

## IV. THE RELIGIONS

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### Halakhah, Medicine And Human Rights In Israel

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We are told that there is a ‘time to be born and a time to die’<sup>1</sup>. For the writer of these words those times were fixed by God. What did he know of in vitro fertilisation, cloning, preimplantation genetic diagnosis, organ transplants or keeping alive those in a persistent vegetative state? Medicine has always interfered with ‘nature’ but to-day advances –and they are unquestionably all advances– has made us re-think our ethical principles and redesign our laws. You cannot pick up a newspaper today without an item about a medical advance. Thus, it has recently been reported<sup>2</sup> that British fertility specialists have developed a powerful way to test embryos for inherited diseases, thus offering many couples their first realistic chance of having healthy children. It will allow doctors to test for a vast array –6000 so it is said– of inherited diseases for which the specific genetic mutation is not known, such as Duchenne’s muscular dystrophy and some forms of cystic fibrosis. For some this is far from unproblematic: it will lead to the destruction of embryos which are, of course, potential human beings, thus taking away from them the only opportunity they will get to experience life. Life, even with cystic fibrosis, some will say, is better than no life at all. And how do we ‘know’ they are not right? I think we think they are wrong: in doing so we are making a substituted judgement. We cannot know what those who have experienced nothing else would prefer. But we –or rather doctors and judges– must make decisions. When the Bible wanted to teach us about wisdom, it used a custody dispute<sup>3</sup>. Today, I suspect, it would draw on one of the

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<sup>1</sup> *Ecclesiastes*. Tradition associates this with King Solomon.

<sup>2</sup> *The Guardian*, June 20 2006. Obviously, similar reports are to be found in the media worldwide.

<sup>3</sup> The story of the wisdom of Solomon in *1 Kings 3:16-28*. It features in a number of oratorios and other musical items, notably Handel’s *Solomon* (1749). See also Holzbauer’s *Il Giudizio di Salomone* (1766) and Elsner’s *Sad Salomona* (1806).

myriad of medical law and ethics problems which daily confront our decision makers. Perhaps the case of the Maltese conjoined twins<sup>4</sup>, which the judges in England confessed was the hardest decision they ever had to make, or perhaps the *Nahmani* case to which reference will be made<sup>5</sup>.

In this paper, I examine how some of these problems are tackled in Israel today. I will necessarily be selective: space constraints and the limits of my own knowledge dictate this. I will, wherever possible, also examine the interface between *Halakhah* (Jewish law) and Israeli law, and I will make a few common law comparisons, so as to show the different solutions and reasoning processes in England, and to some extent the U.S.A. It is worth observing that the use of Jewish law to solve morally challenging biomedical cases is not confined to Israeli law. In the English conjoined twins case (*Re A*) in 2001, the English Court of Appeal cited *halakhic* terminology and legal doctrine as part of its ruling that the twins could be separated even though the weaker one would inevitably perish, saying the weaker twin was ‘designated to die’<sup>6</sup> and hence could be sacrificed to save the life of the stronger one. I deprecate this language –we are all ‘designated to die’– though not the conclusion to which the judges came. The courts in Israel have not yet been confronted with a conjoined twins case. I suspect they would come to the same conclusion as the English Court of Appeal. I suspect also they would appeal to the same halakhic source.

But just as secular law –even secular law outside Israel, as this illustrates– takes cues from religious law (And we may note, why shouldn’t it, since Jewish religious tradition has been thinking about biomedical questions for far longer than secular legal systems have), so *halakhah* itself engages with scientific and medical developments. A striking example, to which I will return, is the contemporary debate over the definition of death in Jewish law.

## Abortion

However, I will start with some questions about life, rather than death. *Halakhah*, as is well-known, stresses the importance of this, condemning depriving someone of even a few moments of life. A classic conflict occurs when one person’s interest in life clashes with another’s. For example, in relation to abortion. Hence the Jewish tradition is very different from the modern Catholic one. I stress ‘modern’ because the prohibitionist view on abortion that we associate with Catholicism dates from the mid-nineteenth century<sup>7</sup>.

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<sup>4</sup> *Re A* [2001] 1 FLR 1. There is considerable literature on this including a Special Issue of *Medical Law Review*. J.D Bleich discusses halakhah and conjoined twins in *Bioethical Dilemmas – A Jewish Perspective* (1998), ch. 11. See also D.B Sinclair, *Jewish Biomedical Law: Legal and Extra – Legal Dimensions* (2003), 219-224.

<sup>5</sup> See below, xx.

<sup>6</sup> *Op cit*, note 4.

<sup>7</sup> Pius IX’s pronouncement of 1869.

Aquinas, a contemporary of the great Jewish sage Maimonides, and the fount of much Catholic thought allowed abortion for male fetuses until 40 days and for female ones to 80 days<sup>8</sup> –perhaps a misinterpretation of *Leviticus*. How, in the thirteenth century, they knew the gender of a fetus is incomprehensible! Whatever, today much Christian– teaching views the fetus as a human being from conception, and there are Catholic countries like Chile where abortion is not allowed, and Christian countries like the United States where a battle to undo the liberal abortion law constantly rages, and elections are fought with it as an issue<sup>9</sup>.

The classic *halakhic* approach is the liberal one. The fetus is not regarded as a human being. So feticide is not considered murder according to biblical law<sup>10</sup>. According to the Rabbis, an unborn fetus does not have the status of a living being. It is considered ‘his mother’s thigh’<sup>11</sup>, and therefore abortion is not considered murder. So, according to the Mishnah, if a woman has difficulty in childbirth, the fetus is cut up in her womb and removed piece by piece, since her life takes precedence over his<sup>12</sup>. And –this will horrify– if a woman is to be put to death, her execution is not postponed until after childbirth<sup>13</sup>. Later authorities ruled leniently on cases involving threats to maternal welfare short of a threat to the mother’s life<sup>14</sup>. Feticide was regarded as murder elsewhere, for example by the Greeks<sup>15</sup> and also by the Qumran sect<sup>16</sup>. As such it became part of early Christian teaching and passed into the Canon law and, as I have indicated already, became even stricter in the nineteenth century.

Jewish law (*halakhah*) has also changed. Daniel Sinclair believes this may well be the result of ‘a growing concern with the moral image of the *halakhah*, and the conviction that the classical doctrine does not provide sufficient moral condemnation of the type of non-life-saving abortion routinely performed in many countries’<sup>17</sup>. There are, of course, lessons here which go beyond abortion. Some modern Jewish authorities are now taking a highly restrictive approach towards abortion, permitting it only where there is an immediate threat to the life of the mother<sup>18</sup>.

<sup>8</sup> It is not clear how it was possible then to work out the sex of the fetus!

<sup>9</sup> See N.Hull and P.Hoffer, *Roe v. Wade: The Abortion Rights Controversy in American History* (2001).

<sup>10</sup> On abortion in Jewish law see I. Jacobovits, *Jewish Medical Ethics* (1962), F. Rosner and J.D. Bleich in *Tradition*, vol. 10 (2) (1968), 48-120, D.M Feldman, *Birth Control in Jewish Law* (1968), 251-294. The Biblical text is *Exodus* 21: 22-25.

<sup>11</sup> See A. Aptowitz in *Sinai* 11 (1942-1943), 9-32 at 1411. This is also the view of the Stoics (e.g. Philo) and of Roman law (*fetus pars ventris*).

<sup>12</sup> *Mishnah Oholot* 7:6. But *cf Tosefta Yevamot* 9:5.

<sup>13</sup> *Mishnah Arakin* 1:4. And see *Genesis* 38:24 (Judah decreed Tamar was to be taken out and burned without regard to the unborn fetus).

<sup>14</sup> See D.B Sinclair, *Jewish Biomedical Law* (2005), 3.

<sup>15</sup> See references in F.H Colson, *Philo*, Loeb Classical Library VIII, Appendices 447-448 (139).

<sup>16</sup> The strict view of feticide is rooted in the ancient Near East. See M. Weinfeld in *op cit*, note 14, 19-35 (originally in Hebrew in *Zion*, 42(1977), 129-142).

<sup>17</sup> *Op cit*, note 14, 4. See also D.B. Sinclair, *op cit*, note 4, 54-59.

<sup>18</sup> There was discussion, for example, at the time of the thalidomide crisis: see Unterman in *No’am*, 6 (1963), 1-11 and Zweig, *No’am*, 6 (1963), 36-56. An interesting ruling resulted from a German decree in

Israeli law, like English law, does not give the mother complete freedom to terminate her pregnancy<sup>19</sup>. In both systems the decision is that of others (in Israel a ‘Committee’, in England doctors) and these others must consider a termination justified. In Israel there are four grounds for abortion<sup>20</sup>: two are similar to those in England *viz*, the child is likely to have a physical or mental defect –note, unlike in England, it does not have to be severe<sup>21</sup>– and secondly continuing the pregnancy is likely to endanger the woman’s life, or cause her physical or mental harm. The other two grounds are unlike English law: that the woman is under marriage age or over 40, and also that the pregnancy is the result of incest, adultery or relations prohibited by criminal law. There was originally a socio-economic ground as well: English law in effect has this.<sup>22</sup> This was repealed in 1980 at the behest of the religious parties<sup>23</sup>. It may have been noted that Israeli law makes no reference to the age of the fetus<sup>24</sup>: in English law the cut-off point for most abortions is 24 weeks though in some cases it is permitted until term (In effect the life of a baby may depend upon its geography –born prematurely it is murder to kill it, but it may be aborted hours before it otherwise would be born). Where is the father in all this? Israeli law agrees with English law in giving him no status: this is in contrast to *halakhah* where his financial interest in the fetus gave him considerable power<sup>25</sup>.

### The Tay Sachs Fetus

Since Tay Sachs largely affects the Ashkenazi (Western) Jewish population, it is not surprising that in Israel today one of the most interesting modern debates centres on the Tay Sachs fetus<sup>26</sup>. Though it finds no parallel in Israeli law –which clearly permits abortion– the different responses by leading *halakhists* are worth pondering. Rabbi Waldenberg –a leading Israeli halakhist in the biomedical field– was asked by the Sha’arei Zedek Hospital in Jerusalem (which is run according to halakhic principles) for advice. He permitted the abortion until the seventh month (His reason for drawing the line here was

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1942 that every Jew falling pregnant should be killed together with her fetus. In the Kovno ghetto, Rabbi Ephraim Oshry ruled that abortion was permissible to save a pregnant woman from the consequences of the decree (see *Mi Ma’amakin*, no. 20).

<sup>19</sup> Of course, Israeli law was originally based on the common law and during the Mandate abortion and attempted abortion were prohibited: see Criminal Law Ordinance of 1936 s. 175. The law was first amended, after independence, in 1966, but this was a very limited reform, relieving the mother of criminal responsibility for self-inflicted abortion.

<sup>20</sup> Penal Law 1977 s. 316.

<sup>21</sup> An interesting challenge to which is *Jepson v. Chief Constable of West Mercia* [2003] EWHC 3318.

<sup>22</sup> See Abortion Act 1967, as amended by Human Fertilisation and Embryology Act 1990.

<sup>23</sup> The provision was in the 1977 Act s. 316(5). It was repealed by the Penal (Amendment) Law 1980 s.2.

<sup>24</sup> But some halakhic authorities do distinguish stages of pregnancy: the earlier the more acceptable is termination. But nevertheless there is no fundamental legal significance attached to the stage of fetal development.

<sup>25</sup> See Sinclair, *op cit*, note 4, 67 n. 191.

<sup>26</sup> Tay Sachs is an incurable disease. Most die by the age of 5, having degenerated to a persistent vegetative state.

danger to the mother thereafter, not the status of the fetus)<sup>27</sup>. He justified his response by referring to Biblical attitudes to feticide, and to a ruling of an eighteenth century rabbi, Jacob Emden, who argued that termination was acceptable where it would save her from ‘great pain’<sup>28</sup>. There can surely be no stronger instance of great pain to the mother than the present case. I suspect most of us will agree, but Rabbi Moshe Feinstein, one of the most distinguished halakhic authorities in the twentieth century, did not. He ruled that ‘no distinction may be made between fetuses on the basis of their life expectancy. One may not kill a fetus which will live only a few years after birth, as is the case of a Tay Sachs victim, since it does not pose a direct threat to the mother’s life. The pain and suffering suffered by the mother is irrelevant, as is any concern regarding the physical or mental welfare of the parents’<sup>29</sup>.

### Medically-Assisted Reproduction

I turn now to medically-assisted reproduction. There are enough issues here to sustain a full paper<sup>30</sup>. I will therefore confine myself to two: disagreements by progenitors over frozen embryos, and surrogacy.

As soon as it became possible to freeze embryos it was inevitable that legal and moral controversies would arise. Most obviously, one would want to use the embryos for reproduction, and the other would not, and would approve of their destruction. The question first arose in the United States. There are two possible answers. One prioritises the man’s right to be free from unwanted reproduction (as an American court did in *Davis v. Davis* in 1992<sup>31</sup>); the other prioritises the woman’s rights on the grounds that after fertilisation (whether natural or in vitro) a man has no rights over the reproduction process (a conclusion arrived at in another American court in *Kass v. Kass* in 1998<sup>32</sup>). The English courts, now supported by the European Court of Human Rights, have endorsed the *Davis v. Davis* reasoning in the *Natallie Evans* case which provided considerable controversy earlier this year<sup>33</sup>.

The Israeli courts were confronted with the same question in *Nahmani v. Nahmani*<sup>34</sup>. The dispute between Ruthy and Danny Nahmani centred on the fate of frozen embryos

<sup>27</sup> *Responsa Tsito Eliezer* 13, no. 102. This can be found in Sinclair, *op cit*, note 14, 37-39.

<sup>28</sup> *She’elat Yaavez* 1, no. 43. Emden lived from 1697 to 1776 and is best remembered as an anti-Sabbatean polemicist. On sabbateanism see M. Goldish, *The Sabbatean Prophets* (2004).

<sup>29</sup> *Responsa Iggrot Moshe, Hoshen Mishpat* 2, no. 69 in Sinclair, *op cit*, note 14, 39-42, 41. Waldenberg’s reply is *idem*, 42-44.

<sup>30</sup> An excellent one is J.D. Bleich, *op cit*, note 4, ch. 7.

<sup>31</sup> 842 SW 2d 588 (1992).

<sup>32</sup> 673 NYS 2d (1998).

<sup>33</sup> See *Evans v. Amicus Healthcare* [2004] 1 FLR 67; on appeal [2005] Fam 1. The European Court of Human Rights’ decision is *Evans v. United Kingdom* [2006] 2 FLR 172. And see Lind (2006) 18 *Child and Family Law Quarterly* 576.

<sup>34</sup> (1995) 50(4) P.D. 661. There is an English translation of the part of Tal J’s judgment in *op cit*, note 14, 101-113.

produced by her ova and his sperm. She had since undergone a total hysterectomy – this of course meant the case was complicated by the need to use a surrogate and one outside Israel<sup>35</sup> – and he was now living with another woman, and refused to give his consent to the implantation of an embryo into a surrogate (It was not the surrogate he was objecting to). Like Natallie Evans – though not the woman in the two American cases – Ruthy’s only chance of having her own biological child was to use the fertilised eggs. A first instance judge supported Ruthy. And so did the majority of the Supreme Court. The reasoning is interesting. For some judges, in the absence of clear law, it was necessary to turn to the dictates of justice. This, they said, favoured Ruthy, not Danny. Others argued that the potentiality for life in the embryos shifted the balance in favour of their implantation. This is to suggest that embryos have a right to life, which would have interesting implications. Just to take one: suppose neither ‘parent’ wanted a pregnancy to be created, would it become necessary for the state (presumably?) to find a surrogate? The most interesting judgement is from Tal J, a judgement which seeks support in both *Brava Metzia* and Lord Denning!<sup>36</sup> It is a judgement also, incidentally, which contains all the arguments we need for forcing a recalcitrant husband to give his wife a *get* (a religious divorce)<sup>37</sup>. In fact the argument for the wife in the *Nahmani* decision is, in Tal J’s view, noted in the reasoning that enables a Beth Din to force a husband to give his wife a *get*. I quote

‘From this....forcing of the husband to divorce “the wife who has a claim, we deduce that beyond his obligation by virtue of the commandment to be faithful and multiply, the husband has an initial obligation to provide his wife with a child if she so desires, on whom she can lean in her old age...; where it is possible to impose fulfilment of this initial obligation – he is forced’<sup>38</sup>.

Tal J saw the case as similar to forcing Danny to provide Ruthy with maintenance. Sinclair comments that: ‘If Jewish law does have a role to play in the area of assisted reproduction, then reminding society of its responsibilities as well as its rights in this area is surely an important part of that role’<sup>39</sup>.

## Surrogacy Arrangements

The earliest recorded examples of surrogacy arrangements are, of course, in the Bible<sup>40</sup>. There is nothing there (in *Genesis*) to suggest disapproval. So it is not surprising

<sup>35</sup> In California in this case.

<sup>36</sup> *Central London Property Trust v. High Trees House* [1947] KB 130.

<sup>37</sup> Though halakhic authorities have ruled that a *get* which is coerced (*me’useh*) is invalid.

<sup>38</sup> This in D.B. Sinclair’s translation in *op cit*, note 14, 110.

<sup>39</sup> *Op cit*, note 14, 7.

<sup>40</sup> In *Genesis* but, given the status of the surrogates, they were not true examples of surrogacy arrangements.

that, since the *Nahmani* decision, Israel has legislated on surrogacy<sup>41</sup> and broadly endorsed it. Unlike in England, where the law on Surrogacy is, as I have argued for many years<sup>42</sup>, to be regulated – this is also the view of a minority of the Warnock Committee in England in 1984<sup>43</sup>. The surrogacy agreement is scrutinised by an Approvals Committee. Ruthy would have, however, not been able to satisfy this Committee. To do so, she would have needed Danny's consent. The legislation refers throughout to 'commissioning parents': there is no way in which Danny would have been prepared to 'commission' a surrogate.

The Israeli law on surrogacy is interesting for other reasons too. It only accepts total surrogacy, that is where the surrogate merely leases her womb. The egg must be that of the commissioning mother: the sperm that of the commissioning father. The surrogate must, ideally, be single and of the same faith as the commissioning mother. The requirement that the surrogate is unmarried is because of the possibility that, were she not, it might be considered (by halakhah) adultery and the child might be regarded as a *mamzer* (an illegitimate child). The Approvals Committee can authorise a married woman as a surrogate if the commissioning parents cannot find a single surrogate. The requirement about common religion is also noteworthy: it should prevent questions arising about the religious identity of the child, an issue of significance in Israel. It is interesting that the commissioning parents do not have to be married (to each other). It would thus appear that England's bogey, the lesbian or single woman wishing to acquire motherhood<sup>44</sup>, is not an issue as such in Israel.

### Refusing Treatment

A fundamental principle of the common law is patient autonomy. In England and the United States a competent patient cannot be treated against his or her will. Thus, the Broadmoor patient – a paranoid schizophrenic – who refused to have his gangrenous leg amputated was vindicated by the courts of England<sup>45</sup>. A woman can refuse a caesarean even if this puts her and/or her child at risk<sup>46</sup> etc. Treatment can be refused for any reason or for no reason<sup>47</sup>. In England patient autonomy is valued above sanctity of life. Contrast Israel's Patient's Rights Law of 1996. 'If a patient whose life is in danger refuses urgent

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<sup>41</sup> Agreements Relating To The Carrying of Embryos (Approval of the Agreement and the Status of Offspring) Law 1996 (in translation in *op cit*, note 14, 115).

<sup>42</sup> (1986) 39 *Current Legal Problems* 45-48.

<sup>43</sup> Cmnd. 9314, 87-89. See also D. Davies, *The Times* 19 July 1984.

<sup>44</sup> The main reason for the controversial provision in the Human Fertilisation and Embryology Act 1990 s. 13(5) that fertility clinics must consider the welfare of children including their need for a father. This provision is about to be scrapped.

<sup>45</sup> *Re C* [1994] 1 All E.R. 819.

<sup>46</sup> *St George's Healthcare NHS Trust v. S* [1998] 3 All E.R. 673.

<sup>47</sup> *Re B* [2002] 2 All E. R. 449. But see A. Tauber, *Patient Autonomy and the Ethics of Responsibility* (2005).

medical therapy, it may be administered against his will<sup>48</sup>. It must be approved by an Ethics Committee. The patient must be ‘heard’ by this Ethics Committee. It is clear it must be an informed refusal. In addition, the treatment must be treatment which is expected significantly to improve the patient’s condition, and there must be a reasonable basis for assuming that following the treatment ‘the patient will consent to it retrospectively’.

The decision of *Yosef Kurtam v. State of Israel* antedates the legislation, but illustrates the problem rather well<sup>49</sup>. The case is a criminal, rather than a medical one, but the issues are still clear-cut. Kurtam, when apprehended by the police, swallowed heroin. Life-saving surgery was performed on him, despite his refusal to undergo the surgery. The case centred on whether evidence obtained in this way could be admitted in his trial. Had this been the United States, the doctrine that prohibits the use of the fruit of the ‘poisonous tree’ would have been invoked, and the evidence could not have been admitted<sup>50</sup>. That exclusionary rule does not apply in Israel<sup>51</sup>. In England the court has a discretion and may refuse to allow evidence if its admission would have an adverse effect on the fairness of the proceedings<sup>52</sup>.

These are interesting issues, but more germane to this paper is whether an operation can be performed to save a person’s life when he does not want such an operation. The Supreme Court held it could. And it relied on the ‘Jewish philosophy of the sanctity of life as a supreme value’ and the ‘Jewish tradition of saving life wherever possible’<sup>53</sup>. ‘You shall not stand by the blood of your fellow’. In the view of Maimonides – and indeed other halakhists – there is a theological principle implicit, namely that ‘a person’s life is not his property: it is the property of the Holy One blessed be He’<sup>54</sup>. Beiski J in *Kurtam* approved the citing by a lower court judge of the argument of Rabbi Jacob Emden: ‘one does not listen to him, if he does not want the pain and prefers death over life, but one amputates even an entire limb, if necessary to save his life’<sup>55</sup>. And this ruling was in eighteenth century Prussia where anaesthesia did not exist.

Israeli law thus adheres to the Biblical position<sup>56</sup> that the obligation to save human life overrides all but three prohibitions: murder, idolatry and unlawful sexual relations<sup>57</sup>. In all other cases the saving of life is paramount: even the Sabbath and *Yom Kippur* (the Day of Atonement, the holiest day in the Jewish calendar) are overridden by the obligation to sa-

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<sup>48</sup> Section 15(2).

<sup>49</sup> Cr. A 480/85, 40 (3) P.D. 673. There is an extract of the case in *op cit*, note 14, 147-154.

<sup>50</sup> and see W. Twining, *Rethinking Evidence* (2006).

<sup>51</sup> *Per* Beiski J in *op cit*, note 49 (cited *op cit*, note 14, 147).

<sup>52</sup> Police and Criminal Evidence Act 1984 s. 78.

<sup>53</sup> See, *op cit*, note 14, 152.

<sup>54</sup> *Hilkhot Rotseah* 1:4. An interesting similar view is found in Greek tradition. See Plato’s *Phaedo*. And note the impact in the Hippocratic Oath.

<sup>55</sup> *In Mor Uketsi’ah*.

<sup>56</sup> See *Leviticus* 19:18, *Leviticus* 19:16, *Deuteronomy* 22:2. See also *Sanhedrin* 73a, *Bava Kamma* 81b.

<sup>57</sup> See *Leviticus* 18:5 and *Yoma* 85a.

ve life. The Jerusalem Talmud branded a rabbi ‘a despicable individual’<sup>58</sup> when he failed to teach this norm to his congregation. Sinclair explains: ‘This is because the first thing that the rabbi ought to have done was to teach this rule, so that if a life-threatening situation arose on the Sabbath, there would be no need to waste time in asking a question’<sup>59</sup>. One consequence of this is that the individual who does not wish to be treated because it is the Sabbath or *Yom Kippur* must be forced to follow medical advice if it is necessary to save his/her life. Of course, she cannot be forced to do so by English law. In English law a doctor who treats a patient against his/her will can be sued for battery and may have to pay damages<sup>60</sup>. This, of course, raises interesting questions about the Jewish doctor who treats the unwilling Jewish patient on the Sabbath and thus complies with Jewish but breaks English law! Incidentally, from the principle that someone can be forced to undergo life-saving treatment unwillingly, the *Tosefta* deduces that the property of Israelites who have not paid their annual contribution to the Temple by a certain date is to be confiscated until payment is made: a ruling with fascinating contemporary implications<sup>61</sup>!

It should not be thought that the *Halakhah* rules out patient autonomy entirely<sup>62</sup>. Particularly hard cases can be resolved by deferring to the wishes of the patient. Sinclair explains that both

‘the coercion rule and the divine ownership principle reflect the  
ween competing halakhically and morally valid options, pa-  
tient choice may well be the halakhic answer’<sup>63</sup>.

This can be illustrated by a dilemma which was the basis for a response by Rabbi Moshe Feinstein, the leading twentieth century authority. The question posed was whether a person should undergo risky surgery which might prolong his life by 5 to 10 years, even though he would survive for a short time without it. Rabbi Feinstein’s answer was that the individual concerned may choose the operation, even though it may shorten his life. He said, in situations of this sort, ‘people own their own bodies with respect to improving the quality of their lives’<sup>64</sup>.

One illustration of this is the discussion by Rabbi Hayyam David Halevy of a case in which a young man refused to undergo chemotherapy for his cancer and chose instead homeopathic medicine. Rabbi Jacob Emden had ruled (in the eighteenth century) that a person should only be compelled to submit to medical treatment if the patient had ‘full

<sup>58</sup> *Yoma* 8:5.

<sup>59</sup> *Op cit*, note 4, 159.

<sup>60</sup> This is clear from *Re B* (see note 47) when a patient treated against her will – to keep her alive – asked for, and was granted, nominal damages.

<sup>61</sup> *Shekalim* 1:6.

<sup>62</sup> See D. Shatz, ‘Concepts of Autonomy in Jewish Medical Ethics’, *Jewish Law Annual* 122 (1997), 3-43.

<sup>63</sup> *Op cit*, note 4, 159.

<sup>64</sup> *Resp. Iggrot Moshe, Yoreh De’ Ah*, vol 3, no. 36.

confidence in it<sup>65</sup>. Since the patient was convinced chemotherapy was not going to be effective, there was, Halevy concluded no justification to force him to receive it<sup>66</sup>.

This raises the question whether the refusal of all treatment, orthodox and alternative, can ever be justified. Sinclair<sup>67</sup> discusses this in relation to the death of a medieval Tosafist known as Riba. Riba refused to eat on the Day of Atonement – a day upon which fasting is obligatory – despite his physician’s warning that if he didn’t eat he would die. But since the physician could not guarantee that if he ate he would survive and Riba was convinced he would die anyway, it was held his certainty prevailed over the uncertainty of the doctors regarding his recovery. This ‘story’ has become part of the *halakhah* in this area. The general trend now is to justify the refusal of treatment which poses a risk to life, even if prospects for long-term survival without the procedure are poor. Thus Rabbi Shlomo Zalman Auerbach ruled that a 50-year-old man who suffered from chronic diabetes, blindness, blocked arteries and various infections was not required to agree to his gangrenous leg being amputated<sup>68</sup>.

### The Definition of Death

I turn now to the definition of death which is crucial in many areas, but particularly with reference to cardiac transplants<sup>69</sup>. The development of artificial means to preserve patients’ vital organs, such as mechanical ventilators to maintain patients’ oxygen supply and heartbeat, means that patients can survive when they are incapable of breathing spontaneously and maintaining heart function. In response to this development, the common law preserved its focus on respiration and pulsation as evidence of life, but accepted the artificial source of energy sustaining vital functions as the equivalent of a person’s spontaneous maintenance of such functions. A person dependent on artificial life support equipment is clearly alive. But it became increasingly clear that heartbeat and respiration alone are not necessarily sufficient to preserve human life. It was progressively recognised that we should instead be looking to the brain. So, the neurological status and prognosis of a human being assumed increasing legal significance, eventually paving the way to concurrent legal recognition of death due to failure of heartbeat and respiration, and of so-called ‘brain death’, now medically described as brain stem death.

The courts in England have now accepted brain stem death as the appropriate test. Thus in the *Bland* case (Bland was a victim of the Hillsborough disaster and was in a persistent vegetative state) Lord Keith observed that ‘in the eyes of the medical world and of the law a person is not clinically dead so long as the brain stem retains its function’<sup>70</sup>.

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<sup>65</sup> *Mor Uketziah*, no. 328.

<sup>66</sup> In *Hatsofeh* 18 July 1991.

<sup>67</sup> *Op cit*, note 4, 163.

<sup>68</sup> *Nishmat Avraham, Yoreh De’ah* 155:2.

<sup>69</sup> See M. Brazier and E. Cave, *Medicine, Patients and the Law* (2007), 440-442.

<sup>70</sup> *Airedale NHS Trust v. Bland* [1993] 1 All E.R. 821, 859.

Bland's brain stem was still alive and functioning: he was accordingly alive. But he was persistently vegetative and would never regain consciousness. The House of Lords approved withdrawal of artificial nutrition and hydration, but not, controversially, the giving of a lethal injection<sup>71</sup>.

Not surprisingly, irreversible cessation of brain stem function is not cited in classical sources of Jewish law. It hardly could be. Various criteria were used. In the *Gemara* discussion centres on whether a sign of life is to be sought in the 'nose' or 'heart' (that is whether the criterion is breathing or pulse)<sup>72</sup>. By the nineteenth century, the criteria discussed were threefold: paralysis of the nervous system (was the patient a lifeless stone?), cessation of the activity of the heart and cessation of breathing<sup>73</sup>. The trend was to bring the signs of death in line with knowledge of physiological processes in the human body at the relevant time. Jewish sages and *poskim* did not have the tools to measure brain activity. And they did not know the brain controlled the operation of other systems, such as respiration and heart.

The issue came to the fore in Israel when a man charged with murder (Belker) was able to show that his victim continued to breathe by means of a ventilator<sup>74</sup>. His brain stem function had however ceased. The ventilator was eventually disconnected by medical staff. Had they killed him or had Belker? The Supreme Court had to grapple with the concept of death. It concluded that Belker was guilty of murder: in other words that cessation of brain stem function was death. Support for this conclusion was found in an analysis of *halakhic* sources. Beiski J argued that these established that death is determined by cessation of breathing, and that this can be 'determined by proving the destruction of the whole brain, including the brain stem, which is what activates a person's independent breathing'<sup>75</sup>. I am not aware of a more detailed analysis of the concept of death in any common law decision. It is fascinating to see these conclusions fortified by reference to generations of *halakhic* sources. Jewish authorities, it seems, were thinking about these issues long before there was serious thinking elsewhere.

The conclusion reached in the *Belker* case provides the basis for the Israeli Chief Rabbinate's authorisation of cardiac transplants in 1989<sup>76</sup>. But this didn't satisfy everyone. In 1991 Rabbi Shlomo Zalman Auerbach and Rabbi Yosef Shalom Elyashiv issued a *halakhic* decision prohibiting heart transplants. They ruled: 'As long as the heart of the donor is beating – and even in the event that his entire brain, including the brain stem, is not functioning, i.e. brain death – in our opinion there is no permission to extract any of his

<sup>71</sup> *Ibid.*, 867, 875, 884, 890.

<sup>72</sup> Yoma, 85a. The 'heart' test is emphasized in later authority: for example, *Responsum Haham Zvi*, no. 77 and *Responsum Levush Mordekhai*, no 124.

<sup>73</sup> See Sinclair, *Op Cit*, note 4, ch. 6.

<sup>74</sup> Cr. A 480/85, 527/85; 31 P.D. 673.

<sup>75</sup> *Ibid.*

<sup>76</sup> and see E. Dorff (1997) 12 *Jewish Law Annual* 65 an 'law' and 'lore'.

organs, and such an act would constitute murder<sup>77</sup>. This led to an elaborate and unnecessarily cruel experiment in which a pregnant ewe was decapitated. The ewe remained without a head for 25 minutes while the heart was beating regularly, the pulse and blood pressure were maintained, and the pulse of the fetus was regular. In fact a live lamb was extracted. This apparently convinced Auerbach<sup>78</sup>.

### End of Life Decisions

This leads to a discussion about treatment of the terminally ill. There is only one Israeli Supreme Court decision (the case of Yael Sheffer): this prioritises the sanctity of life principle over that of patient autonomy<sup>79</sup>. But many decisions at District Court level tend to favour patient autonomy rather than sanctity of life. The feature which is common to all the legal decisions in this area is the struggle to find the right balance between the principles of human dignity and freedom, and the values of Judaism, including that of human life. The Patients' Rights Law of 1996, to which reference was made earlier, originally had a section which read: 'a terminal patient has a right to die with dignity, and is entitled, whenever possible, to medical support in order to help him realize that right'<sup>80</sup>. But this was deleted from the final text: it was criticized for not offering a definition of the terminal condition or specifying the type of treatment which could be withheld or withdrawn. This led to the establishment of a committee in 2000 which reported in 2002 (headed by Professor Abraham Steinberg)<sup>81</sup>. The committee distinguished periodic treatment, which could be withdrawn, and continuous treatment, which needed to be maintained until the establishment of death. Continuous treatment is mainly artificial respiration, periodic treatment includes most of the other procedures commonly carried out with respect to terminally ill patients eg chemotherapy, radiotherapy and dialysis (also resuscitation). Of course, this decision was a compromise to balance those who favoured sanctity of life (*halakhists*) and thus rejected any distinction between different types of treatment, and liberals committed to patient autonomy, who also rejected the distinction because they believed continuous treatment should also be discontinued if that is what the patient wanted.

The Committee also made proposals regarding analgesics. The Draft Law stipulates that life-shortening palliative treatment is to be provided to all terminal patients, provided that the degree of danger posed by the treatment to the patient's life is not unduly serious<sup>82</sup>. At the root of this is the double effect doctrine – which is Catholic in origin –

<sup>77</sup> Translated in *op cit*, note 14, xxx.

<sup>78</sup> and see A Steinberg, *Assia* 53-4 (1994), 13 n. 1.

<sup>79</sup> *Sheffer v State of Lornel*, CA 560/88; 48(1) P.D. 87.

<sup>80</sup> as clause 12. See Sinclair *op cit*, note 4, 269.

<sup>81</sup> There is a summary in Sinclair *op cit*, note 4, 268-270.

<sup>82</sup> The Terminally Ill Patient, 2002, summarized in *op cit*, note 4, 270-273.

which allows an act to be performed which does both good and evil, provided the intention is to achieve a morally virtuous effect (in this instance relieve pain)<sup>83</sup>.

The Draft law forbids both active euthanasia by doctors and physician – assisted suicide.

The Draft is said to contain ‘the best balance between the demands of Judaism and democracy’<sup>84</sup>. Whether the draft will become law remains to be seen. In the meanwhile there is the *Sheffer* decision. The case was about a young girl with Tay Sachs.

The Supreme Court refused to grant an order to her mother allowing her to instruct her daughter’s doctors to withhold artificial respiration and intravenous medicine in the event that she developed a lung infection. The main judgment by Elon, V.P. is a brilliant synthesis of learning, both in relation to halakhah and Israeli law. It is difficult to offer a summary. A few points stand out. There is a concern that ‘the right to die’, often used in the common law world (eg in the Dianne Pretty case in England)<sup>85</sup>, can easily become a ‘duty to die’. That ‘mercy killing’ can become more of a mercy ‘for those around and treating the patient’ than the patient himself. That death with dignity<sup>86</sup> is almost an oxymoron: ‘death and dignity are not consistent with one another, it is rather life and dignity that accord with each other, for life, itself is an expression of human dignity – the dignity of man created in the Divine image’. There are sharp contrasts here with thinking and judicial pronouncements in common law systems and more secular societies. The ideas expressed are conservative, perhaps over-paternalistic. But they need to be said if the issues are to be properly debated.

There are comments also on the incompetent’s status in relation to end-of-life decisions. There is a tendency for common law jurisdictions to apply best interests standards to those who cannot make decisions for themselves.<sup>87</sup> But what exactly is meant by best interests is neither self-evident nor altogether clear. It focuses on the patient but it doesn’t identify the factors which are relevant. It is clear that best interests embraces more than best medical interests, and that doctors cannot be the sole arbiters of best interests<sup>88</sup>. There is some discussion of the concept in Israeli decisions too, including the *Sheffer* case. The Israeli emphasis is on ‘assessment’, what common lawyers would call ‘substituted judgement’ – trying to decide what the incompetent would decide were s/he able to do so. Rightly, the *Sheffer* Court is concerned about this, about the risk in particular that the wishes of incompetents will be determined according to the wishes of those closest to them. The spectre of the ‘slippery slope’ is then invoked.

<sup>83</sup> See the discussion by B. Brody, *Taking Issue – Pluralism and Casuistry in Bioethics* (2003), 260-262.

<sup>84</sup> By D. Sinclair, *op cit*, note 14, xx.

<sup>85</sup> See J. Hardwig, *Is There A Duty To Die?* (2000). The Pretty decision is reported at [2002] 1 All E.R. 1; the European Court’s decision (*Pretty v. U.K.*) at [2002] 2 FLR 45.

<sup>86</sup> *op cit*, note 81, xx. But see R. Cohen-Almagor, *The Right To Die With Dignity* (2001).

<sup>87</sup> For example in *F v. West Berkshire Health Authority* [1989] 2 All ER 545.

<sup>88</sup> See the English Law Commission Report No. 231, *Mental Incapacity*, para. 3. 27.

## Conclusion

These then are a few of the issues which confront ethicists and courts in Israel to-day. The problems are the same in Israel and in the common law world. The materials which go into the decision making process are inevitably different. The *halakhic* background and the values of Judaism are an inevitable backdrop<sup>89</sup>. They mean there is a greater emphasis on sanctity of life and a lesser one on autonomy. There is growing disenchantment with autonomy in the common law world and an increased emphasis on autonomy in Israel. The systems may be moving closer together but each remains distinctive. What, I wonder, would the author of *Ecclesiastes* make of it? There is, of course, plenty new under the sun!

The origins of this text are a public lecture given at Kenton Synagogue on June 20<sup>th</sup> 2006.

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<sup>89</sup> See also T. Amidror and F. Leavitt in R. Blank and J. Merrick, *End-of-Life Decision-Making-A Cross-National Study* (2005), 97-108, and N. Zohar, *Alternatives In Jewish Bioethics* (1997).