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Jewish Bioethics and End-of-Life Issues

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This paper is divided into three parts: first, some general philosophical comments on the subject of death and dying in bioethics; secondly, a review of some of the main attitudes of the Jewish tradition to euthanasia; and thirdly, a look at some recent cases in the formation of norms regarding the end of life in the Israeli legal system, particularly the struggle to find a middle ground in the conflict between the principle of the sanctity of life and the principle of autonomy.

I.

The symmetry between the bioethical principles regarding the beginning of life and those concerning the end of life is both of philosophical and theological meaning. Both fields in modern medical ethics have developed along each other at the same time, namely in the course of the 1950's and 1960's. The fierce debate about the ethics of abortion and the legitimacy of euthanasia ran parallel, raising the same issue of the nature of life and the role of human autonomy in deciding its beginning and its end. But later on the debate expanded from the traditional questions of abortion and euthanasia to completely new issues that were raised by the tremendous development in medical technologies. In the field of the beginning of life, decisions had to be made regarding premature babies born very early and hence with dubious life prospects, IVF technology, surrogate motherhood, genetic screening, PGD tests, cloning and stem cell research. All these gave rise to the philosophical question of when life begins and what does that morally entail. In the field of the end of life, the second half of the twentieth century gave rise to the new definition of brain death, to the novel techniques of organ transplantation, and to an unprecedented power of medicine to extend life for a very long time (sometimes in a way which looks "artificial" or futile).

Although abortion and euthanasia have always been ethical issues and subjected to normative regulation (both ethical and legal), the particular problem of the exact *timing* of the beginning and end of life has had only marginal import. There were indeed debates about the status of the fetus as there were debates about the status of the dying person. But nowadays, crucial ethical issues surround the subtleties of the manner in which the moment of coming into existence and passing away is fixed. Thus, for example, is the very early embryo, three days after conception, a person protected from intervention for research purposes or for selection in an IVF procedure. Similarly, in the end-of-life context, is a brain dead but still breathing person dead or alive and hence eligible or ineligible to donate organs.

So far for the general changes in philosophical discussions of the symmetrical problems in the beginning and the end of life. But the underlying assumption common to both is that life and death are a *given* in the sense that we have no control over them. Theologically, this is captured well in the famous Jewish saying from the Tractate Avot (first and second centuries A.D.) that man is born and dies *by necessity*.

«……for you were created against your will, and you were born against your will, you live

against your will, and you will die against your will…»[1].

I understand this as claiming that human beings have control of much of their life and hence are accountable and responsible for the way their lives go. But the very *fact* of their coming into existence and that of ceasing to live is beyond their power and hence not a matter of choice. From a religious point of view this means, of course, that life is not "owned" by human beings, that it is a divine gift (even if some Jewish commentators in that text argue that necessity means that it is not really a gift and that man would prefer not being born than being born). This sets the deep philosophical debate about the end of life. For here, the symmetry between the beginning of life and its end terminates. We have indeed no control over our birth, but we do have some control over its end. Death is inevitable, but its timing is not. Although we cannot have any say about coming into life, once we are alive we do have at least the power to put an end to it or decide on the way we want to die.

This is the logical or metaphysical background to the big methodological debate about the ethics of euthanasia. From the theological point of view, life is not only a gift of God but also a holy gift. This is the principle of the sanctity of life, life being viewed as a good beyond all goods, a condition which should not be violated even in the face of suffering or despair. To put it in more philosophical terms, life is the underlying condition of all value since without it nothing valuable can be achieved. On the other hand, from the human point of view, life itself is a condition which even if it cannot be created by will (of the subject living this life), it can be terminated at will. The challenge for that attitude, which views the value of human life as a matter of will, is that it is hard to articulate any rational standards in the light of which a person can say that no life is better than a life with certain quality. Even if autonomy is the governing principle, that is to say, it is legitimate for people to find death superior to ongoing life, the reasons for such a preference must be of a different kind than ordinary preferences one makes *within* one's life. For how can we compare the value of a certain kind of life with the value of the condition for any kind of life? This raises the most difficult issue of the morality of suicide which although belonging to the end of life will not be dealt here. It becomes relevant only when we deal with so-called "voluntary euthanasia", which is a subspecies of suicide. But it should be noticed that suicide which is mentioned a few times in the Old Testament (King Saul being the most famous case) is not condemned or prohibited by Scriptures. Nor is it, by the way, condemned as such in Judas' death in the New Testament. It is only in later development of Jewish thought, probably under Christian (Augustinian) influence, that suicide becomes a grave sin.

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II.

"The Lord gave and the Lord has taken away-blessed be the name of the Lord". This phrase, originally from the book of Job (1, 21) and recited by Jews in the face of death, represents the fundamental attitude to death and its inevitability. It gives absolute sovereignty to God in the decision and timing of the birth and death of human beings. The tone of the phrase is resigning, even fatalistic, but as we shall see it does not mean human passivity. Indeed, till medieval times, medical intervention was regarded as a suspicious human intervention in natural (or divinely determined) processes and at most treated as permissible (primarily meaning that the doctor is immune from blame if his treatment does not succeed). Nachmanides (13th century) is a good example for an ambivalent attitude to medical treatment which is an attempt to interfere with divine providence by employing natural causes. It is at most a tolerated practice. But Maimonides (and all major Jewish attitude to medicine ever since) is decisive in the positive view of

healing and sees no contradiction between science and providence, between human intervention in the world and divine design[2]. Medical effort to restore health and to extend life has become a direct duty, both for physicians and for their patients. Theologically, medical treatment should be applied even when the illness itself is considered as inflicted by God. Human beings must do their utmost to further life as long as possible, either by not risking their own lives or by administering the best medical treatment possible to extend life's duration. In more philosophical terms, although life is a natural, universal and inevitable process, human intervention to delay it is a moral imperative. Recent medical means of doing so raise however questions about the thin and controversial line dividing the natural course of events from the artificial, technological intervention in this course. This is an inner tension which preoccupies the debate between rabbis about the limits of human intervention in the struggle for life.

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Death is recognized in the Jewish tradition as a process, and hence as making positive and negative demands on those around the dying person. These are included in the "laws of the dying person" (*gosses*), going back to medieval times. The striking thing about these debates is that they reflect the modern, philosophical distinction between passive and active euthanasia, that is to say, between abstention from intervening in the process of dying and positive action in that sphere, but they recognize its dubious implications. Thus, there is a categorical prohibition on moving the dying person from one place to another (or to close his eyes, wash him, or indeed touch him) lest his death be hastened. On the other hand, it is not only allowed but actually obligatory to stop chopping wood (that is to say, to make a lot of noise), which would prevent natural death and the easy departure of the soul. One is under a duty, according to these sources, to remove salt from the dying man's tongue, since salt is a hindrance in the natural process of dying. The logic of this permission or even obligation is according to a famous 16th century thinker, Rabbi Moshe Isserles that in the same way as stopping the source of noise as well as the removal of salt are both are just forms of letting the natural process take its course. But of course, formally speaking they are "actions" rather than omissions. This is directly relevant to the current debate about the question whether there is a moral difference between not connecting a patient to a respiratory in the first place (starting chopping wood in order to delay the departure of the soul) and disconnecting the patient at a certain point (stopping chopping wood when it turns out that this is the obstacle to the soul's departure). Both actions are distinguished from the *direct* intentional action of moving a dying patient *in order* that he dies[3].

Behind these perceptions there is an implicit underlying view regarding the nature of death and dying. The ultimate principle is obviously *non*-intervention in God's will, especially with regards to the termination of life which is considered the holiest of divine manifestations in the created world. This principle means that we have to distinguish between natural and unnatural death, between the medical assistance we must provide to sick people so as to extend their lives and a passive acceptance of death when it approaches and there is nothing more we can do. The sanctity of life may entail the implementation of so-called aggressive medical treatment as well as the violation of religious commandments (like keeping the Sabbath), but it is compatible with the recognition of the inevitability of death when it gets unavoidably close. Although the terminology of *euthanasia* in the sense of "mercy killing" is alien to Jewish religious thought, its original etymologically related sense – that is "good or easy death" – is not. Even in the Talmud, in Tractate Sanhedrin, we find that "love thy neighbour as thyself, [implies:] choose an easy death for him". Although this phrase comes in the context of the humane man-

ner in which executions should be carried out, it is relevant to the attitude towards the dying person to whom we should show compassion.

The policy of "hands off" or "do not touch" was fairly easy to implement in older times since the means of delaying death without really giving more life in the full sense of the word were very limited. Thus, the techniques of putting salt on the patient's tongue or blasting sound in his ears were justifiably considered as unnaturally blocking the easy departure of the soul. But today, we have extraordinary means of extending one's life by months and years and the dividing line between the natural and the unnatural has become blurred. The Talmudic status of *gosses* extended for a few hours, or at most a few days. Today, people are kept alive for years. Furthermore, as we shall see, the active/passive distinction has become much more complex and controversial.

So we are faced with a tension in the Jewish tradition regarding the treatment of a dying person. On the one hand, any active intervention in the process with the intention of hastening death is considered murder. Furthermore, the good intention of alleviating the person's suffering is no excuse. Compassion, as in the concept of "mercy killing" has no force in the treatment of the dying. It is God's sovereign domain to decide the moment of death and even its circumstances (the degree of suffering involved). Yet, on the other hand, we see explicit expressions of the place of subtle distinctions to the effect that beyond a particular point in the process of dying, there is at least a permission, and maybe even a duty, to remove obstacles from the natural course of dying and of course not to take active measures to extend it, namely what we today refer to as "heroic" efforts to keep the dying person alive for a limited time. The absolute constraint on such practices is that they are not direct and intentional and may be considered as a kind of omissions. This constraint pays due to the absolute relegation of the power to fix the time of death to God. But these arguments which do not adhere to the literal absolute principle of the sanctity of life have had a major role in the formation of Jewish approaches to the modern issue of the treatment of dying patients and some innovative solutions.

Before moving to the current debate about the end of life in the Israeli scene, I would like to note that the concept of the sanctity of life is relatively new in Jewish discourse and mostly absent from the traditional rabbinical debates. This does not mean that life has lesser value than in other cultures. On the contrary, from the book of Genesis life is hailed as the ultimate value and its creation the first and foremost command. Temporary life is often considered of no lesser worth than eternal life, thus making life's length irrelevant to its value ("better is one hour of repentance and good deeds in this world than the whole life in the world to come"). Furthermore, the Talmud says that saving one life is equal to saving the whole world, implying by this hyperbole that a single life is of an infinite value and hence cannot be "weighted" by any quantitative measure. However, the Jewish view of the value of life is more "proactive" than that encapsulated by the concept of *sanctity*. Sanctity means a certain sphere which is protected from any intervention, that is to say trespassing. It is an absolutely separate location or zone which creates a "do not touch" demand. In the Jewish discussions of the dying patient it is represented by the metaphor of a "flickering candle" which should not be touched under any circumstances. But the rabbis are not in full agreement about the meaning of "touching". Much hinges on the distinction between natural and artificial. Tampering with the physical surrounding of the patient may be different from manipulating the inner natural course of an illness in the patient, thus making the former permissible and not considered extinguishing the "candle of life".

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Thus, without introducing any conception of personal autonomy or regard to the will

of the patient, the Jewish tradition opens the way to some forms of *facilitating* natural death, even if not inducing or causing it directly. Reverence to life does not imply a fatalistic approach or an absolute "hands off" policy. The removal of surrounding obstacles to the peaceful departure of the soul is considered permissible and even desirable. And there is even an interesting concession to the use of prayer or occult means for helping the incurable be released from their suffering. It is hard to know whether this permission is given because the rabbis do not really believe that these are effective means for the facilitation of death or that they are in sympathy with the goal of these practices. But in any case, this shows that there is sympathy to the patient and his close relatives regarding the wish for an easy passage[4].

III.

The tradition of Jewish debates about the morality of euthanasia does not refer to the dimension of individual will or wish. Indeed, the case of suicide and forms of death in execution do raise the question of the will of the subject of the imminent death (King Saul, or the second-century sage Hanina ben Tradion, who was tortured to a slow death by the Roman), but the laws of *gosses* do not take individual preference into account. In our contemporary bioethical phraseology, there is no place for voluntary euthanasia. This of course results from the view that both life and death are not the choice of human beings (but rather belong to what we referred above as *necessity*). But today, due both to the growing power of medical technology and to the wide recognition of the value of personal autonomy, religious thinking is willing to take a more forthcoming attitude towards the idea of so-called voluntary euthanasia. There is an immense literature on the subject in the past few decades[5]. But I will deal with just one case, that of the recent Israeli law of the dying patient, which is typical of the compromise between the traditional principles of Jewish orthodoxy and modern social and moral approaches typical of liberal secular society.

The law was enacted in 2005, after a long and very serious work of a committee that included doctors, lawyers, philosophers and religious thinkers (of the three monotheistic religions). It was headed by Dr. Avraham Steinberg, an orthodox doctor and specialist in Jewish bioethics[6]. It made and effort to represent the views and interests of all sectors of the highly diverse Israeli society. The aim of the law, as it explicitly declares in the opening clause, is to balance the principle of the sanctity of human life with the principle of autonomy and the importance of the quality of life of the dying patient. It also expresses the constitutional principle that Israel is a state which is both Jewish and democratic. The only considerations in the medical treatment of the dying patient are, according to the law, the patient's medical condition, his or her will and his or her suffering. Dying patient is defined in the law as a person whose life expectancy, even with treatment, is no more than six months. A terminal patient is defined as a person who will die within two weeks, even with treatment. Patients within those time spans who clearly and explicitly declare their wish that their life be not extended must be respected. There are three limiting clauses in this law: first, any *active* deed leading to the intentional death of the patient, even at his request and even as an act of mercy, is prohibited; secondly, doctors are forbidden from assisting the suicide of their patients even if this is asked for by the patient and even if the act is of a medical nature; thirdly, continuous treatment must not be stopped even at the request of the patient. Thus, active euthanasia and physician assisted suicide are criminal offense according to this law. Yet, the prohibition on disconnecting a terminal patient from life sustaining machines is qualified in an interesting way: if the machine stops by itself, the patient may ask not to be *re*-connected; furthermore, if the ongoing treatment is "cyclical" in nature, like the periodic change of oxygen tanks, the doctor may, in accordance with the request of the

patient, avoid renewing the "cycle". This is again anchored in the distinction between active and passive euthanasia, which as we have seen is acceptable by most rabbis.

The idea of distinguishing between continuous and non-continuous treatment was recently embodied in a technological application. There are now respirators which are operated by *timers*. The idea is that the patient may ask the timer to be fixed to any span desired, longer or shorter. The technology allows the terminally ill to control the prospect of their life without forcing the physician to take action which would shorten that life. To many non-religious members of the committee which prepared the law, the timer solution looked like a trick, circumventing the moral problem in a disingenuous way. But in a second thought this might prove to be a meaningful solution not only to religiously committed rabbis, doctors and patients, but also a helpful technique to any physicians who find it morally troublesome to disconnect patients from respirators. It could appeal to "liberal" doctors and patients who want to relegate the decision about the moment of death to the patient, although under strict conditions.

The second part of the law goes a step further. The law recognizes prior instructions by individuals who wish, while they are well and healthy, to guarantee that if they happen to fall terminally ill and they are not capable of expressing their autonomous will (e.g. due to loss of consciousness), their lives would not be extended. Doctors will not be allowed to apply certain treatments like various forms of resuscitation, life saving surgery, irradiation, antibiotics, etc. This is a far-reaching extrapolation of the original laws of *gosses* we examined earlier. They still preserve the two main principles of the older norms – limited life expectancy and prohibition on direct active ways of curtailing life. But the major change lies in the introduction of the principle of the patient's autonomy which is completely new.

A dying patient in full mental capacity can obviously refuse to get treatment, including antibiotics or even food and liquids. The law says that doctors should persuade the patient to have some food and drink but are not allowed to force them. They should in any case provide the patient with palliative care, including such treatments that subject the patient to a reasonable risk of life. But what about the patient who has lost that capacity but left early instructions? The law says that except for the provision of liquids the doctors should respect the will of the patient and avoid treatment, including treatment of *other* illnesses that occur during the six-month period to which the law applies.

The new law is a fair compromise between the principle of the sanctity of human life and the principle of autonomy, or between the "pull" of religious views and that of liberal, secular attitudes. Like any compromise, the new Israeli haws been the object of criticism by both parties. The more orthodox religious sectors either oppose the law directly or ignore it (and wish to have no use of the rights it provides). They reject the very idea of advance instructions and the principle of individual autonomy. Liberals complain that the law did not go far enough, bending to religious pressure and making individual and medical discretion on the subtle matter of the end of life impossible (doctors acting on demands of the family or the patient risking prosecution).

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The law, indeed, leaves much of the spectrum of problems relating to the end of life unsolved. Most conspicuously, it does not regulate the treatment of people whose condition is awful but their life expectancy is higher than six months. Typically people in coma, dementia, Alzheimer disease and other syndromes cannot – by definition – exercise their autonomy in asking not to extend their lives. But according to the law in Israel they cannot even give prior instructions while being still in their full mental capacity. This seems to many people inconsistent with the general idea that human beings should have control over the way they end their lives.

But, again, the main reason for this lacuna is that from a Jewish point of view the condition of this category of patients cannot be considered – even by extrapolation – to belong to "the dying patient". In other words, the Jewish point of view focuses on the time span left for the individual rather than on the quality of his or her life.

This brings us finally to the issue of *involuntary* euthanasia, the option not covered by the law and hence legally prohibited in Israel. I want to conclude with a legal case decided by the Supreme Court sixteen years ago, still serving as a binding precedent. A baby girl suffering from Tay Sachs disease appealed through her mother to the court asking for a court instruction that once her condition deteriorates in a way which would require respiratory assistance, transfusion or special medication, the treatment will not be given to her against her will (represented by her natural custodian, namely her mother). This is an immensely difficult case of involuntary euthanasia, a decision about the termination of life of a human individual who cannot express her will and who could not have expressed it earlier. The principle of autonomy is inapplicable to this case since the baby has no will of her own. It cannot be exercised by a proxy either, since unlike the cases covered by the law, no prior instructions or power of attorney were given to the parent or custodian. The only option left is for a third party, in this case the court, to decide whether the life in question is worth living.

Supreme Court Judge, Menachem Elon refused to grant the mother the right to stop treatment and explained his reasoning in a long opinion. In many respects the Judge's opinion was based on the Jewish halakhic approach to the issue. The structure of his argument was that on the one hand treating the girl might look, at least prima facie, as an invasion of her body, but refraining from treating her is definitely a harm done to her life and body, that is to say, it is a dilemma between the value of privacy and that of the sanctity of life. In that dilemma, according to Judge Elon, the sanctity of life overrides the value of privacy, at least as long as the life in question is not accompanied by intolerable suffering. But Elon seems to have been wrong in characterizing the case in front of the court as that of active euthanasia. The whole point of the request of the girl's mother was to *avoid* connecting her to machines rather than to actively hasten her death. In that respect allowing it could have been interpreted as legitimate according to some of the opinions of the Jewish tradition, at least if they are read in a flexible manner. Unfortunately, the daily decisions of doctors about neonates who are born with very serious defects has been left out of the scope of the new Israeli law and will have to be addressed separately. And maybe that is as it should be, since the issue of euthanasia in newborns does not relate to the principle of autonomy and cannot be dealt in terms of consent and living wills. They are in a way even more difficult since they have a deeply symbolical meaning regarding the commitment of society to the inherent value of life.

NOTES

[1] *Pirkei Avot*, chapter 4, Mishna 22. This is also reminiscent of Heidegger's idea that we are "thrown into the world".

[2] See N. ZOHAR, *Alternatives in Jewish Bioethics*, State University of New York Press, Albany 1997, 23-34.

[3] R. M. ISSERLES, *Even Ezer*, 121, 7. Zohar (ibid.) has a useful discussion of the general issue of the dying patient in chapter 2.

[4] I. JAKOBOVITS, *Jewish Medical Ethics*, Bloch, New York 1957, 124. Jakobovitz, who was the chief rabbi of England, wrote the first book on Jewish medical ethics and should be acknowledged for his pioneering work. However, there is only a short chapter on the matter of the dying patient.

[5] Just one classical example, highlighting the issue of he moral relevance of the distinction between active and passive euthanasia, is J. RACHELS, *The End of Life*, Oxford University Press, 1986.

[6] A. STEINBERG - CH. L. SPRUNG, «The Dying Patient: New Israeli Legislation», in *Intensive Care Medicine* 32 (2006), 1234-1237. This article presents the substance of the Israeli law (for which there is no English translation).