CA 506/88

Yael Shefer (a minor)
by her mother and natural guardian, Talila Shefer
v.
State of Israel

The Supreme Court sitting as the Court of Civil Appeal
[24 November 1993]
Before Vice-President M. Elon and Justices Y. Malz, H. Ariel

Appeal on the judgment of the Tel-Aviv-Jaffa District Court (Justice E. Mazza) on 8 August 1988 in OM 779/88.

Facts: The appellant, Yael, a minor, was born with the incurable Tay-Sachs disease. When she was two, her mother applied to the District Court for a declaratory judgment that when Yael's condition worsened, she would be entitled not to receive treatment against her will. The District Court denied the application. An appeal was filed to the Supreme Court, and in September 1988, the Supreme Court denied the appeal, without giving its reasons. When Yael was three years old, she died. The following judgment sets forth the reasons for the aforesaid decision of the Supreme Court, and discusses the right of a patient to refuse medical treatment, and the right of a parent to refuse medical treatment for a child.

Held: Under the principles of law accepted in the State of Israel as a Jewish and democratic state, the supreme principle of the sanctity of life and the fact that Yael was not suffering as a result of her terminal illness did not allow any intervention to shorten Yael's life.

Appeal denied.

Legislation cited:

Basic Law: Human Dignity and Liberty, 5752-1992, ss. 1, 2, 4, 5, 7, 8.

Criminal Law Ordinance Amendment Law (no. 28), 5726-1966, ss. 8, 64, 68.

Foundations of Justice Law, 5740-1980.

Legal Capacity and Guardianship Law, 5722-1962, ss. 1, 14, 15, 17, 18, 19, 20, 44, 47, 68, 68(b), 72.

Penal Law, 5737-1977, ss. 298, 299, 300, 301, 302, 304, 305, 309(4), 322, 378.
Prison Regulations, 5738-1978, r 10(b).
Torts Ordinance [New Version], s. 23.
Women's Equal Rights Law, 5711-1951, s. 3(a).
Youth (Care and Supervision) Law, 5720-1960, ss. 2(2), 2(6).

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[1] CA 294/91 *Jerusalem Community Burial Society v. Kestenbaum* [1992] IsrSC 46(2) 464.
[2] CA 1482/92 *Hager v. Hager* [1993] IsrSC 47(2) 793.
[3] CrimApp 2145/92 *State of Israel v. Guetta* [1992] IsrSC 46(5) 704.
[4] HCJ 5688/92 *Wechselbaum v. Minister of Defence* [1993] IsrSC 47(2) 812.
[5] CrimApp 2169/92 *Suissa v. State of Israel* [1992] IsrSC 46(3) 338.
[6] CrimA 3632/92 *Gabbai v. State of Israel* [1992] IsrSC 46(4) 487.
[7] CrimApp 3734/92 *State of Israel v. Azazmi* [1992] IsrSC 46(5) 72.
[8] CrimApp 4014/92 (unreported).
[9] HCJ 3412/91 *Sufian v. IDF Commander in Gaza Strip* [1993] IsrSC 47(2) 848.
[10] HCJ 5304/92 *PeRaH* 1992 *Society v. Minister of* Justice [1993] IsrSC 47(4) 715.
[11] HCJ 953/87 *Poraz v. Mayor of Tel-Aviv-Jaffa* [1988] IsrSC 42(2) 309.
[12] EA 2/84 *Neiman v. Chairman of Central Elections Committee for Eleventh Knesset* [1985] IsrSC 39(2) 225; IsrSJ 8 83.
[13] HCJ 852/86 *Aloni v. Minister of* Justice [1987] IsrSC 41(2) 1.
[14] HCJ 702/81 *Mintzer v. Israel Bar Association Central Committee* [1982] IsrSC 36(2) 1.
[15] PPA 4/82 *State of Israel v. Tamir* [1983] IsrSC 37(3) 201.
[16] LA 698/86 *Attorney-General v. A* [1988] IsrSC 42(2) 661.
[17] CrimA 556/80 *Mahmoud Ali v. State of Israel* [1983] IsrSC 37(3) 169.
[18] CA 548/78 *Sharon v. Levy* [1981] IsrSC 35(1) 736.
[19] CA 461/62 *Zim Israeli Shipping Co. Ltd v. Maziar* [1963] IsrSC 17 1319; IsrSJ 5 120.
[20] CA 518/82 *Zaitsov v. Katz* [1986] IsrSC 40(2) 85.
[21] CrimA 480/85 *Kurtam v. State of Israel* [1986] IsrSC 40(3) 673.
[22] CA 322/63 *Garty v. State of Israel* [1964] IsrSC 18(2) 449.
[23] HCJ 1635/90 *Jerzhevski v. Prime Minister* [1993] IsrSC 45(1) 749.
[24] CrimA 347/88 *Demjanjuk v. State of Israel* [1993] IsrSC 47(4) 221.

[25] CrimA 478/72 *Pinkas v. State of Israel* [1973] IsrSC 27(2) 617.
[26] CrimA 219/68 *Sandrowitz v. Attorney-General* [1968] IsrSC 22(2) 286.
[27] CA 67/66 *Bar-Chai v. Steiner* [1966] IsrSC 20(3) 230.
[28] FH 25/66 *Bar-Chai v. Steiner* [1996] IsrSC 20(4) 327.
[29] CA 3108/91 *Raiby v. Veigel* [1993] IsrSC 47(2) 497.
[30] HCJ 945/87 *Neheisi v. Israel Medical Federation* [1988] IsrSC 42(1) 135.
[31] HCJ 2098/91 *A v. Welfare Officer* [1991] IsrSC 45(3) 217.
[32] CrimA 341/82 *Balkar v. State of Israel* [1987] IsrSC 41(1) 1.
[33] CA 413/90 *A v. B* [1981] IsrSC 35(3) 57.

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[35] CrimC (TA) 555/75 *State of Israel v. Hellman* [1976] IsrDC (2) 134.
[36] OM (TA) 1441/90 *Eyal v. Dr Wilensky* [1991] IsrDC (3) 187.
[37] OM (TA) 498/93 (unreported).
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[41] *Superintendent of Belchertown State School v. Saikewicz* 370 N.E. 2d 417 (1977).
[42] *Schloendorff v. Society of New York Hospital* 105 N.E. 92 (1914).
[43] *Matter of Storar* 420 N.E. 2d 64 (1981).
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[45] *In re Estate of Longeway* 549 N.E. 2d 292 (1989).
[46] *Cruzan v. Director Missouri Department of Health* 110 S. Ct. 2841 (1990).
[47] *Jacobson v. Massachusetts* 197 U.S. 11 (1905).
[48] *Foody v. Manchester Memorial Hosp.* 482 A. 2d 713 (1984).
[49] *Matter of Spring* 405 N.E. 2d 115 (1980).
[50] *Lane v. Candura* 386 N.E. 2d. 1232 (1978).
[51] *Application of President & Director of Georgetown Col.* 331 F. 2d 1000 (1964).
[52] *John F. Kennedy Memorial Hospital v. Heston* 279 A. 2d. 670 (1971).
[53] *Jefferson v. Griffin Spalding Cty. Hospital Auth*. 274 S.E. 2d. 457 (1981).
[54] *John F. Kennedy Hospital v. Bludworth* 452 So. 2d. 921 (1984).
[55] *Barber v. Superior Court of the State of California* 195 Cal. 484 (1983).

[56] *Matter of Westchester County Med. Ctr.* 531 N.E. 2d. 601 (1988).

[57] *Buck v. Bell* 274 U.S. 200 (1927).

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[60] Babylonian Talmud, Tractate *Bava Kamma* (Damages, first part), 46b, 51a, 81b, 85a, 91b.

[61] Rabbi I. Jakobovits, *Jewish Medical Ethics*, Jerusalem, 1966, at pp. 26 *et seq*..

[62] Rashi, Commentary on Babylonian Talmud, Bava Kamma 85a, 'She gave permission'.

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[64] Nahmanides (Ramban), commentary on Leviticus 26, 11.

[65] Midrash Shoher Tov, I Samuel 4 1.

[66] Toseftah, Gittin, 4 6.

[67] Toseftah, Bava Kamma, 6 17; 9 11.

[68] Rabbi Shimon ben Tzemah Duran (Rashbatz), *Tashbatz* (Responsa), I 54; III 82.

[69] R.S. Lieberman, Toseftah Kifeshutah, Tractate Gittin.

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[71] Leviticus 18, 5; 19, 16-18.

[72] Babylonian Talmud, Sanhedrin 6b, 43a, 45a, 73a, 74a.

[73] Deuteronomy 4, 15; 17, 11; 22, 1-3; 32, 39.

[74] Maimonides (Rambam), Commentary on the Mishnah, Tractate Nedarim, 4 4.

[75] Maimonides (Rambam), *Mishneh Torah* (Restatement of the Torah), *Hilechot Nedarim* (Laws of Vows), 6 8.

[76] I Samuel 31, 4-5; II Samuel 7, 19.

[77] Jerusalem Talmud, Tractate *Yoma*, 8 5.

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[82] Maimonides, *Mishneh Torah*, *Hilechot Mamrim* (Laws of Rebellious Persons), 2 4.

[83] Maimonides, *Mishneh Torah*, *Hilechot Shabbat* (Laws of Sabbath), 2 3; 2 18.

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[85] Maimonides, *Guide to the Perplexed*, Rabbi Kapach tr., Jerusalem, 1972, part 3, chapter 34.

[86] Rabbi Yaakov ben Asher, *Arba'ah Turim*, *Yoreh Deah*, 335, 336, 345.

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[91] Genesis 9, 5.

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[93] Rabbi David ben Shelomo ibn Abi Zimra (Radbaz), *Responsa*, Part III, A 52; Part IV, A 138; A 139; Part V, A 582 (218).

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[97] Proverbs 14, 1.

[98] Rabbi David ben Samuel HaLevi, *Turei Zahav*, commentary on *Shulhan Aruch, Yoreh Deah,* 336 sub-par. 1.

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[104] Maimonides, *Mishneh Torah*, *Hilechot Rotzeah uShemirat HaNefesh* (Laws of Homicide and Preservation of Life), 1 4, 14-16; 2 2-3, 7-8, 17.

[105] Babylonian Talmud, Tractate *Ketubot*, 37b, 86a.

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[128] Maimonides, *Mishneh Torah*, *Hilechot Evel*, (Laws of Mourning), 4:5.

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For the appellant — Y. Hashan.

For the respondent — R. Zackai, Senior Assistant A to the State Attorney (Civil Department).

JUDGMENT

Vice-President M. Elon

Opening Remarks

1. The subject before us is difficult, very difficult. It touches the foundations of human values and ethics and the heights of the philosophy of generations past and present. It concerns the basis of the cultural and spiritual fabric of our society. Therefore we delayed giving our reasons, so that we might fully examine their nature, substance and value. By so doing, we have fulfilled what we were commanded: 'Be cautious in judgment' (Mishnah, *Avot* (Ethics of the Fathers), 1, 1 [58]).

'Against your will you are created, and against your will you are born; against your will you live and against your will you die' (Mishnah, *Avot* (Ethics of the Fathers), 4, 22 [58]). This is stated in the teaching of the Sages. With regard to the first two — creation and birth — it is hard to conceive that these are disputed. The subject of our deliberation is the last two, which contain a clue to the heart of our matter.

'Against our will' we are sitting in judgment in the case before us. The angel of judgment stands above us and says: 'Decide!' Even in disputes such as these, a judge is commanded to judge, so that the sick may know what are their rights and what they are obliged to ask and to do, and so that the doctor may know what he is forbidden, permitted and obliged to do in practising his profession, and so that all those who treat the sick, in whatever capacity, may know what they are entitled and obliged to know.

'Against our will' we are sitting in judgment with regard to all of these, for we are not at all confident that we have fully mastered all of these all-encompassing problems, and that we are in possession of all of the knowledge and information required for deciding this issue. On this point too we will raise certain points in our judgment, and we will state what seems to us to be correct.

Because of, and notwithstanding, the aforesaid, we are not discharged from fulfilling our judicial duty, and we are commanded to study, consider and give our opinion.

The following is the order of our deliberation. After discussing the subject of the appeal (paras. 2-4), we will first look at the Basic Law: Human Dignity and Liberty, for a significant part of the rights listed therein — the protection of human life, body and dignity and the prohibition of harming them, the right to personal freedom, privacy and confidentiality– are a cornerstone for the subject of out deliberation. From there we will consider the purpose of the said Basic Law, which is 'to protect human dignity and liberty, in order to enshrine in a Basic Law the values of the State of Israel as a Jewish and democratic state' and finding the synthesis in this value-combining purpose (s. 1 of the Basic Law), and its principle of balance (s. 8 of the Basic Law), which provides the proper and correct solution in a case of a conflict between the supreme values found in it (paras. 5-10). Subsequently, we will examine and consider in detail the issues of this case in light of the values of a Jewish State (paras. 11-38) and a democratic State (paras. 39-53). After we have first considered the case-law of the courts on issues in our case before the Basic Law: Human Dignity and Liberty (paras. 54-56), we will consider a way of synthesizing the values of a Jewish and democratic State with regard to the issues before us (paras. 57-60). When we have done that, we will consider the details of the problems that arise in this case (paras. 61-62) and the judgment in the case before us (paras. 63-65).

The subject of the appeal

2. The infant Yael Shefer was born on 26 February 1986 to her parents Talila and Yair Shefer, members of Kibbutz Merom HaGolan. The family has another daughter, who is older than Yael. When she was about a year old, after her condition had deteriorated, she was diagnosed to be suffering from an incurable genetic disease known as Tay Sachs. When a further deterioration of her condition occurred, she was admitted to the Ziv Government Hospital in Safed on 22 November 1987. On 3 August 1988, Yael submitted an

application, through her mother and natural guardian, to the Tel-Aviv-Jaffa Jaffa District Court for a declaration that:

> '[Yael] through her mother and natural guardian, is entitled, if and when her state of health deteriorates as a result of contracting pneumonia or any other illness for which she [Yael] may require help in breathing and/or giving medications intravenously, or in any other way, except for giving medications for killing pain in order to reduce her pain — to refuse to accept the said treatments against her will' (OM 779/88) (parentheses added).

The District Court (his honour Justice Mazza) rejected the application on 8 August 1988, and that led to the appeal before us. On 11 September 1988 we denied the appeal, without reasons. When she was about three years old, Yael died of her disease and went to her eternal home.

The consideration of the late Yael's case is now merely hypothetical, but this is merely in theory, not in practice. Usually we do not become involved in deciding an issue that is purely academic. But there is no rule that does not have exceptions, and one of these is a case like that before us. This is because usually, in a case like this, the *decision* must be given without delay, as required by the nature of the case and the facts, and the reasons relate to the heart of the matter and the reasoning for it, so that we will know and have established the law on each of the issues before us when it arises and comes before us once more. This has already been discussed, on a different issue in this field, by the Supreme Court of the United States, in Justice Blackmun's well-known opinion on the question of abortions:

> 'The usual rule in federal cases is that an actual controversy must exist at the stages of appellate or certiorari review, and not simply at the date the action is initiated…
>
> But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for

> a conclusion of nonmootness. It truly could be "capable of repetition, yet evading review"...
>
> We, therefore, agree with the District Court that Jane Roe had standing to undertake this litigation, that she presented a justifiable controversy, and that termination of her 1970 pregnancy has not rendered her case moot' (*Roe v. Wade* (1973) [39], at 125).

3. Let us return to the details of the case before us.

The Tay-Sachs disease, from which Yael suffered —

> 'is a genetic disease that causes degenerative neurological disorders in the central nervous system…
>
> At the age of six months, a general motor weakness begins and it progresses as a result of the disease and there is a rapid psychomotor regression thereafter.
>
> As the disease progresses, the patient is subject to epileptic fits, blindness and deafness, which generally occur between the age of 12 and 18 months.
>
> After that, the patient falls into a vegetative state (known colloquially as a 'vegetable') and dies before reaching the age of three.
>
> This disease is terminal (incurable), and in the course of it the patient is likely to develop respiratory diseases and need help in breathing' (the opinion of Prof. André de Paris, appellant's exhibit 'b').

Dr Dora Segal-Cooperschmidt, assistant-director of the children's ward in the hospital, discussed the treatment given to Yael at Ziv Hospital:

> '7. It should be pointed out that the treatment Yael Shefer receives does not require her to stay in hospital. It is mostly nursing, and only minimally medical (administering Ribotril drops and feeding her by tube), and can be administered on a regular basis and correctly even on her kibbutz. She was hospitalised and remains so until now at the express request of the kibbutz, the head of the health committee for the Upper Galilee Regional Council and the family, but it is not required by her medical condition.

> 8. It should also be pointed out that a good part of the nursing treatment that the child needs (such as washing and feeding) is administered by a professional nurse who is hired by the kibbutz and who stays with the child in the morning, and by the child's father in the afternoon.
>
> 9. Yael Shefer is in a permanent state of unconsciousness (known as a "vegetative" state). She does not suffer pain and obviously she is not receiving any pain-relieving medication. She is quiet and does not cry except when she needs to be fed or requires ordinary medical care (in case of fever, earaches or constipation, line any child), a condition that improves after a normal standard treatment.
>
> 10. From a nursing point of view, she is being treated in a manner that is more than reasonable. She is not disgraced or degraded. Her dignity is completely maintained. She is clean, and does not suffer from pressure sores, which appear in most cases of children who are bed-ridden for a long time, and she does not suffer from cramps. I should also mention the comfortable physical surroundings for treating her which are higher than the norm, starting with her being in a private room, along with music being played at the request of the father, a fan in her room, etc..
>
> 11. The mother's visits to the ward, throughout Yael's hospitalization, are rare and occur only at major intervals.
>
> 12. The child's father visits her every day after work, stays with her for many hours, cares for her with love and dedication which radiate in everything he does with her, such as taking her out in her carriage, sitting for long periods of time with the child on his chest, keeping strictly to her feeding times and feeding her when he is present. In my conversation with him, he even said that he had not lost hope that her condition might change' (affidavit of Dr Segal-Cooperschmidt dated 4 August 1988).

With regard to the infrequency of the mother's visits, the mother explained that:

> 'It is true that I make visit the hospital infrequently. The reason is that we have another daughter who is experiencing a crisis, which expresses itself in her studies and other areas. I must give that

> daughter my full support' (p 13 of the court record in the District Court dated 5 August 1988).

As for the father, he did not take any part in the proceedings before us or before the District Court, and the application which was the subject of our consideration was submitted, as stated, by Yael's mother alone. The mother explained this as follows:

> 'The father is in a complete state of collapse… my husband is unable to appear here and he is also unable because he hates publicity…' (p 6 of the court record in the District Court dated 5 August 1988).

The decision of the District Court

4. His Honour Justice Mazza, when he sat in the District Court, set out the legal questions requiring resolution as follows:

> 'Taking a principled and broad outlook, the examination of this case raises two main issues: first, what legal right does the adult and competent patient have to sue — on his own behalf and with regard to his own life — for declaratory relief of the kind sought here against the hospital where he is hospitalised, or against the doctor treating him? Second, assuming that the adult and competent patient does indeed have such a legal right, is this right also conferred on a minor, or someone incompetent at law, such that he can exercise it through his guardians?
>
> Adopting a narrower viewpoint, but one that is sufficient for our case, the examination of the issue raises a third question, as follows: if we make the far-reaching assumption that even the second question above should be answered in the affirmative, may even one of the parents of a patient who is a minor represent his child in a petition for declaratory relief of this kind, when the other parent is not a party to the proceeding at all?
>
> Only if a positive answer is given to all three questions will the applicant's petition contain a cause of action worthy of being considered' (para. 4 of the judgment).

With regard to the first question, after considering the legal position, Justice Mazza comments that —

> 'I will not presume to answer the first question, which is the most difficult of all, since the law, as it stands, does not make it

possible to give an unambiguous answer to it' (para. 4 of the judgment).

With regard to the second question, he held that —

'Even assuming that the law at present recognizes the right of a patient whose disease is incurable to sue, in his own name and regarding his own life, for declaratory relief of the kind sought here, this right is only conferred on a patient who is an adult and is competent at law, and it is not conferred on a patient who is a minor or incompetent. In any event, the subject of the petition cannot be included among those matters which are entrusted to the parents of a minor, by virtue of their guardianship over him, in which they may represent him and supposedly express his wishes'(para. 9 of the judgment).

Finally, regarding the third question, Justice Mazza replied as follows:

'Even if we assume that a minor who is incurably ill has a "right to die a natural death", and that his parents are obliged, as his guardians, to help him realize this right, and therefore they have the authority to represent him even in a petition relating to the termination of his life, it must still follow that the applicant on her own, as one of Yael's parents, has no authority to represent her daughter, as long as Yael's father is not a party to the proceeding' (para. 11 of the judgment).

For these reasons his honour Justice Mazza struck out the application *in limine*, and that is the reason for the appeal before us.

Basic Law: Human Dignity and Liberty

5. When we begin to examine, today, this extensive and complex issue with its many aspects and values, as it should be considered and decided according to the law of the State of Israel, we turn, first and foremost, to the Basic Law: Human Dignity and Liberty, which serves as a cornerstone and a basis for the fundamental values underlying this issue. There are several provisions in this Basic Law that apply to our case. Section 2, entitled 'Preservation of life, body and dignity', states:

'One may not harm the life, body or dignity of a person.'

Section 4 of the said Basic Law, entitled 'Protection of life, body and dignity', states:

> 'Every person is entitled to protection of his life, body and dignity.'

6. The matter before us concerns human life, the human body and human dignity, and we are commanded to uphold and protect all of these. The definition of the substance of these three fundamental values, even when they stand on their own, requires much study. And if the supreme values of human life and protection of the human body are *prima facie* obvious and elementary, this is not the case with regard to the supreme value of *human dignity*. What is human *dignity*? It is obvious and need not be said that this concept, in the *scope* of its application, incorporates many fields and various issues. Thus, for example, human dignity is not only relevant during a person's lifetime, but also after his death. Thus we showed in CA 294/91 *Jerusalem Community Burial Society v. Kestenbaum* [1] that this fundamental value also includes respect for the deceased, respect for the deceased's family, and even respect for the public (*ibid.*, my remarks at p. 493 and the remarks of Justice Barak at p. 519 and in CA 1482/92 *Hager v. Hager* [2]). The concept of *human dignity* is far more complex in its *nature* and *content*. We said in this regard elsewhere (CrimApp 2145/92 *State of Israel v. Guetta* [3] at p. 724):

> 'Human dignity means not embarrassing and despising the *image of G-d in man*. But not every injury to human dignity is included within the framework of the Basic Law: Human Dignity and Liberty. For example, an injury to the dignity of a respected person who deserves, on account of his stature, to sit where people of his stature sit, and not with ordinary people, may injure his dignity from a *social* viewpoint (if indeed such is the case!), but this does not involve a contempt or denigration of the image of G-d in him, and an "injury" of this kind is not included at all within the framework of the Basic Law: Human Dignity and Liberty.'

We have not yet covered even a fraction of the principle of 'human dignity', something that will be done case by case, when the time comes. We will also discuss this further below. But I would like, at this stage, to make one fundamental point of objection.

Recently, my colleague Justice Barak stated (in HCJ 5688/92 *Wechselbaum v. Minister of Defence* [4], at p. 827) that 'the content of "human dignity" will be determined on the basis of *the attitudes of the enlightened public in Israel,* on a background of the purpose of the Basic Law: Human Dignity and Liberty' (emphasis added). With all due respect, I

find this statement unacceptable. I wonder how and whence does the 'enlightened public in Israel' come into the said Basic Law — for the purpose of defining its basic rights? Who is this public, who is entitled to be included among it or not to be included among it, what is the nature of the enlightenment and what is the significance of this *enlightenment*? The concept of an 'enlightened' public or person is a vague concept, and it has no meaning of its own. This concept has been used since the time of the 'enlightenment' as a description of an 'enlightened person, who has the light of education and knowledge, i.e., an educated person — civilized, enlightened, *aufgeklaert*' (E. Ben Yehuda, *Dictionary of the Hebrew Language*, vol. 7, p. 3464), or as an 'educated, enlightened, civilized…' person (A. Even-Shoshan, *The New Dictionary*, Kiryat-Sefer, 1966, 817), and no-one knows the nature and extent of the light, education and culture required to entitle one to be included among those with the title of an 'enlightened' person or public. Moreover, consider the words uttered by one of the philosophers in the past about 'someone educated in the spirit of one of the *enlightened nations of Europe*' (Ahad HaAm 37, cited in the *New Dictionary*, *ibid*.) (emphasis added). Were that philosopher to rise from his grave and know of the *appalling* policy and deeds of one of those nations, which were referred to as *enlightened*, that were perpetrated in the *light* of day in the middle of the 20th century, during the Second World War, in the days of destruction and holocaust. Admittedly the use of the of the expression 'enlightened' or something similar — in describing a person or public — appears from time to time in our case-law in the past, albeit rarely, but even then the very use of it led to discussion and disagreement both in the judgments of this court and in the remarks of thinkers and jurists (see with regard to the concept 'the progressive and enlightened part' of the public — M. Elon, *Religious Legislation in the Laws of the State of Israel and in the Judgments of the Civil and Rabbinical Courts*, HaKibbutz HaDati, 1968, pp. 70-73). In any event, now that we have had the privilege of welcoming the Basic Law: Human Dignity and Liberty into our legal system, it is no longer *necessary* nor *appropriate* to introduce into our legal system an element or definition such as 'the attitudes of the enlightened public in Israel'. It is *inappropriate* because this Basic Law is composed entirely of values whose interpretation is replete with basic attitudes and fundamental outlooks, and a concept so vague as 'enlightened' will merely add uncertainty to uncertainty in this difficult task of interpretation. It is also *unnecessary* because this Basic Law includes an express provision about its purpose — and therefore its interpretation — namely, the incorporation of the values of a Jewish and democratic State. It is neither the attitudes of the 'enlightened' person nor

those of the 'enlightened' public that determine the scope, content and nature of the supreme value of 'human dignity'. The scope, content and nature of this supreme value — as is the case with all the values, provisions and rules found in the Basic Law: Human Dignity and Liberty — shall be determined and interpreted in accordance with what is stated in this law, namely, in accordance with the values of a Jewish and democratic State, and this is done by examining these values, establishing them and finding the balance between them.

7. The concepts of 'life', 'body' and 'human dignity' are not the only supreme values in the Basic Law: Human Dignity and Liberty that are relevant to the issue before us. Section 5 of this Basic Law mentions the basic right of personal liberty, and s. 7 of the Basic Law, entitled 'Privacy and Confidentiality', provides in its first two sub-sections:

> (a) Every person has a right to privacy and confidentiality.
>
> (b) One may not enter the private premises of a person without his consent.

It is obvious and redundant to say that even these basic rights of personal liberty, privacy and confidentiality and the prohibition of entering a person's private premises are substantial and significant values in the case before us.

8. This is not all. Our case raises an unique and special question regarding the application of the supreme values protected by the Basic Law: Human Dignity and Liberty. Usually, it is in the normal nature of principles and values that the basic rights listed in the Basic Law are applied alongside one another and in addition to one another. The protection of human life and body, human dignity and privacy, personal liberty and confidentiality do not contradict one another; they complement one another. This is not so in our case. A central problem that arises in this case is that, *prima facie*, the protection of human *life* is *not* consistent with the protection of human *dignity*, *personal liberty*, *privacy and confidentiality.*

In our case, the obligation to protect the patient's *life* conflicts, so it was argued before us, with the protection of the *dignity* of the patient who wishes to die and refuses to accept medical treatment aimed at prolonging and preserving his life, and it conflicts with the preservation of *the patient's personal liberty* and his *personal autonomy*. Thereby we have come to the heart of the problem that is before us: do we truly have a conflict and inconsistency between this basic right of human *life* and its counterpart human *dignity*? And if there is indeed a conflict between the various basic rights set

out above in a case like this, which of the basic rights is preferable and prevails over the other, and which of them are we commanded to uphold and protect? In other words, in the normal and usual language of our legal system, how and on what basis will the balance be made between them?

9. The proper and correct solution in a case of a conflict between the supreme values in the Basic Law is in accordance with the balancing principle, found in s. 8 of the Basic Law: Human Dignity and Liberty, which states:

> 'The rights under this Basic Law may only be violated by a law that befits the values of the State of Israel, is intended for a proper purpose, and to an extent that is not excessive.'

A condition precedent to an act that violates the basic rights of human dignity and liberty is therefore that this prejudice is consistent with the values of the State of Israel; the nature of these values can be derived from the first section of the said Basic Law, the purpose section, namely the values of the State of Israel as a Jewish and democratic state, which we have already mentioned above. In considering this purpose which incorporates two values, we must also interpret the two additional conditions in the section permitting a violation, namely the requirement that 'it is intended for a proper purpose' and the condition that this will be 'to an extent that is not excessive'.

It is true that s. 8 relates to a case of legislation of *another* law that contains a violation of one of the supreme values in the Basic Law: Human Dignity and Liberty, and it does not relate to a case where such a 'violation' arises between two basic rights in this Basic Law *itself*, as has indeed happened in the case before us. But there is neither reason nor logic in not deducing and applying the method set out by the legislator in the Basic Law: Human Dignity and Liberty for a case of a violation of a basic right by another law, also in a case of a violation and conflict between two basic rights in the Basic Law itself. We shall discuss this further below.

10. As stated, the purpose of the basic rights protected in the Basic Law: Human Dignity and Liberty is to incorporate the values of the State of Israel as a Jewish and democratic State. We have discussed elsewhere the direction, nature and substance of this dual-value purpose (see *Jerusalem Community Burial Society v. Kestenbaum* [1]; CrimApp 2169/92 *Suissa v. State of Israel* [5]; CrimA 3632/92 *Gabbai v. State of Israel* [6]; CrimApp 3734/92 *State of Israel v. Azazmi* [7]; CrimApp 4014/92 [8]; *State of Israel v. Guetta* [3]; *Hager v. Hager* [2]; HCJ 3412/91 *Sufian v. IDF Commander in Gaza Strip* [9]; HCJ 5304/92 *PeRaH 1992 Society v. Minister of Justice* [10]; M. Elon

'The Role of Statute in the Constitution: the Values of a Jewish and Democratic State in Light of the Basic Law: Human Dignity and Liberty,' 17 *Iyunei Mishpat*, 1992, at p. 659). This examination of the values of the State of Israel as a Jewish and democratic State and the direction of this dual-value purpose is of great significance. The basic rights, provisions and rules in the Basic Law: Human Dignity and Liberty were not intended to explain themselves but they were intended to explain the whole legal system in Israel, since they constitute the fundamental values of the Israeli legal system, with all that this implies (see the remarks of Justice Barak in HCJ 953/87 *Poraz v. Mayor of Tel-Aviv-Jaffa* [11], at pp. 329-331). In view of the constitutional status and importance of the Basic Law: Human Dignity and Liberty, the provisions of this law are not merely the fundamental values of the Israeli legal system, but they constitute the very foundations of the Israeli legal system, and therefore the statutes and laws of this system must be interpreted in accordance with the said purpose of this Basic Law, i.e., in accordance with the values of a Jewish and democratic State. We will discuss this matter further in our remarks below.

This therefore will be the order of our consideration. First, we will examine the contents and significance of each of the fundamental values that arise in the case before us as they should be construed with the values of a *Jewish State*; thereafter — their contents and significance as they should be construed with the values of a *democratic state*. In view of the conclusions that arise from this examination, we will consider the method we must choose to find a synthesis between them and to apply this dual-value purpose in the case before us.

The values of a Jewish State with regard to the issues in this case

11. The interpretation of the concept 'values of a *Jewish State*' was discussed by the chairman of the Constitution, Law and Justice Committee when the Basic Law: Human Dignity and Liberty reached its final reading in the Knesset. This is what he said (Proceedings of the Knesset, vol. 125, (1992) 3782-3783):

> 'This law was prepared with the understanding that we must create a broad consensus of all the parties of the House. We are aware that we cannot pass a Basic Law that enshrines the values of the State of Israel as a Jewish and democratic State unless we reach a broad consensus of all the parties of the House.
>
> …

> The law opens with a declarative statement, a pronouncement that it is designed to protect human dignity and liberty in order to incorporate into statute the values of the State of Israel as a Jewish and democratic State. In this sense, the law, in its very first section, stipulates that we regard ourselves as *bound by the values of Jewish tradition and Judaism*, for the law expressly stipulates — the values of the State of Israel as a Jewish and democratic State. The Law defines some of the basic freedoms of the individual, *none of which conflict with Jewish tradition or the set of values that prevails and is currently accepted in the State of Israel by all the parties of the House*' (emphasis added).

Interpretation of the values of the State of Israel as a Jewish State is therefore in accordance with the values of Jewish tradition and Judaism, namely in accordance with what arises from an examination of the interpretation of fundamental values in the sources of Jewish tradition and Judaism. By this method of interpretation, we will be fulfilling the legislator's statement with regard to the proper interpretation of the values of the State of Israel as a Jewish State (see also in detail my article, *supra*, at pp. 663-670, 684-688).

In this context I would like to recall remarks that we have said, on several occasions, with regard to the method of referring to the sources of Jewish tradition under the Foundations of Justice Law, 5740-1980, which has special significance when we are intending now to interpret basic rights in order to establish the dual-value purpose of a Jewish and democratic State:

> 'It is well known that also the world of Jewish thought throughout the generations — and even the system of *Halacha* itself, as we will discuss below — is full of different views and conflicting approaches… It is obvious and need not be said that all the opinions and approaches together contributed to the deepening and enrichment of the world of Jewish thought throughout the generations. But the student seeking knowledge must distinguish between statements made for a particular time and period, and statements intended for all time, between statements reflecting an accepted view and those referring to minority opinions, and other similar distinctions. From this vast and rich treasure, the student must extract what he needs for the purposes of his generation and time, in which those statements that the generation requires will be converted from theory into

> practice, and these in turn will return and become part of the treasury of Jewish thought and Jewish tradition. This reality and this duty of distinction are significant in the world of Jewish thought — and in the world of the Halacha itself — as is inherently the case in every philosophical and theoretical system. Matters are multi-faceted, but this is not the place to dwell on this (see Rabbi Avraham Yitzhak Kook, Chief Rabbi of Israel, *Eder HaYekar,* Mossad HaRav Kook, Jerusalem, 1967, pp. 13-28).' (EA 2/84 *Neiman v. Chairman of Central Elections Committee for Eleventh Knesset* (hereinafter *Neiman*) [12], at pp. 293-294 {142-143}).

See also: HCJ 852/86 *Aloni v. Minister of Justice* [13], at pp. 97-98; M. Elon, *Jewish Law — History, Sources, Principles*, Magnes, Third edition, 1988, p. 1563, n 130.

We will discuss the application of these statements in our consideration of the subject of the case before us.

The Doctor and Healing

Before we discuss the basic rights themselves, we shall begin our consideration with the laws of healing, the patient and the doctor, as these are expressed in the world of *Halacha*.

12. The supreme value of the duty to preserve and protect human life, in so far as concerns the doctor in practising the art of medicine, underwent two stages in the world of Judaism, and we should first consider these.

First, during the era of the *Tannaim*, we hear that it is *permitted* for a doctor to heal. According to the school of Rabbi Yishmael, the proponent of a major and complete theory of the methods of Biblical interpretation, this is derived from a verse in the book of Exodus 21, 19 [59]: 'and he shall surely bring about his healing' — as follows: 'From here it follows that *permission* is given to the doctor to heal' (Babylonian Talmud, Tractate *Bava Kamma* (Damages, first part), 85a [60]). This statement can be interpreted as intending, *inter alia*, to refute an approach, of which hints can be found in various outlooks and religions at that time, and later times, and even a few statements made in the world of Judaism (See Rabbi I. Jakobovits, *Jewish Medical Ethics*, Jerusalem, 1966 [61], at pp. 26 *et seq.*), that a man should not heal what G-d has afflicted, and so supposedly intervene in what has decreed from above (see Rashi, Commentary on Babylonian Talmud, Tractate *Bava Kamma*, 85a, on the words 'Permission was given' [62]: 'And we do not

say G-d afflicts, and he heals?' and Nahmanides, *Torat HaAdam*, 'So that people should not say: G-d afflicts and he heals?' — *Writings of Nahmanides*, vol. 2, Chavel edition, Jerusalem, 1964, at p. 42 [63]; see also Nahmanides, Commentary on Leviticus 26, 11 [64], and our comments *infra*, para. 23).

The sages told a clever parable (*Midrash Shoher Tov* on I Samuel 4, 1 [65]) in this regard:

> 'It happened that Rabbi Ishmael and Rabbi Akiva were walking in the streets of Jerusalem with a certain man. A sick person met them and said to them: "My teachers, how may I be healed?" They replied: "Take such and such until you are healed".
>
> That man who was with them said to them: "Who afflicted him with sickness?" They said to him: "The Holy One, Blessed Be He." He said to them: "And you Sages intervene in what is not yours. He afflicted and you heal?" They said to him: "What is your vocation?" He said to them: "I am a farmer. The sickle is in my hand." They said to him: "Who created the ground; who created the vineyard?" He said to them: "The Holy One Blessed Be He." They said to him: "You intervene in what is not yours. He created it and you eat His fruit?"
>
> He said to them: "Do you not see the sickle in my hand? Were I not to go out and plough it, mow it, fertilize it and weed it, it would not yield anything." They said to him: "Idiot, have you not learned from your work that 'the days of man are like grass?' Just as a tree will not yield fruit unless it is fertilised and tilled, and if it yields fruit but is not watered and not fertilised, it does not live but dies, so the body is like a tree; the medicine is the fertiliser and the doctor is the farmer".'

Other laws set out the doctor's legal responsibility, and these laws are also part of the teaching of the *Tannaim*. An expert doctor, i.e., one who is authorized to heal and is an expert in his work, who deliberately injured a patient, which means that 'he injured him more than was necessary' is liable (*Toseftah*, Tractate *Gittin* (Divorces), 4 6 [66]; *Toseftah*, Tractate *Bava Kamma* (Damages, first part), 9 11 [67]); however, if he caused him damage negligently, he is exempt, for the welfare of society ('*tikkun haolam*': *Toseftah*, Tractate *Gittin* (Divorces), 4 6 [66]), notwithstanding the rule that a person is always responsible, for otherwise doctors would refrain from healing (Rabbi Shimon Duran, *Tashbatz* (Responsa), part 3, 82 [68]). But this

exemption when he is negligent is — in the language of the *Toseftah* — 'according to human law, but his case is entrusted to Heaven' (*Toseftah*, Tractate *Bava Kamma* (Damages, first part), 6 17 [67]; and see Nahmanides' statement in *Torat HaAdam* [63], quoted *infra*, and R.S. Lieberman, *Toseftah Kifshutah*, Tractate *Gittin*, pp. 840-841 [69], and Tractate *Bava Kamma,* p. 57 [70]).

13. More than a thousand years later, we hear from two of the greatest Jewish law authorities that the doctor's art of medicine is a *commandment* and an *obligation* and not merely permitted. They reached this conclusion by two different methods of interpretation. Maimonides reached this conclusion in an original way. From what is stated in the *Torah* 'You shall not stand by the blood of your fellow' (Leviticus 19, 9 [71]), the Sages deduced that a person must save his fellow man who is in danger (Babylonian Talmud, Tractate *Bava Kamma* (Damages, first part), 81b [60]; Tractate *Sanhedrin*, 73a [72]). The Sages further held that this duty exists not only when one can save someone personally but one is also obliged to hire the help of others for this purpose, etc. (Babylonian Talmud, Tractate *Bava Kamma*, *ibid*. [60] and Tractate *Sanhedrin*, *ibid.* [72]). The obligation to save another was also derived by the Sages from the law in the *Torah* regarding lost property (Deuteronomy 22, 1-3 [73]), which applies not only to the return of *property* lost by one's fellow man but also to the saving of the *body* of one's fellow man: 'What is the source of the law about saving a person's body? The *Torah* states: 'And you shall return it to him' (Babylonian Talmud, *Bava Kamma, ibid.* [60] and Tractate *Sanhedrin, ibid.* [72]). From this source, Maimonides derived an additional principle, namely *that the duty of the doctor to heal* derives from the *Torah*:

> 'This is included in the interpretation of the verse 'You shall return it to him' (Deuteronomy 22, 2) — *to heal* his body, which is when one sees him in danger and can save him, either with his body or his money or his *wisdom*' (Maimonides, Commentary on the Mishnah*,* Tractate *Nedarim* (Vows), 4 4 [74]); 'for this is a commandment'; Maimonides, *Mishneh Torah*, *Hilechot Nedarim* (Laws of Vows), 6 8 [75]).

The same conclusion was reached by Nahmanides, Rabbi Moshe ben Nahman, but by a different exegetical method. Nahmanides, one of the greatest rabbis in thirteenth century Spain and founder of the settlement in Israel, composed a special monograph, which deals in part with the laws of healing and all their implications in the world of *halacha*, and in part with all

aspects of the laws of mourning. Nahmanides, who like many halachic authorities in the Middle Ages was a doctor by profession, called his book by the name *Torat HaAdam*, 'The Law of Man' (the name apparently derives from the words of King David: 'And you have spoken to the house of your servant from afar, and is this the way of man (*torat ha'adam)*?' (II Samuel 7, 19 [76]). How much is hidden even in this name alone, when it comes to describe the laws of the doctor and healing! We will discuss this further below. The *permission* given to the doctor to heal, according to Rabbi Yishmael, assumes in the opinion of Nahmanides the status of a *commandment*: 'for it is an aspect of the preservation of life, which is a major commandment; someone who acts promptly is to be praised… every doctor who knows this wisdom and art is *obliged* to heal, and if he holds back, he is a spiller of blood' (see the Jerusalem Talmud, Tractate *Yoma*, 8 5 [77], regarding the preservation of human life which overrides the Sabbath). In order to make his position conform to the aforementioned statement of Rabbi Yishmael that '*permission* is given to the doctor to heal', Nahmanides defines the permission as follows: 'This permission is a *permission with the force of a commandment* to heal' (*Torat HaAdam*, Writings of Nahmanides, vol. 2, Chavel edition, Jerusalem, 1964 [63], at p. 42).

The doctor and the judge

14. In his remarks, Nahmanides gives another interesting reason why a special proof was required that *it is permitted* for the doctor to heal, as we have seen in the aforesaid statement of Rabbi Yishmael. This additional reason is that 'perhaps the doctor will say: "Why do I need this aggravation? Perhaps I will make a mistake and I will have become a negligent killer of men." For this reason the Torah gave him permission to heal' (*Torat HaAdam*, Writings of Nahmanides, vol. 2, Chavel edition, Jerusalem, 1964 [63], at pp. 41-42; and see *Responsa Da'at Cohen* (by Rabbi Avraham Yitzhak Kook, Chief Rabbi of Israel) 140 [78]). To counter this hesitancy and doubt that arose in the doctor's mind and conscience, Rabbi Yishmael said that it is permitted for the doctor to heal, and if a negligent mistake happened and the patient was injured, the doctor is not punished for this; and, as stated, not only is he *permitted* to heal, but it is also a *commandment and an obligation*. In this respect, Nahmanides (*Torat HaAdam*, Writings of Nahmanides, vol. 2, Chavel edition, Jerusalem, 1964 [63], at pp. 41-42) suggests an illuminating analogy between the doctor treating a patient and the judge sitting in judgment. With regard to the judge — the commandment to judge the people at all times and in all matters — the Talmud describes the dilemma that a judge ponders in his

mind. The dilemma is expressed as follows (Babylonian Talmud, Tractate *Sanhedrin* 6b [72]):

> 'The judges should know whom they are judging, before Whom they are judging, and Who is going to hold them accountable, as the Bible says: 'G-d stands in the congregation of G-d; He will judge among the judges" (Psalms 82, 1); and similarly the Bible says of Yehoshafat: "And he said to the judges: consider what you are doing, for you judge not on behalf of man but on behalf of G-d" (II Chronicles 19, 6).
>
> Perhaps the judge will say: "Why do I need this aggravation?" The Bible says: "And He [G-d] is with you when you pass judgment" (II Chronicles*, ibid*.; Rashi on Babylonian Talmud, Tractate *Sanhedrin*, 6b [79]: "for He is with your minds, when your minds consider the matter") — a judge only has what he sees before him"; and Rashi adds (Babylonian Talmud, Tractate *Sanhedrin,* 6b [79]): 'and he shall intend to decide justly and truly, and then he will not be punished".'

The work of the doctor is similar; it is accompanied by great demands on the conscience and it involves much anguish from this dilemma. For this reason, Nahmanides concludes that the law regarding the doctor who is as careful in his work according to the standard of care for matters of life and death (*supra* [63], at p. 42) is the same as the law regarding the judge who intends to dispense justice fairly and truly; if they are unaware that they erred, they are both exempt, both according to the law of man and according to the law of Heaven. But in one material and fundamental respect, the liability of the doctor is greater than that of the judge. Whereas the authorized judge (one who judges 'with the permission of the court'), even if he becomes aware of his inadvertent mistake, remains exempt even according to the law of Heaven, the doctor who negligently erred and became aware of his mistake is albeit exempt according to the law of man, but he is liable according to the law of Heaven and if his mistake caused a death — he is liable to be exiled to a city of refuge.

In the halachic system, this level of liability whereby one is exempt according to the law of man and liable according to the law of Heaven does not mean that the case is removed from the normative legal framework and is transferred to the field of relations between man and his Maker. This liability according to the law of Heaven appears in the world of halacha with regard to a whole series of legal rules in torts and obligations, and its character is

defined as follows: 'Wherever the rabbis said that a person is liable according to the law of Heaven, if that person comes before a court, the court must inform him: "We will not compel you, but you should discharge your duty to Heaven, since your case is referred to Heaven," so that he should take the matter seriously and placate his fellow man, and discharge his obligation according to the law of Heaven.' (Rabbi Eliezer ben Natan (Raban), on Babylonian Talmud, Tractate *Bava Kamma*, 55b [80]). The notice that he is liable to discharge his obligation according to the law of Heaven is therefore also stated by the court, and it is not merely left to the person's conscience (for details, see my book, *supra*, *Jewish Law — History, Sources, Principles*, pp. 129-131).

The doctor and the judge are both partners to the anguish of the dilemma inherent in their work, and to the calming of this anguish by means of a decision of the individual's conscience on the basis of 'what his eyes see', or, in the apposite expression of Rabbi Menahem ben Shelomo HaMeiri, a thirteenth century authority on Jewish law and one of the classic commentators on the Talmud, by acting according to 'what his eyes see, his ears hear and his heart understands' (Rabbi Menahem ben Shelomo HaMeiri, *Bet HaBehira* on Tractate *Ketubot* 51b [81]).

15. It is illuminating that in the world of Jewish law we find several parallels between the art of judging and the art of medicine. It seems to me that this phenomenon derives not only from objective relationship between them, as we discussed above, but a contributing factor is also the fact that a large number of Jewish law authorities were doctors by profession. Let us examine two illuminating examples in the works and thought of Maimonides, one of the great arbiters of Jewish law and accepted also as an expert in the medical profession.

In discussing the principles under which legislation (namely the enactments of the Rabbis) operates in the Jewish law system, (Maimonides, *Mamrim*, 2:4 [82] and see my book, *supra*, *Jewish Law — History, Sources, Principles*, pp. 210-213, 405-446 and the following chapters), Maimonides considers, *inter alia*, the power of Jewish law authorities to make enactments, even if this involves uprooting a positive law in the Torah and even by permitting what is forbidden, if the Jewish law authorities thought it necessary to do so as a temporary measure and in order to prevent something worse, in order to return the masses to observance of the faith. This power of the Jewish law authorities is summarized by Maimonides, on the basis of the Talmudic sources, as follows *(ibid.*, 2:4 [82]):

> 'And similarly if [the court] sees fit to nullify temporarily a positive commandment or to transgress a negative commandment in order to return the masses to the faith, or to save many Jews from transgressing in other cases — they may act according to the needs of the hour. Just as a doctor amputates a hand or a foot of a person in order that the body as a whole may live, so a court may at a certain time order the transgression of a few commandments on a temporary basis so that they may all be observed, in the same way that the rabbis of old said: "Violate one Sabbath for him so that he may observe many Sabbaths"' (see also my book, *supra*, *Jewish Law — History, Sources, Principles*, at pp. 425-426, with regard to the Jewish law sources for this legislative rule).

In this connection Maimonides goes on to say (*Mishneh Torah*, Laws of Sabbath, 2 3 [83]):

> 'And it is forbidden to delay in profaning the Sabbath for a sick person who is in danger, for the Torah says (Leviticus 18, 5): "… which a man shall do and live thereby", but not die thereby; so you see that *the laws of the Torah are not designed to bring evil to the world but to bring mercy, kindness and peace to the world*.'

16. Elsewhere Maimonides compares the art of medicine and the art of administering justice, but this time with the purpose of *distinguishing* them. The subject is that of justice and equity, which is one of the issues that are situated at the pinnacle of every legal system.

It is natural that a provision of law, which stipulates a principle that is beneficial and fair in general, may in certain circumstances be unfair and unjust to the individual. This phenomenon is almost inevitable, for it is the nature of a legal norm to seek to do justice in the majority of cases, and it is almost natural that this cannot be done in every case. The problem that arises in this case is the conflict within the legal norm itself, that does justice in general but causes injustice in certain circumstances to the individual. Is it possible to prevent this injustice being suffered by the individual *within the framework* of the legal norm, i.e., as a part of the binding application of the legal norm, and if so, how? This problems disturbs, first and foremost, the peace of mind of the judge who must decide the case, for it is he who comes face to face with anyone who is caught between the general law and individual justice. What is the jurisdiction of the court and what is the role of the judge as

someone who determines norms with legal significance, in such circumstances where an injustice is caused to the *individual* as a result of ruling in accordance with the law directed at the *majority* of cases? Philosophers and legal authorities have been divided over this problem since ancient times. Some think that the remedy for the individual lies only with the legislator, whereas the judge does not have the authority to make the law equitable and he is compelled to rule in accordance with the generality of the law. But others think that the *judge* hearing a case is competent to prevent an injustice in the specific case of an individual, i.e., to deal equitably with the individual who has been harmed by the inflexibility of the general law. The different approaches are based on the existence of two trends that are legitimate and essential for every legal system, whatever it is: the one is that a major principle in a judicial system is uniformity and stability, which are expressed in the generality of the law and the possibility of knowing in advance what is the binding and applicable law; the second is that the purpose of all fair and proper administration of justice, the essence of law, is to do justice to, and deal equitably with, the specific litigant whose case is tried before the court. These two trends conflict when the generality of the law may cause an injustice to the specific, particular case of the litigant, and the question is, which trend should be preferred in a special case such as this, and can they be reconciled and a fair balance be found between the requirements of the majority and the needs of the individual? (see Elon, *Jewish Law — History, Sources, Principles*, *supra*, at pp. 157-163; HCJ 702/81 *Mintzer v. Israel Bar Association Central Committee* [14], at pp. 13 *et seq.*)

In the Jewish legal system, opinion is divided on this important issue. In the view of many, the remedy of the individual falls within the jurisdiction, and is part of the function, of the legal system itself; and just as it is obliged to rule in accordance with the justice expressed in the general law, so it too is bound to prevent this general law from causing injustice to the case of the individual in its specific circumstances. This duty to do equity is part of the inherent jurisdiction of the court, in accordance with the major principle of the Sages: 'Even if they tell you that left is right, and that right is left — listen to them' (*Sifrei* on Deuteronomy, 'Judges', [84], para. 154, on Deuteronomy 17, 11 [73]: 'You shall act according to the law that they teach you and the judgment that they say to you; you shall not deviate from what they tell you right or left.' For details, see: Elon, *Jewish Law — History, Sources, Principles*, *supra*, at pp. 219-231, the opinions of R. Yitzhak Arama, the author of *Akedat Yitzhak*, Rabbi Yitzhak Abravanel, R. Efraim Shelomo ben Aharon of Luntshitz and others).

By contrast, in Maimonides' opinion, the judge must rule according to the laws made for the benefit of the majority, in the public interest:

> 'It considers the usual and it does not consider the unusual, nor damage that may be suffered by the individual… the general benefits that it has sometimes necessitate personal harm… "There is one statute for you" *(*Numbers 15, 15); *they provide general benefits in the majority of cases*' (Maimonides, *Guide to the Perplexed*, part 3, ch. 34 [85]).

The remedy for the individual cases must be achieved in other ways (such as by making a regulation or, in certain cases, by ruling according to the principle of a 'temporary measure').

However, Maimonides goes on to say that this is not the case with respect to the doctor in his practice of medicine, where:

> 'The cure for each person is unique according to his temperament at that time" (*Guide to the Perplexed, ibid.* [85]).

A judgment given by a judge is in accordance with the general norm; but the treatment of the doctor is according to the special circumstances and temperament of the particular patient before him. Whether this is indeed the *judgment* should be given by the judge is disputed (see Elon, *Jewish Law — History, Sources, Principles*, *supra*, at pp. 219-231); but no one denies that this is the way doctors practise the art of medicine, for it is a duty to cure *the disease* in order to heal the particular *patient* before him, according to his special circumstances and temperament.

17. It should be noted that these principles governing the doctor's behaviour and his art or profession, which combine law and ethics, the strict letter of the law and beyond the letter of the law, the nature of Jewish law and the nature of the world, are formulated after the book *Torat HaAdam* of Nahmanides (see Rabbi Yaakov ben Asher, *Arba'ah Turim*, *Yoreh Deah*, ss. 335 *et seq.* [86]) in special chapters in the codices of Jewish Law compiled after his time — in the book *Arba'ah HaTurim* of Rabbi Yaakov ben Asher and *Shulhan Aruch* of Rabbi Yoseph Karo (*Shulhan Aruch*, *Yoreh Deah* [87], ss. 336 *et seq.*; incidentally, it should be noted that in the book *Mishneh Torah* of Maimonides there is no special grouping of laws relating to the doctor. Maimonides, in chapter four of *Hilechot De'ot* [88] merely discusses the way to maintain the health of the body). It is certainly illuminating that these codifiers, who have a policy of not including in their codices laws not applicable in their time and therefore do not include the law of the negligent

murderer who is exiled to a city of refuge (see Rabbi Yaakov ben Asher, *Arba'ah Turim*, *Hoshen Mishpat*, 425 [89] and Rabbi Yosef Karo, *Shulhan Aruch*, *Hoshen Mishpat*, 425 1 [90]), notwithstanding include the law that a doctor who causes a death and knows that he was negligent goes into exile as a result (Rabbi Yaakov ben Asher, *Arba'ah Turim*, *Yoreh Deah* 336 [86] and Rabbi Yosef Karo, *Shulhan Aruch*, *Yoreh Deah* 336, 1 [87]). This indicates the principle of liability relating to the doctor — even if it does not carry a legal sanction under Jewish law — since he is liable, in the case of such an act of negligence — to go into exile to a city of refuge, to isolate himself in his grief and to engage in soul-searching.

This dilemma in this dichotomy of the art of medicine, which, on the one hand, involves the commandment, the duty and the prohibition against withholding medical treatment, and on the other, the hesitancy of 'Why do I need this aggravation?' has become more acute and more far-reaching in view of the huge advances made by modern medicine, and as a result of contemporary legal and philosophical thinking concerning basic rights and supreme values. Today, both the judge and the doctor are still partners in this dilemma, even more than before. Both carry the burden of the hesitancy, both wish to do justice in their profession, their skill, each in his own field — the judge to administer genuinely true justice and the doctor to find the genuinely true cure.

This directive to search after the genuine truth — the implications of which we will see below — serves as a difficult, complex but essential guideline in resolving major, difficult and complex questions that lie at the doorstep of both the doctor and the judge. As is usually the case with such fundamental questions, they involve fundamental approaches that differ from, and conflict with, one another, and this is the reason for the great hesitancy when we need to rely upon them and apply them.

The patient's obligation to seek healing

18. In the world of Judaism, just as the *doctor* is obliged and commanded to heal, as we have seen in our discussion above, so too the *patient* is obliged and commanded to seek healing.

This is the way of the world, and it is rational: 'Someone who is in pain goes to the house of the doctor' (Babylonian Talmud, Tractate *Bava Kamma* (Damages, first part), 46b [60]); moreover, someone who refrains from seeking healing transgresses what is stated in the Torah: 'And you shall be very careful of yourselves' (Deuteronomy 4, 15 [73]) and 'But for your lives I

shall hold you yourselves accountable' (Genesis 9, 5 [91]). A supreme principle in the world of Judaism is that the preservation of life overrides all the prohibitions in the Torah (except idolatry, sexual offences and bloodshed — Babylonian Talmud, Tractate *Yoma* 82a [92]; *Sanhedrin* 74a [72]), on the basis of what is stated in the Torah: 'You shall keep my statutes and judgments which man shall observe and live thereby' (Leviticus 18, 5 [71]). The Sages explained: 'And live thereby — but not die thereby' (Babylonian Talmud, Tractate *Yoma* 85b [92], Tractate *Sanhedrin,* 74a [72]). The obligation of a person to seek healing for an illness that may endanger his life overrides most of the commandments of the Torah. When a doctor determines that the Sabbath must be desecrated for the purposes of healing, if a patient refuses to accept the medical treatment required for fear of desecrating the Sabbath 'is a pious fool, and G-d will hold him accountable for his life, as the Torah states: And live thereby, and not die thereby… and we compel him to do' whatever the doctor determined (Rabbi David ben Shelomo Ibn Abi Zimra (Radbaz), *Responsa*, Part IV, A 139 [93]; Rabbi Yosef Karo, *Shulhan Aruch*, *Orach Hayim* 328 10 [94]; Rabbi Avraham Abele ben Hayim HaLevi Gombiner, *Magen Avraham*, commentary on *Shulhan Aruch*, *Orach Hayim*, 328, sub-para. 6 [95]). Preferring the observance of a commandment to medical treatment, in such circumstances, is a 'commandment achieved through a transgression' (Rabbi Yehuda ben Yisrael Aszod, *Teshuvot Maharia (Responsa)* on *Shulhan Aruch, Orach Hayim*, 160 [96]). The patient's opinion is accepted when he seeks to *improve* the medical treatment given to him, such as when the patient says that he needs to desecrate the Sabbath or eat on the Day of Atonement, even though the doctor's opinion is otherwise; we listen to the patient, because 'a person knows the danger to his life' (Proverbs 14, 1 [97]; and see Babylonian Talmud, Tractate *Yoma,* 82a, 83a [92]; Rabbi Yosef, Karo, *Shulhan Aruch, Orach Hayim,* 618 1 [94]; Rabbi David ben Shelomo Ibn Abi Zimra (Radbaz), *Responsa* Part IV, A 138 [93]. See also Rabbi Yaakov ben Asher, *Arba'ah Turim*, *Yoreh Deah*, 336 [87] and Rabbi David ben Samuel HaLevi, *Turei Zahav* on *Shulhan Aruch, Yoreh Deah,* 336 sub-par. 1 [98]; Rabbi Eliezer Waldenberg, *Responsa Ramat Rachel* 20 [99]; Dr Avraham Steinberg ed., *Encyclopaedia of Jewish Medical Ethics*, vol. 2, pp. 24-26, 443-445 [100], and see the aforementioned sources for other special laws relating to a patient whose illness does not threaten his life).

The patient's right to choose his healing

19. The basic approach of Judaism with regard to the obligation of the doctor to heal and the obligation of the patient to be healed has major

ramifications on the issue before us with respect to the refusal of a patient to receive medical treatment and the permission and entitlement of the doctor to accede to this refusal of the patient. We shall consider this fundamental question below, where we shall examine the principle, the exceptions and the differences of opinion between Jewish law authorities on this question (see *infra,* at para. 23). But first let us examine several additional principles in the field of healing in Jewish law.

Under Jewish law, it is not only the *obligation* of the patient to seek a cure, but it is his *basic right* to receive medical treatment from the doctor whom the patient trusts and whom he chooses. As we have said elsewhere (PPA 4/82 *State of Israel v. Tamir* [15], at pp. 205-206):

> '3. It is an established rule of ours, by virtue of the principle of personal liberty of each person created in the divine image, that a person has a basic right not to be harmed in his body against his will and without his consent (HCJ 355/79; *Sharon v. Levy*, at p. 755). This basic right includes the right of a person to chose and decide to which of the doctors who are competent for this purpose he entrusts the medical treatment that he needs, for this choice and decision are a substantial part of his basic right to his physical and mental integrity and welfare, and not to be "harmed" by them without his consent (see CA 76/66, at p. 233).
>
> We can find an illuminating expression of this in the teachings of our Sages. The Rabbis taught (Mishnah, Tractate *Nedarim*, 4 4): "If someone abjures any benefit from his fellow man… that person may cure him"; in other words, someone who vowed not to benefit from his fellow man or someone whose fellow man abjured him not to have any benefit from him, is permitted to benefit from the medical services of that fellow man, since the duty and the right to physical and mental treatment is "a commandment" (Maimonides, *Mishneh Torah*, *Hilechot Nedarim* (Laws of Vows), 6 8). The Jerusalem Talmud states that this rule applies not only in a place where there is only one doctor — who is the person from whom he abjures any benefit — but even where there is another doctor, and he is able to avail himself of the medical services of the other doctor, he may, if he wishes, receive the medical services of the doctor from whom he has sworn not to have any benefit, and the reason is, that "a person is not necessarily cured by everyone" (Jerusalem Talmud, Tractate

> *Nedarim*, 4 2), "for even if he has someone else who may cure him, he is permitted to give him medical treatment, for not by everyone may a person be healed" Rabbi Yosef Ibn Haviva, *Nimukei Yosef*, on Rabbi Yitzkah Alfasi's commentary on Babylonian Talmud, Tractate *Nedarim,* 41b). This is the law adopted by us: "If *A* forbad *B* to benefit from him, and *B* became ill, *A* may… heal him even with his own hands, even if there is another doctor who may heal him" (Rabbi Yosef Karo, *Shulhan Aruch*, *Yoreh Deah*, 221 4). In medical treatment, personal trust between the patient and the doctor *whom the patient chose* is of great importance, and therefore "even though there is someone who can cure him, he [the doctor from whom he vowed not to have benefit] must cure him if he is qualified, for the saving of life is of paramount importance (square parentheses added)" (Rabbi Yom Tov ben Avraham Ishbili, on Rabbi Yitzhak Alfasi's commentary on Babylonian Talmud, Tractate *Nedarim*, 41b).'

This basic right is retained by a person even when he is lawfully deprived of his personal liberty because he is serving a prison sentence. As we stated (*ibid*. [15], at p. 206):

> 'This basic right to the integrity and safety of body and mind and to chose the medical care that a person thinks appropriate to preserve them is granted to a person, even when he is under arrest or in prison, and the mere fact that he is in prison does not deprive him of any right except when this is required by, and derives from, the actual loss of his freedom of movement, or when there is an express provision of law to this effect. Therefore, when the prison authorities want to deprive someone who is under arrest or a prisoner of this right, the burden of proof and justification lies with them to show that withholding this right is justified and reasonable and has a legal basis.'

This basic right is a part of other basic rights, such as human dignity, retained by a person when his personal liberty is taken away on account of imprisonment to which he has been sentenced (see *State of Israel v. Tamir* [15], at pp. 206 *et seq.*, and recently, *State of Israel v. Azazmi* [7]).

'In the image of G-d, He made man'

20. This basic right to the integrity and safety of the human body and mind has a special character in Jewish law, and it derives from its basic outlook on the source of human rights to life, bodily integrity and dignity:

> 'A cardinal principle in Judaism is the concept of man's creation in G-d's image (Genesis 1, 27). The Torah begins with this, and Jewish law deduces from it fundamental principles about human worth – of every man as such — his equality and love. "He (i.e., Rabbi Akiva) used to say: Beloved is man who was created in the image; particularly beloved is he because he was created in the image, as the Torah says (Genesis 9, 6): 'In the image of G-d He made man" (Mishnah, *Avot*, 3 14), and this verse was given as the basis for the prohibition of spilling blood made to the descendants of Noah, before the Torah was given' (*Neiman* [12], at p. 298).

The creation of man in the image of G-d is the basis for the value of the life of every human being:

> 'For this reason Adam was created alone in the world, to show that whoever destroys one person in the world is considered as if he destroyed an entire world; and whoever preserves the life of one person in the world is considered to have preserved an entire world' (Mishnah, Tractate *Sanhedrin*, 4 5 [101], according to the text in Maimonides, *Mishneh Torah*, *Hilechot Sanhedrin* (Laws of Courts), 12 3 [102], and see Elon, *Jewish Law — History, Sources, Principles*, p. 1426 and fn. 303).

We have stated this elsewhere (LA 698/86 *Attorney General v. A* [16], at p. 676):

> 'The fundamental principle that should guide the court is that we do not have the authority, nor do we have the right, to distinguish in any way whatsoever with regard to human *worth* between rich and poor, healthy and disabled, sane and insane. All human beings, because they were created in G-d's image, are equal in their worth and quality.'

The creation of man in G-d's image is a cardinal principle for the value of the life of every person, and it is a source of basic rights human dignity and liberty (see *State of Israel v. Guetta* [3], at p. 724). The principle that G-d made man in His image — every man as such and as he is — which originates

as stated in Judaism, has been accepted and is used as a basis for the supreme value of human life also in many different cultures and legal systems, except for those cultures that have always distinguished between people —for example, between the healthy and the disabled, the sane and the insane (such as in the philosophy of Plato, in the Greek city of Sparta and others; see *infra* para. 59).

Judaism has derived additional implications from the principle that 'in the image of G-d He made man'. Thus, for example, just as man is commanded not to harm the Divine image of *his fellow man*, so too is he commanded not to harm his *own* Divine image, by harming his *own* life, body and dignity. This is what we said in *State of Israel v. Guetta* [3], at pp. 724-725:

> 'What we have said about the manner of conducting the search refers to when the consent of the person being searched was not given. But it seems to me that even when consent is given as stated, this still does not mean that everything is possible and permissible. The fact that we are concerned with basic rights relating to harm to human dignity and privacy means that we are liable, even when the search is made with consent, to maintain a reasonable degree of decency so as not to trample the human dignity and the privacy of the body that is being searched, when this is not required or needed for the purpose of the search. This can be seen, primarily, from the sources of Jewish tradition that we have discussed. The basis for the supreme principle of human dignity is that man was created in the image of G-d, and by virtue of this perspective, *he* too is commanded to protect his dignity, since an affront to his dignity is an affront to the image of G-d, and every person is commanded *in this regard*, even a person who dishonours himself. The principle is, as Ben Azzai said: 'Know whom you are dishonouring; in the image of G-d He made him'. There is no difference between and affront to G-d's image in someone else and an affront to G-d's image in oneself… This can also be seen from the provisions of the law that a search may only be made by someone of the same sex as the person being searched. It seems to me that even if consent was given to being searched by someone of the opposite sex, this consent should not be permitted. Similarly, it is inconceivable that for a search involving a penetration into the human body — such as the case of the enema in HCJ 355/79 — even if consent is given to carry

> out the enema in a public place, in the presence of the public, it is permissible to conduct a search of that kind! This would involve an extreme act of human degradation, and it is forbidden to do this, even with a person's consent. In such a case we are obliged, by virtue of the principle of the basic right not to harm the dignity and privacy of a human being, not to carry out a degrading act of this kind in public. An act of this kind involves a degradation of the human image and dignity, which society cannot tolerate. Albeit, when consent is given to the search, it is permissible to carry out the search on the body and inside the body of a person, but we are still commanded, as human beings, to protect the dignity of the person who is being searched and *our own dignity*, as human beings, who are making the search. In this way we will find the proper balance that befits the values of the State of Israel as a Jewish and democratic State, which is intended for a proper purpose, *and to a degree that is not excessive*.'

'In the image of G-d He created man' is the theoretical and philosophical basis for the special approach of Jewish law to the supreme value of the sanctity of human life — of the sanctity of the image of G-d with which man was created — and this has many consequences for the special attitude of Jewish law on many topics, of which the case before us is one of the most central. As we will see below, Jewish law has contended, especially in recent generations, with the tremendous advance in medicine and its requirements, with many different problems that arise from the conflict between the value of the *sanctity of life* and the value of *preventing human pain and suffering* and additional values and considerations, yet the starting point and the cornerstone for contending with these were and still are the supreme value of the sanctity of life, the synthesis of *the right and the obligation* to preserve the Divine image of man.

Thus, in the prayer of the Jew on the High Holydays, he says before his Creator not only 'The soul is Yours and the body is *Your handiwork*', but also 'The soul is Yours and the body is *Yours*', for man is created in the image of G-d, the image of the Creator of the world. This approach, which is in essence a theoretical-philosophical one, is used within the framework of grounds for a legal ruling. Thus, what is stated in the Torah (Numbers 35, 31 [103]): 'And you shall not take a ransom for the life of a murderer' is explained in the *Mishneh Torah* of Maimonides (Maimonides, *Mishneh Torah*, *Hilechot*

Rotzeah uShemirat HaNefesh (Laws of Homicide and Preservation of Life), 1 4 [104], as follows:

> 'The court is warned not to take a ransom from the murderer, even if he gave all the money in the world and even if the redeemer of blood wants to exempt him — for the soul of the murder victim is not the property of the redeemer of blood but the property of the Holy One, blessed by He, as the Torah says: "And you shall not take a ransom for the life of the murderer" (Numbers 35, 31). There is nothing with regard to which the Torah was stricter than the spilling of blood, as it says: 'You shall not pollute the land... for the blood shall pollute the land' (Numbers 35, 30).'

Even if the relative of the murder victim, 'the redeemer of blood', does not insist on punishing the murderer, this does not exempt the murderer from standing trial; the life of the murder victim is not the property of the relative, such that he can, if he so wishes, not insist on the murderer's conviction and punishment; a person's life is the property of the Holy One, blessed be He, and the Torah commanded that the murderer shall stand trial and be punished, for there is no crime as severe as the spilling of blood (and see also Babylonian Talmud, Tractate *Ketubot,* 37b [105]).

The aforesaid remarks of Maimonides that a person's life is the property of the Holy One, blessed be He — which were given as the reason why the relative of a murdered person does no have the right to pardon the crime of his murder — should not be understood to imply a legal conclusion in Jewish law that a person is not the owner of his own body. This view was expressed, apparently for the first time, by Rabbi David ben Shelomo ibn Abi Zimra (*Radbaz*) — albeit with no little hesitation. The remarks of Rabbi David ben Shelomo Ibn Abi Zimra were made with regard to the rule in Jewish law (Babylonian Talmud, Tractate *Yevamot,* 25b [106]) that a person may not be convicted of murder solely on the basis of his own confession. Many reasons have been given for this principle (see *inter alia* Babylonian Talmud, *Yevamot*, *ibid.* [106]), and one of the most illuminating reasons is given by Maimonides *(Mishneh Torah*, *Hilechot Sanhedrin* (Laws of Courts)*,* 18 6 [102]):

> 'The Torah decrees that a court may not sentence someone to death on the basis of his confession... Perhaps his mind is deranged in this respect. Perhaps he is one of those who feel depressed and who wish to die, who thrust swords into their stomachs or cast themselves from the rooftops. Perhaps in such a

> way a person will come and say something that he did not do so that he may be killed. The principle of the matter is: this is a decree of the King.'

We have discussed elsewhere the said principle that a person may not be sentenced to death solely on the basis of his own confession, and the reason of Maimonides that this is due to the fear that the confession derives from psychological pressure on the accused who attributes to himself a crime that was committed by someone else (see CrimA 556/80 *Mahmoud Ali v. State of Israel* [17], at p. 184). Rabbi David ben Shelomo Ibn Abi Zimra adds another possible reason (Rabbi David ben Shelomo Ibn Abi Zimra (*Radbaz*), on Maimonides, *Mishneh Torah, Hilechot Sanhedrin* (Laws of Courts), 18 6 [107]):

> 'It is a decree of the King, and we do not know the reason. *But it is possible to give a partial explanation*; for the life of a person is not his own property but the property of the Holy One, blessed be He, as the Torah says: "Behold all lives are Mine" (Ezekiel 18, 4). Therefore, his confession about something that is not his has no value... but his money is his own, and for that reason we say that an admission of a party is like a hundred witnesses; and just as *a person is not permitted to kill himself* (Babylonian Talmud, Tractate *Bava Kamma* (Damages, first part), 91b [60], Maimonides, *Mishneh Torah*, *Hilechot Rotzeah uShemirat HaNefesh* (Laws of the Murderer and Preservation of Life) 2 2-3 [104]; Rabbi Yaakov ben Asher, *Arba'ah Turim*, *Yoreh Deah,* 345 [86] and Rabbi Yosef Karo, *Shulhan Aruch*, *Yoreh Deah* 345, 1 [87]), so too a person may not confess that he committed an offence for which he is liable to a death sentence, for his life is not his property.'

Maimonides, as we have seen above, gives a completely different reason for the rule that a person may not be sentenced to death on the basis of his own confession. Even according to Rabbi David ben Shelomo Ibn Abi Zimra, was stated, this reason that a person is not the owner of his body is merely a 'partial explanation' for the major principle that a person cannot be sentenced to death on the basis of his own confession (see the remarks of Rabbi David ben Shelomo Ibn Abi Zimra*, supra*). He repeats this in his conclusion: 'And notwithstanding all this, I concede that it is a decree of the King of the world, and it may not be questioned'.

It would appear that apart from Rabbi David ben Shelomo Ibn Abi Zimra, no Jewish law authorities have even considered the possibility that the theoretical-philosophical idea that 'the soul is Yours and the body is Yours' has any legal significance. In recent times, several contemporary Jewish law authorities emphasize that in Jewish law, from a legal perspective, a person *is* the owner of his own body (this conclusion was derived from the remarks of Rabbi Joseph ben Moses Babad, *Minhat Hinuch* 48 [108]; Rabbi Aryeh Leib ben Asher Gunzberg, *Turei Even*, *Megillah* 27a [109]; see in detail Rabbi Shaul Yisraeli, 'The Kibiye Incident in view of Jewish law' in *HaTorah vehaMedinah*, 5-6, 1954, pp. 106 *et seq.* [110] and see there his interpretation of Maimonides and Rabbi David ben Shelomo Ibn Abi Zimra, cited above; Rabbi Shilo Refael, 'Compelling a Patient to receive Medical Treatment', in *Torah Shebe'al Peh*, 33rd National Oral Torah Congress [111]). In the opinion of Rabbi Shilo Refael, who serves as a judge in the Rabbinical Court of Jerusalem, the principle that a person has ownership of his body, and other reasons, can lead to the conclusion that 'one may not compel a patient to receive medical treatment against his will' (see *Torah Shebe'al Peh*, *ibid.* [111], at p. 81); we will discuss this later (para. 22).

These differences of opinion regarding the legal consequences in Jewish law with regard to a person's ownership of his body do not change the approach of Judaism's *basic philosophy* about the source of the rights of man — all men — in the basic belief that 'In the image of G-d He made man'.

The principle: 'And you shall love your fellow-man as yourself' with regard to the doctor and healing

21. An illuminating principle of Jewish law with regard to the doctor and healing serves as the ultimate principle in Jewish law: 'and you shall love your fellow-man as yourself'. We said about this with regard to the basic right of a person not to be physically injured (CA 548/78 *Sharon v. Levy* [18], at p. 755):

> 'This basic right, as expressed in Jewish law, is illuminating. "Whoever strikes his fellow with a blow that is not worth a penny (i.e., which did not cause any damage) transgresses a negative commandment" (Babylonian Talmud, *Sanhedrin* 85a; Maimonides, *Hilechot Hovel uMazik*, (Laws of Wounding and Damaging) 5, 1-3); even if the victim consents to this, there is no legal validity to this consent (Babylonian Talmud, *Bava Kamma* 92a; Rabbi Yosef Karo, *Shulhan Aruch*, *Hoshen Mishpat,* 420, 1 *et seq.*). On what basis may a person let his fellow man's blood,

> even if this is required for therapeutic purposes? According to the Talmudic sage, Rav Matna (Babylonian Talmud, Tractate *Sanhedrin*, 84b), this permission is not based on the patient's consent — express or implied — for such harm, since the consent, as stated, is of no validity; but we learn the permission from the verse "And you shall love your fellow-man as yourself" (Leviticus, 19, 18), from which it can be inferred, as Rashi says: "that Jews were only warned not to do to their fellow men what they do not want to do to themselves" (Rashi, on Babylonian Talmud, *Sanhedrin* 84b); see also Nahmanides (*Writings*, Chavel ed., Rabbi Kook Institute, vol. 2, 1964, *Torat HaAdam* pp. 42ff; and see M. Elon, "Jewish Law and Modern Medicine", *Molad*, (New series) 4 (27) (1971) 228, 232).'

This conceptual basis of Jewish law for the permission to injure the body of a sick person — if the injury is required for the sake of his healing and to the proper degree — on the major principle of the Torah 'And you shall love your fellow man as yourself' is very instructive. The act of healing involves the 'love of one's fellow-man', which in Jewish law is not merely a matter of loving him in one's mind alone:

> 'The major principle 'and you shall love your fellow-man as yourself" is not merely a question of one's thoughts, an abstract love that has no practical implication, but it is a way of life in the practical sphere. The principle was thus expressed in the words of Hillel: 'Whatever is hateful to you — do not do to your fellow-man' (Babylonian Talmud, Tractate *Shabbat*, 31a). Commentators on the Torah noted that this formulation in the negative gave this principle significance that human nature *can* comply with: "For the human heart will not accept that one should love one's fellow-man like oneself. Moreover, Rabbi Akiva has already taught: Your life takes precedence over the life of your fellow-man' (Nahmanides, Commentary on Leviticus 19, 18). Rabbi Akiva, who determined, as stated, that the major and preferred principle is "And you shall love your fellow-man as yourself" was the same person who taught that in a time of danger — to an individual or to the community — there are cases that "your life takes precedence over the life of your fellow-man" (Babylonian Talmud, Tractate *Bava Metzia*, 62a)" (the *Neiman* case [12], at p. 298-299; and see below).

This opinion of Rav Matna is cited by Nahmanides as a generally accepted principle of Jewish law with regard to the issue of doctors and medicine:

> '… for whoever injures his fellow-man for healing (for the sake of medical treatment) is exempt, and this is the commandment of 'and you shall love your fellow-man as yourself'" (Nahmanides, *Writings*, vol. 2, Chavel ed., Jerusalem, 1964, *Torat HaAdam,* [63], at p. 43).

With regard to these remarks of Nahmanides, Rabbi Eliezer Waldenberg, one of the leading contemporary authorities in the field of medicine in Jewish law, says (Rabbi Eliezer Waldenberg, *Responsa Ramat Rachel*, 21 [99]):

> 'We have derived the commandment to heal one's fellow-man also from the verse "and you shall love your fellow-man as yourself".
>
> It must be said that we need all of this teaching [of "And you shall love your fellow-man as yourself], whereas this [the principle that "Nothing stands in the way of saving life"] is not sufficient [as discussed by Nahmanides himself previously, and which is the only rationale given by Rabbi Yaakov ben Asher, Rabbi Yosef Karo, Rabbi Yehiel Michel ben Aharon Yitzhak HaLevi Epstein (i.e. that it is part of saving human life)] because from this teaching [i.e. "And you shall love your fellow-man as yourself" and other sources] we derive the obligation to give medical treatment even in a case where it is clear that there is *no* danger to human life, although there is pain or injury to a limb and the like. And this is obvious.'

22. In this respect, there is an additional point to be made, which has significance with regard to the method of interpretation. It is well known that this major principle of the Torah — 'And you shall love your fellow-man as yourself' — has been adopted and accepted by various religions and cultures and given the name of 'The Golden Rule'. The most impressive and forceful expression of the generality of this rule can be found in the words of Hillel the Elder, who, after making the aforesaid formulation — 'What is hateful to you, do not do to your fellow-man' — adds: 'This is the whole Torah, and the rest is its commentary: go learn it'. Indeed this rule was discussed and studied widely by the Sages, both for its legal and ethical implications, and in the philosophical literature of various cultures (see commentators on the Torah, Leviticus 19, 18 [71], and especially — in addition to Nahmanides cited

above — Rabbi Ephraim Shelomo ben Aharon of Lunshitz, *Kli Yakar*, on Leviticus 19, 18 [112]; Rabbi Yaakov Zvi Mecklenburg, *HaKetav veHaKabbalah*, on Leviticus 19, 18 [113]; and Nehama Leibowitz, *New Studies in Leviticus*, 5743, at pp. 300-304 [114]; see also the book of Tobit (Apocrypha), 4 15 [115]; D. Heller, *Tobit*, A. Kahana ed., vol. 2, p. 322, and the notes [116] and bibliography [116]; and see Elon, *Jewish Law — History, Sources, Principles*, at pp. 126-127; Rabbi Dr J.H. Hertz, *The Pentateuch and Haftorahs*, London, 1938 [117], at pp. 563-564; W. Gunther Plaut, *The Torah, A Modern Commentary*, New York, 1981 [118], at pp. 892-896, 1738).

Notwithstanding, in certain religions and cultures that espoused this rule, ideas that conflict with Judaism were added to it. Thus, for example, we find (Luke, 6 29) that, after stating that one should love the enemy and pray for someone who hurts you: 'If someone hits you on the cheek, turn also the other towards him' (and see the continuation there; see also Matthew, 5 38-48). This way of thinking, which involves an unnatural outlook on life and was not carried out in practice, is foreign to Judaism, as is expressed clearly and emphatically in the remarks of Rabbi Akiva, *supra*, that the rule 'And you shall love your fellow-man as yourself' is congruent with the principle that 'your life takes precedence over the life of your fellow-man'. By virtue of this interpretation and significance in Judaism, the rule 'And you shall love your fellow-man as yourself' is a source for justifying the doctor injuring the patient's body, to the extent that the injury is required for the purpose of healing him; and logic says that it is also a source for the limitations restricting treatment of a patient without his consent: what is hateful to you — do not do to your fellow-man' (see *infra*, paras. 23, 32-36, 38).

The obligation and refusal of medical treatment — rules and limitations

23. This basic approach of Jewish law regarding the obligation to heal and the obligation to be healed is subject to certain limitations, which in our generation are continually increasing, that limit the possibility of treating a patient without his consent.

These limitations were already expressed in the famous responsum of Rabbi Ya'akov Emden, a leading halachic authority in the eighteenth century (Rabbi Yaakov Emden, *Mor uKetzia*, on Rabbi Yosef Karo, *Shulhan Aruch*, *Orach Hayim* 328 [119]. Below we will discuss a different part of the responsum (dealing with pain and suffering — para. 26):

> 'In case of an *obvious* sickness or injury, of which the physician *has certain knowledge and a clear recognition, and he is administering a tested and complete cure* — it is certain that we always compel a patient who refuses in a case of danger, in every sphere and procedure where the doctor was given permission to cure him, such as cutting living flesh on a wound, expanding its perimeter, removing pus, casting a fracture, and even amputating a limb (in order to save him from death)… everything of this kind we certainly do to him and compel him against his will, in order to save his life.
>
> We pay no attention to him if he does not wish to undergo suffering and chooses death over life, but we amputate even an entire limb, if this is necessary to save his life, and we do everything necessary to save his life, even against the patient's will.
>
> Every person is cautioned to do this, on the grounds of "And you shall not stand by the blood of your fellow-man", and the matter does not depend on the wishes of the patient, and he has no permission to destroy himself.'

We are concerned therefore with a disease that is recognized and known to the doctor 'certain knowledge and a clear recognition', and at the time it was an '*obvious* sickness or injury'; and the cure that the doctor wishes to use is a 'tested and complete cure' from the viewpoint of the chances of healing the disease; and we are also concerned with a disease that involves a danger — 'in a case of danger' (see there at the beginning of the cited passage and below for further clarifications with regard to limitations for carrying out treatment on a patient without his consent).

Many contemporary authorities have discussed the right of the patient to refuse treatment given to him, and established additional limitations and cases where the consent of the patient is required; it seems logical that the principle of personal autonomy, which has received particular advancement in our generation, has unconsciously influenced these decisions. The following was the ruling of Rabbi Moshe Feinstein, one of the greatest authorities of Jewish law in our generation:

> 'If there is a patient who needs an operation to save him, and there is a *high probability* that the operation will be successful, the operation should be performed even against his will, so long

> as there is no fear that *the fact that he is being coerced* will cause him *a greater danger*' (Rabbi Moshe Feinstein, 'Responsum', *Judgments, Medicine and Law*, S. Shahar ed., 1989, 101 [120]; Dr M. Halperin, 'Aspects of Jewish Law', *Judgments, Medicine and Law*, S. Shahar ed., 1989, 102 [121]).

According to this ruling, in addition to the need for a *high probability* of success (see *ibid*. [121], at p. 104, note 15, as to whether the meaning is a probability of *two thirds* — as it is with regard to another question of medicine in Jewish law in Rabbi Yaakov Reischer, *Responsa Shevut Yaakov*, 3, 75 [122] — see *infra* — 'a recognizable probability according to most opinions' or whether a majority of *51 percent* is sufficient), we must take account *also of the possible negative effect of the medical treatment against his will*.

According to another opinion, if the patient will also suffer after the medical treatment to such an extent that it can be assumed that he would not have agreed to receive the treatment before it was given — it should only be given *ab initio* with his consent (Rabbi Moshe Feinstein, 'Responsum', *Judgments, Medicine and Law* [120], *ibid.*, at pp. 103-104). In this respect, there is an illuminating responsum of Rabbi Shelomo Zalman Auerbach, one of the greatest arbiters of Jewish law of our time. The following is quoted in Dr Avraham S. Avraham, *Nishmat Avraham*, on Rabbi Yosef Karo, *Shulhan Aruch, Yoreh Deah*, 155 1-2 [123], at pp. 47-48:

> 'A fifty-year-old patient is suffering from severe diabetes with serious complications such as blindness and problems with his blood vessels and infections. He had already had one leg amputated, because of gangrene, and he is in hospital with gangrene in his second leg, causing him excruciating pain.
>
> After a joint consultation between experts on internal medicine and surgeons, it was concluded that the patient would certainly die within a few days if the second leg was not amputated. But he was likely to die also as a result of the operation, and of course even if the operation were successful and his life were prolonged temporarily, this was not a treatment for his basic illness.
>
> The patient himself refused to undergo the operation out of fear of the operation itself, the pain and the suffering of the operation, and mainly because he did not wish to live without both his legs and blind.

> I asked Rabbi Shelomo Zalman Auerbach for the Jewish law position on this case, and he ruled that such an operation should not be performed against the patient's will (nor should any attempt even be made to convince him to agree to the operation), since it was a major and dangerous operation that would merely add to the patient's suffering without any possibility whatsoever of a permanent cure.'

The operation should therefore not be carried out in the aforesaid circumstances against the will of the patient, despite the immediate danger to life. Notwithstanding, if the patient would give his consent for the operation, it would be permitted to desecrate the Sabbath, since once he had given his consent, and there was an immediate danger to life, this was a situation of saving a life that takes precedence over the Sabbath.

(See *ibid.*, [123] an additional responsum of Rabbi Shelomo Zalman Auerbach on this issue; see also S. Shahar ed., *Judgments, Medicine and Law*, 1989, 104 [121]).

An opinion has even been expressed that since, in many cases, the medical opinion is not *certain*, treatment should not be given without the patient's consent unless there is a certain danger of death (see Dr Avraham Steinberg ed., *Encyclopaedia of Jewish Medical Ethics*, vol. 2, 'Consent' [100], at p. 30, and notes 86-87; and see additional cases, *ibid*. [100], at pp. 30-33).

An interesting approach on our subject was recently expressed in an article of Rabbi Shilo Refael (*Torah Shebe'al Peh* [111], *supra*), that deals entirely with the issue of compelling a patient to receive medical treatment, without his consent. Rabbi Refael came to the conclusion that 'a patient should not be coerced to receive medical treatment against his will' *(ibid.* [111], at p. 81); it is not expressly stated, but naturally this does *not* apply to a case of saving someone from mortal danger, *where it is permitted and even obligatory*, even without the consent of the patient (see the remarks of Rabbi Ya'akov Emden, *Mor uKetzia,* on Rabbi Yosef Karo, *Shulhan Aruch*, *Orach Hayim* 328 [119], *supra*). Rabbi Refael bases his conclusion on three grounds; first, according to Nahmanides in his commentary on the Torah (Nahmanides, commentary on Leviticus 26, 11 [64]), a person who is G-d-fearing on a high ethical level may refrain from consulting doctors and seek his cure through prayer and good deeds, as was the practice during the ancient prophetic era (see Exodus 15, 26 [59]; Deuteronomy 32, 39 [73]; II Chronicles 16, 12 [124]; Babylonian Talmud, Tractate *Berachot* 60a [125], in the statement of Rav Acha). Indeed, this view is supported by several other authorities (*ibid*. [111], at p. 75), but as

we have already discussed above, this position is contrary to the position accepted by a decisive majority of Jewish law authorities regarding the patient's *obligation* to receive medical treatment.

Rabbi Refael main reasons are his second and third ones: the second, which we have already mentioned, is that a person is the owner of his body; as stated above (para. 20), Rabbi Refael finds support for this position from arbiters and experts of Jewish law, and after detailed consideration he comes to the following conclusion: 'from all of the above, it is evident that there is a significant body of Jewish law authorities who believe that a person is the owner of his body, and when necessary he may refuse to be fed or given medical treatment against his will' (*ibid*. [111], at p. 80).

The third reason that led to the said conclusion is original and illuminating. According to this reason, even according to the Jewish law experts who do not accept the first two reasons, there is no basis for *compelling* someone to receive medical treatment, because *today* the rule of compelling someone to fulfil a commandment does not apply *ab initio* (the source of the rule is in the Babylonian Talmud, Tractate *Ketubot* 86a [105], in the statement of Rav Papa). Today, the authority of the three judges comprising a rabbinical court is merely 'to judge and decide, but to compel requires three experts' (*ibid.* [111], at p. 80), and today we have no *experts*, according to the requirements of Jewish law (with regard to the question of coercion to fulfil a commandment in our times see also the illuminating remarks of Rabbi Meir Simcha HaCohen of Dvinsk in his book *Or Sameach* on Maimonides, *Mishneh Torah*, *Hilechot Mamrim* 4 3 [126]). As a result, Rabbi Refael concludes as follows (*ibid.* [111], at p. 81):

> 'We see from everything explained above that for three reasons medical treatment should not be given to a patient against his will. 1. There are those who rely on Nahmanides who holds that there is no need to resort to medical treatment. 2. There are authorities who hold that a person is the owner of his body and can do with it as he wishes. 3. In order to compel treatment, a court of three judges is required, and according to *Sefer Yereim*, three experts are required, and there are none of these, and for this reason this rule does not apply at all in our times.'

At the end of his article, he relies in his conclusion also on the decisions of Rabbi Moshe Feinstein and Rabbi Shelomo Zalman Auerbach (cited above [120] [123]) that treatment against the will of the patient will cause him harm because of the very fact that the treatment is being given against his will, and

in some cases it is permitted to refrain from giving this treatment (on the subject under discussion see also Dr D. B. Sinclair, 'Non-Consensual Medical Treatment of Competent Individuals in Jewish Law, with some Comparative Reference to Anglo-American Law', 11 *Tel-Aviv University Studies in Law*, 1992, at p. 227).

This position of Rabbi Shilo Refael is interesting and original, and it joins the wide spectrum of the various approaches and opinions of Jewish law authorities today, in view of the huge increase in problems arising all the time from medical advances, and the response of Jewish law experts to these problems on the basis of Jewish law principles as these are to be construed and applied against the background of current medical and social realities.

The supreme value of human life

24. A major rule and fundamental principle in Jewish law is that human life is one of those things that are of immeasurable importance, both with regard to its value and with regard to its duration. Human life cannot be measured and calculated, and each second of human life has an unique value just like many long years of life. Thus Jewish law rules that:

> 'A dying person is like a living person in all respects... whoever harms him is a spiller of blood. To what can this be compared? To a flickering candle; if someone touches it, it is extinguished. And anyone who closes the dying person's eyes as he is dying is a spiller of blood, but he should wait a little in case the dying man has merely fainted' (Babylonian Talmud, Tractate *Shabbat*, 151b [127]; Maimonides, *Mishneh Torah, Hilechot Evel* (Laws of Mourning) 4 5 [128]; Rabbi Yosef Karo, *Shulhan Aruch, Yoreh Deah* 339, 1 [87]).

Even a flickering candle burns, and it too can give light.

Therefore the rule is (Maimonides *ibid*., [128] and Maimonides, *Mishneh Torah*, *Hilechot Rotzeah uShemirat HaNefesh* (Laws of Homicide and Preservation of Life), 2 17 [104], *Shulhan Aruch, ibid* [87]):

> 'There is no difference between a person who kills a healthy person, and one who kills a mortally sick person, and even if he killed someone who is dying — he is put to death for this.'

The reason for this is:

> 'Even if Elijah will come and say that a person will only live an hour or a moment, nonetheless the Torah did not distinguish

> between someone who kills a child who has many years to live and someone who kills an old man who is one hundred years old. In any case, the killer is liable; even though the victim was near death, nonetheless because of the additional moment that he would have lived he is guilty' (*Minchat Chinuch* 34 [108]).
>
> Since there is no measure or limit to the value of purposeful life, there is no way to distinguish between a small part of something that is unlimited and immeasurable and a very large part of it. Therefore, the Torah does not distinguish between killing a person who kills a healthy young person and someone who kills a dying old man who is one hundred years old' (Rabbi Yehiel Michel Tukachinsky, *Gesher HaHayim*, *Laws of Mourning*, part 1, ch. 2, p. 16 [129]).

The commandments that are overridden by the preservation of human life (see my remarks below), are also overridden by *temporary* extension of a person's life, even for the shortest period. This is the law regarding a desecration of the Sabbath (Maimonides, *Mishneh Torah, Hilechot Shabbat* (Laws of Shabbat), 2 18 [83]; *Shulhan Aruch, Orach Hayim* 329 4 [94] based on the Babylonian Talmud, Tractate *Yoma* 85a [92]):

> 'If an avalanche fell on someone... and he is found alive, even if he is crushed and it is impossible for him to recover, he should be rescued [on the Sabbath], and he should be extricated *for that temporary period of life*.'

Rabbi Yehiel Michel Epstein, a leading halachic authority at the beginning of this century, adds and clarifies (Rabbi Yehiel Michel Epstein, *Aruch HaShulhan, Orach Hayim* 329 9 [130]):

> 'Even if it is clear to the doctors that he will die, but with treatment he may live *a few hours more,* it is permitted to desecrate the Sabbath for him, for the Sabbath may be desecrated even for a small amount of life.'

The following was a decision of Rabbi Shimon Tzemach Duran, a leading respondent in Spain and Algeria in the fifteenth century (Rabbi Shimon Duran, *Tashbatz* (Responsa) 1 54 [68]):

> 'Even if that endangered person lives as a result of this desecration of the Sabbath merely for one hour and afterwards dies, we desecrate the Sabbath for him even for one hour, for the saving of life is of great importance to G-d, even if it is a small,

> temporary saving of life, since even the Sabbath, which is considered as equal to the whole Torah, is desecrated for this.'

25. Notwithstanding, as a result of Jewish law's recognition of the supreme value of human life, it has been held that the short life of a patient may be endangered if and when this is done in order to make it possible for him *to live a long life*, even when there is *doubt* whether as a result of endangering the brief period of life remaining, it will be possible to ensure him of a long life (Babylonian Talmud, Tractate *Avodah Zarah* ('Idol Worship'), 27b [131], and the remarks of the Tosafists beginning *Lechayei Sha'ah* [132]; Nahmanides, *Torat HaAdam* [63], at pp. 22 *et seq.*; and see Dr A. Steinberg, *Encyclopaedia of Jewish Medical Ethics*, vol. 4, the entry 'Close to death' (*Noteh LaMut*) (pre-publication copy) [100], at pp. 45-48, para. d 4).

This matter was the subject of an illuminating deliberation by Rabbi Ya'akov Reischer, a leading halachic expert in Galicia at the beginning of the eighteenth century. I discussed this elsewhere with regard to questions that arise with regard to the question of heart transplants (M. Elon, 'Jewish Law and Modern Medicine', *Molad*, booklet 21 (231), 228 at pp. 234-235):

> 'The other question, from the perspective of the recipient of the heart transplant, is also a very important question of Jewish law, but it has been discussed thoroughly. The question is the following: by removing the diseased heart, we are shortening — for certain — the life of the patient by several weeks, several days or even by only a short time, at a time when we are not certain whether the transplant of the new heart will succeed and prolong the life of the recipient; we have already seen that a moment of life is equal to a long period of life, and anyone who terminates that moment is a spiller of blood. It is illuminating that this question of principle of losing a short period of life when there is a chance, even if there is no certainty, that by certain medical treatment the patient will return to health and life, has already been discussed to some extent by the rabbis during the Middle Ages, and it was reconsidered in detail by Rabbi Ya'akov Reischer, a leading Jewish law expert in Galicia at the beginning of the eighteenth century. Its solution is that we should indeed prefer the chance of a long life over the certainty of a short amount of life.

The following was the question that Rabbi Yaakov Reischer was asked (Rabbi Yaakov Reischer, *Shevut Yaakov* 3 75 [122]) by an "expert doctor":

> "A certain patient became ill with an illness that often leads to death, and all the doctors say that he will certainly die within a day or two, but they say that there is one more medical treatment that may cure him, but also may do the opposite, for if he takes receives that medical treatment and it is not successful he will die immediately within an hour or two; is it permissible to carry out that medical treatment or should we be concerned about the loss of the short period of life left to him, and it is better to refrain from doing anything?"

Rabbi Reischer replies as follows:

> "Since this case is a case of life and death, we must be very careful on this issue in examining the Talmud and the arbiters of Jewish law from all possible aspects, for anyone who causes the loss of a single Jewish life is deemed to have caused an entire world to perish. The opposite is also true: anyone who preserves a single life is considered to have preserved an entire world. At first glance, it would seem preferable not to do anything for we are concerned about the loss of the short period of life even of someone who is literally dying…".

All of this is merely a statement of basic principles. Rabbi Reischer went on to say:

> "After studying the matter in depth, it appears beneficial… if it is possible that with this treatment that he gives him the patient may be completely cured, we should not be concerned about the short period of life… since he will surely die, we put aside the definite and grasp the doubtful: perhaps he will be cured."

After he proves this to be the case by the reasoning process of Jewish law, he concludes by saying:

> "In any event, the doctor should not simply do this, but he should be very cautious in this matter, consult with expert doctors in the city, and act according to the majority opinion, i.e., a recognizable majority which is double, for we must be wary of being hasty…"
>
> We see, therefore, that Jewish law accepts the basic principle, but requires much caution and deliberation, and complete and precise understanding and knowledge; in addition, we should take account of the chances of success when making this difficult and fateful decision.'

This has been the ruling of contemporary Jewish law authorities (see Rabbi David Zvi Hoffman, *Responsa Melamed LeHo'il* on Rabbi Yosef Karo, *Shulhan Aruch*, *Yoreh Deah* 104 [133], and, for further detail, see Dr Avraham S. Avraham, *Nishmat Avraham* (Laws of Patients, Doctors, and Medicine), 1945, on Rabbi Yosef Karo, *Shulhan Aruch*, *Yoreh Deah* 155, 1-2, at pp. 45-47 [123]. See *ibid.*, at p. 47, that the permit to risk temporary life in such cases applies even when the temporary life is for a lengthy period).

The principle of alleviating pain and suffering

26. Another basic outlook in the field of Jewish law relating to medicine is the principle that the pain and suffering of the patient must be considered as a factor when making a ruling on an issue of Jewish law relating to medicine.

In various fields, Jewish law has established rules that when a person is enduring pain and suffering, even if these do not threaten his life, it is permitted to contravene various laws (see, for example, Rabbi Yosef Karo, *Shulhan Aruch, Orach Hayim* 329-331 [94]; *Shulhan Aruch, Yoreh Deah* 262 2 [87]). Thus Rabbi Yaakov Emden held that a person may undergo a medical procedure that involves a possibility of danger to life if his purpose in doing so is to alleviate major suffering that he is enduring (Rabbi Yaakov Emden, *Mor uKetzia, ibid.* [119], at p. 328):

> 'There are those who choose a possible danger to life in order to save themselves from major suffering, such as those who undergo an operation because of a gallstone or a kidney stone that are very painful and involve as much suffering as death — may the Merciful One protect us! Such persons should be allowed to do as they wish without objection, since sometimes they are saved

> and cured' (with regard to this responsum see also *supra*, in para. 23).

The duty to alleviate pain and suffering and to protect a person's dignity is expressed in the teachings of the Sages in the rule: 'Choose for him a painless death'. This rule, in the sense used in Jewish law literature, has nothing in common with the concept 'death with dignity' used nowadays with regard to the question of euthanasia, to which we will refer below. This rule concerns a person who has been sentenced to death; the rabbis instructed that special measures should be adopted to alleviate the pain and suffering of a person being executed and choose for him a 'painless death'. The source on which the rabbis based this rule is illuminating. Even someone who has been condemned to death is subject to the major rule of the Torah:

> 'And you shall love your fellow-man as yourself — choose for him a painless death' (Babylonian Talmud, Tractate *Bava Kamma* (Damages, first part), 51a [60], *Sanhedrin* 45a [72]).

Consequently the rabbis ruled that all measures should be taken in order to alleviate the suffering of a person sentenced to death when carrying out the sentence, by hastening the execution and preventing his humiliation as a human being (Babylonian Talmud, Tractate *Sanhedrin* 45a [72]). They also held (Babylonian Talmud, Tractate *Sanhedrin* 43a [72]) that:

> 'One who is taken to be executed is given a small grain of frankincense (a strong drink — Exodus 30, 34) in a cup of wine (=an intoxicating drink) to drink, to cloud his mind (so that he does not worry and think about his execution — Rabbi Shelomo Yitzhaki, *ibid*), as the Bible says (Proverbs 31, 6): "Give liquor to someone who is perishing and wine to those of bitter spirit".'

In *Midrash Tanhuma* on *Sidrat Pekudei* (Exodus 38-40), para. b [134], the text is:

> 'They bring him good and strong wine and give it to him to drink so that he does not suffer as a result of the stoning' (see also Maimonides, *Mishneh Torah, Hilechot Sanhedrin* (Laws of Courts), 23 2 [102]).

This consideration for a person's suffering and the goal of alleviating and alleviating this suffering is a guiding principle of Jewish law in various questions of medicine and law. In recent times, this principle of having consideration for pain and suffering has been invoked as a way to find balanced solutions for difficult and complex cases, where some departure is

required from the principle of the supreme value of the sanctity and worth of human life. Consequently, Jewish law has developed to some degree the rule of taking account of pain and suffering of the patient, when endeavouring to deal with the needs of the times and of people, as these arise on various occasions and at different times. We have discussed this in detail *supra* (para. 23) and *infra*, with regard to euthanasia, while distinguishing between active euthanasia and passive euthanasia (paras. 27-36).

The judicial principle that 'its ways are pleasant ways' and 'the laws of the Torah shall be consistent with reason and logic'

27. The principles and rules that we have discussed above have been used by the rabbis — and recently this use has become more common — as guidelines for medical-legal questions in Jewish law, in order to establish the fundamental principles in this complex and difficult field, both from a theoretical-conceptual perspective and from the perspective of a person's situation and the circumstances in which he finds himself. As stated, these deliberations have increased in recent years, particularly as a result of the tremendous advances in medicine, which have led to longer life and much good, but also to difficult problems and quandaries. Before turning to these problems and examples of contemporary rulings of Jewish law, let us first examine an additional principle of Jewish law established, with regard to a closely-related issue, as far back as the sixteenth century by a leading writer of responsa, Rabbi David ben Shelomo ibn Abi Zimra, which is a cornerstone and basis for solving medical-legal problems in Jewish law.

This principle was discussed in connection with the obligation of saving human life. A major rule in Jewish law is that 'anyone who can save someone but does not do so transgresses "You shall not stand by the blood of your fellow-man' (Leviticus 19, 16 [71])" (see Babylonian Talmud, Tractate *Sanhedrin*, 73a [72], Maimonides, *Mishneh Torah*, *Hilechot Rotzeah uShemirat HaNefesh* (Laws of Homicide and Preservation of Life), 1 14-16 [104]; Rabbi Yaakov ben Asher, *Arba'ah Turim*, *Hoshen Mishpat*, 426 [89]; Rabbi Yosef Karo, *Shulhan Aruch*, *Hoshen Mishpat*, 426 2 [90]). When there is no danger to the rescuer himself, clearly the obligation to save another is of supreme importance and absolute. But the difficult question is: to what extent is a person *obligated* — and perhaps the question can also be phrased: to what extent is a person *permitted* — to endanger his own life in order to save the life of another? This question has troubled Jewish law experts to no small degree, and according to some arbiters, a person must even risk possible danger to himself in order to save another from certain danger (Rabbi Yosef

Karo, *Bet Yosef*, on Rabbi Yaakov ben Asher, *Arba'ah Turim, Hoshen Mishpat* 426 [135]), but many others disagree with this (Rabbi Yehoshua ben Alexander HaCohen Falk, *Sefer Meirat Einayim*, on Rabbi Yosef Karo, *Shulhan Aruch*, *Hoshen Mishpat* 426, 4 [136]). This law was well summarized by one of the most important scholars of recent times: 'It all depends on the circumstances… one should weigh the situation carefully and not be too self-protective… and anyone who preserves a Jewish soul is as though he has preserved an entire world' (Rabbi Yehiel Michel Epstein, *Aruch HaShulhan*, *Hoshen Mishpat* 426 4 [137]; and for a discussion of the many sources for these differences of opinion, see Rabbi Ovadia Yosef, 'Responsum about the Permissibility of Kidney Transplants', 7 *Dinei Yisrael*, 1976, 25 [138]; Rabbi Ovadia Yosef, 'On the law of Donating a Kidney' in 3 *Halacha uRefua*, 1983, 61 [139]; Rabbi Ovadia Yosef, *Responsa Yehaveh Daat*, 3, 84 [140]).

The removal of an organ from a human body in order to transplant it to someone else's body to save him has recently been associated with the deliberations of Jewish law experts on the said question about the danger that could arise from this to the donor. But this problem has been considered beyond this: is there any basis to compel a person — also in order to save another — to donate one of his organs? A most illuminating answer is given by Rabbi David Ibn Zimra, the rabbi of Egypt and Israel in the sixteenth century, and one of the greatest writers of responsa in the world of Jewish law, in the context of a question that arose against the background of the tragi-heroic reality of the Jewish Diaspora the attitude of non-Jewish governments to their Jewish minority. The question was (Rabbi David ben Shelomo Ibn Abi Zimra (Radbaz), *Responsa* Part 3, A 52 [93]):

> 'You have asked me and I will tell you my opinion about what I have seen written, if the Government says to a Jew: 'Let me cut off one limb, which will not kill you, or I will kill another Jew.'

How is this Jew to react, under Jewish law, to this cruel proposal? Further on in the question, the inquirer adds that there are some who say that the Jew must allow his limb to be cut off, since there is no danger of death involved, in order to save another Jew from death, according to the law of saving life that overrides every commandment of the Torah. In his responsum, after a detailed legal analysis, Rabbi David Ibn Zimra replies that even if it is clear that cutting off the limb will not put the victim in danger of his life, he is not liable to allow them to do this in order to save another, but it is *permissible* for him to allow it and that would be an act of piety.

The summary of his discussion is illuminating:

> 'And further, it is written: "Its ways are pleasant ways" (Proverbs 3, 17), and the laws of the Torah shall be consistent with reason and logic. How is it conceivable that a person should allow his eye to be blinded or his arm or leg to be cut off so that someone else is not put to death? Therefore, I do not any basis for this law other than as an act of piety, and fortunate is he who can stand up to this. But if there is a possibility of danger to his life, then he is a pious fool, for the possible danger to him takes precedence over the definite danger to another.'

The removal of a limb from one person in order to save another, even if there is no danger to the donor, cannot be an *obligation*, for this conflicts with the major principle that the ways of the Torah are pleasant ways, and 'the laws of the Torah shall be consistent with reason and logic'; by virtue of these, it is inconceivable that someone should be *obliged* to give an organ from his body to save another. But this behaviour does involve an act of piety, which a person ideally should do, as a volunteer and beyond the letter of the law (see also Rabbi David ben Shelomo Ibn Abi Zimra, *Responsa*, vol. 5, ('About the Language of Maimonides'), A 582 (218) [93] and the reconciliation of these two responsa. But this is not the place to elaborate).

This responsum of Rabbi David Ibn Zimra serves as a focal point in the deliberations of contemporary halachic authorities on donations of a kidney for a transplant to another person, both from the perspective of the danger to the donor, and whether a person may cause himself bodily harm and other questions of Jewish law, some of which we have considered elsewhere (*Attorney General v. A* [16], at pp. 677-679).

These remarks of Rabbi David Ibn Zimra have been considered extensively with regard to the problem of a person's consent to allow the removal of one of his organs in order to save the life of another who needs this organ to save his life (see *Attorney General v. A* [16]). It would appear that the principle determined by this leading authority of Jewish law with regard to the transplant of limbs is relevant to all the questions and problems that arise in the field of medicine and law, and with regard to the subject of this case. The major principle that guided the ruling of Rabbi David Ibn Zimra that 'its ways are pleasant ways and the laws of the Torah shall be consistent with reason and logic' must serve as a guideline in all rulings, on all matters, on the difficult and most serious cases of medicine and law, just as this principle is appropriate, and even essential, for the methods of making decisions in the

field of Jewish law generally (see Elon, *Jewish Law — History, Sources and Principles*, at pp. 323 *et seq.*; M. Elon, *Index of Responsa of Spanish and North African Rabbis – Index of Sources*, Magnes Press, vol. 1, 1981, at p. 25). This principle must be used with great care and after profound study, as one of the principles whereby every individual case is decided on its merits, with the required combination and with the proper balance.

A terminally ill patient

28. Now we reached this point, let us consider the problems that arise in this case. The first of these, and the most difficult and serious, concern the condition of a person that is defined as 'close to death', or in the currently accepted terminology: a terminally ill patient. There have always been major and serious moral problems when a person reaches the end of the course of his life in this world. Judaism has various laws, both with regard to medical treatment and with regard to laws between man and man and between man and G-d, concerning who is considered a dying person (*gosess*), close to death (*noteh lamut*), a mortally-injured person (*terefa*), the time when the soul leaves the body, etc.. Jewish law distinguishes between these different types of condition, and these distinctions are the subject of dispute, both with regard to the definition of each condition and with regard to the legal implications resulting from these conditions; but this is not the place to elaborate (see Dr A. Steinberg ed., *Encyclopaedia of Jewish Medical Ethics* (pre-publication copy), vol. 4, 'Close to death', pp. 2-5, 26-45, and under the heading 'Mercy killing', at pp. 11-13 [100]). With regard to this terminal condition, Jewish law discusses the basic problem about the importance of *temporary life* and even *momentary life*, as long as 'the candle flickers', which we discussed in part above. The same is true of other cultures, as we can see already in the Hippocratic oath, which states, *inter alia*: 'I will not give deadly poison to any person, even if he asks it of me; and I will not offer it to him', although not all cultures accept this approach (see G. J. Gruman, *Encyclopaedia of Bioethics*, at pp. 168-261; Dr A. Steinberg ed., *Encyclopaedia of Jewish Medical Ethics*, vol. 4, 'Close to death' (pre-publication copy), at pp. 5-6).

These problems, which involve universal ethical, medical and legal questions, have become increasingly difficult and more serious in recent years, and they give rise to much discussion and disagreement among doctors, lawyers, religious leaders and philosophers, and the general public. On the one hand, the huge progress in medical science and technological devices have led to longer average life expectancy, whether by preventing diseases and disease control, and whether by prolonging life by various artificial means; on the

other hand, extending the *length* of does not always mean also an improvement of the *quality* of life; sometimes it is possible that prolonging life leads merely to physical, emotional and mental suffering, and to severe disruption of day-to-day functioning. To this we must add the fact that today a patient in these circumstances stays in hospitals or other therapeutic institutions, when he is connected to various machines and relies on them, and not — as was the case in the past — that the patient close to death was at home, surrounded by his loving family, in the natural environment in he grew up and lived. The persons required to deal with the problems that arise are, first and foremost, the patient himself and his family, and in addition to these — doctors and lawyers, religious leaders and philosophers; the questions that arise are serious and important moral, religious and ethical questions; and the most important question of all is who among all these is authorized and competent to make the fateful decision about life expectancy, shortening it and refraining from prolonging it (Dr A. Steinberg ed., *Encyclopaedia of Jewish Medical Ethics* (pre-publication copy), vol. 4, 'Close to death' [100], at pp. 2-13, 70-72).

Euthanasia

29. One of the best-known concepts within the framework of the subject under discussion — since the middle of the nineteenth century — is known by the name of euthanasia, which means 'dying well' or 'dying easily'. The source of this word is the Greek word εὐθανασία (*euthanasia*), which is made up of two elements, εὖ (*eu* = 'well'), and θάνατος (*thanatos* = 'death'). This is sometimes called 'mercy killing', 'killing out of pity', or 'killing out of compassion', where each name hints at a particular attitude and approach to the issue. Euthanasia relates to children with severe physical and mental defects, very severe cases of mental illness where there is no hope of recovery, and mortally and terminally sick people. It includes two possibilities: first — active euthanasia — i.e., administering a drug or a treatment whose purpose and effect is to speed death, whether by the doctor himself — such as by injecting a poisonous substance into the patient — or by the patient with the help of the doctor, such as assisted suicide. The second possibility is *passive* euthanasia, which can be done in two ways: first, to *refrain* from doing acts that prolong life, such as not initially connecting someone to a life-support or breathing machine; and second, to *terminate* acts designed to prolong life, such as *disconnecting* someone from a life-support or breathing machine to which the patient is already connected. Obviously, *terminating* an act of prolonging life is more complex and problematic, for in this case *taking an action* causes the life not to be prolonged. There are many differences of

opinion about the various definitions of the kinds of treatments that should be continued or that can be refused or terminated — i.e., usual treatment as opposed to unusual treatment, and other distinctions (see with regard to all of the above: Dr A. Steinberg, *Encyclopaedia of Jewish Medical Ethics* (pre-publication copy), *supra*, vol. 4, 'Close to death' [100], at pp. 79-96; *ibid.*, the entry 'Mercy Killing', at p. 10).

Active euthanasia

30. It is clear and undisputed in Jewish law that active euthanasia is absolutely forbidden. By contrast, various opinions and approaches can be found, especially in recent times, regarding passive euthanasia, which is related in Jewish law to the concept of 'removing the prevention', which originates as far back as the twelfth century. The differences of opinion revolve around the two types of passive euthanasia: namely, *refraining* from prolonging life *ab initio* and *terminating a measure for prolonging life* after it has already been begun.

In our remarks hitherto, we have already discussed the principle in Jewish law that —

> 'The dying person is as a living person in all respects… one may not bind his jaws… one may not move him… one may not close the eyes of the dying person' (Tractate *Semachot*, 1 1-7 [141]; Babylonian Talmud, Tractate *Shabbat*, 151b [127]).

All these actions and others detailed in Jewish law (see Rabbi Yosef Karo, *Shulhan Aruch*, *Yoreh Deah* 339 1 [87], *Talmudic Encyclopaedia*, vol. 5, 'A dying person', at pp. 393 *et seq.* [142]) are forbidden because that may bring closer and hasten the death of the dying person:

> 'For Rabbi Meir used to say: it can be compared to a candle that is flickering. If a person touches it — he extinguishes it. Similarly, whoever closes the eyes of a dying person is regarded as if he is taking his life' (Tractate *Semachot*, 1 4 [141], Babylonian Talmud, Tractate *Shabbat*, *ibid.* [127]).

Hastening death *actively* is forbidden even when the patient is suffering:

> 'It is forbidden to cause him to die quickly, even though he is dying and the dying person and his relatives are suffering greatly' (Rabbi Avraham Danzig, *Hochmat Adam*, 151 14 [143]).
>
> 'Even though we see that he is suffering greatly as he nears death, and death would be good for him, nevertheless we are forbidden

> to do anything to speed his death' (Rabbi Yehiel Michel Epstein, *Aruch HaShulhan*, *Yoreh Deah*, 339 1 [144]; see also Dr Avraham S. Avraham, *Nishmat Avraham*, on Rabbi Yosef Karo, *Shulhan Aruch*, *Yoreh Deah*, 339, 4 [123], at pp. 245-246; and *infra*, para. 31).

Indeed, the *punishment* for which a person is liable differs in special cases, such as when a person is defined as incurably ill or injured, but actively causing death is forbidden and punishable (see Maimonides, *Mishneh Torah*, *Hilechot Rotzeah uShemirat HaNefesh* (Laws of Homicide and Preservation of Life), 2 7-8 [104]; *Talmudic Encyclopaedia* [142], *ibid.*); and this is how special acts were interpreted in the Bible (I Samuel 31, 4-5 [76]) and in the Talmud and other sources (see, for example, Babylonian Talmud, Tractate *Avoda Zara* ('Idol Worship'), 18a [131] and others; and see Dr A. Steinberg, *Encyclopaedia of Jewish Medical Ethics* (pre-publication copy) [100], vol. 4, 'Close to death', at pp. 15-18, 53-56; *ibid*., in the entry 'Mercy Killing', at pp. 10-19, which cites many unambiguous recent rulings with regard to the absolute prohibition of active euthanasia). *Active* euthanasia is forbidden even when the patient has given his consent. The value of life is absolute and it cannot be waived.

31. Furthermore, a living will, even when made by a person with legal capacity, in which he gives instructions to carry out *active* euthanasia with regard to himself when he reaches a certain situation, has no validity under Jewish law, and a doctor is forbidden to act according to it (*ibid*., [100] in the entry 'Close to death', at pp. 55-56; *ibid.*, in the entry 'Mercy Killing', at p. 23, n. 84 [100]; for passive euthanasia — see below). Similarly, the living will that is used and has validity in various countries, particularly in the United States (*ibid.*, at pp. 97-102 [100]), do not concern *active* but *passive* euthanasia, of the two kinds discussed above. Under Israeli law it is questionable whether a living will, even one relating merely to *passive* euthanasia, has any binding legal validity (see H. Cohn, 'The Legal Right to Refuse Medical Treatment', *The Freedom to Die with Dignity*, Hila Publishing, second edition, 1992, at pp. 9, 24. For a different view, see Justice M. Talgam in OM (TA) 759/92 *Tzadok v. Bet HaEla Ltd* [34], at p. 498).

'Removing the impediment' — passive euthanasia

32. In contrast to the absolute prohibition of carrying out *active* euthanasia, there are many different opinions in Jewish law about the right and duty to *prolong* the life of a patient and to *refrain* from doing so, which are the two forms of *passive* euthanasia. Under Jewish law, two basic principles

operate in this field: the first principle is the value and sanctity of life, and the supreme value of human life that cannot be measured or quantified, and the duty — both of the patient himself and of the doctor who is treating him — to preserve and continue this; the second principle is the supreme value of preventing the patient from enduring pain, suffering and anguish, whether physical or mental, which is also mandated under the principles and methods of Jewish law.

The discussion of this issue in Jewish law is referred to under the name of 'removing the impediment' — *i.e.*, removing the thing that is preventing the soul from leaving the body and the patient from dying. The discussion began in the remarks of Rabbi Yehuda ben Shemuel HeHassid (the Pious), who lived in Germany in the twelfth century, in his book, *Sefer Hassidim*, para. 723 [145]. The following is what he says:

> 'One may not cause a person not to die quickly; for example, if someone is dying, and there is someone near that house who is chopping wood and the person cannot die, the woodchopper should be removed from that place. And we do not put salt on his tongue to prevent his death, and if he is dying and he says that he cannot die until he is taken to a different place — he should not be moved from that place.'

And elsewhere he adds as follows (para. 234) [145]:

> 'A dying person should not be given food because he cannot swallow, but we put water in his mouth… and we should not shout at him when the soul is leaving the body, so that the soul does not return and he suffers great pain. "There is a time to die" (Ecclesiastes 3, 2); why was it necessary to say this? When a person is dying and his soul departs, we do not shout at him so that his soul returns, for he can only live for a few days, and during those days he will suffer. And why did Scripture not say "There is a time to live"? Because this is not dependent on man for there is no control over the day of death.'

These remarks of the author of *Sefer Hassidim* were discussed at length in the first half of the sixteenth century by Rabbi Yehoshua Boaz ben Shimon Baruch (a victim of the Spanish expulsion of 1492 who went to Italy) in his book *Shiltei Gibborim* on the commentary of Rabbi Yitzhak Alfasi on the Babylonian Talmud. He stated (*Shiltei Gibborim* on Rabbi Yitzhak Alfasi, Babylonian Talmud, Tractate *Moed Katan* 26b [146]):

'It follows that apparently one should forbid what several people have the practice of doing when a person is dying and the soul cannot depart, whereby they remove the pillow from under him so that he will die quickly, since they say that there are feathers of birds in the bed that prevent the soul from leaving the body. On several occasions I have protested against this bad practice but have been unsuccessful… and my teachers disagreed with me, and Rabbi Nathan of Igra, of blessed memory, wrote that it is permitted.

After a number of years I found support for my position in *Sefer Hassidim* para. 723, where it is written: 'and if he is dying and he says that he cannot die until he is taken to a different place — he should not be moved from that place'.

It is true that the words of the *Sefer Hassidim* require close examination. For at the beginning of the passage he wrote that if someone is dying and there is someone near that house who is chopping wood and the soul cannot depart —we remove the woodchopper from there, which implies the opposite of what he wrote afterwards.

But this can be explained by saying that to do something which will cause the dying person not to die quickly is forbidden, such as chopping wood there in order to prevent the soul from departing, or putting salt on his tongue so that he does not die quickly — all of this is forbidden, as can be seen from his remarks there, and in all such cases it is permitted to remove the impediment. But to do something that will cause him to die quickly and his soul to depart is forbidden, and therefore it is forbidden to move a dying person from his place and put him elsewhere so that his soul may depart. And therefore it is also forbidden to put the keys of the synagogue under the pillow of the dying man so that he dies quickly, for this too hastens the departure of his soul.

According to this, if there is something that prevents his soul *from departing, it is permitted to remove that impediment.* This does not present any problem, for a person does not thereby put his finger on the candle and performs no act. But to put something on a dying person or to carry him from one place to

> another so that his soul departs quickly would certainly appear to be forbidden, since thereby he is putting his finger on the candle.'

On the basis of what is stated in *Sefer Hassidim* and *Shiltei Gibborim*, Rabbi Moshe Isserles ruled in his glosses to Rabbi Yosef Karo's *Shulhan Aruch* (*Yoreh Deah,* 339, 1 [87]), as follows:

> 'And it is forbidden to cause the dying person to die quickly, for example, if someone who is dying for a long time but cannot depart, it is forbidden to remove the pillow and cushion from underneath him, according to the belief of those who say that the feathers of certain birds cause this, and similarly he should not be moved from where he is; and it is also prohibited to put the keys of the synagogue underneath his head so that he departs.
>
> But if there is something there which is impeding the departure of the soul, such as if there is a knocking noise near that house, like a woodchopper, or if there is salt on his tongue, and these are impeding the departure of the soul — it is permitted to remove it from there, for this does not involve any act at all, but he is *removing the impediment*.'

From the rulings cited, we can conclude that any *positive action* that hastens the death of the patient — such as disturbing the patient's body by moving him or removing the pillow from beneath his head and the like — is forbidden. By contrast, it is permitted to 'remove the impediment', i.e., to *refrain* from doing certain actions which prevent him from dying and delay the departure of the soul. In certain circumstances, where the pain and suffering of the patient should not be prolonged, not only is this *permitted* but it is even *forbidden* to take steps which would delay his natural death, as stated in Rabbi Yehuda ben Shemuel HeHassid's *Sefer Hassidim*, 234 [145], cited above: 'and we should not shout at him when the soul is leaving the body, so that the soul does not return and he suffers great pain' (and see Dr A. Steinberg, *Encyclopaedia of Jewish Medical Ethics* [100], vol. 4, 'Mercy Killing', at pp. 23-29).

Jewish law experts of subsequent generations differed on the interpretation of the statements cited above, but this is not the place to elaborate on this (see Rabbi Yehiel Michel Epstein, *Aruch HaShulhan*, *Yoreh Deah*, 339 4 [144]). One of the major difficulties in applying the aforesaid principles derives from the fact that the examples given in the aforementioned sources and in other sources essentially have the character of folk remedies and beliefs that were

common in those times. The task facing Jewish law experts in our time was therefore to translate and convert these examples to the procedures adopted and accepted by modern medicine, which in itself has led to widely-spread differences of opinion.

For example, Rabbi Hayim David HaLevy, the Chief Rabbi of Tel-Aviv-Jaffa, discusses the sources cited above, and towards the end of his remarks he says (Rabbi Hayim David HaLevy, 'Disconnecting a Patient who has No Hope of Surviving from an Artificial Respirator', in *Tehumin*, vol. 2, 1981, at p. 297 [147]):

> 'Clearly we did not write all of the aforesaid in order to ascertain the law on feathers in a pillow or a grain of salt, but the law of the grain of salt that may be removed from the tongue of a dying man provides the perfect analogy to the artificial respirator. For the permission to remove the grain of salt is agreed and obvious in the opinion of all the arbiters of Jewish law, without any dissenter, and the main reason is explained as because this is merely *removing the impediment*. It has also already been explained that this grain of salt was placed on the tongue of the patient apparently in order to prolong his life, in the hope of finding a cure for his illness (see the commentary *Bet Lehem Yehuda* on Rabbi Yosef Karo, *Shulhan Aruch*). But when we see that he is dying, and the grain of salt is prolonging his pain in dying, it is permissible to remove it. Now we can see that the respirator is very similar, for the patient, when brought to the hospital in critical condition, is immediately connected to the artificial respirator, and he is kept alive artificially in an attempt to treat and cure him. When the doctors realize that there is no cure for his injury, it is obvious that it is permissible to disconnect the patient from the machine to which he was connected.
>
> This is all the more so permitted, because all the patients considered in Jewish law literature are still breathing on their own, and notwithstanding this when it is seen that their souls wish to depart, but the grain of salt is preventing this, it is permitted to remove it and to allow them to die. This is even more the case today, when the patient who is connected to the artificial respirator cannot breathe at all on his own and his whole life is preserved merely by virtue of that machine… since patients who

> are connected to an artificial respirator are unconscious and in a vegetative state.
>
> Moreover it appears to me that even if the doctors want to continue to keep them alive with the help of an artificial respirator, they are not allowed to do this. For has it not already been explained that it is forbidden to prolong the life of a dying person by artificial means, such as putting a grain of salt on his tongue or chopping wood, when there is no more hope that he will live. Admittedly, Jewish law literature speaks of a dying person who is breathing on his own, and therefore his pain is also great, whereas this is not the situation in the case under discussion, since he does not feel any pain or anguish. Nevertheless, it is my opinion that not only is it permitted to disconnect him from the artificial respirator, but there is even an obligation to do so, for the soul of the man, which is the property of the Holy One, blessed be He, has already been taken by Him from that man, since immediately when the machine is removed, he will die. On the contrary, by the artificial respiration we are keeping his soul in the body and causing it (the soul, not the dying person), anguish in that it cannot depart and return to its rest.
>
> Therefore it seems to me that when you have reached a clear decision that leaves no room for any doubt whatsoever that this person has no further chance of being cured, it is permitted to disconnect him from the artificial respirator and you may do this without any pangs of conscience.
>
> And may G-d, the Healer of all creatures, stand at your side and help you to bring a cure and healing to all those who need it.'

In a similar vein, see the responsum of Rabbi Eliezer Waldenberg, a recent leading arbiter in the field of Jewish medical law (Rabbi Eliezer Yehuda ben Yaakov Gedalia Waldenberg, *Responsa Tzitz Eliezer*, vol. 13, 89 [148]).

33. What is the definition of a 'dying person' for whom it is permissible 'to remove the impediment'? There are those who restrict the term 'dying person' in Jewish law to a defined period to such an extent that they are referring to a period when a person is expected to live no more than seventy-two hours (see Rabbi David J. Bleich, 'Judaism and Healing' in *Halachic Perspectives* [149], 1981, at p. 141). According to Rabbi Bleich the distinction between active speeding of death, which is forbidden, and a passive

act, 'removing the impediment', applies only in a situation where the patient is a 'dying person', i.e., at most for a period of seventy-two hours before his death (*ibid.* [149], at p. 140). This is a minority opinion. By contrast, there are others who extend the principle of 'removing the impediment' and apply it not only to a 'dying person' but also to any 'patient with regard to whom the doctors have given up hope and who is certainly going to die'. This approach is found, for example, in the remarks of the late Rabbi Ovadia Hadaya, who served as a member of the Great Rabbinical Court in Israel. His remarks are illuminating and the main points should be studied (Rabbi Ovadia Hadaya, *Responsa Yaskil Avdi,* on Rabbi Yosef Karo, *Shulhan Aruch*, *Yoreh Deah* 40 [150]). First he states the opinion of the questioner who approached him:

> 'Your honour writes that one should distinguish between a case where one does a positive act, such as the one which Rabbi Moshe Isserles described in *Yoreh Deah*, 339 1, of removing the pillow from beneath him, etc.; putting the keys of the synagogue under his head, etc.; but if one removes the impediment that hinders the departure of the soul — this is allowed. From this you wish to deduce that in our case he is not doing a positive act but is merely sitting passively, and it is permitted to prevent…. You also wrote that one should distinguish between a patient whose soul is already about to depart and a "dying person", since most "dying persons" do die; this is not the case here, where he is not a "dying person" nor is he at the time when the soul is departing, and it is possible that even removing the impediment to speed up his death is forbidden, and he should be given the insulin, as long as he is not a "dying person".'

At the beginning of his remarks, the questioner distinguishes between active euthanasia, which is forbidden, and 'removing the impediment', *i.e.*, passive euthanasia, which is allowed. The case concerns an injection of insulin, where not giving the injection, which will cause the death of the patient, falls into the category of 'removing the impediment'. But at the end of his remarks the questioner comes to the conclusion that since the patient under discussion was not in a condition defined as a 'dying person' nor at the time that the soul is departing, it is forbidden to hasten his death even by 'removing the impediment'.

In his response, Rabbi Hadaya disagreed with the second part of the questioner's remarks:

> 'I did not fully understand your last words. If we are dealing with a patient for whom the doctors have no hope and who will surely die, and he is suffering terrible pain, how can a state such as this not be considered similar to a "dying person"? If for a "dying person" who is like a living person in all respects we allow the removal of the impediment, then this is certainly so in this case, where all the doctors say that he will certainly die, which is worse than a "dying person" — how can we not permit for him the removal of the impediment? Even though we accepted the principle that "One should never despair of Divine mercy", removing the impediment was permitted for a "dying person" even though he is like a healthy person for all purposes, and we do not forbid it for the reason that "one should never despair of Divine mercy".
>
> The matter is simple. The statement that "One should never despair of Divine mercy" refers to praying for mercy only, for a person should continue to pray for the patient, even to the last moment — perhaps a miracle will occur and his prayer will be accepted. But a person must use his eyes, and if indeed we see that there is no hope that he will live, and we see that he is suffering greatly, we certainly should not rely on a miracle and cause him additional suffering by various medical treatments, for such a person is *actively causing him to suffer*. It is better to do nothing, not to cause him suffering actively by medical treatment, and to have faith in the mercy of G-d who revives the dead. But to rely on a miracle *actively to cause him suffering* — no-one has ever said such a thing!'

Therefore if a patient is terminally ill, and he is in a condition from which he will certainly die in the end and he is suffering terrible pain, it is permissible to refrain from giving him an insulin injection for we should not add to his suffering by administering medications, and a person who does this is 'actively causing him to suffer', i.e., he is actively causing him suffering which is forbidden in this special situation.

These remarks and the 'analogy' are illuminating. Just as it is prohibited to bring forward natural death by administering a treatment *that actively hastens death, with one's own hands*, so too is it forbidden to give medical treatment to a terminally ill patient who will certainly die in the end, when the treatment

causes him pain and suffering, and it involves *actively causing him pain and suffering, causing pain with one's own hands*.

Rabbi Shelomo Zalman Auerbach ruled as follows (Rabbi Shelomo Zalman Auerbach, *Responsa Minhat Shelomo*, 91, *anaf* 24 [151]):

> 'Many ponder over this question of treating a patient who is a "dying person".
>
> There are some who think that just as we desecrate the Sabbath for temporary life, so too are we obliged to compel the patient to do so, for he is not the owner of himself such that he may forgo even one moment.
>
> But it is logical that if the patient is suffering great pain and torment or very acute emotional distress, I think that he must be given food and oxygen, even against his will, but it is permitted to refrain from medical treatments that cause the patient suffering if the patient so requests.'

34. This was also the ruling of Rabbi Moshe Feinstein, a leading author of responsa in recent times, and we will quote three of his responsa.

In one responsum (Rabbi Moshe Feinstein, *Responsa Igrot Moshe*, *Yoreh Deah*, Part 2, 174 [152]), various issues were considered with regard to heart transplants. *Inter alia*, the following problem was discussed (*ibid*., *anaf* 3):

> 'With regard to something done by doctors, to keep alive someone from whom they wish to take an organ, so that he remains alive even though he would not otherwise be kept alive, by artificial means until the organ is ready to be transplanted to the patient.'

The question is, therefore, whether it is permitted to prolong the life of the patient donating the organ — although naturally he is no longer capable of living and prolonging his life is done artificially for a short time only — so that the organ may be transplanted, at the right time, into the body of the person who will receive it. Rabbi Feinstein answered this as follows:

> 'It seems to me that, since this does not cure him but merely prolongs his life by a short time, if the temporary life that he will live as a result of the means employed by the doctors involve suffering — it is forbidden. For it is clear that this is the reason that it is permitted to remove something that impedes the departure of the soul… because of suffering.

> … and since it is forbidden to do this for himself, it is surely forbidden to do this for the life of someone else.
>
> And with regard to doctors who say that he does not feel pain any more, they should not be believed, because it is possible that they have no way of knowing this. For it can be understood that impeding the departure of the soul involves suffering even though it is not apparent to us.
>
> And even if it is true that he will not suffer, then it is forbidden to stop treating the person from whom it is desired to take the organ, since this will prolong his life even for only an hour, and therefore it is clear that it is forbidden to do this.'

If prolonging the temporary life of someone who has no natural chance of living involves suffering, this prolonging of life is forbidden, for this is the idea underlying the principle of 'removing the impediment', which refers to someone whose life is being prolonged by a certain cause that prevents the departure of the soul, in which case it is permitted to remove it.

In this matter, Rabbi Feinstein dealt with a situation where the sole purpose for prolonging life was the benefit of another, who is to have the heart of the patient whose life is being prolonged transplanted into him, and not for the benefit of the patient himself. In the following responsum, Rabbi Feinstein reached the same conclusion even where life is being artificially prolonged for the patient himself and not for the sake of someone else.

In this responsum (Rabbi Moshe Feinstein, *Responsa Igrot Moshe*, *Hoshen Mishpat* Part II, 73 *Anaf* 1 [153]), Rabbi Moshe Feinstein was asked by two doctors 'whether there are any patients who should not be given medical treatment to prolong their lives a little longer'.

First, Rabbi Feinstein discussed the sources in the Talmud and commentaries from which it appears that there may be 'occasions when one should pray for a patient to die, such as when a patient is suffering greatly from his illness, and it is impossible for him to recover'.

Then he elaborated on this as follows:

> 'With regard to such persons, where the doctors know that he cannot be cured and live, and he cannot continue to live in his condition of illness but without pain, *but it is possible to give him medicine to prolong his life as it is now, with suffering — he should not be given any kinds of medicine; such persons should be left as they are.*

> But to give them medication that will cause death, or to perform any act that will shorten life even by one moment, is considered shedding blood.
>
> They should rather do nothing.
>
> But if there are medications that will *ease the pain* and not shorten his life by even a moment, these must be given, when he is not yet a "dying person".
>
> A dangerously ill patient who cannot breathe *must be given oxygen* even if he is in a condition that cannot be cured, for this *alleviates his pain*, for the pain of being unable to breathe is great pain, and oxygen alleviates it. But since it will not be clear if he dies, he should be given oxygen in small doses, each time for one or two hours, and when the oxygen runs out, they should ascertain whether he is still alive. They should give him more oxygen for an hour or two, continuously, until they see after the oxygen runs out that he is dead.
>
> In this way there will be no stumbling-block or suspicion of causing death or medical negligence, even for the briefest of moments.'

Administering medications that *shorten* the patient's life 'even by one moment', i.e., *active* euthanasia, is tantamount to spilling blood and is forbidden. However, a terminally ill patient who cannot be cured should not have his life prolonged by medication or other treatment if this extended life would be accompanied by pain which he is currently suffering. But oxygen should be given to this patient, since this alleviates his suffering.

With regard to this responsum, which was referred to Rabbi Moshe Feinstein by two doctors, we see in another responsum (*ibid*., 74 *anaf* 1 [153]) that he was asked to give —

> 'a further clarification of the responsum that I wrote to Dr Ringel and Dr Jakobovits (printed above, number 73). In reality, I do not see the need for further explanation of this, for I do not understand where your honour sees any room for error. The ruling that I gave is clear and simple, that if the doctors do not know of any medication that will either cure the patient or merely alleviate his suffering, but can only prolong his life a little as it is with the pain, such medication should not be administered.'

He then adds the following guidelines and general principles:

> 'But it is clear that if the medical treatment will help until they can find a more expert doctor than those treating the patient, and it is possible that by prolonging his life they will find a doctor who may know a treatment that will cure him — this medication should be given even if it does not alleviate his suffering but prolongs his life as it is with the suffering until they can bring that doctor.
>
> There is no need to consult the patient about this, and even if the patient refuses, one should not listen to him. But one should try to persuade the patient to agree, because bringing a doctor against his will also involves a danger. But if he absolutely refuses to allow a physician to be brought, one should not listen to him.'

Moreover —

> 'It is clear that if even the most expert doctors do not know how to cure this disease that the patient has, they should not administer medications that can neither cure, nor alleviate the suffering, and the patient should not be strengthened in order for him to suffer. Only if the patient can be alleviated by what the doctor gives him, he should given it to him…
>
> But one should not rely, even on a large number of doctors, who say that there is nothing in the world that will cure him, but one should bring all the doctors that one can, even doctors who are less expert than those treating the patient, for sometimes less expert doctors may focus on the problem more than the greater experts.
>
> For even in other matters, we find that sometimes the greater the expertise, the greater the mistakes (Babylonian Talmud, Tractate *Bava Metzia*, 96b). A simple matter may escape a greater expert, whereas a lesser expert may focus on the correct law. This is even more relevant in medical matters. It is particularly the case among doctors when it is not always so clear who is the greatest expert, and also a person may not be able to be cured by every doctor.'

At this point, Rabbi Feinstein leaves the question of choosing doctors and how many to consult, and he proceeds to discuss the implications of his previous responsum with regard to cases where it is permitted to refrain from prolonging life because of 'quality of life':

> 'Afterwards, I became aware that your honour meant that since in this law we assess the "quality of life", and allow the doctors to do nothing and not to treat a patient, one might fear… that they adopt this as a source to make further distinctions with regard to "quality of life", i.e., that one need not treat someone who — G-d forbid — is an imbecile, or who — G-d forbid — was in an accident and has become comatose, and similar cases.
>
> I really do not see any room to misconstrue my words and think that there is no obligation to cure an imbecile who becomes ill, or someone who is not entirely of sound mind whom wicked people call a *vegetable*, such that one should not treat them when they have any illness that does not cause them pain, and the treatment is to make them heal, so that they can live a long time.
>
> It is certainly obvious and clear and well-known to every learned Jew and G-d-fearing person that we are obliged to treat and save, in so far as possible, *every person, without regard to his intelligence or understanding*.'

(See further on this issue the article of Rabbi Zvi Schechter, 'To Him he turns in his anguish', *Bet Yitzhak*, New York, 1986 [154], at pp. 104 *et seq.*).

In balancing the supreme value of *the sanctity of life* and the duty to give and receive medical treatment, on the one hand, and the principle of *the quality of life*, which allows or obliges us to refrain from prolonging life and the right of the patient to refuse medical treatment on the other hand, the principle of *the quality of life does not* include in any way the fact that the patient is mentally deficient, such as an imbecile or retarded person, or physically disabled, such as a paralyzed or comatose person. Indeed, this situation of a mental or physical defect is indeed a difficult issue, but it is not taken into account when balancing the aforementioned considerations. In Jewish law, the balance is between *the sanctity of life*, on the one hand, and the patient's *pain and suffering* on the other hand, for every person irrespective of who or what he is.

35. As we have seen, some Jewish law authorities hold that it is *permitted* to refrain from prolonging a patient's life in cases of pain or very acute mental distress, but there is no *prohibition* against prolonging it; and there are some who even think that *it is a duty* to prolong the life in certain cases, as long as the patient is defined as living (see Dr A. Steinberg, *Encyclopaedia of Jewish*

Medical Ethics, vol. 4 (pre-publication copy) [100], 'Close to death', at pp. 56-58).

In the aforementioned responsum of Rabbi Hadaya, it was stated that one should refrain from administering the insulin in the case of a terminally-ill patient who is suffering pain; by contrast, as stated in the responsa of Rabbi Moshe Feinstein and Rabbi Shelomo Zalman Auerbach, one should continue to give oxygen in order to facilitate the patient's breathing and alleviate his pain. This subject, with all its implications and aspects, has been considered in many other responsa, but this is not the place to elaborate; the following summary by Dr Steinberg will suffice:

> 'According to the approach of those who hold that in certain cases it is permitted to refrain from prolonging life, or even that there is a prohibition against doing this — several limitations and conditions have been established as follows:
>
> In principle, it is obligatory to continue all the treatments that fulfil all natural requirements of the patient, such as food, drink and oxygen, or treatments that are effective against complications that every other patient would receive, such as antibiotics for pneumonia, or blood in severe cases of bleeding. This must be done even against the patient's wishes. By contrast, there is no obligation to administer treatment for the underlying disease or severe complications that will clearly cause the death of the patient if such treatment can only prolong his life somewhat, but there is no possibility that they will bring about a recovery or a cure, and this is certainly the case if the treatments will increase the pain and suffering, and this is certainly the case if the patient does not consent to them. These definitions include resuscitation, artificial respiration, surgery, dialysis, chemotherapy, radiation, etc.' (Dr A. Steinberg, *Encyclopaedia* of *Jewish Medical Ethics* [100], 'Close to death', at pp. 57-58, and see, *ibid.*, at pp. 58-64, for full details of the types of medical treatments and medicines, the stages of the terminal illness, and consideration for the wishes of the patient in his pain and suffering).

36. There is another distinction in Jewish law that may help determine what medical treatment falls into the category of 'removing the impediment'. Rabbi Shelomo Zalman Auerbach, one of the leading authorities of our generation, distinguishes between an ordinary medical procedure and one that is extraordinary. The following are his remarks (quoted in Dr Avraham S.

Avraham, *Nishmat Avraham*, on Rabbi Yosef Karo, *Shulhan Aruch*, *Yoreh Deah* 339, 4 [123], at p. 245):

> 'We must distinguish between treatments that fulfil the patient's natural needs, or which are accepted as ordinary, and treatments which are extraordinary. Thus, for example, if a patient is suffering from cancer that has spread throughout his body and he is near death, even though he has terrible paid and suffering, we may not stop or prevent him from receiving oxygen, or any food, or other nutritious liquid that he needs. If he is suffering from diabetes, one should not stop administering insulin so that he dies more quickly. One should not stop blood transfusions or any other medication, such as antibiotics, required for his treatment… However, there is no duty to treat such a patient if the treatment itself will cause additional suffering when the treatment is not ordinary, and all that can be expected is that his life is prolonged to some degree, without curing the underlying disease, especially if the patient does not consent due to the extreme pain or great suffering…
>
> Similarly, with regard to a patient whose condition is hopeless, and who has stopped breathing or whose heart has stopped beating, there is no obligation to try to resuscitate him or to prolong his temporary life, if this will increase his suffering.'

A patient who is not competent to express his wishes

37. It should be noted that in Jewish law, there is no special extensive consideration of euthanasia in a case of a patient who is not competent to express his opinion and wishes (see *infra*, para. 61(b)(4)), a subject that has been discussed most extensively in other legal systems. The reason for this is clear and simple. In other legal systems, *the premise* is the individual autonomy of the patient, i.e., the patient's wishes; and the cases where one does not take account of the patient's wishes, i.e., the cases which involve 'compelling State interests', as they are called in the law of the United States, are the exceptions to the rule (we will discuss these below). For this reason, there is a need for particular consideration of how and in what way we can establish the wishes of the patient in a case that he is incompetent, who can express his wishes, etc.. By contrast, the principles that govern the issue in Jewish law are mainly the objective supreme principles of the sanctity of life, the pain and suffering of the patient, the distinction between active and passive euthanasia, the consent or refusal of the particular patient, etc., and these must

be decided according to the methods of reaching decisions in Jewish law, according to the criteria of 'Its ways are pleasant ways', and 'deciding according to reason and logic', a task that is imposed, first and foremost, on the Jewish law authority, the doctor and the other parties that we have discussed (see Rabbi Moshe Feinstein's responsum [120], dealing with the quality of life of a comatose patient, *supra*).

The values of a Jewish State — summary

38. In Judaism, there are quite a few supreme values and basic principles operating in the important, difficult and complex field of medical law: the sanctity of human life, based on the fundamental principle of the creation of man in the image of G-d; the cardinal rule of 'And you shall love your fellow-man as yourself'; alleviating pain and suffering; the duty of the doctor to administer medical treatment and of the patient to receive it, and the right of the patient to refuse medical treatment; the case-law rule of 'its ways are pleasant ways' and 'the laws of the Torah shall be consistent with reason and logic'; and additional rules, such as these, that we have discussed above.

The premise in this important, difficult and complex field of medical law is the supreme value of the sanctity of life. This supreme value is, as stated, based on the supreme principle that man was created in G-d's image, with all that this implies. Therefore, a standard for the *worth* of a person does not exist, nor can it exist; if the law for someone who is physically disabled is the same as for someone in full health, and the law for someone who is mentally defective is the same as the law for someone who is of sound mind, and the degree and extent of physical and mental health are not considered. Similarly, a standard for the *length* of a person's life does not exist, nor can it exist; a moment of life is treated the same as a long life, and even when the candle flickers it still burns and gives light. Therefore, *actively* hastening death, shortening human life actively — even if it is called 'mercy killing' — is absolutely forbidden, even if it is done at the request of the patient. The important obligation is — in such cases — to alleviate the pain and suffering of the patient in every possible way.

The situation is different with regard to *passive* euthanasia — not prolonging life — which in Jewish law is called 'removing the impediment'. Passive euthanasia is permitted and, according to some authorities — even obligatory, when taking into account the supreme value of alleviating pain and suffering, both physical and mental, the wishes of the patient, the severe consequences of forcing treatment on the patient against his will, and the

various types of treatment — ordinary or extraordinary, natural or artificial, etc..

The same is the case with regard to the patient's consent to medical treatment. In principle, medical treatment is an obligation both for the doctor and for the patient, and this obligation exists first and foremost when the medical treatment is required to save someone from mortal danger. Except for these special cases of saving someone from immediate mortal danger, provisos have been made to the principle in various cases, where the consent of the patient is required and medical treatment should not be administered against his wishes. These cases have become more numerous in our generation. The autonomy of the individual exists in Jewish law, in many different cases that we have discussed, where the consent of the patient is required for medical treatment and where he has the right to refuse to receive medical treatment. As we have seen, this concept developed to a large extent in Jewish law through the rulings of Jewish law authorities, as a result of the tremendous advances that have occurred in recent times in the means available to the medical profession and the way in which Jewish law authorities have confronted these. It frequently occurs therefore that it is not the doctor's opinion that determines the issue of the patient's suffering but the opinion of the patient being treated, whom it is forbidden to 'cause pain actively', and great importance is attached to the effect that treatment administered without the patient's consent has on him: 'the fact that we compel him endangers him'. This is the path of Jewish law, which develops and is creative in the course of adjudicating cases.

In all these questions and similar ones, we are witness to an ever-increasing number of Jewish law rulings, since there is a not insignificant number of disagreements in Jewish law on these difficult and terrible questions of the relationship of the sanctity of life and alleviating pain and suffering, both physical and mental, with all of their ramifications and variations, as is the normal and accepted practice in Jewish law.

The values of a democratic State with regard to this case

39. Now that we have reached this point, and we have considered the values of a Jewish State on the case before us, we must consider and study the details of this issue according to the values of a democratic State. For this purpose, we will examine the position in two countries included among western democracies; one — the United States on the American continent, and the other — Holland in continental Europe.

The United States

a. The right to refuse medical treatment

40. The legal system of the United States recognizes the right of the patient to refuse medical treatment, with limitations that we will discuss below. The legal recognition of this right has undergone several stages. In the case of Karen Quinlan (*Matter of Quinlan* (1976) [40]) the right of privacy was considered as the legal source for the right of the patient to refuse medical treatment.

Karen Quinlan was 21 years old when she stopped breathing for a significant period of time. Because of a lack of oxygen, Karen suffered severe brain damage, and she entered a 'persistent vegetative state'. A year passed after the incident, when Karen was still in a vegetative state, connected to an artificial respirator and fed by a tube. Karen's father, after consulting his priest, applied to have Karen disconnected from the artificial respirator. The Supreme Court of New Jersey granted the application, stating:

> 'We have no hesitancy in deciding… that no external compelling interest of the State could compel Karen to endure the unendurable, only to vegetate a few measurable months with no realistic possibility of returning to any semblance of cognitive or sapient life' (*ibid*., at p. 663).

As stated, the court saw the right of privacy as the legal source for Karen having this right:

> 'Although the Constitution does not explicitly mention a right of privacy, Supreme Court decisions have recognized that a right of personal privacy exists and that certain areas of privacy are guaranteed under the Constitution. *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029, 31 L.Ed. 2d 349 (1972); *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed. 2d 542 (1969). The Court has interdicted judicial instruction into many aspects of personal decision, sometimes basing this restraint upon the conception of a limitation of judicial interest and responsibility, such as with regard to contraception and its relationship to family life and decision. *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L.Ed. 2d 510 (1965).
>
> The Court in *Griswold* found the unwritten constitutional right of privacy to exist in the penumbra of specific guarantees of the Bill of Rights "formed by emanations from those guarantees that help give them life and substance". 381 U.S. at 484, 85 S.Ct. at 1681,

> 14 L.Ed. 2d at 514. Presumably, this right is broad enough to encompass a patient's decision to decline medical treatment under certain circumstances, in much the same way as it is broad enough to encompass a woman's decision to terminate pregnancy under certain conditions. *Roe v. Wade*, 410 U.S. 113, 153, 93 S. Ct. 705, 727, 35 L.Ed. 147, 177 (1973)' (*ibid.*).

The right of privacy does not appear expressly in the Constitution of the United States, and therefore the courts sought an additional legal source for the right of the patient to refuse medical treatment. In *Superintendent of Belchertown State School v. Saikewicz* (1977) (hereafter — the *Saikewicz* case [41]), the Supreme Court of the State of Massachusetts based the right of the patient to refuse medical treatment both on the right of privacy and on the common-law doctrine of informed consent. The following had already been said by Justice Cardozo in *Schloendorff v. Society of New York Hospital* (1914) [42], at p. 93:

> 'Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages.'

As stated, in the *Saikewicz* case [41], this doctrine, together with the right of privacy, was used as the legal basis whereby the court allowed the chemotherapy treatments to be terminated for a 67-year-old leukaemia patient who suffered from mental retardation.

By contrast, in the *Matter of Storar* (1981) [43], the New York Court of Appeals refused to base the right to refuse medical treatment on the right of privacy, but satisfied itself by relying on the doctrine of informed consent. This happened also in the case *Matter of Eichner* [43] (considered together with *Matter of Storar* [43]), where the court approved disconnecting an elderly man from an artificial respirator, after he had a heart attack in the course of a hernia operation and entered a vegetative state.

In 1985, when the same court that decided the case of Karen Quinlan was once again required to consider the same issue in the *Matter of Conroy* (1985) (hereafter — the *Conroy* case [44]), it held that the main legal source for the right to refuse medical treatment was the doctrine of informed consent, although the right to privacy *might* also be relevant to the matter:

> 'While this right of privacy *might* apply in a case such as this, we need not decide that issue since the right to decline medical

> treatment is, in any event, embraced within the common-law right to self-determination' (*ibid.*, at p. 1223; emphasis added).

Similarly, in the case *In re Estate of Longeway* (1989) [45] the Supreme Court of the State of Illinois preferred to base the right to refuse medical treatment on the doctrine of informed consent rather than on the right of privacy:

> 'Lacking guidance from the Supreme Court, we decline to address whether Federal privacy guarantees the right to refuse life-sustaining medical treatment… In the present case, we find a right to refuse life-sustaining medical treatment in our State's common law and in provisions of the Illinois Probate Act' *(ibid.*, at p. 297).

The turning point with regard to the legal basis for the right to refuse medical treatment occurred when, for the first time, the issue reached the United States Supreme Court in *Cruzan v. Director Missouri Department of Health* (1990) [46]. Nancy Cruzan was 30 years old when she was lost consciousness as a result of a car accident and became comatose. Her respiration and heartbeat continued independently but her mental functioning was severely damaged. The doctors estimated that Nancy could continue living for 30 years; but when it became clear to her parents that there was no hope of her regaining consciousness, they applied to disconnect her from the means of artificial nutrition that fed her. When the case reached the United States Supreme Court, Nancy had been in a comatose state for a period of seven years.

The Supreme Court discussed the fact that the State courts had derived the right to refuse medical treatment from the doctrine of informed consent or the right to privacy or both of them together (*ibid.*, at p. 2847); but the Supreme Court chose to base the right on the 14th Amendment of the American Constitution, which states:

> 'Nor shall any State deprive any person of life, *liberty,* or property, without due process of law' (emphasis added).

Thus, the right to refuse medical treatment was accorded express constitutional protection.

b. *Restrictions on the right to refuse medical treatment*

41. The right to refuse medical treatment is not absolute. The United States Supreme Court said in *Jacobson v. Massachusetts* (1905) [47], at p. 26:

> '… the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis, organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy.'

Similarly, in the *Cruzan* case [46], at pp. 2851-2852, while recognizing the right to refuse medical treatment, the Supreme Court made it clear that the right is a relative one:

> 'But determining that a person has a "liberty interest" under the Due Process Clause does not end the inquiry; whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant State interests.'

The relative nature of the right to refuse medical treatment is expressed by the fact that it may yield to four interests called 'compelling State interests'. These are: the preservation of human life, the prevention of suicide, the maintenance of the ethical integrity of the medical profession and the protection of innocent third parties who are dependent on the patient.

Before we consider, in brief, the nature of these interests, I would say the following. The use of the expression 'compelling *State interests*' is somewhat grating on the ears. It is appropriate to refer in this context to what we said, in a different matter, on the phenomenon that was accepted in the ancient Orient of enslaving a debtor to the creditor for failure to pay a debt. Under Jewish law, this enslavement was absolutely forbidden, by virtue of the principle of the freedom of man who was created in G-d's image, and even entering the house of the debtor to collect the debt was forbidden. By contrast, as stated, the laws of the ancient Orient allowed such enslavement, but there was an exception to this:

> 'It is interesting to discover from the Greek author Diodorus about the order of the Egyptian king Bocchoris at the end of the eighth century B.C.E. that put an end to enslavement for debt. The reason given by Diodorus for this is "enlightening": as distinct from a person's property that is designated for payment

> of his debts, "the *bodies* of citizens *necessarily belong to the State*, so that the State may derive benefit from the services which its citizens owe it, both in wartime and peacetime" (see in detail, *The Liberty of the Individual*, at p. 7, and the notes, *ibid*.)' (*PeRaH* 1992 *Society v. Minister of* Justice [10], at p. 735).

This reasoning for the abrogation of the right of the creditor to enslave the body of the debtor — *viz.*, that his body belongs to the State — is grating on the ears. Some of this grating is present in the expression '*State Interests*' for the preservation of human life, and the like.

42. *The interest in the preservation of human life* has been recognized as the most important of the interests justifying the restriction of the patient's right to refuse medical treatment. The following was said of this interest in the *Cruzan* case [46], at p. 2843:

> 'We think a State may properly decline to make judgments about the "quality" of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual.'

And in the *Saikewicz* case [41], at p. 425, the court said:

> 'It is clear that the most significant of the asserted State interests is that of the preservation of human life.'

See also *Foody v. Manchester Memorial Hosp.* (1984) [48], at p. 718; *Matter of Spring* (1980) [49], at p. 123; *Conroy* [44], at p. 1223.

When attempting to balance the interest in the preservation of human life and the right of a person to refuse medical treatment, the court will weigh the *degree of bodily invasion* of the patient that is required for the medical treatment, and *the likelihood that the treatment will succeed*. The greater the bodily invasion of the patient and the smaller the chance of the treatment succeeding, the less the court will be inclined to force the treatment on the patient, and *vice versa*. As the court said in the case of Karen Quinlan:

> 'The nature of Karen's care and the realistic chances of her recovery are quite unlike those of the patients discussed in many of the cases where treatments were ordered. In many of those cases the medical procedure required (usually a transfusion) constituted a minimal bodily invasion and the chances of recovery and return to functioning life were very good. We think that the State's interest *Contra* weakens and the individual's right to

> privacy grows as the degree of bodily invasion increases and the prognosis dims. Ultimately there comes a point at which the individual's rights overcome the State interest' (the *Quinlan* case [40], at p. 664).

The court will also consider the *pain and suffering* caused to the patient as a result of the medical treatment and the *risk* involved in the medical treatment. That was applied in the *Saikewicz* case [41] which concerned the administration of chemotherapy treatments to a retarded 67-year-old leukaemia patient. The court discussed the suffering that would be caused to the patient as a result of the treatment and the patient's inability to understand the reason for this suffering:

> 'These factors in addition to *the inability of the ward to understand* the treatment and *the fear and pain he would suffer* as a result outweighed any benefit from such treatment, namely, the possibility of some uncertain but limited *extension* of life' (the *Saikewicz* case [41], at p. 419; emphasis added).

The court also noted that the chemotherapy treatment was also likely to affect healthy cells and expose the patient to various infections, that the treatment is effective only in 30-50% of cases, and that it can stop the spread of the disease for a period of two to thirteen months on average only. Therefore, the court concluded that the chemotherapy treatment should not be forced on the patient.

> 'It is clear that the most significant of the asserted State interests is that of the preservation of human life. Recognition of such an interest, however, does not necessarily resolve the problem where the affliction or disease clearly indicates that life will soon, and inevitably, be extinguished. The interest of the State in prolonging a life must be reconciled with the interest of an individual to reject the traumatic costs of the prolongation. There is a substantial distinction in the State's insistence that human life be saved where the affliction is curable, as opposed to the State interest where, as here, the issue is not whether but when, for how long, and at what cost to the individual that life may be briefly extended' (*ibid.*, at pp. 425-426).

Similarly, it was held that a 77-year-old diabetes patient should not be compelled to amputate her right leg despite the fact that it became gangrenous (*Lane v. Candura* (1978) [50]).

By contrast, the same factors have led courts, in the appropriate circumstances, to compel a patient to accept medical treatment against his will. Thus, in *Jacobson* [47], the court held that a person may be compelled to be vaccinated against a contagious disease. In another case, it was held that a woman, who belonged to a certain religious sect, may be compelled to receive a transfusion. The woman refused to receive the transfusion for religious reasons, but the Court compelled her to receive the treatment since it was a simple, ordinary treatment, necessary for saving her life, after determining that the woman wished to continue living: *Application of President & Director of Georgetown Col.* (1964) (hereafter — the *Georgetown* case [51]).

43. *The interest in preventing suicide* is related to the interest of preserving human life, and as to its purpose —

> '… the underlying State interest in this area lies in *the prevention of irrational self-destruction*' (the *Saikewicz* case [41], at p. 426, note 11; emphasis added).

Notwithstanding, with regard to *terminally ill* patients, the court in the *Saikewicz* case [41] noted that the interest in preventing suicide is likely to yield to the right of the patient to refuse medical treatment because the *motive* for the refusal is not necessarily the desire to die:

> 'In the case of the competent adult's refusing medical treatment, such an act does not necessarily constitute suicide since (1) in refusing treatment the patient may not have the *specific intent to die,* and (2) even if he did, to the extent that the *cause of death was from natural* causes the patient did not set the death producing agent in motion with *the intent of causing his own death*... Furthermore, the underlying State interest in this area lies in the prevention of irrational self-destruction. What we consider here is a competent, rational decision to refuse treatment when death is inevitable and the treatment offers no hope of cure or preservation of life' *(ibid.*; emphasis added).

The maintenance of the ethical integrity of the medical profession

44. An additional important interest justifying a restriction of the patient's right to refuse medical treatment is *the interest in the maintenance of the ethical integrity of the medical profession.* The whole of the medical profession is designed merely to cure the sick and preserve life:

> 'The medical and nursing professions are consecrated to preserving life. That is their professional creed. To them a failure

> to use a simple established procedure would be malpractice…' *(John F. Kennedy Memorial Hospital v. Heston*, (1971) [52], at p. 673).

In order not to blur the ethical boundaries that bind doctors, and in order to allow the doctor to exercise his discretion in each case that he confronts, it is appropriate that the right of the patient to refuse medical treatment is sometimes restricted by the interest in the maintenance of the ethical integrity of the medical profession:

> 'The last State interest requiring discussion is that of the maintenance of the ethical integrity of the medical profession as well as allowing hospitals the full opportunity to care for people under their control' (the *Saikewicz* case [41], at p. 426).

But, with regard to *terminally ill* patients, there are some who think that medical ethics do not require the prolonging of life at any cost, and therefore, in such cases, there is no reason why the patient's right to refuse medical treatment should yield to the interest in the maintenance of the ethical integrity of the medical profession:

> '… physicians distinguish between curing the ill and comforting and easing the dying; that they refuse to treat the curable as if they were dying or ought to die, and that they have sometimes refused to treat the hopeless and dying as if they were curable' (*Matter of Quinlan* [40], at p. 667).
>
> 'The force and impact of this interest is lessened by the prevailing medical ethical standards… Prevailing medical ethical practice does not, without exception, demand that all efforts toward life prolongation be made in all circumstances' (the *Saikewicz* case [41], at p. 426).

Active euthanasia and passive euthanasia; distinguishing between types of treatment

45. In order to reach clear boundaries as to when the patient's right to refuse medical treatment is restricted by the interest in the maintenance of the ethical integrity of the medical profession, the courts have relied the following three distinctions: a distinction between *active* euthanasia and *passive* euthanasia; a distinction between *refraining* from acting to prolong life and *discontinuing* acts that prolong life (cf. our remarks, in the chapter on euthanasia, at para. 29, *supra*); and a distinction between *ordinary* treatment and *extraordinary* treatment.

a. *Active euthanasia* is forbidden and constitutes a criminal offence in the whole of the United States. An attempt to pass legislation recognizing the possibility of active mercy killing in the States of California and Washington between 1988 and 1992 failed, if only by a narrow majority (see Dr A. *Steinberg*, *Encyclopaedia of Jewish Medical Ethics*, vol. 4 (pre-publication copy) [100], 'Close to death', at p. 94).

Notwithstanding, some exceptions have been discovered in the United States with regard to active mercy killing. Dr Steinberg says in this regard (*ibid*., [100]) that:

> 'It was publicized that the American pathologist Dr Jack Kevorkian invented a "suicide machine", through which twenty people committed suicide between 1990 and 1993 in the State of Michigan, until a law was passed prohibiting mercy killing and assisting mercy killing. The first patient who committed suicide with the help of this doctor was an Alzheimer's patient called Janet Adkins, on June 4, 1990…
>
> This doctor, who was nicknamed "Doctor Death", was tried and acquitted twice in a court in the State of Michigan, but his methods aroused widespread public opposition. It should be emphasized that this is a doctor without any experience as a clinical doctor, without any professional ability to verify the medical data of the patients and without any professional control over the seriousness of the intentions of those asking to die with his active assistance.'

Another phenomenon (*ibid*. [100]):

> 'An entire book devoted to advice about suicide (D. Humphry, *Final Exit*, The Hemlock Society, 1991) was published in the United States, containing propaganda in support of assisted suicide, encouraging patients to commit suicide and practical advice on how to do this. The book was subject to damning and severe criticisms, since beyond the basic ethical debate, the book contains serious moral and social defects — it does not address itself only to terminally ill patients; it is vulgar, and it is has a bad influence on all sorts of people, particularly teenagers, who have suicidal tendencies.'

b. An additional distinction is between *refraining* from doing an act to prolong life, which is permissible, and *discontinuing* and act that prolongs life,

which is forbidden. It is illuminating to note how similar this distinction is to the distinction that exists in Jewish law between and act which amounts to 'removing an impediment' and an acts that is otherwise. We will return to this later.

It should be noted that the Supreme Court of the State of New Jersey rejected this distinction in the *Conroy* case [44]. In that case, the nephew of a 94-year-old patient applied for her to be *disconnected* from an artificial feeding machine to which she was connected. The patient suffered from severe brain damage and did not respond to speech, but she was capable of moving her head, neck, and arms, and she used to smile when her hair was combed. The court said in that case:

> 'Thus, we reject the distinction that some have made between actively hastening death by terminating treatment and passively allowing a person to die of a disease as one of limited use…' (*ibid.*, at pp. 1233-1234).
>
> '… would a physician who discontinued nasogastric feeding be actively causing her death by removing her primary source of nutrients; or would he merely be omitting to continue the artificial form of treatment, thus passively allowing her medical condition, which includes her inability to swallow, to take its natural course?' (*ibid*.).
>
> '… it might well be unwise to forbid persons from discontinuing a treatment under circumstances in which the treatment could permissibly be withheld. Such a rule could discourage families and doctors from even attempting certain types of care and could thereby force them into hasty and premature decisions to allow a patient to die' (*ibid*.).

c. The last distinction made by the courts in the United States is the distinction between *ordinary* treatment and *extraordinary* treatment. The more 'ordinary' the treatment, the greater the State interest in compelling it, and *vice versa*:

> 'The decision whether to discontinue life-sustaining measures has traditionally been expressed by the distinction between ordinary and extraordinary treatment… Under the distinction, ordinary care is obligatory for the patient to accept and the doctor to provide, and extraordinary care is optional' (*Foody* [48], at p. 719).

Ordinary treatment, as opposed to extraordinary treatment, is defined as follows (*ibid.*, quoting Kelly, *Medico-Moral Problems* (1959) at p. 129):

> 'Ordinary means are all medicines, treatments and operations which offer a reasonable hope of benefit and which can be obtained and used without excessive expense, pain or other inconvenience. Extraordinary means are all medicines, treatments and operations which cannot be obtained or used without excessive expense, pain or other inconvenience, or if used, would not offer a reasonable hope of benefit.'

The protection of third parties

46. The fourth and last interest which may cause the patient's right to refuse treatment to yield is the interest in the *protection of third parties who are dependent on the patient*:

> 'When the patient's exercise of his free choice could adversely and directly affect the health, safety or security of others, the patient's right of self-determination must frequently give way.' (the *Conroy* case [44], at p. 1225).

In the United States, great weight has been attached to this interest when the patient has dependent children. As the court said in the *Saikewicz* case [41], at p. 426:

> '… one of the interests requiring protection was that of the minor child in order to avoid the effect of "abandonment" on that child as a result of the parent's decision to refuse the necessary medical measures.'

(And see also the *Georgetown* case [51], at p. 1008).

There have also been some who gave weight to this interest in the case of a pregnant woman who refuses medical treatment (*Jefferson v. Griffin Spalding Cty Hospital Auth.* (1981) [53]).

The right of a minor/incompetent to refuse medical treatment

47. The right to refuse medical treatment exists also for the minor and the incompetent. Its source was discussed in the *Cruzan* case [46], at p. 2852, and in other sources; but this is not the place to elaborate.

The problem with regard to minors and incompetents, if it may be described as such, is a *procedural* problem: how and in what way can one know that the minor or incompetent wish to exercise their right to refuse medical treatment? Three issues arise in this respect: a. The *test* for

determining the wishes of the minor or the incompetent; b. The *standard of proof* needed to prove these wishes; c. The *competent body* for determining the wishes of the minor or the incompetent.

48. In the United States, two *standards* are used for determining the wishes of the minor: the 'substituted judgment standard' and the 'best interests standard'. According to the first standard, an attempt is made to discover the wishes of the particular patient. The second standard establishes what is best and proper for the patient, and it does not purport necessarily to express the wishes of the particular patient.

The *substituted judgment* standard is applied most typically when the incompetent (this is not relevant to minors) had made a 'living will', i.e., a document made by the patient before he became incompetent, in which he expressed his refusal to accept medical treatment (see, for example, *John F. Kennedy Hospital v. Bludworth* (1984) [54]). Sometimes the courts are prepared to assess the patient's wishes, even if he never expressed his wishes, by relying on the preferences of 'the reasonable person':

> 'If preferences are unknown, we must act with respect to the preferences a *reasonable, competent person in the incompetent's situation would have*' (the *Saikewicz* case [41], at p. 430, note 15).

Thus the 'substituted judgment standard' comes close to the 'best interests standard'. The best interests of the minor, according to this standard, are decided by examining the advantages that the patient will derive from the medical treatment against the burden suffered by the patient as a result of the treatment (see *Barber v. Superior Court of Cal*. (1983) [55]). The following was said in the *Conroy* case [44], at p. 1232:

> '… the net burdens of the patient's life with the treatment should *clearly and markedly* outweigh the benefits that the patient derives from life. Further, the recurring, unavoidable and severe pain of the patient's life with the treatment should be such that the effect of administering life sustaining treatment would be *inhumane*' (emphasis added).

The reasoning of the court in *Conroy* (*ibid*., at p. 1231*)* is interesting:

> 'We recognize that for some incompetent patients it might be impossible to be clearly satisfied as to the patient's intent either to accept or reject the life-sustaining treatment. Many people have spoken of their desires in general or casual terms, or, indeed,

> never considered or resolved the issue at all. In such cases, a surrogate decision-maker cannot presume that treatment decisions made by a third party on the patient's behalf will further the patient's right to self-determination, since effectuating another person's right to self-determination presupposes that the substitute decision-maker knows what the other person would have wanted. Thus, in the absence of adequate proof of the patient's wishes, it is naive to pretend that the right to self-determination serves as the basis for substituted decision-making.
>
> We hesitate, however, to foreclose the possibility of humane actions, which may involve termination of life-sustaining treatment for persons who never clearly expressed their desires about life-sustaining treatment, but who are now suffering a prolonged and painful death. *An incompetent, like a minor child, is a ward of the state, and the state's* parens patriae *power supports the authority of its courts to allow decisions to be made for an incompetent* that serve the incompetent's best interests, even if the person's wishes cannot be clearly established. This authority permits the state to authorize guardians to withhold or withdraw life-sustaining treatment from an incompetent patient if it is manifest that such action would further the patient's best interests in a narrow sense of the phrase, even though the subjective test that we articulated above may not be satisfied' (emphasis added).

See and cf. again the remarks of Diodorus cited in para. 41, *supra*.

49. The issue of the *quantity of evidence* necessary for proving the wishes of the minor/incompetent arises only in connection with the 'substituted judgment standard', since the 'best interests standard' does not purport, as stated, to establish these wishes. In this respect, American legal literature refers to three standards of proof: beyond all reasonable doubt, similar to the standard of proof in criminal cases; preponderance of the evidence, similar to the standard of proof in civil cases; and an intermediate standard — a demand for clear and convincing evidence (see D. F. Forre, 'The Role of the Clear and Convincing Standard of Proof in Right to Die Cases'. 8 (2*) Issues in Law and Medicine*, 1992, at pp. 183-185).

On this issue, there is no uniformity in the legal position in the various States of the United States. Each State follows its own statutes and case-law. In the *Matter of Eichner*, which was considered together with *Storer* [43],

supra, and which was brought before the Court of Appeals of New-York, an 83-year-old patient had been a member of a Christian religious order for 66 years. Father Eichner, the head of the religious order, applied to disconnect the patient from the artificial respirator to which he was connected. He claimed that the patient had expressed his opinion on several occasions that he did not want his life prolonged by means of any treatment that was not ordinary, such as being connected to an artificial respirator. The court granted the request, after finding there was a sufficient body of evidence for this desire of the patient.

In the *Matter of Spring* [49], the court relied on the opinion of the patient's wife and his son as to the patient's *expected* wishes to refrain from medical treatment, although it had no evidence as to the *actual* wishes of the patient. By contrast, in the *Matter of Westchester County Med. Ctr.* (1988) [56], the New-York Court of Appeals refused to follow this approach and ordered — against the wishes of the family of the patient — a 77-year-old patient to be connected to feeding tubes. The court said in that case (*ibid*., at p. 13):

> '… it is inconsistent with our fundamental commitment to the notion that no person or court should substitute its judgment as to what would be an acceptable quality of life for another. Consequently, we adhere to the view that, despite its pitfalls and inevitable uncertainties, the inquiry must always be narrowed to the patient's *expressed intent,* with every effort made to minimize the opportunity for error' (emphasis added).

50. The dispute as to *the standard of proof* required for ascertaining the wishes of a minor or an incompetent was considered in the *Cruzan* case [46], where the Supreme Court approved the requirement of *clear and convincing evidence*:

> 'A State may apply *a clear and convincing evidence standard* in proceedings where a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state. We note that many courts which have adopted some sort of substituted judgment procedure in situations like this, whether they limit consideration of evidence to the *prior expressed wishes* of the incompetent individual, or whether they allow *more general* proof of what the individual's decision would have been, require a *clear and convincing standard of proof* for such evidence' (*ibid*., at pp. 2854-2855).

As a result of this judgment, the 'living will' became the guide for determining the wishes of a patient who is an incompetent. In 1989, a statute was adopted in the United States that requires almost every hospital to provide patients who come to the emergency room with a 'living will' form that the patient can complete (Patient Self-Determination Act, 1989). Use of this form — called the Danforth Form after the senator who submitted it for consideration by the Government — became compulsory in 1992 (Senate Bill 1776, 101st Congress, 1st Session).

51. With regard to the *body that is competent* to determine the wishes of the minor or incompetent, the court in the *Cruzan* case [46] relied on the possibility of appointing someone — a relative or another person — who would investigate the wishes of the patient and act as a kind of guardian for the patient in this matter (*ibid*., at p. 2855).

The relevant literature indicates the factors that the court should consider when deciding on the appointment of a 'decision-maker' for the patient. Alan Meisel emphasizes the question of the relevance of the 'decision-maker': A. Meisel, *The Right to Die*, 1989, with cumulative supplement, 1991). A commission appointed by the President of the United States discussed the advantages of appointing a family member:

> '1. The family is generally most concerned about the good of the patient.
>
> 2. The family will usually be most knowledgeable about the patient's goals, preferences and values.
>
> 3. The family deserves recognition as an important social unit that ought to be treated, within limits, as a responsible decisionmaker in matters that intimately affect its members.
>
> 4. Especially in a society in which many other traditional forms of community have eroded, participation in a family is often an important dimension of personal fulfillment.
>
> 5. Since a protected sphere of privacy and autonomy is required for the flourishing of this interpersonal union, institutions and the state should be reluctant to intrude, particularly regarding matters that are personal and on which there is a wide range of opinion in society' (President's Commission for the Study of Ethical Problems and Biomedical and Behavioral Research, *Deciding to Forego Life-Sustaining Treatment*, at p. 28).

In the *Cruzan* case [46], the court approved the appointment of a family member as a decision-maker for the patient:

> 'We also *upheld* the constitutionality of a state scheme in which parents made certain decisions for mentally ill minors… A decision which allowed a state to rely on family decisionmaking' (*ibid*., at p. 2855).

Nonetheless, the court discussed the difficulties that could arise with regard to such an appointment:

> 'But we do not think the Due Process Clause requires the state to repose judgment on these matters with anyone but the patient herself… There is no automatic assurance that the view of close family members will necessarily be the same as the patient's would have been had she been confronted with the prospect of her situation while competent' (*ibid*., at 2855-2856).

Hospital ethics committees

52. It is worth noting in this context that, in the United States, hospital ethics committees now operate on a regular basis to help interested parties decide questions relating to the matter under discussion. Only when differences arise between the parties do they apply to the courts for the court to decide the matter (see the *Saikewicz* case [41], at p. 424).

Meisel, in *The Right to Die*, discussed the advantages of the activity of the ethics committees — in comparison with the courts. The most important advantage, according to Meisel, is the cooperation between the family members, friends and the doctors treating the patient on the one hand and other doctors, religious leaders, legal advisers, philosophers and psychologists on the other. On a question that involves a mixture of law and ethics, medicine and psychology, religion and philosophy, it is appropriate that all the experts should take part. Other advantages mentioned by Meisel that should be mentioned are: protecting the privacy of the patient and his family members, keeping the matter away from the media, the speed of the proceeding and saving the costs of the court system.

The existence of such ethics committees, which are subject to judicial review where differences of opinion arise, would appear to have quite a few advantages. The competent authorities in Israel should therefore study this matter and give it their attention, in order to discover the different aspects of it.

Holland

53. Holland is the only western democracy where active mercy killing is officially and openly practiced. Initially, the courts and the Royal Society for the Advancement of Medicine drafted detailed guidelines, which, if complied with, allowed a doctor who actively carried out a mercy killing to be forgiven, despite the prohibition at law. These were:

> 'The patient himself declares that his physical and mental suffering is unbearable; the patient himself requests and agrees to this action, when he has all his faculties; the pain and the desire to die are fixed and constant; the consent of the patient to the act of killing is given freely, informed and consistent; the patient understands his condition, the alternatives available to him and the significance of the decision; the doctor and the patient agree that the illness is incurable, and is accompanied by great pain; other attempts have been made to alleviate the pain and suffering, but no other solution has been found that is acceptable to the patient; an additional doctor agrees with these findings; only the doctor, and no other agent, will carry out the killing; the act will not cause others suffering beyond what is necessary; the decision and implementation will be performed with maximum caution; the facts and the decision-making process will be recorded and clearly documented; in cases involving children — the parents' consent is effective in the same conditions' (Dr A. Steinberg, *Encyclopaedia of Jewish Medical Ethics*, vol. 4 (pre-publication copy) [100], 'Close to death', at p. 92).

Only at the beginning of 1993 did the Dutch parliament pass a statute recognizing active mercy killing when the conditions set out in the above guidelines are fulfilled. Regrettably, the recognition of active mercy killing, even under these restrictive conditions, has led in Holland to the realization of the danger of the 'slippery slope':

> 'The number of those killed in this manner is not known for certain. But according to various surveys, it ranges between 5,000 and 10,000 people every year.
>
> Indeed, within a few years after Holland started along this path, a variety of serious deviations have occurred — only a small minority of the activity is reported as required; there have been cases of killings of minors and children born with defects, even

> without their parents' consent; mercy killings have been carried out on unconscious patients; in many cases the decision was made by a single doctor, without the participation and consultation of another doctor. There are some who claim that euthanasia in Holland is completely out of control, and that there are hundreds and thousands of cases of mercy killings without the consent of the patient and without any report to the authorities. Moreover, the outlook of the supporters of active euthanasia in Holland has changed from a position that recognizes and allows such an action to a position that regards the doctor's compliance with such a request as a moral obligation to end an useless life' (*ibid.* [100], at pp. 93-94).

Israeli case-law on issues of medical law before the Basic Law: Human Dignity and Liberty

54. After examining the issues in this case as reflected in the values of a Jewish State and the values of a democratic State, it is proper to discuss, first and foremost, the possibility of finding a synthesis between Jewish and democratic values, as we are required to do by in applying the issues discussed in this case, in order to comply with what is stated in sections 1 and 8 of the Basic Law: Human Dignity and Liberty require of us. But before we consider this, we should first consider the rulings of the court, at all levels, in the field of medicine, Jewish law and civil law, and from this we will discover the enlightening phenomenon that the tendency to rely on Jewish values in this field was accepted in most of the decisions even before the Basic Law: Human Dignity and Liberty came into effect. Let us consider several examples.

The Zim case

CA 461/62 *Zim Israeli Shipping Co. Ltd v. Maziar* (hereafter — the *Zim* case [19]) the question considered was the validity of an 'exclusion clause', that appeared on Zim's tickets, which exempted the Zim company from all damage caused to passengers while on board by the company's negligence. Mrs Mazier became sick as a result of spoiled food she was served while on board the ship. The court held that the exclusion clause was contrary to public policy and void. The late Vice-President, Justice Silberg, said, at p. 1332 {132}:

> 'We have reviewed the English and American case-law on the legal issue before us, we have seen the fundamental differences in their moral approaches to the problem in this case, and the

> question is which path should we, as Israeli judges, choose: should we follow the inflexible English case-law, which says that the contract should be strictly applied, or should we choose — at least with regard to an injury to human life or health — the more liberal rule adopted by American case-law?
>
> It seems to me that we should adopt the American rule.
>
> But in doing so, we are not adopting a 'foreign' child, but we are instead reaching legal conclusions that are deeply entrenched in the Jewish consciousness.
>
> And if someone asks in the future: how can it be legitimate to impose our outlook on a law that originates in Turkish legislation? The answer is that the rule that one can void a contract because it is contrary to public policy is derived from s. 64(1) of the Ottoman Civil Procedure Law, but the answer to the question of *what is* public policy must be found in our moral and cultural outlooks, for there is no other source for such 'policy'.'

Justice Silberg then went on to consider the supreme value of human life in Judaism (*ibid*., at p. 1333 {132-133}):

> 'Since time immemorial, Judaism has glorified and elevated the important value of human life. The Torah is not a philosophical system of ideas and beliefs, but a living Torah — *about* life and *for* life. "Which man shall do and by which he shall live" (Leviticus 18, 5); "by which he shall live — but not by which he shall die" (Babylonian Talmud, Tractate *Yoma,* 85b); there are countless verses in which the *causal* connection between the Torah and life is emphasized, such as: "Keep My commandments and live!" (Proverbs 4, 4); "He is righteous; he shall surely live" (Ezekiel 18, 9); "Who is the man who desires life…" (Psalms 34, 13), etc.
>
> Clearly, Judaism also does not regard life as the highest value. There are higher purposes and more lofty ideals, for which it is worthwhile — and we are commanded — to sacrifice our lives. Witnesses of this are the hundreds of thousands of Jews who gave up their lives in all countries and in all periods of time to sanctify G-d's name. But within the normal framework of communal life, and on the scale of priorities of the Torah, life is the most sacred

> asset, and the preservation of life overrides everything else that is sacred, including, without doubt, the sanctity of contracts. "There is nothing that can stand in the way of saving life, except for the prohibitions of idolatry, sexual immorality and bloodshed" (Babylonian Talmud, Tractate *Ketubot,* 19a); "For it [the Sabbath] is holy for you — it is given to you, but you are not given to it" (Babylonian Talmud, Tractate *Yoma,* 85b).
>
> There is nothing that Jewish morality abhors more than the taking of life. King David was punished, and G-d said to him: "You shall not build a house for My name, for you are a man of battles and have shed blood" (I Chronicles 28, 3); "A court — even a competent and authorized court — that carries out an execution once in seven years is called a destructive court" (Babylonian Talmud, Tractate *Makkot,* 7a). Isaiah and Micah prophesied: "Nation shall not take up a sword against nation; nor shall they again train for war" (Isaiah 2, 4; Micah 4, 3). Does this not amount to a profound abhorrence and repugnance towards bloodshed, since ancient times?
>
> Of course, it is not easy to take these lofty ideals and create from them actual legal formulae. But when the decisive question about the legal conclusion is a question of basic beliefs — what is "good" and what is "bad", what is "the public good", and what is not "the public good" — we may, and we must, draw precisely on these ancient sources, for only these that faithfully reflect the basic outlooks of the Jewish nation as a whole.'

Similarly, in the *Zim* [19] case, the late Justice Witkon stated *(ibid.*, at p. 1337 {138}):

> '… no one questions the criterion of the sanctity of life, and I would say this is one of those accepted principles that require no proof. Everywhere, irrespective of religion and nationality, human life is regarded as a precious possession that must be protected very vigilantly. This is an universal principle and a principle of the Jewish people, as my colleague Justice Silberg has shown in his opinion.'

From two possible approaches on the issue of the content of 'public policy' practised by two Western legal systems, the court has chosen the approach that is consonant with 'our moral and cultural beliefs', i.e., those of Jewish

tradition — 'that are deeply entrenched in the Jewish consciousness'. This is a synthesis between Jewish values and democratic values, which entered Israeli law not by means of a binding mandate of the legislator, but from wise and correct interpretation according to the cultural-historical principles of the legal system. This is all the more so the correct interpretation today, now that the synthesis between the Jewish and democratic values of the State of Israel have become a binding constitutional provisions of the legal system in the State of Israel.

In another matter, the 'kidney case' (*Attorney General v. A* [16]), we considered the question of the consent of an incompetent to the removal of a kidney from his body for it to be transplanted into his father's body or an incompetent's consent to donating a kidney to his father. We conducted a broad survey of the position of Jewish law on the issue (*ibid.*, at pp. 677-684). The major points were discussed in our remarks above (paras. 25, 27).

In CA 518/82 *Zaitsov v. Katz* [20], the issue was whether under the law of torts one may sue a doctor who was negligent in giving advice about genetics to the parents of a child; the child was born with a hereditary disease, and he was only born as a result of the negligence, since were it not for that negligence, the parents would not have brought the child into the world; Jewish law was relied upon in that decision (*ibid.*, at pp. 95, 128). But this is not the place to elaborate.

The Kurtam case

55. Of great importance to our case is the decision of this court in CrimA 480/85 *Kurtam v. State of Israel* [21], in which there arose —

> 'The difficult question, in what cases, if at all, may a doctor carry out an operation on a person against his will, when the doctor is convinced that it is essential for saving the life of that person' (*ibid.*, at p. 681).

In the opinion of Justice Bach, *ibid.*, at pp. 681-682:

> 'It cannot be ignored that, at least in English and American case-law, the principle that a person has control over his body has been accepted and entrenched, and it is not possible to give him physical treatment, and certainly not to operate on his body, against his will and without obtaining his consent…
>
> It follows that a doctor may not perform an operation against the patient's will, even if in the doctor's opinion this is necessary for saving the patient's life.'

The exceptions to the rule are, according to Justice Bach's opinion at p. 683, the following:

> 'Several exceptions are recognized in Anglo-American case-law, and these are the main ones:
>
> I. When the patient is unconscious or is incapable, for any other reason, of adopting an independent position with regard to the proposed surgery or of giving expression to his will, and there no other authorized person to give his consent to the proposed operation…
>
> In such a case, when the doctor thinks that an immediate operation is essential for saving life, this may be regarded as a 'situation of emergency', which justifies the performance of the operation, and the patient is deemed to have given implied consent to the operation.
>
> II. The same is true in cases where it is clear to the doctor that the patient brought to him tried to commit an act of suicide. In such cases, the court assumes that the person involved acted in a disturbed state and without balanced judgment, and will in truth be pleased later when he finds out that his life was saved… This assumption may not be justified by the facts in all cases, but doctors act in these cases in order to intervene and save the life of the attempted suicide, and it should not be expected that the court will criticize this.
>
> III. When the life of a minor can be saved only by surgery and the parents refuse to consent to the operation, for no reasonable cause.'

Another exception is with regard to a prison inmate, under the provisions of the law, that when —

> 'The doctor determines that there is a danger to the health or life of a prison inmate and the prison inmate refuses to accept the treatment prescribed by the doctor, it is permitted to exercise the requisite amount of force in order to carry out the doctor's orders' (reg. 10(b) of the Prison Regulations, 5738-1978; *Kurtam v. State of Israel* [21], at p. 686).

Justice Bach also refers to the position of Jewish law and 'the especially entrenched recognition of ours that the preservation of life should be regarded as a supreme value' (*ibid.*, at p. 687). But he regards this, primarily, as an

additional reason for accepting the aforesaid exceptions accepted in the American and English legal systems.

The position of Justice Bejski was different. With regard to the remarks of Justice Bach that 'in general, the principle that a person has a right not to be operated on without his consent applies also in Israel', Judge Bejski says (*ibid.*, at p. 695):

> 'I find this general approach unacceptable when dealing with an operation, mainly at a time of emergency, whose whole purpose is to save a person's life or to prevent severe harm to his health, where without such intervention immediate death is certain or the severe damage to health will be irreparable.'

In Justice Bejski's view, English and American case-law 'are too extreme in the direction of prohibiting treatment, except in certain cases' (*ibid.*, at p. 694); moreover (*ibid.*, at p. 696):

> 'As for me, I do not think that in this difficult and complex matter we must adopt the principles formulated in the United States and England, whether this is the general principle that prohibits physical treatment by a doctor without the patient's consent, or the few exceptions to the principle. I do not belittle the value of the legal references that my colleague mentioned in this regard, but I am not convinced that this approach is consistent with the Jewish philosophy of the sanctity of life as a supreme value, and with the Jewish tradition of saving life wherever it can be saved.'

As an example of the supreme value of the sanctity of life in Jewish tradition, Justice Bejski cites the remarks of Rabbi Yaakov Emden (in his book, *Mor uKetzia* [119] *supra*), and relies also on the opinion of President Agranat in CA 322/63 *Garty v. State of Israel* [22], and the remarks of Justice Silberg in the *Zim* [19] case; his conclusion is as follows (*ibid.*, at pp. 697-698):

> 'I believe that the principle of the sanctity of life and saving life as a supreme value justifies not following those rules, which support, almost dogmatically, except in specific cases, a prohibition against intervening in the body of a person without his consent, without taking account of the consequences.
>
> It seems to me that the approach implied by CrimApp 322/63 (*Garty v. State of Israel* [22]) and in CA 461/62 (*Zim* [19]), *supra*, is representative of, and consistent with, the proper

> approach to be adopted in Israel, since it is the closest to Jewish tradition that espouses the sanctity of life. Therefore, when a person is in certain and immediate danger of death or there is a certainty of severe harm to his health, it is most certainly permissible to perform an operation or any other invasive procedure on him even without his consent; it is all the more permitted, and even obligatory, when the intervention itself does not involve any special risks beyond the ordinary risks of any operation of intervention of that sort, and when there is no fear of significant disability.'

We will return to these remarks below.

District Court rulings

56. The District Courts have followed a similar approach. In CrimC (TA) 555/75 *State of Israel v. Hellman* [35], where the case involved a mother who killed her son who was ill with cancer by firing a pistol, Justice H. Bental said the following:

> 'The prosecution reminded us that Jewish law also deals severely with the killing of a 'dying person by human intervention' (Babylonian Talmud, Tractate *Sanhedrin*, 78a). Even an action of any kind, which hastens the death of a terminal patient, is a serious prohibition from a moral viewpoint. Thus Maimonides ruled that 'such a murderer is exempt from the death penalty only under human law, but he has committed a grave moral transgression' (Rabbi Dr Federbush, *Mishpat haMelukha beYisrael*, at p. 224). The rabbis were not unmoved by the suffering of a person who is about to die, and the law also required the court to administer to a person sentenced to death 'a cup of wine, so that his mind is clouded' (Babylonian Talmud, Tractate *Sanhedrin*, 43a). But this is far removed from speeding the death of an incurably ill patient.
>
> It should be recalled that Maimonides warned against relying on doctors' opinions as to a person's chances of living, since they are liable to be mistaken. It is interesting that even in our times the fear of error is real, notwithstanding the progress of medical science' (*ibid.*, at pp. 138-139).

Justice Halima added (*ibid*, at pp. 141-142):

> '… there can be no doubt that society enacts laws in order to preserve its humanity, for one of its most sacred elements is the human right to live.
>
> In fact this right came into existence and became an established principle of the Jewish people since the acceptance of the commandment "You shall not kill", which has served as an outstanding example to other nations throughout the generations. Today it can be said that taking the life of another is considered the most serious offence in the statute book.'

In OM (TA) 1441/90 *Eyal v. Dr Wilensky* [36], at pp. 199-200, the case concerned a terminally-ill patient who petitioned the court to prevent the use of an artificial respirator on him. Justice U. Goren relied upon Jewish law:

> 'It is clear that Jewish law, which is known as a most moral law, espouses very strongly the principle mentioned earlier — *viz.* the principle of "the sanctity of life". The halachic basis for this principle can be found in the opinion of Justice Silberg in the *Zim* case (CA 461/62) cited above.
>
> Notwithstanding, Jewish law, being a humane law, recognizes the need not to cause suffering to the person who is close to death, and the Talmud coined the term "a painless death". This term encompasses the consideration for human pain and suffering, even in so far as a condemned man is concerned.
>
> A positive action that shortens the life of a patient is utterly forbidden by Jewish law. If, for example, the patient is already attached to a respirator, disconnecting him from it would, apparently, be a forbidden act under Jewish law.
>
> But in so far as inaction is concerned, i.e., prolonging the life of a dying person by every artificial means possible, the arbiters of Jewish law disagree. In any event, there are some who hold that there is no basis for prolonging the life of the patient artificially, as stated in the article cited above (Dr A. Steinberg, *Mercy Killing in Jewish law*, Asia, booklet 19 (1978), (vol. 5, booklet 3) 429 [100]) at p. 443:
>
> > "By contrast, there are those who believe that it is forbidden to prolong the life of a dying person who is suffering. For example, it is certainly forbidden to take steps to prolong temporary life if doing so will

> cause pain. Similarly, where the doctors believe that there is no possibility of a cure, a dying person should not be given injections in order to postpone his death by a few hours."
>
> An additional development in this area of Jewish law can be found in the concept of "removing the impediment", which was mentioned in the ruling of the author of *Sefer Hassidim*. "Removal of the impediment" means refraining *de facto* from taking certain actions that prevent the departure of the soul from the body. Thus, in part, is currently defined as passive euthanasia.
>
> The discussions among the arbiters of Jewish law provide examples of when the principle of "removing the impediment" applies.
>
> I am insufficiently learned in the Torah to determine the Jewish law…
>
> In any event, for the purposes of the case before me, it is sufficient that I find that the principle of respecting the patient's wishes and preventing unnecessary pain suffering in his final moments is not foreign to Jewish law and is also accepted by some of its authorities.'

See also OM (TA) 498/93 *Tzaadi v. General Federation Health Fund* [37].

References to Jewish law have increased greatly since the enactment of the Foundations of Justice Law, 5740-1980, which, if certain conditions are fulfilled, refers to the principles of justice, equity, liberty and peace of Jewish tradition (see *Attorney General v. A* [16], at p. 677; *Tzadok v. Bet HaEla Ltd* [34], at pp. 503-504).

The synthesis between the values of a Jewish and democratic State

57. As instructed by the legislator in the Basic Law: Human Dignity and Liberty, we have examined the values of a Jewish state and the values of a democratic state with regard to this multifaceted and terrible issue of medicine, Jewish law and civil law. Our analysis was carried out — as it was proper that it should be — by analysing the sources of both of these systems thoroughly and in detail, and we have thereby established the supreme principles of each system and the main laws deriving from these, which are interpreted widely by some and narrowly by others.

After conducting this analysis, we are instructed to find the synthesis between the two-value purpose of the Basic Law: Human Dignity and Liberty, *viz.*, entrenching in the laws of the State of Israel its values as a Jewish and democratic State.

It is in the nature of such a synthesis that it seeks what is common to both systems, the Jewish and the democratic, the principles that are common to both, or at least that can be reconciled with them. In the Jewish legal system we found certain supreme principles that are not in dispute, and disagreements about the principles and details of various rules, and the same is also true of various democratic systems. These differences of opinion in each system can facilitate the combination of the two systems and can complicate the finding of a synthesis, and sometimes they make it impossible.

Let us clarify and illustrate this. One of the most fundamental issues in the matter under discussion is the possibility of actively hastening death. Jewish Law rejects this possibility utterly, and it knows of no opinion or even hint of an opinion that permits this act, which is tantamount, in Jewish law, to murder. In democratic legal systems we have found that in the law of the United States actively hastening death is forbidden; by contrast, in the Dutch legal system active euthanasia is permitted, even by the legislator. It is clear and unnecessary to say that on this issue the synthesis between the Jewish legal system and the system of a democratic country means accepting what is common to the Jewish and American legal systems with regard to the *prohibition* of actively hastening death, and total rejection of the position of the Dutch legal system that allows the active hastening of death. Moreover, even if a *majority* of democratic legal systems were to allow, in certain circumstances, active euthanasia, *i.e.*, hastening death 'with one's own hands', finding a synthesis would be done by finding what is common to the Jewish legal system and the only legal system in whatever democratic country there is the prohibits actively hastening death. Moreover, even if *de facto* no democratic legal system that prohibits active euthanasia could be found (and we saw that even certain States in the United States made attempts to permit active euthanasia in certain circumstances but failed by a small majority — para. 45, *supra*), since active euthanasia is contrary to the nature of the State of Israel as a *Jewish* state, as we have discussed above, the synthesis between the two concepts — 'the values of a Jewish and democratic State' — would require us to give preference to the conclusion implied by the values of a Jewish state, and to *interpret accordingly* the concept of the values of a

democratic State (see *Suissa v. State of Israel* [5]; M. Elon, 'The Role of Statute in the Constitution', 17 *Iyunei Mishpat,* 1992, at p. 687).

With regard to other fundamental issues in the field of law and medicine, finding a synthesis is most certainly possible, but it requires and necessitates much caution and study. As we have seen, both the Jewish legal system and the American legal system distinguish between active euthanasia, which is prohibited, and passive euthanasia — 'removing the impediment' — which is permitted; between refraining from artificially prolonging life *ab initio*, and *disconnecting* someone from artificial prolonging of life that has already begun; between ordinary treatment and extraordinary treatment. There are also different opinions and different approaches, in each of the two systems, with regard to the need for the patient's consent and with regard to his right to refuse treatment, in which cases and in which circumstances, and also with regard to many more issues. But there exists a material difference with regard to the premise in each of these two value systems. The *foremost* supreme value in the Jewish legal system is the principle of the *sanctity of life* which is based on the fundamental idea of the creation of man in the image of G-d, in view of which the life of a human being — of every human being as such and as he is — healthy and of sound body and mind or disabled in these respects — are of infinite value and cannot be measured. *Restrictions and limitations* are permitted to the principle of the sanctity of life, first and foremost, in the principle of alleviating physical and mental pain and suffering, of respecting the patient's wishes when this affects his condition, of applying the principle 'And you shall love your fellow-man as yourself', and similar principles. By contrast, the *premise* in the American democratic legal system is *the patient's right to refuse medical treatment*, based on the principle of *his personal freedom*; this right has been restricted and limited in certain circumstances because of State interests in protecting the lives of its citizens, maintaining the ethical integrity of the medical profession, and similar interests. It is obvious that the difference in *premise* is of great significance in various situations, and much study, thought and contemplation are required in order to reach the proper synthesis between the values of a Jewish State and the values of a democratic State.

An illuminating example of this synthesis can be found in the judgement of the Supreme Court in *Kurtam v. State of Israel* [21], which we discussed in detail above (para. 55). In *Kurtam v. State of Israel* [21], a suspect, attempting to evade the police, swallowed packages of drugs that endangered his life. All the judges on the bench agreed that the packages of drugs were

admissible evidence, but their reasoning differed, as we saw above. Prof. Amos Shapira considered the positions expressed by Justices Bach and Bejski that we cited above, and was unhappy with both of them, since he found both to contain paternalistic thoughts worthy of criticism. In his article '"Informed Consent" to Medical Treatment — the Law as it is and as it should be' (14 *Iyunei Mishpat*, 1989, 225 at p. 269), Professor Shapira says:

> 'These paternalistic thoughts were stated albeit as *obiter dicta*, and almost none of them were required for reaching the decision in *Kurtam v. State of Israel*. But they indicate a judicial attitude that is astonishing and deserves criticism. The limited permit that Justice Bach is prepared to give to life-saving medical treatment against the wishes of the patient — and, even more so, the sweeping approval Justice Bejski gives to such treatment — are inconsistent with the doctrine of "informed consent" to medical treatment. They do not reflect existing law and stand in stark opposition to the principles of individual freedom and personal autonomy. According to Justice Bach, a doctor is legally allowed, and is morally and professionally bound, to carry out an operation on an adult and competent patient whose life is in danger, even against his wishes, if the doctor sees that the patient does not have a "reasonable basis" for his opposition to the operation, which apparently derives from "external motives". Justice M. Bejski completely waives the need for the consent of the adult and competent patient to an operation in circumstances where there is danger to the life of the patient or there is a risk of severe damage to his health. With all due respect, such norms cannot belong in a legal system that espouses the right of the individual to self-determination, freedom of choice and control of his fate.'

I find these remarks of Professor Shapira unacceptable; even when they were written, they were inconsistent with the proper and prevailing law when the judgment in *Kurtam v. State of Israel* [21] was given; *today*, they are certainly inconsistent with the directive of the legislator in the Basic Law: Human Dignity and Liberty (s. 1) that enshrines the principles of a Jewish and democratic State in the laws of the State of Israel, and the provisions of the balancing principle in the Basic Law (s. 8), according to which a violation of the rights contained in the Basic Law must meet three conditions: the violation must befit the values of the State of Israel as a Jewish and democratic State, it

must be intended for a proper objective, and it must not be excessive. These three balancing requirements are absolutely fundamental to the whole legal system of the State of Israel, and the use of labels such as 'paternalism' has absolutely no bearing on the implementation of the said balance. It is well known that this problems of reaching the ideal, proper and correct balance between the basic values of human liberty and personal freedom, the freedom of speech and movement and similar values, on the one hand, and the values of security, public order, a person's reputation, basic survival values and similar values, on the other hand, is the most difficult and demanding, the greatest and the most fertile of our legal thinking in general and of the art of jurisprudence in particular; every decision, for example, in favour of security needs and proper public order may, of course, be labelled the 'paternalism' of the Government or the court. The question in the case is a question of balance, i.e., finding the balance between the fundamental value of personal freedom and freedom of choice of the individual and the fundamental value of saving human life and the value of life, and the court in the *Kurtam* [21] case was engaged in finding this balance, each judge in his own way and according to his own line of reasoning.

When the judgment in *Kurtam v. State of Israel* [21] was given, there were grounds for disagreements between Justice Bach and Justice Bejski *in explaining their positions,* which led, as stated, to the same practical result. Today, after the enactment of the Basic Law: Human Dignity and Liberty, which determines the principle of enshrining the values of the State of Israel as a Jewish and democratic state, it would appear that Justice Bejski's remarks are consistent with the provisions and content of the Basic Law: Human Dignity and Liberty. Protecting human life, body and dignity are intended to enshrine in the legal system of the State of Israel the values of a Jewish and democratic state. We must therefore create the proper synthesis between the values of a Jewish and democratic state, and it is fitting and correct that the determination on the basis of the values of a Jewish State should serve not merely to support the exceptions found in the English and American approach, but to determine an original approach of our own legal system.

Value laden concepts such as liberty, justice, human life and dignity, may be given the most perverted interpretation in certain social conditions; human history does not lack such examples and in our generation, the generation of the Holocaust, the atrocities of the Third Reich and the terror of the governments of 'peace among nations' led to things that the human mind could not have fathomed. The values of a *Jewish* state, whose roots are planted in

the basic values of the dignity of man created in the image of G-d, the sanctity of life, and alleviating pain and suffering — roots that have stood the test of many generations and which have nurtured and sustained the whole world — these are the correct safeguard and guarantee for the proper and correct application of the synthesis between Jewish and democratic values (see HCJ 1635/90 *Jerzhevski v. Prime Minister* [23] at pp. 783-784; and the article of the late Professor G. Procaccia, 'Notes on the Change in Content of Basic Values in the Law', 15 *Iyunei Mishpat*, 1990, 377, at p. 378).

The expressions 'the right to die', 'death with dignity', 'mercy killing', etc.

58. The *premise* of the Jewish legal system with regard to the sanctity, value and measure of human life is of particular importance when we come to discuss the question of euthanasia in its various forms, which is the central issue in this case. In this field, expressions such as '*the right* to die' and 'death *with dignity*' are bandied about; scholars and researchers, doctors and jurists have expressed their views about these terms, both from a theoretical perspective and from practical experience. It is worth listening to some of these comments and responses, from which we will reconsider the caution and the great care needed in making a decision in this fateful area, in finding the proper, correct and judicious synthesis.

The patient's consent to die, and even his express wish to do so, does not always indicate an autonomous and balanced decision untainted by other considerations:

> 'Agreeing to this approach leads people to feel *obliged* to die more quickly in order not to burden the family. Thus the *right to die* may become *the duty to die*; at times the *mercy* in the killing is for *the family and society*, and not necessarily for the *terminally-ill patient*' (Dr A. Steinberg, *Encyclopaedia of Jewish Medical Ethics*, vol. 4 (pre-publication copy) [100], 'Close to Death', at p. 91).

Moreover:

> 'Social consent to such an approach inhibits research and progress in developing effective treatment for alleviating pain and suffering; such an act will cause a breakdown of trust between patients and doctors; it is not the function of the doctor to become society's executioner; the role of the doctor and medicine is to prolong and improve life, and not to kill patients; there is a

> fundamental difference between active euthanasia, where the cause of death is the direct act of murder by the doctor, and passive euthanasia, where the patient dies from his illness and death comes naturally; the role of the doctor ends when he has nothing to offer the patient and it does not continue until he is killed; active euthanasia is irreversible, while passive euthanasia still leaves room sometimes for a reconsideration, and for the correction of mistakes of diagnosis and prognosis; there are other ways to alleviate the suffering of the terminally-ill patient, and a quick and generous offer to kill him to put him out of his pain is not justified even against a background of a desire to help the patient' (*ibid*.).

The following was stated in the opinion of Dr Ram Yishai, the chairman of the Israeli Medical Federation and a member of the Ethics Committee of the World Medical Federation since 1985, which we cite in full below when considering the specific case before us:

> '9. The role of the doctor who treats a terminally-ill patient is to alleviate physical and mental suffering while restricting his intervention to treatment that, in so far as possible, maintains the quality of life of the patient towards the end. We are not speaking of dying with dignity; R. Ramsey ("The Indignity of Death with Dignity", *The Hastings Center Report*, 1981, argues that the phrase *dying with dignity* is a contradiction in terms since for death is the ultimate human indignity. Lofty words such as these often conceal very callous outlooks. *The less emphasis that is placed on helping and treating the terminally-ill patient, the more the need is felt to speak about dying with dignity*. We can agree with M. Muggeridge that: "*I do not exactly support the prolongation of life in this world, but I very strongly recommend not to decide arbitrarily to put an end to it*".'

In the rulings of our courts it has been said:

> 'The serious fear is that the boundary between voluntary euthanasia and involuntary euthanasia will be blurred. It is possible that the patient, *who wants to continue living*, will feel *obliged to choose death*, when he sees the weary looks in the eyes of his relatives and interprets as a desire to be free of the suffering caused by him' (Judge H. Bental in CrimC (TA) 555/75 *State of Israel v. Hellman* [35], at p. 138; emphasis added).

> 'In an interesting article by Professor Robertson, a leading proponent of the 'living will' (Robertson, 'Living Wills', *Hastings Center Report*, 1991), the author admits to second thoughts on the issue; perhaps stressing *the liberty of the healthy and his right to autonomy* disregards *the right of the patient to cling to life so long as it has any value whatsoever*' (*Tzadok v. Bet HaEla Ltd* [34], at p. 496; emphasis added).

An additional factor much discussed in connection with this difficult and complex subject is the fact that the treatment is expensive, and the chances of success are small; the result is the 'hidden' influence of *economic* considerations on the ideology of 'respecting the patient's wishes':

> '… alongside the humane and ideological considerations are very strong *economic* factors (emphasis in the original); the resources of society are limited, and if they are used for the benefit of such patients whose treatment is prolonged and expensive, it is at the expense of the large number of 'healthier' patients who can be restored to meaningful life. This reason, seemingly, could cause the scales to tip towards those dangers that we mentioned, and what started out as a *mercy killing* ends up as *enforced mercy killing*' (*ibid.*, at p. 501; emphasis added).

The terminally-ill patient who lives a life of suffering, yet who wishes — and this is his free will that should be respected — to continue to living such a life, may therefore receive the help of someone who thinks it is 'his best interest' to have his life shortened.

In summary of these remarks: 'the phrase *dying with dignity* is a contradiction in terms'; these words of Ramsey, cited from his illuminating article, 'The Indignity of Death with Dignity', *Hastings Center* Report, 1981, go to the root of one of the main issues in this field. There is a conflict between *the death* of a person and the *dignity* of a person. By contrast, the life of a human being is itself the dignity of man, and there is no conflict between the *life* and *dignity* of man, nor could there be a conflict. The same is true with regard to expressions such as 'the right to die' and 'mercy killing', etc.. These statements should be examined with great caution in order to discover their nature and the circumstances in which they are coined, as we have just done by considering the views of various scholars and thinkers.

The slippery slope

59. The fears of the said dangers are especially great in cases concerning *minors and incompetents*. When we begin to value and weigh the *worth* of a human life, it is only natural that such 'evaluations' and 'weighings' lead first to a permit to kill those persons whose bodies and minds are the most disabled, and after that, those who are slightly less disabled, and in the course of time there will be no limit to the bounds of this policy. This is the phenomenon of the 'slippery slope'. This phenomenon has historical precedents. Such an approach of relativity to the quality and value of life already in the teachings of Plato (Plato, *The Republic,* 3, 405), who took the view that disabled people should not be kept alive, as they are a burden to society, a philosophy that was practised in the Greek city-state of Sparta. In our own generation, we know that there is no end or depth to which the 'slippery slope' cannot lead. In the middle of the twentieth century, in a country which *in the past* boasted of its 'enlightenment' and its culture, the 'slippery slope' led to the T4 operation of the Third German Reich, as a result of which approx 275,000 mentally ill and retarded people, residents of old-age homes and other unfortunates were murdered, many of whom were Germans themselves. The rationale and 'justification' for this was, according to the thinking and evaluation of those who perpetrated these crimes, that there was no value to the life of those unfortunates, and they were a nuisance and a burden to society. This operation, with its 'innovation' of the use of gas to kill its victims, served as a model and a guideline for establishing the death camps and the gas chambers for carrying out the racist Nazi ideology and the annihilation of six million Jews in the Holocaust that the authorities of the Third Reich and their helpers from other nations perpetrated against the Jewish people (see CrimA 347/88 *Demjanjuk v. State of Israel* [24], at pp. 249-250; Dr A. Steinberg, *Encyclopaedia of Jewish Medical Ethics*, vol. 4 (pre-publication copy) [100], 'Close to death', at pp. 77-79, 90-91, 'Mercy Killing', at p. 11).

The phenomenon of the 'slippery slope', which has materialized more than once, and the great and terrible fear that, due to social and other pressures, we may, G-d forbid, move from the patient's *right* to die to the patient's *obligation* to die, and other similar fears, serve as a stern warning. Taking the concept of 'the autonomy of the individual' *to the extreme*, in so far as the questions under discussion are concerned, when the reason of the best interests of society and its philosophy purportedly require this, is likely to lead to serious consequences. Philosophers, doctors, judges and many others have been led astray in this respect. A striking example of this is the remarks made

by the renowned Justice Oliver Wendell Holmes, one of the greatest American judges, in the case of *Buck v. Bell* (1927) [57], cited in *Attorney General v. A* [16], at pp. 687-688).

The facts of the case were as follows: Carrie Buck was an 18-year-old woman, the mother of a mentally-retarded child. Her mother was also mentally retarded. Under a statute enacted in the State of Virginia, it was permitted to sterilize mentally ill persons, provided that the operation did not harm his health. The court in Virginia allowed such an operation be performed on Carrie Buck. In the Supreme Court of the United States it was argued, *inter alia*, that this Virginia statute violated the Fourteenth Amendment of the United States Constitution that guaranteed equal protection of law, and therefore the permission to carry out the sterilization operation was void. The Supreme Court dismissed the argument and approved the sterilization of Carrie Buck. In this respect, Justice Holmes, who wrote the judgment, said (*ibid.*, at p. 207):

> 'The Judgement finds the facts that have been recited and that Carrie Buck is the probable potential parent of socially inadequate offspring, likewise afflicted, that she may be sexually sterilized without detriment to her general health and that her welfare and that of society *will be promoted* by her sterilization and thereupon makes the order. In view of the general declarations of the legislature and the specific findings of the court, obviously we cannot say as a matter of law that the grounds do not exist, and if they exist they justify the result. We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes *(Jacobson v. Massachusetts*, 197 U.S. 11). Three generations of imbeciles are enough' (emphasis added).

These words are terrible and perplexing, and they stand in direct contrast to basic approaches in Jewish thought and in our society. The sterilization — so

it is said — is for 'her welfare and that of society'. But it is clear that the decisive welfare in the eyes of the judges is that of *society*. The analogy between the call of the State to its 'best' citizens to sacrifice their lives for it and the call to the mentally disabled, 'who already sap the strength of the State', to make of themselves a sacrifice in order to spare society from 'being swamped with incompetence' is a terrible analogy for us to hear, including the other remarks in the passage cited, including the declaration that 'three generations of imbeciles are enough!'. If such a distinguished judge could be led astray so terribly in his language and his decision, one sees how cautious in this matter of the reasoning of 'the welfare and dignity of the patient', 'the welfare and interests of society' and 'the public interest'. It should be noted that one of the judges, Justice Butler dissented from the judgment of his colleagues.

Genuine justice and healing; agrees with reason and logic

60. The statements we made and the considerations that we took into account, in the subjects under discussion, with regard to the values of a Jewish and democratic State and the synthesis between the two sets of values are designed to guide not only the court in judging and ruling, but all those who must make these medical and legal decisions, and primarily — the family members and friends, and the doctor treating the patient.

It goes without saying that each case should be treated on an individual basis, according to its special circumstances, in view of these principles and guidelines. In this way, a body of laws and instructions will develop, step by step, in one case after another, with regard to this difficult, complex and wide-ranging area of law.

This interpretative method involves a major undertaking in order to reach case-law that is the product of careful consideration and skilful decisions made with wisdom, openness and understanding of ideas that are ancient, but are also numbered among the needs of the present. We already mentioned at the outset that a judge and a doctor must attempt to engage in their work by means of reaching the absolute truth. The question has already been asked: what is 'the absolute truth'? Is their truth that is not absolute? On this point, Rabbi Yehoshua Falk, a leading commentator on *Arba'ah Turim* and *Shulhan Aruch, Hoshen Mishpat* and a Jewish law expert in Poland in the seventeenth century, said:

> 'Their intention in saying the absolute truth was that one should judge the matter *according to the time and place* truthfully, and

> one should not always rule according to the strict law of the Torah, for sometimes the judge should rule beyond the letter of the law according to the time and the matter; and when he does not do this, even though he judges truly, it is not the absolute truth' (Rabbi Yehoshua ben Alexander HaCohen Falk, *Drisha,* on Rabbi Yaakov ben Asher, *Arba'ah Turim*, *Hoshen Mishpat* 1, 2 [155]).

Rabbi Eliyahu ben Shelomo Zalman, the Vilna Gaon, adds:

> 'Judges must also be familiar with the *nature of the world* so that the law is not perverted, for if he is not familiar with these matters, *even though he is an expert in Torah law*, the absolute truth will not be reached, i.e., even though he makes an honest decision it will not be absolutely true… therefore the judge must be an expert in both areas… i.e., *wise* in Torah issues and *knowledgeable* in worldly matters' (Rabbi Eliyahu ben Shelomo Zalman of Vilna, commentary on Proverbs 6, 4 [156]).

Decision-making with regard to any of the problems arising in this fateful area must be absolutely true, and the balance must be found in each case, according to the place and time, by means of insight into the affairs of the world and expertise as to the nature of the world. As we have said and held, it is not proper for the court to resolve in advance *every* problem that may arise, at some future time. *General* guidelines should be established by courts and ethics committees that should be established; as each problem arises before the doctor and judge, it should be dealt with and considered according to these — in accordance with the values of a Jewish and democratic state, for a proper purpose and to an extent that is not excessive, according to the nature of the world and the needs of life. The underlying principle should be the legal rule of one of the greatest arbiters of Jewish law, Rabbi David ben Shelomo Ibn Abi Zimra, whom we mentioned above [93], in discussing and deciding one of the issues of Jewish medical ethics, that 'it is written: "Its ways are pleasant ways" and the laws of the Torah shall be consistent with reason and logic'.

At the beginning of our opinion, we cited Nahmanides' work about the laws, principles and ethics of medicine which he called 'The Law of Man'. This is a marvellous name. Man is the centre and focus of the Basic Law: Human Dignity and Liberty, which is to be interpreted, according to the instruction of the legislator, in accordance with the values of the State of Israel as a *Jewish and democratic* State. This is a law of great importance and significance. By means of a proper synthesis of the values of a Jewish and

democratic state, the purpose of the law — human welfare and benefit — will be achieved; there is no human welfare and benefit without there being welfare and benefit to that *extra dimension* of man — the Divine image in him — which is the secret of his creation and existence, his form and his being.

The problems in this case

61. Now that we have reached this point, let us consider the problems facing us in this case. Some of these problems have a solution in statutory provisions or case-law. Let us examine these briefly.

a. *The principle of the sanctity of life*

(1) The offence of murder is one of the most severe crimes, if not the most severe, found in our statute books (see ss. 300-301 of the Penal Law, 5737-1977, and s. 305, dealing with attempted murder; s. 298 regarding manslaughter; and s. 304 concerning negligent homicide).

The same is true of the offence of aiding or encouraging suicide, which is one of the most severe offences that appear in the statute books, carrying a penalty of twenty years' imprisonment:

> '302. Someone who induces a person to commit suicide, by encouragement or by advice, or who aids another in committing suicide, is liable to twenty years' imprisonment.'

Originally, attempted suicide was also a criminal offence, but this was repealed (see Criminal Law Ordinance Amendment Law (no. 28), 5726-1966, ss. 8, 64, 68). It is illuminating to note the background and discussions that preceded the repeal of this offence.

When the draft law to repeal the offence of attempted suicide was presented, the Minister of Justice at the time, Mr. D. Yosef, said the following:

> 'Here I would like to say a few words about the repeal of the penalty for attempted suicide. I did not agree lightly to the repeal of this offence. I am aware of the respect that Jewish tradition has for human life and that it also opposes even the taking of one's own life. I am certain that every one of us regards the sanctity of human life an important humanitarian value. But it is precisely the humanitarian outlook that induces me to believe that a criminal investigation and trial are not the proper way of dealing with these tragic cases' (*Knesset Proceedings*, vol. 44, 1966, 138).

Knesset Member Eliyahu Meridor distanced himself from the repeal of the offence of attempted suicide. He explained his reservation as follows:

> 'The principle of the sanctity of life should not be undermined, even when dealing with a person's own life. A person is not entitled to take his own life. This principle is important, and if it is written in the statute books, I suggest that it should be retained.
>
> We do not live in a regime where we are obliged to prosecute every person who attempts suicide...' (*Knesset Proceedings*, vol. 46, 1966, 2090).

A similar reservation was expressed by Knesset Member Moshe Unna:

> 'The question is not how I relate to someone who commits suicide — whether I should regard him as a wretched person, someone who did not find his place in life, someone whom we regard forgivingly. All that may be correct, and yet the significance of repealing this provision is entirely different. The significance of the repeal is — an expression of contempt for human life, an expression that I do not have regard for the sanctity of human life — even if the matter has aspects that justify a different treatment that what is accepted. We cannot ignore this meaning of the repeal' (*ibid.*, at p. 2090).

But these reservations were rejected; 11 Knesset members voted for the repeal of the offence of attempted suicide and 10 Knesset members voted against. Notwithstanding the repeal, the offence of assisting and encouraging suicide remained in full force. To the question of Knesset Member Israel Shelomo Ben-Meir:

> 'What about the aider? If there is no offence, there can be no aiding?' (*ibid.*, at p. 2090) —

Knesset Member Mordechai Bibi, on behalf of the majority of the Constitution, Law and Justice Committee, replied:

> 'Knesset Member Ben-Meir, we are not talking about an aider. The section whose repeal we are discussing says: "Anyone who tries to kill himself shall be guilty of an offence". This refers to someone who tries to kill himself — and in the vast majority of the cases, if not in all of them, these are people who have lost their mental balance. If we were discussing a sweeping legitimization of every suicide, as exists in certain countries, then

> I would certainly oppose that, but we are not discussing such a situation" (*ibid*., at p. 2090).

(2) From here we turn to the question of *euthanasia*, which we discussed at length above, as expressed in Israeli legislation. Section 309(4) of the Penal Law says:

> '309. In all of the following cases, a person shall be deemed to have caused the death of another person, even if his action or omission were neither the immediate cause nor the only cause of the other person's death:
>
> …
>
> (4) *By his action or omission* he hastened the death of a person suffering from a disease or injury that would have caused his death even without that action or omission' (emphasis added).

It is well known that the criminal law distinguishes between a prohibited action and a prohibited omission. An action prohibited by the criminal law is always forbidden, whereas an *omission*, in order to be a criminal offence, requires that there to be *a breach of a legal duty*:

> '… it is possible to agree also to offenses that involve an omission as a behavioral element of their *actus reus*, provided that it is accompanied by a duty to act provided by law; i.e., the special condition for creating an offence of omission is that the omission constitutes a breach of an express legal duty to act. *Without such a duty, an omission cannot be an element of the* actus reus *of an offence*' (S.Z. Feller, *Fundamentals of Criminal Law*, vol. 1, 1984 [61], at p. 398; see also s. 299 of the Penal law, defining a 'prohibited omission').

Active euthanasia is therefore absolutely prohibited. This can be seen from the provisions of the Penal Law, and this can be seen from the synthesis of Jewish and democratic values that we discussed above. Even the patient's consent to causing his death is irrelevant; *the patient's ownership of his body is subject to society's interest in protecting the sanctity of life*:

> 'The offence exists irrespective of whether the victim agrees to its commission or not. The offence harms all of society, and the attitude of one individual, even if he is the victim, is insignificant. He cannot sanction an offence or condone its commission, in the name of society or the State as a political organization of society

> that is interested in the elimination of the occurrence of crime' (Feller, *ibid.* [61], at p. 112).

The following was said by the late President Sussman, in CrimA 478/72 *Pinkas v. State of Israel* [25], at p. 627:

> '… The victim's consent does not absolve the perpetrator from criminal liability, and the reason for this is simple… A person cannot condone someone else's criminal liability, since the criminal indictment is not intended to enforce his right, but the right of society, and a person cannot condone that which is not his to condone…'

A comparison with the remarks of Maimonides, with regard to the prohibition of taking a ransom from a murderer, is illuminating. Even if the victim's closest relation wishes to exempt the murderer, he may not do so, because 'the life of the murder victim is not the possession of the closest relation but the possession of the Holy One Blessed be He' (Maimonides, *Mishneh Torah*, *Hilechot Rotzeah uShemirat HaNefesh* (Laws of Homicide and Preservation of Life), 1 4 [104], see *supra*, para. 20). And see our discussion regarding a person's ownership of his body.

State of Israel v. Hellman [35] concerned a mother who shot her son with a pistol. The son was suffering from cancer and he had no reasonable chance of being cured. When his suffering increased, the son asked his mother to help him and put an end to his suffering. The court sentenced the mother to one year's actual imprisonment. Justice Halima said in this case (at p. 141):

> '… Our law does not recognize the concept of "mercy killing". There can also be no doubt that society enacts laws in order to protect its human 'image', a sanctified element of which is the human right to live.'

See also CrimC (TA) 455/64 [38]. That case involved a mother who killed her mentally retarded son with sleeping pills that she put into his food. Cf. also CrimA 219/68 *Sandrowitz v. Attorney-General* [26].

We will add that recently a number of bills that appeared to sanction active euthanasia were proposed in the Knesset, but these did not even reach a first reading. The same happened to the draft Patient's Rights Law, 5752-1992, a draft bill of the Labour and Welfare Affairs Committee of the Knesset, that said —

> '10. A terminal patient is entitled to die with dignity, in accordance with his outlook on life and belief, and, in so far as

> possible, in the presence of a person of his choosing, and the treating physician and the medical establishment shall assist him in realizing this right and shall refrain from any act that may harm his dignity.'

This draft law passed a first reading in the Knesset only after its proponents deleted the aforesaid section 10 (*Knesset Proceedings* 125, 1992, 3836-3840).

(3) *Active* euthanasia is therefore absolutely prohibited. The main question in this case which is the subject of dispute between the parties is the question of refraining from administering medical treatment —*passive* euthanasia — in the following two forms: *refraining* from acts that prolong life and *discontinuing* acts that prolong life. The framework of the question is: does the doctor have a *legal obligation* to act to *prolong* a patient's life against his will?

As a rule, a doctor has a *legal obligation* to give every medical treatment to a patient under his care. It is sufficient in this respect to refer to s. 322 of the Penal Law, which says:

> 'Whoever is responsible for a person who because of… his illness… cannot discharge that responsibility by himself and cannot provide his own basic needs — whether the responsibility arises from a contract or from the law or whether it was created by a proper or forbidden act of the person responsible — must see to the patient's needs and care for his health, and he shall be deemed to have caused whatever happens to the life or the health of the person as a result of his not complying with his said duty.'

For a detailed analysis of additional sources of obligation, see A. Gross, 'Passive Euthanasia –Moral and Legal Aspects', 39 *HaPraklit*, 1990, 162, at pp. 168-173.

Nonetheless, the *scope and limits* of the doctor's duty to give medical treatment have yet to be clarified, and the law recognizes, in appropriate circumstances, the patient's right to refuse medical treatment.

(4) Violating a person's right not to suffer bodily harm without his consent constitutes both a tort and a criminal offence. The crime of assault is defined in the Penal Law, 5737-1977, in s. 378, as follows:

> 'Whoever strikes a person, touches him, pushes him, or applies force to his body in another way, directly or indirectly, without his consent or with his consent that was obtained by deceit — this

> is an assault; for this purpose, applying force — including the application of… any thing or substance, if it is applied to an extent that may cause damage or discomfort.'

The tort of assault is defined in similar language in s. 23 of the Torts Ordinance [New Version]:

> '(a) Assault is the intentional use of force in any way against the body of a person by striking, touching, moving or in any other way, whether directly or indirectly, without the person's consent or with his consent that was obtained by deceit…
>
> (b) 'Use of force' for the purpose of this section – including the use… of any thing or other substance, if they were used to an extent that may cause damage.'

We have stated that 'the right not to have one's body violated is one of the basic human rights in Israel, and constitutes a part of the human right of personal liberty…' (CA *Sharon v. Levy* [18], at p. 755). This 'derives from the principle of personal liberty of everyone who was created in the Divine image…' (*State of Israel v. Tamir* [15], at p. 205; and see para. 19, *supra*).

A person's right not to have his body violated without his consent means, *inter alia*, that a person is entitled *not to be given medical treatment* which naturally involves harm to the human body *without his consent*. This right is the basis for the duty — the duty of the doctor — to obtain the patient's willing consent to medical treatment. This court ruled thus in CA 67/66 *Bar-Chai v. Steiner* [27], at p. 233 (and see also FH 25/66 *Bar-Chai v. Steiner* [28]. More recently, *President Shamgar* said:

> 'It is undisputed that before performing an operation upon on a patient's body, the doctor must secure the patient's consent thereto… Performing an operation without the patient's consent is an assault, a tort under s. 23(a) of the Torts Ordinance [New Version]' (CA 3108/91 *Raiby v. Veigel* [29], at pp. 505-506).

As to performing surgery against the patient's will in order to save his life, see *Kurtam* [21], at para. 55, *supra*).

(5) Indeed, some of the questions that arise in this matter — such as the definition and the extent of the doctor's obligation to treat a patient, as opposed to the patient's right to refuse medical treatment — and what is connected therewith and implied thereby, which mainly refer to a patient whose condition is defined as *terminal* — have been considered in a series of decisions given in recent years by the District Courts, and most of these were

mentioned above (*Eyal v. Dr Wilensky* [36]; *Tzadok v. Bet HaEla Ltd* [34]; *Tzaadi v. General Federation Health Fund* [37]; See also HCJ 945/87 *Neheisi v. Israel Medical Federation* [30], at p. 136. These decisions, however, have not been reviewed by this court, and they were made before the enactment of the Basic Law: Human Dignity and Liberty.

b. *Ascertaining the wishes of a minor or incompetent*

(1) An additional issue with regard to the current law in Israel is the following: what is the law regarding minors or incompetents who cannot express their consent, or refusal, to receive medical treatment in cases such as the one before us?

On this issue the litigants before us argued at length, while referring to the Legal Capacity and Guardianship Law. Mr Hoshen, the learned counsel for the appellant, argues that 'parents are the natural guardians of their minor children' (s. 14 of the Legal Capacity and Guardianship Law, 1962). Their guardianship includes 'the obligation and the right to provide for the needs of the child…' (s. 15 of the said Law), and one of the needs of the child is his right to refuse medical treatment. It follows that the parents' refusal to allow medical treatment amounts to the refusal of the child (pp. 3-4 of the respondent's brief of 2 September 1988).

By contrast, Ms Zakai, the learned counsel for the State, argues that although 'the needs of the child', mentioned in s. 15 of the Law, 'undoubtedly include the minor's medical and health needs' (para. 3.1 of the Respondent's Outline Arguments of 19 August 1988). However —

> 'Hastening death is not a need of the child. The child's right to live or die is not a subject included in his parent's guardianship, and therefore they are not competent to represent him in so far as these are concerned' (para. 1.5 of the Outline Arguments).

Ms Zakai referred to s. 68 of the Legal Capacity and Guardianship Law, which states:

> '68. (a) The court may, at any time, upon the application of the Attorney-General or the application of his representative, or even of its own initiative, take temporary or permanent measures, as it sees fit, to *protect the interests* of a minor, an incompetent or a ward of court, either by appointing a temporary guardian or a guardian *ad litem* or otherwise; the court may also act in this way if the minor, incompetent or ward of court personally applied to it.

> (b) If the application was to order the performance of surgery or the performance of other medical procedures, the court shall not order these unless it is convinced, on the basis of a medical opinion, that the said procedures are required *to protect the physical or mental welfare* of the minor, incompetent or ward of court' (emphasis added).

According to Ms. Zakai —

> 'In enacting s. 68(b), the legislature has set guidelines both for the court hearing a proceeding under this section and for the guardian of a minor with regard to medical matters that do not reach the court…
>
> The purpose of s. 68(b) is to clarify the "needs of the child" (according to the wording of s. 15 of the Law), and it determines that with regard to operations and other medical procedures the "needs of the child" are only equal to the desire to protect his physical and mental welfare.
>
> … The application in this case is not directed towards protecting the physical or mental welfare of the minor:
>
> It does not involve "protecting" — since it is not intended to preserve the *status quo*. It is not "for the welfare of the minor" — since the welfare of a person requires him first and foremost to be a "person".' (paras. 1.7.7, 1.7.8, 1.7.10 of the Outline Arguments)

These remarks are implied by what is stated in s. 17 of the Legal Capacity and Guardianship Law, which provides:

> '17. In their guardianship of minors, the parents must act *in the best interests of the child, as dedicated parents would act in the circumstances of the case*' (emphasis added).

Ms. Zakai further referred to the special mechanism of review in the Legal Capacity and Guardianship Law, when acts of guardianship relate to immovable property belonging to an incompetent and similar special transactions; such acts require court approval in order to ascertain and ensure that the general principle — i.e., that the guardian will act with regard to all the concerns of the incompetent only in his best interests (ss. 20 and 47 of the Law) — are upheld. Ms Zakai argued that:

> 'If so, it should not be presumed that the legislator who provided approval mechanisms for *money matters* would have provided none for *matters of life and death*' (para. 1 of the respondent's Supplementary Arguments).

(2) In *Garty v. State of Israel* [22], which was decided *before the enactment of s. 68(b) of the Legal Capacity and Guardianship Law*, President Agranat held, with regard to a child whose leg was amputated below the knee because of gangrene, that:

> 'In a case such as this — a case in which the choice is between exposing the child to death or saving his life with an operation which will leave him disabled — the parents' refusal to give their consent to the operation constitutes *a breach of their duty as guardians* "*of his body*" *to act in accordance with his best interests*. This is not all; if as a result of their refusal, the doctor refrains from performing the surgery and consequently the minor dies, then the parents who refused the treatment would be criminally liable for this outcome…' (*ibid.*, at pp. 457-458; emphasis added).

In the 'kidney' case (*Attorney General v. A* [16]), s. 68(b) of the Law was considered at length, and we held the following at pp. 673-675:

> 'Medical treatment that the ward of court needs in order to be cured and to be healthy, is within the authority of the guardian… "the needs of the minor and the ward of court" undoubtedly also include his *medical and health* needs. In these matters also, parents and guardians must act as dedicated parents and guardians would act (see PS (Jer.) 26/82 at p. 227). With regard to *medical treatment that presents a danger to the ward of court* (emphasis added), we have found that the guardian applied to the court for instructions under s. 44 of the Law (see *ibid.*, at p. 229). With regard to this, it was proposed to amend s. 68 of the Legal Capacity and Guardianship Law…
>
> According to the said wording of sub-section (b) that was passed by the Knesset, the court may order, upon an application of the parties set out in the said s. 68, "that an operation is performed or other medical procedures are carried out…". The provision regarding the authority to order "other medical procedures" to be carried out, in addition to performing an operation, includes the

> court's authority to order a medical procedure to be carried out even when this does not amount to a *direct* physical cure of the minor or ward of court, but it is any medical procedure that the court is convinced is required to preserve the physical or mental welfare of the minor. This includes the authority to order surgery to remove an organ from the body of the ward of court and its being transplanted into the body of another, provided that the court is convinced that this operation and transplant are required to protect the physical or mental welfare of the minor, incompetent or ward of court. The reason for this provision is clear. An *absolute* prohibition against the removal of an organ from the ward of court can cause great injury to the ward of court, should the donation of the organ be for the benefit of the ward of court — from the viewpoint of his physical or mental welfare — to a much greater extent than the damage caused by the removal of the kidney.'

In our opinion, as is implied by *Garty v. State of Israel* [22] and the 'kidney' case (*Attorney General v. A* [16]), the guardianship of the parents includes the right to refuse medical treatment, even if the refusal may lead to the child's death, but this refusal requires the approval of the court. The reason for this is simple and obvious. Such a refusal may constitute a breach of the parents' duty to act 'in the best interests of the child as dedicated parents would act in the circumstances of the case,' (s. 17 of the Legal Capacity and Guardianship Law, as was the case in *Garty v. State of Israel* [22]; the refusal might also constitute a breach of the parents' duty to act 'to protect the physical and mental welfare of the minor, the incompetent or the ward of court,' (s. 68(b) of the Legal Capacity and Guardianship Law) as happened in the 'kidney' case (*Attorney General v. A* [16]). The authority of the court to give such approval derives from the provisions of s. 68 of the Legal Capacity and Guardianship Law and is also included in s. 44 of that Law:

> '44. The court may, at any time, on the application of the guardian or the Attorney-General or his representative or of an interested party, or even on its own initiative, give instructions to the guardian with regard to any matter that concerns the performance of his duties; the court may also, on the application of the guardian, approve an act that was performed.'

For this very reason, even the doctor treating the child is obliged to apply to the court and obtain its approval for stopping treatment, and the same

obligation may apply, in appropriate cases, to the Attorney-General, who is responsible for the welfare of the public.

(3) Another issue that is related to our case arose with regard to ascertaining the wishes of minors *who are almost adults*. In HCJ 2098/91 *A v. Welfare Officer* [31], we were almost required to decide this question.

That was a tragic case of a teenager aged 17 years and seven months who was ill with cancer.

The teenager's parents asked him to undergo chemotherapy treatment, but the youth refused the treatment because of the great pain and suffering they caused him. In order to escape the treatment, the teenager ran away from home, and when he was finally discovered, with the help of the police, the Juvenile Court held — by virtue of its authority under ss. 2(2) and 2(6) of the Youth (Care and Supervision) Law, 5720-1960 — that the chemotherapy treatment should be administered to the teenager by force, in the psychiatric ward of the hospital, since only in that ward could treatment be given by force. In his petition, the minor requested that we order the forced treatments to be stopped.

As stated, we were not required to decide the question whether the minor's 'wishes' should take precedence over his parents' wishes, or any other questions involving life-saving treatment in that case, because —

> '… We had the opportunity to speak at length with the petitioner and to advise him of the importance and necessity of the chemotherapy treatment for his illness, the good chance of his being cured and his duty to carry out of his own will the supreme command: "And you shall preserve your lives".
>
> Finally the petitioner informed us that he initially did not want to undergo the treatment because of the pain it caused him, but now he promised that as long as the order that he must undergo the treatment remained in effect, he would abide by it and he promised to go to the treatment willingly and not to run away from it. This promise was given by the petitioner after much hesitation, which was evident from his expression. We, who spoke to him heart to heart, were persuaded, in so far as this is possible, that the petitioner was being candid. The petitioner is indeed a minor who is only nearing adulthood; yet in his appearance, his speech and his sincerity, he is an adult, and it was evident that he was telling the truth' (*ibid*., [31]at p. 219).

This appeared to us to be the proper approach in the circumstances of that difficult case. Matters did not turn out as expected: the minor fled from the country and when his illness worsened he returned here, and a short while later he passed away.

4. How is the court to determine what are 'the best interests' of the child and what constitutes 'protecting his physical and mental welfare'? Jewish law does not discuss this issue at length, and we have discussed the reason for this (*supra*, at para. 37). Let us consider two rulings on the issue.

Rabbi David Zvi Hoffman (*Responsa Melamed LeHo'il*, on Rabbi Yosef Karo, *Shulhan Aruch*, *Yoreh Deah* 104, at p. 108 [133]) was asked —

> 'Whether a doctor was obliged to perform an operation even when the parents of the sick child do not wish it?
>
> The question depends on the following: a) Does the doctor believe that the operation will produce a cure; b) Even if he is uncertain as to whether the operation will succeed, will he die for certain without the operation?'

Rabbi David Zvi Hoffman, in his response, bases himself on the responsum of Rabbi Yaakov Reischer in *Responsa Shvut Ya'acov* [122] (see para. 25, *supra*), that since the patient will surely die without the operation, and since the operation may cure his sickness, he is permitted to undergo the operation. As to the question whether the parents are competent to prevent an operation on their child, Rabbi David Zvi Hoffman held the following (*ibid.*, at p. 109):

> 'Since it is permissible to carry out such an operation, certainly the wishes of his father and mother are irrelevant.
>
> This is because the doctor is obliged to heal, and if he refrains from doing so, he is a shedder of blood. And we do not find a single instance in the entire Torah where the father and mother may endanger the lives of their children and prevent the doctor from treating them.'

The conclusion of the Rabbi David Zvi Hoffman's responsum is illuminating: 'This is the law of Torah; I do not know the law of the land on this issue'. He was referring to German law at the beginning of the twentieth century.

On a closely related issue, some Jewish law authorities believe that the said determination by the courts with regard to the 'best interests' of a child can be made by an 'estimate', *i.e.*, discovering the presumed intention of the minor or

incompetent. We said the following in the 'kidney' case (*Attorney General v. A* [16], at pp. 681-684):

> 'A different opinion [from the accepted view of Jewish law] is expressed by one of the leading Jewish law authorities in accordance with the Jewish law principle of an "estimate", which reminds us of the idea of the "substitute judgment" in American case-law… This position is adopted by Rabbi Moshe Hershler in "Kidney Donation from a paralysed and Unconscious Person", 2 *Jewish Law and Medicine*, 1981, 122.
>
> …
>
> After a detailed discussion of the problem of kidney donation in Jewish law, he concludes that according to Jewish law sources on this issue we should not permit a kidney to be removed from an incompetent for the purpose of transplanting it into his brother's body…
>
> Rabbi Hershler then turned to consider the possibility of allowing the transplant by virtue of the principle of the "estimate" (*ibid.*, at p. 127):
>
> > "But one can approach this from a different perspective, that undoubtedly if he was healthy and of sound mind and it was known that he was of the same age and blood as the patient, he is the only donor who is of the same family and genes as his brother who has the power to donate a kidney that has a chance of being accepted and saving his brother from the danger of death to life, certainly he would donate his kidney willingly to save his brother; if so, it is possible that we can say that even though he is unconscious and cannot decide or give his consent, nonetheless we can estimate that as a rule he would wish that a kidney should be taken from him for his brother."
>
> After discussing the principle of the estimate as applied in Jewish law, he went on to say (*ibid.*, at pp. 127-128):
>
> > "According to this, even with regard to donating a kidney where the vast majority of persons, if asked to give a kidney to save their closest relation, such

> as a father or a brother, from death to life, they would certainly agree, and therefore we say that even with someone who is insane, as a rule he would agree, particularly in a case where the ward of court is very dependent on his brother, and it is possible that his welfare will be harmed more by losing his brother than by losing his kidney, and as a result of the surgery and the transplant, the patient may live longer and care for the needs of the ward of court for a long time.
>
> Even though one must distinguish between an estimate relating to money matters of maintenance and charity and an organ donation, that with regard to money matters, we may collect on the basis of the estimate even though it is defective, but with regard to donating an organ, it is a serious and sometimes dangerous action such that an estimate should not avail us, nonetheless it would appear that an analogy may be made in this respect, for wherever an estimate may be made that a person would certainly do this, we can say that he can be presumed to have agreed to it."

At the end of his responsum, Rabbi Hershler reaches the conclusion that an organ donation should not be permitted in the specific case. He gives two reasons for this:

> "From the language of the 'question' before us, that if the transplant is carried out it would lessen the suffering of the patient, it appears that the concern here is not the death of the patient, but alleviating his suffering, and if so, we cannot make an estimate here that he can be presumed even in this case to donate a kidney, and also one is not permitted by the law to endanger oneself in order to save someone from suffering and the like.
>
> After we investigated the details of this case, we discovered that the patient has a younger sister who is not prepared to donate a kidney and who says that the proper donor should be the paralysed brother.

> This fact undermines the assumption we wished to make, that if this donor were of sound mind, he would undoubtedly donate a kidney voluntarily and with full understanding, and consequently we wanted to say that we had here an estimate that even the paralyzed brother would wish to donate a kidney. But in this case, the sister refused, and although her refusal does not totally refute the 'estimate', since in this case she believes that her elder and paralyzed brother has this duty, and it is possible that were there no other donor she would willingly volunteer, nonetheless her refusal does imply that it is uncertain that the paralyzed brother would wish to give up his own kidney."

The first reason is unique to the case before the respondent — that the recipient brother is not facing a danger of death but the purpose of the transplant is merely to alleviate suffering, and in such a case there exists no estimate that the incompetent would consent to donate his kidney.

Is the second reason also applicable only to that case, i.e., since it was proved that the sister refuses to donate her kidney, there is no longer an estimate that the incompetent brother would consent to donate his kidney if he were capable of making a decision? One could argue otherwise, i.e., that the fact that the sister refuses is a proof — or casts doubt upon the existence of the estimate as a rule and not merely in that case — that an incompetent, were he healthy in body and mind, would consent to donate his kidney. Indeed, there is great doubt as to whether this estimate is in fact correct, since according to the existing statistical research, only a small percentage of healthy relations consent to donate their kidney to their relation.

On the other hand, one may argue that in the specific case confronting Rabbi Hershler this estimate is indeed correct, because, as stated above — "the brother who is a ward of court is very dependent on his brother, and it is possible that his welfare will be harmed more by losing his brother than by losing his kidney, and as a result of the surgery and the transplant, the patient may live longer and care for the needs of the ward of

court for a long time", and it is only because the sister refused to agree to donate a kidney that this estimate is in doubt, because the refusal shows that in *that* family, even if the transplant benefits the donor, the readiness to donate a kidney to another family member does not exist. This matter requires clarification.

It also transpires from the opinion of another Jewish law authority that we can rely on the principle of the estimate to permit the removal of a kidney from an incompetent for transplant to a family member. In an article dealing with the issue of kidney transplants in Jewish law (Rabbi Moshe Meiselman, "Jewish Law Problems with regard to Kidney Transplants," 2 *Jewish Law and Medicine*, 1981, 144), Rabbi Meiselman considers the question under discussion (*ibid.*, at p. 121): "One of the difficult questions is the transplant of a kidney when the donor is a deaf-mute, retarded or a child". After consideration, he concludes:

> "It may be said that if we could establish that the vast majority of brothers donate a kidney to their brothers, the kidney could be taken from the donor. This is not the case for someone who is not a relative at all, for in that case people certainly do not donate, and therefore the kidney should not be taken. With regard to siblings and parents, etc., only in cases where we can establish that the reality is really that the vast majority of brothers or parents or children donate a kidney, is it then permissible to take the kidney for transplant."

In my opinion, this is a radical conclusion from the viewpoint of Jewish law, namely to allow the removal of a kidney from an incompetent because of an estimate that the vast majority of brothers donate a kidney to their brothers. This estimate — even if it is correct, i.e., if the vast majority of brothers do act in this way — is insufficient to permit the removal of a kidney from an incompetent unless — in addition to the estimate — the removal of the kidney from the incompetent and its transplant to the body of the brother also involves a significant benefit to the incompetent, from a physical and mental viewpoint… We have already seen above that there is a basis for distinguishing between

relying on an estimate in a monetary matter, for maintenance or charity, and removing an organ from the body…'

The remarks we made with regard to the use of an 'estimate' to ascertain the consent of a minor or an incompetent to remove an organ from their body are even more relevant for the use of an 'estimate' to ascertain the wishes of a child or an incompetent with regard to the taking of his life. It is difficult, extremely difficult, to estimate a person's wishes on these sensitive issues, and extreme caution must be exercised when dealing with minors or incompetents who are weak and dependent, and who often are a burden for those closest to them. In such a situation, there is a considerable risk that the 'wishes' of the children or incompetents will be determined according to the wishes of *those closest to them* and not according to their own wishes, and from here it is only a small distance to the 'slippery slope'.

62. As we have seen, solutions to some of the problems in the field of law and medical ethics may be found in provisions of existing legislation, and these have been considered in case-law. But many problems still await consideration and decision by this court, and some have been considered in this present case. It goes without saying — as we have said and emphasized above — that in cases of this kind we do not lay down solutions *ab initio*. The solutions must be found in each instance and in each matter, in accordance with the circumstances and the issues that arise. The source for finding the solutions and answers to all these lies in the provisions of the Basic Law: Human Dignity and Liberty, which is the basis and foundation for dealing with all the questions considered, since many basic rights are related to, and involved in, these.

As we stated at the outset, the subject of our discussion involves and concerns many basic rights in the Basic Law: Human Dignity and Liberty: protecting human life, body, and dignity and the right of individual freedom, privacy and confidentiality. From our study of this case, we have seen that all these basic rights arise in the present case: the supreme value of the sanctity of human life and the duty to protect his life and body through medical treatment; the right of the patient not to have his body harmed without his consent. The nature of this issue is such that these basic rights often conflict with one another, such as: the duty to protect and heal conflicts with the right to refuse medical treatment; the duty to invade a person's privacy and confidentiality — by an operation or any other essential procedure — to save the life of a person that is endangered, even if the person in danger does not consent to such intervention. With regard to all these basic rights that conflict with one

another, Jewish law has determined — particularly in recent generations as a result of the great advances in medicine — a series of balancing principles, rules that are basic values in themselves, such as: the duty to alleviate pain and suffering, whether physical or mental; the fundamental precept, 'And you shall love your fellow-man as yourself'; the basic distinction between natural life and the artificial prolongation of life; and the autonomy of the individual, particularly as developed in contemporary responsa, in view of the tremendous advances at the disposal of the medicine profession. These values and balances act, in principle, also within the values of a democratic state. The basic difference between the set of values of Jewish law and the set of values of a democratic state is *the premise* of each of these two systems: in the supreme value of the sanctity of life that is based on the creation of man in G-d's image, which is the premise in Jewish law, and in principle of individual autonomy, personal freedom, which is the premise in a democratic State. This difference sometimes has a practical importance; but in general, all of the principles and the case-law in these two legal systems allow a *synthesis* to be found between the Jewish values and the democratic values in our case, and a *balance* to be found in accordance with the conditions set forth in s. 8 of the Basic Law: Human Dignity and Liberty. A substantive result of this synthesis and balancing is that *active* euthanasia is absolutely forbidden. All of these — and more — have been discussed in detail in our consideration of this case according to the values of a Jewish State (paras. 11-38) and the values of a democratic State (paras. 39-52), and the synthesis between these two systems of values (paras. 57-60), and we shall not repeat this.

But we should re-emphasize the following: from everything that we have discussed and considered, we discover that not every word, expression and phrase mean what they appear to mean. Thus, the terminology about the *right* to die can become — under the pressure of an extreme application of the theory of individual autonomy, according to which everything depends on the patient and his consent — into a *duty* to die, a duty that the patient feels, subconsciously, as a result of his having permission to die, in order to make matters easier for his family and friends. The same applies to the expression *mercy killing*; this can become more of a mercy for those around and treating the patient than for the patient himself. It is even more true with regard to the expression *death with dignity*, which according to great thinkers is a contradiction in terms, an internal contradiction. *Death* and dignity are not consistent with one another; it is rather *life* and dignity that accord with each other, for life itself is the expression of human dignity — the dignity of man created in the Divine image.

It would seem that the supreme principle in case-law and decisions in such cases is the case-law principle established by Rabbi David Ibn Zimra [93] in one of the important issues in this area: the decision must be made in accordance with the principle that 'Its ways are pleasant ways' and with the purpose that 'the laws of the Torah shall be consistent with reason and logic'. We are so instructed by the provisions of the Basic Law: Human Dignity and Liberty, in order to achieve its purpose and goal —enshrining the values of the State of Israel as a Jewish and democratic State. The values of a Jewish and democratic State form *the basic infrastructure and the normative framework* of the legal system in the State of Israel, and its principles, statutes and laws must be interpreted in accordance with these values.

Before reaching a decision, it is proper to reconsider what we said (in para. 52) with regard to establishing ethics committees in hospitals to assist all those involved in deciding questions in this area. In these fateful questions that involve issues of law and ethics, medicine and psychology, Jewish law and philosophy, it is appropriate that, in addition to the patient himself when he is competent to do so, his relatives, the doctors treating him and other doctors, religious experts, legal scholars, philosophers and psychologists should all take part in the making a decision. This joint consideration and discussion will clarify the various aspects of the problem that requires deciding, with each person contributing to the best of his talents and understanding, while protecting the privacy of the patient and away from the media, and with the necessary speed required by the very nature of these problems and situations. Should a difference of opinion arises among members of the committee, the matter may be submitted for the determination of the court that reviews the decisions of the committee. These committees operate in various countries, especially in the United States, and we too should consider establishing them, the sooner the better.

The decision in the case before us

63. The application before us, as worded by the mother of Yael Shefer, is to refrain from the following treatments, if and when the child's condition deteriorates:

a. Not providing respiratory aid;

b. Not administering any medication, except for medication to alleviate pain;

c. Not to administer food (para. 59 of the mother's affidavit of 2 August 1988; the title of the opening motion that was submitted by the mother and which was mentioned at the beginning of our opinion).

At the beginning of our discussion, we considered the facts of the present case, including the details of the illness from which the infant Yael Shefer suffered, and the care she received at the hospital, as set out in the affidavits of the doctors who were involved in the case (see *supra*, paras. 2-3). At the hearing, additional affidavits were submitted on behalf of the appellant and the State and they should be mentioned.

The appellant's expert, Dr Pinhas Lerman, the director of the paediatric neurological unit of the Beilinson hospital in Petah-Tikva, said in his affidavit of 22 August 1988:

> '7. In this [Yael's] condition, the child is comparable to a dead person and there is no medical logic in prolonging her life by artificial life-support machines of any sort, including artificial respiration and/or giving transfusions, if and when her condition deteriorates and she needs such assistance (hereinafter — "the event").
>
> 8. In my opinion, it is a cruelty to continue to treat the child when the aforesaid event occurs.
>
> 9. In my opinion, it is also hypocritical to say that "the child is receiving very humane treatment and is treated with great respect as befits a patient towards the end of his life", for as I have said before, we should only refer in this case as if to someone who is comparable to a dead person.
>
> 10. If I were responsible for treating this child, my medical and humanitarian conscience would not allow me to continue treating the girl, and I would allow her to die naturally, without the aid of any technological means, which cannot cure her in her condition.
>
> 11. In my opinion and according to my medical conscience, it is precisely not administering treatment, i.e., not using artificial life-support measures, that conforms, in the circumstances of the child's illness, with the rules of medical ethics.'

Incidentally, we should point out, as Mr Hoshen, the learned counsel for the appellant, said, that:

> 'Doctor Lerman is the *only* person who is prepared to testify in a court in the State of Israel on a question of no medical for an incurable patient whose illness is determined to be terminal' (para. 3 of Mr. Hoshen's affidavit of 22 August 1988).

In contrast to Dr Lerman, Dr Ram Yishai, the expert for the respondent, presented a different opinion and approach. Dr Yishai, the chairman of the Israeli Medical Association since 1971, a member of the Board of Ethics of the World Medical Association since 1985, and a founder of the Israeli Society for Medical Ethics in 1988, says the following in his affidavit of 30 August 1988:

> '3. The question of refraining from using extraordinary measures and performing resuscitation on a patient who is defined as hopeless and terminal is a central question in medical ethics, and opinions vary in various countries, and are sometimes influenced by the basic beliefs of the persons making the decision.
>
> 4. The World Medical Association adopted in Madrid a *Declaration on Euthanasia*, which says: "Euthanasia, that is the act of deliberately ending the life of a patient, even at the patient's own request or at the request of close relatives, is unethical. This does not prevent the physician from respecting the desire of a patient to allow *the natural process of death* to follow its course in the terminal phase of sickness."
>
> 5. *According to those rules* of medical ethics, the wishes of a competent patient to refrain from medical treatment should be respected. The doctor should try to persuade the patient to accept treatment for his benefit. However, if a competent patient is firm in his refusal, the treatment should not be forced upon him.
>
> 6. Several of the United States have recognized living wills and have adopted a Natural Death Act, which regulates this issue. In a living will, a person, when he is still healthy and competent, gives instructions about not adopting extraordinary means to keep him alive if and when he reaches a terminally condition.
>
> Regardless of the legal aspects, which are in practice designed to exempt the doctor from legal liability, it is doubtful whether the living will solves the ethical problem. The doctor's decision is determined by the patient's medical condition *whether or not he has made a living will.* From an ethical standpoint, the decision

to adopt extraordinary measures for resuscitation *is made according to the medical condition of the patient at the time of the decision*.

7. …

There is a dispute as to whether to continue treating a terminal patient, who is defined as being in a "vegetative state", but this dispute cannot be resolved by referring to such a person as "comparable to a dead person". This term, "comparable to a dead person", is unacceptable to me and is surely inapplicable with respect to a patient who responds by crying when uncomfortable, thereby maintaining a connection with her surroundings.

Even in the case of Karen Quinlan, it was held that she was alive according to the widest definitions of death. The dispute in that case was whether anyone has the right to prefer death to life. As long as life remains, the decision to end life is beyond the scope of human authority, and a decision not to prolong life actually means that man has the ability to evaluate the quality of human life and to determine that it is best to terminate such a life.

In any case, the use of the term "comparable to a dead person" is dangerous. This is certainly true in view of the fact that doctors have chosen the more stringent definition of death; according to the *Statement of Death of the World Medical Association* (Sydney, 1968, amended 1983), we must first clearly determine the irreversible cessation of all brain functions, including the brain stem, as a condition for this determining death. When there is an intention to use an organ for transplant, the determination of death must be made by two doctors. Only when the point of death of a person has been determined is it possible from an ethical viewpoint to stop attempts to revive the patient.

8. The ethical problem is especially difficult because we are not dealing with someone who is "comparable to a dead person" but with a living person, a terminally-ill patient, who is incompetent and who suffers damage that severely affects her quality of life, when all that can be achieved is to restore him to that insufferable life defined by J. Fletcher in *Indicators of Humanhood, a Tentative Profile of Man*, Hastings Center Report, 1972.

> Yael Shefer's condition matches this definition and therefore Dr Cohen, the director of the children's ward of the hospital in Safed, stated that he does not carry out resuscitation in such situations (as stated in the mother's affidavit in the application), but he added that he must give treatment intended to prevent suffocation.
>
> It is difficult to differentiate between extraordinary means that may prolong the child's suffering and treatments that may alleviate her pain and allow her to end her life in dignity, but at this point we cannot assess which procedures are of one type and which are of the other.
>
> 9. The role of the doctor who treats a terminally-ill patient is to alleviate physical and mental suffering while restricting his intervention to treatment that, in so far as possible, maintains the quality of life of the patient towards the end. We are not speaking of dying with dignity; R. Ramsey ("The Indignity of Death with Dignity", *The Hastings Center Report*, 1981, argues that the phrase *dying with dignity* is a contradiction in terms since for death is the ultimate human indignity. Lofty words such as these often conceal very callous outlooks. The less emphasis that is placed on helping and treating the terminally-ill patient, the more the need is felt to speak about dying with dignity. We can agree with M. Muggeridge that: "I do not exactly support the prolongation of life in this world, but I very strongly recommend not to decide arbitrarily to put an end to it".
>
> 10. In my opinion, if the parents decide to keep the child in the hospital, a matter that is currently subject to their discretion, the use of the various measures will be considered when the time comes, according to the child's condition at that time. It will then be necessary to decide what is unnecessary treatment that will prevent the natural course of death, and what is essential treatment which will alleviate suffering during that process.'

See also A. Gruss, 'Passive Euthanasia – Legal and Moral Aspects', 39 *Hapraklit* 162, 1992, at pp. 170-171.

64. Mr Hoshen, the learned counsel for the appellant, argued that:

> 'The application is not for a "mercy killing", i.e. to do an act to shorten Yael's lifespan. Rather, it is meant to prevent the doctors

> from adopting measures such as artificial respiration and transfusions, which cannot save the infant from her fate, but simply prolong her life artificially' (para. 8 of the District Court judgment).

Later in his remarks, he sought to provide a basis for the application of the appellant that respiratory aid, nutrition and medications should not be given to Yael.

Ms. Zakai, the learned counsel for the State, strongly opposed the petition to refrain from giving respiratory aid and nutrition, and pointed out a difference of opinion with regard to not giving medication.

We have dealt in detail with the various arguments raised by counsel for both sides in the course of our discussion of the position of Jewish Law and American Law on this subject. Certainly, Dr Lerman's definition of Yael's condition as 'comparable to a dead person' cannot be reconciled with the values of a Jewish and democratic State. I am amazed how that this can be said of Yael, who responds by crying when uncomfortable like any other child her age, whose father sits by her bed day after day and plays music for her, and when he tells the treating physician, Dr Dora Segal-Cooperschmidt, that 'he has not lost hope that her condition will change' (see the affidavit of Dr Segal-Cooperschmidt of 4 August 1988, *supra*, para 3). We have also pointed out the essential distinction between starvation and not supplying oxygen, on the one hand, and not administer various medications, on the other hand (see, for example, paras. 32-36, 45). We accept the statement made by Dr Yishai (and see the remarks of Justice Talgam in *Tzadok v. Bet HaEla Ltd* [34], at p. 506, and of Justice Goren in *Eyal v. Dr Wilensky* [36], at pp. 194, 198, and in *Tzaadi v. General Federation Health Fund* [37], in paras. 6-7 of the judgment). However, in the specific circumstances of the case before us, there is no need to discuss these distinctions: Yael is not suffering and is not in pain. Let us again quote from the affidavit of Dr Segal-Cooperschmidt two paragraphs that are material to the question under discussion:

> '9. Yael Shefer is in a permanent state of unconsciousness (known as a "vegetative" state). *She does not suffer pain* and obviously she is not receiving any pain-relieving medication. She is quiet *and does not cry except when she needs to be fed or requires ordinary medical care* (in case of fever, earaches or constipation, line any child), a condition that improves after a normal standard treatment.

> 10. From a nursing point of view, she is being treated in a manner that is more than reasonable. *She is not disgraced or degraded. Her dignity is completely maintained.* She is clean, and does not suffer from pressure sores, which appear in most cases of children who are bed-ridden for a long time, and she does not suffer from cramps.'

Yael is not suffering and is not in pain. Her dignity is completely preserved. Yael cries like any other child when she needs to eat or requires routine medical care. Her candle still burns and shines for all who are around her. In these circumstances, the sanctity of Yael's life, even though terminal, is the sole and determining value. Any intervention and harm to that life stands in direct opposition to the values of a Jewish and democratic State.

65. We could have ended our opinion here, but we will say a few words with regard to the additional question that arose before us, namely the fact that the application was made only by the mother.

Section 3(a) of the Women's Equal Rights Law, 5711-1951 provides that the 'father and mother *together* are the natural guardians of their children…' (emphasis added; see also s. 14 of the Legal Capacity and Guardianship Law). The first part of s. 18 of the Capacity Law states that 'In any matter entrusted to their guardianship, both parents must act *by consent*…' (emphasis added). It is true, as Mr. Hoshen argues, that the end of s. 18 states, 'A parent shall be presumed to consent to the action of the other parent as long as the contrary is not proved'. However, this presumption is insufficient when we are dealing with an application that is so substantial and so fateful as in the circumstances of the case before us. And if it is needed, the presumption is rebutted in this case. The conduct of the father clearly shows a different attitude to that of the mother.

It will be remembered that Dr Segal-Cooperschmidt affirmed:

> '8. … a good part of the nursing treatment that the child needs (such as washing and feeding) is administered by… the child's father in the afternoon.
>
> …
>
> 10. From a nursing point of view, she is being treated in a manner that is more than reasonable… I should also mention the comfortable physical surroundings for treating her which are higher than the norm, starting with her being in a private room,

> along with music being played at the request of the father, a fan in her room, etc..
>
> 11. The mother's visits to the ward, throughout Yael's hospitalization, are rare and occur only at major intervals.
>
> 12. The child's father visits her every day after work, stays with her for many hours, cares for her with love and dedication which radiate in everything he does with her, such as taking her out in her carriage, sitting for long periods of time with the child on his chest, keeping strictly to her feeding times and feeding her when he is present. In my conversation with him, he even said that he had not lost hope that her condition might change.'

To this we must add, as stated, the non-attendance of the father at the hearings before the District Court and before us. The mother's explanation that —

> 'The father is in a complete state of collapse… My husband who could not attend here also could not do so since he hates publicity' (p. 5 of the court record in the District Court) —

is insufficient to support a conclusion that the father agrees with the steps the mother has taken, and it is insufficient to rebut the statements made in the affidavit of Dr Segal-Cooperschmidt.

Far be it from us to level complaints or direct a reproach at the mother. Who knows the heart of a mother? The thoughts of her heart are her secrets. But it is impossible for the court to grant an application like the one before us, an application to decide 'who will live and who will die', without the clear and express knowledge of both parents, except in an appropriate case where, in accordance with the values of a Jewish and democratic State, granting this would be justified.

For all these reasons we denied the appeal.

Justice Y. Malz

I agree.

Justice H. Ariel

1. In view of the abundance of illuminating remarks set out extensively in the opinion of the honourable Vice-President, I will confine myself to stating briefly in what my opinion agrees and disagrees therewith.

2. I believe, as I will say below, that Talila Shefer, the mother of the late Yael Shefer, was entitled and permitted to apply to the court with her application, an application that was made with love and out of love, and with sincere dedication to her late daughter Yael, so that instructions might be given with regard to a refusal to administer certain treatments to her daughter, as set out in the opinion of the honourable Vice-President. But the circumstances as they were set out were insufficient to justify granting the request, at that time. Therefore I associated myself with the decision of 11 September 1988 to deny the appeal, in those circumstances, after analyzing and considering the material that was before us, as stated in that decision and in accordance with the special circumstances of the case, but not to dismiss the case *in limine*.

3. Indeed, as the honourable Vice-President says, in his elegant language, we are considering this sad case before us against our will. This case raises not only questions of law, justice and medicine, but also questions of morality, ethics, belief and various values, which accompany mankind as a whole and man as an individual in day-to-day life. In my opinion, this issue ought soon to be regulated, in so far as possible, in clear and detailed legislation, so that there will be no need to apply, except in rare cases, to a judicial forum to obtain its decision.

4. As long as this painful subject has not been regulated, it requires solutions in certain cases, and the court cannot allow itself to hold back from deciding them.

The Vice-President set out a broad spectrum of opinions, citations and decisions relating to and connected with our topic, which, in public discourse, are regarded as part of the general idea of 'mercy killing'. But this is not so.

We are concerned here with an application for a *life of kindness and dignity* before death, and perhaps also 'death with dignity', but not mercy killing.

In the case before us, we are concerned with the question whether and when there is a basis, despite the existence of an incurable disease, to continue, despite the wishes of the patient, treatment that provides no cure but merely an artificial prolongation of life immediately prior to death (with regard to the moment of death — see CrimA 341/82 *Balkar v. State of Israel* [32]). We are

speaking of an artificial prolongation by using medications and various devices in this terminal situation, while the patient is undergoing unbearable pain and personal degradation, which violate his freedom and dignity as man who was created in the Divine image, and he wishes to end this treatment. This subject is close to the issue of passive euthanasia (in the words of the honourable Vice-President, according to Jewish law, 'the removal of the impediment').

5. The decision in this case is necessary, for in as much as we are talking of death, *it is a need of life*. From the day we leave our mother's womb, we approach the day of death, since we were expelled from the Garden of Eden, the place of the tree of life, by virtue of the severe decree made against us:

> '… Cursed is the ground for your sake; in sorrow you shall eat of it all the days of thy life. Thorns and thistles shall it bring forth for you, and you shall eat the grass of the field. With the sweat of your brow you will eat bread, until you return to the ground, from which you were taken; for you are dust, and to dust you shall return" (Genesis 3, 17-19 [157]).

Between these two critical dates when life begins and ends, we seek life each day and try to delay the day of death that was decreed against us: '… How many will pass away and how many will be created, who will live and who will die, who at his allotted time and who not at his allotted time…' (from the Additional Prayer on the High Holidays). Alongside this, we ask in the prayers of those days of judgment: 'In the book of life, blessing and peace, a good livelihood and good decrees, salvation and comfort may we be remembered and inscribed… *for a good life*…' (emphasis added).

With the prayers and hopes for improving life between life and death, we also try in our actions to direct our behaviour to achieve that 'good life', everyone according to his understanding of this concept. Within this framework, we may, with the existing limitations, act to improve our lives and direct our deeds and efforts, according to the natural basic freedoms that a person has in an enlightened and progressive society.

The dignity and freedom of man are a part of these.

The Basic Law: Human Dignity and Liberty, which was enacted recently (on 25 March 1992), is obviously of huge importance, notwithstanding all the differences of opinion that have already arisen and which will yet arise with regard to its interpretation, including with regard to the purpose of the law 'to protect human dignity and liberty in order to enshrine in a Basic Law the

values of the State of Israel as a Jewish and democratic State'. However, the principle embodied in it constituted part of the inheritance of Israeli society even this law was enacted, as was the case in every enlightened and progressive society and country (incidentally, the case before us concerns the period before the enactment of this Basic Law), including ss. 2 and 4:

> '2. One may not harm the life, body or dignity of a person.'
>
> '4. Every person is entitled to protection of his life, body and dignity.'

6. Without entering into the disputes concerning the interpretation of this Basic Law, I believe that based on the natural and statutory basic freedoms, including those relating to human dignity and liberty, a person may, before his death, within the framework of that striving for a 'good life', apply to the court, in principle, when there is no hope left for a cure and when his death is not swift or sudden, if he so wishes, to prevent purposeless medical treatment, in order to save himself pain and suffering, a feeling of personal degradation and humiliation of the humanity in him, when he reaches a point at which we cannot ask him to suffer these any more. When he cannot ask this himself, his guardians, the members of his family and those close and dear to him may do so on his behalf. What we must establish is the existence of those conditions that must be determined by a clear, express and detailed medical decision, so that they have the power and the authority to compel the doctors to refrain from those treatments, and which of course give the doctors protection from the viewpoint of the civil and criminal law.

Since I said that I would keep my opinion brief, I will certainly not refer to all the legal and other material cited by the honourable Vice-President. I will allow myself, here, to cite here in brief some remarks of President Shamgar in *Jerusalem Community Burial Society v. Kestenbaum* [1], at p. 481:

> 'Human beings who are part of a given society are called upon to respect the personal, emotional feelings of the individual and his dignity as a human being, with tolerance and understanding, for personal emotional emphases differ from person to person, and in a free society, there is no striving for an unity of beliefs, ideas or feelings. A free society minimizes limitations on the voluntary choices of the individual and acts patiently, tolerantly, and even tries to understand others; this applies even when we are concerned with following paths that seem to the majority unacceptable or undesirable. Just as we should accept and respect

> the right of a society to develop its culture, national language, its historical tradition and other values of this sort, so too we must show a readiness to live with this or that individual within society, who chooses a path which is not identical with the goals and aspirations of the majority in that society… In a free society, there is room for many different opinions, and the existence of freedom within it, *de facto*, is shown by creating the proper balance, with which we aim to allow each person to express himself in the way that he chooses. This is the essence of tolerance, which allows a wide range of opinions, freedom of speech and freedom of conscience, as long as these do not endanger the general public or another individual.'

It is worth mentioning here that the draft Patient Rights Law passed a first reading after section 10 was removed from it, apparently because of a fear that its provisions were too general and broad, or too extreme. The section said:

> '10. A terminal patient is entitled to die with dignity, in accordance with his outlook on life and belief, and, in so far as possible, in the presence of a person of his choosing, and the treating physician and the medical establishment shall assist him in realizing this right and shall refrain from any act that may harm his dignity.'

For this reason, I stated earlier that legislation ought to be enacted. Such legislation should be made, in my opinion, after an appropriate committee with the appropriate composition (which shall surely include doctors and jurists but may also include other experts in the humanities and persons in other professions or occupations) makes recommendations for clear rules that will be followed in cases of applications of this type. Then the need to apply to judicial forums will also decrease.

However, as I have said, as long as there are no such criteria, the court may not avoid making a decision on this delicate and sensitive issue, even if it troubles and torments the soul of the judge. The decision in this case will be the result of the proper balance between the great principle of the sanctity of life and the sanctity of the human will and dignity within the framework of all the natural and lawful liberties, including the Basic Law: Human Dignity and Liberty but not only within the framework of this law (including s. 8 thereof), in accordance with the facts and circumstances of each case (see also A. Barak, *Legal Interpretation*, vol. 3, 'Constitutional Interpretation', Nevo,

1994, at pp. 286 *et seq.*). This will also ensure that we do not become victims of the 'slippery slope'.

7. This brings us to a case involving a minor, as is the painful case before us. Section 1 of the Legal Capacity and Guardianship Law, 5722-1962 says: 'Every person is competent for rights and duties from the time he is born until he dies'. We are commanded to protect the welfare and health of the minor and to prevent any harm to him, to the best of our understanding and the prevailing principles with regard to every person as a person, and all the more so since he is a minor. Indeed, many laws are intended, whether directly or indirectly, to protect and shelter him (there are also cases where the protection extends also to a foetus — see CA 413/90 *A v. B* [33]).

The dignity and freedom of a minor should be as precious to us as our own dignity and freedom, and the sanctity of his life should be more sacred than our own life, and the suffering of a child should hurt us more than our own suffering.

A minor has full rights except as limited by law.

Therefore, in the case before us also, his right is that his dignity in a terminal state should be maintained, and pain, suffering, personal degradation and unnecessary humiliation should be prevented. Therefore even a minor may, in those same instances and circumstances, if he is able to, apply to the court to prevent such outcomes. His guardians, including his natural guardians, i.e., his parents, or either one of them, may also make this application on his behalf, whether or not the minor is capable of submitting such an application himself.

Indeed, we must be completely and meticulously insistent with regard to the existence of those conditions which make it possible to make such an application. Neither in every case not at every age can a minor reach a decision according to the particulars of the case for the purpose of giving his consent or submitting an application. Not every consent is his consent, and it must be ascertained whether his request is influenced by others because of their care for him, his respect for them or his fear of them (including his parents and guardians), and perhaps this request and consent is not the request or consent of the minor. Certainly the parent's application should be examined (and in every case both parents should be heard) or that of the guardians as well as the sincerity of their application, with all the respect due to them. However, this course should not be regarded merely as available or possible,

but as obligatory, on behalf of the minor and for him, in accordance with the aforesaid principles.

With all respect, I do not accept the argument that such an application by the guardians is contrary to any provision of the Legal Capacity and Guardianship Law. Section 68 of this Law, which concerns the duty 'to protect the physical and mental welfare of the minor…' certainly constitutes no such barrier. On the contrary, it is consistent with this Law. This position finds solid support also in sections 1, 14, 17, 19 and 20 of the same Law. I also do not accept that *one* of the parents may not make the application on behalf of the minor without the other parent. Admittedly s. 18 requires the consent of both of them, and under s. 19 of the said Law, the court will decide when there are disagreements between the parents, when the application is made jointly by the parents to the court for its decision, but in cases of the kind considered here, the parents or guardians do not necessarily apply to the court *in their capacity as parents or guardians*, but they *act as a voice* for the minor.

The minor may himself apply in any manner or through any proper person or organization, and certainly he may do so through his mother, in this or other situations of distress, to the proper court. There is support for this precisely in s. 68 of the Legal Capacity and Guardianship Law, and see all of chapter 4, and particularly s. 72 of the Law (and there is no need to refer to s. 3(a) of the Women's Equal Rights Law, 5711-1951), provided that the court approves this application as it is, or by appointing another or an additional guardian or by appointing a guardian *ad litem* or by hearing the minor in person.

We should not lock the door in the face of a minor in distress, as long as he does not abuse this method (support for this position can be found in *Garty v. State of Israel* [22] and the 'kidney' case (*Attorney General v. A* [16]). It is incumbent upon the court, in this and other cases, to leave a door open in order to prevent injustice and distress to minors when their application is a genuine one, including a need of a terminal patient as in the case before us, according to the principle: 'Open for us a gate, at the time of locking the gate, for the day is passing' (the Closing Prayer on the Day of Atonement).

Appeal denied.

24 November 1993.