



Law and Bioethics in Israel: Between Liberal Ethical Values and Jewish Religious Norms

Professor Amos Shapira
The K. Lubowski Chair of Law and Biomedical Ethic
Faculty of Law, Tel Aviv University

I. The normative regulation of biomedical science and technology is a multidisciplinary enterprise that builds on the combined effort of men and women of science, ethics, politics, socio-economics, theology and law. A meaningful multidisciplinary cooperation is a sine qua non to the normative engineering of the biomedical field, where a balancing of varied – and sometimes contending – claims of value and interest is often required.

In Western-liberal societies, biomedical law is closely related to human rights jurisprudence. Biomedical human rights claims – relating to issues of life and death, health and sickness – are readily identifiable. Still, the much acclaimed and often referred-to concept of human dignity is, one must admit, rather vague in formulation and nebulous in meaning. It is highly culture-dependent and value-sensitive. Also, responsible decision-makers – such as legislators, judges and members of ethics committees – in a field characteristically surrounded by cultural and emotional debate must exercise highly delicate judgment when choosing between red, green or yellow lights in charting the biomedical normative map.

In a pluralistic society, people of varied religious and humanistic persuasions are prone to display a diversity of moral attitudes towards novel technologies affecting reproduction and genetics, human dignity and social control, family integrity and professional responsibility, freedom of scientific research and state regulation. Such diversity makes it unlikely that any suggested normative scheme will be accepted by everyone without reservation. Therefore, to be fair and effective, guiding normative principles in the biomedical sphere ought to present a carefully balanced common social and moral position. And one must also bear in mind the inherent limitation of all regulatory law in a free society. Such law should only attempt to set the truly necessary limits and directives that are indispensable to guaranteeing a tolerable societal life. Law givers must acknowledge that sometimes what is a right answer for you may be a wrong answer for me and that no one has the right answer for everyone.

It follows that what is legally permissible is not necessarily socially desirable or morally praiseworthy. Individuals and groups may voluntarily opt, for instance on religious grounds, for stricter norms of behaviour. Within the broad limits of the law, a liberal society should make room for different moral judgments. The law just cannot guarantee an absolute and uniform quality of all human transactions. To be sure, the opportunities offered by contemporary biomedical technology for the betterment of the human condition are overwhelming. But so also are the many risks involved, first and foremost the danger of dehumanization and instrumentalization in the sense of treating humans as a means rather than an end. The law is one device, not the only one, which can be used to curb instances of unjustified risks, manipulation and abuse. Yet, like with medicine, it ought to be viewed as a powerful instrument with its own potential for harm and, consequently, it must only be employed sparingly.

II. In Israel, the bulk of the population leads an essentially secularist, liberal, and permissive individual lifestyle. At the same time, certain cultural-religious values, institutions, practices, and injunctions are formally woven into the Israeli communal fabric. Consequently, the bioethical discourse in Israel has evolved in a socio-cultural context which manifests a unique mix of orthodoxy and secularism, of communal paternalism and assertive individualism, of proscription and permissiveness, of religious norms and liberal ethical values. There can be no denying of the impact of Jewish religious tenets, and the political groups that champion them, on the shaping of Israeli biomedical jurisprudence. Yet it would be wrong to assume that such impact invariably has been prohibitive and restrictive. To illustrate the diverse influence of religious attitudes on normative postures regarding biomedical dilemmas in Israel, I will focus on end-of-life medical decision making, on the one hand and on embryonic stem cells research, on the other.

1) End-of-Life Medical Decision Making

The Halakha (the corpus of Jewish religious law) holds an essentially negative attitude towards euthanasia. This stems from the theological premise that Man does not possess absolute title to his body and, therefore, is not entitled to destroy it. By the same token, sanctity of human life is a fundamental tenet of Jewish moral and legal thinking. The value of human life is supreme and takes precedence over essentially all other considerations. The obligation to save and preserve life is virtually all-embracing. Consequently, the deliberate hastening of the death of a terminally ill patient is condemned as blood shedding. The “Thou Shalt not Kill” commandment is designed to provide equal protection to both the young and healthy and the old and ailing. It should be noted, however, that the Halakha is not indifferent to human pain and suffering. Thus

the biblical story of King Saul's tragic death provided a foundation for the view that regards unbearable suffering as an arguably acceptable justification for committing suicide.

There is no question that the taking of life by an affirmative action ("active euthanasia") is unequivocally proscribed by Jewish religious law, even in the case of a terminally ill patient begging that his inevitable and impending death be hastened to relieve him of immitigable pain. Life may not be shortened by active measures in any circumstances. And according to the prevailing Halakhic view, active measures include not only direct and deliberate killing (by, e.g., administering a lethal injection) but also the withdrawal of an ongoing life support treatment (such as disconnecting a respirator). Any direct act which may hasten death is categorically forbidden.

The position of the Halakha is more permissive with regard to the withholding of life sustaining medical treatment of terminal patients ("passive euthanasia"). It is not prohibited to refrain from prolonging the life of a dying patient through artificial medical means. Such withholding of treatment is not considered as an affirmative action causing death but rather is regarded as a removal of a hindrance which delays artificially the departure of the soul. There is no obligation to artificially prolong the expiring life of a dying patient by impeding the natural dying process. However, nutrition and hydration, even if administered through artificial means, are not viewed as artificial medical treatment and consequently may not be withheld under any circumstances.

What has been the impact of these Jewish religious norms on the evolution of Israeli jurisprudence regarding end-of-life decision making? Most judicial decisions in this matter thus far concerned adult patients, suffering from Amiotropic Lateral Sclerosis, Alzheimer's disease or emphysema. The patients involved, or their representatives, sought declaratory judicial authorization of withholding or withdrawal of future or

present life-sustaining treatment (such as artificial respiration) in allegedly terminal or incurable situations. In the absence of specific legislative directives, the sporadic judicial handling of these dilemmas has been fraught with normative ambivalence and ambiguity. Ad hoc judicial determination of concrete controversies has been vacillating between the liberal constitutional values of human dignity, autonomy, bodily integrity and privacy, on the one hand, and the pre-eminence accorded in the Jewish religious tradition to the sanctity of the divine gift of human life and its preservation, on the other. Judicial ambiguity has thus joined the medical profession's own ethical ambivalence and uncertainty as to the limits of clinical discretion in end-of-life decision making.

The issues of active euthanasia and physician assisted suicide have not yet been confronted head-on by the Israeli judiciary. There seems to be a widespread consensus that such practices of deliberate and direct hastening of death are unacceptable under current Israeli law. On the other hand, palliative care is assumed to be lawful with no explicit reservations or elaborate qualifications. Physicians, who feel professionally and ethically obliged to alleviate patients' pain and suffering, do not require court approval of the administration of palliative care even if, in fact, such care might shorten the life of the patient. It is also generally understood that clearly futile medical treatment, particularly if invasive and burdening, may be withheld from terminal patients and that physicians must not be compelled to behave contrary to their professional conscience. Still, treatment decisions that err in favor of sustaining life are likely to be tolerated if not indeed commended.

The absence of legislation on the validity and effect of advance directives has prompted patients, while still competent, to seek declaratory judicial assurance that their preferences regarding end-of-life treatment will be heeded when they are no longer capable to decide for themselves. Judicial attitudes to treatment refusals have been

ambivalent and occasionally inconsistent. Factors such as the patient's pain and suffering and the invasiveness of the procedure in question are prone to enhance the prospects that the patient's treatment refusal will be respected. Divergent opinions have been voiced as to whether the legitimate forgoing of life-sustaining medical treatment may extend to nutrition and hydration. An accommodating attitude toward the asserted right to forgo nutrition and hydration at the end of life could arguably be inferred from a recent Supreme Court decision on treatment refusal (concerning a 91-year old woman in a persistent vegetative state).

All early cases of refusal of artificial respiration that reached the courts concerned treatment withholding, namely, patients who were still breathing spontaneously applied for declaratory relief against possible administration of artificial respiration in the future. In subsequent cases the question has arisen whether the principle endorsing a qualified patient's right of respiration refusal should also apply in treatment-withdrawing cases, that is, where an already ventilated patient wishes to be disconnected from a respirator. Judicial response to this issue has not been uniform. According to one view (patently shaped by the traditional religious Jewish law position on the matter), the withdrawal of life-preserving treatment is akin to active euthanasia and therefore forbidden. Other judges have held that there is neither logic nor merit in distinguishing between withholding and withdrawal of life support such as artificial respiration and nutrition. Hence both forms of treatment refusal ought to be dealt with alike and permitted under similar circumstances. One must realize, however, that many medical practitioners seem to find it psychologically and emotionally far more difficult to unplug the respiration machine.

In the most recent judicial pronouncement on end-of-life medical decision making, the Israeli Supreme Court made a plea for a legislative solution to the issues

involved. This judicial appeal for a comprehensive statutory scheme has been heeded with the introduction in August 2002 by the Ministry of Health of The Dying Patient Act draft bill. The proposed bill, which is based on a report prepared by a multidisciplinary public commission appointed by the Minister of Health, comprises 56 clauses and addresses such themes as underlying principles and presumptions, treatment of the dying patient, competent and incompetent patients, and ethics committees. For the purposes of my presentation, let me just focus briefly on the mix of liberal ethical values (“autonomy”) and Jewish religious tenets (“sanctity of human life”) as reflected in the various provisions of the proposed bill. The principle of autonomy is expressed in the explicit permission to refrain from medical treatments (such as resuscitation, ventilation, radiation, chemotherapy, dialysis, surgery and experimental procedures), in the authorization to alleviate pain and suffering by providing palliative care (even if risky to the patient’s life), and in the formal endorsement of advance directives and durable power of attorney. The “sanctity of human life” religious tenet is manifested in the presumptive wish to go on living attributed to patients (unless otherwise indicated by them), in the explicit prohibition of deliberate killing (active euthanasia) and assisted suicide, in the prohibition of interrupting an ongoing life sustaining treatment (such as disconnecting a respirator), in the prohibition of withholding routine treatment (unrelated to the incurable terminal illness), nutrition and hydration from an incompetent patient, and in the inclusion of clergy as members of ethics committees. All in all, it appears that the normative position presented by the proposed bill tends to be relatively restrictive when compared to liberal, autonomy-grounded normative modalities. Without doubt, Jewish religious attitudes do play a significant prohibitive role in the shaping of Israeli normative arrangements concerning end-of-life medical decision making.

2) Embryonic Stem Cells Research

The overall normative environment in Israel with regard to the human embryo, notably concerning embryo stem cells research, seems to be less dogmatic and proscriptive, more pragmatic and permissive in comparison to the regulatory posture featured by certain Western societies.

The currently existing Public Health (Extra-Corporeal Fertilization) Regulations, 1987, prescribe terms and conditions for the authorization of retrieving, fertilizing, freezing and implanting fertilized eggs for reproductive purposes. The proscription of ovum retrieval save for the purpose of fertilization and subsequent implantation in a woman's womb seems to imply a ban on embryo research, at least in the sense of forbidding the deliberate formation of embryos solely for purposes of research and therapy. The regulations address neither the question of the fate of frozen embryos at the end of the freezing period nor the issue of supernumerary embryos (i.e., embryos initially formed in the course and for the sake of infertility treatment and not replaced or donated for implantation for some bona fide reason). Likewise, the currently proposed law for the regulation of the donation of eggs for purposes of in vitro fertilization does not address the possibility of embryo stem cells research.

In 1999, the Knesset (Israeli Parliament) enacted the Prohibition of Genetic Intervention (Human Cloning and Genetic Modification of Reproductive Cells) Act. The proclaimed purpose of this Act is to prescribe a five-year period during which certain genetic interventions in humans may not be conducted, thereby facilitating an assessment of the moral, legal, social and scientific connotations of such interventions and their impact on human dignity. The banned interventions are: firstly, cloning of a human being (defined as "the creation of a whole human being who is absolutely identical, genetically-chromosomically, to another – a human being or an embryo, whether alive or

dead”), and secondly, the creation of a human being through the use of reproductive cells (human sperm or egg) that were subjected to germ-line gene modification. The Act provides for the establishment of a multi-disciplinary advisory board that is mandated to follow medical, scientific and biotechnological developments in the field of human genetic research, to submit to the Minister of Health an annual report on such developments, to advise the Minister on these matters, and to offer recommendations with regard to the said prohibitions. The Act further stipulates that the Minister may authorize, by promulgating regulations, the conduct of specific genetic interventions if the Minister considers that such genetic interventions are not violating human dignity, upon the recommendation of the advisory board and subject to prescribed conditions. Violators of the five-year ban prescribed by this Act are liable to up to two years imprisonment. Patently, the ban applies only to the two kinds of genetic intervention addressed (human cloning and genetic modification of reproductive cells), but not to other possible modes of genetic research or therapeutic genetic intervention (concerning, for instance, cells and tissues taken from aborted fetuses). Embryo cloning for therapeutic research purposes (by nuclear transfer) is seemingly not prohibited by this Act.

The Israeli Academy of Sciences and Humanities issued in August 2001 a report entitled “The Use of Embryonic Stem Cells for Therapeutic Research”. The position taken by the Academy in this regard is manifestly liberal and permissive. It emphasizes the high multiplication and differentiation potential of embryonic stem cells and their promise for derivation of various transplantable cells and tissues and for generally providing new therapeutic approaches to the treatment of cell disorders and other human diseases. It permits, within the framework of IVF treatment, the donation for therapeutic research of spare embryos that are not destined to implantation in utero for reproductive purposes. The possibility of such embryo donation should be discussed from the outset of

the IVF process. Access to supernumerary embryos available for therapeutic research ought to be facilitated. The Academy reasons that the removal and culture of cells from spare pre-implantation embryos, who in any event are doomed to discarding or indefinite freezing, is by no means indicative of disrespect for human embryos. One must also bear in mind the already common practice of pre-implantation genetic diagnostics designed to identify genetic diseases and to select for reproduction purposes embryos with the highest implantation potential.

Furthermore, the Academy considers it ethically permissible to experiment with new in vitro technologies to produce embryonic stem cells, such as reprogramming somatic cell nuclei by transfer into enucleated oocytes (popularly called therapeutic cloning, without reproductive purposes). The renucleated oocyte is then cultured, without implantation, until the blastocyst stage when stem cells can be derived from the inner cell mass. While emphasizing the high therapeutic potential of such research (producing autologous tissues for patients in need of transplantation with no danger of graft rejection), the Academy reasons that the creation of such cloned embryonic forms for therapeutic research is ethically justified since the process does not entail the mixing of ova and sperm with a view to initiating complete fetal development for reproductive purposes. The Academy notes that the prohibition under Israeli law explicitly targets “the creation of a whole human being” by reproductive cloning while not expressly ruling out embryonic therapeutic cloning. The report then addresses such matters as possible sources of human oocytes for nuclear transfer, sources of stem cells other than pre-implantation embryos (aborted fetuses, living adults, cadaver sources), and various ethical restraints and guidelines for research conduct and application

It is evident that this manifestly accommodating normative, both legal and ethical, stand on the issue of embryonic stem cells research in Israel fully accords with traditional

Jewish religious attitudes concerning the value of life saving by medical healing and regarding the moral status of the embryo. The Halakha (Jewish law) delineates six stages of human maturation and status, from the pre-implantation embryo (first stage) to the neonate (sixth stage). Man's creation in the image of God imparts infinite value to human life and renders its destruction a capital offense. Yet the absolute inviolability of life begins only at birth. Still, a right, or entitlement, to life is recognized and protected from the early beginning of embryonic development and it intensifies progressively from stage to stage of human maturation. By the same token, the pre-birth entitlement to life may only be compromised by overriding countervailing considerations that must become growingly compelling as the pregnancy develops.

The in vitro pre-implantation embryo possesses the lowest status on this scale. As there is only a slight likelihood that it might reach the neonatal stage, an in vitro pre-implantation embryo's entitlement to life is most inferior and by no means equals that of an implanted embryo. Nonetheless, even the destruction of an in vitro pre-implantation embryo with an actual implantation potential can be likened to the proscribed waste of semen. The biblical precept "be fruitful and multiply" implies an objection to the deliberate frustration of the procreative process. As for the first forty days after conception or implantation, some Halakhic authorities tend to minimize the embryo's moral status to the point that the prohibition against the destruction of potential human life does not apply. Other authorities, however, consider that even during this early embryonic stage the embryo is already endowed with a certain human status which is superior to that possessed by the in vitro pre-implantation embryo. In sum, the Halakha draws a clear distinction between the pre-implantation and the implanted embryo. An in vitro pre-implantation embryo with an actual potential for implantation may not be destroyed or used for scientific research, unless this is done for the purpose of saving life.

An in vitro pre-implantation embryo lacking actual potential for implantation may be subjected to research, even if it entails the extraction of cells and the ending of the embryo's capacity to develop. It is forbidden to use a viable implanted embryo for research purposes. Finally, the creation of in vitro pre-implantation embryos for research purposes may be allowed if the contemplated research is probable to facilitate the saving of human life. This applies also to creating embryos by means of cloning.



Let me conclude reiterating my initial observation: While Jewish religious teachings do impact the evolution of Israeli biomedical jurisprudence, it is not a foregone conclusion that such impact invariably takes on a prohibitive direction. Depending on the particular subject-area, the Halakhic normative effect can be highly permissive indeed.