention "depends on the extent of its need or necessity".[74] The SGIC does not go further and identify the cases of necessity. Obviously, it is not the duty of physicians to determine the circumstances where performing an illegal act is justified as a necessity in *Shari'a*. In the absence of definitive legal norms on these complex matters, medical practitioners are expected to consult the *Ifta* centre in the CSU to obtain a *fatwa r*egarding the legitimacy of each case.

The SGIC states two categories of consent: restricted and unrestricted consent.[75] Restricted consent refers to a patient's permission for a physician to perform a specific medical intervention.[76] This form of consent remains in effect until the end of the procedure for which the consent was obtained. Thus, if the doctor intends to administer an additional procedure, it is necessary to obtain a new consent. On the other hand, the SGIC recognises absolute consent, which grants the physician the authority to perform any medical procedure if they obtain unrestricted consent from the patient.[77] This form of consent suggests that the doctor has the authority to perform multiple medical procedures without obtaining further consent if the doctor considers any new procedure to be in the best interest of the patient.

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[69] The Saudi law can grant a female (like the mother, grandmother) the authority over the guardianship of a minor before a male (the grandfather) and gives the mother the custody of her child even before the father. See, Family Law Act 2022, ch4, s 2, (124,127); ch 5, s 1 arts (137) (147).

[70] In the context of legal guardianship, the SGIC raises the issue of disagreement among the patient's relatives' viewpoints. It directs physicians to prioritise the opinion of whoever has the patient's best interest, as determined by the physicians' professional judgement. Such instruction suggests that the developers of the guideline adopt a physician-knows-best approach in formulating this guidance. This does not suggest a criticism of this guidance, since the current law, as outlined in PHP 2005, is grounded in trust in the physician, which recognises the principle that the physician knows what is best for the patient. See Saudi Guidelines for Informed Consent (2019) 11.

[71] Ibid condition (3) at 9.

[72] Article 19 states: "Under no circumstances may the life of a terminally ill patient be terminated, even if so, requested by the patient or his family". Practising Healthcare Professions Act 2005, ch2, s 2 art (19). Article 19 explicitly prohibits euthanasia of terminally ill patients, no matter whether the patient or their family requests it. Thus, physicians who terminate the lives of their patients, even with their consent, are engaging in unlawful action for which they will be held criminally liable for murder.

[73] Saudi Guidelines for Informed Consent (2019)15-17.

[74]Ibid 17.

[75]Ibid10.

[76]Ibid 10.

[77]Ibid 10.

The SGIC stresses that the patient's consent must be given voluntarily and without coercion.[78] However, the SGIC fails to provide further information about the circumstances in which an external coercive force can impact the patient's will. The SGIC also emphasises the importance of obtaining consent while the patient is conscious.[79] Hence, in practice, the consent of unconscious and comatose patients is deemed invalid. Yet, the SGIC lacks practical instructions on obtaining consent from such patients.

Concerning critical medical cases, the SGIC maintains that physicians are authorised to perform medical procedures without obtaining consent, if the following requirements are fulfilled:[80] Firstly, the patient is incapable of providing consent or where the patient's guardian or representative is not available and waiting for their consent could result in the deterioration of the patient's condition. Secondly, at least two physicians agree that immediate medical intervention is necessary to save the patient's life or preserve an organ.[81]

The SGIC clearly restricts the administration of medical treatments without consent to cases directly involved in preserving life and organs. This restriction contradicts the current legal rules of the PHP 2005, which impose a duty of care to include "preventing severe harm that may result from a delay in performing the medical procedure".[82] Although the SGIC fails to address this obligation, doctors will have legal responsibility for cases where they do not fulfil this duty.

3.6 Conclusion

This chapter provides a detailed review of the legal rules governing consent in medical treatment within the Saudi legal system. Under the current Saudi law, medical consent is required for any medical treatment provided to a patient. This requirement is acknowledged by Article 19 of the PHP 2005.

According to the provisions of Articles 18 and 19 of the PHP 2005, three conditions must be met for valid consent that a physician: a) must obtain consent from the eligible person; b) disclose information about the medical treatment; and 3) provide a warning about the importance of following the physician's instructions.

In Article 26, the Saudi law adopts the professional physician standard, which physicians must adhere to when obtaining consent from a patient concerning: 1) disclosing possible side effects; and 2) providing an alert and a warning about the importance of following the physician's instructions. Further, the PHP 2005 provisions grant the physicians therapeutic privilege in two specific situations. This case includes a) incurable disease and b) life-threatening disease. The Saudi law establishes an objective test, neglecting the patients' views and what they would do if they had been informed.

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[78]Ibid 15.
[79]Ibid 9.
[80]Ibid 15.
[81]Ibid 15.
[82]Practising Healthcare Professions Act 2005, ch2, s 2 art (19).

This chapter concludes with an overview of the informed consent requirements outlined in the SGIC 2019. It discusses the confusion in this guide. Despite the guidelines' efforts to address many issues physicians encounter in obtaining medical consent, they are ultimately not legally binding.

Since this chapter provides a detailed review of the legal rules governing medical consent under the Act of PHP 2005, the following section turns to address the two main principles that underlie the Saudi approach to regulating the current legal rules of medical consent under the Act of PHP 2005. The first principle concerning the high significance placed on health in *Shari'a*. Since health is significant in *Shari'a*, maintaining good health becomes especially important when formulating the Saudi law of medical consent. This is because, as Chapter Two demonstrates, the Saudi law is closely influenced by *Shari'a* teachings. The second principle is a trust-based model in medical decision-making, in which physicians' judgment is given much weight to act in the patient's best interest. Ultimately, the next Section will emphasise that the first principle concerning the value of health in *Shari'a* is essential and will remain fundamental in the upcoming chapters, while critically analysing and suggesting a move from the second principle of trust in physicians.

SECTION TWO: THE EXISTING PRINCIPLES GROUNDING THE CURRENT APPROACH TO MEDICAL CONSENT IN SAUDI ARABIA

Chapter 4: The Importance of Health in *Shari'a*

4.1 Introduction

After reviewing the Saudi consent law under the Practising Healthcare Professions Act 2005 (PHP 2005), this section outlines the two moral principles underpinning the current Saudi approach to consent law. The first principle concerns the high significance placed on health in *Shari'a*. Since maintaining good health is important in *Shari'a*, and Saudi laws, as demonstrated in Chapter Two, must adhere to *Shari'a* principles, the current Saudi legal approach has adapted the principle of trust in physicians to make the best medical decisions for the interest of maintaining patients' health. The principle of trust in physicians is closely linked to the argument that the best health outcomes can be achieved by placing trust in physicians to make medical decisions in the interest of maintaining good health.[1]

This chapter addresses the first principle and highlights the significance of health in *Shari'a.* It argues that good health enables an individual to lead a purposeful life and meet religious and worldly duties as a vicegerent of God on earth. It begins by emphasising the value of health in *Shari'a* through a review of some of *Shari'a* teachings concerning the promotion and protection of health. Then, the chapter discusses the three levels of responsibility for health preservation: the individual's commitment, the obligation of societal members, and the ruler's duties. It concludes by asserting that health has a preeminent importance in *Shari'a* discourse.

4.2 Health in *Shari'a*

Shari'a has consistently emphasised the importance of health and the unique right to health of every human.[2] In *Shari'a*, maintaining a healthy life is essential for humans to lead a meaningful existence and fulfil their worldly and religious duties.[3] Islam urges its followers to build a society that promotes the physical, mental, and spiritual well-being of its members. Maintaining good health is not solely for the enjoyment of worldly pleasures. It is also to fully understand the purpose of existence, fulfil their role as God's vicegerents on earth, and enhance their relationship with the Creator, all of which demand good health.[4] In this regard, Bhat maintains that implementing God's law in humankind requires the presence of individuals in good physical and mental health, as humans can apply this divine burden effectively within human society.[5] The Prophet says, "The stronger believer is better and more beloved to *Allah* than the weaker believer, although both are good".[6] In

[1] See generally, Ezkiel Emanuel and Linda Emanuel, 'Four Models of the Physician-Patient Relationship' (1992) 267(16) *JAMA* 2221, 2221; Edmund Pellegrino and David Thomasma, *For the Patient's Good: The Restoration of Beneficence in Health Care* (Oxford University Press 1988) 7-8.

[2] See generally, Muhammad Al-Khayat, *Health an Islamic Perspective* (World Health Organization, Regional Office For Eastern Mediterranean 1997).

[3] See generally the discussion on the significance of health in Abdul-Rahim Al-Maliki and Amin Al-Shaqawi, *Einayat Al-Islam Bi Sihat Al-Ensan*' [The Significance of Human Health in Islam] (King Fahad National Library for Publishing 2019) 6

[4] Javid Bhat, 'Preventive Measures of Health in Islam' (2019) 12(1) Islam and Muslim Societies: A Social Science Journal 76, 76.

[5] Ibid.

[6] *Sunan Ibn Majah,* (*Hadith* 4168).

commenting on this *hadith,* Shaheen maintains that a strong believer is a person who possesses the physical strength necessary to engage in worship in this world.[7] This *hadith* also suggests that a Muslim in good health possesses a larger capacity for worship than one who is weak.[8] Al-Ghazali states that a correct understanding and application of religion can be achieved only by preserving physical health.[9]

Hence, *Shari'a* places importance on health, ranking it second in significance after religion.[10] In this regard, the Prophet says: "Ask God for forgiveness and health, for after being granted certainty, one is given nothing better than health".[11] In another *hadith*, the Prophet highlights the importance of health by comparing the value of health and money, saying, "There is nothing wrong with being rich…but good health is better than riches."[12] A further Prophetic statement provides valuable insight into the fundamental aspects of daily life: "Whoever among you wakes up physically healthy, feeling safe and secure within himself, with food for the day, it is as if he has acquired the whole world".[13]

In line with the importance of health, there is a remarkable Prophetic declaration: "Your body has a right over you".[14] This responsibility demands that individuals respond to their bodies' needs by providing food when hungry, allowing for relaxation when exhausted, maintaining hygiene when dirty, safeguarding against potential injury, taking preventive measures to avoid disease, and providing the essential requisites for their health. The right should never be disregarded or neglected since it is intricately connected to preserving human health. Health, therefore, is critical, and *Shari'a* places health at a high value. There are countless guidelines in divine discourse about the importance of health, as seen in the Prophet's statements.

Muslim scholars maintain that the value of health stems from two primary elements: the first is rooted in the universe's structure.[15] The second element is related to the original state of human creation.[16] The first element appears in the *Qur'anic* verse: "And the heaven He has raised high. And He has set up the Balance. So that you may not transgress the balance [due]. And establish weight in justice and do not make the balance deficient."[17] These verses refer to the "balance" that God has established in the universe, encompassing its

[7] Musa Shaheen, *Fatah Al-Muneim Sharh Sahih Muslim* [An Explanation of *Hadith* Collection of *Sahih* Muslim] (vol 10, *Dar Al-Shrooq* 2002) 195.
[8] Ibid.
[9] Muhammad Abu-Hamid Al-Ghazali, *Al-Iqtisad Fi Al-Itiqad* [The Moderation in Belief: The Faith Between the Perspective of Rationality and The Texts of Sources of *Shari'a*] (Abdullah Al-Khalili ed, 1st edn, *Dr Al-Kutm Al-Elmia* 2004) 17.
[10] Al-Maliki and Al-Shaqawi, (n 3) 6.
[11] *Mishkat Al-Masabia* (*Hadith* 2489).
[12] *Sunan Ibn Majah*, (*Hadith* 2141).
[13] *Sunan Ibn Majah*, (*Hadith* 4141).
[14] *Sahih al-Bukhari* (*Hadith* 5199).
[15]Muhammad Al-Khayat *Health and Faith in Islam* (World Health Organization: Regional Office for the Eastern Mediterranean 2004) 15.
[16] Ibid.
[17] *Sura Al-Rahman.*7,8,9.

structural, environmental, and biological composition, and which includes human life.[18] Thus, these verses draw attention to the delicate balance that applies to everything in this universe. It also indicates that any imbalance in this delicate balance, whether an excess on one side or a deficiency on the other, whether intentional or accidental, may result in highly adverse outcomes that initially impact humans.

Muslim philosophers understood the concept of balance and implemented it in health. For instance, Ibn Abbas briefly defines health, stating that "health is that the body is in a state of balance."[19] Ibn Sina also establishes the balance of health, stating that "the state of equilibrium which a human being enjoys has a certain range with an upper and lower limit, and thus the balance of health shifts between two limits."[20]

The second factor that demonstrates the value of health is the state of human creation. Humans were created in the best mould, as evidenced by the divine statement: "O mankind, what has deceived you concerning your Lord, the Generous. Who created you, proportioned you, and balanced you? In whatever form He willed has He assembled you".[21] Many additional verses from the *Qur'an* provide similar indications: "Glorify the name of your Lord, the Highest. Who hath created, and further, given order and proportion".[22] "We have certainly created man in the best of stature".[23] Preserving this blessing from God, which consists of the suitable moulding and fair shape of humans, can only be attained by maintaining one's health and taking every measure needed to preserve and enhance health. To emphasise the importance of the right moulding of humans, the Prophet says: "Man's feet will not move on the day of resurrection before he is asked about… his body, how did he wear it out".[24] In another narration: "And in what pursuits he used his health". The prophetic statement emphasises that health is significant in *Shari'a*, as Muslims are accountable to God. Thus, it is an obligation to maintain good health and prevent harm to one's health through improper usage.

Maintaining good health can be achieved by taking all necessary actions to preserve it and then enhancing it. These two factors significantly impact physical and mental health, as health encompasses more than just the absence of disease or disability. In this regard, the

[18] See the interpretation of the verses, Abdul-Rahman Nasser Al-Saadi, *Taysir Al-Karim Al-Rahman Fi Tafsir Kalam Al-Manan* [The Facilitation from the Most Generous (God) and Most Merciful (God) in Interpreting the Words of the Most Generous (God): A Book of Exegesis of the *Qur'an*] (Abdul-Rhaman Al-Luwaihaq ed, 1st edn, *Mussat Al-Risala* 2000) 828.
[19] Ali Abdullah Ibn-Abbas, *Kamil Al-Sinaeah Al-Tibiyah* [The Complete Book of the Medical Art] (Manuscripts of Department of King Saud University ed, King Saud University [no date]) 3. Manuscript is also available at https://muslim-library.com/books/2021/02/ar_kamil_alsinaeat_altibiya.pdf accessed 5 September 2023.
[20] Al-Hussin Abdullah Ibn-Sina, *Al-Cannon Fi Al-Tib* [The Canon of Medicine] (Mohamed Al-Danawi ed, vol 1, 1st edn, *Dar Al-Kutb Al-ilmiah* 1999) 104. Manuscript is also available at https://hdl.loc.gov/loc.wdl/wdl.15436 accessed 1 September 2023.
[21] *Sura Al-Infitra*r. 6,7,8.
[22] S*ura Al-A'ala*. 1,2.
[23] *Sura Al-Teen*. 4.
[24] *Riyad as-Salihin, Riyadh as Salihin* (*Hadith* 407).

Qur'an and *Sunnah* encompass statements guiding the followers of Islam on how to lead a healthy life and attain a state of purity.[25]

Preserving and enhancing good health is integral to *maqasid shari'a*. Ibn-Abd-Al-Salam maintains that the divine rules have been formulated in a manner that serves the purpose of safeguarding the welfare of individuals and mitigating potential harm to them.[26] Al-Shatibi notes that divine law has been established to fulfil the higher objectives of the five fundamental necessities: religion, life, progeny, property, and intellect.[27] Thus, with a bit of reflection, it becomes clear that the protection of life, progeny, and intellect, which account for 60% (three of the five) of these necessities, cannot be effectively preserved without health protection.[28] Health is, therefore, a crucial need to maintain the five necessities, which explains the significant value that *Shari'a* places upon health. Thus, it is not surprising that many statements in the *Qur'an* and *Sunnah* are aimed at guiding individuals in maintaining and promoting their health to preserve their inherent shape, which is bestowed upon them by God and sustaining a balanced state of health.

4.3 The Responsibility for Maintaining Health in *Shari'a*

As illustrated in the previous part, the high priority of health in *Shari'a* teachings simultaneously imposes a responsibility to maintain good health conditions. These responsibilities can be categorised as the responsibilities of the individual, members of society, and the state.

4.3.1 Responsibility of the Individual

The origin of individual responsibility is expressed in the Prophetic statement: "Your body has a right over you.[29]" According to Al-Shatibi's categorisation, individuals take responsibility for themselves by performing two distinct actions. The first is to fortify health's structure and solidify its foundation, which means taking the best possible care of what we have of health and well-being. The second action is to safeguard health from any potential adverse developments that may arise in the future, which means protecting health before it collapses.[30] Al-Shatibi further notes that the two classifications are essential for maintaining the five necessities in *maqasid al-shari'a*. In addition, they refer most explicitly to Islamic health protection guidance and suggest two categories of measures.[31]

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[25] For instance, ablution is a pillar before prayers; without it, prayers are invalid. Ablution includes washing the mouth, nose, ears, face, arms and feet. The *Qur'an* states: "O you who believe! When you intend to offer *Al-Salat* (the prayer), wash your faces and your hands (forearms) up to the elbows, rub (by passing wet hands over) your heads, and (wash) your feet up to ankles… Allah does not want to place you in difficulty, but he wants to purify you and to complete His Favour on you". *Sura Al-Ma'idah*.6. When ablution is performed five times daily, this ritual leaves a person clean and refreshed.

[26] Izz-Al-Din Abdul-Aziz Ibn-Abdul-Al-Salam, *Q'waad Al-Ahkam Fi Massalih Al-Anam* [The Rules of Islamic jurisprudence in People Interest: A commentary in The Roots of Islamic Jurisprudence] (Taha Abdel Raouf Saad ed, vol 1, *Maktabat Al-Kuliyaat Al-Azharia* 1991) 9.

[27] Ibrahim Musa Abu-Ishaq Al-Shatibi, *Al-Muwafaqat Fi Usual Al-Shari'a* [The Reconciliation of the Fundamentals of Islamic Jurisprudence] (Mashhour bin Hassan Al Salman ed, vol 2, 1st edn, *Dar Ibn Afan* 1997) 22.

[28] Muhammad AL-Khayat, *Health as Human Right in Islam* (World Health Organization: Regional Office for The Eastern Mediterranean (2004) 7.

[29] *Sahih al-Bukhari*, (*Hadith* 5199).

[30] Al-Shatibi (n 27) 19-20.

[31] Ibid.

The first measure aims to promote various aspects of health, including physical and mental health. For instance, maintaining personal hygiene, good nutrition, marriage, and caring for all body parts. The second measure aims to protect all aspects of health, including physical and mental health, in the face of any adverse current or future developments. For instance, avoid infectious diseases and refrain from harmful substances, such as drugs. The *Qur'an* and *Sunnah* provide countless statements about the two categories of measures, but an in-depth demonstration and discussion of these measures is outside the scope of this thesis.

Notably, *Shari'a* regards any failure to take these measures as a form of wrongdoing. For instance, proper nutrition is a health promotion measure, whereas disregarding adequate nutrition without a valid reason is opposed to the teachings of Islamic healthcare. This tradition can be understood through the reasons for the revelation of the verse: "O you who believe! Make not unlawful the good things which *Allah* has made lawful to you and transgress not. Verily, *Allah* does not like the transgressors".[32] According to *Qur'an* scholars, this verse was revealed in response to a group of individuals who sought to impose prohibitions on good things, including the consumption of specific foods.[33] However, the verse explicitly declares that their action was deemed harmful to their health.

4.3.2 Responsibility of Fellow Members of Society

The individual's responsibility to maintain good health is transferred to their status as a member of society. The Prophet says: "No one of you becomes a true believer until he likes for his fellow what he likes for himself".[34] Society members are responsible for maintaining healthy standards for their fellow members. This form of responsibility entails two levels of action: promoting and protecting the health of individuals within society.

The first measure, designed to promote the health of society members, is the commitment to maintaining a healthful environment. From the Islamic perspective, there are two approaches to maintaining a healthy environment. The first method is to ensure the cleanliness of the environment, while the second approach is to enhance and protect the various components of the environment that contribute to its equilibrium and overall healthy state.

Concerning the first approach, the Prophet encouraged his adherents to maintain a hygienic environment. The Prophet says, "Clean your courtyard [of your house]."[35] The first action, therefore, to enhance a healthy environment begins with individual households by avoiding hazardous production pollution that affects the residents of their homes, their neighbours,

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[32] *Sura Al-Ma'idah* 87.

[33] Muhammad Ibn-Jarir Al-Tabari, *Jami Al-Bayan Fi Tawil Ayi Al-Quran* [Collection of Statements on the Interpretation of the Verses of the *Qur'an*: A Book of Exegesis of The *Qur'an*] (Mahmood Shaker ed, vol 10, *Dar Al-Tarbia Wa Al-Turath* [no date]) 514; Muhammad Ahmad Al-Qurtubi, *Al-Jami li-Aḥkam Al-Qur'an* [The Entire *Shari'a* Judgements in The *Qur'an*: A Book of Exegeses of The *Qur'an*] Ahmed Al-Bardouni and Ibrahim Atfeesh eds, vol 6*, Dar Al-Kutb Al-Masria* 1964) 260; Imad Al-Din Ismail Ibn-Kathir, *Tafsir Ibn-Kathir* [Exegesis of Ibn-Kathir: A Book of Exegeses of The *Qur'an*] (Muhammad Shams-Al-Din ed, vol 3, *Dar Al-Kutb Al-Elmia* 1998) 153.

[34] *Riyad as-Salihin*, (*Hadith* 183).

[35] *Jami at-Tirmidhi*, (*Hadith* 2799).

and the entire neighbourhood. The command to clean houses extends to all similar enclosed spaces, such as stores, mosques, restaurants, etc.

Moving to the second approach, to safeguard the elements of nature, the Prophet urges maintaining the necessary elements for environmental protection, such as water, animals, and plants. The Messenger instructs his followers not to waste water through practical examples: Aishah reported: "The Messenger used to perform ablution with a *Mudd* [less than half of one litre] and perform a bath with approximately a *Sa'a* [less than two litres of water]".[36] The Prophet also passed by a river, and he dismounted from his mount. He filled a container with water and went aside to perform ablutions. Some water remained in the container, and he poured it back into the stream. He said, "God may give it to someone or an animal, and they may use it beneficially." The same applies to protecting agricultural and animal resources to maintain a healthy environment.

The second measure of the community's responsibility to protect the health of all its members manifests in the duty to protect against infection. In *Shari'a* teaching, every member of society has the right to avoid being infected by another person. Exposing others to infection falls within one of the five major maxims in Islamic jurisprudence: *no harm and no reciprocated harm*, and thus, *harm must be eliminated*.[37] This principle prevents causing harm, whether to oneself or others.[38] The Prophet also forbade infected people from transmitting their illness to healthy people, stating, "Not the transmission of disease from one person to another."[39] Therefore, a person with an infectious disease should avoid going to public places, including places of worship such as mosques, until they are no longer capable of transmitting the disease to others.

4.3.3 Responsibility of the Community's Ruler

Besides the responsibility of individuals and society members to promote and preserve good health conditions, the leader, who oversees and rules the Islamic community, is also responsible for promoting and safeguarding the health of the people.[40]

From an Islamic perspective, the responsibility of a Muslim ruler to promote health and provide healthcare is considered an Islamic duty. This responsibility is grounded upon various fundamental principles. The *Qur'an* illustrates that humans are regarded as dignified beings: "And We have certainly dignified the children of Adam".[41] Hence, this divine blessing entails maintaining humans' health and living in optimal conditions. In addition, Humans are God's vicegerents on earth, and to establish this vicegerency, access to healthcare is essential to lead a meaningful life.

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[36] *Sunan an-Nasa'i,* (*Hadith* 346).
[37] Muhammad Mustafa Al-Zuhayli, *Al-Qawa'ed Al-Fiqhi'a Wa Tatbiqatha Fi Al-Madhahib Al-Arba'a* [The Legal Maxims in Islamic Jurisprudence and their Applications in the Four Schools of Islamic Jurisprudence] (vol 1, 1st edn, *Dar Al*-Fikr 2006) 199.
[38] Ibid 210
[39] *Riyad as-Salihin*, (*Hadith* 1674).
[40] The leader of the Islamic community now represents a responsibility of the state.
[41] S*ura Al-Isra*.70.

Furthermore, the protection of life is a primary objective of *maqasid Shari'a,* and the delivery of healthcare plays a crucial role in maintaining life.[42] Finally, justice and quality are essential principles in *Shari'a*. Hence, protecting health and providing health care for every resident of the Islamic community are crucial responsibilities of the ruler.[43]

Moreover, since religious burdens, such as worship, cannot be fully fulfilled in the absence of physical health, an Islamic jurist could argue that the Islamic State has a moral obligation to protect its citizens' health for a good religious life. Therefore, providing "physical health, personal security, and adequate clothing, housing, and food" is an integral part of the ruler's responsibilities, as these essentials are crucial in religious life.[44]

In practice, since the earliest days of Islam, the ruler of the Islamic society has been obligated to safeguard health by establishing a healthcare system. The Islamic healthcare system commences with proper care at birth and extends to old age, promoting good health throughout an individual's lifespan. Throughout every stage of life, no individual who is ill, disabled, or injured shall be denied medical treatment. The following three examples illustrate the practical application of the community ruler's responsibility to protect health by providing healthcare to community members.

1) Every child has a fundamental right to receive state-provided care and support. Ibn Saad's book, *The Major Book of Classes*, demonstrates this obligation upon the ruler to provide healthcare to every child. The second caliph, Omar Ibn Al-Khattab, allocated one hundred *dirhams* (currency) for every infant. As the child's age developed, the allowance doubled to two hundred *dirhams*.[45] The scale of the increase rises even more upon reaching adulthood.[46]

2) A person who is weak, disabled, or older is entitled to state-provided care. *Imam* Abu Yusuf cites this obligation of the ruler in his book of *Islamic Taxation System*, wherein he references the agreement between Khaled Ibn Al-Waleed and the people of Hira, quoting that: "people who are elderly and unable to work, affected by any form of difficulties, or have experienced a fall in wealth resulting in reliance on charity from fellow believers in the faith, are eligible for support from the Muslim treasury as long as they reside in the Land of Immigration".[47]

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[42] Aasim Padela 'Social Responsibility and The State's Duty to Provide Healthcare: An Islamic Ethico-Legal Perspective' (2017) 17(3) Developing World Bioethics 205, 209.
[43] Ibid 210.
[44] Muhammad Fadel 'The True, The Good and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law' (2008) 21(1) The Canadian Journal of Law and Jurisprudence 5, 38.
[45] Muhammad Ibn-Sad Al-Basri, *Al-Tabaqat Al-Kabir* [The Book of Major Classes] (Muhammad Atta ed, vol 3, *Dar Al-Kutb Al-Elmia* 1990) 226.
[46] Ibid.
[47] Yaqub Ibn Ibrahim Al-Ansari *Al-Kheraj* [Islamic Taxation System] (Tah Abdul-Ra'uf and Saad Hassan eds, *Al-Maktaba Al-Azharia li Turath* [no date]) 157.

3) Patients have the right to maintain their health and receive care from the state during their disease. Al-Blatheri provides proof of this obligation of a ruler in his work, *The Conquering of Lands*.[48] The second caliph, Omar Ibn Al-Khattab, passed by Christian people with lepers at the Al-Jabiyah Gate in Damascus. He issued an order to allocate a portion of the *zakah* (charity funds) to be given to them, along with providing food for them.[49]

The above practices of early Islam highlight the Muslim ruler's obligation to provide healthcare, recognising that health is a fundamental entitlement for all individuals regardless of age, race, gender, or religion. These practices also emphasise that the leader of the Islamic community, now considered to be the state, should protect the fundamental right to health for every individual within their jurisdiction.

4.5 Conclusion

This chapter argues that health has crucial significance in *Shari'a.* It is a great blessing to lead a purposeful existence in this life. Good health enables humanity to fulfil its religious and worldly responsibilities as God's vicegerent on earth. In this context, *Shari'a* discourse provides numerous directives and teachings for maintaining and enhancing good health.[50] The maintenance of good health entails responsibilities in three distinct directions: towards oneself, fellow members of society, and the community's ruler.

In turn, the high relevance of health *Shari'a* reflects why the Saudi approach values health and thus adapts a physician-centric model to underpin current legal rules governing medical consent. This is because the trust approach is particularly relevant to the argument that the best health outcomes for patients are achieved when trust is placed in physicians to make the best medical course judgments. Hence, the next chapter critically assesses the moral approach of trust in physicians that underpins the current legal rules of PHP 2005 regulating medical consent.

While the next Chapter concludes with a suggestion of replacing trust with an autonomy approach, this chapter emphasises that the importance of health in *Shari'a* remains fundamental and central to the discussions of autonomy in the Third Section. As this chapter has shown, *Shari'a* emphasises the importance of health and recognises the maintenance of good health through individual responsibility. Therefore, the importance of health from a *Shari'a* perspective will remain relevant in the discussions of autonomy Chapters. In the context of autonomy, the best medical decisions will be made by empowering patients to choose medical treatment according to their moral preferences and aspirations, when the patient's health is concerned.

[48] Ahmad Ibn-Yahya Al-Baladhuri, *Futuh Al-Buldan* [The Conquering of Lands: The Origins of the Islamic System] (Umar Al-Taba'a ed*, Mussat Al-Ma'rf* 1987) 177.
[49] Ibid.
[50] Bhat (n 4) 76.

Chapter 5: Trust: The Moral Approach Underpinning the Current Saudi Legal Rules to Medical Consent

5.1 Introduction

The previous chapter emphasises the value of health in *Shari'a*. Building on this principle, this chapter addresses how Saudi law adopts the principle of trust in physicians to promote better decision-making in the patient's best interests and health in medical treatment. In the healthcare context, it has been argued that the best health outcomes are achieved by placing trust in physicians and granting them the authority to make the best medical decisions for patients.[1] Until recently, medical practitioners have been the principal decision-makers in hospitals.[2] Trust in physicians as medical decision-makers is often linked with their substantial knowledge, training, and experience in disease pathology, management, and diagnosis.[3] The principle of trust was developed during the early stages of medicine. Accordingly, the patient-physician relationship is traditionally established based on this approach.[4]

In the modern era, trust in physicians remains the moral foundation that underpins the legal framework for obtaining medical consent under Saudi law, as outlined in the Practising Healthcare Professions Act, 2005 (PHP 2005). This chapter aims to analyse the notion of 'trust' as a moral approach underpinning legal rules of medical consent in the current Saudi law. It additionally addresses how trust has transformed into a paternalistic practice in the hospital setting.

To this end, this chapter is divided into two sections. The first section analyses the principle of trust in fellow humans in the social context in *Shari'a* discourse. It discusses the four moral components of the framework of the principle of trust in fellow humans, encompassing trust as trustworthiness, the giver's trust, the recipient's duty, and the recipient's responsibility. This will be followed by an emphasis on the trust-based patient-physician relationship described by the Muslim philosopher Ibn-Sina. Accordingly, this moral framework of trust, alongside Ibn-Sina's philosophy, serves as a lens for considering the manifestation of trust as the moral ground of the current legal rules governing medical consent in Saudi law of PHP 2005.

Having concluded that the Saudi legal system employs a trust-based approach in obtaining consent for medical treatment, the second section presents an argument that the concept of trust in physicians has led to physicians' manifestation of paternalistic behaviours in Saudi

[1] See generally, Ezkiel Emanuel and Linda Emanuel, 'Four Models of the Physician-Patient Relationship' (1992) 267(16) *JAMA* 2221, 2221; Edmund Pellegrino and David Thomasma, *For the Patient's Good: The Restoration of Beneficence in Health Care* (Oxford University Press 1988) 7-8.

[2] Mehrunisha Suleman and Arzoo Ahmed, 'Islam, Healthcare Ethics and Human Rights' (The Islamic Tradition, Human Rights Discourse and Muslim Communities Conference, Oxford Centre for Islamic Studies and Atlantic Council, 2018) 1.

[3] Ibid.

[4] Khaled Al-Mohaimede, Rakan Al-Mogheer, Abdulaziz Al-Subaie, Turki Al-Turki, Abdulaziz Al-Muhanna and Jamal Al-Jarallah, 'Informed consent for Invasive Procedures: A Perspective from Saudi Arabia' (2017) 5(1) Merit Research Journals 35, 35.

hospitals. The decision-making process primarily centres around the physician, who demonstrates a paternalistic approach to obtaining consent. This claim will be substantiated by numerous empirical studies that have significantly illustrated the shift in the patient-physician interaction in the consent process toward a paternalistic model.

5.2 Trust: Trust in Fellow Humans

5.2.1 The Term of Trust in The *Qur'an*

The *Qur'an* uses the notion of 'trust' in various moral discussions. In the theological discourse, the *Qur'an* highlights the concept of trust through the believers' reliance on God, manifested as *tawakkul.* This concept of trust is not relevant to the central focus of this thesis.

Furthermore, there is an additional expression of trust in social discourse known as *amanah*. *Amanah*, as a technical term, refers to trust between fellow humans. It involves the abstract noun *amanah* (trust) and the attribute of being *ameen* (trustworthy). In the *Qur'an*, the term *amanah* signifies the concept of trust in humans in the context of social discourse and human relationships.[5] In the verses of the *Qur'an*, *amanah* (trust) appears as a noun in six places,[6] and the adjective *ameen* (trustworthy) is used 11 times.[7] These verses will be presented and discussed when addressing the Islamic moral framework of trust.

The etymology of the term *amanah* is derived from the root *a-m-n*.[8] According to Ibn-Faris, *amanah* signifies trust and directly contrasts treachery.[9] Similarly, Ibn-Manzur illustrates the basic concept linked to the origin of the phrase *amanah* by comparing it with its opposite, noting that *amanah* refers to trust, whereas its opposite is deception.[10] In the Arabic-English lexicon, *amanah* is translated as "trust, trustworthiness, honesty, sincerity."[11]

5.2.2 Definition of Trust

Trust, as defined by Al-Raghib Al-Isfahani, is a concept that encompasses both abstract and tangible meanings.[12] It refers to an individual's state and conditions and can apply to whatever has been entrusted to their care.[13] Ibn Arabi's definition of trust encompasses a collection of activities safeguarded against dishonesty and fraud, together with the

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[5] Nora Eggen, 'Conceptions of Trust in the *Qur'an*' (2011) 13(2) Journal of *Qur'anic* Studies 56, 60.
[6] *Sura Al-Baqra.* 283; *Sura Al-Nisa*.58; *Sura Al-Anfa*l.27; *Sura Al-Mu'minun*.8; *Sura Al-Ahzab*.72; *Sura Al-Ma'arij*.32.
[7] *SuraAl-Qassas*.26; *Sura Al-Shu'ara.*107,125,162,178,18,193*; Sura Al-A'raf.*76*; Sura AL-Naml.*39*; Sura AlDukhan.*18*; Sura Al-Takwir.*21.
[8] Elsaid Badawi and Muhammad Abdul Haleem, 'Arabic-English Dictionary of *Qur'anic* Usage' (Brill 2008) 50.
[9] Ahmad Al-Razi Ibn-Faris, *Muejam Maqayis Allugha* [Dictionary of Linguistic Measurements:An Arabic Dictionary] (Abdul-Salam Muhmmad ed, vol 1, *Dar* ALfker,1979)133.
[10] Muhammad Ali Ahmad Al-Ansari Ibn-Manzur, *Lisan Al-Arab* [The Tongue of the Arabs Dictionary] (vol 13, 3rd edn, *Dar Sader*1993) 21.
[11] Edward William Lane, *Arabic-English Lexicon* (vol 1, Cambridge Press 1876)102.
[12] Hussein Al-Raghib Al-Isfahani, *Al-Mufrdat Fi Ghareeb Al-Qur'an* [Linguistic Terminology of the *Qur'an*] (Safwan Al-Dawi ed, Dar *Al-Qalam* 1992) 90.
[13] Ibid.

responsibilities that must be fulfilled by the person who is given the trust.[14] Trust is the completeness that is expected of a person who has been entrusted to perform a task correctly.[15] Dawam observes that the concept of trust may encompass all aspects of duty, obligation, right, and responsibility as a fundamental principle.[16] Therefore, trust is a deliberate intention that must be maintained in all human efforts.[17]

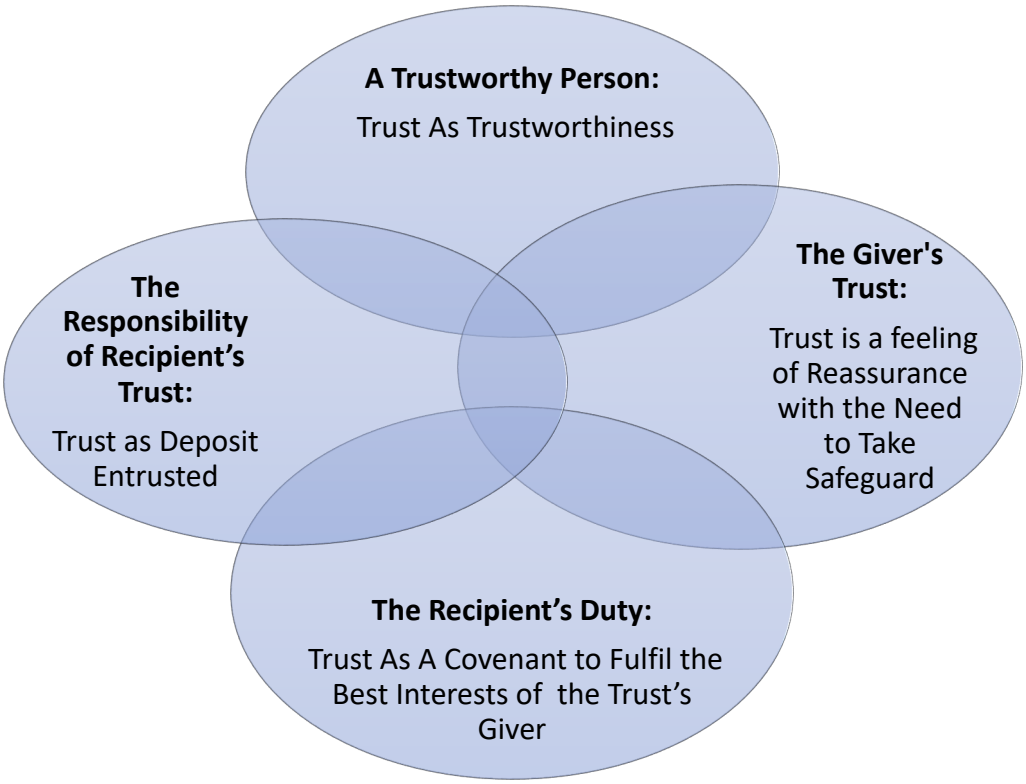
5.3 The Moral Framework of Trust in Fellow Humans and Its Application in Saudi Law of Consent to Medical Treatment

In Islamic morals, trust is a fundamental virtue that can be built on trustworthy attributes. Trustworthy conduct establishes constructive, secure, and reliable relationships among people. In his sermons, the Prophet repeatedly emphasised the value of trust and trustworthiness in interpersonal relationships, stating, "There is no faith for one who is not trustworthy. There is no religion for one who cannot keep their trust."[18]

In Islamic moral literature, Muslim philosophers Al-Jawzi and Al-Damghani develop a moral framework for the principle of trust in fellow humans.[19] The moral aspects have been derived from the *Qur'an*'s verses indicating the term *amanah* in its noun form, denoting (trust) and the quality of being *ameen* (trustworthy). The four moral components of the notion of trust in fellow humans are shown in the following diagram:[20]

Diagram 1: The Four Moral Components of the Notion of Trust in Fellow Humans Based on *Shari'a* Discourse. (See diagram 1 on next page)

[14]Muhammad Al-Malki Ibn-Arabi, *Ahkam Al-Qur'an* [The Legal Rulings of The *Qur'an*: A Book of Exegeses of The *Qur'an*] (Muhmmad Ataa ed, vol 1, *Dar Al-Kutb Al-Elmia* 2003) 570-571.
[15] Edisi Keemapt, *Amanah Is Something Entrusted (deposited) to Others* (Balai Pustaka 2005) 35.
[16] Dawam Rahardjo, *Encyclopedia of The Qur'an: A Social Interpretation Based on Basic Concepts* (Paramadina 1996) 204.
[17] Ibid.
[18]*Mishkat al-Masabih*, (*Hadith* 35).
[19] Al-Hussein Muhammad Al-Damaghani, *Al-lwujuh Wa Al-Nazayir Fi Al-Qur'an Al-Kareem* [Polysemy and the Genres in the Holy *Qur'an*] (Abdul-Aziz Al-Ahal ed, vol 4, *Dar Al-Alam Lil Malayeen* 1983) 46; Abd-Al-Rahman Ali Al-Jawzi, *Nuzhat Al-Ayun Al-Nawazir Fi Eilm Al-Wujuh Wa Al-Nazayir*, [The Sight of The Eye: A Book of Exegeses of The *Qur'an*] (Muhammad Al-Radi ed, 1st edn, *Mussat Al-Risala* 1984) 104-105.
[20] Ibid.



The following discussion provides a brief overview of the fourfold components of the principle of trust in fellow humans in *Shari'a*. It will then emphasise the trust-based patient-physician relationship articulated in Ibn-Sina's philosophy.[21] Accordingly, this moral framework of trust and Ibn-Sina's philosophy can be used to reflect how the principle of trust manifests as the moral approach that underpins the current legal rules regulating medical consent under the PHP 2005.

5.3.1 A Trustworthy Person: Trust as Trustworthiness

The first element in the moral framework of trust suggests that trustworthiness facilitates the establishment of trust. It is crucial for an individual to actively strive to acquire and develop good morals that enhance and attract the trust of others. This element manifests in the verse demonstrating the Midian man's family's belief in Prophet Moses because of his trustworthy qualities: "One of the women said: O my father, hire him. Indeed, the best one you can hire is the strong and the trustworthy."[22]

The verse concerns the story of the Midian man's daughters. The girls had to fulfil duties outside the house since their father was elderly, and they had no brother to perform these outdoor tasks. When the Prophet Moses encountered the two girls standing behind the shepherd, he asked them, "What is your circumstance?"[23] The girls responded: "We do not

[21] Ibn-Sina was a prominent philosopher and physician in the Muslim world. In the West, he is widely recognised as Avicenna.
[22] *Sura Al-Qassas*.26.
[23] Sura *Al-Qassas*.23.

water until the shepherds dispatch [their flocks], and our father is an old man".[24] The Prophet Moses helped the two women and provided water for their flocks. "So, he watered [their flocks] for them; then he returned to the shade".[25]

Later, the girls asked their father to place their trust in that man (the Prophet Moses) to perform the outdoor responsibility because he is strong and trustworthy.[26] Immediately, their father asked them, how did you know that the man was strong and trustworthy? The girls noticed Moses' strength by observing his ability when watering the flocks. The interpreters of the *Qur'an* maintain that Moses could raise a stone that could only be lifted by the strongest men.[27]

Regarding Moses' trustworthiness, the *Qur'anic* interpreters Al-Baghawi and Ibn-Kathir state that this is because the Prophet Moses asked the girls to walk behind him, which is evidence of the characteristic of *iffa* (modesty/decency) through lowering one's gaze.[28] Similarly, Al-Tabari notes that the "Prophet Moses was *iffa* since he never raised his eyes at us [the girls]".[29] Thus, these interpretations suggest that the Midian man's family had to trust and rely on the Prophet Moses due to his demonstration of trustworthy qualities.[30]

The verse regarding the Midian man's daughters and the Prophet Moses provides a vital principle and emphasises the first element of trust. When people seek to place trust in their fellow humans, they grant the trust to identifiable individuals based on their capabilities, as shown in the verse, "the strong"[31] and demonstrate a trustworthy character, "the trustworthy"[32]. In this story, a trustworthy character was associated with the virtue of *iffa.*

Beyond the context of trust in fellow humans, the *Qur'an* uses the term trustworthy to describe Prophets, Messengers, and the Angel Gabriel as worthy of God's trust when transmitting his divine discourse. The *Qur'an* affirms the trustworthiness of the Prophet Noah, Hud, Salih, Lot, Shuaib, and Moses in identical wording, respectively, in *Sura Al-Shu'ara*:" I am to you a trustworthy Messenger".[33] In the *Qur'anic* exegesis literature, the prophets' trustworthiness was linked to the attribute of honesty. Ibn-Kathir interprets trustworthiness as faithfully conveying the truth about God without any alterations or omissions.[34] Al-Baghawi suggests that the messengers faithfully transmitted the divine

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[24] Sura *Al-Qassas*.23.
[25] See *Sura Al-Qassas*.23
[26] See *Sura Al-Qassas*.26.
[27] Imad Al-Din Ismail Ibn-Kathir, *Tafsir Ibn-Kathir* [Exegesis of Ibn-Kathir: A Book of Exegeses of The *Qur'an*] (Muhammad Shams-Al-Din ed, vol 6, *Dar Al-Kutb Al-Elmia* 1998) 206; Al-Husayn Masud Al-Baghawi, *Ma'alim Al-Tanzil* [Signs of the Revelation of The *Qur'an*: A Book of Exegesis of The *Qur'an*] (Muhammad Al-Namir, Uthman Jummah and Suliman Al-Harash eds, vol 6, *Dar Taybah* 1997) 202; Muhammad Ibn-Jarir Al-Tabari, *Jami Al-Bayan Fi Tawil Ayi Al-Quran* [Collection of Statements on the Interpretation of the Verses of the *Qur'an*] (, Mahmood Shaker ed, vol 19, *Dar Al-Tarbia Wa Al-Turath* [no date]) 563.
[28] Al-Baghawi, (n 27) vol 6, 202; Ibn-Kathir, (n 27) vol 6, 206.
[29] Al-Tabari (n 27) vol 19, 563.
[30] Ibid.
[31] *Sura Al-Qassas*.26.
[32] *Sura Al-Qassas*.26.
[33] *Sura Al-Shu'ara.*107,125,162,178,18.
[34]Ibn-Kathir (n 27) vol 6, 136.

message that was revealed to them.[35] Al-Qurtubi asserts that the prophets conveyed the prophetic message honestly and truthfully, without deception or falsehood.[36] Al-Saadi states that the prophets are trustworthy because they never lied to God while conveying the divine discourse.[37]

From the same moral perspective of prophets' honesty, the Prophet's biography describes Prophet Muhammad as someone who consistently showed honesty towards all individuals during his time.[38] The Meccans, among whom he resided for forty years before his prophethood, unanimously acknowledged his constant honesty.[39] Despite their disbelief in his prophethood, the Meccans admitted that even if the "Prophet had been dishonest about his prophethood, he had never lied to people".[40]

In this sense, it is obvious that Prophets needed to possess the virtue of honesty to carry the divine message with trust. Honesty is also an essential virtue for prophets to earn the trust of people. This is because people are unlikely to trust the prophethood of someone known within their community to lack honesty.

Furthermore, the term 'trustworthy' appears in the *Qur'an* in the context of the Angel Gabriel. "The trustworthy spirit has brought it down"[41] and "Obeyed there [in the heavens] and trustworthy".[42] The interpreters of the *Qur'an* agree that in the two verses, the word trustworthy refers to the Angel Gabriel.[43] In the first verse, the commentators of the *Qur'an* state that this verse was revealed in the context of the Angel Gabriel faithfully transmitting the *Qur'an* from God to the Prophet Muhammad. God described the Angel Gabriel as trustworthy because of his firm integrity in faithfully delivering *Allah's* verses to the Messenger Muhammad, just as they were entrusted to him in both structure and words, without making any additions or modifications of his own in the *Qur'an*.[44] Equally, in the second verse, the Angel Gabriel is portrayed as a trustworthy Angel because of his unwavering integrity in accurately transmitting the holy *Qur'an* without any alteration, just as it was received from God.[45]

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[35] Al-Baghawi, (n 27) vol 6, 121.
[36] Muhammad Ahmad Al-Qurtubi, *Al-Jami li-Aḥkam Al-Qur'an* [The Entire of *Shari'a* Judgements in The *Qur'an*: A Book of Exegeses of The *Qur'an*] (Ahmed Al-Bardouni and Ibrahim Atfeesh eds, vol 13, *Dar Al-Kutb Al-Masria* 1964) 119.
[37] Abdul-Rahman Nasser Al-Saadi, *Taysir Al-Karim Al-Rahman Fi Tafsir Kalam Al-Manan* [The Facilitation from the Most Generous (God) and Most Merciful (God) in Interpreting the Words of the Most Generous (God): A Book of Exegesis of the The *Qur'an*] (Abdul-Rhaman Al-Luwaihaq ed, 1st edn, *Mussat Al-Risala* 2000) 594.
[38]Abdul-MalikAl-Himyar Ibn-Hisham, *Al-Sīrah al-Nabawiyyah* [The Life of the Prophet: Prophetic Biography] (Mustafa Al-Saqa, Ibrahim Al-Abyari and Abdul-Hafeez Shalaby eds, vol 1, 2nd edn, Mustafa Al-Baby Al-Halabi 1955) 183,197, 198.
[39] Ibid.
[40] Ibid.
[41] *Sura Al-Shu'ara.*193.
[42] *Sura Al-Takwi*r.21.
[43] See generally, Al-Tabari, (n 27) vol 19, 396 and vol 24, 259; Al-Baghawi, (n 27) vol 6, 128 and vol 8, 349-350; Ibn-Kathir (n 27) vol 6; 146 and vol 8; 233; Al-Saadi, (n 37) 597 and 912; Al-Qurtubi (n 36) vol 1, 116; vol 13, 138 and vol 19; 240.
[44] Ibid.
[45] Ibid.

The various contexts in which the term 'trustworthy' is mentioned in the *Qur'an* suggest that the moral focus in the *Qur'an* is that being trustworthy attracts others to place their trust in one. The concept of trust in fellow humans, therefore, cannot be addressed apart from considering the ethics of trustworthiness. Nevertheless, the *Qur'an* does not specify the ethics required to recognise a trustworthy person. This suggests that the ethical attributes of a trustworthy person can vary depending on the specific form of trust bestowed upon them.

Ethics of Trustworthiness in the Framework of Theories of Noble Morals

In Islam, qualities are generally defined in terms of their positive aspects, such as humility and honesty, or their negative aspects, such as greed and injustice. These positive and negative attributes are interpreted respectively as ethics or vices. Therefore, the standard praiseworthy behaviour is attained by developing ethics and restraining vices.

In the context of trust, Muslim philosophers examine the ethics of trustworthiness, specifically the issue of placing trust in fellow humans. The most apparent normative claims in Muslim philosophers' discussions primarily focus on the ethical character of a trustworthy person. Trustworthiness is a matter that has a valued component. Accordingly, Muslim philosophers developed *Makarim Al-akhlaq's* theories (noble morals) centred on individual ethics, aiming to cultivate a virtuous Muslim character through learning and practising noble morals.

One of the earliest remaining contributions to the theory of noble virtues is the work of Ibn Abi Al-Dunya, which he presented in his book *Makarim Al-Akhlaq.* Abi-Al-Dunya establishes a set of righteous ethics that are derived from the texts of the *Qur'an*, *Sunnah*, and the utterances of the Companions. Abi-Al-Dunya also typically recognises moral values that originated from pre-Islamic Arab culture. According to Abi-Al-Dunya, noble morals are ten qualities that encompass: "honesty, patience, giving to the needy, rewarding good deeds, maintaining kinship ties, fulfilling the trust, preserving the rights of neighbours, preserving the rights of companions, hospitality to guests, and the first of these is modesty". [46]

Abi-Al-Dunya utilises the list of noble morals as a general framework to develop virtue ethics centred around the trustworthiness of trust. Abi-Al-Dunya establishes a connection between trust and the virtue of modesty, drawing from the *hadith:* "The initial [qualities] that God will take from this nation [Islamic nation] are modesty and trust".[47] Modesty serves as a measure of an individual's moral standing, and a lack of modesty signifies a decline in their morality, resulting in a loss of trust in them. Abi-Al-Dunya sustained his statement with the Prophetic *hadith*: "Every religion has its distinct characteristic, and the distinct characteristic of Islam is modesty."[48]

[46]Abdullah Muhammad Ibn Abi-Al-Dunya, *Makarim Al-Akhlaq* [Noble Morals in Islam] (Majdi Al-Sayied ed, *Matabat Al-Aqur'an* [no date]) 26.
[47] Ibid 88.
[48]Ibid 41.

In addition, Abi-Al-Dunya defines compassion as a quality that facilitates earning trustworthiness, and he frames this morally and theologically through the concept of charitable donation.[49] The philosopher Abi-Al-Dunya also describes other virtues, such as honesty and respect for the rights of neighbours, and their strong correlation with an individual's trustworthiness and ability to be trusted.[50] Abi-Al-Dunya also states that these two virtues are related to the morality of decency.[51]
Abi-Al-Dunya argues that possessing virtues is not inherent in an individual or transmitted through inheritance. Developing a trustworthy character is an individual's obligation.[52] This can be achieved by incorporating these values into their actions, attitudes, and words, thus building a sense of social trust among people. In his theory, Abi-Al-Dunya emphasises that an individual's behaviours that fall against these characteristics make them untrustworthy, regardless of their prayers, fasting, and claims to be a Muslim. Ibn-Abi-Al-Dunya also maintains that being trustworthy is not an absolute or fixed state but links to one's faith.[53] The less a person is worthy of trust, the less faith they have. This means that noble morals nourish faith. Ultimately, Abi-Al-Dunya asserts that noble morals hold significance in building a trustworthy character and qualify one to receive rewards in the afterlife.[54]

Following the well-known work of Abi-Al-Dunya, many notable figures, such as Al-Raghib Al-Isfahani, Al-Mawardi, and Al-Ghazali, made significant contributions to the field of noble morals.[55] Similar to Abi-Al-Dunya, the work of these philosophers relied on the statements of the *Qur'an* and *hadiths,* as well as explanatory texts from the early Islamic period, to define the qualities of noble character. However, they partly replaced the narrative and descriptive methodology of ethics found in Abi-Al-Dunya's work with a more analytical approach, defining virtuous character through technical terminology, precise definitions, and systematic classifications.

For instance, Al-Raghib Al-Isfahani formulates the ethical philosophy of noble morals from a theological perspective. He argues that noble ethics can be developed by practising fundamental virtues such as "rationality, courage, justice, generosity, and decency".[56] Drawing upon the contributions of Al-Raghib Al-Isfahani, the preeminent philosopher's theorists Al-Mawardi and Al-Ghazali have formulated their theory of noble morals. The two thinkers made significant contributions to the field of ethics, addressing the characteristics of a trustworthy person in the context of interpersonal trust.

[49] Ibid 89.
[50] Ibid 88-90.
[51] Ibid 90.
[52] Ibid 91.
[53] Ibid 91-92.
[54] Ibid 91.
[55] See generally, Hussein Al-Raghib Al-Isfahani, *Al-Thari'ah Ila Makarim Al-Shari'a* [The Noble Morals in *Shari'a*] (Abu Al-Yazid Al-Ajami ed, *Dar Al-Salam* 2007); Ali Muhammad Al-Mawardi, *Aadab Al-Dunya Wa Al-Din* [The Ethics of Religion and This World: A book of Islamic Ethics] (*Dar Maktabt Al-Hayat* 1986); Muhammad Abu-Hamid Al-Ghazali, *Ihya'a Ulum Al-Deen* [The Revival of The Religious Science] (1st edn *Dar Ibn-Hazm* 2005).
[56] See generally, Al-Isfahani, *Al-Thari'ah Ila Makarim Al-Shari'a* (n 55) 121.

Al-Mawardi, in his book *Ethics of Religion and This World,* introduces an ethical theory with a dual aim: to urge people to adopt noble ethics that will lead to the establishment of a morally upright society in this life and ensure salvation in the afterlife. In Al-Mawardi's theory, virtue is defined as a balanced position between two extremes, guided by the *hadith*: "The best of affairs is their middle course".[57] When addressing the notion of trust, Al-Mawardi acknowledges that trust is a crucial factor in social interactions, and the prosperity of civilisations relies on it.[58] Nevertheless, Al-Mawardi argues that trust carries inherent risks and cautions individuals against trusting everyone. In Al-Mawardi's theory, a person's trustworthiness is associated with a specific set of qualities, such as modesty.[59] The honesty of an individual is also of utmost significance, as lying hinders the establishment of trust in them.[60]

Additionally, apparent piety and religion are signs of trustworthiness, as trust is associated with a religious faith and commitment to piety.[61] Further, demonstrating genuine affection has been recognised as a praiseworthy characteristic that promotes interpersonal connections and encourages a sense of comfort and trust in others.[62] Al-Mawardi also emphasises the need to keep secrets, stating that it is a fundamental value linked to an individual's trustworthiness.[63]

In the context of noble ethics in trust, Al-Mawardi reaffirms the importance of rationality in choosing a trustworthy person and maintains that a rational individual trusts only those who are trustworthy.[64] Finally, Al-Mawardi adds a distinctive mark for a trustworthy person and notes that a genuinely trustworthy person does not ask for trust. The one who seeks trust is perceived as a "betrayer" or a "dubious" person, as trust is given rather than being requested.[65]

Similar to Al-Mawardi, Al-Ghazali defines virtue as the balanced path between two extremes.[66] In his ethics philosophy, Al-Ghazali classifies ethics into four qualities, which he refers to as the "mothers of ethics": "wisdom, courage, justice and decency".[67] Concerning the principle of trust, Al-Ghazali's ethical theory addresses the notion of trust in various contexts, discussing the ethics of a trustworthy person. Al-Ghazali discusses the concept of trustworthiness in relation to vices that are contrary to honesty.[68] He identifies deceit and cunning as specific vices opposite to trustworthiness.[69] Therefore, anyone

[57] According to Al-Mawardi, if a praiseworthy trait is taken beyond its appropriate limits, it becomes blameworthy. See Al-Mawardi (n 55) 24.
[58] Ibid 324-325.
[59] Al-Mawardi (n 55) 247-251.
[60] Al-Mawardi (n 55) 261-269.
[61] Ibid 317-347.
[62] Ibid 161-182.
[63] Ibid 306-309.
[64] Ibid 17-28.
[65] Ibid 308.
[66] Al-Ghazali, (n 55) 935.
[67] Ibid 936.
[68] Ibid 1024-1055 with emphasis at 1075, 627, 583, 1351.
[69] Ibid.

recognised in their culture for displaying these attributes is considered a traitor, and trustworthiness is not attributed to individuals with such characteristics.

The notion of trust in fellow humans also manifests in Al-Ghazali's theory within the framework of brotherhood. Brotherhood emphasises that the relationships among Muslims are founded on the bond of brotherhood in Islam.[70] Nevertheless, Al-Ghazali emphasises the importance of choosing a reliable individual to trust, as not all brothers possess the qualities necessary to be deemed trustworthy. According to Al-Ghazali, one who deserves the trust of fellow Muslims possesses a rational approach, exhibits modesty and humility, and can keep secrets.[71] Further, Al-Ghazali cautions readers to avoid individuals who display heretical beliefs, aggression and excessive preoccupation with worldly matters.[72] Al-Ghazali ultimately emphasises the importance of the criterion of fear of God, as he believes that those who do not fear God cannot be trusted, since they are prone to changing their behaviour based on self-interest.[73]

Through the framework of noble morals theories, theorists have not agreed on formulating definitive standards for recognising a trustworthy individual. The theorists also refrain from addressing specific attributes of trustworthiness in particular disciplines. Instead, they established a set of noble ethics that may be used generally to recognise a trustworthy person. These virtuous qualities can be developed and applied in different circumstances, such as those required for trustworthy politicians, judges, lawyers, or physicians.

Ethics of A Trustworthy Physician

In the medical context, Islam regards medicine as a noble profession, and its practitioners are expected to be trustworthy in this highly esteemed field. As noted earlier, under the moral framework of trust-based relationships with fellow humans, the normative claim focuses on the characteristics of the trustworthy individual who will be trusted. This is because being a trustworthy person helps to establish trust with others. Accordingly, since the early days of Islam, Muslim scholars have contemplated the ethics of the trustworthy physician in practising the noble profession of medicine.[74] Therefore, they have developed ethical theories based on noble morals to establish the ethics of physicians. These theories aim to build the character of a virtuous Muslim physician by learning and practising the virtues that are appropriate for the noble profession of medicine. In turn, such noble ethics enhance the conduct of a trustworthy physician and consequently strengthen the patient's sense of security in their physician, giving them the trust to treat their diseases.

The work of Rahwi's: *The Ethics of Physicians* is the first Islamic contribution to investigate the noble morals of a trustworthy person in medicine.[75] The contribution of Rahwi primarily

[70] Ibid 610-685.
[71] Ibid 939-963, 1022-1024.
[72] Ibid 966-1021, 1082-1088,1101-1133.
[73] Ibid 1488-1540.
[74] Sajad Azmand and Mojtaba Heydari, 'Medical Ethics According to Avicenna's Stance: A Synopsis' (2017) 6(4) Galen Medical Journal 261, 261.
[75] Ibid 261.

focuses on portraying the qualities of doctors viewed as trustworthy in the medical profession. Following Rahwi's initial work, many Muslim thinkers have made significant contributions to defining the attributes of a trustworthy physician in medicine. One notable contributor is Al-Tabari, a Muslim philosopher and physician. Al-Tabari highlights the critical qualities of a trustworthy physician as follows:

> "The physician ought to be modest, virtuous, merciful, not slanderous or addicted to liquor, and speak no evil of men of reputation in the community or be critical of their religious beliefs. He should be honest with women and not divulge his patients' secrets, nor make jokes and laugh at inappropriate times and places… He should speak well of his acquaintances, colleagues, and clients and not be a money grabber".[76]

Like Al-Tabari, many Muslim philosophers, such as Al-Shirazi in his Manuscript of Medicine and Al-Razi in his Medical Encyclopaedia, identify the ethics of trustworthy physicians in medicine.[77] Typically, the virtuous attributes of a trustworthy doctor are essentially a manifestation of the virtuous qualities outlined by the theories of noble morals. These ethics are primarily expressed through the virtues of keeping secrets, modesty, decency, honesty, kindness, and genuineness.

Ethics of A Trustworthy Physician According to Ibn-Sina

Ibn-Sina argues that medicine is a noble profession, and its practitioners must have virtuous ethics.[78] Accordingly, Ibn-Sina formulates a set of virtuous religious and social norms that defined the characteristics of a trustworthy physician in the medical profession. These attributes are drawn from the primary sources of *Shari'a* and the exemplary moral behaviour in early Islam.

In various parts of his philosophy, Ibn-Sina argues that physicians should learn and practice religious and social virtues to enhance their trust and thus contribute to developing a trustworthy character for practising medicine. Ibn-Sina defines the behaviour of a virtuous physician as moderate, which entails maintaining a balanced position between two extremes.[79] In this sense, Ibn-Sina's definition of virtue aligns with the definition of virtue in the theories of noble morals, as indicated by Al-Mawardi and Al-Ghazali. In this context, Ibn-Sina illustrates the notion of moderation by demonstrating the virtue of modesty.[80] The modesty of physicians refers to maintaining a balanced approach and avoiding excessive intimacy and arrogance. Excessive Intimacy, such as excessive joking, might undermine the doctor's respect.[81] On the other hand, excessive arrogance can be perceived as harshness, ultimately damaging the doctor-patient relationship.

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[76] Sami Hamarneh, 'The Physician and The Health Professions in Medieval Islam' (1971) 47(9) Bull N Y Acad Med 1088, 1110.
[77] Azmand and Heydari (n 74) 261.
[78] Ibn-Sina'a perspective is presented in the work of Qutb-Al-Din Al-Shirazi, *Fi Bayan Al-Hajat ila Al-Tibb Wa Al-Atib'a Wa Adabbham wa Wasayhm* [The Need of Medicine and Physicians: Ethics and Advice for Physicians] (Ahamad Al-Mazidi ed, Section Three: Ibn Sina's Guidance to Physicians, *Dar Al-Kutb Al-Elmia* [no date]) 35-82.
[79] Ibn Sina'a's perspective in Al-Shirazi (n 78) 35-42.
[80] Ibid.
[81] Ibid.

Ibn-Sina, then, describes narratively many virtuous moral qualities that a physician should acquire and display.[82] According to Ibn-Sina, the qualities of a trustworthy physician involve being capable of maintaining calm behaviour, which is associated with patience, genuine affection, and tolerance. Ibn-Sina also clearly asserts that a virtuous physician maintains the patient's secrets, refraining from disclosing the patient's illness to anyone unless in cases of necessity or to individuals who have a legitimate reason to know.[83] The attributes of a trustworthy physician in Ibn-Sina's contemplation are repeatedly manifested as moral virtues crucial for recognising a trustworthy person in social interactions within the framework of theories of noble morals.

Ibn Sina emphasises that trustworthy physicians should demonstrate religious qualities, such as faith. Finally, Ibn-Sina argues that the fear of God is a vital factor in assessing a physician's trustworthiness.[84] A physician lacking this quality cannot be considered reliable and is unsuitable for medical treatment.[85] In this sense, the fear of God is a significant indicator for recognising a trustworthy physician. The qualities listed by Ibn-Sina frequently manifest as crucial traits of a trustworthy individual in the theories of noble morals.

The Application of Trustworthy Physicians: Trust as Trustworthiness in Saudi Law:
In trust-based relationships, Islamic discourse focuses primarily on the moral character of the trustworthy individual. Trustworthiness, as observed, is an essential characteristic to consider when choosing whom to trust. Thus, when individuals seek to give their trust to others, they grant it to someone who can be recognised by their abilities and trustworthiness, as demonstrated in the story of the daughters of Madyan's man in the words "strong" and "trustworthy".

There has been extensive discussion among Muslim theorists regarding the ethics of trustworthiness. They investigate the matter under noble morals theories and identify a set of virtuous qualities that can be utilised to recognise a trustworthy person. In the context of trust in social interactions, one can judge a trustworthy person based on the person's knowledge.[86] This knowledge can be either innate, such as knowing one's family members or acquired through personal experience and interactions.[87]

Yet, in other contexts built on trust, like medical treatment, how patients might correctly recognise a trustworthy physician is a vital question. The interaction of the patient with the physician may be formal or brief. In addition, the patient may have no prior knowledge of the physician. In such circumstances, how do patients lacking personal knowledge of the doctor judge the doctor's competency and trustworthiness, thereby placing their trust in them?

[82] Ibid.
[83] Ibid.
[84] Ibid.
[85] Ibid.
[86] Eggen (n 5) 75.
[87] Ibid.

In Islamic theology, moral principles such as trust establish moral abstract requirements. The theoretical requirements do not specify policies and procedures for their practical application. To embed these moral requirements into practice in the context of medical treatment, lawmakers find ways to resolve the abstract requirements. Policymakers, therefore, establish codes of conduct and professional standards to govern the implementation of these moral requirements. In the context of determining a qualified and trustworthy physician, Article 1 of the PHP 2005 states that the health practitioner shall obtain a practice license from the competent local medical authority in Saudi Arabia, the Saudi Commission for Health Specialities (SCHS).[88] Article 2 provides further details regarding the criteria for obtaining a licence to practise medicine and clearly states in Regulation (B) the specific medical qualifications and a mandatory internship required for practising medicine.[89]
Concerning the trustworthiness requirement, the PHP 2005 explicitly embeds the element of trustworthiness of the health practitioner. Regulation (B) of Article 2 states that a physician who has obtained a practising license must exhibit a trustworthy character. "Not to be previously convicted in a crime against *sharaf* [honour] or *amanah* [trust] unless he/she [the physician] was rehabilitated".[90] Accordingly, the PHP 2005 sets a standard for assessing the trustworthiness of a physician, refraining from actions that breach honour and trust.

Yet, the PHP 2005 does not go further and define actions considered a breach of honour and trust. In the Saudi legal system, 'honour' and 'trust' are two attributes of a set of highly valued principles and ideals in the society that people must respect and cherish in light of what is imposed by the rules of religion and morality prevailing in Saudi society. Actions against honour and trust are defined as actions that society strongly rejects, viewing the perpetrator as lacking moral values, deviating from societal norms and lacking noble qualities.[91] These actions include but are not limited to, bribery, forgery, indecent assault, theft, acts of fraud and deception in commercial and financial matters, treason, treachery and deception, lying and slander, defamation, blasphemy, false testimony, use of alcohol and drugs, adultery and rape.

Refraining from committing acts that violate honour and honesty is legally required in professions and occupations. It demands a high level of trustworthy ethics, such as those expected of judges, *muftis*, ministers, and physicians. In the context of doctors, any actions that violate the principles of 'trust' and 'honour' will undermine the doctor's trustworthiness. Determining if someone's behaviour violates the values and ethics of trust and honour, thus deeming them untrustworthy, is a legal matter that falls under the courts' responsibility.

[88] Practising Healthcare Professions Act 2005, ch1 art (1) reg (1).
[89] Practising Healthcare Professions Act 2005, ch1 art (2-b 1,2,3).
[90] Practising Healthcare Professions Act 2005, ch1 art (2-b 4).
[91] The definition is mentioned in Case 1265/6 [1436H (2015)], The Board of Grievances.

5.3.2 The Giver's Trust: Trust is a Feeling of Reassurance with the Need to Take Safeguard

The second element of the moral framework of trust involves a feeling of reassurance that allows one to place trust in a trustworthy person. This element is evident in one of the verses that addresses the notion of trust. "But if any of you *am'n* [feels safe with] another, let him who is trusted fulfil the trust".[92] The verse uses the word *am'n* to express an individual's satisfaction in placing trust in another. Lexicographers trace the word *am'n* to its origin in the Arabic term *a-m-n,* which refers to "the state of tranquillity of heart and demise of fear".[93] The noun *am'n* refers to many concepts like "security, safety, shelter, peace and protection".[94] Ibn Al-Jawzi interprets the word *am'n* to signify a state of security and tranquillity.[95]

The word *am'n* appears in two places in the *Qur'an* to refer to the state of sleep. The first verse, "Then after the distress, He sent down upon you *am'n* (security) [in the form of] drowsiness."[96] The second verse, "And when He covered you with slumber as *am'n* (security) from Him."[97]

The first verse illustrates that following the Muslims' defeat in the Battle of *Uhud*, they remained vigilant and did not rest, as they were consumed by worry and grief.[98] Divine mercy caused drowsiness to overcome them, leading them to feel safe and subsequently fall asleep.[99] Thus, the first verse suggests that Muslims did not sleep until they had a sense of security, as distress prevents them from sleeping.

The second verse relates to the historical event of the Battle of *Badr.*[100] The *Quraysh* army possessed superior armament and weaponry, while the Muslim army severely lacked such resources. Furthermore, the army of *Quraysh* was more significant than the Muslim force. Nevertheless, Muslims slept on the battlefield. This verse suggests that sleeping on the battlefield signifies a manifestation of tranquillity and security,[101] as one cannot sleep on the battlefield until one feels protected and safe. The conclusion that can be drawn from these two verses is that in both situations, Muslims felt a sense of security and tranquillity, leading them to sleep peacefully due to their trust in God.

In light of this meaning of the word *am'n* (feels security) that arose from trust in God, the *Qur'an* uses the root word to portray trust in fellow humans as a positive value associated with feeling secure in them. While the feelings of security in God arise from absolute trust in God (this type of trust is out of the scope of this thesis), a sense of tranquillity in people is conditioned by the circumstantial factors of others. Such circumstances are relevant to

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[92] *Sura Al-Baqra.* 283.
[93] Sirajul Islam and Sofiah Samsudin, 'Interpretations of *Al-Amanah* Among Muslim Scholars and Its Role in Establishing Peace in Society' (2018) 48(3) Social Changes 437, 448.
[94] Ibid.
[95] Al-Jawzi (n 19) 104.
[96] *Sura Al-Imran*.154.
[97] *Sura Al-Anfal*.11.
[98] See Ibn-Kathir (n 27) vol 4, 19-20.
[99] Ibid.
[100] Ibid vol 4, 20.
[101] Ibid.

showing the moral standards for trustworthy behaviour as stated in the first component: the ethics of a trustworthy person in daily activities.

The feeling of security manifests when an individual (the trust's giver) trusts the trustworthy person (the trust's recipient). In this sense, placing trust is a form of explicit or implicit choice.
Nevertheless, the divine discourse declares that it is not contradictory to feel secure in trusting a trustworthy individual while taking the appropriate precautions. The verse of the *Qur'an* preceding the text under discussion states, "And do not be [too] weary to write it, whether it is small or large, for its [specified] term. That is more just in the sight of *Allah* and stronger as evidence and more likely to prevent doubt between you".[102] Following that, the first part of the verse in concern states: "And if you are on a journey and cannot find a scribe, then resort to taking pledges in hand".[103]

These two verses address the principle of trust in the particular context of lending.[104] The divine teachings emphasise the importance of taking appropriate safeguards when lending money to a trustworthy individual. In this specific context, these safeguards are expressed in three different methods: a) the testimony of witnesses, b) documenting the content of the discussions related to the trust matter, and c) requesting a deposit from the trust's receiver.[105] In regards to these safeguards, the interpretations of the *Qur'anic* texts suggest that taking precautions does not indicate a lack of trust in the recipient but rather aligns with God's directive to demonstrate good intentions and avoid any future misunderstanding or conflict between the persons involved. However, the *Qur'anic* teachings exclude taking necessary precautions in the case of an emergency, such as when travelling. In such situations, the *Qur'an* teachings emphasise the sufficiency of relying solely on the person's trustworthiness to fulfil the trust without further safeguards.[106]

The Patient's Trust According to Ibn-Sina
Ibn-Sina argues that the ethics of trustworthiness are essential to building patient trust in their physicians and, thus, establishing their sense of assurance throughout the medical treatment process. However, suppose such ethical virtues of trustworthiness are neglected.[107] In that case, the doctor's trustworthiness among patients can be diminished, undermining the patient's trust in the doctor's treatment and the medical profession as a whole.

In this sense, Ibn Sina's argument asserts that placing trust in physicians to undergo medical treatment depends on situational factors. Such situational factors are associated with a physician's manifestation of the ethical standards expected of a trustworthy physician in treating patients. The argument of Ibn-Sina aligns with the second element of the moral

[102] *Sura Al-Baqra.* 282.
[103] *Sura Al-Baqra.* 283.
[104] For the interpretation of these two verses, See Ibn-Kathir (n 27) vol 1, 562-564; Al-Baghawi, (n 27) vol 1, 348-351.
[105] Ibid.
[106]Ibid.
[107] Ibn Sina'a perspective in Al-Shirazi (n 78) 35-42.

framework of trust in *Shari'a* discourse. According to the component, the trust-giver (the patient) places their trust in another individual (the physician) who demonstrates social and religious qualities of trustworthiness (the physician's quest for and commitment to the virtues of trustworthiness).

As observed in the principle of trust in fellow humans, the *Qur'anic* teachings emphasise adopting necessary precautions while placing trust in others in non-urgent situations. Such safeguards demonstrate genuine intent and prevent potential misinterpretation or discord among the concerned individuals. However, Ibn-Sina's ethical philosophy of medical treatment does not address the issue of patients obtaining any form of safeguards from their doctors. This suggests that Ibn-Sina accepts that the trustworthiness of doctors is sufficient to establish a sense of security for patients to undergo treatment without requiring additional safeguards, whether it involves a routine, urgent, or non-urgent medical condition.

The Application of The Patient's Trust: Trust as a Feeling of Reassurance with the Need to Take Safeguards in Saudi Law:

A physician who satisfies the requirements for obtaining a licence to practise medicine and successfully acquires it meets the second moral condition of feeling secure in their competence and trustworthiness in medical treatment. In this sense, placing trust in physicians as the moral basis of the patient-physician relationship is legally established. Accordingly, the patient's trust in the doctor is presumed and established by law, rather than based on personal knowledge or personal interactions between patients and physicians.

Nevertheless, it has been previously noted that *Shari'a* teachings emphasise that feeling secure in trusting a trustworthy person does not contradict the adoption of necessary precautions. Such safeguards are essential to demonstrate good intentions and prevent any future misunderstandings or conflicts among those engaged in trust-based interactions. To ensure such safeguards, lawmakers enforce moral standards on trustworthy physicians, and the legal provisions of the PHP 2005 require obtaining consent to medical treatment as a moral requirement in practice in favour of trust. Article 19 of the PHP 2005 states that obtaining medical consent from the patient is an obligation that must be fulfilled in all medical interventions.[108] Thus, under PHP 2005, medical consent is a moral construct that stems from the principle of trust in a trustworthy physician. It serves as a moral standard, enabling patients to protect themselves against actions such as coercion or deception.

However, in emergencies, *Shari'a* directives exclude the act of adopting necessary safeguards. Under such circumstances, it is satisfactory to rely solely on the sense of security provided by a trustworthy person without implementing additional precautions. This exception is also reflected in the PHP 2005. Article 19 exempts physicians from the

[108] Practising Healthcare Professions Act 2005, ch2, s 2 (19).

moral obligation to obtain consent in emergencies necessitating immediate medical intervention.[109]

In recent years, policymakers have recognised that medical consent is an insufficient moral standard. Ultimately, a patient consents to describing a medical procedure that may not address the undisclosed fears and risks. The 2017 reform of the PHP 2005 introduced a new legal provision concerning consent to medical treatment. Under the additional provision, health practitioners shall disclose potential adverse effects of medical procedures.[110] As discussed earlier, in *Shari'a* discourse about trust, such requirements do not weaken or question the doctor's trustworthiness. Instead, it is crucial to demonstrate good purpose and prevent any potential confusion or dispute between the patient and the doctor.

5.3.3 The Recipient's Duty: Trust as A Covenant to Fulfil the Best Interests of the Trust's Giver

The third element in the *Shari'a* moral framework of trust considers trust a covenant between God and individuals. This covenant requires the trust's recipient to have the trust's giver's best interests at heart.

Trust, as a covenant between God and humanity that places an obligation, is expressed in the verse: "Truly, we [God] did offer trust to the heavens and the earth, and the mountains, but they declined to bear it and were afraid of it. But mankind bore it".[111] In the literature of *Qur'anic* interpretation, Al-Zamakhshari maintains that in this verse, the principle of trust appears as a covenant between God and humans, which requires the recipient's trust to fulfil the obligation entrusted to them.[112]

In *Shari'a* discourse, the concept of God permeates every aspect of a Muslim's life. The *Qur'an* does not address any central concept without connecting it to God. In this sense, portraying trust as a sacred covenant between God and humans places a moral value on trust. This moral significance imposes a duty on the recipient of the trust to fulfil since it is a divine command: "And fulfil [every] covenant. Indeed, the covenant will be questioned".[113] Therefore, expressing trust as a sacred covenant between God and humanity enhances the value of trust for the person to whom it is given. It instils a strong sense of obligation in the recipient of the trust to fulfil their duty, as this obligation stems from a covenant with their Creator in the first place.

Furthermore, the *Qur'an* expresses the principle of trust in people by explicitly using the word covenant in two verses that utilise identical wording in *sura al-mu'minun* and *sura al-ma'arij*: "and those who fulfil their trusts and their covenants".[114] In the interpretation of both parallel verses in formulations, the *Qur'anic* commentators state that when a trust

[109] Ibid.
[110] Practising Healthcare Professions Act 2005, ch2, s2 (18) reg (1).
[111] *Sura Al-Ahzab*.72.
[112] Mahmud Umar Abu-Al-Qasim Al-Zamakhshari, *Al-Kashshaf* [The Revealer: A Book of Exegeses of The *Qur'an*] (Mustafa Hussein ed, vol 3, 3rd edn, *Dar Al-Kitab Al-Arabia* 1987) 564.
[113] *Sura Al-Isra*.34.
[114] *Sura Al-Mu'minun*.8; *Sura Al-Ma'arij*.32.

is placed in a person, it is akin to a covenant that imposes a duty upon the recipient to fulfil the trust faithfully bestowed by the person who entrusted it.[115] In the context of trust in fellow humans, the obligation to achieve trust is the ideal standard that the person entrusted with the responsibility must meet to act in the best interests of the trust-givers. Al-Tabari maintains that the recipient of the trust must be conscientious and attentive in upholding their covenant with their fellow humans regarding the duties entrusted to them.[116]

The Duty of the Physician to Fulfil the Best Interests of Patients According to Ibn-Sina

In his philosophy of biomedical ethics, Ibn-Sina asserts that physicians are required to behave in a manner that enhances trust and establishes them as trustworthy practitioners in the eyes of their patients. In the medical treatment setting, to enhance such trust placed in the physician, Ibn-Sina repeatedly argues that physicians must act in the patient's best interests and consider their specific circumstances during the examination, diagnosis, and in all medical decisions concerning treatment options.[117]

Ibn-Sina provides illustrations to elucidate the meaning of prioritising the patient's interests. For instance, when proposing medical interventions, the physician should begin with the most straightforward and least invasive treatments, minimise the prescription of potentially harmful medications, and refrain from recommending expensive treatments that the patient cannot afford.[118] Notably, Ibn-Sina argues that considering the patient's interests necessitates the physician instructing patients to adhere fully to the physician's advice.[119]

Hence, Ibn-Sina's argument reflects the third aspect of the principle of trust in *Shari'a* discourse, which involves the recipient of the trust (the physician) being morally obligated to prioritise the interests of the person who entrusted them (the patient).

Further, Ibn-Sina adopts the professional physician's conduct standard to provide medical treatment that prioritises the patient's interests. Ibn-Sina also advises physicians to improve their specialised medical knowledge to meet this criterion constantly.[120] For instance, Ibn-Sina maintains that the doctor should exert maximum effort to enhance their medical expertise, which includes travelling to acquire the necessary knowledge by engaging with other medical experts and collecting books and resources that help diagnose and treat patients.[121]

The Application of The Physician's Duty: Trust as A Covenant to Fulfil the Best Interests of Patients in Saudi Law:

[115] For the interpretation of *Sura Al-Mu'minun*.8, See Ibn-Kathir, (n 27) vol 5, 404; Al-Baghawi (n 27) vol 5, 410.For the interpretation of *Sura Al-Ma'arij*.32, See Al-Saadi (n 37) 887; Al-Tabari (n 27) vol 23, 618.
[116] Al-Tabari, (n 27) vol 23, 618.
[117] Ibn Sina'a perspective in Al-Shirazi (n 78) 38-42.
[118] Ibid.
[119] Ibid.
[120] Ibid 39.
[121] Ibid.

As discussed, within the moral framework of trust in humans, trust is regarded as a covenant between the trust's recipient and God. This covenant entails a duty on the receiver of the trust to prioritise the interests of the trust's giver. Therefore, the trust granted to the physician in the context of medical treatment imposes a duty on the physician to prioritise the patient's interests. To maximise physicians' moral obligation to prioritise their patients' interests, Saudi policy adopted two actions that raise the moral criteria for physicians.

Firstly, physicians adhere to the medical ethical oath, which includes their responsibility to prioritise the interests of their patients. The oath commences with the declaration, "I swear by God Almighty," and concludes with the affirmation, "And God bears testimony to my words". Thus, the medical oath establishes that a physician's duties, rooted in the principle of trust, are firstly a sacred covenant between the physician and God. This covenant with God is intended to strengthen the physician's sense of the importance of fulfilling their duty towards patients, as it begins with a covenant with their Creator. If physicians fail to fulfil their duties, they will break the covenant they made with their God.

Secondly, the PHP 2005 explicitly states in Article 5 that the doctor must actively adhere to the interests of the patient and the public.[122] To fulfil the duty of adhering to patient interest, Article 26 of the PHP 2005 establishes the professional physician standard that Ibn-Sina developed in his ethical philosophy concerning medical treatment.[123] In this sense, the physician must prioritise the patient's best interest and safety as the primary concern when deciding treatment options. The imposed legal standard is the professional standard to determine whether the physician has fulfilled this duty. Under this standard, the physician considers the recommended course of treatment in the patient's best interests that another physician with similar training and experience considers material for making a treatment decision. Thus, if a physician informs the patient about the treatment options that are commonly accepted within their medical community, they would likely not be legally responsible for not disclosing the patient about other alternative treatments that are not recognised, regardless of the evidence supporting those alternative treatments or whether the patient considers that information important for their treatment decision. The professional standard implies that the extent of information to be revealed to the patient during medical treatment is based on trust in medical competence.

Furthermore, based on the argument of Ibn-Sina previously stated, Ibn-Sina considers that placing the patient's well-being first involves ensuring that the patient is informed about the significance of adhering to the doctor's instructions. This paternalistic attitude has been reflected in the PHP 2005. Article 18 stipulates that a physician, after disclosing the proposed treatment, must inform the patient about the importance of following the physician's advice and recommendations and warn the patient about the potential consequences of failing to comply with these instructions.[124]

[122] Practising Healthcare Professions Act 2005, ch2, s1 art (5).
[123] Practising Healthcare Professions Act 2005, ch3, s1 art (26).
[124] Practising Healthcare Professions Act 2005, ch2, s2 art (18).

Accordingly, by connecting the requirement for disclosing medical treatment choices to the standards of the physician's profession and enforcing a responsibility on the doctor to give a warning about the significance of adhering to the doctor's instructions, the patient's consent is essentially nothing more than agreeing to what the doctor proposed.

5.3.4 The Responsibility of Recipient's Trust: Trust as Deposit Entrusted

The last component of the moral framework on the trust principle considers trust as a deposit entrusted to its recipient's care until it is returned to its rightful owners. This deposit holds the recipient responsible for any failure to fulfil their duties.

Trust as a deposit is mentioned in the *Qur'an* in the following verse: "*Allah* commands you all to hand back trusts to their owners… *Allah* is ever Hearing and Seeing".[125] The *Qur'anic* commentator, Al-Tabari, interprets this verse through its historical context and the reason for its revelation.[126] This verse was revealed when the Prophet Muhammad took the keys of the *Ka'ba*[127] from its custodian, Uthman Ibn-Talhah, on the day of the Conquest of Mecca. Subsequently, a divine revelation commanded the Prophet to return the entrusted object (the keys) to Uthman.[128] The Prophet went out while reading this verse and called Uthman to return the keys to him.[129]

Further, Al-Qurtubi maintains that the most clear textual interpretation of the verse concerns the responsibility to protect the trust until it is returned to its rightful owners.[130] Al-Razi affirms Al-Qurtubi's interpretation, and Al-Razi adds that while the verse was revealed as a response to the matter of *Ka'ba's* keys, the wording of the verse is general and not exclusive to that particular matter.[131] According to Al-Razi, this verse instructs all believers to honour and protect all their trust, whether it pertains to religious or worldly affairs.[132] This generalisation of the provisions of the verse is substantiated by the plural form in the verse "*Allah* commands you all," which suggests that the command applies to all believers and is not restricted to the Prophet. Al-Razi further observes that the plural form signifies the obligation to return the trust to its rightful owner, regardless of their faith, moral character or adherence to righteousness and virtue.[133] The *Sunnah* of the Prophet also supports the generalisation. The Prophet says: "Give back the deposit to him who deposited it with you, and do not violate the trust of him who violates your trust".[134]

Furthermore, Al-Razi states that the *Qur'an* discourse uses the plural form in the term "trusts", which signifies that God instructs all followers of Islam to protect their trusts and

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[125] *Sura Al-Nisa.*58.
[126] Al-Tabari, (n 27) vol 8, 491-492.
[127] The black cube in the Great Mosque in Mecca.
[128] Al-Tabari (n 27) vol 8, 491-492.
[129] Ibid.
[130] Al-Qurtubi (n 36) vol 5, 255-257.
[131]Fakhr-Al-Din Muhammad Al-Razi, *Mafatih Al-Ghayb: Al-Tafsir Al-Kabir*' [Keys to The Unknown: A Book of Exegeses of The *Qur'an*] (Khalil Al-Mais ed, vol 10, *Dar Ehya Al-Truth Al-Arabi* 1999) 108-110.
[132] Ibid.
[133] Ibid.
[134] *Mishkat al-Masabih* (*Hadith* 2934); In *Sunan Abi Dawud*, (*Hadith* 3535).

return them to their rightful owners, regardless of whether they are of a religious or worldly nature.[135] Ibn-Kathir agrees with Al-Razi's explanation of the term "trusts" and maintains that trust involves various forms. Trust can be material, such as safeguarding money, children, and property, or intangible, such as keeping secrets.[136]

Hence, the *Qur'an's* use of the plural form in addressing the matter of trust removes any doubt about the broad interpretation of the verse and its continued application or the claim that the verse is addressed only to the Prophet. The text of the *Qur'an* is neither abrogated nor unequivocal to the Prophet[137], allowing the list of trusts to remain open and adaptable to different forms of trust based on social customs, practices, and needs.

Since trust is a deposit in the care of its recipient, it also imposes a responsibility on the recipient for any deliberate negligence in the care of the trust. This responsibility appears in a verse that refers to the principle of trust: "Believers! Do not betray *Allah* and His Messenger, nor be knowingly betray your trusts".[138] In commenting on this verse, Ibn-Kathir maintains that it is in the interest of individuals to prioritise the care and fulfilment of their people as the ultimate salvation of humanity in the afterlife hinges on fulfilling their trust.[139] Ibn-Kathir further states that intentionally failing to fulfil trust results in committing sins and transgressions, thereby leading to punishment in both the current world and the hereafter.[140]

The Responsibility of Physicians According to Ibn-Sina

Ibn-Sina strongly emphasises the importance of physicians refraining from actions that might harm their patients in medical treatment.[141] Ibn-Sina lists examples of actions the physician must avoid, including abstaining from administering toxins and lethal medications.[142] Ibn-Sina further highlights that if the physician causes harm to the patient or fails to consider the patient's interests, they bear responsibility and therefore will have to compensate.[143]

Ibn-Sina's assertions about the physician's responsibility for any harm inflicted on patients during treatment align with the fourth aspect of the moral principle of trust. This fourth element states that trust is a deposit (the patient's body and health) in the care of the recipient of the trust (the physician). This deposit places the recipient (the physician) responsible for any deliberate failure to care for the patient's body and health throughout the treatment procedure.

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[135] Al-Razi (n 131) 109.
[136] Ibn-Kathir (n 27) vol 2, 298-299. The *Sunnah* of the Prophet also confirms that trust involves immaterial matters. The Prophet said, "When a man tells something and then departs, it is a trust". S*unan Abi Dawud,* (*Hadith* 4868).
[137] Al-Razi (n 131).
[138] *Sura Al-Anfa*l.27.
[139] See Ibn-Kathir's interpretation of *Sura Al-Rha'ad.*20,25 "Those who fulfil the covenant of Allah and do not break the contract", "and sever that which Allah has ordered to be joined and spread corruption on earth -for them is the curse, and they will have the worst home". Ibn-Kathir (n 27) vol 4, 387,389.
[140] Ibid.
[141] Ibn Sina'a perspective in Al-Shirazi, (n 78) 41-42.
[142] Ibid 42.
[143] Ibid 40.

According to Ibn-Sina's arguments presented above, physicians must strive to attain and cultivate the virtue of trustworthiness to establish trust with their patients. He further argues that a trustworthy physician consistently prioritises the patient's interests throughout the entire course of treatment.[144] This includes informing the patient about the importance of following the doctor's recommendations. If a physician fails to adhere to the standards of professional behaviour and causes harm to the patient, they are responsible for providing compensation.[145]
Hence, Ibn-Sina's philosophy principally emphasises and assigns significant weight to placing utmost trust in the physician. However, Ibn-Sina does not address patients' involvement in treatment discussions, their level of knowledge and comprehension of the therapy, and their preferences as patients.

The Application of The Physician's Responsibility: Trust as Deposit Entrusted in Saudi Law

In *Shari'a* discourse, the moral obligations that stem from the principle of trust are regarded as a deposit entrusted to the recipient's care until it is returned to its rightful owners. This deposit imposes moral responsibility on the receiver for failing to fulfil their trustworthy obligations.

To address this moral requirement, lawmakers have developed an audit and responsibility agenda for physicians who granted trust but neglected their responsibilities related to medical consent. The responsibility framework is well illustrated in PHP 2005 under the section dedicated to professional liability.[146] Regulation 28-7 imposes criminal liability on doctors who perform medical procedures on patients without their consent.[147] In addition, Article 27 imposes civil responsibility for negligent actions if the doctors fail to fulfil their duties to inform patients about the significance of following their instructions, caution patients about the severe consequences of non-compliance, and disclose information regarding the potential adverse effects of the medical intervention.[148]

Once criminal or civil liability is proven, Article 31 refers to further disciplinary actions, including the termination of the medical license. Revoking the medical licence entails withdrawing trust in the doctor.[149] Ultimately, Physicians are legally granted trust when they obtain a medical license, and this trust may only be withdrawn through a court decision.

Furthermore, Saudi policy has implemented an additional approach to enhance the audit and responsibility of physicians in fulfilling their duties. In 2019, a compulsory reporting

[144] Ibid 39-41.
[145] Ibid 39-40.
[146] See Professional Liability Under Act of Practising Healthcare Professions 2005, ch 3, s1 Civil liability; s2 Criminal liability; s3 Disciplinary liability.
[147] Act of Practising Healthcare Professions 2005, ch3, s2 art (28-7).
[148] Act of Practising Healthcare Professions 2005, ch3, s1 art (27).
[149] Act of Practising Healthcare Professions 2005, ch3, s3 art (31).

policy was enacted for severe incidents.[150] This policy coincided with the amendment of Article 18 of PHP 2005, which requires physicians to disclose potential side effects of a proposed medical intervention.[151] If investigations establish a correlation between the incident and the physician's conduct, and if it is determined that there was no provision for exemption, as mentioned in the policy's rules for reporting serious incidents, there will be legitimate grounds to assume medical negligence. Therefore, the case will bypass the hospital administration and proceed directly to the court.

In conclusion, medical consent under current Saudi law is a legal requirement that arises from the moral principle of trusting in a trustworthy physician. Trustworthiness is determined by the PHP 2005, which is based on meeting the requirements of medical competence and abstaining from actions that breach trust and honour in the Saudi legal system. Trust in the physician places a legal duty on the physician to prioritise the patient's best interests, as established by the prevailing professional physician standard in the medical community. The failure of a physician to fulfil their duties to obtain medical consent under the PHP 2005 requirements imposes legal responsibilities including criminal and civil liability upon physicians. If criminal and civil responsibilities are proven, they may lead to further disciplinary sanctions, including the withdrawal of the medical licence due to the loss of trust of the physician.

5.4 Trust in Physicians in Saudi Medical Practice

The previous section demonstrates that the Saudi legal system adopted a trust-based approach to obtaining consent for medical treatment.[152] In practice, the medical decision-making process primarily centres around the physician, who demonstrates a paternalistic behaviour to obtaining consent.[153] This claim is substantiated by many empirical findings showing that the patient-physician interaction in obtaining consent has evolved into a paternalistic model.[154] The main findings of a study conducted on a sample of patients who had undergone surgical operations reveal that there is a prevalence of physician paternalism in Saudi healthcare.[155] This conclusion was derived from the study results, which indicate that patients expressed a lack of awareness of their surgical procedures, the related risks,

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[150] See Ministry of Health of Saudi Arabia (ed) Saudi Healthcare Sentinel Event Manual, (Effective 1 March 2021) available at https://www.spsc.gov.sa/English/PublishingImages/Pages/RCA/SHS11.pdf accessed 29 April 2024; See incidents (4,9,14,15,16,19,22,24,26,27).

[151] The duty to disclose 'potential side effects' is imposed under the Act of Practising Healthcare Professions 2005, ch 2, s 2 art (18-1).

[152] Al-Mohaimede and Others (n 4) 35.

[153] See generally, Mostafa Abolfotouh and Abdallah Adlan, 'Quality of Informed Consent for Invasive Procedures in Central Saudi Arabia, (2012) 5 International Journal of General Medicine 269; Al-Mohaimede and Others (n 4); Mohammed Alsaidan, Aisha Abuyassin, Hanin Alammar and Ghaiath Hussien, 'Prevalence and Quality of Information Consent for Patient Undergoing Cosmetic Procedures: A Cross Sectional Study' (2020) 27 (1) Acta Bioethic 37; Bakur Jamjoom, Aimun Jamjoom, Momen Sharab and Abdulhakim Jamjoom, 'Attitudes Towards Informed Consent: A Comparison Between Surgeons Working in Saudi Arabia and The United Kingdom' (2011) 26(1) Journal of Oman Med 29; Amr Sabra and Magdy Darwish, 'Medical Ethics:Awareness about Consent and Documentation among Medical Interns, University of Dammam, Saudi Arabia' (2013) 2(3) International Journal of Medical and Health Sciences 311; Muied Al-Qarny, Amal Al-sofiani and Ali Githan Al-Garny, 'Medical Ethics Knowledge and Practice among Healthcare Workers at Prince Mansour Military Hospital (PMMH), Taif, Saudi Arabia' (2016) 2(4) International Journal of Medical Research Professionals 127; Afnan Nassara and Abrar Demyatib, 'Informed Consent in the Health Care System: An Overview from a Dental Perspective in Saudi Arabia' (2021) 1 Saudi Journal of Health System Research 11.

[154] Ibid.

[155] Abolfotouh and Adlan, (n 153) 270.

and how to cope with such hazards.[156] The authors state that "in the present study, a striking finding was that more than 50% of our study population believed that their decision was not important because the physician had already decided for them."[157] The author ultimately argues that trust in the physician should not be used as a basis for diminishing the patient's involvement in medical consent.[158]

The prior findings align with another local study, which similarly found that healthcare professionals tend to adopt a paternalistic manner that does not easily include patients in decision-making.[159] This study observed that 50% of the patients expressed a desire to be actively involved in the decision-making process.[160] Nevertheless, physicians were unwilling to include patients in the medical decision-making process, viewing them as lacking the capacity to make informed choices regarding their health matters.[161] Similarly to the previous finding, patients also perceived their decisions as meaningless because the doctor had already made a decision on their behalf. [162]

Therefore, it is unsurprising that the local study conducted by Al-Qarny and others found that medical professionals do not consistently support the notion that the desires of patients should always be strictly followed.[163] The practice of paternalism and neglecting a patient's wishes can be a sensitive issue and raise concerns, especially if those desires are related to the patient's religious requirements. In a local study conducted at a large central hospital in the Kingdom, it was found that over half of the 352 Muslim physicians do not ask their patients about their religious needs.[164] According to the study, 62% of respondents believed engaging in discussions about spiritual issues with a patient would result in the patient rejecting medical treatment.[165] The study enabled physicians to assess their level of religiosity as low, moderate, or high and found that physicians with a high level of religiosity were more likely to discuss religious subjects with their patients. [166]

The study's results suggest that medical decision-making centred around physicians fails to address patients' spiritual and moral needs, but it prioritises their health. In addition, patients' religious needs will be addressed if they are lucky enough to have an intrinsically religious physician. Yet, optimal medical care is provided to patients when their religious wishes are respected, particularly in cases where certain patients prioritise their commitment to their religious traditions over their physical health.

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[156] Ibid 275.
[157] Ibid 274.
[158] Ibid 270.
[159] Al-Mohaimede and Others (n 4) 35.
[160] Ibid 39.
[161] Ibid 39.
[162] Ibid 40.
[163]Al-Qarny and Others (n 153) 130.
[164]Nada Al-Yousefi, 'Observations of Muslim Physicians Regarding the Influence of Religion on Health and Their Clinical Approach' (2012) 51 Journal of Religion and Health 269, 96, 271.
[165] Ibid 269.
[166] Ibid 270, 271.

A more recent study conducted in 2020 confirms that most medical professionals continue to exhibit a paternalistic approach when seeking consent from their patients.[167] A further investigation also highlights that when doctors make their decision is in the patient's best interest, most physicians are divided between forcing the patient to consent or enticing them with the proposed therapy.[168] The persistent paternalistic approach in Saudi hospitals explains this result.[169] Further, Adlan maintains that the doctor's paternalism led some doctors to become self-centred and resistant to being questioned.[170] A local investigation substantiates this claim and shows that the majority of patients had questions that were not answered.[171] Adlan explains this behaviour by maintaining that the physician has already determined the patient's most suitable course of action.[172]

5.5 Paternalistic Practices in Saudi Hospitals

The empirical studies demonstrate that a paternalistic manner of obtaining consent is observed in physicians' behaviour in the process of obtaining consent to medical treatment. This observation of paternalistic practices manifests through the following themes: 1) poor quality of information disclosed to patients; 2) consent is simply a routine procedure; 3) consent is a legal safeguard rather than a moral duty; and 4) patient vulnerability.

5.5.1 Poor Quality of Information Disclosure

Al-Adlan states that some Saudi physicians maintain that not all information should be disclosed to the patient.[173] The rationale behind this perception is revealed in a recent study by Nassar and Demyati, in which physicians perceive that providing detailed explanations to patients may result in doubts and suspicions about their proposed treatment.[174]

Regarding the duty of information disclosure, the only standard imposed by the PHP 2005 is a discourse of side effects.[175] Alsaidan and others note that in Saudi Arabia, the failure of physicians to explain potential side effects is a major cause of litigation over medical consent.[176] Nevertheless, Al-Adlan notes that physicians lack a consensus regarding the importance of risk disclosure to patients and an acceptable criterion for what should be disclosed.[177] In addition, several surgeons believe that providing much information about risks could frighten patients.[178] Physicians also believe that informing patients about the potential adverse consequences of medical interventions may negatively influence their decision-making.

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[167] Alsaidan and Others (n 153) 40.
[168] Sabra and Darwish, (n 153) 318.
[169] Ibid 318.
[170] Abdallah Adlan, 'Informed Consent in Saudi Arabia' in Beran R (ed) Legal and Forensic Medicine (Springer 2013) 901.
[171] Abolfotouh and Adlan, (n 153) 272.
[172] Adlan (n 170) 901.
[173] Ibid 903-904.
[174] Nassara and Demyatib, (n 153) 13.
[175] See Practising Healthcare Professions Act 2005, ch 2, s2 (18) reg (1).
[176] Alsaidan and Others (n 153) 38.
[177] Adlan (n 170) 903-904.
[178] Ibid.

The unwillingness of physicians to provide information on the side effects has adversely impacted patient satisfaction concerning the medical consent process. Various empirical studies have shown that patients perceive the quality of medical consent in Saudi hospitals to be low, weak, and poor. This is because, during the consent process, physicians do not provide sufficient information before medical intervention, there is a lack of transparency in disclosing risks, and alternative therapies are not adequately disclosed.[179] For example, a study of 111 patients reveals that the side effects and risks associated with the surgical procedure were not disclosed.[180] Over half of the patients, 57.3%, believed the risk of the intervention was underestimated.[181] Most patients, over 80%, who underwent the procedure reported that they were not informed of a rare complication, blindness.[182] According to this study, doctors' lack of transparency in reporting adverse events undermined patients' trust.[183] Thirty-seven per cent of patients sought a second opinion for the same medical issue[184] because they felt their doctors had underestimated the potential side effects.[185] Patients with a second consultation were significantly less likely to experience side effects or dissatisfaction after the procedure.[186] On the other hand, the study indicates that alternative treatment options, including no treatment, were the least frequently provided information. [187]

Another study conducted at a medical centre in Saudi Arabia found that 70.0-98.0% of participants preferred medical professionals to provide most details regarding procedures before the medical consent.[188] In two further investigations, the authors observe that a cause of patient dissatisfaction with the quality of care in the Kingdom is the lack of information about the proposed medical treatment[189] and the challenge of understanding the consent form before signing it. [190]

In a survey of 162 patients, which aimed to evaluate the amount of information disclosed to patients undergoing surgical procedures, approximately 50% expressed dissatisfaction with the information provided about the procedure.[191] The study's findings indicate that the quality of consent is generally poor. In addition, physicians' attitudes suggest that physicians should be conservative about the amount of information they disclose regarding

[179] See generally, Alexander Woodman, Khawaja Bilal Waheed, Mohammad Rasheed and Shakil Ahmad, 'Current State of Ethical Challenges Reported in Saudi Arabia: A Systematic Review and Bibliometric Analysis From 2010 to 2021' (2022), 23(82) BMC Medical Ethics 1, 31.
[180] Alsaidan and Others (n 153) 39-40.
[181] Ibid 39.
[182] Ibid 40.
[183] Ibid 39-40.
[184] Ibid.
[185] Ibid.
[186] Ibid.
[187] Ibid 39.
[188] Muhammad Hammami, Yussuf Al-Jawarneh, Muhammad Hammami and Mohammad Al Qadire, 'Information Disclosure in Clinical Informed Consent: "Reasonable" Patient's Perception of Norm in High-Context Communications' (2014) 15 (3) BMC Medical Ethics 1, 8.
[189] Saad Al-Ghanim, 'Assessing Knowledge of The Patient Bill of Rights In central Saudi Arabia: A Survey of Primary Health care Providers and Recipients' (2012) 32(2) Ann Saudi Med 151,153.
[190] Mohamed Mahrous, 'Patient's Bill of Rights: Is it a Challenge for Quality Health Care in Saudi Arabia' (2017) 5(3) Saudi Journal of Medicine and Medical Sciences 254, 255.
[191] Abolfotouh and Adlan (n 153) 271-272.

hazards. Moreover, most patients requested more details but were not provided with or informed about alternative treatments.[192]

This finding is consistent with other study populations of patients who underwent surgical operations.[193] The study's conclusions suggest that the consent process is of low quality.[194] Approximately half of the surveyed patients expressed dissatisfaction with their consent experience, particularly regarding the information provided and their knowledge of the risks associated with the intervention and alternative treatment options.[195] Moreover, patients did not comprehend what had been disclosed to them.[196]

5.5.2 Consent is Simply a Routine Procedure

Previous national empirical evidence has shown that physicians tend to be conservative in disclosing information to patients in the current practice of medical consent. This leads to dissatisfied patients who perceive the consent process as inadequate due to their limited knowledge about the proposed treatment. This current practice suggests that patients do not participate in the medical decision-making. In a cross-sectional study of 140 surgeons from various specialities working in different medical centres, over one-third of the participants agreed that medical consent is not a shared decision between the doctor and the patients.[197] In addition, most of the participants "agreed" and "strongly agreed" that consent is most often a mere routine, occurring in a single moment before the procedures and that the consent of patients is nothing more than signing a paper.[198] The findings of this study align with those of another investigation conducted on 162 patients who underwent surgery.[199] The study demonstrates that around two-thirds of patients were informed that obtaining consent was routine and that they were required to sign it.[200] Similarly, the study of Al-Mohaimede and others suggests that healthcare practitioners perceive medical consent to medical intervention as a mere act of signing a consent form.[201]

5.5.3 Consent is A Legal Protection

The current practices of medical consent in the Saudi health system suggest that it is primarily employed as a legal tool to protect physicians. Al-Saihati and others state that in Saudi practice, medical consent is performed as legal protection in medical rituals and is not considered a moral duty of the physician.[202] Abdallah maintains that consent

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[192] Ibid.
[193] Al-Mohaimede and Others (n 4) 39.
[194] Ibid.
[195] Ibid.
[196] Ibid.
[197] Ali Al-Saihati, Amer Alotaibi, Ali M Alhawaj, Areej Alabdulsalam, Nourah Alajmi, Mohamed Boukhet, Waleed Altulayqi, Ali Alkahtani, Nawaf Almarek, Zahra Alhussain, Ali Al-Sultan, Mohammed Alkhalaf, Hani AlAbdullah, Abdulhalim Hafizallah, Fahad F Almutairi, Bothayna Alanzan, and Mohammed Alrashed, 'Knowledge, Opinions and Attitude of Surgeons in Saudi Arabia toward Informed Surgical Consent' (2017) 69 (4) The Egyptian Journal of Hospital Medicine 2232, 2234.
[198] Ibid 2234.
[199] Abolfotouh and Adlan (n 153) 271-269.
[200] Ibid 269.
[201] Al-Mohaimede and Others (n 4) 40.
[202] Al-Saihati and Others (n 197) 2234.

distinguishes between practising medicine and committing criminal conduct.[203] Nassara and Demyati note that medical consent is essential in reducing the likelihood of legal action against the physician.[204] Al-Mohaimede and others assert that consent provides legal safeguards for healthcare professionals. Thus, they must be careful and document it to prevent unfavourable consequences.[205]

Despite the medical consent in the Saudi healthcare system appearing to be mainly practised as a legal protection for healthcare practitioners, empirical findings of a study indicate that the majority of 140 physicians are opposed to obtaining consent for all surgical procedures.[206] A further cross-sectional survey of 246 patients found that nearly 30% of medical procedures were performed without obtaining the patient's consent.[207] A recent study reveals the number of malpractice cases in the capital, Riyadh within a one-year.[208] The study indicates that 32 cases were filed, comprising 20 clinical and 12 non-clinical cases.[209] The alarming finding in this previous study was that only one case had obtained the patient's consent.

This tendency of physicians to be less concerned with obtaining consent from patients suggests that they trust their decision-making to be in the patient's best interest. Therefore, physicians prioritise obtaining the patient's consent for the most severe medical procedures rather than for all cases. Nevertheless, obtaining patient consent for all medical interventions is a legal obligation under the PHP 2005.[210] Performing medical procedures without obtaining consent is a clear deviation from the accepted norms of medical practice and establishes sufficient grounds for criminal liability.[211] However, in practice, the issue of obtaining medical consent typically arises only when harm is caused to the patient, leading to the filing of a formal complaint or lawsuit.

5.5.4 Patient Vulnerability

The current paternalistic approach becomes even more harmful when patients are subjected to intimidation.[212] In such a situation, the patient may perceive that disagreeing with the doctor's instructions could negatively impact their relationship with the doctor.[213] Consequently, this could result in postponed follow-up appointments, less sympathetic treatment, or a referral to a less proficient physician.[214] This claim is substantiated by local empirical evidence involving over 300 healthcare practitioners.[215] The study found that

[203] Adlan (n 170) 900.
[204] Nassara and Demyatib, (n 153)11.
[205] Al-Mohaimede and Others (n 4) 35- 39.
[206] Al-Saihati and Others (n 197) 2236.
[207] Alsaidan and Others (n 153) 39-40.
[208] Nassara and Demyatib, (n 153) 13.
[209] Ibid.
[210] Practising Healthcare Professions Act 2005, ch2, s 2 (19).
[211] Act of Practising Healthcare Professions Act 2005, ch3, s1 art (28-7).
[212] Adlan (n 170) 901.
[213] Ibid.
[214] Ibid.
[215] Al-Qarny and Others (n 153) 130.

physicians were more likely to refuse to treat patients who failed to adhere to their advice.[216] This observation indicates that the respondents have a paternalistic attitude and a superior view.

A further national study reveals that almost half of the patients in the sample believed that rejecting their doctor's instructions would lead to a deterioration in their relationship with the doctor.[217] Additionally, the patients felt that rejecting the treatment plan would result in the doctor losing motivation to assist them.[218]

Further, Adlan argues that in some paternalistic situations, physicians demonstrate their "ego" and provide assurances based on their knowledge and experience.[219] Despite their potential for mistakes or lapses in judgment, they are very generous towards offering lavish assurances. This attitude can be observed in expressions like "what could go wrong?" or "calm down, we have done this hundreds of times."[220]

5.6 Conclusion

This chapter assesses trust as a moral approach that underpins the current legal rules for medical consent in Saudi law, as outlined in the PHP 2005.It also addresses how, in medical practice, the notion of trust has evolved into a paternalistic model in the process of obtaining medical consent.

The concept of trust is conveyed in the *Qur'an* through the term *amanah,* which portrays trust-based relationships among people. Within the *Shari'a* discourse on trust in fellow humans, the most apparent moral and normative claims in Muslim philosophers' discussions primarily focus on the ethical attributes of a trustworthy person. Hence, trust cannot be discussed apart from trustworthiness. Trustworthiness is a matter that has a valued component. Accordingly, Muslim philosophers investigate the ethics of trustworthiness within the framework of Islamic noble ethics theories. Theorists provided their insights and reflections on the attributes of a trustworthy person in varying degrees and through diverse approaches.

A person's trustworthiness is determined by their display of good social morals and religious morality based on faith and piety. Thus, it can be argued that establishing trust in fellow humans is not easy in *Shari'a* discourse. In this discourse, a person cannot just ask others to trust them. Al-Mawardi states that anyone seeking trust from others is considered a traitor or arouses suspicion.[221] Instead, one must earn the trust of others by actively striving to adhere to the morals of trustworthy individuals. Accordingly, the *Qur'anic* teaching does not encourage naive and blind trust in all people, and Muslims are not expected to place their trust in others with absolute trust. Trust in humans is conditional on

[216] Ibid.
[217] Abolfotouh and Adlan (n 153) 237.
[218] Adlan (n 170) 901.
[219] Ibid.
[220] Ibid.
[221] Al-Mawardi (n 55) 308.

circumstantial factors and depends on people's actions in various aspects of their daily lives. One is advised to refrain from placing trust in others based on their deficiencies in moral standards and to be cautious about simply granting trust to someone because of their apparent adherence to Islamic rituals such as prayer and fasting.

Ultimately, in the *Qur'anic* narrative, trust in humans is depicted as a deliberate or implied choice, expressed as a sense of security and assurance in granting someone trust based on their demonstrated trustworthy character. The *Qur'anic* account also highlights that while maintaining one's trustworthiness, it is essential for the person who places trust in others to take assurances and safeguards to demonstrate good intentions in the event of future conflict. Being a trustworthy person to bear trust means fulfilling moral duties, prioritising the best interests of the individual who has placed their trust, and being responsible for all assigned tasks, including safeguarding various deposits and faithfully returning the trust to its owners.

The question remains: Can their being trustworthy ensure they consistently fulfil their obligation to uphold trust? It is challenging to answer this question precisely. However, it can be argued that no person except the Prophets can ensure the constant trustworthiness of their performance. Muslim scholars unanimously acknowledge the trustworthiness of prophets in faithfully transmitting the trust of divine messages.[222] This exception is established for messengers due to their exceptional status in the sight of God. God specifically appointed them for their trustworthiness in delivering His message to humanity and as intermediaries between Himself and His creation, to convey His commands. In the *Qur'an*: "Those are the ones to whom We gave the scripture and authority and prophethood".[223] God Himself affirms the trustworthiness of the Prophets Noah, Hud, Salih, Lot, Shuaib, and Moses by stating, "Indeed, I am to you a trustworthy messenger".[224] Further, Prophets were under the constant oversight of God, and thus, they never made any errors in fulfilling their trust in the divine message. This statement is supported in the *Qur'an*. For instance, regarding the Prophet Muhammad: "And if Muhammad had made up about Us [the Divine message] some [false] sayings. We would certainly have seized his right hand, and cut off his lifeblood, and none of you could have defended him".[225]

Regarding humans other than Prophets, consider that the responsibility of ruling the affairs of Muslims is a duty assigned to the caliph, entrusted by the people to manage their affairs effectively. Thus, the caliph must fulfil this trust with utmost faithfulness. In this regard, the first caliph of Muslims, Abu Bakr, who was also described as *al-Siddiq* (the truthful) in Islamic literature, in his inauguration speech as caliph of Muslims, requested the Muslims to correct him if he adopted the wrong direction in his leadership. This request suggests that the person's current trustworthiness does not ensure that they will consistently fulfil

[222] See Abdul-Aziz Ibn-Baz, '*Fatawas* of Abdul-Aziz Abdullah Ibn-Baz' [The Grand *Mufti* of Saudi Arabia Between 1993-1999] (*Fatwa* 6/371) available at https://islamqa.info/en/answers/42216/are-prophets-infallible accessed 15 October 2024
[223] *Sura Al-An'am*.89.
[224] *Sura Al-Shu'ara.*107,125,162,178,18.
[225] *Sura Al-Haqa.*44,45,46,46.

their trust as expected, and that the conduct of the trustworthy person may change in the future. In other words, the constancy of a trustworthy person's performance of the trust is a relative matter that can be influenced by accompanying circumstances. Nevertheless, in *Shari'a* discourse, the notion of repentance and regret provides a person whose behaviour deviates from the correct path to fulfilling trust a chance to restore their trustworthiness. Repentance and regret are comprehensive and extensive, and it is out of the scope of this thesis to investigate them further.

Furthermore, Abu Bakr's acknowledgement of the potential for departing from the trust bestowed upon him by Muslims raises relevant questions: Can patients always trust their physicians to prioritise their best interests when determining the most appropriate medical treatment? Should patients trust that their physicians will prioritise their best interests in the proposed treatment?

In Saudi practice, this trust in physicians is assumed and is especially placed by law. In this sense, a trust-based relationship is not established through personal interaction between the patient and the physician. The untrustworthy behaviour of some physicians in empirical studies, as manifested in the paternalistic glow of obtaining medical consent, provides some evidence for these doubts. Empirical studies reveal that the quality of consent is typically poor in terms of disclosing information to patients, understanding side effects, transparency of risks, and the availability of alternative treatments. Patients often express dissatisfaction with the limited information they receive and the lack of response to their requests for additional details. Certain physicians perceive consent as a routine procedure, involving the signing of a document that safeguards doctors, particularly when medical intervention has serious consequences. Such results suggest that trust in physicians has shifted to a paternalistic approach in obtaining consent for medical interventions.

It can be too easy to argue that these parental activities are benevolent behaviours stemming from good intentions. However, such paternalistic behaviour fundamentally conflicts with the *Shari'a* perspective of the ethics of a trustworthy person who is entrusted with others' trust. For instance, suppose a physician exaggerates the likelihood of recovery or the effectiveness of a treatment in healing the patient's disease to pressure them into undergoing the proposed medical procedure. If a physician informs a patient that they will experience minor discomfort following a surgical procedure, in reality, the patient may experience significant pain. Yet, disclosing this medical truth about the side effects may influence the patient's consent to undergo a treatment that the physician believes will mitigate the illness or facilitate a full recovery. If a physician is allowed to conceal information regarding the nature of a serious illness, such as a cancer diagnosis, even such information is crucial for the patient to know and understand their health condition. When a patient requests the physician to disclose more information about the benefits or risks of a proposed medical intervention, the doctor responds: "Calm down, we have done this hundreds of times". As this chapter demonstrates, the meaning of the notion of trust in *Sharia'a* discourse is evident. The previous paternalistic practices, despite efforts to characterise and describe

them in benevolent terms associated with good intentions[226], inherently conflict with and undermine the principles of trust and the ethics of trustworthiness within the Islamic framework of noble morals.

Genuine consent to medical treatment, if it is believed to be morally significant in making the best health decisions for a patient, can be attained by moving from the principle of trust to the principle of respecting the patient's autonomy. Indeed, Chapter Four emphasises that health is of paramount importance in *Shari'a*. More than that, Chapter Four places the responsibility for maintaining and promoting good health initially and ultimately on the individual oneself, and also in their capacity as a member of their community. This individual responsibility, as Chapter Four argued, stems from the role of the individual as God's vicegerent on earth to fulfil their religious and worldly duties in this life.

However, Chapter Four demonstrates that the responsibility of community rulers, which is typically understood today as referring to the modern state, is to provide provisions for equal and organised access to healthcare. While the state regulates the legal rules concerning medical consent when the individual's health is concerned, this role shall maintain that the responsibility of the individuals to maintain and promote their health is protected. Therefore, the principle of autonomy provides a safeguarded domain for the responsibility of those individuals who are regarded as God's vicegerents on earth to make moral medical decisions concerning their health. Especially, since this Chapter reveals that the principle of trust gives rise to paternalistic practices, which inherently conflict with the principles of trust in *Shari'a* discourse.

Accordingly, Section Three moves forward to present a normative moral argument from Islamic theology regarding the significance of respecting patients' autonomy in medical decision-making when their health is concerned. This autonomy approach, as the next chapter reveals, is derived from the theory of *taklif* that emerged from the Islamic framework of dignity related to the concept of human vicegerency on earth.

SECTION THREE: TOWARDS AN AUTONOMY-BASED MODEL

[226] For instance, 'white of lies. This expression is mentioned in Onora O'Neill, *Autonomy and Trust in Bioethics* (Cambridge University Press 2001) 119.

Chapter 6: The Normative Theoretical Foundations of Autonomy: Autonomy Derived from Dignity and Its Significance in Moral Decision-Making in *Shari'a*

6.1 Introduction

The previous chapter concludes that, in medical treatment, the principle of trust in physicians has evolved into a paternalistic model that undermines the moral concept of trust as described in *Shari'a* discourse. Furthermore, chapter four emphasises that in *Shari'a* discourse, individuals bear primary responsibility for maintaining their health. Taken together, these conclusions suggest a normative moral imperative to consider a shift from a trust-based to an autonomy-based model in medical decision-making.

Thus, the Third Section presents a contribution to Islamic scholarly investigation into the significance of patient autonomy in medical decision-making. It argues that in Islamic theological discussions, autonomy as a moral construct originates from the doctrine of *taklif,* which is derived from the Islamic framework of dignity associated with humanity's vicegerency on earth. The theory of *taklif* maintains that the fundamental qualities bestowed by God upon humanity to bear the divine burden are reason, cognitive faculties, and free will. These attributes empower individuals to make autonomous moral decisions, fulfilling their role as God's vicegerents while bearing the divine burden and being morally responsible before God for their actions.

In the medical treatment context, this chapter presents a normative moral argument that patient autonomy is crucial in decision-making regarding medical treatment options. The best spiritual and moral outcomes in health can be attained by respecting and maximising patients' autonomy, free from paternalistic interventions and practices. The inherent human capacity to make moral choices, derived from the theological notion of *taklif,* places patients as moral agents in making autonomous decisions regarding medical interventions related to their health. Thus, maximising patient autonomy in medical decision-making is crucial, as it ultimately influences the moral responsibility of the patient before God when their health is concerned.

In Islamic philosophical discourse, significant precursors to the notion of autonomy emerge from theological discussions regarding the framework of human dignity and the freedom of individuals in *taklif* to exercise self-determination while assuming moral responsibility for their intentional actions. Following the establishment of the vicegerency on earth "We (God) said: "Go down all of you from this place (the Paradise to the earth)"[1], the journey of mankind began to bear *taklif* (divine burden) "We offered the trust [divine burden] to the heavens, and the earth, and the mountains, but they refused to bear it, and were afraid of it, and the human carried it".[2] Hence, the Islamic perspective on recognising the significance of individual autonomy arises from an appreciation for human dignity.

[1] *Sura Al-Baqra*.38.
[2] *Sura Al-Ahzab*.33.

To present the argument of the significance of patient autonomy, this chapter is divided into three primary sections. It begins by providing the normative foundation of autonomy in *Shari'a,* which originates from theological discussions regarding the Islamic framework of human dignity. This framework is associated with the concept of vicegerency, where humans are the vicegerents of God on earth, leading to the development of the theory of *taklif.*

Then, the second section dives into and addresses the three key components of the *taklif* theory, which involve God imposing divine burdens, humans being granted autonomy to choose their actions, and moral responsibility before God.

The last section briefly outlines the four conditions of *taklif* that enable the moral agent, named as a *mukallaf,* to make an autonomous moral judgement regarding the divine burden, thereby establishing moral responsibility. This section begins by discussing the first condition of *taklif*, namely, sanity and puberty. This condition addresses the Islamic theory of legal capacity, which enables a person to bear and fulfil civil responsibilities. This requirement argues that the doctrine of legal capacity to engage in civil actions requires two elements: a person must be sane and be able to distinguish between harmful and beneficial acts upon reaching the age of majority. It will engage in Islamic discussion on defining the age of majority in civil actions and briefly outline the natural impediments of legal capacity.

The second condition addresses the disclosure of information about divine burdens. This condition maintains that to qualify a person to make autonomous moral decisions about a divine burden, they must have information about the specific divine task. Such information is obtained through the disclosure of divine tasks through sources of revelation.

Further, *taklif's* theory identifies a third fundamental condition for autonomous moral choices: understanding divine burdens. Thus, this section highlights the value of understanding, which enables individuals to perform tasks consciously.

Finally, the *taklif* doctrine considers the requirement of free will without coercion. Hence, the last section argues that free will is not an additional condition in the theory of *taklif*, but rather, it emphasises that the person's will must be free from coercion. This requirement provides a brief overview of the doctrine of coercion in Islamic law. It discusses the definition of coercion and types of coercion that can influence an individual's voluntary decision to engage in civil actions.

6.2 The Conceptual Foundations of Dignity in *Shari'a*

In Arabic, dignity is known as *karamah* or *takrim,* referring to the honour and respect accorded to humans. *Karamah* can be used in the infinitive and noun forms. In dictionaries, *karamah* means nobility, high-mindedness, noble-heartedness, honour, dignity, respect,

esteem, standing, prestige, a mark of honour, a token of esteem, favour.[3] *Karamah's* synonyms include *Sharaf* (honour), *hurmah* (sanctity) and *fadiylah* (virtue).[4] In contrast to its synonyms, dignity refers to something that is not in comparison to or in relation to others. Therefore, dignity is an inherent noblesse and virtue, not a relative position.[5] *Karamah* and its derivatives have been mentioned 47 times in the *Qur'an*.[6] The origin of dignity to humans appears in the *Qur'an* in the following verse:

> "And We [God] have certainly *krarmna* (dignified) the children of Adam and carried them on land and sea and provided for them of the good things and preferred them over much of what We have created, with [definite] preference".[7]

In the *Qur'an*, dignity is assigned explicitly to humankind.[8] The first part of the verse highlights the unique feature inherent to humans, distinguishing them from all other creation, that is, dignity. The concluding sentence states the notion of human supremacy over other creatures.[9] The *Qur'an* scholars maintain that God elucidates the foundation of human dignity through four critical elements:[10] 1) "We have dignified the children of Adam"; this explicitly expresses God's grants of dignity to all humankind. 2) "We have" provided animals on "land" and ships at "sea" to assist humans in their journeys. Thus, such resources enable humans to seek blessings and the bounty of God; this grace of God demonstrates dignity. 3) "We have" provided humans with lawful "goods" and endless graces such as fruit, meat, and food; this also manifests dignity. 4) "We have given a unique preference" to the progeny of Adam over any "other creatures", including jinns and animals. Angels are excluded from this comparison as their existence is beyond the boundaries of the physical world. [11]

The above verse explicitly acknowledges the dignity of humans. Accordingly, the *Qur'an's* interpreters attempt to investigate the divine reason behind granting humankind dignity. The *Qur'an* scholars present diverse views on the unique dignity attributed to humans. These perspectives can be classified into two distinct schools. The first school associates the concept of human dignity with the core qualities God has bestowed on humans: rationality and their cognitive abilities. The second school establishes human dignity based on the concept of the vicegerency of humankind on earth.

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[3] *Al-Maany* Dictionary [The Meaning of Arabic Terms] www.almaany.com, available at: https://www.almaany.com/ar/dict/ar-ar/كرامة?c=المحيط%20القاموس accessed: 7 August 2024

[4] Ibid

[5] Muhammad Al-Tabatabai, *Al-Mizan Fi Tafsir Al-Qur'an* [The Balance in Interpretation of The *Qur'an A Book of Exegesis of The Qur'an*] (Hussin Al-Aalami ed, vol 13, *Mussat Al-A'la* 1997) 152

[6] Muhammad Fuad Abd-Al-Baqi, *Al-Mujam Al-Mufahris li-Al-faz Al-Qur'an Al-Kareem* [Concordance to the Words of The *Qur'an*] (2nd edn, *Dar Al-Hadith* 2016) 602-603.

[7] *Sura Al-Isra*.70.

[8] Alfadl Alhasan Al-Tabrasi, *Majma Al-Bayan Fī Tafsir Al-Qur'an* [Compendium of Elucidations on The Exegesis of the *Qur'an*: A Book of Exegesis of The *Qur'an*] (Hussin Al-Aalami ed, vol 6, 1994) 244-245.

[9] Muhammad Ahmad Al-Qurtubi, *Al-Jami li-Aḥkam Al-Qur'an* [The Entire *Shari'a* Judgements in The *Qur'an*: A Book of Exegeses of The *Qur'an*] (Ahmed Al-Bardouni and Ibrahim Atfeesh eds, vol 10, *Dar Al-Kutb Al-Masria* 1964) 293.

[10] Fakhr-Al-Din Muhammad Al-Razi, *Mafatih Al-Ghayb: Al-Tafsir Al-Kabir*' [Keys to The Unknown: The Large Commentary] (Khalil Al-Mais ed, vol 21, 3rd edn, *Dar Ehya Al-Truth Al-Arabi* 1999) 372-375; Al-Tabatabai (n 5) 152; Al-Qurtubi (n 9) 293.

[11] Ibid.

6.2 1 Human Rationality

Al-Tabri argues that God grants humanity dignity over other creatures, such as animals and jinn.[12] Al-Tabri utilises a simple fact to underpin his claim that humans consume food using their hands, whereas animals eat directly with their mouths.[13] Al-Zamakhshari provides further grounds for the exclusivity of dignity to humans.[14] According to Al-Zamakhshari, humans possess intelligence, the capacity to speak, the ability to comprehend literature and art, and the capacity to make moral judgments.[15] Al-Tabrasi discusses all the attributes identified by Al-Tabri and Al-Zamakhshari, concluding that the best way to comprehend the reasons for the distinctiveness of human dignity is to believe in all attributes and all distinguishing human characteristics rather than just one. Al-Tabrasi, therefore, categorised the reasons for human dignity into three different classifications.[16] The first category encompasses intellectual attributes, including the human ability to speak and write.[17] The second group consists of the specifics of *fadalna* (priority or favour) mentioned in verse: "And greatly preferred *fadalna* them [humans] above much of Our creation".[18] The third category includes the features that extend beyond the literal meaning of the verse, such as the creation of humans by God's Hands and the selection of Prophets and Messengers among humans.[19]

Among the *Qur'an* exegesis, Al-Razi presents the most detailed explanation for the uniqueness of human dignity. Al-Razi argues that humans have the most dignified souls and bodies of all earth creatures. The argument of Al-Razi centres on the mental faculties of humans.[20] He outlines eleven grounds for the honourable nature of the human soul and body.[21] Ten of them concentrated on human rationality. The eleventh reason for human dignity is that God created humans by His hand.[22] Accordingly, the creation of humans by God's hands demonstrates the unique regard bestowed on humanity.[23]

In line with Al-Razi's core argument, Al-Qurtubi maintains that human rationality forms the fundamental basis for human dignity. This is mainly because people can comprehend the existence of God, understand his divine revelation, benefit from his bestowed bounties, and recognise the importance of His divine messengers.[24] Similarly, Al-Tabatabai maintains that the primary rationale of human dignity lies in the intellect.[25] Such intellect enables humans to differentiate between right and wrong, good and evil, and beneficial and harmful

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[12] Muhammad Ibn-Jarir Al-Tabari, *Jami Al-Bayan Fi Tawil Ayi Al-Quran* [Collection of Statements on the Interpretation of the Verses of the *Qur'an*: A Book of Exegesis of The *Qur'an*] (Mahmood Shaker ed, vol 17, *Dar Al-Tarbia Wa Al-Turath* [no date]) 501.
[13] Ibid.
[14] Mahmud Umar Abu-Al-Qasim Al-Zamakhshari, *Al-Kashshaf* [The Revealer: A Book of Exegeses of The *Qur'an*] (Mustafa Hussein ed, vol 2, 3rd edn*, Dar Al-Kitab Al-Arabia* 1987) 680.
[15] Ibid.
[16] Al-Tabrasi (n 8) vol 6, 244- 245.
[17] *Sura Al-Isra*.70.
[18] Al-Tabrasi (n 8) vol 6, 244-245.
[19] Ibid.
[20] Al-Razi (n 10) vol 21,372.
[21] For more information about the 11 grounds for human dignity, see Al-Razi (n 10) vol 21, 372-374
[22] Ibid vol 21, 374; Other creatures, such as animals, were created through "Be and it is". *Sura Ya-Seen*.82.
[23] Al-Razi (n10) vol 21,374.
[24] Al-Qurtubi (n 9) vol 10, 294.
[25] Tabatabai (n 5) vol 13, 152-153.

actions. The distinction and uniqueness of humans lie in their distinctiveness within the scope of material existence.[26]

Based on the accounts of the *Qur'an's* exegesis, one can argue that scholars of the *Qur'an* establish the ground for the concept of human dignity through a main approach. Human dignity is rooted in human rationality and its additional components, such as cognitive abilities that enable humans to distinguish between right and wrong. These qualities distinguish humanity from other creatures on earth and thus place them in a position of supremacy over other creatures.

However, Al-Alusi argues that the grounds presented by the *Qur'anic* commentators, who claim that human rationality and its components of cognitive abilities are the foundation of human dignity, were merely illustrative examples.[27] According to Al-Alusi, the claim that the foundation of dignity is exclusively derived from rationality is incorrect. It constitutes a departure from the correct transmission of the meaning of the *Qur'an.*[28] Similarly, Al-Tabrasi maintains that the rationales centred upon intellect for human dignity were allegorical.[29]

In this sense, although rationality and cognitive abilities are fundamental characteristics that distinguish humanity from other beings, associating dignity solely with possessing these traits represents an incomplete interpretation of the framework of dignity in *Shari'a*. It is obvious that some individuals, such as infants and those with mental illness, etc, may not have rationality. In addition, the components of rationality, including the capacity to distinguish between beneficial and harmful actions, may be absent in certain conditions, such as young children, situations of dementia and brain death.[30] Undoubtedly, Islamic tradition unequivocally acknowledges the dignity of those individuals.

Hence, the following discussion presents an Islamic framework of dignity that encompasses all humankind, including infants and people with mental illness, etc. In this framework, such individuals,[31] as the discussion will demonstrate, are excused from bearing the divine burden, not excluded from human dignity.

6.2.2 The Vicegerency of Humans on Earth

The *Qur'an* verses provide further and broader insights into the Islamic perspective on human dignity.[32] Although the term dignity may not be expressly mentioned in these verses, it is intrinsically intertwined with their precepts.[33] This broader concept of human dignity

[26] Ibid.
[27] Shihab Al-Din Mahmud Al-Alusi, *Ruh Al-Maeani Fi Tafsir Al-Quran Al-Aazim* [The Spirit of Meanings in The Interpretation the Noble *Qur'an*] (Ali Ati'a ed, vol 8, *Dar Al-Kutb Al-elmia* 1994) 112.
[28] Ibid.
[29] Al-Tabrasi (n 8) vol 6, 245-247.
[30] Kadivar Mohsen, 'Dignity (Human)/ *Karāmah*' in John L Esposito (ed), *Oxford Encyclopedia of the Islamic World: Digital Collection* (Oxford University Press 2022) 7.
[31] For instance, minors, individuals with mental illness, and people in situations of unconsciousness, etc.
[32] Mohsen (n 30) 3.
[33] Ibid.

is principally associated with humanity's vicegerency on earth, fulfilling the role of God's vicegerent on earth. The *Qur'an* indicates the concept of vicegerency of mankind in the following verses:

> "And [mention, O Muhammad], when your Lord said to the angels, "Indeed, I am placing on the earth a *Khalifah* (vicegerent). They said, Will You place upon it one who causes corruption therein and sheds blood, while we declare Your praise and sanctify You? *Allah* said: Indeed, I know that which you do not know".[34]

In the subsequent verse, once the will of God determined Humans to be His vicegerent on earth, God transferred Adam (the father of humanity) all 'Names' and subsequently asked the angels:

> "He [God] taught Adam all names, and then presented them to the Angels, saying: Tell Me the names of these if you are truthful. Exaltations to You. They replied: We have no knowledge except that You taught us. You are indeed the Knowing, the Wise". Then He [God] said to Adam: Tell them [the Angels] their names. When he [Adam] told them their names [the Angels] …".[35]

In the first verse, the *Qur'an* commentators interpret *khalifah* as indicating that humankind acts as "God's vicegerent" on earth to establish His law.[36] Accordingly, humankind's vicegerency on earth does not mean humans are the deputies or successors of prior human beings or any other creatures, such as angels or jinn.[37] Further, *Qur'anic* exegetes maintain that the word *khalifah* does not refer only to Adam but to the entire human race.[38] The *Qur'anic* scholars substantiate their interpretation by referencing additional verses from the *Qur'an*, which clarify that God's vicegerent on earth includes the entirety of humanity rather than only Adam.[39] For instance, "Who makes you *Khalifahs* (vicegerents) on the earth?"[40] In this verse, the word *Khalifahs* is plural, indicating the vicegerency of all humans on earth.[41] [42]

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[34] *Surat Al-Baqra.*30.
[35] *Surat Al-Baqra.*31,32,33.
[36] Imad Al-Din Ismail Ibn-Kathir, *Tafsir Ibn-Kathir* [Exegesis of Ibn-Kathir: A Book of Exegeses of The *Qur'an*] (Muhammad Shams-Al-Din ed, vol 1, *Dar Al-Kutb Al-Elmia* 1998) 124-126; Al-Qurtubi (n 9) vol1, 263; Al-Razi (n 10) vol 2,388-3889; Al-Alusi (n 27) vol 1, 222; Al-Zamakhshari (n 14) vol1, 124.
[37] See the entire interpretation of *Sura Al-Baqra* 30. Ibn-Kathir (n 36) vol 1, 123- 130; Al-Qurtubi (n 9) vol 1, 261-278; Al-Razi (n 10) vol 2, 383-396; Al-Alusi (n 27) vol 1, 222-224; Al-Zamakhshari (n 14) vol 1,124-125.
[38] See Ibn-Kathir (n 36) vol 1, 124; Razi (n 10) vol 2, 383; Al-Zamakhshari (n 14) vol 1,124.
[39] Ibid.
[40] *Sura Al-Naml*.27.
[41] For more information, see Ibn-Kathir (n 36) vol 1, 124.
[42] Further verses in the *Qur'an* support the interpretation that God's vicegerent on Earth includes all humanity. For instance, "But the generation that succeeded them wasted their prayers and followed their desires" *Sura Maryam.* 19; "He [God] it is Who has made you successors, generations after generation in the Earth" *Sura Fatir*.39; "It is He [God] who made you successors on the earth and raised some of you above others in ranks" *Sura Al-An'am* 165. Additionally, in the verse that directly follows that regarding human vicegerency, where God conveys knowledge of all 'names' to Adam, the verse is not restricted to Adam alone but includes all human beings.

In the second verse, once God dignified humans as His vicegerents on earth, He transmitted all *names*[43] to His deputy, Adam. In this regard, Adam is considered representative of his species, meaning all humanity.[44]
Since God has the comprehensive meaning of all *names* and that *names* are devoid of errors, weaknesses, and evil, He taught Adam the meanings of these *names*. Thus, God's vicegerents (humanity) would know and represent these meanings on the earth. The *Qur'an* scholars demonstrate various interpretations of the concept of *names*. Ibn-Kathir argues that God taught Adam the *names* of all things in the universe, including their nature, essence, attributes, and whether they are minor or significant.[45] Ibn-Kathir adds that the *names* God taught Adam are not restricted to *Shari'a* knowledge, such as knowledge of God, His names, attributes, and rulings, suggesting that knowledge of *names* is not limited to *Shari'a* sciences.

Al-Mawardi states that there are three distinguished meanings for the notion of *names*.[46] *Names* can refer to Adam's progeny, the *names* of angels without further elaboration, and the *names* of all things on the earth and every aspect of existence.[47] According to Al-Mawardi, *names* and their meanings are important in the universe.[48] Each thing possesses an identifiable appellation, and God transmitted the meaning of all names to Adam.[49] Therefore, Adam acquired knowledge of all things in the universe.

Further, Al-Shawkani argues that *names* refer to the knowledge God taught Adam.[50] This knowledge includes every *name* on earth without omission of anything, regardless of nature, substance, or value. Al-Shawkani reinforces his argument by citing the word "all" in the verse, which suggests that Adam was taught everything in this universe, regardless of what it is.[51]

What matters in the verses of the vicegerent of the earth is that in Islam, God is the treasure and origin of all valued traits and honourable distinctions. [52] The divine source (God) bestows all humanity a significant honour when choosing the progeny of Adam (humanity) among all His creatures, including the jinn and the angels to be His vicegerents on earth: "That is the Grace of *Allah*, which He bestows on whom He wills."[53] Further, *names* are how humans have acquired knowledge about everything in this universe.[54] Such knowledge

[43] In Islamic literature, 'Names' is known as the science of Names and Nomenclature.
[44] Adam represents all humanity, as Adam passed all 'names 'to his progeny. See Muhammad Ali Al-Shawkani, *Fath Al-Qadir* [Grant of The Creator: A Book of Exegeses of The *Qur'an*] (Abdulrahman Amira ed, vol 1, 1st edn, *Dar Ibn-Kathir*1992) 77; Ali Muhammad Al-Mawardi, *Al-Nukat Wa' Al-Uyun: Tafsir Al-Mawardi* [Exegeses of Al-Mawardi: A Book of Exegeses of The *Qur'an*] (Abdul-Mansour Abdul-Rahim ed, vol 1, *Dar Al-Kutb Al-Ilmiah* [no date]) 99.
[45] Ibn-Kathir (n 36) vol 1,130-134.
[46] Al-Mawardi (n 44) vol 1, 99.
[47] Ibid.
[48] Ibid.
[49] Ibid.
[50]Al-Shawkani (n 44) vol 1, 76-77.
[51] Ibid.
[52] Mohsen (n 30) 9.
[53] *Sura Al-Jumuah*.4.
[54] A further verse in the *Qur'an* sustains that God taught the progeny of Adam all names: "He [God] taught mankind that which he knew not" *Sura Al-Alaq*.5.

is not ordinarily gained and has no human instructor. Adam's learning of *names* is not equivalent to normal knowledge of an object. Mere knowledge of something does not merit honour and dignity for Adam and his progeny. However, the genuine honour is that God bestows humanity a unique spiritual awareness to comprehend the meanings of all worldly *names* through divine instruction. This represents the essence of human dignity within the concept of human vicegerency on earth.[55]

Accordingly, when God, who has the ultimate origin and the source of goodness, bestows honour on an object, this thing becomes the bearer of nobility, honour and virtue in tangible existence.[56] Hence, God's choice of Adam (symbolising all of humankind) and teaching Adam all *names* was a divine existential decree[57] (existential privilege) rather than a simple verbal or metaphorical command.[58] Ultimately, humanity gained dignity through the blessing of God's vicegerent and the honour of vicegerent on earth over all other creatures.

6.3 The Interaction Between the Islamic Conceptual Framework of Dignity and Autonomy: The Theory of *Taklif*

Since the will of God dignified humans by appointing them as His vicegerent on earth, the journey of vicegerency on earth began by God's command:[59] [60]

> "Go down, [from the paradise to the earth], all of you [Adam's progeny]. We said, so if guidance shall come to you from Me, whosoever follows My guidance no fear shall be on them, neither shall they be saddened". [61]

Accordingly, the vicegerency of humanity on earth commenced with the era of Adam and continues to the present day.[62] The relevant question, here, is, what is humanity's role as God's vicegerent on earth? The *Qur'anic* scholars demonstrate a broader perspective, maintaining that humanity's mission on earth as God's vicegerent is to establish God's law[63] by carrying the divine burden.[64] This mission is described in the following verse:[65]

> "Indeed, we [God] offered the Trust to the sky, earth, and mountains, and they declined to bear it and feared it, and mankind bears it."[66]

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[55] Mohsen (n 30) 5.
[56] Mohsen (n 30) 9.
[57] Existential decree means that the divine decree is irrevocable and unchangeable. The term 'existential' denotes a concept whose existence is indisputable. These definitions are mentioned in Al-Tabatabai (n 5) vol 8, 28; see also Al-Mawardi (n 44) vol 1, 94; Al-Qurtubi (n 9) vol 1, 262.
[58] Mohsen (n 30) 5.
[59] This verse of the *Qur'an* relates to the series of verses concerning the vicegerency of humans on earth discussed earlier in this Chapter, Section 6.2.2, 103.
[60] Al-Shawkani (n 44) vol 1, 76.
[61] *Sura Al-Baqra.* 38.
[62] This vicegerency of humans on earth is established and stable. Nonetheless, it is not everlasting. The vicegerency will continue till the end of life. In the *Qur'an*: "Go down [from paradise to the earth]. We said: … The earth will provide your dwelling place an enjoyment for a while". *Sura Al-Baqra.* 36. 'A while' in this verse suggests that the journey of humans as God's vicegerents on earth will end one day.
[63] The divine law is delivered to people through revelation and sending Messengers and Prophets. See, Al-Qurtubi (n 9) vol 1, 263; Ibn-Kathir (n 36) vol 1,124-125.
[64] See generally, Al-Mawardi (n 44) vol 1,95; Al-Shawkani (n 44) vol 1, 74, Ibn-Kathir (n 36) vol 1,124-125, Al-Qurtubi (n 9) vol 1, 263.
[65] For more discussion of the connection between the following verse on 'trust' and the Islamic framework of dignity related to the vicegerency of humans on earth, see Mohsen (n 30) 3-6
[66] *Sura Al-Ahzab.*72.

The *Qur'an* scholars interpret the word 'trust' in the above verse as denoting *taklif* (divine burden) imposed upon humanity to establish God's law while assuming the role of God's vicegerent on earth. The *Qur'an* commentators employ various expressions to convey the concept of *taklif*. For instance, Ibn-Kathir notes that trust is "*al-taa'ea"* (obedience) in this verse. Ibn Kathir adds, "If you do well, you will be rewarded; if you do wrong, you will be punished".[67] Ibn-Kathir's interpretation of trust fundamentally reflects the notion of *taklif*.[68] Al-Qurtubi states that trust is "*alf-aray'd*" (divine directions), and Al-Qurtubi adds that this trust is the law established by God for humanity to be reflected within the universe.[69] Al-Baghawi uses an identical expression to that of Ibn-Kathir and Al-Qurtubi. According to Al-Baghawi, trust is "*al-taa'ea wa alf-aray'd"* (obedience and divine directions) that God placed upon humankind.[70] Al-Razi uses the term "*taklif"* (divine burden) to clarify the meaning of trust and argues that trust is the "*taklif*" that God has imposed upon humanity. In this sense, "*taklif* is a significant affair"; hence, the *Qur'an* describes it as trust. [71] Similarly, the twentieth-century *Qur'an* interpreter, Al-saadi, maintains that trust is "*tkalif*" (divine burdens) given to "*mukallafs*" (the moral agent who bears the divine burden).[72] [73]

This trust, described in the *Qur'an* and agreed upon by the *Qur'an's* interpreters to be the *taklif* (divine burden) entrusted by God to humans (His vicegerent on earth) to act as a deputy in establishing God's law on earth, is upheld by humanity. In the *Qur'an*: "and mankind bears it [trust]."[74]

In recognition of humanity's role as God's deputy on earth, which fundamentally pertains to establishing God's law[75] (described in *taklif*), God explicitly expressed that He has dignified all humanity in the verse earlier.

> "And We [God] have certainly *krarmna* (dignified) the children of Adam and carried them on land and sea and provided for them of the good things and preferred them over much of what We have created, with [definite] preference".[76] [77]

The verse suggests that, in recognising humanity's dignity (through the vicegerency of humans on earth and *taklif*), God subjugated all universal resources, including but not

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[67] Ibn-Kathir (n 36) vol 6, 431.
[68] The next discussion will clarify that the elements of *taklif* include imposing directives by a divine source and the moral responsibility before God.
[69] Al-Qurtubi (n 9) vol 14, 255.
[70] Al-Husayn Masud Al-Baghawi, *Ma'alim Al-Tanzil* [Signs of the Revelation of The *Qur'an*: A Book of Exegesis of The *Qur'an* (Muhammad Al-Namir, Uthman Jummah and Suliman Al-Harash eds, vol 6, *Dar Taybah* 1997) 380
[71] Al-Razi (n 10) vol 25, 187.
[72] The moral actor who bears the divine burden.
[73] Abdul-Rahman Nasser Al-Saadi, *Taysir Al-Karim Al-Rahman Fi Tafsir Kalam Al-Manan* [The Facilitation from the Most Generous (God) and Most Merciful (God) in Interpreting the Words of the Most Generous (God): A Book of Exegesis of the *Qur'an*] (Abdul-Rhaman Al-Luwaihaq ed, 1st edn, *Mussat Al-Risala* 2000) 673.
[74] *Sura Al-Ahzab.*72.
[75] See, Al-Qurtubi (n 9) vol 1, 263; Ibn-Kathir (n 36) vol 1,124-125.
[76] *Sura Al-Isra*.70.
[77] In the Arabic version, this verse uses the past tense: "*qa'd krarmna*" translated to "have dignified", indicating that that humanity's dignity was granted before it is asserted in this verse. This suggests that God's will to dignify and honour humanity occurred earlier, through the existential decree related to the vicegerency of humans on earth and *taklif*.

limited to animals, seas, crops, and fruit, to humanity.[7879] Humans are also endowed with superior attributes compared to other creatures, such as rationality and cognitive abilities.[80] All this facilitates the human's mission as vicegerents on earth while bearing the *taklif* (divine burden).

This conclusion reaffirms the arguments of Al-Alusi and Al-Tabrasi mentioned earlier in Section 6.2.1 of this Chapter, which suggest that rationality and cognitive ability alone are incomplete arguments and do not form the primary foundation for bestowing dignity on humans over all other creatures.[81] However, as the following discussion about the doctrine of *taklif* will demonstrate, human rationality and cognitive ability are fundamental attributes bestowed by the divine source upon humanity to bear *taklif* while assuming the role of God's vicegerents on earth. In this sense, the rationality and cognitive abilities of humanity are a result of God imposing upon humans the mission of bearing divine burdens as God's vicegerent on earth. Hence, such attributes do not stand alone to provide a solid and valid explanation for the divine reason for granting humans dignity.

Since God placed upon humans the dignity of vicegerency on earth, His deputy shall maintain *taklif* to reflect the correct meaning and true essence of God's vicegerency on earth. Thus, the question emerges: What *taklif* do humans bear on earth?

The following discussion introduces the theory of *taklif* in Islamic literature, illustrating how *taklif* generates the principle of autonomy for the *mukallaf*.[82]

6.4 Theory of *Taklif* in Islamic Theology

Al-Deheawi maintains that the notion of *taklif,* or divine burden, is connected to the term trust*,* expressed in the verse of the *Qur'an*[83]: "Indeed, we offered the 'Trust' to … and mankind bears it".[84] The term *taklif* is the infinitive form of the Arabic verb *kalf,* which means to "order someone to perform a task".[85] *Taklif* is generally defined as "an imposition on the part of God of obligations on His creatures, of subjecting them to a law".[86] The terminological definition of *taklif* is compatible with its literal meaning, which refers to the divine teachings imposed by God. The first use of the term *taklif* dates to the founder of the *Hanafi* school, *Imam* Abu-Hanifah. Abu-Hanifah utilises *taklif* to refer to the moral

[78]Obviously, these resources must be used within the boundaries established by God in His law through *taklif*.

[79] For the argument that resources on earth are provided to humans, see generally, the interpretation of the verse in Al-Qurtubi (n 9) vol 10, 294; Ibn-Kathir (n 36) vol 5, 89; Al-Tabari, (n12) vol 17, 501; Al-Baghawi (n 70) vol5, 108; Al-Saadi (n 73) 463

[80] Ibid. The *Qur'an* commentators provide various instances of human dignity's outcomes, including reason, cognitive faculties such as speech, writing, learning, acquiring knowledge, literary, perceiving details of things, free will to choose, and eating with the hands.

[81] For instance, the *Qur'an* scholar, Al-Qurtubi, in his discussion of the verse in question, maintains that one benefit of granting dignity to humanity is that God has bestowed rationality on mankind, which serves as the basis for bearing '*taklif*'. See Al-Qurtubi (n 9) vol 10, 294.

[82] The moral actors who bras *taklif* (divine burden).

[83] See generally, Shah Wali Allah Al-Deheawi, *The Conclusive Argument from God* (Brill 1996)

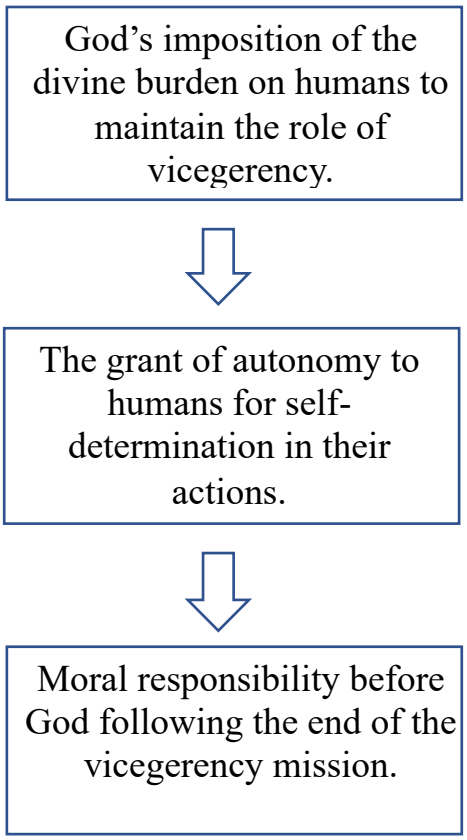
[84] *Sura Al-Ahzab*.72.

[85] Muhammad Ali Ahmad Al-Ansari Ibn-Manzur, *Lisan Al-Arab* [The Tongue of the Arabs Dictionary: An Arabic Dictionary] (vol 13, 3rd edn, Letter '*Kalf*', *Dar Sade*r1993) 113.

[86] Mohammad Nasir, 'The Concept of *Taklif* According to Early *Ash'arite* Theologians' (2016) 55(3-4) Islamic Studies 291, 291.

obligations and responsibilities imposed upon individuals[87] to fulfil their role as representatives of God on earth. Such obligations and duties of individuals are grounded collectively under the concept of *taklif*.[88] Fulfilling one's duties to others involves acknowledging the rights of others and fulfilling one's responsibility to God. A person who meets the conditions of the legal capacity to bear the divine burden in *taklif* is called a *mukallaf*.[89] In Islamic scholarship, the theory of *taklif* consists of three fundamental components.

Diagram 2: The Three Moral Components of The Theory of *Taklif* in *Shari'a*.[90]



6.4.1 The Imposition of Divine Burden by God

The Muslim way of life is based on divine obligations outlined in the teachings of the *Qur'an* and the *Sunnah*. In this regard, Al-Baqilni argues that the divine burden stated in the sources of revelation entails imposing on *mukallafs* a burden that is bothering, troubling,

[87] Liyakat Taki, *Taklif'*, *Encyclopaedia of Islamic Bioethics*, 1-6, 1.
[88] Wael Hallaq, *Sharī'a: Theory, Practice, Transformations* (Cambridge University Press 2009) 114, 119, 226.
[89] The conditions of the legal capacity to bear the divine burden in in *taklif* will be presented later in this Chapter 6, Section 6.5.1.
[90] Saeed Ahmad, *AL Wasila Al-Sharia Hujat Allah Al-Baligh* [The Means of *Shari'a*: The Eloquent Proof of God] (vol 1, *Maktabt Al-Hijaz* 2001) 246; Mohammed Al-l-Fijawi, 'Imposition of Divine Obligations (*Taklif*) As a Trust (*Amenah*) Entrusted to Mankind and the Wisdom behind It' (2021)18(2) Journal of Medical Ethics 159, 162.

and inconvenient; thus, the divine burden is associated with obligations to fulfil "the difficult".[91]

God, however, never imposes burdens on individuals that place them in difficulties, distress, or suffering. In the *Qur'an*: "We have not sent down the *Qur'an* [divine teachings] to cause you distress".[92] This verse suggests that divine instructions and teachings do not subject a *mukallaf* to hardship and suffering. The core doctrine of *taklif* centres on the concept of mercy.[93] Ibn-Al-Qayyim states that the foundation of divine teachings in *taklif* is wisdom and the interests of mankind.[94] All divine teachings are "just" and "merciful for the welfare of mankind" and "wisdom".[95] Such teachings are "God's justice among His people, His mercy among His creation, and His shade on His earth.[96] In the *Qur'an*: "And We have not sent you, [O Muhammad], except a mercy to the world".[97] God, therefore, does not impose a burden on *mukallafs* that they are incapable of performing. Instead, for instance, if a person lacks the cognitive ability to perform tasks of *taklif,* such as minors and individuals with mental diseases, they are exempt from bearing the divine burden. Furthermore, divine burdens take into account the individual's specific circumstances. Such circumstances are referred to as *taklif ma la yutaq* (unaffordable divine burden), meaning that God does not impose a divine burden exceeding an individual's capacity to fulfil.[98]

Further, the notion of *taklif* appears six times in the *Qur'an*, and with each use, *taklif* does not assign burdens that surpass the *mukallaf* capacities and limitations. The *Qur'an* uses identical wording in three verses: "We [God] do not *nukalif*[99] [place a burden on] any person beyond his or her scope".[100] A further verse appears in two *suras*: "*Allah* does not

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[91] Muhammad bin-Al-Tayyib Al-Baqillani, *Taqrib Waal-Irshad All-Sageer* [Approximation and Minimal Guidance: A Commentary in The Roots of Islamic Jurisprudence] (Ali Abo-Zaneed ed, vol 1, 2nd edn, *Mussat Al-Risalah* 1998) 239.
[92] *Sura Ta-ha*.2.
[93] Muhammad Bin-Abi-Baker Ibn-Al-Qayyim Al-Jawziyya, *Aalam AlMuqaeen* [Information for Those who Write on Behalf of the Lord of the Worlds] (Mashhur H Al Salman and Ahmed Abdullah eds, vol 11 *Dar Al-Kkutb Al-Elmia* 2002) 3.
[94] Ibid. Ibn Al-Qayyim presents this argument in the context of Muslim jurists who do not consider that divine burdens are changeable according to time, place, or people's interests. He argues that the ignorance of certain Muslim jurists may result in a significant mistake by issuing *fatwas* that place individuals in difficult circumstances and burden them with duties beyond their capacity. Consequently, their fatwas suggest that God imposes a challenging divine duty on individuals, and fulfilling it involves difficulty and hardship for the *mukallaf*. The full text of his argument: "The foundation of divine teachings is wisdom and the interests of mankind. All of the teachings are just, all of the teachings are merciful, all of the teachings are for the welfare of mankind, and all of the teachings are wisdom. Therefore, every matter [in Islamic jurisprudence] that deviates from justice to injustice, from mercy to its opposite, from benefit to corruption, and from wisdom to futility is not part of the *Shari'a,* even if it is included in it through interpretation and the explanation of the jurists. The divine teachings are God's justice among His people, His mercy among His creation, and His shade on His earth".
[95] Ibid.
[96] Ibid.
[97] *Sura Al-Anbiya*.107.
[98] Generally, see the verse discussion: "Our Lord, and burden us not with that which we have no ability to bear". *Sura Al-Baqra*.286 , in Muhammad Abu-Hamid Al-Ghazali, *Al-Mustasfa Min Elm Al-Usual* [The Clarified in Legal Theory of Islamic Jurisprudence] (Muhammad Al-Shafi eds, *Dar Al-Kutb Al-Elmia* 1993) 69; Al-Baqillani (n 91) vol 1, 375-376; Muhammad Ala-Din Ali Al-Hanafi Ibn-AbI-Izz, *Sharah Al-Aquida Al-Aqui'da Al-Tauhawi'a* [Explanation of the Tahawi Doctrine: A Book of *Hanafi* Islamic Jurisprudence] (Naser Al-Albani and others eds, 9th edsn *Almukt Al-Islami* 1998) 445.
[99] *Nukalif* is the imperative form of the noun *taklif.*
[100] *Sura Al-An'am*.152, *Sura Al-A'raf*.42 and *Sura Al-Mu'minun*.62.

impose *taklif* (burden) on anyone beyond his or her capacity".[101] The last verse states, "No one is *taklifed* (burdened) except to his or her capacity".[102]

The divine burden does not impose tasks that exceed the capacities of *mukallafs,* as illustrated in the following examples. Prayers, fasting during Ramadan and pilgrimage are all divine burdens and are among the five pillars of Islam. Such religious tasks are relaxed in various situations. Prayers can be shortened in travelling: "And when you travel throughout the land, there is no blame upon you for shortening the prayer".[103] Similarly, there are several excuses for not fasting during Ramadan, including those who are patients or travellers. In the *Qur'an:* "O you who believe! Fasting [during Ramadan] is prescribed for you…For a specified number of days, but whoever among you is sick or travelling, an equal number of days [are to be made up]. For those who are unable [to fast] a ransom [as substitute] of feeding a needy person [each day]".[104] A further example concerning pilgrimage. Pilgrimage is a pillar of Islam that is obligatory for all *mukallafs*. However, *mukallfas* who do not have sufficient money to afford the journey to perform the pilgrimage are exempt from this burden. In the *Qur'an*: "Pilgrimage to the House is a duty to *Allah* for all who can [only] make the journey".[105]

The divine wisdom of alleviating these burdens is stated in the *Qur'an* in several places: "God intends for you ease and does not intend for you hardship".[106] "God wants to lighten (the burden) for you, and mankind was created weak".[107] And "He [God] has chosen you [Muslims] and has not placed upon you in the religion any difficulty".[108] The nature of *taklif,* therefore, does not inherently entail a sense of hardship and suffering. Instead, *taklif* considers the capabilities of individuals, including their state of health and mental and financial conditions.

Al-Juwayni redefines divine burdens as obligations that burden *mukallafs,* emphasising that such an imposition involves limitations on people.[109] Unlike Al-Baqilni, Al-Juwayni avoid attributing hardship, difficulties, and suffering to the nature of divine burdens. Al-Juwayni's definition emphasises that the essence of divine burden is linked to God's boundedness. As defined by jurist Al-Juwayni, the divine burden is significant as it indicates the legal status of burdens in *Shari'a*.[110] According to Al-Juwayni, divine burdens imposed through *taklif* are limited to injunctions, whether prohibitions or obligations.[111] Prayer, therefore, is

[101] *Sura Al-Baqra*.286 and *Sura Al-Talaq*.7.
[102] *Sura Al-Baqra*.233.
[103] *Sura Al-Nisa*.101.
[104] *Sura Al-Baqra*.183,184.
[105] *Sura Al-Imran*. 97.
[106] *Sura Al-Baqra:* 185.
[107] *Sura Al-Nisa*.28.
[108] *Sura Al-Hajj*.78.
[109]Abd-Al-Malik Abdullah Yusuf Al-Juwayni, *Al-Burhan Fi Usul Al-Fiqh* [The Proof in the Roots of Islamic Jurisprudence] (Salah Muhammad ed, vol 1, 2nd en, *Dar Al-Ansar* 1997)14-17.
[110] Ibid.
[111] Ibid.

obligatory considering the verse: "[O believers] Perform prayer."[112] Adultery is prohibited: "And do not approach adultery. It is immoral and an evil way."[113]

However, Al-Juwayni's description of divine burden fails to reflect such burdens as a comprehensive moral framework regulating all the behaviours of the *mukallaf*. This is because Al-Juwayni excludes moral values of activities related to *permissibility*, r*ecommendation*, and *discouragemen*t, considering them not to be a divine burden. The scope of divine burden extends beyond mere moral *obligations* and *prohibitions*. Divine burden constitutes a comprehensive moral framework describing the actions a *mukallaf* should refrain from doing based on a *mukallaf'*s moral conscience.[114] Various *recommended* behaviours are deemed worthy of praise and remuneration, implying that their performance has a moral value. Other *discouraged* actions are also considered blameworthy, suggesting their omission has a moral value. In addition, no sanctions or rewards for behaviours categorised as *permissible*.[115]

The *Qur'an* emphasises all five rulings of *taklif*, including *obligatory*, *prohibited, recommended, discouraged,* and *permissible.* Therefore, one cannot disregard the divine origin of *recommended, discouraged,* and *permissible* conduct. For example, concerning *permissibility,* the *Qur'an* states, "And the food of those who were given the Book before you [Jews and Christians] is permitted for you [Muslims]".[116] This verse demonstrates that consuming meat slaughtered by the people of the Book, including Jews or Christians, is lawful, even if it has not been slaughtered in a manner that is compatible with *Shari'a* teachings.

The *Qur'an* additionally indicates the *taklif* ruling of *recommendation:* "O believers, when you contract a debt for a specified term, write it down".[117] The *Qur'an* encourages Muslims to document contracts between parties to prevent future misunderstandings or conflicts among the individuals concerned. The verse's language suggests that writing down is considered only *recommended* rather than *obligatory*.

Further, the *discouraged* ruling can be seen in the following verse: "[Charity is] for the poor [people]…The ignorant [person] would think them self-sufficient because of their abstinence [from asking people a financial aid], but you will know them by their [characteristic] signs. They do not ask people persistently [or at all]".[118] The verse concerns poor people who refrain from requesting financial aid from others despite their dire financial needs. *Shari'a* teachings call its followers to refrain from asking others for

[112] *Sura Al-Baqra*.43.
[113] *Sura Al-Isra.*32.
[114]Gamal Moursi Badr, 'Islamic Law: Its Relation to Other Legal Systems' (1978) 26(2) American Journal of Comparative Law 187, 189.
[115] The five rulings introduced in Chapter 1, Section 1.7.1, 29-31
[116]*Sura Al-Ma'idah*.5.
[117] *Sura Al-Baqra*. 282.
[118] *Sura Al-Baqra*.273.

financial assistance, as it is deemed *discouraged*.[119] The Prophetic statement emphasises this *discouraged* ruling: "Whatever wealth I have, I will not withhold from you. Whosoever would be chaste and modest; *Allah* will keep him chaste and modest, and whosoever would seek self-sufficiency, *Allah* will make him self-sufficient, and whosoever would be patient, *Allah* will give him patience, and no one is granted a gift better and more comprehensive than patience".[120]

While the definitions provided by Al-Baqillani and Al-Juwayni suggest that the divine burden established by God inherently contains the concept of hardship and that such burdens consist only of obligations or prohibitions, the Muslim philosopher Al-Ghazali provides a more comprehensive account of the divine burden. According to Al-Ghazali, the divine burden is a conceptual structure encompassing its moral and legal status.[121] Al-Ghazali illustrates this argument by stating that the essence of the *taklif* is a burden that *mukallafs* bear to satisfy their Creator. The scope of God's burdens on His creatures is beyond mere *obligations* and *prohibitions.*[122] The divine discourse outlines certain behaviours as *recommended, discouraged,* and *permissible*. Hence, adherence to this moral framework of divine burdens will guide humanity towards proper behaviour in all aspects of life.[123]

6.4.2 The Grant of Autonomy to Mankind to Choose Their Actions

Since the will of God assigned humanity to bear the divine burden and disclosed this burden through revelation, humans are bestowed the autonomy to shape their destiny through their choices.[124] Tan maintains that autonomy is a prerequisite for humans to bear the divine burden and fulfil their role as God's vicegerent.[125] Al-Ghazali argues that divine discourse gives individuals the "option of doing or not doing" of obligatory actions.[126] Al-Hindy maintains that in the context of actions in the divine discourse, "*al-mamur"* (a moral agent who bears *taklif*) shall intend to choose what is entrusted to them (actions in the divine burden), thereby choosing to perform the action imposed by divine decree.[127] Al-Hindy adds that this statement is evidenced by the Almighty's "and everyone shall have nothing but what they strive for".[128] According to the arguments of Al-Ghazali and Al-Hindi, an individual cannot choose between acting or not acting regarding a divine task in *taklif,* for which they will be rewarded or punished based on their choice, unless they have initially autonomy to determine their destiny.

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[119] Note: The teachings of the *Qur'an* consider it *discouraged* for people in need to ask others for financial assistance, yet, *Shari's* teachings urge wealthy people who can provide financial ais to seek needy and regards a *recommended* to giving them charity.
[120] *Riyad as-Salihin*, (*Hadith* 26).
[121] Al-Ghazali, *Al-Mustasfa Min Elm Al-Usual* (n 98) 45-79
[122] Ibid.
[123] Ibid.
[124] Ahmad (n 90) vol 1, 246.
[125] Charlene Tan, 'Rationality and Autonomy from The Enlightenment and Islamic Perspectives' (2014) 35(3) Journal of Beliefs and Values 327, 331.
[126]Al-Ghazali, *Al-Mustasfa Min Elm Al-Usual* (n 98) 61.
[127]Muhammad Abdul-Rahim Safi-Al-Din Al-Hindi, *Nihayat Al-Wusul fi Dirayat Al-Usul* [The Ultimate Access to Knowledge of the Roots of Islamic Jurisprudence] (Saleh Al-Youssef and Saad Al-Suwai eds, vol 3 ,1st edn, A*l-Maktaba Al-Tijaria* 1996) 1132.
[128] *SuraA Al-Najm.*39.

To enable the manifestation of the bestowed autonomy, Muslim jurists maintain that when God assigned humanity as His vicegerent and entrusted them with *taklif,* He granted humans two fundamental attributes. The first is rationality and cognitive abilities necessary to know and understand the divine burden.[129] The second is free will to choose between adhering to or deviating from the divine tasks.[130] These attributes distinguish humanity as God's vicegerent from other beings and provide the two fundamental requirements for human autonomy. [131]

Muslim jurists argue that sanity is a starting point for *mukallafs* to know and understand the divine burdens and their moral responsibilities.[132] Al-Qurtubi maintains that rationality is a method by which humans understand the divine burdens presented in the sources of revelation, attain God's benefits and recognise His messengers.[133] Al-Tabrasi argues that God not only bestowed sanity onto humanity but also furnished them with the means of reason, such as the tools of intellect, like writing.[134] Similarly, Al-Zamakhshari asserts that God endowed humanity with reason and cognitive faculties, including the ability to write, read, speak, comprehend literature and the arts, discern between harmful and advantageous activities, and make moral judgements.[135] Ultimately, sanity and cognitive abilities are the means by which one can know and understand the truth and distinguish between good and evil. The *Qur'an* notes, "And have shown him [the human] the two ways".[136] Scholars of the *Qur'an* explain what "the two ways" mean: good and evil.[137] Only rationality and its cognitive abilities can distinguish between the paths of good and evil.

In contrast to humans, other creatures cannot differentiate between good and evil. For example, stones and trees cannot be judged unjust when they fall upon a person, as they have no rational capabilities. Therefore, they lack the capacity for knowledge and understanding and, thus, the ability to be just or unjust.

In addition to sanity and cognitive abilities, God has endowed humanity with free will. Free choice, without external influences, is fundamental for a *mukallaf* when participating in or

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[129] See generally, Ali Muhammad Al-Amidi, *Al-Ahkam Fi Usul Al-Fiqh* [The Rulings in The Roots of Islamic Jurisprudence] (Abdullah Bin Ghadyan and Ali Al-Salihi eds, vol 1, 2nd edn, *Al-Maktb Al-Islami* 1982)150; Al-Ghazali *Al-Mustasfa Min Elm Al-Usual* (n98) 57; Wahbah Al-Zuhayli, *Usul Al-Fiqh Al-Islami* [The Fundamental of Islamic Jurisprudence] (vol 1, 1st edn, *Dar Al-Fikr* 1986) 158; Al-Ghazali *Al-Mustasfa Min Elm Al-Usual* (n98) 67, Al-Ghazali also indicates importance of reason in divine discourse in various places, at 74, 311.

[130] See generally, W Al-Zuhayli, *Usul Al-Fiqh Al-Islami* (n 129) 186; Al-Ghazali *Al-Mustasfa Min Elm Al-Usual* (n 98) 69; Mohamamd Ali Shomali, 'Islamic Bioethics: A General Scheme' (2008) 1(1) Journal of Medical Ethics and History of Medicine 1, 3; Areej Al-Fattani and Hala Al-Alem, 'Islamic Concepts in Ethics of Pediatric Clinical Research' (2002)16 (1-2) Research Ethics 1, 3.

[131] See generally, Al-Amidi (n 129) vol 1,150; W Al-Zuhayli, *Usul Al-Fiqh Al-Islami* (n 129) 158.

[132] See Al-Amidi (n 129) vol 1,150; W Al-Zuhayli, *Usul Al-Fiqh Al-Islami* (n 129) 158; Al-Ghazali *Al-Mustasfa Min Elm Al-Usual* (n 98) 57; Richard Martin and Mark Woodward and Dwi Atmaja, *Defenders of Reason in Islam: Mu'tazilism from Medieval School to Modern Symbol* (One world 1979)62-64.

[133] Al-Qurtubi (n 9) vol 10, 294.

[134] Al-Tabrasi (n 8) vol 6, 207.

[135] Al-Zamakhshari, (n 14) vol 2, 680.

[136] *Sura Al-Balad.*10.

[137] Ibn-Kathir, (n 36) vol 8, 393- 394.

Al-Qurtubi (n 9) vol 20, 65.

abstaining from a moral activity.[138] Al-Baqillani states that for a *mukallaf*, characterised by rationality and discernment[139] to know and understand the divine burdens, free will is crucial for fulfilling the divine tasks.[140] In this sense, it is not sufficient for a *mukallaf* to merely possess sanity, which enables knowledge and comprehension of their activities. Additionally, for an action to be deemed autonomous in *taklif*, a *mukallaf* must have the free will to perform the particular action or refrain from it.[141]

Al-Ashari argues that God has the absolute power to compel all people to follow His divine tasks, as disclosed in revelation, cultivate goodness within them, and confer blessings upon them, enabling them to discern virtue and avoid evil in accordance with His will.[142] In the *Qur'an*: "With *Allah* is the far-reaching argument. If He [God] willed, He could have guided you all".[143] In a further verse: "And upon *Allah* is the direction of the [right] way, and among the various paths are those deviating. And if He willed, He could have guided you all".[144] Guiding all *mukallaf* to adhere to divine burdens as revealed as "and that is for *Allah* not difficult".[145] Nevertheless, "they [humans] will not cease to differ".[146] In a further verse: "Of them [people] some were righteous, and some were otherwise".[147]

The will of God does not impose His will upon *mukallafs.* If God imposed the choice of good and righteous action on everyone, the autonomy He granted to humans in shaping their fate while fulfilling their mission as vicegerents on earth would be deemed meaningless. God Almighty says, "The truth from your Lord [is disclosed]". [148] In a further verse: "The truth is from your Lord. Then whosoever wills, let him believe, and whosoever wills, let him disbelieve".[149] These verses explicitly demonstrate that God disclosed the divine burden through the sources of revelation and communicated it to humanity through His Messengers.[150] For Muslims, Muhammad's message clarified the final version of the divine burdens in *taklif*. Subsequently, God bestowed upon humanity the free will to either fulfil the divine burden or to diverge from it and to act before the action itself was executed. In this regard, Al-Sulami states that:

> "God bestowed upon humanity a will, with which they can choose whatever they want. If a person performs a particular action, it is within the will of humanity. If people have two options, they will choose whatever they desire, whether to act or not. Individuals are capable of acting before taking action, and they are also capable of refraining from acting before abstaining. The action that the individual

[138] Ayadh Al-Salmyi, *Usul Al-Fiqh La Yassa'e Al-Faqih Jahlha* [The Fundamental of Islamic Jurisprudence that a Jurist Should Be Aware of Them] (1st edn, *Dar Al-Tirmidah* 2005) 71; Al-Hindi (n 127) 1133; Al-Ghazali *Al-Mustasfa Min Elm Al-Usual* (n 98) 72.
[139] It means a person with the ability to differentiate between beneficial and harmful actions.
[140] Al-Baqillani (n 91) vol 1, 236, 251-252.
[141] Ibid.
[142] Cited in Mohammad Nasir (n 86) 269.
[143] *Sura Al-An'am*.149.
[144] *Sura Al-Nahl*.9.
[145] *Sura Fatir*.17.
[146] *Sura Hu'd.*118.
[147] *Sura Al-A'raf.*168.
[148] *Sura Al- Al-Imran*.60.
[149] *Sura Al-Kahf*.29.
[150] Ibn-Kathir (n 36) 2, 42; vol 5, 139; Al-Qurtubi (n 9) vol 4, 102; vol 10, 393.

performed or abstained from performing was the result of their free will and their choice, without any form of coercion".[151]

Hence, a *mukallaf* is inherently endowed with autonomy to make moral decisions and thereby shape their ultimate destiny, which is determined by their autonomous choices.

Once more, autonomy distinguishes humans from other creatures. The sky, mountains, and other creatures lack free will and remain fixed with no chance for self-determination.[152] For instance, the sun and the moon obey pre-established timetables regarding their rise and set, the clouds to rain, the sky above, and the earth below. None of these cosmic phenomena can oppose divine rules that control them. Put simply, they lack the free will to disobey. The sunrise will not occur until the moon has set. In the *Qur'an*: "The sun shall not outstrip the moon, nor shall the night outstrip the day. Each is floating in an orbit".[153] The sky cannot fall on earth: "And the sky He has raised high, and He has set up the balance".[154] Despite these cosmic creations' responsibilities, their adherence to God's laws in the universe does not yield any reward. However, human beings are imposed with *taklif,* allowing them to either comply with or defy the divine burdens. Consequently, they are subject to rewards for obedience and penalties for disobedience.

Muslim jurists demonstrate various arguments regarding the significance of autonomy under the doctrine *of taklif*. For instance, Al-Najjar argues that autonomy is fundamental for humans to morally and effectively bear the divine burdens as God's vicegerent on earth.[155] In illustrating his argument, Al-Najjar cites the verse, "It is He [God] Who hath made you (His) agents, inheritors of the earth and has raised some of you above others in degrees [of rank] that He may try you through what He has given you".[156] This verse suggests that humanity is entrusted with the 'trust' to bear the divine burden on earth.[157] This position affords humans the utmost significance, elevating them to a superior status in the universe.[158] Humans are endowed with two fundamental elements that empower them to assume divine burdens and fulfil the tasks of vicegerency. The material factor of sanity and cognitive abilities enables humans to extract the burdens from their divine origin. In addition, free will enables humanity to make conscious decisions that nurture and populate the earth, guided by divine moral standards.[159] Alternatively, people may diverge from the divine essence of vicegerency, allowing corruption and injustice to spread.[160] Al-Najjar adds:

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[151] Abdul-Rahim Al-Sulami, *Sharah Al-Aqida Al-Wasatia* [An Explanation: Middle Path of Islam's Doctrine] (vol 15, *Al-Shabakah Al-Islmaia* [no date]) 10.
[152]Abd-Al-Majid Al-Najjar, *Khilafah'* The Vicegerency of Man: Between Revelation and Reason (Aref T Atari tr, International Institute of Islamic Thought 2000) 23-24.
[153] *Sura Ya-Seen.*40.
[154] *Sura Al-Rahman.*7.
[155] Al-Najjar (n 152) 21-43.
[156] *Sura Al-An'am.*165.
[157] Al-Najjar (n 152) 21-43.
[158] Ibid.
[159] Ibid.
[160] Ibid.

> "Trust [*taklif*] on the basis of autonomy is the only path for growth and perfection. Being given the choice to follow the self's desires and be subjected to base (lower) motives or to pursue the divine instructions and long for higher aspirations enables individuals to overcome the soul's *hawa* [vain or egotistical desire, individual passion and impulsiveness] and achieve sublimation. It is a kind of psychological *jihad* [doing one's utmost], leading to gradual growth and perfection through interacting with the universe, during which human beings observe *Allah*'s injunctions by enjoining right or refraining from wrong. This *jihad* climaxes with the realisation of *khalifah* [vicegerency of humans to fulfil the divine burden as revealed]".[161]

According to Jiyad, the *taklif* assigned to humans entails disclosing to *mukallafs* their expected burdens and providing them with relevant information through divine communication. Such information allows every person to autonomously choose their destiny after considering the implications of their choice.[162] Such *taklif is* based on autonomy, the sole means by which humanity can grow and develop through its interactions with the universe.[163] This level of engagement is impossible to attain without enabling people the freedom of choice.[164] As stated in the *Qur'an*, trust, or the divine burdens assigned to humans, with all its implications of growth and development through interaction with the universe, elevates humanity to the highest level of value. It also refers to humans as the highest and most powerful beings in all creation. As a result, it gives human beings optimism and motivation to promote growth and prosperity on earth that God has appointed them to steward.

Further, Al-Ghazali emphasises the significance of autonomy in *taklif* due to its association with moral responsibility, which is the result of autonomous actions.[165] According to Al-Ghazali, a *mukallaf* can only be held morally responsible for choices that they make autonomously. Consequently, Al-Ghazali's discussions on *taklif* refrained from forcing individuals to perform actions under divine burden, instead highlighting that their autonomous choice serves as a ground for the responsibility of their actions. To strengthen his argument, Al-Ghazali cited the following *Qur'anic* verse as proof.[166] "This is the truth from your Lord. Let whosoever will, believe, and whosoever will, disbelieve it."[167] Al-Ghazali comments on this verse and argues that even regarding forbidden actions by *taklif* discourse, one should not presume that the *obligatory* command is a "definitive command" for the individual to act.[168] Al-Ghazali clarifies his reasoning by asserting that God does not require people to submit to His law for its own sake, but rather for the benefit of

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[161] Ibid 24.
[162] Abdul-Ridha Jiyad, '*Mafhum Al-khilafa Al-illahia Lil Ensan Fi Al-Quran Al-Kareem Wa Kitabat Al-Ulama Al-Muslimen'* [The Concept of the Divine Succession of Mankind in The Holy Qur'an and the Comments of Muslim Scholars] (2008) 1(2) Kufa Journal of Arts and Literature 133, 140-148.
[163] Ibid.
[164] Ibid.
[165] Generally, see Al-Ghazali's comprehensive and detailed discussion of the five *taklif* rulings in *taklif* discourse and the moral responsibilities associated with each ruling. Al-Ghazali *Al-Mustasfa Min Elm Al-Usual* (n 98) 52-74.
[166] Ibid 62.
[167] *Sura Al-Kahf.* 29.
[168] Al-Ghazali, *Al-Mustasfa Min Elm Al-Usual* (n 98) 61.

individuals. Therefore, God grants humans the choice to comply with His divine burden, even in the context of *prohibited* actions.[169]

Indeed, Al-Ghazali's reasoning is substantiated by many verses in the *Qur'an*. For instance, "O mankind, the truth has reached you from your Lord! Those who receive guidance, do so for the good of their souls; those who stray, do so to their loss: And I am not over you a manager"[170],
"Whoever does a good deed - it is for himself, and whoever does evil - it is against the self. Then to your Lord you will be returned."[171], and "Whoever does righteousness - it is for his [own] soul, and whoever does evil [does so] against it. And your Lord is not ever unjust to [His] servants [humans]".[172]

The significance of autonomy in the doctrine of *taklif* can also be seen in its capacity to enable *mukallaf*s, those entrusted with the divine burden, to make varied moral choices based on the related rewards and penalties of the action. Behaviours of divine burden in *taklif* are defined according to what God commands and forbids.[173] Consequently, all God prohibits is *forbidden*, and all God mandates is *obligatory.* Yet, there are *recommended*, *discouraged*, and *permissible* actions between prohibited and mandatory conduct.[174] The moral conduct of *mukallafs* is motivated by a desire for rewards or avoidance of negative consequences in the Hereafter, with their knowledge of both the promised reward and the pathways to achieve it based on divine revelation.[175]

In this sense, autonomy distinguishes the moral decisions of *mukallafs.* While some *mukallaf*s perform the *recommended* action motivated by divine rewards, others *mukallaf*s may choose not to seek such praise, and some *mukallafs* may not care about the moral consequences if the action is not punishable by the positive law.[176] In this context, autonomy empowers *mukallaf*s to evaluate their actions in accordance with their conscience, guided by their moral values and aspirations. Hence, autonomy enhances the spiritual development and growth of *mukallaf*s while assessing the moral consequences of God's *mandates, prohibitions, permissible, recommendations, and discouragements.* As Ramadan states, autonomy is significant because it assists "all Muslims enter into personal growth and, consequently, to become autonomous in their lives, their choices, and, more generally, in managing their freedom".[177]

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[169] Ibid.
[170] *Sura Yunus*.108.
[171] *Sura Jathiyah.*15.
[172] *Sura Fussilat*.46.
[173] Mark Halstead, 'Islamic Values: A Distinctive Framework for Moral Education?' (2007) 36(3) Journal of Moral Education 283, 286.
[174] Ibid.
[175] Ibid 285.
[176] In this context, positive law refers to a set of legal rules that impose duties on individuals to perform or refrain from certain actions by the legislative authority in the state.
[177] Tariq Ramadan, *Western Muslims and the Future of Islam* (Oxford University Press 2004)129.

Suppose that *mukallafs* were not endowed by God with the autonomy to make moral decisions about their behavioural choices, what would motivate some to pursue virtuous actions and good deeds or abstain from prohibited ones at all? In addition, if a *mukallaf* lacks autonomy, what would encourage a *mukallaf* to strive to perform *recommended* actions and avoid *discouraged* behaviours? Ultimately, if a *mukallaf* lacks autonomy in their behavioural choices, the good and bad deeds of *mukallafs* will not be meritorious and sinful acts by any Islamic standard.

6.4.3 Moral Responsibility Before God

From an Islamic perspective, permanent human existence on earth is impossible to accomplish.[178] In the *Qur'an:* "Go down [from paradise to the earth]. We said [God]: … the earth will provide your dwelling place an enjoyment for a while".[179] The phrase "a while" suggests explicitly that the journey of humans as God's vicegerents on earth will end one day. A further verse affirms that humanity's vicegerency on earth is not enduring: "And for you on the earth is a place of settlement and enjoyment for a time".[180]

Accordingly, *taklif* and bearing the divine burden will ultimately terminate once humanity's role as God's vicegerent comes to an end, as moral responsibility before God commences. In the *Qur'an* "Then did you think that We created you uselessly and that to Us [God] you would not be returned [in the day of judgement]".[181] "That day [the day of judgement], it [the earth] will report its news.[182] "[In the day of judgement] whoever does good equal to the weight of an atom (or a small ant), shall see it"[183] "and whoever does evil equal to the weight of an atom (or a small ant), shall see it".[184]

Shabana argues that the notion of *taklif* places a high value on the concept of autonomy, alongside the notion of individual responsibility for one's own acts.[185] Similarly, Mustafa maintains that *Shari'a* prioritises the autonomy of individuals whilst also placing significant stress on the individual's responsibility for their moral choices.[186] The bestowed capacity for autonomous decision-making is inherently linked to the moral responsibility before God. In this sense, being morally responsible to God results from the bestowal of autonomy to individuals who make moral choices while fulfilling their mission on earth to bear divine burdens. If *mukallafs* were not endowed by God with autonomy to shape their destiny through their choices, on what basis could their actions be judged? If humans lack autonomy in decision-making, justice becomes meaningless, and God cannot judge them

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[178] Fazlur Rahman and Muhsin S. Mahdi, 'Eschatology (doctrine of last things) in Islam', *Encyclopaedia Britannica* (last update 2025) available at https://www.britannica.com/topic/Islam/Eschatology-doctrine-of-last-things accessed 20 March 2025, para 1.
[179] *Sura Al-Baqra.* 36.
[180] *Sura Al-A'raf.* 24.
[181] *Sura Al-Mu'minun*.115.
[182] *SuraAl-Zalzalah*.4.
[183] *SuraAl-Zalzalah*.7.
[184] *SuraAl-Zalzalah*.8.
[185] Ayman Shabana, 'Limits to Personal Autonomy in Islamic Bioethical Deliberations on End-of-Life Issues in Light of the Debate on Euthanasia' in Mohammed Ghaly (ed*) Dying and Death in the Islamic Moral Tradition* (Brill 2023) 238.
[186] Yassar Mustafa, 'Islam and the Four Principles of Medical Ethics' (2014) *Journal of Medical Ethics*, 40(7): 479-483, 482.

fairly. In the *Qur'an*: "Whoever works righteousness benefits his own soul; whoever works evil, it is against his own soul: nor is thy Lord ever unjust (in the least) to His worshipers".[187]

Hence, in the doctrine of *taklif,* in this life, the ultimate goal of human existence is to serve as God's vicegerents on earth, maintaining the correct meaning of human vicegerency. Ultimately, humanity confronts two potential destinations in life after, with only one being reachable. The great trial on the day of judgement would be rendered meaningless if humans were not granted autonomy for self-determination over their own actions in this life.

The *Qur'an* contains numerous verses that emphasise people's moral responsibility for their choices. For instance: "And every soul earns not [blame] except against itself, and no bearer of burdens will bear the burden of another. Then to your Lord is your return, and He will inform you concerning that over which you used to differ".[188] "And that there is not for man except that [good] for which he strives".[189] "On the Day [The day of judgement] when every person will be confronted with all the good, he has done, and all the evil he has done".[190] "Whoever does righteousness - it is for his [own] soul, and whoever does evil [does so] against it. And your Lord is not ever unjust to [His] servants".[191] [192]

Ultimately, human agency on this earth as *mukallafs*, where they have been chosen as deputies of God, is autonomous, suggesting that humankind should not be forced to undertake any specific behaviours. If the *mukallaf* possesses the rational and cognitive capacities, they are entitled to exercise free will and make moral, autonomous decisions to engage in virtuous and evil actions. In the *Qur'an*: "And have shown him the two ways [good and evil]?"[193] Choosing to follow the path of either good or evil is a matter of personal choice. Thus, humans' reward or punishment hereafter depends upon the decisions made through the inherent autonomy God granted them during their earthly existence.

Most importantly, the *Qur'an* explicitly emphasises that autonomy in *taklif* must be free of external pressure since individual responsibility before God is personal, and no one can claim that others influence their moral decisions. In the *Qur'an*: "The day [the day of judgement] on which a man shall fly from his brother, and his mother and his father, and

[187] *Sura Fussilat*.46.
[188] *Sura Al-An'am*.164.
[189] *Sura Al-Najm*.39.
[190] *Sura Al-Imran*.30.
[191] *Sura Fussilat*.46.
[192] Examples for further verses of the *Qur'an* emphasise people's moral responsibility for their choices: "On the Day [the day of judgement] when their tongues, their hands and feet will bear witness against them as to what they used to do". *Sura Al-Noor*.24; "And We will surely give those who were patient their reward according to the best of what they used to do". *Sura Al-Nahl*.69.
[193] *Sura Al-Bald*.10.

his spouse and his son".[194] "That [in the day of judgement] no burdened person (with sins) shall bear the burden (sins) of another".[195]

The previous theological discussion of the notion of vicegerent on earth, which led to the development of the theory of *taklif,* clarifies the significance of a *mukallaf's* autonomy in choosing one's destiny through intentional choices. Autonomy, from an Islamic perspective, is a moral construct that stems from the theory of *taklif,* which maintains that fundamental attributes bestowed to humanity by God are reason, cognitive abilities, and free will. These attributes empower humans to make autonomous moral choices, enabling them to fulfil their role as God's vicegerents on earth. In this sense, autonomy is tied to the Islamic concept of dignity. The inherent human capacity to make autonomous choices generates moral obligations to make moral decisions about the divine burdens in *taklif* according to the *mukallaf's* moral priorities and aspirations. Accordingly, the autonomous choices of a *mukallaf* must be respected, as every *mukallaf* bears moral responsibility before God for their choice and actions.

6.5 The Theoretical Framework of Conditions of *Taklif* in *Shari'a*

In this thesis, the term *mukallaf* is of utmost importance. It refers to the moral actor who bears divine burdens of *taklif* and entitled to exercise autonomy to make moral decisions on such burdens. Muslim jurists identify the moral requirements for qualifying a *mukallaf* to make autonomous and moral decisions, thereby assuming moral responsibility.[196]

1. Sanity and puberty.[197]
2. Disclosure of information about the divine discourse.[198]
3. Understanding the divine discourse.[199]
4. Free will without coercion[200].

6.5.1 Sanity and Puberty

A *mukallaf* is a sane person with the cognitive capability to recognise God's teachings, evaluate the benefits and disadvantages of their actions, and make deliberate choices that prioritise their preferences based on their aspirations and moral value of an action.[201] Therefore, Muslim scholars agree that the mind and maturity of cognitive abilities are fundamental attributes for a person to bear the divine burden and thus be responsible before God.[202]

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[194] *Sura Abasa* 35,36,37.
[195] *Sura Al-Najm.*38.
[196]See generally, Ayyad Al-Salami, *Usul Al-Fiqh Al-adhi La Yasae Al-Faqih Jahlah* [The Roots of Jurisprudence that A Jurist Should be Aware of] (*Dar Al-Termidya* 2005) 70.
[197] *Aql wa bulugh.*
[198] *Eilm alkitab.*
[199] *Fehm alkitab.*
[200] *Ikhtiar khali min alikrah.*
[201]Abdul-Mohsen Al-Zamil, *Sharh Al-Qawaeid Al-Sa'dia* [An Explanation of The Sixty Islamic Rules] (*Dar Atlas Al-Kadra* 2001) 75.
[202] Al-Salami (n 196) 71.

In Islamic jurisprudence literature, *ahliyyah* (legal capacity) is a concept closely associated with the conditions of the sanity and puberty of the *mukallaf*. In principle, Muslim scholars assume that a person who has sanity and reaches puberty possesses the cognitive capacity required to meet the conditions for legal capacity to be called a *mukallaf* in *Shari'a.*[203] Hence, the person can perform and bear moral burdens in the divine discourse of *taklif.*[204]

Nevertheless, Muslim jurists recognise that sanity and attaining puberty are not always signs of full legal capacity. They cite verses of the *Qur'an* and *Sunnah* to establish the scriptural ground of the legal capacity framework in Islamic law. The first two references are from the *Qur'an*: "And test the orphans [in their abilities] until they reach marriageable age. Then, if you perceive them to be of sound judgment, release their property to them.".[205] The second verse: "But if the one who has the obligation is of limited understanding or weak or unable to dictate himself, then let his guardian dictate in justice".[206] The third reference is from the main Prophetic *hadith* concerning legal capacity. "The Pen has been lifted from three [their actions are not recorded]: the child until he reaches puberty, the sleeper until he wakes up, and the insane [person] until he regains his sanity".[207]

Based on previous texts of *Shari'a* sources, Muslim jurists establish a scriptural foundation for the age of majority in *Shari'a* and natural limitations on legal capacity to perform actions. The natural limitations encompass three categories: minors, individuals with mental illness, and those who are in a state of sleep. These groups are considered incapable of fulfilling their responsibilities and acting autonomously. Their incapacity arises from the irrationality or immaturity of their cognitive abilities.[208] Accordingly, Islamic jurisprudence has developed legal rules concerning an individual's capacity to bear divine burdens within the detailed framework for legal capacity. The following discussion addresses this framework in Islamic law.

Types of Legal Capacity in *Shari'a*

Islamic jurists distinguish between two primary forms of legal capacity: 1) *dahlia alwujub* (capacity of obligation) and 2) *dahlia ala'da* (capacity to act).[209] *Capacity of obligation* refers to an individual's capacity to acquire obligations.[210] This capacity is inherent in all people, and it commences with the development of the fetus and continues until a person dies.[211] The *obligation's capacity* is not conditioned by attaining a specific age or

[203] For example, See Abdul-Aziz Ahamad Ala-Al-Din Al-Bukhari, *Kashf Al-Asrar* [Revealer the Secrets: A Book of Islamic Jurisprudence] (vol 4 ,1st edn, *Sharikat Al-Sahafa lAl-Uthmania* 1890) 248; see also Al-Ghazali *Al-Mustasfa Min Elm Al-Usual* (n 98) 67.
[204] Al-Ghazali *Al-Mustasfa Min Elm Al-Usual* (n 98) 67.
[205] *Sura Al-Nisa*. 6.
[206] *Sura Al-Baqra*.282
[207] *Musnad* Ahmad (*Hadith* 940).
[208] Ibid.
[209] See generally, Wahba Al-Zuhayli, *Al-Fiqh Al-Islami Wa Adlitah* [Islamic Jurisprudence and its Evidence] (vol 4, 4th edn, *Dar Al-Fikr* 1988) 2960.
[210] Ibid 2961.
[211] Ibid.

developing cognitive abilities to distinguish between beneficial and harmful matters. For instance, if the father dies while the embryo is still in the womb, the embryo has the right to property through different mechanisms like gifts and testaments dedicated through and receive inheritance if the embryo is delivered alive. However, this capacity does not enable a child to manage their property.

On the other hand, the *capacity to act* refers to an individual's ability to fulfil obligations deemed valid from a religious and moral perspective.[212] In the modern Islamic discourse, this capacity is classified as: a) the capacity to perform acts of ritual worship, b) the capacity to perform civil and financial affairs, and c) the capacity to bear liability for criminal actions. The *capacity to act* requires the legal subject to possess rational and cognitive abilities.[213] [214]

Elements of Capacity to Act

The capacity of an individual to act is intrinsically marked by two attributes: 1) *aql* (sanity) and 2) the ability of *tamyiz* (discernment) to distinguish between beneficial and harmful activities.[215] According to Al-Baqillani, sanity encompasses certain essential forms of knowledge restricted to rational beings.[216] These include understanding that "opposites cannot coexist simultaneously, that what is known can exist or not exist and that two is greater than one".[217] Individuals who possess such knowledge are deemed "sane" and therefore, they become a "*mukallaf*".[218]

In line with Al-Baqillani, Al-Juwayni defines sanity as that category of knowledge consistently possessed by rational individuals and inaccessible to irrational individuals; such individuals are aware of the feasibility of what is logically possible and the impracticability of what is illogically impossible.[219] Al-Juwayni's definition highlights that the mind as a form of essential knowledge does not deny the existence of other meanings associated with the term. Instead, Al-Juwayni intends to describe the concept of sanity necessary for moral responsibility, without which a person would be unable to comprehend the divine burdens.[220]

Based on the previous definitions of sanity and the broader discussion on *taklif* in Islamic jurisprudence, jurists often pair the term 'sane' with 'discernment' when discussing the conditions of a person who can act and bear the divine burdens of *taklif*.[221] The jurists seem

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[212] Ibid 2962.
[213] Ibid 2967.
[214] Ibid 2964. In classical Islamic literature, this capacity is classified as: a) The capacity to perform obligations to God. b) The capacity to perform obligations to humans. c) The capacity to perform mixed obligations between God and humans.
[215] Ibid 2966.
[216] Al-Baqillani (n 91) 197.
[217] Ibid.
[218] Ibid.
[219] Abdul Al-Malik Abdullah Yusuf Al-Juwayni, *Al-Irshad Illa Qawati'a Al-Adila Fi Usul Al-Itegad* [The Guidance to the Conclusive Evidence in the Fundamentals of Having Faith in Islam] (Mohamed Youssef Ali Abdel-Moneim eds, *Maktabt Khanji* 1950) 112-113.
[220] Ibid.
[221] For example, see W Al-Zuhayli, *Al-Fiqh Al-Islami Wa Adlitah* (n 209) 2965.

to suggest that discernment is a necessary attribute of a sane individual, enabling them to effectively distinguish between two separate matters, such as truth and falsehood and between useful and harmful matters. If individuals lack this cognitive capacity, they are considered mentally unsound or incompetent. Consequently, they are ineligible to fulfil the divine burden due to their insufficient competence required to perform such a burden.

Muslim jurists understand that the cognitive capacity to distinguish between advantageous and harmful actions develops as a person matures.[222] For instance, minors have a sense of sanity, but their cognitive abilities are not yet fully mature. Therefore, puberty is the practical and tangible indication of the mental capacity to perceive matters fully.[223] Al-Hindi maintains that because the intellect and comprehension remain hidden within them [the children], they gradually manifest themselves, and there is no criterion to identify them. Hence, the lawgiver establishes puberty as a criterion for them.[224] The child, as such, is exempted from *taklif* before reaching puberty.[225] The prophetic statement substantiates this requirement: "The Pen has been lifted from three: from the child until he reaches puberty…".[226] This means minors are exempt from all divine burdens and are not subject to any responsibility for not fulfilling these tasks.[227] However, once a person reaches puberty, they are considered to have transitioned from childhood to adulthood. Muslim scholars from the four primary Islamic jurisprudence schools agree that puberty marks the commencement of an individual's *taklif* to fulfil their legal and religious obligations.[228]

Hence, if *takli*f is associated with puberty, at what age does puberty begin? Puberty is associated with the physical changes that develop in males and females.[229] Such bodily signs can manifest at varying ages; thus, someone may reach puberty as early as 13. In contrast, others attain puberty at 17 or even later. Most Muslim jurists agree that puberty for males and females commences at the age of 15.[230] This perspective is held by *Hanbali, Shafi,* and *Malki* schools, and one account of Abu-Yusuf from *Hanafi* school. In contrast, Abo-Hanifa from *Hanafi* school argues that puberty commences at the age of 18 for girls and 17 for boys.[231] Thus, Islamic jurisprudence maintains that the age of puberty is not less than 15 years unless a person reaches puberty before that age.[232]

Adopting puberty as a determining factor for maturity and, hence, determining the legal age of adulthood has faced criticism. Al-Ghazali argues that puberty does not indicate an

[222] Al-Ghazali, *Al-Mustasfa Min Elm Al-Usual* (n 98) 67.
[223] Ibid.
[224] Al-Hindi (n 127) vol 3, 1124.
[225] Ibid.
[226] *Musnad Ahmad*, (*Hadith* 940).
[227] W Al-Zuhayli, *Al-Fiqh Al-Islami Wa Adlitah* (n 209) 2966.
[228] Azizah Mohd, Nik Mahmod, Ashgar Muhammad, Yusuf Amuda, and Marhanum Salleh, 'Child Labor Under Islamic Law (The *Shari'*a): An Overview' (2018) 23(2) Journal of the International Institute of Islamic Thought and Civilization 295, 300.
[229]W Al-Zuhayli, *Al-Fiqh Al-Islami Wa Adlitah* (n 209) 2966.
[230] Mohd and others (n 228) 300; W Al-Zuhayli '*Al-Fiqh Al-Islami Wa Adlitah'* (n 209) 2966.
[231] Mohd and others (n 228) 301; W Al-Zuhayli '*Al-Fiqh Al-Islami Wa Adlitah'* (n 209) 2966.
[232] W Al-Zuhayli, *Al-Fiqh Al-Islami Wa Adlitah* (n 209) 2966.

individual's cognitive growth, nor does it increase one's intellectual capacity.[233] While puberty is seen as an indicator of full maturity, it does not always coincide with a state of rationality. A child may reach puberty at 13, but this does not necessarily mean they have reached maturity or the capacity to distinguish between risky and beneficial situations. Thus, it is not necessarily valid to claim that a person in puberty attains adequate maturity to perceive issues and discern between them. In this sense, if puberty is not always a valid indicator of a person's maturity, what is the age of majority in *Shari'a*?

Age of Majority in *Shari'a*

The *Qur'an* demonstrates that puberty alone is insufficient for achieving cognitive maturity. The test for an individual's competence can be found in the verse about orphans' affairs: "And test the orphans [in their intellectual abilities] until they reach the age of marriage. If you perceive in them *rushd* (to be of sound judgement), release their property to them".[234]

The verse states that measuring a person's competence demands consideration of two elements: a) a person reaches the age necessary for marriage: "they reach the age of marriage".[235] b) a person reaches the *rushd* that enables them to have a long-range understanding of their obligations and responsibilities: "if you perceive in them *rushd*". Therefore, once the orphan meets the two requirements, they will have the legal capacity to manage their own financial affairs without a legal guardian: "release their property to them".[236]

Since the *Qur'an* associates a person's competence with marriage age, what age does *Shari'a* establish as an acceptable age for marriage? Muslim jurists have not yet determined the specific age for marriage, whether for males or females.[237] The jurists suggest that puberty marks the appropriate age for marriage.[238] Besides puberty, jurists also understand that males and females must attain the level of *rushd* to fully understand and perceive their rights and duties in marriage and, therefore, be capable of fulfilling them.[239]

Rushd is an infinitive form of the Arabic verb *ra-sh-da.*[240] Its linguistic meaning refers to acquiring and maintaining *hidayah* (guidance to the right path), which directly opposes deviation.[241] The word *rushd,* which appears in the verse of the orphan, means attaining maturity in cognitive abilities.[242] Several words derived from *rushd* are found in the

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[233] The argument of Al-Ghazali is cited in Calis Halit, *The Theory of Legal Capacity in Islamic Jurisprudence: A View in light of the Impediments to Legal Capacity (Adal Offset* 2004) 110.
[234] *Sura Al-Nisa*.6.
[235] See Abd-Al-Rahman Ali Al-Jawzi, *Zad Al-Masir Fi Elm Al-Tafsir* [Subsistence for Travellers in Science of *Qur'anic* Interpretation: A Book of Exegesis of The *Qur'an*] (Abdul Razzaq Al-Mahdi ed, vol1, 1st edn, *Dar Al-Kitab Al-Arabi* 2001) 371-372.
[236] Ibid.
[237] Mustafa Al-Sebaei, *Al-Mara'a Bayn Al-Fiqh Wa Al-Kanon* [The Rulings of Women in Islamic Jurisprudence and Positive Law] (*Dar Al-Waraq* 1999) 50.
[238] Ibid.
[239] Ibid.
[240] Ibn-Manzur (n 85) vol 3, Letter "R",174. See also vol 15, 140.
[241] Ibid 175.
[242]The verse: "And test the orphans [in their intellect abilities] until they reach the age of marriage. If you perceive in them *rushd* (sound judgement), release their property to them." *Sura Al-Nisa*.6.

Qur'an to signify various concepts, including "right guide", "accomplishing the right path", "sound reasoning", and "wisdom".[243]

Terminologically, *rushd* is defined by the *Hanafi* jurist Al-Zarqa as the capacity of [a person] to perceive and anticipate potential hazards and consequently make sound and rational choices about one's conduct and dealings.[244] Halaq notes that a person who attains *rushd* can manage their affairs in a "responsible and constructive manner".[245]

Therefore, in *Shari'a,* the marriage age is attained when males and females reach puberty and have matured enough to attain *rushd*. This emphasises the argument that it is not always valid to assume that one attains maturity upon reaching puberty. Ultimately, puberty is an indication of maturity rather than proof of full maturation. *Rushd* of a person may occur simultaneously with puberty, or it might be slightly or significantly delayed.[246] Minors reach maturity at various ages, influenced by various factors.[247] These variables are linked, for instance, to their approach to life, environment and surroundings, family upbringing, socialisation forms, and other rational variables. Hence, Muslim jurists avoid establishing a specific age for *rushd* because they recognise the reality of variations among individuals.[248] Nevertheless, the jurists attempt to develop criteria to measure an individual's maturity.[249] For example, *Shafi* scholars upheld moral behaviour and good character in matters related to religion and transactions.[250] The *Hanbli* and *Malki* jurists state that demonstrating adequate vigilance in making decisions in transactional matters is enough to determine maturity.[251]

Similar to the prevailing Islamic jurisprudence views, a *fatwa* issued by the Council of the International Islamic *Fiqh* Academy (IIFA) states that the age of puberty is 15 for both males and females unless an individual attains puberty before that age.[252] Thus, upon reaching puberty, an individual is obligated to perform acts of ritual worship. However, the age of *rushd* is required to conduct civil actions.[253]

The Natural Impediments to The Capacity to Act

1) Minors

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[243] For instance, see the verse: "Perhaps my Lord will guide me to what is nearer than this to *rashd* [right conduct]". *Sura Al-Kahf*.24; "But they followed the command of Pharaoh, and the command of Pharaoh was no rasheed [right guide]". *Sura Hu'd*. 97; "And We had certainly given Abraham his *rushdah* [sound judgement] before". *Sura Al-Anbiya* 51; "The *rushd* [right path] has become clear from the wrong". *Sura Al-Baqra*.26.

[244] Zahraa Mahdi, 'The Legal Capacity of Women in Islamic Law' (1996) 11(3) Arab Law Quarterly 245, 250

[245]Hallaq (n 88) 239.

[246] W Al-Zuhayli, *Al-Fiqh Al-Islami Wa Adlitah* (n 209) 2970.

[247] Ibid 2971.

[248] Ibid.

[249] Many criteria are mentioned in Al-Jawzi, *Zad Al-Masir Fi Elm Al-Tafsir* (n 235) vol 1, 373.

[250] Mahdi (n 224) 250.

[251] Ibid.

[252] The Council of the International Islamic *Fiqh* Academy of the Organization Cooperation, 'Definition of the Age of Puberty and its Implications on Obligations', (*Fatwa* 168, (6/18) 9–14 July 2007) available at <https://iifa-aifi.org/en/32956.html> accessed 20 February 2024.

[253] Naturally, the age of majority will vary among Islamic states, with each country defining its age of majority based on the principles of Islamic jurisprudence it adopted. Upon attaining the age of majority as defined by the state, an individual will possess full legal capacity to engage in civil actions.

As discussed in the previous section, the capacity to act is conditioned by sanity and cognitive maturity. These faculties act as instruments that enable a person to fulfil the obligations to God and humans stated in the divine discourse. Thus, for natural reasons, minors are exempt from divine discourse until they reach puberty and the age of *rushd*. This exemption ensures minors are not burdened with burdens beyond their cognitive capacity.[254] [255]

Concerning civil actions, Muslim jurists categorise the growth of minors into two stages: The first stage is a *non-discerning child,* which starts from birth and lasts until the child reaches the age of seven.[256] The second stage is a *discerning child*, which begins at seven and continues until the age of *rushd*.[257] At the stage of a *non-discerning child*, the cognitive ability to distinguish between beneficial and detrimental obligations is absent, resulting in a complete lack of capacity to act.[258] Thus, all civil actions undertaken by the child are null and will not have any legal effect.[259] Under the stage of a *discerning child*, a minor has developed limited cognitive capacity, enabling them to somewhat differentiate between beneficial and harmful conduct.[260] Yet, the minor's cognitive abilities are less developed than those of adults. Therefore, the capacity of the minor to act will rely upon the specific form of civil action in which the minor is engaged. Muslim jurists classify the actions of a *discerning child* into three types:[261]

a. Exclusively beneficial actions, such as accepting charity and endowments, will be deemed valid without the child's guardian's approval.
b. Exclusively detrimental actions, such as donating from the child's wealth, will be considered invalid even if the guardian endorses the donation.
c. Actions that fall between exclusively beneficial and detrimental, including buying and selling, will be deemed valid only if the guardian authorises them.[262]

Once minors reach the age of *rushd,* a stage that signifies their cognitive and moral maturity, they are considered to have attained full maturity; therefore, they transition from childhood to adulthood. Before reaching adulthood, a minor will be under the guardianship of a legal guardian who will act on their behalf in matters concerning their civil affairs.[263]

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[254] For instance, minors are not obligated to fulfil the commitment to God concerning performing ritual worship practices such as prayer and fasting. See, Ahamad Taqi Al-Din Ibn Taymiyya, *Majmue Al-Fataws* [A Great Compilation *of Fatwas* of Ibn Taymiyya: Book of the Principles and Roots of Islamic Jurisprudence, Monotheism, and Belief , *Hadiths* and Exegeses of The *Qur'an*] (Abdul Rahman Bin-Qasim ed, vol 11 , 2nd edn, King Fahd Complex for publication 2004) 191; Abdullal Ahamad Al-Maqdisi Ibn-Qudamah, *Al-Mughni* [The Enricher: A Book of Islamic Jurisprudence] (Taha Al-Zaini,- Mahmoud A Fayed, Abdel-Qader Atta and Mahmoud G Ghaith eds, vol 8, 1st edn, *Maktabt AL-Qhara* 1969) 548.
[255] This exemption is derived from the second verse and the *hadaith* mentioned earlier in Section 6.5.1, 120.
[256] W Al-Zuhayli, *Al-Fiqh Al-Islami Wa Adlitah'* (n 209) 2968.
[257] Ibid.
[258]Ibid.
[259] Ibid.
[260] Ibid.
[261] Ibid 2969.
[262] Ibid 2969.
[263] The natural guardian of a minor is the father or the mother, presuming that the mother has custody of the child. Islamic law discusses the qualified guardian in the event of the parent's death, but it is out of the scope of the thesis to elaborate on the legal guardianship concept for a child.

2) Mental illness

Similar to minors, Muslim scholars perceive a person with mental disability as incapable of bearing *taklif* because of their inability to reason. The jurists classify mental disability into various levels of severity, with the most extreme being referred to as *jnnun* (insanity).[264] In addition, Islamic jurisprudence acknowledges the existence of a less severe mental illness known as *atah*.[265] Although there are extensive and detailed debates about legal provisions concerning insanity and *atah,* the following discussion will provide a concise overview of the categories of mental disability that affect the capacity to act.

a. *Jnnun* (Insanity)

In Islamic scholarship, a *majnun* (insane person) is the frequent term used to describe individuals with unusual behaviour, and it is used to describe people who are currently referred to as mentally ill.[266] Muslim jurists provide various definitions of insanity, including the lack of intellect and discernment, the antithesis of reason and intelligence, and the detraction of intellect, which involves a disruption in the steady progression of rational action.[267] These definitions suggest that a reference to insanity is frequently placed with rationality to denote a state of the insane person that contradicts the sane individual. Despite this juxtaposition between insanity and rationality in these definitions, it is difficult to deduce or specify any detailed description of the nature of the insane individual and the functional implications of insanity.

When investigating the subject of mental illness in classical Islamic jurisprudence, the initial difficulty is the lack of a clear and comprehensive definition of insanity. Petrarca states that defining insanity is a complex task, and despite numerous attempts over the centuries, no clear and precise definition has been achieved.[268] In addition, there is a lack of consensus regarding the specific behaviours that constitute insanity.[269] Dols and Immisch argue that Muslim jurists have discussed the matter of insanity in a short, indirect, and frequently superficial manner. The legal concept of insanity within Islamic jurisprudence is inherently vague and confusing. The authors state that the definitions of insanity developed by Muslim jurists are typically non-empirical and unclear.[270]

However, contemporary thinkers such as Ghaly maintain that the lack of clarity in defining insanity within Islamic jurisprudence had a specific purpose.[271] For example, the standards for defining insanity were less stringent, allowing the social context to play a more

[264] See generally, Muhammad Abo-Zahra, *Al- wilaya Ala Al-Nafs* [Self-Governance in *Shari'a*] (*Dar AL-Fiker* 1994) 32.
[265] Ibid.
[266] Mohammed Ghaly, 'The Convention on The Rights of Persons with Disabilities and The Islamic Tradition: The Question of Legal Capacity in Focus' (2019) 23(3) Journal of Disability and Religion 251, 261.
[267] See generally, Abo-Zahra (n 264) 32.
[268] Rachel Petrarca, *Madness in Islam: Cultural Dimensions and Medical Knowledge from The Medieval to the Postcolonial* (Bard College 2022) 1.
[269] Ibid.
[270] Michael Dols, and Diana Immisch, '*Majnūn'*: The Madman in Medieval Islamic Society' (Oxford University Press 1992) 451.
[271] Ghaly (n 277) 262.

significant role in determining the nature of insanity. During the pre-modern era, medical institutions did not possess the ultimate authority to determine the meaning of insanity. Instead, individuals within a larger network encompassing "family, neighbourhood, and society" together determine the genuine nature of insanity.[272]

Through a close reading of the jurists' applications to cases of insanity, it can be concluded that the jurists maintain the concept of insanity as vague to accommodate a broad spectrum of abnormal behaviours. This flexibility allows for the encompassing of various conditions, including cognitive disabilities, dissociative anger, and potentially even personality disorders.[273]

Furthermore, Muslim jurists have a consensus that if a person is considered insane according to the prevailing understanding at a specific time and society, their actions do not have any negative moral value in the divine discourse.[274] [275] Insane people, therefore, are exempt from performing and bearing obligations to God and humans.[276] This is because reason and discretion are the essential attributes for the legal subject to bear duties. Muslim scholars also agree that, by way of analogy, the legal rules concerning the civil actions of a *non-discerning child* are applied to the actions of an insane person. [277] [278] Hence, the court will appoint a legal guardian to manage the civil affairs of an individual who is deemed to be insane.

b. *Atah*[279]

In Addition to insanity, Muslim jurists recognise *atah*, which is a less severe condition than insanity, yet it affects the competence of an adult to bear divine burdens. *Atah* is a term used to refer to individuals of diminished mental capacity.[280] Islamic jurisprudence provides various definitions of *atah*, with the most common being the definition of Al-Hanafi. *Atah* is "a state in which a person at times speaks like a sane and normal person while at other times the person speaks as an insane person".[281] *Atah* is also described as a

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[272] Ibid.

[273] For example, Abo-Zahra (n 264) at 33 discusses and cites the applications of lunacy for Al-Najari.

[274]This exemption is derived from the second verse and the *hadaith* mentioned earlier in Section 6.5.1, 120.

[275] See generally, Abo Zahra (n 264) 32.

[276] W Al-Zuhayli, *Al-Fiqh Al-Islami Wa Adlitah* (n 209) 2972.

[277] Ibid.

[278] In this context, it is important to emphasise that Muslim jurists do not view insanity as a one-block. Instead, the jurists understand that insanity has various forms and levels and, therefore, insanity can manifest as either a permanent or intermittent condition. Furthermore, it can be categorised as either full or partial insanity, with each form having a set of regulations and provisions. The legal rule of complete exemption to perform and bear obligations only applies under the conditions of permanent and total insanity. See generally, Abo-Zahra (n 264) 32.

[279] The Arabic term *atah* (noun) and *ma'tūh* (adjective) are frequently translated into English as 'idiocy' and 'imbecile'. "Idiocy" is the equivalent translation for the Arabic word '*atah*'. For instance, see Edward William Lane, *Arabic-English Lexicon* (Cambridge 1876) 1951, available at http://lexicon.quranic-research.net/data/18_E/022_Eth.html accessed 25 October 2024. 'Imbecile' is also utilised in the Islamic Civil Code, *Mjalla Al Ahkam Al Adalyyah* [Mecelle]1882, (94), available at http://legal.pipa.ps/files/server/ENG%20Ottoman%20Majalle%20(Civil%20Law).pdf, accessed 25 October 2024. The terms 'idiocy' and 'imbecility' are linked to 'stupidity'. However, the definition of *atah* in Arabic bears no relation to this notion. Therefore, the thesis will avoid using the English equivalent and the Arabic term 'atah' (n) and '*ma'tūh'* (adj).

[280] See generally, Abo-Zahra (n 264) 32.

[281] Abdullah Al-Jade'a, *Taysir Ealm Usul Al-Fiqh* [Facilitating the Roots of Islamic Jurisprudence] (*Mussat Al-Rayan* 1997) 90; W Al-Zuhayli, *Al-Fiqh Al-Islami Wa Adlitah* (n 209) 2972.

state where an adult maintains a child's intellectual abilities.[282] Mecelle defines *atah* as "a person whose mind is so deranged that his comprehension is extremely limited, his speech confused, and whose actions are imperfect".[283]

Most scholars of jurisprudential schools agree that there is a line of distinction between insanity and *atah*.[284] Insanity is understood to eliminate the mind, whereas *atah* is perceived as a condition where the mind is diminished but retains its original nature.[285] In other words, an insane person has lost their intellect, while a *ma'tūh* is feeble-minded.[286]

The jurists have a consensus that through analogy, the capacity of a *ma'tūh* to act has been deemed equivalent to that of *a discerning child*.[287] This is because a *ma'tūh* person has reason, yet their cognitive capabilities are not as developed as those of adults. When a person is described as *ma'tūh*, they are subject to a declaration of legal incapacity. If the *atah* occurred after puberty, the disability can only be declared by the court.

In light of this brief overview of the definitions of insanity and *atah,* Islamic jurisprudence suggests that the meanings of these two concepts are very paradoxical. On the one hand, insanity and *atah* are natural restrictions that affect one's capacity to perform their duties. Thus, when an adult is deemed insane or *ma'tūh*, legal guardianship is imposed. On the other hand, the concepts of insanity and *atah* in Islamic jurisprudence are loose and lack a scientific basis.
Further, in Islamic jurisprudence, an insane person lacks rationality and comprehension, whereas a *ma'tūh*is weak in understanding but still possesses their natural mental capacity. The threshold for determining whether a person is deemed insane, or a *ma'tūh* is developed through objective tests that assess their ability to distinguish between concepts such as "good and evil" and "truth and falsehood".[288] The jurists also acknowledge specific symptoms and signs of insanity and *atah*, which are interesting but rudimentary symptomatology.[289] The determination of whether a person is deemed insane and, therefore, exempted from the capacity to perform and bear obligations is not a matter for Muslim jurists. Despite the efforts of Muslim jurists to establish the symptoms of insanity and *atah* they are unable to arrive at a decision declaring an individual mentally disabled. Thus, the court shall not issue a judgment of guardianship for an individual based on a test derived from Islamic jurisprudence. The task of measuring cognitive capacities and identifying

[282] Al-Bukhari (n 203) 274.
[283] Islamic Civil Code, *Mjalla Al Ahkam Al Adalyyah* [Mecelle]1882, art (945).
[284] See generally, Abo-Zahra (n 264) 32; Al-Bukhari (n 203) 274.
[285] Ibid.
[286] Islamic jurisprudence identifies some social signs of *atah.* For instance, Al-Jawzi identifies social indicators of *atah*, including engaging in pointless speech, trusting everyone the person meets, revealing others' confidential information with good intentions, lacking the ability to distinguish between a friend and an enemy, openly discussing any thought that comes to their mind, and giving others what should not be given. See Abd-Al-Rahman Ali Al-Jawzi, *Sayd Al-Khater* [The Hunt of Thoughts: A book on Islamic Ethical and Psychological Teaching] (Hassan A Sweidan ed, 1st edn, *Dar Al-Qalam* 2004) 278, 383. Islamic jurisprudence outlines a further symptom of *atah,* such as inability to correctly count twenty dirhams (currency), counting from one to ten, and a person's lack of awareness of their age.
[287] W Al-Zuhayli, *Al-Fiqh Al-Islami Wa Adlitah* (n 209) 2972.
[288] See generally, Al-Bukhari (n 203) 263; See also Al-Najari perspective cited in Abo-Zahra (n 264) 33.
[289] Some symptoms and signs are mentioned above in footnote 286.

psychological disorders that impact the mind falls under the responsibility of specialised physicians with the knowledge and appropriate measurement instruments to administer the required tests and diagnose each person individually.

Hence, it is important to reconsider the notion of insanity and *atah* and redefine it scientifically by adopting a new psychological definition. This review shall also reconsider the utilisation of the pre-modern terms '*mujnun'* and '*ma'tūh*'. Such terms are antiquated and might be considered offensive, unfriendly and sensitive. Nevertheless, these expressions are still used in contemporary Islamic jurisprudential investigations. [290] Modern commonly used terms include mental diseases, mental illness, psychosis, schizophrenia, etc.[291]

3) A Person in the state of sleep

In addition to minors and individuals with mental disabilities, Muslim jurists establish that a person in a state of sleep is naturally exempt from performing burdens to God and humans.[292] This recognition is based on the explicit *hadith*: "The Pen has been lifted from three … from the sleeper until he wakes up…".[293]

Ibn-Al-Qayyim defines sleep as a state of the body that involves the movement of innate heat and forces into the body's interior to achieve rest.[294] Ibn Al-Qayyim categorises sleep into two types. Natural sleep, where all senses and voluntary movement cease to relax and rest, and abnormal sleep, which is caused by illness. According to Al-Kindi, "sleep is to allow the soul to be used by all senses. If we do not see, hear, feel, taste, touch, without any usual illness [causing it] and we are in a normal state, then we are said to be sleeping".[295]

Modern medical scientists define sleep as a condition of unconsciousness in which the body rests with closed eyes.[296] Sleep is also described as a state of unconsciousness in which a person rarely responds to external stimuli.[297] Other scientists view sleep as a state of unconsciousness in which sensory or other stimuli can still awaken a person.[298]

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[290] See generally, Abo-Zahra (n 264) 32.
[291] Hoda Muhammad Hilal, *Nzaryat Al-A'ahlia'*[The Theory of Legal Capacity: A Comparative Analytical Study from Islamic Jurisprudence and Psychology] (2013) 18(72) Journal of Islamic knowledge 70, 148.
[292] Al-Bukhari (n 203) 263; W Al-Zuhayli, *Al-Fiqh Al-Islami Wa Adlitah* (n 209) 2973.
[293] *Musnad* Ahmad, (*Hadith* 940).
[294] Muhammad Bin-Abi-Baker Ibn-Al-Qayyim Al-Jawziyya, *Zad Al-Ma'ad* [Provisions of The Hereafter: A Book of Principles of Islamic Jurisprudence] (Shuaib Al-Arna'ut and Abdul-Qadir Al-Arna'ut eds, vol 4, 2nd edn, *Mussat Al-Risalla* 1996) 220.
[295] Yaqub Abu-Yusuf Al-Kindi, 'The Treaty of Sleeping and Dreaming' in *Rasai'l Al-Kindi Al-Falsafia* [The Philosophical Treatises of Al-Kindi] Muhammad Abo-Rida ed, vol 1, *Dar Al-Fikr Al-Arabi* 1950) 284.
[296]Roger Bingham, Terrence Sejnowski and Jerry Siegal, 'Waking Up to Sleep' (Science Network Conferences, several conference videos 2007) available at http://thesciencenetwork.org/programs/waking-up-to-sleep accessed 1 March 2024.
[297]Michael Schupp and Christopher Hanning, 'Physiology of sleep' (2003) 3(3) British Journal of Anaesthesia 69, 69.
[298] David Dinges and Roger Broughton, *Sleep and Alertness: Chronobiological, Behavioral and Medical Aspects of Napping* (Raven Press 1989).

Ibn-Manzur argues that sleep is a concept that "is known".[299] Since the meaning of sleep is clear, it should not be subjected to further definitions, as they may introduce ambiguity to a well-understood concept.

Sleeping and its related derivatives are mentioned nine times in the *Qur'an*.[300] These terms denote various phases and categories of sleep. In *Shari'a*, sleep is a right for the human body,[301] as sleep is the most effective means of rest for the human body, exhausted by daily activities. *Shari'a* teachings urge humans to sleep and emphasise that sleep is an essential need that must be fulfilled.[302] Individuals must grant their bodies the necessary rest following a long day of activity and engagement in many exhausting actions.[303] [304]

In the literature of *Qur'anic* exegesis, there is an argument that the soul rises to the Creator and is partially separated from the body. The *Qur'an* suggests this argument by drawing an analogy between sleep and death. In the *Qur'an:*

> "It is God *wafah* (takes the souls) at the time of their death (the temporary death of sleep), and those that do not die [He takes] during their sleep. Then, He keeps those for which He has decreed death and releases the others for a specified term. Indeed, there are signs for people who give thought".[305]

In another verse, "And it is God who *wafah* (takes your souls) by night and knows what you have committed by day".[306]

The *Qur'an* scholars categorise the soul's state into two components: a state of consciousness when a person is awake, and a state of *wafah* (the soul is taken).[307] The concept of *wafah* is classified into two distinct states: a) sleep, which refers to a temporary death, and b) death, which signifies the permanent cessation of life.[308] Hence, the cited verses above suggest that God takes and preserves the soul after a temporary death during sleep, but releases the soul after the rest that occurs during sleep. The following Prophetic *hadith* serves to reinforce the interpretations of the previous verse. Hudhaifah and Abu Dharr reported**:** "Whenever the Messenger of *Allah* went to bed, he would supplicate: With Your Name, O *Allah*, I die and return to life; and when he woke up, he would supplicate

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[299] Ibn-Manzur (n 85) vol 12, Letter "N", 595.
[300] Ahmed Bahammam,'Sleep from an Islamic perspective' (2011) 6(4) Ann Thorac Med 187,187.
[301] Farahwahid Yusof, Siti Muhamada, Arieff Rosmana, Sarimah Ahmadb, Nor Farhah Razakb, Nor Izzati Hashimb and Asmahani Awangb, 'Sleep Phenomena from the Perspectives of Islam and Science' (2014) 67(1) UTM Journal of Teknologi (Sciences and Engineering)105, 106.
[302] Ibid.
[303] Ibid.
[304] The argument of sleep is a right for the human body is supported by the *hadith* concerning the account of Abu-Darda, who, among other reasons, refused to sleep at night to perform night worship, Salman, his companion, rebuked him for the following reason: "Your Lord has rights over you, your self has rights over you and your family has the right over you. Give those rights their due." When the Prophet heard the words of Salman, the Prophet said, "Salman spoke the truth."*Sahih al-Bukhari* (*Hadith* 6139).
[305] *Sura Al-Zumar.42*.
[306] *Sura Al-An'am.60*.
[307] For the interpretations of the two verses of *Sura Al-Zumar.*42 and *Sura Al-An'am.*60; see generally, Al-Qurtubi (n 9) vol 15, 260; vol 7, 5; Ibn-Kathir (n 36) vol 7, 91; vol 3, 238.
[308] Ibid.

All praise belongs to *Allah* Who has restored us back to life after causing us to die; and to Him shall we return."[309]

Based on this perspective, sleep activity is different from conscious activities.[310] Muslim jurists unanimously agree that sleepers are in a state of temporary death and are unaware of and lack awareness of their surroundings.[311] Due to the temporary influence of sleep on an individual's mental state, they typically cannot fulfil their obligations. Therefore, the sleeper is not required to perform any moral duty towards God or humankind, as they lack the intention and will to act in such a manner.[312] Ibn Taymiyyah maintains that if a person's mental faculties are affected by a legitimate reason, such as sleep or fainting, they will not be held responsible for performing religious and moral actions, as they are neither obligated to act nor morally responsible in such a situation.[313] Al-Hindi also states that a person in a state of sleep is exempt from fulfilling divine burdens.[314] Therefore, the capacity to perform duties to God and humans is temporarily suspended.[315] [316]

6.5.2 Disclosure Information of the Divine Discourse

The second condition for the *mukallafs* to make autonomous moral decisions is that they need to know the divine discourse regarding the specific task. The jurists maintain that a *mukallaf* endowed with moral burdens can only fulfil them if such duties are disclosed in divine discourse.[317] Muslim jurists consider revelation as the sole valid source of concepts that regulate human actions and behaviour.[318] The jurists argue that the divine burdens are determined through God's normative communication.[319] Rationality alone cannot deduce the significance of performing certain behaviours and avoiding others without relying on sources of revelation.[320] Thus, the individual cannot fulfil the divine duty without a divine discourse detailing the task and its rules.

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[309] *Riyad as-Salihin* (*Hadith* 1446).
[310] Yusof and others (n 310) 107.
[311] W Al-Zuhayli, *Al-Fiqh Al-Islami Wa Adlitah* (n 209) 2973.
[312] Ibid.
[313]Ahmad Taqi-Al-Din Ibn Taymiyyah, *Minhaj Al-Sunnah Al-Nabawiyyah* [The Approach of Prophet's *Sunnah*] (Muhammad Rashad ed, vol 5, 1st edn, 1986) 184.
[314] Al-Hindi (n 127) vol 3,1124.
[315] Ibid.
[316] For example, regarding performing acts of worship, Muslims must perform five obligatory prayers daily during certain times. Prayer times will strictly overlap the sleep time of Muslims, especially since Prayer times are not fixed and are influenced by the season and the location. When the time for prayer begins, asleep persons are not obligated to conduct the prayer at its scheduled time until they awake. Another example concerning the capacity to bear the liability for performing criminal actions is when a person is asleep, falls on a child and causes their death. In this scenario, the sleeper is not liable for murder.
[317] Generally, see the argument of Al-Ghazali that *al-sama'a* (Knowing the divine discourse) is a condition for a *mukallaf* to bear *taklif*, Al-Ghazali, *Al-Mustasfa Min Elm Al-Usual* (n 98) 72; See also Al-Baqillani (n 91) vol 1, 262.
[318]Abd-Al-Malik Abdullah Yusuf Al-Juwayni, *Al-Talkhis Fi Usul Alfiq* [Summary of the Principles of Islamic Jurisprudence] (Abdullah J Al-Nabali and Bashir A Al-Omari eds, vol 2 Dar Al-Bashyir [no date]) 464; Badr-Al-Din Al-Zarkashi, *Al-Bhar Al-Muhit Fi Al-Fiqh'* [The Ocean: A Book of Roots of Islamic Jurisprudence] (Abdul Qader Al-Ani ed, vol 1, 1st edn, *Dar Al-Kataby* 1994) 179; Al-Ghazali, *Al Mankhawal Min Talyqat Al-Usul* [The Clarified in the Fundamental of Islamic Jurisprudence (3rd edn, *Dar Al-Fiker* 1998) 63-68; Al-Baqillani (n 91) vol 1, 278; Al-Salami (n 196) 24; Al-Hindi (n 127) vol 2, 705.
[319] See generally, the discussion in the section titled 'There is no source other than the primary sources of *shari'a*' and 'The variation Among the Jurists on rationality' in Al-Zarkashi (n 318) vol 1, 175-221, see also Al-Juwayni, *Al-Talkhis Fi Usul Alfiq* (n 318) vol 2, 263-264; Al-Baqillani (n 91) vol 1, 278; Al-Hindi (n 127) vol 2, 704.
[320] Ibid.

A *taklif* ruling is defined by Muslim scholars as the divine discourse relating to the behaviours of morally responsible individuals before God, which involves *obligations, recommendations, discouragements, permissibilities*, or *prohibitions.*[321] Muslim jurists explain that divine prescriptive speech encompasses commands, prohibitions, provisions derived from injunctions, promises of rewards, threats of punishments, and conditions of fulfilling these duties.[322] This divine discourse can be obtained through the words of God, as revealed to His Messenger, whether in the *Qur'an* or the *Sunnah.* Additionally, Muslim jurists derive such provisions through their *ijtihad*[323] and interpretation of the teachings in the *Qur'an* and *Sunnah*.[324]

Muslim jurists categorise *taklif* discourse into five rulings:[325] *obligatory*[326], *recommended*[327], *prohibited*[328], *discouraged*[329] and *permissible*[330]. Divine discourse refers to divine prescriptive speech directed towards those *mukllafs* who can understand it.[331] It implies the presence of an addresser (God) and an addressee (the *mukallaf*) in communication.[332] Muslim jurists maintain that the communication's nature and essence remain unchanged, despite God being the addresser and humankind being the addressee in this act of speech. In this sense, divine discourse, as a kind of communication, is not considered by jurists to have any unique characteristics that distinguish it from traditional human communication. Hence, as with every form of human communication, the divine communication includes specific qualities that contribute to its performative significance.

The divine discourse intends to create awareness and attention between God and the *mukallaf.* Al-Ghazali states that for a *mukallaf* to act, prior knowledge and understanding of such conduct are required.[333] For *mukallasfs* to fulfil their burdens of *taklif*, divine speech is used to generate clear and sufficient discourse to achieve the desired results.[334] As Al-Ghazali states, such results are utilised to fulfil the divine burdens to satisfy the creator.[335] Muslim jurists suggest that the communications conditions require the disclosure of clear information to *mukallafs* and that the task in the divine discourse is fulfillable.[336]

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[321] Al-Salami (n 196) 24.
[322] Ibid.
[323] The process to deduce a ruling in Islamic jurisprudence.
[324] Ibid.
[325] Al-Zarkashi (n 318) vol 1, 169; Al-Ghazali, *Al-Mustasfa Min Elm Al-Usual* (n98) 52; Al-Salami (n 196) 29.
[326] A definite command to act. See Chapter 1, Section 1.7.1, 30
[327] A non-definite command to act. See Chapter 1, Section 1.7.1, 30
[328] A definite command to refrain from acting. See Chapter 1, Section 1.7.1, 30
[329] A non-definite command to refrain from acting. See Chapter 1, Section 1.7.1, 30
[330] A choice whether to perform or neglect an action. See Chapter 1, Section 1.7.1, 30
[331] See generally, the discussion in the section titled 'divine discourse' in Al-Zarkashi (n 318) vol 1, 168-169.
[332] Al-Ghazali, *Al-Mustasfa Min Elm Al-Usual* (n98) an address (God) is mentioned at 66 and an addressee (a *mukallaf*) at 67.
[333]Al-Ghazali, *Al-Mustasfa Min Elm Al-Usual* (n98) 66,72, 69.
[334] Al-Zarkashi (n 318) vol 2, 108, the author discusses the conditions of *al-muklaf b'h* (a task in the divine discourse) in *taklf.*
[335] Al-Ghazali, *Al-Mustasfa Min Elm Al-Usual* (n98) 66, 69.
[336] Generally, see Al-Ghazali, *Al-Mustasfa Min Elm Al-Usual* (n98), the jurist discusses the concepts in many places, in one place under the conditions of *al'makom fe'ih* (a task in the divine discourse at 69; in addition, under the categories divine discourse at 52; See also the discussions of Al-Zarkashi about the conditions of *al'makom fe'ih* (a task in the divine discourse
(n 317) vol 2, 108.

Thus, clear disclosure of information in divine discourse is crucial. This significance is vital not just from the perspective of devout Muslims but also for every *mukallaf* to consider the moral value of each divine task. Clear communication necessitates the identification of the objectives of such a burden, the benefits it brings, the evils it prevents, and the moral value of the burden to God.[337] In addition, since the fulfilment of or failure to perform a divine task is mainly determined by its moral value, it is essential also to define the rewards or punishments associated with such a task. Al-Ghazali emphasises the importance of clarity in the divine discourse.[338] According to Al-Ghazali clarity encompasses the accessibility of the task and the precision and accuracy of its meanings[339]. When a task is stated clearly, it means encompassing consistency, stability, and continuity in the divine discourse and its consequences. Repetition is sometimes necessary as it enhances attention and clarity in both *obligatory* and *prohibited* actions.[340]

The following instance illustrates the divine burden of prayer, serving as an illustrative example of the discourse information about the task in divine discourse. Prayer is a divine burden imposed by the *Qur'anic* verse "[O Muhammad], tell My servants [people] who have believed to establish prayer".[341] The *Sunnah* of the Prophet provides detailed explanations of this daily burden, clarifying the number of *rak'ahs* (bowing) for each prayer, their timings, and the instructions for performing the prayer. Additionally, the *Sunnah* suggests that purity and ablution are prerequisites for prayer and outlines specific regulations for performing ablution. The divine speech also describes situations in which women are excused from the burden of performing prayer and situations in which prayer should be shortened due to specific circumstances, including sickness, and travelling. Further, the divine discourse stresses the moral significance of prayer in *Shari'a*: "The first of man's deeds for which he will be called to account on the Day of Resurrection will be *Salat* (prayers)". The divine discourse also clarifies the benefits of prayer to the soul of Muslims. In *Sunnah*, the Prophet says: "Bilal [the person who proclaims the call to prayer], declare that the time for prayer has come, and give us rest by it [it means that prayer brings peace of mind and the soul]".[342]

Based on the above example, divine communication does not merely impose a divine task upon a *mukallaf* and leaves *mukallafs* to perform it as they consider. Instead, divine speech provides detailed information to enable a *mukallaf* to morally decide how to fulfil such divine tasks.

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[337] See generally, the discussion in the section titled '*Taklif* discourse' in Al-Zarkashi (n 318) vol 1, 231.
[338] Al-Ghazali, *Al-Mustasfa Min Elm Al-Usual* (n 98) 191.
[339] Ibid.
[340] Al-Zarkashi (n 318) vol 3, 313,373; Al-Ghazali, *Al-Mustasfa Min Elm Al-Usual'* (n 98) 214; Al-Ghazali, *Al-Mankhawal Min Talyqat Al-Usul (*n 318) 174-1177.
[341] *Sura Ibrahim*.31.
[342] *Mishkat al-Masabih* (*Hadith* 1253).

6.5.3 Understanding the Divine Discourse

The theory of *taklif* defines an essential requirement for qualifying a *mukallaf* to make autonomous moral decisions: understanding divine speech and its intended purpose.[343] Divine discourse is a communication between God and *mukallafs* that aims to generate understanding in their minds. This means the addresser's discourse must be clear and understandable to *mukallafs.*

Muslim jurists argue that to respond to divine discourse, the *mukallaf* must first comprehend it and then react with a specific type of behaviour. For instance, Al-Amidi expressly emphasises the necessity of understanding the divine discourse as defined in *taklif,* and he maintains that divine speech is words with an ordinary meaning intended to create understanding in those capable of comprehending it.[344] Similarly, Al-Ghazali emphasises the importance of understanding, arguing that *mukallafs* must comprehend divine speech. This emphasis on understanding places a significant responsibility on *mukallafs*, making them feel accountable for their comprehension of divine discourse.[345] In this sense, Al-Ghazali emphasises that adherence to divine speech as outlined in *taklif* discourse necessitates a comprehension of the divine discourse.[346]

The jurists describe some forms of comprehension that must be present in the mind of the *mukallaf* when conducting a specific action.[347] Al-Amidi maintains that to comprehend divine speech, the moral actor must have a particular level of understanding. This understanding includes recognising whether the speech is an *obligation*, *prohibition*, *recommendation, discouragement, or permissibility.* It also includes an understanding of the associated rewards and punishments, the features of divine duty, and who commanded such actions. Hence, a *mukallaf* can engage effectively in the moral decision-making process.[348]

Based on Al-Amidi's discussion, understanding the divine discourse emphasises that fulfilling divine duties is not done unconsciously but with intention and willingness to comply with God's instructions, either out of a desire for rewards or fear of punishment. Al-Zarkashi also highlights the importance of understanding in assessing the moral responsibility for intentional acts in *taklif*. The jurist states that "performing an action [defined in divine discourse] with intent and compliance depends on ... understanding of it".[349] Hence, within the framework of
the theory of *taklif*, understanding the divine discourse provides moral significance to intentional acts. It leads the *mukallaf* to perform or abstain from the task according to their

[343] See generally, Al-Amidi (n 129) vol 1, 150; Al-Zarkashi (n 318) vol 2, 64; Al-Ghazali, *Al-Mustasfa Min Elm Al-Usual* (n 98) 67.
[344] Ibid.
[345] Al-Ghazali, *Al-Mustasfa Min Elm Al-Usual* (n 98) 67.
[346] Ibid.
[347] Al-Zarkashi (n 318) vol 1, 31.
[348] Al-Amidi (n129) vol 1,150.
[349] Al-Zarkashi (n 318) vol 2, 64.

value in divine burden and the *mukallaf's* aspirations for the rewards and penalties associated with such tasks.

6.5.4 Free Will Without Coercion

Free choice without external influences[350] is deemed necessary for a person who is morally responsible to perform or abstain from an activity.[351] Al-Baqillani states that for rational *mukallaf* to fulfil their divine burdens, they must possess free will.[352] Therefore, it is not sufficient for the *mukallaf* to maintain a mere knowledge and understanding of an action. It remains, moreover, for an action to be considered moral burden, the *mukallaf* must have the free will to undertake the action.[353]

Muslim jurists assume a person is ordinarily free to choose which action to perform or abandon. This is because the fundamental components of the theory of *taklif,* discussed earlier in Section 6.4.2 in this Chapter, maintain that individual autonomy is significant and that God has endowed humans with free will to manifest this autonomy. Thus, freedom of choice is not an additional requirement for a *mukallaf* to make moral and autonomous decisions in *taklif* theory. Instead, the absence of coercion is the condition that should be emphasised.[354]

The term coercion is mentioned in the *Qur'an*: "except for one who is coerced to renounce [his religion] while his heart is secure in faith".[355] Ibn-Kathir states that this verse was revealed about Ammar bin Yasser, who was subjected to torture by the *Meccans* for abandoning faith in Muhammad.[356] As a result of the bodily harm Ammar suffered, he declared his disbelief in Muhammad. When he apologised to the Prophet, the Prophet asked him about his belief in the Message of Islam. Ammar affirmed, 'My heart is secure in faith [of the Message of Muhammad of Islam]". Following this story, God revealed this verse.[357] In commenting on this verse, Ibn-Kathir notes that individuals who are coerced to publicly declare abandonment of their faith and, at the same time, maintain belief in God are exempt from moral responsibility before God.[358]

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[350] One could enquire whether the obligations and the prohibitions in the divine discourse are regarded as an external influence on the free will of a *mukallaf.* The Islamic rulings of obligations and prohibitions established by God is not regarded as an external influence. This because a Muslim subordinates to the ruling of obligatory and forbidden in the divine burden. This submission stems from the literal meaning of Islam, which entails absolute and unconditional submission of Muslims' *mukallaf* to God. Accordingly, Muslims welcome external interference through divine commands and prohibitions.

[351] Al-Salami (n 196) 71.

[352] Al- Baqillani (n 91) vol 1, 250.

[353] Ibid.

[354] In this regard, Al-Ghazali maintains that "Only voluntary [of *a mukallaf*] actions fall under *taklif*". See Al-Ghazali, *Al-Mustasfa Min Elm Al-Usual* (n 98) 69. Therefore, Islamic jurisprudence literature, Muslim jurists incorporate a specific section addressing the rules on *mukallaf* activities performed under coercion. This suggests that in the theory of *taklif*, free will is a fundamental condition for a *mukallaf* to choose their actions.

[355] *Sura Al-Nahl.*106.

[356] Ibn-Kathir (n 36) vol 4, 520.

[357] Ibid.

[358] Ibid.

This verse establishes that the existence of coercion removes the grounds for condemning an act before God, providing a moral defence in which coercion can exempt the individual from the responsibility for various types of actions. Muslim jurists utilise this verse as leading evidence of the notion that coercion may minimise an individual's moral and legal responsibility.[359] At its height, coercion renders the legal and moral responsibilities of any forced actions invalid.

Islamic jurisprudence has a multifaceted and extensive approach to addressing the doctrine of coercion. In certain aspects, the provisions of *Shari'a* are strict to safeguard the sanctity of human and divine rights. In contrast, to protect the rights of the coerced person, the legal norms of *Shari'a* are flexible in other respects. Islamic jurisprudence has formulated the provisions of the doctrine of coercion by balancing the rights of God, society, and the individual being coerced. Therefore, in some areas, it places importance on the specific form of coercion and the nature of the rights affected, while also accommodating the subjective emotions of the one being forced.

The various approaches in Islamic jurisprudence result in differing perspectives and fluctuations in the stances of Muslim jurists between objective and subjective standards, without a unified methodology to address the concept of coercion. In each of the various provisions related to coercion, coercion involves both moral considerations and factual conditions relating to the individual being forced to act in a certain way and the type of action being compelled. Hence, it is challenging to develop a comprehensive, systematic, and precise approach for establishing an agreed concept of coercion or examining and explaining all cases of coercion. Although there are differences, Islamic jurisprudence acknowledges that the doctrine of coercion fundamentally considers the voluntary nature of an action, viewing coercion as an aberration that negates the presumption of voluntary action.

This section, however, does not aspire to present a comprehensive review of the doctrine of coercion, addressing all forms of coercion and the various positions in Islamic jurisprudence. The objective is to briefly define coercion as a factor influencing the voluntary decision-making process to engage in a civil action in *taklif*.

The Definition of Coercion

Jurists of Islamic jurisprudence provide similar definitions of coercion.[360] Coercion generally refers to the illegal use of pressure and force placed on an individual to perform or refrain from a specific action. According to Mecelle, coercion is the act of forcing someone to do something unlawfully and without their consent, usually by fear.[361] According to Al-Zuhayli, coercion is compelling someone to do something against their

[359]Muhammad Mustafa Al-Zuhayli, *Al-Qawa'ed Al-Fiqhi'a Wa Tatbiqatha Fi Al-Madhahib Al-Arba'a* [The Legal Maxims in Islamic Jurisprudence and their Applications in the Four Schools of Islamic Jurisprudence] (vol 1, 1st edn, *Dar Al-Fiker* 2006) 93-34.

[360] Majed Khalifa Al-Sulami, *Al-Ikrah Wa Atharuh Fi Al-Fiqh Wa Al-Qada* [Coercion and Its Effect in Islamic Jurisprudence and Judiciary] (2020) 22(2) Journal of College of *Shari'a* and law 1119, 1133.

[361] Islamic Civil Code, *Mjalla Al Ahkam Al Adalyyah* [Mecelle]1882, art (948).

will through the use of unlawful means.[362] Al-Sarakhsi defines coercion as forcing individuals to engage in actions they dislike or have not chosen voluntarily, nullifying their consent or autonomy.[363] Coercion, as defined by Al-Ainy, is an action performed without someone's consent or that undermines their ability to make a choice. It involves threatening someone with consequences to compel them to do something against their will.[364] Al-Bukhari's definition is the most comprehensive definition of coercion. Coercion, as defined by Al-Bukhari, entails compelling individuals to act against their will by intimidating them with something that the coercer can inflict, which creates fear in the coerced individual, causing them to give consent mainly to this fear.[365]

Despite the simplicity of the definitions of coercion, they reveal a shared understanding of the concept of coercion among Muslim jurists. While the terminology may differ, the core meaning remains consistent. Coercion is an act of forcing individuals to act against their will through the use of intimidation.

Types of Coercion

The four schools of jurisprudence agree in categorising coercion into two main types: *Mulji* (compelling coercion), and *gyer Mulji* (non-compelling coercion).[366] However, they differ in their definitions of what each form encompasses.[367] *Compelling coercion* invalidates consent and undermines free choice.[368] This type of coercion is highly coercive, to the extent that the person is unable to provide voluntary consent and is also deprived of any chance to make a choice.[369] This includes several forms of acts such as torture, threat to death, maiming and physical assault.[370] The *compelling coercion* nullifies consent and the ability to choose.

Furthermore, the four schools of jurisprudence unanimously agree that *compelling coercion* involves the form of coercion in which the coercer uses force to the degree that the victim is incapacitated, making them completely unable to abstain from acting.[371] For example, physical restraint can force an individual to act.[372] In this category, the jurists consider the victim merely a *tool in the hand of the coercer* and entirely subject to the coercer's

[362] M Al-Zuhayli, (n 359) vol 1, 261.
[363] Muhammad Ahamad Al-Sarakhsi, *Al-Mabsut* [A Book of Islamic Jurisprudence and The Exercise of The Opinion in Systematic Reasoning and Juristic Preference] vol 6, *Dar Al-Ma'refa* 1993) 177.
[364]Bader-Al-Din Al-Ayni, *Al-Binaya Sharh Al-Hidaya* [The Building in Explaining Guidance: A Book of Islamic Jurisprudence] (vol 11, *Dar Al-Kutb Al-Ilmia,* Ayman Saleh ed, 1st edn, 2000) 39.
[365] Al-Bukhari (n 203) vol 4, 383.
[366]Al-Salami (n 196) 87.
[367] Ibid.
[368]See generally Ala-Al-Din Al-Kasani, *Bada'e Al-Ssana' Fi Tartib Al-Shara'i* [Unseen Artistry in the Arrangement of *Shari'a* -Legal Regulations: *Hanafi* Jurisprudence] (Ali Moawad and Adel-Abdel-Mawgoud eds, vol 7, *Dar Al-Kutb Al-Elmia* 2002) 175; Al-Bukhari (n 203) vol 4, 384.
[369] Ibid.
[370] Ibid.
[371] M Al-Sulami (n 360) 1136; Al-Salami, (n 196) 87-88.
[372] M Al-Sulami (n 360) 1136; Al-Salami, (n 196) 87-88.

control.[373] This type of coercion is categorised as *compelling coercion*, and thus, it nullifies consent and the ability to choose.[374]

The second category of coercion is *non-compelling coercion*, which renders consent invalid without nullifying free choice.[375] This coercion is not very coercive; therefore, the coerced individual can still choose to do the coerced action.[376] This includes acts of coercion, such as verbal assault, short-term imprisonment, light beating and property damage.[377] *Non-compelling coercion* negates consent but does not nullify the ability to choose.

Al-Kasani outlines the distinction between the two categories of coercion and states that coercion is classified into two categories.[378] The first type, *compelling coercion*, establishes a situation of necessity and does not inherently provide the coerced individual with any options, as it involves a threat of grievous danger.[379] For instance, the threat of death, body mutilation, or beatings that endanger the life or limbs of an individual, irrespective of the number of blows.[380] The second form of coercion, non-*compelling coercion*, does not establish a necessity and, by its very nature, leaves the forced individual with an option.[381] This is because such coercion does not pose a gross threat. For instance, the threat of imprisonment, beatings that do not endanger life, or the loss of a limb of the human body.[382]

Some jurists from *Shafi* school argue that coercion is classified entirely as *compelling coercion*, and the *non-compelling* type should not be considered coercive action.[383] Many *Hanafi* jurists have developed a further form of coercion known as *moral coercion*.[384] In this category, threats are used to cause harm to third parties such as parents, husband and wife, sons and daughters.[385] Most jurists from *Hanbali*, *Malki*, and *Shafi* categorise *moral coercion* within the types of coercion, whether *compelling* or *non-compelling*.[386] However, the four schools of jurisprudence differ in their view of who the third party is.[387] Some jurists restrict the third party to threats directed specifically at parents, sons and daughters, siblings, or spouses. Other scholars consider threats directed at strangers.[388] Nevertheless,

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[373] M Al-Sulami (n 360) 1136; Al-Sarakhsi (n 363) vol 24, 89; Al-Salami, (n 196) 87-88.
[374] M Al-Sulami (n 360) 1136; Al-Salami (n 196) 87-88.
[375] Ibid.
[376] Ibid.
[377] Ibid.
[378] Ibid.
[379] Ibid.
[380] Ibid.
[381] Ibid.
[382] Ibid.
[383] See generally, Al-Kasani (n 368) vol 7, 175.
[384] See generally, Al-Bukhari (n 203) vol 4, 383.
[385] Ibid.
[386] Ibid.
[387] Al-Bukhari (n 203) vol 4, 384; Ibn-Qudamah (n 254) vol 7, 384; Ala-Al-Din Ali Suleiman Al-Mardawi, *Al-Ensaf* [Fairness: A Book of Comparative Islamic Jurisprudence within the School of *Hanbli*] (Muhammad H Al-Faqih ed, vol 8, 1st edn, Dar *Al-Ihia Al-Arabia* 1955) 441.
[388] This is based on the prophetic *hadith* "...A Muslim is the brother of another Muslim; he neither oppresses him nor does he look down upon him, nor does he humiliate him…", *Riyad As-Salihin,* (*Hadith* 235). See generally, Ali Al-Andalusi Ibn-Hazm, *The Muhalla* [The Adorned Treatise: A Book on Islamic Jurisprudence] (Abdul-Ghaffar S Al-Bandari ed, vol 7, *Dar Al-Fikr* 1984) 203.

some jurists of *Hanabli* and *Hanafi* schools stress that any threat, regardless of its nature, is considered *non-compelling coercion* when directed at third-party individuals.[389]

Further, Islamic jurisprudence distinguishes between two types of coercive conduct and categorises them as criminal or civil actions. In criminal acts such as murder, rape and damaging property, Islamic jurisprudence considers only *compelling coercion*. However, in civil activities such as contracts, divorce, and marriage, a more flexible approach is adopted, and *both compelling and non-compelling coercion* is recognised. In both types of acts, the provisions of Islamic jurisprudence strike a balance between the subjective feelings of victims and the enforcement of legal maxims of conduct, including the legal maxim of *choosing the lesser of two evils* and the principle of *proportionality* between the type of coercion and the victim's response.

Since coercion in criminal acts is not relevant to the focus of this thesis, the following discussion focuses on the provisions of Islamic jurisprudence regarding coercion in consenting to civil acts.

Coercion in Civil Acts

As presented earlier in the previous section, coercion is generally classified into two types, and Islamic jurisprudence recognises both *compelling coercion* and *non-compelling coercion* in civil actions. Islamic jurisprudence establishes an objective test to assess whether coercion is *compelling or non-compelling*. The objective test is reliant on a threat of *grievous harm*. If such is the case, then it constitutes *compelling coercion.* Islamic law establishes varying definitions of *grievous harm* across different schools of thought. *Grievous harm*, generally, encompasses actions such as a threat to death or harm to a body's limbs, destroying all of the victim's property, or a threat directed to harm a third party that the coerced person cares about, like their parents, children, or spouse.[390] If coercion involves the use of force, the objective test will assess whether the forced action, by its nature, leaves the coerced person as a *mere tool in the hands of the coercer*, thereby nullifying the essential element of free will required for legal responsibility in civil actions.[391]

Once the required type of coercion is found, Islamic law establishes a subjective test to determine whether the victim feels forced to consent to the civil act due to the real fear of the coercer. Hence, Muslim scholars have stipulated the requirement to investigate if the victim feels, based on their *preponderance of belief*, that they are facing a situation in which

[389]See generally, For *Shafi* School: Shams Al-Din Al-Ramli, *Nihayat Al-muhtaj Illa Sharh Al-Mminhg* [Commentaries that Provide A Comprehensive Explanation of all the Essential Aspects of *Shari'a*] (Nour-Al-Din A Al-Shabramalsi and Ahmed A Al-Rashidi eds, vol 6 *Dar Al-Fikr* 1984) 447; *Hanafi* School: Muhammad Ahamad Al-Sarakhsi (n 363) vol 24, 38;*Malki* School: Ibrahim Abd-Al-Aziz Al-Desouki, *Hashiat Al-Deasouki Ala Al-Sharh Al-Kabee*r [Al-Deasouki's Footnote on the Book of *Al-Sharh Al-Kabir* [The Great explanation] (Ahmed Al-Dardour ed, vol 2 *Dar Al-Fikr* [no date]) 268; *Hanbali* School: Muhammad Al-Maqdisi Shams-Al-Din Ibn-Muflih *Al-Furu* [The Branches: A Book of Islamic Jurisprudence] (Abdullah Al-Turki ed, vol 9 1st edn, *Mussat Al-Risala* 2003) 14.

[390]Ministry of *Awqaf* and Islamic Affairs of Kuwait (ed), *Kuwaiti Jurisprudence Encyclopaedia* (vol 6, *Dar Al-Salasl* 2006) 105.

[391] See generally, Al-Sarakhsi (n 363) vol 24, 89.

they have no choice but to either consent to the civil act or face the harm that was being threatened.[392] If such were the case, it would generate a situation of coercion, rendering the civil action null and void. Thus, the test employed in civil acts is subjective and focuses on establishing the presence of fear in the victim's mental state. Al-Sarakhsi explains the subjective test and states:

> "Can you not perceive that the *preponderance of belief* of the person being coerced, and what they felt, shall take priority over the objective truth of a matter that we cannot independently confirm?... The situation of individuals differs in their capacity to endure suffering; that is the case, there is no way other than to consider the *preponderance of belief* of the victim".[393]

Al-Sarakhsi's argument is that due to the fundamental uncertainty surrounding people's capacity to bear or endure the threat, it is crucial to carefully examine the specific circumstances of each individual subjected to coercion to determine the presence of fear in the victim's mind.[394] According to Al-Sarakhsi, this approach is the most effective in reducing suffering for individuals, as per the legal maxim that *hardship begets facility.* Al-Sarkhasi concludes that in each case, the judge will be left to decide whether the victims perceive themselves as compelled by coercion, which demands their consent to the civil act.[395]

This implies that the existence of coercion can be relative depending on the specific situation of the person being coerced. The test considers factors such as gender, age, degree of influence, cultural background, social status, and health condition for each person individually. Put simply, Islamic jurisprudence does not set a fixed or constant personal standard. Hence, what may not be considered coercion for a brave person could be perceived as the reverse for someone timid, feeble, or lacking experience. Each case will be decided individually by the court.

Regarding whether the threat of coercion must be imminent or urgent. There is a lack of consensus amongst the classical Islamic schools.[396] Some Muslim jurists argue that the threat should be imminent and immediate, providing a slight chance of escape. [397] Thus, coercion is acknowledged when the victim actively engages in coercion in the presence of the coercer.[398] However, other Muslim scholars maintain that the essence of coercion involves fear in the victim's mind, leading them to believe that they have no alternative but

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[392] Al-Kasani (n 368) vol 7, 176.
[393] Al-Sarakhsi (n 363) vol 24, 49.
[394]Al-Sarakhsi (n 363) vol 24,52; see also Muhammad Al-Husayni Ibn-Abidin, *Radd Al-Muhtar Ala Al-Durr Al-Mukhtar* [The Guiding the Baffled to The Exquisite Pearl: A Book of Islamic Jurisprudence] (Adel AAbdel-Mawgoud Ali M Moawad eds, vol 6, 2nd edn, *Mustafa Al-Baby Al-Halabi* 1966) 133.
[395] Al-Sarakhsi (n 363) vol 24, 52.
[396]Ibn-Abidin (n 394) vol 6,129.
[397] See Islamic Civil Code, *Mjalla Al Ahkam Al Adalyyah* [Mecelle]1882, art (1005); Ibrahim Muhammad Al-Maqdisi Burhan Al-Din Ibn-Al-Muflih, *Al-Mubd'e Fi Sharh Al-Muqana* [The Creative in Clarifying Convincing Proof: A Book of Islamic Jurisprudence] (Muhammad Al-Shafi ed, vol 6, 1st edn, *Dar Al-Kutb Al-Elmia* 1997) 298; Ibn-Qudamah (n 254) vol 7, 383.
[398] Ibid.

to comply with the forced action.[399] Thus, the coercer does not need to be physically present for the victim to feel threatened.

The second perspective aligns with the provisions of Islamic jurisprudence, which prioritises the subjective test of the victim's *preponderance of belief*. In this context, immediateness is only relevant when considering whether the victim feels the fear is being forced upon them.

It is essential to emphasise that an individual's subjective feeling cannot transform a *non-compelling coercion* into a *compelling* one. To clarify this statement, in Islamic jurisprudence's discussions, if someone is threatened with a single slap to the face or a single blow to the body by a whip, it is not considered *compelling coercion* that negates free choice and thus invalidates consent.[400] However, the fact is that a timid, feeble, or elderly person may feel completely overwhelmed as a result of a slap or blow. The purpose of the subjective test is only to ascertain whether the victim genuinely felt threatened with *grievous harm*. Yet, the categorisation of types of coercion that distinguish between *compelling* and *non-compelling coercion is* determined by legal standards, as previously noted, the threat of *grievous harm*.

It is also important to note that Islamic law imposes standards of legal conduct for addressing the types of coercion in civil cases. The victim's response must be proportional. The victim cannot cause more harm than required in the given situation and will be held accountable for any excessive behaviour or overreaction.[401] The principle of *proportionality* aligns with the legal maxim of *necessity*: *Necessity is limited to what is necessary*.[402]

Furthermore, in addressing types of coercion, Islamic law also adheres to the principle that the victim cannot inflict more severe harm to prevent less severe harm.[403] This judgment aligns with the sub-legal principles derived from the legal maxim of *harm*: *choosing the lesser of two evils.* In this regard, Al-Sarakhsi states that the general premise is that:

> "If it is stated that the oppressed have the right to combat oppression using whatever available methods. We maintain that while it is possible for the oppressed to resist or fight against their oppressors, they cannot oppress others".[404]

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[399] Al-Ramli, (n 389) vol 6, 447; Solman Omar Al-Azhari Al-Jamal, *Hashiat Al-Jamal Aala Sharh Al-Manhaj* [Comments of *Al-Jama*l on Explaining the *Shafi*'s Jurisprudence Approach] (Abdul Razzaq G Al-Mahdi ed, vol 4, *Dar Al-Fikr* 1996) 323.

[400] See generally Al-Ramli, (n 389) vol 6, 447; Ibn-Qudamah (n 254) vol 7, P.384; Al-Jamal (n 399) vol 4, 325; Muhammad Ahamad Al-Disuqi, *Al-Sharah Al-Kabeer Fi Hashiat Al-Disuqi* [The Great Explanation According to Al-Disuqi's Footnote: A Book of Islamic Jurisprudence] (vol 2, *Dar Al-Fiker* [No date]) 368.

[401] See generally, Al-Sarakhsi (n 363) vol 24, 132.

[402] Samir Saeed Hussein, *Al-iikrah Wa Hahalat Al-Darura: Dirasa Muqaranat Biyn Al-Shari'a Al-Islamia Wa Al-Qanun Al-Wade* [Coercion and The State of Necessity a Comparative Study Between Islamic law and Positive Law] (2022) 25(2) Journal of the College of *Shari'a* and Law of Daklahiya, 2571, 2555-2558.

[403] Ibn-Qudamah (n 254) vol 7, 383; Al-Sarakhsi (n 363) vol 24, 135.

[404] See Al-Sarakhsi (n 363) vol 24, 58; Ibn-Hazm (n 388) vol 7, 204.

Al-Sarakhsi's argument suggests that the victims cannot safeguard themselves from the threat of harm at the expense of others. However, if the evil the victims will face is more severe than the evil they will cause, they are excused. Hence, the victim will always have a duty to minimise the harm. Al-Sarakhsi provides many examples that illustrate the principle of the lesser evil.[405] For instance, if a man is forced to divorce his wife or commit murder, then he must divorce his wife rather than commit murder; if an individual is compelled to kill another or the abandonment of their belief in Islam, and the person chooses to kill, the act of murder is not justified; if a person is as to choose between killing a person or destroying his property, the victim must choose to damage the property, as human life is protected and more sacred.[406]

Further, it is essential to consider whether the threat of harm has to be explicitly expressed or implicitly. Al-Sarakhsi comments on this issue, stating that an explicit threat is unnecessary in cases of coercion.[407] Al-Sarakhsi rationalised this legal norm by arguing that oppressors normally refrain from directly threatening to kill individuals.[408] Instead, they issue commands, and if these commands are not followed, they always administer fatal punishments to those who defy them. If this type of behaviour is prevalent, a simple order may be seen as an implicit threat of death that meets the requirements of coercion.[409]

6.6 Conclusion

The theological discussion on the conceptual framework of human dignity and the concept of vicegerency, which developed the *taklif* theory, demonstrates that *Shari'a* does not marginalise or suppress the autonomy of its followers. In *Shari'a,* autonomy is a moral construct that originates from a superior divine source of *taklif*. *Taklif* is derived from the Islamic framework of dignity and the concept of humanity as vicegerents on earth. The autonomous person is the *mukallaf,* perceived as the moral actor who bears the divine burden in *taklif* in every aspect of life and assumes moral responsibilities before God for their moral choices. The will of self-governance of a *mukallaf* determines the performance of actions according to the moral values associated with each action in the *taklif* discourse.

In *taklif* doctrine, for a *mukallaf* to bear the divine burdens and thus make moral and autonomous decisions in response to these burdens, the *mukallaf* must possess the sanity and cognitive abilities to distinguish between harmful and beneficial behaviours and comprehend the moral consequences of their actions. Accordingly, *taklif* is associated with legal capacity and attaining the age of majority. *Taklif* also maintains that the moral agent cannot make a moral decision about conduct without being provided with information relevant to that behaviour and its moral significance in the divine burden. In addition, *taklif* states that mere knowledge of divine discourse is inadequate for the *mukallaf* to make a moral decision. The *mukallaf* must also understand this divine discourse and grasp its

[405] Al-Sarakhsi (n 363) vol 24,135.
[406] Ibid.
[407] Ibid 76-77.
[408] Ibid.
[409] Ibid.

significance, along with the related rewards and punishments that accompany it. Furthermore, *taklif* requires that the moral actor manifest autonomy in moral decision-making by acting freely and without external coercion.

In the context of medical treatment, as Chapter Four emphasised, when maintaining health is the responsibly of the individuals oneself, the theory of *taklif* places on the individual named the *mukallaf* the role of the moral agent to bear the divine burdens and thus make autonomous decisions about proposed treatment options when it comes to their health. This capacity to make autonomous decisions about medical treatment is a fundamental attribute of humans, who possess rationality, cognitive abilities, and the free will to bear the divine burdens of vicegerency. Given that medical treatment has a moral value within the divine discourse of *taklif* (this will be investigated in the next chapter), maximising a patient's autonomy is significant. This is because the theory of *taklif* generates a moral obligation on patients to consider the divine discourse concerning the proposed medical treatment and assess the moral value according to the five *taklif* rulings. Thus, the *mukallaf* considers the rewards or penalties associated with each action. In this sense, the best spiritual and moral outcomes for health can be achieved by respecting and enhancing patient autonomy, without paternalistic interventions and practices.
Accordingly, patients should not be forced to agree to a specific treatment or exposed to paternalistic interventions that influence their decision-making. Instead, patients' decisions should be respected since they are granted the fundamental attributes necessary for autonomous choices. Maximising and honouring patient autonomy are also crucial as they connect to and influence the patient's moral responsibility in *taklif.*

Ultimately, this chapter emphasises that respect for patient autonomy is crucial in medical decision-making when the health of the *mukallaf* is concerned. This significance is grounded in the theological concept of *taklif.* Hence, the next chapter explores the moral value of medical treatment within the divine burden of *taklif,* aiming to establish a moral framework for the autonomy of *mukallaf* patients as they seek medical treatment for their health.

Chapter 7: The Moral Framework of A *Mukallaf* Autonomy in Seeking Medical Treatment in *Taklif*

7.1 Introduction

The previous chapter highlights in *Shari'a* discourse, autonomy stems from theological discussions on human dignity and vicegerency, leading to the doctrine of *taklif*. From this perspective, autonomy is regarded as a moral construct: God endows humans, as vicegerents on earth, with reason, cognition, and free choice, enabling them to make moral decisions while bearing the divine burden in *taklif*.

In the medical setting, *taklif* places the role of moral agents on patients, enabling them to make spiritual and moral decisions regarding proposed medical interventions that influence their health. The capacity to make autonomous decisions regarding medical treatment is an intrinsic characteristic of humans, who possess rational, cognitive abilities and free will, enabling them to complete their earthly duty as God's deputy in all facets of life, including medical treatment choices. Hence, maximising the patient's autonomy in medical decision-making is crucial, as it ultimately affects the moral responsibility before God to bear the divine burden regarding medical treatment when the *mukallaf* patient's health is concerned.

In this sense, understanding the divine burden associated with medical treatment is crucial for the *mukallaf* patient. This is because, in divine discourse, every behaviour has a moral value and can bring rewards or punishments to the *mukallaf* individuals in the afterlife. Comprehending the divine burden associated with medical treatment requires an appreciation of how the sources of *Shari'a* shape morality and conduct. Hence, this chapter aims to establish the moral framework of *mukallaf* autonomy in seeking medical intervention by investigating the moral value of medical treatment in the context of divine discourse. Such a moral framework is significant as it clarifies to a *mukallaf* patient the divine burden concerning medical treatment when the *mukallaf's* health is the concern. Thus, the moral framework enables *mukallaf* to assess medical treatment options based on their moral significance and the patient's aspirations for rewards or avoidance of punishments.

To this end, this chapter is divided into two sections. The first section outlines the fundamental jurisprudential considerations within normative Islamic discourse that should be considered when analysing patient autonomy and the moral value of medical treatment in divine discourse. These foundations fall within the broader context of three considerations: God, the person, and society, encompassing the Islamic scheme of rights, *maqasid al-shari'a*, and public interest.

Having highlighted the foundational jurisprudential principles that influence autonomy, the second section investigates the moral value of seeking medical treatment within the context of the divine discourse of *taklif.* The analysis commences with a review of the moral significance of medical treatment in the *Qur'an* and *Sunnah*. It then presents the stances of

classical Islamic jurisprudential schools regarding seeking medical treatment and relevant contemporary *fatwas*, specifically emphasising the *fatwas* issued by the International Islamic *Fiqh* Academy (IIFA) of the Organisation of Islamic Cooperation (OIC).

7.2 The Jurisprudential Foundations Influencing the Moral Value of Seeking Medical Treatment in Divine Burden

To investigate the divine burden concerning medical treatment and thus establish a moral framework for *mukallaf* autonomy, it is crucial to consider the jurisprudential foundations in Islamic normative discourse that shape the conceptualisation of autonomy within a larger framework that includes the three considerations: God, the person, and the community. Thus, this section provides a brief overview of the significant juristic grounds that will guide the discussions in this chapter, including the Islamic scheme of rights, *maqasid al-sharia,* and public interest.

7.2.1 The Scheme of Rights in Islam

The notion of the scheme of rights is one of the topics that shall be considered in Islamic normative discussions to establish the moral framework of autonomy in seeking medical treatment. In *Shari'a,* the responsibilities of individuals are determined by the specific type of right involved. Islamic philosophy categorises rights into three categories: the rights of God, the rights of people, and mixed rights, which encompass both divine rights and human rights.[1] The second type is further divided into two categories: individual rights and societal rights. The third category is also divided into two rights, where God's rights may be greater than those of his people, and rights where the rights of people may be greater than the rights of God.[2]

The rights of God encompass all divine commands and prohibitions, particularly in the spheres of worship and religious rituals, such as prayer and fasting.[3] The rights of individuals are linked to their interests, whether private interests, such as financial transactions and debts, or public interests, including the preservation of the environment and public facilities. Mixed rights in which God's rights are more significant than people's rights, such as slander. The impact of slander is dual because it affects the reputation of the individual being defamed, but it also involves God's right. It violates the divine prohibition of slander and affects public morality. One of the mixed rights in which a person's right is more significant than God's right is *qusis* (retaliatory punishment) in murder crimes.[4] This is because killing takes the life of an individual. Therefore, if the perpetrator is convicted of murder, the punishment of retaliation cannot be replaced by the judge's discretion or by seeking forgiveness from God. Retribution can only be replaced if the victim's family agrees to accept the payment of *di'a* (blood money) or grants pardon and forgiveness.[5]

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[1] Ali Ahmed Abdel-Zuabi, *Haq Al-Khususia Fi Al-Kanun Al-Jina'e* [The Right to Privacy in Criminal Law] (*Al-Mussah Al-Hadithah Li Al-kitab* 2006) 84-89.
[2] Ibid.
[3] Ibid.
[4] This punishment is based on the verse of the *Qur'an*: "We have written for them a life for a life". *Sura Al-Ma'idah.*45.
[5] Abdel-Zuabi (n 1) 84-89.

One key distinction between divine and people's rights is the ability to abandon claims associated with the right in question, such as pardoning or dismissing such claims. In mixed rights, if the person pardons the perpetrator, it does not eliminate the moral guilt associated with the act. This is because God's right mandates a different kind of repentance or atonement.[6]

In analysing autonomy in seeking medical interventions, the topic of rights is of utmost importance as a basis for determining the role of patient autonomy in consent to medical procedures. Muslim jurists understand the protection of human life and the human body as a mixed right between God and humanity.[7] This understanding is established based on the *Qur'anic* passages that refer to God as the sole bestower of life to humanity and the owner of the human body.[8] [9]

7.2.2 *Maqasid Al-Shari'a* (The higher *Shari'a* Objectives)

The theory of *maqasid al-sharia* is also a crucial and relevant topic for understanding autonomy and framing its moral framework in the context of seeking medical treatment. In general, *maqasid al-sharia* is the ultimate objective of every rule in Islamic jurisprudence.[10] These goals and fundamental purposes of *Shari'a* are integral components of God's wisdom as the legislator, safeguarding the well-being of human beings in both this life and the afterlife, which ultimately enables humans to fulfil their role as deputies of God on earth.[11]

Al-Ghazali establishes the concept of *maqasid al-sharia*, which was further developed by the scholar Al-Shatibi.[12] Over time, *maqasid al-sharia* has been divided into various categories. Nevertheless, the normative triple classification of necessities, needs and complements has remained one of the most prominent aspects of Islamic jurisprudence discussions. Necessities encompass five values: religion, life, mind, progeny and property.[13] The punishments for violating any of these five necessities in Islamic law are specifically formulated to safeguard the necessities from any breach and restrict an individual's excessive desires in engaging in actions that endanger these necessities.[14] For instance, the prohibition of homicide and adultery.[15]

The relationship between these five necessities and autonomy in consent to medical procedure is apparent.[16] Any medical intervention that upholds one of these five necessities

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[6] Ibid.
[7] Ahmad Sharaf-Al-Din, *Al-Aḥkam Al-Shariyah lil -Al-Amal Al-Tibbiyah* [The Provisions of *Shari'a* in Medical Procedures] (2nd edn, *Almujls Alwatanyi* 1987) 26.
[8] Ibid 24
[9] See Generally, Sherine Hamdy, *Our Bodies Belong to God: Organ Transplants, Islam, and the Struggle for Human Dignity in Egypt* (1st edn, University of California Press 2012).
[10] The meaning and the significance of *maqasid al-sharia* were defined previously in Chapter 1, Section 1.7.2, 31-34.
[11] Wahbah Al-Zuhayli, *Usul Al-Fiqh Al-Islami*' [The Fundamental of Islamic Jurisprudence] (vol 2, 1st edn, *Dar Al-Fikr* 1986) 1015.
[12] Yassar Mustafa, 'Islam and the Four Principles of Medical Ethics' (2014) 40(7) Journal of Medical Ethics 479, 480.
[13] Muhammad Abu-Hamid Al-Ghazali, *Al-Mustasfa Min Elm Al-Usual* [The Clarified Legal Theory of Islamic Jurisprudence] (Muhammad Al-Shafi eds, *Dar Al-Kutb Al-Elmia* 1993) 174.
[14] Mohammad Hashim Kamali, *Maqasid Al-Shariah Made Simple* (International Institute of Islamic Thought 2008) 4.
[15] Ibid.
[16] Mustafa (n 12) 480.

is deemed desirable, whereas any procedure that undermines them generates concerns over their morality and legitimacy. The patient's capacity to agree to any medical procedures that might threaten any of the five necessities will undoubtedly be discussed in Islamic jurisprudence.[17]

7.2.3 *Al-Maslaha Al-Amah* (Public Interest)

Maslah al-amah is a crucial aspect to consider when structuring the *mukallaf*'s autonomy in the divine burden of medical treatment. Classical Muslim scholars formulated the concept of *maslaha* to address social change through legal changes.[18] It is a legal mechanism to impose new legislation and regulations in contemporary times.[19]

It is well-accepted that humans are inherently social creatures and cannot live in isolation without a community.[20] Within all societies, there is an inevitable conflict between the individual's objectives and the community's collective interests.[21] The *Qur'an* notes: "Certainly, your efforts and deeds are diverse [different in aims and purposes]".[22] A conflict arises when there is a difference between the desires and self-interests of individuals and what is necessary for the ultimate well-being, protection, and stability of the entire community.[23]

Al-Tufi argues that *maqasid al-Shari'a* has been established to obtain *maslah* (benefits) and prevent *mafsada* (evils).[24] The evolution of benefits and evils does not only seek to achieve the well-being of an individual or fulfil personal desires.[25] The *Qur'an* notes: "And if the truth had been in accordance with their desires, verily, the heavens and the earth, and whosoever is therein would have been corrupted".[26] As such, in *Shari'a,* prioritising the welfare of the entire community over the self-interests of an individual is considered. According to the theory of *maqasid al-Shari'a*, assessing benefits and harms aims to safeguard the individual's interests and promote their welfare.[27] However, in cases where there is a conflict between the individual's interests and those of the entire Muslim

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[17] Ayman Shabana, 'Limits to Personal Autonomy in Islamic Bioethical Deliberations on End-of-Life Issues in Light of the Debate on Euthanasia' in Mohammed Ghaly (ed) *Dying and Death in the Islamic Moral Tradition* (Brill 2023) 238-281,247.

[18] Sulaiman Lebbe Rifai, The Concept of Public Interest in Islamic Law (*Maslaha*) and Its Modern Implications' (2021) 1, 5,13, available at SSRN: < http://dx.doi.org/10.2139/ssrn.3788222 > accessed: 5 December 2023; See also Anwar Abu Bakr Al-Jaff, 'Public Interest: Its Meaning and Characteristics Under Islamic' (The Third International Conference of Department of Comparative Jurisprudence–, University of Sulaimaniyah, 12-22 October 2021) 34, 36.

[19] For example, legal rules concerning public order that restricted individual civil freedoms during the COVID-19 pandemic.See generally, Sayyed Muhsin and Muhammad Ali, 'Facing COVIDE-19 In the Light of The Maxim 'No Harm Shall Be Inflicted nor Reciprocated' (2020) 3(1) INSLA e-Proceedings 450, 450.

[20] Hayat Azmat, Muhammad Shafiai and Muhammad Hakimi, 'The Nature of Public Interest in Muslim and Non-Muslim Writers' (2019) 94153 MPRE 1, 2.

[21] Ibid.

[22] *Sura Al-Layl.*4.

[23] Al-Jaff (n18) 50.

[24] Najm AL-Din Sulayman Al-Tufi, *Al-Ta'een Fi Sharah Al-Arbeen'* [Book of Specification for Commenting on the Forty: Commentary on Al-Nawawi's Collection of the Forty Hadiths] (Ahmad A Uthman ed, 1st edn, *Mussat Al-Rayan* 1998) 19.

[25] Ibrahim Musa Abu-Ishaq Al-Shatibi, *Al-Muwafaqat* [The Reconciliation of The Fundamental of Islamic Jurisprudence] (Mashhour bin Hassan Al Salman ed, vol 2 1st edn, *Dar Ibn Afan* 1997) 8.

[26] *Sura Al-Mu'minun*.71.

[27] Al-Shatibi (n 25) 46.

community, the welfare of the community as a whole is prioritised over the individual's interests. In this context, Al-Shatibi argues that the purpose of obtaining benefits and avoiding harm is not merely to satisfy personal desires; rather, *Shari'a* prevents people from following their interests for the benefit of the Muslim community.[28]
Balancing the common interests of society against the self-interests of each individual is an essential principle in Islamic jurisprudence, known as *maslaha al-amah. Maslaha al-amah* refers to the judgement of whether an issue is permitted or prohibited by considering if it serves the public interest of the Muslim community.[29] Najm Al-Din maintains that "If there are multiple benefits in the place, and it is possible to obtain all of them, that is done.[30] "If it is impossible to have more than one benefit and the benefits vary in importance, then the most important is considered and [shall be] obtained."[31] Najm Al-Din further comments that *maslaha al-amah* stems from the jurisprudential maxim of *harm*.[32] In *Sunnah*, the Prophet states that: "There should be neither harming nor reciprocating harm".[33] In the first part of the *hadith*, "There should be neither harming" means harm should not be inflicted on those who have not harmed themselves. In the second part, "reciprocating harm" means no infliction of retaliatory harm on others.[34]

Accordingly, if the conduct is beneficial and does not harm anyone, it is good, and doing it is an undoubted virtue. If the action benefits one person and harms others, a conflict and clash arise between the benefit and the harm.[35] In this case, the good is to abandon a minor harm to obtain a more significant benefit, abandon a temporary benefit for a permanent benefit, or abandon an uncertain benefit to obtain a confirmed benefit.[36]

Najm Al-Din emphasises the significance of *maslaha al-amah* in determining legal rules, except in matters related to worship or those explicitly addressed in the *Qur'an* and *Sunnah*.[37] Further, Najm Al-Din identifies the conditions of *maslaha al-amah.* Firstly, *maslaha al-amah* must not contradict values supported by explicit texts in the *Qur'an* and *Sunnah.* Secondly, *maslaha al-amah* must be genuine. Thirdly, *maslaha al-amah* must be of a general interest to secure benefits and prevent harm for all community members, rather than for a specific individual or group.[38]

When investigating the moral value of seeking medical treatment in divine burden, *maslaha al-amah* is essential in shaping the moral framework for a *mukallaf* autonomy. *Maslaha al-*

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[28] Ibid.
[29] Jonathon A Brown, '*Maṣlaḥah*' in J Esposito (ed), *The Oxford Encyclopaedia of the Modern Islamic World,* (Oxford University Press 2009). *Maslahah* is also emphasised under Farhat J Ziaseh, '*Uṣūl al-fiqh'* in J Esposito (ed), *The Oxford Encyclopaedia of the Modern Islamic World,* in *The Oxford Encyclopaedia of the Modern Islamic* World Digital Collection (Oxford University Press 2022) 23.
[30] Al-Tufi (n 24) 19-26.
[31] Ibid.
[32] Ibid.
[33] *Sunan Ibn Majah* (*Hadith* 2341)
[34] Al-Tufi (n 24) 19-26.
[35] Ibid.
[36] Ibid.
[37] Fhad Al-Ajlan, *Maerakat Al-Nas'* [The Conflict Over Interpretation of *Shari'a* Sources] (vol 1, 1st edn, Markz Al-Bayan 2013) 124.
[38] Ibid.

amah imposes moral commitments on the person. For example, during the spread of the infectious disease COVID-19, if a patient has the disease, the patient must not transmit it to the rest of the community who are not infected. In this sense, *maslaha al-amah* imposes a moral burden on the patient, requiring them to refrain from actions that might harm others. The notion of *maslaha al-amah* is widely recognised and utilised in Islamic states. Its use has increased in contemporary times to formulate new laws and regulations that are not textually regulated in *Shari'a* sources.[39] [40]

7.3 The Moral Value of Seeking Medical Treatment in *Taklif*

All conduct has a moral value in the divine discourse of *taklif*. Accordingly, any behaviour may result in either reward or punishment in the afterlife.[41] Muslim jurists endeavour to determine the relationship between an activity and divine rewards or punishments by evaluating the moral standing of the conduct according to the five rulings of *taklif*.[42]

The following discussion will investigate the moral value of medical treatment within the framework of divine burden to develop a moral framework for the *mukallaf* autonomy in medical treatment, grounded in the moral value of medications as stated in divine discourse. This moral framework is significant as it empowers a *mukallaf* patient to assess medical treatment options based on their moral significance and their aspirations for rewards or avoidance of punishments, thereby playing an active role in their health.

This section, therefore, commences with investigating the moral significance of medical treatment in the *Qur'an* and *Sunnah*, followed by a review of the perspectives of the four classical schools of Islamic jurisprudence and an analysis of the moral value of medical treatment as stated in the *fatwa* of IIFA.

7.4 Seeking Medical Treatment in The *Qur'an*

The moral value of seeking medical interventions primarily derives from the Prophetic traditions.[43] The *Qur'an*, however, in certain verses, has only indications of the concept of *shif'a* (healing), which refers to the process of recovering from illness by treatment and ultimately is the objective of seeking medical intervention.[44]

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[39] Rifai (n 18) 1; See also Al-Jaff (n 18) 15.

[40] For example, the notion of *maslaha al-amah* has been used by some Islamic states as a legal device to justify compulsory vaccinations during COVID-19. Accordingly, individuals actively participated in herd immunity by receiving vaccination to minimise harm to others. The example of COVID-19 demonstrates how *maslaha al-amah* directs individuals towards the decision to receive mandatory vaccines, even if it may not be in their own interest. However, the collective benefit and welfare of the community outweighed the person's benefit. The case of COVID -19 will be discussed in detail in this Chapter, Section 7.6.1.3, 163, In addition, more discussion will be presented under the heading *COVID-19 Pandemic as a Contemporary Example of Contagious*, 171-173.

[41] Aasim Padela, 'Reflecting and Adapting Informed Consent to Fit within Islamic Moral Landscape and in Muslim Contexts' (2018) 11(2) Studia Bioethics 31, 34.

[42] The five rulings and rewards and penalties associated with each ruling introduced in Chapter 1, Section 1.7.1, 29-31

[43] Kamal Al-Din Bakro, *Ahkam Al-Tadawi Wa Al-Dawa' Fi Al-Fiqh Al-IslamI* [The Ruling in of Seeking Medical Treatment and Medication in Islamic Jurisprudence] (Dar *Al-Di'a* 2013) 17.

[44] See generally, Mohamed Akhiruddin, Mohad Shahir and Robiatul Adawiyah, 'Concept of *Shifa* in *Al-Qur'an*: Quranic Medicine Approach in Healing Physical Ailment' (2017) 6 (2) Al-Qanatir: International Journal of Islamic Studies 23, 24.

In the *Qur'an*, the notion of *shif'a* is mentioned four times.[45] [46] The *shif'a* refers to curing two forms of illness: *alqalb* (the soul) and *albadan* (bodily) diseases.[47] Interpreters of the *Qur'an* maintain that three verses relate to utilising the *Qur'an* for the treatment of spiritual diseases. In contrast, one verse refers to the use of honey as a medicinal substance for treating physical body illnesses.[48] Since this thesis focuses specifically on consent regulations for physical medical treatment, the verse of honey will be considered further by providing interpretations from *Qur'an* scholars. The honey verse is:

> "Then eat from all the fruits and follow the ways of your Lord laid down [for you]. There emerges from their bellies a drink, varying in colours, in which there is *shif'a* [healing] for people. Indeed, that is a sign for people who give thought".[49]

The above verse of the *Qur'an* suggests that honey is a remedy for bodily ailments. Al-Tabri states that the word "drink" refers to honey produced by bees, which comes in varying colours, such as white and red.[50] In addition, this verse clearly indicates that honey has healing qualities and is utilised as a medicinal treatment.[51] Al-Tabri maintains his claim by referring to some prophetic *hadiths* that emphasise the curing effects of honey.[52]

Similarly, Al-Zamakhashri posits that "drink" refers to honey, which comes in many colours, including white, black, yellow, and red, and honey acts as a cure for specific diseases[53]. Al-Zamakhashri further comments that although the verse recognises honey as a beneficial treatment, it is not always practical for all illnesses. The Prophetic statement reinforces this claim: "There is a cure for every disease".[54] Thus, while honey may help alleviate specific ailments, it is not a cure for every disease. In line with Al-Zamakhashri's interpretation, Ibn Atiyya maintains that honey is not intended to cure all diseases.[55] However, the verse suggests that honey can be used as a medical means to cure certain

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[45]Ibid.

[46] Indeed, the term *shifa'* is mentioned six times in the *Qur'an,* with four times in verb form and two times in subject form. The subject form refers to God as the healer of diseases. The above discussion restricts the focus to the word *shif'a* in the verb form. The four verses concering the concept of *shifa'a* are: 1) "We send down in the *Qur'an* healing [*shif'a]* and mercy for believers" *Sura Al-Isra*:82; 2) "O mankind, there has to come to you instruction [through the *Qur'an*] from your Lord and healing [*shif'a]* for what is in the breasts and guidance and mercy for the believers". *Sura Yunus*.57; "Say, "It [The *Qur'an*] is, for those who believe, a guidance and cure [*shif'a]*". *Sura Fussilat* .44.

[47] Mohd Noor Bin-Omar, 'Analysis of The Concept of Al-Quran as A Healing for What is in the Breasts: The Reality of Understanding and Practises of Muslims in Malaysia' (2020) 1(81) International Open University, 6,17.

[48] See the interpretations of these verses in Imad Al-Din Ismail Ibn-Kathir, *Tafsir Ibn-Kathir* [Exegesis of Ibn-Kathir: Book of Exegeses of The *Qur'an*] (Muhammad Shams-Al-Din ed, vol 4, *Dar Al-Kutb Al-Elmia* 1998) 499; Muhammad Ibn-Jarir Al-Tabari, *Jami Al-Bayan Fi Tawil Ayi Al-Qur'an* [Collection of Statements on the Interpretation of the Verses of the *Qur'an*: A Book of Exegesis of The *Qur'an*](Mahmood Shaker ed, vol 17, *Dar Al-Tarbia Wa Al-Turath* [no date]) 249.

[49] *Sura Al-Nahl.* 69.

[50] Al-Tabari (n 48) 249.

[51] Ibid 249-250.

[52] For instance, "A man came to the Prophet and said: My brother is suffering from loose bowels. The Prophet said: Let him drink Honey". *Jami`At-Tirmidhi* (*Hadith* 2082).

[53]Mahmud Umar Abu-Al-Qasim Al-Zamakhshari, *Al-Kashshaf* [The Revealer: A Book of Exegeses of The *Qur'an*] (Mustafa Hussein ed, vol 2, 3rd edn*, Dar Al-Kitab Al-Arabia* 1987) 619.

[54] *Mishkat Al-Masabih*, (Hadith 4515).

[55] Abd Al-Haqq Al-Andalusi Ibn-Atiyya, *Al-Muharrar Al-Wajiz Fi Tafsir Al-KitAb Al-Aziz* [The Compendious Record in the Interpretation of The Noble *Qur'an*: A Book of Exegeses of The *Qur'an*] (Abdul Salam A Muhammadvol ed, vol, 1st edn, *Dar Al-Kutb Al-Elmia* 2001) 406.

diseases. [56] Ibn-Kathir also comments on this verse and states that honey is a curative substance derived from the mouth of bees, which comes in various colours and is effective in curing specific diseases.[57] Further, Ibn-Kathir argues that if the *Qur'an* stated, "*shif'a* for people", honey would have been a general remedy for all diseases. However, the *Qur'an* only states that "there is *shif'a* for people", suggesting that honey is not generally effective in curing all forms of illness.[58]

Sunnah of the Prophet is in harmony with the *Qur'anic* directives. On many occasions, the Prophet advised Muslims to utilise honey to treat internal ailments and external wounds.[59] For instance, honey was used to heal abdominal pain: "A man came to the Prophet and said: My brother is suffering from loose bowels. He said [the Prophet]: Let him drink Honey." [60]

To adhere to the thesis's objective, this section will not elaborate further to provide a review of the efficacy of honey in remedying diseases or the modern scientific opinions regarding honey's benefits. However, the verse of the *Qur'an* concerning honey demonstrates that honey has a living meaning in the context of seeking medical treatment for *shif'a* to heal from diseases and thus maintain or recover one's health.

Based on the *Qur'an's* verse that refers to honey as a medicinal remedy for bodily illness, along with *Qur'an* scholars' interpretations that honey has curative qualities but cannot treat all diseases. Honey is also mentioned in the *Qur'an* in the context of the notion of *shifa'a,* which is the aim of seeking medical treatment. Therefore, it can be deduced that there is a clear indication that the *Qur'an* acknowledges the concept of seeking medical interventions in cases of illness, and it is considered *permissible* and thus lawful. Honey in the *Qur'an*, therefore, is regarded as a symbol of its types of medications. The utilisation of honey as a form of medicine coincides with the time when the *Qur'an* was revealed, as medical treatments relied on the availability of natural resources. Therefore, the *Qur'an* does not mention contemporary medications, such as invasive or surgical treatments, as examples of medications.

The *Qur'an* provides further indication of the concept of *shif'a*. Whilst the term *shif'a* may not be expressly mentioned in the following verse, it is intrinsically intertwined with the notion of *shif'a.* The *Qur'an* states:

> "And the pains of childbirth drove her to the trunk of a palm tree. So, a voice reassured her from below her, "Do not grieve! Your Lord has provided a stream at your feet. And shake toward you the trunk of the palm tree; it will drop upon you ripe, fresh dates".[61]

[56] Ibid.
[57] Ibn-Kathir (n 48) 499.
[58] Ibid.
[59] Tajwar Ali and Haseena Sultan, 'An Islamic Perspective on Infection Treatment and Wound Healing' (2023) 14(8) Religions studies 1,5.
[60] *Jami`At-Tirmidhi* (*Hadith* 2082).
[61] *Sura Maryam*.23,24,25.

Interpreters of the *Qur'an* agree that this verse concerns Lady Maryam, the mother of the Prophet Jesus.[62] Lady Maryam was lying against the tree, suffering intense pain and in urgent need. The severe pain of childbirth exhausted her, necessitating assistance. For instance, drinking water or perhaps consuming a small amount of food, to restore her strength, energy and capacity. Lady Maryam received divine guidance from angels to shake the tree, causing fresh dates to drop, which would alleviate her suffering.

Al-Suyuti maintains that the divine guidance provided to Lady Maryam to consume dates as a means to alleviate the discomfort of labour suggests that dates contain a medicinal benefit in reducing labour suffering.[63] If God knew of another method to alleviate her suffering, He would have directed her toward it.[64] Abu Shkhidem also states that dates have healing qualities as they contain high levels of simple sugars, which adequately feed the body and provide energy.[65] This is demonstrated by the divine wisdom that guided Lady Maryam to consume dates since dates gave her energy and alleviated her labour pains.[66] Ibn Al-Jawzi notes that previous predecessors advised women to eat ripe dates during childbirth to provide them with energy and relieve pain.[67]

In *hadith* literature, the Prophet refers to the teachings of the *Qur'an*, asserting that dates possess medical qualities that aid in healing, provide the body with energy, and help prevent diseases.[68] [69] Yet, this section does not intend to examine nutritional features and explore the medical uses of this date fruit.

However, the verse concerning the story of Lady Maryam and the divine guidance to eat dates is presented to illustrate that the verse provides tangible value regarding the concept of *shif'a.*
The curative uses of date to achieve *shif'a* are substantiated by prophetic traditions. Thus, the insight gained from Lady Maryam's narrative is that the *Qur'an* advises patients to seek material remedies, such as medication, to alleviate their suffering and improve their physical state.[70]

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[62] See the interpretations of this verse in Ibn-Kathir (n 48) vol 5, 198; Al-Tabari (n 48) vol 18, 179; Muhammad Ahmad Al-Qurtubi, *Al-Jami li-Aḥkam Al-Qur'an* [The Entire *Shari'a* Judgements in The *Qur'an*: A Book of Exegeses of The *Qur'an*] (Ahmed Al-Bardouni and Ibrahim Atfeesh eds, vol 11, *Dar Al-Kutb Al-Masria* 1964) 94-95.
[63] Jalal-Al-Din Al-Suyuti, *Al-Durr Al-Manthur Fi Tafsir Al-Mathur*, [The Scattered Pearls: A Book of Exegesis of The *Qur'an*] (Abdullah Al-Turki ed, vol 10, 1st edn, *Markaz hijr* 2003) 58-60.
[64] Ibid.
[65] Mahmoud Abu Shkhidem, '*Al-Iejaz Al-Iilmiu fii Alam Al-Nabat fi Al-Ayat Al-Qurania Wa Al-Ahadith Al-Nabawia'* [Scientific Miracles in Plants in The *Quranic* Verses and Prophetic *Hadiths*] (PhD Thesis, Hebron University 2016) 80
[66] Ibid.
[67]Abd-Al-Rahman Ali Al-Jawzi, *Zad Al-Masir Fi Elm Al-Tafsir* [Subsistence for Travellers in Science of Qur'anic Interpretation: A Book of Exegesis of The *Qur'an*] (Abdul Razzaq Al-Mahdi ed, vol 3, 1st edn, *Dar Al-Kitab Al-Arabi* 2001) 127.
[68] Ali and Sultan (n 59) 10.
[69] For instance, the Prophet commonly used dates for healing purposes. Saa'd narrated: "I suffered from an illness. The Messenger of *Allah* came to pay a visit to me… He said: You are a man suffering from sickness. Go to Al-Harith Ibn Kaladah, brother of Thaqif. He is a man who gives medical treatment. He should take seven *ajwah* dates of Medina, grind them with their kernels, and then put them into your mouth." *Sunan Abi Dawud*, (*Hadith* 3875).
[70] Bakro (n 43) 19.

The *Qur'an* only provides indications of seeking treatment in cases of illness. These signs suggest that obtaining medical treatment is *permissible* under the five *taklif* rulings and is not associated with rewards. This is because the *Qur'an* does not use the language of command or encouragement regarding medications. Accordingly, in principle, the *Qur'anic* references to the notion of *shif'a* grant a *mukallaf* the choice to seek medical procedure to heal their illness or to avoid seeking such treatment when it comes to their health.

7.5 Seeking Medical Treatment in Islamic Jurisprudence Schools

Based on the teachings of the *Qur'an*, most schools of Islamic jurisprudence agree that seeking medical treatment is generally *permissible*. However, some Muslim jurists have changed the ruling to a *recommendation,* while others have added a sub-ruling to the ruling of *permissibility.* Thus, the position of Islamic jurisprudence schools towards seeking medical treatment can be categorised into three perspectives: *permissible, recommended,* and *permissible,* but it is best to avoid it for the sake of *tawakkul* (trust in God), it is piety.

7.5.1 *Permissible*

According to most jurists in Islamic jurisprudence schools, including *Imams* Ibn-Malik and Ibn-Abidin,[71] seeking medical treatment is *permissible.*[72] This ruling allows individuals to choose between seeking medical intervention and abstaining from it without any further rewards or punishments.[73]

Supporters of this position substantiate their argument by referencing verses from the *Qur'an* and statements from *hadith* literature. For instance, in the *Qur'an,* God says about honey: "In which there is a cure for people".[74] The verse emphasises the *permissibility* of using medicine as a form of treatment. However, it is once more that there is no mandatory language that instructs Muslims to seek medical interventions at the time of illness. In *Sunnah*, the Prophet says: "O worshipers of *Allah*! use remedies. For indeed *Allah* did not make a disease but He made a cure for it".[75] In this Prophetic *hadith*, "disease" is defined as the body's deviation from its natural course. "Cure" is defined as the body's return to its natural course through appropriate medication and treatment.[76] The command of the

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[71] Ibn-Malik is a jurist of *Maliki* school; Ibn-Abidin is a jurist of *Hanafi* School.

[72] For the perspective of most jurists in Islamic jurisprudence schools, See generally, Abdur-Rahman Mubarakpuri, *Tuhfat Al-Ahwadhi bi Sharah Jam'a Al—Tirmidhi* [The Masterpiece of *Al-Ahwadhi* in Exlening *of Sunnah* Al-Tirmidhi Collection] (vol 6, *Dar Al-Kutb Al-Elmia* [no date]) 159; Al-Qurtubi (n 62) vol 10, 138; Ali Muhammad Al-Muhammadi, *Hukm Al-Tadawi Fi Al-Islam* [The Ruling on Seeking Treatment in Islamic Jurisprudence] in *Majalt Majm'a Al-Fiqh Al-Islmi* [*The Book of Islamic Fiqh Academy*] (Usama Al-Zahra (ed) *Majalt Majm'a Al-Fiqh Al-Islmi* vol 7, Islamic *Fiqh* Academy of OIC [no date])1548; Mansur Ibn-Yunus Al-Buhuti, *Kashaf Al-Qinaa An Matn Al-Iqnaa* [Remove Veil to Clarify the Persuasive Argument: Hanbali Jurisprudence] (Hilal M Mustafa ed, vol 2 *Dar l-Fikr* 1968) 76; For the position of Imam Ibn-Abidin, See Muhammad Al-Husayni Ibn-Abidin, *Radd Al-Muhtar Ala Al-Durr Al-Mukhtar* [The Guiding the Baffled to The Exquisite Pearl] (vol 6, 2nd edn, *Al-Baby Al-Halabi* 1966) 389; For the perspective of Imam Ibn Malik, see Malik Ibn-Anas, *Muwatta Imam Malik* [Well-Trodden Path: A Book of Malki Islamic Jurisprudence] (Muhammad F Abdul-Baqi ed, vol 2, *Dar Ihia Al-Truath Al-Arabi* 1958) 943.

[73] See generally, Al-Muhammadi (n 72) 1548.

[74] *Sura Al-Nahl*.69.

[75] *Jami at-Tirmidhi*, (*Hadith* 2038).

[76] Musa Shaheen Lashin, *Fath Al-Muneama Sharh sahih Muslim* [Explaining Muslim's Collection of *Hadiths*] (vol 8, *Dar Al-Shrooq* 2002) 582.

Prophet to seek treatment was not irrevocable, and therefore, there is no absolute command on *mukallafs* to seek treatment. Further, the jurists cite a *hadith* narrated by Ibn Abbas:

> "A woman came to the Prophet and told him that: I suffer from epilepsy and during fits my body is exposed, so make supplication to *Allah* for me. The Prophet replied: If you wish, you endure it patiently and you be rewarded with *Jannah* [paradise], or if you wish, I shall make supplication to *Allah* to cure you?".[77]

In commenting on this *hadith*, Muslim jurists note that the Prophetic statement indicates that it is *permissible* for patients to reject treatment and choose the situation of being patient.[78] The words of the Prophet, "If you wish", suggest that the Prophet offered the woman the option to seek treatment and recover from the illness or refuse treatment and choose to exercise patience while sick. Thus, the *hadith* recognises a person's right to abstain from seeking treatment, as obtaining it is not mandatory in the first place, and a patient has the choice of seeking treatment or abstaining.[79]

7.5.2 *Recommended*

This is the position of most successors to the founders of the classical Islamic schools of jurisprudence, including Ibn-Al-Jawzi, Ibn-Hubayra and Abo-Al-Wafa.[80] The *recommended* ruling suggests that it is more desirable for individuals to seek medical intervention when they are ill rather than choosing not to do so.[81] This ruling does not amount to an *obligation*, but rather a mere *recommendation*. To underpin their ruling, the jurists utilise the earlier *hadith*: "O worshipers of *Allah*! Use remedies. For indeed *Allah* did not make a disease but He made a cure for it".[82] The proponents of this view agree with the jurists of the previous view that the Prophet's direction to seek treatment was not definitive. Therefore, seeking medical treatment is not mandatory.[83] Nevertheless, the Prophet's statement is perceived as encouraging his followers to seek medical treatment when they are ill, and thus, it is *recommended* to seek treatment when needed.[84]

Advocates of this position validate their interpretation of the Prophetic phrasing as a *recommendation* by providing two main rationales: Firstly, the Prophet constantly advises

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[77] *Riyad as-Salihin* (*Hadith* 35).
[78] Ahmad Al-Asqalani Ibn-Hajar, *Fath Al-Bari* Fi *Sharah Sahih Al-Bukhari* [The Grant of the Creator: Ibn-Hajar's Commentary of *Sunnah* Al-Bukhari Collection] (Muhibb Al-Din Al-Khatib ed, vol 10 *Al-Maktaba Al-Alafia* 1970) 114-115; See also Taqi Ad-Din Ahamad Ibn Taymiyya, *Majmue Al-Fataws* [[A Great Compilation of *Fatwas* of Ibn Taymiyya: Book of the Principles, Roots of Jurisprudence, Monotheism, and Belief , *Hadiths* and Exegeses of The *Qur'an*] (Abdul Rahman Bin-Qasim ed, vol 24 2ed edn, King Fahd Complex for publication 2004) 269.
[79] Ibid.
[80]Muhammad Al-Zurqani, *Sharah Al-Al-Zurqani on Muwatta of Imam Malik* [Al-Zarqani's Commentary on Imam Ibn-Malik's *Muwatta*: A book on Islamic Malki Jurisprudence] (Tah A Saad ed, vol 4, 1st edn, *Maktabt Al-Thaqafa Al-Dinia* 2003) 519; Al-Buhuti (n 72) vol 2, 76; Al-Muhammadi (n 72) 1547; Yahya Ibn-Sharaf Al-Nawawi, *Al-Minhag Fi Sharah Sahih Muslim* [A Commentary on the Hadith Collection of *Sahih Muslim*] (vol 14, 2nd edn, *Dar Ihia Al-Turath Al-Arabi* 1972) 191; Zain Al-Din Al-Iraqi, *Tahrib Al-Tathreeb Fi Sharh Al-Taqrib* [An Explanation and Arranging of Chains of Transmission in *Sunnah*] (vol 8, Dar Al-Fikr Al-Arabi [no date]) 184.
[81]Al- Muhammadi (n 72) 1547.
[82] *Jami at-Tirmidhi* (*Hadith* 2038).
[83]The Ministry of *Awqaf* and Islamic Affairs of Kuwait (ed) *Islamic Jurisprudence of Kuwait Encyclopaedia,* (vol 11, *Dar Al-Salasl* 2006) 234.
[84] Al-Nawawi, *Al-Minhag Fi Sharah Sahih Muslim* (n 80) vol 14, 191.

Muslims to treat their illnesses, wounds, injuries, and cuts by utilising remedies such as food with curative properties.[85] This includes the Prophet's references to utilising honey, dates, black seed, and olive oil to treat many illnesses during his time.[86] In addition, the Prophet agree on the use of various methods and procedures to cure illnesses and alleviate pain. For example, Indian incense, cupping, cauterisation and the ash of burnt palm leaves.[87] The Prophetic practices suggest that the Prophet urges his followers to seek medical intervention in the case of illness.[88]

Secondly, the Prophet himself utilised various medical treatments to cure his illness as acknowledged by Aisha (his wife), who reported his frequent usage of medication.[89] For instance, during the Battle of *Uhud,* the Prophet had injuries to his face, including wounds and a broken tooth. The Prophet used ash from a burnt palm leaf mat to stop the bleeding in his wounds.[90] In a further *hadith*, Ibn Abbas narrated: "The Messenger of *Allah* was treated using cupping when he was in *Ihram*".[9192] The use of the Prophet in different medical methods demonstrates the importance of seeking medical assistance when an individual is unwell. Furthermore, the Prophet serves as a role model for Muslims to emulate, which is why his life has been recorded in detail. Thus, jurists reach the conclusion that Muslims are *recommended* to seek medical means to emulate the conduct of the Prophet.

7.5.3 *Permissible,* But it is Best To Avoid it For The Sake of *Tawakkul* (Trust in God), It is Piety

This perspective is held by some jurists of the *Hanbali* school, including *Imam* Ahmad, with an account from Al-Nawawi from *Shafi'* jurisprudence.[93] The supporters of this position maintain that seeking medical treatment is *permissible,* as individuals can determine whether or not to seek it. However, the jurists adopting this position add an argument to their judgement: it is best to avoid seeking treatment for the sake of *tawakkul,* as it reflects piety. This additional argument suggests that the jurists endorsing this view consider seeking medical treatment to be *discouraged.* Nevertheless, the jurists refrain from explicitly issuing a *discouraged* ruling due to the absence of supporting evidence from sources of *Shari'a* to maintain a *discouraged* ruling.

[85] Al-Muhammadi (n 72) 1548.
[86] Ali and Sultan (n 59) 5, 10, 11.
[87] Ibid 6-8.
[88] Al-Muhammadi (n 72) 1548.
[89] Ibid.
[90] See Ali and Sultan (n 59) 6.
[91] *Ihram* is a sacred situation when a Muslim performs the Pilgrimage.
[92] *Sunan An-Nasa'i*, (*Hadith* 2845).
[93] Advocates of this perspective use various terms to express their viewpoints such as: 'it is best to avoid seeking medical treatment, 'it is recommended to avoid seeking medical treatment' and 'avoiding seeking medical treatment leads to higher degree [from God]. See, Ibn Taymiyya *Majmue Al-Fataws* (n 78) vol 24, 269; Al-Muhammadi (n 72) 1546; Yahya Ibn Sharaf Al-Nawawi, *Al-Majmu' Sharh Al-Muhadhab* [The Comprehensive Manual of Islamic Jurisprudence According to *Shafii* School] (vol 5, *Dar Al-Fikr* 1928) 106; Al-Buhuti (n 72) vol 2, 76; Muhammad Al-Maqdisi Shams-Al-Din Ibn-Muflih, *Al-Adab Al-Sharei'a Wa Al-Minnah Al-Marei'a* [The Ethics in *Shari'a*] (vol 2, *Alam Al-Kutb* [No date]) 48. The perspective of Al-Nawawi and Hanblis emphases in Wahbah Al-Zuhayli, *Al-Fiqh Al-Islmaic Wa Adlath* [Islamic Jurisprudence and Its Evidence] (vol 2, *Dar Al-Fikr* 1984) 1476.

To prevent repetition, scholars of this perspective restate the same Prophetic statements that jurists of earlier schools relied upon to establish the ruling on the *permissibility* of seeking medical intervention. However, jurists of this perspective cite an additional *hadith* as a basis for their supplementary ruling: *it is best to avoid seeking treatment for the sake of tawakkul*.[94] The supplementary ruling does not mean seeking treatment is forbidden, but it contradicts what is best and most ideal. Ibn Abbas narrated: "*Allah's* Messenger said: seventy thousand people of my followers will enter Paradise without accounts, and they are those who do not practise *al-ruqya*[95] … and put their trust in their Lord".[96] According to this *hadith*, *Imam* Ahamad and Al-Nawawi maintain that the Messenger was referring to several Muslims who will enter Paradise without facing judgment.[97] This exemption is attributed to their choice not to utilise *al-ruqya*, which the jurists interpreted as a method of treating illnesses, due to their complete trust in God. Thus, the jurists claim that when individuals refrain from seeking medical means during an illness, they demonstrate their reliance on God.[98] This is because they believe that God has specifically chosen this disease for them and that only God is the healer of such illness. Patients, therefore, must submit to and accept God's will.[99]

Furthermore, the jurists substantiate their claim by referencing some of the Prophet's Companions who intentionally abstained from seeking medical treatment and chose to suffer their illnesses, such as Abu Dharr Al-Ghifari and Ubayy Ibn Ka'b.[100] Their refraining to seek medical interventions arose from the fear of believing that the actions of the healer and medication are solely responsible for *shif'a.* Thus, medical treatment might lead them to place more trust in medical intervention rather than in God. The jurists recognise the Companions' position that placing faith in the doctor and medical treatment, as they bear the responsibility for the patient's recovery, would impact the faith that God alone is the healer of illness: "And when I am ill, it is He [God] who cures me".[101]Accordingly, seeking medical interventions may lead to polytheism.[102]

The jurists' argument mainly centres on the notion of *tawakkul* in God and abstaining from seeking any medical interventions. Seeking a cure undermines the patient's faith and trust in God, the sole power capable of providing healing. *Tawakul* refers to placing absolute trust and reliance solely on God in all situations and circumstances. The *Qur'an* has many verses related to the notion of *tawakkul,* for instance, "Those who remained patient, and put their trust in their Lord [God Alone]".[103] "So put your trust in *Allah*; surely, you are on

[94] Al-Muhammadi (n 72)1546 .
[95] *Al-ruqya* is a form of supplication and invocation recited over a patient seeking healing. See Bakro (n 43) 30.
[96] *Sahih Al-Bukhari* (*Hadith* 6472).
[97] This perspective is presented in Al-Muhammadi (n 72) 1546-1547.
[98] Ibid.
[99] Ibid 1546.
[100] Ibid 1547.
[101] *Sura Al-Shu'ara*.80.
[102] Al-Muhammadi (n 72) 1547.
[103] *Sura Al-Nahl*. 42.

manifest truth". [104] "And put your trust upon the Ever-Living who does not die".[105] "Indeed, *Allah* loves those who rely [upon Him]".[106]

Based on the argument of the jurists, which is centred on the notion of *tawakkul,* the believers who place their *tawakkul* in God accept that whatever He chooses will inevitably occur, and whatever He does not intend for will inevitably not occur. Therefore, *tawakkul* ultimately results in the acceptance of divine decree.[107] In *hadith* literature, Ubadah Al Samit said to his son:

> "Son! You will not get the taste of the reality of faith until you know that what has come to you could not miss you, and that what has missed you could not come to you. I heard the Messenger of *Allah* says: The first thing Allah created was the pen. He said to it: Write. It asked: What should I write, my Lord? He said, 'Write what was decreed about everything until the Last Hour comes.' Son! I heard the Messenger of *Allah* says: He who dies on something other than this does not belong to me".[108]

In a further *hadith*, the Prophet says:

> "Were you to spend in support of God's cause an amount of gold equivalent to Uhud, God would not accept it from you till you believed in the divine decree and knew that what has come to you could not miss you and that what has missed you could not come to you".[109]

On this basis, the believers must have faith and confidence in their Lord, as He is the one who chose the illness for them and He possesses the sole ability to cure and eliminate it.[110] "And when I am ill, He [God] cures me".[111]

Hence, according to the jurists of this position, placing one's trust in God in this manner demonstrates a profound degree of faith. The true believer relies only on God during their illness, accepting that God possesses the power to cure them.[112] Believers who demonstrate reliance on God in times of illness are indicative of their piety, as piety is inherently associated with a deep trust in God. The supplementary ruling of Hanablis and Al-Nawawi regarding the concept of *tawakkul* has been heavily criticised by many Muslim jurists.[113]

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[104] *Sura Al-Naml*. 79.
[105] *Sura AL-Furqan*. 58.
[106] *Sura Al-Imran*.159.
[107]Al- Muhammadi (n 72) 1547.
[108] *Sunan Abi Dawud* (*Hadith* 4700).
[109] *Mishkat Al-Masabih* (*Hadith* 115).
[110] Al-Muhammadi (n 72)1546.
[111] *Sura Al-Shu'ara*. 80.
[112] Al-Muhammadi (n 72) 1547.
[113] This chapter will not expand to addresses the critical arguments and discussions raised by Muslim jurists. Nevertheless, the arguments opposing Hanablis and Al-Nawawi's perspective mainly centre on the following: 1) The opposing arguments assert that seeking medical treatment does not contradict the concept of *tawakkul* in God because the Prophet himself sought treatment. Thus, does this mean that the Prophet was not trusting in God? The Prophet was not ordinary but a Messenger conveying God's *Shari'a*. 2) The evidence from the *Qur'an* and *Sunnah* is clear and explicit that seeking medical treatment is *permissible* in principle, and *Sunnah* has approved the use of many medical methods to minimise pain, as previously explained in this chapter. 3) The Hanbalis and al-Nawawi's reliance on the *hadith* in which the Prophet praised those among his nation who did not seek *al-ruqya* is out of context and devoid of its proper intended meaning. *Al-ruqya* differs from medical treatment, and it may involve polytheistic rituals from pre-Islamic times, especially during the time of the Companions, which is close to the pre-Islamic era. Thus, the reason for the Prophet's prohibition is specific

7.6 Seeking Treatment in the Contemporary *Fatwas* of IIFA

As presented in the previous section, the classical schools of Islamic jurisprudence agree that, in principle, seeking medical treatment is *permissible*. The crux of the disagreement is whether seeking treatment is *permissible* or *recommended*. In this sense, in *taklif,* the divine discourse does not impose an *obligatory* ruling on a *mukallaf* patient to seek medical treatment.

However, a recent publication by Al-Tayar, which analyses the *fatwas* of the jurist Ibn Taymiyyah, argues that Ibn Taymiyyah categorises the rulings on seeking treatment into five categories: *permissible, recommended, discouraged,* and *forbidden*.[114] Al-Bar is a contemporary Muslim physician who agrees with Ibn Taymiyya's classification of seeking medical treatment according to the five rulings of *taklif*. Al-Bar states that seeking medical treatment is *permissible,* as established by the jurists of classical Islamic jurisprudence schools.[115] However, such viewpoints have been developed when medical knowledge was limited, the outcomes of medical procedures were uncertain, and many medical interventions carried significant dangers, particularly surgical interventions.[116] Furthermore, in the past, hospital facilities were rudimentary, and the medical methods and means could not necessarily relieve patients' pain.[117] However, advancements in medical methods have made it necessary to reassess the ruling of seeking medical treatment in the contemporary era. The perspective of Al-Bar is also emphasised by the Muslim physician Al-Nusaimi. Al-Nusaimi argues that in the past, methods of diagnosing and treating diseases were limited, and the scarcity of specific medicines for diseases was also a concern.[118] However, considering the methods of modern medicine and improvements in medical procedures, the ruling of seeking medical treatment is encompassed by the five rulings in *Shari'a*.[119]

Therefore, Muslim scholars reconsider the ruling of seeking treatment. The contemporary *fatwa* of IIFA notes that "The initial *Shari'a* ruling on medical treatments is *permissibility*

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to a specific time. In this sense, using the argument of *al-ruqya* through polytheism is an out-of-context and out-of-time cause. For more information about these arguments, see Bakro (n 43) 35-44; Muhammad Abu-Hamid Al-Ghazali, *Ihya'a Ulum Al-Deen* [The Revival of The Religious Science] (vol 4, 1st edn *Dar Al-Ma'rifa* 2005) 291-292. In this context, it is also important to note two key considerations: Firstly, *Shari'a* teachings regarding the concept of *tawakkul* in God are clear: a Muslim must take appropriate actions and then place their trust in God. See the Prophetic *hadith* concerning the Bedouin man who came to the Prophet with his camel and asked the Prophet: "Shall I tie it and rely (upon Allah), or leave it loose and rely (upon *Allah*)? The Prophet said: Tie it and then rely upon *Allah*". *jami` at-Tirmidhi* (*Hadith* 2517). Secondly, the matter of piety resulting from *tawakkul* in God is determined solely by God's assessment. Thus, people cannot outline, and measure actions of piety based on what they consider a virtuous deed.

[114]Ahamad Al-Tayar, *Taqrib Fatwas Wa Ras'el Ibn Taymiyya* [Collection and Evaluation of Ibn Taymiyya's *Fatwas* and Letters] (vol 2 1st edn, *Dar Ibn Al-Jawzyi* 2020) 105.
[115] Mohammad Al-Bar, 'Seeking Remedy, Abstaining from Therapy and Resuscitation: An Islamic Perspective' (2007) 18(4) Saudi Journal of Kidney Diseases and Transplantation 629, 632-633.
[116] Ibid.
[117] Bakro (n 43) 153.
[118] Muhammad Nazim Al-Nusaimi, *Ahkam Al-Tadawi Bi Al-Muharamat* [The Islamic Rulings on Medical Treatment Contain Prohibited Substances] (vol 3, 4th edn, *Matabat Al-Balagha* 1972) 13-14.
[119] Ibid.

given its explicit mentions in the Holy *Qur'an* and in the verbal and the practical *Sunnah* and due to its preservation of life, which is one of the higher objectives of *Shari'a*".[120] Furthermore, the *fatwa* of IIFA stipulates that the ruling on seeking treatment can vary based on various circumstances and individuals. Therefore, seeking medical treatment can be categorised into five classifications of *taklif* rulings: *obligatory, prohibited, recommended*, *discouraged* and *permissible.*[121] The following discussion will analyse the application of the five *taklif* ruling in the context of seeking medical treatment.

7.6.1 *Obligatory* Treatment

The *fatwa* of IIFA outlines three fundamental contexts in which a patient must seek medical interventions: a) life-preserving situations; b) preventing a person's organ loss or disability; and c) contagious diseases that may spread to others.[122]

7.6.1.1 Life Preserving Situations

Life is identified as one of the higher objectives of *maqasid al-shari'a,* and it falls into the category of necessities that *Shari'a* aims to preserve. Human life's valuable position in *maqasid al-shari'a* is rooted in the doctrine of sanctity of life. According to Islamic traditions, the sanctity of human life is attributed to the belief that life is a gift from God.[123] The *Qur'an* notes: "It is He [God] who made you from the earth and let you live upon it".[124] Thus, a *mukallaf* Muslim must preserve their life in a complete submission to their faith that only God has the ultimate will and ability to grant life and take it. [125] In the *Qur'an*: "And it is not [possible] for one to die except by permission of *Allah*"[126], "It is *Allah* Who takes away the souls at the time of their death".[127] Therefore, to preserve this divine gift, *mukallafs* must protect their life to the best of their ability, which includes seeking treatment in the event of a life-threatening condition.

The sanctity of human life is emphasised in the primary sources of *Shari'a*. The guiding principle of the significance of human life is the following verse: "whoever killed a soul, except for a soul slain, or sedition in the earth, it should be considered as though he had killed all humankind".[128] Therefore, human life is sacred, and it must be protected from all forms of harm, including murder, suicide, and euthanasia. Concerning murder, the *Qur'an* states: "But whoever kills a soul intentionally - his recompense is Hell, wherein he will

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[120] The Council of the International Islamic *Fiqh* Academy of the Organisation of the Islamic Cooperation, 'Medical Treatments' (*Fatwa* 67, (5/7), 9–14 May 1992) available at <https://iifa-aifi.org/en/32451.html> accessed 26 October 2023.
[121] Ibid.
[122] Ibid.
[123] Shabana, 'Limits to Personal Autonomy in Islamic Bioethical Deliberations on End-of-Life Issues in Light of the Debate on Euthanasia' (n 17) 252.
[124] *Sura Hu'd*.61.
[125] Jan Ali, 'Islamic Perspectives on Organ Transplantation: A Continuous Debate' (2021)12(8) Religions 576,7; Ramizah Muhammad, Fadhlina Puteri, Nemie Kassim and Nasimah Hussin, 'The Doctrine of Sanctity of Life from The Islamic Prespective' (2016) 21(1) Journal of Medical Ethics 23, 30.
[126] *Sura Al-Imran*.145.
[127] *Sura Al- Zumar*.42.
[128] *Sura Al-Ma'idah*.32.

abide eternally, and *Allah* has become angry with him and has cursed him and has prepared for him a great punishment".[129] In suicide: "O you who have believed… And do not kill yourselves. *Allah* is the Most Merciful to you."[130] In euthanasia: "And do not kill anyone whom *Allah* has forbidden"[131]

The sanctity of human life is also emphasised in many Prophetic statements: Concerning murder, Anas bin-Malik reported: "The biggest of Al-Kabair (the great sins) are … to murder a human".[132] In suicide, Thabit bin Ad-Dahhak narrated: "A man was inflicted with wounds, and he committed suicide, and so *Allah* said: My slave has caused death on himself hurriedly, so I forbid Paradise for him".[133] In euthanasia: "Every Muslim's blood, property and honour are unlawful to be violated by another Muslim".[134]

Most significantly, the protection of the sanctity of life is guaranteed through defined criminal sanctions on those who attack the lives of humanity. The *Qur'an* notes that: "O you who believe! *qisas* (the Law of equality in punishment) is prescribed for you in case of murder"[135] Due to the sacredness of human life, the murderer is punished even in the afterlife: "And whoever kills a soul intentionally, his recompense is Hell, wherein he will abide eternally… [God] has prepared for him a great punishment".[136]

The above texts, cited from the *Qur'an* and *Sunnah,* illustrate the *Shari'a's* stance on the sanctity of human life. Human life is sacred and should be protected, safeguarded, and treated with utmost respect[137] regardless of its quality.[138] At the same time, those statements affirm that harming human life, whether on one's own or by others, is a sin and a grave violation that is not only punishable in this life but also brings severe punishment in the afterlife.

The sanctity of human life is crucial in discussions of divine discourse regarding medical treatment. A *mukallaf* patient is morally *obligated* to seek treatment in specific life-preserving situations.[139] In a sense, a *mukallaf* shall submit completely to God's command to preserve the sanctity of their life. This moral duty also applies to physicians, who are obligated to protect and maintain patients' lives.[140] Therefore, doctors who terminate the lives of their patients will hold liability and cannot claim that they obeyed a *mukallaf* patient's instructions. This moral obligation is embedded in the Islamic Code of Medical Ethics (ICME) under the section on the Character of the Physician:

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[129] *Sura Al-Nisa*: 93.
[130] *Sura Al-Nisa*.29.
[131] *Sura Al-Isra*.33.
[132] *Sahih Al-Bukhari* (*Hadith* 6871).
[133] *Sahih al-Bukhari* (*Hadith* 1363).
[134] *Sahih Muslim* (*Hadith* 2564).
[135] *Sura Al-Baqra*.178.
[136] *Sura Al-Nisa*.93.
[137] Muhammad and others (n 125) 24.
[138] Mohamamd Ali Shomali, 'Islamic Bioethics: A General Scheme' (2008) 1(1) Journal of Medical Ethics and History of Medicine 1,1.
[139] Al-Bar (n 115) 631.
[140] Muhammad and others (n 125) 26.

> "The physician should firmly know that 'life' is God's…awarded only by Him…and that 'Death' is the conclusion of one life and the beginning of another. Death is a solid truth…and it is the end of all but God. In his profession, the Physician is a soldier for "Life" only…defending and preserving it as best as it can be, to the best of his ability."[141]

The ICME also emphasises the sanctity of human life, stating that: "Human Life is sacred…and should not be wilfully taken… A Doctor shall not take away life even when motivated by mercy".[142] Further, the ICME states that preserving the sanctity of human life extends to include the life of the fetus inside the womb.[143]
Based on the above demonstration of the sacredness of human life, the divine discourse imposes an *obligatory* burden on the *mukallaf* to seek specific life-saving treatment. For example, a patient who needs blood transfusions to preserve their life shall morally undergo the medical procedure.[144]

7.6.1.2 Prevent A Person's Organ Loss or Disability

In *Shari'a* discourse, the value of humans' physical body and its organs is also recognised, and they hold a sacred position in *Shari'a*. The value of the physical body is grounded in the story of human creation and the notion that God is the owner of human bodies. Humans are created from the soul of God: "So when I have proportioned him and breathed into him of My [created] soul"[145] and in the image of God: Abu Hurayrah narrated: "*Allah* created Adam in his image".[146] The *Qur'an* mentions the development stages of the human soul and body creation step by step:

> "And certainly, We [God] created the human from an extract of clay. Then we placed him as a sperm-drop in a firm lodging [i.e., the womb]. Then We made the sperm-drop into a clinging clot, and We made the clot into a lump [of flesh], and We made [from] the lump, bones, and We covered the bones with flesh; then We developed him into another creation."[147]

The final result of human creation is: "Verily, we [God] created human of the best stature (mould)".[148] "*Allah*, it is He … given you shape and made your shapes good-looking".[149] "Blessed is *Allah*, the Best of creators".[150]

According to the *Qur'an* account, the phases of human creation maintain that God creates the physical body of mankind. The human body is also the temple of God's soul: "And when I have proportioned him [mankind] and breathed into him of My soul, then fall down

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[141] Islamic Code of Medical Ethics,1981, s (Characters of the Physician).
[142] Ibid s (The Sanctity of Human Life).
[143] Ibid s (The Sanctity of Human Life).
[144] In such situations of certain lifesaving, the patients' freedom will be entirely submitted to the divine discourse to preserve the life bestowed upon them by God.
[145] *Sura Sadd*.72.
[146] *Sahih al-Bukhari* (*Hadith* 6227).
[147] *Sura Al-Mu'minun*. 12,13,14.
[148] *Sura Al-Teen*.4.
[149] *Sura Ghafir*.64.
[150] *Sura Al-Mu'minun*.14.

[the angels] to him in prostration".[151] [152] Further, in the *Qur'an,* God notes that He grants humans their organs: "Have We not made for him two eyes?"[153], "And a tongue, and two lips".[154] Thus, the human's physical body and soul are a divine gift and the property of the Creator, God.

Based on this account of the *Qur'an,* Sachedina argues that humans do not possess their bodies at all.[155] If anything, humans have custodianship or "stewardship" over their bodies. Humans, therefore, have an *amanah* (trust) as a deposit entrusted before God to safeguard their physical body and organs, abstaining from causing harm to their bodies.[156] Mossa also analyses a collection of normative *fatwas* related to organ transplantation, highlighting that a primary concern among Muslim jurists is the sacredness of the human body.[157] Consequently, some Muslim jurists argue that the body is a divine trust entrusted to humans and that individuals do not possess absolute control over it. This position maintains that any change to the body and its organs by an individual is not allowed in *Shari'a*, as it contravenes the sanctity of the body.[158]

The 20th-century Muslim scholar Al-Sharawi presents a detailed argument regarding the notion that humans do not possess ownership over their bodies.[159] According to Al-Sharawi, the human body is a divine trust that is entrusted to humans by God, which must be safeguarded and protected.[160] Al-Sharawi's argument mainly relies on Islamic faith doctrine, including that humans do not own proprietary rights over their bodies as if they were possessions.[161] Additionally, unity between the human body and God is achieved through worship and piety.[162] Al-Sharawi concludes that humans do not own their bodies, and therefore, they have no power over their own bodies.[163]

As individuals do not own their bodies, the human physical bodies are sacred, and humans do not have the authority to inflict harm on their bodies. The *Qur'an* indicates that no one has the right to harm their bodies in a manner that leads to severe damage, such as a loss of an organ or causing disability: "And do not throw yourselves into destruction".[164] In this setting, Shomali notes that with all the blessings of God, including our bodies, we can gain

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[151] *Sura Al-Hijr*.29.
[152] Many Prophetic *hadiths* emphasis and illustrate the *Qur'an's* reference to blowing the spirit of God into human beings. For instance, Abu Hurayrah narrated: "*Allah* created Adam in his image". *Sahih al-Bukhari* (*Hadith* 6227). In a further *hadith*, Abu Hurayrah narrated that "The Messenger of *Allah* says: "When anyone of fights his brother, let him avoid the face, for *Allaah* created Adam in His image". *Sahih Muslim* (*Hadith* 2612e).
[153] *Sura Al-Balad*.8.
[154] *Sura Al-Balad*.9.
[155] Abdulaziz Sachedina*, Islamic Biomedical Ethics: Principles and Application* (Oxford University Press 2009) 175-176.
[156] Ibid.
[157]See generally, Ebrahim Moosa 'Transacting the Body in the Law: Reading *Fatawa* on Organ Transplantation' (1998) 5(6) Journal of African History 292
[158] Ibid.
[159] The argument of Al-Sharawi has been made in a discussion concerning organ donation.
[160] Mohamed Metwally Al-Sharawi, '*Fatwa Al-Shaykh Al-Sharawi Bi Al-Tabarue Bi Al-A'eda'* [*Fatwa* of *Sheikh* Al-Sharawi on Organ Donation] (The Official Channel of Sheikh Mohamed M Al-Sharawi, YouTube 10 January 1985) available at https://www.youtube.com/@alsharawiofficial accessed 1 April 2024.
[161] Ibid.
[162] Ibid.
[163] Ibid.
[164] *Sura Al-Baqra*.195.

advantages from them, but we cannot destroy or squander them.[165] No one may express a desire to burn their possessions on fire.[166] Our position on this earth can be likened to that of a visitor invited to a guesthouse. The host has furnished the guesthouse with items intended to provide convenience and enjoyment for the guest. Nevertheless, the guest is prohibited from causing harm to or damaging the guesthouse or its possessions.[167] Hence, each human's organs are a unique blessing from God; thus, humans must ensure their well-being.

Given the argument that humans do not possess ownership of their bodies, but instead, their bodies are only entrusted to them by God, it suggests that the divine burden places an obligation on a *mukallaf* patient to seek medical treatment in circumstances when failing to do so will result in organ loss or disability. The human body and its organs are a sacred gift from God. As the rightful owner of the human body, God has entrusted humans with the responsibility of acting as custodians and caretakers of their physical bodies.

Consequently, choosing not to seek treatment in situations where it is more likely that a patient will lose an organ or disability would breach this deposit entrusted by God. In addition, it is considered a form of self-harm that inflicts significant damage on the physical body of the patient, which they do not mainly own. Therefore, patients shall morally seek medical treatment to safeguard their organs and maintain the responsibility entrusted to them over their bodies.

The argument that God is the owner of the human body is simple and straightforward, but interesting. However, in the context of investigating the divine discourse concerning the medical treatment, it is essential to note that the notion that our bodies belong to God and, therefore, our bodies are merely a deposit entrusted to us, does not mean that a *mukallaf* should not undertake any action on their own behalf. For example, women can pierce parts of their ears or noses to wear earrings for aesthetic purposes. In principle, *Shari'a* teachings welcome plastic surgery if it is performed for the advantage of the patient.[168] The *Qur'an* states: "Who has forbidden the adornment of *Allah*".[169] Abdullah bin Mas'ud also narrated:"*Allah* is Beautiful, He loves beauty".[170] Furthermore, many Muslim jurists advocate organ donation: "If anyone saved a life, it would be as if he saved the life of the whole people".[171]

These instances demonstrate that a person's deposit entrusted over their body does not entail an absolute *prohibition* of any form of medical intervention. It is beyond the scope of this section to elaborate on the Islamic grounds for those rules. However, these examples are

[165]Shomali (n 138) 7.
[166] Ibid.
[167] Ibid.
[168] Bishara Atiyeh, Mohamed Kadry, Shady Hayek and Ramzi Moucharafieh, 'Aesthetic Surgery and Religion: Islamic Law Perspective' (2008) 32(1) Aesthetic Plast Surg 1,10.
[169] *Sura Al-A'raf*.32.
[170] *Riyad As-Salihin* (*Hadith* 611).
[171] *Sura Al-Ma'idah*.32.

provided to highlight an essential aspect. The argument that God has ownership of the human body will not provide a valid and solid ground for prohibiting individuals from engaging in any form of bodily modification or removal of organs. This point is supported by the variety of jurisprudential rulings that govern the actions individuals take regarding their bodies, as illustrated by the above examples.

7.6.1.3 Contagious Diseases that may Spread to Others

The *fatwa* of IIFA establishes that seeking treatment is *obligatory* in situations of contagious illnesses that pose a threat to society's health.

Infectious diseases have existed since human history[172], and Islamic historical literature references a series of major diseases that have reached epidemic levels since the early days of Islam.[173] In more recent history, infectious diseases remain prevalent. In the 14th century, the Black Death spread rapidly, affecting a vast number of individuals in Africa, Asia and Europe, eventually resulting in the death of more than 75 million people.[174] In the 20th century, the Spanish influenza epidemic emerged, resulting in the death of 50 million individuals.[175] In 1972, Macfarlane Burnet, a Nobel laureate, suggested that "the most likely forecast about the future of infectious disease is that it will be very dull".[176] That, however, seemed overly optimistic. In our times, humans around the globe witnessed the spread of the COVID-19 pandemic. According to World Health Organisation (WHO) statistics for June 2025, COVID-19 has infected 778,050,175 people, resulting in 7,096,935 deaths.[177] It appears that infectious diseases are likely to continue to be a source of anxiety and concern for our health.

Considering the harmful effects that contagious diseases can cause to the entire community, it raises the question of the moral grounds for IIFA to mandate seeking medical treatment for such diseases.

The scope of the moral obligation of Muslims to prevent the spread of infectious diseases stems from the jurisprudential maxim of *harm,* "*La darr wl-la dirar*" (no harm shall be inflicted nor reciprocated). This maxim is derived directly from the *hadith*: "There should

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[172] Muhammad Masruria, Faisal Husen Ismail, Abd Shakor bin Borham, Arwansyah Kirin, Muhammad Misbahe, Masyku and Imam Tabroni, 'The Perspective of *Al-Sunnah Al-Nabawiyyah* to Handle the Outbreak of A Pandemic Disease' (2021) 12 (2) Turkish Journal of Computer and Mathematics Education 686, 686.

[173] For example, Al-Nawawi outlines five major diseases that were prevalent throughout the early era of Islam. The first is the plague of *Shirawah* and took place during the time of the Prophet in Iraq in the year (6 AH). The second notable disease was *Amwas* and arose in the Levant during the time of the second Caliph Umar ibn Al-Kattab in and resulted in the death of around 25000 individuals. The third pandemic developed during the era of the Umayyad dynasty. The disease was known as *Al-Jarf* and killed indicated that around 70,000 people daily for three days. The fourth infectious illness spread in Iraq and the Levant in the year (78 AH) and is known as 'plagues of girls' because most of the deaths of this disease were girls. The fifth pandemic spread in the year (131 AH) and it is claimed that during the month of Ramadan the pandemic reached its peak, resulting in the death of 100,000 people daily. See Al-Nawawi, *Al-Minhag Fi Sharah Sahih Muslim* (n 80) vol 1, 106.

[174] Masruria and others (n 172) 686.

[175] Ibid.

[176] Michael Selgelid, 'Ethics and infectious disease' (2005) 19 (3) Bioethics 272, 285.

[177] World Health Organization, Number of COVID-19 Cases Dashboard, available at<https://covid19.who.int/?mapFilter=deaths> accessed 18 June 2025.

be neither harming nor reciprocating harm".[178] The two words in the short *hadith* have been subject to varying interpretations. Some jurists consider the two terms to be synonymous, arguing that the latter term, "*dirar,*" merely underscores the former term, "*darr*."[179] Other jurists, however, argue that the two terms have distinct meanings due to the notion that "establishing a new norm is better than emphasising an existing one".[180] Ibn Abd-Al-Barr distinguishes between the two words: "*darr*" refers to harm inflicted on another person, from which the perpetrator gains benefit, whereas "*dirar*" refers to harm inflicted on others, from which no one benefits.[181] The common definition in Islamic jurisprudence scholarship suggests that the term "*darr*" refers to causing harm to someone who has not harmed you, whereas "*dirar*" refers to causing harm, beyond what is legally permissible, to someone who may have harmed you.[182] According to interpretations of two words, it can be deduced that there are two means of inflicting harm against individuals: either with or without any reason or justification, and for a benefit or without a benefit.

The scope of the short *hadith*: "*La darr wl-la dirar*" encompasses various aspects of Islamic jurisprudence and can be used in any situation involving the prevention, avoidance, and elimination of harm in moral responsibilities.[183] Ibn-Rajab maintains that the various rules of Islamic jurisprudence are centred around this *hadith of* harm.[184] Al-Mardawi argues that the *hadith* of "*La darr wl-la dirar*" encompasses half of the discussions in Islamic jurisprudence*,* as these discussions primarily concern obtaining benefits or preventing harm.[185] According to Al-Mardawi, Islamic jurisprudence rulings are established to enhance benefits, mitigate difficulties and preserve the five necessities in *maqasid al-shari'a*.[186] The short *hadith* concerning harm highlights the necessities of *maqasid al-shari'a* and how they are fulfilled by deterrent actions, preventive measures, or reducing their occurrence.[187]

Muslim jurists formulate the legal maxim that *harm should be eliminated,* citing the *hadith*: "No harm shall be inflicted nor reciprocated," as an indication of the legitimacy of this legal maxim.[188] The maxim that *harm should be eliminated* (the maxim of *harm*) is considered

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[178] *Sunan Ibn Majah* (*Hadith* 2341).

[179] Luqman Zakariyah, 'Legal Maxim Regarding Elimination of Harm: "No Injury/Harm Shall Be Inflicted or Reciprocated" (*La Darar wa-la Dirar*) in *Legal Maxims in Islamic Criminal Law: Theory and Applications* (Brill 2015) 159.

[180] Ibid.

[181] Yusuf Abdullah Al-Qurtubi Ibn-Abd-Al-Barr, *Al-Tamhid Lima Fi Al-Muwatta Min Al-Ma'ani Wa Al-Asanid'* [The Facilitation to the Meanings and Chains of Transmission Found in Malik's *Muwatta*: A Book of Maliki Islamic Jurisprudence] (Mustafa A Al-Alawi and Muhammad A Al-Bakri eds, vol 20, Ministry of Endowments and Islamic Affairs of Morocco 1967) 158.

[182] Zakariyah (n 179)160.

[183] Ibid 158.

[184] Abd-Al-Rahman Ahamad Ibn-Rajab, *Jami' Al-Uloom Wa Ahkam Fi Sharh Khamsina Hadith Min Jawami Al-Kalim* [The Compendium of Knowledge and Wisdom by Truthi in Explaining Fifty *Hadiths*] (Shuaib Al-Arna'ut and Ibrahim Bajis eds, vol 2, *Mussat Al-Risala* 1997) 211.

[185] Ala-Al-Din Ali Suleiman Al-Mardawi, *Al-Tahbir Sharh Al-Tahrir Fi Usual Al-Fiqh* [Explanation of Principles of The Fundamental of Islamic Jurisprudence] (Abd-Al-Rahman Al-Jibrin, Awad Al-Qarni and Ahmed Al-Sarrah eds, vol 8, 1st edn, *Maktabat Al-Rushd* 2000) 3846.

[186] Ibid.

[187] Ibid.

[188] Ibid.

one of the five leading normative maxims in Islamic jurisprudence.[189] Further, in Islamic jurisprudence, the maxim of *harm* is applied to various matters through five sub-maxims.[190] The sub-maxims include: a) *Harm must be eliminated as much as possible*. b) *Harm is not repelled with harm*. c) *Personal harm should be incurred to prevent general harm*. d) The *lesser of two harms is preferred*. e) *Repelling evils is preferable over attaining benefits*.[191]

The maxim of *harm* is commonly used to deduce social morality rules and establish binding legal policies on contemporary matters.[192] The maxim of *harm* is also closely connected to the concept of public interest. Public interest is crucial in situations that require a balance between the collective welfare of society and individual self-interest.[193] Therefore, the maxim of *harm* became crucial in infectious diseases, particularly diseases that can be transmitted to others and potentially develop into a pandemic. This is because transmitting infectious illness between members of society is considered an action that carries the meaning of causing harm to others.

Islamic jurisprudence considers preserving the five necessities, known as *maqasid al-shari'a*, the utmost objective. Among these objectives, preserving human life holds the highest value. Undoubtedly, infectious diseases pose a genuine hazard to human life. The ancient and contemporary eras have revealed horrific numbers of deaths caused by infectious diseases that have developed into pandemics.[194] Even non-pandemic contagious diseases can be lethal. For example, common cold infections may be occasionally fatal.[195]

Therefore, the maxim of *harm* can be effectively employed to influence individuals' choices and guide them in making specific moral decisions regarding infectious diseases. Such decisions will be made based on normative *Shari'a* principles to ensure the preservation of the life and health of all individuals in society. Thus, the maxim of *harm* imposes two distinct forms of moral burdens on *mukallafs*.[196] The first is a negative duty to abstain from any action that would facilitate the transmission of infectious disease. The second is a positive duty to undertake activities to eliminate or minimise the likelihood of spreading harm caused by infectious disease to the community.

a. The Negative Duty

[189] The Five leading maxims in Islamic Jurisprudence: 1) Acts are judged by their intention. 2) Harm must be eliminated, 3) Certainty is not overruled by doubt. 4) Cultural usage shall have the weight of law. 5) Hardship begets ease. See generally, Muhammad Mustafa Al-Zuhayli, *Al-Qawa'ed Al-Fiqhi'a Wa Tatbiqatha Fi Al-Madhahib Al-Arba'a* [The Legal Maxims in Islamic Jurisprudence and their Applications in the Four Schools of Islamic Jurisprudence] (vol 1, 1st edn, *Dar Al*-Fikr 2006) 63,69,199,257,298.
[190] Ibid. vol 1, 208,215,235,226,230.
[191] Ibid.
[192] This statement has been presented earlier in this Chapter, Section 7.2.3,149.
[193] The concept of public interest has been presented earlier in this Chapter, 7.2.3, 147-149.
[194] See the number of deaths caused by COVID-19 mentioned earlier in this Chapter, Section 7.6.1.3, 164.
[195] Wang Jae Lee, 'Common Cold and Flu' in *Vitamin C in Human Health and Disease: Effects, Mechanisms of Action and New Guidance on Intake* (Springer Dordrecht 2019) 89-100,94.
[196] Sarah Khaleefah, 'Justice and Autonomy in Islamic Bioethics' (2022)10(3) Acta Cogitata: An Undergraduate Journal in Philosophy 1, 3.

Muslims' actions should not conflict with the genuine interests of members of the community or cause harm to them.[197] In this sense, the maxim of *harm* places a duty on every *mukallaf* with an infectious disease to abstain from behaviours that could potentially promote the spread of contagious illnesses. Thus, every *mukallaf* must maintain vigilance and attentiveness to avoid transmitting the infection to others. This includes interaction with uninfected people. Abo Huraira narrated:

> "A Bedouin man said, O Allah's Messenger! What about the camels, which, when on the sand [desert], look like a deer, but when a mangy camel mixes with them, they all get infected with mange? On that the Prophet said: Then who conveyed the [mange] disease to the first [mangy] camel?"[198]

This Prophetic utterance highlights that infection from others is one of the primary sources of disease spread.[199] In addition, the Prophet advises his followers: "Do not put a patient with a healthy person".[200] In a further *hadith*: "There was a man with tubercular leprosy in the deputation of *Thaqif,* and the Prophet sent to him a message: We have taken your oath of allegiance, so go home".[201] Moreover, the Prophet warns his followers to enter or depart an area affected by a disease outbreak.[202] The Prophet says: "If you hear of an outbreak of plague in a land, do not enter it; but if the plague breaks out in a place while you are in it, do not leave that place".[203]

Three main considerations can be deduced from the above prophetic teachings. The statements recognise the influence and capacity of infectious diseases to spread through contact. This knowledge is deemed valid for Muslims since the *Qur'an* mentions that about the Prophet: "Nor does he [Muhammad] speak from his desires. Indeed, it is not except a revelation which is revealed [By angel Gabriel]."[204] Another consideration is that the Prophetic *hadiths* emphasise that Islam is deeply concerned for the life and health of others. This is demonstrated through the Prophet's instructions to adopt precautionary measures against impending harm and the necessity of being vigilant to prevent harming those in good health conditions. The *Qur'an* notes, "And those who harm believing men and believing women for [something] other than what they have earned have certainly borne upon themselves …a manifest sin".[205] A Further consideration is that the prophetic statements stress the importance of preventing harm before it occurs. The Prophet commands individuals to proactively undertake all possible activities as a precaution against potential harm. This is illustrated by the Prophet's warning against all forms of communication between infected patients and others. Thus, infected patients may

[197] See generally Al-Jaff (n 18) 50-57.
[198] *Sahih al-Bukhari* (*Hadith* 5770).
[199] Ayman Shabana, 'From the Plague to the Coronavirus: Islamic Ethics and Responses to the COVID-19 Pandemic' (2023) 7(1-2) Journal of Islamic Ethics 92, 101.
[200] *Sahih al-Bukhari* (*Hadith* 5771).
[201] *Mishkat al-Masabih* (*Hadith* 4581).
[202] Shabana, 'From the Plague to the Coronavirus: Islamic Ethics and Responses to the COVID-19 Pandemic' (n 199) 101.
[203] *Sahih al-Bukhari* (*Hadith* 5728).
[204] *Sura Al-Najm*. 3,4.
[205] *Sura Al-Ahzab*.58.

undertake preventive measures to isolate themselves from others. For instance, avoiding visits and travel.[206]

Moreover, the commitment to the maxim of *harm* applies even to avoiding engaging in religious worship, such as attending prayer in the mosque. Prayer at the mosque is a *mandatory* practice for Men who are capable.[207] Nevertheless, mosques are crowded with worshippers. Thus, the presence of an infected individual poses a significant risk of disease transmission to others. In this setting, Muslim scholars employ the method of *quias*, by utilising the following *hadith*: "Whoever has eaten onion or garlic should not approach our Mosque".[208] The Prophet commands that people who consume strongly scented foods, such as garlic and onions, should refrain from entering the mosque, as the scent harms the worshipers. This command applies the sub-maxim that *repelling evils is preferable over attaining benefits*.[209] That is because it is most suitable to prioritise the public interest of all prayers in the mosque and protect them from harm, rather than focusing on individual interests. In this situation, a person's interest in attending prayer and receiving the reward for praying with the congregation is neglected when considering the Prophet's instruction.[210]

By employing *quias,* the jurists compare the prohibition of a patient with a contagious disease from entering the mosque with the ban mentioned in the *hadith* regarding preventing an individual who consumed food with a strong smell from participating in congregational prayer.[211] The common rationale for the two bans is harm. The jurists argue that the potential harm inflicted on worshippers by transferring an infectious disease to them outweighs the harm caused by breathing an undesirable scent.[212] If the Messenger were to ban a person who ate food with a strong scent from entering the mosque, it would be more appropriate to prohibit the attendance of an individual with a contagious illness from attending congregational prayer.[213]

Therefore, in this situation, the primary interest for individuals is to gain the benefits of attending prayer at the mosque. However, the risk of transmitting the disease amongst the prayers outweighs the personal benefit. Therefore, praying at the mosque is suspended or restricted for the public's interest.

Based on previous prophetic traditions regarding moral responsibility imposed by the maxim of *harm*, it can be inferred that *mukallafs* have a moral burden to prevent others

[206]Further examples, maintaining social distance, refraining from drinking from common bottles and so on.
[207] Muhsin and Ali (n 19) 454.
[208] *Riyad As-Salihin* (*Hadith* 1703).
[209] The Council of *Ifta* in Egypt, 'Ruling on Congregational Prayer in the Mosque for A Patient With A Contagious Disease' (*Fatwa*, 22 August 2020) available at <https://www.youm7.com/story/2020/8/22/فتوى-اليوم-ما-حكم-صلاة-الجماعة-لمن-كان-مريضا-بمرض/4941065>.
[210] Ibid.
[211]Masoud Sabri, *Fatawa Al-Ulama Hawl Fayrus Kuruna* [*Fatwas* of Muslim Jurists on Coronavirus] (*Dar Al-Bashir* 2020)14-15.
[212] Ibid.
[213] Ibid.

from infection. This burden means that individuals aware that they are infected with an infectious illness have a negative duty to refrain from interacting with uninfected individuals to prevent further transmission to others. This abstention is regarded as a preventive measure to prevent the chain of transmission of the illness to others in the community. Ultimately, the negative duty serves as an approach to averting impending harm, and it should be implemented as it is better than attempting to alleviate harm after it has occurred.

Although *mukallafs* shall morally adhere to such measures with utmost commitment to prevent harm to others, the moral burden of avoiding infection presents a practical challenge. The negative responsibility requires the involvement of many moral actors. Instinctively, it is obvious that not every *mukallaf* patient with an infectious disease will refrain from interacting with others. In addition, the scope of potential measures to prevent the spread of contagious diseases, through the negative duty of individuals, is not limited to those who are aware of being carriers of infectious diseases. There will be individuals who have suspicions of infection. In addition, the infection phase frequently commences before the individual's awareness of being infected, and the patients may continue to carry the infection even after they recover. Furthermore, the reasonableness of expecting individuals to bear this moral burden will depend to a large extent on the provision of financial compensation, such as paid leave. As such, individuals can isolate themselves from others.[214]

Thus, in divine burden, the effectiveness of negative duty seems to be restricted, and *mukallafs* are not morally responsible for what is beyond their capabilities. In the *Qur'an*: "Our Lord, [People are asking God that] do not burden us with a load which we cannot bear."[215] God responds: "*Allah* does not place a burden in a soul except to its capacity." [216]

b. The Positive Duty

If it is difficult to eliminate imminent harm through the negative responsibility of individuals with infected diseases, the harm of transmitting infectious diseases will affect the genuine and actual benefits of society members. This is because the immediate harm is inflicted on the life and health of others, both of which are highly valued and preserved in *Shari'a.*[217]

Therefore, applying the maxim of *harm* is not limited to the precautions taken by those infected persons, such as avoiding contact with others. Accordingly, the norms of the maxim of *harm* impose a positive duty on all community members to eliminate or minimise harm. This positive duty is placed by implementing the sub-maxim that *harm shall be*

[214] See Marcel Verweij, 'Obligatory Precautions Against Infection' (2005) 19 (4) Bioethics 323, 324.
[215] *Sura Al-Baqra*.286.
[216] *Sura Al-Baqra*.286.
[217] Muhsin and Ali (n 19) 453.

eliminated as much as possible.[218] Through positive responsibility, all individuals in the community strive to take adequate measures to mitigate harm inflicted by others. In other words, people have a general moral burden to prevent harm for which they are not responsible. Such measures aim to uphold public interest, which is crucial in *Shari'a*. This burden can be achieved by the most effective prevention against infectious illnesses, vaccination.[219]

Vaccination not only provides immunity to the infected individual receiving it, but also hinders the transmission of the illness by that individual.[220] For instance, vaccination of people helps prevent outbreaks of the disease among people in mosques and public places.[221] Furthermore, considering that unvaccinated individuals can act as carriers for diseases, the positive duty imposes a moral responsibility not only on individuals who are aware of their disease status, but also on those who are at higher risk and even those who are certain of their good health. In this sense, applying the sub-maxim of *harm* that *should be eliminated* has placed a positive moral obligation on every *mukallaf* to actively promote public welfare by encouraging all members of society to participate in attaining herd immunity through vaccination.[222]

In this setting, imposing vaccination on everyone to prevent the spread of infectious illnesses fails to respect the individual's choices to accept or reject vaccination. However, when confronted with a decision between two conflicting interests. The first interest enhances the personal interest of the individual.[223] Yet, such an individual's interest conflicts with the entire Muslim community's interest as it does not promote the public interest or may even undermine it. In such a matter, the sub-maxim that *harm shall be eliminated as much as possible*, will be implemented.[224] The genuine public interest is to prevent the transmission of infectious diseases among all individuals in the community as much as possible. This public interest will have to consider moral responsibilities. One of these considerations is to prevent or minimise actual harm, which is the potential disease transmission within the community.[225] In addition, it maintains and enhances the health of all members of society. Moreover, it is also necessary to safeguard the well-being and preserve the lives of those who are vulnerable and unable to receive vaccinations, such as infants, the elderly, and individuals with underlying medical conditions.[226]

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[218] Ibid 542.
[219] Verweij (n 214) 326; Khaleefah (n 196) 3.
[220] Verweij (n 214) 325-326.
[221] The following analysis is based on applying the maxim of harm and its sub-maxims in Islamic jurisprudence, along with considering the grounds and rationales behind many fatwas issued during the COVID-19 pandemic. For *fatwas* concerning the COVID-19 pandemic, see Sabri (n 211). Some of the *fatwas* will be introduced in the following section. For the maxim of harm and its application, see generally Abdullah Al-Hilali, '*Qaidat La Darar Wa-la Dirar: Maqasdha Wa Tatbbiqatuha Al-Fiqhia* [The Maxim of '*No Harm Shall Be Inflicted* Nor Reciprocated' and Its Classical and Modern Applications in Islamic Jurisprudence] (1st edn, *Dar Al-Buhuth* 2005).
[222] Ibid.
[223] Ibid.
[224] Ibid.
[225] Ibid.
[226] Ibid.

Furthermore, immunisation by vaccines has benefits that extend to future generations and can help effectively mitigate the potential for future disease transmission.[227] Ultimately, the adverse effects of the spread of contagious illnesses extend beyond the public health domain, significantly impacting both the healthcare system and the economy. Accordingly, attaining immunity by vaccination is a matter of significance that extends beyond the *mukallaf* interests to the Muslim community's interests.[228]

By applying the maxim of *harm* to impose a moral duty of vaccination, it suggests that *mukallaf* shall participate in minimising and eliminating harm, even if they are not directly responsible, for the sake of the public interest of entire Muslim community. In other words, every *mukallaf* in the society is responsible for preventing all potential cases of infection to safeguard the well-being and life of others. In this sense, mandating vaccination based on the maxim of *harm* seems overly moralistic.[229] In the *Qur'an*: "And no bearer of burdens shall bear another's burden".[230] "It will have [a soul] reward for that (good) which he has earned, and he is punished for that (evil) which he has earned".[231]

This does not, however, mean that *mukallafs* should only consider their own interests. Rather, *mukallafs* can be encouraged to participate in vaccination by embracing the Islamic notion of brotherhood: "None of you believes until he loves for his brother what he loves for himself".[232] Muslims, therefore, are encouraged to consider the harmony between their personal interests and the benefit of their brothers and sisters in the community by actively contributing to a far-reaching duty to mitigate the transmission of contagious illnesses.

Moreover, the principle of benevolence can also be considered, through which a person seeks vaccination to protect the elderly, the most vulnerable, and infants from infectious diseases. In the *Qur'an*: "Indeed, *Allah* orders justice and good conduct".[233] "And do good; indeed, *Allah* loves the doers of good".[234] The notions of brotherhood and benevolence merit consideration. They impose moral obligations on *mukallaf* and support the public interest, albeit to a lesser stringent than the legal maxim of *no harm shall be inflicted*.

COVID-19 Pandemic as a Contemporary Example of Contagious Diseases

In light of the COVID-19 pandemic over the last few years, various *fatwas* have been issued around the Islamic world in response to a range of inquiries arising from the outbreak of COVID-19.[235] Treatment through vaccination was a significant aspect of the debate

[227] Ibid.
[228] Ibid.
[229] Most importantly, when a Muslim jurist issues a *fatwa* that determines seeking medical treatment in cases of infectious diseases is a moral obligation, the ruling of obligatory under the five rulings of *taklif* entails the mandatory performance of a specific action. Failure to fulfil this obligation results in a *mukallaf* committing religious wrongdoing.
[230] *Sura Fatir*.18.
[231] *Sura Al-Baqra*.286.
[232] *Jami' At-Tirmidhi* (*Hadith* 2515).
[233] *Sura Al-Nahl*.90.
[234] *Sura Al-Baqra*.195.
[235] Shabana, 'From the Plague to the Coronavirus: Islamic Ethics and Responses to the COVID-19 Pandemic' (n 199) 104.

addressed in these *fatwas*. In this regard, in 2020, IIFA issued a *fatwa* (IIFA 2020) addressing matters relevant to the coronavirus, including concerns about vaccination.[236]

The IIFA 2020 discussed two main approaches to attain herd immunity in the community including, prior exposure to the disease and vaccination.[237] The first method enables the transmission of the infection amongst individuals without inhibiting its transmission. The *fatwa* of IIFA 2020 denounced the concept of herd immunity through collective exposure to the virus, as it is deemed incompatible with *Shari'a* teachings.[238] This incompatibility arises from applying the sub-maxim of *harm,* which states that *harm is not repelled by harm*. In this sense, the maxim of *harm* aims to eliminate the harm caused by the disease itself, but not in a way that inflicts the same harm it seeks to avoid. Most importantly, this approach is risky and presents a hazard to the life of individuals, especially it affects vulnerable people with weakened immune systems, such as the elderly,[239] or those with weakened immune systems, such as those with chronic diseases, diabetes, hypertension, etc. Thus, those vulnerable groups in society would be most vulnerable to infection from the disease, which could potentially result in death.[240] The *fatwa* of IIFA 2020 also emphasises the importance of preserving human life, which is regarded as a crucial objective in *maqasid al-shari'a.* The IIFA 2020 cited the verse from the *Qur'an*:[241] "whoever killed a soul, except for a soul slain, or sedition in the earth, it should be considered as though he had killed all mankind; and that whoever saved it should be regarded as though he had saved all mankind".[242] Thus, achieving herd immunity through prior exposure to the disease does not preserve the absolute value of all human life, which manifestly opposes the higher objectives of *maqasid al-shari'a* in protecting the lives of all humans.

On the other hand, the second approach to achieving herd immunity is vaccination.[243] The *fatwa* of IIFA 2020 indicates that Muslims must prioritise their well-being in a way compatible with *maqasid al-shari'a*. The higher *maqasid al-shari'a* aim to protect life from harmful contagious diseases.[244] The statement notes the necessity of disease prevention through seeking medicine and citing the *hadith*: "O worshipers of *Allah*! Use remedies. For indeed *Allah* did not make a disease, but He made a cure for it".[245]

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[236] The Council of the International Islamic *Fiqh* Academy of the Organization of the Islamic Cooperation, 'Recommendations of the Second Annual Medical-Legal Symposium: The Novel Coronavirus (Covid-19) Medical Treatments and *Shariah* Provisions' (*Fatwa*, 16 April 2020) available at <https://iifa-aifi.org/ar/5254.html> accessed 5 November 2023.
[237] Ibid.
[238] Ibid.
[239] Ibid.
[240] Ibid.
[241] Ibid.
[242] *Sura Al-Ma'idah*.32.
[243] *Fatwa* of IIFA, 'Recommendations of the Second Annual Medical-Legal Symposium: The Novel Coronavirus (Covid-19) Medical Treatments and *Shariah* Provisions' (n 236).
[244] Ibid.
[245] *Jami at-Tirmidhi* (*Hadith* 2038).

Considering the language used in the IIFA 2020 statement addressing the issue of seeking treatment in cases of COVID-19, it can be inferred that seeking treatment through vaccination is considered *recommended* but not *obligatory*. The IIFA 2020 ruling differs from the previous IIFA ruling discussed earlier in Section 7.6.1.3, which states that seeking treatment for infectious diseases is *obligatory*.[246] At the same time, the IIFA 2020 statement referenced the identification number of the prior *fatwa* issued by IIFA in 1992 concerning seeking treatment for contagious diseases.[247] Given the nature and the purpose of the statement of IIFA 2020, which centred on addressing issues related to a prevalent infectious disease during its issuance, it appears that the IIFA 2020 tended to formulate this *fatwa* in a general form, enabling further specification based on the guidelines and policies of Islamic states in combating this pandemic.

Afterwards, *fatwas* issued by Islamic councils globally varied in terms of their position on the ruling of seeking medical treatment through vaccination. For instance, the Assembly of Muslim Jurists of America Resident *Fatwa* Committee[248] and Leeds Grand Mosque have deemed it *obligatory*.[249] Vaccination for COVID-19 is deemed *recommended* by the General *Ifta'a* Department in Jordan[250.] The Australia *Fatwa* Council,[251] Emirates Council for *Shari'a Fatwa,*[252] and the *Ifta'a* Council of Egypt[253] have ruled that it is *permissible*.

There have been distinct differences in the rulings among these Islamic councils. The rulings on seeking vaccination for COVID-19 in these *fatwas* vary on whether vaccination is *obligatory, recommended, or permitted*. This means the issue of seeking treatment through vaccination for infectious diseases is a matter of disagreement in Islamic jurisprudence and among modern Islamic councils for issuing *fatwas.* The Islamic *Ifta* councils that adopted the ruling of *permissible* and *recommended* founded their ruling on the clear Prophet's *hadith*: "O worshipers of *Allah*! *tadaw'u* (use remedies). For indeed *Allah* did not make a disease, but He made a cure for it".[254] They, therefore, consider the *usuli* (fundamental) maxim *no ijtihad in the presence of a text*. Yet, the crux of their disagreement centred mainly around the interpretation of the term mentioned in the *hadith*

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[246] *Fatwa* of IIFA 1992, 'Medical Treatments' (n 120).
[247] *Fatwa* of IIFA 2020, 'Recommendations of the Second Annual Medical-Legal Symposium: The Novel Coronavirus (Covid-19) Medical Treatments and *Shariah* Provisions' (n 236).
[248] America Resident *Fatwa* Committee, 'The Ruling on Getting The COVID-19 (Coronavirus) Vaccine' (*Fatwa* 87763, 2020) available at < https://www.amjaonline.org/fatwa/en/87763/the-ruling-on-getting-the-covid-19-coronavirus-vaccine> accessed 3 November 2023.
[249]The Assembly of Muslim Jurists of America Resident *Fatwa* Committee: Approval and Ratification by the *Mufti* and *Shari'a* Advisor of the Leeds Grand Mosque, 'The Ruling on Getting the Covid-19 Vaccine' (*Fatwa*, 2021) available at <
https://www.leedsgrandmosque.com/covid-19/fatwas/the-ruling-on-getting-the-covid-19-vaccine> accessed 3 November 2023.
[250]The General *Ifta'a* Depearment of Jordan, 'Ruling on Refusing Medical Treatment and COVID-19 Vaccination' (*Fatwa* 3664, 08 12 2021) available at < https://www.aliftaa.jo/Question2En.aspx?QuestionId=3664> accessed 3 November 2023
[251]Australian *Fatwa* Council, 'Coronavirus(COVID-19) Vaccine *Fatwa* (Islamic Verdict)' (*Fatwa*, 2021) available at https://www.anic.org.au/wp-content/uploads/2021/02/AFC-Coronavirus-COVID-19-Vaccine-Fatwa.pdf accessed 3 November 2023.
[252] The Council of United Emirates for *Shari'a Fatw*a, 'Ruling on Using the New Corona Vaccine (Covid 19)' (*Fatwa,* 2020) available at <https://binbayyah.net/arabic/archives/4986> accessed 3 November 2023
[253] The Council of *Ifta* in Egypt, 'Ruling on Getting Coronavirus Vaccine' (*Fatwa,* 2021) available at <https://www.dar-alifta.org/ar/fatawa/15762/التطعيم-بلقاح-كورونا> accessed 3 November 2023.
[254]*Jami at-Tirmidhi* (*Hadith* 2038).

"*tadaw'u*" (use remedies) used by the Prophet, either as a way of r*ecommending* his followers to seek medical treatment or as an indication that seeking treatment is fundamentally *permissible*.

On the other hand, Islamic councils that rule that seeking treatment is *obligator*y ground their ruling on the maxim of harm that *harm should be eliminated*. Thus, these Islamic councils use *ijtihad* to establish a ruling on a particular issue. In Islamic jurisprudence, the *ijtihad* of a jurist may be conducted without explicit text in the *Qur'an* and *Sunnah* related to the issue at hand.[255] If a clear situation establishes an individual interest that conflicts with the public interest,[256] *ijtihad* must address the contradiction and prioritise the public interest over personal interests.[257]

To conclude, based on the discussions of the contexts of *obligatory* medical treatment, the *fatwa* of IIFA defines three contexts in which a patient must seek medical intervention: life-preserving situations, to prevent a person's organ loss or disability, and contagious diseases that may spread to others. Similarly, Al-Zuhayli states that seeking medical interventions is *obligatory* when a patient is certain that their abstention would result in gross harm to themselves, such as death, loss of an organ and disability or in the case of contagious diseases.[258] Bakro maintains that seeking treatment is *obligatory* for the patient in cases where they are certain that the treatment will preserve their life or organs.[259] Al-Tayyar and others argue that the patient is *obligated* to seek medical treatment if it is more likely that the medical interventions will effectively save their lives or protect their organs.[260] Furthermore, Abo-Zayd notes that if the patient is certain that not undertaking the medical intervention will result in severe harm to their life, they *must* actively seek medical assistance.[261] However, assume that the patient is seeking medical treatment for reasons other than maintaining their life. In that case, patients are not *obligated* to undergo medical treatment.[262]

Remarkably, Muslim jurists use the terms 'certain' and 'more likely' as a criterion to determine whether the treatment is *obligatory*. In Islamic jurisprudence, these terms are addressed through one of the five main normative maxims: *certainty is not overruled by doubt* (the maxim of certainty). In Islamic jurisprudence, the maxim of *certainty* underpins what is now recognised as evidence-based medicine.[263] Although certainty is theoretically

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[255] Muhammad Amanullah, 'Misunderstanding About the *Usuli Usuli* [Roots of Islamic] Maxim ' No *Ijtihad* in The Presence of a Text' (International Business, Economics and Law Conference 11, Kuala Lumpur, 17–18 December 2016) 483,489,486.
[256] Ibid.
[257]Abdullah Mohammed Al-Tayyar, Abdullah Mahmoud Al-Mutlaq and Mohammed Ibrahim Al-Mousa, *Al-Fiqh Al-Musr Dou'a Al-Ketab Wa Al-Sunnah* [Facilitated Islamic Jurisprudence in the Light of the *Qur'an* and *Sunnah*] (vol 12, , 2nd edn, *Madar Al-Watan* 2012) 43.
[258] Wahbah Al-Zuhayli, *Al-Fiqh Al-Islmaic Wa Adlath* [Islamic Jurisprudence and Its Evidence] (vol 7, *Dar Al-Fikr* 1984) 5204.
[259] Bakro (n 43) 32.
[260] Al-Tayyar and others (n 257) vol 1, 465.
[261] Bakr Abo-Zayd, *Fiqh Al-Nawazil* [Contemporary Issues in Islamic Jurisprudence] (vol 2, *Mussat Al-Resala* 1996) 20.
[262] Ibid.
[263] Mustafa (n 12) 480.

ideal for medical judgments,[264] medical decisions are based on probability rather than certainty. Because achieving certainty is often unattainable in most situations. Al-Mardawi states that "where we accept the judgement of the physician, then [acting on] the greater likelihood is sufficient". Thus, sound medical judgments should be established based on *ghalabat al-zann* (the more likely or prevailing hypothesis), which is more reliable than *zann* (a mild inclination) and *shakk* (doubt). [265]

Based on the analysis of the *fatwa* of IIFA and the position of contemporary Islamic jurists, a *mukallaf* is morally *obligated* to seek medical treatment:

1. In all cases, the medical treatment is 'more likely' to:
a. Preserve life.
b. Preserve organs.
c. Prevent disability.
d. Prevent the transmission of contagious illnesses from the infected patient.

According to the five rulings in *taklif*, an *obligatory* action refers to an action that must be performed and that rewards the person when performed and punishes them when they are negligent. Thus, a *mukallaf* who obtains the *obligatory* treatment will be rewarded. However, abstaining from undergoing an *obligatory* treatment can result in moral blame. In this sense, a *mukallaf* may need to consider morally seeking medical interventions in specific situations. The threshold of *obligatory* treatment is that abstaining from undergoing a medical treatment would more likely result in death, loss of an organ, cause disability, or transmit infectious diseases to others.

7.6.2 *Recommended* Treatment

The *fatwa* of IIFA specifies the contexts in which a patient is *recommended* to seek medical treatment. The *recommended* treatment applies in situations where abstaining from seeking treatment may lead to the weakening of the patient's body. At the same time, such abstention shall not result in any of the consequences outlined in the *obligatory* treatment: life-threatening hazards, loss of organs or disabilities, and transmission of infectious diseases to others.[266]

The *recommended* ruling is compatible with *Shari'a's* significant concern about health and the treatment of diseases. As demonstrated in Chapter Four, Muslims are encouraged to prioritise their physical well-being and maintain good health. Therefore, individuals are encouraged to make every effort to seek medical treatment when confronted with illnesses, particularly if these illnesses result in physical weakness.[267] This coincides with the statements of the Prophet: "O worshipers of *Allah*! Use remedies. For indeed *Allah* did not

[264] Ala-Al-Din Ali Suleiman Al-Mardawi, *Al-Ensaf* [Fairness: A Book of Comparative Islamic Jurisprudence within the School of *Hanbli*] (Muhammad H Al-Faqih ed, vol 2, 1st edn, *Dar Ihia Alturath Alrabi* 1955) 311.
[265] Ibid.
[266] *Fatwa* of IIFA, 'Recommendations of the Second Annual Medical-Legal Symposium: The Novel Coronavirus (Covid-19) Medical Treatments and *Shariah* Provisions', (n 236).
[267] W Al-Zuhayli, *Al-Fiqh Al-Islmaic Wa Adlath* (n 258) vol 7, 5204

make a disease, but He made a cure for it".[268] Further, the Prophet says: "Your body has a right over you".[269] To avoid repetition, the importance of maintaining good health in *Shari'a* has been emphasised in detail in Chapter Four.

Furthermore, abstaining from obtaining medical treatment affects the activities of a Muslim towards oneself, family, and the community.[270] For example, a mother who is ill cannot care for her children. In this situation, medical intervention helps the patient fulfil duties that are beneficial to both them and others.[271] Moreover, seeking medical treatment also helps fulfil religious duties.[272] For example, if the patient is a man, he can perform the prayer at the mosque rather than at home. Accordingly, if a patient becomes inactive due to illness, many worldly and religious affairs will cease or be lost.

Bakro argues that seeking medical treatment is *recommended* for patients who are more likely to believe that the treatment will successfully heal the disease.[273] Thus, the patient benefits from such treatment by alleviating the distressing symptoms of the disease.[274] Similarly, Tayyar and others state that if the patient is reasonably certain that the medical intervention is beneficial and, therefore, successfully benefits from the treatment, it is *recommended* that the patient undergo such treatment.[275] The jurists emphasise that, "but there is no certain death from refusing it [the medical treatment]".[276]

Al-Zuhayli also maintains that obtaining treatment is *mandatory* in cases when an individual's refusal to receive treatment will certainly result in self-harm, including death, loss of body parts or disability, or if it is a contagious disease.[277] However, obtaining medical intervention is *recommended* when the patient's refusal to undergo treatment will result in the weakening of their physical condition. Still, the refusal to undergo the treatment will not result in the three contexts of self-harm.[278] Abo-Zayd agrees with Al-Zuhayli, and he maintains that medical treatment is *obligatory* when the patient is certain that refusing treatment will cause the loss of their life.[279] However, medical treatment is *recommended*

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[268] *Jami at-Tirmidhi* (*Hadith* 2038).
[269] *Sahih al-Bukhari* (*Hadith* 5199).
[270] Al-Bar (n 115) 3.
[271] Abdulaziz Abdullah Ibn-Baz, '*Hukm Al-Tadawi Min Al-Amradh'* [The Ruling on Seeking Medical Treatment To Heal Diseases, (*Fatwa* 8104) available at The official website of the Grand *Mufti* of Saudi Arabia https://binbaz.org.sa/fatwas/8104/حكم-التداوي-من-الامراض#:~:text=غيره%20ولا%20صناعة%20ولا%20بحرام%20فالتداوي,زراعة%20ولا%20تداووا%20ولا%20تداووا،. Accessed 15 November 2023. For emphases, this *fatwa* is also cited in Abu Khadeejah Abdul-Wahid, 'It Is Not Allowed to Forcibly Medicate A person… The Prophet Stated, "Did I Not forbid you From Putting Medicine in my Mouth?" An-Nawawi said: "It is desirable that the sick person is not forced to take medication' (*Fatwa in* Health and Medicine, 2021) available at< https://abukhadeejah.com/taking-medicine-is-recommended-in-islam-for-the-one-who-is-sickbut-it-is-not-obligatory/> accessed 7 November 2023.
[272] Ibid.
[273] Bakro (n 43) 32.
[274] Ibid.
[275] Al-Tayyar and others (n 257) vol 1, 456-457.
[276] Ibid
[277] W Al-Zuhayli, *Al-Fiqh Al-Islmaic Wa Adlath* (n 258) vol 7, 5204.
[278] Ibid.
[279] Abo-Zayd, (n 261) vol 2, 20

if it improves or restores the patient's health. In addition, the treatment is as successful as possible in eliminating or minimising the patient's ailment.[280]

Based on *fatwa* of IIFA and the position of the jurists in Islamic jurisprudence, a *mukallaf* is morally *recommended* to seek medical treatment:

1. In all cases, the benefit of medical treatment is more likely to eliminate or mitigate the distressing symptoms of the disease.
2. In all cases, the benefit of medical treatment is more likely to maintain or recover health.
3. In all cases, the benefit of medical treatment is more likely to treat the disease effectively.

According to the scale of five ruling in *taklif*, *recommended* refers to an action encouraged by *Shari'a*, but not binding.[281] Adhering to the *recommended* actions yields moral rewards, whereas neglecting them does not result in consequences or punishments.[282] Hence, a *mukallaf* who obtains the *recommended* medical treatment will be rewarded. However, no sin or moral wrongdoing will occur when a *mukllaf* does not seek *recommended* treatment intervention.

Accordingly, a *mukallaf* can seek or reject the *recommended* treatment for various conditions, ranging from minor illnesses, such as seasonal flu, to severe diseases, like heart disease. The *recommended* treatment threshold is that abstaining from seeking medical treatment would not be more likely to lead to any outcomes stipulated earlier in the *obligatory* treatment.

7.6.3 *Permissible* Treatment

The IIFA recognises the *permissibility* of seeking treatment in some contexts and states that a patient can either undergo medical intervention or refuse it. According to the IIFA, *permissible* treatment applies to all medical interventions that do not fall within the scope of *obligatory* or *recommended* treatments.[283] In this sense, the IIFA reverted the judgement of seeking medical treatment to its normative premise that *everything is originally permissible* in *Shari'a*.[284] The rationale for ruling the *permissibility* of seeking treatment is based on the Prophet's statements, which establish the ruling of *permissibility* as a general rule without using a command language to mandate Muslims to seek medical treatments. The Prophet says: "O worshipers of *Allah*! Use remedies. For indeed *Allah* did not make a disease, but He made a cure for it".[285] In commenting on the *hadith*, Al-Khattabi states that the Prophet emphasises the importance of medical knowledge and the *permissibility* of seeking treatment for illness. Additionally, the second part of the statement indicates the

[280] Ibid.
[281] Mohammad Hashim Kamali, 'The Recommended (*Mandub*)' in *Shariah and the Halal Industry* (Oxford University Press 2021) 120.
[282] Ibid.
[283] *Fatwa* of IIFA, 'Recommendations of the Second Annual Medical-Legal Symposium: The Novel Coronavirus (Covid-19) Medical Treatments and *Shariah* Provisions', (n 236).
[284] This normative premise has been introduced in Chapter 1, Section 1.7.1, 29.
[285] *Jami at-Tirmidhi* (*Hadith* 2038).

possibility of a cure for all diseases, which promotes optimism in people to seek medical treatment.[286] In addition, Lashin maintains that this Prophetic text demonstrates that God revealed knowledge related to medicine and treatment for humanity on earth.[287] Therefore, individuals are *permitted* to obtain medical treatments when they are ill. Lashin adds that medication is generally a means to secure good health because it prevents harm and provides benefits, mitigating pain and curing diseases.[288] Therefore, patients cling to methods that can potentially recover their bodily well-being and health. As such, *Shari'a* teachings permit Muslims to seek medical care for their illnesses at their own choice.

In a further *hadith* reported by Ibn Abbas about a woman suffering from epilepsy, the Prophet said: "If you wish, you endure it patiently and you are rewarded with Paradise, or if you wish, I shall make supplication to *Allah* to cure you?".[289] The Prophet's utterance demonstrates that he does not force the woman to seek treatment. Instead, it presents her with a *permissibility* of action: to tolerate the illness with patience or to actively heal from it.[290]

According to the *fatwa* of IIFA, seeking treatment remains *permissible* if abstaining from treatment does not result in outcomes stipulated in *obligatory* and *recommended* treatment contexts. This means that the *permissible* treatments include contexts in which abstaining from seeking medical intervention will not result in the following outcomes: loss of life, loss of an organ, causing disability, transmission of contagious illnesses to others, or weakening the patient's physical condition.

Similarly, Al-Zuhayli states that the original ruling of obtaining medical treatment is *permissible.*[291] This ruling is based on the clear evidence of the *Qur'an* and *Sunnah*. However, this ruling does not apply in situations when a patient refuses treatment that will lead to death and disability, loss of an organ, spread of a contagious disease to others, or weakness in the body.[292] Abo-Zayd maintains that, in principle, seeking medical intervention to cure a disease is *permissible*.[293] Abo-Zayd outlines some situations in which he affirms that seeking medical treatment is *permissible*. For instance, if the side effects of medical treatment remain unknown. In such a case, ignoring treatment may equate to receiving treatment.[294] According to Al-Tayyar and others, obtaining treatment is *permissible* when a patient is certain that they will not benefit from treatment and there are no hazards to their life if they refuse treatment.[295] Equally, the ruling of *permissibility* extends to withholding, terminating, or ceasing medical treatment that has already been

[286]Hamad Muhammad Al-Khattabi, *Alam Al-Hadith Fi Sharh Sahih Al-Bukhari* [Outstanding Examples from the Prophet Traditions: Explaining Al-Bukhari's Compendium] (Muhammad Al-Saud ed, vol 3, 1st edn, *Umm Al-Qura* University Press 1988) 1204.
[287] Lashin (n 76) vol 8, 582.
[288] Ibid.
[289] *Riyad As-Salihin* (*Hadith* 35).
[290] Lashin, (n 76) vol 10, 42-43.
[291] W Al-Zuhayli, *Al-Fiqh Al-Islmaic Wa Adlath* (n 258) vol 7, 5204-5205
[292] Ibid.
[293] Abo-Zayd, (n 261) vol 2, 20-21.
[294] Ibid.
[295] Al-Tayyar and others (n 257) vol 1 ,456-457.

commenced, as long as doing so does not pose a threat to the patient's life. Bakro states that "it [i.e., seeking medical treatment] is *permissible*" if its benefit is not more likely to be ineffective in curing the disease.[296] Bakro provides an example that some cancer types, especially if they have spread throughout the human body and were not initially treated.[297]

Based on the discussion of *fatwa* of IIFA and the perspective of contemporary Muslim jurists, a *mukallaf* is morally *permitted* to seek medical treatment:

1. In all cases, the benefits of the medical treatment are more likely to be ineffective in healing diseases.
2. In all cases, the consequences of the medical treatment are more likely to be unknown.
3. In all cases, the benefits of seeking or abstaining from the medical treatment are 'more likely' to be equivalent.

Under the scale of the five rulings in *taklif*, *permissible* actions provide a *mukallaf* the choice to act or refrain from doing a conduct. Performing a *permissible* action does not result in praise and remuneration. Equally, abstaining from a *permissible* action does not lead to a moral sin or punishment. Thus, a *mukallaf* can seek or reject the *permissible* treatment for various conditions, ranging from minor diseases to severe illnesses. The threshold of *permissible* treatment is that abstaining from seeking medical treatment would not be more likely to result in any outcomes stipulated earlier in the *obligatory* or *recommended* treatment.

7.6.4 *Discouraged* Treatment

The IIFA establishes a criterion wherein the act of seeking medical treatment is ruled *discouraged*: "It [treatment] is undesirable if the action to be taken is risky and may cause serious complications, worse than the disease to be cured".[298] The rationale for this ruling is established based on the Prophetic traditions. Ibn Abbas narrated: "If there is any healing in your medicines, then it is in cupping, a gulp of honey or branding with fire (cauterisation) that suits the ailment, but I do not like to be (cauterised) branded with fire".[299] In another narration, the Prophet dislikes that his nation uses cauterisation: "But I forbid[300] my followers to use cauterisation (branding with fire)."[301] This *hadith* refers to some forms of *permissible* medicine, such as a gulp of honey and cauterisation, used in early Islam. However, upon confirming the *permissibility* of using cauterisation, the Prophet made an additional statement: "But I forbid my followers to use cauterisation." Muslim jurists argue that the phrase "I forbid" does not imply a complete ban but rather indicates a strong

[296] Bakro (n 43) 32.
[297] Ibid.
[298] *Fatwa* of IIFA, 'Recommendations of the Second Annual Medical-Legal Symposium: The Novel Coronavirus (Covid-19) Medical Treatments and *Shariah* Provisions', (n 236).
[299] *Sahih Al-Bukhari* (*Hadith* 5683).
[300] The word used in Arabic is '*anha*'. Forbid is not an equivalent translation, but it is the most analogous term. '*anha*' indicates he possibility of *discouragement*.
[301] *Sahih Al-Bukhari*, (*Hadith* 5681).

disapproval of treating illnesses by cauterisation.[302] This claim is reinforced by the Messenger's explicit reference to forms of treatment, including cauterisation, followed by his expression "I do not like," which means there is no definite *prohibition*. However, the Prophet does not promote the use of cauterisation as a method of treatment.
In addition, after the Prophet's statement about cauterisation, one of the companions utilised it. Imran narrated: "The Messenger of *Allah* prohibited cauterisation."[303] After that, the Prophet said: "We were tested (with severe medical conditions) so we were cauterised, but we did not have good results, nor was it successful for us". In commenting on this *hadith,* Al-Azim-Abadi notes that the usage of cauterisation by the Companions, after the statements of the Prophet, reaffirms that the Messenger's position on the utilisation of cauterisation was not an absolute *prohibition*, but rather a matter of non-preference.[304] The statement also suggests that medication with severe adverse effects does not guarantee a successful treatment: "We did not have good results".

Furthermore, in another *hadith*, Muhammad Al-Ansari narrated: "Sa'd bin Zurarah, who was the grandfather of Muhammad through his mother, was suffering from pain in his throat, known as croup. The Prophet said: 'I shall do my best for Abu Umamah.' Such that I will be excused (i.e., free of blame if he is not healed). And he cauterised him with his hand, but he died."[305] This *hadith* clearly demonstrates that the Messenger personally used cauterisation as a treatment method. This emphasises that the prohibition stated in the first *hadith*, "I forbid", was not absolute.

The Prophet's reference to cauterisation as a permissible method of treatment, combined with his later expression of disfavour towards its use by his followers, provides Prophetic instruction. The use of "burned by fire" was consistent with the medical practices of the Prophet's time, where medicine was based on accessible natural resources. The Prophet was not a physician; however, in the medical context, Muslim jurists interpret his traditions as applicable concepts that can be used based on specific context and times. Accordingly, the jurists recognise that medications stated in the *hadith* as being "burned by fire" or cauterisation equate to modern treatments that inflict greater suffering on the patient, possibly exceeding the pain caused by the disease itself.[306]

In commenting on this *hadith*, Al-Nawawi states that when the Prophet says, "but I do not like to be (cauterised) branded with fire", the Prophet makes a strong indication that treatments that inflict severe pain on patients, which may exceed the pain caused by the illness itself, are undesirable.[307] Therefore, it is not *prohibited* to use such treatment, but

[302] For instance, Al-Nawawi discusses this *hadith* under the section of non-prohibited treatment. See, Al-Nawawi, *Al-Majmu' Sharh Al-Muhadhab* (n 93) vol 9, 63; Lashin also discusses this *hadith* under the sections "Every disease has a cure'. See Lashin (n 76) vol 8, 576.
[303] *Jami` At-Tirmidhi* (*Hadith* 2049).
[304] Muhammad Shams-Al-Haq Al-Azim-Abadi, *Sharah Sunn Abi Dawud* [A Commentary of Al-Azim Abadi in Interpretation of Collection of Hadith of Abi Dawud] (vol 10, 2nd edn, *Dar Al-Kutb Al-Elmia* 1994) 24.
[305] *Sunan Ibn Majah* (*Hadith* 3492).
[306] Bakro (n 43) 39.
[307] Al-Nawawi, *Al-Majmu' Sharh Al-Muhadhab* (n 93) vol 9, 63.

discouraged.[308] Ibn-Al-Qayyim agreed with Al-Nawawi, claiming that seeking treatment fulfils the goal of healing a patient's illness according to measures that individuals are capable of.[309] As such, when the Prophet says, "But I forbid my followers to use (cauterisation) branded with fire," he suggests that inflicting further suffering on a patient would be contrary to the fundamental purpose of treatment.[310] Thus, the patient is inflicted with a greater harm to prevent a lesser harm.[311]

In this regard, Al-Zuhayli states that patients are urged to avoid seeking medical treatment if they are certain that the potential risks of the treatment outweigh the risks posed by the illness being treated.[312] Al-Tayyar and others maintain that if the treatment's benefits are more likely to be effective in treating the disease and it is associated with life-threatening hazards, it is *discouraged* to obtain such treatment.[313] This is because the interest in preserving life is greater than any interest to gain the benefits of treatment.[314] According to Abo-Zayd, obtaining a medical intervention for a patient is *discouraged* if such treatment is associated with risks and the side effects and consequences exceed the benefits.[315] Bakro notes that some treatments may have therapeutic benefits but also entail risks.[316] Thus, if the treatment poses side effects to the patient, while its impact on recovery is minimal, it is *discouraged* for the patient to undergo this form of treatment.[317]

Judging from the *fatwa* of IIFA and the discussions of Muslim jurists, it is morally *discouraged* for a *mukallaf* to seek medical treatment:

1. In all cases, the pain, inconvenience or discomfort inflicted by the medical treatment is more likely to exceed the pain of the disease.
2. In all cases, the medical treatment risks are more likely to exceed their benefits.
3. In all cases, the medical treatment is more likely to be associated with life-threatening hazards.

According to the five rulings of *taklif*, discouraged refers to actions between *permissible* and *prohibited*.[318] The *discouraged* action "should be avoided."[319] However, a person who performs a *discouraged* action is not subject to punishment and does not bear moral consequences.[320] In this sense, a *mukallaf* who avoids *discouraged* medical treatment will be rewarded. Yet, no moral blame will occur when a *mukllaf* undergoes *discouraged*

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[308] Ibid.
[309] Muhammad Bin-Abi-Baker Ibn-Al-Qayyim Al-Jawziyya, '*Al-Tibb Al-Nabawi'* [The Prophetic Medicine] in *Zad Al-Ma'ad Fi Hdi Khir Al-Ebad* [Provision of the Hereafter According to the Prophet] (Shuayb Al-Arna'ut ed, vol 4, 1st edn, 1st Issue, *Mussat Al-Risala* 1997) 46-47.
Vol 4, 46.
[310] Ibid.
[311] Ibid.
[312] W Al-Zuhayli, *Al-Fiqh Al-Islmaic Wa Adlath* (n 258) vol 7, 205
[313] Al-Tayyar and others (n 257) vol 1, 457.
[314] Ibid
[315] Abo-Zayd, (n 261) vol 2, 21.
[316] Bakro (n 43) 39.
[317] Ibid 33.
[318] Mohammad Kamali, 'The Reprehensible *Makruh*' (n 281) 112.
[319] Ibid.
[320] Ibid.

treatment intervention. The threshold of *discouraged* treatment is met when the medical treatment is more likely to involve inflicting pain, inconvenience, or discomfort that outweighs the pain of the illness, risks that outweigh the benefits or is associated with life-threatening risks.

7.6.5 *Prohibited* Treatment

The *fatwa* of IIFA has not specified contexts under which seeking treatment is *forbidden.* This seems clear because the ruling on seeking medical treatment is originally *permissible,* and hence, *muftis* and jurists cannot alter the ruling to a *prohibition.* In Islam, the authority to establish *prohibited* rulings is with God.[321] If someone were to do so, they would exceed their boundaries, wrongfully seizing the sovereignty that belongs only to God by imposing *prohibitions* on *mukallafs*. Muslim jurists, therefore, identify unlawful actions through explicit evidence revealed in the *Qur'an* and *Sunnah*.

However, Islamic jurisprudence scholarship contains numerous discussions of forbidden treatments that may be *permitted* in specific medical contexts. One of the most important topics related to these discussions is seeking treatment with medications that contain an unlawful substance in *Shari'a*.[322] This subject has been widely discussed, with a special focus on utilising medicines manufactured from wine[323] or animal products, such as those derived from swine. The particular attention to alcohol and swine is evident as the prohibition of these substances is thoroughly established in *Shari'a* with definitive evidence. Nevertheless, they are used in the ingredients of many contemporary medical treatments. The following discussion addresses the use of medications containing unlawful substances, such as those derived from wine and swine.

7.7 The Islamic Position on Utilisation of Swine and Wine for Medical Purposes

Consuming wine and swine are *forbidden* in *Shari'a* by clear *Qur'an* and Prophetic statements texts. The prohibition of consuming the flesh of swine is mentioned in four places in the *Qur'an.* For instance*,* "Say, in what was revealed to me, I find nothing forbidden to a consumer who eats it, except carrion, spilt blood, or the flesh of swine, which is *rijs* [impure]".[324] [325] Regarding the prohibition of consuming wine, the *Qur'an* notes: "Satan only desires to provoke enmity and hatred among you with intoxicants [alcoholic

[321] The ground for the concept that God is the sole authority to establish *Prohibited* actions is that in the *Qur'an*: "Have you seen what *Allah* has sent down to you of the provision of which you have made [some *halal* [lawful] and some *haram* [unlawful]?" Say, "Has *Allah* permitted you [to do so], or do you invent [something] about *Allah*?" *Sura Yunus.*59; In another verse of the *Qur'an*: "And do not say about what your tongues assert of untruth, this is *halal* [lawful,] and this is *haram* [unlawful], to invent falsehood about Allah". *Sura Al-Nahl.* 116*;* Further, the *Qur'an* notes "Or have the other deities who have ordained for them a religion to which *Allah* has not consented?". Sura *Al-Shu'ara*.21; In *Hadiths*, the Prophet says: "What is *halal* is that which *Allah* has permitted, in His Book, and what is *haram* is that which *Allah* has forbidden in His Book". *Sunan Ibn Majah*, (*Hadith* 3367).

[322] Nurdeen Deuraseh, 'Is Imbibing *Al-Khamr* (Intoxicating Drink) for Medical Purposes Permissible by Islamic Law?' (2003) 18 (3) Arab Law Quarterly 355, 335.

[323] Ibid.

[324] *Sura Al-An'am*.145.

[325] The other three verses: "He [God] has forbidden you carrion, blood, the flesh of swine." *Sura Al-Baqra*.173; "Prohibited for you are carrion, and blood, and the flesh of swine." *Sura Al-Ma'idah*.3; "He [God] has forbidden you carrion, blood, and the flesh of swine." *Sura Al-Nahl.* 115.

drinks] and gambling and hinder you from the remembrance of *Allah* and the prayer. So, will you not then abstain?".[326] [327] The *Sunnah* of the Prophet also explicitly forbade the consumption of swine and alcohol. The Prophet says: "*Allah* forbade wine and the price paid for it… and forbade swine and the price paid for it".[328]

The *Qur'an* describes swine and wine as *rijs*.[329] *Rijs* is mentioned in the *Qur'an* ten times in various contexts.[330] Certain signs associated with the term "*rijs*" are explicitly linked to swine, wine, raffles, gambling, and idols, while others are indirectly related to human ethics.[331] The word *rijs* has been interpreted as "*najs*" (dirty) and "filth".[332] *Najs* has two distinct meanings: firstly, it refers to an object that is inherently impure by its nature. The second meaning of *najs* refers to an impure object as perceived by the mind or the law.[333]

Muslim jurists of the four schools of thought agree that swine is naturally impure.[334] However, most schools of jurisprudence maintain that wine is originally a clean drink and its impurity is moral by divine decree in the *Qur'an.*[335] The importance of this distinct line in the meaning of *najs* between swine and wine will become clear later through the discussion in this chapter.[336]

The prohibition on the consumption of porcine products and wine is firmly established in *Shari'a* doctrine. Nevertheless, materials derived from swine and wine are utilised to produce beneficial medicines and preventative measures for various diseases and health

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[326] *Sura Al-Ma'idah*.91.

[327] Concerning the prohibition of consuming wine, given that wine was prevalent among the Arabs before the birth of Islam and during its early stages, drinking wine was banned through four phases until the prohibition was established in the verse mentioned in *Sura Al-Ma'idah*. 91.

[328] *Sunan Abi Dawud* (*Hadith* 3485).

[329] For instance, concerning wine, "O, you have believed, wine and gambling, idols and divining arrows are '*rijs'* from the work of Satan. Avoid them, so that you prosper". *Sura Al-Ma'idah*.90; Concerning swine, "Say, do not find within that which was revealed to me [anything] forbidden to one who would eat it unless it be a dead animal or blood spilled out or the flesh of swine - for indeed, it is '*rijs*'". *Sura Al-An'am.*145

[330] Nurdeng Deuraseh, 'Lawful and Unlawful Foods in Islamic Law focus on Islamic Medical and Ethical Aspects' (2009) 16 International Food Research Journal 469, 474.

[331] Ibid.

[332] Ibid.

[333]Abdullah Al-Tariqi, *Ahkam Al-Dhaba'ih Wa Al-Luhum Al-Mustauradah: Drasah Muqranah* [The Provisions of Imported Meat: A Comparative Study] (*Idarah Al-Buhuth Al-iLmiyah Wa Al-Irshad* 1983) 320.

[334] Nadi Al-Badawi and Hassan Al-Bashir, '*Makhatir Al-Khinzir Wa Aham Estikhdamatih Al-Mueasirat Dirasa Fiqhia Tibiya Muqara*' [The Hazards of Pork and its Most Significant in Contemporary Uses: A Medical and Islamic Jurisprudence Study] (2015) 11 Journal of Al-Madinah International University 287, 301.

[335] Deuraseh, 'Is Imbibing *Al-Khamr* (Intoxicating Drink) for Medical Purposes Permissible by Islamic Law?' (n 322) 362.

[336] Concerning the rationales underpinning the prohibition of pork and wine, the prohibition of alcohol appears to have obvious reasons. One of the main reasons is that alcohol has an impact on the mind, which is considered one of the necessities in *maqasid al-shari'a*. It harms one's mental health and can result in addiction and causes disturbances in the community. Muslim scholars and medical researchers have investigated the wisdom behind the prohibition of pork. One of their major results was protecting individuals from the potential health harm that could arise from consuming pork. Despite the efforts made and the results reached regarding the harmful effects of consuming pork, God alone knows the precise rationale and genuine wisdom behind the prohibition of swine. For more information, See Hatal Al-Kamali, '*Turuq Al-Tahalil Al-Kimiayiyat Wa Al-Biwkimyayiyat Al-Mustakhdamat Fi Al-Kashf an Al-Mawad Al-Muharamat Fi Al-Ghidha' W Al-Dawa'* [Techniques and Analytical Chemical Methods Used to Detect the Forbidden Substances in Foods and Medicines] (2013) 10 *Journal of Research and Studies of the Islamic World* 310-329; Zamn Shaker and Wafa Hamid, '*Tijarat Al-Khamr Fi Al-Jahiliat Wa Tahrimih Fi Al-Islam*' [The Trade of Wine in Pre-Islamic Era and Its Prohibition in Islam] (2021) 74 Journal of Arts, Literature, Humanities and Sociology 1,1; Al-Badawi and Al-Bashir (n 334) 304; Deuraseh, 'Lawful and Unlawful Foods in Islamic Law focus on Islamic Medical and Ethical Aspects' (n 330) 474.

problems.[337] Porcine organs exhibit the highest degree of similarity to human organs, and clinical studies on swine have demonstrated significantly beneficial outcomes.[338] Using the pig's organs provides the most immediate remedy for the acute shortage of human organs suitable for transplantation.[339] In addition, a vast array of medical treatments originates from swine.[340] For instance, substances derived from swine are used in anticoagulants, the treatment of blood clots, pain medications, digestive supplements, and cholelitholytics.[341] Alcohol, also in its various forms, is used in medicine as an antiseptic and mouthwash for oral hygiene purposes.

The use of unlawful substances-derived ingredients raises moral concerns and a question as to whether the *mukallaf* Muslim would be *permitted* to undergo such medical procedures that incorporate unlawful substances like swine and wine.[342]

In *hadith* literature, many *hadiths* discuss the topic of using *forbidden* materials for medical purposes. Abu Darda reported: The Messenger says: "God has sent down both the disease and the cure, and He has appointed a cure for every disease, so treat yourselves, but use nothing unlawful".[343] In another *hadith,* the Prophet says: "*Allah* did not make your cure in what He made unlawful to you".[344]

In principle, the Prophet's statements maintain that it is *forbidden* to use unlawful medications to treat illnesses. However, the following discussion provides the perspective of Muslim jurists about using *prohibited* substances for medical purposes. The discussion centres on swine and wine due to their broad utilisation in medicinal applications and their constant reference in Islamic jurisprudence scholarship. Ultimately, comprehending the

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[337] Ya'arit Bokek-Cohen, Limor D. Gonen and Mahdi Tarabeih, 'The Muslim Patient and Medical Treatments Based on Porcine Ingredients' (2023) 24 (89) BMC Medical Ethics 1, 2; Deuraseh, 'Is Imbibing *Al-Khamr* (Intoxicating Drink) for Medical Purposes Permissible by Islamic Law?' (n 322) 364

[338] Bokek-Cohen and Others (n 337) 3.

[339] Ibid.

[340]S Pirzada Sattar, Mohammed Shakeel Ahmed, James Madison, Denise R Olsen, Subhash C Bhatia, Shahid Ellahi, Farhan Majeed, Sriram Ramaswamy, Frederick Petty and Daniel R Wilson, 'Patient and Physician Attitudes to Using Medications with Religiously Forbidden Ingredients' (2004) 38(11) Annals of Pharmacotherapy 1830, 1830.

[341] Bokek-Cohen and Others (n 337) 2.

[342] While this section focuses on treatments containing unlawful substances, especially alcohol and swine, some may enquire about the use of 'drugs' for medical purposes. The schools of Islamic jurisprudence acknowledge the use of drugs for medication, and jurists consider such usage *permissible* rather than perceiving it as an exception based on the principle of *necessi*ty. This ruling is established on the core premise of *Shari'a*: *everything is originally permissible*. This maxim signifies that God bestows *permissibility* on all actions, and the *permissibility* can only be overturned to *prohibition* if there is solid *Shari'a* evidence to prove the contrary. Accordingly, since there is no definite prohibition command on consuming drugs in *Shari'a* sources, including the *Qur'an* and *Sunnah*, the use of drugs for medicinal purposes is originally *permissible*. However, in Islamic jurisprudence, concern around drugs emerged when individuals began to use drugs for pleasure. Therefore, the perspective of Muslim jurists on the use of drugs is divided into three groups. The first group fully *permits* the use of drugs. The second group *permits* the use of drugs under the principle of *necessity*. The third group *prohibits* the use of drugs entirely. Most importantly, the ruling of using drugs for medical purposes and pleasure reasons should not be confused. For further information concerning the maxim of *everything is originally permissible,* See Jala-Al-Din Al-Suyuti, *Al-Aashbah Wa Al-Nazayir Fi Qawaid wafurue: Fiqh Al-Shafi* [Similarities and Counterparts in The Islamic Legal Rules and Sub-Rules: *Shafi's* Jurisprudence] (1st edn, *Dar Al-Ktb Al-Elmia* 1983) 60. For more information about the use of drugs in Islamic jurisprudence, see Yasmin Hanani and Mohd Safian, 'An Analysis on Islamic Rules on Drugs' (2013) 1(9) International Journal of Education and Research 1.

[343] *Mishkat Al-Masabih* (*Hadith* 4538).

[344] *Sunan Abi Dawud* (*Hadith* 50).

moral rules on alcohol and swine applies to similar *forbidden* substances if they are used in the manufacture of medical medications.

Regarding the utilisation of swine or its derivatives for medical purposes, all four classical schools of jurisprudence forbade using swine fat, bones, and organs in medicine.[345] This consensus arises from their common view that swine is naturally impure, leading to the *prohibition* of using any of its components for medical purposes.[346] The judgment of the schools of Islamic jurisprudence is sustained by the explicit ban on pork consumption in the *Qur'an* and the description of swine as naturally impure.[347]

Similar to the position of jurists about using swine in medical treatment, all schools of Islamic jurisprudence agree on *prohibiting* the use of wine as a form of medication.[348] The jurists recognise that wine is fundamentally a pure substance and that the prohibition mentioned in the *Qur'an* relates specifically to the consumption of alcohol to seek pleasure and happiness.[349] However, they agreed to further forbid consumption of wine as a medical treatment according to a clear prophetic *hadith*: Tariq bin Suwaid Al-Hadrami reported: "I said: 'O Messenger of *Allah*, in our land there are grapes which we squeeze (to make wine). Can we drink from it?' He said: 'No.' I repeated the question and said: 'We treat the sick with it.' The Prophet said: That is not a cure, it is a disease".[350] The jurists also cited the Prophet's statement: "Indeed, God did not make the healing of my nation on what He had forbidden to them".[351] Based on these Prophetic statements, Muslim jurists concluded that wine is deemed unlawful to consume to treat illness.[352] Wine can also not be consumed, even in small amounts, and that it does not lead to intoxication. This judgement is established based on the *hadith*: "If a large amount of anything causes intoxication, a small amount is prohibited".[353] [354]

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[345]Muhammad Al-Naysaburi Ibn-Al-Mundhir, *Al-Egma* [The Consensus of Muslim Jurists: A Book of Jurisprudential Matters Agreed by the Majority of Muslim Jurists in the Classical Schools of Islamic Jurisprudence] (Fouad A Ahmed ed, 1st edn, *Dar Al-Muslim* 2004) 130; Ali Al-Andalusi Ibn-Hazm, *Maratib Al-Ejma fI Al-Muamalat, Al-Ebdat Wa Al-Itiqatadat* [Levels of Consensus of Muslim Jurists in Transactions, Worship, and Beliefs] (*Dar Al-Kutb Al-Elmia* [No date]) 136.

[346]Ibrahim Muhammad Ibn-Dowayan, *Manar Al-Sabil Fi Sharh Al-Dalil* [The Clear Light in Explaining the Evidence of Islamic Jurisprudence] (Zuhair Al-Shawish ed, vol 2 *Al-Maktab Al-Islami* 1989) 410.

[347] Ibid.

[348]Ahmed Al-Fahdawi, '*Hukm Al-Tadawi Bi Al-Khamr'* [The Ruling on Using Wine for Treatment purposes] (2016)11(2) Journal of Kirkuk University Humanity Studies 116, 125.

[349] Ibid.

[350] *Sunan Ibn Majah* (*Hadith* 3500).

[351] *Sahih Muslim* (*Hadith* 3670).

[352] See, Al-Tayyar and others (n 257) vol 7, 159-160; W Al-Zuhayli, *Al-Fiqh Al-Islmaic Wa Adlath* (n 258) vol 4, 2609-2610

[353] *Mishkat Al-Masabih* (*Hadith* 3645).

[354] Early *Hanafi* jurists held a very detailed consideration of this matter. The jurists distinguished between three types of alcohol: 1) Alcohol made from grapes. 2) Alcohol made from dates or raisins is completely prohibited, regardless of the amount consumed or whether it causes intoxication. 3) Alcohol made from honey, fig, wheat, barley or corn can be utilised under the following conditions: a) it is not used as an intoxicant. b) it is not used in an intoxicated amount; c) it is not used for vain purposes .For more information, See generally, Ibn-Abidin (n 72) vol 6, 452-455; Ministry of Endowments and Islamic Affairs of Qatar (ed) '*Rae'y Al-Ahnaf fi Al-Nabeed Wa Al-Qawl Al-Muftaa Bih Endahum'* [The Hanafi Viewpoint on Alcohol and Their Religious Ruling] (*Fatwa,* 161877, 27-07-2011) available at https://www.islamweb.net/ar/fatwa/161877/رأي-الأحناف-في-النبيذ-والقول-المفتى-به-عندهم accessed 15 November 2023.

Hence, the perspective of classical Muslim jurists from all schools of jurisprudence towards utilising swine and wine for medical purposes is definite. The consensus amongst jurists is that the prohibition of wine and swine is divinely established through decisive and unequivocal texts of the *Qur'an* and *Sunnah*. Thus, there is no room for *ijtihad* within explicit texts from the primary sources of *Shari'a.*

7.7.1 The Principle of Necessity

Although there is a consensus amongst Muslim jurists about the *prohibition* of using swine and alcohol for medical purposes, Chapter Four demonstrates that *Shari'a* is highly concerned with the health and well-being of its followers.[355] The preservation of life is a necessity in *maqasid al-shari'a,* and life must be protected against any hazard of illnesses.[356] Further, *Shari'a* protects Muslims in all aspects of their daily activities and provides facilities in many situations that may pose a threat or cause Muslims' discomfort, particularly in terms of their health and well-being.[357] The *Qur'an* notes, "*Allah* intends for you ease and does not intend for you hardship".[358] "And *Allah* wants to lighten for you [your difficulties]; and mankind was created weak".[359] Further, the Prophet says: "The religion (of Islam) is easy, and whoever makes the religion a rigour, it will overpower him".[360]

Despite *Shari'a prohibiting* the consumption of certain foods and drinks such as pork and wine*, Shari'a* teachings authorise *mukallafs* to consume *forbidden* substances in situations of necessity. Muslim jurists apply the following verse of the *Qur'an* to the use of unlawful substances under the principle of necessity, including medical necessity: "He has only prohibited for you carrion, blood, the flesh of swine…then, whoever is compelled by necessity, neither seeking pleasure nor transgressing, there is no sin on him. Verily, *Allah* is most-forgiving, very-merciful".[361] This verse uses the term "necessity" and emphasises that in the case of necessity, a person would not be deemed sinful for consuming ordinarily *forbidden* food. Judging from this *Qur'anic* verse, Muslim jurists establish the jurisprudence maxim: *Necessity removes prohibition* (the maxim of *necessity*).[362] The following discussion presents a brief overview of the principle of *necessity* as defined by classical and contemporary Muslim jurists.

In the classical Islamic schools of jurisprudence, specifically in the *Hanafi* school, Al-Jassas maintains that *necessity* refers to the fear of harm to one's life or physical organs if an individual refrains from consuming unlawful food or drinks.[363] In *Shafi* jurisprudence*,*

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[355] The importance of health in *Shari'a* has been discussed in detail in Chapter 4, 58-65.
[356]Siti Nur Ali and Setiyawan Gunardi, 'Porcine DNA in Medicine toward Postpartum Patients from Medical and Islamic Perspectives in Malaysia' (2021) 3(1) International Journal of Halal Research 29, 29
[357] Ibid.
[358] *Sura Al-Baqra*.185.
[359] *Sura Al-Nisa*.28.
[360] *Riyad As-Salihin* (*Hadith*145).
[361] *Sura Al-Baqra*.173.
[362] See M Al-Zuhayli (n 189) vol1, 276
[363]Ahamad Ali Abu-Baker Al-Jassas, *Ahkam Al-Quran* [Provisions of The *Qur'an*] (Muhammad S Al-Qamhawi ed, vol 1, *Dar Ihya Al-Turath Al-Arabi* 1985) 160.

Al-Suyuti and Al-Zarkashi define *necessity* as critical circumstances where one faces a life-threatening condition or imminent death unless they perform a *forbidden* action.[364] Al-Dardir, a jurist from the *Maliki* school, maintains that *necessity* refers to the act of safeguarding life by preventing it from being lost or suffering significant harm.[365] Ibn-Qudama from the *Hanbli* school states that *necessity* is a situation in which a person experiences the fear of losing their life if they refrain from consuming forbidden food.[366] The jurists from all four schools provide many examples to illustrate *necessity* and mainly focus on preserving life by eating and drinking unlawful substances.[367]
Through careful examination of the definitions and examples provided by classical jurists, it can be concluded that in classical Islamic jurisprudence, the elements of *necessity* are:

a. The presence of fear about the loss of life or significant harm to bodily organs.
b. The consumption of the forbidden food will eliminate the fear.[368]

Contemporary Muslim jurists expand the definition of *necessity* to encompass a broader scope than what was observed by classical Muslim scholars. For instance, Zaydan establishes a more comprehensive definition of *necessity* than those defined by classical jurists. According to Zaydan, *necessity* refers to compulsive circumstances in which a person is forced to participate in unlawful actions.[369] Such unlawful acts are not limited to avoiding loss of life, but also extend to other necessities, such as progeny and property.[370] In addition, Al-Zarqa defines *necessity* as the situation that, if not fulfilled, would lead to a significant risk to an individual due to hunger or complete coercion. The significant risk is not restricted to the threat of death, but it is sufficient to lead to significant weakness or a health issue.[371] According to Al-Zuhaily, *necessity* is the extreme hardship that challenges an individual, leading to a fear of harm to their life, organs, progeny, mental abilities, or

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[364]Jala-Al-Din Al-Suyuti, *Al-Aashbah Wa Al-Nazayir Fi Qawaid wafurue:Fiqh Al-Shafi* (n 342) 84; Badr-Al-Din Al-Zarkashi, *Al-Manthur Fi Al-Qawaid: Fiqh Shafi* [Rules of Islamic Jurisprudential: *Shafi* Jurisprudence] (Tayseer M Faiq ed, vol 2, 2nd edn, *Wezart Al-Awqaf Al-Kuwaitia*1985) 317.
[365] Ahmad Muhammad Al-Adawi Al-Dardir, *Al-Sharh Al-Saghir Alaa Aqrab Al-Masalik Illa Madhhab Al-Imam Malik* [The Minor Explanation on The Path Closest to The Doctrine of Imam Ibn Malik] (Mustafa K Wasfi ed, vol 2, *Dar Al-Marf* 1119) 184.
[366]Abd-Allah Ahmad Ibn-Qudama, *Al-Mughni* [The Enricher: A Book of Islamic Jurisprudence] (Taha Al-Zaini, Mahmoud Abdel-Wahab Fayed and Abdel-Qader Atta eds, vol 9, 1st edn, *Maktabt Al-Qahra* 1969) 415.
[367] For instance, if one were stranded in the desert with only wine available to quench their thirst, and if the person abstained from consuming wine, they would die from thirst. In this scenario, necessity allows the person to drink wine. For more examples, see generally, Al-Qurtubi, (n 62) vol 2, 228-232; Ibn-Qudama (n 366) vol 9, 415- 418.
[368] Note: the definitions of *necessity* according to the four schools of thought prioritise only one of the five necessities of *maqasid al-shari'a*, life, while neglecting the other necessities, including religion, mind, posterity and property. This provokes inquiries, as the classical jurists have a profound knowledge of other situations of *necessity* relating to *maqasid al-shari'a* and have extensively and comprehensively discussed them in their works. The jurists utilised the concept of *necessity* to justify many rulings that facilitate and remove hardship by issuing merciful rulings. These rulings were not restricted to protecting life alone, but also encompassed the preservation of all necessities in *maqasid al-shari'a.* However, their definitions of *necessity* were limited solely to situations where one's life is preserved through the consumption of prohibited substances. What may be inferred from this, albeit not conclusively, is that the definition of *necessity* was a particular interpretation of the verse of the *Qur'an,* and it functions as a legal guideline for applying *necessity* to all topics that impact *maqasid al-shari'a*. Regardless of the main rationale for the difference between the definition of necessity among Muslim jurists and their practical implementation, they maintained an understanding of the principle of *necessity* and employed it as an exception to justify departing from *prohibited* command in specific situations, in favour of more merciful rulings.
[369] Abdul-Kareem Zaydan, *Halat Al-Darura Fi Al-Sharia Al-Islamia* [The State of Necessity in Islamic Law] (vol 1, *Matbat Al-Mani* 1970) 9.
[370] Ibid.
[371] Mustafa A Al-Zarqa, *Al-Madkhal Al-Fiqhi Al-Aam* [Introduction to Islamic Jurisprudence] (*Dar Al-Qalam* 2004) 1004.

possessions.[372] In such circumstances, participating in the *forbidden* conduct in *Shari'a* becomes *permissible*.[373]

Through a strict reading of the definitions provided by the contemporary *Shari'a* scholars, it can be deduced that the elements of *necessity*:

a. There must be a situation of a genuine fear of death or severe harm.
b. This situation targets one of the five necessities in *maqasid al-shari'a.*[374]
c. Engaging in a prohibited act is the sole option to exit this situation.

The distinction in the meaning of *necessity* between classical and contemporary jurists can be observed through two main aspects. Firstly, the principle of *necessity* that permits engaging in *forbidden* action in S*hari'a* is not solely established based on the fear of death, but also encompasses all five necessities in *maqasi al-shariah*. Secondly, the state of *necessity* stems from famine or extreme thirst to consume *forbidden* substances and can also be caused by coercion.

Muslim jurists recognise the notion of *necessity* and use it in the context of medicinal substances that include unlawful components like alcohol and swine.[375] Al-Qaradawi discusses the medical *necessity* and maintains that the utilisation of *prohibited* medications, like medicines containing alcoholic substances or swine derivatives, is *permissible* in "critical situations".[376] According to Al-Qaradawi, "critical situations" refer to situations where the patient's life is at risk if they do not take the medicine, and no alternative treatment is available from *halal* (pure/clean) materials.[377] Al-Tayyar and others argue that unlawful treatment becomes *permissible* if the patient's recovery and life depend on it.[378] In addition, no available *halal* medication can be used to save a life. This is because when *necessity* exists, what is *prohibited* becomes *permissible*.[379]

According to the perspective of the previous jurists, the notion of medical *necessity* appears to only apply to medical interventions that save life. However, other Muslim jurists expand the medical *necessity* to include situations where the prohibited substances-based medication is *necessary* to preserve the patient's health. Ibn-Najim maintains that it is *permissible* for a Muslim to utilise medication containing a *prohibited* ingredient to treat their disease, provided that the patient is certain that the *prohibited* medication is an effective cure for the disease and there is no *halal* alternative available.[380] The quantity of

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[372] Wahbah Zuhayli, *Nazariyat Al-Durwora Al-Sharia* [The Theory of Necessity in *Shari'a*] (*Mussat Al-Ressala* 1985) 73.
[373] Ibid.
[374] The five necessities in *maqasid Al-shar'a* include religion, life, mind, progeny, and property. See Chapter 1, Section 1.7.2 (a), 32-33.
[375] See, Al-Tayyar and others (n 257) vol 12, 36; W Al-Zuhayli, *Al-Fiqh Al-Islmaic Wa Adlath* (n 258) vol 4, 2610-11.
[376] Yousif Al-Qaradawi, *Al-Halal Wa Al-Haram Fi Al-Islam* [The Lawful and Unlawful in Islam] (*Maktabt Wahba* 1997) 64.
[377] Ibid.
[378] Al-Tayyar and others (n 257) vol 12, 136.
[379] Ibid.
[380] Zein-Al-Din Ibn-Najim, *Al-Bahr Al-Raayiq Fi Sharh Kanz Al-Daqayq*, [The Clear Explanation: Treasure of Minor Matters in Islamic Jurisprudence] (vol 1, 2nd edn, *Dar AlKetab Al-Islami*[No date]) 122.

the treatment used is limited to the extent necessary for survival and healing the disease.[381] This is based on the sub-rule of *necessity*: *necessity is limited to what is necessary*.[382] This sub-maxim means that in situations of *necessity*, treatments that contain *prohibited* substances must not be expanded beyond the need required to address the necessity.

Al-Zuhayli affirms that, under *necessity*, the use of *prohibited* treatment is *permitted* if the patient knows that such treatment will cure the illness and no alternative *halal* treatment is available.[383] Al-Zuhayli adds that, concerning wine, it is *permissible* to use wine for medical purposes to hasten the patient's recovery, provided that the amount used is small and does not cause intoxication.[384] This is because achieving an interest in health surpasses the interest in avoiding impure substances.[385] Yet, Al-Zuhayli affirms that *necessity is generally limited to what is necessary*.[386] Therefore, in cases of medical necessity, the patient shall be restricted to using the treatment only to the extent required to cure the disease. To sustain this judgement, jurists refer to examples from the Prophetic statements, which indicate that for medical purposes, it is *permissible* to use substances that were originally *forbidden* to consume or wear. For instance:

> "A group of eighty people from '*Ukl*' came to the Prophet, but the climate of Al-Medina did not suit them, and they fell sick. They complained about that to the Messenger of Allah and said: Why don't you go out with our herdsmen and drink the milk and urine of the camels? They said: Yes (we will do that). They went out and drank some of the (camels') milk and urine, and they recovered".[387]

The four schools of jurisprudence agree that it is *prohibited* to consume urine due to its impure nature.[388] Nevertheless, the Messenger authorised urine consumption to maintain good health conditions.

The jurists cite a further example that concerns the *prohibition* on Muslim men wearing silk and gold. However, for medical *necessity,* the wearing of the forbidden materials has been made *permissible*. In *Shari'a*, wearing silk clothes and gold is *forbidden* for men.[389] However, for medical purposes, "the Prophet allowed Az-Zubair and Abdur-Rahman to wear silk because they suffered from an itch".[390] Further, Urfajah bin As'ad reported: "My nose was severed on the Day of *Al-Kulab* during *Jahiliyyah*. So, I got a nose of silver which caused an infection for me, so the Messenger of *Allah* ordered me to get a node made of gold".[391] The Prophetic *hadiths* demonstrate that the Prophet has shifted the ruling of *prohibition* to *permissibility* for medical *necessity* even in the absence of life-threatening situations.

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[381] Ibid.
[382] For more information about this sub-maxim, see M Al-Zuhayli (n 189) vol 1, 281
[383] WAl-Zuhayli, *Al-Fiqh Al-Islmaic Wa Adlath* (n 258) vol 4, 2610.
[384] Ibid.
[385] Ibid.
[386]Ibid vol1, 40.
[387] *Sunan An-Nasa'i* (*Hadith* 4024).
[388] WAl-Zuhayli, *Al-Fiqh Al-Islmaic Wa Adlath* (n 258) vol 1, 303.
[389]Al-Qaradawi (n 376) 74.
[390] *Sahih al-Bukhari* (*Hadith* 5839).
[391] *Jami At-Tirmidhi* (*Hadith* 1770).

In this context, it is essential to note that the principle of necessity, derived from the consumption of unlawful substances such as wine and swine, serves as a normative and guiding principle for similar medical treatments that contain unlawful substances or involve unlawful procedures in *Shari'a*. Once the conditions of necessity are met, the principle of necessity will apply to the unlawful medical intervention.[392]

To conclude, based on the discussion of Islamic jurisprudence about the use of unlawful substances for medical purposes, it is morally *prohibited* for *a mukallaf* to seek medical treatment:

1. In all cases, the medical treatment contains unlawful substances or involves an unlawful procedure in *Shari'a*.

However, Islamic jurisprudence recognises the significance of human life and health. Therefore, the maxim of *necessity* provides a *mukallaf* with a moral exception to seek medical treatment that contains unlawful substances. *Necessity* exists:

a) In all cases, the medical treatment is more likely to preserve life.
b) In all cases, the medical treatment is more likely to heal the disease.
c) No *halal* alternative medical treatment exists in requirements (a) and (b).
d) The amount of treatment administered is restricted to the extent necessary for meeting conditions (a) and (b)

7.7.2 The Principle of *Istihalah* (Substance Transformation)

In addition to the principle of *necessity*, Islamic jurisprudence recognises and applies the principle of *istihalah*[393] to transform the final product, initially including unlawful substances, into one that is *halal* for Muslim use. Kamali states that:

> "The principle of *istihalah* in *Shari'a* is concerned with substance transformation, either naturally or through chemical and other forms of intervention. When a forbidden substance is transformed such that, it is no longer the same, then so are the rules of *Shari'a* concerning it".[394]

In this sense, *istihalah* refers to transforming a substance into a new substance with a different taste, colour, and odour.[395] Accordingly, the "impure" substances become "pure" materials[396]. Thus, the *Shari'a* ruling of using materials that have undergone the *istihalah* process becomes *permissible*.

Similarly, Al-Shanqeeti defines *istihalah* as the transformation of an impure material into a pure one, or the transformation of an impure substance into a pure one due to the agent's

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[392] For example, the principle of *necessity* will apply to a *forbidden* procedure in *Shari'a.* For instance, therapeutic abortion requested by a pregnant woman for life-saving.
[393] In Islamic jurisprudence, some jurists use the Arabic term '*Istihalah*', and others use the Arabic term '*Tathyir'*. This thesis uses the term '*Istihalah*'.
[394] Kamali, '*Haram*, Permanence, and Change: The Principle of Substance Transformation (*Istihalah*)' (n 281) 92.
[395] Ibid.
[396] Ibid.

actions.[397] Therefore, such transformation shifts the unlawful substances to new *halal* materials. Al-Zahily also defines *istihalah* and maintains that *istihalah* is the process of transforming one substance into another with a different specification It involves changing impure substances into pure ones.[398] Thus, it transforms unlawful substances into *halal* substances in *Shari'a*

In Islamic jurisprudence, Muslim jurists' positions differ about the *permissibility* of using unlawful materials transformed through *istihalah.* This includes the usage of medications in capsule form, vaccines with alcohol and swine ingredients, toothpaste and mouth antiseptics that contain alcohol, etc. The following discussion presents the Islamic debate about alcohol and porcine derivatives that have been transformed through *istihalah.* The discussion is limited to presenting jurists' various viewpoints and the underlying grounds upon which they have made their judgments without delving into the nuances of the scholarly debates or their responses to opposing views.

1. *Istihalah* of wine in Islamic Jurisprudence

There is a consensus amongst all the schools of Islamic jurisprudence that if wine naturally fermented into vinegar, it becomes a pure substance; thus, it becomes lawful for consumption.[399] Jabir reported: "When the Prophet asked his family for condiments and was told that they had only vinegar, he called for it and as he was using it in his food, he said, 'Vinegar is a good condiment; vinegar is a good condiment".[400] The prophet's commendation of vinegar provides explicit proof that the usage of vinegar is *permissible*, although it originates from wine.

However, if wine is transformed through external influences, the perspectives of Islamic jurisprudence are divided into three distinct views: a) Alcoholic substances become lawful after *istihalah*. b) Alcoholic substances remain unlawful after *istihalah*. c) Deliberate *istihalah* is *discouraged*, yet alcoholic substances become lawful after *istihalah.*

a) Alcoholic substances become lawful after *istihalah*

This is the perspective of the *Hanafi* school [401]and one account of Malik, the founder of the Malik school.[402] According to this viewpoint, if alcohol undergoes a chemical process that

[397] Muhammad Al-Shanqeeti*, Sharah Zad Al-Mustaqni* [Explanation of the Requirements for Muslims to be Convinced of Their Faith: A book of Various Matters in Islamic Jurisprudence] (vol 3, *Al-AShabaka Al-Ismaia* 2007) 12.
[398] W Al-Zuhayli, *Al-Fiqh Al-Islmaic Wa Adlath* (n 258) vol 7, 5265.
[399]Yahya Muhammad Abu-Muzzafar Ibn-Hubayra, *Ekhtilaf Al-Iumah Al-Ulama* [The Disagreement on Various Jurisprudential Matters Between Muslims Jurists] (Muhammad A Baydoun ed, vol 1, 1st edn, *Dar Al-Kutb Al-Elmia* 2002) 30.
[400] *Mishkat al-Masabihm* (*Hadith* 4183).
[401]Ala-Al-Din Al-Kasani, *Bada'i Al-Sana'i Fi Tartib Al-Sh-Shara'I* [*Unseen Artistry in the Arrangement of the Religious-Legal Regulations: Hanafi Fiqh*] (Ali Moawad and Adel Abdel Mawgoud eds, vol 5, 1st edn, *Mutba't Al-Jamalia* 1910) 113.
[402] Muhammad Ahamad Al-Disuqi, *Al-Sharah Al-Kabeer Fi Hashiat Al-Disuqi* [The Great Explanation According to Al-Disuqi's Footnote] (vol 1, *Dar Al-Fiker* [No date]) 48.

transforms it into another substance, then the new substance is considered pure. Therefore, it is lawful.[403] This judgment is grounded on *qiyas*.[404]

In *Shari'a*, it is *forbidden* to consume the meat of dead animals, as it is deemed impure.[405] However, in *hadith* literature, "Maimuna was given a goat in charity, but it died. The Messenger of *Allah* happened to pass by that and said: Why did you not take off its skin? You could put it to use after tanning it. They [the Companions] said: It was dead. The Prophet said: only its eating is prohibited".[406] The Prophetic statement demonstrates that the prohibition does not extend to the utilisation of leather from dead animals during the tanning process.

In context of wine, jurists establish *qiyas* between tanning a dead animal's leather and the process of alcohol acetification.[407] This analogy is built on the common features of (a) and (b), both of which are impure substances. The process of removing impurities from substance (a) is achieved by the intervention of an external actor, which is tanning. Equally, through the acidification process, wine can be transformed into a pure form, making it lawful. The acetification of wine renders the new substance of wine a lawful material, since it effectively removes the undesirable components of wine and replaces them with good ones. Thus, the crucial aspect is the current state of the new product, rather than its original state.[408]

b) Alcoholic substances remain unlawful *after istihalah*

This is the opinion of the *Shafi* school[409] and the *Hanbali* school.[410] The jurists argue that if wine undergoes a chemical interaction with another material, it will not attain purity; therefore, the new product is considered unlawful. Scholars of this perspective reinforce their argument based on the *hadith* of the Prophet: "*Allah's* Messenger was asked about making vinegar out of wine. He said, 'No' ".[411]

This *hadith* bans the transformation of wine into vinegar and indicates that the certification process is not authorised. If it were allowed, the Prophet would provide approval when asked for it. Therefore, although wine goes through *istihalah* and the intoxicating portion is removed, the resulting product remains impure and thus unlawful.[412]

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[403] See Al-Kasani (n 401) vol 5, 113; Disuqi (n 402) vol 1, 48.
[404] *Qiyas* (analogical reasoning) is a source of *fiqh*. The definition of *qiyas* has been introduced in Chapter 1, Section 1.5.2 ,27.
[405] The prohibition of consuming the meat of dead animals is established in the *Qur'an*: "Say, in what was revealed to me, I find nothing forbidden to a consumer who eats it, except carrion…, which is *rijs* [impure]". *Sura Al-An'am*.145; "He [God] has forbidden you carrion." *Sura Al-Baqra*.173; "Prohibited for you are carrion" Sura Al-Ma'idah.3; "He [God] has forbidden you carrion.". *Sura Al-Nahl*. 115.
[406] *Sahih Muslim*, (*Hadith* 363a).
[407] Al-Kasani (n 401) vol 5, 114, Al-Disuqi (n 402) vol 1, 48-49.
[408] Ibid.
[409] Al-Nawawi, *Al-Majmu' Sharh Al-Muhadhab* (n 93) vol 2, 575; The perspective of Shafi's school is also referenced when Maliki school presents their viewpoint, See Al-Disuqi (n 402) vol 1 48.
[410] Ahmad Taqi-Al-Din Ibn Taymiyya, *Al-Fatawa Al-Kubra* [The Major *Fataws* of Ibn Taymiyya: A Book of the Principles, Roots of Jurisprudence, Monotheism, and Belief in Islam] (vol 1, 1st edn, Dar Al-Kutb Al-Elmia 1987) 307-308; Ibn-Qudama (n 366) vol 9,173.
[411] Al-Nawawi, *Al-Majmu' Sharh Al-Muhadhab* (n 93) vol 2, 575; Ibn Taymiyya, *Al-Fatawa Al-Kubra* (410) vol1, 307-308; Ibn-Qudama (n 366) vol 9,173.
[412] Ibid.

c) Deliberate *istihalah* is *discouraged*, yet alcoholic substances become lawful after *istihala*

This is the opinion of the jurists of the *Malki* school.[413] Their perspective aligns with the position of Malik, the founder of this school, as well as the *Hanafi* school's perspective. The scholars of the *Malki* school maintain that after *istihala*, wine is converted into a new substance that is pure and lawful for consumption.[414] However, the *Malik* jurists argue that *istihala,* which results from an external agent's intervention, is morally undesirable.[415] This is because the *prohibition* of alcohol is proven by explicit evidence in the high sources of *Shari'a.*

Accordingly, there is a concern that individuals may attempt to manufacture and utilise alcohol through various methods to escape the *prohibition.* To address such moral concerns, the *Malki* jurists use the jurisprudential principle of *blocking means to evil.* [416] This principle is applied to transform a *permissible* ruling into *discouragement,* thereby preventing the exploitation of means to commit moral corruption. Therefore, the *Malki* school rules that it is *discouraged* to reproduce and consume alcohol through *istihalah,* unless there is a *necessity* to transform wine through *istihalah.*[417]

2. *Istihalah* of Swine Derivatives in Islamic Jurisprudence

Moving to the issue of swine derivatives being transformed into new substances through *istihalah*, the Islamic schools of thought hold two distinct positions on the *permissibility* of consuming swine ingredients in these new substances. The opinions can be categorised as: a) Swine derivatives become lawful after *istihalah*. b) Swine derivatives remain unlawful after *istihalah.*

a) Swine derivatives become lawful after *istihalah*

This is the position of the *Hanafi* school, except for Abu Yusuf,[418] and some jurists of the *Malki* schools,[419] as well as the favoured opinion among three jurists of the *Hanbali* school, as stated by *Imam* Ahmad, Ibn Taymiyyah, and Ibn Qudama.[420] Advocates of this perspective maintain that *istihalah* converts a naturally impure substance derived from swine into a new and pure one.[421] Hence, *istihalah* renders the unlawful substance lawful. This judgment is developed through the application of analogical reasoning and jurisprudential analysis. To sustain their jurisprudential opinion, the jurists mainly use the previously mentioned *hadith* concerning the method of tanning dead animals.[422]

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[413] Muhammad Ahmad Ibn-Rushd, *Bdayat Al-Mujtahid Wa Nihayat Al-Muqtasad* [The Point for *Mujthid* to End with Middle Course of Islamic Jurisprudence] (vol 3, *Dar Al-Hdith* 2004) 28.
[414] Ibid.
[415]Ibid.
[416] Ibid.
[417] Ibid.
[418] Al-Kasani (n 401) vol 1, 86.
[419] Al-Disuqi (n 402) vol 1, 48-50.
[420] Ibn Taymiyya, *Al-Fatawa Al-Kubra* (n 410) vol 1, 252; Ibn-Qudama (n 366) vol 1,57.
[421]Al-Kasani (n 401) vol 1, 86; Al-Disuqi (n 402) vol 1, 48-50; Ibn Taymiyya, *Al-Fatawa Al-Kubra* (n 410) vol 1, 252; Ibn-Qudama (n 366) vol 1,57.
[422] Ibid.

The *Hanafi* jurists argue that the existence of impurities is a feature of the substance, and by eliminating this attribute from the new substance, the impurity is likewise eradicated, resulting in a transformation of the product's colour, form, and scent.[423] Consequently, the new substance attains a state of purity, cleanliness, and lawfulness for utilisation. The jurists illustrate their argument by stating many instances. For example, the impurity of a dead animal can be removed by tanning, resulting in its purification. Furthermore, the consumption of animal waste is inherently impure and unlawful. However, the ash derived from animal dung is pure and lawful for cooking. In addition, human and animal waste are buried in soil; therefore, the waste decomposes with the help of external elements, such as sunlight and air. Thereafter, the clay becomes pure and lawful for various uses. Accordingly, the ruling is determined by such transformation of the substance, rather than its original state.[424]

In line with the *Hanafi* school, some of the *Malki* jurists claim that *istihalah* methods can purify the impure substances.[425] For instance, blood is forbidden for consumption. However, musk is derived from deer blood, pure and deemed lawful after being processed into grainy powder. Similarly, plants and fruit fed with water containing impure materials are lawful for human consumption. Furthermore, cooking the alcoholic substance with fire purifies it, regardless of the quantity of alcohol. Therefore, when impure substances transform, the ruling of *prohibition* is lifted, and it becomes *permissible*.[426]

Equally, some jurists in the *Hanbali* school maintain that naturally impure materials acquire purification through the process of *istihala*.[427] This judgment is built on the analogy of the *hadith* concerning the leather of a dead animal. Based on the Prophetic statement, a dead animal is impure; however, if the basis for its description as impure is no longer in existence, then it should be regarded as pure. When an impure material transforms, it does not leave any trace in terms of its flavour, colour, or scent. It becomes a good material and not impure, and the current state of a product is more significant than its origin. The judgment on impurity cannot remain when the name and nature of the object have undergone modification. Therefore, the correct analogy suggests that the approach may be extended to all other types of impure substances that have undergone a transformation process.[428]

b) Swine derivatives remain unlawful after *istihalah*

This is the perspective of the *Shafi* school,[429] as well as some jurists of the *Hanbali* school[430] and Abo Yusuf from the *Hanafi* school.[431] Fundamentally, the argument of the jurists is

[423] Al-Kasani (n 401) vol 1, 86.
[424] Ibid.
[425] Al-Disuqi (n 402) vol 1, 48.
[426] Ibid.
[427] Ibn Taymiyya, *Al-Fatawa Al-Kubra* (n 410) vol 1, 252; Ibn-Qudama (n 366) vol 1, 51.
[428]Ibid.
[429] Al-Nawawi, *Al-Majmu' Sharh Al-Muhadhab* (n 93) vol 2, 568.
[430] Ibn-Qudama (n 366) vol 1, 27.
[431] Al-Kasani (n 401) vol 1, 86.

based on the principle of *istishab* (presumption of continuity).[432] *Istishab* refers to the presumption of the continued existence of a fact until there is evidence of a change of the state.[433] This continuance is not proved by positive evidence, but by the absence of evidence.

In the context of *istihalah,* the school of *Shafi* argue that an inherently impure substance remains impure, and *istihalah* does not change its impurity.[434] Furthermore, the jurists of the *Shafi* school state that there is no method to purify a material that naturally contains impure substances. However, two exceptions exist where *istihalah* turns the impure substance into a pure one.[435] The first exception is specific to the leather of a dead animal, which undergoes purification through tanning. The second exception relates to wine that naturally transforms into vinegar. Thus, *istihala* only applies to these two exceptional situations due to explicit textual evidence from the Prophetic statements.[436]

In line with *Shafi's* jurists*,* Abo Yusuf from the *Hanafi* school claims that *istihalah* does not purify an inherently impure substance.[437] Accordingly, impure substances continue to exist and remain active.[438] Equally, some jurists of the *Hanbali* school maintain that *forbidden* substances cannot be purified through *istihalah* due to their intrinsic impurity.[439] Hence, such substances maintain their impurity since impurity is an inherent feature of their origin.[440]

3. *Istihalah* of Wine and Swine in *Fatwa* of IIFA

Given the clear division amongst Islamic jurisprudence scholars on *istihalah* of unlawful substances and the advancements in medicine that incorporate swine derivatives and alcoholic components in numerous contemporary medications, in 2015, the IIFA (IIFA 2015) reconsidered the issue of *istihalah* of unlawful additives in medication.[441] The IIFA recognises the principle of *istihalah* and concludes that:

> "In *Fiqh* [Islamic jurisprudence] terminology, *Istihalah* means occurrence of real change in the defiled or Shariah-banned material leading to its conversion to another material that differs from the original one in characteristics and attributes… As chemical interaction can be done intentionally through scientific means and techniques, while it can also take

[432] The term is derived from the Arabic word '*suhbah*', which means to accompany. It is one of the fundamental notions of legal reasoning in Islamic jurisprudence.
[433] Muhammad Al-Shanqeeti, *Sharah Al-Waraqat Fi Usul Al-Fiqh* [Explanation of Fundamentals of Islamic Jurisprudence] (vol 5, *Al-Shabka Al-Islmaia* [No date) 15.
[434] Al-Nawawi, *Al-Majmu' Sharh Al-Muhadhab* (n 93) vol 2, 568; Ibn-Qudama (n 366) vol 1, 27.
[435] Al-Nawawi, *Al-Majmu' Sharh Al-Muhadhab*'(n 93) vol2, 568.
[436] Ibid.
[437] Al-Kasani (n 401) vol 1, 86.
[438]Ibid.
[439] Ibn-Qudama (n 366) vol 1, 27.
[440] Ibid.
[441] The Council of the International Islamic *Fiqh* Academy of the Organization of the Islamic Cooperation, 'Transmutation and Dilutiotion of Additives in Food and Medication' (*Fatwa,* 210 (6/22), 22-25 March 2015) available at <https://iifa-aifi.org/ar/3988.html> accessed 27 November 2023.

> place – invisibly – as per the forms that *Fiqh* scholars have indicated, including for instance: pickling, tanning and, burning. If chemical interaction is partial, it is not considered as transmutation and, therefore, if the material in question is originally defiled, it remains as it is and should not be used."[442]

Upon a strict reading of the IIFA 2015 statement, the *fatwa* acknowledges that impure substances can be transformed into pure material through 'complete' *istihalah,* whether such transformation occurs naturally or through chemical interaction. Therefore, medications manufactured from *prohibited* substances become lawful after complete *istihalah*. However, if *istihala* is 'partial', the substances remain impure. Thus, the medication is unlawful for medical purposes.

Based on this ruling, for instance, ointments, creams, and tablets containing swine ingredients are unlawful for medical use, unless such medication is transformed through 'complete' *istihalah*. Examining whether a prohibited substance turns into a lawful one through 'complete' *istihalah* is the task of experts, technicians, religious and medical authorities. For instance, before being placed on the market in Saudi Arabia, all medications undergo a test and examination conducted by the Food and Drug Authority (FDA). The FDA issues a *halal* certificate if such medicines are compatible with *Shari'a* teachings.

It is important to note that, in the context of *istihalah* of unlawful substances while seeking *prohibited* treatments, Islamic jurisprudence primarily agrees that the principle of *necessity* provides a basis for using medicines that contain unlawful substances. However, in classical Islamic schools of jurisprudence, a distinct dichotomy exists regarding the matter of *istihalah* and its legitimacy in transforming an unlawful substance into a lawful material. The *fatwa* of IIFA 2015 has adopted the view that *istihalah* transforms a *prohibited* material into a lawful one, when there is a 'complete' *istihalah.*

The matter of *istihalah* may appear relatively straightforward concerning alcoholic substances. The rationale behind the prohibition of alcohol is obvious, as it causes intoxication, thereby affecting the mind. This explains the lenient ruling of IIFA 2015, as will be explained in the following heading, about the use of alcoholic substances for external applications*,* as the mind is secured. Thus, if the alcoholic substance employed in the treatment does not induce intoxication, complete *istihala* is achieved, and hence, it is *halal*.

However, for some considerations, the issue regarding swine derivatives that have been transformed into lawful material through *istihalah* is more complex. Despite efforts to understand the divine reasons behind the prohibition of consuming swine derivatives, the genuine wisdom of the prohibition is known only to God. Additionally, Muslim jurists have a consensus that swine derivatives are inherently impure. Furthermore, the argument of Muslim scholars who perceive that *istihala* renders a forbidden substance lawful is mainly

[442] Ibid.

grounded in *qiyas,* which remains a source of *fiqh*. In other words, it has not been established based on texts of the sources of *Shari'a*.

The division of views among Muslim jurists regarding *istihalah* has also manifested in practice. *Istihala* concerning transforming unlawful substances due to their impurity into lawful substances is not accepted and authorised by all councils of *Ifta* across the Islamic world.[443] In a contemporary example, the use of porcine trypsin during the early production process of the AstraZeneca COVID-19 vaccine has caused debates in the Islamic world. For instance, the Indonesian *Ulama* Council issued a *fatwa* stating that the AstraZeneca vaccine is *prohibited* due to its inclusion of swine trypsin. However, its usage is *permissible* under the principle of *necessity*.[444] Other Islamic *ifta* Councils, such as Saudi Arabia, the United Arab Emirates, Egypt, and Malaysia, used the vaccine without concerns over its *prohibition*.[445] For Instance, the Council of *Ifta* of Saudi Arabia maintain that chemical processes and transformations involved in vaccine manufacture are governed by the principle of *istihalah* in Islamic jurisprudence.[446]

Based on the discussion of Islamic jurisprudence and the *fatwa* of IIFA about the principle of *istihalah*, it is morally *prohibited* for *a mukallaf* to seek medical treatment.

1. In all cases, the medical treatment contains unlawful substances in *Shari'a*.

However, the principle of *istihalah* turns medications that contains unlawful substances into a lawful one. *Istihalah* exists:

a) In all medical treatments, unlawful substances are transformed into lawful substances naturally or chemically through complete *istihalah.*
b) (a) is fulfilled if the medical treatment is approved by a *halal* certificate product.

Using Alcoholic Substances in External Medical Applications

The *fatwa* of IIFA 2015 has introduced more provisions regarding the use of alcoholic substances in treatments. The IIFA states that "*Shari'a* does not consider alcohol impure material."[447] This statement agrees with what has been mentioned earlier in Section 7.7 of this Chapter, "wine is originally a clean drink, and its impurity is moral by divine decree in the *Qur'an*".[448] The consumption of alcohol is prohibited due to its intoxicating effects. In this sense, the IIFA statement distinguishes between products manufactured from swine and alcohol for external applications. Hence, the IIFA rules that it is *permissible* to use alcohol medically as an antiseptic "for the skin (wounds) and instruments or as a germicide".[449]

[443] Yan Mardian, Kathryn Shaw-Shaliba, Muhammad Karyana and Chuen-Yen Lau, 'Sharia (Islamic Law) Perspectives of COVID-19 Vaccines' (2021) 2 Frontiers in Tropical Diseases 788, 4.
[444] Ibid.
[445] Ibid.
[446] Ibid 5.
[447] *Fatwa* of IIFA 2015, 'Transmutation and Dilutiotion of Additives in Food and Medication' (n 441).
[448] This statement is mentioned earlier in this Chapter, Section 7.7, 182.
[449] *Fatwa* of IIFA, 'Transmutation and Dilutiotion of Additives in Food and Medication' (n 441).

This ruling is clearly based on the rationale behind the prohibition of swine and alcohol. Swine is *forbidden* because it is impure by nature, while alcohol is prohibited due to its intoxicating effects. Swine derivatives, therefore, remain unlawful for external use unless there is a case of *necessity* or *Istihalah*. However, treatments include alcoholic substances that are applied externally, not ingested, and do not enter the body's internal system. Therefore, using alcoholic substances for external medical application would not result in intoxication and hence impact the mind.

Judging from the ruling, the *fatwa* of IIFA, in the absence of a situation of *necessity* or *istihalah, a mukallaf* is morally *prohibited* from seeking medical treatment:

1. In all cases, the medical treatment contains unlawful substances in *Shari'a*.

However, a special rule provides a *mukallaf* with a moral exception to seek medical treatment that contains alcoholic substances, since such substances will not cause intoxication. The special rule exists:

a) In all medical treatments, the alcoholic medication is administered for only external application.

According to the five rulings in *taklif*, *prohibition* refers to an action that *Shari'a* has *forbidden* by a definitive text.[450] It is a mandatory command from God for a *mukallaf* to abstain from doing an action. However, if such a command is violated, the wrongdoer is subjected to divine punishment.[451] Thus, a *mukallaf* who abstains from undergoing a *forbidden* treatment will be rewarded. However, seeking a *prohibited* medical treatment can result in moral consequences. In this sense, a *mukallaf* may need to consider morally seeking *prohibited* medical interventions in specific situations. The threshold of *prohibited* treatment is obtaining a *prohibited* medical treatment without an exceptional situation of *necessity* or *istihalah.* In addition, administering alcohol-based treatments beyond external application, yet the cases of *necessity* and *istihalah* do not exist.

Based on the discussions in this chapter, the categorisation of medical treatment behaviours is established based on the moral value associated with the medical treatment under the divine discourse of *taklif.* The moral significance of medical treatment encompasses the five *taklif* rulings: *obligatory, prohibited, permissible, recommended,* and *discouraged.* A clear distinction is present in the moral value associated with each *taklif* ruling. This distinction can be categorised into two circles:

The first circle includes *obligatory* and *prohibited* treatments: In this circle, *Shari'a* unequivocally defines consequences for omitting the moral value associated with *obligatory* or *prohibited* treatment. A *mukallaf* who fails to undertake *obligatory* treatments

[450] Kamali, 'The Prohibited (Haram)' (n 281) 57.
[451] Ibid.

bears moral responsibility. A *mukallaf* who engages in prohibited treatments in a situation other than *necessity* or *istihalah* also faces moral consequences.

The second circle encompass *recommended*, *discouraged,* and *permissible* treatments. In this context, *Shari'a* has not defined moral consequences for omitting the moral value of *recommended*, *discouraged,* and *permissible* treatments. Therefore, a *mukallaf* who fails to undertake such treatments faces no moral consequences. However, a *mukallaf* who undertakes *recommended* treatments will be praised and remunerated, and a *mukallaf* who refrains from performing *discouraged* treatments will be rewarded and remunerated. In contrast, a *mukallaf* who undertakes or neglects *permissible* treatments will neither be praised nor punished for it.

In this sense, the divine burden of *taklif* associated with medical treatment is crucial for a *mukallaf* patient. This is because every behaviour in *Shari'a* has a moral value and can bring rewards or punishments to *mukallafs*. Such a moral framework is significant as it clarifies to a *mukallaf* patient the divine burden concerning medical treatment when their moral and medical decision come to their health. Thus, it enables *mukallafs* to assess medical treatment options based on their moral significance and the patient's aspirations for rewards or avoidance of punishments.

The categorisation of medical treatment behaviours discussed in the previous Sections of this Chapter is summarised for ease reference in the upcoming chapters; see Appendix A, Table A1.

7.8 Conclusion

This chapter investigates the moral value of medical treatment within the divine discourse of *taklif,* with the aim of establishing a moral framework for a *mukallaf's* autonomy in seeking medical treatment. Exploring the divine burden associated with medical interventions necessitates a recognition of how the moral value of each action is shaped in *taklif.* In *taklif*, every behaviour has a moral value, enabling the *mukallaf* to gain rewards or avert punishments.

The analysis of the moral values of medical treatment in the divine discourse of *taklif* demonstrates that the moral value of medical intervention in the divine burden includes the five rulings of *taklif*: *obligatory, prohibited, recommended, discouraged,* and *permissible*. The five rulings associated with medical treatments reveal the presence of two distinct moral dimensions when a *mukallaf* seeks medical treatment. Firstly, within the framework of seeking *obligatory* and *prohibited* treatment, certain established consequences will arise when the moral significance associated with these treatments is neglected. Secondly, in the context of obtaining *recommended, discouraged,* and *permissible* medical treatments, there are no moral consequences when the moral value linked to the proposed treatments is disregarded.

The investigation of the divine discourse within the framework of medical treatment and its moral significance for a *mukallaf* when making moral decisions concerning their health substantiates the argument of Chapter Six that maximising the *mukallaf* patient's autonomy is crucial in medical decision-making when their health is concerned. The *mukallaf* patient cannot cultivate moral and spiritual growth or assess the moral consequences of their medical treatments unless their autonomy is respected in the context of medical decision-making. As Ajyad argues, this autonomy lifts humanity to the supreme value in the universe, which is the highest of all beings.[452] The utmost value derived from the capacity for autonomous decision-making cannot be attained by the patient if subjected to medical interventions under the paternalistic approach of physicians. Medical practitioners should morally respect patient autonomy and facilitate medical decision-making. Ultimately, when the patient bears moral responsibility solely before God for the medical interventions they undergo, all healthcare teams are morally required to respect that patient's autonomy in making medical decisions.

In medical practice, the principle of informed consent is the most prominent manifestation of respecting patient autonomy in modern bioethics.[453] Informed consent plays a vital role in enhancing the moral interests of *mukallaf* patients, as it empowers them to make decisions that align with their moral values and preferences and, by extension, their spiritual duties when health is their primary concern.

Thus, the next chapter moves forward to discuss the elements of informed consent as a moral principle that stems from respect for the patient's autonomy. In this discussion, the patient is not merely a recipient of medical treatment, but a moral actor in the decision-making process. To this end, the next chapter applies the theoretical framework of the conditions of *taklif,* as addressed in Chapter Six, to the context of the informed consent process in medical treatment.

[452] Abdul-Ridha Jiyad, Abdul-Ridha Jiyad, '*Mafhum Al-khilafa Al-illahia Lil Ensan Fi Al-Quran Al-Kareem Wa Kitabat Al-Ulama Al-Muslimen'* [The Concept of the Divine Succession of Mankind in The Holy Qur'an and the Comments of Muslim Scholars] (2008) 1(2) Kufa Journal of Arts and Literature 133, 140-148.
[453] Shabana, 'Limits to Personal Autonomy in Islamic Bioethical Deliberations on End-of-Life Issues in Light of the Debate on Euthanasia' (n17) 243.

Chapter 8: Applying The Theoretical Framework of Conditions of *Taklif* in the Context of Informed Consent to Medical Treatment

8.1 Introduction

The previous chapter establishes the moral framework of *mukallaf* autonomy in medical treatment, grounded in the divine burden of *taklif* and encompassing all five rulings, from obligation to prohibition. Recognising the importance of *mukallaf* autonomy, physicians are morally obligated to promote patient autonomy and facilitate decision-making through the principle of informed consent. This principle enables patients to act as moral agents in medical decisions concerning their health.

Yet, the question is how a *mukallaf* patient might make an autonomous and moral judgment about the medical treatment.

The theory of *taklif,* discussed in Sections 6.4 and 6.5 of Chapter Six, which generated the principle of autonomy, provides a theological foundation for an Islamic version of the key elements of the principle of informed consent in medical treatments. In the theoretical framework of conditions of *taklif,* the moral actor who bears the divine burden is referred to as a *mukallaf*. The status of *mukallaf* is that of a rational agent with the cognitive ability to understand the divine burden, assess the benefits and disadvantages of actions, and comprehend the moral consequences of their behaviour. In this sense, *taklif* presupposes a sufficient level of maturity and the capacity to distinguish between harmful and beneficial actions, and it is specifically linked to the person's legal capacity and attaining the age of majority. Then, the rational person acts intentionally, making voluntary choices free from external coercion, to pursue moral self-interests related to the specific task in the divine discourse, aligning with their aspirations, priorities, and moral values. In this sense, *taklif* is intrinsically linked to the principle of free will, which entails the absence of coercion.

Furthermore, within the philosophical framework of *taklif,* rational actors are not capable of making an autonomous moral choice and bearing moral responsibility for their actions unless the divine discourse discloses the burden to them, and they understand it.

This theoretical framework of *taklif,* relating to making autonomous moral decisions, in essence, constitutes an Islamic normative framework that can be applied to the principle of informed consent in medical treatment. Specifically, such a framework ensures that patients can make autonomous, informed decisions about the proposed treatments in relation to their health. In applying the theoretical framework of *taklif* to the principle of informed consent, the patient is the moral agent who bears the moral burden of seeking medical treatment, as stated in the divine discourse. The patient must have the sanity and cognitive ability to understand the proposed medical procedure and distinguish between its benefits and risks. Therefore, the patient can perceive the moral value of the medical intervention under the

five rulings of *taklif.* Since the patient bears the full moral responsibility for their medical decisions, it is of utmost importance that they exercise their free will in making choices regarding the proposed medical interventions without external coercion. On the other hand, the patient can know the objective of a proposed medical intervention, distinguish between the potential risks and benefits of the treatment and determine the moral value of the medical intervention only after physicians provide them with relevant information about the proposed procedure and the patient understands such information.

This chapter, therefore, conceptualises the principle of informed consent as a moral construct arising from respect for patients' autonomy to make moral choices. In the context of informed consent, the patient is the *mukallaf*, who assumes the role of a moral agent in *making* moral and medical decisions regarding their health. To this end, this chapter is divided into two main themes to discuss the two fundamental normative principles that underpin the concept of informed consent in medical treatment. Firstly, the principle against coercion, which asserts that a patient who meets the conditions for legal capacity as a *mukallaf* must maintain autonomy; thus, no medical treatment should proceed without their consent. Secondly, the principle is that such consent must be centred on the disclosure of relevant information; therefore, the primary matter is to identify the medical information that should be disclosed and assess the patient's understanding of this information.

The first theme begins by outlining the legal requirements necessary for a patient to qualify as a *mukallaf* in the theory of *taklif*. Judging from the discussion of Muslim jurists regarding the legal capacity in civil actions discussed in Section 6.5.1 of Chapter Six, this chapter argues that a patient's legal capacity to make an informed decision regarding proposed medical procedures can be classified into two types: 1) competence to make a medical decision regarding the proposed treatment. In this category, the patient is capable of giving informed consent to treatment. 2) Incompetence to make a medical decision regarding the proposed treatment. Under this type, the patient has natural barriers to their abilities; thus, patients shall give medical consent through a legal guardian.

Additionally, in *taklif* theory, as discussed in Section 6.5.4 of Chapter Six, a *mukallaf* cannot make an autonomous moral decision unless their will is free of coercion. Similarly, when applying this moral condition to the context of medical consent, this chapter argues that a *mukallaf* patient's consent shall be given voluntarily without coercion. Hence, this section aims to define voluntariness as freedom from coercion in the context of informed consent, using hypothetical clinical scenarios. It argues that for a patient's consent to be considered voluntary, it must be free from pressure factors, which can manifest as either external pressures or external forces exerted by others.

Having concluded that a *mukallaf* patient who has the legal capacity is entitled to practice autonomy and consent voluntarily to medical treatment, the second theme of this chapter proceeds to discuss two main issues. The first matter is that the patient's consent must be based on the disclosure of relevant information about the proposed medical treatment. This is because, as demonstrated in Section 6.5.2 of Chapter Six, in *taklif* theory, the *mukallafs*

cannot make a moral and autonomous decision unless information about the divine burden is disclosed to them. Therefore, this chapter argues that when adapting the moral requirement of information discourse into informed consent setting, physicians morally must disclose the medical information on the proposed treatment. By utilising the five leading maxims in Islamic jurisprudence, this chapter identifies information disclosure standards and a threshold for the duty of care to disclose medical information in informed consent. It argues that such standards and thresholds should be centred on information that a *mukallaf* patient would consider substantial in making moral and medical decisions. The substantial information will be defined as flowing from the categorisation of seeking medical treatment behaviours according to the moral value associated with every behaviour in the divine discourse, as outlined in Appendix A, Table A1.

Furthermore, disclosing information about a medical intervention primarily involves transmitting information, and it does not necessarily mean that the patient understood it. This chapter, therefore, argues that, as addressed in Section 6.5.3 of Chapter Six, when the conditions of *taklif* theory are applied in the medical context, it imposes a moral duty on physicians to ensure that patients understand the medical information. Drawing on the broad Islamic philosophical discussion surrounding the notion of understanding the reality of a matter, this section aims to define the standards of the patients' understanding in medical consent through hypothetical clinical scenarios. This section concludes by proposing standards for assessing patient understanding and suggesting an Islamic approach to evaluating understanding through the adoption of a questioning method.

8.2. Adapting The Theoretical Framework of Conditions of *Taklif* into Informed Consent to Medical Treatment

This chapter applies the theoretical conditions of *taklif* theory, addressed in Section 6.5 of Chapter Six, to the context of informed consent in medical treatment. Accordingly, this chapter outlines two fundamental elements that form the foundation of an Islamic version of the principle of informed consent to medical treatment. Firstly, the principle that a competent patient acting in their own free will, without coercion, must consent to the medical treatment. This principle will be addressed through discussions of the conditions of (a) sanity and puberty, and (b) free will without coercion. Secondly, the principle that informed consent must be based on (a) disclosure of medical treatment information and (b) the patient's understanding of such information. This principle, hence, will consider what information should be disclosed and how to assess the patient's understanding of such information.

8.3 Sanity and Puberty

Judging from the discussion of Islamic jurisprudence in Section 6.5.1 of Chapter Six concerning the legal framework of capacity to act, the legal capacity of a patient to make an informed decision concerning a proposed medical procedure can be categorised into two types: Firstly, a competent patient can decide on the proposed medical treatment. In this category, the patient is legally qualified to act directly to give informed consent. Secondly, an incompetent patient may not be able to make an informed decision about the proposed

medical treatment. In this type, the patient has natural impediments to their capacity; therefore, informed consent is given by a legal guardian.

8.3.1 A Competent Patient to Give Consent to Medical Treatment

As discussed broadly in Section 6.5.1 of Chapter Six, to qualify a person as a *mukallaf* capable of making an autonomous decision and thus bearing the divine burden in *taklif*, the person must possess two qualities: sanity and the capacity for discretion to distinguish between benefits and detrimental matters.[1] The marker of puberty proves these two requirements. However, attaining puberty has been criticised as an inadequate marker of a person's competence to be a *mukallaf.* Instead, attaining *rushd* (sound judgment) serves as an indicator for determining an individual's competency. Nevertheless, Islamic jurisprudence refrains from specifying a particular age for *rushd* due to the acknowledgement of individual variances. Instead, Islamic jurisprudence establishes specific standards to assess an individual's maturity.

Accordingly, in the medical context, the rules on informed consent only apply to a competent patient who has met the threshold of *rushd.* Each Islamic state will have the authority to determine the *rushd'* age at which a patient can provide consent for medical intervention. The eligibility age for giving informed consent will likely be consistent with the state-determined age at which a person becomes eligible for marriage.

8.3.2 An Incompetent Patient to Give Consent to Medical Treatment

As demonstrated in Section 6.5.1 of Chapter Six, there are categories of individuals who cannot fulfil the conditions of *taklif* due to natural impediments. When applying such natural factors in a medical context, the rules of informed consent will not apply to those categorised as minors, individuals with mental illnesses and individuals in a state of sleep.

Regarding the last category, in a medical context, sleep states will encompass those who suffer a loss of cognitive function due to acute or permanent incapacity. For instance, patients in a state of fainting or unconsciousness. In a manner analogous to sleep, unconscious individuals exhibit reduced levels of consciousness, weakened self-awareness, and diminished sensitivity to external stimuli.[2] There are various causes of unconsciousness, including dementia, following an accident, "trauma, cerebrovascular disease, seizures and intoxication".[3] This section, however, will not detail the reasons for unconsciousness or the process of regaining consciousness. The objective is limited to emphasising that a *mukallaf* patient in a state of unconsciousness and coma has a natural barrier that prevents them from giving their informed consent in medical treatment.

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[1] See the discussion of Chapter 6, Section 6.5.1.

[2] Zaith Bauer, Orlando De Jesus and Jessica L Bunin, 'Unconscious Patient' in *StatPearls [Internet] Treasure Island* (FL) (StatPearls Publishing 2025) para 2,3 available at <https://www.ncbi.nlm.nih.gov/books/NBK538529/ > accessed 15 January 2025.

[3] Ibid. The source states that some patients may naturally recover complete awareness without medical intervention, whilst others need special care and careful diagnostic examinations.

In natural impediments, the legal guardian is responsible for making medical consent for the following patients: a *non-discerning child*, an insane person, and a proxy for a patient in the conditions of coma and unconsciousness.[4] In the cases of a *discerning child*, a *ma'tūh* person and the legal guardian may authorise or prevent their consent.

In the process of obtaining informed consent from a competent patient, several principles should be considered as follows:

a. The Capacity of Competent Patients to Consent is Presumed

In Islamic jurisprudence, the presumption is that every person who reaches puberty and attains the age of *rushd* and is free of insanity or *atah* is a competent adult with full capacity to act.[5] This presumption suggests that a competent patient can always consent to medical treatment unless the contrary is demonstrated. Proving the opposite and determining whether a patient is considered insane or a *ma'tūh* and thus exempt from giving medical consent is a court matter.

In this sense, the competent patient's capacity to consent should not be confused with making objectively unreasonable medical decisions, provided the patient understand the disclosed information concerning their medical intervention.[6]

b. If No Proxy Has Been Appointed, The Hierarchy of Family Members Determines a Proxy for A Patient in A State of Coma and Unconsciousness[7]

A competent adult patient can always consent to medical treatment. Nevertheless, a competent adult patient is considered to lack the capacity to consent if they are in a state of coma and unconsciousness.[8] In such cases, an alternative decision-maker, the proxy, will have the duty to consent to medical treatment for the patient in a coma and unconsciousness. The proxy can be appointed in advance by the patient when they are in good health, allowing a person to choose a substitute proxy to make medical decisions on their behalf in the event of a severe illness or loss of consciousness.[9] In addition, the person can explicitly state their preferences regarding healthcare, for instance, the withdrawal of treatment when

[4] The matter of appointing a legal guardian is distinct from this discussion. This thesis will not delve into discussions of Islamic jurisprudence regarding the appointment of a legal guardian, as its focus is limited to defining the conditions for obtaining medical consent from a *mukallaf* patient (an individual deemed competent to make decisions).

[5] See the discussion of the condition of sanity and puberty in Chapter 6, Section 6.5.1.

[6] The patient's understanding of information about a proposed medical treatment will be discussed in detail later in this Chapter, Section 8.6.

[7] It is beyond the focus of the thesis to address in detail the matter of obtaining informed consent from an unconscious competent adult patient. However, this chapter only outlines several principles that can guide if such a complex situation arises in the context of obtaining consent from a competent adult patient.

[8] Some patients may naturally recover complete awareness without medical intervention, while others require specialised care and careful diagnostic examinations. This section, however, will not detail the reasons for unconsciousness or the process of regaining consciousness. The objective is limited to how informed consent can be obtained from a patient in a state of unconsciousness.

[9] Maryam Sultan, '*Salb Al-Hayah: Al-Mandhur Al-Islmai Hul Al-Raiyah Al-Tibia Fi Akhr Marahl Al-Hayat*' [The Ethical Considerations of the Termination of Life: An Islamic Perspective on End-of-Life Medical Care] (*Ma'hd Yaqeen* 2018) pt 6, available at < https://yaqeeninstitute.ca/read/paper/سَلْب-الحياة-المنظور-الإسلامي-حول-الر> accessed 15 August 2024.

the risks outweigh the benefits and other instructions that reflect the patient's moral aspirations.[10]

Most importantly, the principle of *best interest* limits the proxy's capacity to consent to or refuse in certain situations. All schools of Islamic jurisprudence agree that the scope of a proxy capacity is limited to the person's best interest.[11] In the medical context, interest refers to treatments that eliminate patient harm.[12] Section 7.6.1 of Chapter Seven establishes that harm is related to severe risks resulting in loss of life, an organ, disability or spread of contagious diseases to others. In such cases, treatment is *obligatory*. Accordingly, the proxy's consent may be overridden in cases where *obligatory* treatment applies to the conditions of a patient in a state of coma and unconsciousness.

If the patient is in a state of coma and unconsciousness and has not yet appointed the authorised proxy in advance, family members will assume the role of the proxy. An interesting dilemma arises when multiple family members hold various perspectives. Ideally, the treating medical team should avoid intervening in family conflicts, request that the family engage in internal discussions, and return with a mutually agreeable decision.[13] If there is a lack of agreement within the family, the hierarchy of family members might be determined based on their strengths as potential inheritors .[14]

c. If the Proxy is Unavailable, The Principle of *Necessity* is An Exception to the Requirement of Obtaining Consent in Emergency

In Arabic, an emergency is defined linguistically as a situation that cannot be delayed.[15] In a medical setting, an emergency medical situation refers to an urgent medical condition that cannot be postponed.[16] The *fatwa* of IIFA defines emergency medical situations as "urgent cases that require 'immediate necessary' medical treatment or surgical intervention to save life or avoid damage to an organ of [the patient's] body".[17] As established in Section 7.6.1

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[10] Ibid.

[11] In *Hanafi* school, see Muhammad Ahamad Al-Sarakhsi, *Al-Mabsut* [A Book of Islamic Jurisprudence and The Exercise of The Opinion in Systematic Reasoning and Juristic Preference] vol19, *Dar Al-Ma'refa* 1993) 159; In *Malki* school, Ahmad Al-Malki Al-Qarafi, *Al-Ddhakhira* [Ammunition: A Book of Islamic Jurisprudence] (Saeed A'arab ed, vol 4, Dar Al-Gharb Al-Islami 1994) 250; In *Shafi* School, Yahya Ibn-Sharaf Al-Nawawi, *Rawdat Al-Ttaalibin Wa Eumdat Al-Mfuin* [The Garden of the Seekers and *The Reliance of the Muftis:* Book of Islamic Jurisprudence] (Zuhair Al-Shawish ed, vol 4, *Al-Maktb Al-Islmai* 1991) 325; In *Hanbli*, Al-Din Ibn-Al-Muflih, *Al-Mubd'e Fi Sharh Al-Muqana* [The Creative in Clarifying Convincing Proof: A Book of Islamic Jurisprudence] (Muhammad Al-Shafi ed, vol 4, 1st edn, *Dar Al-Kutb Al-Elmia* 1997) 221

[12] The Council of the International Islamic *Fiqh* Academy of the Organisation of the Islamic Cooperation, 'Medical Treatments' (*Fatwa* 67, (5/7), 9–14 May 1992) available at <https://iifa-aifi.org/en/32451.html> accessed 26 October 2023.

[13] Hasan Chamsi-Pasha and Mohammed Al-Bar, 'Ethical Dilemmas at the End of Life: Islamic Perspective' (2017*)* 56 Journal of Religion and Health 400, 402.

[14] Ibid. For instance, the decision made by a son is given greater importance than the decision made by a brother, and the decisions of sons and daughters have priority over the wife's decision.

[15] Ahmed M Omar, 'Lexicon of Contemporary Arabic Language' (vol 1, *Alam Al-Kutb* 2008) 384.

[16] Muhammad Al-Sahli, *'Al-Idhn Al-Tabiy Fi Al-Halat Al-taari'a*' [Medical Consent in Medical Emergencies Cases] 31(4) Journal of the School of *Shari'a* and Law of Tanta 1794, 1804.

[17] The Council of the International Islamic *Fiqh* Academy of the Organization of the Islamic Cooperation, 'Consent for Emergency Surgeries' (*Fatwa* 184 (10/19) 26–30 April 2009) available at < https://iifa-aifi.org/en/32997.html> accessed 15 October 2024.

of Chapter Seven, this treatment situation outlined by IIFA for urgent medical procedures is considered *obligatory* treatment.[18]

In such emergencies, where a) a patient cannot consent due to their age, mental illness or an unconscious state, b) the proxy is unavailable, and 3) providing medical treatment is a *necessity* to save life or an organ, the physician can process the medical intervention without obtaining consent. The exception to obtaining consent is grounded on the principle of *necessity.* The *fatwa* IIFA states, "It is *permissible* for a physician to perform necessary medical intervention… based on *Shariah* rulings on 'necessity'."[19] The principle of *necessity* asserts that *necessity removes prohibitions*, suggesting that it excludes the demand for obtaining consent in urgent medical procedures when three specific conditions are met. Applying the principle of *necessity* in immediate medical treatment is compatible with *maqasd shari'a* to save life and prevent the loss of bodily organs.[20] In the *Qur'an:* "If anyone saved a life, it would be as if he saved the life of the whole people".[21]

d. If A Competent Patient Refuses to Consent to Treatment in Emergencies, Documentation of the Refusal is Required

If a competent patient with total capacity to make medical decisions to reject the treatment of an emergency where providing immediate medical treatment is a *necessity* to save the life or prevent the loss of an organ, the *fatwa* of IIFA concludes that: "if the patient is in full capacity and consciousness" and is capable of making decisions, and medical professionals determine that the condition is urgency and necessitates medical procedure, it is the patient obligation to consent to the medical intervention; failure to do so would constitute a "sin according to *Shari'a*". [22]

In such refusal of urgent medical intervention, the *fatwa* of IIFA identifies factors that physicians need to consider, including 1) the medical team must explain the significance of medical intervention, the seriousness of the patient's condition and the several risks associated with refusal of treatment; and 2) A group of doctors including at least three consultant physicians, excluding the attending physician, must confirm the diagnosis, the medical treatment has been proposed, the several risks have been fully explained to the patient and document minutes signed by the team members, and notify the hospital management regarding the situation.[23]

Furthermore, the *fatwa* of IIFA added a third condition regarding the physician's obligation to make a considerable effort to persuade the patient to reconsider their refusal, thereby preventing the deterioration of their health. However, adopting this criterion in the informed consent model, grounded on autonomy, conflicts with the principle of free will, free of external pressures, which will be addressed in the following section.

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[18] See the discussions of *obligatory* treatment in Chapter 7, Sections 7.6.1.1 and 7.6.1.2.
[19] *Fatwa* of IIFA, 'Consent for Emergency Surgeries' (n 17).
[20] Al-Sahli, (n 16) 1829.
[21] *Sura Al-Ma'idah.*32.
[22] *Fatwa* of IIFA, 'Consent for Emergency Surgeries' (n 17).
[23] Ibid.

8.4 Free Will Without Coercion

As emphasised earlier in Section 6.4.2 of Chapter Six, the theory of *taklif*, which generates the principle of autonomy, maintains that a divine source endows humans with the free will to make decisions and shape their ultimate destiny. Hence, the free will of the *mukallaf* while bearing the divine burdens of *taklif* is an axiomatic value of autonomy and should not be considered an additional requirement in *taklif*. Instead, freedom from coercion is the condition that should be focused on to make an autonomous moral decision while bearing the divine burden.

Accordingly, Section 6.5.4 of Chapter Six, addresses that the theory of *taklif* imposes a moral requirement that the *mukallaf* who bears the divine burden cannot make an autonomous decision and thus be morally responsible for their moral decisions unless their will is free from coercion. Equally, when adopting this moral requirement of *taklif* in the context of informed consent, a *mukallaf* patient would be capable of making an autonomous and moral choice about the proposed medical intervention when their health is concerned, only if their will is free from coercion.

8.4.1 Voluntariness in Medical Decision-Making

By applying the discussions of Islamic jurisprudence in Section 6.5.4 of Chapter Six, related to free will without coercion, to the context of informed consent, the following condition can be identified: a competent patient must consent to medical treatments voluntarily, free from any coercion by others. This condition will be discussed through considering hypothetical scenarios of the dynamics of situations in which a patient receiving medical treatment may be perceived as being influenced by external pressure or force, thereby affecting the patient's free will to consent.

8.4.2 Types of External Influence

8.4.2.1 External Pressure from Others

Patient A is a 19-year-old girl who is very obese. She experiences verbal abuse because of her being overweight from her family, who consistently and repeatedly use abusive verbal expressions and teasing in the presence of others. Her family has been trying to influence her to undergo obesity surgery, but A is resistant to this treatment. A attempted to adhere to a diet regimen, but she could not maintain it. One day, A experienced a psychological breakdown and decided to undergo bariatric surgery. The physician informs A that while weight loss surgery is prevalent, it is not the appropriate medical option for A due to her health circumstances, and her doctor explains the risks and side effects. Alternatively, the doctor proposes an 18-month diet regimen that includes exercise. Nevertheless, A decides to undergo sleeve gastrectomy surgery. Days after the surgery, A experienced food leakage from her stomach, causing a severe infection inside the abdomen. Subsequently, A enters into a coma.

Now, consider a further scenario, Patient B, a 28-year-old female, is going to undergo a caesarean section operation. The obstetrician is trying to convince her to undertake a spinal

anaesthetic as it very efficiently blocks the pain during the surgery. B repeatedly refuses to receive a spinal anaesthetic and requests complete anaesthesia. The physician warned her that: 'If you refused to have the spinal anaesthetic, you would be discharged from the hospital'. Therefore, B consented to the procedure by saying to her doctor: 'Do whatever you wish!' B afterwards suffered paralysis as a consequence of the procedure.

8.4.2.2 External Force by Others

Now, consider the following scenario: Patient C is a 53-year-old male. He collapsed at home and has been taken to the hospital. C was diagnosed with severe anaemia caused by a lack of iron. Following the stabilisation of his health situation through blood transfusion, his physician informed him to undergo the two medical procedures: a) undergoing a test to ensure no signs of bowel haemorrhaging, and b) undertaking an injection for two days as a preventative measure against blood clot formation. C understood the medical information provided concerning the two procedures and decided to reject the test and the injection. The patient informs his doctor that he will return to see him if any new symptoms or discomfort arise.

The doctor and the patient's family exert pressure on C to authorise the test and injection, yet the patient remains unaffected by this pressure. Despite the overt rejection, the physician deems this test necessary, and once C dozed, the physician administered anaesthesia to C and undertook the test without the patient's consent. Moreover, the patient's family requested the nurse to administer the injection, and C received the injection while being anaesthetised. When C awakened, a nurse informed him that the medical team continued to conduct the test and administer the injection despite his objection.

In the above three scenarios, are the consents of patients A, B and C to undergo the medical interventions considered voluntary and free from coerced elements?

Based on the discussion in 6.5.4 of Chapter Six regarding the legal framework of coercion in Islamic jurisprudence, Muslim jurists define coercion similarly.[24] All definitions maintain an essential component in coercion, which includes compelling individuals to act against their will through intimidation or the use of force.

Building on the Muslim jurist's definitions and discussions of types of coercion, in informed consent, a patient's coercion refers to an act of unlawful pressure or force to coerce a patient to undergo medical treatment. On one hand, such pressure is applied through a threat to cause harm, and thus, this threat generates fear, leading the patient to consent to the medical treatment based on this fear. On the other hand, the use of force places the patient in a position of being a tool in the hands of others.

[24] The definitions of coercion in Islamic jurisprudence have been presented in Chapter 6, Section 6.5.4.

Therefore, it can be inferred that voluntariness in medical decision-making refers to the patient's entitlement to make decisions about the proposed medical interventions without feeling influenced by external coercive factors.[25] Naturally, this right entails the patient's entitlement to consent to treatment, as well as the right to refuse and withdraw consent to treatment. The external coercive elements involve two types. The first type is exerting pressure on the patient by others, such as physicians or the patient's family, through using explicit or implicit threats to undergo treatment. For example, the patient's family may state, 'If you persist in refusing treatment, we will request the medical team to administer it by sedating you', or the physician may state, 'If you refuse to undergo this test, I will cease treating you'. The second external coercive factor involves controlling the patient by using force to compel the patient to receive treatment. For example, a physician administers anaesthesia to the patient to enable the treatment to be given.

It is essential to emphasise that, in medical practice, coercion can render consent invalid if the source of coercion is the physician. However, this thesis acknowledges that the patient's family can also act as external coercive influences, causing the patient to undergo medical interventions against their personal preferences. Despite the centrality and the important position of the family in Islam, Muslim scholars, when discussing the doctrine of coercion, do not grant family members any privilege or authority to use pressure or force that amounts to coercion to force a person to engage in an action against their will.[26]

8.4.3 Coercion in Medical Consent in Islamic Law

As stated in Section 6.5.4 of Chapter Six, Islamic law has multifaceted approaches to addressing coercion in civil acts and distinguishes between two types of coercion.[27] In the context of informed consent, coercing a patient to accept or reject medical treatment is considered a civil act. In civil actions, Islamic jurisprudence acknowledges both types of coercion: *compelling* coercion and *non-compelling* coercion.[28] It also outlines an objective standard to determine whether coercion is *compelling* or *non-compelling*. The objective test relies on a threat of *grievous harm*, such as a threat of death.[29] Once the required type of coercion is found, Islamic law establishes a subjective test to determine whether the patient genuinely feels, based on their *preponderance of belief*, that the patient is confronted with a situation in which the patient is compelled to consent to medical intervention or if the patient would face the threatened harm. If this is the case, if the coercion is *compelling*, the patient's consent and free will of choice will be considered invalid. Yet, if the coercion

[25] The types of coercion in the informed consent context are based on discussions of Islamic jurisprudence regarding types of coercion, as addressed in Chapter 6, Section 6.5.4.

[26] External coercive factors are not limited to the physician or family. In certain contexts, external factors may include friends. However, in Islamic society, the influence of friends is generally restricted. Hence, they have not been regarded as a source of external coercion on the patient, at least in the hypothetical scenarios of this thesis. In this context, it is also important to emphasise that the requirement of voluntariness does not suggest that physicians or the family should abstain from convincing patients about the merits and effectiveness of the medical intervention, as long as they still allow the patient to accept or decline their suggestions freely.

[27] See the discussion under the headings: *Types of Coercion* and *Coercion in Civil Acts* in Chapter 6, Section 6.5.4.

[28] Ibid.

[29] In a medical context, such a threat of grievous harm may seem non-existent. This chapter, therefore, does not go further and present hypothetical clinical scenarios of a threat of grievous harm.

is *non-compelling*, the patient's consent is invalid, and it does not vitiate free choice. Thus, the test applied to determine the presence of coercion in the patient's consent is a subjective test carefully designed to ascertain the existence of fear in the mental state of every individual patient.

Furthermore, all four schools of jurisprudence agree that there is a form of coercion in which the coercer uses force to render the coerced person a *mere tool in the coercer's hand*, entirely subject to the coercer's will. Such force leaves the coerced person entirely incapable of abstaining from any action, including civil actions such as medical treatment.[30] The jurists consider this form of coercion to be *compelling* coercion, and thus, it nullifies consent and vitiates the free choice of the coerced individual.[31]

When applying the legal rules of Islamic law on using force in the context of informed consent, situations may occur where force is used by others. This force can manifest, for example, as physical restraint, sedation, or exploiting a patient's loss of consciousness while they are asleep. In such situations, if a lawsuit arises, the court will not apply the subjective test to determine whether the patient, based on the *preponderance of belief*, feels that they are confronted with a situation in which they are coerced into consenting to medical intervention. Instead, the test will be objective and consider whether coercive conduct, by its nature, leaves the person as a *mere tool in the hands of the coercer*, thereby nullifying the essential element of free will required for civil actions. If such elements of forced action are found, the patient's consent and free will of choice will be null and void. Consequently, the person who engaged in the act of force will face the full legal responsibility for their coercive actions.

The Clinical Scenarios

Returning to the hypothetical scenarios of Patients A, B and C. In the case of Patient A, the patient accepted surgical treatment for purely aesthetic purposes. However, the surgical procedure involves potential hazards and side effects. Ultimately, the surgical procedure was not expected to improve the patient's general health condition. A ignored the possible health hazards and side effects of the surgical procedure. Can A's decision be deemed coerced due to the external pressure imposed by her family, especially her exposure to constant verbal abuse?

Exposure to verbal abuse is a form of assault that *Shari'a* forbids in many places in the *Qur'an* and *Sunnah*.[32] Engaging in abusive language, verbal insults, belittlement, mockery, and laughter directed at others can be categorised as a misdemeanour, and certain

[30] This type of coercion has been addressed under the heading: *Types of Coercion* in Chapter 6, Section 6.5.4.
[31] Ibid.
[32] For instance, in the *Qur'an*: "Believers, do not let people mock other people who may be better than themselves. Do not let women mock women, who may be better than themselves. Do not find fault with one another, nor abuse one another with nicknames. An evil name is disobedience after belief. Those who do not repent are wrongdoers." *Sura Al-Hujraat*. 11; "Woe to every scorner and mocker" *Sura Al-Humazah*.1. In *Suannah*, Abu Jubayrah narrated: "When the apostle of *Allah* came to us, every one of us had two or three names. The Messenger of *Allah* began to say: O so and so! But they would say: Keep silence, Messenger of Allah! He becomes angry at this name. So this verse was revealed: "Nor call each other by (offensive) nicknames." *Sunan Abi Dawud* (*Hadith* 4962).

expressions might even qualify as a criminal offence. In this scenario, whether the verbal abuse experienced by A is classified as a misdemeanour or crime, it is considered a clear and direct threat to keep verbally abusing A until she undergoes surgical intervention to improve her body shape.

According to Islamic jurisprudence, constant exposure to all forms of verbal abuse is categorised as *non-compelling coercion*. If A chose to consent to undergo the bariatric surgery against her will, her consent would be deemed invalid. However, *non-compelling coercion* does not vitiate free choice, and thus, A had the option to either endure verbal abuse or undergo medical intervention.
The doctor who has a moral concern that A is being coerced to undergo the surgical treatment, which she does not want, can rightly claim A's consent was not freely given and is thus invalid. The court will apply the subjective test to determine whether the patient genuinely feels, based on her *preponderance of belief*, that she has to consent to the surgical treatment due to the constant verbal abuse she could not endure. Thus, the judge will consider A's circumstances, including her age, gender, cultural background, health issues, and other relevant variables, to ascertain whether her consent was genuinely influenced by a feeling of fear regarding the constant verbal threats and her incapacity to endure them.

Moving to the case of patient B, the obstetrician used an explicit threat to ensure the patient's compliance with accepting the spinal anaesthetic. Following the direct threat, B consented to receive the injection and fully consented to the doctor's authority to proceed as desired. Was the patient's consent obtained through coercion due to fear of an explicit threat?

Based on the classifications of coercion in Islamic law, the threat of the obstetrician is categorised as *non-compelling coercion*. If there are elements of coercion present in this case, B's consent to receive the unwanted anaesthetic is considered null and void. Yet, the *non-compelling coercion* does not negate the free will of choice, as B still had the freedom to choose between bearing the threat, resisting it, or accepting the medical procedure.

If B believes that she was conceived to accept the spinal anaesthetic, her consent was not voluntary, and she sued the obstetrician, the court will assess whether or not there are factors of *non-compelling coercion* by applying the subjective test. This test is designed to determine whether the patient genuinely feels, based on her *preponderance of belief*, that she felt driven to give consent to undertake the spinal anaesthetic. The judge will consider patient B's specific circumstances, including her age, cultural background, number of previous pregnancies, financial situation, and other relevant elements, to ascertain whether B's consent was driven by a fear that the physician would implement the threat.

Regardless of whether the lawsuit will succeed in A’s or B's case, it is obvious that the circumstances in which patients A and B gave consent are open to criticism and involve questionable moral behaviour. Both scenarios demonstrate that A’s and B's consent signifies

the existence of factors such as defeat, surrender, exhaustion, and loss of willpower. Yet, the court ultimately determines whether these factors amount to coercion.

The scenarios of patients A and B illustrate hypothetical cases of *non- compelling coercion*. While acknowledging that cases of *compelling coercion*, where a patient's family or physicians threaten to cause *grievous harm,* such as causing death or maiming, may appear to be non-existent in the context of informed consent. Even situations of *non-compelling coercion* seem to be rare. Yet, there will inevitably be situations where patients may feel that they have been coerced, either explicitly or implicitly, into receiving medical intervention that they would have preferred to reject.

Now, consider the final clinical scenario involving force to ensure the patients receive the medical procedure. C is a competent patient who can provide informed consent. He was provided with all the relevant information concerning the test and injection and understood them. However, C explicitly refused to undergo the two proposed procedures. These two interventions are unrelated to lifesaving, organ-saving, or disease prevention measures that prevent the spread of contagious diseases. Hence, they do not fall under the category of *obligatory* treatment as outlined in Chapter Seven.

According to the provisions of Islamic law, exerting control over a patient using force, as exemplified in the case of Patient C through the exploitation of his sleep and subsequent administration of anaesthetic, is deemed as *compelling coercion*. In this form of coercion, Muslim jurists consider the patient as a *tool under the entire control of the coercer*. In this case, the coercers are the physician and the nurse. This is because C is subject to complete control without leaving freedom of choice to his will. This form of coercion invalidates consent and the patient's freedom of choice.

C, overtly forced into undergoing medical procedures that he does not want, can rightly claim that he did not provide consent. If the patient experiences adverse consequences and complications due to these two procedures, the court will utilise the objective test to ascertain the existence of coercion. The judge will assess whether the coercive conduct, by its nature, left C merely *a tool in the hands* of the doctor and the nurse, eliminating the essential element of free will required to obtain medical consent.

Even if no side effects or complications arise from performing these two procedures, the behaviours of the medical team, including the physician and the nurse, are still considered professional misconduct. They may be legally liable for violating the patient’s bodily integrity. At the same time, the patient’s family, who requested that C receive the injection, may bear moral and legal responsibility. The regulations governing such responsibilities are detailed and involve numerous elements, including good intentions and other considerations; however, it is beyond the scope of this section to delve into their specifics.

Based on the previous discussions of clinical scenarios and the Islamic jurisprudence position on coercion, voluntariness without coercion is a moral requirement for a patient's

consent to proposed medical treatment. This requirement is grounded on the moral principle of autonomy, which emphasises that patients have free will to determine their fate based on their moral aspirations and preferences.

In practice, this moral obligation requires doctors to prevent circumstances in which the patient's choices are subject to unjustified pressure or force. If a patient consents to medical treatment and the physician has a moral concern that the consent was not given freely, the doctor can raise a judicial claim. Whether coercion existed is a matter for the judge to decide, not the physician. Patients who also have a feeling that they are coerced to undergo treatment by their physicians can rightly claim that their consent was not voluntary and, hence, invalid.

8.5 Disclosure of Medical Treatment Information

As discussed earlier in Section 6.5.2 of Chapter Six, the theoretical framework of conditions of *taklif* stipulate that a person with the capacity to acquire rights and fulfil obligations, defined as a *mukallaf,* cannot autonomously reach a moral decision to engage in or refrain from action unless the relevant information about an action is disclosed in the divine discourse.[33]

Similarly, when applying *taklif's* condition in the context of informed consent. The moral actor in medical decision-making is a *mukallaf* patient. The *mukallaf* patient, who acts voluntarily to consent to a proposed treatment, cannot make a moral and informed decision concerning their health unless the relevant information about the proposed medical intervention is disclosed. The patient is not expected to know the relevant information about the proposed medical procedure. The attending physician can only provide information such as diagnosis, benefits, risks of the medical intervention, available alternative treatments, etc. Following the disclosure of treatment information, patients can assess the moral value of the treatment and make decisions aligned with their ultimate moral values and principles. Therefore, a valid moral informed consent by a *mukallaf* patient must be based on disclosing medical treatment information through communication with their physician. This imposes a moral duty on physicians to disclose information about medical treatment to their patients. Ultimately, such medical information empowers patients to make informed decisions about their health that align with their priorities and moral aspirations, as guided by the moral values underlying the behaviour categories of medical treatment.

An important question lies at the heart of the disclosure issue: What are the standards for the moral duty of disclosure? The primary sources of *Shari'a* do not explicitly respond to this matter. Similarly, classical scholarship in Islamic jurisprudence does not specifically

[33] See the argument of Al-Amidi, *taklif* is [a divine] discourse in Ali Muhammad Al-Amidi, *Al-Ahkam Fi Usul Al-Fiqh* [The Rulings in The Roots of Islamic Jurisprudence] (Abdullah Bin Ghadyan and Ali Al-Salihi eds, vol 1, 2nd edn, *Al-Maktb Al-Islami* 1982) 150; See also the discussion of the [divine] discourse in Badr-Al-Din Al-Zarkashi, *Al-Bhar Al-Muhit Fi Al-Fiqh* [The Ocean: A Book of Roots of Islamic Jurisprudence] (vol 1, 1st edn *Dar Al-Katbi* 1994) 168.

address or discuss the issue of disclosing medical information, leaving room for further investigation.

In this context, Padela states that while many fundamental jurisprudential maxims are related to Islamic medical ethics, they are primarily dispersed among the extensive body of Islamic jurisprudence sources.[34] Identifying these relevant principles to outline specific moral and legal criteria concerning information disclosure involves an in-depth investigation and analysis, which can be the topic of a separate thesis. Nevertheless, the following discussion presents an attempt to conduct a brief investigation into establishing moral standards and a threshold for disclosing information about the proposed medical intervention.

In Islamic jurisprudence literature, the prominent *Imam* Shafi has developed a systematic methodology known as *usual al-fiqh* (roots of jurisprudence) to derive moral and legal norms for matters not explicitly addressed in the primary sources of *Shari'a*.[35] This approach refers to how Islamic jurisprudence rules, maxims, and principles are derived from the original sources in *Shari'a* and applied to a specific matter. The sources primarily consist of *Shari'a* sources, including the *Qur'an* and *Sunnah*, as well as the sources *of fiqh, ijma*, and *qiyas*.[36]

Muslim jurists establish five major legal maxims by applying the *usual al-fiqh* approach. The jurisprudential maxims are specifically relevant to medical practice and Islamic medical ethics.[37] The five leading maxims are: 1) Matters are judged by their objective, 2) No harm shall be inflicted, 3) Hardship begets facility, 4) Certainty is not overruled by doubt, and 5) Custom is authoritative.[38]

The following discussion will apply the five major jurisprudential maxims to define moral standards and establish a threshold for disclosing medical information in the context of informed consent.

8.5.1 Standards for Disclosure Information

8.5.1.1 The Maxim of *Objectives*: Standards for the Disclosure of Treatment Objectives

[34] Aasim Padela, 'Medical Ethics in Religious Traditions: A Study of Judaism, Catholicism, and Islam' (2006) 38(3) Journal of the Islamic Medical Association of North America 106, 122.
[35] Yassar Mustafa, 'Islam and the Four Principles of Medical Ethics' (2014) 40 (7) Journal of Medical Ethics 479, 479.
[36] Ibid.
[37] Hani Al-Jubeir, '*Al-Qawaeid Wa Al-Dawabit Al-Fiqhia Al-Mmuathira Fi Ahkam Al-Amal Al-Tibia'* [The Jurisprudential Maxims and Standards that Influence the Provisions of Medical Practice] (2021) Research Paper, Saudi Scientific Society for Medical Jurisprudential Studies, 1-17, 4; Mustafa (n 35) 480.
[38] Although the translation of several words in these maxims may vary in English sources, they still maintain the same concept. For the meaning of the five leading maxims and their application across various fields, see as an example, Buerhan Saiti and Adam Abdullah, 'The Legal Maxims of Islamic Law (Excluding Five Leading Legal Maxims) and Their Applications in Islamic Finance' (2016) 29(2) Islamic Econ 139; Mustapha Muzaimi, Nurfaizatul Aisyah Ab Aziz, and Sabarisah Hashim,'Reflections on Neuroethical Issues in Neuroimaging Research Advances from the Islamic Perspective' (2024) 24 International Journal of Islamic Thought 122.

The maxim of *objectives* is that *matters are judged by their objectives*.[39] This maxim means all actions or matters should be evaluated and determined based on the intended outcomes behind performing or abstaining from them.[40] [41]

When applying the maxim of *objectives* in the context of informed consent, the maxim suggests a disclosure standard for the intended benefits of a proposed medical treatment. Yet the question arises: What is the threshold of information concerning the intended outcomes of a proposed procedure that a physician should disclose?

Mukallaf Patient Test

In the previous two chapters, Chapter Six acknowledges that in the theory of *taklif*, a *mukallaf* patient is the moral agent who exercises the obligation of making autonomous decisions regarding their health.[42] Consequently, Chapter Seven investigates the moral value of medical treatment within the divine discourse of *taklif* and establishes that every medical intervention holds moral significance based on the five rulings in *taklif.* The *mukallaf* patient's ability to consider and evaluate the proposed medical treatment, and thus make a moral decision, is subject to the moral significance of the medical treatment. In this sense, the theory of *taklif* inherently suggests adopting a *mukallaf* patient standard to determine the scope of information that should be disclosed to them. The type of information the *mukallaf* patient seeks is *substantial* information enabling the *mukallaf* patient to identify the moral value associated with the proposed treatment. Accordingly, this thesis defines *substantial* information that a *mukallaf* patient would find of considerable importance based on categorising treatment behaviours in the divine discourse according to the five rulings of *taklif,* as established in Chapter Seven and outlined in Appendix A, Table A1.[43]

Returning to the disclosure standard derived from the maxim of objectives, under the *mukallaf* patient standard, physicians morally shall disclose to the patient the **intended benefits** of a proposed medical treatment that a *mukallaf* patient would consider *substantial*. Information that a *mukallaf* patient would find *substantial* to know is established based on categorising treatment behaviours in the divine discourse according to the five rulings of *taklif,* outlined in Appendix A, Table A1.[44]

Accordingly, the maxim of *objectives* would require physicians to disclose to the patient the intended objectives of a medical treatment, including:

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[39] This maxim is also translated in many English sources as *matters are judged by their intentions.*

[40] Luqman Zakariyah, *Legal Maxims in Islamic Criminal Law: Theory and Application* (Brill 2015) 60-79, 61.

[41] For example, intention is a fundamental element in determining murder behaviour, whether it is deliberate homicide, quasi-deliberate homicide, or erroneous homicide. Consequently, the offender is liable to a particular punishment based on the intended objective of the criminal act.

[42] This is because Chapter Six emphasises that the theory of *taklif* places on patients the role of moral agents to bear the divine burdens and thus make autonomous decisions regarding their health and proposed treatment options. Consequently, Chapter Seven investigates the moral value of the medical treatment in the divine discourse according to the five rulings of *taklif.*

[43] The categories of treatment behaviours in the divine discourse of *taklif* are presented Appendix A, Table A1.

[44] See the more likely benefits associated with *obligatory, recommended and permissible* treatments in the categories of treatment behaviours in the divine discourse of *taklif* presented in Appendix A, Table A1.

1) A disclosure of diagnosis, if known, and the **intended benefits** of undertaking the treatment.

The threshold for the standard of relevant information for treatment intended benefits is that: all information that would be *substantial* for a *mukallaf patient* to know, including whether the intended benefits of the treatment are: [45]

a. Preserving life.
b. Preserving organs.
c. Preventing disability.
d. Preventing the transmission of contagious illnesses to others.
e. Eliminating or mitigating the distressing symptoms of the disease.
f. Maintaining or recovering health.
g. Treating the disease effectively.
h. Ineffective in healing the diseases.
i. Equivalent to abstaining from undergoing the treatment.[46]

8.5.1.2 The Maxim of *Harm*: Standards for the Disclosure of Treatment Harm

The maxim of *harm* is that *no harm shall be inflicted*. This jurisprudential maxim emphasises the significance of abstaining from causing harm to others, regardless of whether the person causing the harm benefits from it or if no one benefits.[47] The principle of *harm* applies through five sub-jurisprudential principles.[48] The sub-maxim relevant to the context of informed consent is that *harm should be avoided as much as possible*. In practice, this maxim is implemented by identifying anticipated harm and systematically preventing and mitigating it to the best extent possible before it occurs.

In the medical treatment setting, it is unavoidable that medical treatment, whether it involves medications, surgery, diagnostics, pharmaceuticals, or therapy, may entail risks, adverse effects, and complications. Since the patient has the ultimate right to decide on medical options, they can only make a moral and informed decision about the treatment's merits if they consider the harm associated with the medical procedures.

Therefore, the maxim of *harm* morally suggests a disclosure standard based on **anticipated harm** before it occurs. Under the *mukallaf* patient standard, physicians shall disclose to the

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[45] The threshold for the substantial relevant information concerning the disclosure standard on the intended benefits has been identified based on whether the intended outcomes of a proposed medical treatment would lead to benefits as outlined in the treatment behaviours of *obligatory, recommended and permissible.*

[46] For example, based on the analysis of chapter seven, a *mukallaf* patient would consider whether the proposed intervention is intended to save their life or an organ. In such a case, the ethical value of the treatment is *obligatory*. Thus, a *mukallaf* patient would consider undertaking the treatment to avoid sinning. However, if the benefit of the treatment is ineffective in healing the disease, the ethical value of the treatment is *permissible*. Thus, a *mukallaf* patient consents or refuses the intervention without facing ethical consequences.

[47] Muhammad Mustafa Al-Zuhayli, *Al-Qawa'ed Al-Fiqhi'a Wa Tatbiqatha Fi Al-Madhahib Al-Arba'a* [The Legal Maxims in Islamic Jurisprudence and their Applications in the Four Schools of Islamic Jurisprudence] (vol 1, 1st edn*, Dar Al*-Fikr 2006) 199.

[48] Ibid, 208, 215, 235, 226, 230. The five sub-maxims are: a) harm must be avoided as much as possible, b) harm is not repelled with harm, c) personal harm should be incurred to prevent general harm, d) the lesser of two harms is preferred, and e) repelling evils is preferable over attaining benefits.

patient the anticipated harm of a proposed medical treatment that a *mukallaf* patient would consider *substantial*. Information that a *mukallaf* patient would find *substantial* to know is established based on categorising treatment behaviours in the divine discourse according to the five rulings of *taklif,* outlined in Appendix A, Table A1.[49]

Accordingly, the maxim of *harm* would require physicians to disclose to the patient the anticipated harm of a medical treatment, including:

1) A disclosure of **severe risks** associated with the proposed treatment during the medical procedure and the recovery phase.

The threshold for the standard of relevant information to severe risks is that: all information that would be *substantial* for a *mukallaf* patient to know, including whether the severe risks of the treatment are associated with:[50]

a. Life-threatening hazards.
b. Organ loss.
c. Causing Disability. [51]

2) A disclosure of **side effects and complications** associated with the proposed treatment during the medical procedure and the recovery phase.

The threshold for the standard of relevant information regarding side effects and complications is that all information that would be *substantial* for a *mukallaf* patient to know, including whether the treatment's side effects and complications are associated with

a. Inflicting pain, inconvenience, or discomfort.
b. Causing unknown side effects.
c. Causing complications that exceed the benefits of the treatment.

Furthermore, since the maxim of *harm* stipulates that *harm should be avoided or mitigated as much as possible before it occurs*, it also morally establishes a disclosure standard regarding the availability of alternative means to mitigate or prevent harm.

Accordingly, the maxim of *harm* would require physicians to disclose to the patient the available alternative means to mitigate or avoid the harm of a medical treatment, including:

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[49] See the more likely harm associated with *obligatory*, *permissible, discouraged* treatments in the categories of treatment behaviours in the divine discourse of *taklif* presented in Appendix A, Table A1.

[50] The threshold for the substantial relevant information concerning the disclosure standard on the anticipated harm has been identified based on categorising treatment behaviours, including *obligatory, discouraged and permissible.* The harm is divided into two types: 1) severe harm, if the anticipated harm of a proposed medical treatment would lead to a contrary outcome of the intended benefits outlined in the obligatory treatment behaviours. 2) side effects and complications, if the anticipated harm of a proposed medical treatment would lead to harm as outlined in the treatment behaviours *discouraged* and *permissible*.

[51] For example, based on the analysis of chapter seven, a *mukallaf* patient, would consider obtaining information concerning the hazards related to the medical procedure if it threatens their life. In the situation where a patient expresses a desire to donate an organ for the sake of another person's life, yet his act entails a serious risk that threatens the donor's own life. In this scenario, the medical intervention would be categorised as a *prohibited* treatment. Hence, it is substantial for the patient to be informed of the type of risk deemed life-threatening for the donor. A further instance involves a patient with many health conditions who would consider information that is relevant to the side effects that could cause pain or discomfort, in contrast to the benefits. In this scenario, the treatment is classified as *discouraged*, allowing the patient to refuse or undergo the treatments without further moral consequences.

3) A disclosure of any **available means to mitigate severe risks, side effects, and complications,** if they occur, or any alternative **available treatment options to avoid them**.

The threshold for the standard of relevant information regarding available alternative treatments is that all information that would be *substantial* for a *mukallaf* patient to know, including whether the available alternative treatments are to

a. Prevent or mitigate severe risks associated with the initial proposed treatment.
b. Prevent or mitigate side effects and complications associated with the initial proposed treatment.

8.5.1.3 The Maxim of *Hardship*: Standards for the Disclosure of Treatment Hardships

The maxim of *hardship* is that *hardship begets facility*. This maxim means that one of the purposes of *Shari'a* is to alleviate or remove burdens that individuals may face in all situations where strict obedience to *Shari'a's* textual injunctions would result in difficulties and hardships for a person.[52] The principle of *hardship* is applied through many sub-principles. The central principle in information disclosure is that *Necessity removes prohibition*. Section 7.7.1 of Chapter 7 addresses this maxim, which maintains that that all behaviours forbidden in *Shari'a* can be performed in situations of *necessity*.[53]

As also discussed in Section 7.7 of Chapter Seven, the prohibition of consuming porcine products and wine is firmly established in *Shari'a*.[54] However, materials derived from swine and wine are utilised to produce beneficial medicines and preventative measures for many diseases and health problems.[55]

Since the patient is the moral agent who exercises the right to make an autonomous moral decision, their ability to assess and decide their moral position in accepting or refusing the prohibited treatments is subject to their knowledge that such treatments involve the use of unlawful substances.

Therefore, the maxim of *hardship* morally suggests a disclosure standard for the **medical treatment that contains an unlawful substance or involves an unlawful procedure in *Shari'a*.** Under the *mukallaf* patient standard, physicians shall disclose to the patient the unlawful substances involved in a proposed medical treatment that a *mukallaf* patient would consider *substantial*. Information that a *mukallaf* patient would find *substantial* is

[52] Al-Zuhayli (n 47) 275.
[53] As stated in Chapter Seven, *Shari'a* recognises the application of the doctrine of *necessity* in seeking medical treatments, provided that the specific conditions for *necessity* are fulfilled. For the detailed discussion of the principle of *necessity*, see Section 7.7.1 of Chapter 7.
[54] The Islamic position on utilisation of swine and wine for medical purposes has been presented in Chapter 7, Section 7.7.
[55] Ya'arit Bokek-Cohen, Limor D. Gonen and Mahdi Tarabeih, 'The Muslim Patient and Medical Treatments Based on Porcine Ingredients' (2023) 24(89) BMC Medical Ethics Journal 1, 2.

established by categorising treatment behaviours according to the five values of *taklif* outlined in Appendix A, Table A1.[56]

Accordingly, the maxim of *hardship* would require physicians to disclose to the patient the unlawful substances involved in a medical treatment, including

1) A disclosure of **treatments that contain an unlawful substance in *Shari'a***, whether they are utilised in diagnostic or treatment procedures.

The threshold for the standard of relevant information regarding treatments containing an unlawful substance is that all information that would be *substantial* for a *mukallaf* patient to know, including whether the proposed unlawful treatment is: [57]

a. Preserving life
b. Healing the disease.
c. Approved by a *halal* product certificate as it has been transformed to lawful treatment through *istihalah*.
d. Used only for external application if the unlawful substances are alcohol substances.

2) A disclosure of **treatments that involve an unlawful procedure in *Shari'a***.

The threshold for the standard of relevant information regarding treatments containing an unlawful procedure is that all information that would be *substantial* for a *mukallaf* patient to know, including whether the proposed unlawful treatment is to:

a. Preserving life

Further, the maxim of hardship stipulates that a *prohibited* action is only performed if there is no alternative except to engage in the *forbidden* conduct. Thus, the maxim of hardship morally suggests a disclosure standard about the availability of any alternative *halal* treatment options.

Accordingly, the maxim of *hardship* would require physicians to disclose to the patient the available alternative *halal* treatment, including:

3) A disclosure of any **available alternative *halal* treatment** for the initial unlawful treatment.

The threshold for the standard of relevant information regarding available alternative *halal* treatments is that all information that would be *substantial* for a *mukallaf* patient to know, including whether the available alternative *halal* treatment is:

a. Preserving life
b. Healing the disease.

[56] See the *Shari'a* exceptions to undergo *prohibited* treatments in the categories of treatment behaviours in the divine discourse of *taklif* presented in Appendix A, Table A1.

[57] The threshold for the substantial relevant information concerning the disclosure standard for treatment components that contain unlawful substances or procedures has been identified based on whether the outcomes of a proposed prohibited medical treatment would fall under the exceptions as outlined in the treatment behaviours of *prohibited.*

8.5.1.4 The Maxim of *Certainty*: Standards for the Disclosure of Treatment Certainty

The maxim of certainty is that *certainty is not overruled by doubt*. Certainty is the undoubted knowledge of something.[58] The principle of *certainty* suggests that a matter decided based on an unshakable faith and supported by legitimate, qualified and acceptable evidence is considered secure and cannot be overruled by further questioning.[59] Put simply, a matter whose validity is clearly evident leaves no room for doubt or questioning.

Every medical treatment brings potential benefits, but it entails the possibility of risks and adverse effects. The optimal course of action for each patient is to maximise the benefits of each treatment while minimising any potential hazards, adverse effects, or use of treatments that include forbidden substances. However, the reality is considerably complex. For example, an effective medicine is used to control cholesterol levels, yet it is potentially associated with the risk of death due to cardiac disease in a patient. In another scenario, implanting a genetically modified porcine kidney into the patient's body indicates successful treatment and alleviates suffering, but the kidney is a swine's organ.

Therefore, the most challenging aspect for a *mukaalf* patient in the medical decision-making process is assessing the benefits and disadvantages of the suggested medical intervention while also considering whether the proposed treatment involves any *Shari'a*-prohibited procedures or substances.

Since the patient is the moral actor with the right to make moral and medical judgments, the maxim of certainty requires that the patient receive reliable information about their proposed medical intervention. The maxim of *certainty* morally suggests a disclosure standard for reliable information, measurably about the proposed medical treatment relevant to the patient's condition, using reliable evidence. This is commonly referred to as evidence-based medicine.[60] In practice, the situation appears as follows:

A 75-year-old woman is experiencing severe pain in her knee. For the specific circumstances of the patient, the doctor proposes the following two interventions:

a. Surgical treatment: Artificial joint replacement effectively decreases pain by 70-90%. The patient's age affects the likelihood of surgical intervention's efficacy and raises doubts about the surgery's success. Therefore, the likelihood of reaching full recovery is low. Post-surgery, approximately 5% of individuals experience stiffness in the knee, while inflammation occurs in about 1% of cases. Furthermore, all surgical procedures have the probability of unforeseen side effects.

[58] Mohamed S Al-Borno, '*AL-Wajiz Fi Iidah Qawaeid Al-Fiqh Al-Kuliya'* [The Clarification of the Leading Jurisprudence Maxims] (*Al-Rissala* 1996) 166-169.
[59] Daud Mustafa, Hashir Abdulsalam, and Jibril Yusuf, 'Islamic Economics and the Relevance of *Al-Qawā'id Al-Fiqhiyyah* Islamic Legal Maxims] (2016) 6:(4) Sage Open Journal 1, 4.
[60] Mustafa (n 35) 480.

b. Conservative treatment involves injections into the knee joint. This can alleviate the severity of symptoms in 55-70% of infected individuals. However, conservative treatment can also have adverse effects. Injections into the joint may cause the joint to become infected, which is doubtful, occurring in only 3% of cases. However, if an infection does arise, it can be deadly.

Both medical treatment options in the above scenario have merits, potential risks, and adverse effects. The important question is what factors a *mukallaf* patient, particularly those with multiple medical conditions, should consider before choosing a course of treatment.

In Islamic jurisprudence, knowledge and degrees of evidence are categorised based on qualitative terms that maintain measurable value:[61]

a) *Yaqin* (certainty) is 100%.[62]
b) Galabat al-*zann* (more likely) is calculated to be between 51% and 99%.
c) *Zann* (probability) is when the likelihood of a matter's existence or nonexistence is equal to 50%.
d) *Shak* (doubtful) is below 50%.[63]

Islamic jurisprudence establishes a clear line for patients to evaluate information on medical interventions. The patient is guided to assess the medical treatment information based on the 'more likely' scale, with a score of 51%-99%.[64] Although certainty of 100% is theoretically ideal when assessing the benefits or risks of a medical intervention, it is unattainable in most medical treatments.[65] The more likely measure is typically employed when accepting a specific statement, and the information is complex and not easily obtained. The closer the likelihood ratio approaches the degree of certainty, the more it is crucial to consider it.

Regarding the classification of probability and doubt, Islamic jurisprudence does not consider statements founded on a probability of 50% or doubt below 50%. Imam Izz Ibn-Abdul-Al-Salam maintains that a person should not pay attention to the weak ratios that correspond to the more likely ratios.[66] If such a low percentage is adopted, it would disrupt people's interests and prevent them from avoiding minor risks in order to achieve more significant goals. In the medical context, Al-Ezz Ibn-Abdul-Al-Salam's argument suggests that when a patient is provided with a proposed treatment that entails risks deemed probable

[61] Zakariyah, (n 40) 81.
[62] Sayyid Fadhil Hosseini, 'Certainty Is Not Challenged by Doubt' in *Thirty Principle of Islamic Jurisprudence* (Ansariyan Publications 2011) Para 2, available at <https://www.al-islam.org/thirty-principles-islamic-jurisprudence-sayyid-fadhil-milani/chapter-7-certainty-not-challenged> accessed 5 August 2024.
[63] Ibid.
[64] Kamal Al-Din Bakro, *Ahkam Al-Tadawi Wa Al-Dawa' Fi Al-Fiqh Al-IslamI* [The Ruling in of Seeking Medical Treatment and Medication in Islamic Jurisprudence] (Dar *Al-Di'a* 2013) 27.
[65] Mustafa (n 35) 480.
[66] Izz Al-Din AbdualAziz Bin Abdul Al-Salam, *Q'waad Al-Ahkam Fi Massalih Al-Anam* [The Rules of Islamic Jurisprudence in People Interest: A commentary in The Roots of Islamic Jurisprudence] (Taha Abdel Raouf Saad ed, vol1, *Maktabat Al-Kuliyaat Al-Azharia* 1991) 4. The argument of Izz Ibn-Abdul-Al-Salam emphasises in Muhammad Al-Shanqeeti, '*Al-Ahkam Al-Jiraha Al-Ttibiya Wa Alathar Al-Mutaratiba Alayha*' [The Legal Provisions of Surgical Procedures and its Outcomes] (2nd edn, *Maktabat Al-Shaba* 1994) 119.

at 50% or less, the patient may disregard these risks, as there remains a 50% likelihood that such risks will not materialise.

The recognition of Islamic jurisprudence of the validity of the more likely scale simplifies the process of making medical decisions. The patient is morally responsible for the consequences that result from their choices. While certainty is difficult to achieve, the measure of likelihood would satisfy the patient's soul in making medical decisions consistent with their moral values. To clarify this statement, consider the following scenario:

A pregnant woman is suffering from a specific medical condition; her doctor has prescribed a painkiller. The medication has a low risk of causing an abortion. Only 5% of women who consumed this medicine lost their babies. Following the administration of the medication, the woman suffered a miscarriage.

According to the likelihood scale, the medication is deemed safe for use during pregnancy. Evidence grounded on 5% is classified as doubtful. The norms of Islamic jurisprudence do not give weight to statements that are doubtful. From a moral standpoint, in *taklif*, the woman is exempt from moral responsibility since she made her medical decision based on a greater likelihood that the treatment is safe. The recognition of the measure of likelihood in decision-making makes the patient morally satisfied with their medical choices, even if such outcomes go differently than doctors expected based on their best estimation, which reflects evidence-based medicine.

Based on the above discussion, the maxim of *certainty* morally suggests a disclosure standard about the certainty of the proposed medical treatment. Under this standard, physicians shall disclose to the patient **reliable information, measured** in a manner that a *mukallaf* patient would consider *substantial,* about a proposed medical treatment. Information that a *mukallaf* patient would find *substantial* to consider is a greater likelihood (more likely) of all relevant information being disclosed based on the maxims of *objectives*, *harm* and *hardship*.
Accordingly, the maxim of *certainty* would require physicians to disclose to the patient reliable information, that is known as evidence-based medicine, through measurable expressions, either quantitative (verbal) or qualitative (numerical), including:

1) A disclosure of **reliable information** on all substantial information provided based on the maxims of *objectives*, *harm*, and *hardship*.

The threshold for the standard of reliable information is the measurable likelihood of occurrence of all information that would be *substantial* for a *mukallaf* patient to know, including whether the anticipated occurrence of the disclosed information is:

a. More likely 51-99%.
b. Probability 50%.

c. Doubtful below 50%.[67]

8.5.1.5 The Maxim of *Custom*: Standards for the Disclosure of Treatment Custom

The maxim of *custom* is that *custom is authoritative*. Islamic jurisprudence recognises the validity of prevailing customs and norms in society as a basis for reaching judgments.[68] The principle of custom maintains that customs, conduct, and traditions consistently practised and deeply ingrained in the culture of a particular society can serve as a foundation for formulating moral and legal norms if morally sound individuals widely accept them. [69]

In medical practice, physicians adhere to standard and widely accepted medical practices when performing medical interventions. Applying the custom principle to information disclosure morally suggests a disclosure standard about the standard **procedure followed by physicians in medical treatment.** Under this standard, physicians would disclose to patients, for instance, which procedure they follow in the medical intervention.

However, such information is *insubstantial* for a *mukallaf* patient to consider when making a moral decision about the proposed medical treatment. The thesis presents *substantial* information, as evidenced by categorising treatment behaviours in the divine discourse according to the five rulings of *taklif,* as established in Appendix A, Table A1. Information disclosed from the maxim of *custom*, which is not associated with a moral value in divine discourse, would not be morally significant for the *mukallaf* to make a moral decision about the proposed treatment.

For example, wound closure techniques vary from minor to complex wounds, including sutures, staples, and adhesives.[70] It is not morally *substantial* for a patient to consider information about the standard technique of wound closure in the case of a scalp laceration or to know that suturing is used to close the wound after appendectomy surgery. Such information has the potential to generate confusion for the *mukallaf* patient, which can adversely affect their ability to make moral decisions. Hence, the patient's excessive concentration on procedural details may hinder their ability to consider the *substantial* information necessary for making a morally informed decision.[71]

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[67] Certainty 100% has been excluded, since the discussion demonstrates that certainty is unattainable in information about medical treatment.

[68] Zakariyah (n 40) 173.

[69] Al-Zuhayli (n 47) vol1, 298.

[70] Chaudhary Ehtsham Azmat and Martha Council, 'Wound Closure Techniques' in *StatPearls [Internet]. Treasure Island (FL)* (Stat Pearls Publishing 2025) para 2, available at < https://pubmed.ncbi.nlm.nih.gov/29262163/> accessed 15 January 2025.

[71] A Further example: If the medical community accepts that a doctor with certain skills and qualifications can perform surgery, then the maxim of *custom* would require the physician to disclose information about the physician's skills as demonstrated in their personal performance record. Once again, such information is not morally significant for the *mukallaf* patient to consider in medical decision-making. Instead, this information may increase the *mukallaf* patient's confusion, distract them from making decisions that serve their best moral medical interests, especially if the doctor is performing the procedure for the first time.

Accordingly, a disclosure of information based on the maxim of *custom* is information that a *mukallaf* patient would not find *substantial* to consider in a moral medical decision about their health. Nevertheless, patients may enquire about such information from physicians, but it does not establish a moral and legal standard for a discourse.

8.6 Understanding Disclosed Medical Treatment Information

As discussed earlier in Section 6.5.3 of Chapter Six, in the theory of *taklif*, providing information about divine burdens is insufficient for a *mukallaf* to fulfil a task. A *mukallaf* must also understand the divine discourse that imposes such a task.[72] The requirement for understanding highlights that the performance of a divine task is only achieved with the *mukallaf's* awareness, as the moral actor is entitled to exercise the moral obligation to voluntarily and autonomously choose whether to comply with or depart from a divine burden. Therefore, the conditions of *taklif* stipulate that a *mukallaf* cannot autonomously reach a moral decision to engage in or refrain from action and bear the moral responsibility unless the *mukallaf* understands the relevant disclosed information about an action in the divine discourse.[73]

Equally, when applying the *taklif's* condition in the context of informed consent, the physician's disclosure of information concerning the medical intervention primarily entails transmitting information. It does not necessarily imply that the patient understood it. For a patient's moral consent to be valid, they must understand the *substantial* information disclosed. This is because expressing a preference for a treatment decision is only meaningful if *mukallaf* patients understand what is being disclosed to them. Physicians, therefore, morally have a moral duty to make medical information understandable to patients and assess whether the patient understood such information. The patient's understanding of the information enables them to make informed and moral medical decisions concerning their health, based on their moral preferences and values that they seek to achieve from seeking a particular medical treatment.

In this regard, whether the physician should understand the moral significance of the proposed medical treatment in the context of the divine burden is worth considering. The moral physician's duty is limited to making medical information understandable to patients and ensuring that they comprehend it. For instance, if the benefit of the proposed medical intervention is intended to prevent a patient's disability, the physician must ensure that the patient recognises that refusing medical treatment can cause disability. In this sense, the physician will not be obligated to ensure that the patient understands the moral consequences of undergoing or rejecting the proposed medical treatment established in the divine discourse. This is because in the theory of *taklif,* the *mukallaf* patient is the moral actor to whom the divine discourse of seeking medical treatment is directed. Ultimately, a

[72] See the discussion about *understanding the divine discourse* in Chapter 6, Section 6.5.3.
[73] See the argument of Al-Amidi, *taklif* is [a divine] discourse, Al-Amidi (n 33) 150; See also the discussion of the [divine] discourse in Al-Zarkashi, (n 33) vol 1,168.

mukallaf patient bears the moral responsibility for the consequences of their moral medical decisions.

In the context of understanding disclosed information, the important matter is, in practice, how can a doctor effectively assess whether a patient understood the medical information provided to them?

Despite Muslim scholars' extensive investigation of the concept of understanding, its meaning and application in the field of making medical decisions remain unaddressed. This knowledge gap poses a challenge in developing standards for assessing patient understanding in practice, highlighting the need for further research in this area. Thus, this section aims to provide conceptual standards for the moral requirement of patients' understanding in the context of informed consent. It will draw upon existing Islamic philosophy literature to outline moral standards for defining patients' understanding. Hypothetical clinical scenarios will be used to illustrate these standards. Additionally, this section will outline methods for assessing such understanding. While the following contribution has limitations, it has the potential for further development to enhance its application in an informed consent setting.

In Islamic jurisprudence, the act of considering a specific matter and reaching a decision is closely linked to the notion of understanding. Understanding is the cognitive process of knowing and grasping something from its words. For instance, Ibn-Qayyim defines understanding as the correct way of dealing with speeches by grasping their semantic meanings and intended dimensions.[74] Kamal states that one who understands words is the one who grasps the meaning of the words through connotation and intent.[75] Al-Jawziyya maintains that understanding is the ability to grasp the intended meaning of the speaker's words through their implications and inferences.[76] According to the jurists, an adequate comprehension of the matter enables an individual to discern between what is true and what is corrupted and between truth and falsehood. It provides them with virtuous intentions and a commitment to seeking the truth.[77]

The *Qur'an* mentions the word 'understanding' in the context of a substantial and comprehensive body of knowledge:

> "And it is He [God] who placed for you the stars that you may be guided by them through the darkness of the land and sea. We have detailed the signs for people who know. And it is He who produced you from one soul and [gave you] a place of dwelling and storage. We have detailed the signs for

[74] Muhammad Bin-Abi-Baker Ibn-Al-Qayyim Al-Jawziyya, *Aalam AlMuqaeen* [Information for Those who Write on Behalf of the Lord of the Worlds] (Mashhur H Al Salman and Ahmed Abdullah eds, vol 2 *Dar Al-Jawzi* 2002) 165, the concept of 'understanding' the *Shari'a* sources texts is illustrated through an example at vol 3, 137-140.
[75] Kamal Kapash, '*Al-Siyaq Wa Majalat Iiemaliha Eind Fakhr Al-Din Al-Razi Drasaa Nazariatan Tatbiqia'* [The Context and Fields of its Implementation According to Fakhr Al-Din Al-Razi: An Applied Theoretical Study] (2022) 16:(1) Journal of Social and Human Sciences 429, 430.
[76] Muhammad Bin-Abi-Baker Ibn-Al-Qayyim Al-Jawziyya, '*Madarz Al*-Salken' [Stations of the Seekers] (Muhammad Al-Baghdadi ed, vol 1, 3rd edn, *Dar Al-Kitab Al-Arabia* 1996) 68.
[77] Ibid 65.

people who **understand.** And He sends down rain from the sky, and We produce the growth of all things. We produce from its greenery, from which we produce grains arranged in layers. And from the palm trees, of its emerging fruit are clusters hanging low. And [We produce] gardens of grapevines and olives and pomegranates, similar yet varied. Look at [each of] its fruit when it yields and [at] its ripening".[78]

In the above verses, the word 'understanding' appears alongside an array of cosmic phenomena, suggesting that its purpose is to make the person addressed by the provisions of the *Qur'an* cognizant of these phenomena and to understand their connotations, the wisdom behind their diversity, and the harmony and consistency between them.[79]

8.6.1 Understanding the Reality of a Matter in Islamic Philosophy

In Islamic philosophy, determining the appropriate course of action is based on the person's understanding of the reality of the matter.[80] The fundamental approach to assessing the individual's correct understanding of this reality is through questioning.[81] The following discussion explores the philosophical concept of understanding reality of a matter, followed by questioning as an Islamic approach to assessing such understanding in the context of informed consent.

8.6.2 Standards for The Patient Understanding

8.6.2.1. Grasping: The Patient Grasps Information

Consider this scenario: Patient A is diagnosed with a salivary gland tumour. The physician proposes the following intervention: Surgical treatment, which involves removing the tumour and is followed by radiation therapy to eradicate any remaining cancer cells. Surgical intervention is 70% to 90% effective in achieving recovery, especially when the tumour is in its early stages. However, the position of the tumour extraction increases the probability of potential adverse effects. These complications affect the ability to speak and swallow.

The doctor communicates this information in a way that the doctor believes the patient A can understand. How can the doctor determine whether A understood the information?

In this scenario, understanding is a cognitive accomplishment that links the subject of patient A's understanding to a set of understandable information about salivary gland

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[78] *Sura Al-An'am*. 97,98,99.

[79] See the interpretation of theses verses in Abdul-Rahman Nasser Al-Saadi, *Taysir Al-Karim Al-Rahman Fi Tafsir Kalam Al-Manan* [The Facilitation from the Most Generous (God) and Most Merciful (God) in Interpreting the Words of the Most Generous (God): A Book of Exegesis of the *Qur'an*] (Abd al-Rahman M Al-Luwaihaq ed, 1st edn, *Mussat Al-Risala* 2000) 265-267.

[80] See Generally, Ibn-Al-Qayyim Al-Jawziyya, *Aalam AlMuqaeen* (n 74) vol 1, 66. The author outlines the level of understanding necessary to comprehend the divine discourse through the heart and ears, and thereafter, to form a response.

[81] For the use of the method of questioning in the *Qur'an*, see generally Aabd-Alkarim M Yousuf, '*Uslub Aliastifham Fi Al-Qur'an Al-Karim*' [The Method of Questioning in the Holy *Qur'an]* (*Al-Sham* 2000); For the use of the method of questioning in the *hadiths* of the Prophet, see generally, Nagash Eidah, '*Uslub Aliastifham Fi Al-hadith Al-Napoyia'* [The Method of Questioning in the Prophetic Hadiths] (Thesis, Mouled Mammeri University 2012).

tumour treatment. Al-Zarkashi states that understanding is not limited to simply knowing individual pieces of information.[82] "Understanding surpasses normal knowledge since it allows one to recognise that the truth occurs with…grasping the subject material".[83] Ibn-Al-Qayyim maintains that understanding enables one to grasp what others cannot, even if they possess equivalent memorisation skills.[84] For instance, A Muslim can read and memorise the *Qur'an,* but implementing its instructions and teachings and attaching its principles and values to a specific issue requires more than memorising the facts mentioned in its verses. Understanding requires appreciating how facts relate to each other; it is a cognitive process that jurists refer to as *ed'raak* (grasping).[85] Grasping requires an individual's ability to recognise the interconnections among different elements inside a particular body of information, specifically how alterations in one set of facts would result in changes in others.[86] Individuals ultimately grasp results and make inferences based on multiple pieces of information.[87]

Applying the condition of grasping in a medical setting refers to the patient's capacity to grasp the *substantial* information related to the proposed medical intervention. Therefore, a patient's understanding entails more than just being informed about the actual details of the suggested medical procedure, such as the intended benefits and risks of the proposed treatment, the balance of such benefits and risks, and the inclusion of unlawful substances in *Shari'a*. Understanding means the patient grasps how different parts of information connect, enabling them to draw inferences. Such grasping of information indicates cognitive achievement in understanding the facts about the medical intervention, extending beyond mere knowledge.

Returning to the patient's scenario, understanding means that A appreciates how the proposed medical intervention affects his health and evaluates the treatment's benefits and risks. In addition, A considers the option of abstaining from undergoing the treatment and assesses whether abstaining would have consequences for his health. Furthermore, A appreciates such side effects and assesses whether they can accept living with the consequences of abstaining from the treatment. Obviously, the assessment of willingness to live with the consequences varies depending on each patient's situation. For a patient, the choice to undergo a procedure that can lead to paralysis will be more worthwhile than the choice of death. Patients' appreciation will also consider the moral considerations rooted in their moral priorities and aspirations regarding each treatment.

8.6.2.2 Medical Truth: The Patient Understands True Information

Now, consider this scenario: Patient B is diagnosed with advanced-stage four liver cancer. The patient informs the general doctor that he is following a course of nutritional

[82] See generally the discussion of Al-Zarkashi about the concept of understanding in Al-Zarkashi (n 33) vol 1, 31-32.
[83] Ibid.
[84] Ibn-Al-Qayyim Al-Jawziyya, *Aalam AlMuqaeen* (n 74) vol 1, 65.
[85] See Al-Zarkashi (n 33) vol1, 31-32. The term of *e'drak* is mentioned at 32.
[86]Ibid.
[87] Ibid 36. The author illustrates this argument through explaining '*aistinbat*' (drawing correct conclusions from what it has been understood).

supplements, which contradicts the advice provided by the oncologist. The patient conducted considerable internet research and spent time reading information on a website specifically focused on the treatment of liver cancer. The patient concludes that the nutritional supplements he is now taking do not conflict with his therapy for liver cancer, based on the description of how it works. The doctor considers this inference to be of dubious scientific validity.

In this scenario, patient B appears to have grasped the information he read and concluded that the nutritional supplements he is currently undergoing will not interfere with his cancer treatment. However, if the information is factually incorrect, can Patient B's understanding be deemed valid to meet autonomous medical decision requirements?

To clarify the issue further, imagine another clinical scenario: Patient C is diagnosed with chronic dacryocystitis after experiencing severe eye pain, redness, and a high fever. The doctor proposes two treatment options: 1) temporary pain relief with antibiotics, eye drops, warm compresses, mild eye massage, and sedatives if needed. 2) Permanent pain relief through surgical treatment. Sebaceous cyst removal and pain relief are more likely after surgery. The surgery includes the potential risk of causing blindness. However, the doctor does not have the correct number for the rate of this side effect at the time and mistakenly recalls it as 8% instead of 80%.

The patient C grasped the two proposed treatment choices and their benefits and disadvantages. Therefore, the patient concluded that surgery is safe because blindness is unlikely to occur. The patient gave consent to the surgery. Patient C understood the information, but is his understanding valid enough to make a medical decision?

In both cases, there might be an apparent issue. Patient B grasped the knowledge he had read. Similarly, patient C understood the information revealed by the doctor. However, patients B and C comprehended incorrect or imprecise information. Grasping a body of information does not demonstrate a genuine understanding of the subject matter. This is because untrue knowledge leads to wrong understanding.[88] If the information lacks a link to the truth, it becomes challenging to argue that the patient genuinely understood the material. This implies that the patient's understanding entails demonstrating cognitive achievement regarding the correct truth about the proposed treatment.

However, the question arises as to what constitutes the correct truth in medical information. Truth refers to everything that is truthful, realistic, stable and certain.[89] Truth, therefore, contradicts lies, error, delusion, suspicion, doubt, conjecture, opinion, belief, and

[88] See generally Ibn-Al-Qayyim Al-Jawziyya, *Aalam AlMuqaeen* (n 74), vol 1, 6- 8, vol 2, 187-189.
[89] See, Muhammad Ali Ahmad Al-Ansari Ibn-Manzur, *Lisan Al-Arab* [The Tongue of the Arabs Dictionary: An Arabic Dictionary] (vol 3rd edn, *Dar Sader*1993) 51-52; Jamil Hamdawi, *Mafhum Al-Hhaqiqa Fi Al-khitab Al-Falsafi* [The Concept of Truth in Philosophical Discourse] (1st edn, *Al-Shamla Al-Thahbia* 2015) 7; Ali Muhammad Al-Jurjani, '*Kitab Al-Tare'fat'* [The Book of Definitions] (*Dar Al-Kutb Al-Elmia* 983) 90.

falsehood.[90] Truth in Islamic philosophy can be categorised into three distinct types:[91] The first type of truth is a sublime, divine truth.[92] This type of truth is certain, for instance, facts related to the Islamic religion, such as the doctrine of monotheism. The second truth is a physical and empirical truth recognised through reason and personal observation.[93] This physical fact is not absolute or certain, but rather its relative truth, which is subject to change with developments in technological and scientific knowledge. The third fact is a demonstrative truth, considering induction, deduction, and *ijtihad*.[94] For example, facts related to jurisprudence, language, and literature.

Truth in medical information is relevant to the second type of truth. Truth in this context is not necessarily objective but rather the currently accepted scientific consensus derived from evidence-based medicine.[95] In other words, truth refers to the judgment of healthcare professionals who propose a medical intervention based on the well-informed and prudent utilisation of the latest medical information. Accordingly, determining whether the body of information understood by the patient is correctly connected to the truth should rely on the truth reached by the judgment of healthcare specialists.

When a medical judgment is reached by physicians based on evidence-based medicine, it is considered a valid medical truth. This is because Islamic jurisprudence accepts such physicians' judgment based on the higher likelihood. Although certainty is theoretically ideal for establishing medical judgments, medical decisions are based on likelihood rather than certainty.[96] This is because achieving certainty is often unattainable in most situations. Al-Mardawi maintains that "where we accept the physician's judgment, then [acting on] the greater likelihood is sufficient".[97] Thus, sound medical judgments should be established

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[90] *Al-Maany* Dictionary[The Meaning of Arabic Terms] www.almaany.com, available at < https://www.almaany.com/ar/thes/arar/حقيقة/#:~:text=3%(اسم)20%حَقيقة20%أضداد%20%A,غ%D9%902%20%شٌ%C%20كَذ%D9%902%20%بٌ%C%20ك%D9%902%20%ذُبٌ%C%20مُخاتَلَةٌ%C%20> accessed: 25August 2024; Jamil Hamdawi, *Mafhum Al-Haqiqat fI Al-Fkir Al-Islami* [The Concept of Truth in Islamic Thought] (*Majalat Dewan AlArab* 2016) 7.

[91] For a general discussion of the types of truth related to knowledge, See Ahmed Diaa-El-Din Hussein and Raeda Khaled Hamad Nasirat, '*Nzariat Al-Maerifat end Al-Imam Al-ghazali'* [The Theory of Knowledge According Imam Al-Ghazali] (2016) 39(2) Al-Quds University Journal 361, Mustafa Al-Nashar, '*Al-Mantiq Wa Falsafat Al-Eilm fi Al-fikr Al-Islami'* [Logic and Philosophy of Science in Islamic Thought] (no date); Hamdawi (n 89).

[92] See generally, Hamza Tzortzis, *The Divine Reality: God, Islam and The Mirage of Atheism* (1st edn, Newly Revised Edition, Lion Rock Publishing 2020).

[93] See generally, Ammar Al-Sagheer, *Nzariaat Al-Ma'rifa* [The Theory of Knowledge: Epistemology] (1st edn, *Al-Markz Al*-Islami 2023); Sabry Muhammad Khalil, '*Nzariaat Al-Ma'rifa Wa Maeayir Al-Haqiqat Fi Al-Falsafa Al-Gharbia Wa Al-Flfikr Al-Islami*' [Theories of Knowledge and Standards of Truth in Western Philosophy and Islamic Thought] (Sabry Muhammad Khalil 2019 Blog) available at < https://drsabrikhalil.wordpress.com/2019/11/15/نظريات-المعرفة-ومعايير-الحقيقة-وتستند،تتطابق%20معه%20"اى%20إذا%20لم%20A%معيار%20التطابق%20"التناظر"%text=3:~:/#/في-الف> accessed 15 July 2024

[94] See generally, Hamdawi (n 89); Fathi Al-Darini, '*Manahij Al-Bahth Fi Al-Maerifa Al-Islamia'* [The Methods in Islamic Knowledge] (*Dar Al-Fikr Al-Muas'r* 2001); See further sources available online: Abdul-Salam Al-Ahmar, '*Nazariat Al-Ma'rifa Wa Maswuwliat Al-arif Fi Al-Flfikr Al-Islami*' [The Theory of Knowledge and the Responsibility of the Knower in Islamic Though] *Amanah* or Scientific Research and Studies, available at < https://alamanaweb.ma/نظرية-المعرفة-ومسؤولية-العارف-في-المن/> accessed 15 August 2024; Muhammad Ahmed Al-Zoubi, '*Madkhal Manhajiun Li Nazariat Al-Ma'rifa Fi Al-Flfikr Al-Islami*' [An Methodological Introduction to the Theory of Knowledge in Islamic Thought] (2019) available at < https://www.odabasham.net/مقالة/108359-مدخل-منهجي-لنظرية-المعرفة-في-الفكر-الإسلامي> accessed 15 August 2024.

[95] Mustafa (n 35) 480.

[96] Ibid.

[97] Ala-Al-Din Ali Suleiman Al-Mardawi, *Al-Ensaf* [Fairness: A Book of Comparative Islamic Jurisprudence within the School of *Hanbli*] (Muhammad H Al-Faqih ed, vol 2, 1st edn, *Dar Ihia Alturath Alrabi* 1955) 311.

based on *ghalabat al zann* (more likely), which is more reliable than *zann* (probability) and *shakk* (doubt).[98]

Thus, the correct information in determining whether the set of information a patient has understood is sufficiently connected to the truth should depend on information established by
the physician's assessment of what is more likely to reflect the medical truth. Accordingly, understanding information to make autonomous choices requires the patient's grasping of a body of information and the grasping of the information considered most likely to reflect the truth by the medical professionals' assessment.

8.6.2.3 Various Level of Understanding: The Patient Understands Information to the Degree of Rightness

Consider a further scenario involving three patients: patient D, patient E, and patient F. All these patients have been diagnosed with myeloma and have been provided with two surgical treatments: the first involves removing the tumour with chemotherapy. A different choice is a bone marrow transplant. Both procedures benefit the patient's health condition, yet they also include risks and potentially severe complications.

Patient D is a neuro-oncology surgeon with 15 years of experience in this field. Patient E has a high academic qualification in a field unrelated to medicine. Patient F left school at fifteen without obtaining any academic qualifications.

It appears that patient D will have a better understanding than patients E and F. Hypothetically, patient E could demonstrate a better understanding than patient F. Should the variation among patients influence the meaning of understanding in informed consent?

As discussed in Section 6.5.1 of Chapter 6, Muslim jurists argue that sanity is considered the factor by which understanding occurs.[99] Additionally, individuals who have reached the age of *rushd* possess the cognitive capacities necessary to comprehend divine discourse. This suggests that a competent patient possesses the cognitive capacity to understand information regarding medical intervention choices and weigh their advantages and risks to reach an autonomous medical decision.

Nevertheless, Islamic philosophy recognises that individuals possess different degrees of understanding and perceptions.[100] Such variations in understanding result in different perspectives and varied judgements.[101] The *Qur'an* emphasises the differences in

[98] Ibid.
[99] See Al-Zarkashi's argument 'The intended purpose of the discourse [divine] is to make comprehension for those capable of understanding' Al-Zarkashi (n 33) vol1, 168. In an earlier discussion, Al-Zarkashi states that sanity is the basis for *taklif* [since it is the factor by which understanding happens] at 116; See also the argument of Al-Amidi that jurists have a consensus that sanity are conditions of *taklifs* to understand the divine discourse, since directing the discourse to someone who has no sanity and thus no understanding is impossible. Al-Amidi (n 33) vol 1 ,150.
[100] See generally Al-Zarkashi (n 33) vol 8, 304-309; Ibn-Al-Qayyim Al-Jawziyya, *Aalam AlMuqaeen* (n 74) 64-65.
[101] Ibid.

individuals' understanding by providing an example in the narrative of the Prophet David and his son Solomon.

> "And remember David and Solomon, when they gave judgment in the matter of the field into which the sheep of certain people had strayed by night: We did witness their judgment. And We made Solomon to understand (the case); and to each of them We gave wisdom and knowledge".[102]

The commentators of the *Qur'an* maintain that both the Prophet David and his son possessed the knowledge to examine the case, and David's decision was not wrong.[103] However, when God indicates that "And We made Solomon to understand", the verse's significance suggests that Solomon's understanding of the matter was more profound than his father's, resulting in a more compassionate judgment towards both the sheep and the field owner.[104]

Hence, Muslim scholars acknowledge that individuals have varying levels of comprehension regarding the same matter.[105] Some individuals possess a profound comprehension, while others have a moderate understanding, and some may struggle to grasp even the most basic concepts. Many different reasons might lead to differences in people's understanding. For instance, the presence of ambiguity and complexity in a speaker's speech and language. The nature of the subject has also a significant role in understanding. For instance, grasping everyday topics is easier than comprehending complex theological and political issues.

Returning to the scenarios of patients D, E, and F, was the difference in the patients' understanding a result of a genuine variation in their levels of understanding? The variation in the three patients' understanding resulted from their past knowledge. Knowledge and understanding are distinct concepts.[106] Knowledge is the acquisition of previously unknown information by the individual, indicating their prior lack of knowledge in that domain.[107] Understanding refers to grasping the words' meaning or recognising the words' significance in the speech.[108] In this sense, knowing and understanding differ because

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[102] *Sura Al-Anbiya*.78,79.

[103] See the interpretation of the two verses, Muhammad Ahmad Al-Qurtubi, *Al-Jami li-Aḥkam Al-Qur'an* [The Entire *Shari'a* Judgements in The *Qur'an*: A Book of Exegeses of The *Qur'an*] Ahmed Al-Bardouni and Ibrahim Atfeesh eds, vol 11, *Dar Al-Kutb Al-Masria* 1964) 307-309.

[104] Ibid.

[105] For instance, Ibn Taymiyya states that the reasons for the diversity of rulings in Islamic jurisprudence are the differences among jurists in their understanding of *Shari'*a texts. An individual may read a Prophetic *hadith* but not understand its meaning. In another context, Ibn Taymiyyah asserts that the differences among the jurist's stem from their varying understandings. See Ahmad Taqi Al-Din Ibn Taymiyya, '*Rafe Al-Malam An Al-A'ema Al-A'elam'* [Lifting Blame from Muslim Jurists: A Book on the Reasons of the Various Perspectives Among Islamic Legal Jurists (The General Presidency of the Departments of Scientific Research and *Ifta* of Saudi Arabia 1983) 25-30; Al-Shatibi also emphasises that differences in understanding among jurists lead to differences in rulings. He explains this difference stems from differences in understanding. See Ibrahim Musa Abu-Ishaq Al-Shatibi, *Al-Muwafaqat Fi Usual Al-Shari'a,* [The Reconciliation of the Fundamentals of Islamic Jurisprudence] (Mashhour bin Hassan Al Salman ed, vol 5 1st edn *Dar Ibn-Afan* 1997) 342.

[106] See generally the philosophical discussion that distinguishes between knowledge and understanding by explaining that the 'mind' is the instrument of the concept of understanding, while 'the senses' are the instrument for obtaining knowledge. Hassan Moalimi, *Itlala Ala Nazryat Al-Marifa fi Al-Falsafa Al-Islamia* [A View of the Concept of Knowledge in Islamic Philosophy] (*Maktabt Narjs* 2023).

[107] *Al-Maany* Dictionary (n 90) available at <https://www.almaany.com/ar/dict/ar-ar/معرفة/> accessed: 18 August 2024

[108] Ibid, available at < https://www.almaany.com/ar/dict/ar-ar/فهم/> accessed 18 August 2024.

knowledge does not involve cognitive processes. Knowledge is the state of being aware or unaware of something. However, understanding necessitates grasping the knowledge a person acquires. For instance, one can know Family law, which differs from understanding how to apply its legal rules in a particular custody case. Therefore, it may be inferred that, despite patients D, E, and F possessing varying levels of understanding, they can all still actively comprehend information to make an autonomous treatment decision.

The questions arise: How can a specific threshold for understanding be determined in medical decisions? In other words, what are the minimum and maximum requirements for understanding? Islamic jurisprudence literature has not identified a specific degree of understanding in the context of medical decisions. Generally, the concept of understanding within the field of bioethics has not yet been addressed.

Considering Islamic jurisprudence's broad discussions of understanding, Al-Baqalani and Abo-Zaneed maintain that a moral agent must fully understand their conduct.[109] Such a complete understanding can be achieved by grasping the rationale behind their performance of the action.[110] Hence, the jurists' moral framework demands complete understanding for the moral actor to determine their moral stance on the activity. Such complete understanding enables one to fulfil obligations or abstain from prohibitions.

In the medical decision-making setting, it is reasonable to assume that patients do not necessarily require a complete understanding of very technical information, complex cognitive concepts, or causal relationships between diseases. For instance, patients may not need to understand why two medications have contrasting effects or the reasons why blood clots develop in the blood vessels after knee surgery. The purpose of patient understanding is not to assess their comprehension of causative mechanisms. The patient is not a medical student who must understand every detail to perform well on the test. Thus, patients need to understand the information and, specifically, its relevance to them, to make medical decisions that reflect their moral aspirations.

Al-Amaidi argues that understanding does not necessarily have to be full or even close to being full.[111] Al-Amaidi elucidates the relationship between knowledge and acting by asserting that the recipient of an expression of speech necessitates a certain degree of understanding to act accordingly.[112] This level of understanding enables the individual to discern whether the speech is a directive or a restriction.[113] However, Al-Amaidi remains vague about how to define some level of understanding.

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[109] See generally, the discusstion about the meaning of *taklif.* Muhammad Bin-Al-Tayyib Al-Baqillani, *Taqrib Waal-Irshad All-Sageer* [Approximation and Minimal Guidance] (Ali Abo-Zaneed ed, vol 1, 2nd edn, *Mussat Al-Risalah* 1998) 239.
[110] Ibid.
[111] Al-Amidi (n 33) 150.
[112] Ibid.
[113] Ibid.

Further, Al-Ghazali maintains that one should understand discourse to engage effectively in it and behave properly.[114] According to Al-Ghazali, understanding leads to adherence to directives and restrictions.[115] Nevertheless, Al-Ghazali did not clearly define the level of understanding necessary for the moral agent to react effectively.

It seems that Muslim jurists refrain from establishing a specific threshold, whether minimum or maximum, for understanding. In practice, establishing a precise level of understanding is challenging, as it is unattainable to identify a particular criterion that generally applies to all contexts. However, a meticulous examination of the arguments of Al-Baqalani, Alamaidi, and Al-Ghazali reveals that the jurists' stance implies that understanding extends beyond an individual's comprehension of the discourse alone. The requisite understanding is what guides an individual in adhering to obedience or abstaining from engaging in prohibited actions. In essence, the requisite understanding denotes the cognitive process through which an individual comprehends a certain matter, enabling them to act in accordance with *sawwab* (rightness).[116] The concept of rightness implies an evaluative aspect that inherently acknowledges the existence of varying degrees in understanding. Rightness refers to performing in a manner that is proper and under the moral principles of the matter in question.[117] It is a term used to describe a judgment with a difference in preference.[118] When multiple options are available, one is considered more likely to be correct or valid than the others.[119] In alternative terms, it functions as a weighting measure.[120] Based on this criterion, the judgment will be determined by the likelihood of being correct.[121]

Judging from the above discussion around the concept of understanding the reality of the matter in Islamic philosophy, the *mukallaf* patients' understanding of the disclosed information standards encompasses the following:

1. The patient demonstrates cognitive achievement by grasping information related to the medical treatment, going beyond mere knowledge of information.
2. Based on the physicians' assessment, this information will more likely reflect the truth.
3. The patient understands the information to the extent that they satisfy the threshold of rightness.

8.6.3 Approach to Assessing Patient Understanding: Questioning

In practice, how can the patient's understanding be assessed? In other words, how can physicians determine whether the patient satisfies the understanding standards and

[114]Muhammad Abu-Hamid Al-Ghazali, *Al-Mustasfa Min Elm Al-Usual* [The Clarified in Legal Theory of Islamic Jurisprudence] (Muhammad Al-Shafi eds, *Dar Alkutb AlElmia* 1993) 67.
[115] Ibid.
[116] In Arabic dictionaries: Rightness means the opposite of wrong, see Ibn-Manzur (n 89), vol 1, 535.
[117] Muhammad Al-Sayyid Ibn-Duraid, *Al-Jamahra Musa't -Mustlahat Al-Sharia* [*Encyclopaedia of for the Meaning of Sharia Terms*] Ch (The Terms of Islamic Jurisprudence) available at https://islamic-content.com/dictionary/word/6385/ar, accessed 29 May 2024.
[118] Ibid.
[119] Ibid.
[120]Maryam Al-Dhafiri, *Mustalahat Al-Madhahib Al-Fiqhiat Wa'asrar Al-Fiqh Al-marmus* [Terminology of Islamic Jurisprudential Schools and Secrets of the Symbols of Jurisprudence] (*Dar Ibn Hazem* 2002) 272-273.
[121] Ibid.

threshold of rightness? Islamic jurisprudence scholarship emphasises questioning as a main approach to assess the recipient's understanding.

In the context of informed consent, it can be argued that the questioning approach can be applied to assess the patients' understanding after adopting effective communication techniques. Communication is the process of transmitting information, thoughts, and emotions between two or more parties[122] through speech, language, gestures, gaze, and physical contact.[123] In this sense, communication is crucial in the context of informed consent. Therefore, physicians are morally responsible for communicating *substantial* information about the proposed treatment before assessing the patient's understanding of it.

In *Shari'a* literature, the ability to effectively communicate information is essential to understanding a specific matter successfully.[124] The *Qur'an* and *Sunnah* recognise the significance of communication skills and provide instruction on efficient communication techniques that maximise an individual's comprehension. However, while this chapter concerns moral standards for assessing the patient's understanding, it will not delve further into the methods of achieving effective communication.[125]

Returning to the primary focus, questioning is employed through *Shari'a* sources to assess the recipient's understanding of the divine speech. The technique can be found in the sources of *Shari'a,* the *Qur'an* and *Sunnah*, which have been applied to evaluate the

[122] Sanaa Mohammed Suleiman, *Saykulujiat Al-Etisal Al-Insani Wa Maharatah* [The Psychology of Human Communication and its Skills] (1st edn*, Alam Al-Kutb* 2014) 22.

[123] Radwan Al-Qudmani and Osama Al-Aksh,'*Nazariat Al-Ttawasul Al-mafhum Wa-Almustala*' [Theory of Communication: The Concept and Terminology] (2007) 29:(1) Journal for Studies and Scientific Research- Arts and Humanities Series 139,140.

[124]Generally, see some examples in Anwar Sabahih, '*Maharat Al-Tawasul Fi Al-Qur'a Al-Kkarim Wa Tatbiqatiha Altarbawia*' [Communication Skills in The Holy *Qur'an* and Its Educational Applications] (2022) 38(9) Journal of Educational and Psychological Research 163; Saleh Khalid Al-Shaqirat, '*Maharat Nabawia Fi Al-Itisal* (*Mufti, Quadi, Waeizi ,Mulum, and Murabi*' [Prophetic Communication Skills (For Muftis, Judges, Preachers, Teachers, Educators)] (2015) 3(4) Journal of Social Studies and Research 7.

[125]Nevertheless, examples of specific mechanisms recognised in the *Qur'an* and *hadiths* can be adapted into a medical consent context. For instance, 1) using plain language: 'And We have certainly made the *Qur'an* easy for remembrance, so is there anyone who will remember?' *Sura Al-Qamar.22*. 2) Repetition: The *Qur'an* narrates the story of Moses with the Pharaoh 20 times and repeating the Moses story assists recipients in understanding its main concepts. 3) Using visual aids and gestures, active listening, including encouraging patients to ask questions: in *Hadith*, 'The relationship of the believer with another believer is like (the bricks of) a building, each strengthens the other'. *Riyad as-Salihin* (*Hadith* 222). In this *hadith*, the Prophet illustrated His *hadith* by interlacing the fingers of both his hands. There are also additional techniques that can be adapted in communication dialogue that can be observed from *Shari'a* sources; including but not limited to: using teach-back by asking patients to repeat what they understood in their own words, taking into consideration patients' levels of understanding and communicating with patience, communicating information to patients in a gradual method, and convey information in a way respectful and dignified manner. For general effective ways of communication in an Islamic perspective*,* see generally Eni Zulaiha, 'Prophet Muhammad's Communication Strategy Perspective of Tafsir Maudu'i Al- Wajiz' (2024) 12(1) International Journal of Nusantara Islam 77; Zin Eddine Dadach, 'Effective Way of Communication According to Prophet Muhammad (PBUH)' (Conference of Communication Skills 2020); Niaz Muhammad and Fazle Omer, 'Communication Skills in Islamic Perspective' (2016) 33(2) Al-Idah 1.

recipient's comprehension of material after it has been communicated.[126][127] For instance, in the *Qur'an,* the verse that prohibits wine states that "Satan seeks to stir up enmity and hatred among you by means of wine and gambling and to bar you from the remembrance of *Allah* and from praying. Will you not abstain from them?".[128]

The *Sunnah* also employed the technique of asking questions to ensure the recipient's understanding of the divine discourse. In many places, the prophet posed a question to ensure the person understood the intended meaning of his statements. The prominent scholar of *Hadith, Imam* Al-Bukhari, dedicated a full volume in *Sahih* Al-Bukhari titled *Questioning the Recipient of a Matter to Assess Their Understanding*.

In the context of informed consent, questioning is a method that physicians can adapt to assess a patient's understanding. Yet, in practice, how can physicians determine which questions to ask patients to ensure they understand the information? Although Muslim jurists acknowledge the significance of understanding in making morally autonomous decisions, Islamic jurisprudence lacks a theoretical framework to evaluate understanding.[129] The following discussion presents a concise yet ambitious attempt to outline standards for assessing patients' understanding of the s*ubstantial* information disclosed about a proposed medical intervention.

8.6.4 Standards for Assessing Understanding of the Patient

As stated earlier in Section 8.5 of this Chapter, when establishing moral or legal standards on matters not directly addressed in the primary sources of *Shari'a*, *Imam* Shafi has developed the methodology of applying *Usul Al-fiqh*. Once again, the five leading jurisprudential maxims will be employed to define standards for assessing patients' understanding when physicians develop questions to ensure that the patient comprehends the *substantial* information disclosed about a proposed medical intervention.[130]

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[126] For the using of the method of questioning in *Hadith*, generally see some examples in Safaa Hamdi Muhammad Ali, '*Hjajiat Al-Eastifham Fi Al-Khitab Al-Nabawi'* [The Argumentative Question in The Prophetic Speech] (2020)12(1) Journal of the Faculty of Arts, Fayoum University 35; Muhammad Mustafa, *Al-Taqwim Al-Tarbawiy Fi Al-Sunnah Al-Nabawia* [Educational Assessment in the *Sunnah* of the Prophet] (*Dar Iqdam* 2024); Rabie Abdel-Ati Abdullah, 'Min Blaghat *Al-Eastifham Fi Al-Hadith Al-Nabawi*' [From the Eloquence of The Interrogative in The Prophetic] 41 (2022) Journal of Al-Zaytouna University 145. In those sources, the authors examine the method of questioning as a tool aimed at stimulating the recipient to think and reflect, which ultimately contributes to assessing the extent to which the recipient understands the speech addressed to them.

[127]For the using of the method of questioning in *the Qur'an,* generally see as an example Jamal Badi, Salah Machouche and Benaouda Bensaid, 'Questioning Styles in the Qur'ān and their Impact on Human Thinking a Conceptual Analysis' (2017) 25 Intellectual Discourse 553.

[128] *Sura Al-Ma'idah*.5.

[129] Although this thesis attempts to provide practical guidance for the assessment of patient understanding, it is crucial to underscore the need for further discussion and an extensive investigation, including the conduct of empirical research to identify legal standards for patient's understanding, assess the efficacy of these standards and formulate questions to ask. This will lead to the development of efficient legal criteria and questions, promoting more consistent practice in the medical field. such examination requires in-depth review and analysis and can stand alone in a separate thesis.

[130] It is important to consider that, in the previous section, the requirement to disclose medical treatment information outlines information disclosure standards and the scope of the relevant substantial information that a *mukallaf* patient would find of considerable importance to know. Accordingly, when developing criteria to ensure that a patient understands the substantial information disclosed, this thesis considers that the physician's duty is limited to assessing patients' understanding of substantial information. That is, if the patient is provided with information that exceeds the substantial information defined in the previous section, the physician will have no obligation to ensure that insubstantial information is understood.

To satisfy the requirement of understanding, physicians shall ensure that the patient meets the understanding standards and assess whether:

1) The patient demonstrates cognitive achievements in grasping the *substantial* information relevant to *objectives*, *harm,* and *hardship* of a proposed medical intervention.
2) The patient's understanding of such information reflects the medical truth established by the physician's assessment.
3) The patient understands this information to the degree that satisfies the threshold of rightness.

The following discussion defines standards for patient understanding assessment using the five major jurisprudential maxims.

8.6.4.1 The Maxim of *Objectives*: Standards for Assessing Understanding of the Intended Objectives of the Treatment

Section 8.5.1.1 of this Chapter establishes that the maxim of *objectives* requires a disclosure of diagnosis, if known, and the **intended benefits** of undertaking the treatment.[131] Accordingly, when applying the maxim of *objectives* to the context of assessing patient understanding, it would require physicians to assess that:

1) The patient understands the *substantial* information relevant to the intended benefits of the proposed treatment.

The assessment of the patients' understanding of the intended benefits of a proposed treatment can be achieved by applying the following. When proposing a particular medical intervention and disclosing information related to its intended benefits, it is crucial for the physician to initially ascertain that the patient understands their health situation by asking questions that enable patients to describe their current medical condition in their own words. These questions ensure that patient understands the nature of their health issue or disease. Without understanding their current medical condition, patients may lack the ability to grasp the intended benefits of the treatment and evaluate its potential outcomes.

Once the patient has described their current health condition, the doctor can proceed to inquire about the patient's comprehension of the development of their health condition, disease, or suffering over time. The patient may provide various responses, requiring the physician to ask more free-flowing questions. However, once more, a lack of understanding regarding the progressive nature of the current medical condition might hinder the patient's ability to grasp the substantial treatment information and evaluate the more likely benefits. When a patient manifests an understanding of their present health condition and its course,

[131] See the discussion under the heading *Standards for the Disclosure of Treatment Objectives* in this Chapter, Section 8.5.1.1.

the physician can assess the patient's comprehension of the intended outcomes of the suggested medical procedure to treat the health issue, disease or discomfort.

Further, the physician cannot assess the patient's understanding of the information based on the maxim of objectives unless the patient understands the more likely outcomes of refusal the treatment. The doctor may assess this understanding by asking questions concerning the patient's awareness of the anticipated health consequences if the patient chooses not to undertake the proposed medical treatment or postpone it to a later time.

Responses to these inquiries shall demonstrate that the patient considers and grasps the consequences of the refusal associated with their specific case. The patient's failure to appreciate the possible negative outcomes on their short-term and long-term health may suggest a lack of understanding of the disclosed information about the intended benefits of the treatment.

8.6.4.2 The Maxim of *Harm*: Standards for Assessing Understanding of the Anticipated Harm of the Treatment

Section 8.5.1.2 of this Chapter establishes that the principle of *harm* requires disclosure of **severe risks, side effects, and complications** associated with the proposed treatment, as well as **any available alternative means to mitigate or avoid such harm**.[132] Accordingly, when applying the maxim of *harm* to the context of assessing patient understanding, it would require physicians to measure the three standards:

1) **The patient understands the *substantial* information relevant to severe risks associated with the proposed treatment.**

Under this standard, the physician shall ask questions to assess the patient's understanding of the severe risks associated with the proposed medical treatment if it is undertaken. Patients' responses will vary based on the suggested medical intervention and their health conditions. However, this thesis defines severe risks as those that lead to life-threatening hazards, organ loss and cause disability. Physicians, therefore, will need to ascertain that the patient understands any severe hazards involved in their treatment and how such risks would affect the patients' health conditions in the short and long term.

2) **The patient understands the *substantial* information relevant to side effects and complications of the proposed treatment.**

Similarly, to assess the patient's understanding of severe risks, physicians can frame questions to ensure that the patient understands the potential adverse effects and complications associated with the proposed medical treatment, as well as any unknown side effects that could occur if the medical intervention is undertaken. Patients' responses will vary based on their interventions and current health conditions. Failure to recognise the negative effects and complications on the patient's well-being and balance them with the

[132] See the discussion under the heading *Standards for the Disclosure of Treatment Harm* in this Chapter, Section 8.5.1.2.

benefit of the treatment in the short and long term may suggest a lack of understanding of the side effects and complications of the treatment.

3) **The patient understands the *substantial* information relevant to available alternative treatments to mitigate or avoid harm from the initial proposed treatment.**

The physician's duty to disclose information derived from the maxim of *harm* extends to informing patients about methods to mitigate or avoid risks and side effects, as well as whether other alternative medical treatments are available. The patient, therefore, needs to demonstrate an understanding of the options for alternative treatments.

To assess this understanding, the physician shall pose questions that require the patient to describe the alternative medical options provided. Additionally, ask questions about the rationale for selecting the alternative medical treatment and determine whether the patient is open to reconsidering their decision should the chosen treatment prove ineffective in healing the disease. The central issue here is the patient's ability to clearly describe and weigh the potential benefits and disadvantages of various mitigation measures, as well as to assess alternative options in comparison to the benefits, risks, and side effects of the initially suggested treatment.

8.6.4.3 The Maxim of *Hardship*: Standards for Assessing Understanding of the Hardship of the Treatment

Section 8.5.1.3 of this Chapter establishes that the maxim of *hardship* requires a disclosure of **treatments that contain an unlawful substance or involve an unlawful procedure in *Shari'a*** and **any available alternative *halal* treatment** options.[133] In addition, a disclosure of **alcoholic medications is administered for only external application**.

Accordingly, when applying the maxim of *hardship* to the context of assessing patient understanding, it would require physicians to assess the following three standards:

1) **The patient understands the *substantial* information relevant to medical grounds for undertaking unlawful treatment in *Shari'a.***

Under this standard, the physician may ask questions to confirm that the patient demonstrates awareness that the proposed treatment contains unlawful substances. Patients' responses will vary based on their ethical position. Yet, the patient's awareness that the treatment involves unlawful substances will pose further questions about their health situation, such as whether the proposed treatment would cure their health issue completely or partially and whether it would be used in all stages of treatment or a specific phase. Furthermore, the physician may ask questions to assess whether the patient understands that such *prohibited* treatment is proposed for a life-saving outcome or to cure the health issue effectively.

[133] See the discussion under the heading *Standards for the Disclosure of Treatment Hardships* in this Chapter, Section 8.5.1.3.

The crucial matter here is that the patient understands that the proposed treatment consists of *Shari'a*-prohibited substances, and whether such unlawful substances are transmitted to a *halal* by *istihala,* or if the alcoholic substances are administered externally. The patient also demonstrates a grasp of the life-threatening risks and health conditions that could result from refusing or delaying treatment.

2) The patient understands the *substantial* information relevant to medical grounds for undertaking unlawful medical procedures in *Shari'a*.

Certain medical interventions, such as abortion, are firmly forbidden in *Shari'a*. However, such interventions are authorised on the grounds of medical *necessity*. Therefore, physicians must ensure the patient understands the medical grounds for the proposed *prohibited* procedure. To assess the patient's understanding, doctors can ask questions to confirm that the patient is aware of the life-threatening hazards associated with refusing or delaying the procedure. The central matter here is the patient's understanding of the risks associated with refusing or delaying it, and whether its effects pose a threat to life or general well-being.

3) The patient understands the *substantial* information relevant to available alternative *halal* treatments to avoid undertaking the initial unlawful proposed medical treatment.

Based on the maxim of *hardship*, the doctor's duty to disclose information extends to informing patients about available *halal* alternative treatments. The patient, thus, needs to manifest an understanding of such alternative treatments. To assess this understanding, the physicians can ask the patient to describe the alternative *halal* medical options provided. Additionally, ask questions about the rationale for selecting the alternative *halal* treatment and determine whether the patient is open to reconsidering their decision should the chosen treatment prove ineffective in healing the disease. The patient's demonstration of weighing the merits and disadvantages of *halal* treatment compared to *forbidden* treatment is an essential factor.

8.6.4.4 The Maxim of *Certainty*: Standards for Assessing Understanding of the Certainty of the Treatment

Section 8.5.1.4 of this Chapter establishes that the maxim of *certainty* requires disclosing **reliable and measurable information** on all *substantial* information relevant to the *objectives*, *harm,* and *hardship* of the proposed treatment.[134] Accordingly, when applying the maxim of *certainty* to the context of assessing patient understanding, it would require physicians to assess the two standards:

[134] See the discussion under the heading *Standards for the Disclosure of Treatment Certainty* in this Chapter, Section 8.5.1.4.

1) **The patient understands that the *substantial* information relevant to a proposed intervention's *objectives*, *harm*, and *hardship* reflects the medical truth established by the physician's assessment.**

Based on the maxim of *certainty*, physicians should disclose reliable and measurable information on all *substantial* information disclosed to the patient. Such reliability is founded on evidence-based medicine, the prevailing scientific consensus and therefore lends validity to proposing possible treatment options.

Thus, under this standard, the physician should ensure that the information provided by their attending physician is the only valid information that the patient should understand. The physician may ask the patient to describe in their own words what they understood about the benefits and risks of the proposed treatment, and how this information might affect the treatment of their illness or health condition.

The key element here is that the doctor ensures that the patient does not confuse any prior knowledge or information from external sources with information provided by the physician, asserting that the only reliable information concerning the proposed treatment and its relationship to the patient's health condition is that which the physician communicates.

2) **The patient understands this information to the degree that satisfies the threshold of rightness.**

Under this standard, the physician must ensure that the patient has a correct understanding of all information provided about the benefits, harms, and hardships of the proposed medical treatment, any alternative available treatments, and how such treatments, if accepted, delayed, or rejected affect the patient's health conditions in the short or long term. In such a situation, Section 8.6.2.3 of this Chapter demonstrates that rightness is determined by the likelihood of being correct.[135] When there are proposed treatments or other alternative treatment options, each with its benefits, harms, and hardships, rightness refers to the likelihood of a proper action or judgment in a particular medical situation. The rightness assessment is left to medical professionals, based on their judgment of the validity of the patient's understanding, which is more likely to align with the medical profession's view of medical truth.

It is important to emphasise here that the physician does not have to ensure that the patient understands all the medical facts of the proposed treatment, such as the causal relationship between the occurrence of complications and the patient's health condition. Rather, it is sufficient for the physician to ensure that the patient comprehends, based on reliable information, the more likely outcome of taking, refusing, or delaying the treatment.

[135] See the discussion under the heading *Various Level of Understanding: The Patient Understands Information to the Degree of Rightness* in this Chapter, Section 8.6.2.3.

The crux of the matter is that the patient can properly assess and weigh all information about medical treatment against their health condition and understand, in such cases, what is most likely to be sound and correct for treating or improving the health condition. Nevertheless, the patient might decide against what they understood as correct according to medical truth. This is irrelevant, as rightness is a measure of understanding, not the objectivity of the final decision.

To conclude, the patient understanding assessment standards focus on evaluating the patient's ability to comprehend information, rather than their capacity to make an objectively sound decision. This is because the standards prioritise the process of understanding by which a patient arrives at decisions rather than the ultimate decision itself. A patient who understands the medical information and subsequently decides to accept or reject the proposed medical treatment is a *mukallaf* and, therefore, morally responsible for their decision.

Furthermore, it is essential to recognise that even if the patient comprehends the medical information, they may still disagree with the doctor's perspective. A physician's assessment of a patient's understanding shall ensure that the patient can make an informed decision regarding the proposed medical treatment by establishing that the patient meets the standards of understanding. Respecting patients' autonomy in making medical decisions according to their preferences and moral values does not require patients to agree with their physicians' opinions.

8.6.4.5 The Maxim of *Custom*: Standard for Assessing Understanding of the Custom of the Treatment

Section 8.5.1.5 of this Chapter establishes that the maxim of custom requires a disclosure of the **standard procedure followed by physicians** in the medical treatment.

However, when this Chapter discussed standards for the custom of the treatment, it considers that information relevant to the *custom* of the proposed medical treatment is *insubstantial* for a *mukallaf* patient to know.[136] Accordingly, physicians will not be morally obligated to assess the patient's understanding of the information provided based on the principle of *custom*, even if the patient requests such information.

8.7 Conclusion

This chapter conceptualises the principle of informed consent as a moral construct arising from respect for patients' autonomy in the theological doctrine of *taklif.* In the medical treatment setting, the patient is the *mukallaf*, who assumes the role of a moral agent in making moral medical decisions concerning their health. Physicians, therefore, are morally

[136] See the discussion under the heading *Standards for the Disclosure of Treatment Custom* in this Chapter, Section 8.5.1.5.

obligated to maximise the patient's autonomy in making medical decisions about proposed interventions through the principle of informed consent.

In an informed consent setting, to ensure that patients fulfil the moral requirements in medical decision-making concerning their health, this chapter applies the theoretical framework of conditions of *taklif*, discussed in Section 6.5 of Chapter Six. Judging from this framework of the conditions of *taklif,* this chapter outlines two fundamental normative principles that underlie the notion of informed consent. Firstly, the principle against coercion, which asserts that a patient who meets the criteria for being a *mukallaf* must maintain autonomy; thus, no medical treatment should proceed without their consent. Secondly, the principle is that such consent must be centred on the disclosure of relevant information and the patient's understanding of such disclosed information.

Concerning the first element, in the normative framework of the principle of informed consent, the patient must act as the moral agent to make autonomous decisions. In this setting, the theory *of taklif* assumes a rational person who, by principle, possesses the cognitive ability to assess the benefits and disadvantages of a medical intervention, as well as the consequences of obtaining or abstaining from it. In this sense, informed consent is associated with adulthood and maturity by attaining the age of *rushd*. Rationality and cognitive abilities enable *mukallaf* patients to classify each medical procedure into the appropriate moral category based on the five rulings in *taklif*. Therefore, the principle of informed consent presupposes the presence of rational *mukallaf* patients. Suppose a patient is unable to consider the proposed medical treatments to make informed decisions owing to cognitive disability, such as minors, mental illness, or a patient in a state of unconsciousness. In such situations, *taklif* considers those individuals to have natural barriers to making informed medical decisions. Therefore, in an informed context setting, those categories of individuals are exempt from making moral and medical decisions, and the doctrine of *taklif* places the moral burden on the surrogate decision-makers to fulfil the duty of making the informed consent.

In addition, in *taklif*, the free will to make moral decisions is inherent in the *mukallaf,* while bearing the divine burdens of *taklif*. This free will is an axiomatic value of autonomy. Similarly, in the informed consent setting, the *mukallaf* patient must act voluntarily, free from any coercion by others, when making medical decisions about their health. Consequently, the patient shall voluntarily decide whether to receive or refuse treatment. Put simply, in obtaining informed consent, the voluntariness of making decisions must be free from external coercion or influence. The patient is ultimately morally responsible for their health-related choices.

Turning to the second principle, informed consent, in its most effective form, implies a bilateral relationship between the moral actor, the *mukallaf* patient and the physician, with moral duties that the physician must uphold to facilitate the patient's ability to make a moral and informed medical decision. Thus, in the medical decision-making process between the moral actor and the physician, the moral actor, that is, the *mukallaf* patient, can only engage

effectively in this process if they have *substantial* information about a proposed intervention that is of considerable importance to know. The *substantial* information that a *mukallaf* patient would find of considerable importance is based on categorising treatment behaviours in the divine discourse according to the five *taklif* rulings established in Appendix A, Table A1. Such information helps patients assess the reliable and measurable information associated with the objectives, harms, and hardships of a proposed medical procedure relevant to their health conditions. Hence, in a systematic process, making informed consent necessitates that doctors provide patients with *substantial* medical information concerning a proposed intervention. This condition is known as the disclosure of medical information to the patient. In *taklif* theory, this condition enables the *mukallaf* patient to know the divine discourse regarding the specific proposed medical procedure.

Furthermore, disclosing information about the proposed medical intervention is insufficient for a *mukallaf* patient to make a moral decision. In *taklif* doctrine, to respond to the disclosed divine discourse, the *mukallaf* must also comprehend it and then react with a specific type of action. Likewise, in an informed consent setting, for a *mukallaf* patient to respond to the information disclosed about the proposed treatment, the patient must first understand the *substantial* medical information disclosed to them and therefore, engage in a specific course of action either by accepting or rejecting the procedure. In this medical context, the patient's understanding shall encompass the more likely intended benefits, the risks associated with the proposed medical treatment, and whether it contains an unlawful substance or involves an unlawful procedure in *Shari'a*. Physicians, therefore, morally must ensure that patients understand the *substantial* information disclosed to them to the degree of rightness by assessing their understanding through a questioning method.

Ultimately, in the medical treatment setting, reinforcing the conditions of the two fundamental normative elements of the principle of informed consent outlined in this chapter maximise the ability of the *mukallaf* patient to make an autonomous and moral decision concerning their health, based on their moral preferences, aspirations, and values that they seek to achieve by seeking a particular medical treatment.

Finally, since this thesis argues that the autonomy of the *mukallaf* patient is crucial in medical decision-making, this chapter applies the theoretical moral conditions for making an autonomous moral decision as outlined in the doctrine of *taklif* that generates autonomy within the context of informed consent. The moral framework of the principle of informed consent, underpinned by the approach of autonomy, has been established based on the discussions of Chapters Six and Seven of Section Three: *Towards An Autonomy-Based Model*. Yet, while the thesis concerns the Saudi legal rules that regulate medical consent, in the legal practice, if a shift has been made from a physician-centric model to a patient-centred model, how will the Saudi law discussed in Chapter Three be affected? Thus, the following Chapter aims to conclude the thesis by providing a practical illustration for moving from a trust to an autonomy model in Saudi legal practice.

SECTION FOUR: A PRACTICAL APPLICATION FOR MOVING FROM A TRUST TO AN AUTONOMY MODEL IN SAUDI ARABIA

Chapter 9: The Concluding Chapter: A Practical Example of Transitioning from A Physician-Centric Model to A Patient-focused Model in Saudi Law

9.1 Introduction

The analysis of previous sections establishes the thesis's core moral argument, highlighting the importance of respecting patient autonomy in medical decision-making. It further demonstrates that the principle of informed consent is the most prominent expression of respect for patient autonomy in modern bioethics, as it supports both the moral and spiritual interests of the *mukallaf* patient. Accordingly, the previous chapter develops an Islamic specification of informed consent grounded in the theological doctrine of *taklif*.

Yet, the question is, in practice, if a shift is made to a patient autonomy-focused model instead of a trust and physician-focused model, how would the autonomy model be applied, and what would be the impacts on the Saudi legal rules on medical consent, as previously reviewed in Chapter Three?

This final chapter aims to conclude the thesis by demonstrating a practical illustration of how a patient-focused model can be applied in Saudi law. The practical example will be developed based on discussions of Section Three (Chapters Six, Seven and Eight), which outline the Islamic moral framework of a *mukallaf* patient seeking medical treatment and the conditions of the principle of informed consent-based patient autonomy model, as derived from the doctrine of *taklif*.

To this end, this chapter begins by identifying specific amendments to the Saudi law regulating consent to medical treatment. This will encompass the legal rules of Articles 18, 19, 26, and 5 of the Act on Practising Healthcare Professions 2005 (PHP 2005), which were previously discussed in Chapter Three. Such changes on these articles will be suggested by applying the two fundamental principles of the notion of informed consent as defined in Chapter Eight.

Then, judging from the specific amendments that this Chapter suggests to the legal provisions of the Saudi law of PHP 2005, the chapter moves forwards to develop a practical legal guide for the requirements of informed consent grounded in a patient-focused model.

Finally, it is important to emphasise that in this chapter, the specific changes in Saudi law will flow from the transition from a physician-focused to a patient-focused model. Thus, the scope and importance of this chapter are limited, and such changes serve only as a practical illustration of how the theoretical and moral autonomy model established in the previous chapters can be applied in Saudi practice rather than an effort to restate the Saudi law of consent.

9.2 A Practical Demonstration of Changes to Shift from A 'Trust' to an 'Autonomy' Model in Saudi Law

9.2.1 Practical Amendments to Legal Rules of Consent Under the Current Saudi Law

As previously discussed, Chapter Eight addresses the two primary elements of the principle informed consent, which are grounded in respecting patient autonomy. The two principles are:

1. The principle against coercion maintains that a patient who qualifies as a *mukallaf*, meeting the conditions for legal capacity, must maintain autonomy; hence, no medical intervention should proceed without their consent.
2. The principle is that consent must be based on a) the disclosure of relevant substantial information about a proposed medical treatment and b) the patient's understanding of such information.

In practice, if the two main principles are applied, specific changes would impact the Saudi legal rules regulating medical consent, specifically Articles 18, 19, 26, and 5 of the PHP 2005. The following discussion presents such amendments that arise from moving from a physician-focused model to a patient-focused model.

Article 19

As discussed in Section 3.3 of Chapter Three, the current legal regulations, as outlined in Article 19 of the PHP 2005, impose a legal duty to obtain medical consent from the eligible person before proceeding with medical intervention.[1] If the patient-focused model is applied, Article 19 will address the first principle of the notion of informed consent concerning the two conditions of the legal capacity of patients and free will without coercion, as outlined in Sections 8.3 and 8.4 of Chapter Eight.[2]

Thus, Article 19 still imposes the legal duty to obtain consent for all medical interventions. Accordingly, no medical treatment shall be performed without obtaining a patient's consent. In addition, to include the requirements of the first principle of free will without coercion and the legal capacity of the patient discuses, Article 19 will consist of the following legal requirements: a) informed consent is given **freely and voluntarily**; and b) obtaining the consent from a *mukallaf* patient who **attained the age of *rushd***. Hence, changes to Article 19 can be expressed as follows:

> Consent is required before any medical intervention, and it must be freely and voluntarily given by a competent adult with legal capacity to provide informed consent.

[1] For the legal duty to obtain medical consent under PHP 2005, See the discussion of Art.19 in Chapter 3, Section 3.3.
[2] The condition of *Sanity and Puberty* has been discussed in Chapter 8, Section 8.3; the condition of *Free Will Without Coercion* has been discussed in Chapter 8, Section 8.4.

Article 18

As discussed in Section 3.3 of Chapter Three, the current legal rules, as outlined in Article 18, address the duty of care to disclose information about the proposed medical treatment when obtaining medical consent.[3]

If the patient-focused model is applied, Article 18 will address the second principle of the notion of informed as discussed in Sections 8.5 and 8.6 of Chapter Eight.[4] The second principle of informed consent stipulates that informed consent must be based on a) the **disclosure of substantial information** about a proposed medical treatment and b) **the patient's understanding of that information**. Accordingly, to include these two legal requirements, the specific amendments to Article 18 can be stated as follows:

> A health practitioner shall be committed to providing the patient with reliable and measurable information about the objectives, harm, and hardship of a proposed medical treatment, and ensuring that the patient understands the information provided.

Articles 5 and 26

As discussed in Section 3.3 of Chapter Three, Articles 5 and 26 deal with the threshold for a physician's duty to disclose information about the proposed medical intervention, outlined in Article 18. The current law adapts the professional physician standard.

Suppose a patient-focused model is applied. In that case, based on the discussion of Section 8.5.1 of Chapter Eight,[5] there will be a transition from the professional physician standard to a *mukallaf* patient standard regarding the two legal duties of a) disclosure of relevant substantial information about the proposed medical treatment and b) ensuring that the patient understands the disclosed information.

Thus, to include the *mukallaf* patient standard, the specific change in Article 26 can be stated as follows:

> The duty of a health practitioner governed by the regulations of Article 18 is a commitment to disclose medical information that a *mukallaf* patient would consider substantial and to ensure that a *mukallaf* patient grasps the substantial information that reflects the medical truth established by the health practitioner's assessment to the degree of rightness.

Once Article 26 explicitly applies the *mukallaf* patient standard, it would restrict the scope of application of Article 5 to the rules of informed consent in medical treatment.

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[3] Under the current legal rules, Article 18 imposes a duty on physicians to 1) provide information about the "possible side effects" of the proposed medical treatment. 2) provide an alert and a warning about the importance of following the physician's instructions. The discussion of Art.18 of PHP 2005 has been addressed in Chapter 3, Section 3.3.

[4] The condition of *Disclosure of Medical Treatment Information* has been discussed in Chapter 8, Section 8.5; the condition of *Understanding Disclosed Medical Treatment Information* has been discussed in Chapter 8, Section 8.6.

[5] The discussion of *Mukallaf Patient Test* has been addressed in Chapter 8, Section 8.5.1.1.

9.3 A Practical Legal Guide for Informed Consent in Medical Treatment

9.4 Defining Informed Consent

Based on the legal changes suggested to Articles 18, 19 and 26 presented earlier in the Section 9.2.1 of this Chapter, for informed consent, a grounded patient-focused approach, to be valid, it must meet three conditions:

1. The person who consents must have the legal capacity to make the medical decision.[6]
2. Informed consent must be given freely and voluntarily.[7]
3. The consent must be informed.[8]

Concerning the threshold for fulfilling the duty of care, as defined in Art 18, is determined through a *mukallaf* patient test.[9]

9.5 The Meaning of Terms: Legal Capacity, Freely and Voluntary and Informed

9.5.1 Legal Capacity

A guide on legal capacity to consent in medical decision-making has been developed based on the rules of capacity of execution in civil actions as established in Section 6.5.1 of Chapter Six and Section 8.3 of Chapter Eight; see Appendix B, Table B1.[10]

9.5.2 Freely and Voluntarily

Judging from the condition of free will without coercion addressed in Section 6.5.4 of Chapter Six and Section 8.4 of Chapter Eight.[11] The patient shall make a medical decision on their proposed treatment freely and voluntarily, without feeling coerced by external factors. This right, naturally, involves giving consent to treatment, refusing consent to treatment; and withdrawing consent to treatment.

The external coercive factors are the capacity of others, such as the physicians or the patient's family, to:

1. Exert pressure on the patient by using explicit or implicit threats to undergo treatment.
2. Controlling the patient by using force to compel the patient to receive treatment.

A Guide on consent freely and voluntarily in medical decision-making has been developed based on the principle of free will without coercion as established in Section 6.5.4 of Chapter Six and Section 8.4 of Chapter Eight; see Appendix C, Table C1.

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[6] This condition is suggested based on changes to art19.
[7] This condition is suggested based on changes to art19.
[8] This condition is suggested based on changes to art18.
[9] This threshold is suggested based on changes to art 26.
[10] Section 6.5.1 of Chapter Six presents the theoretical framework of legal capacity in *taklif*, while Section 8.3 of Chapter Eight presents the application of legal capacity in the context of informed consent.
[11] Section 6.5.4 of Chapter Six presents the theoretical framework of the condition of free will without coercion in *taklif*, while Section 8.4 of Chapter Eight presents the application of the condition of free will without coercion in the context of informed consent.

9.5.3 Informed

Based on the discussions of Sections 6.5.2 and 6.5.3 of Chapter Six and 8.5 and 8.6 of Chapter Eight, informed consent requires: [12]

1. The physician discloses reliable and measurable information about the objectives, harm, and hardship of a proposed medical intervention.
2. The physician ensures that the patient understands the information.

9.5.3.1 A *mukallaf* Patient Standard

Based on Section 9.2.1 of this Chapter, the legal changes suggested for Article 26 outline the standard of a *mukallaf* patient. Accordingly, the threshold of the legal duty for information disclosure and assessing the patient's understanding shall meet the *mukallaf* patient standard.

9.5.3.2 Standards for Medical Information Disclosure

The legal standard for the disclosure obligation has been established based on the five legal maxims in Islamic law.[13] The threshold of conduct to which a physician must conform is set based on a *muklif* patient standard. This standard concerns what a *mukallaf* patient would consider *substantial* to know to make an autonomous and moral medical decision. The relevant information that is *substantial* to a *muklif* patient is identified through the categorisation of treatment-seeking behaviours according to the five rulings of *taklif,* as outlined in Appendix A, Table A, and discussed in Section 8.5.1 of Chapter Eight.

A guide on legal standards related to the duty of care for information disclosure in the medical decision-making has been developed based on the discussion of Section 8.5.1 of Chapter Eight; see Appendix d, Table D1.

9.5.3.3 Standards for the Patient Understanding and Assessing the Patient Understanding

A guide on legal standards related to the duty of care for ensuring the patient understands the disclosed information and assessing the patient's understanding has been developed based on the discussion of Section 8.6.2 and 8.6.4 of Chapter Eight.

1. Standards for Understanding the Intended Objectives of the Treatment; see Appendix E, Table E1.

2. Standards for Understanding the Anticipated Harm of the Treatment; see Appendix E, Table E2.

3. Standards for Understanding the Hardship of the Medical Treatment; see Appendix E, Table E3

[12] Sections 6.5.2 and 6.5.3 of Chapter Six presents the theoretical framework of the conditions for disclosing information in the divine discourse and understanding the divine discourse in *taklif*, while Sections 8.5 and 8.6 of Chapter Eight presents the application of these conditions for disclosing medical treatment information and understanding disclosed medical treatment information in the context of informed consent.

[13] The discussion of *Standards for Disclosure Information* is presented in Section 8.5.1 of Chapter 8.

Standards for Understanding the Certainty of The Medical Treatment; see Appendix E, Table E4
4. Standards for Understanding the *Custom* of the Medical Treatment; see Appendix E, Table E5.

9.6 Conclusion

By no means does this chapter intend to restate the Saudi law of consent to medical treatment or consider potential reforms to Saudi law in a broad sense. However, having established the normative argument of this contribution regarding the relevance of patient autonomy in medical decision-making, this chapter concludes the thesis by presenting a closing illustration that demonstrates how theautonomy model can be applied in Saudi practice. This practical legal framework is shown by introducing changes to the current Saudi law of consent, which was reviewed and discussed earlier in Chapter Three. The parented amendments are outlined based on the discussions in Section Three of this thesis, titled "*Toward an Autonomy Model*." Hence, the changes fundamentally flow from transmission from a physician-focused to a patient-focused model.

The chapter outlines that in a patient-focused model, for informed consent to be valid, it must satisfy three legal requirements: The person who consents must have the legal capacity to make the medical decision; informed consent must be given freely and voluntarily; and the consent must be informed through a) the disclosure of relevant information to the patients and b) ensuring that the patient understands that information. Furthermore, the practical legal framework based on the patient's autonomy model introduces a *mukallaf* patient standard instead of a professional physician standard concerning the two duties: a) what information should be disclosed to the patient, and b) ensuring the patient's understanding of such information and assessing the patient's understanding.

Having outlined the legal requirements for obtaining a valid informed consent based on a patient-focused model, this final chapter concludes by developing a practical legal guide for informed consent. The guide defines the terms of legal capacity, freely and voluntarily, and informed .In addition, this legal guide identifies legal standard related to the duty of care for information disclosure in the medical decision-making process and ensuring that the patients' understating such information.

Conclusion

This thesis presents a normative moral argument from a *Shari'a* perspective on the relevance of respecting patients' autonomy in medical decision-making when their health is concerned. It suggests a transition from a trust to an autonomy model to underpin the legal rules of informed consent in medical treatment in the specific jurisdiction of Saudi Arabia.

To present this argument, it was necessary in the First Section to emphasise that the medical consent law under consideration in this thesis is the Saudi law, and *Shari'a* fundamentally shape the legal system of Saudi Arabia. Thus, all analyses and discussions are grounded on the *Shari'a* teachings and principles. Accordingly, Section One, through Chapters One and Two, provides an overview of what *Shari'a* means and how *Shari'a* influences the formulation and structure of the legal system of Saudi Arabia.

Following the preliminary Chapters, Chapter Three reviews the development of legal regulations governing medical consent in Saudi law. The review focuses on the national legislation governing consent, specifically the Act of Practising Healthcare Professions (PHP 2005) and its Executive Regulations of 2017. It provides a detailed review of the legal provisions in Articles 18 and 19, which address the legal requirements for obtaining valid medical consent. Additionally, it examines Articles 5 and 26, which establish the threshold of the physician's duty of care in medical decision-making. Furthermore, Chapter Three considers the 2019 Saudi guidelines for informed consent issued by the Ministry of Health. It discusses the confusion in this guideline and identifies certain contradictions with the legal provisions of consent under the current law, PHP 2005.

Having examined the Saudi legal framework on medical consent in Section One, Section Two in Chapters Four and Five proceeds to outline the foundational principles underpinning these current legal rules. Chapter Four addresses the first principle concerning the high significance placed on health in *Shari'a.* It outlines many of *Shari'a* teachings related to maintaining and promoting good health. It concludes that good health enables individuals to live a purposeful life, fulfilling their religious and worldly duties as vicegerents of God on earth. Ultimately, such a strong emphasis on the importance of health in *Shari'a* explains the Saudi legal system's concerns with establishing legal rules of medical consent based on the principle of trust in physicians to maintain good health. This is particularly linked to the prevailing argument that the best health outcomes can be achieved by placing trust in physicians to make medical decisions in the best interest of patients.

Hence, Chapter Five critically analyses the principle of trust as a moral foundation underpinning the current legal rules of medical consent under the Act of PHP 2005. This analysis investigates the notion of trust as presented in the *Qur'an.* The *Qur'anic* narration uses the term *amanah* to illustrate trust-based relationships between fellow humans. The analysis of trust demonstrates that in *Shari'a* discourse, the main normative assertions presented by Muslim philosophers primarily emphasise the moral character of the trustworthy individual.

Consequently, it was difficult for this thesis to analyse the concept of trust apart from the notion of trustworthiness. Trustworthiness is a matter that involves a value component, and Muslim philosophers investigate the ethics of trustworthiness within the theories of Islamic noble ethics. Theorists have expressed their views and reflections on the attributes of a trustworthy person in varying degrees and manners. Through examining the theories of Islamic noble ethics, the Second Section demonstrates that establishing trust in fellow humans is not an easy matter in Islamic discourse. In this discourse, a person cannot request people to place their trust in them. However, a person who seeks trust from others is perceived as a "traitor" or "suspect". One must build the trust of one's fellow humans by actively adhering to the ethics of trustworthy individuals.

Chapter Five also reviews the current empirical studies concerning medical consent in Saudi hospitals. This review suggests that the principle of trust in physicians prompts paternalistic behaviours among physicians in the healthcare sector. The decision-making process primarily centres around the physician, who often employs a paternalistic approach to obtaining consent. Subsequently, the patient-physician interaction in the medical consent process shifted from a trust model to a paternalistic one.

Drawing on the analytical insight presented in Chapter Five, this Chapter demonstrates that the untrustworthy behaviours of some physicians in the empirical research, manifested in paternalistic glare when obtaining medical consent, raise concerns regarding patients' capacity to trust their physicians to prioritise their best interests in determining the most appropriate medical intervention. Such doubts are heightened mainly because this thesis establishes that trust in physicians is granted exclusively by law and is not established through personal interactions between patient and physician. More significantly, Chapter Five asserts that paternalistic behaviours, regardless of attempts to depict them as beneficence, constitute deception. Deception, irrespective of its purpose, significantly undermines the values of trust and the virtues of trustworthiness within the *Shari'a* framework of noble ethics. Thus, this paternalistic behaviour fundamentally undermines *Shari'a's* perspective of the ethics of a trustworthy individual in whom others place their trust.

Given these moral concerns, Chapter Five concludes by arguing that genuine medical consent, if it is believed to have moral significance in making the best health decisions, can be attained by shifting from a trust-based principle, which has evolved into a paternalistic approach in practice, to a model that respects patient autonomy. This argument for this transition is also supported by the observation, as highlighted in Chapter Four, that the responsibility for maintaining good health ultimately lies with individuals themselves.

Thus, Section Three moves forward to introduce its scholarly contribution by presenting a moral normative argument derived from purely Islamic theology, regarding the relevance of respecting an individual's autonomy in the context of medical decision-making. In this Section, the thesis argues that in Islamic theological discussions, autonomy is a moral

construct that arises from the doctrine of *taklif,* which stems from the Islamic framework of dignity associated with humanity's vicegerency on earth. *Taklif's* theory maintains that the fundamental attributes bestowed upon humans by God to bear the divine tasks are rationality, cognitive abilities and free will. These attributes empower individuals to make autonomous moral choices to fulfil their role as God's vicegerents while bearing the divine burden and being morally responsible to God for their actions.

Section Three presents its arguments through the discussions of Chapters Six, Seven and Eight. Chapter Six begins by providing the conceptual framework of human dignity and the notion of the vicegerency of humans on earth, which led to the development of the theory of *taklif.* This discussion establishes that from an Islamic perspective, autonomy originates from a superior moral authority, *taklif* (rooted in human dignity). The autonomous person is the *mukallaf,* seen as carrying the divine burden in every aspect of life and bearing moral responsibilities before God for their moral choices. An autonomous action is determined by the will of a *mukallaf* exercising self-governance, while considering the divine tasks in *taklif.* Chapter Six additionally identifies that such autonomous behaviours demand a moral actor, the *mukallaf*, who must fulfil a particular requirement known as the conditions of *taklif.* Chapter Six, therefore, theoretically addresses *taklif* conditions that enable a *mukallaf* to make an autonomous moral decision regarding a task in the divine burden.

Chapter Six concludes that in the context of medical decision-making, the theory of *taklif* places on the patient the role of a moral agent to bear divine burdens and thus make autonomous moral medical decisions when their health is concerned. In this sense, *taklif* imposes a moral obligation on patients to consider the divine discourse concerning the proposed medical intervention morally and assess its moral value in the five *taklif* rulings, thereby determining its relation to divine rewards or punishments. In light of this, the best spiritual and moral health outcomes can be achieved by respecting and enhancing the autonomy of patients, who possess the rationality, cognitive capacities, and free will to bear their burdens, free from paternalistic interventions and practices. Ultimately, maximising and respecting patient autonomy is crucial since it affects the moral responsibility of patients in *taklif*.

Given that *taklif* emphasises the autonomy of the *mukallaf* patient in medical decision-making, and every medical treatment also has a moral value in the divine burdens of *taklif.* Chapter Seven investigates the moral value of medical treatment in the context of divine burden. It aims to establish the moral framework for the *mukallaf's* autonomy in seeking medical treatment. Building on the analytical insights and discussions of the moral value of medical treatment in the divine discourse, Chapter Seven concludes by outlining the categorisation of behaviours of seeking medical treatment in *taklif,* which encompasses the five *taklif* rulings: *obligatory*, *prohibited, recommended*, *discouraged, and permissible.* These five categorisations of behaviours suggest that there are two distinctive circles for the moral value of medical treatment in the divine discourse of *taklif.* The first circle involves *obligatory* and *prohibited* medical interventions, whereas the second circle

encompasses *recommended*, *discouraged* and *permissible* treatment. The distinctions between the two circles are drawn based on the moral responsibilities associated with the forms of treatment according to the divine burden of *taklif*.

The conclusion of Chapter Seven substantiates the argument of this thesis that maximising patient autonomy is crucial in medical decisions concerning their health. A *mukallaf* patient cannot develop moral and spiritual growth and consider the moral consequences of their medical choices unless they are granted decision-making autonomy. Physicians, hence, must respect patient autonomy and facilitate the process of medical decision-making. Ultimately, when a patient alone bears the moral responsibility before God for the medical interventions they undergo, all healthcare teams are morally obligated to respect this patient's autonomy in making medical decisions. Chapter Seven, therefore, suggests that the principle of informed consent is the most prominent manifestation of respect for patient autonomy in modern bioethics. All that said, the important matter was how a *mukallaf* patient can make an autonomous and morally informed decision regarding a proposed medical intervention.

Accordingly, Chapter Eight identifies and discusses the elements of informed consent that enable a *mukallaf* patient to make a moral judgment about medical treatment. The discussion of this Chapter addresses informed consent as a moral construct that stems from respect for the *mukallaf* patient's autonomy. Hence, the patient is not merely a recipient of medical treatment but a moral agent in decision-making. Chapter Eight applies the theoretical framework of the conditions of the *taklif* addressed in Chapter Six to the context of informed consent to medical treatment. Judging from the normative conditions of the *taklif,* Chapter Eight outlines and discusses in detail two main principles of informed consent in medical treatment. The first is the principle of non-coercion, which emphasises that a patient who qualifies as a *mukallaf,* meeting the conditions for legal capacity, must maintain their autonomy; therefore, no medical treatment may proceed without their voluntary consent. The second principle is that this consent must be based on the disclosure of medical information and that the patient understands such information. Hence, the primary matter was to determine what medical information shall be disclosed and how to assess the patient's understanding of such information.

Having analysed and established the core moral argument of the thesis in the previous Sections, the concluding Section, through discussions in Chapter Nine, presents an illustration of a practical application of how the autonomy model is applied in Saudi practice. To this end, Chapter Nine assesses how the Saudi legal rules of medical consent, as outlined in the PHP 2005 Act examined earlier in Chapter Three, would be impacted if a shift is made from a trust and physician-focused model to a patient autonomy-focused model. Therefore, This Chapter outlines changes that stem from a shift from a trust to an autonomy approach. Such suggested changes are built upon the discussions in Section Three: *Toward an Autonomy Model*. The Final Chapter concludes by developing a practical legal framework centred on the model of patient autonomy. Under this legal framework, a

valid informed consent must meet three legal conditions: it must be obtained from the person who has the legal capacity to consent, must be obtained freely and voluntarily, and must be informed. The threshold for fulfilling the legal duty of information disclosure and assessing the patient's understanding of that information is established by the *mukallaf* patient standard.

Appendices

Appendix A

Table A1. A Moral Framework for The *Mukallaf's* Autonomy in Seeking Medical Treatment in *Shari'a* Based on The Divine Burden in *Taklif*

Taklif's Ruling	The Burden of Taklif	Moral Responsibility
Obligatory	1. All cases, the benefit of medical treatment is more likely to: a) Preserve life b) Preserve organs c) Prevent disability d) Prevent the transmission of contagious illnesses from the infected person	Neglect brings Moral Consequences
Prohibited	1. In all cases, the medical treatment contains unlawful substances or involves an unlawful procedure in Shari'a.	Neglect brings Moral Consequences
	Exceptions 1. The Principle of Necessity exists: a. In all cases, the medical treatment is more likely to preserve life. b. In all cases, the medical treatment is more likely to heal the disease. c. No *halal* alternative medical treatment exists in conditions (a) and (b). d. The amount of treatment administered is restricted to the extent necessary for meeting requirements (a) and (b)	In Exceptions: Moral Consequences are lifted
	2. The principle of istihalah exists: a. In all medical treatments, unlawful substances are transformed into lawful substances naturally or chemically through complete istihalah. b. (a) is fulfilled if the medical treatment is approved by *halal* product certificate product.	
	3. Alcoholic substances will not cause intoxication exists: a) In all medical treatments, the alcoholic medication is administered for only external application.	

Permissible	1. In all cases, the benefits of medical treatment are more likely to be ineffective in healing the diseases. 2. In all cases, the consequences of the medical treatment are more likely to be unknown 3. In all cases, benefit of medical treatment is more likely to treat the disease effectively.	Neglect has No Moral Consequences
Recommended	1. In all, cases, the benefit of medical treatment is more likely to eliminate or mitigate the distressing symptoms the disease. 2. In all cases, the benefit of medical treatment is more likely to maintain or recover health. 3. In all cases, the benefit of the medical treatment is more likely to treat the disease effectively.	Neglect has No Moral Consequences
Discouraged	1. In all cases, the pain, inconvenience, or discomfort inflicted by the medical treatment is more likely to exceed the pain of the disease. 2. In all cases, the medical treatment risks are more likely to exceed their benefits. 3. In all cases, the medical treatment is more likely to be associated with life-threatening hazards.	Neglect has No Moral Consequences

Appendix B

Table B1. A Guide on Legal Capacity to Consent in The Process of Medical Decision-Making.

A Competent Patient					
Elements of Capacity	1. Sanity. 2. The ability to discern between beneficial and harmful activities.				
The Threshold to Acquire Legal Capacity	1. Attain Puberty: The age of puberty is 15 for both males and females, unless a person attains puberty before that age. 2. Reach rushd: The ability to make sound and rational judgement.				
The Age of Majority to Consent to Medical Treatments	Islamic law avoids establishing a specific age for rushd due to recognising of variations among individuals. Nevertheless, the age at which a person can give informed consent is expected to align with the age at which they are legally allowed to be married, as determined by the state. The legal age of marriage in Saudi Arabia is 18 years old.[1] Thus, an adult person aged 18 is competent to give informed consent to medical treatment.				
An Incompetent Patient					
Natural Impediments	**(1) Minors**		**(2) Mental illness**		**(3) A Patient in the State of Sleeping**
Legal Rules Regulating the Medical Consent	Non-Discernment child From birth to 7 years old.	Discernment child From 7 years old until reaching the age of majority	Insanity If someone is considered insane by reason of insanity, the court appoints a legal guardian to manage their medical affairs.	*Atah* If someone is considered *ma'tūh* by reasons of atah, the court appoints a legal guardian to manage their medical affairs.	Sleep states encompass patients who suffer a loss of cognitive function due to acute or permanent incapacity—for instance, patients who are in a state of fainting or unconsciousness.

[1] Family Act 2022, ch 1, s 2, (9).

	All medical decisions are null	Medical consent falls into actions that are neither exclusively beneficial nor exclusively detrimental.	The legal rules concerning the actions of a non-discernment child will be applied.	The legal rules concerning the actions of a discernment child will be applied.	Patients are exempt from making medical decisions until they awaken. Family members will make decisions if the patient has not appointed a proxy in advance. If the family disagrees, their inheritor strengths may determine their hierarchy.
		The legal guardian has the right to authorise or prevent the medical consent.	All medical decisions are null	The legal guardian has the right to authorise or prevent the medical consent.	

Appendix D

Table D1. A Guide on Legal Standards for Medical Information Disclosure in the Process of Medical Decision-Making.

Legal Maxim	Due Care Criteria: Standards of Information Disclosure	Threshold of relevant information: The mukallaf patient standard: Information that is substantial for a mukallaf patient to consider in the process of medical decision-making.
Objectives of the Proposed Treatment	1. Disclose the intended objectives of a medical treatment, including declaration of diagnosis, if known, and intended benefits of undertaking the treatment.	Is the intended objective of the proposed medical treatment: a. Preserving life. b. Preserving organs. c. Preventing disability. d. Preventing the transmission of contagious illnesses to others. e. Eliminating or mitigating the distressing symptoms of the disease. f. Maintaining or recovering health. g. Treating the disease effectively. h. Ineffective in healing the diseases. i. Equivalent to abstaining from undergoing the treatment.
Harm of the Proposed Treatment	1. Disclose the severe risks associated with the proposed treatment during the medical procedure and recovery phase.	Are the anticipated severe risks of the proposed medical treatment associated with: a. Life-threatening hazards. b. Organ loss. c. Causing Disability.
	2. Disclose the side effects and complications associated with the proposed intervention during the medical procedure and the recovery phase	Are the anticipated side effects and complications associated with: a. Inflicting pain, inconvenience, or discomfort. b. Causing unknown side effects. c. Causing complications that exceed the benefits of the treatment.
	3. Disclose any available means to mitigate sever risks, side effects, and complications, if they	Are the available alternative treatments anticipated to

	occur, or any alternative available treatment options to avoid them.	a. Prevent or mitigate severe risks associated with the initial proposed treatment. b. Prevent or mitigate side effects and complications associated with the initial proposed treatment.
Hardship of the Proposed Treatment	1. Disclose information of the unlawful substances in Shari'a involved in the proposed medical treatment whether they are utilised in diagnostic or treatment procedures.	Is the medical ground to use the unlawful substances in the proposed medical intervention: a. To preserving life. b. To healing the disease. c. The treatment is approved by a *halal* product certificate as it has been transformed to lawful treatment through istihalah. d. The treatment is used only for external application if the unlawful substances are alcohol substances.
	2. Disclose information of the unlawful procedure in Shari'a involved in the proposed medical treatment.	Is the medical ground to use the unlawful procedure in the proposed medical intervention: a. To preserving life.
	3. Disclose information of any available alternative *halal* treatment for the initial unlawful treatment.	Are the available alternative *halal* treatments: a. Preserving life b. Healing the disease.
Certainty of the Proposed Treatment	1. Disclose reliable information on all relevant information of objectives, harm, and hardship of the proposed medical treatment.	Is the likelihood of occurrence of all substantial information relevant to objectives, harm, and hardship of the proposed medical treatment: a. More likely 51-99%. b. Probability 50%. c. Doubtful below 50%.
Custom of the Proposed Treatment	1. Disclose the standard procedure followed by physicians in medical treatment.	Insubstantial information for a mukallaf patient to consider unless the patient requests this information.

Appendix E

Table E1. A Guide on Legal Standards Understanding the Intended Objectives of the Treatment.

Legal Maxim	Due Care Criteria		Threshold
	The Patient Understanding Standers	Patient Understanding Assessment Standards	
Objectives of the Proposed Treatment	The patient understands the substantial information relevant to the intended benefits of the proposed treatmen	Does the patient demonstrate an understanding of the intended benefits of the proposed medical treatment?	The patient manifests a cognitive achievement by grasping the substantial information related to the treatments' objectives on their health conditions going beyond mere knowledge of information to what extend affects their health conditions on the short and long terms.

Table E2. A Guide on Legal Standards for Understanding the Anticipated Harm of the Treatment

Legal Maxim	The Patient Understanding Standers	Patient Understanding Assessment Standards	Threshold
Harm of the Proposed Treatment	1. The patient understands the substantial information relevant to severe risks associated with the proposed treatment.	Does the patient demonstrate an understanding of the anticipated severe risks of medical treatment?	The patient manifests a cognitive achievement by grasping the substantial information related to the severe risks associated with the proposed medical treatment going beyond mere knowledge of information to what extend affects their health conditions on the short and long terms.
	2. The patient understands the substantial information	Does the patient demonstrate an understanding of the	The patient manifests a cognitive achievement by grasping the

	relevant to side effects and complications of the proposed treatment.	anticipated side effects and complications of the medical treatment?	substantial information related to the adverse effects and complications associated with the proposed medical treatment going beyond mere knowledge of information to what extend affects their health conditions on the short and long terms.
3.	The patient understands the substantial information relevant to available alternative treatments to mitigate or avoid harm from the initial proposed treatment.	Does the patient demonstrate an understanding of whether there are any means to mitigate severe risks, side effects and complications, if they occur, or any available alternative treatment to avoid them?	The patient manifests a cognitive achievement by comparing and weighting the benefits and disadvantages of the alternative treatment to the initial proposed treatment and to what extend affects their health condition on the short and long terms.

Table E3. A Guide on Legal Standards for Understanding the the Hardship of the Medical Treatment

Legal Maxim	The Patient Understanding Standers	Patient Understanding Assessment Standards	Threshold
Hardship of the Proposed Treatment	1. The patient understands the substantial information relevant to medical grounds for undertaking unlawful treatment in Shari'a.	Does the patient demonstrate an understanding of the medical ground for undertaking a treatment that contains unlawful substances Shari'a?	The patient manifests a cognitive achievement by grasping the substantial information related to treatment that contains unlawful substances going beyond mere knowledge of information to what extend affects their health conditions on the short and long terms if the unlawful treatment is rejected or postponed.
	2. The patient understands the substantial information relevant to medical grounds for	Does the patient demonstrate an understanding of the medical ground for	The patient manifests a cognitive achievement by grasping the substantial information related to

	undertaking unlawful medical procedures in Shari'a.	undertaking unlawful medical procedures in Shari'a?	unlawful medical procedures going beyond mere knowledge of information to what extend affects their health conditions on the short and long terms if the unlawful treatment is rejected or postponed.
	3. The patient understands the substantial information relevant to available alternative *halal* treatments to avoid undertaking the initial unlawful proposed medical treatment.	Does the patient demonstrate an understanding of whether there is any available *halal* alternative treatment to the initial proposed unlawful treatment?	The patient manifests a cognitive achievement by comparing and weighting the benefits and disadvantages of the alternative *halal* treatment to the initial Shari'a- unlawful treatment to what extend affects their health condition on the short and long terms.

Table E4. A Guide on Legal Standards Understanding the Certainty of The Medical Treatment

Legal Maxim	The Patient Understanding Standers	Patient Understanding Assessment Standards	Threshold
Certainty of the Proposed Treatment	1. The patient understands that the substantial information relevant to a proposed medical intervention's objectives, harm, and hardship reflects the medical truth established by the physician's assessment.	Does the patient demonstrate an understanding of that the valid substantial information relevant to of the objectives, harm, and hardship of the proposed medical treatment is that established by attending physician?	The patient manifests an understanding that the valid medical information is that disclosed by the attending physician and that the patient does not confuse the reliable information disclosed by the attending physician with prior knowledge or information from external sources.
	2. The patient understands this information to the degree that satisfies the threshold of rightness.	Does the patient demonstrate an understanding of the substantial information relevant to the objectives, harm, and hardship of the proposed medical	The patient manifests an understanding of the more likely of the substantial information relevant to the objectives, harm, and hardship

		treatment to a degree satisfies rightness?	of the proposed medical treatment options, would affect their health conditions on the short- and long-term if the treatment is accepted, postponed, or rejected. In such case the patients manifest an understanding of the more likely a proper action in the medical situation.

Table E1.5. A Guide on Legal Standards for Understanding the Custom of the Medical Treatment

Legal Maxim	The Patient Understanding Standers	Patient Understanding Assessment Standards	Threshold
Custom of the Proposed Treatment	1. Information relevant to the custom of the proposed medical treatment is insubstantial for a *mukallaf* patient to know. Accordingly, physicians will not have a legal duty to assess the patient's understanding of the information provided, based on the principle of custom, even if the patient requests such information relevant to customs standards.		

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