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Law, Bioethics and Society:
Jewish and Islamic Approaches to Fertility Treatments and Human Germline Genome Editing

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Doctor of Philosophy
The University of Edinburgh
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Lay Summary

The genetic sciences have recently advanced in ways that make heritable genetic modifications in embryos a possibility. At the moment such genetic modifications are highly regulated and generally prohibited, but global discussions demonstrate that societies differ in their ethical approaches. Some societies welcome the potential to heal and eliminate genetic diseases while others fear the rise of a eugenic society. Religious voices are often not well represented or understood in the international debate. This thesis investigates how Jewish and Muslim jurists discuss these topics because Jewish and Muslim ethics are traditionally part of Jewish religious law and Muslim religious law. The examples of three reproductive technologies show how the debates of religious jurists have developed from the mid-twentieth century to today. It finds that their debates about the treatment of infertility and abortion form the bedrock for discussions about the genetic design of embryos today. Jewish and Muslim jurists prioritise the avoidance of adultery and the legitimate lineage of the child in all areas of procreation, whilst Jewish jurists also prioritise the ritual purity of the mother at the time of conception. These concerns are rooted in scripture and have retained their relevance. The thesis also investigates the impact that the opinions of religious jurists have on the legislation of fertility medicine in the Middle East. It finds that the influence of religious jurists is considerable and needs to be contextualised. For this reason, this thesis brings together anthropological and legal studies that explain the Jewish and Muslim approaches to infertility, procreation and genetic science in Israel and the Muslim Middle East.
Abstract

In 2018, the Chinese biophysicist He Jiankui announced the birth of the first genetically modified babies; this broke an international moratorium. When the Russian biologist Denis Rebriko reported similar intentions, ethicists and legislators began working with an increased sense of urgency towards a global framework to define the limits of Human Germline Genome Editing (HGGE). This is because HGGE poses concerns for the safety of future generations, and reproductive tourism has the potential to undermine the legislation of any one country. Whilst secular international bioethics councils aim to find global consensus on this matter, religious jurists and bioethicists, though influential in their own communities, are not necessarily part of the same international debate. The thesis proposes that the influence of religious law is considerable on societies, legislation and on fertility practices, especially in Israel and the Muslim Middle East, so the inclusion of religious legal viewpoints is an important aspect of any global consensus on bioethical issues. In Judaism and Islam the field of bioethics is a subcategory of contemporary religious law. As the legal narratives of Jewish law (Halakha) and Islamic law (Shari'a) are complex, the legal reasoning and influence of religious jurists has to be understood within their religious paradigm if they are to be successful integrated in the international debate.

The thesis investigates the process by which contemporary Orthodox Jewish and Muslim jurists engage with the bioethical questions of reproductive medicine in general in order to understand their specific response to the potential permissibility of HGGE. It enquires how the religious legal systems have already adapted to reproductive technologies and how the legislation of fertility treatments in Israel and the Muslim Middle East incorporates the values and legal guidelines of Halakha (Jewish law) and Shari’a (Muslim law).

The thesis is divided into three parts. Parts I and II introduce the mechanisms by which Halakha and Shari’a respectively engage with new legal cases as a result of medical and scientific advancements and then explore the sociological context of applied Jewish and Muslim bioethics in the Middle East. Part III charts the development of the key legal debates concerning fertility treatments from the late twentieth century onwards in Orthodox Judaism and in Islam. It focuses on three
reproductive technologies: 1.) Artificial Insemination with Donor sperm (AID) 2.) In Vitro Fertilisation (IVF) and 3.) Pre-Implantation Genetic Diagnosis (PGD). It finds that the legal opinions of prominent jurists in the late 20th century set precedents for all subsequent debates in both religious legal traditions including the current debate about the permissibility of HGGE. This evolving engagement of scientists and religious jurists demonstrates how Halakha and Shari’a both have normative legal principles that are rooted in the Torah, the Qur’an and in the wider scriptural tradition in both faiths. Legitimate conception and lineage retain their central importance in all debates about fertility treatments. However, the legal traditions have adapted significantly in the face of emerging reproductive medicine and the wider societal and ethical implications for the rights of the parent and the child.

Finally, this research studies the rapid acceptance of genetic screening programs in Israel and the Middle East and highlights the different approaches to the genetic improvement of societies. It finds a religious narrative which endorses the deselection of pre-embryos as an ethical alternative to abortion and explores how this may impact future debates about the permissibility of HGGE. Given this context it becomes apparent how Jewish and Muslim jurists debate the fundamental questions about the creation of human life and why their divergent legal judgements, which are generated for the moral good of their respective societies, matter in the global debate.
# Contents

Lay Summary .................................................................................................................. 2  
Abstract .......................................................................................................................... 3  
Acknowledgements ........................................................................................................ 7  
Glossary .......................................................................................................................... 9  
Preface .................................................................................................................................. 20  
Introduction ..................................................................................................................... 24  
Structure and Methodology ........................................................................................... 34  
Part I Approaches to Bioethics in *Halakhah* .................................................................. 40  
  Chapter One Jewish Interpretative Approaches to *Halakhah* ...................................... 41  
  Chapter Two The Sociological Context of Applied Jewish Bioethics in Israel ............. 63  
Part II Approaches to Bioethics in Islamic Law .............................................................. 85  
  Chapter Three *Sunnī* and *Shīʿa* Interpretative Approaches to *Sharīʿa* ...................... 86  
  Chapter Four The Sociological Context of Applied Islamic Bioethics in the Muslim Middle East ........................................................................................................... 109  
Part III ............................................................................................................................ 129  
Legal Debates and Rulings and their Implications .......................................................... 129  
  Chapter Five *Halakhic* Debates and their Implications in Israel ............................... 130  
    First Reproductive Technology - Artificial Insemination with Donor sperm .......... 130  
  Chapter Six *Halakhic* Debates and their Implications in Israel ............................... 152  
    Second Reproductive Technology: In Vitro Fertilisation ........................................ 152  
  Chapter Seven *Halakhic* Debates and their Implications in Israel ........................... 178  
    Third Reproductive Technology: Pre-Implantation Genetic Diagnosis and the Implications for Human Germline Genome Editing of Embryos during IVF .......... 178  
  Chapter Eight Islamic Legal Debates and their Implications in the Middle East ...... 207  
    First and Second Reproductive Technologies - Artificial Insemination with Donor sperm and *In Vitro Fertilisation* in *Sunnī* Islam .................................................. 207
Chapter Nine  Islamic Legal Debates and their Implications in the Middle East.. 242

First and Second Reproductive Technologies - Artificial Insemination with Donor sperm (AID) and *In Vitro Fertilisation* in Shi‘a Islam ........................................... 242

Chapter Ten Islamic Legal Debates and their Implications in the Middle East.... 260

Third Reproductive Technology: Pre-implantation Genetic Diagnosis and the Implications for Human Germline Genome Editing of Embryos during IVF ..... 260

Conclusion .................................................................................................................. 284

Bibliography .............................................................................................................. 302

Appendix: .................................................................................................................... 315

Legal sources of *Halakhah*: .................................................................................... 315

Three Models of Legal Interpretation which Explore the Divergent Hermeneutic Approaches to Jewish Bioethics and Law ......................................................... 320

The Importance of Protecting Embryonic Life both *in vivo* and *in vitro* According to David Novak in Comparison with the View held by David Bleich .................... 336

The *Halakhic* Debate of Mitochondrial Replacement Therapy (MRT) in Context of a Genetic Understanding of Judaism ................................................................. 338

Interview with Rabbi Dr J. Shindler (summary) ...................................................... 343

Interview with Rabbi Sylvia Rothschild (summary) ............................................... 346

Istifta Section - Office of His Eminence Al-Sayyid Ali Al-Sistani ........................ 358
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<table>
<thead>
<tr>
<th>Glossary Item</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>'Aqīda</td>
<td>The Muslim creed</td>
</tr>
<tr>
<td>AI</td>
<td>Artificial Insemination</td>
</tr>
<tr>
<td>AID</td>
<td>Artificial Insemination with Donor sperm</td>
</tr>
<tr>
<td>AIH</td>
<td>Artificial Insemination with the Husband’s sperm</td>
</tr>
<tr>
<td>Al-ahkām al-mutaghayyira</td>
<td>Muslim legal ruling that is context bound</td>
</tr>
<tr>
<td>Al-ahkām al-thābita</td>
<td>Permanent instructions that fall into the category of certainty such as those regarding permitted foods (Islam)</td>
</tr>
<tr>
<td>'Alaqa</td>
<td>Congealed blood (early Muslim description of the second stage of pregnancy based on the Qur’anic verses 23:12-14)</td>
</tr>
<tr>
<td>Al-walad li'il-firāsh</td>
<td>Islamic legal concept that the child belongs to the owner of the marriage bed</td>
</tr>
<tr>
<td>Aql</td>
<td>Intellect or reason (Islam)</td>
</tr>
<tr>
<td>ART</td>
<td>Assisted Reproductive Technologies</td>
</tr>
<tr>
<td>Ash’enazi Jews</td>
<td>Jewish communities of northern European descent</td>
</tr>
<tr>
<td>Ayatollah</td>
<td>Senior scholar in Shi‘a Islam (Twelver Shi‘a clergy)</td>
</tr>
<tr>
<td>Azl</td>
<td>Coitus interruptus (used as a form of contraception). Azl is the term used by Muslims.</td>
</tr>
<tr>
<td>Babylonian Talmud (BT)</td>
<td>Two Talmuds exist that record the discussions of the sages living in two of the most distinguished Jewish settlements; these are the Palestinian Talmud (PT) and the more extensive Babylonian Talmud (BT)</td>
</tr>
<tr>
<td>Baraita</td>
<td>Texts that are preserved outside the Mishnah are collectively known as Baraita (outside) they may also include collections of midrashim such as Mekhila, Sifre and Sifre'i</td>
</tr>
<tr>
<td>Beit/Beth Din</td>
<td>Jewish legal court (Judaism)</td>
</tr>
<tr>
<td>Ben Niddah</td>
<td>A child conceived at a time when the mother was a niddah (Judaism)</td>
</tr>
<tr>
<td>BIMA</td>
<td>British Islamic Medical Association</td>
</tr>
<tr>
<td>Term</td>
<td>Definition</td>
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</tr>
<tr>
<td>Bitul B’rov</td>
<td>Halakhic principle that decides whether a small amount of a non-kosher substance in a larger amount of kosher substance makes the combination of both non-kosher. Usually this is not the case unless the small amount changes the nature of the large amount.</td>
</tr>
<tr>
<td>Brit</td>
<td>Jewish circumcision ceremony</td>
</tr>
<tr>
<td>CILE</td>
<td>Centre for Islamic Legislation and Ethics</td>
</tr>
<tr>
<td>CIM</td>
<td>Centre for Islam and Medicine</td>
</tr>
<tr>
<td>CRISPR-cas9</td>
<td>Clustered Regularly Interspaced Short Palindromic Repeats, cas9 is an enzyme, together they form a type of molecular scissors that form the basis for CRISPR-Cas9 genome editing technology.</td>
</tr>
<tr>
<td>Cryopreservation</td>
<td>The preservation of tissue such as sperm at low or freezing temperature</td>
</tr>
<tr>
<td>Datiim</td>
<td>Section of Israeli society that are described as devout, but more integrated in the society than the Haredim</td>
</tr>
<tr>
<td>Decisor</td>
<td>A posek, Jewish jurist who makes authoritative decisions</td>
</tr>
<tr>
<td>Diaspora</td>
<td>Jews living outside Israel</td>
</tr>
<tr>
<td>Diyyah</td>
<td>The penalty for a murdered life according to Shari’ah</td>
</tr>
<tr>
<td>DMD</td>
<td>Duchenne Muscular Dystrophy</td>
</tr>
<tr>
<td>Donum Vitae</td>
<td>Papal Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation</td>
</tr>
<tr>
<td>Dor Yeshorim</td>
<td>Jewish grassroot movement for the genetic testing of adolescents in order to avoid the marriage of two carriers of the same genetic diseases</td>
</tr>
<tr>
<td>Ensolement</td>
<td>The concept in Judaism and Islam that the soul enters the physical developing body of the embryo at a certain time during gestation</td>
</tr>
<tr>
<td>Ex-utero</td>
<td>Outside the womb</td>
</tr>
<tr>
<td>Family Balancing</td>
<td>Choosing the gender of a child during IVF usually because a family has already got 3 or 4 children of one gender</td>
</tr>
<tr>
<td>Farḍ al-kifāyah</td>
<td>Collective duty (Islam)</td>
</tr>
<tr>
<td>Fatwa</td>
<td>Non-binding legal opinion (Islam)</td>
</tr>
<tr>
<td>Term</td>
<td>Definition</td>
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<td>------------------</td>
<td>-----------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Fiqh</td>
<td>Islamic Jurisprudence</td>
</tr>
<tr>
<td>Fitra</td>
<td>Humanity’s inborn essential disposition to the good and towards God (Islam)</td>
</tr>
<tr>
<td>FLOH</td>
<td>‘Fertility in Light Of Halakah’, organisation which brings together rabbis, patients and doctors</td>
</tr>
<tr>
<td>Frum</td>
<td>Pious, usually used to describe the Haredim</td>
</tr>
<tr>
<td>Fuqaha</td>
<td>Jurist (Islam)</td>
</tr>
<tr>
<td>Gemara</td>
<td>Aramaic equivalent of Hebrew “Talmud”. The earliest discussions on the Torah by the sages</td>
</tr>
<tr>
<td>Ghaybiyyāt</td>
<td>Matters of the unseen world (Islam)</td>
</tr>
<tr>
<td>Ghurra</td>
<td>Reduced blood money (Islam)</td>
</tr>
<tr>
<td>Goses</td>
<td>Halakhic medical category referring to a terminally ill patient</td>
</tr>
<tr>
<td>Hadith</td>
<td>Sayings or traditions of the Prophet Muhammad</td>
</tr>
<tr>
<td>HaGaon</td>
<td>The exalted one of the generation - honorary title for the most respected halakhist</td>
</tr>
<tr>
<td>Halakhah</td>
<td>Jewish Law</td>
</tr>
<tr>
<td>Halakhah le’maaseh</td>
<td>Practice referring to the practical application of the law (Judaism)</td>
</tr>
<tr>
<td>Halakhhic Adultery</td>
<td>Adultery is defined by Halakhah as a sexual relationship between a married Jewish woman and a Jewish man who is not her husband</td>
</tr>
<tr>
<td>Halakhhic Infertility (akarut hilchatit)</td>
<td>Condition describing when a woman’s natural cycle is too short for her to conceive in the time period in which, according to Rabbinic law, she is allowed to have sexual relations with her husband</td>
</tr>
<tr>
<td>Halal</td>
<td>Permitted according to Sharīʿa (Islam)</td>
</tr>
<tr>
<td>Halizah</td>
<td>Levirate marriage, the halakhic concept that if a man dies without offspring his widow can marry his brother to secure her former husband’s future lineage (Judaism)</td>
</tr>
<tr>
<td>Hanafi</td>
<td>Sunni School of Islamic jurisprudence</td>
</tr>
<tr>
<td>Hanbali</td>
<td>Sunni School of Islamic jurisprudence</td>
</tr>
<tr>
<td>Haram</td>
<td>Forbidden according to Sharīʿa</td>
</tr>
<tr>
<td>Term</td>
<td>Description</td>
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<tr>
<td>Haredim</td>
<td>Literally those who tremble before God, often described as ultra-orthodox although the term ultra-orthodox is often rejected by the haredim. Haredim tend to shun modern society. (Judaism)</td>
</tr>
<tr>
<td>Hashgacha</td>
<td>Specially trained halakhic “supervision”- usually Ultra-Orthodox women trained by FLOH, or similar organisations, to follow the sperm and egg at every step of the IVF process to avoid accidental mislabelling and mix ups (Judaism)</td>
</tr>
<tr>
<td>Hasidism</td>
<td>Pietist movement founded by Jewish mystics in the 18th century, and which is part of the Haredim (Judaism)</td>
</tr>
<tr>
<td>HGGE</td>
<td>Human Germline Genome Editing – the type of Genetic Editing which passes onto subsequent generations</td>
</tr>
<tr>
<td>Hilonim</td>
<td>Section of Israeli society that are described as secular in outlook</td>
</tr>
<tr>
<td>Hojjat al-Islam</td>
<td>Senior scholar in Shi‘a Islam</td>
</tr>
<tr>
<td>HRT</td>
<td>Hormone Replacement Therapy</td>
</tr>
<tr>
<td>Hudud</td>
<td>Transgressions that are regulated by the founding texts of the Qur’an and Sunna</td>
</tr>
<tr>
<td>Hukkim</td>
<td>Religious obligations that cannot be understood rationally by the human mind (Judaism)</td>
</tr>
<tr>
<td>Hukm (sing), ahkam (pl)</td>
<td>Islamic legal rulings which fall into five categories ranging from mandatory to forbidden.</td>
</tr>
<tr>
<td>Hurma</td>
<td>Bodily rights (Islam)</td>
</tr>
<tr>
<td>Ibâdât</td>
<td>Religious rituals (Islam)</td>
</tr>
<tr>
<td>ICSI</td>
<td>Intracytoplasmic Sperm Injection</td>
</tr>
<tr>
<td>Iddah</td>
<td>Waiting period in which a Muslim widow or divorcee may not remarry</td>
</tr>
<tr>
<td>IFA</td>
<td>Islamic Fiqh Academy in Mecca</td>
</tr>
<tr>
<td>Iggrot Moshe</td>
<td>Nine volume Responsa my Rabbi Moses Feinstein</td>
</tr>
<tr>
<td>IIFA</td>
<td>International Fiqh Academy in Jeddah</td>
</tr>
<tr>
<td>Ijma</td>
<td>Consensus of scholars or elders (Islamic Law, one of the sources of usul al Fiqh)</td>
</tr>
<tr>
<td>Term</td>
<td>Definition</td>
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<tr>
<td>Ijtihad</td>
<td>Discipline of developing new legal responses to unprecedented problems via a thorough re-evaluation and interpretation of legal sources (Islam)</td>
</tr>
<tr>
<td>Ikhtilāṭ al-ansāb</td>
<td>Kinship (Islam)</td>
</tr>
<tr>
<td>Ilā</td>
<td>The effective cause (of a legal problem in Sharī‘a)</td>
</tr>
<tr>
<td>In vitro</td>
<td>In glass (test tube)</td>
</tr>
<tr>
<td>In vivo</td>
<td>In the body</td>
</tr>
<tr>
<td>In utero</td>
<td>Inside the womb</td>
</tr>
<tr>
<td>IOMS</td>
<td>Islamic Organisation for Medical Science in Kuwait</td>
</tr>
<tr>
<td>Ismaili</td>
<td>Shi‘a School of Islamic jurisprudence</td>
</tr>
<tr>
<td>Istislah</td>
<td>The principle of seeking the common good (Maslaha) (Islam)</td>
</tr>
<tr>
<td>IUD</td>
<td>Contraceptive device, the coil</td>
</tr>
<tr>
<td>IVF</td>
<td>In Vitro Fertilisation</td>
</tr>
<tr>
<td>Jafari</td>
<td>Shi‘a School of Islamic jurisprudence</td>
</tr>
<tr>
<td>Kabbalah</td>
<td>Esoteric teachings of Jewish mysticism</td>
</tr>
<tr>
<td>Kalam</td>
<td>Islamic scholastic theology</td>
</tr>
<tr>
<td>Khalīfa</td>
<td>Vicegerent, successor (Islam)</td>
</tr>
<tr>
<td>Kiddushin</td>
<td>Part of the Talmud and the Mishna (Judaism)</td>
</tr>
<tr>
<td>Knesset</td>
<td>Israeli Parliament</td>
</tr>
<tr>
<td>Kohen</td>
<td>Priestly tribe in Judaism</td>
</tr>
<tr>
<td>Kosher</td>
<td>Objects and substances such as food or human actions that, according to Halakha, are permitted (Judaism)</td>
</tr>
<tr>
<td>La darar wa la dirar fi al-islam</td>
<td>No harm, no harassment (Islamic legal concept)</td>
</tr>
<tr>
<td>Ma‘aseh (Cases and Incidents)</td>
<td>One of the six sources that a Jewish jurist needs to consider to create a new law from his creative interpretation. A set of concrete circumstances from which a halakhic principle has been derived in Talmudic times (Judaism)</td>
</tr>
<tr>
<td>Madhab (sing), Madhāhib(pl) Madhabs anglised</td>
<td>Schools of Islamic jurisprudence</td>
</tr>
<tr>
<td>Mafsada</td>
<td>Mischief (as opposed to Maslaha) (Islam)</td>
</tr>
<tr>
<td>Term</td>
<td>Definition</td>
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<tr>
<td>---------------------------</td>
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<tr>
<td>Mahram</td>
<td>Relatedness between family members with the plural maharim used to describe the male family members which a woman is not permitted to marry (Islam)</td>
</tr>
<tr>
<td>Majlis-e Negahban</td>
<td>The Guardian Council of Iran</td>
</tr>
<tr>
<td>Majlis-e Shura</td>
<td>Iranian single chamber parliament</td>
</tr>
<tr>
<td>Majma’ Tashkhis-e Maslahat-e Nezam</td>
<td>Expediency council of Iran</td>
</tr>
<tr>
<td>Maliki</td>
<td>Sunni School of Islamic jurisprudence</td>
</tr>
<tr>
<td>Mamzer (sing) mamzerim (pl)</td>
<td>A child who according to Halakha is illegitimate (Judaism)</td>
</tr>
<tr>
<td>Mamzerut</td>
<td>The status of being a mamzer (illegitimate according to Halakha) (Judaism)</td>
</tr>
<tr>
<td>Mappah (The tablecloth)</td>
<td>Halakhic code that has been adapted to Ashkenazi laws and customs by Rabbi Moshe Isserles (Judaism)</td>
</tr>
<tr>
<td>Maqasid</td>
<td>Objectives of Sharīʿa (Islam)</td>
</tr>
<tr>
<td>Marja’ al-taqlid</td>
<td>The source of emulation, a religious title of high authority amongst Shiʿa Muslims</td>
</tr>
<tr>
<td>Maslaha</td>
<td>Public good (Islam)</td>
</tr>
<tr>
<td>Masortim</td>
<td>Section of Israeli society that are described as middle ground, spanning from the secular to the religious</td>
</tr>
<tr>
<td>Massekhtot</td>
<td>The same six orders that are found in the Mishnah are also found in the Talmud, although the Talmud is further subdivided into sixty-three tractates called massekhtot. (Judaism)</td>
</tr>
<tr>
<td>mDNA</td>
<td>Mitochondrial DNA</td>
</tr>
<tr>
<td>Mekhilta</td>
<td>Collection of midrashim (Judaism)</td>
</tr>
<tr>
<td>Midrash (sing) Midrashim (pl)</td>
<td>Story in which Rabbinic authorities have creatively interpreted a portion of Torah (Judaism)</td>
</tr>
<tr>
<td>Midrash yozter</td>
<td>A new law that is created in Halakha by the jurist through his creative interpretation of the relevant sources (Judaism)</td>
</tr>
<tr>
<td>Minhag</td>
<td>Custom. One of the six sources that a Jewish jurist needs to consider to create a new law from his creative interpretation (Judaism)</td>
</tr>
<tr>
<td>Term</td>
<td>Description</td>
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<tr>
<td>-----------------------</td>
<td>-----------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Mishna</td>
<td>As the oral Torah is so extensive attempts have been made throughout Jewish history to reduce the legal matters and codify the oral Torah in writing. The earliest often quoted compositions are by Rabbi Akiva (d. 132) and his pupil Rabbi Meir, but the most widely used is the Mishnah by Rabbi Judah the Patriarch, known simply as Rabbi (d. 219). The Mishnah recorded the opinions of previous authorities and presents itself like a case book of law in six orders: agriculture, sacred times, women and personal status, damages, holy things and purity laws (Judaism)</td>
</tr>
<tr>
<td>Mitzvah (sing), Mitzvot (pl.)</td>
<td>One of the 613 Commandments derived from the Torah (Judaism)</td>
</tr>
<tr>
<td>Mohel (sing), mohalim (pl.)</td>
<td>Circumciser (Judaism)</td>
</tr>
<tr>
<td>MRT</td>
<td>Mitochondrial Replacement Therapy</td>
</tr>
<tr>
<td>Mu‘āmalāt</td>
<td>Non-permanent instructions such as social affairs and human conduct (Islam)</td>
</tr>
<tr>
<td>Mu‘tazili</td>
<td>School of theology in Islam (8th Century CE onwards)</td>
</tr>
<tr>
<td>Muḍgha</td>
<td>A little lump of flesh (early Muslim description of the third stage of pregnancy based on the Qur‘anic verses 23:12-14)</td>
</tr>
<tr>
<td>Mufti</td>
<td>Muslim jurist</td>
</tr>
<tr>
<td>Mujtahid (sing), Mujtahidun (pl)</td>
<td>Highest legal authority in Islam able to perform ijtihad</td>
</tr>
<tr>
<td>Nasab</td>
<td>Lineage (Islam)</td>
</tr>
<tr>
<td>Nashim</td>
<td>Important for the study of procreation is the sixth order of the Mishnah and Talmud called nashim (women), which is made up of different tractates that discuss procreation, conception and contraception. Nashim also covers ritual purity laws on menstruation. (Judaism)</td>
</tr>
<tr>
<td>Nawāzīl</td>
<td>Novel bioethical challenges in Islam</td>
</tr>
<tr>
<td>nDNA</td>
<td>Nuclear DNA</td>
</tr>
<tr>
<td>Nefel</td>
<td>Halakhic medical category referring to a non-viable neonate (Judaism)</td>
</tr>
<tr>
<td><strong>Term</strong></td>
<td><strong>Description</strong></td>
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<tr>
<td><strong>Niddah</strong></td>
<td>A Jewish woman who is not at a time in her menstrual cycle where she is supposed to have sexual relations with her husband (Judaism)</td>
</tr>
<tr>
<td><strong>Nikah mut'ah</strong></td>
<td>Temporary marriages amongst Shī‘a Muslims</td>
</tr>
<tr>
<td><strong>Nutfa</strong></td>
<td>A drop stage (early Muslim description of the first stage of pregnancy based on the Qur’anic verses 23:12-14)</td>
</tr>
<tr>
<td><strong>Oocyte pick-up</strong></td>
<td>The extraction of ova during IVF prior to fertilisation in vitro</td>
</tr>
<tr>
<td><strong>Oral Torah (Torah sheb'al peh)</strong></td>
<td>Along with the written Torah Judaism holds that God revealed the oral Torah (Torah sheb'al peh) that was orally handed down from generation to generation alongside the written word of God. (Judaism)</td>
</tr>
<tr>
<td><strong>Ovum (sing), ova (pl)</strong></td>
<td>Egg</td>
</tr>
<tr>
<td><strong>Palestinian Talmud (PT)</strong></td>
<td>Two Talmuds exist that record the discussions of the sages living in two of the most distinguished Jewish settlements; these are the Palestinian Talmud (PT) and the more extensive Babylonian Talmud (BT) (Judaism)</td>
</tr>
<tr>
<td><strong>PGD</strong></td>
<td>Pre-implantation Genetic Diagnosis</td>
</tr>
<tr>
<td><strong>PGT</strong></td>
<td>Pre-Implantation Genetic Testing</td>
</tr>
<tr>
<td><strong>Pikuach nefesh</strong></td>
<td>Halakhic principle to preserve life (Judaism)</td>
</tr>
<tr>
<td><strong>Posek (sing), Poskim (pl)</strong></td>
<td>Authoritative Legal Decisor (Judaism)</td>
</tr>
<tr>
<td><strong>Pronatalism</strong></td>
<td>Philosophy or policy that encourages the birth of children</td>
</tr>
<tr>
<td><strong>Psak din (sing) piskei din (pl)</strong></td>
<td>Legal Ruling (see responsa) (Judaism)</td>
</tr>
<tr>
<td><strong>Puah</strong></td>
<td>‘Family, Fertility, Medicine and Halakhah’, organisation which brings together rabbis, patients and doctors (Judaism)</td>
</tr>
<tr>
<td><strong>Qadi</strong></td>
<td>Judge of a Shari‘a court (Islam)</td>
</tr>
<tr>
<td><strong>Qalb</strong></td>
<td>The heart (Islam)</td>
</tr>
<tr>
<td><strong>Qiyas</strong></td>
<td>Legal reasoning by analogy (Islamic Law, one of the sources of usul al Fiqh) (Islam)</td>
</tr>
<tr>
<td><strong>Qur’an</strong></td>
<td>Central sacred scripture of Islam, held to be the word of God as revealed to Prophet Muhammad</td>
</tr>
<tr>
<td>Term</td>
<td>Definition</td>
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<tr>
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<tr>
<td>Rebbe</td>
<td>Usually refers to the head of a Hasidic dynasty. A Rebbe, who is also known as a Tzadik, is both the spiritual leader and the sole legal decisor for all members of his dynasty (Judaism)</td>
</tr>
<tr>
<td>Responsa</td>
<td>Authoritative legal ruling by a posek or eminent Halakhist (Judaism)</td>
</tr>
<tr>
<td>Rosh yeshiva</td>
<td>Dean of a Jewish college (Judaism)</td>
</tr>
<tr>
<td>Ruh</td>
<td>Soul (Islam)</td>
</tr>
<tr>
<td>Ruh</td>
<td>The Holy Spirit of God (Islam)</td>
</tr>
<tr>
<td>Salafi</td>
<td>Traditionalist movement in Islam</td>
</tr>
<tr>
<td>Sephardi Jews</td>
<td>Communities descending from the Iberian Peninsula (Judaism)</td>
</tr>
<tr>
<td>Sevarah (Legal Reasoning)</td>
<td>One of the six sources that a Jewish jurist needs to consider to create a new law from his creative interpretation</td>
</tr>
<tr>
<td>Shabbat</td>
<td>Friday sunset to Saturday sunset (Judaism)</td>
</tr>
<tr>
<td>Shafi’i</td>
<td>Sunni School of Islamic jurisprudence</td>
</tr>
<tr>
<td>Shari’a</td>
<td>Islamic Law</td>
</tr>
<tr>
<td>Shoah</td>
<td>Literally catastrophe referring to the holocaust. The term holocaust is often considered offensive because in its origins it refers to a sacred burnt offering (Judaism)</td>
</tr>
<tr>
<td>Shtetl (sing.), Shtetlekh (pl)</td>
<td>Jewish towns and settlements that were destroyed in large numbers during the Shoah. Today many Hasidic communities derive their name from the shtetl of their origin.</td>
</tr>
<tr>
<td>Shubba</td>
<td>Doubt (in a legal sense that there must be no doubt in the witnesses of a crime according to Sharī’a) (Islam)</td>
</tr>
<tr>
<td>Shulhan Arukh (The Table)</td>
<td>Halakhic code written by Joseph Karo in 1563 This code reflects the laws and customs of the Jewish Sephardic tradition. (Judaism)</td>
</tr>
<tr>
<td>Sifra</td>
<td>Collection of midrashim (Judaism)</td>
</tr>
<tr>
<td>Sifrei</td>
<td>Collection of midrashim (Judaism)</td>
</tr>
<tr>
<td>Sine concubito</td>
<td>Conception sine concubito, conception without sexual intercourse</td>
</tr>
<tr>
<td>Sunna</td>
<td>Prophet Muhammad's way of life and legal precedent</td>
</tr>
<tr>
<td>Term</td>
<td>Definition</td>
</tr>
<tr>
<td>----------------------</td>
<td>---------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Tafsir</td>
<td>Exegesis (Islam)</td>
</tr>
<tr>
<td>Takkanah and Gezerah</td>
<td>One of the six sources that a Jewish jurist needs to consider to create a new law from his creative interpretation (Judaism)</td>
</tr>
<tr>
<td>(Legislations)</td>
<td></td>
</tr>
<tr>
<td>Talmud (Gemara in Aramaic)</td>
<td>The vast collection of historical legal discourse is known as the Talmud. It is a study, discussion and commentary on the oral law by the sages (Judaism)</td>
</tr>
<tr>
<td>Taqlid</td>
<td>Reliance on the imitation of former legal decisions (Islam)</td>
</tr>
<tr>
<td>Telos</td>
<td>Ultimate purpose or goal</td>
</tr>
<tr>
<td>Terumah</td>
<td>Offerings given to the priest in the times of the Jewish Temple (Judaism)</td>
</tr>
<tr>
<td>TESE</td>
<td>Testicular Sperm Extraction</td>
</tr>
<tr>
<td>TFR</td>
<td>Total Fertility Rate</td>
</tr>
<tr>
<td>Tiferet Yisrael</td>
<td>Commentary on the Mishna by Rabbi Yisrael Lifschitz (1860-1782), a highly respected Rabbi of Danzig (Judaism)</td>
</tr>
<tr>
<td>Torah (literally teachings)</td>
<td>In a legal context Torah refers to the first five books of the Hebrew Bible and in a wider sense the teachings of Judaism</td>
</tr>
<tr>
<td>Tosafos</td>
<td>Medieval Talmudic commentary (Judaism)</td>
</tr>
<tr>
<td>Tosefta</td>
<td>Rabbi Judah the Patriarch, known simply as Rabbi (d. 219) edited some opinions out of the oral law and these edits were preserved as a supplement called the Tosefta</td>
</tr>
<tr>
<td>Tzadik</td>
<td>Spiritual master and leader of a Hasidic community (Judaism)</td>
</tr>
<tr>
<td>Ullama</td>
<td>Community of theologically trained scholars in Sunni Islam, whilst in Shī‘a Islam the Ulama are made up of superior mullas; their mujtahidun are hojjat al-Islam and ayatollahs (Islam)</td>
</tr>
<tr>
<td>Ummah</td>
<td>Community of Muslims worldwide (Islam)</td>
</tr>
<tr>
<td>Urf</td>
<td>Custom (Islam)</td>
</tr>
<tr>
<td>Usul al Fiqh</td>
<td>The science of interpreting fiqh (Islam)</td>
</tr>
<tr>
<td>WHO</td>
<td>World Health Organisation</td>
</tr>
<tr>
<td>Yeshiva (sing), yeshivot (pl)</td>
<td>Jewish educational institution (Judaism)</td>
</tr>
<tr>
<td>Term</td>
<td>Definition</td>
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<tr>
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<td>---------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Yevamot</td>
<td>A tractate of the Talmud (Judaism)</td>
</tr>
<tr>
<td>Yichus</td>
<td>Family purity in Judaism</td>
</tr>
<tr>
<td>Zaidi</td>
<td>Shīʿa School of Islamic jurisprudence</td>
</tr>
<tr>
<td>Zina</td>
<td>Adultery/ Illicit relationship (Islam)</td>
</tr>
<tr>
<td>Zohar</td>
<td>Foundational Jewish Mystical text of Kabbalah (Judaism)</td>
</tr>
</tbody>
</table>
In 2005 Dr John McDade, the principle of Heythrop College, University of London, was directly affected by the London bombings. In response he launched a new Undergraduate course in Abrahamic Religions and I was one of his Catholic students. The course touched on a number of bioethical subjects and initially it appeared that there was broad consensus amongst the three Abrahamic faiths on the sanctity of human life, yet soon I realised that sanctity could mean different things. This came into sharp relief when I discovered that Israel was at the forefront of embryonic stem cell research. Perplexed at the apparent coexistence of the protection and destruction of unborn life I turned to my tutor Jonathan Gorsky who explained my error in assuming that Jews and Muslims agreed with Catholicism on issues of unborn life, when in fact they just happened to occasionally arrive at the same answer. Only when the legal reasoning, the path to each individual response, was understood in detail, could one differentiate between true agreement with shared priorities and concerns as opposed to coincidental agreement arrived at through different values.

I decided to focus on different approaches to bioethics and the implications of religious legal decisions on the legislation of science and medical treatment in the Middle East. In thinking about my PhD I had hoped to use existing material but found very little scholarship on comparative religious bioethics. Anthropological studies compare societal and political approaches but focus little on religious law, whilst religious legal studies tend to focus only on single denominations within any one faith tradition. Consequently, authorities from different backgrounds can struggle to understand each other’s language, concepts and concerns. This lack of knowledge and understanding not only arises between secular and religious ethicists, but also exists between different denominations of the same religion. Whilst religious specialists tend to be aware of the decisions taken by their secular counterparts, the world of religious ethical and legal decisions remains largely alien to outsiders.
The World Health Organisation, ethics councils and leading scientists, stress the importance of cross-cultural dialogue, especially since the new gene editing technology of CRISPR-cas9 has significantly simplified human germline genome editing. The stated objective is to find global consensus on the limitations of human germline manipulation, but there is little evidence of a dialogue with religious scholars who specialise in bioethical research. A global consensus on this important topic, will face severe limitations if the religious legal narratives, which influence the bioethical debate in many parts of the world, especially the Middle East, are not well understood. This thesis hopes to contribute to the emerging field of interreligious bioethical scholarship.

It builds on my undergraduate and masters dissertations at Heythrop where I initially explored the Jewish approach to embryonic stem cell research. Under Dr Gorsky’s guidance I began with a study of Jewish law Halakha. Without this initial step the Jewish bioethical literature remained largely inaccessible to me as an outsider. Tales of pregnant virgins and impure ovens appeared disconnected from the bioethical issue at hand and authorities were difficult to place historically and often appeared contradictory. I studied the legal sources and authorities as well as different interpretative approaches to Halakha. This enabled a better grasp of the legal approach but I lacked an understanding of the historical, political and sociological contexts of the law. The anthropological sources mentioned above, provided this insight. The methodology and structure I have chosen for this thesis follow the same

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CILE (Centre for Islamic Legislation and Ethics) Qatar, https://www.cilecenter.org/ accessed 4.5.2019

The agenda for the Second International Summit on Human Gene editing included scholars with a scientific, social, ethical and philosophical background, speakers with a religious bioethical background were not present. Religious bioethical events often have religious and scientific scholars, but these are seldom from outside the particular religious community. Organisations like CILE (Centre for Islamic Legislation and Ethics) are reaching out to secular ethicists and anecdotal evidence suggest that the religious voice is slowly being welcomed at secular ethics councils.
path. Part one thus focuses on the Jewish interpretative approaches to Halakha and the sociological context of applied Jewish bioethics in Israel.

Under the guidance of my PhD supervisor Professor Mona Siddiqui, I have chosen a similar approach to studying Islamic bioethics in part two. This begins with a study of interpretative approaches to Shari‘a, followed by applied Islamic bioethics in the Middle East.

My goal is to understand the religious, legal and moral values Orthodox Jews and Muslims apply to human genome germline editing. In the conclusion of this thesis, I project how the legal argument will be formed. A legal narrative develops over time and reflects multiple ethical challenges and subtle interpretations of religious texts. Comprehension of how religious communities navigate the ethical challenges of genome editing depends on a deep understanding of the former narratives which have addressed the key developments of reproductive medicine.

To explore this development, I have chosen three key reproductive technologies and discussed them in Part III of this thesis. These are: artificial insemination (AI), in vitro fertilisation (IVF) and pre-implantation genetic diagnosis (PGD). The religious legal debates of these three technologies form the bedrock of the debate about human germline editing today.

My motivation is twofold; on a personal level I am keen to compare the response of my own Catholic tradition, with that of the other two Abrahamic Religions. The Holy See has followed a most conservative approach to reproductive medicine, whilst Muslim and Jewish jurists have been more open to debate. This thesis enquires in what way this engaged approach has affected the authority and authenticity of Jewish law (Halakhah) and Muslim law (Shari‘a). Have the legal traditions retained their authority and relevance in their respective communities and to what extent have legal principles been influenced by advances in modern science?

Practically, this research compares how Muslim and Jewish jurists engage with the ethical and legal questions surrounding reproductive medicine. It explores the priorities and motivations of jurists and enquires how their decisions have directly impacted on the fertility industry in many parts of the Middle East.
The study of comparative religious bioethics requires a constant reassessment of the key themes. The technology of *Mitochondrial Replacement Therapy* (MRT) seemed of pivotal importance to me as a Catholic. MRT involves the genetic material of two women and one man, leading to a child with a genetic make-up that could not occur through natural conception. As neither Jewish nor Muslim bioethicists appeared to focus on this technology the topic of MRT has largely been placed in the appendix. Topics such as ritual purity, modesty, adultery and kinship have been prioritised, because these are the themes that matter in these traditions. In this way this thesis provides a small window into the Jewish Orthodox and Muslim world of reproductive medicine and the complex interweaving of legal narratives.
Introduction

Since the latter half of the 20th century, advances in fertility medicine have fundamentally changed approaches to human reproduction. New medical techniques have increased the chances of both infertile couples and those with detrimental genetic predispositions to conceive healthy children, but each new technique brings with it fresh religious, ethical and legal challenges. As the availability of fertility treatments increases internationally, differences in moral approaches and legislation become more important. These are especially momentous as the international community confronts questions surrounding the genetic enhancement of embryonic life. Often the worldwide divergences are the result of culture specific legal and ethical approaches to infertility, to the protection of embryonic life and to the genetic improvement of humanity. This research studies both the process by which Orthodox Jewish and Muslim jurists have engaged with scientists of their own religions to establish the legal and moral implications of new fertility treatments and the impact of their recommendations. The legal reasoning and societal contexts of these religious jurists is complex. Religious law is not practised in a social and political vacuum. There is, therefore, neither one answer for all Muslims nor for all Jews, but the legal concepts of Shari‘a and Halakhah do extend across the respective communities providing a shared set of values. Understanding these shared values can be a key to engaging with each other.

This thesis will suggest that the influence of religious jurists on legislation and on the behaviour of their respective religious communities can be considerable, but

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‘Infertility is a disease of the male or female reproductive system defined by the failure to achieve a pregnancy after 12 months or more of regular unprotected sexual intercourse’


In response to the revelation that the Chinese scientist He Jiankui has already edited twin babies who were born in China in 2018 leading scientists have repeatedly call for a moratorium, see Eric Lander et al.:

“We call for a global moratorium on all clinical uses of human germline editing — that is, changing heritable DNA (in sperm, eggs or embryos) to make genetically modified children.”
because the process is complex, it is often poorly understood. The assumption is often made that religious authorities may hinder development, but it is rarely acknowledged that religious leaders may support new fertility practices far beyond what is considered the norm outside their particular religion. An example is the subject of human cloning, which is currently prohibited worldwide:

The use of PSCs (including iPSCs), SCNT technology, or any other method for human reproductive cloning is prohibited, illegal, and punishable worldwide.\(^5\)

In many countries the ethical implications of creating children through cloning cause significant concerns amongst the general population as well as scholars, even if the current medical concerns could be alleviated.\(^6\) This viewpoint is not necessarily shared by religious jurists, who may approach the subject with a set of questions that are unique to their viewpoint:

... from my point of view, human cloning is halal for I have not found any authentic legal evidence to prohibit it after exploring jurisprudential sources. (Ayatollah Muhammad Ibrahim Jannātī)\(^7\)

Questions concerning the legality and morality of new and emerging medical procedures are today debated by bioethicists amongst other scientists and ethicists. However, bioethics is a relatively modern academic field that developed as a distinct field of academic study in the 1960s.\(^8\) Bioethics is a term that does not neatly translate into classical Islam and Orthodox Judaism. Medical matters were and continue to be decided upon by religious jurists as part of religious law, namely Sharīʿa and Halakhah. Although today there are specialists in the area of religious

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bioethics, they and most religious jurists continue to work on the premise that religious law covers every aspect of life.

For this reason, this thesis focuses on how principles of *Halakha* and *Sharīʿa* shape a very distinctive approach to the genetic sciences.

Abdulaziz Sachedina describes the role of *Sharīʿa* as such:

Islamic Law covers all the actions humans perform, whether towards one another or towards God. The *Sharīʿa* is the norm of the Muslim community.⁹

Rabbi David Bleich holds that:

Judaism is fundamentally a religion of law, a law which governs every facet of the human condition. … The divine nature of Torah renders it immutable and hence not subject to amendment or modification. Although the Torah itself is immutable, the Sages teach that the interpretation of its many laws and regulations is entirely within the province of human intellect.¹⁰

For Muslims and Jews there are parameters as to who is permitted to reinterpret the application of established legal principles. Each new medical treatment must be translated by experts into existing legal concepts and the resulting legal categorisation will reflect the concerns of the jurists.

Ethics must have normative statements. Whether generalised rules…or specific guidelines on the permissibility of abortion or euthanasia, normative statements are central to the ethicist’s task. Religious ethicists have the particular burden of applying the normative statements already recognized by that religious tradition.¹¹

These Religious-legal translations and applications have considerable implications both for the science they permit and the Law itself because modern science

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challenges and changes the known legal categories of parenthood, lineage and legitimacy, all of which used to be considered unchanging.\textsuperscript{12}

A small number of foundational legal opinions by eminent jurists in the early days of IVF have remained authoritative for all subsequent developments. As the field of Assisted Reproductive Technologies (ART) is constantly evolving, these legal arguments need to be understood in order to engage with the debates on genetic screening and enhancement of embryos.

In most religious cultures procreation has often been regarded as a natural and desirable consequence of marriage, making infertility a societal challenge. Infertility was most commonly attributed to the wife and motherhood was established only through parturition. It was generally assumed that the husband of the mother was the biological father of the child.

\text{"...legitimacy is linked to “ownership” of the nuptial bed. In other words, the husband is the legitimate father in case of marriage...\textsuperscript{13}\"}

Adultery was regarded as going against God’s law.

You should not covet your neighbour’s wife. (Exodus 20:14)

The woman and the man guilty of zināʾ (for fornication or adultery), - flog each of them with a hundred stripes: Let not compassion move you in their case, in a matter prescribed by Allah, if ye believe in Allah and the Last Day: and let a party of the Believers witness their punishment. (Q 24:2)

Identifying the correct lineage of a child has always been seen as important for societal stability, for the moral wellbeing of families and for the laws of inheritance. Thus, the process of procreation and pregnancy carries huge religious significance. Judaism, Islam and Christianity are all religions in which the moral conduct of the believer is significant for a correct relationship with God. Therefore, the religious

\textsuperscript{12} Avraham Steinberg, "In Search of the Halakhic Definition of Motherhood," B’Or Ha’Torah 25 (2017), https://go.gale.com/ps/i.do?id=GALE%7CA572402554&sid=googleScholar&v=2.1&it=r&linkaccess=abs&issn=03336298&p=AONE&sw=w&enforceAuth=true&linkSource=delayedAuthFullText&userGroupName=ed_itw&u=ed_itw. accessed 11.5.2022

legal system of Halakhah, Shari’a and Canon Law have sought to encourage family life through legitimate procreation. They have evolved to encode the key assumptions of family life, underpin legitimate procreation and prohibit a doubtful or illegitimate lineage. Halakhah, Shari’a and Canon Law thus support and enforce known maternal and paternal lineage and marriage has tended to be a pre-requisite for parenthood, even if parenthood is not the only reason for marriage. This pro-natalist religious approach has historically interpreted the bearing of any child as a blessing from God and medical intervention was limited.

Fundamental change in the treatments of infertility began in the latter half of the 20th century. Since then, fertility medicine and embryonic research has developed at such speed that ethicists, religious authorities and legislators admit their struggle to keep pace with the science. With the advent of IVF in 1978, a child can be created from a donor egg and also gestated by a surrogate mother. Recently developed mitochondrial replacement therapy (MRT) could theoretically lead to a child having three or even four mothers. (Mitochondrial donor, nucleus donor, gestational mother and the mother who brings up the child.) Maternal identity presents new challenges.

…a “three parent” implantation procedure presents a halakhic issue of maternal identity.

In tandem with innovations in reproductive medicine, the Human Genome Project was completed in 2003, which has given scientists:

…a resource of detailed information about the structure, organization and function of the complete set of human genes. This information can be thought


of as the basic set of inheritable "instructions" for the development and function of a human being.\textsuperscript{18}

This genetic knowledge has since been applied to fertility medicine and whilst fertility treatments used to be reserved predominantly for infertile patients, today reproductive medicine has taken on a further role in routinely determining the health of embryos.\textsuperscript{19} During IVF, \textit{pre-implantation genetic diagnosis} (PGD) can now be used to map the entire genome of a developing embryo \textit{in vitro}. This technique identifies undesired genetic markers in embryos from fertile parents with a known predisposition to inherited genetic disorders.\textsuperscript{20} Depending on the results from PGD, the embryo is then either selected to be implanted into the womb or deselected and destroyed. This technique can also be used for parents without known genetic problems to choose the genetic traits of their children, although legislation in this area varies greatly worldwide.

Until recently it was possible to select only from naturally occurring traits that were genetically understood, but now genetic traits can potentially be created even beyond those that naturally occur in the human genome. If the traits chosen are heritable this also implies that the genetic edit will be passed onto subsequent generations, affecting thus the \textit{germ line} of the human race.\textsuperscript{21} Genome editing used to be difficult, time consuming and extremely expensive which made the legislative control of the few research centres worldwide relatively easy. Since the introduction of new genome editing tools, especially the CRISPR-cas9 technology in 2012, the

\begin{flushleft}


In humans, the embryo refers to the growing organism after being a zygote and before being a fetus. The zygote becomes an embryo immediately after series of cell division. After the continuous cell division and differentiation in eight weeks, the embryo becomes a fetus in which the organism undergoes extensive organogenesis.


This article demonstrates how PGD was used in IVF even before 2003, but its effectiveness has increased exponentially.

\textsuperscript{21} Nuffield Council on Bioethics, \textit{Genome Editing and Human Reproduction}. 32-36
\end{flushleft}
process has become much cheaper, simpler and faster. 22,23 This is the reason why worldwide collaboration on ethical guidelines of fertility treatments is so important today.

This increasingly medicalised procreation, which may incorporate donor gametes, surrogates and the genetic selection of embryos has meant that the normative religious legal positions about childbirth have needed re-examination in the following areas:

1. Firstly, donor sperm (whether anonymous or not) undermines the paternal lineage of a child and raises various legal concerns in classical law including the charge of adultery. This has been by far the most divisive topic in both Judaism and Islam. A child born outside of a legal marriage may carry the stigma of illegitimacy, with considerable social and legal implications.

2. Secondly, AI and IVF challenge the religious importance of the sexual act of penetration and the significance of the locus of fertilisation. This leads to debates of whether the location of an embryo outside (in vitro) or inside (in vivo) the womb affects its right to protection from destruction. Judaism traditionally understands conception of new life as the coming together of husband, wife and God in union in the marriage bed, leading to questions of how a scientist performing the fertilisation and the location of conception in vitro (glass) affect this understanding.

3. Thirdly, donor eggs and surrogacy question maternal identity. A child born of a surrogate mother arguably has two mothers, especially if the mother

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CRISPR-cas9 stands for Clustered Regularly Interspaced Short Palindromic Repeats, cas9 is an enzyme, together they form a type of molecular scissors that form the basis for CRISPR-Cas9 genome editing technology.

23 Nuffield Council on Bioethics, Genome Editing and Human Reproduction. 36

The selection of genetic traits of future children is now a possibility although…

‘…it is important to recognise the uncertainty that continues to exist about the technical efficacy of genome editing in human embryos. First it must be established whether CRISPR-Cas9 systems faithfully cleave their intended genomic target without uncontrolled cutting of other sequences (‘off target events’) in ways that make them unsafe for clinical use.’
supplying the womb did not supply the egg. This means that children are born with a personal and religious status that does not exist in the legal categories of classical Halakhah. A Jewish mother births Jewish children, but what if the egg used was from a Jewish mother but the surrogate womb was not ‘Jewish’? The womb is important because it can create religious affiliation and children from a surrogate womb may require conversion. The womb is also of particularly importance in religions that see it as the only physical place in which ensoulment can take place. Ensoulment can be understood as a prerequisite for personhood; this leads to the hypothetical, but important, question whether a child gestated in an artificial womb would be considered less of a person. In both Judaism and Islam, the position of an embryo in vitro is given less protection than in that in vivo, so that location of gestation may become legally relevant to ensure that full legal personhood is granted to children that are not born of a womb in the future.

4. Fourthly, cryopreservation of embryos raises the question of the beginning of life. The destruction of deselected embryos has become a routine bi-product of the IVF industry.

5. Fifthly, the use of PGD and embryonic genetic editing raise a debate about whether parents ought to have any choice in the genetic make-up of their offspring and whether religious authorities should influence parental decisions on the matter.

Some religious authorities such as the Holy See, argue that none of the above should be permitted, because the deliberate human design of children through the medicalisation of procreation undermines the sanctity of life itself and the fundamental right of every human being to life. Humankind is legally and morally considered fully human from the moment of fertilisation. However, much of

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24 Surrogacy can involve a surrogate mother being artificially inseminated with the sperm of the intended father, this means the surrogate mother supplies her own egg, or the intended mother and father can supply an embryo which is artificially implanted into the womb of the surrogate mother.


Orthodox Judaism appears to have fully endorsed medically assisted reproduction. The Muslim approach has been more nuanced, but also stands in stark contrast to the views of the Holy See.

The rejection of any medicalisation of procreation from the outset appears to have severely limited dialogue between the Holy See and bioethical debates. In contrast, Orthodox Judaism and Islam offer a different approach in that both have created organisations that are dedicated to bringing together religious jurists, scientists and policy makers in order to discuss the bioethical and religious legal challenges of the new and emerging fertility techniques. The diversity of viewpoints and multiple authoritative structures within Judaism and Islam, which share many of their sacred narratives as well as their historical rejection of adultery and illegitimacy, makes for a rich but complex framework for comparison.

As a consequence of different societal priorities, the legislation of fertility treatments varies greatly worldwide. Currently the use of PGD, for example, is legally restricted in the United Kingdom to patients with a severe family history of inheritable genetic abnormalities. It is age restricted to women under 40 and stipulates that:

There should be no living unaffected child from the current relationship.27

Countries such as Israel, Qatar or the US are far less restrictive and offer PGD to nationals as well as foreign paying customers. Some countries permit the use of gender selection while others restrict it.28 This has led to reproductive tourism (or fertility tourism), which sees patients travel to access treatments that are not legally


Fertility clinics in the USA currently offer to screen embryos for 400 hereditary conditions; parents can choose the gender and eye colour of their offspring. Prices at the time of writing, appear to start at £9800.
available in their home country. This difference in legislation, which determines whether embryonic traits can be selected or even created, will have considerable repercussions globally and is a matter for concern for bioethics councils worldwide.

Currently an international commission convened by the Royal Society, the US National Academy of Sciences and the US National Academy of Medicine is debating recommendations on the use of human germline genome editing (HGGE) in embryos. The most opportune time to edit the genome of a living organism is around the time of its fertilisation. In humans this requires the use of IVF and the manipulation of DNA at the embryonic stage. Current debates about genetic improvements of the genome in any society cannot, therefore, be understood in isolation from the legal debates of the 20th century, which decided whether to permit the use of donor sperm, the use of IVF and the abortion of embryos afflicted with life limiting disabilities. These debates form the foundations for the debate about genetic embryonic medicine today. For this reason this thesis investigates the interaction between religious jurists, scientists and legislators from the late 20th century to the present time.

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30 In this latest development genome editing involves a type of genetic engineering in which the genome of a living organism is changed through the insertion, modification, replacement or deletion of sections of DNA. This means that any characteristic or trait of a living organism which depends on its DNA can potentially be changed through genome editing.

31 Nuffield Council on Bioethics, Genome Editing and Human Reproduction.

It is the most opportune time because if the DNA changes are introduced at the time of fertilisation, then every cell produced to form the embryo, from treatment onwards will carry this new DNA.
Structure and Methodology

The thesis is divided into three parts,

**Part I:** Chapter One will introduce Jewish Law (*Halakhah*) and demonstrate the interpretative mechanism by which Jewish scholars and Rabbis engage with new legal problems.\(^{32}\) Chapter Two will explore the sociological context of applied Jewish bioethics in Israel.

**Part II:** Chapter Three will introduce Islamic Law (*Sharīʿa*) and explore how Muslim jurists have approached modern legal challenges. Chapter Four will explore the sociological context of applied Muslim bioethics in the Muslim Middle East.\(^{33}\)

The research into the societal and political context in which modern bioethical responses emerge will explore why societies in the Middle East can be described as pronatalist (promoting the reproduction of human life). It will explore how this pronatalism effects the experience of infertility. This will include insights into how *Sharīʿa* and *Halakhah* have shaped societal attitudes towards ritual purity, legitimacy and lineage. The collaborative work of religious jurists and scientists will be discussed and the success and challenges of these joint ventures will be highlighted.

**Part III:** Will research the foundational legal arguments of three reproductive technologies in the chronological order of their development.

This will demonstrate how a small number of highly influential legal decisions made in the late 20\(^{th}\) century set the course for all subsequent bioethical and legal decisions in the field of fertility treatments. The first two technologies are *artificial insemination with donor gametes* (AID) and *in vitro fertilisation* (IVF). The third technology is *pre-implantation genetic diagnosis* (PGD). Debates about PGD address the increased management of the human genome through the genetic testing of parents and deselection of embryos.

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\(^{32}\) The introduction to *Halakhah* will be brief, for a deeper analysis see *Jewish law (Mishpat Ivri): Cases and Materials*, ed. Elon M. et al. (Lexis Nexis, 1999, 1999).

The legal debates about each of these technologies will demonstrate the legal principles that are invoked and the key areas of contention. This will show the underlying issues at the heart of the religious legal debate. Examples will show how key legal rulings have been translated into legislation.

The aim of the three-part structure is to explore the process by which Jewish and Muslim jurists engage with the science of fertility treatments and discuss how their legal recommendations influence the fertility treatments and attitudes in their respective communities. The process is diachronic and dialectic, over time each scientific development challenges and at times prospectively transforms long held assumptions about humanity, conception, parenthood and lineage. This means that the religious/legal traditions adapt and transform, but in countries where Jewish and Muslim bioethicists and religious jurists influence the legislation of fertility treatments, the medical sciences themselves also adapt or show receptivity to incorporate religious concerns.

It has been challenging to draw geographical boundaries for this research. The initial aim to study Jewish and Islamic bioethics purely in the UK found that all Rabbis who were interviewed for this research referred in their decision making to authorities who reside either in the United States or in Israel. Equally, Islamic bioethics conferences in the UK have recently drawn their speakers from the UK as well as the Middle-East and America. The influence of leading authorities in the field of bioethics is thus global. Within Judaism not all of these authorities are poskim (legal decisors), a great number are academics and often they are associated with the Yeshiva University of New York. From the Islamic angle, jurists who specialise in medical ethics often collaborate with medical professionals who specialise in Islamic ethics and law. Most are associated with influential legal councils who tend to be in the Middle East and America (see below for a detailed description). Part I of this thesis thus draws globally from published material.

In Chapters Two and Four, Israel and several predominantly Muslim countries in the Middle East have been chosen to explore the application of religious bioethics. Israel

34 For transcripts of the interviews please see the appendix
35 Yeshiva University is a private Jewish research University in New York of considerable academic influence within Judaism. Amongst other disciplines it incorporates a School of Law, a Theological Seminary and a Medical School. "Yeshiva University,," https://www.yu.edu/about. accessed 2.2.2020
has a particular set of cultural and political issues that make it *sui generis*. Demographically it is the only country with a Jewish majority that the state aims to maintain and thus the only country where the effect of Jewish legal approaches to the fertility industry can be directly studied. Orthodox Rabbis are known to steer state policies in the field of fertility, as part of family law.\(^{36}\)

The initial aim to compare Israel to one other pre-dominantly Muslim country was dismissed as misrepresentative of the great scope of Muslim bioethical responses. In the practical application of Islamic bioethics examples from a cross section of the Middle East, namely from Turkey, Dubai, Egypt, Lebanon and Iran provided the most fruitful insights. These countries reflect different aspects of Sunnī or Shi‘a influences in their policies.

Religious responses to current fertility treatments are part of a legal narrative that began in the mid-20th century. The legal debates about the reproductive technologies discussed in Part III chart this narrative and the time period studied thus covers around seventy years. It is worth noting in which time period the different fertility practices were introduced and when the subsequent religious responses were published. The freezing of sperm (cryopreservation) began in the 1950s and Jewish jurists began extensive debates about the permissibility of donor sperm in 1959.\(^{37}\) Early decisions made by Jewish jurists in the 1950s, 60s and 70s form the foundations of the Jewish narrative. IVF was first performed successfully in 1978 and the cryopreservation of embryos (fertilised eggs) began in the mid-1980s. The 1980s and 1990s are the time of the foundational *fatwas* in Islam, in which the use of donor sperm and IVF are covered together. Whilst the destruction of surplus embryos would have begun in the late-20\(^{th}\) century, much of the religious bioethical discussions surrounding the legal status of embryos appear more recently with the advent of *embryonic stem cell research* at the beginning of the 21\(^{st}\) century in both Jewish and Muslim debates. The question of whether surplus embryos can be destroyed has today been broadened to include whether positive eugenic choices can be made in order to choose the most desirable genetic traits through *pre-

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\(^{36}\) See Chapter Two for the influence of the Rabbis in the Knesset.

\(^{37}\) See Chapter Five, Part III
implantation genetic diagnosis (PGD). All the legal responses concerning PGD and genome editing are current or published since 2010.

Choice of authoritative material and terminology

Sharīʿa and Halakhah, the legal traditions of Islam and Judaism, operate in complex ways and for the purpose of this thesis, it is impossible to speak of one single approach to religious bioethics in either Judaism or in Islam. Both traditions incorporate a multitude of interpretative approaches. Beyond these divisions, every bioethical jurist works within a framework that is itself part of a societal, political and scientific macrocosm. For the purpose of this study Torah and Sharīʿa will be used to refer to the ideal heavenly law. However, Fiqh (Islamic jurisprudence) explores how Sharīʿa is understood and applied. Similarly, Halakhah refers to the whole of Jewish law. The terms Jewish and Islamic tradition will be used more generally to refer to Jewish and Islamic thought including Jewish and Islamic legal debates. In the case of Judaism, the term tradition is used specifically to refer to the concept of Mesorah, which understands Rabbis as custodians of Halakhah and the culture that proceeds from it, which is believed to be rooted in divine revelation.

In Islam the jurists of the different madhāhib (schools of jurisprudence) within Fiqh (Islamic jurisprudence) often differ in their hermeneutic approach to law and bioethics; divergences also occur within the individual schools of thought. However, within Sunnī and Shīʿa Islam certain authorities are influential on a global level. The fatwas on the use of donor gametes made by the highly authoritative Grand Imam of Al-Azhar, Sheikh Jād al-Ḥaqq, proved foundational for the Sunnī approach to all subsequent innovations in IVF. In Shīʿa Islam the diverging opinions of the Grand Ayatollahs Al-Sistani and Khameneʿi have proved authoritative for their respective followers worldwide. Building on the foundations of these initial fatwas, today an ever-growing number of biomedical and legal specialists meet regularly at centres of modern interpretation of Sharīʿa and Fiqh. For this thesis the work published in the Middle East by the Islamic organisation for medical science in Kuwait (IOMS), the

Islamic Fiqh Academy in Mecca, the International Fiqh Academy in Jeddah and the Research Center for Islamic Legislation and Ethics in Qatar (CILE) will be of utmost importance. In the western hemisphere academics of the University of Chicago, in the UK academics at the Centre for Islam and Medicine (CIM) and at the British Islamic Medical Association (BIMA) are all working in the interdisciplinary field of bioethics and Sharīʿa. Differences between the Shīʿa and Sunnī approach to innovation will be pivotal for this research as it has a direct influence on the use of donated genetic material to create offspring. The official websites of the Ayatollahs al-Sistani and Khameneʿi will be used to compare different Shīʿa perspectives, with Khameneʿi accepting the use of donor gametes and Al-Sistani’s rulings underpinning the rejection of donor gametes found in Sunnī Islam.40

Halakhah (Jewish law) was also never monolithic, but Judaism as a religious tradition was divided only into the Ashkenazi Jews (of northern European descent) and Sephardi Jews (descending from the Iberian Peninsula) until the 1800s. Only then did Reform movements bring fundamentally different approaches to the law itself. Today there are deep divisions between Ultra-Orthodox, Orthodox, Conservative and Reform communities.41 Decisions made by experts of bioethics and Halakhah vary significantly. Bioethical questions are considered a legal matter within Orthodox and Conservative Judaism, less so in Progressive and Reform Judaism where adherence to the law is understood in very different terms. Despite sharing moral and societal concerns, the hermeneutic approach to the law is one of the key factors dividing these different denominations. Classification of Jewish denominations can be confusing. This thesis will distinguish between Orthodox and Conservative authorities. A capital C is used for Conservative authorities, as opposed to the adjective conservative which can also be used as a classification for the more traditionally minded branches within Orthodoxy e.g., conservative Orthodox Judaism versus Conservative Judaism.

40 Over time Al- appears to have moved closer to Khameneʿi in his decision to permit the use of embryos created from donor sperm, see Part III.
Conservative versus Orthodox approaches to Halakhah will be discussed in Chapter One because they are insightful for a deeper understanding of different interpretative techniques. However, although Conservative Judaism engages deeply with modern bioethical problems, the legal debates of Part III focus on Modern Orthodox (generally referred to as Orthodox) and Ultra-Orthodox interpretations because authorities of these denominations have influenced policies in Israel. Of the three most influential Rabbis who debated the use of donor gametes in the 20th century, both Rabbi Feinstein and Rabbi Teitelbaum resided in New York whilst Rabbi Jakobovits was Chief Rabbi of the Commonwealth and lived in London. Their debates on the use of donor gametes will be the focus of the first halakhic debate in Chapter Five. One leading institution publishing research in the area of halakhic bioethics is Yeshiva University in New York.

Interviews with Muslim and Jewish authorities have guided this research and the choices of source material. However, this thesis is not predominantly based on empirical research, but draws on an array of scientific, sociological and anthropological studies. These disciplines go some way towards contextualising the research into religious legal bioethics. Many of the legal documents are written in Hebrew, Yiddish, German, Arabic, Farsi and English. Because of language limitations this thesis has limited its research to English and German translations of a variety of significant sources. The Gregorian year 2022 CE is the year 5728 in the Jewish calendar and the Islamic year 1443 AH; to avoid confusion all dates have been converted to the Gregorian calendar CE. When Arabic, Hebrew or unfamiliar terms are used they are transliterated and italicised with the English meaning given in brackets after the term. Diacritical marks are kept to a minimum, they have been used for a number of key terms only, although quotations are presented as found. The definitions found in the glossary are also given in the text in brackets for ease of reading. Sources for the individual definitions can be found in the bibliography and in the footnotes. Footnotes are given via Endnote in Chicago 17th Footnote.
Part I

Approaches to Bioethics in *Halakhah*

Chapter One: Jewish Interpretative Approaches to *Halakhah*

Chapter Two: The Sociological Context of Jewish Bioethics in Israel
Chapter One

Jewish Interpretative Approaches to *Halakhah*

‘Throughout the millennia, Judaism and medicine have marched hand-in-hand as allies, not rivals… for the most part rejected all varieties of dualism and rivalries between the body and spirit, maintaining rather that spiritual progress can be enhanced by a healthy body’

Judaism and Jewish Law

The term Torah may refer in general to the teachings of Judaism but in a legal sense Torah refers to the first five books of the Hebrew bible believed to have been given to Moses on Mount Sinai. Tradition holds that together with the written Torah, the oral Torah was given to Moses, so providing the foundational source from which the law *Halakhah* has been developed over millennia. There are 613 commandments derived from the Torah named *mitzvot* (sing. *mitzvah*).

Judaism is often represented as an overly legalistic tradition and Rabbi Louis Jacobs stresses the importance of questioning this supposition and appreciating the beloved position that Torah (literally *teaching*) holds within the covenantal relationship between humankind and God. Within Orthodox Judaism, Torah is seen as the gift of God and a bridge to the divine. It incorporates the law and is the vehicle by which God, in loving instruction, gives guidance to every ethical, legal or moral problem that may ever challenge his people. Edward Reichman explains the traditional Orthodox view:

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44 Jacobs, *The Jewish Religion Torah*, 562-565
We, ...as Orthodox Jews who subscribe to the halakhic process and live by
the words of Hazal (the sages), employ the past to solve the dilemmas of the
present and future ... 45

Within Orthodox Judaism Torah, given at Sinai, is understood as ahistorical and
eternal, although its ahistorical quality is questioned by other denominations. One
image, often described, is of the Jewish people becoming the Bride of God, in which
the covenantal relationship is likened to a marriage and God through the gift of Torah
and through infinite love gives both a moral and legal guidebook on how to live a
divinely guided, righteous life.46

The sources of Halakhah carry different levels of authority. Legal sources of the
highest authority are the written Torah, followed by the oral Torah. The earliest
discussions on the Torah by the sages make up the Talmud (Gemara in Aramaic).
This vast corpus of legal discourse is distinctly non-monolithic. Discussions from the
Talmud have been re-debated throughout the centuries and commentaries on the
Talmud form the next level of legal sources. These debates preserve the Jewish
flexibility of the Law as no one answer is preserved as ultimate doctrine.

The codes are the counterpart to the vast corpus of legal debates. Here eminent
scholars have codified the Law, which simplifies its application but also restricts its
flexibility. Finally, the Responsa are legal opinions of authoritative jurists (poskim)
that have been preserved and serve as examples of legal decision making. For a
more detailed description of the legal sources please see the appendix of this thesis.

One might be overwhelmed by the magnitude of the Jewish source material. It is
however, part of the very essence of Halakhah that a thorough knowledge of the
legal sources is a prerequisite for any legal scholar being granted the authority of the
posek. This means that the large number of sources safeguards against any
unqualified individual becoming a legal authority. Only the most learned are
authorised to interpret the law and are trusted, entitled and expected to creatively
interpret the legal sources. Not only can the sources lead to equally authoritative

45 Edward Reichman, “The Rabbinic Conception of Conception: An Exercise in Fertility,” in Jewish
Law and The New Reproductive Technologies, ed. Emmanuel Feldman and Joel B. Wolowelsky
(KTAV Publishing House, 1997).

46 For an imagery of Israel as the bride see Isaiah (54:10-14)
opposing legal answers but there is also great emphasis placed on the fact that every case may be different and, therefore, deserves to be ruled upon in its own right using the sources afresh.

The chain of transmission that safeguards the legal authority of Torah is recorded in the *Mishnah of Tractate Avot*. It states that originally the law is given to Moses who passed it on to Joshua who in turn handed it to the Elders. They passed the law on to the prophets who delivered the law to their successors until it was passed onto the men of the Great Assembly.47 During the time of the temple, the Great Sanhedrin of Jerusalem (the highest court in the land) held both absolute legislative and judicial authority. Following the destruction of the second temple in 70 CE the court moved to Yavne, after which it became the duty of the Rabbinic authorities in each community of the diaspora to interpret the law through individual Rabbinic authorities and the local *Beit/Beth Din* (Jewish legal court).48

**Denominational differences**

It is important to distinguish between the different denominations of Judaism. Most of the authorities cited in the halakhic debates of Part III belong to the Orthodox world, but great differences are found between different branches of Orthodoxy. The term *Ultra-Orthodox* is controversial and is often rejected by those who are referred to as such. The term *Haredim* (literally those who tremble before God) is often used instead, whilst *Hasidism* refers to the pietist movement founded by Jewish mystics in the 18th century, and which is part of the *Haredim*. Whilst it is beyond the scope of this thesis to explore the complex difference between the *Modern Orthodox* and the *Hasidic or Haredi* approach to *Halakhah*, a short biographical sketch is given for each authority mentioned in order to aid an understanding of where these voices sit in the Jewish world of today. It is important to bear in mind that *Modern Orthodox* and *Haredi or Hasidic* communities differ greatly in their reaction to modernity and this is significant in their reaction to fertility treatments. *Modern Orthodox* Jews are very much part of the modern world and whilst the majority live their lives observant

47 *Jewish Law*, Elon ed., 61
48 *Jewish Law*, Elon ed., 60
of Halakhah, many Modern Orthodox Rabbis are trained doctors and scientists. Modern Orthodoxy thus provides a bridge between the intellectual world of classical Judaism and the pragmatic world of science. In contrast members of the Haredi and the Hasidic communities tend to reject the modern world and view it as a hostile threat to their way of life. Few Haredim pursue secular education to an advanced level as most of their study time is devoted to the study of Torah. The Hasidic and Haredi voices mentioned in Part III inhabit a world that can be described as a sacred universe in which every apparently mundane act has a spiritual significance. Deeply influenced by the Kabbalah (esoteric teachings of Jewish mysticism) the perspective and legal reasoning of Haredi and Hasidic Rabbis can thus be difficult to access for outsiders.\footnote{Because members of the Hasidic community tend to shield their private lives from outsiders and tend not to study at secular universities it is very difficult to find academic sources that are written by members of the Hasidic community themselves. Although there are various academic papers written about the Hasidic community by outsiders, some of the most insightful sources are autobiographical accounts of individuals who have left Hasidic communities. Although a potential bias against the community must be accounted for, these autobiographies often include the very private matter of infertility in considerably more detail than any other source. These books often spark lively online debates as to their accuracy which gives further insights. For examples of this genre see: Deborah Feldman, Unorthodox: The Scandalous Rejection of My Hasidic Roots (Simon & Schuster, 2012). Abby Stein, Becoming Eve: My Journey from Ultra-Orthodox Rabbi to Transgender Woman (Little, Brown, 2019). The highly acclaimed television drama series Shtisel, which represents the lives of Haredi Jews in Jerusalem also touches upon the highly sensitive issues surrounding infertility and the use of surrogate mothers.}

In practical terms, a Modern Orthodox couple struggling to conceive can contact their Rabbi to enquire whether any new medical procedure is permitted. The Rabbi may not be a specialist in the field of medical Halakhah and he will then consult the works of a posek (legal decisor) or refer the case to his beth din (legal court). If the new medical procedure has not yet been decided the beth din may consult poskim, academics and doctors before making an individual decision in every case. Different poskim (plural of posek) have often issued an array of sometimes opposing responses to the question of whether certain treatments are permitted or prohibited. It will in this case be up to the couple’s Rabbi or beth din to decide which posek’s psak (legal decisor’s legal ruling) is followed. At times a Modern Orthodox couple may also choose to ask a Rabbi who is known to be more lenient than another. This ability to choose whom to ask or whose halakhic opinion to follow, is important.
because it gives the individuals the ability to influence which halakhic rulings are likely to become normative. This will be demonstrated in Part III.

In contrast a Hasidic couple will usually ask the Rebbe of their Hasidic dynasty who will advise them personally in all private and medical matters.\(^{50}\)

Conservative Judaism has Rabbinic scholars who issue responsa, which may in turn be authorised through a Conservative Rabbinic Council and published.\(^{51}\)

Chapter Two will discuss specialist organisations that bring together Rabbis and doctors who specialise in the field of fertility treatments. Their role is to debate the implications of the fertility treatments for Halakhah and find ways in which fertility treatments can be adapted to take religious concerns into account.

The difference between a posek and an academic halakhist

It is important to distinguish between different levels of authority amongst halakhists to understand the way their opinions are referenced. The highest authorities are the poskim who are legal decisors (singular of posek) often as members of a beth din (Jewish court). Their halakhic decisions are usually referred to as responsa in English or piskei din (plural of the singular psak din.) in Hebrew. Often the responsa of a posek are published as a book and the posek is frequently referred to under the title of his book; Rabbi Moses Sofer of Pressburg (1762–1839) who wrote Hatam Sofer is thus widely known as ‘the Hatam Sofer’. The responsa literature of prominent poskim since biblical times is used by contemporary poskim when a new ruling is being made to give authority to modern halakhic decisions. The most famous sages and poskim are often also known by acronyms; Rabbi Solomon ben Isaac is known as Rashi (1040-1105), whilst Rabbi Moses ben Maimon or Maimonides (1138-1204) is known as Rambam (not to be confused with Ramban (1194-1270) which is the acronym for Moses ben Nahman or Nachmanides). Not every halakhist who is an expert on biomedical Halakhah is a posek, some are academics in universities or heads of yeshivot (Jewish educational institution) and whilst these specialists maybe highly regarded and may be consulted by the batte

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\(^{50}\) See Chapter Two

*din (plural of beth din Jewish court of law) worldwide they do not claim the title of a posek. Authorities who publish their opinions in an academic capacity will also use the responsa of past poskim to strengthen their arguments.*

The term halakhist is used to refer to all who are experts in Halakhah, whether in academic institutions or in the community. Many Rabbis are experts in Halakhah, so both terms are used. The term Rebbe usually refers to the head of a Hasidic dynasty. A Rebbe, who is also known as a Tzadik, is both the spiritual leader and the sole legal decisor for all members of his dynasty. A Rebbe is unlikely to seek the opinion of a halakhic academic as the two inhabit different worlds (see above for denominational differences).

Authorities who act as a Rabbi will personally face desperate couples searching for solutions to infertility problems, whilst halakhists who are academics are likely to approach infertility more theoretically and universally. Some authorities will be Rabbis, poskim and academics, fulfilling different roles in their lives simultaneously. Biographical introductions will note in what capacity the halakhist is publishing his opinion.

**Key figures in modern Jewish bioethics**

The modern Jewish bioethical/biomedical tradition has its roots in the early twentieth century. Scholars who may be referred to as the pioneers of this scholarship include Lord Immanuel Jakobovis, Rabbi Moshe Feinstein, Rabbi Shlomo Zalman Auerbach and Rabbi Eliezieer Yehudah Waldenberg. The next generation of specialists in Jewish medical ethics includes Abraham S. Abraham, David J. Bleich, David M Feldman, Mordechai Halperin, Fred Rosner, Abraham Steinberg and Moshe David Tendler. The scholars above are all Orthodox, not all consider themselves as poskim but rather as academic scholars, and some identify as both in different circumstances. Rabbi Bleich and Rabbi Tendler are both prominent figures at the Yeshiva University of New York which is a leading institution in the study and research of Jewish bioethics. Rabbi Dr. David Bleich is Professor of the Theological Seminary of Yeshiva University, Rabbi Moses Tendler is Professor of Biology and Medical Ethics. Both distinguished authorities write extensively on Jewish bioethics

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and tend to disagree. This is of great interest, because one Orthodox scholar approaches the topic from the perspective of a theologian, whilst the other's first perspective is that of a biologist.  

Conservative specialists in the field of bioethics include David Novak and Eliot Dorff.  

The concept: Torah is not in heaven

When Jewish scholars face unprecedented problems the question of how they innovate often depends on their approach to the immutability and eternity of the law. Despite these differences there is an intriguing teaching in Judaism that is accepted across the denominations although it can be interpreted in different ways. It concerns itself with the nature of halakhic authority and at the heart of the teaching lies a story about an oven. *Tamu shel Akhnai* (the Akhnai oven) is the story of the eminent sage R. Eliezer who declared that a bread oven was pure and ready for use. The majority of sages disagreed with R. Eliezer although he was said to be superior to them. There followed a number of heavenly miracles that supported the opinion that the oven was pure. The sages, however, continued to declared it impure. Even when a heavenly voice declared that R. Eliezer was right, the sages turned to heaven and said that Torah was given at Sinai and was not in heaven. (Deuteronomy 30:12). The Gemara continues this story and records that years later Rabbi Natan encountered Elija and asked what God’s reaction had been to such impertinence. Elija is said to have recounted that the divine reaction was that ‘the Holy One, blessed be He, smiled and said: My children have triumphed over Me.’

This extraordinary tale is interpreted in different ways. According to the Talmud, God reveals the Torah, but the interpretation of Torah is not revealed. The authority to interpret Halakhah is granted to the poskim so that according to tradition not even God has the right to overrule the decision of the majority of poskim on earth. The

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53 Rabbi Bleich is professor of Talmud (Rosh Yeshiva) at Rabbi Isaac Elchanan Theological Seminary, an affiliate of Yeshiva University New York

54 Rabbi Moshe Tendler is the Professor of Jewish Medical Ethics and a professor of biology and a Rosh Yeshiva in the Rabbi Isaac Elchanan Theological Seminary at Yeshiva University New York


56 Talmud Bava Metzia 59b, (Sefaria,), https://www.sefaria.org/Bava_Metzia.59b?lang=bi accessed 11.4.2019
The Talmudic idea of *lo ba-shamayin hi* (*The Torah is not in heaven*) can be cited by Conservative scholars to imply that the Law does indeed evolve on earth. Rabbi Lord Jonathan Sacks disagrees with this and states that *lo ba-shamayin hi* implies the opposite. Sacks holds that this Talmudic idea protects *Halakhah* from any one person who claims a mystical insight, a prophetic experience and especially a modern rational autonomous take on *Halakhah*. This raises the question about whether this approach stifles and fossilises the law, protects its core principles or whether Jews of the modern era feel alienated by its language and principles unless the law allows itself to be ‘translated’ and tested against modern ethical values.

Menachem Elon suggests a final interpretation of the oven of Akhnai that appears to summarise succinctly many of the arguments and tensions. Elon recognises two models of *Halakhah*; one view sees humanity as so insignificant that:

No mortal judge can hope to discover the absolute truth as to the facts, or the soundness of the legal arguments in any case.

In this instance the practical consequence is that courts cannot make any innovative legal judgements and must leave all decisions to the Divine, or listen only to those who claim direct divine inspiration; a model that does not appear to be favoured by classical *Halakhah*. The second model is represented by this story of the oven of Akhnai and according to Elon it is the one clearly favoured by the classical *Halakhah*;

This model is based on the view that the Almighty has ordained, that human beings must make use of their capabilities, however limited, to resolve disputes without any divine help or intervention. This view therefore confers on the courts the exclusive authority to judge. It does so, however at a price, because the right to decide is also the right to err. In this second model, absolute truth must give way to ‘legal truth’. In the words of the *Talmud*, while ‘the Torah is from heaven’, ‘the Torah is not in heaven’.

Finally, Eliezier Berkovits finally makes a distinction between the theoretical and the practical application of the law. Although Orthodox in his approach Berkovits

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58 *Jewish Law*, Elon ed. 17
59 *Jewish Law*, Elon ed. 17
demonstrates that ‘Not in Heaven’ meant that Rabbis throughout the centuries adjusted the circumstances to the law. He explains that although laws such as the death penalty continued to exist, they were in fact hardly ever enforced. Berkovits thus encourages his fellow Orthodox Rabbis to approach Halakhah creatively in real life situations. He distinguished between being:

…guided by common sense sevara, as the wisdom of the feasible, according to which the law must maintain its application in practice and … as the priority of the ethical, according to which it is understood as furthering the larger moral principles embodied in the Torah.\textsuperscript{60}

It is equally important to distinguish between Halakhah which refers to the product of highly technical and theoretical legal discussion and Halakhah le’maaseh (practice) which is dialectical and refers to the practical application of the law. As the application of Halakhah always takes into account the individual circumstances in which the law is applied, it differs from legal systems that rely solely on codified law. Although normative legal codes exist in Judaism, a rabbi who advises an individual faced with exceptionally challenging circumstances, may draw on his knowledge of earlier responsa or dissenting interpretations in similar circumstances that allow a certain pragmatic flexibility when appropriate. Chapter Two researches the societal and political context in which the law is applied in Israel because the context in which Halakhah is applied matters. By comparison the legal debates of Part III will focus on specific reproductive technologies which demonstrate the legal reasoning behind the divergent approaches to Halakhah.

The process of law making

Although some authorities hold that there is always a precedent to any new situation, halakhists often recognise the need to create new legal interpretation (midrash) either because there is a conflict of laws, because the situation is unprecedented or the situation requires a re-evaluation of established laws.\textsuperscript{61} According to former Chief Rabbi Immanuel Jakobovits, Jewish law functions as case law and Jewish bioethics,

\textsuperscript{60}Eliezer Berkovitz, \textit{Not in Heaven} (Shalem Press, 2010). 3
\textsuperscript{61} \textit{Jewish Law, Elon ed.} 65
as a separate endeavour is a modern second order discipline that derives its insights from the legal dialogues of *Halakhah*. The Hebrew bible already introduces the concept of medical and penal case laws in Exodus 22:21 when it discusses the loss of a child as a result of the deliberate injury of the mother. Here no theological or philosophical demands are made of the religious believer, nor is the case made for the sanctity of life in abstract terms, but the compensation for an unborn child is set and laws concerning the legal and moral value of an unborn child are from this moment onwards at least partly deduced from this initial case. This type of biblical law is limited in scope, it is therefore the duty of the jurist to develop further laws from the sources by analogy and legal reasoning.

If the jurist needs to create a new law from his creative interpretation this is called *midrash yozar* and the jurist must look to six sources. Many of these have already been mentioned above but, in legal reasoning, they may be referred to in the following terms:

He must consider tradition (*kabbalah*) which refers to the oral tradition transmitted from Moses as the direct commandment of God. This source is said to be static in its authority. The other sources are dynamic and include interpretation (*midrash*), legislation (*takkanah* and *gezerah*), custom (*minhag*), cases or incidents (*ma’aseh*) and finally legal reasoning (*sevarah*).

*Midrash* is the interpretation of sources and it is here that great differences of approach exist between those who favour a more creative approach and those who restrict law making to a more literalist interpretation of sources. Justice Menachem Elon demonstrates that this is not a new phenomenon with the following example.

Deuternonomy 24:12,13 declare that if a poor man pledges his only cloak this must be returned to him every day at sundown, so he may not freeze in the night.

Deuterononomy 24:17 states that no pledge may be taken from a widow.

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63 *Jewish Law, Elon ed. 66*
The question arises in the \textit{Mishnah}, whether it makes any difference whether the widow is rich or poor, to which responses from two \textit{tannaim} (Rabbinic sages whose views are recorded in the Mishnah) are remembered. R. Judah restricts himself to the literalist interpretation and declares that no pledge may be taken from any widow, whilst R. Simeon goes beyond the literalist interpretation and declares that one may not take a pledge from a poor widow, because returning her cloak every night would risk the ruin of her reputation as a morally upright woman (this presumes a man visiting her). If, however, the widow is rich a pledge may be taken from her, because she will not require her cloak at night (she is likely to have another). Therefore, R. Simeon’s declaration that a pledge may be taken from a rich widow demonstrates his use of legal reasoning and a creative interpretation of scripture, compared to the literalist approach of R. Judah.\textsuperscript{64}

Legislation (\textit{takkanah} and \textit{gezerah}) and custom (\textit{minhag}) recognise the authority of individual communities after the fall of Jerusalem and Babylon as legislative strongholds. Up to the modern era all Jewish communities were in essence Orthodox and would have recognised each other’s legal framework. Today, however, the relationship to law differs between denominations with little interaction.\textsuperscript{65} Compared to the written \textit{responsa} literature, \textit{ma’aseh} is a set of concrete circumstances from which a \textit{halakhic} principle has been derived in \textit{Talmudic} times. It is, therefore, not a legal principle that exists, \textit{ma’aseh} is simply the memory of what a well-known legal authority did in a particular situation. As mentioned above the use of \textit{ma’aseh} demonstrates that Jewish law recognises that \textit{halakhic} principles can be arrived at through a set of circumstances and that there is value in a legal source, which demonstrates law in action rather than in codification. This enforces the considerable creativity that a \textit{posek} possesses in his legal reasoning.\textsuperscript{66}

Finally, \textit{sevarah} is legal reasoning that does not depend on any source other than logical reasoning alone. An example of a legal maxim of this kind is that ‘the burden of proof is on the claimant not on the accused’. So important is the value of this legal source in \textit{Halakhah} that Rav Ashi (the first editor of the Babylonian \textit{Talmud})

\textsuperscript{64} \textit{Jewish Law}, Elon ed. 66
\textsuperscript{65} \textit{Jewish Law}, Elon ed. 71,72
\textsuperscript{66} \textit{Jewish Law}, Elon ed. 91-96
questioned the necessity of any biblical support to this ruling even though it exists.\(^67\) This is because justice demands the authority of such common-sense laws to such a profound extent that *severah* alone has the status of a biblical command even if it is not explicitly mentioned in the bible.\(^68\)

**The process of interpreting ancient sources for unprecedented modern situations: switching on the light on Shabbat**

To demonstrate how different denominations use analogy and interpretation to consult ancient sources, the question of whether it is lawful to use electric switches on Shabbat, serves as a good example.

When modern life confronts *halakhists* with questions unknown in biblical times, there is no suggestion that Torah gives literal instructions. According to Orthodox Judaism new questions, whether they concern electricity or human germline genome editing, can be distilled into moral and legal principles that have been covered at Sinai. These principles form the foundational moral, legal and ethical principles of *Halakhah*. The task of the legal expert is to uncover the relevant principles and texts.\(^69\) Whilst there are enormous differences within Orthodoxy as to how creatively the law can be interpreted, the underlying principle is that the applications of the law change but the law itself does not. It is therefore eternal.

At the conservative Orthodox end of the Jewish bioethical spectrum Rabbi David Bleich describes the law according to the traditional view as eternal and unchanging:

> Every facet of human endeavour is regulated by eternal norms enunciated at Sinai...the challenge lies in teasing out the *halakhic* issues, uncovering

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\(^{67}\) Ashi was a celebrated Babylonian amora; born 352; died 427; re-established the academy at Sura, and was the first editor of the Babylonian Talmud.


\(^{68}\) Jewish Law, Elon ed. 97,98

relevant sources and precedents, and reaching normative determinations through the application of *halakhic* dialectic.\(^\text{70}\)

The Conservative Rabbi David Novak understands the law quite differently. His approach incorporates *natural law* into *Halakhah*\(^\text{71,72}\). To Novak the result of this approach is that finding the right ethical answers may go beyond the ‘eternal norms enunciated at Sinai’ mentioned by Bleich above.

I see a middle road theologically between a reduction of reason to revelation, which seems to characterise the opponents of natural law, and a reduction of revelation to reason, which seems to characterise the proponents of natural law in Judaism, especially in modern times… Without it, Judaism is left to be either a rationalism or a fideism; but both are positions that obscure rather than uncover the larger truth.\(^\text{73}\)

Conservative scholars in contrast are thus likely to interpret the underlying principle of Jewish law and through logical reasoning adapt the law itself to the new circumstance; in this way Conservative Judaism understands the law itself as evolving. Both denominations value the wisdom of former sages, but Conservative scholars will in all likelihood give far greater weight to the historical context of a legal decision, whereas Orthodox scholars may not consider the historical context at all.\(^\text{74}\)

When the use of electricity became common, Rabbis questioned whether the use of electric switches was permissible during Shabbat. Electricity needed *halakhic* categorisation and the category of fire was chosen by analogy. Consequently, switching on electricity was *halakhically* examined in terms of kindling fire. The rigorous legal debate that followed demonstrates to some extent the difference between the Orthodox and Conservative approaches to *Halakhah*. Orthodox

\(^\text{70}\) Bleich, *Bioethical Dilemmas*. ix
Judaism tends to emphasise the fulfilment of commandments and therefore decided not permit the operation of any electric switches during Shabbat.

The use of electricity on Shabbat and Yom Tov is a relatively new, and exceedingly complex, area of *Halakhah*.... It is the near unanimous opinion that the use of incandescent lights on Shabbat is biblically prohibited.\(^{75}\)

Not every authority agreed on the reasons for this prohibition, but most Orthodox authorities did agree on the main laws that should be considered by analogy. This means they agreed on the sort of questions that should be posed. These were:

1. The biblical prohibition against the kindling of flames led to the question of whether a flame was being kindled.
2. The prohibitions against work, the creation of something new (*molid*) and building (*boneh*) questioned whether turning on electric switches could be classed as the creation of something new, such as the completion of an electric circuit.
3. Finally, the prohibition against cooking, considered whether an increased usage of fuel may constitute a form of cooking.

All these actions are forbidden on Shabbat. Through the interpretation of these laws the usage of electric switches is still prohibited by almost all Orthodox authorities. It is however not prohibited to use electricity if the light, heater or radio is left on during Shabbat because a fire that was kindled before Shabbat is also allowed to continue to burn.\(^{76}\) Some Orthodox authorities even permit the use of electricity if it is not used to create heat or light,

Some authorities maintain that any time a circuit is opened or closed a biblical violation occurs. Other authorities insist that the use of electricity absent lights is only a Rabbinic prohibition. Still other authorities accept that *in theory* the use of electricity without the production of light or heat is permitted - although

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even those authorities admit that such conduct is prohibited, absent great need, because of tradition.77

Conservative Rabbi D. Nevins gave a responsa to the same question that takes a different approach in that it focused on the intention of the biblical law. He argued against the use of electronic devices that produce data, due to the Rabbinic ban on writing, but permitted the switching on and off of all electrical devices that do not disrupt the atmosphere of Shabbat:

The operation of electrical circuits is not inherently forbidden as either melakhah (work performed on Shabbat) or shvut. However, the use of electricity to power an appliance which performs melakhah with the same mechanism and intent as the original manual labor is biblically forbidden on Shabbat…Recording text, sound, images or other data with an electronic device is forbidden as toledat koteiv, a derivative form of writing. Shabbat and Yom Tov operation of any electronic recording device, camera, computer, tablet, or cellular phone is forbidden by this standard…Shabbat should be dedicated to prayer, Torah study, meals and rest, not to weekday concerns…Sabbath observant people can be trusted to decide what formally permitted activities are consonant with their Shabbat tranquillity.78,79

In this way the principle, which is the regard for the atmosphere of Shabbat, is upheld but Halakhah itself is seen to adapt to modern times. There is a marked sense of personal responsibility and emancipation in that observant Jews are trusted to decide where the use of electricity will undermine or support the purpose of Shabbat. On the other hand, the Shabbat is less protected by Halakhah and the need to justify these limitations, readily accepted in the Orthodox community, may test the resolve of Jews who wish to respect the Shabbat, but who adopt this Conservative approach. Rabbi Nevins’ responsa was approved by the Conservative Committee on Jewish Law and Standards but, once more, not all Conservative

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77 Rabbi Michael Broyde, “The Use Of Electricity On Shabbat And Yom Tov.”
78 Nevins, The Use of Electrical and Electronic Devices on Shabbat 55
79 Melakhah refers to work performed on Shabbat whilst shvut activities are not strictly work, but are to be avoided as they are not in the spirit of Shabbat.
Rabbis would agree with Nevins. The more traditionally minded would steer their arguments closer to the analogy of the Orthodox Rabbis.\(^{80}\)

The example of electric switches demonstrates how Judaism can move legally from ancient texts to what is legally permissible when applied to contemporary topics. In the case of electricity, the fire analogy proved relatively straightforward and, in general, the more traditional and Orthodox the authority, the stricter or more restrictive the interpretation will be, as is the case in Haredi or Hasidic communities.

In bioethics the legal reasoning is more complex; an example of this is the question of the exact beginning of life and whether an early embryo, produced in vitro during IVF should have any legal protection when it is outside the body of the mother. In this instance Conservative interpretations can lead to stricter and Orthodox interpretations to more lenient approaches towards the protection of embryonic life. This topic is discussed within Orthodoxy in Chapter Six, whilst the view of Conservative academic David Novak is discussed in the appendix.

**The challenge of halakhic categories**

Different legal approaches often rest on whether halakhic categories are used today as they were in biblical or medieval times, or whether scholars challenge the parameters of these traditional categories if they are founded on antiquated scientific assumptions.

*Halakhists* work with medical/legal categories that are clearly defined but can be antiquated such as a *nefel* (non-viable neonate) and a *goses* (terminally ill patient). A *goses* is not expected to survive 72 hours a *nefel* is a child that cannot survive. Each category has halakhic implications and rules; whether and how for example, the body of a *goses* can be treated or moved. The pressing question is how to interpret these categories in light of modern medical procedures. Some authorities will argue that a person is a *goses* even if they are kept alive by a life support machine over years because they would die within 72 hours if they were disconnected. Others such as Rabbi Bleich will argue that the category of *goses* can only be applied to a person who cannot by any means be kept alive for the appointed time. Rabbi Waldenberg permitted the abortion of a severely sick developing child *in utero* up to

\(^{80}\)Nevins, *The Use of Electrical and Electronic Devices on Shabbat*
a level of development that could today be medically saved as a premature neonate. Presumably Waldenberg viewed this stage as a nefel, but he also ruled that halakhic decisors need not adapt their rulings due to technological advances.\textsuperscript{81} This creates a modern legal paradox, it cannot be legal to kill a child that is viable today, even if it is sick, on the grounds that it would not have survived at this stage in earlier times and thus be a nefel. The question, therefore, is whether halakhic medical categories are accepted as such or whether their parameters must be re-examined in light of modern science.\textsuperscript{82} The problem here is that for some authorities, the law is understood to be eternal and, by extension, these categories which were established by the sages of the early period of the Jewish tradition, are also viewed as eternal. If Jews today question and adjust the parameters of these halakhic categories then traditionalist authorities fear that this will undermine the authority of Halakhah.

One legal category of great concern for the bioethical debate is the halakhic version of de minimis non curat Lex. According to traditional Halakhah Rabbis do not need to concern themselves with matters that are too small for the naked eye to see. When the microscopic examination of water droplets showed that microscopic ‘creeping water creatures’ were present, the Rabbis did not forbid the drinking of water based on de minimis non curat Lex, although Halakhah forbids the consumption of creeping animals. Today the genetic sciences create fundamental changes to life that are at least initially in the sub-visual category. Part III will demonstrate Rabbis who use this legal principle to justify the legality of the genetic sciences and other Rabbis who argue that de minimis non curat Lex applies only when the effects also remain sub visual. A final group dismisses the principle outright because our modern scientific knowledge proves to what extent the sub-visual matters in science. In their view, Halakhah can simply not allow any procedure on the grounds that the human cannot see it.\textsuperscript{83}

\begin{footnotesize}

\textsuperscript{82} Newman, Past Imperatives. 162-173

\textsuperscript{83} Bleich, Bioethical Dilemmas. 211-215
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The divine gift of science and its use for medicine

To understand how halakhists engage with new bioethical issues, the metaphysical meaning of science is insightful. Firstly, the human endeavour to understand Creation through scientific research is considered a religious obligation and holds a metaphysical value, which understands science as a divinely gifted tool, given to humanity from the beginning of time. Maimonides advises:


\[...\text{he who wishes to attain human perfection must therefore first study logic, next the various branches of mathematics in their proper order, then physics, and lastly metaphysics.}\]

Whilst God revealed the Torah, and thus, the principles of Halakhah to Moses, according to many Orthodox scholars, scientific knowledge and the workings of the universe are gradually revealed to humankind through man’s research and God’s mercy. Rabbi Tendler suggests that, in case of illness, humankind should not pray for a miracle, as God does not perform miracles that go against the Laws of science, instead humankind should pray for more knowledge to be revealed to the clinician.

Humanity has an obligation to study Creation in order to unveil the secrets of the universe, but humankind’s autonomy in medical matters is limited.

According to the Babylonian Talmud:

Regulations concerning danger to life are more stringent than ritual prohibitions.

This means that humanity’s obligation to care for its health and avoid danger is more important than any ritual religious duty, because a person’s body belongs to God in

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Two views coexist within Judaism, one according to Ramban (Nachmanides) suggests that God does perform miracles that violate the laws of nature, the other view, which Rabbi Moshe Tendler appears to follow is the interpretation of Rambam (Maimonides), who suggests that God is eternal and unchanging, and does not change the laws of nature, even for a miracle. What humans conceive as miraculous can be scientifically understood. The correct prayer is thus for a better understanding of a cure by the doctors, not for a miraculous cure of a patient.

life and death. It follows that this will have great implications in all matters of medical risk taking. Lord Jakobovits explains the difference this makes, compared to secular bioethics, because the emphasis is far less on autonomy. A Jewish patient according to Halakhah may not have the right to refuse treatment if it is in their medical interest.

The biblical obligation (mitzvah), to be fruitful and multiply’ (Gen. 1:28), could, therefore, lead to the assumption that women who are diagnosed with fertility problems could be forced to undergo fertility treatments such as IVF, as long as infertility is classed as an illness (which indeed it is). It is noteworthy that within Judaism the question of whether women should be forced to undergo fertility treatments is considered a legitimate one. The legal reasoning given why women cannot be forced to undergo fertility treatments is not because they have autonomy over their body, but because fertility treatments pose a degree of danger and no person can be forced to undergo danger to their health in order to fulfil a mitzvah (which in this case would be the command to be fruitful). The other argument against having to use fertility treatments for women is that the command to be fruitful is given to men not women. The authority for this is given in the Mishna: ‘A man is commanded concerning fruitfulness, but not a woman.’ Nevertheless, according to Israeli anthropologist Professor Meira Weiss, Jewish women are not forced to undergo fertility treatments, but Israel is a nation described as obsessed with fertility. This is not just a consequence of religious ideals, but also a desire to replenish the Jewish community after the Shoah (Holocaust). There is, according to Weiss, a clear tension within the fertility debate between social and religious pressure to procreate and female reproductive autonomy. Unlike in many Western nations where some women choose neither to marry nor to procreate, this does not appear a plausible choice even for secular Israelis, according to Professor Remennick:

87 Dorff Elliot N., Jewish Voices.
88 Jakobovits, “Rosned ed.”Pioneers.” 4
Concomitant to this demographic reality is social climate in which motherhood is mandatory and a married childless woman is regarded as unlucky, morbid, or even deviant… Because no voluntary childlessness to speak of exists in Israel, the absence of children is assumed to reflect medical or psychosocial problems of the couple.\textsuperscript{91}

It is unclear to what extent the same can be said about Jewish couples of the diaspora (Jews living outside Israel), but it is clear from Weiss’s research that a distinction needs to be made between Jews living in Israel and Jews living in the diaspora. Chapter Two will address infertility and pronatalism in Israel in detail.

The Jewish relationship to Creation

Modern fertility treatments can actively select and deselect genetic traits of future generations. The extent to which this management of human genetics is religiously justified is a question posed throughout this thesis. In Judaism it may be related to the role that humanity is given by God in relation to the \textit{telos} of Creation. Different approaches exist,

R Hirsch understood all \textit{hukkim} (religious obligations that cannot be understood rationally by the human mind) as being reflective of the principle that man should not interfere with the order and harmony – hence the telos – of creation.\textsuperscript{92}

Many Jewish authorities present this relationship to Creation quite differently. Orthodox Judaism holds that God has left Creation itself unfinished from the beginning of time and through the gift of scientific knowledge has commanded the Jewish people to complete and perfect His Creation.


\textsuperscript{92}Bleich, \textit{Bioethical Dilemmas}. 135
He has declared, “Enough” (Genesis 17:1) i.e., He has precipitously interrupted the process of creation and co-opted man, who must complete the process, as a collaborator in fashioning the universe.  

This means that Creation in Judaism is not generally considered a sacred, untouchable entity that God demands humankind to protect; instead, the act of changing and improving nature can be interpreted as a religious obligation.

There is no reflection in Jewish tradition of a doctrine that establishes a global prohibition forbidding man to tamper with known or presumed teloi of creation.  

Although individual Orthodox scholars limit the scope of such change, the limitations generally refer to biblically stated limitations such as the crossbreeding of certain species. This permissive religious attitude towards man’s enhancement of nature may be of pivotal importance when genetic sciences now supply the ultimate tool to achieve this. The act of circumcision is the sign of the covenant that exists between God and the Jewish people and this act is understood as the first act in which humanity is obliged to enhance Creation in accordance with God’s will.

God has created an incomplete world, leaving human beings to bring it to perfection…The rite of circumcision is seen as the removal by man of an appendage to his body for which there is no purpose except its removal as a symbol of total obedience to God’s will.

Quite how far the metaphysical value of science and the role of humankind as a scientific co-creator of Creation is pushed, varies throughout the tradition. Jonathan Sacks describes Science and Religion as a great partnership. The human enterprise of science explores how this world functions, whilst Religion asks why. Rabbi David Bleich pushes the metaphysical value of science far further. As humankind discovers the secrets of the universe, humanity moves closer to the Messianic time where all

93 Bleich, Bioethical Dilemmas. 137
94 Bleich, Bioethical Dilemmas. 9
95 Jacobs, The Jewish Religion 82
96 Jonathan, The Great Partnership. Introduction
knowledge is revealed. Although Bleich does not stress the practical implications of the Messianic time he cites the mystical text of the Zohar which foretells that:

In the year six hundred of the sixth millennium the gates of wisdom will open on high and the fountains of wisdom (will open) below and the world will be readied to enter the seventh millennium. (Zohar, Bereishit 117a) 97

Each of these approaches explores the triangle of the relationships between God, Creation and humanity from complementary perspectives. This thesis enquires into the likelihood of positive eugenics in the form of genetically edited children in the future. It will question whether this religious rhetoric, which can tie science to the *eschaton*, may justify scientific experiments in the future that may bring Judaism into direct conflict with other bioethical legal systems. Bleich acknowledges the tensions that this highly spiritually charged scientific enquiry can bring. Maimonides himself testified that his love of God increased as his knowledge of Creation grew, so that the thirst for knowledge must at all times be legitimate. 98 The danger then lies not in the acquisition, but in the incorrect use of this knowledge.

…not everything that can be done, should be done; that which is possible is not for that reason moral. 99

*Halakhists* recognise the ethical challenges that scientists face; the application of the knowledge gained about Creation is the focus of a vast array of legal sources that form the foundations of medical *Halakhah*.

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97 Zohar, Bereish 117a, Bleich, *Bioethical Dilemmas*. 1


99 Bleich, *Bioethical Dilemmas*. 2
Chapter Two
The Sociological Context of Applied Jewish Bioethics in Israel

Introduction - The influence of biomedical *Halakhah* in Israel

Religious law may dictate strict or lenient biomedical guidelines for its followers, but the faithful may not necessarily follow the guidelines of their rabbi, imam or church. Neither is it necessarily the case that religious decisors have any influence on the legislation of medical treatment in any given country. It is, therefore, necessary to investigate whether medical *Halakhah* is predominantly a theoretical and pietistic enterprise or whether it impacts on patients’ choices, medical practitioners and the fertility procedures that are permitted and performed on account of any religious guidelines. For the study of the impact of medical *Halakhah* on science and medicine, Israel presents the optimal country for investigation. Israel is a highly diverse country with a parliament that combines the values of both a secular democracy and of Judaism. Any legislation that addresses new technologies must address and negotiate the bioethical concerns of these different value systems. Rabbi Professor Avraham Steinberg, who is co-chair of the Israeli Bioethics council and author of *The Encyclopaedia of Jewish Medical Ethics*, explains the legislative process:

The modern state of Israel is a secular democratic Western state and the legislations are enacted by the Israeli parliament (Knesset). The first constitutional law in Israel states that: This Basic Law, aims to protect human dignity and liberty, in order to establish in a Basic Law, the values of the State of Israel as a Jewish and democratic state. Hence, each new legislation ought to be judged in accordance with Jewish and democratic values. Those encompass both secular and Jewish ethical values.100

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100 Rabbi Dr. Avraham Steinberg, email correspondence February 2015.
In response to the question of how the legislation for the use of embryonic stem cells incorporated the values of *Halakhah*, Steinberg replied:

Concerning the example you cited, i.e., the law re embryonic stem cell research: Based on the principles described above the issue has been examined from scientific, ethical and Jewish perspectives and was found to be permissible. Since, on the one hand, by Jewish law (as opposed to Catholic doctrine) pre-implanted fertilized eggs have no human status, and on the other hand such research has the great potential of curing millions of people, the ethical balance is toward allowing the research.  

Steinberg acknowledges that this approach of integrating the principles of *Halakhah* puts Israel on a potentially very different trajectory to other countries:

On the other hand, end-of-life issues have been solved differently in the Israeli legislation than in other western societies because by Jewish law the value of life has a much greater impact on decisions than in current western countries whereas the principle of autonomy is somewhat less binding by Jewish law compared to western societies. Hence the balance between the value of life and the principle of autonomy is decided differently in Israel.  

Steinberg thus describes the process of navigating between different value systems and explains why Israeli law can differ profoundly from other Western legal systems, but he does not allude to the tensions that are generated when the goals of the different factions in Israel collide. The Pew Research Centre estimated in 2014/15 that 49% of Israelis self-identify as *Hilonim*, who according to Pew are secular in outlook and strongly support a separation between state and religion. It found that 9% identify as *Haredim*, who are described as the most fervently religious, favouring to live their lives apart from the rest of society. The *Haredim* traditionally opposed

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101 Rabbi Dr. Avraham Steinberg, email correspondence February 2015
102 Rabbi Dr. Avraham Steinberg, email correspondence February 2015

Other polls estimate that 11% identify as *Haredim*, with *Haredi* women giving birth to an average of 6.9 children compared to the average Israeli woman of 2.07 children.
the creation of the State of Israel as only God could grant this privilege in the Messianic age; their political influence is felt most strongly in issues where religious values are under threat. It found that 13% of Israelis are identified as Datiim, who are described as ‘highly devout’ although in reality their level of religious devoutness is said to vary. Compared to the Haredim, Datiim are more integrated in Israeli society, valuing successful careers and political activism; this group includes Modern-Orthodox communities. This leaves around 29% of Israelis, who are described as Masortim; a large group that spans the secular and the religious. This group is the most divided in opinion and, according to Pew, it is numerically in decline. The example of the legal enforcement of the Sabbath is insightful:

…while strong majorities of both Haredim and Datiim favour shutting down public transport during the Sabbath and over nine-in-ten Hilonim Jews oppose it, Masorti respondents are split on the issue (44% are in favour and 52% oppose).\textsuperscript{104}

If the Masortim are in decline it would suggest that the divisions in Israel are likely to be on the increase.

Perhaps the most contentious battle is fought over the compulsory conscription of all Israelis into the military. Traditionally, young Haredi men and Arab Israelis could be exempted from military service. The Haredim see it as their birth-right to devote their time to Torah-study at Yeshiva (religious centres of education). As Haredi families are a growing subgroup in the community, this exemption has been severely challenged recently by other members of society, who feel that all Israelis should be called to protect their homeland. Military service thus demonstrates the divisions between different societal factions when their priorities clash.\textsuperscript{105}

In contrast to the divisive topics of military service or religious observance the subject of fertility, with its focus on procreation and the growth of the Jewish people, is a subject that unites almost all factions of Israeli society. To investigate why, this


research will contextualise the halakhic influence on the fertility industry in Israel from different academic perspectives. Dr. Tsipy Ivry is an anthropologist, who studies the fertility industry, at the University of Haifa. Her work explores the triadic relationship between rabbis, doctors and patients and coins the term the koshering of medicine. Dr. Susan Martha Kahn is a social anthropologist at Harvard, whose ethnographic study Reproducing Jews provides a cultural account of assisted conception in Israel. Her interviews range from the secular lesbian couple wishing to conceive with donor sperm to the Ultra-Orthodox couple navigating a secular medical system, all of whom are touched by Rabbinic decisions in Israel. Dr. Ronit Irshai, who specialises in gender studies at the Hebrew University of Jerusalem, offers a ‘feminist perspective on Orthodox responsa literature’ in her book Fertility and Jewish Law. Dr. Daphna Birenbaum–Carmeli is a medical sociologist at the Faculty of Social Welfare and Health Studies at Haifa University, whose paper ‘Cheaper than a newcomer’: on the social production of IVF policy in Israel, describes the fertility industry in terms of power relations and group interests. Finally, Dr. Carmel Shalav is a human rights lawyer and ethicist at Haifa University who investigates the relationship between religion and the politics of fertility in her paper Seminal Reasoning Ultra-Orthodoxy and the Biopolitics of Medically Assisted Reproduction in Israel. Together these sociological studies will contextualise Halakhah le’maaseh, the practical application of Halakhah that depends on the social and cultural context in which the law is applied.


**Halakhic infertility and the 'koshering' of medicine**

Although many Israelis follow a secular lifestyle and not all Israelis are Jewish, Dr. Tsipy Ivry describes the influence of the Orthodox Rabbinate as substantial:

> In Israel the state sanctioned the religious courts to rule on matters of personal status and family laws (the Orthodox Rabbinate has full authority for Jewish citizens), and Orthodox Jewish representatives play an important role in policymaking.\(^{111}\)

Dr. Shelav echoes this view and considers the Haredim, most influential in the field of fertility:

> From a political perspective, the major influence in Israel over issues of state and religion—including in the area of reproduction—is exercised by the ultra-Orthodox minority…. The authority of the Rabbi extends to matters of personal choice, from voting in parliamentary elections to undergoing infertility treatment.\(^{112}\)

The relationship between doctors and rabbis is described by Ivry as one of careful negotiation. Rabbis have predominantly been lenient and supportive of assisted reproductive technologies (ART) although, according to Shelav, the Haredim have erred on the side of strictness and doctors have been willing to accommodate the different concerns of observant Jews.

> Significantly, biomedicine and Rabbinic law interpenetrate to produce ‘kosher’—religiously appropriate—routes to consume biomedical services and to ‘medicalize Halakhah’.\(^{113}\)

Tensions between the different value systems of doctors and rabbis surfaced in the dispute between Dr. Rosenak and the Rabbinate, when the doctor publicly refused to treat halakhic infertility in 2006. Halakhic infertility (akarat hilchatit) is caused when a woman’s natural cycle is too short for her to conceive in the time period in which, according to Rabbinic law, she is allowed to have sexual relations with her husband.

\(^{111}\) Ivry, "Halachic Infertility." 209-210  
\(^{112}\) Shalev, "Ultra-Orthodoxy and the Biopolitics of Medically Assisted Reproduction in Israel_2013."  
\(^{113}\) Ivry, "Halachic Infertility." 210
Outside this time, she is classed as ritually impure and should she conceive, she would risk being cast out of the community or at least bearing a child whose conception is ritually tainted.

In biblical purity codes, menstrual blood determines a woman’s intimacy with or distance from her husband and God alike. Leviticus 15, designated the Priestly code, classifies menstrual blood as impure ... This prohibits them (women) from entering God’s presence in the tabernacle, and later the Temple. The onset of menstrual bleeding places a woman in a state of ritual impurity, which renders her a niddah (separated, removed from the community of the pure) for seven days. Leviticus 17–26, designated the Holiness code, concerns conjugal relations. It warns twice that sexual relations with a niddah are strictly forbidden and punishes violators with karet (being “cut off” from the people of Israel).114

The biblical period of female impurity has, according to Ivry been reinterpreted and lengthened by later Rabbinic law. Any irregular bleeding (zavah) requires an additional seven days of abstinence before the woman can perform the purification ritual and have sexual intercourse. The time window for an observant woman to become pregnant has thus become increasingly small and many women with shorter ovulation cycles, not medically infertile, suffer from halakhic infertility.

Whereas biblical law assumes a simple timeline to ritual purity, women were now instructed to inspect their menstrual flow, and all genital discharges, systematically. Vaginal self-checks were to be conducted with a piece of cloth to determine the cessation of menstrual bleeding and then daily check-ups to ascertain seven ‘clean’ days. Only then could a woman immerse in a miqveh ... and only then did her menstrual impurity lapse according to Rabbinic law. Finally, whereas biblical law held women accountable for diagnosing their condition, the Mishnah allocates this authority to Rabbis.115

Since the 1970s, high doses of hormonal replacement treatment (HRT) have been the ‘cure’ for halakhic infertility in Israel. This treatment lengthens a woman’s natural

114 Ivry, "Halachic Infertility." 212
115 Fonrobert 1999 quoted in Ivry, "Halachic Infertility." 213
cycle, so that she can conceive at a time when she is ritually pure. By 2006 Dr. Rosenak refused to prescribe this treatment in light of the increasingly known damaging side effects. Dr. Ivry recounts the argument:

…hormones taken to delay ovulation…were four to six times the dosage of contraceptive pills…. This surge in the use of hormones … may increase the risk of thromboembolic disease in women. Dr. Rosenak questioned the ethical appropriateness of the medicalization of Halakhah, whether taking medications should be a prerequisite to observe God’s commandments, and why a healthy woman should receive hormonal treatment.116

Pivotaly, Rosenak does not argue against Halakhah, instead he argues for a return to the biblical definition of niddah against the later Rabbinic lengthening of the period of impurity.

Rosenak criticized Rabbinic law itself, demonstrating its potential to make women barren—an absurdity in a religious code whose prime commandment is to be fruitful and multiply.117

As Ivry recounts the doctor’s objections, she describes that the rabbis rejected Dr. Rosenak’s concerns unequivocally, whilst secular doctors tended to remain silent. This silence points to the dependence of the medical profession on the good will of the rabbis:

Generally the collaborative, welcoming approach to rabbinic interventions characterizes doctors of a tolerant, pluralistic outlook that acknowledges and even ideologizes the patient’s right to culture-sensitive medical care… Others may ‘grudgingly’ collaborate while privately criticizing many aspects of rabbinic interventions…. But they explain that they have ‘no choice’ but to collaborate with the rabbis if they want access to a religious clientele.118

This situation has given rise to what Ivry terms kosher medicine and high-tech rabbis in a struggle over authoritative and professional boundaries.

116 Ivry, "Halachic Infertility." 216
117 Ivry, "Halachic Infertility." 216
118 Ivry, "Halachic Infertility." Ivry quoting the head of a leading fertility unit in Israel, 218-219
The rise of specialist organisations

Increasingly organisations such as *FLOH* (Fertility in Light of *Halakhah*) or *Puah* (Family, Fertility, Medicine and *Halakhah*) specialise in acting as a bridge between patients and doctors.\(^{119}\) *FLOH* is an organisation of rabbis who specialise in biomedical *Halakhah* and have medical knowledge. *FLOH* does not provide one unanimous ruling for Jewish patients but acknowledges the authority of different religious affiliations:

FLOH’s idea is to constitute an information centre offering religious couples the full range of Rabbinic opinions juxtaposed to the full range of medical options…. Rabbinic and medical opinions are presented with information on actual treatment possibilities based on FLOH’s constant mapping of medical services.\(^{120}\)

Ivry states that the practice of consulting one’s rabbi is seen as a religious expression that varies according to ethnic affiliation (Jews of eastern *Sefardi* versus Jews of western *Ashkenazi* origin) and it also depends on one’s denomination within Judaism. Whilst *Hasidic* Jews are likely to consult their Rebbe for every detail of their life, *Modern Orthodox* Jews especially those affiliated to the Lithuanian tradition will consult their rabbi only about major life decisions.\(^{121}\)

Organisations such as *FLOH* or *Puah* work with doctors to adapt medical treatment to eliminate *halakhic* concerns. This leads, however, to medical procedures that are challenged on ethical and religious grounds by a growing number of female social anthropologists. As the case of *halakhic infertility* demonstrates, women’s health can

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As a response to the first IVF child being born in 1978 ‘Rabbi Mordechai Eliyahu, then the Chief Rabbi of Israel, charged Rabbi Menachem Burstein with researching a *halakhic* framework to assist the Jewish community’. Rabbi Burstein founded Puah, named after the biblical midwife to aid Jewish couples who experience fertility problems. Puah specialises in genetic counselling.

\(^{120}\) Ivry, "Halachic Infertility." 217

\(^{121}\) Ivry, "Halachic Infertility." 217
be compromised to accommodate for *halakhic* concerns, although the health of the mother should be protected by *Halakha*, according to the rabbis.¹²²

The social anthropologist Dr. Susan Martha Kahn investigates the effects of *kosher medicine* on medical procedures. She describes the harvesting of eggs in a religiously minded fertility centre. After hormonally stimulating the ripening of eggs in a woman during IVF, these eggs are removed surgically. Bleeding from the uterus may be a normal, harmless side-effect during egg retrieval that is evidently not menstrual blood. Nevertheless, the *halakhically* approved procedures require specially adapted harvesting techniques to avoid any bleeding from the uterus; otherwise, she would be classed in the impure status of *niddah* and the eggs could not be inserted into the woman’s womb a few days later.

The doctor who performs the oocyte pick-up… avoids extracting eggs that are positioned in such a way as to require her to pierce the uterine wall…, even if this means that she can only retrieve eggs that she can reach by inserting the needle through the walls of the vagina and into the ovary, since vaginal and ovarian bleeding are not considered to trigger the status of *nidda*.¹²³

Although Kahn acknowledges that some rabbis allow the woman to become impregnated even when bleeding occurs, not all do and the precious fertility window is lost. Kahn also questions the ethics of not removing eggs simply because bleeding may occur and enquires whether the medical risk already undergone by women should not justify optimal extraction of eggs.¹²⁴

*Halakhic* concerns are also prioritised over maternal health when medically intrusive IVF is chosen, even though artificial insemination with donor sperm (AID) would suffice. IVF is preferred by a number of rabbis, who argue that AID should be classed *halakhically* as adultery:

> The prohibition against adultery is only against putting ‘seed’ in thy neighbour’s wife; it is not against putting an embryo in her. Thus, IVF and

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¹²² Shapiro, “Be Fruitful and Multiply.” 76
¹²³ Kahn, *Reproducing Jews*. 120-121
¹²⁴ Kahn, *Reproducing Jews*. 120-121
embryo transfer are preferred by some Rabbis as a form of fertility treatment that do not violate the literal halakhic precepts against adultery. Some communities thus choose IVF so that children are not classed as halakhically illegitimate (mamzer).

**Halakhic illegitimacy and adultery**

Although the status of being a mamzer is often translated as illegitimate, this is misleading. The English usage of the word illegitimate refers to any child born out of wedlock. According to Halakhah, a child is not necessarily a mamzer because they are born out of wedlock, - but because their conception is not kosher, usually because they are born of adultery. Adultery is defined by Halakhah as a relationship between a married Jewish woman and a Jewish man who is not her husband. The other cause for the birth of a mamzer is a child born of an incestuous relationship. The halakhic debates of Part III will demonstrate that the legal arguments employed by Rabbis in favour or in prohibition of infertility treatments often centre around whether the child is a mamzer and whether any treatment may be classed as adultery or leading to incest. In conclusion, a child born to an unmarried woman, according to English common law, would legally be considered illegitimate, whilst according to Halakhah the child would not be a mamzer if the mother was unmarried.

Being classed as a mamzer has grave consequences because:

> A bastard (mamzer) shall not enter into the congregation of the Lord; even to his tenth generation shall he not enter into the congregation of the Lord (Deuteronomy 23:3).

Throughout history the status of mamzerut was thus meticulously avoided, but even when a woman acted in good faith and remarried with Rabbinic blessing after many

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125 Kahn, *Reproducing Jews*. 103-104

126 Jacobs, *A Tree of Life*. 237-254


128 "Legal Status: Legitimate or Illegitimate." 239
years of believing herself to be a widow, - (because her husband had vanished), her children would be classed as *mamzerim*, should the first husband suddenly re-appear.

Louis Jacobs describes the fate of the *mamzer* as that of a second-class citizen, a *mamzer* could become a rabbi, but appointing such a rabbi would, according to Rabbi Isserles (1530-1572), be ‘a disgrace to Torah’.129

The *Shulhan arukh* rules that a *mamzer* is to be circumcised and the benediction recited as at the circumcision of any other child, but that the usual prayers for the child to grow up and be well is not recited. This goes back to Jacob Moellin (Maharil), who also states that the child should be circumcised at the door of the synagogue so as to make a clear distinction between him and other Jewish children. In some places it was, and still is, the custom to add to the name given to the *mamzer* at his circumcision the additional name of ‘Kidor’.130

Jacobs accepts that this treatment of children is inhumane and in stark contrast with the Jewish belief that children are not responsible their parents’ deeds, but the halakhic problem is that the status of *mamzerut* is part of biblical law and difficult to dismiss. In the past rabbis are said to have advised prospective marriage couples with dubious lineage to travel to a village where their status was unknown to local rabbis. In England and America, many non-Orthodox Jewish communities have today abandoned the status of *mamzerut* by declaring that no Jew can confirm against all doubt that their lineage is kosher. They too have not, however, dismissed the biblical status but simply declared all members of their congregation ‘of doubtful descent’. In Israel, by contrast, the laws against *mamzerim* (pl) appear more zealous than in the past. According to Rabbi Rothschild, Rabbinic authorities, highly influential in Jewish law-making in all aspects concerning marriage and divorce, now

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129 Jacobs, *A Tree of Life*. 244
130 Jacobs, *A Tree of Life*. 245
hold lists of all Jews with the status of mamzerut, which is said to be an entirely new development.\footnote{Rabbi Sylvia Rothschild informed me of the lists being kept in Israel and the lenient approach her congregation adopted. See Appendix: Interview with Rabbi Sylvia Rothschild November 2019}

Laws on marriage and divorce in Israel... are not simply influenced by religious law, but are constituted by religious law.\footnote{Kahn, Reproducing Jews. 69, 72}

In real terms this means that individuals classed as mamzerim cannot marry a Jew of kosher status in Israel whether observant or secular in outlook. Religious schools may discriminate against a mamzer, the marriage potential of a child who is a mamzer may be affected beyond the borders of Israel and should the child live in the diaspora and wish to become an Israeli citizen he will rely on: ‘the Law of return’.\footnote{Kahn, Reproducing Jews. 71}

This law enables any person, who can demonstrate Jewish heritage, to emigrate to Israel, but the question of who is a rightful and legal Jew lies in the hands of the rabbis and starts with kosher birth. Kahn says that it has been impossible for her to collect any data or statistics in Israel as to how many single women are impregnated with donor sperm because doctors deliberately destroy this information for fear of the Rabbinic authorities investigating and declaring the children as mamzerim, if they discover the true number of women who conceive in this way.\footnote{Kahn, Reproducing Jews. Kahn also describes lists of mamzerim being kept by the Rabbis in order to check whether a marriage in Israel will be allowed. 59}

Ivry thus describes a triadic relationship between patients, doctors and rabbis. At times she describes this relationship as beneficial - it serves to calm, help and guide religious couples and doctors alike. The halakhic fear of producing illegitimate children is eased by the services of specially trained halakhic “supervision” (hashgacha), usually Ultra-Orthodox women trained by FLOH to follow the sperm and egg at every step of the fertilisation process to avoid accidental mislabelling and mix ups. At other times, however, the relationship becomes a power struggle in which both religious and medical authorities overstep each other’s boundaries at the cost of the patient.
FLOH represents a new form of religious authority that draws on nonreligious bodies of authoritative knowledge to negotiate medical care on behalf of patients but also to fortify its power vis-a-vis patients, doctors, and other Rabbis. Such a combined mode of authority, its push for kosher medical care, and the simultaneous medicalization of Halakhah that it inspires as part and parcel of the koshering process generate a dynamic of uneasy Rabbi–doctor interdependence in which each party appropriates the other’s forms of authoritative knowledge and language to exert power over patients as well as over the other, each strategically refers patients to and fro, and each often crosses the other’s professional boundaries and red lines.\textsuperscript{135}

Women in this triangular relationship are generally willing to undergo the fertility treatments which Rabbis and doctors endorse, but Ivry points to the lack of necessary formal discussions about the ethics and religious justification of certain kosher medical practices in the medical and social sphere in Israel.

In this interlocking power nexus, women may undergo invasive medical procedures: numerous IVF treatments, subsequent caesarean sections, and even hormonal treatments to counter infertility caused by ritual abstinence—all under the approval of Rabbinical authorities with relatively little discussion of the effects of these procedures on their physical health.\textsuperscript{136}

As the relationship between rabbis and doctors has no clearly defined boundaries it varies with each relationship but, as long as doctors economically rely on the rabbis, the rabbis retain the upper hand. The accountability of either profession is thus in flux at the potential risk to women.

…the data here show quite striking evidence of the fragility of physicians’ position, and even that of medical institutions, in the face of organized interventions by authoritative religious agents. Anthropologists have been


\textsuperscript{136} Tsipy, “Kosher Medicine.”
keen to study the “power of the weak”; this case points to the necessity of studying “the weakness of the powerful.”\textsuperscript{137}

These accounts demonstrate that Rabbinic decisions are not made in a theoretical vacuum. Rabbis heavily influence medical procedures in Israel and this position of power has been strengthened by organisations such as FLOH and Puah that have become knowledgeable and well versed in the science and language of fertility science. Through their influence, medical practices are adapted to make them kosher, but \textit{Halakhah} is also medicalised. This is perceived as helpful and positive by some participants and of concern by others. Why the predominantly secular section of society, which is known to challenge the authority of the religious authorities in other realms of life, appears to accept this \textit{halakhic} influence in the field of fertility is the focus of Daphne Birenbaum-Carmeli’s research that contextualises \textit{Halakhah} and pronatalism in Israel.

Birenbaum-Carmeli demonstrates that Israel may be divided by class, ethnicity, Rabbinic and political affiliation, but the vast majority of Israelis, across these divisions, are highly family orientated. Compared to Western nations, Israelis marry earlier, divorce less and have more children. The country is driven by what Birenbaum-Carmeli terms a ‘quest for survival’; this originates partly in a desire to rebuild the Jewish nation after the losses in the \textit{Shoah}, but it also reflects the spirit of Zionism. The responsibility to build a nation unites all Israelis:\textsuperscript{138}

\begin{quote}
Collective strategies of survival were rooted in the familial body, rendering reproduction a collective pursuit.\textsuperscript{139}
\end{quote}

With the constantly perceived threat of destruction and in light of high birth rates amongst neighbouring Arab states - the creation of more Israelis, to continue the fragile Jewish community and protect the homeland - has become a focus for individuals and politicians alike:

\begin{quote}
Some feel they must have children to counterbalance what they believe to be a demographic threat represented by Palestinian and Arab birth rates. Others
\end{quote}

\textsuperscript{137}Tsipy, "Kosher Medicine."

\textsuperscript{138} Birenbaum-Carmeli, "Cheaper than a Newcomer." accessed 2. March.2020

\textsuperscript{139} Birenbaum-Carmeli, "Cheaper than a Newcomer." 901
believe they must produce soldiers to defend the fledgling state. Some feel pressure to have children in order to “replace” the six million Jews killed in the Holocaust.¹⁴⁰

The quest for survival in the Hasidic world

The belief that young couples carry the responsibility to replace lives that were lost in the Shoah, often referred to as lost Jewish souls, is particularly strong in the Haredi-Hasidic community in Israel and the diaspora.¹⁴¹ This Weltanschauung (world view) must be contextualised. The losses of life amongst Hasidic communities who originated in Central and Eastern Europe was particularly devastating, even in comparison to other Jewish communities, with whole villages wiped out by Nazi Germany. When the very few survivors and their rebbes (Hasidic spiritual and community leaders) arrived in their new homelands, the decision was made to try to recreate the settlements (shtetl sing./ shtetlekh plural) that were lost, so that the legacy of the dead would survive despite the genocide. Many rebbes and their communities were already known by the names of their shtetl (town) of origin and they continued to use this name whether in New York, Israel or London. Hasidic rebbes lead dynastic courts and Rabbi Teitelbaum from the village of ‘Satmar’ became the Satmar Rebbe within the Satmar community, the court of ‘Ger’ came from the town of Gora Kalvaria and the court and dynasty of ‘Vizhnitz’ originated in the town of Vyzhnytsia. Although many dynasties are frequently at odds with each other, the dynasties have also intermarried through arranged marriages with a strict hierarchy based on the genealogy of the individual.¹⁴² The Shoah was interpreted by some leading rebbes, such as the Satmar Rebbe Teitelbaum, as a punishment of God for the transgression of Jews who had assimilated into modern western culture and those who had developed Zionist ambitions because they had tried to bring about a Jewish homeland before the Messianic time. Despite this notion of divine punishment, it was not God but Nazi Germany that was viewed as the evil, destructive force. As a result of the Shoah, Hasidic communities for this reason

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¹⁴⁰ Kahn, Reproducing Jews. 3

¹⁴¹ For an insight into the responsibility to replace the lost souls of the Shoah, two biographies who tell of life in the Hasidic community are: Feldman, Unorthodox. and Stein, Becoming Eve.

¹⁴² See Abby Stein’s account of marriage potential in ‘Becoming Eve’
became far more conservative and insular than they had been before the war and information about their highly private and protected communities relies largely on the very few individuals who leave, such as Deborah Feldman and Abby Stein.\textsuperscript{143} Feldman grew up in the Satmar community and describes how the experience of the Shoah still evokes a sense of victimhood and vulnerability in the community today.\textsuperscript{144} Stein, who was born into a family of notable Hasidic leaders, explains how after the war a dress-code was adopted that echoed the fashion of a bygone era in Central and Eastern Europe, Halakhah was even more strictly interpreted than it had been before and zealous piety was enforced through suspicion and fear of the outside world. The goal was then - and remains today - to appease God through this modest and pious life in order to avoid further genocide. Whilst Hasidic children pre-war would have spoken Yiddish (the universal language of Hasidism) and the tongue of their homeland, be it Hungarian, Polish or Lithuanian, Hasidic children today growing up in New York will often not learn English, but speak and read only Yiddish and Hebrew (both written in Hebrew script.) The outside world is shunned wherever possible and children are shielded from the internet, secular education and Western culture. Children are taught that it is their responsibility, as the offspring of survivors, to continue the legacy of those who were lost and for this reason to have large families.\textsuperscript{145} As the communities are said to lead near identical lives wherever they live, the experience of Feldman and Stein in New York also gives insight into the lives of Hasidic communities in Israel. Infertility in an arranged marriage is a substantial problem because the wife can be interpreted as a hindrance for the husband to fulfil his religious obligation to procreate. According to Feldman, a woman who does not conceive may face divorce and disgrace.\textsuperscript{146} Although some of the greatest opposition to fertility treatments came from the Hasidic rebbes, most

\textsuperscript{143} The charity Footsteps, which helps former Hasidic Jews adjust to life outside Hasidism, estimates that only 2\% of the Hasidic community ever leave. Many people return because coping outside the community without any secular education is challenging, especially as the community often shuns those who leave. For further information see: “Footsteps,” accessed 6.2.2022, 2022, https://www.footstepsorg.org/resources/ (Charity).accessed 1. May 2020

\textsuperscript{144} Feldman, Unorthodox.

\textsuperscript{145} Feldman, Unorthodox./Stein, Becoming Eve.

\textsuperscript{146} Feldman, Unorthodox.
notably Rabbi Teitelbaum, whose opinion will be discussed in Chapter Five, any halakhically permitted aid to fertility is thus likely to be welcome by couples.

Pronatalism and state support

In Israel, the desire to increase the population through childbirth is encouraged politically through pro-natalist policies.

As early as 1949, one year after the establishment of the State of Israel, Prime Minister Ben Gurion awarded a symbolic monetary prize to 'Heroine Mothers' who delivered their 10th child.\(^{147}\)

In 1962 the Natality Committee and in 1968 the Demographic Centre were founded with the aim to:

… carry out a reproductive policy intended to create a psychologically favourable climate, such that natality will be encouraged and stimulated; an increase in natality in Israel being crucial for the future of the whole Jewish people.\(^ {148}\)

Financial backing and favourable taxation policies towards families with children have followed with an almost unlimited state funding of fertility treatments for all Israeli citizens, whilst contraception and family planning tend to lack state funding.

Israel’s pro-natalism is reflected in women’s social and health status. On the one hand, women’s procreativity is glorified and endowed with political meanings that go beyond the private realm. On the other hand, motherhood is constituted as an imperative, which may be oppressive to women who cannot, or prefer not to, become mothers.\(^ {149}\)

Pronatalism is taught as part of the national curriculum from primary school onwards in order to nurture a sense ‘of linking oneself to the communal Jewish body.’ Pivotal,

\(^ {147}\) Birenbaum-Carmeli, "Cheaper than a Newcomer." 902
\(^ {148}\) Birenbaum-Carmeli, "Cheaper than a Newcomer." 902
\(^ {149}\) Birenbaum-Carmeli, "Cheaper than a Newcomer." 902
according to Birenbaum-Carmeli and Kahn, is that the narrative of child-bearing is underpinned with the teaching of major biblical texts that tell of the command to be fruitful and the tragic fate of the biblical matriarchs who struggle with infertility. Following Rachel’s lament: ‘Give me children or else I die’ (Genesis 30:1), childlessness is understood across the nation as the greatest misfortune for any individual and science is hailed as the tool to combat this misfortune.\(^{150}\)

The barren woman is an archetype of suffering in the Israeli/Jewish imagination.\(^{151}\)

As discussed in Chapter One, Judaism has a long tradition of interpreting new advances in science as tools given by God to help humankind heal the world. In this way new fertility treatments can be interpreted as God-given tools to heal infertility. Israel has now elevated the goal to provide children to every Israeli woman to the status of a woman’s legal right. This right to motherhood has been tested in a well-documented legal battle between a divorced woman, Ruti Nahmani, and her former husband, Dani. Ruti, unable to gestate babies, wanted the right to use frozen embryos from her former marriage and have them gestated in a surrogate mother in America, against the will of her former husband. After initially ruling in favour of her husband, the court eventually supported Ruti’s right to motherhood, even if a surrogate was needed and the husband expressly did not want the children to be gestated. Judge Tsvi Tal ruled in favour of motherhood, with the justification that:

> The interest in parenthood is a basic and existential value, both for the individual and for society as a whole. In contrast there is no value to the absence of parenthood. (Jerusalem Post 1996)\(^{152}\)

According to Kahn this legal ruling further demonstrates why fertility treatments are seldom scrutinised:

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\(^{150}\) Birenbaum-Carmeli, "Cheaper than a Newcomer." 903 / Kahn, Reproducing Jews. 3

\(^{151}\) Kahn, Reproducing Jews. 3

\(^{152}\) Kahn, Reproducing Jews. 68
...if the technological means exist to assist motherhood, they must be employed.153

Whilst technically this case was heard in an Israeli secular court, Kahn describes it as a landmark case that reflects the influence of the Rabbinic authorities in Jewish law-making in all aspects concerning marriage, divorce and pronatalism.

Scientific achievements that combat infertility are heavily state subsidised and any scientific progress in the field is the source of great national pride.154 State funding for IVF extends to unmarried Israeli women (including Muslim and Christians) as well as lesbian couples. The demand for IVF has steadily grown, explaining why doctors have feared a backlash if children conceived through donor sperm are officially classed as mamzerim:

Politicians, service providers, Rabbis, doctors, feminists and laypersons all praised the innovative technology. State support for assisted reproductive technologies was swiftly inscribed into Ministry of Health (MOH) regulations that entitled every Israeli woman aged 18 to 45, irrespective of her family status or sexual orientation, to unlimited, funded treatment up to the birth of two live children with her current partner, if applicable.155

The number of IVF cycles performed annually rose from 5,000 in 1990 to 40,000 in 2012. By 2015, Israeli women had become the greatest consumers of IVF, with twice as many cycles per capita as Danish women who were the second greatest consumers worldwide. By 2013 the usage of IVF in Israel stood at five times the European and ten times the international average. The state is generous in paying for medical treatment and, for the majority of the population, the self-identification with biblical matriarchs and the goal to grow and protect the Jewish community in the Jewish homeland serve to bridge the divides between different sections of Jewish Israeli society.156

153 Kahn, Reproducing Jews. 68
154 Birenbaum-Carmeli, "Cheaper than a Newcomer." 906
156 Birenbaum-Carmeli, "Cheaper than a Newcomer." 903
Whilst different perspectives undoubtedly divide the nation, it is important to note that the concept of a more-or-less religious or secular Jew is a procrustean bed. Whilst there is much discussion on the right way to serve God, or whether God exists, Rabbi Manis Friedman explains that every Jew remains always a Jew whether he believes in God or not. Many Orthodox Rabbis reject outright any categorisation and prefer to stress the covenantal community of belonging to a people. The distinction between Hiloni and Haredi is thus not their religiosity or Jewishness, but their level of observance of Halakhah. This is well demonstrated in Kahn’s ethnography, which cites the case of a newly born IVF child to a lesbian couple. Kahn describes the difficulties in arranging a circumcision ceremony (brit), which is performed by an Ultra-Orthodox mohel (circumciser). As some mohalim (pl. of mohel) will refuse to perform the ritual for a lesbian couple, Kahn questions the parents whether in light of this discrimination they ever considered not circumcising the boy. The parents assure Kahn that they would never consider not circumcising their child, as it would set the child apart from the community. This demonstrates that even for secular lesbian couples who do not consider themselves observant of Halakhah, the circumcision of a child, which is the physical act of entering into the Jewish covenantal relationship with God, remains a vital sign of a Jewish identity:

For these secular lesbians in Tel Aviv and for the Ultra-Orthodox mohel who performed the circumcision of their alternatively conceived child, maintaining cultural continuity, symbolised through religious ritual, was completely taken for granted regardless of how the child was conceived.\textsuperscript{157}

Whilst the case of the observant mohel interacting with the secular lesbian couple may suggest an active social interaction between the different sections of Israeli society it is paramount to remember that Israeli society is deeply divided even if all Jews are part of the covenantal society. It remains difficult to research the responses of Haredi and Hasidic rebbes, who tend not to publish their halakhic approach and who are thus easily misrepresented and misinterpreted. Rabbis who appear to be in a power struggle with the medical profession and demand at times seemingly unethical medical procedures that risk the health of young women, are working from within a religious worldview that is inaccessible to the outsider. The Satmar

\textsuperscript{157} Kahn, Reproducing Jews. 42
community, founded by Rabbi Teitelbaum, is especially reclusive. It is thus prudent to remember that within these religious communities, rabbis may not desire power over the medical world, but seek workable solutions within their philosophical, legal and religious constraints whether they reside in Israel, America or in the United Kingdom. Their problem is that, historically, Judaism does not have convents or other religious orders or institutions that provide childless women with a religiously significant role. Without motherhood, ‘the barren woman is, therefore, in the past and present, an archetype of suffering in the Jewish imagination.’\textsuperscript{158} Women within the Ultra-Orthodox mindset are born in order to become mothers and life in its entirety is religiously minded. There is thus no meaningful other role in life, such as a career, and by extension no other purpose to life for a woman who cannot become a mother. The importance of this cannot be overstated.\textsuperscript{159} Critical views that question the ethical nature of allowing women no other role than motherhood may be legitimate, but may also be misplaced here because Ultra-Orthodox women in their majority wish to become mothers, as they want to become a meaningful part of their community, according to the way they were raised. In this context, decisions of the poskim, which appear irrational and unethical to the outsider, can be understood.\textsuperscript{160} A halakhic authority writing in theory about the permissibility of a certain treatment may search for the optimal course of action in theory. A rabbi in practice may well be aware that no ideal solution can be found and so his objective may be to choose the lesser of many halakhically problematic scenarios for a barren woman. Depending on his community and the leading authorities he follows this may be more or less challenging for the outside world to understand.

Conclusion

Whether Israeli Jews are observant or non-observant and whether religious rituals are performed according to their spiritual meaning or not, this Chapter has demonstrated that the halakhic considerations of the rabbis regarding the birth of children impact Israelis across societal divisions. Rabbis, who have specialised in

\textsuperscript{158} Kahn, \textit{Reproducing Jews.}, 3

\textsuperscript{159} For an insight into the struggle of infertile women in the Hasidic community see Feldman, \textit{Unorthodox}.

\textsuperscript{162} Judaism has no equivalent institution to the Christian religious orders where woman can lead religiously significant lives without motherhood as nuns.
the field of fertility, can have a direct influence on the type of medical procedures performed in Israeli infertility clinics, to the extent that medical procedures are specially adapted to make them kosher. There is no one kosher approach, but institutions such as Puah help to construct kosher procedures that take into account the halakhic concerns of different Jewish subgroups. Halakhah is thus impacting on medicine, but medicine is also forcing Halakhah to constantly adapt to changing parameters and this will be most clear in the halakhic debates of Part III. Whilst different sections of the Israeli population differ in their priorities and beliefs, the motivation that unites the different agents is to produce children who are full members of the Jewish community and Israeli nation. The Rabbinic decisions on what constitutes a kosher conception is thus of utmost importance, not only because it is religiously significant but because it impacts on the future marriage potential and societal rights of the children born.

The legal debates of Part III will assess fertility treatments in detail and explore how and why these treatments pose a challenge to halakhists in order to understand how opposing halakhic interpretation will translate into different forms of kosher medicine.
Part II
Approaches to Bioethics in Islamic Law

Chapter Three: Sunnī and Shīʿa Interpretative Approaches to Islamic Law

Chapter Four: The Sociological Context of Applied Islamic Bioethics in the Muslim Middle East
Chapter Three

Sunnī and Shīʿa Interpretative Approaches to Sharīʿa

Like Orthodox Jews, Muslims also believe that God has provided humankind with the source for a moral and legal system that informs every aspect of life. Muslim theologians and jurists may use the broad meaning of Sharīʿa as referring to the right path or the source for a life lived in righteousness and goodness. The prominent legal scholar Abou El-Fadl describes Sharīʿa as:

God’s eternal and immutable law – the way of truth virtue and justice.\textsuperscript{161}

In essence Sharīʿa is the metaphysical ideal of justice according to the divine realm and unachievable in all its fullness on earth. The human endeavour to interpret this divine law is known as fiqh (jurisprudence) and the science of interpreting fiqh is usul al Fiqh. Legal rulings are called ahkam (sing. hukm) and fall into five categories which range from mandatory to forbidden.

For Sunnī Muslims the Qur’an, the Sunna, Hadith, Qiyas (legal reasoning by analogy) and ijma (the consensus) of the ummah (community) form the sources of usul al Fiqh in descending authoritative order. Shīʿa Muslims place equal emphasis on the Qur’an as the primary source and the Hadith, if the latter are transmitted by an authority recognised as reliable within Shīʿa Islam. Beyond this, the Twelvers (see denominations below) rely on the authority of their authoritative imams as they apply the principle of ijtihad, which is the discipline of interpreting new legal responses to unprecedented problems. The controversies surrounding ijtihad will be elaborated below, as the different approaches are significant in the bioethical debate. Shīʿa Muslims also place less significance on scholarly consensus as the wisdom of the Immanent Imam is said to inform his appointed successors (see denominations).

Although the scope of this research is limited, differences between the Shīʿa and Sunnī legal approach to fertility treatments are of pivotal importance today and will be the focus of the legal debates. (This research will limit itself to the largest branch, which is the Twelver Shīʿa). Unlike Judaism, Islam expanded rapidly and had to establish its legal, moral and religious rulings in foreign lands. The question of

\textsuperscript{161} El-Fadl, \textit{Reasoning with God}. xxxii
succession created the initial schism. After the death of the Prophet his authority passed to his companion, Abu Bakr, whose followers became the Sunnī branch, whilst the Prophet’s cousin and son-in-law, Ali Ibn Abu Talib was recognised as the authoritative leader by his followers, who became the Shi’a branch. Shi’ism split into further groups but the largest remains the Twelvers who understand the first twelve descendants of Muhammad as authoritative and infallible, with the final Twelver remaining hidden in occultation.162

As such, the Imam occupies a central and pivotal position in Shi’ism, and during his occultation, it is argued, some of his authority is transmitted to the jurists to strive in resolving contemporary challenges to the best of their abilities without ever claiming to have attained certainty.163

In both the Sunnī and Shi’a tradition, numerous schools of jurisprudence (madhab sing./ madhahib pl./ madhabs anglicised pl.) were established and continue to coexist. These initially followed the legal principles of their founder, but local customs and changing times have always been taken into consideration and formed these legal traditions, so that Hanafi law in Egypt may differ from Shafii law in Egypt, but also from Hanafi law in Syria.164 There are four main madhabs in Sunnī Islam, Maliki (covering much of Northern Africa), Hanafi (covering parts each of Turkey, Egypt, Syria, Jordan, Iraq, Afghanistan, Pakistan, Turkmenistan, Kazakhstan and China), Shafii (covering parts each of Egypt, East Africa, Eastern Turkey, Yemen, Malaysia and Indonesia) and Hanbali (covering most of Saudi Arabia, the UAE and parts of Oman). There are three main madhabs in Shi’a Islam of which the largest is the Jafari school (covering Iran, parts of Afghanistan and Azerbaijan). The Zaidi school can be found in parts of Yemen and southern Saudi Arabia across the border, whilst the Ismaili school is transnational with small pockets in South East Asia. In bioethical matters these schools diverge especially in their interpretation of the legal sources, although they are united in their legal concerns. As a result, abortion, for example, tends to be prohibited by Maliki jurists from conception onwards, unless the life of the

162 Wael B. Hallaq, *Shari’a* (Cambridge University Press, 2009). part 1 formative period


164 Khaled Abou El-Fadl, *Speaking in God’s Name*, (Oneworld, 2005). 34
mother is in danger, whilst Hanafi jurists tend to permit abortion up to 120 days of gestation. After this point abortion tends to be prohibited by all madhabs unless exceptional circumstances apply.\textsuperscript{165,166} Today bio-ethical and bio-medical matters are debated by jurists from the different madhabs, who work together with scientists in order to further their understanding and reach consensus. The work of these new bioethics councils will be discussed in detail at the end of this Chapter and in the legal debates of Part III.

\textit{Sharī’a, Fiqh, Islamic law and Muslim law}

It is important to further distinguish between \textit{Sharī’a}, \textit{Fiqh}, Islamic law and Muslim law even though the terms are often used interchangeably. \textit{Fiqh} may be translated as Islamic law, but Abou El-Fadl notes the difference between Islamic law and Muslim law. The vast corpus of classical Islamic law is the product of Islamic legal systems and jurists who lived throughout the Islamic world in pre-colonial times. It is a highly complex and contested legacy. Islamic law represents the legal values and ethical principles drawn from the classical sources of \textit{Sharī’a} by Muslim jurists. By comparison, Muslim law can incorporate all the laws and customs that were found in countries and communities in which Islam developed. Some of these legal practices were tolerated or incorporated by Muslim jurists whilst other legal practices were rejected as un-Islamic.

The legacy of colonial times, which saw European legal systems, superimposed onto the traditional Muslim legal systems is a further challenge. Abou El-Fadl explains how colonial powers at times sought to integrate \textit{Sharī’a}, but, according to el-Fadl, this led to a process of codification that stifled the flexibility of the law. These changes harmed the institutions that traditionally taught \textit{usul al Fiqh}, undermined the authority of Muslim jurists and saw foreign ethical values and laws enshrined into the


legal systems of Islamic countries that were essentially alien to these Islamic countries.\textsuperscript{167}

The notion of ‘qadi justice’ became a virtual archetype for whimsical, personalized, and unreasonable lawmaking fundamentally at odds with the rule of law in civilized societies. Therefore, the eventual replacement of indigenous legal systems became a part of the ‘white man’s burden’ and Europe’s civilising mission.\textsuperscript{168}

For these reasons it is difficult to speak today of any one authentic Islamic law even in countries that have attempted a re-Islamification of their legal structures. The difficult task for Muslim jurists today is to interpret the classical legal sources of \textit{Fiqh} in their complexity in order to reflect the highest principles of \textit{Sharīʿa} and apply them to modern legal problems. Like \textit{Halakhah}, \textit{Fiqh} is non-dogmatic, meaning that a variety of opinions may coexist.\textsuperscript{169}

\textbf{The different legal authorities}

There are a variety of scholars and legal authorities in Muslim societies. Imams, \textit{quadi} (judges), \textit{muftis} (jurists) and lay scholars are all involved in debating social and ethical issues. \textit{Muftis} can issue a \textit{fatwa} which is a non-binding legal opinion. For difficult legal questions the opinion of a \textit{grand-mufti} is sought. The highest authority is traditionally held by the \textit{mujtāhidūn} (sing. \textit{mujtāhid}), whose extensive legal knowledge enables them to develop new legal decisions via a thorough re-evaluation of legal sources – a process called \textit{ijtihād} (see below). Whilst conflicting legal decisions may legitimately coexist, the \textit{Ulama} of \textit{Sunnī} Islam, in particular, strive for legal consensus especially in bioethical matters. In the largest denomination of \textit{Shī'a} Islam (the Twelvers), where the practice of \textit{ijtihād} is more dominant than in \textit{Sunnī} Islam, the \textit{Ulama} are made up of superior \textit{mullās}; their \textit{mujtāhidūn} are \textit{hojjat al-Islam} and \textit{ayatollahs}. These legal authorities have a personal following of Muslims, who will exclusively follow their legal guidance, not unlike the rebbes of the \textit{Hassidim}. The

\textsuperscript{167} El-Fadl, \textit{Reasoning with God}.
\textsuperscript{168} El-Fadl, \textit{Reasoning with God}. 339
\textsuperscript{169} El-Fadl, \textit{Reasoning with God}.
legal debates of Part III will demonstrate the effects of this Shi'ite legal approach on fertility patients.\(^\text{170}\)

**The Process of law-making using *Ijtihad* in Sunnī and Shi‘a Islam**

As the Jewish principle that the Torah is not in heaven enables *halakhists* to engage creatively with the law, trusting in the wisdom of their consensus, so the concept of *ijtihad* in classical Islam enables the *mujtahid* to strive for novel interpretations. Here too the question to what extent classical and scriptural sources can be re-evaluated and historically contextualised divides scholars. Whilst appropriate and authentic legal answers must be found to precedented and unprecedented legal cases, new legal interpretations must not undermine the authority of *Sharī‘a*. The question about the limitations of *aqīl* (human reason) is part of this debate about legal reasoning.

Hamid Mavani understands *ijtihad* as:

> The legal-ethical dynamism in Islamic law which allows it to respond to the challenge of modernity.\(^\text{171}\)

Fazlur Rahman defines *ijtihad* as:

> The effort to understand the meaning of a relevant text or precedent in the past, containing a rule, and to alter that rule by extending or restricting or otherwise modifying it in such a manner that a new situation can be subsumed under it by a new solution.\(^\text{172}\)

The period of the founders of the *madhabs* and the first four to six hundred years of Muslim jurisprudence is understood as the golden age of *ijtihad*. When faced with new legal questions in their expanding realms the *mujtahids* turned to the Qur’an, *Sunna* and *Hadith*. If no specific answer could be gleaned, relevant texts and examples from the *Sunna* were chosen to provide legal and moral guidance through *qiyas* (analogy). In this way innovative rulings were formulated that were rooted in

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the foundational sources and authorised through *ijma* (consensus) by the *Ulama*. After this initial period of legal creativity, Abdullah Saed describes a consolidation of legal schools that lead to a gradual decline in the flexibility of scholars, as both oral law and past examples of this highly adaptive legal system began to be transcribed. This formalisation led, according to Saeed, to a growing reliance on the imitation of former legal decisions, which is termed *taqlid*.173 Whilst a number of scholars in the past have gone further and suggested that the ‘doors of *ijtihad*’ were closed, this is vehemently disputed today by scholars such as Abou El-Fadl, who interprets the *closed doors theory* as a myth set in motion by orientalists and colonial powers wishing to destabilise the authority of *Sharīʿa*. In El-Fadl’s opinion, *taqlid* simply gave the necessary stability for lesser jurists to uphold the laws of their *madhabs* as the community grew. This, however, did not mean that senior jurists ever refrained from *ijtihad*.174

This early period saw tensions between scholars associated with the *Muʿtazili* school of theology and the *Ash’ari* school (8th century CE onwards). Both differed on the epistemological foundations of legal thought and the role of *aql* (reason) which saw the boundaries between theology, philosophy and law overlap.

Two rival schools of thought have dominated the debate over the nature of legal validity and its relationship to the normative authority of law as law—*Muʿtazili* (ethical objectivism) and *Ashʿari* (theistic subjectivism).175

Essentially the *Ashʿari* wished to limit the role of reason in the belief that human intellect alone could not establish the law and that law flowed from God. The Qur’anic verse: *He cannot be called to account for anything He does, whereas they will be called to account* (Q 21:23) is interpreted as proof that the law originates in and is authorised by the will of God alone; law in this view is not subject to justice understood by human reason. The *Muʿtazili* in contrast understood human reason to have the capacity to discover those universal moral norms that are the foundations of the law. This means that legal interpretation is less dependent on revelation.176

174 El-Fadl, *Reasoning with God*. xivi
175 Mavani, "Two Shi‘i Jurisprudential Methodologies." 263-270
176 Mavani, "Two Shi‘i Jurisprudential Methodologies."
Remnants of this initial debate continue today in the different approaches of Shi'a and Sunnî scholars to *ijtihād*. In bioethical matters Twelver Shi'a have adopted much of the Mu'tazili approach which gives a far greater scope in the practice of *ijtihād*. Sunnî Islam, which is largely heir to the Ash'ari approach, understands the role of human reason as important, but to a lesser extent. In both traditions different scholars call for a more or less radical approach to *ijtihād*.177

**Shi’a *Ijtihād*:**

Mavani describes two streams amongst Shi’a jurists, those proposing traditional *ijtihād* and those supporting foundational *ijtihād* (*ijtihād dar-usul*). Mohsen Kadivar and Grand Ayatollah Mohammed Hussein Fadlallah are prominent scholars who have called for *foundational ijtihād*, compared to the Shi’a Orthodoxy who support *traditional ijtihād*. Both groups broadly agree that religious doctrines can be classed into two groups; the first, which includes ‘*aqidah* (the creed), ‘*ibādah* (religious rituals) and explicit directives such as those regarding permitted foods, are *al-ahkām al-thābita* (permanent instructions) that fall into the category of certainty. The second group, which includes *mu'amalāt* (social affairs and human conduct) are not permanent instructions. They are less certain and this allows space for public negotiation and re-interpretation.178 Rulings in this category are considered probable rather than certain and are referred to as *al-ahkām al-mutaghayyira*; pivotally these rulings are temporal and context bound.

According to scholars demanding *foundational ijtihād*, even the scriptural sources of revelation need to be revised if they are not found to adhere to the moral principles of Islam. *Aql* (reason) plays its part in that anything which appears unjust to a reasonable person cannot remain part of *Sharī‘a*, as *Sharī‘a* is seen to be the end result of the entire moral system. Rules about slavery and compensation can thus be revised despite revelation.179

Twelver Shi’a Muslims acknowledge legal infallibility to Prophet Muhammad and the chain of twelve descendants after him, but beyond this time the imams may be

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177 El-Fadl, *Reasoning with God.*
178 Mavani, “Two Shi’i Jurisprudential Methodologies.”
179 Mavani, “Two Shi’i Jurisprudential Methodologies.” 274
inspired by the twelfth and final descendant/imam, who is presently in occultation; this, however, entails a degree of uncertainty that is accepted:

The Shi'i school deemed the transition from certainty to probability to be necessary so it could deal with new contingencies and societal changes that are not covered in the texts and occur during the infallible Imam’s occultation. This prompted Shi'i jurists from the time of Muhaqqiq al-Hillı (d. 1277) onward to accept *ijtihad* with a clear-cut epistemological distinction between certainty and probability.¹⁸⁰

Shi‘a jurists view the Qur’an and the Sunna as primary sources. *Ijma* (consensus) is not a further source, which ratifies a decision, as it does in Sunnī Islam, but as a sign of the emanating influence of the infallible imam.

Thus, *ijma* represents a means to discover the infallible Imam’s opinion, for only his endorsement, as opposed to juristic consensus, validates it and assigns it a value of certainty. In addition, Shi‘i legal methodology has limited the scope for analogical reasoning (qiyaṣ) because it is considered to produce, in general, only a conjectural ruling. In order for it to be valid, the efficacious cause (‘illa) must be explicitly stated (al-qiyaṣ al-jālī) and not subject to multiple readings, as is the case with hidden analogy (al-qiyaṣ al-khāfī).¹⁸¹

Whilst this acceptance of changing parameters gives legitimacy to new interpretations, scholars who apply *traditional ijtihad* are far more restricted than those using *foundational ijtihad* when it comes to the usage of sacred sources and this is well demonstrated in the examples of organ donation and slavery.

Initially, organ donation was prohibited in both Sunnī and Shi‘a Islam. This decision was based on the tradition that the Prophet reproached a gravedigger for breaking the bones of a corpse. The Prophet’s concern for the bones of the corpse was extended to other parts of the body resulting in rituals that treat a corpse with utmost reverence and sanctity. As in Judaism, bodies are understood as the property of God at all times and humans are mere caretakers. This led to the legal interpretation that

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¹⁸⁰ Mavani, “Two Shi‘i Jurisprudential Methodologies.” 266

¹⁸¹ Mavani, “Two Shi‘i Jurisprudential Methodologies.” 267
the _karama_ (dignity) and _hurma_ (inviolability) of the body would be violated if organs were removed. Organ donation was thus initially prohibited.

Although this _ijtihad_ was based on the _Sunna_ of the Prophet, a number of conditions permit a reinterpretation of decisions. These include a change in the essence of the subject or the relationship between the subject and the original ruling. Mavani gives the example of chess playing which was originally prohibited as it was considered as part of gambling. This has been revised as chess may be played without gambling. They also include the rule of secondary injunction which permits acts on a temporary basis that are prohibited at all other times, such as eating pork or even human flesh in life-or-death situations, which become mandatory to save life. This dispensation is comparable with the _halakhic mitzva_ to break the sabbath laws when life is endangered. Concerns of _maslaha_ (public good) and the accepted aims and the _maqasid_ (objectives of the _Sharīʿa_) can also be used to justify legal changes. Both legal categories will be elaborated on below.¹⁸²

Once organ donation became safer and the only way to save the life of Muslims, the initial prohibition was revisited and an initial ruling was issued by Ayatollah Sistani, who permitted organ donation to his followers with certain limitations in 2006:

> …the deceased [from whom the organ was to be harvested] was not a Muslim or someone who is regarded to be a Muslim; the life of a Muslim depends on such a procedure. (Sistani 2006, 165)¹⁸³

After deliberation on the Qur'anic principle to save life regardless of creed (Q.5:32) a further ruling was issued by Ayatollah Khamene’i in 2008 that permitted both the harvesting of Muslim organs and the donation to non-Muslim recipients.¹⁸⁴

In this instance, proponents of _traditional_ and _foundational_ _ijtihad_ permitted a change in the law, meaning that the subject matter of organ donation was classed in the category of temporary rulings (_al-ahkām al-mutaghayyira_). In comparison, the permission for slavery, or the decree that the murder of a Muslim free man demands twice the compensation of the murder of a slave, woman or non-Muslim remain in

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¹⁸² Mavani, “Two Shi‘i Jurisprudential Methodologies.” 271-272
¹⁸³ Mavani, “Two Shi‘i Jurisprudential Methodologies.” 273
¹⁸⁴ Mavani, “Two Shi‘i Jurisprudential Methodologies.” 273
the category of certainty (*al-ahkām al-thābita*), within the *Shī‘a* tradition because these appear as Qur’anic instructions.  

**Sunni Ijtihad:**

Sunni Islam faces a similar debate. According to Professor Abdullah Saeed, broadly speaking three approaches exist in contemporary Islam that are often referred to in different terms. The relatively modern Salafi movement assumes that authentic Islam needs to return to the Law of Prophet Muhammad’s time, although this is not in line with the *tafsir* (exegesis) of the traditional *Ulama*. Salafis and other traditionalists view Sharī‘a as unchanging and demand that the Qur’an needs to be approached in a literalistic way, with no concern for the socio-historical context of revelation. Whilst tradition is authoritative, this authority is limited to the time of the Prophet and his companions. Abdullah Saeed refers to this group as Textualists. Hadith are often used to reinforce the message, even if the apparent meaning conflicts with the spirit of the remaining text. Modern concerns, whether social or scientific, are not usually considered legitimate reasons for changing Sharī‘a.  

A second group, termed semi-Textualists, may be more flexible in interpreting language figuratively. According to Saeed, this group is the hardest to classify because individual scholars may interpret different issues with, at times, harder or softer textualism. The authority of legal opinions from the time of the Prophet and beyond are generally considered, but also not historically contextualised. The traditional *Ulama*, which draw on a classical *madhab*, may be part of this group and Saeed includes the reform movements, such as the Muslim Brotherhood, amongst the semi-textualists, although many of these have been classed as un-Islamic by the *Ulama*.

Saeed describes the third group as Contextualist and holds that this *tafsir* (exegesis) is favoured by many academic Muslim scholars today, who may also be referred to as Progressives. The Contextualist approach considers the socio-historical context of revelation and of tradition as vital tools for understanding the underlying moral and

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185 Mavani, “Two Shī‘i Jurisprudential Methodologies.” 273  
legal principles of the Qur’an, with the expectation that neither Qur’an nor Sharīʿa can ever contradict another. The double movement theory of Fazlur Rahman can be seen as the foundational hermeneutic of this type of *ijtihad*.

The new step simply consists in studying the Qur’an in its total and specific background…not just studying it verse by verse …with an isolated ‘occasion of revelation (*sha’n al-nuzul*)

For Rahman the macro and micro meaning of the text needed to be studied in its socio-historical context. From this study the underlying Islamic principles can be distilled and applied to the macro and micro situation of the present; the hermeneutic movement has to be circular until no contradictions remains. However, Rahman did not underestimate the challenge and danger of deconstructing tradition:

The greatest difficulty …is not the new step itself but extricating one’s feet from the stagnant waters of the old Qur’anic exegesis, which may contain many pearls but which, on the whole, impedes rather than promotes a real understanding of the Qur’an.

*Contextualists* who build on Rahman’s work strive to understand the changing linguistic meaning of text, as well as studying the social, political, economic, intellectual and cultural circumstances that were present at the time of revelation and are present today. The aim is to apply authentic Islamic legal principles that have been adapted to modern situations without loss of value, principle and authority. In this way the Qur’an remains authoritative and whilst the *tafsir* of classical Islam is respected and deliberated upon, it is not accepted without question, because the socio-historical parameters will have changed.

Despite these new approaches to *ijtihad* in *Shī’a* and *Sunnī* Islam, successful *ijtihad* remains challenging. It is argued that law and ethics are not always seen as separate disciplines in Islamic thought; like *Halakhah*, *Sharīʿa* is seen to incorporate both. Whilst the belief is justified that *Sharīʿa*, based on divine revelation, must by its very essence be ethical, the inseparability of law and ethics also causes problems.

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The Muslim failure to make a clear distinction between Qur’anic ethics and law has resulted in a confusion between the two ... to keep law permeated with a living moral sense it is not necessary to ignore the distinction between the two, only to keep law *organically* related to morality, that is to keep law Islamic and prevent its secularization.  

The problem with any new *ijtihad*, which is part of *usul al-Fiqh*, is that it is felt to be highly technical and complex. According to modern bioethicists, science and medicine are moving so fast that *ijtihad*, with its demanding legal reasoning, analogies and consensus can be too slow to react, especially in light of the burden of classical precedents.  

Two other approaches to finding new legal answers have thus gained significance in the bioethical debate, these are the focus on the public good (*maslaha*) and on the objectives of *Sharī‘a* (*maqasid*).

**The process of Law-making using *maqasid* and *maslaha*:**

*Maqasid* is translated as the goals and purposes of *Sharī‘a*, whilst *maslaha* is translated as the source of the public good or public welfare.

Unlike *ijtihad*, which was described as technically complex and part of *usul al-fiq*, the *maqasid* are described by Mohammad Hashim Kamali as:

...inherently dynamic by comparison and capable of evolution in tandem with the changing conditions of society .... the *maqasid* also resonate more strongly with the advancement of essential human rights. The Muslim world is currently witnessing growing support for international human rights law and the *maqasid* are seen to be offering a preferable approach to that of the *usul methodologies*.  

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192 Kamali, "Law and Ethics." 24
Depending on the background and goals of the scholars, some have argued that scriptural obligations must always prevail above all other interpretations whilst others have argued that the *maslaha* and *maqasid* can abrogate revelation:

They drew upon al-Shatibi’s theory of law with its hierarchy of universal and particular as well as general and specific rulings. *Maslaha* was interpreted as a universal ruling …. fully implemented this interpretation of *maslaha* and Islamic law potentially could overturn much of the traditional body of Islamic law as well as some theological doctrines.\(^{193}\)

*Maqasid* and *maslaha* are practical tools for modern bioethical decision making. They can unite scholars from different legal backgrounds by focusing the attention on the higher values of *Sharīʿa*, making jurisdiction more agile, but different approaches to *maslaha* can also divide scholars.

… a particular jurist's interpretation of *maslaha* is not random, but rather is influenced by the nexus of education, personal position, and historical environment that affects the way in which a jurist employs the principle of *maslaha* to shape the legal sphere.\(^{194}\)

Whilst the challenge using *ijtihad* were the technicalities and what Rahman termed the stagnant waters of former exegesis, the challenge in the use of the *maqasid* and *maslaha* is the opposite because their boundaries are somewhat fluent. This means that ethical goals can be declared as Islamic, although they do not have their roots in the Qur’an or the *Sunna*. Sherman Jackson warns of:

… “false universalism” for it (the use of *Maqasid*) suggests a belief in the possibility and propriety of subsuming the massive diversity of the modern Muslim community under a single, concrete articulation of the *Maqasid al-Sharīʿa*.\(^{195}\)

This is highly relevant for the bioethical debate of modern fertility treatments. When consensus is the aim of the legal ethical debate, compromises can at times only be


\(^{194}\) Opwis, "Maṣlaḥa in Contemporary Islamic Legal Theory." 223

\(^{195}\) Kamali, "Law and Ethics." 45
found through the use of the least challenging common denominator. This entails the risk of devaluing the high moral values, rituals and observances, which have so far been protected by the Ulama.

As early as the 11th century the prominent Ashar’ite theologian Al-Juwayni held that the companions of the Prophet pondered over the goals of Sharīʿa in light of the commandments and prohibitions. His student, the prominent theologian, philosopher and Ash’ari jurist Abu Hamid al-Ghazali, wrote that the five foremost maqasid (objectives of Sharīʿa) are the protection of life, intellect, religion, property and family. At a time of great diversity amongst the Ulama, Ghazali was seeking for principles that could unite divisions. The maqasid were not clearly defined by the classical texts of usul al-fiqh, until in the 14th century Andalus al-Shatibi formalised a theory of maqasid because he too feared that the unity and authority of Sharīʿa was being undermined and diluted by the diverging law schools and sectarian disagreements: 196

…al-Shatibi strove to achieve two major objectives, one ethical and the other legal. His ethical purpose was to sensitise the individual to the meaning and purpose of Sharīʿa, so that he might become a self-motivated person who would internalise the purposes of the law and become a willing carrier of its values. Al-Shatibi’s second purpose was to promote unity in the corpus juris of the Sharīʿa, so that the jurist and practitioner might be guided by an integrated vision of its goals and purposes. 197

Ibn Taymiyya extended the five goals of maqasid to include honourable and ethical traits such as honouring contracts and the rights of one’s neighbour, love of God and moral purity, leaving the list essentially open ended. Despite these developments the theory remained on the peripheries of jurisprudence in the main schools of law. 198 In light of the challenge of modernity and the need for Sharīʿa to redefine its status in colonial and post-colonial times, Wael Hallaq describes a renewed interest in the concepts beginning with the development of maslaha in the work of Muhammad

196 Sachedina, Islamic Biomedical Ethics. 51
197 Kamali, "Law and Ethics." 24
198 Sachedina, Islamic Biomedical Ethics. 52
Rashid Rida.\textsuperscript{199} Although both concepts remained divisive, there is a need in modern bioethical councils (see below) to bridge divergent approaches amongst traditionalist, revivalists and scholars from different schools of law. This has rekindled the interest in the goals of \textit{Shari‘a} as a way to circumnavigate some of the technical difficulties of \textit{ijtihad} and focus instead on higher goals and objectives. Yusuf al-Qaradawi is one of the contemporary scholars who has added \textit{al-takaful} (social welfare support), freedom and human dignity to the \textit{maqasid}. Kamali suggests:

I propose to add protection of the fundamental rights and liberties, economic development, research and development in technology and science, as well as peaceful coexistence among nations to the structure of \textit{Maqasid}.\textsuperscript{200}

New legal interpretations using \textit{ijtihad} require a textual source that, by analogy, is applied to a new situation. The \textit{maqasid} are not tied to a textual source and can, therefore, be used to find new rulings, and also to understand the underlying goals of existing prohibitions. A common example is the prohibition of alcohol. The approach of \textit{ijtihad} must enquire what is \textit{illa} (the effective cause) when the Qur’an forbids the drinking of \textit{khamr} (wine) (Q5:90); does it refer by analogy to all wines or all intoxicating substances? Does the strength or ingredient matter? Each question must be researched separately by the precise methods of \textit{ijtihad}, trying to find analogies and consensus. An enquiry using \textit{maqasid} asks a different question, it seeks the goals of the prohibition. This means that the prohibition on drinking alcohol is understood in terms of avoiding intoxication and the loss of reason. This approach is concerned with the resulting \textit{maslaha} (the public good) and the prevention of \textit{mafsada} (mischief). \textit{Maslaha} then is the result of the correct use of \textit{maqasid}. Both \textit{maqasid} and \textit{maslaha} are classified into categories; the \textit{maqasid} are divided into essential, complementary and desirable categories, whilst \textit{maslaha} is divided into primary needs, general needs and secondary needs. For these, the principle of \textit{isticlah} (seeking the common good) serves as a significant source of legislation, as it entails a rational investigation into how each legal decision will harm or benefit \textit{maslaha} (the public good) because it fulfils or hinders the \textit{maqasid} (objectives of

\begin{itemize}
\item \textsuperscript{199} Hallaq, \textit{Shari‘a}. 504-8
\item \textsuperscript{200} Kamali, “Law and Ethics.” 28
\end{itemize}
Sharī'a). The rule of *la darar wa la dirar fi al-islam* ('No harm, no harassment') is the counterpart to the seeking of *maslaha* (common good) and it is particularly relevant in the bioethical debate, as will be demonstrated in Part III.\(^{201/202}\)

**How to be a vicegerent; Muslim approaches to stewardship:**

New scientific insights about Creation, evolution and procreation continually challenge the literalist interpretations of Revelation in all Abrahamic faiths. Judaism understands scientific knowledge as a gift from God and the human body as a vehicle for the human soul, which remains the property of God at all times. In Judaism this reduced the levels of personal autonomy that the secular world tends to attribute to individuals. There are parallels in the Islamic bioethical debate, but the narrative also demonstrates great differences.

Muslims also consider the body the property of God and this, as mentioned above, has influenced the debate about organ donation and sacred rituals surrounding the treatment of a corpse. It also limits the autonomy of patients and the aim to save life is highly religiously endorsed. This is the result of the Qur’anic directive:

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... \text{if anyone saved a life, it would be as if he had saved the life of the whole people. (Q: 5:32)}^{203}
\]

Bioethical debates about the medicalisation of procreation and the genetic enhancement of human life consider the revealed relationship between humanity and Creation. In Islam the concept of humankind as the vicegerent of God on Earth is well established and based in part on the Qur’anic verse:

\[
\text{Behold, your Lord said to the angels: "I will create a vicegerent on earth." (Q 2:30)}^{204}
\]

According to Jaafar Sheikh Idris, this is another concept with its roots in classical Islam, but that has recently risen in significance and become a central part of Muslim

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\(^{201}\) Sachedina, *Islamic Biomedical Ethics*. 57,66

\(^{202}\) Research Center for Islamic Legislation and Ethics CILE, "01/2021 CILE Online Winter School on *Maslaha* (Benefit/Interest) as an Ethical Concept" (2021).


\(^{204}\) "The Holy Qur'an."
identity, although the classical meaning has been adapted to meet modern needs. Idris traces the meaning of khalifa, which is the Arabic term translated above as vicegerent, through classical times to mean little more than a successor. Khalifa on Earth is the lineage of Adam, those who succeed him in on Earth; alternatively, it may refer to the succession of Muslim rulers. Ibn Arabi introduces a radical interpretation that suggests that the khalifa may be a perfect man, who is the representative of God on Earth:

And He called him khalifa ... because it is through him that He preserves His creation. ... The world will always be preserved so long as this Perfect Man is in it.

Idris describes Ibn Arabi’s interpretation as:

...speculative philosophising, clothed in Islamic terminology.

Even here a perfect human is not every Muslim by any means. The concept is taken up once more by Muhammad Abduh, who was said to be inspired by Ibn Arabi. Abduh in turn inspired Sayyid Mawdudi and Sayyid Qutb.

Qutb states:

It is thus the supreme will intending to give to this new being the reins of the Earth, and a free hand in it; and entrusting him with the task of revealing the will of the Creator in innovation and formation, in analysis and synthesis, in alteration and transformation; and of discovering the powers and potentialities, and treasures and resources of this Earth, and make all this—God willing—sub-servient to the great task with which God entrusts.

We witness here a shift that Idris rates as inconsistent and unhelpful, but he accepts the influence that the idea is having in mobilising young Muslims to understand their place in the modern world. In comparison to Judaism this concept does not go as far

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207 Jaafar Sheikh Idris, “Is Man the Vicegerent.”
208 Jaafar Sheikh Idris, "Is Man the Vicegerent.” 107
209 Qutb quoted Jaafar Sheikh Idris, "Is Man the Vicegerent." 107
as being a co-creator with God, nor is there the link to the eschaton that we witnessed in the writings of Bleich; nevertheless the words of Qutb could certainly be used to religiously endorse a proactive approach to genetic sciences. The narrative here is closely linked with the concepts of maqasid and maslaha. As the modern understanding of khalif entrusts the Muslim scholars to bring about the goals of Sharīʿa and promote public well-being, so it is also a command to protect humankind from suffering. Suffering is understood as a negative force and Fadl describes the view that it undermines human potential.

As Muslims, as part of our covenantal relationship of vicegerency with God, we have been charged with the duty of striving to safeguard the wellbeing and dignity of human beings. Fadl views the vicegerent model as a positive force that urges Muslims to strive for justice, compassion and mercy, values that Islam should promote for all of humankind. Science and medicine are but a tool for Muslims to achieve the betterment of human health. Part III will investigate how this translates into assisted procreation and genetic interventions. It will also debate at what stage of conception a human being is considered in need of protection from suffering. Debates of this kind are today frequently led by the new bioethics councils.

Collective ijtihad, the formation of the Councils to overcome the problems of medical categories

The different legal schools have always ensured that diverging authoritative legal opinions can co-exist, but two factors proved problematic from the early-20th century onwards. The Ulama (theologically trained scholars) received little scientific education in the Middle East, whilst scientists tended to receive little training in Sharīʿa. As early as 1910 the prominent Muslim reformist Muhammad Rashid Rida highlighted the necessary link between scientific and scriptural knowledge in order to rule correctly, especially on the accepted length of a pregnancy.211

210 El-Fadl, Reasoning with God. 196

Rida argued that upholding such outdated conventions and neglecting the achievements of modern science could eventually result in a wide range of harms including the attempts of non-Muslims to “defame and discredit our Sharia based on science and experimentation, not on prejudice and fanaticism, which would eventually preclude them from converting to our religion and prevent revealing its truth to those who do not know the origin of these claims within our tradition. This also entails spreading doubt amongst many Muslims about the truthfulness of our Sharia and its divine nature…”.

Especially in this field of fertility medicine, classical legal sources assumed medical facts about gestation that were incompatible with modern medical knowledge. Muslim jurists thus faced a challenging legal heritage similar to the problematic medical categories of the goeses and nefel in Halakhah.

The seminal medical compendium al-Shifāʾ (The Cure) of the well-known Muslim physician Avicenna (Ibn Sīnā, d.1037) was consulted by a number of jurists to prove that pregnancy can continue for years. Avicenna’s statement, “I have been informed by someone I absolutely trust that a woman, after being pregnant for four years, delivered a viable child whose teeth already grew”, was quoted by prominent Muslim scholars such as the Shafiʿī jurist Fakhr al-Dīn al-Rāzī (d. 606/1210). This classical concept of the dormant embryo, which may have served to protect women who had fallen pregnant outside marriage, was now seen as a principle that could no longer be defended. By the 1980s the majority of Muslim scholars recognised that the lack of scientific knowledge in earlier rulings had to be taken into account and it was counterproductive to accept a gestation time far beyond the nine-month limit. To better inform the Ulama, organisations were formed that specialise in interdisciplinary research by enabling the dialogue between doctors, scientists, religious and legal scholars. Senior religious scholars, such as Yusuf al-Qaradawi,

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212 Ghaly, “Sharia Scholars.”


Mohammad Ghaly is Professor of Islam and Biomedical Ethics at the Research Centre for Islamic Legislation & Ethics (CILE), Hamad Bin Khalifa University.
welcomed this development as the necessary approach for the collective *ijtihad* in novel bioethical matters. Mohammad Ghaly recounts the development and reasoning of this pivotal new approach:

According to some researchers, bioethical issues like test-tube babies... belong to a distinct category of *nawāzil*, namely those novel issues whose likes... have never happened before... Muslim religious scholars call for conducting a rigorous and multi-layered investigation before construing the religious ruling (ḥukm sharʿī) in a *fatwa* on such issues, so that the possibility of reaching erroneous conclusions can be kept to the minimum.

Today an ever-greater number of these interdisciplinary organisations drive the bioethical debate to find authentic, well-informed Muslim responses to unprecedented bioethical legal questions. Three of the most influential institutions are the *Islamic organisation for medical science* in Kuwait (IOMS), the *International Islamic Fiqh Academy* in Mecca (IFA) and the *International Fiqh Academy* in Jeddah (IIFA). Prominent jurists also continue to issue personal *fatwas* which depending on their personal standing, can have substantial influence in their country of origin and beyond. This is particularly the case for *Shīʿa* authorities in the fertility debate. Two of the most influential individual *fatwas* will be the focus of the legal debates of Part III, significantly these tend not to concern themselves with individual cases, but individual subject matters or technologies.

**Strengths and weaknesses of the councils**

Mohammed Ghaly, paints a predominantly positive image of the bioethics councils. Ghaly stresses that although the councils are all in the Gulf region, their legal approach is not limited to the *Salafi* or *Hanbali* approaches which are usually found...
in the Gulf regions. Instead, these institutions bring together the collective reasoning of scholars from almost all Muslim countries and include Sunnī and Shi‘a scientists, theologians and jurists ranging from conservative to progressive. The councils provide a platform where new innovative medical procedures can be discussed.\textsuperscript{217}

Abdullah Sachedina is more critical than Ghaly of the diversity of the councils. He is concerned that the Islamic Juridical Council of Mecca is searching for normative answers that are solely based on revealed sources.

The Council, represented by Sunnī and Shi‘ite jurists, has deemphasized the human dimension of medical enterprise by ignoring to evaluate human moral action and its ramifications for Islamic biomedical ethics. The classical juridical heritage… instead of functioning as a template for further moral reflection about critical human conditions and vulnerability in the context of modern healthcare institutions, has simply been retrieved to advance or obstruct legitimate advancements in biomedicine.\textsuperscript{218}

The council thus over-legalises decisions and fails to provide a moral Islamic discourse.\textsuperscript{219} Sachedina describes Iran and Egypt as the only countries where the Ulama have the freedom and independence from the government to engage in a meaningful way with scientist and legislators.

I mention Egypt and Iran only because these are the only Muslim countries where religious scholars, the ulama, are engaged in formulating national policies related to healthcare. In Iran one can even observe the relative independence enjoyed by the religious scholars from governmental interference in formulating their judicial decisions.\textsuperscript{220}

While the political situation especially in Egypt has seen dramatic changes, Sachedina’s comments emphasise the extent to which religious bioethics and biopolitics are intertwined in the Middle East:

\textsuperscript{217} Ghaly, "Biomedical Scientists ".
\textsuperscript{218} Sachedina, Islamic Biomedical Ethics. Epilogue, Abdullah Sachedina is professor in Islamic Studies at George Mason University in Fairfax, Virginia
\textsuperscript{219} Sachedina, Islamic Biomedical Ethics. 29
\textsuperscript{220} Sachedina, Islamic Biomedical Ethics. 29
... there, the function of the ulema is not merely to provide endorsement of the decisions made by the government, as so often happens in Saudi Arabia or to a lesser extent in Egypt. In these latter countries, since the religious authority is under the direct control of the government, usually the dissenting opinion against the *fait accompli* is repressed. In the case of Pakistan, as indicated by K. Zaki Hassan, there seems to be a wide gulf between medical professionals and religious scholars.\(^\text{221}\)

Mohammed Ghaly recognises this weakness of the councils, but describes the field of Islamic bioethics as an evolving discipline. Ghaly identifies as a main problem not the diversity of legal approaches as much as the lack of social scientists who are currently not involved in the discourse between scientists and jurist; this leads according to Ghaly to a medicalisation of Islamic bioethics.\(^\text{222}\)

Asim Padalla, for similar reasons calls for a distinction between Islamic bioethics and Muslim bioethics in order to bridge the gap between legalism and applied ethics:

> The former concerns itself with the study of texts, doctrines, and those who produce texts and doctrines, while the latter studies the human actors, that in partial and varied ways engage these texts and doctrines while facing bioethics challenges.\(^\text{223}\)

Certainly, the individual voices of scholars can be lost if councils publish only the consensus that has been reached at the end of the debate in form of a *fatwa*. Even if the debates are published, they are rarely translated from their original language. It follows that the individual voices of those committee members whose opinions fall in the minority, can be lost and thus law can become increasingly monolithic.

\(^{221}\) Sachedina, *Islamic Biomedical Ethics*. 29
\(^{222}\) Ghaly, "Biomedical Scientists ".
Authoritative figures and legal guidelines for infertile couples

In Judaism a number of scholars specialised in Jewish bioethics and became leaders in their field. Although in Islam prominent scholars do issue fatwas on individual fertility treatments, these scholars do not tend to specialise exclusively on bioethics, but are high ranking legal authorities, such as the Ayatollahs Sistani and Khamene’i or the Imams of Al-Azhar. The bioethics councils publish their findings and scholars and doctors such as Mohammed Ghaly, Abdullah Sachedina, Aasim I. Padela and Ebrahim Moosa publish on the subject. It is difficult to discover how exactly a Muslim couple accesses help other than visiting a fertility clinic or reading the scholarship mentioned above. Shī‘a couples, in particular, will be guided by the rulings of their imam, but the highly personalised couple to rabbi treatments, which we witness in Judaism, certainly does not seem to be replicated in Muslim societies. Searches for charities that specialise in Muslim infertility support in the English-speaking world show only a small amount of Instagram posts of fellow support groups, but nothing that compares to the well-established fertility charities that are available to Jewish couples. It is possible that communities have their own support groups, but the concrete lack of any online presence may suggest that infertility for the time being remains a stigma that is dealt with privately. This is an assumption that is supported by the anthropological studies of Chapter Four.
Chapter Four
The Sociological Context of Applied Islamic Bioethics in the Muslim Middle East

Introduction:
Chapter Two established that many different halakhic approaches coexist within Judaism. Despite these different approaches, it was possible to investigate the effects of Halakhah on the treatment of infertility in Israel and the sociological context in which the halakhic responses are generated.

The initial aim of this research was to replicate this approach in one of the many predominantly Muslim countries in the Middle East and create a meaningful comparison to Israel. The initial choice fell either on Saudi Arabia or Qatar, however, it soon became evident that this approach was problematic. Like Judaism and unlike Catholicism no one decisive authority exists in the Muslim world. Although opposing opinions can be found in individual countries, which could be compared to those in Israel, by far the most significant difference exists between Sunnī and Shīʿa approaches to the use of donor gametes, with the majority of Sunnī jurists prohibiting donor gametes, whilst a number of prominent Shīʿa clerics have permitted their use.

It was thus decided that the most meaningful approach would be to compare Israel with a number of countries in the Middle East which reflect the Sunnī/ Shīʿa divide.

As Chapter Two demonstrated societal, political and religious motivations for a rise in fertility in Israel, this Chapter will discuss how falling birth rates and a surge in infertility is changing the face of pronatalism across the Middle East. This will be based on the research of Marcia Inhorn, a leading authority in the anthropological study of fertility treatments.

The research of Mohammed Ghaly, who is Professor of Islam and Biomedical Ethics at the Hamad Bin Khalifa University, will provide the counterpart to Dr. Tsipy Ivry’s discussion on the triadic relationship between Rabbis, doctors and patients. Ghaly describes the tensions which can arise when the areas of jurisdiction blur in the current Muslim bioethics’ councils. Finally, this Chapter will explore the importance of
lineage and legitimacy in Islam based on the work of Professor Ebrahim Moosa and Abdulaziz Sachedina. Together these three areas form the cornerstones of how fertility and infertility are experienced across the Middle East today.

Falling birth-rates and a surge in infertility – the changing face of pronatalism in the Middle-East

According to Marcia Inhorn, the whole of the Middle East can be described as pronatalist and in both Judaism and Islam infertility is understood as a legitimate reason for divorce. Many Muslim women are said to live in fear of being divorced if infertile. Although women have the same right as men to divorce their husbands in case of male sterility, this is said to be far less likely. In a similar way to Israel, the great majority of Muslim men and women across the Middle East see it as their religious and/or social obligation to procreate and this desire crosses the divisions of country, culture, religious observance and social background. A barren Muslim woman thus faces very similar problems to a Jewish barren woman; she faces religious, social and private consequences although not all barren women are divorced by their husbands.224

The marked difference in fertility trends is that the birth-rate in Israel, in 2018, for the first time overtook that of its Arab neighbours. Although Israel’s population includes Muslim Israelis and can thus not be understood solely in a Jewish context, the steady growth of Israel’s population can be understood as a direct consequence of the halakhic influenced pronatalist legislation in Israel, which is enjoyed by all Israeli citizens. According to the UN, Israel today leads the world in the annual rate of population growth.225

In comparison, Muslim countries in the Middle East have seen a sharp decline in birth rates over the last generation. Encouraged by Western nations to implement family planning schemes, because of a perceived threat of overpopulation in the

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‘Third World’, the United Nations encouraged countries across the Middle East to provide access to contraception in the latter half of the 20th century.\textsuperscript{226}

In this post-war period, the International Planned Parenthood Federation (IPPF), the Population Council, the Ford Foundation, and the United Nations Fund for Population Activities (UNFPA)—later renamed the United Nations Population Fund—were formed to initiate population control activities.\textsuperscript{227}

The rollout of these family planning programs has been slow and patchy and acceptance of both male and female contraceptive devices and medication has been varied across the Middle East. However, the knowledge of contraceptive techniques has steadily increased even in war-torn countries where the supply chain of medication is unreliable. As a result, birth rates have fallen sharply across the Middle East in what Inhorn terms the Arab World’s ‘Quiet’ Reproductive Revolution. The total fertility rate (TFR) in the Arab nations far exceeded the world average of 3.85 children per woman in 1975-1980.

Seven Arab countries—Algeria, Kuwait, Libya, Oman, Saudi Arabia, Syria, and Yemen had TFRs greater than 7.0, with the highest recorded TFR of 8.58 in Yemen. Today, only three of these Arab countries—Egypt, Jordan, and Yemen—have TFRs above 3.0.\textsuperscript{228}

In present day Algeria, Lebanon, Libya, Oman and Qatar childbirth has declined by 60% whilst Tunisia, the UAE and Libya have witnessed a drop of 70%. This staggering change in procreation has occurred in both resource rich and resource poor nations, in peace and war-zones:

The Arab fertility decline has occurred largely through human agency—namely, the decision of Arab couples to have fewer children to love and support.\textsuperscript{229}


\textsuperscript{228} Inhorn, "The Arab World’s ‘Quiet." 153

\textsuperscript{229} Inhorn, "The Arab World’s ‘Quiet." 153
Inhorn thus attributes this decline to a fundamental change in the number of children which Middle Eastern Muslim couples wish to conceive in the 21st century. Whilst their ancestors routinely had large families, today’s couples ideally wish to conceive two or three children. The Jewish ideal of large families, witnessed especially in Haredi circles, does thus not seem to be replicated in the Muslim world. As in Orthodox Judaism, sexual relations in Muslim societies are strictly prohibited outside marriage and this religious prohibition is state enforced in a number of Middle Eastern countries. However, unlike in Judaism where continuous procreation amongst observant couples is encouraged and contraception is restricted, the anthropological studies in Muslim countries do not suggest a religious bias against contraception, especially not against coitus interruptus. Quite contrary to the halakhic prohibition against the spilling of seed, the practice of coitus interruptus appears religiously endorsed in the perception of Muslim men:

Studies conducted in a variety of Arab countries demonstrated men’s strong advocacy of male-controlled birth control—not with condoms, …. but rather through the time-tested method of ‘azl (withdrawal, or coitus interruptus). ‘Azl has played an important role in the history of Islamic societies. Not only does ‘azl receive support within the Islamic scriptures as a viable means of male-enacted contraception, but Arab men also tend to prefer withdrawal as a “safe” method of family planning that is more “natural” than most female-controlled methods.230

Whilst there is no doubt that Islam encourages marriage and procreation, the fact that azl is not prohibited demonstrates a great difference to Judaism, where the obligation not to prevent conception by ‘spilling seed’ was a religious commandment for men. According to the research of Inhorn, azl, appears to be accepted both religiously and socially, but the matter of masturbation is more complex and particularly relevant for fertility treatments, as no artificial reproduction can currently take place without sperm collection; here Judaism appears more lenient. In Judaism masturbation is prohibited under the prohibition to spill seed, but it has been permitted by the majority of poskim if it is done as part of fertility treatments. In comparison, amongst Muslim scholars, there is no consensus on masturbation.

230Inhorn, "The Arab World’s ‘Quiet." 151
According to the founder of the Hanbali school of law, Ahmad Ibn Hanbal, masturbation is lawful in extreme circumstances for prisoners, travellers or those without access to lawful sexual relations in order to avoid the far greater sin of zina (illicit sexual relations). However, this permissive approach appears to be in the minority. According to the majority of Shafi’i and Maliki jurists, masturbation is haram (unlawful) although it may be permitted if the wife or during classical times, the concubine performs the act. Inhorn cites the following hadith which states that:

…he [masturbator] will not be seen on the day of resurrection.\textsuperscript{231}

This means that although masturbation is allowed by certain jurists, the majority of medieval and contemporary jurists see the act as unlawful and shameful according to Shari‘a. These religious legal verdicts continue to influence societal attitudes today and this has an impact on the ability of Muslim couples to conceive.

According to Inhorn’s research, based on interviews with men across the Middle East, masturbation is considered shameful and albeit that many men admit to performing the act, their shame causes guilt. This guilt manifests itself in difficulties when sperm samples are needed. It also leads many sterile men to conclude that their infertility is due to their moral and religious weakness in adolescence, when they masturbated despite being warned against it. This shame may thus be religiously motivated, but it is enforced through social pressures and guilt, with men lamenting their conservative upbringing and the limited sexual knowledge and guilt which their mothers instilled in them. Whilst many men do manage to produce samples through masturbation others prefer to opt for an invasive medical procedure called sperm aspiration which is said to be painful, costly and may have long term medical side effects.\textsuperscript{232} Shari‘a and social norms thus work hand in hand; sperm, although life bringing, is considered a polluting substance which requires ritual cleaning according to Shari‘a.

A person polluted by semen on the body is not allowed to “pray, fast, walk around al-Ka‘ba, touch or read the Qur’an or the poetry recited in praise of

\textsuperscript{231}Inhorn, \textit{The New Arab Man}. 280

God and his Prophet. He is also forbidden from entering or staying in the mosque.” As noted by one jurist: “Purification by washing the body after orgasm is an absolute requirement; the person who intentionally leaves a single hair unwashed will be doomed to fire.”

This polluting quality of sperm is therefore not restricted to the result of masturbation, but it also affects the female body after intercourse which in turn leads men and women to wash meticulously after sex. This in itself makes conception less likely according to Inhorn:

Women explained, immediate internal washing of the vagina with warm water… is imperative as a purifying method within the first half-hour after the sex…. But because this practice also lessens the likelihood of pregnancy, infertility physicians must constantly remind Egyptian women to remain on their backs for at least thirty minutes, and to refrain from douching…. The thought of remaining “unpurified” for up to one day with an inherently polluting sexual secretion from their husbands’ bodies was a condition that many of my female informants found defiling and even repugnant.

These personal accounts are significant, because Middle Eastern couples not only choose to have fewer children, but they also suffer from a high level of infertility. Statistically, in Europe and in the USA in 50% of infertile couple the male factor is ‘one of the multiple factors involved’. In the Middle East this percentage rises to 60-70%, which makes this the region with the highest number of men who suffer from often severe forms of infertility worldwide. Middle Eastern Muslim couples have therefore become highly dependent on modern fertility treatments. Medical reasons for these high levels of infertility are only beginning to emerge, but at present the high percentage of consanguineous marriages appears the most likely reason and these make up more that 50% of marriages in countries such as Saudi

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233 Inhorn, The New Arab Man. 281
Arabia. According to recent research amongst men, there are high number of azoospermia cases, meaning that these men produce no sperm at all, as well as a higher rate of genetic disorders such as:

...men who are born without the vas deferens (a marker of cystic fibrosis carrier status) a condition where the tubes carrying the sperm are defective or not present.

Women born of consanguineous marriages are also likely to suffer in higher numbers from infertility and early research points to a reduced ovarian reserve:

Parental consanguinity is strongly associated with reduced ovarian reserve.

In recognition of the elevated genetic risks to children born of past consanguineous marriages many Muslim countries have introduced mandatory genetic testing before marriage in order to identify the genetic risk of every potential couple. Iran introduced testing in 1997, Saudi Arabia in 2004 and the United Arab Emirates in 2011. This in itself is significant as scientists from countries without a history of cousin marriage tend to assume that the knowledge of harmful effects of cousin marriage will prohibit or discourage the custom, however, in the Middle East this custom appears to remain strong and is further enabled through genetic testing.

In countries where marriage and family are of central importance, both socially and religiously, infertility can lead to couples being willing to take medical risks in order to

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237 Inhorn, *The New Arab Man*. 403


239 Ammar Alhosain, "Premarital Screening Programs in the Middle East, from a Human Right's Perspective," *Diversity & Equality in Health and Care* 15 (01/01 2018), https://doi.org/10.21767/2049-5471.1000154.

240 The question whether PGD should be used to enable cousin marriage led to heated discussions at a conference in London led by CIM The Centre for Islam and Medicine on the topic of *Genome Editing* in 2016/17
bow to societal and religious expectations. The problems of *halakhic* infertility saw Jewish women exposed to high doses of hormones in order to shift their fertility window, to conceive when ritually kosher. Amongst Muslim women the pressure to conceive is as acute, but no medical intervention appears in the literature that is comparable to *halakhic* infertility, bar the desire to ritually wash. Hymen reconstructive surgery is common; it appears religiously prohibited in Iran and Saudi Arabia and religiously endorsed in certain circumstances in Egypt, but whilst this surgery may serve as an example of *Sharīʿa* impacting on the medical choices of young Muslim women, it does not aid fertility.\(^{241,242}\) Amongst men however, the choices made by men to extract sperm by *Testicular Sperm Extraction* (TESE) is comparable. One Muslim man interviewed by Inhorn appears even more willing to engage in serious medical procedures to fulfil religious obligations. Infertile and consequently divorced, this Muslim man rejects all donor sperm, because donor sperm is prohibited by the Imam whose rulings he follows. He hopes therefore for an operation that would provide him with donated testes, that could produce sperm in his body and enable him to marry and reproduce. The donation of testes is not routinely performed in most countries, because the testes will continue to produce sperm with the genetic blueprint of the donor, producing thus sperm for the recipient, who to all intents and purposes could simply use donor sperm and avoid surgery and a life on medication.\(^{243}\) It is unclear from the interview, whether the hopeful young man is aware that even donated testes would not produce children which are genetically his, but the account never-the-less gives a meaningful insight into the influence which religious rulings have on the medical choices of young Muslim couples.\(^{244}\)

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\(^{244}\) Inhorn, *The New Arab Man*. 

116
The era of the Co-mufti: productive and strained relationships between scientists and religious scholars

Dr. Tsipy Ivry described the triadic relationship between Rabbis, patients and fertility doctors in Judaism and Mohammed Ghaly provides the counterpart in his assessment of what he terms the modern co-muftis in Islam. As in Judaism, the necessity for religious scholars to educate themselves, by consulting with scientists, is almost unchallenged in Islam. As mentioned in the previous Chapter, Ghaly gives examples of fruitful collaboration in cross disciplinary councils, but he also describes how difficult it becomes when either jurist or scientist ventures into the domain of the other and demands authority. According to Ghaly the *ijtihad* (legal decision-making process) for *nawāzil* (novel bioethical challenges), from an Islamic religio-ethical perspective requires a twofold approach. Firstly, the informative approach requires the religious scholar and *mufti* (jurist) to acquire *tašawwur șahîh* (a precise perception) of the bioethical question which he is deliberating on. This requires a correct understanding of *fahm al-wâqi’* (the subject matter) and a study of *taḥqîq al-manâṭ* (the underlying principles of the issue at hand). This knowledge should be supplied by the scientists. For a *mufti* it is not unusual in classical or modern Islam to consult experts from outside ʿ*ulûm shar’iyya* (the religious sciences), but after sharing their expertise the role of the experts ends, it does not traditionally stray into the field of legal consultations.245

Today however, in the bioethical councils, the role of the scientist is metamorphosing. Many of the most influential scientists at the councils, have some degree of religious legal training. This aids their ability to understand the religious and legal context, but it also blurs the authoritative process of the legal debate, when scientists demand that their own legal interpretations be heard.

During the IOMS meeting on AIDS, the Syrian physician Haytham al-Khayyāṭ spoke about those who “have a share of knowledge in medicine and also a share of knowledge in Islamic jurisprudence” (*naṣīb min al-ṭibb wa-naṣīb min al-Fiqh*). Al-Khayyāṭ himself would fall into this category of physicians who are well-versed in the Islamic tradition in general. He studied *Sharī‘a* along

245 Ghaly, "Biomedical Scientists ". 286-311
Because scientists initially have a better understanding of the bioethical subject matter, it often falls to them to decide the agenda of the collective *ijtihad* and the questions which are to be discussed. This increases the influence of the scientist beyond that of a consultant to that of a legal co-decider. The power in choosing the agenda is demonstrated by the case of the physician Ḥassān Ḥāṭūt and his brother the cardiologist Māhir Ḥāṭūt who in the 1980's and 1990's convinced the bioethics councils of IOMS and IIFA to discuss the issues of human cloning although there was initially little enthusiasm from a number of religious scholars including Shaykh Yūsuf al-Qaraḍāwī. The reason stated for their reservation is insightful:\(^{247}\)

Hypothesising non-existent problems and then trying to forge Islamic perspectives on them has been seen as a notorious and abhorrent practice by many scholars. According to them, this practice wastes precious time that should be used to discuss already existing problems.\(^{248}\)

Despite these concerns the topic was ultimately discussed. The reason according to Ghaly was that the scientists' knowledge of the western academic world is viewed as highly authoritative.

This familiarity with and recognition from Western scientific academies give these biomedical scientists a certain credibility in the eyes of Muslim religious scholars, who believe that trustworthy and evidence-based science is to be found in these Western academies rather than in the Muslim world.\(^{249}\)

There thus exists a certain paradox, in that many of the bioethics councils have been formed specifically to find authentic Islamic answers to bioethical issues, but according to Ghaly in cases of a disagreement it paradoxically is the side which can

\(^{246}\) Ghaly, "Biomedical Scientists ". 299
\(^{247}\) Ghaly, "Biomedical Scientists ". 299
\(^{248}\) Ghaly, "Biomedical Scientists ". 301
\(^{249}\) Ghaly, "Biomedical Scientists ". 298
underpin their arguments to a greater extent with Western academic references which often persuades the majority.²⁵⁰

To demonstrate that his position was not “folktale”, al-Mahdī appended to his paper a bibliographical list of twenty-one sources, including papers published in reputable journals such as The Lancet…To my mind, al-Mahdī did not parade this list for the benefit of his colleague Ḥassān Ḥatḥūt in the first instance, but rather for the participating religious scholars, even though most of them would have no access to the content of these papers, for linguistic reasons if nothing else. Al-Mahdī wanted to manifest his familiarity with the biomedical sources produced by Western academies in a bid to win Muslim religious scholars’ hearts and minds.²⁵¹

The quote above refers to an argument between two scientists, the gynaecologist Hassan Hathut and the neurologist Mukhtār al-Mahdī. The discussion concerned the correct definition of the beginning of human life, which is pivotal for the debate on what is permissible from an Islamic legal standpoint in the fertility debate. Both scientists aimed to persuade the religious scholars to back their definition of the beginning of human life.

Al-Mahdy gave his interpretation of the most frequently cited religious source, the tradition of Ibn Masʿūd, which describes the first forty days in a mother’s womb:

The creation of one of you is assembled in his mother’s belly in forty days, then he becomes a clot of congealed blood (ʿalaqa) for a similar period, then a little lump of flesh (muḍgha) for a similar period. Then Allah sends an angel who is ordered to write four items. He is ordered to write down his [i.e., the new creature’s] deeds, his livelihood, his date of death, and whether he will be blessed or wretched. Then the soul is breathed into him.²⁵²

²⁵⁰ Ghaly, “Biomedical Scientists “. 286-311
²⁵¹ Ghaly, “Biomedical Scientists “. 298
Al-Mahdi presented an interpretation to this passage which was entirely novel to all the religious scholars and according to Ghaly quite peculiar. He argued that rather than interpreting the three stages of early gestation as three distinct periods of forty days each (as is the usual reading of the tradition), the stages should be interpreted as overlapping. 120 days thus becomes 84 days according to Mahdi’s interpretation which bases this insight on two hadiths by al-Bukhārī and Muslim. Whilst none of the religious scholars initially criticised Mahdi for his approach, other scientists such as the cardiologist Aḥmad Shawqī Ibrāhīm and two gynaecologists Ḥassān Ḥaṭṭūt and ʿAbdallāh Bāsalāma gave opposing arguments for the definition of early life, also basing their opinions on personal interpretations of the Qur’an and Sunna. When the final draft of the discussions was to be published the scientists and religious scholars struggled to find consensus. The remark of the religious scholar Shaykh Yūsuf al-Qaraḍāwī demonstrates the somewhat fraught relationship:

I kindly ask Ḥaṭṭūt and brother Dr. al-Qāḍī not to pressure us [namely religious scholars] more than this. For three days now, they have been trying to force their opinion [upon us]. We have made some concessions, and now they have to make concessions too.253

This incident demonstrates why a number of scholars, such as the Yemeni religious scholar ʿAbd al-Qādir al-ʿAmmārī, object when scientists overstep their role as advisors, because this confuses the traditional approach of ījīhād.254 A further example demonstrates the interaction between scientists and religious scholars in a very positive light. During the 1989 session of IOMS the topic of organ donation focused amongst other topics on the question of donated testicles. As we have witnessed in the former section on infertility, Muslim men have a dire need for their own sperm and are willing to undergo significant surgery to enable their bodies to produce sperm. During the debate the Jordanian religious scholar Muḥammad al-Ashqar submitted a paper in which he permitted the transplantation of testicles as a religiously acceptable cure for male infertility. Against the objection that this may lead to ikhtilāṭ al-ansāb (a mixed lineage) al-Ashqar argued that if the testicles were procured from a dead body, it was inconceivable to argue that the wife of the

253 Ghaly, “Biomedical Scientists “. 309
254 Ghaly, “Biomedical Scientists “. 306
recipient was impregnated by a dead man, thus no illegitimacy could occur. Al-Ashqar further deliberated on the ownership of the organs and decided that once transplanted an organ belonged legally to the recipient and not the donor; this was enforced by his example that the recipient not the donor would feel pain if the donated organ was injured.

The sperm produced by the transplanted testicles originate in the recipient’s body and not anywhere else…. Thus, al-Ashqar concluded, transplanting testicles is permitted because the recipient of the testicles is the genetic and legal father from the Islamic point of view.255

During the IOMS discussions around ten biomedical scientists deliberated with Al-Ashqar because they felt his legal interpretation rested on a misconception of medical facts. They explained that the spermatogenic cells which produce sperm are developed when the man is still a fetus in the womb. During puberty these cells begin to mature and produce sperm, but a recipient of donor testicles will never be able to produce his own sperm as the genetic code of the donor will always be reproduced by the recipient and neither (in response to Al-Ashqar’s question) can testicles be ‘emptied’ of donor sperm. After long discussions all religious scholars present concluded that the paper permitting testicular donations had been based on an erroneous understanding of the science and concluded with Al-Ashqar that the permission to use donated testicles should be withdrawn. In this way the collaboration between scientists and religious scholars can be seen as a positive example of the joint *ijtihad*, even though the case of the Muslim man wishing for testicular transplants (which was mentioned above), demonstrates that this legal opinion is not known or accepted across all Muslim communities.256

Ghaly’s paper demonstrates persuasively that scientists are gaining in influence and are deeply involved in steering legal opinions on bioethical matters. Comparisons to the triadic relationship between doctors, patients and Rabbis may be difficult, but it does not appear as if the patients are part of this decision-making process to the extent that they appear to be in Judaism. It also appears from this research that in

255 Ghaly, “Biomedical Scientists ”. 304
256 Ghaly, “Biomedical Scientists ”. 306
the Jewish triadic relationship the power balance appeared somewhat in favour of the Rabbis, whereas Ghaly’s research suggests that in the Islamic bioethics councils the power balance appears in favour of the scientists who at times steer the discussions until they reach the consensus which they desire.

Illegitimacy and adultery, the importance of an untainted lineage in Islam

In Judaism the status of being a mamzer, was often translated as a bastard, but this was misleading because the definition of adultery and illegitimacy was found to differ in Halakhah from that found in British common law. In Judaism the status of mamzerut carried grave consequences for a child and the desire for parents to avoid this status was found to significantly influence fertility treatments in Israel.

In Islam the question of illegitimacy is equally pertinent, the definition of illegitimacy varies from that of Halakhah and is closer to that found in common law, but as in Judaism the consequences for an illegitimate child are grave.

Professor Ebrahim Moosa of Notre Dame University, defines legitimacy according to Shari'a as:

> The conception of a child during the lawful wedlock of its parent.

A child born outside wedlock is the product of fornication (zina) and therefore suffers certain legal disabilities.

Whilst Judaism used the term mamzer, there does not appear a similar term in Arabic to describe the child. This demonstrates that the focus in Islamic law is more on the prohibition of committing zina than on the consequences. Never-the-less, the highly influential 12th century legal manual Al-Hidaya describes how a child born of zina is illegitimate (in translation) and is one of the least favoured to lead prayers:

> If two persons are equal in terms of knowledge, then, the best of them in recitation (is to lead the prayers) .... If they are equal..., then, the one who is the eldest.... Giving priority to a slave is disapproved, as he is not free to devote time to knowledge...and the illegitimate person born out of zina,

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257 Moosa, "The Child ". 171-181
because he does not have a father who can supervise (discipline) him and consequently ignorance overtakes him…. If, however, they are given preference, the prayer is valid, due to the words of the Prophet (God bless him and grant him peace).²⁵⁸

In Judaism the locus of a child in the womb of a Jewish mother was of utmost importance for the Jewish status of the child and the distinguishing factor for adultery and illegitimacy was that the mother was a married Jewess, who had birthed a child fathered by a Jewish man who is not her husband. In Islam the focus appears predominantly on the paternal line within marriage. Legal paternity is defined by acknowledgement of fatherhood and by a valid marriage contract between the parents of a child. It is this legal paternity which gives the child access to the legal bond of its father and its father's blood relatives.²⁵⁹

According to Moosa, illegitimacy disadvantages the child considerably; it can cause shame and social stigma to the child and its relatives. It can affect a child’s rights of inheritance and permission to lead prayers at the mosque.²⁶⁰ According to al-Sahfi’i, founder of the Shafi’i school of law, an illegitimate child’s legal bond to his father is so insignificant that a man could technically marry his illegitimate daughter; two halfsiblings who share the same father (from one licit and one illicit union), could also technically marry each other. Other schools disagree with this ruling but it demonstrates the importance of a legally accepted paternity, as this guarantees the avoidance of incest and supports traditional family bonds.²⁶¹

The Islamic legal maxim al-walad li‘l-firāsh (the child belongs to the marriage), implies that legitimacy of the child is linked to the ownership of the marriage bed. The husband is the owner of the marriage bed, this means that a husband is the legal father of any child birthed by his wife. Only if the mother is not a married Muslim woman, she becomes the rightful owner of her bed and by implication the child. In this case, similarly to the child born of the Jewish mother and the gentile


²⁵⁹ Moosa, "The Child ". 171-181

²⁶⁰ Moosa, "The Child ". 171-181

²⁶¹ Moosa, "The Child ". (Shafi’i died 820 CE)
father, the child has no legal father, although in Judaism this unmarried status did not lead to the status of being a *mamzer*, whereas in Islamic law the birth of a child from any unmarried parents constitute illegitimacy with all its negative implications.\(^\text{262}\)

Islamic legal schools differ in their interpretation of when a couple should have married in order to guarantee a legitimate birth. Only a minority of Hanafi scholars consider a marriage contract sufficient to legitimise a birth irrespective of when the marriage and conception occurred. According to Moosa the possible time of conception in classical Islamic law allowed up to seven years of gestation (presumably seven years after the death of a husband). Today any child born 6 months after the parents are married and up to two years after a husband has died or divorced the wife is usually considered a legitimate child.\(^\text{263}\) As in Judaism, the somewhat generous rulings are understood in terms of dealing legally in a humane way with children who can otherwise be ostracised by society. Jurists may thus wish to discourage *zina* and promote marriage, but at the same time they wish to avoid children being labelled illegitimate where possible.\(^\text{264}\)

Whilst Moosa concludes that the issue of illegitimacy raises the crucial question of necessary legal reform, Professor Abdulaziz Sachedina describes the right of a child to an untainted *nasab* (lineage) as one of the main purposes of *Sharīʿa*. Rather than questioning the legitimacy of the negative consequences of illegitimacy, Sachedina views proper lineage as essential from an Islamic, as well as a Muslim cultural point of view. *Urf* (custom) and *Sharīʿa* are united in their desire to protect a child from social and religious stigma.\(^\text{265}\) Modern fertility treatments in particular need to be evaluated as to their effects on lineage and for this reason Muslim jurists have made a great distinction between natural and artificial procreation. If only the gametes of a married couple are used during artificial insemination or IVF, then the lineage of the child to its parent and its blood-relatives remains secure, if however, donor gametes are used, then lineage is denied:

\(^{262}\) Moosa, "The Child ".
\(^{263}\) Moosa, "The Child ".
\(^{264}\) Moosa, "The Child ".
\(^{265}\) Sachedina, *Islamic Biomedical Ethics*. 103
If the gametes that are fertilized in IVF clinics cannot be related to a married couple, then the Sharī’a denies the lineage to the child, unless the identity of the donors is known. In that case, the child is related to the donor of the sperm.266

As mentioned by Moosa in his definition of illegitimacy, the greatest concern of the jurists is the avoidance of zina, which is one of the transgressions which are classed as hudud. Hudud applies to transgressions that are regulated by the founding texts of the Qur’ān and Sunna. Wael Hallaq defines hudud as:

Literally, the limits described by God, and technically offenses whose punishments are fixed and are God’s right.267

Hallaq defines the classical definition of zina as sexual intercourse which:

(a) Involves actual penetration, (b) by a person of full legal consequences, (c) outside a man’s right to such intercourse, (d) without there being any doubt whatsoever (shubha) with regards to these rights, even when defined broadly.268

Hudud offenses can carry extreme sanctions and thus in the case of zina great weight is placed on securing that a number of witnesses swear under oath that they have witnessed the full sexual act. Severe punishments are given to false witnesses and any admission of guilt must be given four times by a person of age who is free, compos menti and without compulsion.

Generally, married couples who are convicted of zina are punishable by stoning and their marriages are annulled (according to some jurists). The punishment for unmarried adulterers is a hundred lashes (plus banishment for one year, according to some jurists).269

266Sachedina, Islamic Biomedical Ethics. 103
267 Hallaq, Shari’a. 310
268 Hallaq, Shari’a. 312
269 Hallaq, Shari’a. 312
Whilst even a declaration that the adulterer mistook his lover for his wife in the dark, should count as sufficient *shubba* (doubt) to avert capital punishment, the role of *Sharīʿa* is not the same as western penal or criminal law. Within a belief system of an omniscient God the fear of *zina* has consequences in the afterlife. The avoidance of adultery is thus central to the debate about donor gametes. Albeit, that classical Islamic jurists defined adultery as the act of penetration, many jurists regard childbirth out of wedlock as proof that *zina* has taken place, this is why the charge could apply even to IVF pregnancies. The different juristic opinions on the consequences of using donor gametes will be discussed in detail in Part III, but it is important to note at this point, that four main areas of concern exist for Muslim jurists, in their deliberation on any kind of assisted reproduction.

The first concern is that of lineage and paternity if the husband is not the biological father, the second is whether the placing of sperm from a man, other than the woman's husband, into the womb of a wife, constitutes adultery, if no sexual act has taken place. Both have already been touched upon, and they are both concerned with donor sperm.

The third and fourth concern exists even when the couple's own gametes are used and are not part of the lineage debate, but part of the wider ethical deliberation on Muslim ethics; they are the concerns of modesty and of human intervention in God's Creation.

Any kind of medical infertility treatment involves strangers coming into contact with the *private parts* of both the husband and the wife, even if these strangers are medical professionals, the third concern is thus one of modesty:

While artificial insemination with husband’s sperm (AIH) has been mostly endorsed as permissible by most Sunnī and Shiʿite scholars, the traditions that prohibited depositing a stranger’s sperm in a woman’s vagina, in addition to the Qur’anic concern with the “guarding of the private parts” by abstaining
from sexual relations outside a marriage, raised serious concerns about the morality of asexual in vitro reproductive procedures.\textsuperscript{270}

This concern is rooted in the Qur’anic directive which is usually interpreted as referring to illicit sexual relations:

> Prosperous are the believers who … guard their private parts (furūj) [by abstaining from sexual relations] except with their marriage partners …

(Q. 23:1) \textsuperscript{271}

These legal and social demands for modesty thus raise concerns in countries where too few fertility experts and gynaecologists are women to ensure that women patients will only expose themselves to fellow women. As in Judaism, the fourth area of legal debates amongst Muslim jurists concern the moral and legal consequences of the infertility treatments themselves. This concerns the human intervention in treating the ‘God given’ state of infertility and the selection and deselection of human life in its embryonic form, including its destruction. These concerns will be discussed in Part III.

**Conclusion**

Chapter Four has demonstrated how the choice of young Muslim couples in the Middle East to conceive fewer children and the growing rates of infertility amongst these couples, has resulted in dramatically falling birth rates across the region. Despite this, the region is still classed as highly pro-natalist, because couples do still wish to conceive at least one or two children. In light of higher rates of genetic predispositions, couples are routinely accessing genetic testing facilities to conceive healthy children. Infertility presents a high social stigma, as does the use of donor sperm in cases of male infertility, because the paternal lineage is considered important. As in Judaism the avoidance of the status of illegitimacy is prioritised although it does not appear to lead to specially adapted medical procedures apart from male patients who may opt for sperm aspiration. As in Judaism the relationship

\textsuperscript{270} Sachedina, *Islamic Biomedical Ethics*. 110

\textsuperscript{271} Sachedina, *Islamic Biomedical Ethics*. 106
between religious authorities and scientists who are debating the legality of new bioethical issues can be fraught. Tensions are especially acute when any one authority extends their influence beyond their acknowledged role. Whilst in Judaism the Rabbis appeared more influential, in the Muslim Councils scientists with some legal training and Western scientific knowledge appeared to steer the debate. The collective *ijtihad* of the councils has however also enabled Muslim bioethicists to free themselves from classical rulings that were based on an outdated knowledge of science, enabling a well-informed approach to modern fertility problems. Unlike in Judaism where rulings were often tailored to individual couples, the approach in Islam appears less tailor made and patients do not appear part of the debate.
Part III

Legal Debates and Rulings and their Implications

Chapter Five: Halakhic Debates and their Implications in Israel

First Reproductive Technology: Artificial Insemination with Donor Sperm

Chapter Six: Halakhic Debates and their Implications in Israel

Second Reproductive Technology: In Vitro Fertilisation

Chapter Seven: Halakhic Debates and their Implications in Israel

Third Reproductive Technology: Pre-Implantation Genetic Diagnosis and the Implications for Human Germline Genome Editing of Embryos during IVF

Chapter Eight: Islamic Legal Debates and their Implications in the Middle East

First and Second Reproductive Technologies: Artificial Insemination with Donor Sperm and IVF in Sunnī Islam

Chapter Nine: Islamic Legal Debates and their Implications in the Middle East

First and Second Reproductive Technologies: Artificial Insemination with Donor Sperm and IVF in Shīʿa Islam

Chapter Ten: Islamic Legal Debates and their Implications in the Middle East

Third Reproductive Technology: Pre-implantation Genetic Diagnosis and the Implications for Human Germline Genome Editing of Embryos during IVF
First Reproductive Technology - Artificial Insemination with Donor sperm

As demonstrated in Chapter Three, concerning the birth of a mamzer, Orthodox Judaism insists on kosher lineage. Conception should be the result of sexual intercourse between husband and wife at a time when the wife is considered ritually pure to conceive. Artificial Insemination (AI), even with the husband’s sperm, replaces intercourse with the medical procedure of collecting sperm and mechanically inserting it into the woman’s womb, raising the question whether this conception sine concubito (without intercourse) constitutes kosher conception. Chapter Five will focus on the debate about donated sperm, whilst Chapter Six will discuss authorities who object to conception sine concubito with the husband’s sperm. In either case the collection of sperm is problematic because it is usually collected through masturbation, which is prohibited.272 The use of donated sperm undermines the halakhic commitment to a clear lineage. The biblical prohibition of incest and adultery must, therefore, be addressed when children are conceived through donor sperm.273

After initially discussing conception ‘sine concubito’ (without intercourse), the responses of Rabbi Moses Feinstein, Rabbi Joel Teitelbaum and Rabbi Immanuel Jakobovits will be discussed and compared. Each come from different communities

272 Genesis (38:9-10) 9 And Onan knew that the seed would not be his; and it came to pass when he went in unto his brother’s wife, that he spilled it on the ground, lest he should give seed to his brother. 10 And the thing which he did was evil in the sight of the LORD; and He slew him also. “Torah,” in Online Torah Hebrew/English (Mechon-Mamre). https://mechon-mamre.org/p/pt/pt0138.htm. This passage, known as the sin of Onan, is usually understood to forbid masturbation, because Onan wasted his seed, by implication the destruction of seed is usually prohibited by the poskim. This has led to numerous debates whether the sperm necessary for AI and IVF can be collected. Some authorities forbid it, others permit the collection of sperm if used for procreation, others legitimise donor sperm from gentile donors as the prohibition to masturbate is directed at Jewish men.

273 Responsa ZIZ Eliezer III #27 (published 1951) in Jewish Law, Elon ed. The command against adultery raises concerns about the use of donor gametes, it is derived from: Leviticus (18:20) And thou shalt not lie carnally with thy neighbour’s wife, to defile thyself with her. The source for the biblical prohibition against incest is: Leviticus (18:6) ‘None of you shall approach to any that is near of kin to him, to uncover their nakedness. I am the LORD’
that often had opposing philosophical responses to modernity. These diverging schools of thought continue in the fertility debate today and, for this reason, a detailed description of their background is given. The three rabbis fulfilled different roles in their respective communities and this too will be explored as it is important for the contextualisation of their response. Rabbi Feinstein permitted donor sperm from gentile donors on *halakhic* grounds, Rabbi Teitelbaum prohibited all artificial insemination on *halakhic* grounds whilst Rabbi Jakobovits allowed artificial insemination with the husband’s sperm, but opposed AID for moral rather than *halakhic* reasons.

**Scientific background**

Artificial Insemination (AI) is a medical procedure that involves injecting sperm from a husband, partner or donor with a pipette into the vagina or uterus of a female patient *in vivo* (literally in the living body). This is performed to create a density of sperm at the site of fertilisation. There are a number of reasons for AI, but the most common is that the sperm from the partner of the woman is not sufficiently abundant or agile to reach the site of fertilisation during sexual intercourse. When the sperm from the husband is used this is called Artificial Insemination Husband (AIH). Should the husband be infertile, then donor sperm may be used through Artificial Insemination Donor (AID). AI can, therefore, involve donor sperm, but not donor eggs. As sperm does not store well outside the body, only the development of a sperm-freezing technique in the 1950s meant that artificial insemination became a routine medical procedure, with donor sperm banks becoming commonplace from the 1970s onwards.

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Other reasons for using AI may include single women or same-sex couples who wish to use donor sperm, couples who for a variety of reasons cannot have vaginal intercourse or couples where the male partner is HIV positive and requires sperm washing in order to decrease the risk of passing on HIV.

The *halakhic approach to conception sine concubito*:

From a *halakhic* perspective, the legality of any fertility treatment rests on the initial question whether *Halakhah* recognises any conception *sine concubito* (procreation without sexual intercourse) and whether there are any classical sources that are relevant for the modern debate.

The second question is whether conception *sine concubito* is permitted when the gametes of the husband and wife are used (discussed in Chapter Six under IVF), or, by extension, when donor gametes are used. This leads to legal considerations about the consequences for the husband, wife, donor and potential child if artificial insemination has been performed, despite its prohibition.

The earliest Jewish source that considers conception *sine concubito* can be found in the Babylonian *Talmud*. In *Hagigah 14B* the question is posed to Ben Zoma whether a pregnant virgin can marry a priest:

> May a high priest marry one who has become pregnant [but claims that she is a virgin]? ... He replied ... "We consider the possibility that she may have conceived in a bath [in which semen has been discharged]."

This unusual passage is widely quoted and understood as an important story from the Rabbinic narrative, which demonstrates that *Halakhah* does recognise that procreation may occur without the sexual act. In essence a priest can only marry a virgin and the question addressed by Ben Zoma is whether the woman concerned can still be legally considered a virgin if she is found to be with child, but asserts that she is a virgin. The answer is that conception *sine concubito* is an accepted possibility.

Modern discussions of the medical likelihood of such virgin pregnancies appear misplaced here as the question is not whether the possibility could experimentally be proven or disproven today; even classical authorities make no attempt to suggest the likelihood of such a case. Instead, the text demonstrates that legal debates about conception *sine concubito* are found in the Torah literature. The *Talmudic*...

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276 *Jewish Law, Elon ed.* 625
discussions that follow these can help guide rabbis in their decision-making process today. This process harbours problems and scholars, such as Louis Newman and Edward Reichman, point to the difficulties of using classical texts that are based on pre-scientific understandings of fertility. Throughout antiquity the role of the male and female gametes in producing a child were poorly understood; many authorities dismissed the female contribution outright. Aristotle disputed the idea that women produced seed, Jewish authorities acknowledged the female seed, but did not necessarily attribute it with co-creating embryos. Nachmanides (Moses Ben Nahman 1194-1270) thus holds that:

Although it says “when a woman emits seed” …the implication is not that the fetus is made from the female seed. For even though the woman has ovaries (beitzim) analogue to the male (beitzei zahar) [testicles], either no seed is made there or the seed has nothing to do with the fetus.277

Legal principles that are generated by the classical sources should, according to Newman and Reichman, be contextualised to avoid wrong conclusions. This is in line with the legal debate mentioned in Chapter One concerning whether it is permissible to lend money to a widow and take her cloak, - because the literal meaning may change when the story is historically contextualised. The possible marriage of a pregnant virgin to a priest may be a sign of a patriarchal society that wishes to control the sexual behaviour of their women, on the other hand it may demonstrate the humanity of early halakhists, who needed a legal path to re-integrate into the community a vulnerable individual, who had fallen short of the moral and legal expectations of that community. As Chapter Two investigated the influence of the rabbis on the lives of women and on marriages today, so this narrative gives a window into the way Rabbis in the past interacted with their communities. Then, and now, the rabbis’ challenge is to uphold the necessary moral imperatives that define and secure the community, which is based on kosher procreation, without having to cast individuals out of their community. This moral

277 Ramban quoted in Reichman, “The Rabbinic Conception of Conception: An Exercise in Fertility.” 6

133
challenge will be discussed at greater length below in the moral response of Rabbi Jakobovits.

A further classical authority who discusses the possibility of conception sine concubito is Perez ben Elijah of Corbeil (died in 1295). In his halakhic work Haggahot Semak he discusses that:

…a woman may lie on her husband’s sheets but should be careful not to lie on sheets upon which another man slept lest she becomes impregnated from his sperm. Why are we not afraid that she becomes pregnant from her husband’s sperm and the child will be conceived of a niddah (menstruating female)? The answer is that since there is no forbidden intercourse, the child is completely legitimate (literally kosher) even from the sperm of another just as Ben Sira was legitimate. However, we are concerned about sperm of another man because the child may eventually marry his sister.\textsuperscript{278}

Three important legal concerns are touched upon in this passage: Firstly, as in the first passage, conception sine concubito is considered a possibility (in this case conception via soiled sheets). Secondly, the child is not a mamzer, although it may be a ben niddah, which is a child that has been conceived at the forbidden time of menstruation. As no intercourse has occurred the child is not marred by this fact. Whether or not this case can be applied to the status of children born through AI and IVF will be a point of legal dispute. The third point addresses the possibility of future incest (‘the child may eventually marry his sister’), which is of great concern in the debate surrounding donor gametes because of the fear that anonymity of sperm donors may result in siblings unknowingly marrying each other.\textsuperscript{279}

The mention of Ben Sira is particularly relevant, for his conception sine concubito was also an unusual one and is related by Rabbi Jacob Moellin Segal (1365-1427 CE). This classical source is part of the midrashic literature, which is not normally used as a source for legal debates. The use of this midrash, which is often referred to in the modern debate, demonstrates how difficult it remains to find suitable

\textsuperscript{278}Bleich David Rosner Fred, Jewish Bioethics (KTAV Publishing House, 2000). 127

\textsuperscript{279}Elliot Dorff, Matters of Life and Death, a Jewish Approach to Modern Medical Ethics, (Varda books, 2002). 49-50
precedents for modern medical concerns in classical sources. Ben Sira is said to have been conceived without sexual intercourse by the daughter of the Prophet Jeremiah (who incidentally lived centuries before Ben Sira) when she accidentally fell pregnant in a bath into which her father had emitted semen when he was coerced to do so by a group of wicked men.\footnote{Rosner Fred, \textit{Jewish Bioethics}. 128}

The legal concerns that the \textit{midrash} of Ben Sira’s birth addresses are the fatherhood of the Prophet Jeremiah, whose status as the \textit{halakhic} father of the child is not questioned in this source and the status of the child, who once more does not appear to be tainted. The question of who the \textit{halakhic} father and mother are when donor gametes are employed is a main theme in the bioethical debate today, which is why this thesis has elaborated on these foundational sources concerning conception \textit{sine concubito}. Having established that this concept is accepted in Judaism, the next line of enquiry examines the legal arguments for and against the use of donor sperm.

The \textit{halakhic} responses of Rabbi Moses Feinstein and Rabbi Joel Teitelbaum to AID

By the second half of the 20\textsuperscript{th} century donated sperm from sperm banks had become readily available and many \textit{halakhists} expressed grave concerns that the new fertility treatments would soon lead to the degradation of marriage; yet as early as 1959 Rabbi Moses Feinstein allowed the use of gentile donor sperm for Jewish women. This led to a well-documented dispute between Rabbi Moses Feinstein and Rabbi Joel Teitelbaum and their debate gives great insight into the different \textit{halakhic} approaches to artificial insemination.

Both rabbis were poskim (legal decisors) and authorities of a magnitude that, according to many \textit{halakhists}, is no longer in existence today. Both were born into highly respected Rabbinic families and trained as rabbis in Eastern Europe before the \textit{Shoah} and during the time of communist pogroms. Both eventually emigrated to America. They, therefore, represent a \textit{halakhic}, social and cultural link to a bygone era of unbroken tradition, which was destroyed almost in its entirety by Nazi
Germany and communist Russia. This link died with their generation and so their influence and memory remain strong even after their death.

Rabbi Moses Feinstein was born in Uzda near Minsk in 1895 and his piety and intellectual brilliance was recognised from an early age. As a young man, he became Rabbi of Luban where he remained as one of the last Rabbis in the area before the communist regime made his family's survival near impossible. His father Rabbi David Feinstein:

…descended from a lineage studded with brilliant talmidei chacharmin (honorary title of a great scholar lit. meaning student of sages) …. a direct descendant of the brother of the Vilna Gaon…Reb Moshe’s mother was of royal Torah lineage. Her father's family included Rabbi Yom Tov Lipman Heller and Rabbi Yechiel Halperin while her mother’s family traced itself back to Rabbi Yeshaya HaLevi Horovitz, the famed Shelah HaKadosh.281

Rabbi Joel Teitelbaum was born in 1887 into the Hasidic Teitelbaum dynasty, which was founded by his forefather Moses Teitelbaum (1750-1842). The family were Hungarian rabbis and Hasidic masters.282 In 1929 Rabbi Joel Teitelbaum became the Rabbi of the Orthodox community of Satmar and was smuggled into Switzerland and then Israel during the Second World War to preserve his life. After the war, Teitelbaum moved to Williamsburg, USA, and became the founder and first grand rebbe of the Ultra-Orthodox Hasidic Satmar dynasty. His community, which shuns the modern world, was described in Chapter Two.283

Feinstein and Teitelbaum were both known for their tremendous Talmudic and halakhic knowledge and widely revered, but their genealogy represents two different strands of Jewish East-European Orthodoxy that were, and continue to be, in conflict. The Teitelbaum dynasty were followers of the spiritual revivalist movement of Hasidism, which was founded by Israel Baal Shem Tov in the 18th century. Dismissed and feared by the traditional Orthodox community as mysticism of the

282 Jacobs, The Jewish Religion , 540
masses, the movement spread rapidly throughout Eastern Europe and attracted large numbers of followers, who revered their rebbe as a sacred bridge to the divine. The highly emotive Hasidic spiritual leaders called Tzadikim (Plural of Tzadik) formed heredity dynasties and courts of followers, who became part of the Ultra-Orthodox Hasidic communities we see today. Although Rabbi Feinstein’s maternal line includes the Hasidic Yeshaya HaLevi Horovitz, Feinstein’s paternal genealogy mentions the Vilna Gaon. Vilna continues to be remembered as ‘the Jerusalem of Lithuania,’ a term that invokes the memory of a Jewish community famed for its learned piety, wisdom and opposition to reform in which Rabbi Elija of Vilna, known as the Gaon, became a famous misnaged (opponent) of the Hasidic movement.

Rabbi Moshe Feinstein appears to have followed the Lithuanian tradition of his paternal line in upholding a traditional Orthodox approach to Halakhah. This decides legal matters in a rational manner, exclusively on the grounds of the most authoritative traditional legal sources, dismissing the large corpus of often emotive, non-legal sources from the later tradition. As rosh yeshiva (dean) of a prominent Orthodox Yeshiva Mesivtha Tifereth (Talmudic academy) in New York and President of the union of Orthodox Rabbis of America and Canada, Feinstein was considered the foremost authority in Halakhah for the whole of Orthodox Judaism, often referred to as HaGaon (the exalted one of the generation). On account of one infertile couple visiting him for advice on whether he would permit them to use donor sperm, Feinstein published his opinion in 1959 that, from a purely halakhic perspective, the use of sperm from a non-Jewish donor may be permissible. In doing so, Feinstein differed with the majority of poskim of his time who had ruled against AID. Most rejected AID on the grounds of adultery (because a woman was being impregnated with the sperm of a man other than her husband’s) and on the grounds of unclear lineage, which could lead to the child being a mamzer. They also objected on grounds of potential incest - because donor sperm could lead to future incestuous relationships between half siblings. Feinstein now ruled that gentile sperm was

284 Jacobs, The Jewish Religion 218-223
285 Jacobs, The Jewish Religion 165
permissible for AID because adultery, by *halakhic* definition, involves a Jewish man and a married Jewish woman:

A child born from the sperm of a non-Jew ... even as a result of sexual intercourse, is not a *mamzer*...Therefore, in a case of extreme urgency ... there is grounds to permit artificial insemination, but only with the sperm of a non-Jew. 287

This opinion caused such outrage when it was published that Rabbi Feinstein was persuaded to withdraw his statement although he later repeated and defended it.

One of his fiercest critics was Rabbi Teitelbaum, who not only disputed Feinstein’s permission to use gentile sperm, but condemned the reductionist *halakhic* methodology that had been applied. According to Teitelbaum, Feinstein’s arguments use only a small number of highly authoritative texts that give Feinstein the flexibility to be permissive towards gentile donor sperm. However, in not acknowledging the weight of the moral tradition of *Halakhah*, Feinstein was effectively distorting the law through legal positivism.

...there is no scholar in our time who is able to fathom the true meaning of the *Talmud* without the aid of the *gaonic* commentaries.288

The *Gaonim* were the sages of the Babylonian exile (589 CE-1038 CE) and are revered as interpreters of the age that went before them.289 Teitelbaum raised an important point in arguing for the value of the chain of traditional interpretation as the only way to access the true meaning of a classical text, which is held against the opposing position that the true meaning of a text becomes increasingly distorted through consecutive interpretations.

Adultery, Teitelbaum thus argued, could not be dismissed on purely legalistic, technical and rational terms as an act that did not count if the man was gentile, nor

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287 Responsa Iggerot Moshe, EH #71 (published 1959) in *Jewish Law*, Elon ed.
288 Teitelbaum in Daniel B. Sinclair, *Jewish Biomedical Law*. 81
289 Yosef Eisen, “Overview of the Geonic Era,.”
could the sperm of a gentile be considered a neutral product that fathered children who were legally fatherless. Instead, the teachings surrounding conception and adultery had to be considered as a whole, which includes the mystical understanding of Halakhah and incorporates the insights of the Zohar (foundational literary source of the Kabbalah). 290

Teitelbaum held that:

In truth there are many more hidden reasons (against adultery) than revealed ones and they are only known to the mystics.291

Only an interpretation that acknowledged the additional sources of tradition, all of which warned of the dangers of incest, family erosion and moral decline, could lead to an authoritative answer, according to Teitelbaum.

.. the correct approach is to exercise great caution before permitting any course of action which might even conceivably constitute the crime of adultery.292

Furthermore, a distinction needed to be made between the passive fertilisation of women through bathwater or bedsheets and the actively pursued fertilisation of women during AID. In all his arguments it can be seen that Teitelbaum follows the Hasidic tradition, which grants a high authority to Kabbalah (the Jewish tradition of mystical interpretation of Torah) and the whole of the classical tradition.

Judaism has a long tradition of Kabbalah and Rabbi Jacobs in his book, A Tree of Life, highlights the tension that has existed since the Middle Ages between rabbis who allow mystical texts (first and foremost the Zohar) to be consulted in legal decision making and those who reject it outright. Maimonides (1138-1204) is cited as the most influential authority who rejects Kabbalah or any prophetic insights for legal decisions. As discussed in Chapter One, the concept that the Torah is not in Heaven

290 Daniel B. Sinclair, Jewish Biomedical Law. 81-85/ Kabbalah is the name of the mystical tradition of Judaism.
291 Daniel B. Sinclair, Jewish Biomedical Law. 82
292Daniel B. Sinclair, Jewish Biomedical Law. 84
demands, according to Maimonides, that *Halakhah* is strictly decided upon by the opinion of the majority of the *poskim* in accordance with the *Talmud* and accepted legal codes.\textsuperscript{293}

If a thousand prophets all of the rank of Joshua and Elijah, advance a certain theory and a thousand and one sages hold the opposite opinion, the majority opinion must be followed.\textsuperscript{294}

Jacobs suggests that Maimonides was influenced in his vehemently rational approach by the Islamic culture that surrounded him, which rejected any prophetic inspiration after Prophet Muhammad. Never-the-less many eminent rabbis from the Middle Ages onwards, beginning with Jacob of Marvege, did allow *kabbalistic* ideas to be incorporated into *Halakhah*. Generally, the rule was followed that mystical insights through dreams, mystical texts or other means could only inspire the rabbis to decide which *halakhic* opinion to follow if two opinions were in conflict. If *Kabbalah* disagreed with the *Talmud* or earlier *halakhic codes*, then *Kabbalah* could not be followed, but if *Kabbalah* provided answers to questions that were not covered by the *Talmud* or the *codes*, then *Kabbalah* could be followed.

In the case of Artificial Insemination, it is disputed whether the *Talmud* provides guidance for modern infertility treatments, depending on whether analogies between bedsheet and bathwater inseminations are accepted. However, according to the Vilna Gaon, there could never be a real conflict between the *Zohar* and the *Talmud*, and if they appeared to be in conflict, either must have been misinterpreted. The Gaon, therefore, always followed the *Talmud*, because he saw no conflict between the two approaches. The only time he is said to have followed the *Zohar* was when the *Zohar* was stricter. This is crucial for understanding the conflict between Teitelbaum and Feinstein because, for the *Kabbalists* the *Kabbalah* began to represent the soul of Torah. Although the Vilna Gaon was an opponent of *Hasidism*, the desire to do more than the *Talmud* demanded was taken up by the *Hasidic* movements of whom Teitelbaum is a representative. These *Kabbalists* began to see

\textsuperscript{293} Jacobs, *A Tree of Life*. 59-72

\textsuperscript{294} Jacobs, *A Tree of Life*. Maimonides in Jacobs, 60
every action by humans as a cosmic action that affected the upper world or heavenly realm:

Since the *kabbalistic* view is that each of man’s deeds has a cosmic effect – influencing the ‘upper worlds’ for good or for ill, promoting or frustrating the flow of divine grace – the whole of the *halakhic* discipline with its ‘dos’ and its ‘don’ts’ becomes a mighty instrument of cosmic significance. ²⁹⁵

According to Jacobs, the desire to please God and fulfil the *mitzvot* (Commandments) to the utmost of what is humanly possible has meant that some actions that are voluntary acts of piety, according to Orthodox interpretation of *Halakhah*, have become definite obligations in Hasidic circles. ²⁹⁶

In light of this Hasidic zeal to please God and the fear of cosmic effects due to human actions, Teitelbaum’s vehement rejection of Feinstein’s *halakhic* argument can be understood. Teitelbaum chooses utmost caution beyond the rational understanding of man; whilst Maimonides’ rejection of any non-legal sources lives on in Feinstein, who dismissed his critics and countered that, in these modern matters, legal certainty could only be achieved through the study of rigorous objective *halakhic* principles and sources. According to Feinstein, leniency based on *Halakhah* should not be declared false because it is deemed un-traditionalist:

> All my opinions are based solely upon the knowledge of the Torah and are completely free of any external ideas. For the laws of the Torah are true whether their effect is to be strict or to be lenient. There is no *halakhic* validity whatsoever in external ideas or inclinations of the mind, even if they lead to a strict ruling. The idea that a strict result is necessarily purer and more holy than a lenient one is false. ²⁹⁷

Feinstein decides to *halakhically* dissociate the sexual act from the procreative act:

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²⁹⁵ Jacobs, *A Tree of Life*. 64
²⁹⁶ Jacobs, *A Tree of Life*. 73
²⁹⁷ Feinstein in, Daniel B. Sinclair, *Jewish Biomedical Law*. 84
Inasmuch as it is sexual intercourse that I proscribed, the prohibition does not apply to artificial insemination where there is no intercourse, [such insemination] is neither incest nor adultery. It follows that a child born from this procedure is not a mamzer; that status can result only if there has been sexual intercourse.298

Feinstein’s argument that the illicit act of adultery requires sexual intercourse was shared by a number of poskim including Rabbi Ben Zion Uziel, Rabbi Shalom Mordecai Schwadron, Rabbi Aaron Auerbach and Rabbi Aaron Walkin and is based on the sources mentioned above concerning conception sine concubito. Many Hasidic and non-Hasidic poskim, however, continued to agree with Teitelbaum that a distinction has to be made between active and passive insemination without intercourse. The most prominent rabbis who considered AID adultery and the child a mamzer, were Rabbi Eliezer Waldenberg (whose opinion will be elaborated on in the next chapter), the Ultra-Orthodox Rabbi Yizhac Yaakob Weiss and the kabbalist Rabbi Ovadia Hedaya.299

Feinstein’s opinion surprises on a number of levels as he appears to suggest that through AID even incest is of no concern. Although Feinstein accepts that a child born through AID may unwittingly marry a sibling in the future, he reasons that because Jews are likely to marry within the Jewish community this concern is limited to sperm from Jewish donors and as Jews are unlikely to donate sperm anonymously, the event is unlikely. This argument would be undermined if the Jewish woman were a convert. Whilst not stated as such, the sources speaking of ‘bathwater or bedsheet’ conception also underpin Feinstein’s decision that no incestuous relationship can occur during AID because of the tale of the birth of Ben Sira mentioned above. This does, however, lead to potentially troubling conclusions if this ratifies artificial insemination with donors who are genetically closely related. On the other hand, modern Judaism is so adept at genetic screening and so aware of the genetic consequences of consanguine unions that this danger is unlikely not to be acted upon.

298 Jewish Law, Elon ed. 632
299 Rosner Fred, Jewish Bioethics.
Feinstein’s lack of concern for a clear genealogy is extremely surprising considering the importance of lineage in Judaism which was demonstrated by Feinstein’s and Teitelbaum’s own genealogy. As discussed above, the fear of producing a child, who carries the status of a *mamzer*, continues to be of very real concern in Israel today. Feinstein, however, classes gentile sperm in a neutral category and suggests that, in the case of its use, the child may follow the genealogy of its Jewish mother. In effect the child is fatherless. Even half-siblings, who are related through a gentile sperm donor, could theoretically marry from this *halakhic* perspective, which once more is a concern from a modern genetic perspective.

Teitelbaum addresses these issues by stating that, even in *Talmudic* times, the likelihood of children being conceived through semen on bedsheets and subsequently marrying their half-siblings was extremely remote. Nevertheless, the fact that the sages consider the matter worthy of legislation demonstrates that, in matters of *yichus* (family purity), the house of Jacob must be protected from contamination, even against the *halakhic* opinion of the majority. Teitelbaum makes a covenantal objection to AID, in that he follows the commentary of Nachmanides (1194-1270), who interprets the prohibition of adultery in Leviticus as a prohibition against producing seed or offspring with a confused lineage, the children of which would be *mamzerim*. According to Rashi (1040-1105), *mamzerim* could be rejected from the covenant by the divine spirit.

Feinstein dismisses the objection that the Divine Spirit will not rest on those with uncertain genealogy because gentile sperm does not lead to an unclear lineage. The child simply has no *halakhic* father and his status follows that of his mother.

Therefore, the argument that the Divine Spirit will not rest on such a child is misplaced. The verse “[To be a God to you] and your offspring to come” signifies that the Divine Spirit rests only on those whose genealogy is certain. And, in our case the child’s genealogy is not doubtful but certain, for it is certain that he is considered to have no father. The verse applies only to the

301 Daniel B. Sinclair, Jewish Biomedical Law. 81,82
situation where a child’s genealogy follows the father, but the identity of the father is unknown.\textsuperscript{302}

Following the legal principle that, in the case of ignorance, \textit{Halakhah} follows the \textit{likelihood of the majority}, Feinstein argues that it is unlikely even when the origin of the sperm is unknown, that the sperm donor is Jewish [because the majority of sperm donors are not Jewish] and, even in the event that a donor was Jewish, it is unlikely that the child will marry his or her half-sibling, so the concern is dismissed. The status of \textit{mamzerut} is further dismissed because Judaism does not declare a foundling a \textit{mamzer}, even if their lineage is clearly unknown.\textsuperscript{303}

As artificial insemination with a donor will lead to a child who is considered the husband’s child by the community, Feinstein relies on the truthfulness of the mother to disclose this fact should her husband die and she require release from the biblical system of levirate marriage.

\begin{quote}
…therefore, with regard to the widow requiring \textit{halizah} (the biblical system of levirate marriage), in view of the fact that it is known that the husband is not the child’s father, she will know that she requires \textit{halizah}, and she will not remarry without \textit{halizah} if the husband should die.\textsuperscript{304}
\end{quote}

The concern here is that if a man dies without offspring, levirate marriage enables him to fulfil his biblical obligation to be fruitful through a brother marrying his widow (the case of Onan is such a marriage). If the widow does not admit that the child is conceived through AID then she would deny her dead husband this right. This is another objection to AID that Feinstein dismisses because it relies on her truthfulness. Feinstein thus concludes that the concerns of those \textit{poskim} who dispute him are unfounded and that the ‘purity and sanctity of the people of Israel remains intact.’\textsuperscript{305} In doing so Feinstein follows the axiomatic norm that in the case of doubt or, as in this case, in a highly unlikely scenario, the \textit{halakhist} can rely on the majority

\textsuperscript{302}Feinstein, resp. Iggerot Moshe, II, Eh 11 (1962) in \textit{Jewish Law, Elon ed.} 633

\textsuperscript{303} \textit{Jewish Law, Elon ed.}, \textit{mamzerut} is the legal status of being a \textit{mamzer}

\textsuperscript{304} \textit{Jewish Law, Elon ed.} 633

\textsuperscript{305} \textit{Jewish Law, Elon ed.} 633
or most likely scenario and rule accordingly. Feinstein’s response must be
historically contextualised as in the early days of fertility treatments and sperm
banks, the likelihood of incest may have been remote. Today, however, Feinstein’s
ruling is still highly authoritative, but the axiom has changed. There have been cases
where sperm donors have fathered hundreds of children, sometimes in the same
community; it would thus seem prudent to reflect on the likelihood of accidental
incest today, unless genetic testing against accidental incest also becomes a
common procedure before marriage. Feinstein did not advocate - or could have
imagined - the use of donor sperm on the scale that exists today; instead, he
reluctantly permitted the use of gentile donor sperm for one couple whose
desperation to conceive was hampered by a severely infertile husband. Feinstein
permitted, in this instance, the use of gentile sperm as a better alternative to Jewish
sperm. After much discussion with other poskim, Feinstein issued a final opinion on
the matter that is viewed by some scholars as a retraction, he writes:

But I never permitted [it) except in a case of extreme need, when the woman
was in great distress, for it is clear to all that only an expert Rabbi, great in
Torah and outstanding in teaching may judge such matters ... and because of
this [when it came to me] I forbade it, and G-d forbid that any Rabbi should
permit it based on my book. They are not fit to rule on an issue as grave as
this ... It is necessary to make a restriction so that under no circumstances
should anyone be lenient on this other than an outstanding Rabbi.307

Rather than retracting his halakhic reasoning, Feinstein is in fact clarifying that his
permissive ruling must not be used out of context and that every case must always

306 M. K. Nelson, R. Hertz, and W. Kramer, “Gamete donor anonymity and limits on numbers of
offspring: the views of three stakeholders,” J Law Biosci 3, no. 1 (Apr 2016),
https://doi.org/10.1093/jlb/lsv045.
accessed 18. Sept. 2020

307 Rabbi Yaacov Breisch, "Helkat (or Chelkat) Yaacov " 3:47 (Tel Aviv, 1992).
Rabbi Alfred S. Cohen, "Artificial Insemination"
" RJJ Journal of Halacha and Contemporary Society Volume 13 (2009), http:ll
download.yutorah.org/1987/1053/735710.pdf

(2002).
be ruled on individually by a competent posek. He also ratifies his permissive ruling as a predominantly theoretical one:

Everything I have written in my responsa ... is valid and clear...However, I have not directed that this be done in practice, because such insemination does not fulfil the husband's commandment "to be fruitful and multiply." The wife is not subject to this commandment, and the husband may become extremely jealous. It is therefore not a good idea...But if it is done, the child is legitimate.308

Despite this highly cautious note, Feinstein is regularly quoted today as the authority who permitted the use of all donor sperm, gentile and Jewish. Bearing in mind the authority of Feinstein, it cannot be overstated how highly unusual it is that the cautious nature of Feinstein's permissive ruling which applied only to donor sperm from gentiles in extreme circumstances, appears today all but forgotten. It may be prudent to wonder whether Feinstein would argue differently in our time, when sperm banks and fertility treatments are abundant and run as lucrative businesses.

The moral objection of Rabbi Jakobovits

A third approach to AID was presented in the 1980s by Rabbi Immanuel Jakobovits, the Chief Rabbi of the United Hebrew Congregations of the Commonwealth, often referred to as the father of Jewish medical Halakhah. Equally opposed to AID as Teitelbaum, his argument rests on the moral teachings of the Jewish tradition.

Rabbi Immanuel Jakobovits was born in 1921 in Koenigsberg (later Kaliningrad), but spent much of his youth in Germany after his family moved to Berlin. Whilst Eastern Europe had witnessed the tension between Hasidism and Orthodoxy, so German Jewry saw tensions rising between the Orthodox communities and the movement of Reform Judaism. The Jakobovits family were part of the Orthodox community, who rejected Reform Judaism, but sought to find authentic Orthodox responses to the challenges that the Enlightenment posed to religious belief. It is said to be no

308 Jewish Law, Elon ed. 634
coincidence that Jakobovits shares his first name Immanuel with the most famous son of Koenigsberg, Immanuel Kant. Kantian philosophy was deeply challenging to Judaism because the bar/bat mitzvah celebrates the beginning of maturity and adulthood as a Jew, with the expectation to follow biblical commandments. So, whilst Reform Judaism had the:

...aim of reinterpreting Judaism in the light of Western thought, values, and culture…. Orthodox Judaism maintains that the very principle of Reform is in conflict with the basic principle of faith that the Torah is immutable…. the Haskalah movement of Enlightenment, of which Moses Mendelssohn was the leading figure, grappled with this very problem, but tended to leave traditional norms more or less intact.\(^\text{309}\)

The family of Jakobovits did not see the future of Judaism in the Reform movement, instead the correct response to Kant and the Enlightenment was education, both in secular and Orthodox religious faculties. Unlike the majority of East European Jews whose education may not have included secular studies, Jakobovits was educated from an early age both in Jewish and secular studies by teachers who followed the ideology of Samson Raphael Hirsch:\(^\text{310}\)

One of his (Hirsch’s) main tenets – that Judaism needs to be studied and practiced alongside secular knowledge and pursuits (Torah im derech Eretz) – is one that I still cherish, together with his insistence on studying Judaism from within, rather than analysing faith out of existence with external criteria.\(^\text{311}\)

Fleeing Nazi persecution, the family settled in London in 1938 and Jakobovits became the pioneer of Jewish bioethics by studying the interaction between medical ethics and Halakhah. In 1959, Jakobovits began to distinguish between a purely halakhic and a purely secular approach to biomedical ethics and found both lacking unless grounded in morality:

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\(^{309}\) Jacobs, *The Jewish Religion*


\(^{311}\) Pershoff, *Immanuel Jakobovits a Prophet in Israel*, 9
Moral autonomy and moral automation, between these alternatives lies the most fateful choice confronting mankind today.\textsuperscript{312}

Jakobovits became Chief Rabbi of the United Hebrew Congregation of the Commonwealth in 1967. In his pastoral and professional role, he was a passionate advocate for the sanctity of traditional marriage and fiercely opposed to modern fertility treatments, especially those involving donor sperm. Unlike Teitelbaum, Jakobovits did not argue that AID resulted in adultery and that children would be tarnished with the status of \textit{mamzerut}, instead his arguments follow a moral approach to \textit{Halakhah}:

AID is not morally acceptable, even if technically it constitutes no adultery nor imposes the disabilities of illegitimacy or bastardy on a child ... The objection lie in the profanation of marriage, the deception of the public whereby the paternity of the child is fraudulently registered in the barren husband's name ... the possibility of incestuous unions between parties closely related through or to the donor ... the immorality of paying donors who will never know or care for their own natural offspring, and the debasement of human generation to stud-farming methods. The erosion of the family founded on marriage, as the basic unit of society is a greater social and moral evil threatening the stability of society ... than the suffering of individuals caused by disease or childlessness.\textsuperscript{313}

Rabbi Jakobovits' words demonstrate the central importance of a clear family lineage, both for the covenantal relationship with God and the social fabric of the Jewish community which rests on intact family structures and marriage. Jakobovits acknowledges the suffering of a childless couple, but rejects the assumption that fertility allows for the abrogation of other \textit{halakhic} principles. In this he shares the concerns raised by Teitelbaum but his argumentation differs distinctly. Acutely aware of the fragility of the Jewish community after the \textit{Shoah}, Jakobovits' primary concern is not simply to follow a legal investigation, but to root \textit{Halakhah} in what is morally right. His argument follows Maimonides' teleological-versus-the-legal positivist

\textsuperscript{312}\textit{Pershoff, Immanuel Jakobovits a Prophet in Israel},... 64

\textsuperscript{313}\textit{Immanuel Jakobovits, "Submissions to the Warnock Committee of Inquiry and the Department of Health and Social Security" (London: Office of the Chief Rabbi, 1984).} 6
approach to scripture discussed in the appendix. At the heart of this debate lies the question whether Jewish bioethics and Jewish law are essentially indistinguishable. Jakobovits follows Maimonides' reasoning that *Halakhah* is teleological in nature and this implies that humankind must use its God-given sense of reason to question whether the application of a *halakhic* judgement is moral and ethical in any new situation. Whilst he always cites and never disputes Feinstein's legal reasoning, Jakobovits feared the devastating effects that this *psak Halakhah* (legal ruling) would have on the larger community of which he was in charge. Especially after the devastation of the *Shoah*, the sanctity of life, of lineage and Jewish family values had to be upheld and, therefore, AID could not be condoned from a gentile or Jewish donor.

It is important to contextualise the legal responses of Feinstein, Teitelbaum and Jakobovits not only according to their formative years and the difference between Hasidic and non-Hasidic Orthodox approaches, but also to understand the different positions these men held in their respective communities. Each was revered and loved, but Feinstein was a jurist and when faced with a problem, he specialised in finding authentic and novel *halakhic* solutions to the legal question at hand. As the outstanding legal expert of his generation, he would publish his findings with an uncompromising approach to *Halakhah*, whether the outcome resulted in a lenient or strict ruling. Teitelbaum, as leader of a Hasidic community, would have fulfilled a fatherly role in which his community would have relied on his judgement in every minutia of their life. As their *Tzadik* (spiritual master), his role was emotionally entwined with his community, which he wished to protect from the negative influences of the modern world. His view was thus an introvert one that protected the values and life of one Ultra-Orthodox Hasidic community. Finally, Jakobovits was Chief Rabbi of England and the Commonwealth and, as such, presided over a large and diverse congregation who would challenge his views in ways that Teitelbaum’s community would not. As a member of parliament, Lord Jakobovits had a direct understanding of the secondary and indirect effects that Feinstein’s legal responsum would have on the fabric of his people and so the positions in which the three rabbis
are held within their respective communities is likely to be reflected in their judgements.\textsuperscript{314}

Conclusion

In conclusion, the first halakhic debate about the permissibility of AID has given an insight into the legal reasoning of Rabbi Feinstein, who permitted AID, and Teitelbaum, who forbade it. Their discussion marks the beginning of the modern debate about the legality of infertility treatments from a \textit{halakhic} point of view, a debate which began in the 1950s. Whilst the two rabbis came to opposing conclusions, their line of enquiry followed a similar path. Both enquired whether AID would lead to adultery, whether it would result in the child being classed as a \textit{mamzer}, and whether the lack of a clear genealogy would have covenantal consequences. They both consulted the same classical sources that considered conception \textit{sine concubito}, but whilst Feinstein understood the passages about bathwater and bedsheet conception as analogies that permit AID, Teitelbaum differentiated between passive and active conception \textit{sine concubito} and thus rejected the permissibility of AID on these grounds. Both rabbis considered the biblical passage in Leviticus (18:20), which forbids adultery, but their interpretations of this biblical source also brought them to opposing conclusions. Feinstein argued that adultery required sexual intercourse between a married Jewish woman and a Jewish man, so AID with a gentile donor was thus permitted. Teitelbaum included in his judgement the opinion of the later tradition, especially the interpretation of the 12\textsuperscript{th} century \textit{Talmudist} Nachmanides on whose account Teitelbaum understood adultery in terms of creating an unclear genealogy. As the passage in question is open to different readings, Feinstein did not accept the use of Nachmanides in this case.

It is worth noting that neither rabbi questions whether the infertility of the couple was a decision made by God that humankind should accept. Following the biblical command to be fruitful, the decision to try to conceive is never in doubt. Whilst Feinstein appears to have little concern for life beginning without sexual intercourse

\textsuperscript{314} The different positions of Rabbi Feinstein, Rabbi Teitelbaum and Rabbi Jakobovits were explained to me in conversation by Rabbi Isaac Abraham of the London School of Jewish Studies in January 2020.
outside the marriage bed, Teitelbaum is concerned that mechanical procreation has negative impacts that are beyond human comprehension. At this stage of the halakhic debate, Feinstein appears to be more concerned with the medical or psychological implications of infertility than those caused by this procedure and, although the possibility of incest is often mentioned, incest is classified in halakhic rather than modern medical terms. Rabbi Jakobovits also approaches the question of AID from a Jewish perspective. He too questions whether adultery, lineage and incest prohibit the use of AID and concludes that, whilst Halakhah does not strictly speaking forbid the use of AID, the moral traditions of Judaism certainly cannot condone it. As the biomedical discussion about fertility treatments and Jewish law develop, the following halakhic debate in Chapter Six will explore how these Jewish concerns mature, develop and adapt to the modern world of fertility science. This first halakhic debate about the early reproductive technology of AID has explored the foundational discussions that already demonstrate why there is no one way to produce kosher children in Israel today. This is because different halakhic authorities demanded, and continue to demand, different approaches due to their varying interpretation of Halakhah. These differences in interpretation have been linked to the background of the halakhic authority; how these authorities view themselves within the modern world, how pragmatically they view science and how influenced they are by the kabbalistic and moral tradition of Judaism.

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315 Chapter Six will demonstrate that Rabbi Waldenberg is concerned with any fertility treatment that involves sperm being collected, because of the biblical prohibition to spill seed and the sin of Onan. According to Kabbalistic sources this can lead to the dangers of evil spirits that are released when sperm does not immediately enter the female body as it is emitted.
Chapter Six

Halakhic Debates and their Implications in Israel

Second Reproductive Technology: In Vitro Fertilisation

The initial reproductive technology of artificial insemination saw the beginning of the medicalisation of conception, but conception itself, even if artificially inseminated, still occurred within the reproductive organs of the woman. In Judaism, the creation of life is considered a product of husband, wife and God joining in union. This is expected to occur in the body of the woman and any child conceived has a growing legal status, which under usual circumstances in vivo protects it from being legally aborted once the fertilised ovum is attached to the womb of the gestating mother. Legal discussions on the topic of IVF must question this understanding of conception, however, because during IVF the fertilisation of the female ovum with the male sperm happens outside the body in a petri dish. Halakhists must question whether the union between God and the genetic parents of the child can now happen outside the body in a laboratory with the facilitation of a fertility scientist. They must assess what legal status the fertilised ovum has outside the body and what implications this may have for the halakhic status of mother, father and child.

The opinions of Rabbi Eliezer Waldenberg, who opposes IVF on legal grounds, will be discussed, followed by the view of Rabbi Avigdor Nebenzahl who permits IVF. Finally, the question is posed whether surplus embryos can be destroyed. The opinion of Rabbi Bleich will be discussed and contextualised.

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316 Talmud Kiddushin 30b in Bleich, Bioethical Dilemmas. 15

‘... there are three partners in [the conception of] a person: their father, their mother and God.’


There are circumstances when this right to life of the growing embryo is compromised. All halakhists will permit abortion if the life of the gestating mother is at risk before the head of the child is born, some halakhists will allow abortion even if the mother’s life is not in danger, in cases where the embryo is proven to suffer from debilitating disease, such as that it suffers from Tay-Sachs. Rabbi Eliezer Waldenberg permitted abortion of a fetus up to the end of the second trimester of gestation.
The halakhic response of Rabbi Eliezer Waldenberg and Rabbi Avigdor Nebenzahl to the use of IVF without donor gametes

While there has been much debate about adultery and mamzerut status in the use of donor gametes (see above), there is a further halakhic debate about IVF without the use of donor gametes, which questions whether medically assisted conception outside the body is kosher. Two authorities who have ruled on this matter are Rabbi Avigdor Nebenzahl and the eminent medical halakhist Rabbi Eliezer Waldenberg.

Rabbi Avigdor Nebenzahl, former Chief Rabbi of the Old city of Jerusalem (born in 1935), is senior Rosh Yeshiva (dean) at Yeshivat Netiv Aryeh and the founder of Yeshivat HaKotel (both institutions of higher education dedicated to the study of Torah). He serves as a posek (judge) for schools and organisations, including Zaka, a rescue and recovery volunteer organisation. Nebenzahl’s mission at Zaka is the identification of body parts, especially after terror attacks and accidents, in order to enable a proper Jewish burial. The Yeshivat HaKotel was founded after the Six Day War opposite the Har Habayit (The Temple Mount), the site of the old Jewish temple of Jerusalem in order to create a presence of high-level Torah study in the heart of Jerusalem. HaKotel is a Yeshiva, which is part of the Hesder programme that combines Torah study and military service. Rabbi Nebenzahl is thus very much part of contemporary Israeli religious Zionism. He has spoken out against the destruction of Jewish settlements on land that is claimed by the Palestinians and his rulings on IVF should be understood in light of the Zionist ambition of growing the Israeli nation (see Chapter Three). In comparison, the Hesder programme does

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not exist in the Haredi world because many Haredi reject Zionism and the ‘man made’ State of Israel.\textsuperscript{322}

Rabbi Eliezer Waldenberg was born twenty years before Nebenzahl in 1915 in Jerusalem into a Rabbinic family who had immigrated to Palestine from Lithuania long before the formation of the State of Israel. He was a posek and judge on the Supreme Rabbinical Court in Jerusalem. As Rabbi of the Shaare Zedek Medical Center in Jerusalem Waldenberg was frequently consulted by doctors on questions concerning medical Halakah\textsuperscript{2} and thus became an eminent authority on the subject. Waldenberg published his extensive judgements in a monumental work called Tzitz Eliezer, which has become one of the cornerstones of medical and bioethical Halakah. Rabbi Waldenberg died in 2006 and is remembered for a number of strict rulings that forbid certain medical treatments permitted by the majority of Orthodox poskim of his time.\textsuperscript{323} Professor Yitzhak Brand suggests that Waldenberg’s decisions were ‘molded in the spirit of a religious ideology.’ This ideology rejects legal positivism, which is often used by other rabbis to permit any procedure that is not halakhically prohibited. Waldenberg emphasised the religious and ethical component of Halakah, which sees value in the natural order created by God. In this view the autonomy of the doctor needed to be restricted because, whilst doctors are divinely instructed healers, they must remain agents of God and protect the natural order of the universe; therefore, certain acts must remain in the hands of God. Waldenberg’s choice of words and narrative can thus be understood to reflect the worldview of a bygone pre-scientific era in comparison to the pragmatic logical reasoning of many of his fellow poskim, such as Rabbi Nebenzahl.\textsuperscript{324}

Waldenberg’s view on IVF is particularly restrictive in that he rules that even when a married couple uses their own gametes the process of IVF is not kosher. Waldenberg objects on a number of grounds; firstly, he opposes the procurement of

\textsuperscript{322} Even if they may not go as far as Rabbi Teitelbaum in blaming Zionism and assimilation as the cause for the Shoah.

\textsuperscript{323} R. D. Strous and E. Shenkelowsky, "The World of Medicine Encounters the World of Halakha--the Great Medical Halakhist and Israel Prize awardee Rabbi Eliezer Waldenberg (1915-2006)]," Harefuah 147, no. 1 (Jan 2008).

the husband’s sperm that is necessary for IVF and for AIH. According to Genesis (39:10), any spilling of seed is forbidden, as demonstrated in the sin of Onan. Against the permission given by some poskim to allow the procurement of sperm for the fulfilment of the mitzvah to be fruitful (Genesis 1:28), Waldenberg objects that IVF is usually performed, not because the husband is infertile, but because the woman is unable to conceive without medical help, possibly because her fallopian tubes are blocked. Waldenberg decides that because the command to be fruitful is directed only at men, not at women, there is no halakhic reason to allow the spilling of seed in this instance. According to Daniel Sinclair, the prohibition to use sperm for procreation, which has not moved directly into the female reproductive organs whether through AID, AIH or IVF, can be for mystical reasons. According to Sinclair, the fear of spilling seed is sometimes based on the kabbalistic belief that:

…any semen that does not travel directly into the female reproductive organs gives rise to ‘demons of the night’, which remains in existence to plague the semen-emitter right up until the moment of death (Resp. Yaskil Avdi).

Besides this fear, conception outside the body during IVF leads Waldenberg to the conclusion that the resulting child has neither a halakhic mother nor father. This follows the minority view of Rabbi Malkiel Tennenbaum (1847-1910), who states:

Once the semen has been emitted and has warmth only because of the administration of the physician and skill of his pipette’, the resulting child is not considered to be that of the sperm donor.

Waldenberg concludes that the child has no halakhic father. For his maternal argument, Rabbi Waldenberg extends the ruling of Rabbi Menahem Azariah of Fano (16th century), who states that a child of an illicit relationship between a Jewish woman and a non-Jewish father is a ‘bizarre combination’. According to Azariah, ‘a bizarre combination’ of a child would lose its Jewish identity were it not through its occupancy in the womb of its Jewish birth-mother. Waldenberg uses this as a

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325 For an explanation of the sin of Onan see footnotes of Chapter Five
326 Daniel B. Sinclair, Jewish Biomedical Law. 70
Rabbi Hadaya for similar reasons prohibits AIH at times when the woman is not ritually pure because the child conceived would ‘suffer from a great burden of mystical impurity’
327Daniel B. Sinclair, Jewish Biomedical Law. Sinclair quoting Tennenbaum, 97
precedent to rule that a child conceived in a petri dish is also a ‘bizarre combination’,
but as conception does not take place in the maternal Jewish womb, Waldenberg
concludes that this child no longer has a claim to this maternal lineage and thus has
neither a halakhic mother or father.\(^\text{328}\) Indirectly this argument confirms the
prohibition against the spilling of seed, as the child can thus no longer be viewed as
a fulfilment of the mitzvah to procreate.

Nebenzahl differs with Waldenberg in that he dismisses the prohibition against the
spilling of seed because of the higher purpose of a couple fulfilling their obligation to
procreate. In this he is likely to follow the ruling of his teacher Rabbi Auerbach, who
had offered a compromise position on AIH in stating that, whilst a husband may not
fulfil the full biblical command to be fruitful through AIH, he does fulfil the separate,
lesser obligation to ‘populate the earth and not leave it desolate’ based on Isaiah
45:18.\(^\text{329}\)

Nebenzahl dismisses the analogy made by Waldenberg between a child conceived
outside the womb through IVF and a ‘bizarre combination’. Nebenzahl stresses that
Rabbi Menahem’s view was based on an illicit relationship, whilst a child conceiv-
ed through IVF with the gametes of a married couple is not the fruit of an illicit
relationship, but the fulfilment of a marriage, which itself could be at risk of divorce if
the pain of an infertile couple is left to fester.\(^\text{330}\) In this Rabbi Nebenzahl is raising a
moral obligation to support marriages as the cornerstones of the Jewish community.
Unlike Jakobovits, who used the moral argument against the use of AID, Nebenzahl
uses the moral argument to state that parents should not be deprived of their chance
to conceive.\(^\text{331}\) Instead the poskim should explore the legality of the underlying
motivation to use IVF through reason:

\[\ldots\text{we ought not to follow external form, but ought to focus on inner content.}\]  

\(^{328}\) Daniel B. Sinclair, Jewish Biomedical Law. 97

\(^{329}\) According to Sinclair this second command ranks lower than the former. 72

\(^{330}\) Daniel B. Sinclair, Jewish Biomedical Law. 97

\(^{331}\) Although AID is very different from IVF in that it uses gametes from a third party, nevertheless the
use of the moral rather than the halakhic argument is of interest.

\(^{332}\) Daniel B. Sinclair, Jewish Biomedical Law. 98
Nebenzahl appears to imply that legal reservations about IVF should not prevent couples from fulfilling the greater legal priority of procreating and that the means by which an ovum is fertilised by the husband’s sperm should remain a medical, not a legal technicality. Nebenzahl also cites the kabbalistic doctrine that this is the ‘age of technical wisdom’, to demonstrate that medical advances should be welcome and no distinction should be made between different techniques of assisted reproduction. It is interesting to see that Rabbi Nebenzahl, who appears to approach IVF as a medical matter, uses a single line from the complex literature of Kabbalah to confirm IVF, when noted Kabbalists such as Rabbi Ovadyah Hadaya (cited above by Rabbi Waldenberg), warned of ‘demons of the night’ even in the case of AIH (Artificial Insemination with the husband’s sperm) and used these sources to argue against it.333 Nebenzahl concludes with the pragmatic view that:

Both the husband and the wife in the case of IVF are potentially capable of producing their own biological child, all they need is a little help.334

The moral approach and fragments of the kabbalistic tradition have thus been used both to support and reject IVF, but the question of whether halakhic motherhood and fatherhood can be achieved when the fertilisation happens outside the body points to the religious significance of the female womb. The womb is significant as a locus where halakhic maternal and paternal relationships are formed; the womb literally births a child into the Jewish community and only a Jewish womb can birth Jewish children. The issue of halakhic motherhood will be discussed below, it will enquire whether in the case of egg donation the genetic mother or the gestating mother is considered to be the halakhic mother, a problem that may be exacerbated in the events such as mitochondrial replacement or surrogacy, with the potential for three mothers.

In conclusion Rabbi Waldenberg’s insistence on conception in vivo for halakhic motherhood remains a minority view, as does his naturalist view that the artificial nature of IVF taints the child as a ‘bizarre combination’. Although Rabbi Waldenberg was not alone in his rejection of IVF and other prominent poskim, such as Rabbi Hadaya, raised considerable objections, their position appears today to have almost

333 See earlier footnote
334 Daniel B. Sinclair, Jewish Biomedical Law. 97
been classed as historic and outdated by *modern Orthodoxy*. This is a significant development as Waldenberg remains highly regarded and it is unusual for authorities of his standing to be classed as such. One may assume that permissive responses, such as that of Rabbi Nebenzahl, were taken up with greater zeal because they religiously endorsed the Zionist goals of the State of Israel. Rabbi Steinberg in his Encyclopaedia of Jewish Medical Ethics concludes that:

> Judaism does not accept the view that nature is supreme and that technology ought not to be allowed to intervene in natural processes. On the contrary, man is a partner with God and his role is to improve the world in all its aspects.\(^{335}\)

Steinberg supports Nebenzahl in his argument that science should fulfil its:

> …*halakhic* obligation to conquer all manner of physical disability, especially in an area in which the disability in question also threatens the survival of a marriage.\(^ {336}\)

The debate about IVF thus demonstrates how the gradual medicalisation and modernisation of Jewish reproductive ethics is taking place. In the beginning, authorities such as Rabbi Teitelbaum, Rabbi Waldenberg and Rabbi Jakobovits approached the *halakhic* questions surrounding procreation with great caution and concern. In accordance with great *kabbalists* such as Rabbi Hadaya, they interpreted the act of procreation as part of the sacred universe, which according to *Kabbalah* cannot be rationally distilled into medical procedures. Their moral and ethical concerns centred on the sanctity and purity of conception, marriage and lineage in accordance with the Jewish legal and moral tradition.

Gradually, however, the *kabbalistic* sacred view of procreation appears to have been replaced by an increasingly medicalised pragmatic approach, which aims to find medical solutions to *halakhic* concerns. There is less concern for the humanly unknown sacred implications of this medicalisation, instead a pragmatic view focuses on the plight of infertile couples and the moral and ethical obligation to help

\(^{335}\)Reuven Ben Dov, “Avraham Steinberg MD, ed., Encyclopedia of Jewish Medical Ethics,” (Jerusalem College of Technology, 2006). ii 129 n.48

\(^{336}\) Daniel B. Sinclair, *Jewish Biomedical Law*. 100
these couples fulfil their religious obligation to procreate. This approach is legally justified in that the biblical command to procreate is understood to abrogate lesser legal concerns. Rabbi Nebenzahl is a proponent of this approach and Rabbi Steinberg attests that this indeed is becoming the dominant halakhic view, which works hand in hand with the wishes of patients and the goals of the pro-natalist State of Israel.

Before the third halakhic debate about Pre-Implantation Genetic Diagnosis (PGD) will assess where the limits of this scientific engagement with human nature may be found, two serious ethical dilemmas arise during IVF that deserve deeper investigation. Both are concerned with the role of the womb: the first is the question of halakhic motherhood and how the status of motherhood is affected by fertility treatments; the second problem is the legal status of embryos that are produced during IVF and readily destroyed, either because they are spare or considered of inferior quality. It is often assumed that these embryos hold a different legal status outside the womb than they would if they were implanted, but why this should be the case is not obvious. After a discussion about halakhic motherhood, the final question of this second halakhic debate will examine whether the locus in the maternal womb or the state of fused gametes give rise to halakhic humanhood and thus halakhic protection.

The search for a halakhic definition of motherhood in Israel when donor eggs or surrogate mothers are used

IVF can help a couple conceive with their own gametes, but it can also enable couples to use donor eggs or surrogate mothers. In Israel and the diaspora this has led to discussions concerning the effects of these techniques on halakhic motherhood.

Rabbi Avraham Steinberg describes how the poskim of Israel have questioned whether any new innovation, which is not expressly forbidden, is either permitted or prohibited and whether the new advances in fertility should be dismissed as
humanity playing God. Steinberg suggests that the idea of playing God is not a Jewish concept:

“Playing G-d,” by the way, is not Jewish terminology. Jews know that we don’t understand G-d. Since we don’t know what He is doing or why He is doing it, it is impossible to play G-d. The innovations in reproductive medicine, moreover, are technical and not fundamental. If we take the idea of playing G-d as a metaphor for achieving extraordinary feats, though, the more science advances, the more scientists should draw closer to G-d rather than feeling that they are detracting from Him. We are revealing the existing order of nature, not creating new phenomena.

Steinberg acknowledges that although the Talmud describes three partners in the creation of a human being, it does not define what it means to be a mother, father or human being. He recounts that opinions in Israel have been deeply divided as to whether the woman who supplies the ovum or the woman who gestates the child should be the halakhic mother and this has practical implications. In summary Steinberg’s paper holds that:

1. It is forbidden for any person to marry their sibling or half-sibling as the resultant child from this union would be a mamzer. A child born from a donated ovum must, therefore, know whether these limitations apply to further children from its egg donor or its birth-mother.
2. The child must fulfil the mitzvah (biblical command) to honour your mother and the child must know which mother this applies to. (Exodus 20:12)
3. Inheritance laws are affected if the halakhic mother is not identifiable.
4. If either the donor of the ovum or the birth-mother is not Jewish, the parents must know whether the child needs a conversion to Judaism.

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337 Rabbi Professor Avraham Steinberg is co-chair of the Israeli Bioethics Council and author of The Encyclopaedia of Jewish Medical Ethics, see Chapter Two
339 Steinberg, “In Search,..”
340 Steinberg, “In Search,..” The four point are a summary of his presentation, rather than a direct quote.
The fourth point has been particularly traumatic for parents, who already have children from gentile egg donors. As long as the advice stood that the children were Jewish as long as Jewish mother birthed them, there appeared no need to convert children born in this way. Equally, when the halakhic mother was assumed to be the genetic mother and the egg donor was Jewish, the children birthed by a gentile surrogate were assumed Jewish. However, each time the advice changed, there was great confusion and anxiety about whether these children would be discriminated against in the community, even if a conversion took place in hindsight.\(^\text{341}\)

According to Steinberg the poskim of Israel fall into three categories:

1. Rabbi Shlomo Goren, Rabbi Qvadia Yosef, Rabbi Shlomo Amar and Rabbi Yaakov Ariel ruled that the genetic mother (egg donor) is the halakhic mother.
2. Rabbi Yehudah Waldenberg, Rabbi Shaul Yisraeli, Rabbi Zalman Nehemiah Goldberg, Rabbi Mordechai Eliyahu and Rabbi Moshe Sternbuch ruled that the woman who gestated the child is the halakhic mother.
3. Finally, Rabbi Shlomo Zalman Auerbach, Rabbi Shalom Yosef Elyashiv, Rabbi Zalman Nehemiah Goldberg and Rabbi Moshe Sternbuch decided that the matter could not be resolved and that both women are halakhic mothers.\(^\text{342}\)

Rabbis Shlomo Zalman Auerbach, Shalom Yosef Elyashiv, Zalman Nehemiah Goldberg and Moshe Sternbuch did however express more than one view and this demonstrates how fraught the decision can be. Rabbi Auerbach authoritatively stated that as the problem remains halakhically unresolved the principle of l’humra should be applied, which means that extra stringency is called for. Therefore, the child should not marry siblings or half-siblings from either mother and if either mother is a gentile the child should be converted by a giyur l’humra (conversion done to be strict). The child should not inherit from either mothers and if the child is a boy, the circumcision ceremony must take into account that the halakhic parentage is not fully known.

\(^{341}\) This point was made in an interview with the charity CHANA, which supports Jewish couples with infertility problems. A scientific advisor of CHANA told the story of one couple who used donor eggs twice and the advice changed from one child to the next, causing great distress.

\(^{342}\) Steinberg “In search”

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If the boy is really a Gentile, then saying *l’hakhniso b’vrito shel Avraham Avinu* would be a *brakhah l’vatalah*, pronouncing the name of G-d in vain. If the boy is really Jewish, then saying *la’mul et ha’gerim* would be a *brakhah l’vatalah*, pronouncing the name of G-d in vain. This is a sensitive situation.\(^{343}\)

Auerbach also took into consideration that the guests at the *brit* (circumcision ceremony) may not know how the child has been conceived and that the parents will wish to keep this sensitive information to themselves. As the words of the blessing may suggest unclear parentage, his solution is innovative:

> The solution that Rabbi Shlomo Zalman Auerbach suggested is that the *mohel* should say the second blessing incompletely in a quiet inaudible way that does not contain the name of G-d… No one will suspect that this is not a regular birth, and everyone will be happy.\(^{344}\)

The combination of high regard for biblical commands and willingness to acknowledge the embarrassment of parents in front of their guests is insightful. The inclusion of embarrassment in *halakhic* decisions may weaken the moral principles of the tradition, but shame and embarrassment are also legal categories that are generally taken into account. This is one example where the pragmatic and compassionate nature of *Halakhah* is demonstrated and many of the greatest *poskim* are revered for their humanity and humility towards their followers.

The concerns about *halakhic* maternal identification were integrated into Israeli legislation from 1996 onward in the Surrogacy Act. With the guidance of Rabbi Mordekhai Eliyahu, who was then the Sefardi Chief Rabbi, it was decided that when a surrogate mother gives birth in Israel, the child is not initially registered as the child of any one person because its identity is *halakhically* unclear.

Then, the couple who arranged the surrogacy and wants the child, goes to court to request a court order of parenthood. This grants them a status higher than adoptive parents but lower than natural parents. This is a specific definition that detours the question of who is the mother.\(^{345}\)

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\(^{343}\) Steinberg, "In Search,…"

\(^{344}\) Steinberg, "In Search,…"

\(^{345}\) Steinberg, "In Search,…"
This process also allows the courts to register which Israeli citizens have been born by a surrogate mother. This ensures that records are kept to identify siblings and half-siblings born of the birth-mother and the genetic mother and it is not legal for the child born by surrogacy to marry either.

The special legal status of surrogate children will enable us to prevent *halakhically* forbidden marriages of half-siblings.\textsuperscript{346}

It was also established legally that only unmarried Jewish women would be allowed to become surrogate mothers, because the resulting child of a married Jewish surrogate mother could be classed as a *mamzer*. This made finding a Jewish surrogate mother extremely difficult.

By 2010 Rabbi Shlomo Amar had become the Sefardi Chief Rabbi and he followed Rabbi Ovadiah Yosef’s position that the egg donor, not the birth-mother was the *halakhic* mother. Instead of keeping a somewhat open-minded position, as Rabbi Auerbach had done previously, Rabbi Amar desired a clear ruling in favour of the donor of DNA. This position was not accepted by the *Knesset* and the government ruled against Rabbi Amar.\textsuperscript{347} Legally the birth-mother was named as the mother and the donor of DNA was deemed irrelevant. This produced a mismatch between the guidelines of the Surrogacy Act of 1996 and the Egg Donation Law of 2010.\textsuperscript{348}

Through the account of Rabbi Steinberg, we witness how new medical procedures are integrated into Israeli Law by making the necessary adjustments and precautions in order to create kosher versions of the fertility treatments. By recording the surrogate births, the *halakhic* concern of accidental incest is alleviated. The greatest concern remains the birth of children who carry the status of being a *mamzer*.

\textsuperscript{346}Steinberg, "In Search,.."

\textsuperscript{347} According to Dr. Jonathan Gorsky, the matter was highly sensitive, because the genetic versus the gestational definition of motherhood was not only a *halakhic* argument, but came perilously close to defining Jews as a biological race. In light of Jewish persecution in the past and present this argument raised concerns of racist and nationalist policies. (Based on private communication with Dr. Jonathan Gorsky)

\textsuperscript{348} Steinberg, "In Search,.."
As director of the Puah institute, Rabbi Gideon Weitzman offers a very different perspective of the fertility debate in Israel and is at the forefront of finding kosher solutions for parents who are desperate to conceive.\textsuperscript{349}

The Rabbis at Puah are in constant contact with poskim throughout the world and have counselled tens of thousands of couples, and so are in a unique position to present a picture of what is happening in the Jewish world. Puah has a finger on the pulse of halakhic developments (as well as medical advances) and therefore its opinion and expertise is sought by Rabbis and medical professionals worldwide.\textsuperscript{350}

Whilst Steinberg implied that, according to Rabbi Auerbach, the problem of maternal halakhic identity could be overcome by extra precautions, such as conversions, Weitzman recounts how Puah has encountered problems with this convenient solution:

In a discussion with Rabbi Mordechai Eliyahu, he was adamant that the birth mother is the halakhic mother in every circumstance… he did not permit Rabbi Menahem Burstein, the founder of the Puah Institute, to participate in the hurried conversion at the circumcision of a child born to a Jewish mother from a Gentile egg donor.\textsuperscript{351}

Although Weitzman describes a period of frantic calls from parents who wanted to know whether their children needed a conversion, he states that the expected flood of conversions has not taken place:

It is possible that there have been clandestine conversions, but our suspicion is that the number of such conversions is so small that it is insignificant. Nor do we see an increase in conversions of children conceived from East European donors, even though if we follow the opinion that the genetic mother is the mother, such children would need to be converted to be considered Jewish. It appears that there is a consensus of silence and that either the


\textsuperscript{350} Rabbi Gideon Weitzman, "Egg Donation.”

\textsuperscript{351} Rabbi Gideon Weitzman, "Egg Donation.”
poskim are not aware of the phenomena or they have opted to remain mute rather than demand conversion that could open a Pandora’s box of questions related to many children who have grown up believing that they were Jewish.\textsuperscript{352}

This final point suggests that it is not only the rabbis who influence the fertility debate, but the role which parents and society play on the rulings of the rabbis is equally significant. Weitzman describes the pressure exerted on rabbis to find kosher solutions, even in cases where the halakhic prohibition is quite clear. Although many Haredi poskim, according to Weitzman, continue to oppose all egg donation, Haredi couples are still finding ways to use donated eggs.

...some fertility organizations servicing the haredi community will not publicly condone any third-party reproduction methods. However, couples are turning to poskim who will permit it, even though these Rabbis may not be the couple’s primary posek. Sometimes their own posek will point them to another Rabbi who is more lenient or may at least agree to turn a blind eye and not actively oppose the couple’s intended path of treatment, which is essentially de facto condoning the procedure. The desire of couples to have children is so strong that it is nearly impossible to block their way and to forbid such a procedure outright.\textsuperscript{353}

Weitzman describes the laws regarding egg donation in Israel as one of the most permissive in the world. He suggests that these policies are generated from the bottom up with desperate parents ‘bombarding poskim with questions and almost “forcing” them to take a more lenient stance’ both towards egg donation and IVF.\textsuperscript{354}

The reason for the high demand and the confidence to challenge the rabbis may be the fact that more couples are divorcing, even in Orthodox and Haredi communities and are wishing to have children when they remarry and are older. Whilst the actual

\textsuperscript{352} Rabbi Gideon Weitzman, "Egg Donation."
\textsuperscript{353} Rabbi Gideon Weitzman, "Egg Donation."
\textsuperscript{354} Rabbi Gideon Weitzman, "Egg Donation."
number of children born through egg donation is unknown, Weitzman suggests it is significant.

As Jewish donor eggs and gestational carriers are in short supply Weitzman acknowledges that many fertility clinics work with clinics in other parts of the world, especially Eastern Europe where both eggs and gestational carriers can be cheaply obtained. Quite apart from the fact that neither tend to be Jewish, Weitzman demands that such baby farms should be avoided whether or not they can be halakhically justified.

…it should be clearly stated that the conditions in which these women are held are dire. It is reprehensible for a morally ethical person to condone such modern slavery. I believe that we should oppose this option as human beings first, and only later for religious and halakhic reasons.\(^{355}\)

Apart from this moral argument, Weitzman also challenges Rabbi Tendler who argues for a scientific determination of motherhood through which he declares the gestational mother to be the halakhic mother. This, according to Weitzman, is misleading. The argument for and against the halakic permission to use donor egg or gestational carriers must be ruled according to classical sources:

…since the debate up to now has been based on the discussion and elucidation of sources in the Rabbinic literature — not on scientific evidence.\(^{356}\)

These accounts by Steinberg and Weitzman demonstrate how in Israel, as in the diaspora, the halakhic debate is influenced by scientific discoveries, parental pressure and moral arguments, all of which shape modern halakhic responses. Fertility treatments that are halakhically permitted or tolerated today are not solely the result of new interpretations of biblical and Rabbinic sources, but the classical sources remain important.

\(^{355}\) Rabbi Gideon Weitzman, "Egg Donation."

\(^{356}\) Rabbi Gideon Weitzman, "Egg Donation."
The legal status of a embryo in vitro versus in vivo

From a Catholic perspective human life begins at the moment of fertilisation, consequently the destruction of life is no less grave during the embryonic stage than at any other point of a human life. This also applies to the destruction of spare or deselected fertilised eggs and embryos during the IVF process. Crucially, neither age or location matter for Catholicism. Judaism and Islam have not taken this view and distinguish between different stages of human development and also between the position of the fertilised egg inside or outside the womb.

The legal status and by implication the required protection of embryos in vitro is fundamentally a modern concern, because it was unthinkable to remove a female ovum from a body and fertilise it outside the womb until the advent of IVF. Any biblical guidance on how such a zygote should be treated is thus highly problematic.

In their initial investigation about the legality of destroying unwanted IVF embryos, most halakhists explore the legal status of an embryo in vivo, for which the debate about the legality of abortions is helpful, although here too significant differences of opinion are found.

The analogy of abortion:

It is generally accepted that Judaism forbids abortion, although there are certain circumstances in which all halakhists will allow it. There are other circumstances in which some halakhists will allow it. A few eminent poskim allow the abortion of a child with a dangerous affliction, such as Tay-Sachs, in order to save both the parents and the child from undue suffering. Notably Rabbi Waldenberg, who we witnessed as a stern objector to IVF, permits abortion in this case up to the third trimester, whilst Rabbi Feinstein, who permitted the use of gentile donor sperm for artificial insemination, does not permit abortion in this instance.\footnote{Jewish Law, Elon ed. 613-619.}

If an embryo or fetus risks the life of the mother then an abortion will generally be allowed or even seen as obligatory. In this instance, the child can be declared a rodef, which is a pursuer of the mother’s life. The life of the mother is prioritised over the life of the child in vivo, until the head of the child has emerged during parturition. Only at this point is the life of the child halakhically equal to that of the mother; and,
as no one life can be sacrificed to save another, both enjoy the same protection. Maimonides authoritatively holds the following:

It is a negative command that one should have no pity for the life of a pursuer (rodef). Therefore, the sages ruled that if a pregnant woman is having difficulties giving birth [and her life is in danger] the fetus inside her may be cut up...because it is like one pursuing her to kill her. But if the head has emerged, it may not be touched because one life may not be pushed aside in favour of another life, and this is the natural order.\footnote{Maimonides, Mishneh Torah, Hilkhot Roze'ach u'Shemirat ha-Nefesh 1:8, in Jewish Law, Elon ed. 609}

He bases his argument on a text from Mishnah Oholot 7:6 that states that ‘...her life comes before the life of her fetus ...’.\footnote{Mishnah Oholot 7:6 in Daniel B. Sinclair, Jewish Biomedical Law. 12} However, Sinclair clarifies that, although the fetus is classed as alive, it is only the birth-process that grants it personhood. With regards to abortion, the destruction of a fetus up until the moment that the head emerges does not constitute homicide because homicide is the killing of a person or born individual only. Some \textit{halakhists}, as will be demonstrated below, argue that the fetus should be defined as a potential person or hold the legal category of quasi-personhood from the moment of conception, but the more widespread classical approach is legally to view the developing child as part of the mother’s body.\footnote{Daniel B. Sinclair, Jewish Biomedical Law. 12-14} As its development relies on her body, the rabbis often refer to the growing child in terms of being of the value of its mother’s thigh. By implication a mother would never sever herself from her thigh voluntarily, but if her thigh would become gangrenous and endanger her life, then few would object to an amputation of her thigh in order to save her life.\footnote{Zoloth Laurie Dorff Elliot N., Frankel Mark S. , Jews and Genes: The Genetic Future in Contemporary Jewish Thought (Philadelphia: The Jewish Publication Society, 2015). 12,27}

If a pregnant woman is attacked and she miscarries, the attacker will, therefore, not be charged with murder or accidental manslaughter, but compensation will be similar to that entailed if the body of the woman had been injured. This is based on the biblical passage from Exodus:

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\begin{itemize}
\item \footnote{Maimonides, Mishneh Torah, Hilkhot Roze'ach u'Shemirat ha-Nefesh 1:8, in Jewish Law, Elon ed. 609}
\item \footnote{Mishnah Oholot 7:6 in Daniel B. Sinclair, Jewish Biomedical Law. 12}
\item \footnote{Daniel B. Sinclair, Jewish Biomedical Law. 12-14}
\item \footnote{Zoloth Laurie Dorff Elliot N., Frankel Mark S. , Jews and Genes: The Genetic Future in Contemporary Jewish Thought (Philadelphia: The Jewish Publication Society, 2015). 12,27}
\end{itemize}
When men fight, and one of them pushes a pregnant woman and a miscarriage results, but no other damage ensues, the one responsible shall be fined according as the woman’s husband may ask from him, the payment to be as the judge determines. But if other damages ensue, the penalty shall be life for life, eye for eye, tooth for tooth. (Exodus 21:22-23)

The age of the embryo:

*Halakhah* distinguishes between the time period of the first forty days after conception and the time period thereafter. Two views compete for the legal value of the first forty days of embryonic life. The first is based on *Yevamot* 69b in the *Talmud*; it recounts the ruling of Rav Hisda that the recently widowed daughter of a *kohen* (priestly tribe) may still eat *terumah* (offerings given to the priest) in the first forty days after consummation of her marriage. The underlying reason is that a married daughter of a *kohen*, who is pregnant may no longer partake *terumah*. For these first forty days she may be unaware that she is pregnant, but even if she were pregnant, the pregnancy would legally be classed as no more than *mere water.*

Rav Hisda’s ruling appears to indicate that, in the eyes of *Halakhah*, fetal development within the initial forty days of gestation is insufficient to warrant according the fetus independent standing.

*Mishnah Niddah 30a* furthermore states that an aborted fetus during the first forty days of gestation does not give rise to the impurity laws of childbirth in Leviticus 12:25, nor the usual rituals associated with a dead body according to *Mishneh l*-*Melekh, Hilkhot Tum’at Met* 2:1. The competing view which prohibits the destruction of a fetus even within the first forty days is often based on Nachmanides who notes that according to *Ba’al Halakhot Gedolot* the Sabbath may be violated to preserve the life of an embryo. As this is one of the objections raised by Rabbi Bleich, it will be explored below. All of these legal views concerning nascent life are historically directed at life *in vivo*, for IVF the debate needs to be extended to life *in vitro*, which is not without complication.

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362 Bleich, *Bioethical Dilemmas*, 205
363 Bleich, *Bioethical Dilemmas*. 206
364 Bleich, *Bioethical Dilemmas*. 206
The location of the embryo: The *halakhic* response of Rabbi Bleich in comparison with the majority of *poskim* today

The legal status *in vitro* considers the importance of the location of the embryo and thus by extension the legal significance of the womb. The response of the Orthodox Rabbi Dr. David Bleich, who is *rosh yeshiva* (dean) at the Rabbi Elachanan Theological Seminary, Yeshiva University, New York, will be discussed. Although he does not claim to be a *posek*, Bleich lives in America and is often consulted by rabbis and Orthodox *batte din* (Jewish courts) worldwide. Rabbi Bleich, whose legal reasoning is considered highly conservative, uses a legalistic approach that quotes established *halakhic* sources to come to the conclusion that embryos should be protected both *in vivo* and *in vitro*. This leaves him in stark contrast to the majority of *poskim* today.

Bleich begins his discussion by questioning the importance of the womb. He uses R. Gershon Leiner’s opinion that the killing of Adam, who has no mother, would still constitute murder. As Adam was not born of a womb the legal status of personhood cannot rest solely on a zygote being within the womb. Bleich also cites the prohibition against ‘*the destroying of seed*’ based on the aforementioned ‘*sin of Onan*’ (Genesis 38:7-10) which further protects the zygote *ex*, as well as *in utero*.\(^{365}\)

Destruction of a developing fetus within the first forty days of gestation entails a violation of the prohibition against “destroying the seed,” that prohibition applies with equal force to the destruction of an ovum fertilized *ex utero*.\(^{366}\)

In a paper discussing the illegality of harvesting embryonic stem cells for research from embryos created *in vitro*, Bleich cites the previously mentioned view of Nachmanides which states that a single Sabbath may be violated even within the first forty-day period (which is normally classed as the period where the embryos has only the status of *mere water*), if there is any chance of preserving the life of this embryo. The desecration of the Sabbath laws is usually a grave offence and so this

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\(^{365}\) Bleich, *Bioethical Dilemmas*. 220-222

\(^{366}\) Bleich, *Bioethical Dilemmas*. 221-222
ruling is significant. The interpretation of this ruling is based on the Talmudic declaration in *Shabbat 151b*:

Better to violate a single Sabbath in order to preserve many Sabbaths.\(^{367}\)

The many Sabbaths are said to refer to the many Sabbaths that a child and the children of the child may observe if this life is saved. It does not suggest personhood for the developing child in the first forty days *in vitro* or *in vivo*, but grants significance and certain privileges to the potentiality of this life.

Bleich cites the opinion of Ba’al Halakhot Gedolot (Simeon Kayyara) and the author of Havvot Ya’ir, citing *Tosafot, Niddah 44b* which show:

That the right to violate the Sabbath for the sake of saving prenatal life is incompatible with permission to kill it deliberately.\(^{368}\)

This reasoning is strengthened by an example used by Rabbi Iser Yehuda Unterman, *No’am*, VI,4f of the commandment against the kidnapping and sale of a person into slavery, citing the opinion of Rashi, Sanhedrin 85b, who includes the sale of an unborn child into this prohibition.

Although the fetus may not be considered a fully developed person, the kidnapper is culpable because he has stolen an animate creature whose status is conditioned by its potential development into a viable human being.\(^{369}\)

Although this example speaks of a child *in vivo* it challenges assumptions based on the *mere water* status. Based on his knowledge on the ethics of *Halakhah* Bleich stipulated that the distinction between embryos *ex* or *in utero* is unthinkable if in the future embryos could be gestated entirely outside the body.

The scenario …[where] a human being conceived in vitro and allowed to develop in a laboratory incubator for the full nine months of gestation might be

\(^{367}\) *Shabbat 151b* in Bleich, *Bioethical Dilemmas*. 207

\(^{368}\) Bleich, *Bioethical Dilemmas*. 206

\(^{369}\) Bleich, *Bioethical Dilemmas*. 207
killed with impunity at any stage of his life. Such a conclusion is certainly counterintuitive.\textsuperscript{370}

Although this final suggestion is hypothetical in nature, 2017 saw reports of premature lambs being kept alive in artificial wombs for up to four weeks:

We’ve developed a system that, as closely as possible, reproduces the environment of the womb and replaces the function of the placenta.\textsuperscript{371}

Bleich is aware of the ‘slippery slope’ that exists if halakhist now allow medical procedures, which will be used as precedents in the near future. Only the acknowledgement that potential life deserves protection will protect future lives, which are not gestated in a womb, from potential exploitation.\textsuperscript{372}

Other authorities such as Noam Zohar (Professor of Philosophy at the Shalom Hartman Institute, Bar-Ilan University, Israel and member of the Israeli council on bioethics) and Rabbi Yosef Leibovitz (founder of the Yad’yakov foundation) share Bleich’s reservation against the unquestioning destruction of embryos. The acclaimed Jewish Conservative academic David Novak also argues vehemently against the destruction of early embryos, his arguments can be found in the appendix.

Despite the concern of these respected individuals, all rabbis today are faced with the reality that the fertility industry in Israel is supported by the state and in great demand. According to Rabbi Gideon Weitzman, director of the Puah Institute, the only prominent and vocal posek who opposes fertility treatments in Israel today is the Haredi posek Rabbi Chaim Kanieovsky.\textsuperscript{373} As a consequence, embryos for many years now have been discarded and to question the legality of their destruction in hindsight would be increasingly difficult.

Apart from those who are influenced by Zionist ideals to expand the Jewish nation in Israel, the Haredi (Ultra-Orthodox) Rabbi Moshe Sternbuch, who serves as the Vice-

\textsuperscript{370} Bleich, \textit{Bioethical Dilemmas}. 221


\textsuperscript{372} One scenario which is imaginable is that embryos are bred to provide spare organs for the living.

\textsuperscript{373} Personal correspondence with Rabbi Gideon Weitzman 23. Sept.2020
President of the Rabbinical Court and the Ra’avad (Chief) of the Edah HaChareidis (Haredi Council) of Jerusalem (born 1928) published the following opinion:

The prohibition against abortion is [limited to the destruction of the embryo] in the woman’s uterus, for the [embryo] has the potential to develop and become complete in her womb and it is destroyed. But here, outside the womb, an additional procedure is required to implant [the embryo] in the woman’s uterus and without that [procedure] it will perish of its own accord and not reach completion.374

Edah HaCHaredis, the Orthodox council of Jerusalem, is an organisation combining different groups of strict Haredim with a profound anti-Zionist and anti-secular agenda. Rabbi Moshe Sternbuch’s permissive attitude to the destruction of embryos and IVF can thus not be understood as a result of Israeli state influence; rather it demonstrates that the goal of fertility is shared by those Israeli factions that are normally deeply divided.375

Further authorities that share the permissive approach are the American Conservative Rabbi Elliot Dorff, Professor of Jewish theology at the American Jewish University and Rabbi Chaim David Halevi, Sephardi Chief Rabbi of Tel Aviv-Jaffa (born 1924 – died 1998). Despite the divisions that exist in so many matters between Conservative, Modern Orthodox and Haredi Jews, the prevailing opinion across the denominations is permissive and holds that an ovum, which has been fertilised outside the body, does not carry the potential for life in its current location.376

Elliot Dorff states that:

While we should have respect for gametes and embryos in a petri dish as potential building blocks of life, they may be discarded if they are not going to be used for some good purpose. If an embryo during the first forty days of gestation is “simply fluid”, an embryo situated outside a woman’s womb,

374 Sternbuch in Bleich, Bioethical Dilemmas. 219
375 Peter Herriot, Religious fundamentalism : global, local and personal / Peter Herriot (London ; New York: Routledge, 2009).
376 Bleich, Bioethical Dilemmas. 219
where it cannot with current technology ever become a human being, surely has no greater standing: it is at most “simply fluid”.\textsuperscript{377}

Rabbi Bleich rebukes this, arguing that no sources are given to support the view that embryos \textit{in vitro} can be destroyed with impunity; that indeed there is no reason to suggest that any difference should be made.\textsuperscript{378} To counter Bleich the translation of Genesis 9:6 which speaks of a \textit{man in man} is frequently used to demonstrate that the category of a child \textit{in vivo} has a different biblical status from a child who is not \textit{in vivo}. The usual translation is:

\begin{quote}
Whoso sheddeth man’s blood, by man shall his blood be shed; for in the image of God made He man’ (Genesis 9:6).\textsuperscript{379}
\end{quote}

But an alternative translation suggests that Genesis 9:6 can also be understood as:

‘Whoever sheds the blood of man \textit{in man}.’

The \textit{Talmud} records the opinion of Rabbi Ishmael that a \textit{man in man} refers to a fetus growing in its mother’s womb.\textsuperscript{380} \textit{Poskim} using this source may imply that Genesis 9:6 thus adequately states that the protection of an embryo relies on its location in the mother’s womb, otherwise it neither has personhood, nor life. However, Rabbi Ishmael’s view can be read in different ways. Albeit that Genesis is before the Sinaitic Covenant and the instructions are considered applicable for Gentiles rather than Jews, Rabbi Ishmael introduces the idea that feticide before birth can be a capital crime. Rather than understanding the fetus as dependant on the womb, \textit{man in man} can also be interpreted as an individual who is independent of the womb. According to this understanding, \textit{even - and not only in -} the womb life is sacred and inviolable. Maimonides’ ruling that the sabbath laws can be set aside to save an embryo applies to the case of a pregnant woman dying on the Sabbath. The fetus in this case is removed from the womb and tended to outside the womb. The maturity

\textsuperscript{377}Dorff Elliot N., \textit{Jews and Genes.}, 33

\textsuperscript{378} Bleich, \textit{Bioethical Dilemmas}. 219

\textsuperscript{379} "Torah." (accessed 7.1.2020)

of the fetus is not the issue in this case, the issue is that the responsibility to the fetus does not change whether it is outside or inside the womb. The fact that an embryo in the womb is protected, in no way entails, that outside the womb it is not protected.\textsuperscript{381}

The two interpretations of \textit{man in man} thus come to opposing conclusions. Bleich initially disputed that only a \textit{man in man} rendered protection to the embryo through the example that the killing of Adam, who, as the first man on Earth and so was not born of a womb would still constitute murder. The legality of the destruction of embryos \textit{in vitro} thus remains unresolved. One biblical narrative that supports the idea of the \textit{halakhic} value of potential life is found in Genesis 4:10, which tells of God confronting Cain after the murder of Abel. It is usually translated into English as:

\begin{quote}
And He said: “What hast thou done? the voice of thy brother's blood crieth unto Me from the ground.”
\end{quote}

Although all English translations appear to translate the word blood in the singular, the Hebrew text uses the plural \textit{da.mim} (bloods), not \textit{dam} (blood), referring thus to the brother's bloods. The sages of the Mishnah interpret this unusual plural as meaning that not only Abel, but the blood of his potential descendants is crying out.

\begin{quote}
For so have we found it with Cain that murdered his brother, for it says, “The bloods of your brother cry out” (Gen. 4:10). It doesn’t say, “The blood of your brother”, but rather “The bloods of your brother” meaning his blood and the blood of his descendants. Another saying is, “The bloods of your brother” that his blood was cast over trees and stones. Therefore, but a single person was created in the world, to teach that if any man has caused a single life to perish from Israel, he is deemed by Scripture as if he had caused a whole world to perish; and anyone who saves a single soul from Israel, he is deemed by Scripture as if he had saved a whole world.\textsuperscript{382}
\end{quote}

By analogy, this interpretation that acknowledges potential life, which lies in the future of the descendants of a murdered individual, would appear to support the

\textsuperscript{381} \textit{Shabbat} 151b Bleich, \textit{Bioethical Dilemmas}. 207

\textsuperscript{382} Mishnah Sanhedrin 4:5 “Torah.” accessed 5 June 2020 This biblical support was mentioned in a discussion with Dr. Jonathan Gorsky who has supported this research.
argument that life *in vitro* should not be nullified just because it cannot thrive outside the mother’s womb. It is noteworthy that Rabbi Feinstein permitted the destruction of embryos as part of IVF to treat infertility, he did not permit the destruction of embryos for the selection of healthy embryos if the couple did not suffer infertility. This is in line with his permitting the treatment of infertility through donor sperm (healing infertility), but objecting to the abortion of a child who has a debilitating disease.\(^\text{383}\)

**Implications in Israel:**

In Israel, as well as in the diaspora, the voices of *halakhists*, who oppose IVF and the destruction of embryos, appear somewhat side-lined today and this may give a valuable insight into the effect that the legislation of fertility issues in Israel has on medical *Halakhah*. No data can be found to support this supposition, but many contemporary discussions no longer seem to question the use of donor gametes, the legitimacy of IVF and the destruction of embryos *in vitro*. It appears that because the *halakhic* permissive opinions of certain Orthodox rabbis who, are normally on opposite ends of the political spectrum, are united in their support for Jewish fertility, their opinions remain largely unchallenged today and have become state-supported Israeli policies. This means that, although different rabbis in Israel will vary in their permissiveness towards certain medical interventions, the underlying assumption that allows IVF and the destruction of embryos becomes gradually dominant and normative, even beyond the borders of Israel. In this way medical *Halakhah* may become increasingly codified through its application and legal authorisation in Israel. This would explain why the opinions of some of the great *halakhists*, who oppose aspects of the fertility industry, are slowly being side-lined.\(^\text{384}\) Only the status of *mamzerut* in Israel, which in previous generations was treated with some discretion, appears more dogmatically enforced today, if rabbis do indeed keep lists with children of unkosher conception.\(^\text{385}\)

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\(^{384}\) Numerous authorities, including Rabbi Shindler in an interview, cite the opinion of Rabbi Feinstein for donor gametes beyond the limitations of gentile sperm. See the interview with Rabbi Shindler in the Appendix.

\(^{385}\) See the interview with Rabbi Sylvia Rothschild in the Appendix about the mention of lists of *mamzerim*. 

176
Conclusion

Bearing in mind the ethical and legal concerns raised in the early days by Teitelbaum, Waldenberg and Jakobovits about the effects of the medicalisation of procreation on the legal and moral tradition of the community, it is quite remarkable that today long held assumptions appear more negotiable. Kosher conception used to mean children born and conceived (almost) exclusively within the marriage bed, today kosher conception may involve donor gametes, surrogate mothers and carefully controlled hormone cycles in order to fulfil newly defined *halakhic* requirements. It is not the case that lineage or marriage no longer matter for childbirth, but that the command to be fruitful appears to be increasingly prioritised over other commands and concerns.
Chapter Seven

*Halakhic Debates and their Implications in Israel*

Third Reproductive Technology: Pre-Implantation Genetic Diagnosis and the Implications for Human Germline Genome Editing of Embryos during IVF

This final halakhic debate examines Pre-Implantation Genetic Diagnosis (PGD) and the implications for Human Germline Genome Editing (HGGE) of embryos. PGD is used when problems exist in the nuclear DNA of the parents or when parents wish to select certain genetic traits. HGGE is a highly controversial technique that is not yet used routinely, but is under discussion. It changes the genetic code of the embryo and the germline, meaning that the changes will be passed onto future generations.

The nuclear DNA of a baby determines the main features and characteristics of a child. This halakhic debate builds on the conclusion of all the previous legal debates and suggest a trajectory where the *halakhic* debate and Israeli legislations are likely to lead. The first halakhic debate asked whether procreation could use artificial insemination possibly with donor sperm, the debate discussed the legal status of a fertilised ovum *in vitro* versus *in vivo* and the implications of using donor eggs or surrogate mothers for *halakhic* motherhood. This final halakhic debate examines the legal arguments surrounding nDNA (nuclear DNA). It considers screening for genetic disorders as well as the selection of desired genetic traits and physical characteristics. These discussions in turn form the foundation and potential *halakhic* precedents for the debate about HGGE.

**Scientific background and ethical questions which arise:**

**Human Germline Genome Editing**

HGGE of IVF babies is a technique in which individual genes of embryos are changed, added or deleted. The changes can be heritable, meaning that the offspring of these edited children will pass the edit onto future generations. Making
changes to individual genes in the nDNA used to be a very difficult, slow and expensive procedure, but since the advent of new gene-editing tools, such as the Crispr-cas9 technology in 2012, nuclear gene editing has become far more accessible. Many of the genetic disorders that disproportionately afflict the Jewish community are single-gene disorders, such as Tay-Sachs and Cystic Fibrosis. The hope is that eventually gene therapies can be found that can edit faulty genes in both adults and embryos. As an embryo is at a very early stage of development, gene therapy that edits a fault at this moment would need to reach far fewer cells than in a born child or adult. This is why the embryonic stage is considered an opportune moment for gene therapy.

Human embryos have already been edited and born in China, breaking a moratorium that had been agreed amongst scientists, but the technique remains highly controversial. So far embryonic germline gene editing is not considered safe, as the positive effects of one genetic edit may have unknown negative genetic side effects. Besides safety, even genetic edits which protect children from illness or disability raise fears of a society driven by eugenic practices. Most countries worldwide, including Israel, currently prohibit the editing of the nDNA of embryos, but reasons behind this moratorium differ worldwide. Investigating this reasoning is important if we are to understand the decision-making process in different countries. For most ethicist and legal advisors, safety is for now the major concern, but many also disagree with its use when proven safe. Opponents consider germline gene editing to be a eugenic practice, which diminishes the dignity and diversity of life. Others advocate human stewardship of Nature and fear that HGGE interferes with the telos of Creation. Furthermore, as any genetic enhancement is likely to be expensive, they fear it may increase societal inequality. Proponents of the technique herald the advent of a genetically enhanced society as an opportunity to help all of

386 Nuffield Council on Bioethics, Genome Editing and Human Reproduction.


humankind, erase disabilities and enable the genetically less fortunate. Genetic edits can be divided into those that heal illness and those that enhance beyond illness, but these divisions are difficult to pinpoint. Deciding on a human norm is all but impossible whether this concerns physical or mental attributes. Religious leaders are divided; whilst some condemn, others encourage the human intervention in Creation. Axial points of divergence often depend on the importance given to the autonomy of the child, the importance of procreation and the moment at which the embryo or developing child achieves a moral and legal status that grants it protection.\textsuperscript{390}

**Pre-Implantation Genetic Diagnosis (PGD)**

Very similar questions to HGGE are raised by the practice of PGD (Pre-implantation genetic diagnosis). Here children are not edited, instead IVF embryos are selected or deselected according to their genetic traits. This involves taking a biopsy from an embryo during the IVF process and running a number of tests in order to filter out genetic abnormalities for known conditions or genetic traits. Embryos with genetic traits that are desired are then selected and implanted into the mother’s uterus, whilst embryos with unwanted genetic traits are discarded. IVF already routinely selects the healthiest-looking embryos in order to achieve a successful pregnancy, but, in the case of PGD, this filtering or selection is done on a genetic level. PGD can be used for a number of reasons, each with their own ethical and halakhic challenges, but whilst these challenges exist, the use of PGD has become mainstream in some countries, whilst in others it is illegal or highly regulated.

The most obvious and perhaps least controversial use of PGD is the deselection of embryos with a known genetic disorder that is life-threatening and leads to a short life of suffering (e.g., Tay-Sachs). This, however is often expanded to conditions that are serious, but treatable (such as Haemophilia or Cystic Fibrosis), or conditions with a late onset in adulthood (such as Huntingdon’s disease). Genetic testing for symptoms, such as Down’s Syndrome, deafness or dwarfism, have led to heated discussions about whether humanity has the right to eliminate these conditions or whether their difference adds to the rich diversity of humanity.

This in turn has led to the question of whether deaf or dwarf parents have the right to deliberately select an embryo with the same condition. This leads to ethical discussions of what constitutes a normal and healthy child, whether a norm can or should be established and whether the right to autonomy for the unborn child should disallow any decisions by the parents that will affect the children.

PGD offers the option to select genetic traits such as the eye colour or the sex of a baby. Some countries view this parental choice as ethically acceptable, whilst others see it as a deeply unethical path to a society with a clear gender preference and imbalance.

Trait selection can also be used to select donor siblings, which in turn raises an ethical question; should parents of a child, who suffers from a disease for which a genetically well-matched donor is required, be able to choose amongst the available embryos for a potential sibling with a genetic makeup suitable for cell donation?

This practice is called preimplantation genetic diagnosis for histocompatibility. Cells can initially be harvested from the umbilical cord, causing no harm to the newborn. However, the child may in its life feel morally obligated to supply other tissues and cells with a more invasive harvesting procedure. Some countries view this as a deeply unethical act that demotes the child to an organ factory, whilst others celebrate the ability to save a child by giving birth to a sibling.

Differences in the worldwide legislation of PGD

The regulation of PGD sees vast differences around the world. These are the result of legal, social, religious, economic, ethical and political variations. America, for various reasons, has not regulated the use of PGD at all and, for a price (at present $15,000), parents can have their early-stage embryos screened for all known genetic conditions, as well as choosing gender and eye colour. Germany, in contrast, initially outlawed PGD, because this invasive deselection of viable embryos was considered a form of eugenics, which was in clear conflict with the Embryonenschutzgesetz (The

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Embryo Protection Act).\textsuperscript{392} Today, in Germany, Italy, Austria and Switzerland, PGD is no longer prohibited, but highly regulated.

England allows the use of PGD in cases where there is valid medical concern for the genetic wellbeing of children born to a couple with known genetic abnormal predispositions. Preimplantation genetic diagnosis for histocompatibility is permitted in certain circumstance. Gender and trait selection are not permitted, nor is PGD permitted for a couple without a well-established genetic risk.\textsuperscript{393}

Israel has a permissive approach to PGD, thanks to a government commission, formed in February 2005, that set the limits for the use of PGD. The commission presented three categories that would suffice for allowing a couple to undergo PGD:

1. a severe genetic disease that appears in young children, such as Tay-Sachs and cystic fibrosis
2. if one of the partners carries a balanced translocation that could cause illness or the death of their offspring
3. to create a donor HLA match for a sick person, a “sibling saviour”.\textsuperscript{394}

Whilst these limitations appear similar to those set out in the UK, it appears from examples set out below that PGD has become a mainstream addition to IVF in Israel. In 2005, the Knesset permitted PGD for gender selection for the non-medical purpose of family balancing for couples who have already had four children of the same gender\textsuperscript{395}. The following subchapters will investigate how these decisions were made and how halakhists approached the subject. Albeit that Israeli law is not synonymous with Halakhah, it will assess in what way, through the influence of


Halakhah, Jews and Israelis differ in their approach to PGD from other nations and suggest that the criteria by which they will judge HGGE are likely to follow a similar narrative.396

**Halakhic responses to PGD**

So far it has been the aim of this research to present opposing halakhic views that condone or permit individual fertility treatments. Although in the case of PGD there is mention in the literature of Rabbis who still do not condone any form of IVF, no published voices could be found from within Jewish Orthodoxy who specifically oppose PGD and HGGE outright. Judging from the past halakhic debates, opposition to PGD is likely to come from individual authorities such as David Bleich (see below), from David Novak and from rabbis who continue to follow the teachings of the poskim opposed to artificial insemination and IVF, such as Rabbi Teitelbaum and Rabbi Waldenberg. It may be the case that those who oppose IVF see no need to publish their disproval of PGD; because it is consequential that anyone who opposes IVF will oppose PGD. Whilst no published responses from the Hasidic leaders, especially the Satmar leadership, were accessible for this research a number of leading Haredi poskim have spoken out in favour of PGD. The result of this is that modern Orthodox, Haredi and Conservative halakhist all appear to support PGD.397

The main difference in their approach is the degree to which the practice is either accepted, recommended or viewed as obligatory. The halakhic narrative is markedly different to that mentioned above in Europe. This is because it is pragmatically justified by the argument that PGD is the best way to avoid the potential abortion of embryos in vivo that are found to carry genetic defects at a later stage of pregnancy. Rabbi Michael Broyde, Professor of Law at Emory University and member of the Beth Din of America until 2014, states as early as 2004 that:

397 The Conservative Rabbis of America have issued their support for PGD, but as their influence is not strong in Israel, their halakhic reasoning goes beyond the scope of this research.
Given that the alternative to PGD is typically either a post-implantation abortion or an even worse alternative, Jewish public policy ought to support the ready availability of PGD. 398

In the following subchapter, the arguments of Rabbi David Bleich, who somewhat cautiously acknowledges that PGD is not forbidden, will be compared with the view of Rabbi Asher Weiss, who strongly encourages PGD, and Rabbi Shlomo Moshe Amar who views the use of PGD as obligatory in certain cases. 399 From a religious legal viewpoint, PGD addresses the ideal relationship between man, God and Creation and the limits to which humankind should alter the telos of Creation.

Rabbi Bleich, the cautious view:

Rabbi Bleich addresses the question of PGD in an article published in 2010 in the book The Value of Human Life, Contemporary Perspectives in Jewish Medical Ethics. 400 Bleich begins with a lengthy discussion in which he contextualises himself as a halakhist who inhabits two worlds, that of a professor of Law and that of a Rosh Yeshiva (Dean of a Yeshiva dedicated to the study of Halakhah). For a professor of Law, it is acceptable to apply legal realism and support an argument through whichever source will support it:

Legal realism is not only accepted but applauded …that is so because in secular legal systems there is no transcendental truth. 401

As a Rosh Yesiva, however, an argument must be based only through the prism of Jewish tradition and the use of authoritative sources. In setting these limitations to his halakhic argument Bleich establishes his conservative Orthodox approach which seeks to avoid the influence of public pressure and secular sources, drawing instead only on the unchanging transcendent truth of Torah.

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401 Bleich J. David, “Pre-Implantation.” 120
There is no ethical principle that is not contained in the Torah. There is no Jewish ethics that does not stem from the mesorah, tradition, that originated at Sinai. For Judaism, any propositions that is not part of that tradition is devoid of ethical value.\textsuperscript{402}

To establish that humanity is in partnership with God, Bleich cites Genesis 3:19. Here Adam is instructed ‘by the sweat of your brow shall you eat bread’ and this is interpreted both as a curse and an authorisation. It is a curse because Adam is no longer provided for in the Garden of Eden like a guest, instead he is authorised to get involved, to till the earth and involve himself in ma’aseh bereishit (Creation).\textsuperscript{403} This act of co-creation is not without limits and Bleich cites a number of medical practices that step beyond these limits: vasectomies for contraception, Viagra for unmarried men or assisted suicide may not be performed by physicians. The doctor is described as:

God’s partner in exercising providential guardianship over human beings.
God afflicts and He sends cures. He chooses to send them through his emissaries (physicians).\textsuperscript{404}

Understanding the instructions as to what procedures are permitted and prohibited is a matter of intense halakhic debate, and Bleich emphasises the necessity of this ongoing halakhic debate. The mitzvah to procreate is directed at men only and Bleich clarifies that the commandment to be fruitful is only finally fulfilled when a son and daughter are born and when both children themselves have reproduced. As mentioned in previous Chapters Bleich cites a number of reasons why fertility treatments are not without halakhic problems- such as the destruction of embryos, the procurement of seed without the forbidden spilling of seed etc, but he cites the principle that a negative commandment may at times be suspended in order to fulfil a positive commandment. In the case of fertility, the Talmud relate the case of a man who is half a slave and half a free man. The Talmudic case is discussed by Tosafos

\textsuperscript{402} Bleich J. David, “Pre-Implantation.” 123 Bleich is setting his argument up against the methodology of those halakhists, who, according to Bleich, allow personal preference to influence their halakhic reasoning.

\textsuperscript{403} Bleich J. David, “Pre-Implantation.” 125

\textsuperscript{404} Bleich J. David, “Pre-Implantation.” 126
in two places; *Chagigah 2b* and *Bava Bara 13a*.\(^{405}\) As a slave the man is not permitted to marry a Jewess and, as a free man, he is not permitted to marry a slave, how then is he to fulfill the commandment to procreate? According to the *Gemara* (commentary on the *Mishnah* – (oral tradition), the only possible solution is to compel the master to free the half slave. This is because, although the positive command to be fruitful might supersede the negative command not to cohabit in an illicit relationship, the two acts must occur at the identical time in order for this principle to be applied and in this case of PGD they do not occur simultaneously.\(^{406}\)

On the Day of Judgement, a person will be asked….: Did you engage in procreation? (*Gemara Shabos 31a*)\(^{407}\)

The question is not how many children have been sired, or whether grandchildren have been born, but only whether a man engaged in the *mitzvah* to procreate:

Apparently, the obligation is to engage in sexual intercourse, and what happens afterwards is up to God.\(^{408}\)

Thus, a man who has done all in his power to procreate and has not sired children has fulfilled the *mitzvah* to be fruitful according to Bleich. In discussions about the legality of *mitochondrial replacement therapy* (MRT), a medical innovation that aims to create healthy children by replacing faulty mitochondrial DNA through donor *mitochondria*, Bleich addresses the delicate balance between the commandment to heal and the need to remain cautious in light of unknown dangers of new treatments. Bleich does not dispute the Jewish obligation to heal and procreate, but notes two legal principles that may be applied to preclude MRT. Firstly, King Hezekiah did not wish to procreate because he feared that his children would not be morally upright, and the prophets rebuke him with the words:

… of what concern are the secrets of God to you? (*Berakhot 10a* -tractate in the *Mishnah* and *Talmud*)

\(^{405}\) Bleich J. David, "Pre-Implantation." 128

\(^{406}\) The permission to break the laws of Shabbat in order to save a life may be such a case, but again the life must be saved at the exact moment at which the Shabbat is broken not at some future time.

\(^{407}\) Bleich J. David, "Pre-Implantation." 129

\(^{408}\) Bleich J. David, "Pre-Implantation." 129
Secondly, the *Talmud* records a discussion between the two eminent Rabbinic schools known as *Beit Shamai* (House of Shamai) and *Beit Hillel* (House of Hillel) which discuss whether it is better for humankind to be created or not. In their debate they suggest:

Better for man that he had not been created (Eruvin 13b – *Talmud*).\(^{409}\)

Bleich acknowledges that the Jewish tradition provides the earliest eugenic legislation, when it discouraged marriage into families with known hereditary maladies, but the rebuke of King Hezekiah also teaches that ultimately this concern is with God and does not free a Jew from the obligation to procreate. Although the comparison with the king who feared moral discrepancies from his children may stretch the analogy, Bleich’s second point is very insightful in that it determines that life at any cost, when it is not yet created, is not necessarily a blessing. Bleich’s argument is compelling because he reasons that as long as the safety of MRT through subsequent generations (as the genetic edit crosses the germline), cannot be known, it may be a grave mistake to burden as-yet-unborn life with hardship:

Judaism recognises that, for any given individual, existence is not an unmitigated blessing and hence his or her personal welfare might have been better served had he or she not been born.\(^{410}\)

The pivotal insight here is that Judaism does not recognise the act of suffering as a positive human achievement. Suffering is a malady that should be avoided, it has no higher or mystical meaning as it does in the Christian tradition.

Certainly, one must empathize with the emotional anguish of the infertile. But elimination of their pains does not justify the risk of imposing congenital burdens upon the yet to be born.\(^{411}\)

Procreation is a religious obligation, but the fact that the *mitzvah* is given to men and does not apply to women is usually explained by the fact that giving birth is a dangerous act and no woman can be ordered to risk her life. This may be taken as


\(^{410}\) Bleich J. David, "Pre-Implantation." 71

\(^{411}\) Bleich J. David, "Pre-Implantation." 72
an analogy to support the argument of Bleich that unborn life cannot rightfully be burdened with the risk of a life of suffering.

This does not mean that fertility treatments are forbidden, but it does mean that the common justification to break *halakhic* rules in order to fulfil the command to be fruitful is challenged. Bleich concedes that many *poskim* disagree with him and have permitted the destruction of embryos *ex utero* (*in vitro*), that the procurement of semen can be done in a *halakhically* permissible way and that the ethical argument can be made to protect children from suffering. There is thus no condemnation of PGD per se, but PGD and MRT should at the least be treated with great caution:

> I cannot say that the procedure is prohibited…but if a decision is made to allow any of these procedures it is a decision which must be reached only after a great deal of soul searching …Such determinations should certainly not be made lightly for purposes of producing a designer baby or for similar trivial reasons.\(^{412}\)

Rabbi Asher Weiss, the strong endorsement of PGD

Rabbi Asher Weiss is a well-known and respected contemporary *Haredi posek* (born in 1953) who grew up in Borough Park, Brooklyn. He is the *Rosh Kollel* of Machon Minchas Osher L'Torah V'Horaah (a *Rosh Kollel* is the head of a *kollel* which is an institute for the advanced study of the *Talmud* in the US). Weiss is also the *posek* for Sha’arei Zedek hospital, a large hospital in Jerusalem. He is an authority on medical *Halakhah* from an *Ultra-Orthodox* or *Haredi* background.\(^{413}\)

Rabbi Weiss has made several statements concerning the use of IVF and PGD. Weiss ruled that IVF is not obligatory for a couple with fertility problems, but it is strongly recommended for them. When approached by a couple who had a 50% chance of passing on a serious genetic disorder with the question whether they were still obliged to fulfil the *mitzvah* to be fruitful and bring more children into the world, Weiss ruled that it was a well-established *halakhic* principle that Jews were not

\(^{412}\) Bleich J. David, *“Pre-Implantation.”* 131-138

required to fulfil a *mitzvah* if there is excessive burden or if it involves severe physical distress:

All the more so here, *a fortiori*, that one is exempt when it would cause a lifetime of suffering for a child not yet born, where there is serious fear that they will be born with physical or mental disabilities and will face a lifetime of suffering.\(^{414}\)

The couple therefore was not obliged to have more children. Presumably, although this is not explicitly said, the couple could use contraception to avoid a pregnancy.

Weiss also considers the example of King Hezekiah, but suggests that the modern situation differs from that of the king. The descendants of the king had free will to repent and there was thus insufficient reason for King Hezekiah not to procreate. In this modern case the conclusions are drawn from the insights of scientific data of heritable genetic diseases that the child cannot change.

Weiss considers whether a couple are obligated to use PGD if they are known to carry a genetic risk and want to have children and rules that, whilst the couple are not *halakhically* obligated, they are strongly recommended to use PGD.\(^{415}\)

In response to the question whether a healthy fertile couple should undergo IVF and PGD in order to assure healthy children, Weiss rules that a healthy couple should not use IVF as it is an invasive medical procedure that is not risk free, but if a couple are using IVF already for reasons of infertility, then it is legitimate to use PGD as well, in order to ensure a healthy child.

In response to the question whether PGD can be used by a couple to decide the gender of a child, Weiss responds that PGD and IVF should not be used for frivolous purposes such as deciding the gender of a child, as any child is a gift from God. If, however, the parents have a legitimate reason to use IVF and PGD in order to avoid


genetic diseases, then there is no harm in choosing the gender of the child, if sufficient healthy embryos exist to make this choice.\footnote{Rav Asher Weiss, "Cedars-Sinai Beginning of Life I.,"}

Rabbi Weiss further rules that the discarding of spare embryos is lawful. Although their potential for life is acknowledged, they do not warrant the protection that Halakhah gives to embryos \textit{in vivo}. This is because the permission to violate one Shabbat in order to save an embryo, which can then observe many Shabbats, is only warranted for embryos \textit{in vivo}.\footnote{Rav Asher Weiss, "Cedars-Sinai Beginning of Life I.,"}

Weiss does not state a source for his opinion on the location of the embryo's lack of protection \textit{in vitro}. If Weiss's source for the violation of the Shabbat is Nachmanides, then it could be argued that Nachmanides was referring to an embryo in a pregnant mother who was dying. Nachmanides (Ramban) lived at a time when the success of saving the life of such a child was negligible, nevertheless the attempt to save life always justified breaking Shabbat. Rabbi Breitovits explains the context:

Ramban makes clear that according to \textit{Behag},\footnote{Simeon Kayyara, Jewish-Babylonian halakhist of the first half of the 8th century} no distinction should be drawn between pre-40 day and post. It is the potential for human life, not its actualization, that justifies the dispensation of \textit{pikuach nefesh} (to save a life).\footnote{“The Preembryo in Halakha, Jewish Law Articles,” JLAWS - Jewish Law Articles, \url{https://www.jlaw.com/Articles/preemb.html} accessed 10. Oct.2020}

The importance of saving potential life to Ramban thus appears an absolute priority even in the face of negligible success. To infer from this that the embryo's \textit{locus} needs to be \textit{in vivo}, to be protected thus may be unsubstantiated. An embryo \textit{in vitro} if frozen can flourish if successfully implanted even after many years. The \textit{halakhic} demand to save life need not therefore be confined to life \textit{in vivo}.

\textbf{Rabbi Shlomo Moshe Amar and Rabbi Bakshi-Doron, the obligation to use PGD in certain circumstances}

Only a few poskim have ruled decisively that PGD should be a \textit{halakhic} obligation for any couple who are known to carry a genetic disposition, but these \textit{poskim} have held
highly authoritative positions in Israel. Benjamin David and Gideon Weitzman, both of the Puah Institute, quote two former Sephardic Chief Rabbis of Israel. Rabbi Bakshi-Doron (Chief Rabbi from 1993-2003) ruled that couples who know that they are likely to pass on a severe genetic condition are obliged to use PGD and avoid natural pregnancy.\textsuperscript{420} His successor, Rabbi Shlomo Amar (Chief Rabbi from 2003-2013), is quoted as ruling that although parents and doctors have no moral obligation towards embryos \textit{in vitro}, parents do have an obligation to care for the wellbeing of a developing child in the uterus and a living child, even those who are not yet conceived or born.

The prominent Orthodox posek Rabbi Nahum Rabinovich, described as a senior halakhist in the Israeli Religious Zionist community explains the implications of this on the mitzvah to procreate:

\begin{quote}
In addition, one is not permitted to fulfil the halakhic requirement of procreation if this causes damage to another person, and this obviates the performance of the commandment; thus, it can be defined an obligation to undergo PGD.\textsuperscript{421}
\end{quote}

In the case of a woman who was a known carrier of a genetic disposition, Rabinovich ruled that:

\begin{quote}
…one may not permit in any way to bring in to the world a child that, God help us, might well die with such suffering, and this prohibition applies to the woman, the man and the doctors involved.\textsuperscript{422}
\end{quote}

Quite which conditions are severe enough to warrant this prohibition is unclear, but these decisions by eminent poskim demonstrate the change of narrative that has happened since the time of the early fertility treatments in the first two halakhic debates, which saw the poskim ruling with caution and concern even at artificial insemination \textit{in vivo}. The halakhic debate on fertility has thus come a very long way in a short time in Israel. This positive attitude might not be surprising, were it not for the significant halakhic concerns raised by earlier poskim and were it not for the

\textsuperscript{420} David et al., "Genetic Counseling ".

\textsuperscript{421} Rabinovich N. E. Responsa Siah nahum, vol 1, responsum 96, quoted in David et al., "Genetic Counseling ".

\textsuperscript{422} David et al., "Genetic Counseling ".

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comparison to many other countries where ethicists and policy makers view PGD with considerable caution and fear for humankind’s genetic future if the fertility industry is left unbridled. Yet, in Israel we witness not only modern Orthodox, but even Haredi poskim (who often shun modernity), accepting the medicalisation of procreation and genetic filtering of embryos with little obvious reservation. The reason may be associated with the plight of parents with children who suffer from life limiting genetic diseases. Certain genetic diseases are particularly prevalent in the Jewish community. As a consequence, a unique project began in the 1980s that may have aided the general acceptance of genetic intervention seen today. It was the result of one Haredi rabbi, who tragically lost four of his young children to Tay-Sachs and decided that, in the age of genetic knowledge, the next generation of parents should not suffer like this.

Genetic screening in young adults, contextualising the positive response to PGD

Tay-Sachs is a genetic condition particularly prevalent in the Ashkenazi community (Jews originating from the northern hemisphere). In 1983, Rabbi Yosef Ekstein founded a grassroots programme called Dor Yeshorim (the upright generation), which was first established in the Haredi community in Brooklyn and continues to this day. Whilst at school, students are tested for recessive genes that have a particularly high frequency in the Ashkenazi community. Today these include Tay-Sachs, familial dysautonomia, cystic fibrosis, Canavan disease, glycogen storage disease (type1), Fanconia anaemia (type C), Bloom syndrome, Niemann-Pick disease and Mucolipidosis (type IV). Initially, however, Rabbi Ekstein’s aim was to eradicate Tay-Sachs. This affects babies after the first few months of their lives and is a progressive, and usually fatal, disorder of the nervous system. Rabbi Ekstein faced considerable opposition to this programme from his community, which was suspicious of the genetic sciences and the outside world. Against much opposition, Ekstein was supported by the late Voidislaver Rav (Rebbe) Yissachar Ber


The concerns raised by PGD were discussed in detail at the 2nd Commission meeting of the International Commission on the Clinical use of Human Germline Genome Editing (London November 2019) a link was established between the use of PGD and the likelihood of the application of the gene editing CRISPR technology during PGD in the near future.
Rottenberg, who in turn was a close advisor of Rebbe Yoel Teitelbaum (the Satmar Rebbe of the first halakhic debate). Objections from the Haredi community (often referred to as the frum (pious) community), focused especially on the stigma that would be attached to any young person found to be a carrier. This would affect the marriage potential of any young person branded as such and their family. In response, Rabbi Ekstein devised a system in which adolescent children were tested, but not told their genetic predisposition; instead, the family were issued a number per patient. Haredim usually marry via arranged marriages and now, before a match is finalised, both sides phone the office of Dor Yeshorim to enquire whether the couple are compatible, i.e. whether both partners are carriers of the same genetic predisposition. If they are, the match is usually not made, if they are not carriers of the same disorder, then the marriage can go ahead. If a couple were only tested after they married or have a child suffering from a genetic disorder, which was not routinely tested for, then they are advised to use PGD.424

The programme of Dor Yeshorim is not without criticism; normally this centres on the fact that patients are not told their results. Similar programmes have been set up in modern Orthodox communities where patients have the choice of knowing their results, but there is little question that this grassroots movement has been ground-breaking. Tay-Sachs has been virtually eliminated in the Jewish community in America, other genetically transmitted diseases have declined as ever more conditions are tested for. The Dor Yeshorim programme has spread worldwide and is at the forefront of genetic testing in the Jewish world. Pivotaly, the programme has changed the attitudes of the Jewish community. Genetic illness was a terrible burden and stigma and was not openly discussed before the advent of Dor Yeshorim, so that secular test facilities were shunned. Rabbi Ekstein proved that the concerns of the frum community about the marriage potential of their children could be incorporated in the testing process. Whilst many families used to bear the tragedy of losing young babies to Tay-Sachs this fear is no more, now that the genetic testing of young adults has become routine. It is highly likely that the positive acceptance of

PGD is at least in part to be explained by the positive experience that this highly sheltered and conservative community has had with Dor Yeshorim.

**Halakhic flexibility or the slippery slope to eugenics**

As PGD deselects embryos according to genetic attributes, the use of PGD raises concerns about eugenic practices. A case presentation of the Puah institute on: *Genetic Counselling for the Orthodox Jewish Couple Undergoing Preimplantation Genetic Diagnosis*, dismisses the charge of eugenics and distinguishes it from the Jewish exercise in healing:

Eugenics is an attempt to create a perfect society and to wean out or destroy any substandard characteristics and qualities…PGD is not intended to create a perfect society, nor does it suggest a societal solution. Rather, it is primarily a solution for medical conditions that is suggested and offered only in specific cases of need, and each case must be judged on a case-by-case basis, and is therefore not eugenics.\(^425\)

Against the concern that the eradication of disabilities in children would increase discrimination against disabled adult members of society, David, Weitzman, Herve and Fellous argue that Judaism has a long tradition of not judging people by their physical ability:

The *Talmud* and tradition are replete with Torah scholars who were physically disabled (Babylonian *Talmud*, Kiddushin 31a). Jewish law has never attempted to create a physically ‘perfect’ human being, but has sought to raise the spirit and views spiritual accomplishments as superseding physical perfection (Babylonian *Talmud*, Ta’anit 7a). …There is no fear that PGD will initiate the slippery slope towards a desire to choose the ‘best’ physical characteristics.\(^426\)

As the focus in Orthodox families and more so amongst the Haredim is indeed on pious modesty rather than on cosmetic or physical attributes, this may be a justified

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425 David et al., "Genetic Counseling .

426 David et al., "Genetic Counseling .
argument, but whilst parents might desire modest children, few parents can resist wishing for intelligence and any other attribute that will help their offspring succeed. As Jewish couples tend to be guided by their rabbis or by institutions, such as Puah, every case continues to be judged by the individual circumstances and needs of the couple concerned. The hope is, therefore, that unethical desires of parents and scientists are curtailed. On the other hand, it has been shown that the desires of parents do influence rabbis, that some seek out rabbis who are more permissive than others and that rabbis are willing to accommodate for the embarrassment and shame of infertile parents. This means that actions have been allowed for the sake of the emotional response of embarrassment, which would otherwise be prohibited.

Whether this halakhic approach presents a slippery moral slope is difficult to judge. Certainly, the Jewish narrative appears cohesive and the desire to heal and avoid suffering is laudable. Rabbi Tendler pragmatically suggested that science will progress in any case and this supports the argument that the intense debate between scientists and rabbis, who draw on the halakhic bioethical principles of their tradition, is far preferable to debate not taking place and scientists progressing unchallenged. However, it appears that in this world of genetic improvements, halakhically there are few lines in the sand that cannot be crossed and even Feinstein’s limitation to healing is easily challenged. One example is sex selection, which is not considered part of healing unless it is for medical reasons. It is strictly speaking not halakhically prohibited because the Talmud gives examples of methods that can aid sex selection, but it is generally not considered morally acceptable to use PGD for this purpose. In Israel sex selection is thus highly regulated, but halakhically and legally permitted in order to avoid a gender-based genetic disease and it is also permitted in certain cases for family balancing. This applies if a couple has already given birth to four children of the same gender and appears emotionally distressed. Once more the emotional needs and desires of parents challenge the halakhic boundaries.

In 2012, Puah reported the case of a French couple who were carriers of Duchenne Muscular Dystrophy (DMD). They wished to conceive a healthy baby boy. DMD is only expressed in boys, with girls carrying the genetic predisposition. The couple had
been offered PGD in France in order to choose a baby girl who would not suffer from the DMD gene, but could carry it.

The genetics department that they approached refused to perform the PGD procedure on the basis that they did not want to face the dilemma of having to choose healthy embryos over carriers. This was viewed by them as too close to eugenics and contradicting their mandate as health providers, which was to produce healthy children, not genetically perfect beings.\textsuperscript{427}

The couple turned to Puah in Israel and the decision was made that a healthy boy could be chosen for implantation through PGD because the future marriage potential of a girl, who was a known carrier, could be taken into halakhic consideration to allow this process.

In our experience, girls who are carriers or even potential carriers of dominant genetic abnormalities or X-linked conditions face difficulties when coming to get married. The genetic counsellor has a responsibility to take into account the social ramifications of children born and cannot shirk this responsibility.\textsuperscript{428}

The justification for this decision was the biblical command to care of a neighbour:

The Torah (Deuteronomy 21:1–3)\textsuperscript{429} commands one not to ignore the pain of a neighbour, and the Talmud (Baba Metzia 31a) expands this responsibility to include the obligation to prevent any future damage. If one is able to prevent future pain and anguish, one is obliged to do so.\textsuperscript{430}

Here, the authors are using a source about the prevention of future pain (protecting travellers in the vicinity from future attacks) creatively, in order to include preventing pain and anguish in children born in the future. This case highlights the flexibility of

\textsuperscript{427}Popovsky, "Jewish Perspectives on the Use of Preimplantation Genetic Diagnosis." 709
\textsuperscript{428}David et al., "Genetic Counseling ".
\textsuperscript{429}The love of the neighbour is usually based on Leviticus 19:18, but in this case the unresolved murder is cited
\textsuperscript{430}David et al., "Genetic Counseling ".
the *halakhic* system, but arguably also its vulnerability to being ever expanded until the original principle is all but lost to the will of the parents, the will of the doctors and the emotional needs of the unborn. There appears a paradox that the as-yet-not-conceived child’s emotional needs can have *halakhic* weight, whereas an embryo which has already been conceived has no *halakhic* protection when it is not sheltered by a womb.

**Halakhic responses to the genetic editing of embryos**

*Halakhic* responses to the potential editing of human embryos have been predominantly positive towards the new technology, but only within the category of healing rather than enhancing, although the terms prove somewhat fluid. The aforementioned biologist and medical ethicist Rabbi Dr. Tendler and research biologist and bioethicist Dr. John Loike discuss the *halakhic* response to the genetic editing of embryos in their paper *Tampering with the Genetic Code of Life: Comparing Secular and Halakhic Ethical Concerns.*

Three areas of secular bioethical concern are identified, namely:

1. the tampering with human DNA, which is viewed as ‘playing God’;
2. the violation of the unborn child’s autonomy by its parents;
3. the charge of eugenics or designer babies.

According to Loike and Tendler none of these concerns are shared by *halakhists* in the same way because science can impact on *Halakhah* and challenge hitherto accepted rituals, through a collaboration between the *poskim*, scientists and Torah-committed doctors. The first examples given are the *Talmudic* obligations that permit the breaking of the Sabbath laws in order to wash the wound of a recently circumcised baby boy on the third day with boiled water and *metzitza* (the action of applying suction to the wound of circumcision). Both actions used to be considered vital for promoting healing in newly circumcised children. Breaking the sabbath laws by boiling water and applying suction was thus permitted under the principle of *pikuach nefesh* (the principle to preserve life), which overrides virtually every other

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431 Loike John D., “Tampering with the Genetic Code.”
command. Since it is today medically accepted that sterile wound dressings are better at healing than suction or washing, it is no longer permitted to break the Sabbath for this purpose.\textsuperscript{432}

This analogy is somewhat flawed because in the case of genetic editing the problem is not that scientific insights have changed, but that the outcome of this innovative scientific treatment is unknown and potentially hazardous. Many poskim will also continue to quote Talmudic instructions and the opinion of past sages even if their medical understanding has clearly been superseded, but Tendler and Loike, however, counter the concern of ‘playing God’ with the halakhic obligation that:

Human beings serve as partners with God in the creation process.\textsuperscript{433}

Secondly the halakhic principle coined by the 19\textsuperscript{th} century commentator Tifreret Yisrael (Rabbi Yisrael Lifshutz) on Mishna Tractate Yadayim 4:3 #27 is cited stating:

Any activity that we have no reason to prohibit is permitted in Halakhah without having to find a reason for its permissibility, for the Torah does not mention every permissible thing but rather elaborates on only those things that are forbidden.\textsuperscript{434}

This argument supposes a transcendent knowledge of all that is forbidden in the Torah which the previous argument about the breaking of the Sabbath appears to have negated. Whilst Loike and Tendler accept that safety concerns remain about gene editing, they state that no normative prohibition against gene editing for any medical condition exists in Halakhah.

Aside from as-yet-undefined side effects, gene-editing procedures do not involve any prohibited acts.... Retrieving sperm and eggs from individuals may elicit halakhic problems such as shikhvat zera le-vatalah in retrieving sperm and acts of havala (inflicting injury) to retrieve the egg from the ovary and using contraception in marital relations. However, many halakhic decisors

\textsuperscript{432} Loike John D., “Tampering with the Genetic Code.”
\textsuperscript{433} Loike John D., “Tampering with the Genetic Code.” 50
\textsuperscript{434} Loike John D., “Tampering with the Genetic Code.” 50,51
rule, that when such actions are performed to correct a medical condition … there is no prohibition.\textsuperscript{435}

This argumentation considers only the \textit{halakhic} permissibility of the medical interventions themselves, but not the \textit{halakhic} problems concerning the long-term consequences.

Tendler and Loike suggest that \textit{halakhists} are most likely to accept gene editing for conditions for which no cure or successful therapy exists at present. This would place Tay-Sachs in the category in which editing would be permitted and haemophilia in the category for which treatment exists. Healing remains the prerogative, according to Loike and Tendler:

\begin{quote}
Tampering with human DNA for medical reasons is included in the biblical directive that people are partners with God in the creation process.\textsuperscript{436}
\end{quote}

If genetic editing becomes more common Loike and Tendler suggest that the principle of \textit{kevan d-dashu beh rabim, shomer petayim Hashem} (since it has become common practice that God protects those who behave as others because they trust that all will be good) may also be applied. The example given is that of smoking, which used to be permitted until it became common knowledge that it is unhealthy and was then \textit{halakhically} prohibited.\textsuperscript{437} Once more the analogy is problematic, smoking was allowed and has increasingly proven dangerous. If genetic editing were allowed and was seen to be dangerous it too could be prohibited in the future.

In contrast to the secular concern for the autonomy of the child, Tendler and Loike state that Judaism explicitly charges the parents to make decisions for their children when \textit{Kiddushin 29a} instructs a father to teach his sons how to swim in the same vein as teaching them Torah. The principle \textit{zokhin le-adam sh-lo be-fanav} which translates as ‘something favourable can be done for someone who is not present’ and \textit{Ve-ahavta le-re`acha kamocha} which translates as ‘love your neighbour as yourself’ - also supports the obligation that parents should decide what is in the best interest of the child. This would apply to conditions that affect the child in childhood.

\textsuperscript{435} Loike John D., “Tampering with the Genetic Code.” 51,52
\textsuperscript{436} Loike John D., “Tampering with the Genetic Code.” 51,52
\textsuperscript{437} Loike John D., “Tampering with the Genetic Code.” 51,52
and in adulthood because Judaism accepts that a normal person would not want to suffer in adulthood and parents can make this moral judgement. The limit to parental rights is demonstrated in the naming of Cain by Eve. Eve understands Cain as her possession, the name Cain implies that Eve has ‘acquired a person from God’, this sense of ownership must result in tragedy.\textsuperscript{438} How this applies to genetic editing is not clear, presumably the parents must distinguish between their wishes and the interest of the child and do not choose to create a child according to their design.

Finally, regarding the secular concern of creating designer babies, Loike and Tendler suggest that gene editing would only be permitted for medical conditions, not for human enhancement. At present, parents would have to show substantial impairment to justify enhancement, but as the public attitude develops towards accepting therapeutic genetic interventions, the reasons for intervention may broaden. This appears a slippery slope, as any parent can argue that a child’s life would benefit from a number of both physiological and mental adaptions.

Indeed, Loike and Tendler address the genetic influence on mental, sexual and personality traits and, whilst they suggest that tampering with non-physical traits poses grave medical problems, their \textit{halakhic} concern is for the safety, not the ethics of such edits.

\textbf{We therefore propose that \textit{Halakhah} would prohibit, at this point in time, the utilization of gene editing to alter behavioural characteristics, because of their unknown, far-reaching consequences on the personality of the individual. As science gains further knowledge regarding these issues, the \textit{halakhic} prohibition may be revisited in the future.}\textsuperscript{439}

According to this \textit{halakhic} reasoning, it appears there are few \textit{halakhic} limits to the genetic editing of embryos that cannot be overcome by further scientific research and the proof of either physical or mental suffering. \textit{A priori} there appears little \textit{halakhically} to stop future generations from creating a child with preferred traits that

\textsuperscript{438} Loike John D., “Tampering with the Genetic Code.” 53. Rabbi Lord Sacks comes to a similar conclusion on the binding of Isaac, that Abraham must prove to God that Issak’s life belongs to God not to Abraham.

\textsuperscript{439} Loike John D., “Tampering with the Genetic Code.” 54
may include sexual preference, gender, intelligence and health as long as it is medically safe.

Two competing halakhic views in light of innovation and the obligation to heal:

The aforementioned Rabbi Avraham Steinberg responds to the limitations of creating designer babies in 2011 in a highly methodological way. He explains that any new innovation can be approached through two competing views in Halakham; the first is based on Hatam Sofer (responsa Orach Hayyim 28 and 181) and it represents the stricter approach that great caution should be used towards anything that is new. The basis for this is a line in the morning prayer which states:

He makes new things. He is the master of battle.

The interpretation of this line by Rabbi Moses Schreiber (1762–1839), author of Hatam Sofer, is that any new innovation brings inherent danger, change and conflict (battle) and thus it is best avoided. Schreiber became Rabbi of Pressburg/Pozsony in Hungary, but he was born in Germany. Schreiber was a fierce opponent of the Haskalah movement (the early Jewish Enlightenment) and his cautious approach should be understood in light of the threat he felt to Orthodoxy from Jewish reformers of the nineteenth century.

It was Sofer’s penetrating understanding of the threat to tradition posed by reformers, and his formulation of a traditionalist paradigm that would guide the words and actions of generations of his own followers, that earned him the appellation “the father of Orthodox Judaism.” Sofer coined several pithy maxims. His motto was “He-ḥadash asur min ha-Torah!” (Innovation is forbidden as a biblical prohibition!)

However, it may be argued that opposition to scientific innovation should not be based on opposition to the Reform movement. The competing view is supported by

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440 Professor Avraham Steinberg, is co-chair of the Israeli Bioethics council and author of The Encyclopaedia of Jewish Medical Ethics. See Chapter Two
Tiferet Yisrael (Masekhet Yadayim 4:3) written by Rabbi Yisrael Lifschitz (1860-1782), a highly respected Rabbi of Danzig. The Tiferet Yisrael is a commentary on the Mishna and approves innovation. It specifically addresses biomedical matters such as the halakhic debate about the smallpox vaccination and it states that anything for which there is no reason to prohibit it is permitted.

And from this, it seems to me [that one can derive that it is] permissible to perform a smallpox inoculation, even though one out of a thousand dies because of the inoculation. Nevertheless, if the [small]pox [enters] his body naturally, the danger is greater, and therefore he is permitted to place himself in a situation of a small chance of danger in order to save himself from a more likely danger. (Tiferet Yisrael, commentary on the Mishna, Yoma 8:7)  

Steinberg states that the Torah, Maimonides and the Shulhan Arukh (legal code written by Joseph Karo in 1563) all state the actions that are prohibited, so that, according to Halakhah, that which is not stated as forbidden is permissible, unless it falls short of another halakhic principle. Steinberg appears to follow the instructions of Tiferet Yisrael and he deplores the fact that certain Halakhists today prohibit actions that were previously permitted. With reference to new scientific technologies, Steinberg affirms that, although innovation can bring challenges, Judaism does not share the concept of other religions that forbid humanity to change Creation. While the genetic sciences are innovative, none of what is considered today, even genetic engineering, questions the sovereignty of God the Creator, as Steinberg insists that true creation is only creation ex-nihilo.

Only G-d can create something from nothing. ...there is no basis to the non-Jewish fear of the genetic revolution empowering us to "play G-d". When we work on existing genetic material to improve the quality of human life, we are making something from something.  


444 Steinberg, “Designing Babies – Halakhic Pespectives"
In response to the question whether scientists have the permission, or the obligation to heal genetic diseases, Steinberg asserts that it is an obligation:

Are we allowed to interfere with nature in the way we are doing now with new genetic technologies? I submit that not only is it permissible, but required. Consider the following halakhic examples. When one person injures another, he has to pay five types of compensation payments. One of them is to pay the physician who treats the injury. The Torah says:

And heal he shall heal. (Exodus 21:19) From here is derived the permission for the healer to heal. (Talmud Bava Kama 85a) The obligation to pay the physician means that the physician was permitted to treat and cure this patient. If the physician was forbidden to heal, then why should anyone pay him?445

The command to heal thus obligates the physician to use the knowledge he has been given by God to heal.

A trajectory into the limits of future genetic design:

Limitations to the actions of scientists are set by the accepted halakhic prohibitions, means and consequences must abide to Halakhah and the overriding aim must be to improve and not to endanger the world. Steinberg holds the following:

When we apply the above principles to genetically designing babies, we can assume that we are allowed to do this and that the techniques involved will improve the future of our children as long as we do not violate Halakhah in the process.446

Genetic engineering, according to Steinberg is the natural progression of the halakhic decisions that have begun in the Talmud.

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445 Steinberg, "Designing Babies — Halakhic Perspectives."
446 Steinberg, "Designing Babies — Halakhic Perspectives."
Without knowing Mendelian laws of genetics, the Talmud Sages advise us against marrying people who have--or are assumed to have--what we today call genetic diseases. Hence, the Talmud Bekhorot 45b, advises a midget male not to marry a midget female because the result might be an etsbeoni (micro-midget) child.447

After these initial Talmudic instructions, the Twentieth Century saw the genetic screening of young adults through Dor Yesharim to avoid the marriage of two carriers of genetic diseases. This procedure was sanctioned in the responsum of Rabbi Moshe Feinstein in Igrot Moshe (Even Ha’Ezer 4:10).

PGD initially raised halakhic concerns over the destruction of genetically affected embryos. Feinstein prohibited the destruction of embryos other than to heal infertility (IVF second halakhic debate), but the prominent Haredi posek Rabbi Yosef Shalom Elyashiv permitted PGD:

His clear answer was that it is permissible.... There is no prohibition against destroying a fertilized egg that carries a disease. We are allowed to use the fertilized eggs free of a genetic disease to make sure that a child will be born without the disease.448

Steinberg, as author of The Encyclopaedia of Jewish Medical Ethics, states with authority that Catholicism and Judaism diverge because they differ in their approach to the soul, which has implications for fertilised egg in vitro and in vivo:

Perhaps the divergence between the Jewish and Catholic views on this procedure is that, according to Halakhah, ensoulment occurs in stages, not right away.... Moreover, halakhically there is a significant difference between a fertilized egg already implanted in a woman's womb and a fertilized egg in a dish outside the womb.... It is clear from Rabbi Elyashiv's position that a fetus not yet implanted in a womb and less than forty days old is not yet a human

447 Steinberg, "Designing Babies — Halakhic Perspectives."
448 Steinberg, "Designing Babies — Halakhic Perspectives."
being, since, according to the *Talmud*, "until forty days after conception the fetus is mere fluid" (Yevamot 69b).  

There is no acknowledgement here that academics, such as Rabbi Bleich, question the literal interpretation of ‘mere fluid’. Instead, Rabbi Steinberg continues to raise the ethical question of which genetic disorders should be deselected and whether late-onset diseases should be considered or ignored. He does not instruct on whether a saviour sibling should be permitted, but simply raises the debate about the ethical questions that are relevant. Steinberg combines the debates over PGD and genetic editing seamlessly because their implications overlap. It becomes clear that Steinberg’s arguments always focus on the permission to heal, not to edit for the sake of frivolous parental ambitions. Only genetic healing has the *halakhic* permission to risk the dangers inherent in any treatment. This is *halakhic* pragmatism, as long as the outcome is likely to be preferable, then it is probably permitted. Genetic editing is seen as no more or less an act of healing in the service of God than any other medical intervention:

…we are permitted to change the genetic makeup of a baby who has Tay-Sachs to a baby who has a healthy replacement gene. This is similar to transplanting a heart or liver, giving fertility treatment to an infertile couple, or putting someone on dialysis. Before the antibiotic era, people died from pneumonia. Now we interfere with nature by applying antibiotics. Are we permitted to do this? Yes, we are even commanded to heal. This is our power as partners with G-d. Hence, when we reach the stage of genetic therapy - which hopefully will be soon - we can use it as any other medical treatment.

*Conclusion*

There are thus none of the boundaries that exist in many other countries, where there is a perceived significant difference to healing, deselecting and editing

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449 Steinberg, "Designing Babies — Halakhic Perspectives."

450 Steinberg, "Designing Babies — Halakhic Perspectives."
embryos and this means that Israel, by the very nature of its arguments, is on its own trajectory in the genetic debate.

The sentiment that gene therapy will be limited to healing is supported by the majority of poskim today and is based on a ruling by Rabbi Feinstein, who held that within the Jewish tradition a physician only has the permission to perform invasive procedures for the sake of healing his patient. Any medical act that does not fulfil this criterion violates the decree against ‘tampering with God’s Creation’.\footnote{Feinstein quoted in Popovsky, "Jewish Perspectives on the Use of Preimplantation Genetic Diagnosis." 709} This is interesting in light of the hormone treatment to delay ovulation in women, which is not without medical risk. Drawing the lines between enhancement and healing will be difficult, especially when the emotional welfare of the parents and the future child are allowed to influence this debate.
Chapter Eight

Islamic Legal Debates and their Implications in the Middle East

First and Second Reproductive Technologies - Artificial Insemination with Donor sperm and In Vitro Fertilisation in Sunnī Islam

Conception *sine concubito* was discussed by a number of pre-modern Muslim jurists, such as the eminent *Hanafi* jurist al-Nawawī (d.1277). He decided that a woman who had impregnated herself with the sperm of her husband, still had to obey the ‘*iddah* (waiting period if the couple had separated), even if no sexual act had occurred. The ‘*iddah* is necessary to establish a potential pregnancy and ensure a legitimate *nasab* (lineage) for the child. In the twentieth century the former Sheikh of Egypt’s renowned al-Azhar university Maḥmūd Shaltūt (d. 1963) discussed artificial insemination for humans and concluded that it could only be performed by a married couple in order to uphold the demands of lineage.452 The modern debate about Conception *sine concubito*, therefore, has a number of early sources to draw on, however it is generally assumed that the most influential *Sunnī* *fatwa* was given by the rector of al-Azhar university, Sheikh Jād al-Ḥaqq in 1980 who built on the *fatwa* of his predecessor Shaltūt. The most influential *Shīʿa* *fatwa* was published in the 1990s by Ayatollah Al-Khamene’ī. Both *fatwas* discuss the use of donor sperm as well as the use of IVF. For this reason, the topics of donor sperm and the use of IVF are combined in this Chapter (first and second legal debates). Important differences exist between *Sunnī* and *Shīʿa* responses, Chapter Eight will therefore discuss *Sunnī*, whilst Chapter Nine discusses *Shīʿa* responses.453

Chapter Four described the importance of *nasab* (lineage) for a child and the serious implications of being born of *zina* (an illicit relationship), which may result in the child being declared fatherless and not belonging to the marriage bed. The parents also


453 Shabana, "Islamic Normative Principles."
fear the charge and consequences of adultery. Chapter Two discussed the importance of *maqasid* (the underlying goals and purpose of *Sharīʿa*) and of *maslaha* (the public good). Both concepts stress the importance of the family and Sachedina describes the preservation of *nasab* as one of the main purposes of *Sharīʿa* that gives the child the right to legitimate conception.454

The Grand Sheikh Jād al-Ḥaqq issued his authoritative *fatwa* on the 23rd of March 1980, less than two years after the birth of the first IVF baby, Louise Joy Brown, in 1978. Jād al-Ḥaqq was born in 1917 in a northern village of the Nile delta. He studied *Sharīʿa* at Al-Azhar and in 1956 became a judicial officer of the Dār al-Iftā’, an institution held in high regard for contemporary *fatwas* and affiliated to the ministry of justice. In March 1982, Sheikh Jād al-Ḥaqq became the Grand Imam or Rector of al-Azhar.455 In his ruling, al-Ḥaqq permitted IVF as a way to conceive for infertile Muslim couples, but with certain restrictions:

Sunni Muslim couples were prohibited from using any gametes that were donated, therefore only the eggs and sperm of wife and husband were to be used. The embryo had to be transferred back into the uterus of the wife. Whilst this *fatwa* addressed IVF, it also had implications for artificial insemination because it implied that here too no third-party reproductive techniques would be permitted. For this research it has not been possible to establish whether artificial insemination with donor sperm was performed in Egypt before this *fatwa* was published but, certainly after 1980, the prohibition against third party reproduction during IVF included donor sperm for AI (Artificial Insemination) and surrogacy was also prohibited.456

454 Sachedina, *Islamic Biomedical Ethics*.103


Strangely all sources appear to state that the fatwa of 1980 was issued by Sheikh Jād al-Ḥaqq although he appears to have taken up his post as Grand Imam only two years later.

The legal-reasoning of the Al-Azhar fatwa

The legal reasoning behind this Al-Azhar fatwa begins in the introduction of the fatwa with the Qur’anic quote:

It is he who has created man from water. Then He has established relationships of lineage and marriage. (Q 25:54)

This establishes that lineage is an essential objective of Sharīʿa. Al Ghazali is cited supporting this view of lineage as he defined the five targets of Sharīʿa as:

To preserve beings’ religion, themselves, [their] minds, descendants and money…. any act which jeopardizes them [the targets] is then a harm.

The importance of marriage is stressed in the Qur’anic verse:

He created for you mates among yourselves, that ye may dwell in tranquillity with them.(Q 30:12)

After establishing the Qur’anic emphasis of lineage, marriage and tranquillity which presents the ideal familial setting, the Al-Azhar fatwa acknowledges the idea that conception concubito is a known possibility and a man’s sperm does not take shape before it is attached to the womb of the woman:

However, a sperm is not to acquire shape until it is introduced into a woman’s womb ready to receive it, and that could be through a sexual body contact (intercourse). The child then will be called after his father, [if] the aspect of marriage is present. However, there are cases where a man’s sperm could be introduced to a woman’s womb through means other than body contact. Islamic scholars elaborated in their books on this issue, and mentioned several examples where a woman was able to get and introduce a husband’s or a master’s sperm into her womb, which consequently will require a waiting period (‘idda) before she remarries and creates a lineage.

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457 All quotes in this section are taken from the translation of the Al-Azhar fatwa in Inhorn, The New Arab Man. unless otherwise stated

458 Inhorn, The New Arab Man. Appendix: The translation of the Al-Azhar Fatwa, including the translation of the Qur’anic verses was obtained by Inhorn once it had already been translated from Arabic into English by the Ford Foundation in Cairo, Egypt.
The introduction of the *fatwa* then contrasts correct lineage with *zina* (adultery), which is forbidden using the verse:

Nor come nigh to adultery: For it is a shameful (deed), and an evil, opening the road (to other evils). (Q 17:32)

This is followed by a juxtaposition of two different ideas. On one hand the illegitimate child is presented in disadvantageous terms compared to a legitimate child by the Al-Azhar *fatwa*:

A legitimate child will grow and be raised by his parents in the best manner they can afford, while an illegitimate one is a shame for the mother and her people, neglected in the community and will then turn into a disease.  

However, this is immediately followed by the statement that Muslim scholars have ruled that according to *Shari‘a* illegitimate children are:

Human beings who deserve to be brought up properly and taken care of so as to stimulate what is best in them and avoid their evilness.  

A further Qur’anic verse is used to elevate this proper upbringing to the level of saving a life:

If anyone saved a life, it would be as if he saved the life of the whole people. (Q5:32)

Two aspects are of particular interest in this argument. Firstly, there is no hesitation to link donor gametes to illicit sex (*zina*). Adultery would usually require a sexual act, secrecy, immodesty and deception, but none of these are prerequisites for IVF and donor sperm. To categorise donor gametes as adultery is thus a translation from one concept to another with considerable moral and legal consequences. An infertile husband may decide with his wife that a child conceived of donor sperm and the

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459 Inhorn, *The New Arab Man*. Introduction of the Al-Azhar Fatwa; the translation of this part of the fatwa in Shabana (2021) reads slightly differently:

‘The child who is born out of wedlock, however, is considered a source of disgrace for his mother and her family because his father is unknown and because of this he will (likely) grow up suffering from, prone to corruption, and neglected – and as a result, he will become a harmful agent in the society.’

See Shabana, "Islamic Normative Principles."

wife’s ovum may be preferable to no child. No deception, immodesty or sexual act is necessary for third party reproduction, so the link between the use of donor sperm and adultery is not necessarily a rational consequence.

However, it is interesting to note that, instead of using a term to describe the child as illegitimate, the term *zina* is used to describe the illicit act performed by the parents during the conception of the child. This suggests it is they, not the child, who carry the legal responsibility for adultery. However, the description of the illegitimate child in the *fatwa* as a disease, or in a translation by Ayman Shabana, as a *harmful agent in society, which must be managed to avoid the spread of immorality*, demonstrates further the importance of kinship and the consequences of falling short of a legitimate lineage, both in the past and present. This is despite the ruling of Islamic scholars that illegitimate children should be brought up properly.461 Once more the use of donor gametes need not suggest an unclear lineage if the identity of the donor is known. Instead of focusing on the stigma of illegitimacy, third-party reproduction could have been interpreted as less ideal to natural parenthood, but more favourable to infertility, if husband and wife wish for a child and decide for a child who is at least fifty percent their genetic offspring for the sake of their marriage. It could be argued that the tranquillity of a marriage may be saved by third party reproduction and that this serves the common good. The reason why Sunnî jurists appear to have rejected this approach is the Muslim status of *mahram* (relatedness) between family members.

*Mahram* was a term traditionally used for the Bedouin tent that was reserved for women, with connotations of being inviolable, holy, sacred and forbidden. The plural *maharim* is used for the female relatives of a man whom he cannot marry. In the case of sperm donation, the implications may thus be that the infertile father’s daughter may not be *mahram* to him but only to the sperm donor. This affects the extent to which the woman has to veil in front of any father figure who is not the genetic father (according to local custom), or whether he can act as her guardian.

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461 Shabana, "Islamic Normative Principles."
Both sons or daughters may not be able to carry on the family name or inherit from their non biological father.\(^{462}\)

As will be shown in the next chapter, a number of \(Shi'a\) jurists take these implications into account and avoid the conceptualisation of donor sperm as \(zina\). However, Jād al-Ḥaqq in the Al-Azhar \(fatwa\) does declare a link to adultery and justifies this with the legal requirements of divorced women, who must uphold ‘\(idda\)’ (a waiting period) before they remarry as well as with the prohibition to adopt. Both serve the purpose of an identifiable lineage. The latter is based on the Qur’anic instruction:

Nor has He made your adopted sons your sons. (Q 33:4)

This instruction makes adoption an unviable option for infertile couples; whilst it is religiously encouraged to look after orphans, there is no religious precedent that can turn the orphan into kin.

Finally, the actual legal statement of the Al-Azhar \(fatwas\) reads:

A woman shall not be pregnant unless through a normal legal intercourse with her husband or by introducing his sperm into her womb…if the husband is impotent, it is unlawful to have a stranger donate sperm. This consequently will confuse origins: furthermore, the method implies adultery which is strictly unlawful by Qur’an and Sunna.\(^{463}\)

This is followed immediately with the permission to use IVF as long as the same limitations are adhered to:

[If] a wife’s ovum is impregnated by her husband’s sperm outside the womb in a tube, then implanted back to the womb with no doubts or confusion about sperm donor … if a trustworthy physician recommends in vitro fertilization and shall be responsible for its appropriateness, then it is permissible and obligatory as a treatment for a woman who has pregnancy impediments.\(^{464}\)


\(^{463}\)Inhorn, \(The New Arab Man\).

\(^{464}\)Inhorn, \(The New Arab Man\).
The legal reasoning for this opinion states the example of Prophet Muhammad who:

…mentioned the necessity to seek remedy for any disease, and sterility is a
disease that might be curable; therefore, to seek lawful treatment is then
permissible.\textsuperscript{465}

The improvement of race is thus limited to the choice of:

The best of either husband or wife in all aspects (health, ethics, mind, and so
forth).\textsuperscript{466}

As a deterrent to wrongdoing, the \textit{fatwa} declares both patients and doctors culpable,
in the eyes of the Law, in case of misuse, even if they claim ignorance of the Law.
This is based on the Qur’anic verse:

Revile not ye those whom they call upon besides God, lest they out of spite
revile God in their ignorance. (Q 6:108)

In summary, the Al-Azhar \textit{fatwa} touches on seven legal issues of fertility procedures:

1. Artificial insemination between husband and wife is permitted;
2. Artificial insemination between unmarried couples with donor sperm is not
   permitted because it is classed as adultery;
3. IVF using a donor ovum is not permitted as it is classed as adultery;
4. IVF using only the gametes of the married couple is permitted as long as the
   child is gestated by the same wife of the same couple. The child may thus not
   be gestated by a surrogate woman or animal. The advice of a trustworthy
   physician should be sought;
5. Adoption is not permitted if, against the advice above, donor gametes have
   been used;
6. The child of any fertility treatment that uses donor sperm is considered like a
   \textit{laqit} (foundling). It is attributed to the mother but is considered fatherless, like
   the offspring of an adulterous relationship;

\textsuperscript{465} Inhorn, \textit{The New Arab Man}.
\textsuperscript{466} Inhorn, \textit{The New Arab Man}. 
7. Any physician, who performs fertility procedures that are considered zina, has himself performed illegitimate work and carries the moral consequences.\textsuperscript{467}

According to Shabana, the influence of this fatwa is the result of its rootedness in the Qur’an and the moral and legal tradition of classical Islam.

Other scholars deliberated on the use of IVF beyond these questions and their opinions will be discussed below, but the Al-Azhar fatwa does not appear to concern itself with the number of embryos that may be implanted, the question of cryopreservation, the status of an embryo in vivo versus in vitro or the precise moment for the beginning of life.

To contextualise the fatwas of Jād al-Ḥaqq, it is worth noting earlier rulings that may have influenced this fatwa. The former Sheikh of al-Azhar, Maḥmūd Shaltūt (d. 1963), and the famous modern Egyptian jurist, Muḥammad Abū Zahrah (d. 1974), had previously ruled in a similar way to Jād al-Ḥaqq. Both had ruled on the use of artificial insemination and suggested that this could be permitted in the case of infertility, but only with the sperm of the husband. They too translated the use of donor sperm into the legal category of adultery.\textsuperscript{468}

Another former Sheikh of al-Azhar, ʿAbd al-Ḥalīm Maḥmūd (d. 1978), appears to have rejected the use of fertilisation in vitro in a commentary on the early attempts of IVF:

Fertilization of embryos in tubes is impermissible (lā yajūz). Neither utility nor necessity can justify this procedure. It cannot be seen except as a corrupt approach because it would ultimately result in the untying of all human connections, about which God Almighty said: ‘O people We created you from a male and a female and We made you into nations and tribes so you may know each other’ (49:13).\textsuperscript{469}

This prohibition goes beyond the concern for donated gametes and raises concerns for the religious and social implications of conception in vitro. Despite this concern, the fatwa of 1980 by Jād al-Ḥaqq proved highly authoritative for Sunnī Islam.

\textsuperscript{467} Shabana, "Islamic Normative Principles."

\textsuperscript{468} Shabana, "Islamic Normative Principles."

\textsuperscript{469} Shabana, "Islamic Normative Principles."
According to Professor Serour, Professor of Obstetrics and Gynaecology and Director of the International Islamic Centre for Population Studies and Research at Al Azhar University, this fatwa was confirmed by:


Mahdi Zahraa and Shaniza Shaf’ie describe the steps of legal reasoning that lead the jurists of the Islamic Fiqh council Majma’ Al Fiqh Al-Islami to the conclusion that IVF may be used only with the gametes of married couples. Firstly, tradition holds that Prophet Muhammad stated that for every disease Allah also created a cure:

...so treat yourself with medicine but do not treat yourself with prohibited medicine.471

The question of whether IVF should be encouraged as a newly discovered cure for infertility, provided by Allah, or as a prohibited medicine, was addressed by Muslim jurists through the use of qiyas (analogical reasoning), which has four fundamental elements:

1. asl (an original case that has settled rulings);
2. far’ (a new case that is in need of ruling);
3. illah (effective cause that is common to both the original and the new case);
4. ukm (ruling of the original case which can be extended to another case).472

In practice, these can be explained as follows:

472 Zahraa, "An Islamic Perspective." 161-162
1. In the case of IVF, *asl* – (the original case that has a settled ruling) is chosen through *qiyas* (analogical reasoning) to be sexual intercourse;
2. *far*’ (the case in need of ruling) is IVF;
3. *illah* (the common effective cause) between *asl* and *far*’ is the conception of a child;
4. *ukm* (the ruling that can be extended from *asl* to *far*’) are the Qur’anic directives to protect both parentage and lineage. Rulings which are applicable to sexual intercourse, and, above all, the insistence on marriage between the parents, are thus extended and provide a ruling *ukm* for the new case.

*Qiyas* (analogical reasoning) is considered a secondary legal source when primary legal sources do not contain guidance; this then is the reason why IVF with the use of donor gametes has been legally translated as *zina*, but IVF without donor gametes has been permitted by the Islamic Fiqh council.\(^{473}\)

**The effects of the Al-Azhar *fatwa***

According to Serour, the effects of these religious rulings on IVF manifested themselves in Egypt in two ways. Firstly, patients are said to have gained the confidence to openly seek fertility treatments without the shame previously experienced. Secondly, both clinics and patients in Egypt and, according to Inhorn, in other predominantly *Sunnī* countries, have tended to uphold the restrictions on donor gametes and surrogacy that were laid down by the initial 1980s *fatwa*; despite a lack of juristic restrictions. Supported by the social and religious desire to sire children and avoid *zina*, most patients and clinicians willingly appear to endorse the limitations for the sake of Islam, society, and the future of their children.\(^{474}\) The first fertility clinic opened in Egypt in 1986, and by 2003, approximately 50 centres had opened, showing substantial demand.\(^{475}\)

The UAE, especially the cosmopolitan city of Dubai, offer a very different but equally insightful perspective. Here too, the Al-Azhar *fatwa* has been influential in that

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\(^{473}\) Zahraa, “An Islamic Perspective.”

\(^{474}\) Inhorn, “Globalization.”/Serour, “Islamic Perspectives.”

Muslim moral values are being integrated into the practices of the fertility industry. Initially IVF was not available in the UAE and so, with State funding, citizens travelled abroad for treatment (frequently to London). By 1991, the UAE’s Ministry of Health (MOH) invited fertility experts from London to set up a fertility clinic in Dubai’s main government hospital. To all intents and purposes, a London clinic was set up in Dubai.\footnote{Marcia C. Inhorn, “Cosmopolitan Conceptions in Global Dubai? The Emiratization of IVF and its Consequences,” Reproductive Biomedicine and Society Online 2 (2016), https://doi.org/10.1016/j.rbms.2016.04.004.}

…Dubai’s government clinic was a British import, practising assisted reproduction according to British standards…. infertile male patients could import donor spermatozoa via international couriers ... Infertile women – including many professional women in Dubai of advanced reproductive age – were allowed to bring their own ‘known donors’ to the clinic...to undergo egg harvesting. Although surrogacy was rare, the Dubai government IVF clinic was otherwise the equivalent of a London IVF centre.\footnote{Inhorn, “Cosmopolitan Conceptions ”.}

From the outset the first clinic had a highly profitable monopoly position and is said to have charged the highest prices in the Middle East. As profits and waiting times grew, the government allowed foreigners to open private clinics as long as they had an Emirati silent partner (\textit{kafil}), who would receive more than 51% of ongoing profits.\footnote{Marcia C. Inhorn, Cosmopolitan Conceptions, Cosmopolitan Conceptions, (North Carolina: Duke University Press, 2015).} A second government clinic also opened outside Dubai in Abu Dhabi, as part of the University of the United Arab Emirates (UAEU). This new fertility centre offered free fertility treatments to all UEA residents, both Emirates and foreign workers. Free fertility treatments meant that this clinic also suffered from long waiting lists and within five years (the mid-2000s), the generous funding was limited only to Emiratis.\footnote{Inhorn, “Cosmopolitan Conceptions ”.}

Two different political developments can be observed at this time; firstly Dubai decided to actively promote itself as a tourist destination especially in the area of

\begin{flushright}
217
\end{flushright}
health tourism, which turned the city into a central hub for the international reproductive industry.

Dubai’s medical tourism is part of a much larger state-sponsored attempt to create the Middle East's first global “techno-hub”.\textsuperscript{480}

Dubai became the world’s fourth most visited destination with 15.93 million overnight visitors in 2018. The economic rewards of reproductive tourism soon became considerable\textsuperscript{481}.

By 2005, the UAE hosted seven IVF clinics, five of them private facilities. By 2012, that number had doubled to 14, 12 of them privately owned.\textsuperscript{482}

Secondly, the government sponsored a deliberate \textit{cultural cosmopolitanism}, with Emiratis constituting only 13% of the population, which is said to signal:

…a new moral and ethical way of living in an increasingly interconnected and heterogeneous world, characterized by geographic deterritorialization, cultural pluralism, and hybridity. Cultural cosmopolitanism has been characterized as a style of living in transnational spaces such as Dubai - a willingness to engage in the world with cultural others.\textsuperscript{483}

This brought the challenge of a mixed population with differing moral codes and ambitions, living side by side. The government increasingly followed, in Inhorn’s terms, an \textit{emiratization} programme in parallel to its \textit{cultural cosmopolitanism}, which gave Emirati citizens preferential treatment by prioritising their needs. This was already demonstrated when IVF funding in Abu Dhabi was restricted to Emirati infertile couples and foreign investors were unable to open private clinics without an Emirati partner.\textsuperscript{484}


\textsuperscript{482}Inhorn, “Cosmopolitan Conceptions ”.

\textsuperscript{483}Inhorn, "Medical Cosmopolitanism in Global Dubai."

\textsuperscript{484}Inhorn, "Cosmopolitan Conceptions ".

218
As competing clinics vied for patients, one state clinic committed slander against a private clinic. Accusations of deliberate mixing up of gametes and failure to secure intact blood lines were unfounded, but this added to the public, religious and political debate about Islamic values and the legitimacy of Western-style fertility treatments. This had begun in the late 1990s when Muslim patients and practitioners, working in the UK founded clinics, expressed their quiet concern about the use of donor gametes. As a result, the government clinic destroyed all donor gametes and embryos in 1998, and began new legislative discussions. These, in turn, led to a new wave of severe legislative restrictions in all clinics and, by 2010, all third-party reproductive techniques, the freezing of embryos and surrogacy were all forbidden for Muslims and non-Muslim patients alike. The justification was that Sunni Islam had forbidden the use of third-party reproduction ever since the authoritative Al-Azhar fatwa in 1980, although third-party gamete donation had been permitted in Dubai from 1991-1998. Dubai now went further still and forbade the freezing of spare embryos, which was permitted elsewhere.

The UAE’s Federal Law No. 11 .... can also be described as one of the most comprehensive – indeed, most draconian – assisted reproduction laws in the world. It describes how IVF clinics are to be set up, licensed and staffed…. … Waiting rooms and bathrooms are to be clearly marked and gender segregated, without any pornography … Couples presenting to clinics for treatment must bring valid passports or identity cards, a marriage licence and a photo of each spouse.485

This moral and legal code was no longer one of cultural metropolitanism, where at least non-Muslim patients were permitted to use fertility treatments, which their own moral or religious tradition permits, instead foreigners and nationals were expected to follow the Muslim rules of religious modesty and the child’s right to an untainted lineage was enforced.

Federal Law No. 11 is very specific about which assisted reproduction practices are legally allowed (halal) and which are illegal and prohibited (haram) … Of 22 potential assisted reproduction procedures…. Fifteen… are prohibited, including, most notably, cryopreservation (freezing) of embryos;

485Inhorn, “Cosmopolitan Conceptions “.
gamete and embryo donation; surrogacy (including by a co-wife within a polygynous union); or any kind of assisted reproduction outside of heterosexual marriage.\textsuperscript{486}

The negative effect of these legislations on women’s health was that cryopreservation of embryos is an important part of protecting female patients from having to undergo hormone treatment for egg retrieval for every IVF cycle. Since the changes in legislation, foreign patients are said to have flocked to Dubai ignorant of the fact that cryopreservation is no longer permitted and all surplus embryos had to be destroyed. Other local inhabitants were left unaware of the possibility of freezing surplus embryos. Beyond the medical strain on the women, the cost of repeated hormone treatment and egg retrieval significantly increased the cost of IVF. Whilst the decision not to permit cryopreservation was seen as part of the legal emiratization of the fertility industry in Dubai, it was difficult to justify; Serour, Aboulghar and Mansour stated that, according to the Egyptian \textit{fatwa}:

\begin{quote}
The excess number of fertilized eggs (pre-embryo) can be preserved by cryopreservation. The frozen pre-embryo is the property of the couple alone and may be transferred to the same wife in a successive cycle but only during the validity of the marriage contract.\textsuperscript{487}
\end{quote}

In 2019 the highly restrictive law in Dubai was challenged and overturned:

\begin{quote}
Dr. Michael Fakih…. said the law would help reduce the financial cost of medically-assisted reproduction by 80 per cent, while at the same time increasing the chances of pregnancy for patients.\textsuperscript{488}
\end{quote}

The frequently changing laws surrounding IVF in Dubai are testament to the competing forces of cosmopolitan pluralism and the desire to uphold the legal

\textsuperscript{486} Inhorn, "Cosmopolitan Conceptions ".


guidelines of *fatwas*. It may also be seen as a result of the growing confidence with which Muslim bioethicists are rejecting initial Western models in the desire to produce legal and ethical guidelines that are authentically Muslim, whilst also fulfilling the economic ambitions of the modern age. The situation is evolving and, whilst the prohibition against third-party reproduction is likely to continue, fertility centres in Dubai are excelling in the treatment of male infertility using *Intracytoplasmic Sperm Injection (ICSI).* In the case of severe male infertility, this technique can assist men, as long as any sperm can be found in the sperm sample or the testes, even if the sperm count is low and the sperm immobile. Furthermore, techniques, which locate *hidden sperm*, are said to have helped male patients who had previously been diagnosed with zero sperm count. Muslim men have a heightened need to father their own biological children because of social pressure and religious restrictions on the use of donor sperm. This need is likely to have encouraged progressive treatments for male infertility.\(^{489}\)

Dubai is thus testament both to the tension between scientists, lawmakers and religious jurists and their potential to work together. Here, Muslim legislators are engaging, struggling and negotiating with the demands from political and religious authorities. The reason why Dubai is found to have a stricter legislation than other Muslim nations is for the very reason of this tension between religious and cosmopolitan principles:

The UAE is the sole Arab nation in the heart of the Middle East to pass an assisted reproduction law. Egypt, Jordan and Saudi Arabia – the first three *Sunni* Muslim countries to open IVF clinics – have never passed assisted reproduction legislation, relying instead on *fatwa* guidelines, which, although religiously authoritative, are not legally binding (Inhorn, 2003). This is because most Arab countries are decidedly less cosmopolitan than the UAE; thus, the

\(^{489}\) *Intracytoplasmic Sperm Injection*, HFEA, [https://www.hfea.gov.uk/treatments/explore-all-treatments/intracytoplasmic-sperm-injection-icsi/](https://www.hfea.gov.uk/treatments/explore-all-treatments/intracytoplasmic-sperm-injection-icsi/) 0.1.2023
strength of fatwa guidelines alone is sufficient to define assisted reproduction clinical practice. 490

Although, since 2003, other nations have begun to introduce legislation, the nature of cosmopolitan life appears to require the introduction of more legislation to protect Muslim moral and legal values than in a predominantly Sunnī Muslim country such as Egypt where we initially saw patients and clinics upholding the fatwa without legislation.

**Legislative discussions of legal councils which build upon the Al-Azhar fatwa**

To contextualise the frequent changes in legislation in the UAE it is helpful to review the resolutions and recommendations of the International Islamic Fiqh Academy (IFA) of the Organisation of Islamic Cooperation (OIC) and of The Islamic Organisation of Medical Sciences (IOMS).

The first session, which addressed so called Test-Tube Babies, was held by IFA during its second session in Jeddah, Saudi Arabia in 1985. This places it more than five years after the Al-Azhar fatwa and, at this stage, no resolution was passed. The Saudi Hanbali scholar and President of the Academy, H.E. Sheikh Dr. Bakr bin Abdullah Abu Zayd, was commissioned to lead further research. After less than a year, in 1986, the Council held its third session in Amman, Jordan, and resolved that, of the seven methods currently used for assisted reproduction, five were to be classed as prohibited and two were permitted. In short, all third-party reproduction and all surrogacy was prohibited, thus upholding the Al-Azhar fatwa. IVF using the

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490 Inhorn, "Cosmopolitan Conceptions ".

222
The at times divergent conclusions of the different councils in the Middle East can be observed in the discussions about cryopreservation of excess embryos or the potential use of excess embryos for scientific research. The two topics are often combined, as both are concerned with the dignity and rights that may be granted to early embryonic life.

The topic was discussed in 1982 and 1987 during the first and third symposium of the IOMS in Kuwait. Thomas Eich describes the collective *ijtihad* of the councils in detail. The Islamic legal positions were presented at the 1987 IOMS meeting by two medical doctors, instead of by a Muslim *fuqaha* (jurist). One doctor, Ma'mun al-Hajj’Ali Ibrahim, argued that fertilised eggs, which have not yet implanted in the uterus, should not have the same *hurma* (bodily rights) as fertilised eggs that are implanted in the uterus. These spare embryos could, therefore, be used for research. His colleague Abdallah Basalama, argued that all fertilised eggs should be implanted into the uterus of the women whose eggs they were created from, and spare embryos should not be experimented upon. During discussions the religious scholars were equally divided; Muhammad al-Ghazali from Egypt and Badr al-Mutawalli from Kuwait supported use of early embryos for scientific research, arguing that even an ensouled aborted embryo did not have the same rights as a birthed human being. Muhammad al-Mukhtar al-Salami from Tunisia held that human dignity was not exclusively linked to human life because even a corpse had the right to be treated with dignity. Al-Salami thus concluded that human dignity should begin at the point of conception and the decisions of the premodern *fuqaha* (jurists) should be contextualised to a time when they were not able to detect life as early as doctors

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491 Resolutions and Recommendations kindly sent to the author by the Office of the International Fiqh Academy, October 2021.


492 Brockopp and Eich, *Muslim Medical Ethics*. 63
can today. Finally, the council of 1987 recommended that excess embryos should be avoided and IVF should use only the gametes of married couples. If spare embryos had been created, then three options existed: letting them die, killing them, or using them for research. Of these three, the first was preferred as ‘the lesser of three bad options.’ Detailed debates on the beginning of life followed, which will be discussed at the end of this chapter. In the discussions of the councils, embryos are often referred to as fertilised eggs, which of course they are, however, the use of these terms can invoke different emotional responses. The term embryo tends to imply to a greater extent the potential human being, whilst the term fertilised egg does so to a lesser extent. It is not clear whether the use of different terms was deliberate.

Two years later, during the 1989 IOMS meeting, two Jordanian fuqaha (jurists), Abd al-Salam al-Ibadi and Muhammad Na’im Yasin, presented a new way of discussing the rights of embryos.

Ibadi defined abortion as ‘ejecting’ the embryo from the female body before or after nidation [implantation into the uterus]. In this way he could treat the issue of using aborted embryos and frozen embryos together.

Ibadi held that aborted embryos could be used for research as they were no longer alive under the pretext that the abortion had not been done for research purposes, but for a legal reason (such as protecting the life of the mother). As, however, the majority of classical sources opposed abortion, the use of frozen embryos was not allowed (presumably because they still have the potential for life), and, therefore, all frozen embryos needed to be implanted in the mother. He did not explain what should happen if this was not possible.

Yasin argued quite differently; he stated that life existed from fertilisation onwards, but human life existed only after the 120th day through ensoulment. Although

493 Brockopp and Eich, *Muslim Medical Ethics*. 63
494 Brockopp and Eich, *Muslim Medical Ethics*. 68
abortion was only allowed in case of grave necessity, classical *fiqh* did not see abortion before ensoulment as the killing of a human life. Therefore, a frozen embryo could be used for research if it served a higher purpose, just as abortion was the lesser evil to losing the mother’s life. His argument depended on the lost potential for the embryo to develop into a full human life. If the mother died or the couple divorced, then this potential no longer existed because *Shari‘a* would not permit the frozen embryo to be implanted into another woman or to be used after divorce, therefore, the potential life is no longer a legal option. If, however, the parents therefore permitted it, then the embryo could be used for the higher purpose of research. This view was supported by the religious scholars Yusuf al-Qaradawi and Uthman Shabir and the council permitted their use for research:

> The opinion of the majority….is that the destruction of fertilized eggs before their nidation in the uterus is allowed.”

Less than one year later, the IFA meeting witnessed a U-turn in that all embryo research was strictly forbidden. Yasin was absent from this meeting and Ibadi, who had argued against the use of frozen embryo at IOMS, was present as the Deputy Head of IFA. Whilst all studies of the IOMS meeting were presented, according to Eich, more weight was given to the position of Ibadi. It was also noted that Germany and Australia had passed laws restricting embryonic research on fertilised eggs. As a consequence, IFA published a recommendation (see below) that is more restrictive than the original IOMS recommendation of 1987. It now said that only the number of eggs that could be implanted should be fertilised, in order to prevent any surplus embryos. Whilst in 1987 the option existed to use them for research, even if this was the least favourable option now the instruction was that in the event of surplus embryos, they had to be left to die.

\(^{495}\) Brockopp and Eich, *Muslim Medical Ethics*. 69

\(^{496}\) Brockopp and Eich, *Muslim Medical Ethics*. 69,70
The IFA Resolution No.55 (6/6) states that IFA held a session on this topic in 1990 in Jeddah, Saudi Arabia, where the recommendations made by the symposia of 1982/7 were examined. The *Sixth Medical Fiqh Symposium* (in Kuwait in October 1990), was held jointly by the Academy and the *Islamic Organisation for Medical Science* of Kuwait. Together all previous research papers and debates were examined and the following recommendation was published:

In light of the scientifically established possibility of preserving non-fertilized eggs for future use, only the number of eggs required each time for insemination must be fertilized to avoid the existence of surplus fertilized eggs. If surplus fertilized eggs exist … it should be left … until the life of this surplus ends naturally… It is prohibited to inseminate fertilized eggs into another woman.497

This final recommendation may explain the ban on the cryopreservation of embryos in Dubai, even if it was only acted upon years later. However, particular attention should be paid to the reasoning behind the published recommendation, namely the stated fact that unfertilised eggs could now be preserved, making the freezing of embryos unnecessary. In 1990 this technique was certainly a scientific possibility; *The Lancet* had reported in 1986 on the first successful twin pregnancy from frozen and thawed human oocytes (ova). However, human eggs proved much harder to freeze in practice, than sperm and embryos, so that the use of frozen eggs dramatically decreased the rate of successful pregnancies.498 Advances in rapid freezing techniques saw the first child born of a vitrified ovum in 1999, but the reality of preserving ova remained challenging until recently, so that, since 2008, the

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497 International Islamic Fiqh Academy Organisation of Islamic Cooperation, *Sessions 2-24*. taken from Resolution No 55(6/6) Excess Fertilized Eggs

technique of harvesting and cryopreserving whole sections of ovarian tissue has been hailed as a new solution.\(^{499}\)

Among reproductive cells, there exist efficient cryopreservation techniques for spermatozoa and embryos. Oocytes, however, present significant hurdles in achieving successful cryopreservation, primarily due to their sensitive microtubule structure. Recently, cryopreservation of ovarian and testicular tissues has been investigated with success reported. \(^{500}\)

Whilst this research does not know on what grounds precisely the decision to ban cryopreservation of embryos was made in 1990, this early mention of the possibility to freeze ova, as a viable alternative to preserving embryos, demonstrates the challenges faced by jurists when making far-reaching decisions that will impact on the health of women. In theory, the freezing of ova may have appeared a suitable alternative; in practice many women will have had to undergo a far greater number of expensive and invasive hormone treatments and egg-retrieval procedures because their spare embryos could not be frozen on the assumption that this was no longer necessary.

Meanwhile, current searches in the literature of IVF treatment centres reveal that the changes in Dubai’s legislation appear to have turned in favour of cryopreservation, so that the freezing of embryos is once more offered in Dubai and Saudi Arabia, but not in Egypt.\(^{501, 502}\) Egg freezing is permitted across the region and this has recently led to a number of high-profile young, unmarried, celebrity influencers announcing their intention to freeze their eggs. The harvesting of eggs in unmarried women is

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\(^{501}\)"Dr Sulaiman Al-Habib Medical Group, operating across the UAE and Saudi Arabia.,” https://hmg.com/en/Medical-Facilities/FertilityCenter/Pages/-ivf.aspx. accessed 5. Nov.2021

usually promoted for young, unmarried, cancer patients in order to preserve their fertility post chemotherapy, but now young, healthy women are attracted to the procedure in order to have a career and prolong their fertility. Whilst taboos are being broken down, the older generations generally disapprove of this method to delay marriage. As it is, however, not considered haram (forbidden) to freeze eggs, according to the jurists mentioned below, the younger generation appear to justify their decision as in keeping with Islamic teachings. In Egypt the case of a young woman called Reem Mehanna is insightful. On the 2nd of September 2019 it was reported by Egypt Today, that Reem had announced on Facebook that she had frozen her eggs two years previously. The article further mentions that:

Religiously, Egypt’s Dar al-Iftaa, the Islamic body concerned with issuing fatwas [Islamic decisions], stated on its official website that the egg-freezing process is not prohibited, saying “egg-freezing could be a complementary process of in vitro fertilization, which was allowed by different schools of Islamic jurisprudence for the married couples.”

However, it was stated that four rules regulated the egg-freezing process:

1. Frozen ova can only be used in marriage. They need to be fertilised by the husband’s sperm and if fertilised cannot be used after the death of the husband or after divorce;

2. ova should be kept in a tightly controlled place to avoid confusion with other ova;

3. ova should under no circumstances be used in other women;

4. the process is only permitted if the ova are not negatively affected by the freezing (in order to prevent birth defects).

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504 It is also not permitted to fertilise them after death or divorce with the sperm of the husband

505 Samar Samir, “Breaking Social Taboos, Egyptian Girl Announces Freezing her Eggs.” This is a summary of the article not a direct quote.
Two days after the initial publication, *Egypt Today* published a further article titled: *Egypt’s Islamic Institutions set four conditions for freezing women’s eggs*. Having previously stated that egg freezing has become a burning issue in Egypt, as well as in the UEA, the article covers the same story but with a stronger emphasis on the religious limitations of this new trend.\(^{506}\) Whilst the former article states the author of the article as Samar Samir, the second article refrains from stating an author, using “*Egypt Today Staff*” instead, which suggests how controversial this issue may be. This may also demonstrate how young Muslim women are challenging societal expectations to marry young and are taking control of their own fertility. Whilst they desire motherhood, they are also demanding more choice and using the Islamic rulings about fertility medicine to their advantage. *Vogue Arabia* further demonstrates this trend across the Sunnī Middle East with its 2021 article: *Everything you need to know about freezing your eggs in the region* by Christine van Deemter.\(^{507}\)

When considering the influence of *Sharī’ā* on the legislation or availability of fertility medicine, countries with a traditionally more conservative Muslim approach to fertility, such as Egypt, may thus be witnessing a certain softening of rigid rules. Other countries, which have traditionally granted less influence to *Sharī’ā*, such as Dubai, are witnessing a renaissance of stricter interpretations. The most striking example of recent greater restrictions can be found in Turkey.

As recently as 2007, Dr. Berna Arda, Professor of medical ethics at Ankara University, described Turkey, in her paper on *The importance of secularism in medical ethics*, as:

> a successful example of a ‘nation state model’ based on secularism… After the establishment of the Republic, all legal systems in Turkey have gained a

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secular character. In this context, it is evident that legal regulations in medicine are secular in spirit and content.\textsuperscript{508}

Arda held that regulations concerning assisted reproduction demonstrate this secular approach to bioethical legislation in Turkey. IVF was initially regulated by the Ministry of Health in 1987, revised in 1996 and issued as the \textit{Statute on Treatment Centres Assisted Reproduction}.\textsuperscript{509} Arda described this legislation as follows:

\begin{quote}
The Population Planning Law of Turkey is one of the most modern laws in the World and it has already gained general public support. Under these circumstances, while it was necessary to investigate if there were any shortcomings in the law and if so to correct them, disregarding the law and stepping back from its advanced level is unacceptable.\textsuperscript{510}
\end{quote}

Although Arda stressed the importance of autonomy for the patient, she states explicitly that:

\begin{quote}
…religious edicts have no direct impact on legislative regulations in Turkey.\textsuperscript{511}
\end{quote}

Arda explains that IVF in Turkey is permitted only for married couples using their own gametes. There is no acknowledgement over why this limitation to accessing IVF and donor gametes should exist in the country, if religious concerns are not influencing legislation.

By 2011, the anthropologist Dr. Zeynep B. Gu"rtin of Cambridge University’s Centre for Family Research describes the situation in Turkey somewhat differently. No change has happened in what is permitted, IVF is still only permitted for married couples and the use of donor gametes is still prohibited, but a new amendment to the law has come into force, which from the 6th of March 2010 onwards makes Turkey the first country to prohibit reproductive travel. Named ‘\textit{Legislation Concerning Assisted Reproduction Treatment Practices and Centres}’ (Official


\textsuperscript{509} Arda, “The Importance of Secularism.”

\textsuperscript{510} Arda, “The Importance of Secularism.”

\textsuperscript{511} Arda, “The Importance of Secularism.”
Gazette no. 27513), this law does not prohibit tourists from coming into Turkey to partake in competitively priced fertility treatments, but does ban Turkish women, who may be lesbian or single, and couples, who may require donor gametes, from travelling abroad for treatment.\textsuperscript{512} Further changes affect the licensing of private IVF centres. New specifications on the storage of gametes and restrictions on the number of embryos that can be implanted into a patient have been introduced. For women under 35, the number is limited to one embryo for the first two IVF cycles and two embryos for the third and subsequent cycles; two are also allowed for women over the age of 35. Of particular concern to Gu¨rtin are the penalties under the new legislation:\textsuperscript{513}

If it is discovered that an individual has travelled abroad to receive fertility treatment using donor eggs, donor spermatozoa or surrogacy, then ‘the person who has conducted this procedure, the persons who have referred patients or acted as intermediaries, the impregnated person, and the donor will be reported to the state prosecutor’ (Official Gazette no. 27513)…the [assisted reproduction practice] certificates of the involved persons will be nullified, the centre will be closed indefinitely, and all personnel will be indefinitely barred from working at ART centres. (Official Gazette no. 27513, item 18.5)\textsuperscript{514}

Gu¨rtin contextualises this response by noting that the reproductive industry in Turkey had witnessed a boom prior to 2010. On the one hand, the fertility industry was hailed as a liberal and forward-thinking vehicle for a pro-natalist society that promised to deliver children to almost any couple, on the other the narrative remained conservative and heteronormative in character, promoting only the nuclear family within marriage. A strong media presence catapulted a number of doctors to a celebrity status. Financially successful doctors led private practices that founded satellite practices abroad, especially in Cyprus. Here, patients could be treated relatively openly with donor gametes. Ova are said to have been purchased


\textsuperscript{513} Gürtin, "Banning Reproductive Travel."

\textsuperscript{514} Gürtin, "Banning Reproductive Travel."
predominantly from paid Turkish donor women, who also travelled to Cyprus for the harvesting of their eggs, whilst sperm was generally sourced from non-Muslim countries such as Denmark. Although Gürtin describes a relative openness of the clinics to facilitate cross border fertility treatments, she also relates the surprise of one fertility specialist who encounters a group of outwardly religiously observant, veiled Muslim women travelling quite openly to Cyprus for third-party assisted reproduction. The cross-border fertility tourism is described as such:

This supra-legal choreography – …not only provided patients who desired them with an effective way to access treatments involving donor gametes, but also to access them very discreetly…. On the one hand it perpetrated the myth of a Turkish consensus regarding the prohibition of third-party assisted reproduction and on the other allowed a much broader group of patients to take advantage of treatments that they would not openly admit to undergoing.\textsuperscript{515}

According to Gürtin, several factors may have influenced the decision to clamp down. Firstly, two single celebrity women publicly chose to birth children conceived with donor sperm in the years leading up to the 2010 amendments. This caused a public debate about the importance of the nuclear family and the risk of allowing single parents to choose assisted reproduction over marriage. Secondly, the economic growth in the fertility industry raised concerns about the moral value of human life. Fundamentally, however, Gürtin sees the new legislation as a religious reaction endorsed by the Presidency of Religious Affairs, the highest religious authority in legal matters in Turkey, who stated as early as 2006 that:

[IVF] is no longer permissible if a foreign element is included, meaning if the sperm, eggs or womb belong to a person outside of the husband–wife couple; because according to the general principles of the religion of Islam, there is an imperative for a legitimate child to belong, whether by sperm or egg or womb, to a wedded husband–wife couple.\textsuperscript{516}

\textsuperscript{515} Gürtin, “Banning Reproductive Travel.”

\textsuperscript{516} Gürtin, “Banning Reproductive Travel.”
The wording that it is no longer permissible, when in fact it was never permissible since the first revised legislation in 1996, suggests a growing awareness and concern amongst the religious establishment that third-party assisted reproduction threatens the Muslim moral ideal of the heterosexual married couple as the only place to birth children. Religious legal concerns, whether directly through fatwas or indirectly through the moral code of the mainly Muslim culture, are thus influencing the legislation and use of fertility treatments even in Turkey, which Arda described as strictly secular in its legislation and approach to medical ethics. Anthropologists Inhorn, Birenbaum-Carmeli, Tremayne and Guertin, describe Turkey as a country with:

…a growing social divide between those Turks committed to secularism and those devoted to increasing Islamic piety in the public sphere.\(^{517}\)

Despite this social divide, the public pressure to adhere to the moral status quo makes it difficult to gauge the public opinion of third-party reproduction even amongst Turks with a secular outlook and it is, therefore, important to avoid generalised assumptions about religious motivations.\(^{518}\) However, it can be asserted that many couples up to 2010 secretly conceived abroad, even though they are likely to have been aware that Islam forbids donor gametes. The reluctance to use donor sperm secretly abroad was reportedly much higher than the reluctance to use donor eggs, although the use of donor sperm from a patient’s point of view requires less medical intervention. Obviously, the reason for infertility in different couples will determine whether donor eggs, donor sperm or both are required, but the reluctance towards donor sperm rather than eggs is likely to be a direct consequence of the emphasis on the paternal blood line. Since 2010 the option of going abroad is prohibited, whilst the demand is likely to continue to exist despite religious verdicts.\(^{519}\)

In summary, the situation in Turkey, Dubai and Egypt has shown how multifaceted the influence of Sharīʿa is on reproductive medicine. The recommendations of the councils cannot be understood in isolation from other social and political trends, nor

\(^{517}\) Inhorn et al., "Assisted Reproduction."

\(^{518}\) Inhorn et al., "Assisted Reproduction."

\(^{519}\) Gürtin, "Banning Reproductive Travel."
can one speak of one unified Muslim response. One can, however, sense a trend in which Muslim jurists, bioethicists and doctors are no longer following decisions made in the non-Muslim world. Nor are Muslim patients unaware of what is permitted according to Shari’ah. As the bioethical debate develops, so loopholes are closed. Whilst young women use decisions made according to Shari’ah to extend their fertility, and single status, by freezing eggs, choices to travel for fertility treatments and use third-party reproduction have been curtailed. Beyond doubt is that the Al-Azhar fatwa served as the axial moment for fertility treatments in the Sunnī Middle East. It ruled that third-party reproduction led to adultery and illegitimacy and this has never been challenged within Sunnī Islam, and, indeed, upheld in the countries mentioned. It also ruled that conception sine concubito was acceptable, giving a green light to artificial insemination and in vitro fertilisation, as long as only the gametes of the married couple were used. This means that paternity and maternity are defined biologically and rely on the matrimony of heterosexual couples. If marriages end through divorce or death then frozen embryos cannot be used. This too has not been challenged and it leads to the question of when the right to life begins according to Islam.

The debate about the beginning of life

The debates about IVF and frozen embryos pivot on the question of when a human being both, as a biological and a legal entity gains life. This effects the legal rights the entity gains at the moment of life and the obligations that society has towards it. The exact moment of the beginning of life, according to Shari’ah, was disputed amongst classical scholars and so a dedicated symposium was held in 1985 by IOMS in Kuwait with the title:

*Human Life from Its Beginning to Its End from an Islamic Perspective.*

From the outset the intention of the symposium was to perform collective *ijtihad* (*al-ijtihad al-jama‘i*) between scientists and jurists for the first time on the subject. This *ijtihad* should be an ongoing process so that new scientific discoveries would regularly be taken into consideration. Whilst both scientists and jurists acknowledged the need for each other’s expertise, the extent to which scientists wished to

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520 Ghaly, “The Beginning “.
participate in the *ijtihad*, rather than just inform the jurists with their medical expertise, led to heated discussions. This was previously discussed in Chapter Four on the topic of co-muftis.

Broadly speaking the delegates divided into two groups; the first argued that life began at conception and the second argued that life began with ensoulment. Within each group there were important nuances. The first group saw scientists and jurists argue that modern scientific knowledge should take precedence over the legal decisions of classical Muslim jurists, because their decisions were informed by the knowledge of their time. As an example, Al-razi held that a number of *Maliki* religious scholars had historically classed babies who had only suckled once or twice and died, as non-living at birth, whilst modern science holds that only living babies can suckle.521 Scripture should, therefore, be interpreted in light of modern scientific insights:

As for the interpretation of the scriptural texts, it was clear that different advocates of this position were convinced that the apparent meaning (*al-zahir*) of a scriptural text should be abandoned as long as it contradicts scientific knowledge, and preference should be given to the metaphorical interpretation (*ta’wil*).522

This first group included the physicians Hassan Hathut, Ahmad al-Qadi and Abd al-Hafiz Hilmi and the religious scholars Badr al-Mutawalli, ‘Abd al-Basit, Muhammad Mukhtar al-Salamı, Muhammad ‘Abd al-Hadi Abu Rıda, Ahmad al-Ghandur, and ‘Abd al-Qadir bin Muhammad al-‘Amman.523 The group referenced the experience of the thirteenth century religious scholar Umar bin-Muhammad al-Sunami as a classical authority for their approach as Sunami also tried to reconcile the medical knowledge of his time with the Qur’anic text. Whilst this group agreed that life began at conception, only Dr. Hathut argued that this conception was from the moment of fertilisation onwards, regardless whether *in vivo* or *in vitro*. The other members of the first group spoke for life at the moment when the fertilised egg had implanted in the womb; this excludes embryos *in vitro*. In response to the second group, who argued

521 Ghaly, “The Beginning ”. 181
522 Ghaly, “The Beginning ”. 181
523 Ghaly, “The Beginning ”. 80-183
that ensoulment marked the beginning of life, Hathut suggested that the soul was part of the metaphysical world and, as science could not prove the metaphysical, the beginning of life should not be based on that which is part of ghaybiyyāt (the matters of the unseen world).

In the second group, which argued for life beginning at ensoulment, the scientists who supported this view included Isam al-Shiribini, Ahmad Shawqi Ibrahim and ‘Abd Allah Basalama, whilst the religious scholars included Yusuf al-Al-Qaradawi, Muhammad Na‘im Yasin, Muhammad Fawzi Fayd Allah, Mustafa Sabri Ardughdu, Salih Musa Sharaf, ‘Abd al-Rahman ‘Abd al-Khaliq, and ‘Abd Allah al-‘Isa. Whilst the group agreed that life began at the time of ensoulment, there was disagreement as to how science could detect the soul and at what point during pregnancy ensoulment occurred. Jurists in this second group tended to reject metaphorical interpretations in favour of a literal approach to scripture. The Kuwaiti religious scholar ‘Abd al-Rahman ‘Abd al-Khaliq was especially critical of Dr. Hathut’s position, claiming that the first group was trying to cross out the Qur’anic verses and prophetic tradition by claiming that metaphysical texts cannot be examined by science. He argued that if the Prophet said the nutfa (see below) stage lasted 40 days then this was a definite and could not be metaphorically altered in order to please modern scientists:

Such a metaphorical interpretation is not a religious paradox, but a religious sin.

According to this position, science is ever-changing, whilst scripture is unchanging, and if science disagrees, then the correct scientific discovery has not yet been made. The physicians who supported the soul in-breathing theory, argued that advances in science could now detect embryonic developments that may be understood as the presence of the soul. The Egyptian neurologist Mukhtar al-Madi suggested that certain neurological developments may indicate the arrival of the soul. Medical advocates of the soul position suggested that significant brain development occurred after 12 weeks, a time when some scholars assume ensoulment, other physicians, such as Dr. Hathut, argued strongly against the position that brain maturity could

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524 Ghaly, “The Beginning ”. 182
525 Ghaly, “The Beginning ”. 187
determine ensoulment and the beginning of life. According to Ghaly, the disagreements amongst physicians strengthened the jurist’s perception that science could not be relied upon. Scripture and classical interpretations were thus considered the more reliable source.

The symposium’s legal discussions about embryology were based largely on the debates of classical Muslim jurists, who were considering the consequences of abortions and miscarriages. Beyond their physical observations classical jurists based their understanding of human embryonic development on Qur’an 23:12-14 in particular. This passage mentions what appear to be three different stages of development; the nutfa (drop stage), the ‘alaqa (clot of congealed blood stage) and the mudgha (lump stage). Q 23:14 includes the statement:

Then we developed out of it another creature.

This other creature is said to refer to the act of ensoulment, which according to tradition sees the angel Gabriel breathing in the soul and deciding at this moment much of a person’s fate and gender. Whilst this verse speaks of different stages, it is a hadith from the Sahih al-Bukhari usually referred to as the traditions of Ibn al-Mas’ud which recounts Prophet Muhammad saying:

The creation of one of you is put together in his mother’s womb in 40 days, then he becomes a clot of congealed blood (‘alaqa) for a similar period, then a little lump (mudgha) for a similar period. Then Allah sends an angel who is ordered to write four things. He is ordered to write down his (i.e., the new creature’s) deeds, his livelihood, his (date of) death, and whether he will be blessed or wretched. Then the soul is breathed into him.

This tradition is used by many jurists to debate the length of the different stages of pregnancy and their Islamic equivalents (nutfa, ‘alaqa, mudgha). These lengths are disputed, although the dominant view holds that each stage takes 40 days thus

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526 For information on the classical jurists view on abortion see:
527 Brockopp and Eich, Muslim Medical Ethics. 65
528 Brockopp and Eich, Muslim Medical Ethics. 65/Ghaly, “The Beginning”. 210
leading to ensoulment on day 120 or at least not before day 40. This timing can then be used for different purposes; it can be used to try to link the scriptural texts to the knowledge of modern science in order to prove or disprove the relevance and wisdom of scripture. The argument that neurological developments happen around 120 days of gestation serve as an example that is said to prove the scientific literal wisdom of the Qur'an, whilst the fact that the gender of a child is biologically decided during fertilisation and not at 120 days is an argument for the metaphorical wisdom of scripture.

The attempt to pinpoint the exact timing of the in-breathing of the soul may also be used to argue that this is the moment at which life, according to Shari‘a, begins, regardless of biological insights, affecting mainly the legal and ritual concerns regarding this entity. The second group felt that ensoulment did mark the beginning of human life, just as death marks the end of life as the soul leaves the body. The first group differed, suggesting the term ruh (soul) had a somewhat elastic meaning and need not entail the beginning of life, and that ensoulment could merely be part of the development of life. One must in any case differentiate between the beginning of life and the sanctity or inviolability of life. Even if the soul is breathed into the body at a given time, this need not mean that before this moment the embryo can be destroyed with impunity. This topic was of pivotal importance during the debate because scholars from the first group were concerned that, if life was said to begin only at ensoulment, this would open the floodgates to abortions.529 This was seen as an especially acute problem after the Jordanian religious scholar Umar al-Ashqar used the Qur’anic verses 2:28 and 40:11 to suggest that before the in-breathing of the soul (which he marks at day 40) the embryo is dead, at ensoulment it gains life, at the departure of the soul it dies once more before being granted eternal life. Thus, according to Ashqar, each person is both dead and alive twice in this life cycle. This opinion is said to be based on Ibn Al-Mas‘ud himself and the Qur’anic commentator Qatada ibn Di’ama al-Sadusi (died 735).

This second group cited the Shafi‘i and Hanbali school as permitting the destruction of an embryo before the 40-day mark in certain cases, but agreed that after ensoulment it was forbidden. Furthermore, some scholars suggested that even before

529 Ghaly, "The Beginning ". 192
ensoulment and life, the embryo had a certain dignity that some scholars even
granted to the seed of life (presumably eggs and sperm), thus prohibiting
contraception or the wasting of seed. In response to this, the first group cited Abu
Hamid al-Ghazali (d.1111), who considered the beginning of life as the moment of
conception. Also cited was the Maliki school, which is known to protect life from
fertilisation onwards and deems any destruction of it as an offence. If the embryo is
declared lifeless flesh, it is unlikely that this dignity will be respected. Dr. Hathut and
the first group, however, held that this approach was outdated:

As for the contention of other classical religious scholars that the fertilized
ovum can be damaged before the stage of soul-breathing… such an opinion
is not valid anymore now. These classical scholars based their contention on
the belief that a fertilized ovum before breathing the soul can be just
congealed blood….it is scientifically proven that there is life before the
moment of breathing the soul, and thus it is clear that the soul does not get
breathed into a dead fetus.\textsuperscript{530}

Dr. Hathut appears to have been the only delegate who stood firm to his belief that
life began before implantation either in \textit{vitro} or \textit{in vivo}. The rest of the first group
contended that implantation was the beginning of life. At the time, delegates were
discussing whether or not to permit the use of IUD devices (the coil) for
contraception. Delegates decided to permit the use of the IUD as fertilised eggs
before implantation did not have life status. This then also informed the narrative
about IVF embryos.

Finally, Abdurezah A. Hashi suggests that there was a group of jurists who did not
approve of artificial insemination or IVF, although it is unclear whether these jurists
were part of the councils mentioned above. They are said to have objected on the
grounds that AI firstly interfered with the natural course of birth and reproduction
based on the Qur’anic verse: \textsuperscript{531}

\textsuperscript{530} Ghaly, "The Beginning ". 185
\textsuperscript{531} A. Hashi Abdurezak, \textit{Bioethics : a Comparative Study of its Concepts, Issues and Approaches}
To Allah belongs the dominion of the heavens and the earth…and He leaves barren whom he will: for He is full of Knowledge and Power. (Q 42:49)

Secondly, it relied on the unveiling of private parts of both parents in front of strangers and that the techniques could produce children of ill health and unclear lineage. Proponents of artificial insemination did not accept these concerns as they argued that many couples were infertile because of curable fertility issues. God had created the eggs and sperm and given humankind the knowledge to help, and the pleasure of having children outweighed the concerns mentioned. Unveiling and the need to collect eggs and sperm were categorised as necessities:

\[\text{…necessity begets facility, and difficulty brings facility, thus unveiling the }\]
\[\text{'}awrah with the aim of taking the egg of the female and the sperm of the intended father for fertilization and initiating a pregnancy is permitted.}\]

In conclusion, the debates about the beginning of life, donor gametes and frozen embryos demonstrate both the strength and weakness of the collaboration between jurists and scientists. On the one hand, it shows how a deeper understanding of medical science can inform jurists in their interpretations of scripture; on the other hand, the merger of biological and legal definitions is deeply problematic. Just as the translation of Shari’a into Law causes the problems of a Procrustean bed, so jurists and lawyers may use the same terminology of life, death and of ensoulment, but essentially, they speak a different language concerned with different aspects of life. By forcing incompatible elements into a one-size-fits all structure, the merger of scientific and religious definitions causes confusion. Speaking of an embryo as dead body before ensoulment is incompatible with our biological knowledge of the beginning of life, but does this mean that law must always bow to science? The jurists decided not to be entirely directed by science, but the tension remains. Perhaps it would be prudent to speak of a physical beginning of life and a spiritual beginning of life, which need then not pinpoint the exact same moment. This clarification would allow for a better understanding of the objectives of the different domains. This chapter has further demonstrated how third-party reproductive technologies have been translated into the legal categories of adultery and illegitimacy. This too was a translation from one concept to another that was not

\[532\text{ Aburezak, }\text{Bioethics.}\]
necessarily a rational consequence. Different legal categories could have been chosen that reject labelling a child as illegitimate and a woman as adulterous. However, once a certain translation has been decided upon, this initial categorisation is rarely challenged and so the early fatwa of Al-Azhar has set the scene for all subsequent debates in Sunnī Islam.
Chapter Nine
Islamic Legal Debates and their Implications in the Middle East

First and Second Reproductive Technologies - Artificial Insemination with Donor sperm (AID) and *In Vitro Fertilisation* in Shi’a Islam

Chapter Eight described the profound influence of the Al-Azhar *fatwa* of 1980 and a similarly important *fatwa* was published in the 1990s by Ayatollah Al-Khamene’i in Iran. Initially, there was a ban on third party reproduction in Iran, but following the birth of the country’s first IVF baby in 1990, a different legal approach to third party reproduction gradually began to dominate. After the death of Ayatollah Khomenei in 1989, Ali Hussein Al-Khamene’i became the new supreme leader of Iran and was elevated to *marja’ al-taqlid* (the source of emulation) in 1994. Whilst not all Twelver Shi’a Muslims follow the leadership of Al-Khamene’i, this title guarantees him a large following of disciples who view the *marja* as a religious person.533

Embodying the highest principles of religious legitimacy.534

As supreme leader, his political influence in Iran is unquestioned and so he unites legislative and religious influence. By the late 1990s Ayatollah Khamene’i issued a *fatwa* presented as four sets of questions-and-answers, and set out as eight points. In style it is very different to the Al-Azhar *fatwas* in that it gives no classical authorities or Qur’anic sources to underpin its position. Once more the question of the use of donor sperm using AID does not proceed the discussions on the use of IVF and donor eggs, instead, the *fatwa* begins with questions concerning the legitimacy of conception *in vitro*:

533 Inhorn, *The New Arab Man*.
534 Inhorn, *The New Arab Man*. 
Question 1:

a. Is IVF acceptable in case the sperm and egg came from a legally married couple?
b. Suppose it is acceptable, could a foreign doctor do the operation?
   Would the new-born be considered the child of the married couple who collected the sperm and eggs?
c. Suppose IVF is not acceptable, could it be an exception when it comes in the form of a ‘marriage saviour’.  

The brief answer states:

Answer 1:

Doing the IVF operation is acceptable under the cited circumstances. However, one should avoid getting involved in issues that are considered haram [forbidden] in Islamic Law – i.e., the foreign [presumably male] doctor should not perform the IVF procedure if it involves touch or gaze [of the woman’s genitals].

From this it is clear that neither conception without intercourse sine concubito, nor conception in vitro, is considered legally prohibited. Legally problematic are issues concerning the protection of the modesty of the woman from a male, unrelated doctor. It is of interest that point c. introduces the concept of the marriage saviour even though at this stage with the use of the married couples’ own gametes no exception is necessary even from the perspective of the Al-Azhar fatwa.

The next question addresses the topic of donor gametes, but interestingly it addresses the more medically invasive question of donor eggs before donor sperm.

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535 All 8 points of the fatwa are direct quotes from the translation of the Khamene’i fatwa found in Inhorn, The New Arab Man

536 Inhorn, The New Arab Man. Appendix: The Al-Khamene’i fatwa was translated by Inhorn from an anthology of fatwas published in Arabic issued by Ayatholla Khamene’i - bracketed words are additions by Inhorn.

537 Inhorn, The New Arab Man.
After describing the psychological and marital distress brought on by female infertility the question is posed:

**Point 3**

**Question 2:**

Would it be acceptable to make use of another woman’s egg and fertilize it with the husband’s sperm outside the uterus and then transfer the embryo back into the wife’s uterus?\(^{538}\)

The answer is highly insightful in that permission is given to use donor eggs, but the legal consequences name the wife and gestational mother as the surrogate mother:

**Point 4**

**Answer 2:**

Although egg donation is not in and by itself legally forbidden, the newborn would be considered to be the child of the person who collected the sperm [the husband] and the egg donor, as well as the surrogate [infertile] mother. It follows that both the sperm collector [husband] and egg donor have to apply the exceptions cited within the religious codes regarding parenting.\(^{539}\)

This is a very different foundational narrative to the Al-Azhar narrative. There is no mention of the negative implications of *zina* in that neither adultery or illegitimacy are associated with the act of using donor gametes and this is extended to donor sperm in question 4. However, the use of donor gametes has legal implications in that parenthood is determined both biologically and socially, and in that all three parties are considered related and must abide to the necessary religious codes which apply.

The third question concerns the use of a dead husband’s sperm, the use of which was prohibited by the Egyptian Islamic Institutions mentioned in the previous chapter.\(^{540}\)

\(^{538}\) Inhorn, *The New Arab Man.*

\(^{539}\) Inhorn, *The New Arab Man.*

\(^{540}\) Samar Samir, "Breaking Social Taboos, Egyptian Girl Announces Freezing her Eggs." accessed 5. Nov.2021
Point 5

Question 3:

a. If the sperm was taken from the husband and, after his death, it was fertilized by the wife’s egg and implanted in her uterus, would this be considered legal?

b. Would the new-born be considered the husband’s son and would he bear his name legally?

c. Does the child inherit from the owner of the sperm [the dead husband]?\(^{541}\)

Point 6

Answer 3:

It is okay to do the cited procedure and the new-born would be considered the child of the egg and uterus bearer and the sperm owner [dead husband], but he would not inherit anything from him.\(^{542}\)

The wording in point 3a. is most unusual and may be a remnant of times when the genetic contribution of the wife was unknown, despite it being known today.\(^{543}\)

Importantly however, though the sperm of a deceased husband can be used by the widow, patrilineal lineage can thus continue after death and so the end of a marriage may be interpreted differently by Shi‘a authorities, despite the inability of the child to inherit.

The final question addresses the most controversial topic of sperm donations:

Point 7

Question 4:

\(^{541}\) Inhorn, *The New Arab Man*.

\(^{542}\) Inhorn, *The New Arab Man*.

\(^{543}\) This comment relies on the translation being correct.
Is it okay to fertilize a woman’s egg with a donor sperm in case her husband has some infertility problems, and then implant the fertilized embryo back into her uterus?\textsuperscript{544}

**Point 8**

**Answer 4:**

It is legally not forbidden to fertilize a woman’s egg with donor sperm in and by itself, but the opposite gender [infertile man] should avoid touching or seeing the [female] child [naked], as these are considered *haram*. In any case, a child born this way would not carry the name of his father, but rather that of the sperm owner [the donor] and the egg and uterus carrier. However, in such instances, one should abide by the exceptions that have to do with inheritance and veiling issues.\textsuperscript{545}

According to this *fatwa*, there is thus no moral or religious stigma per se in the act of using donor gametes, the sperm of a donor in the womb of a wife does not constitute adultery because, according to Ayatollah Khamene’i, *zina* requires the physical act of intercourse between a man and a woman who are not married. However, the consequence for the infertile father is that he will not be permitted the same status of kinship as he would with a biological daughter. A child will not carry his name, rules of modesty must be considered and the child will inherit from the sperm donor. This, therefore, affects the status of *Mahram*, which was discussed in the previous chapter.

Whilst the concept is not developed further, question 1c introduces the idea of fertility medicine as a ‘marriage saviour’. In speaking about IVF and donor gametes in a way that dissociates third-party reproduction from the illicit act of *zina*, the *fatwa*

\textsuperscript{544} Inhorn, *The New Arab Man*.

\textsuperscript{545} Inhorn, *The New Arab Man*.
introduced a very different legal narrative and translation of the concept of donor gametes from the Al-Azhar fatwa.\textsuperscript{546}

Kamenei’s fatwa was considered controversial from the beginning and Dr. Hassan Chamsi-Pasha, who serves as expert in the International Islamic Fiqh Academy, Jeddah explains how leading Shi’a authorities outside Iran such as Grand Ayatollah Sistani and Muhammad Sa’id al-Tabataba’i al-Hakim of Iraq as well as Sheikh Muhammad Husayn Fadlallah, Lebanon’s most prominent Shia religious authority, disagreed with the permissive ruling on donor sperm.

Many Shi’a religious authorities support the majority Sunnī view: Namely they agree that third-party donation should be strictly prohibited.\textsuperscript{547}

It is difficult to determine to what extent religious Shi’a authorities who disagreed with Khamene’i (from outside Iran) were influenced by the Sunnī rejection of AID in the countries they lived in and to what extent the opinion of Khamene’i was influenced by Iranian politicians, who at the time of his fatwa desired population growth. Whilst the opinion of Khamene’i is highly influential Sachedina explains the limitations of his authority:

The ayatollahs are not infallible; nor is the institution of ijtihad immune from committing errors of textual hermeneutics. Unlike the papal infallibility located in the institution of Vatican leadership there is no such guarantee in the Shiite marja’iyya.\textsuperscript{548}

Grand Ayatollah Safi Golpaygani, one of the most senior Twelver Shi’a Marja, teaching in Qom, Iran, took a very different view in 1992 on donor sperm:

The acceptance of this [reproductive technology] goes against the goals of the Islamic revelation and other important benefits (masalih muhimma) … The


\textsuperscript{548} Email from Abdulaziz Sachedina 30. Jan.2022
main goal of the revelation-based law is to provide stability in the family in Islamic societies… Those who support the technology… have not considered its legal/moral implications, for surely this means that it is possible to inseminate the sperm of a father with the egg of a daughter… asexually and regard it as permissible on the inference that donor sperm is permissible. Given that no act of penetration has occurred to render it adulterous, its acceptance as a permissible procedure of procreation is morally reprehensible.  

Similar to the objection of Rabbi Jakobovits, the argument here is not a legal but a moral one because the suspected breakdown of known family structures goes against the core principles of Islamic teaching. 

In Iran the permission to use donor sperm would be legally challenged in 2003 and Khamene’i himself is said to have withdrawn his legal opinion in later publications. Despite these retractions, the influence of this initial narrative cannot be overstated because it introduced the possibility of a different narrative, a translation of the medical use of AID into a legal narrative that does not include the charge of adultery. This set Iran, and countries with a part Shi’a population, at odds with the narrative of Sunni-dominated Muslim countries: Iran is the only Muslim country in which ARTs using donor gametes and embryos have been legitimized by religious authorities and passed into law. This has placed Iran, a Shia-dominant country, in a unique position vis-à-vis the Sunni Islamic world, where all forms of gamete donation are strictly prohibited.

Legislation in Iran reflects the interaction between Iranian theocracy and parliamentary democracy. Iranians vote for representatives to the Majlis-e Shura (a single-chamber parliament). This parliament debates and passes laws which then need to be verified by the Majlis-e Negahban (the Guardian Council). This council examines whether any proposed legislation violates Islamic rulings. The Guardian

549 Sachedina, Islamic Biomedical Ethics. 110-111
550 Sachedina, Islamic Biomedical Ethics. 246 footnote 20
551 Al-Bar and Chamsi-Pasha, “Contemporary Bioethics.”
Council consists of six jurists chosen by the supreme religious leader and six jurists chosen by parliament. If any bill violates religious rulings, it is sent back for amendment or passes onto the Majma’ Tashkhis-eMaslahat-e Nezam (Expediency council) for mediation.\textsuperscript{552}

In order to contextualise the initial fatwa of Khamene’i, it is noteworthy that historically, both government and religious authorities have sought to influence the reproductive trends of Iranian families, hand in hand.\textsuperscript{553} After the Islamic revolution in 1979 the government initially promoted population growth. Family planning centres were closed, sterilisation and abortion were outlawed, maternity benefits were offered and the age of marriage was lowered to nine for girls and fifteen for boys (said to be in keeping with Sharīʿa). By 1986 an annual population growth of 3.9% caused alarm amongst policy makers, resulting in a population conference in 1988 which brought new policies to reduce childbearing.\textsuperscript{554}

Islamic scholars, concluded that Islam does not necessarily advocate large families, but encourages better quality of life and health for mothers and babies, which can be achieved by having fewer children.\textsuperscript{555}

The public is said to have been encouraged, not coerced, into achieving an ideal Iranian population, although the outlawing of sterilisation and abortion may be viewed as coercion.

The policies further argued that it was the duty of the citizens to help the state build a strong, independent [of foreign interference and colonialism], healthy


\textsuperscript{555} Tremayne and Akhondi, “Conceiving IVF in Iran.”
and well-educated Muslim nation by reducing the size of families, thus linking reproduction to national identity.\textsuperscript{556}

So successful were these family planning measures that, by the mid-1990s the growth rate was on a downward trend at 2.1\% and soon fell below the replacement rate. This level was deemed too low by the government and a further change in direction followed shortly after with some of the pronatalist measures from the early 1980s being readopted. In order to be effective, each change in direction has been endorsed by the religious leadership.\textsuperscript{557}

The Supreme Leader admitted ‘one of the mistakes we made in the 90s was population control’ and stressed the necessity of building a strong nation and that Iran’s goals were to reach a population increase from the current 80 million to 150 million by 2050. Interestingly, the justification for having larger families to form a strong nation is identical to the argument used in the 1980s family planning campaign, advocating smaller families for the purpose of building a stronger nation.\textsuperscript{558}

Iranians supported the first two population control measures, but it appears to have been difficult to re-establish the desire for large families. Across the social divides the majority of Iranian couples of childbearing age now wanted fewer and ‘better’ children.\textsuperscript{559}

In order not to upset the pronatalist sentiments in Iranian society, the government’s support of infertile couples has always been supportive throughout the many population control changes, even if the demand for assistance in the 1980s and 1990s far outweighed the financial and medical support that was available.\textsuperscript{560} By 2012, fifty IVF clinics had opened, mostly in Teheran; today more than eighty Iranian fertility centres recruit their international customers from countries including most of

\textsuperscript{556} Tremayne and Akhondi, “Conceiving IVF in Iran.”
\textsuperscript{557} Tremayne and Akhondi, “Conceiving IVF in Iran.”
\textsuperscript{558} Tremayne and Akhondi, “Conceiving IVF in Iran.”
\textsuperscript{559} Tremayne and Akhondi, “Conceiving IVF in Iran.”
\textsuperscript{560} Tremayne and Akhondi, “Conceiving IVF in Iran.”
its Sunnī neighbours.561 With the ban on third-party gametes and surrogacy lifted, the fertility industry has expanded considerably. However, as the permissive approach of Khamene’i is not universally accepted, different religious authorities have found a variety of ways to permit treatment with certain legal conditions. One such condition is the use of nikah mut’ah (temporary marriages), which initially gained popularity in Iran in order to provide income for war widows, but is now used to secure donor eggs without the concern of zina. In this instance a woman will enter into a temporary marriage contract with a man for a certain amount of time. Under Shī‘a law polygamy is permitted and some clerics have demanded that egg donors should enter into a temporary marriage with the husband of the recipient woman, so that during the egg harvest, fertilisation and later gestation all acts are undertaken between adults who are legally married during their involvement. This does not permit women to marry their sperm donor, however, because women are not permitted to have more than one husband at any one time, although some clerics have apparently permitted women to divorce their infertile husbands, marry their sperm donors, divorce their sperm donors and re-marry their infertile husbands. Khamene’i does not insist on the use of temporary marriages because he does not interpret any act that does not involve intercourse as zina. According to Clarke, a further reason for this decision, is that egg donors are often the sisters of infertile women and men are not permitted to marry sisters.562 Poignantly, Lebanon’s highest Shī‘a authority, Ayatollah Muhammad Husayn Fadlallah, vehemently disagrees with Khamene’i in his permission to use donor sperm and classes this as zina. He does, however, permit donor eggs, because he prioritises the paternal line. Ayatollah Ali al-Sistani and Muhammad Sayid al-Tabataba’I al-Hakim permit neither egg nor sperm donations.563 All these decisions need to be understood in light of the priority to avoid the act of zina and the necessity to provide for the child a legitimate nasab (lineage).

Sachedina acknowledges the permissive approach to donor gametes, but warns of the danger:

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563 Clarke, “Shiite Perspectives “.
Maqasid (objective-based) jurisprudence requires the protection of a child’s lineage (nasab) at all times when introducing ART.\textsuperscript{564}

Naef Garmaroudi explains the permissive religious verdicts as a consequence of Shīʿa approaches to parenthood, which understand the patrilineal and maternal line as more equal. Whilst she acknowledges the general unease towards donor sperm, this more open approach to nasab has apparently left some Shīʿa scholars more accepting of donor gametes.\textsuperscript{565}

Garmanoudi differentiates between the different uses of donor sperm and the effects of the locus and development of the sperm. Donor sperm in a patient’s womb by Artificial Insemination is less likely to be accepted by individual clerics than donor sperm used for IVF because the foreign sperm does not enter the womb. Once it has formed an embryo in vitro it is no longer in the forbidden category of foreign sperm. Ayatollah Sistani thus permits the following:

\begin{quote}
In the Name of Allah, the Most High

If a stranger’s sperm is inserted directly in a woman’s womb, it is absolutely forbidden. But if the insemination takes place out of her womb with another man’s sperm and then the fertilized eggs are placed in her womb, it is not harām by itself, although it is against precaution. However, since this act involves looking at the woman’s private part, it is not permissible in cases where it is not necessary. And if a woman has a child, it is forbidden for her to go for another insemination that involves a stranger looking at her private part. In any case, the child will not belong to the husband, it will be that of the owner of sperm. Therefore, the husband cannot register the child in his own name and as his own child.\textsuperscript{566}
\end{quote}

\textsuperscript{564} Email correspondence from Abdulaziz Sachedina 30. Jan.2022


\textsuperscript{566} Ayatullah Sayyid Ali Husaini Sistani, Is it permissible to use donor sperm if the husband is infertile and the couple are suffering because they want a child?, posed 2.2.2022, response 17.2.2022, Istifta Section -Office of His Eminence Al-Sayyid Al-Sistan. (the question was posed by Vanessa Goodwin, the response was sent by email and can be found in the appendix)
This attitude towards donor sperm for IVF has also opened the legal door to embryo donation, which can be done anonymously or from blood-relatives. Garmaroudi cites a number of couples, who help their cousins or nieces because the donation stays within the family.\textsuperscript{567} Incest or genetic problems resulting from closely related patients did not appear a concern, perhaps this is because PGD can now help to deselect embryos with genetic problems.\textsuperscript{568}

Leila Afshar and Alireza Bagher from the Universities of Medical Science in Shiraz and Teheran discuss the ethical implications of embryo donation in Iran. Unlike many fertility techniques that are regulated by \textit{fatwas}, embryo donation is regulated by the \textit{Act of embryo donation to infertile spouses}. This was ratified in 2003 by parliament and by the Guardian Council. In five articles, the act gives detailed instructions on how embryo transfer may take place, but significant loopholes remain, according to Afshar and Bagher.\textsuperscript{569} Inhorn suggests the act of donation appears increasingly financial and decoupled from religious legal obligations in Iran:

\begin{quote}
I did not get the impression that people desperate to have a child thought very far about the issues of kinship and family relations. As far as I could see, the donation is considered more a financial transaction than a donation/gift, and once you have paid the couple to buy their embryo, or paid the temporary wife for her egg, they have no further claims on you and this is the end of the story.\textsuperscript{570}
\end{quote}

The situation can be similar in Lebanon apparently and, in this climate of permissive \textit{fatwas} and patchy legislation, the concerns of incest, lack of kinship and bloodlines can appear side-lined. The moral reasoning of saving a marriage is often stated as a justification and it is interesting to note that the legislation of embryo transfer appears, according to Leila Afshar and Alireza Bagher, more likely to attract the

\textsuperscript{567} Garmaroudi Naef, "The Iranian Embryo Donation Law."
\textsuperscript{568} Please see the following chapter for the effects of PGD on cousin marriage
\textsuperscript{570} Inhorn, "Making Muslim Babies."
exploitation of loopholes than those techniques regulated by fatwas alone. This appears to support the view that, in a religiously motivated society, a religious restriction will carry more weight than political legislations. This points to the difference between religious ethics and secular ethics, with the former being based on a relationship between the believer and God in which no loophole can be exploited in secret.

Quite unlike Dubai, where the cosmopolitan and multi-religious nature of the population was the result of a foreign workforce and government prioritisation of the interests of its national citizens, the population of Lebanon is truly and deliberately religiously diverse. Lebanon is said to have intentionally not held a census since 1932 in order to protect the fragile peace in the country. Estimates state that around 57.7% of Lebanese are Muslim, conveniently the estimates assume roughly half to be Sunnī and half Shīʿa with smaller groups of Aalawites and Ismaʿīlis; 36.2% are expected to be Christians and other minorities of Druze, Jews, Baha’is, Buddhist and Hindus make up the rest of the population. Calculations by the Lebanese Information Centre expect the Muslim population to be higher at 65.47% and the Christians at 34.35%, but significantly no breakdown is given of the Sunnī and Shīʿa divide. In this deliberately multi-religious environment it is unsurprising that fertility centres reflect the diversity of religious and ethical beliefs. Due to the Lebanese civil war, the first fertility clinic only opened in the mid-1990s, nearly ten years after the first clinic in Egypt. By the year 2000 around 15 clinics had opened, all upholding the Muslim ban against third party reproduction. The turning point came in 1999 at a conference of the Middle East Fertility Society (MEFS):

…the audience of Middle Eastern practitioners was stunned when a group of Iranian female physicians, dressed in black chadors, described in great

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573 Inhorn, Patrizio, and Serour, "Third-Party."
scientific detail the clinical outcomes of their egg donor programme. When questioned by the incredulous audience, these Iranian physicians explained that the Supreme Leader of the Islamic Republic of Iran, Ayatollah al-Khamene'i … had in 1999 issued a fatwa effectively permitting both egg and sperm donor technologies to be used.\textsuperscript{574}

The consequences of this Iranian fatwa were immediate, especially since Sheik Mohammed Tawfiq al-Miqdar, the representative of Kahmene'i in Beirut, confirmed the fatwa.\textsuperscript{575} Although the powerful Shīʿa clerics, mentioned above, disagreed with the permission to use donor gametes and, with Sunnī supporters, tried to legislate against their use, the legislation was never passed, indeed fertility treatments in Lebanon remained largely un-legislated as Inhorn, Patrizio and Serour reported in 2004 and 2010:

Some clinicians … retain significant moral and medical ambivalence toward the way donation is being practised in Lebanon. First, there is no local treatment registry of any sort; thus, there are no reliable statistics on the numbers of treatment cycles with and without donation. Second, there is no reliable regulatory system in the country. As a result, third-party reproductive assistance is being carried out behind closed doors, in the unregulated, sometimes secretive, environment of private clinics (Inhorn, 2004). As a result of this lack of regulatory oversight, practices that would never occur in Euro-American settings do, in fact, take place in Lebanon.\textsuperscript{576}

In this legislative vacuum, clinics began to serve a particular religious set of patients: Shīʿa and Christian-led clinics tend to offer third-party assisted reproduction, whilst Sunnī-led practices do not. There are also those practices that serve patients from across all religious backgrounds and this is where the effect of the fatwas from Shīʿa clerics affect Sunnī patients most.\textsuperscript{577} Not only are Sunnī Lebanese patients able to access donor gametes and surrogate mothers, but Sunnī couples from other Muslim countries come to Lebanon in secret in the hope of conceiving. Serour, Professor of

\textsuperscript{574} Inhorn, Patrizio, and Serour, "Third-Party."
\textsuperscript{575} Clarke, "Shiite Perspectives ", 26–27.
\textsuperscript{576} Inhorn, Patrizio, and Serour, "Third-Party."
\textsuperscript{577} Inhorn, Patrizio, and Serour, "Third-Party."
Obstetrics and Gynaecology and Director of the International Islamic Centre for Population Studies at Al-Azhar University, relates in 2008 the example of Egyptian couples who have made the journey, usually to Beirut:

A number of Muslim couples, their number has never been determined, fly over or cross borders to fulfil a reproductive choice that may not be permitted in their own societies or countries.\textsuperscript{578}

Inhorn explains that the moral and religious threshold for using donor eggs is lower than for using donor sperm, because of the importance of the patrilineal line:

In multi-sectarian Lebanon…Some Sunni Muslim patients from Lebanon and from other Middle Eastern Muslim countries such as Egypt and Syria are quietly slipping across transnational borders to ‘save their marriages’ through the use of donor gametes, thereby secretly ‘going against’ the dictates of Sunni Muslim Orthodoxy. That such reproductive travel is done in secrecy – usually under the guise of a ‘holiday in Beirut’ – is quite important, given the moral condemnation of gamete donation in the Sunni Muslim countries.\textsuperscript{579}

If a pregnancy is achieved then the couple still face the concern of keeping the child’s genetic history a secret. If, however, the pregnancy fails, the guilt of using donor gametes against the instructions of the religious verdicts can be overwhelming. The case of a Syrian Sunni couple is related by Inhorn in 2011 in the story of Hatem and Huda’s secret egg quest, in which a couple’s twin babies, conceived in a Beirut IVF clinic from donor eggs, die in a Syrian rural hospital, after premature labour. The wife is said to have felt that her sin of using donor eggs made her sick and ultimately led to the death of the children. The village community is also said to have become suspicious of the couple’s actions when the blood group of the deceased twins suggested the use of donor gametes.\textsuperscript{580}

The consequence for any future children of a couple such as this are grave, as their kinship and the moral status of their parents’ marriage will be cast in doubt. Moral, social and religious viewpoints thus remain tightly interwoven in the Muslim Middle

\textsuperscript{578} Serour, "Islamic Perspectives ".
\textsuperscript{579}Inhorn, “Globalization.”
\textsuperscript{580} Inhorn, “Globalization.”The story of Hatem and Huda’s secret egg quest.
East and the Shi’a fatwas enable a secret root to conception, but also a temptation laden with guilt and societal punishment in case of discovery.

Research into current approaches to sperm donation in Lebanon show that today’s couples can choose between known and anonymous sperm donors. The sperm donor’s physique, blood group and what is termed ‘genetic content’ are also closely matched to the husband of the wife. Presumably today this is used to avoid the fate of Hatem and Huda by making donation less detectable.

Kinship by milk – the bond of breastmilk

Whilst the problem of un-relatedness and lack of kinship continues to exist with all donor gametes or embryos, the ability to nurse a child has important religious and legal implications. As mentioned above, the mother and father of the child are determined according to the donors of gametes and this can have implications on the status of Mahram - because the birthmother and father may not be considered related to the child. If, however, a child is breastfed, then milk also creates a bond, the so-called milk or suckling mahramyad. A child can still not inherit from their milk-parents, but a close bond is created that is close to consanguine kinship.

The belief that the milk has the capacity to change the child’s nature is traceable in several Shi’i hadith and Feqhi scholarship… Taking milk kinship into account is of utmost importance, as intermarriage between mahram milk relatives is considered incestuous and a grave sin.

Significantly this milk-bond may extend to the husband of the woman who is breastfeeding the child, although interpretations on the exact conditions for milk or suckling kinship vary:

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The kinship is closely defined by paternal relations; the patrilineal system is extended to the milk kinship, and milk plays the same role as blood.\textsuperscript{584}

Fadwa El Guindi relates a case of a Qatari woman called Ego whose son died. She and her husband decided to adopt a son, but religious and social restrictions meant this son would not be kin.

…the boy remains a ‘stranger’ even after he is adopted. Hence the incest taboo cannot apply, and since he is male, avoidance is required from resident females. The incest taboo would then be the only means for the adoptee to become a kinsman. The activation of the incest taboo lifts prescribed, ritualised avoidance among strangers.\textsuperscript{585}

Ego thus timed the adoption to coincide with her sister-in-law giving birth and the birth of a child to Ego’s husband’s granddaughter by a previous marriage. After the sister-in-law and granddaughter both nursed the adopted boy, according to precisely prescribes instructions, the boy became kin to his adopted parents through milk, although Ego could not become his mother.

... the suckling brother’s wife became the adoptee’s mother, and by extension Ego’s brother became father, and by further extension, Ego became paternal aunt to the adopted boy. And the co-suckled infants became siblings…The solution was to resort to a means which would ‘double lock’ incest, as it were. Ego’s husband (grandfather of the suckling woman) became grandfather to the adoptee (who is now sibling to his birth great-grandson) and, by extension, Ego became the adoptee’s grandmother. Ego is now both paternal aunt via suckling through the procreative chain of kin, and grandmother through the affinal chain of kin. This doubly-secured lifting of avoidance enabled Ego to proceed with ‘mothering’ the adoptee.\textsuperscript{586}

The milk-kinship demonstrates the importance of \textit{nasab} and relatedness once again, which appears central in Middle-Eastern Muslim societies. In Ego’s case we see how the interrelatedness of individuals is managed by a complex social, religious and

\textsuperscript{584} Rahbari, "Milk Kinship and the Maternal Body in Shi‘a Islam."


\textsuperscript{586} El Guindi, "Properties of Kinship."
biological network, which can be difficult to comprehend for outsiders. Kinship can be achieved through blood, through marriage or as demonstrated here through milk, although not to identical degrees. Blood relations can be brought even closer within this kin-community by sharing a milk-mother. By doing so an extra layer of relatedness is added. Similarly to blood relations, milk relations are also prohibited from marriage and thus enable milk relations of the opposite sex to mingle. The prohibitions of marriage due to the incest taboos is also activated through milk. Understanding the centrality of reproduction and legitimate kinship helps to contextualise the *Shīʿa* responses. No literature appears available in English that discusses how children from donated gametes are tied into kinship, but it is likely that similar methods may be employed to overcome the difficulties mentioned above, A person without kin is described as "*maqtuʿ min shajarah*" meaning 'severed from the tree'.\footnote{Fadwa El Guindi, "Milk and Blood: Kinship among Muslim Arabs in Qatar," *Anthropos* 107, no. 2 (2012), http://www.jstor.org/stable/23510057.} \footnote{Rahbari, "Milk Kinship and the Maternal Body in Shiʿa Islam."} Milk-kinship is practiced both in *Shīʿa* and *Sunnī* communities. Both traditions view the genetic parents as central for decisions concerning *nasab*. We thus witness the difference it makes whether the use of donor gametes is classed as *zina* or not.
Chapter Ten

Islamic Legal Debates and their Implications in the Middle East

Third Reproductive Technology: Pre-implantation Genetic Diagnosis and the Implications for Human Germline Genome Editing of Embryos during IVF

Chapter Seven explored the halakhic response to PGD, which was interpreted as a positive way to avoid abortions in vivo by most poskim. Amongst Muslim jurists a similar narrative can be found. Unlike in England or Germany where the excessive use of PGD is often interpreted negatively as a form of eugenics, Muslim jurists have also taken a more positive approach to this embryonic screening and deselection technology.589 To contextualise this response, it is worth revisiting the abortion debate and understanding the legal implications of abortion at different times of pregnancy.

Amongst Shīʿa jurists in the late 1990s Ayatollah Khomenie’l had declared his opposition to abortion even in the early stages of pregnancy and in cases of hardship:

The Sharīʿa does not permit the abortion of a fetus. In the consideration of the honourable Sharīʿa, there is no difference between a fetus less than or greater than four months gestation with regard to this matter. 590

His successor Ayatollah Khamene’i has tended to follow similar lines and initially did not permit abortion, even if a mother is suffering from mental illness. However, the younger generations of leaders, such as the progressive Grand Mufti Ayatollah Saane’i, have declared in a singular ruling in 2005 that:


590 Hedayat, Shooshtarizadeh, and Raza, "Therapeutic Abortion."
Any fetal or maternal condition that brings extreme difficulties ('usr va haraj) for the mother or the family allows for abortion.\(^{591}\)

This applies to the first trimester of pregnancy.\(^{592}\) Other Shi’a religious leaders, such as Ayatollah Makarim-Shrazi, state that permission to abort a deformed fetus is difficult to justify from a religious legal viewpoint when it is impossible to determine whether the fetus could survive after birth. Ayatollah Fazel-Lankarani has allowed the abortion of fetuses before the moment of ensoulment (four month) in cases where maternal illness threatens the life of the fetus. Although Ayatollah Khamene’i initially did not permit therapeutic abortions because of foetal deformity, he has since permitted abortion in certain circumstances.\(^{593}\)

A questioner wrote, “Is it permissible for a woman to abort a deformed fetus when she requires special assistance in delivering it, especially granted that she had a similar experience with past pregnancies?” In reply he wrote, “To the degree necessary, such a procedure, with the husband’s consent, is not forbidden, but you must avoid any impermissible action that may result from under-going the abortion.”\(^{594}\)

As mentioned in the previous chapter, legislation in Iran is passed by parliament and ratified by the Guardian Council. After twice rejecting the proposals for therapeutic or compassionate abortion, the Guardian Council approved a bill in 2005 that permits abortion in the following cases:

Therapeutic abortions may be performed under the following conditions. First, the fetus must be less than four months of age, that is, before the spirit is breathed into it. Second, the fetus must be suffering from profound developmental delay or profound deformations or mal-formations. Third, these fetal problems must be causing extreme suffering or hardship for the mother or the fetus. Fourth, the life of the mother should be in danger. Fifth, both the mother and the father give their consent to the procedure. The physician

\(^{591}\) Hedayat, Shooshtarizadeh, and Raza, "Therapeutic Abortion."

\(^{592}\) Shapiro, "Abortion Law ".

\(^{593}\) Shapiro, "Abortion Law ".

\(^{594}\) Hedayat, Shooshtarizadeh, and Raza, "Therapeutic Abortion."
performing the abortion shall not be penalized for the performance of these services.  

Although from a religious legal perspective there is little change here because the life of the mother has usually justified an abortion, the parameters that can be considered have been widened. In the application of this law, it appears that not all criteria must be met to permit abortion. A 2020 epidemiological study into successful application for therapeutic abortion in Iran found that patients who are refused permission tend to apply too late. This means that usually the window for a permissible abortion before ensoulment has been missed, rather than the other criteria for abortion. It thus does not appear necessary to fulfil all criteria stated above.  

In Sunni Islam the severity of the impairment and the age of the fetus are the most important factors for permission to abort on compassionate grounds. Sheikh Nasr Farid Wadis, the mufti of Egypt, permits abortion in the case of severe fetal impairment, as do Abdul Fadl Mohsin Ebrahim and Abd al-Qadim Zallum, as long as the fetus is less than 17 weeks old and deformed. Jad al-Haqq, the late Sheikh of al-Azhar, only permits abortion in the most severe cases of deformities or genetic disease. Whilst the severity of any deformation is subjective, blindness and deafness are singled out by al-Qaradhawi as not sufficiently severe to warrant abortion, as humans have successfully integrated into society with these conditions for millennia; he limits abortion to the first 40 days.  

All these decisions on compassionate abortions are the result of modern pre-natal scans which give an insight into the health of the fetus, previously concealed until birth.

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595 Hedayat, Shooshtarizadeh, and Raza, "Therapeutic Abortion."


597 Shapiro, "Abortion Law ."

Disability - a modern Western concept? Contextualising the response to PGD and HGGE

Deformities and medical conditions are today classed as disabilities (or less abled, differently abled etc), both by Muslim and Western jurists and in modern Arabic the terms iʿāqa, ʿawaq, and taʿwīq may be used. However, quite apart from pre-natal scans, that today inform future parents of potential disabilities, it is also this categorisation between what is deemed normal and abnormal that, according to Ghaly, was unknown to classical Muslim jurists. A cultural shift of understanding has taken place, due to the influence of Western medicine and culture. Whilst terms such as ahl-, aṣḥāb- or dhawūal-ʿāhāt in classical Islam implied ‘blighted people’, this group used to apply to blind and deaf as well as unfortunate or unusual people. It included those with flat noses, bad breath, the beardless or those with very long beards as well as the mentally disabled, many of whom would not fit the modern categorisation of disabled. Otherness was also conveyed with the Arabic term zurq (sing.) and azraq (pl.) The Qur'an warns:

On the Day when the Horn will be blown, we will gather the wicked, zurqan, on that day. (Q 20:102).

This term has negative implications of greed or wickedness, but it may also be used for the blue eyed, who were often considered the enemy. Pivotal for this narrative and terminology was the belief, according to Ghaly, that every human is born with a set of God-given attributes and possibilities. Nobility and success were determined by the way a person used their gifts to serve God, rather than a judgement on their normality or outwardly desirable attributes:599

The most noble of you in the sight of Allah is the most God-conscious/ righteous.

(Q 49:13)

Within the context of the sanctity of God’s Creation, illness, blindness or other disabilities need not deter from a life lived fully in service to God.

599 Ghaly, “Physical and Spiritual Treatment.”
The Qurʾanic macro-narrative presents man as God’s noble creature whose main task is to worship God through performing certain religious obligations and rituals, steadily improving his/her (spiritual) wellbeing (tazkiya) and also through taking care of the universe he/she is living in as God’s trustee (khalīfa) on earth (Q 02:30; 11:61; 51:56) … Thus, one’s status and degree of nobility, according to the Creator’s scale, is not inherently linked to his/her performance and production in the economic sense of the word but to the degree of success in employing the available physical and mental capacities for accomplishing man’s designated mission on earth.600

The ultimate goal for classical jurists was thus to live a righteous life, which was no less achievable for a less-abled person.601 Humankind’s covenantal relationship is enshrined in Shari’a in that the legal responsibility of every individual takes into account the individual’s God given attributes:

These two powers (i.e., the mental and physical) make up the basic components of what Muslim jurists called ahliyya (legal capacity). The package of religious obligations and duties (taklif) automatically decreases once either of these two types of powers becomes deficient or is not properly functioning.602,603

PGD chooses or discards embryos with certain genetic attributes, whilst HGGE has the potential to create embryos with genetic attributes that do not naturally occur through the pairing of the parental gametes. Changes may be therapeutic or classed as enhancement. Both PGD and HGGE thus essentially involve humankind

600 Ghaly, “Physical and Spiritual Treatment.”

601 Ghaly, "Physical and Spiritual Treatment."


Firoozeh Kashani-Sabet states that in the Shi’a tradition the categorisation of a disabled group is also not easily translated into classical Islam. However, she describes the negative effects of this lack of categorisation, because no provisions were therefore made for the blind, the lame or injured. Although she agrees that a tradition of alms giving was well established, it was mainly through the work of foreign agents that schools and institutions were founded to improve the life of the disabled.
influencing or even changing the genetic attributes with which humans are born. This leads to the question whether human intervention is permitted and whether these changes will affect man’s ability to be a righteous man.

The Qur’an (2:30) refers to humankind as *Khalifa’ fi al-ard* (Allah’s vicegerent) and the question of how humankind can fulfil this role in the genetic era is not just a legal and ethical question but also concerns *kalam* (Islamic scholastic theology).\(^\text{604}\) The Religious question arises about whether this new categorisation of physical and mental ‘normality’ undermines the covenantal relationship between humans and their Creator. Does the endeavour to create humans with physical and mental attributes that conform to a norm, demonstrate a shift in Islam from prioritising the relationship between humanity and God to one that prioritises inter-human relationships in which disabilities are seen as a burden on society? Does human autonomy or parental choice undermine the gratitude that is owed to God for any child? Or should this shift be interpreted as part of the covenantal obligation to heal and serve the community in the name of God?

In 2013 the International Islamic Fiqh Academy classed research into the HGGE as:

> Part of Man’s discovery of himself and of God’s ways in His creations and, as a means to identify some genetic diseases…it has become an added value to health and medical sciences in their pursuit to cure diseases, thus being considered part of the collective obligation (*furud al-kifaya*).\(^\text{605}\)

As such, HGGE has initially been categorised in a neutral and practical category, which is not forbidden as long as it is beneficial and not harmful for humans and is used as a prevention or treatment for illness. However, when genetic intervention is used on an as-yet unborn child, the question of autonomy must be addressed as the child cannot choose to be treated. Comparable to the question of autonomy is the system of rights according to *Shari‘a*, the rights owed to God, the unborn child and the parents.

\(^{604}\) Mutaz Al-Khatib, “The Ethical Limits of Genetic Intervention: Genethics in Philosophical and Fiqhi Discourses,” in *Islamic Ethics and the Genome Question* ed. Mohammed Ghaly (Brill, 2018). 173-174

\(^{605}\) Al-Khatib, "The Ethical Limits."
The embryo is primordially a divine creation, and this is a religious issue that distinguishes between parents as the means of procreation and God as the owner and creator of the fetus. The formation and development of the embryo is part of the system of creation, from the beginning to the end.\footnote{Al-Khatib, "The Ethical Limits."}

According to this view, abortion can be understood as an act of transgression against God’s will and thus the deliberate deselection of certain embryos through PGD or the deliberate genetic editing could equally be understood as a transgression against the design of God’s Creation. According to tradition a number of hadiths speak of an angel who protects the child through its different stages of development:

Some late Hanbalis argue that the angel [who] designates for the affairs of the fetus starts recording its destiny in its first forty seconds.\footnote{Al-Khatib, "The Ethical Limits."}

If destiny is understood to include the functions of the body into which the soul is breathed, then genetic deselection of certain bodily attributes is particularly problematic.

Although the deselection of embryos would happen at such an early stage of life that the embryo is not even classed as a ‘clinging substance’, Al-Khatib holds that this system of punishments for abortion suggests the illegality of transgression against God’s design. According to him genetic intervention, presumably through PGD or HGGE, which would affect the rest of the child’s life, could be included in this rubric.\footnote{Al-Khatib, "The Ethical Limits." 190}

This punishment is proof that the sinful act represents a transgression against the Creator’s wisdom and design, hence the imposition of expiation as an obligation towards Almighty God. Genetic interventions can be included in this rubric, and the permission of the legislator is necessary in this regard, because it represents an act of disposition that concerns God’s Kingdom and system of creation.\footnote{Al-Khatib, "The Ethical Limits." 190}
Once more, the permission to use PGD can best be understood in the context of legal approaches to abortion. In case of a miscarriage due to a blow to the stomach, the distinction is made between the sin against God and the sin against the fetus and the severity of transgression depends on the developmental stage of the fetus. It is greatest after ensoulment which relates to the legal approach to abortion. Abortion is forbidden by all legal schools after ensoulment, unless the mother is in danger. Before ensoulment, opinions differ as to the reasons and stage when abortion may be permitted. The Maliki school forbids abortion even during the earliest nutta stage (usually considered the first 40 days), the Hanbali school tends to forbid it from the alaqa or mudgha stage (usually considered the next two sets of 40 days), whilst Hanafi and Shafi'I jurists tend to forbid abortion after ensoulment (usually expected at 120 days).\footnote{610}

Rulings on the legality of PGD must thus consider the legal consequences of transgressions in the case of illegal abortions or miscarriage due to blows to the stomach:

> The religious sin is established as a crime against the clinging substance and the unformed lump of flesh, though the jurist do not require that the offender pay blood money or perform acts of expiation in this instance.\footnote{611}

Traditionally, the deliberate death of a fetus with human features would demand a payment of ghurra (reduced blood money) which is one 20\textsuperscript{th} of the diyyah of a born person.\footnote{612} Prophet Muhammad is said to have fixed diyyah (the penalty for a murdered life) to one hundred camels, whilst the killing of a fetus demands five camels (or the equivalent in money). In a criminal case of murder, it is the victim’s family who, according to Shari‘a, have the right to decide whether this money is paid


\footnote{611} Al-Khatib, “The Ethical Limits.” 190

\footnote{612} This is based on hadith Sahih AL-Bukhari, Kitab Al-Tub cited in Esmailzadeh Mahdi*, “Developmental Biology in Holy Quran ”. 168

According to the \textit{Hanbali} scholar Ibn Quadamah (died 1223 CE) no blood money needs to paid in the early stages of pregnancy, but, if the child has reached a stage of development in which it bears human traits, then reduced blood money must be paid. The scholar Ibn Taimiyyah (died 1328 CE) required the culpable person to fast for two months in addition to paying the blood money to expiate the manslaughter, whilst the \textit{Hanafi} School is said to have demanded blood money for a miscarriage, but if it was caused by accident or the husband pardons the perpetrator then no blood money is due.\footnote{Alkali et al., "Abortion."}

Apart from the transgressions against God, genetic intervention may thus also transgress against the unborn child. Despite that fact that the fetus is usually considered part of the mother’s body and not normally considered an independent being (because the fetus cannot assume religious obligations), this matter is undecided. According to the \textit{Hanafi} school, the fetus is classed as \textit{a faceless body} and this status entitles it to all the rights that do not require acceptance; these include the right to lineage, inheritance and eligibility of endowment. The parents hold \textit{al-wilaya 'ala al-nafs} (the guardianship of the soul of the child) and this entitles them to make decisions regarding therapeutic medication, but not on the non-therapeutic genetic make-up of the child. No changes can be made to the germline of the children or even the parents as this would change the genetic future of their offspring in perpetuity without consent of the child.\footnote{Al-Khatib, "The Ethical Limits." 191}

We thus see two different arguments developing. In one, abortion is considered very seriously by the jurists and whilst some permit it, in certain circumstances, it is never a trivial matter and certainly of severe consequences at the later stages of pregnancy. In the other, pre-natal testing gives insights into the health of the developing fetus and has persuaded jurists to permit compassionate abortions when pre-natal findings suggest great abnormality in the fetus. This is despite the narrow categorisation of normality being a new concept in Islam. However, many pre-natal
tests, which reveal medical problems, are performed in the later stages of pregnancy, which, theologically, fall past the moment of ensoulment.616 This means that the timing of knowing when a problem arises is crucial, only early knowledge can be easily acted upon. It is, therefore, a logical consequence that Muslim jurists, much like their Jewish counterparts, have encourages PGD as a positive alternative to abortion, rather than an act of potential eugenics.617

The rise of compulsorily pre-marital genetic testing

In the Middle East, PGD is usually used as a result of pre-marital testing. This genetic compatibility testing for couples wishing to get married has become routine and even mandatory in many Middle Eastern countries. Muslim contemporary jurists have followed Qur’anic instructions (Q 4:23) that decree who a person should avoid in marriage because they are close kin. Classical jurists, too, have instructed both on the moral and physical attributes of a suitable marriage partner. They have deduced from this the importance of choosing a partner who ensures healthy progeny. Pre-marital testing has thus been broadly welcome and interpreted as an obligation towards the well-being of future children. Although classical sources, most significantly Caliph Umar, instructed their followers to avoid consanguineous marriages - because it had been observed that the children of non-related couples were of better health - the tradition of marrying within families has continued. This has resulted in a higher rate of genetically based disorders, especially in communities of the Gulf region, which in turn has made the use of pre-marital testing more necessary.618

Because of the importance of kinship, described in the previous chapter, pre-marital testing has not only been supported by Muslim jurists, but the ability to test has also given new impetus to the tradition of consanguineous marriages. If a match is deemed genetically problematic, this will either lead to an end of the proposed marriage or the use of PGD by the young couple. Muslim jurists differ in their opinion

617 Alkali et al., "Abortion." 104
of whether pre-marital testing should be optional or enforced. Scholars also disagree whether marriage should be permitted if the findings are incompatible. Whilst the Syrian jurist Muhammad Al-Zuhayli holds that a greater than 50% chance of disability in children should prevent a marriage, others argue that no result should legally deter a couple from marriage, but they should be encouraged or even legally obliged to use PGD in order to protect the health of their children:619

In this context genetic testing is seen as an important preventative measure to avoid contagion, by protecting offspring against potential genetic disorders.620

The deselection and destruction of surplus embryos is not dismissed but, as mentioned above, these embryos do not have the protection of being attached to the womb, nor are they considered ensouled at this embryonic stage. The greatest concern for jurists debating pre-marital testing is that the results are kept confidential and no individual can suffer from being branded as genetically undesirable, which would affect their marital prospects and the status of their kin.621

The limits of genetic intervention

Sex selection through PGD is permitted by the majority of jurists if the reason is therapeutic (some genetic disorders are restricted to either sex). If, however, gender selection is for the purpose of family balancing, then jurists differ over whether they permit the procedure or not. The subject was first discussed at a symposium of IOMS in 1987 and is a good example of how PGD has been discussed amongst scholars. Broadly speaking, reactions fall into three groups that are described by Shabana as liberal, restrictive and intermediary. The liberal group hailed the religious merits of scientific discovery as part of man’s divinely ordained endeavour to unveil the secrets of the universe. Islam’s proud history of supporting the sciences should thus be continued as no knowledge would be imparted to humankind without divine intent. Using this knowledge in areas that are not explicitly forbidden should be permitted, according to this liberal view. The intermediary group urged for caution and more time to study the implications of the procedure. The third, restrictive, group

619 Shabana, "Transformation."
620 Shabana, "Transformation."
621 Research Center for Islamic Legislation and Ethics CILE, "01/2022 CILE Virtual Winter School: Genetics, Genomics & Ethics (GenEthics) and the Islamic Tradition" (2022).
drew parallels with the infanticide of girls that was so prevalent in pre-Qur’anic times and which is explicitly forbidden in the Qur’an. According to this view, gender selection is considered a change in God’s design, which goes against Qur’anic instructions.622

To Allah `alone` belongs the kingdom of the heavens and the earth. He creates whatever He wills. He blesses whoever He wills with daughters, and blesses whoever He wills with sons. (Q 42:49-50)

The debate about whether humans have the right to interfere in the telos of God’s Creation often begins with the Qur’anic verse that describes humanity as the pinnacle of God’s Creation:

He shaped you `in the womb`, perfecting your form. And He has provided you with what is good and lawful. (Q 40:64).623

According to Shabana the liberal group understood the question of PGD and gender selection in predominantly juristic terms, which permits what is not prohibited; whilst the group, which prohibited the practice, explored the deeper underlying theological demands of Shari‘a to understand what is prohibited.624

Padela examines the question of interfering with God’s Creation and states that the prohibition to commit suicide is cited by jurists as proof that God alone gives beginning and end to life. Padela agrees that contemporary Muslim bioethicists tend to focus predominantly on the legal and medical questions raised by genetic therapies as well as the genetic knowledge that our new understanding of DNA enables. The question of what legally may be done and what morally should be done requires according to Padela a far deeper engagement with kalam (theology) and Muslim ethics than the legal approach through jurisprudence permits.625 Padela studies different approaches to ontology and finds three relevant models. The first is humankind as a repository of knowledge, DNA is both window into the past and the

622 Shabana, “Transformation.” 94-99
624 Shabana, “Transformation.” 94-99
625 Padela, “Conceptualizing the Human Being.”
future of humanity. The second model finds humankind as a reproductive organism, whilst the third ontology understands humankind as an evolving entity. How, though, does this genetic knowledge challenge the Muslim understanding that all knowledge comes from God and how does it fit with Islamic theological approaches to fate and determinism? Padela suggests the need for further debates on whether a modern Muslim ontology should accept humans as they were designed by God, including their infertility, or whether man’s ability to create, perhaps, even synthetic gametes in the future, should be celebrated as God given wisdom.626

Shabana also explores the reasons why humankind should not interfere with God’s Creation.

Islamic scriptural sources often place creation within a restrictive list of actions such as provision (rizq), death (mawt) and resurrection (ba’th), that are usually attributed to God. (eg.30:39, 45:26). This exclusive ascription of the act of Creation to God within the Islamic moral universe explains the theological as well as ethical legal problem associated with the notion of changing God’s creation.627

Shabana suggests that changing Creation could be hubris, which challenges God’s will and that both Qur’an and prophetic traditions appear to warn humankind of evil plots by the Devil that mislead humankind to challenge God.628

And I will mislead them, and I will arouse in them [sinful] desires, and I will command them so they will slit the ears of cattle, and I will command them so they will change the creation of Allah. And whoever takes Satan as an ally instead of Allah has certainly sustained a clear loss. (Q 4:119)

The 2006 IOMS symposium and a number of further conferences addressed this challenge and established the limitations of humanity in its role as vicegerent on Earth. In order not to change the original order of Creation, genetic intervention was limited to therapeutic and preventative measures in humans. In animals and agriculture, genetic intervention was considered legitimate as it improved food

626 Padela, "Conceptualizing the Human Being."
627 Shabana, "Transformation."
628 Shabana, "Transformation." 99-104
production and thus benefitted humankind. The theological concept of human uniqueness establishes that humankind is both physical and spiritual being combined and genetic intervention could tamper with the metaphysical fitra of humankind. This fitra is humanity’s inborn essential disposition to the good and towards God. Humankind is endowed with dignity and sanctity, which distinguishes humans from animals. This physical and metaphysical symbiosis should not be tampered with. The greatest concerns of scholars were the possibilities of rejuvenating eugenics and the genetic design of babies. Both actions would, according to scholars, undermine the theological understanding of the sanctity of life as well as the social fabric of families. Both theological and social implications were thus acknowledged.

Apart from the prohibition to genetically edit humans beyond therapeutic or preventative measures, the scholars also debated the future possibility to genetically edit human traits and personalities:

   It proscribed any effort of manipulating the human genetic structure, which would adversely affect human personality or distinctive characteristics.

This inclusion of human personality traits leads to the question of what attributes or characteristics could be described as adverse and what conditions could be classed as worthy of therapeutic intervention. Would, for example, sexual orientations, such as homosexuality, which fall outside Qur’anic guidelines, be classed as in need of therapy? Would the manipulation of human genetic structures that improve human personalities or distinctive characteristics also be prohibited? Debates about the enhanced ability to memorise the Qur’an suggest that such improvements would not be permitted, but so far there appears to have been little debate on subjects such as depression or other mental disorders.

At present it does not appear possible to genetically edit human traits, but as science develops new ethical questions will be posed. The deliberations of scholars outlined in this chapter demonstrate that the decisions made by jurists are rooted in

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629 Shabana, "Transformation." 99-104
630 Shabana, "Transformation." 103
631 Ghaly CILE Winter School Genomics January 2022
theological debates about Muslim ontologies and the correct interpretation of man’s role as the *Khalīfa* of God on earth.

The more scientists understand the effects of individual genes, of nature and of nurture, of human decision making and the workings of the brain; the more religious communities need to debate what part of this human construct they attribute to the entity that is in a relationship with God. If the soul is purely metaphysical, breathed into the physical body at a certain moment in time, and if it is the soul that turns a body into a human person, then is the person who is in relationship with God best understood as the soul, the body and brain or a combination of both? If the brain is the locus of moral decision making, then genetic edits presumably alter the person who has been designed by God. If, however, the body is purely a vehicle for the soul, and it is the soul that is the locus of moral decision making, then is a genetic upgrade to the physical parts of personhood not comparable to an upgraded car or house; a space or vehicle that simply surrounds the actual entity? Ahmed and Suleman debate this relationship between the Muslim understanding of the soul and the human genome. Their research demonstrates how the Qur’an presents *insān/bashar* (humankind) as constituted of three elements:

The physical body is created from *ṭīn/ ṣalsāl* (clay) and *turāb* (dust) (Q. 32:7; 15:28; 35:11), which are the materials of the earth, the *rūḥ* (spirit of God) (Q. 38:72) which blows into the physical body the *nafs* (soul). 632

He created you from a single soul (*nafs*). (Q. 4:1).

The term *nafs* translated as the soul is mentioned 290 times in the Qur’an and is thus of central importance. The term *fitra*, which was mentioned above and denoted the human nature that is oriented in its natural state towards God, is mentioned only once. *Qalb* (the heart) is mentioned 132 times, *ruh* (the Holy Spirit of God) is mentioned 21 times, whilst the term *aql* (intellect or reason), which is another central

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concept in Islam that is highly relevant for the genome debate, is mentioned as a verb *aqalu* (to reason/understand) 49 times.\(^633\)

Ahmed and Suleman present the views of classical scholars, who offer different interpretations on the relationship between *ruh* and *nafs*, the interaction between *nafs* and *aql* and the role of *qalb* in order to explore the physical and metaphysical dimensions of humanity according to Islam. According to Abū ʿAbd Allah al-Qurṭubī (d. 1273):

...it [the rūḥ] is a great matter and a significant affair from the matters of God that He has obscured for us and not explained, so that man realizes his apodictic incapacity to know the reality of his self, whilst knowing that [his reality] exists. And if man is so incapable of knowing his own reality, then he is, a fortiori, incapable of knowing the reality of God.\(^634\)

According to this view, the spirit of God *ruh* is distinct from the soul *nafs*, it is essentially beyond human knowledge. Other scholars do not distinguish between *ruh* and *nafs* and see the terms as interchangeable, both refer to the spirit or soul that is breathed into the body or leaves the body during death. Scholars agree that the soul experiences the death of the body, but the soul does not die according to the qur’anic verse:

...every soul (nafs) shall taste death. (Q. 3:185).

Some scholars such as Saʿīd Ḥawwa understood *ruh* as the state of the soul before it became *nafs* in the body, whilst the Sufi exegete, ʿAbd al-Karīm al-Qushayrī (d. 1072) understood *ruh* as the locus of positive attributes whilst *nafs* is the locus of the more blameworthy attributes of the soul.

The Qurʾān assigns three states to *nafs*: the satisfied soul (*nafs al-muṭma-innah*) (Q. 89:27); the self-accusing soul (*nafs al-lawwāmah*) (Q. 75:2); and the soul inclined to evil (*nafs al-ammārah biʾl-sū*) (Q. 12:53).

It is suggested that the association of *nafs* with both positive and negative actions provides a link between the physical and metaphysical aspects of a person. Other

\(^633\) Ahmed and Suleman, "Islamic Perspectives ".

\(^634\) Ahmed and Suleman, "Islamic Perspectives ".

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exegetes associate *nafs* with *aql*, the intellect, whilst *ruh* is associated with life. Tradition suggests that during sleep the soul returns to God and in death it remains, in this case it is believed to be the *nafs* that journey to God, whilst the *ruh* rests in a person during sleep and leaves only at death.

According to Ahmad and Suleman:

> Opinions of scholars citing a significant difference between *nafs* and *rūḥ* present a perspective that is more coherent with the Qur’ānic characterization of both aspects of the human person. In the Qur’ān, God attributes *rūḥ* to Himself, as part of His command, whereas *nafs* is more directly associated with humans. Were *nafs* and *rūḥ* similar in their origin, existence and function, the Qur’ān would not have distinguished between the two so clearly.⁶³⁵

Ibn Sina (Avicenna 980-1037), the great philosopher and physician, is said to have followed Aristotle’s approach to the soul and understood it as the defining feature that distinguishes humankind from animals and possesses self-consciousness:

> Avicenna postulates a tripartite division of the souls (vegetative, animal, and human). These are bifurcated into the physical (vegetative and animal) and spiritual (human) souls, with the former “passing away upon the death of the body” and the latter (human, spiritual) being classified as an “independent and immaterial substance”.⁶³⁶

Still other scholars question whether the first covenant between God and the children of Adam was made with the physical or metaphysical souls of humankind:

> Ibn Ja‘rīr al-Tabarī (d. 310/923) cites ʿAbd Allāh ibn ʿAbbās (d. 687) … as having said, ‘When God created Ādam, He extracted his progeny from his back [and they were] like atoms (*dharr*) (al-Tabarī 2005, 6:111).
> …Muhammad ibn Ka‘b (d. 726-738?) … remarks, “they were souls (*arwāḥ*) to whom a task was given” (al-Thaʿālibī 1996, 1:586). ⁶³⁷

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⁶³⁵ Ahmed and Suleman, "Islamic Perspectives ".
⁶³⁶ Ahmed and Suleman, "Islamic Perspectives ".
⁶³⁷ Ahmed and Suleman, "Islamic Perspectives ".
These deliberations are relevant for the contemporary debate about HGGE, because during the Fall of Ādam and Ḥawāʾ (Eve), the Qur'an states that:

...their nakedness was exposed to them, prompting them to cover themselves with leaves from Paradise. (Q 7:22).

According to Al-Qurṭūbī, this suggests that the physical act of eating the apple created a change both in the physical and metaphysical state of Ādam and Ḥawāʾ. This in turn affected their perception of the self. Soul, intellect and body are connected in this account:

The actions of Ādam and Ḥawāʾ with their physical, psychological and spiritual consequences, demonstrate that inasmuch as human beings act and produce actions, they and their physical and spiritual fate are also impacted by their actions.638

Abu Hamid al-Ghazali includes the heart qalb in the interaction between body and soul. The heart, said to be the centre of faith, must be pure for an authentic knowledge of God. The heart too is thus a connection between the physical and spiritual dimensions of humankind. Sulema and Ahmed thus conclude, that human actions can have an impact on the nafs (soul) as well as the qalb (heart) and that genomic alterations of the body could thus have both physical and metaphysical consequences.639

Council resolutions and consequences

In light of the many considerations mentioned in this chapter, the International Islamic Fiqh Academy IIFA published a number of resolutions regarding the use of genetic testing and genetic treatments:

Firstly, Resolution No. 203 (9/21), concerning Heredity, Genetic Engineering and Human Genome, states that the reading of the human genome has been classed as an act of farḍ al-kifāyah (collective duty) in the society because it facilitates knowledge on how to treat many diseases that afflict the society. In doing so, the gathering of genetic information across large sections of the population has been

638 Ahmed and Suleman, "Islamic Perspectives .
639 Ahmed and Suleman, "Islamic Perspectives .
classed as a necessary act. All actions concerning the genome and the knowledge about individual genomes must adhere to the principles of Sharīʿa and no harm must be done with this knowledge and no mapping of individual genomes must be undertaken without permission of that person. Whilst the genetic examination of sperm cells is permitted to identify problems, genetic medical treatments are generally limited to somatic cells whilst the treatment of sperm cells is prohibited, because this could affect the lineage of future children. Even in somatic cells, treatment is limited to disorders for which there is no alternative therapy and the treatment must be proven to be less harmful than the disorder. Genetic treatment is not permissible simply for an altered characteristic because this would go against the prohibition to change the original form of God’s Creation, unless there is a necessity recognised by Sharīʿa. Pre-marital genetic examination is also considered in the public interest and may be enforced, with emphasis being placed on the need for genetic counselling. Genetic diagnosis during IVF, such as PGD, is permitted, provided that all risks of sample mixing are eliminated to ensure the correct lineage of the child. Genetic testing throughout pregnancy is permitted and, in case of genetic diseases, the fetus can be aborted as indicated by the Academy Resolution No.56 (7/6) on Abortion (see below for further information on this topic). Genetic examinations of the new born should also be performed to detect early signs of curable diseases. Beyond this resolution IIFA recommended that the public awareness and education in genetic matters should be encouraged to protect the public from exploitation and ensure that the guidelines according to Sharīʿa are known. 640

The reference to Resolution No.56 is most important as this resolution addresses not only abortion, but the potential use of fetuses as a source for organ donations. This possibility is a concern when the status of humanhood is only attributed after ensoulment. However, Resolution No.56 (7/6) states:

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640 International Islamic Fiqh Academy Organisation of Islamic Cooperation. Sessions 2-24. IIFA Resolution No. 203 (9/21) Heredity, Genetic Engineering and Human Genome
First: It is not permissible to use fetus as source of obtaining organs to be transplanted in another human, except in certain cases and under certain conditions which must be fulfilled:

1. It is not permissible to make an abortion in order to use the fetus for the transplantation of its organs into the body of another person. Abortion should be restricted in the case of miscarriage or Sharīʿa approved abortion, and no surgical operation should be resorted to in order to remove the fetus unless it is essential to save the mother’s life.

2. If the fetus has a chance of remaining alive, medical treatment must be directed to keep it alive, and not for using it in organ transplantation. If it cannot survive, it must not be used except after its death in accordance with the conditions stipulated in Academy Resolution No. 26 (1/4) at its fourth session.

Second: Organ transplantation surgery must not, at all, be used for commercial purposes

Third: Supervision of organ transplantation surgeries must be entrusted to specialized and reliable authorities.641

The final resolution, particularly relevant for this research is Resolution No. 235 (6/24) Human Genome and Future Bioengineering: Review of IIFA Resolutions, their Practical Results, Updates and Challenges.

The Council of the International Islamic Fiqh Academy of the Organization of Islamic Cooperation held its 24th session in Dubai (4–6 November 2019). This conference focused on genetic editing using especially the CRISPR-CAS 9 technology. Whilst the Council decided that the technique still required further research in order to fulfil the requirement of safety according to Sharīʿa, it announced that genetic editing would be permitted if firstly, safety and effectiveness were proven, if it was used to treat or prevent a genetic disease and not for ‘aesthetic (ameliorative) purposes.’ The dignity of the patient had to be ensured to prevent abuse of the technique and

mitochondrial transfer was prohibited because no treatment, whether genetic or otherwise should confuse ikhtilāṭ al-ansāb (kinship). MRT was also prohibited for safety fears.642

These resolutions reflect well the concerns for lineage, safety and the protection of the ensouled unborn embryo. They also reflect the concern not to change God’s Creation without good reason, but they do not reflect the enthusiasm with which countries in the Middle East, in particularly in the Gulf region have adopted the genetic sciences. Religious scholars and scientists understand the Genome project and subsequent genetic developments as an important landmark in human history, an axial moment that sees humankind understanding its existence from a molecular perspective. Governments as well as religious scholars, take pride in Islam’s long history of supporting science and many reportedly feel that in recent history Muslims have been too much on the sidelines of scientific discovery. In light of this, many oil-rich countries of the Gulf region have made genetic testing obligatory for couples before a marriage licence is granted. Although a marriage is not prohibited if the results are of concern, PGD may be obligatory if the couple proceeds to marry. In addition to this, population wide genome mapping programmes have been generously funded in order to improve the health of nations. Qatar has launched a most ambitious genome sequencing programme of its whole population, beginning in 2012 as part of the Qatar Vision 2030 Program and the overwhelming narrative is one of optimism:

Qatar Genome combines whole genome sequencing data with comprehensive phenotypic resource collected at Qatar Biobank, and is considered the first, largest and most ambitious population-based projects of its kind in the Middle East.643

642IIFA Resolution No. 235 (6/24) Human Genome and Future Bioengineering: Review of IIFA Resolutions, their Practical Results, Updates and Challenges. (Send by email from IIFA)


Saudi Arabia has followed suit with its *Saudi Vision 2030 Genome Program* in 2018 whilst Dubai has launched *Genomics* as part of the *Dubai 10X project*. The objectives of each of these projects are very similar. The first phase builds the infrastructure for large scale whole-genome sequencing and focuses on public education. The second phase focuses on an analysis of this data in order to accurately predict and understand genetic-related illnesses that are specific to the population of the Gulf region. In Dubai, there is an emphasis on using artificial intelligence for complex sequence analysis. The final phase hopes to develop personal precision medicine and collaborate with pharmaceutical companies and academia on a global platform. This research is particularly necessary as previous international sequencing research has tended not to include Arab populations. The first studies are now being published and have already demonstrated genetic traits specific to the Arab regions.

The debates about abortion, PGD and HGGE have demonstrated the interplay between *Sharīʿa*, science and governance and three aspects have become particularly evident. Firstly, it has been a priority to demonstrate that *Sharīʿa* has the ability to answer modern problems. Secondly, there is an ambition to use the wealth of the region to ensure that Muslims are at the forefront of research. As the genetic sciences have the power to heal complex diseases the research into genetics has been elevated to *fārd kifāya* (a collective duty). Thirdly, because the power of this science could lead to devastating misuse, there is a determination to guard and control its use through *Sharīʿa*. Despite differences in approaches this determination to involve the ethical and legal principles of *Sharīʿa* is shared by jurists and scientists across all councils.

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Both accessed 25. March.2022


646 Ghaly, ”Sharia Scholars “.
In conclusion, it has been shown that discussions about the permission to use PGD in embryos is closely linked to discussions about compassionate abortion. Also discussed was that the concept of disability is not found in classical Muslim sources as it is found in Western literature. New screening techniques, and a Western approach to what is considered the physical norm have changed the way Muslims perceive physical otherness. As abortion is considered prohibited at a time when many pre-natal tests are performed, the use of PGD is today preferred as a better option to abortions in vivo, although the use of PGD for gender selection remains controversial. Most preferred and endorsed is the option to reduce the likelihood of genetic disabilities through the use of parental screening before conception, especially before marriage. Pre-marital testing has thus become so widespread in many Muslim countries of the Middle East that PGD is often used when an incompatibility is discovered through pre-marital testing. Testing and screening have been widely welcomed by jurists and the genetic screening has been elevated to a public duty. The hope is to understand the genome of Muslims living in the Middle East so much better that in future a greater number of diseases can be treated or even prevented. Many countries have dedicated substantial financial sums to the genetic sciences in an aim to re-establish the classical Muslim tradition of supporting scientific research.

However, it has also been recognised that genetic sciences, especially in the field of reproductive medicine, have the power to do harm. The laws and ethics of Shari’a are considered vital for keeping the excesses of human ambition in check. Especially in the field of genetic editing, this has led to complex debates that question the role of humanity in Creation. The correct relationship between God and his khalif on Earth and the relationship between the body and the soul were discussed and it became clear that the legal decisions were deeply rooted in Muslim theology. This led to questions about whether genetic edits would undermine God’s Creation and man’s destiny. In light of the sacredness of God’s Creation, any genetic edits were limited to curing or preventing disease. Any enhancements have been prohibited, although the limits of therapy and enhancement continue to be hard to identify. This will be especially difficult, if and when, genetic edits can influence human mental traits. In countries where all reproductive medicine is limited to married, heterosexual couples, the question of whether homosexual traits would be considered in need of
treatment was raised, as were questions concerning mental health. The preservation of lineage continues to be the most important priority for Muslim jurists in this final legal debate. Identity in this Muslim bioethical and legal paradigm is not just the knowledge to be Muslim, but the certainty of belonging to a specific patrilineal family. Kinship and tribe, blood, marriage and milk create an identity that is religiously endorsed to preserve cultural and religious values of family life.
Conclusion

This research has investigated how contemporary fertility medicine is debated by Jewish and Muslim jurists and how their debates influence the legislation of fertility medicine in Israel and Muslim countries in the Middle East. As a Catholic, living in a largely secular society, I am aware how inaccessible religious language and concepts can be, especially to the Western secular scientific community, making the international dialogue between secular and religious bioethicists difficult. My purpose was to understand the underlying religious, legal and social issues at the heart of the debate and examine how the religious legal traditions of Halakhah and Shari`a have adapted to new medical and scientific advancements. My belief is that understanding these underlying issues is necessary for any successful debate between religious and secular bioethicists. Equally important is an understanding of how Jewish and Muslim jurists negotiate with scientists within their respective traditions. In spite of the medicalisation of Jewish and Muslim reproductive ethics, key legal principles have remained relevant in both traditions. The insights gained suggest a trajectory for how Jewish and Muslim jurists are likely to engage with questions surrounding the genetic interventions in reproductive medicine in the future.

The foundations of this debate were laid in the mid-to-late-20th century, when the ethical and legal problems generated by artificial insemination with donor sperm and IVF were first deliberated. If we imagine the fertility debate as a road on which different religious communities travel, then Catholicism decided to stop right at the outset. By prohibiting artificial insemination, the road was terminated and IVF, MRT, PGD and HGGE must all be prohibited if conception sine concubito is not permitted a priori. Amongst the Jewish authorities we witnessed a number of eminent poskim, who like the Holy See, prohibited any artificial procreation from the outset. Crucially, however, their legal reasoning and the effects of their ruling were different to those of Catholicism. Judaism does not have one dogmatic authority, so the co-existence of different halakhic opinions meant the road was not terminated but divided. In Islam, two authoritative fatwas were formative for subsequent debates by bioethics councils with opposing views on the use of donor sperm. The Sunnī Al-Azhar fatwa prohibited
donor sperm, whilst Ayatollah Khamene’i permitted its use. The road thus parted and 
Sunni and Shi’a legal responses diverged from this moment onwards, although 
many of their legal concerns are shared.

The thesis began by investigating legal interpretative approaches and the 
sociological context of the fertility debate in part 1 for Halakhah and part 2 for 
Sharī’a. Key themes in the legal approaches were the concept of humankind’s 
relationship to the telos of Creation and the religious jurists’ approach to science. 
Key themes that emerged in the sociological context of applied bioethics in the 
Middle East were the collaboration of religious jurists and scientists, the pronatalism 
and experience of infertility in the Middle East, and the halakhic versus the Islamic 
legal interpretations and implications of illegitimacy.

Part III charted the legal narratives about specific reproductive technologies as they 
developed from the mid-20th century to the present day. Key themes were the legal 
definition of the beginning of human life, the concept of ensoulment, of healing and 
of the location of embryonic life in vivo versus in vitro. Donor gametes proved the 
most divisive topic as extramarital genetic material affects legitimacy and religious 
affiliation. Legal principles that have remained relevant throughout the debate have 
scriptural foundations and address the themes of legitimacy, lineage, ritual purity and 
healing.

Throughout the legal debates there were five main areas of halakhic concern:

1. The legitimate status of the child to avoid the status of birthing a mamzer;
2. the avoidance of halakhic adultery;
3. the halakhic implications of donor gametes and surrogacy on halakhic 
   maternity and emphasis on the maternal line;
4. the genealogy and Jewish status of the child;
5. the preservation of ritual purity for the mother during conception in order to 
   avoid the conception of a child by a woman in the state of niddah (ritual 
   impurity).

All these concerns were found to be rooted in biblical law and could thus not be 
halakhically ignored.
Key concerns of Muslim jurists were:

1. The legitimate lineage of the child;
2. the avoidance of adultery;
3. the implications of donor gametes on maternal and paternal relationships, with particular emphasis on the paternal line;
4. the implications of donor sperm on the status of mahram (relatedness);
5. the importance of kinship.

In Islam, concerns about legitimate conception and the protection of intact family structures were shown to be rooted in direct Qur’anic and prophetic instructions.

The concept of humankind’s obligation towards Creation marked the starting point for the narratives about reproductive medicine in Judaism. Halakhists agreed that the covenant with God does not limit humankind’s relationship with Creation to that of stewardship; instead, Chapter One described how humankind is obligated to perfect Creation as co-Creators. Circumcision is interpreted as the first divine command to perfect Creation. Chapter Three explored how Muslim jurists describe humankind’s role to that of stewardship, through the term vicegerent. This approach does not extend to co-creation, but focuses on the protection of the created world. Both approaches provide cornerstones for attitudes towards the genetic sciences because of their potential to alter the natural world. Science in general is seen by both faiths as a positive tool to fulfil the religious obligation to heal, but it also raises the question of where does healing stop and enhancement begin? As the body belongs to God, man’s autonomy is not absolute but halakhists, especially, emphasise the religious obligation to seek a healthy body. Treatment is thus not necessarily a matter of human choice, but may be obligatory. Muslim jurists frame a similar concept differently. Here the religious obligation to seek maslaha (public good) interprets healing as a religious duty for the public good.

In both faiths the legacy of past religious authorities and jurists, who worked with a pre-scientific understanding of pregnancy, has proved challenging. Halakhah upholds the authority of past poskim, although current halakhists may favour opinions that are more compatible with contemporary science. Decisions in Orthodox Judaism are made on a case-by-case basis, and Chapter Two found rabbis
collaborated with medical practitioners in organisations such as Puah. Here no consensus is sought, but different medical treatments are developed to adhere to the specific requirements of individual rabbis who represent different branches of Judaism. This means that infertility may be experienced very differently by a modern Orthodox woman compared to a Haredi or Hasidic woman. The treatment of halakhic infertility has proved particularly controversial as the health of women appears compromised in order to adhere to halakhic demands of ritual purity during conception. In the Muslim Middle East there is no parallel to the demand for ritual purity during conception, but classical sources did acknowledge the possibility of the dormant embryo, which is an inconceivable concept from a modern scientific perspective. For this reason, and others, the decision was taken in the late 20th century to re-interpret former legal decisions that are based on a pre-scientific understanding of pregnancy. Chapter Four described how, today, interdenominational bioethics councils involve Sunnī and Shī‘a jurists collaborating with medical practitioners in order to debate and find consensus on bioethical matters. Classical and scriptural sources are approached through the interpretative process of collaborative ijtihād, although the use of the legal concepts of maslaha (public good) and maqāsid (objectives of Sharī‘a) are increasingly preferred. It was suggested that the speed with which bioethics councils have developed in the last forty years is testament to the confidence with which Muslim scholars are developing bioethical responses that are deliberately independent from Western thought, - even if Western influence is still part of this process of deliberation. In both instances of collaboration, the interdisciplinary work between scientists and jurists is challenging. In Judaism it appears that rabbis play the more dominant role whilst the Muslim councils appear to give medical practitioners greater authority in steering the debate.

Chapter Two and Chapter Four explored the experience of infertility and pronatalism in the Middle East - to contextualise the response of the religious jurists. The sociological reasons for the dominant pronatalism in Israel showed that, whilst many approaches to Halakhah coexist, the motivation to have children is shared across social, religious and political divides. Survival of the Jewish community remains a dominant theme, for socio-political, biblical and historical reasons. The loss of life in the Shoah, the fragility of peace in Israel with her Arab neighbours, and the historical desire to create covenantal legacies all support the efforts to have many healthy
children in the face of a traditionally small genetic gene pool. Whilst Israeli society is usually deeply divided, this has resulted in an unusual affinity between the religious, Zionist and the medical way of thinking about infertility. Fertility treatments are thus publicly funded, leading to an unusual equality of access. For observant Jews, procreation is understood as a biblical commandment for Jewish men, and so infertility is particularly problematic for Orthodox Jews, if either the man himself is infertile or if he is married to a woman who cannot bear his children. According to Orthodox Judaism the biblical prohibition against the ‘spilling of seed’ is understood in terms that sperm should be used to create life according to biblical instructions. Social and religious expectations thus combine to create a nation that, according to Meira Weiss, is ‘obsessed with fertility’. This may create social and religious pressure for couples to conceive, but it also translates into generous public funding for infertility treatments. Fertility is, therefore, not just a religious obligation, but a state funded and juristically supported right, which is available to all Israeli citizens. Treatments available include donor gametes and surrogacy, although not every rabbi will permit the use of the full range of fertility treatments. In Muslim communities, voluntary childlessness also appears a largely unknown concept, but there is no direct religious command to conceive as many children as possible. Whilst social expectations continue to influence couples to have children, the tendency towards large families has declined rapidly. The state support and availability of fertility treatments differs across Muslim countries in the Middle East. Often the wealth of the nation, political ambition and religious denomination will affect the availability of fertility treatments, which is explored in the final three chapters, but, generally, surrogacy and donor gametes tend to be prohibited in countries with a predominantly Sunnī population and permitted in countries that are predominantly Shi‘a. Across political, religious and social divides Muslim couples today appear to desire fewer but healthier children, whilst some Muslim women are harnessing the permission to freeze their eggs in order to delay marriage and pregnancy in favour of a career.

Chapters Two and Four also focused on the different concepts and implications of illegitimacy. According to Orthodox Jewish law, a mamzer (illegitimate child) is the product of an illicit union between a married Jewish woman and a Jewish man.

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647 Weiss, The Chosen Body.
(although the halakhic debates showed that some authorities expanded the meaning). It was shown that the status of being a *mamzer* has serious negative social, religious and political implications and is of major concern in all *halakhic* deliberations about fertility treatments. In Islam, the concern to protect family structures was arguably even more central to the debate than in Judaism because the child has a birth-right to legitimate lineage and kinship. Muslim jurists define illegitimacy as a child conceived through the illicit act of *zina* (adultery) between a man and woman who are not married. The focus is predominantly on the act of the parents, rather than on the status of the child, although here too the implications are serious. The options for infertile Muslim couples are limited, especially if the husband is infertile. Adoption does not create kinship and a child conceived of donor sperm continues to belong to the lineage of its sperm donor, even according to *Shi'a* jurists who permit the use of donor sperm. Donor gametes are not permitted by *Sunni* jurists, which means that children conceived by donor sperm can only inherit from their sperm donor. Modesty rules may also demand that a daughter born of donor sperm may need to veil in the company of her non-biological father and he may also not be her guardian. Whilst methods such as milk-kinship exist to create affiliation post birth, full kinship or paternity cannot be created or restored in hindsight. The legal debates thus focus on how to overcome the infertility of the parents without compromising the child’s right to a legitimate lineage.

The legal debates of Part III explored the main themes of legitimacy, kinship and healing from a legal perspective and charted their direct influence on governance. Legitimacy in light of the use of donor sperm is the central most contentious theme; it focused initially on the question of whether the act of adultery requires the sexual act, or whether sperm artificially inserted into the womb of a woman, who is not the donor’s wife, constitutes adultery.

Rabbi Teitelbaum was a fierce opponent of AI, who argued that donor sperm compromised the lineage and legitimacy of a child. He prohibited its use on legal grounds using direct biblical commands that forbid adultery, potential incest and the spilling of seed. Rabbi Waldenberg expressed a similarly conservative view, extending it to any artificial procreation as this undermined the traditional and divinely ordained act of procreation. The language and sources used by Teitelbaum
and Waldenberg represent the *hasidic* and *haredi* approach to Halakhah, which relies to a greater extent on the inclusion of texts and concepts from the mystical *kabbalistic* tradition of Judaism. Natural conception, according to this view, is not just the result of a physical act with legal consequences, but part of the sacred universe that understands the creation of a child as the result of husband, wife and God joining in union. Because this sacred act of procreation is governed by rules beyond human comprehension, the medicalisation of this act cannot be permitted using legal sources alone and in exclusion of traditional values and wisdoms. Rabbi Jakobovits supported this view with a moral bioethical approach that saw medical procreation, especially with donor gametes, as a degradation of Jewish family values; the sacred act of procreation reduced to one of stud farming. Whilst some *poskim* continue to object to any conception *sine concubito*, the initial cautious permission of Rabbi Feinstein proved seminal for the development of the *halakhic* debate today.

Feinstein permitted the use of artificial insemination, and the spilling of seed, because he prioritised the religious obligation to procreate. He gave legal permission for the use of Gentile donor sperm in principle because he insisted that *halakhic* adultery requires the sexual act between a Jewish married woman and a Jewish man who is not her husband. The implications of donor eggs proved even more difficult as Judaism passes through the maternal line, raising questions of *halakhic* maternity and religious affiliation. However, unlike the problem of the illegitimate *mamzerut* status, children can be converted to Judaism if there is doubt about the Jewish status. The *halakhic* discussions about IVF witnessed the widening of the gap between *conservative* Orthodox approaches such as Waldenberg’s and the more modern *Zionist* Orthodox approach of Rabbi Nebenzahl. Donor eggs posed a significant problem for *halakhists* because only a Jewish womb births Jewish children. This has led to the pivotal question of when life begins and when it should be legally protected.

Muslim discussions followed a similar narrative. The two seminal rulings of Al-Azhar and Ayatollah Khamene’i discussed in Chapters Eight and Nine began the legal narrative of fertility medicine. Whilst both permitted conception *sine concubito* by artificial insemination or IVF with the husband’s sperm, the Al-Azhar *fatwa* prohibited donor sperm, whilst Ayatollah Khamene’i permitted its use. The main reason was that Al-Azhar regarded a child conceived of donor sperm as born of *zina* (adultery),...
whilst Khamene’i considered the sexual act as a prerequisite for zina. Discussions about the permissibility of IVF demonstrated the effect of different interpretative approaches between Muslim jurists of different legal schools and denominations. Shi'a jurists have greater interpretative flexibility, which allows them to permit the use of donor gametes from a legal perspective, whilst Sunnī scholars prohibit their use, even if they share similar concerns of lineage and the implications of donor sperm. Temporary marriages and donor embryos are two examples of how Shi'a jurists avoid the charge of zina. The use of IVF often entails spare embryos and here too the question of how to treat nascent life led the bioethics councils to address the question of the legal protection of embryos.

The Holy See treats the fertilised ovum as a full human being with all consequent rights from the moment of conception, including the right to be conceived naturally in the marriage bed. Catholics are expected to accept the state of infertility if it cannot be treated to enable natural conception. Although eminent Orthodox scholars, such as Bleich, were shown to consider the protection of life from the moment of conception, for the majority of Orthodox halakhists the fertilised ovum is not a full human being, but it gradually acquires more rights as it develops (Chapter Six). It was found that this process only begins when the fertilised ovum is embedded in the womb in vivo; at a certain stage it is then considered ensouled and granted a certain sanctity, but it remains legally part of the mother’s body until it is born. Only at birth is its life distinct from its mother’s and legally equally protected. Halakhists consider infertility a medical condition in need of healing in order to fulfil the obligation to procreate. Chapter Eight demonstrated that Muslim scholars were divided in their opinion of what rights should be granted to the fertilised ovum, but granted legal rights only to the fertilised ovum in vivo and only once embedded in the womb. Again, the child is considered legally part of the mother’s body, but the moment of ensoulment appears even more significant than in Judaism. After ensoulment (usually at 12 weeks) only the endangered life of the mother appears to justify any violation of the pregnancy. Muslim scholars also interpret infertility as a treatable condition, rather than a divine decision, as long as the treatments follow the requirements of Shari’ā.
Following the narrative trail back to its origins demonstrated that the debate about the permission to destroy embryos *in vitro* developed both in Judaism and Islam out of the debate about the permissibility to abort embryos *in vivo* when they are found to be suffering from illness. This demonstrates how Orthodox approaches in Judaism increasingly build upon the initial permission of Rabbi Feinstein and, today, extend his rulings far beyond his initial instructions by combining his views with those of Rabbi Waldenberg on therapeutic abortion. Initially, Rabbi Feinstein permitted the destruction of embryos *in vitro* as part of IVF to treat infertility, but he did not permit the destruction of embryos of fertile couples *in vitro* for the selection of healthy embryos. This is most likely because he did not permit abortion in cases where the child was found to suffer from a disease *in vivo*. In other words, Feinstein permitted IVF to treat infertility, even if this may lead to the destruction of embryos in the process, but IVF was not permitted by Feinstein to destroy life that is unhealthy. Other *poskim*, such as Rabbi Auerbach and Rabbi Waldenberg, permitted the abortion of unhealthy fetuses to avoid suffering, for parents and child, although Rabbi Waldenberg did not permit IVF (Chapter Six). 648 Some rabbis thus associated physical disability with suffering and invoked the religious obligation to heal the future suffering of the parent and avoid the suffering of the as-yet-unborn disabled child by abortion. This permission to avoid suffering was later expanded to permit the deselection of unhealthy embryos *in vitro*, through PGD, in consideration of ‘parental anguish’ by Rabbi Eliyashuv, Rabbi Zilberstein and Rabbi Lichtenstein. 649 This was initially permitted for those conditions that allowed for abortion, according to Rabbi Auerbach and Rabbi Waldenberg, and later expanded. The permissive approach of Rabbi Feinstein was thus combined with the permissive approach of Rabbis Auerbach and Waldenberg to benefit from what either permitted, whilst overcoming their restrictions. Therefore, embryonic deselection and destruction through PGD is viewed today as a positive tool to avoid the abortion of embryos *in vivo* and it is emphatically not viewed as a eugenic tool. 650

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648 See *Jewish Law, Elon ed.*


650 For the opinion of Feinstein and Auerbach see: Popovsky, "Jewish Perspectives on the Use of Preimplantation Genetic Diagnosis." 706
PGD does not suggest that a discarded embryo is an ‘Untermensch’ or a parasite. “PGD is about individuals and their own choices, eugenics is not.”

_Halakhists_, such as Rabbi Bleich, were shown to disagree with this reasoning, so that the legality of destroying embryos _in vitro_ is disputed by some. However, the opinion that permits destruction _in vitro_ appears to have manifested itself as the modern accepted norm in Jewish Orthodoxy. It is further legitimised by Israeli legislation that supports modern fertility treatments financially, politically and socially. The halakhic debates demonstrate how this process has been aided by institutions like Puah. Most _halakhists_ were shown to emphasise that Judaism generally prioritises the choice of parents over the autonomy of the child.

There is a similar narrative in Islamic law. Chapter Nine examined how Ayatollah Khamene’i did not initially permit an abortion for fetal abnormality, but his decision appeared to soften in light of the suffering of expectant mothers of children with major health problems, which could not be delivered naturally. The Guardian Council ratified the legislation to permit the abortion of severely deformed embryos under certain conditions before the moment of ensoulment. The Sunnī schools differed in their approach towards compassionate abortion, with the _Maliki_ school presenting the most conservative approach and the _Hanafi_ school the most lenient approach. This demonstrates that Muslim jurists have also made the legal link between conditions that are detected in pre-natal scans, future suffering and compassionate abortion. Abortion after ensoulment is generally prohibited unless the mother’s life is endangered. The deselection of embryos during the IVF process is generally preferred as embryos _in vitro_ are not legally protected. The Muslim narrative also does not focus on eugenics; instead, healing, public welfare and procreation remain in the foreground of the debate.

Chapters Seven and Ten described the success of pre-marital genetic testing and the enthusiasm with which it has been adopted to combat genetic predispositions due to genetic bottlenecks. As marriages are not prohibited on grounds of these tests, PGD and deselection have become the logical consequence of genetic testing.

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651 David et al., “Genetic Counseling.”
The religious obligation to heal and avoid suffering raises questions about the limits of healing that were touched upon earlier. Beyond the religious limits on tampering with the telos of Creation, the societal impact of genetic sciences on subgroups of the community should be considered. Generally, both Jewish and Muslim jurists limited genetic deselection and genetic therapy to healing rather than enhancements, although it is difficult to be precise about the limits.

The use of PGD can raise concern in groups representing people with disabilities. As an increasing number of genetic predispositions are deselected at the embryonic stage and fewer people are born with genetic diseases, so people with disabilities fear stigmatisation. The incentive to find medical solutions for these conditions can also decrease. Halakhists in Israel have not focused on this potential disadvantage and, instead, interpreted the use of PGD as a positive tool to avoid the later abortion of embryos with disabilities. Rabbis insisted that Judaism has a strong tradition of not discriminating against any member of the society. The fact that Judaism equates disability with suffering, and does not appear to recognise suffering or disabilities as a positive human reality, has ramifications. The Talmudic discussion -

Better for man that he had not been created (Eruvin 13b – Talmud).652

- mentioned by Bleich in Chapter Seven further suggests that it may be better for some humans not to be conceived if their lives are filled with suffering.653 This reduction of disability to a negative condition can rob people with disabilities of any visible positive contribution to society.654

Puah described a case that demonstrated sex selection and the deselection of embryos, affected by DMD (Duchenne Muscular Dystrophy), was permitted on the grounds of the biblical command to protect one’s neighbour from pain and anguish. This was expanded to the potential anguish of as-yet-unborn children (in this case girls who may be carriers of DMD, even if they do not suffer from the disease).

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653 David et al., "Genetic Counseling ."
654 This point was vehemently made in speeches made by disabled pressure groups at the recent symposium on genome editing. London, October 2019
Although genetic enhancement was forbidden and genetic medicine was restricted to therapeutic medicine, this raises the question whether this presents a dangerous precedent in the future because children may also suffer if they are too short, too tall or not intelligent. It may also raise the question whether an embryo already in existence in vitro should not be granted the right to continue its existence if the anguish of a child not-yet-conceived is worthy of consideration. The anguish of parents, who want to balance their families with a child of a certain gender, was also shown to be a legitimate reason to expand the halakhic limitations of healing through genetic medicine, even if gender selection is generally frowned upon because it is not part of healing. Halakhic decisions are highly personalised as couples seek permission from rabbis, so the influence of parents is tangible. Muslim couples, by comparison, did not appear to have a comparable influence on the decisions of religious jurists and councils.

Chapter Ten showed that classical Islamic law did not recognise physical disability as a distinct category. References to individual disabilities were discussed in terms of how this may impact the ability to perform religious obligations. Without the category of ‘the disabled’, provision and care was sometimes lacking and modern Muslim states are seeking to rectify this at the same time as trying to reduce the birth of disabled children. The desire to reduce suffering is beyond reproach and the cost of ill health can burden societies, it is thus a rational consequence that a reduction in genetic disabilities has been interpreted as a societal obligation. However, according to Ghaly, mentioned in Chapter Ten, the modern desire to narrowly define the boundaries of normality and genetically deselect afflicted embryos also stigmatises the disabled. Ghaly found little to no discussion about the effects this policy may have on less-abled members of the community. It would seem that classical Islamic law developed a more inclusive approach in which people were not judged by their physical attributes but by their relationship with God and that current trends undermine this inclusivity.

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655 Mohammed Ghaly, "Disability in the Islamic Tradition," Religion Compass 10 (2016). It may be argued that the new categorisation of disability also serves to provide essential services for disabled members of the community.
PGD for sex selection saw Muslim scholars divided. Some scholars found the practice permissible, while others drew parallels between sex selection and the infanticide of girls which the Qur’an condemns. Whilst gender selection divides scholars, there is widespread consensus that any genetic editing in the future must be restricted to therapeutic or preventative medicine and that no experimental and dangerous therapy may be considered, for conditions which can already be treated or potentially brings the patient greater suffering.

The halakhic debates highlighted how far halakhic legal reasoning in Israel has travelled on its particular road and suggested that it is now on a different trajectory to many other countries. Future innovations in the field of synthetic or bionic biology will build on the decisions that have already been made in Israel. What sets the halakhic discussion apart is not necessarily what questions are asked, as every society will have questions that are culture specific, but what questions will not be asked. The greatest points of divergence are likely to be that Halakhah - and by extension Israel - does not perceive irreversible genetic changes as unethical and that the beginning of human personhood depends on its locus in a womb and not when a certain level of development or sentience has been achieved. This begs the question posed by Bleich, how Halakhah will prevent bodies being grown as spare parts in vitro?

Interviews with rabbis have shown that the likelihood of this happening is emphatically denied because it goes against the moral ethos of Halakhah. However, there has been an enormous shift away from the moral objections of former legal authorities in the recent past. The question thus remains how resolutely these moral objections of today will be upheld in the future? Might the case be made that without a soul, a body is not a person and that the living and ensouled take priority, just as the life of a mother takes priority over a fetus at any gestational age?656

Muslim scholars have addressed this question quite specifically, in that the International Islamic Fiqh Academy issued Resolution No. 56 stating that organs must not be harvested from fetuses unless very specific circumstances permit it. These circumstances are not elaborated on, but the councils have addressed the

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656 This challenging subject is tentatively approached by Rabbi Bleich, in the discussions surrounding cloning. Bleich suggests whether the stories of the creation of a golem might aid this discussion, but this question is beyond this research.
problem and set the legal parameters. Muslim scholars do not share the Jewish assumption that Creation has been left unfinished and so the reluctance to go beyond healing or preventative medicine appears more resolute. The Qur’anic warning against the human desire to change Creation serves as a theological boundary and Al-Qaradhwai’s unwillingness to include blindness and deafness as reasonable grounds for an abortion further demonstrates the boundaries at which Muslim jurists limit parental choice.

The concept of ensoulment is important in both *Halakhah* and *Sharīʿa*, but the implications of ensoulment are not clear. Is the soul the locus of the personality of a person or simply the breath of life given by God? The separation between body and souls could undermine the importance of physical enhancements. If the body is not the person, but a shell for the person who is encapsulated in the soul then improvements to the body could be seen as less significant. Once more the limitations on changing the telos of Creation could prevent this approach. It may also depend on how exactly Creation is defined, whether it is limited to the physical or also includes the metaphysical.657

A concern is that *Halakhah* traditionally retains its authenticity and moral standing through constant legal challenges and debates. As the usually opposing parties in Israel all share the common interest in fertility, the current debate no longer appears to challenge the legitimacy of genetic deselection *a priori*. Instead, the debate has moved on to surrogacy laws, the ability for single women to freeze their ova and the *halakhic* status of a donated womb. A similar concern can be raised in the legal debates of the Muslim councils. A final observation is that the *halakhic* decisions which form the foundations of their approach to procreation have all been made by men. None of the *halakhic* authorities found by this research present the voice of Orthodox women. Only the academic voices in Chapter Three were female, but as no female *poskim* exist in Orthodox Judaism, the *halakhic* decisions on female bodies and the importance of Jewish wombs are made by men. Whilst a few female Muslim scholars are mentioned by this research, here too there is little evidence of

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657 It would depend on which Hebrew word is used for the English translation of the soul. *Nefesh* is often translated as soul, but can simply mean the breath of life.
women’s contribution. The voices of women who have birthed disabled children and those who have endured invasive fertility treatments on their bodies, perhaps without success, may be a valuable addition to both the Muslim and the halakhic debates.

In conclusion, this research has shown how fundamentally Halakhah and Shari’a have adapted in recent years in their approach to assisted reproduction and how the modern legal narratives, which begun in the mid-20th century are continuing to develop. Whilst Jewish and Muslim communities may be influenced by a variety of factors including religious law, religious jurists have a meaningful and influential voice in the bioethical debate of the Middle East. In Muslim countries, as in Israel, pronatalism permeates religious and societal expectations and this leads to the very real potential of divorce and social alienation if marriages remain childless. Voluntary childlessness for fertile couples remains a largely alien concept and infertility is perceived as an illness in need of healing. However, the desire for fewer children and higher rates of infertility has led to a rapid downwards trend in Muslim birth rates, as opposed to the growing birth rates in Israel.

The most enduring legal and moral themes in Halakhah and Shari’a of legitimacy, kinship, healing and ritual purity are rooted in scripture, but they are also enforced socially. Kinship and lineage, so important to Shari’a is more negotiable in Halakhah, whilst concerns of ritual purity are limited to Halakhah. In both traditions the importance of legitimacy through the avoidance of adultery and the religious obligation to heal are prioritised. These principles have endured, despite modern lifestyle changes, and they describe the value given to the relationship with God, to known family structures and to kinship. Whilst religious observance and faith may differ across the communities, the priority to know oneself in relation to others and to be a legitimate part of a communal network remains a central need. Whilst deep divisions exist across the Middle East, the challenge of overcoming infertility is a shared experience that unites people of different backgrounds. The emphasis on the maternal womb in Judaism, through which a belonging to the covenantal people is guaranteed, is not replicated in Islam. The need for conversion post birth only appeared in Judaism. Instead, in Islam the patrilineal line is emphasised as the guarantor of kinship. There is a greater reluctance in Jewish couples to use donor eggs (although they are used), as this has implications for the Jewish status of the
child. In Muslim couples, there is a greater reluctance to use donor sperm, which is not usually used by Sunnis, as the womb appears mostly as an incubator for the male seed. This makes it possibly more challenging for a Muslim man to be sterile in a social sense and more challenging for a Jewish man to be infertile in a religious sense, as Judaism emphasises to a far greater extent the religious obligation on a man to procreate. Fertility treatments have thus been welcomed by the communities and governments with enthusiasm and legislative support.

Despite the political and religious will to increase the birth rate, especially in Iran, fertility treatments in Muslim countries tend to be solely reserved for heterosexual, married couples, whilst Israel also allows single women and lesbian couples access to state funded IVF. This research showed that the reason why single parenthood is permitted only in Judaism is a result of differences in the definition of illegitimacy in Islam and Judaism. Whilst the need for men to be fertile saw fertility clinics in both Israel and Dubai excel in fertility treatments for men, only in Israel did fertility treatments become specially tailored to adhere to kosher demands. In comparison, in Muslim countries those treatments which were considered haram were simply not permitted.

Across the Middle East some governments have chosen to adjust their governance of fertility medicine to incorporate religious opinions. Others have used religious endorsement to underpin political aims. Some have refrained from jurisdiction in the knowledge that the religious verdicts command authority from the community. The interdisciplinary dialogue between scientists and religious jurists is complex and challenging, and the religious narrative can be perceived as controlling or protective of the values of a community. Religious Law may be in danger at times of losing its guiding principle of upholding multiple opposing opinions as truth especially when political, social and religious ambitions intertwine, but as religious jurists from different legal backgrounds and scientists come together, they are also forced to engage and find consensus. In their debates, the legal and moral values of the community and of the religion are tested and reinterpreted. Aware of Western influence, Jewish and Muslim authorities are confidently searching for a bioethical

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658 Inhorn et al., "Assisted Reproduction."
future that is sensitive to and representative of the religious and moral heritage of their community. Two models of how this collaboration can be achieved have been demonstrated, and, in each case, organisations have been specially formed to enable this new collaborative work. Judaism uses a model that allows for a very personalised approach; specialised rabbis meet with scientists in order to discuss and adapt medical practices in order to reflect halakhic concerns. No one approach fits all Rabbinic requirements and so the halakhic approach is tailored to respect individual religious approaches in specialised clinics. Muslims use councils that bring religious jurists of different denominations together with scientists with the aim to debate and find consensus, which is then published in form of fatwas. The fatwa then fulfils an advisory role for the jurisdiction in individual Muslim countries. In both the Jewish and Muslim model, the dialogue enables a shared platform in which scientists and religious jurists learn to understand each other’s concerns. Even though this shared platform is difficult to navigate, it has enabled a bioethical narrative framework with a shared language.

The legal narratives that will continue to emerge in debates about genetic editing are likely to focus on the same key moral themes and legal principles that have dominated the debate in the recent past. New scientific approaches will be tested for their impact on lineage, legitimacy, purity and the concept of healing. In light of this, the opinion of Ayatollah Jannātī mentioned in the introduction can now be contextualised. Human cloning, which he found permissible, is much less challenging than donor gametes or surrogacy, because it does not rely on any genetic material outside a married couple, it does not lead to zina, even if it may question the relationships within a family. Human Germline Genome Editing is likely to be judged by the same legal principles and rely on precedents set today, which was the reason for the choice of reproductive technologies debated in Part III. HGGE is likely to be performed on embryos in vitro. Where Catholicism grants protection of life from the moment of conception, neither the majority of Jewish nor Muslim jurists grant embryos in vitro protection. Ensoulment, the concept most linked with the protection of nascent life, is expected at a much later stage of pregnancy in vivo and therefore will not apply. Whilst a number of nations worldwide warn that the deselection of embryos by PGD can be a form of eugenics, Muslim and Jewish jurist have rejected the charge of eugenics and interpret the use of PGD as a preventative
tool against abortion, because the deselection of embryos *in vitro* is permitted through the precedent set by the permission to abort genetically defective embryos *in vivo*. This is because religious jurists have linked the concept of physical disability to the concept of suffering, which invokes the scriptural obligation to heal and avoid suffering. Premarital genetic testing is also religiously endorsed as a way to protect against the effects of genetic bottlenecks and consanguineous marriages in order to reduce suffering in future generations. Premarital testing and embryonic screening is thus elevated by a number of religious authorities to that of a religious and public duty. Whilst deselection is limited to genetic attributes that would lead to suffering, the question of what constitutes suffering remains difficult to determine. Gender selection is generally not permitted, but family balancing for a number of religious jurists, is a sufficient reason to permit it. Future discussions on HGGE will look to the precedents set for PGD. Currently the worldwide moratorium on HGGE is upheld and debates about the use of HGGE are theoretical. Debates so far have instructed, that genetic therapies are limited to therapeutic uses, triggering the same question as above as to the limits of therapy. Certainly, HGGE need not trigger concerns of adultery, lineage or purity as no extramarital genetic material is necessary as it is for AID or MRT. It can be performed in ways that should not trigger the charge of impurity any more than any IVF procedure. The religious concepts most likely to influence the debate are those of healing and those of the limits of changing the *telos* of Creation. Healing and the avoidance of suffering will demand that HGGE is safe, before it is used, so that it does not cause suffering. This leaves the concept of the *telos* of Creation, which is robustly protected by those Muslim jurists who insist that humanity has limits in its capacity as God’s vicegerent. Jewish jurists have a different approach, albeit that at present genetic enhancements are viewed unfavourably, the narrative to co-create and perfect Creation as a religious obligation could become a powerful advocate for HGGE. As new technologies appear, such as biotechnical or biosynthetic approaches, the legal narratives of Muslim and Jewish jurists are likely to follow a similar pattern of balancing religious concerns and obligations against societal needs and political ambitions.


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306


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Appendix:

Legal sources of *Halakhah*:

**The written Torah:**

The primary authority in Jewish law is the written law of *Torah*, constituting of the first five books of the Hebrew Bible, otherwise known as the *Pentateuch*; although within the tradition the whole of Jewish religious teaching can sometimes be referred to as *Torah*. Any single book of *Torah* is often referred to as *chumash* (meaning one of five). According to Orthodox Judaism, the written *Torah* was presented in its entirety by God to Moses on Mount Sinai (Exodus 20).\(^{660}\) Conservative Judaism also holds the written *Torah* in the highest regard, but accepts historical literal criticism, whilst not denying divine inspiration. The difference here must not be underestimated as it created a schism in the English Orthodox community. When eminent Rabbi Louis Jacobs alluded to his acceptance of biblical literary criticism in 1964, he was excluded from ministry by the then Chief Rabbi Brodie and had to leave the Orthodox community, many followed him to form the first Conservative synagogue in London and repercussions of this split continue to be felt.\(^{661}\) Laws derived from the written *Torah* (*Torah shebikh’tav*) are referred to as biblical law.\(^{662}\)

**The oral Torah:**

Along with the written *Torah* Judaism holds that God revealed the oral *Torah* (*Torah sheb’al peh*) that was orally handed down from generation to generation alongside the written word of God. According to George Foot Moor, the oral law fulfilled three different roles, it interpreted, applied or supplemented the written Torah.\(^{663}\) This oral interpretation falls into two further categories, of which the first is based on Exodus 18:20 ‘*the way in which they should walk and the things they should do*’ from the verb to walk *halokh* so that the term *Halakhah* (Jewish Law) was devised meaning all

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\(^{660}\) *Jewish Law, Elon ed.59*

\(^{661}\) Louis Jacobs, *We Have Reason to Believe* (Valentine Mitchell 2004).


\(^{663}\) Feldman, *Marital Relations*.4
the laws that guide Jews in their daily life with one another. In parallel the oral law also developed extra-legal teachings, often in the form of stories which dealt with theological, philosophical or moral matters. This is the Aggadah and although strictly speaking it is not a traditional source of Jewish law making, in the case of modern bioethical matters where jurists struggle to find precedents, agadic material is often used to study Jewish ethical principles. Maimonides stresses the importance of the Aggadah as long as the material is not taken literally but is rationally and allegorically interpreted. Never the less the use of this material is disputed for Halakhah.

As the oral Torah is so extensive attempts have been made throughout Jewish history to reduce the legal matters and codify the oral Torah in writing. The earliest often quoted compositions are by Rabbi Akiva (d.132) and his pupil Rabbi Meir, but the most widely used is the Mishnah by Rabbi Judah the Patriarch, known simply as Rabbi (d. 219). The Mishnah recorded the opinions of previous authorities and presents itself like a case book of law in six orders: agriculture, sacred times, women and personal status, damages, holy things and purity laws. Rabbi Judah also edited some opinions out of the oral law and these edits were preserved as a supplement called the Tosefta. Texts that are preserved outside the Mishnah are collectively known as Baraita (outside) they may also include collections of midrashim such as Mekhilta, Sifra and Sifrei. Midrashim (plural of midrash) are usually stories in which Rabbinic authorities have creatively interpreted a portion of Torah and they stand alongside the Mishnah.

The Talmud:

The study of these sacred sources has been at the epicentre of Jewish religious devotion. Instead of simply memorising legal texts, Judaism has a tradition of preserving legal arguments by recording opposing opinions, including the contradictory sources that support these conflicting views. The vast collection of historical legal discourse is known as the Talmud. It is a study, discussion and

664 Feldman, Marital Relations. 4
666 Feldman, Marital Relations. 5
commentary on the oral law. The commonly used term G’mara/Gemara is the Aramaic term for the Hebrew term Talmud and it remains one of the greatest resources for contemporary bioethical law-making. Often the Talmudic debates remain open ended; this emphasises that rabbis throughout the centuries who study and reopen these debates need to learn to approach the problems of their own time with flexibility and confident interpretation. Through this Talmudic debate, every scholar is meant to add creatively to the Jewish understanding of Torah, with the aim of uncovering ever deeper or more varied truths. The same six orders that are found in the Mishnah are also found in the Talmud, although the Talmud is further subdivided into sixty-three tractates called massekhtot. Important for the study of procreation is the sixth order called nashim (women), which is made up of different tractates that discuss procreation, conception and contraception. Nashim also covers ritual purity laws on menstruation. This can be of relevance when a woman’s natural cycle is too short to allow her to procreate in the ritually appointed time, leading to fertility problems. Because the Jewish communities lived in exile after the destruction of the second temple, two Talmuds exist that record the discussions of the sages living in two of the most distinguished Jewish settlements; these are the Palestinian Talmud (PT) and the more extensive Babylonian Talmud (BT).

Commentaries on the Talmud:

The next generation of sources used are the commentaries on the Talmud. The most celebrated of these was written by Rabbi Sh’lomo Yitzhaki in the eleventh century. Yitzhaki is known as Rashi and his wisdom and vast knowledge of the sourced continues to this day to act as an indispensable commentary on the sources mentioned above. Bioethical debates surrounding procreation and birth control will often base their arguments on discussions between Rashi and his distinguished grandson, the biblical scholar Rabb Jacob ben Meir of Rameru known as Rabbenu Tam.

667 Jacobs, The Jewish Religion 527
668 Feldman, Marital Relations.5,6
669 Sometimes the Palestinian Talmud is also referred to as the Jerusalem Talmud. Feldman 5,6
The Codes:

Quite different to the *Talmud* - and the commentaries on the *Talmud* that celebrate the diversity of legal interpretations - are the post *Talmudic* codes. Whilst the first attempts at codification of the law were made in the eighth and eleventh century by Gaon and Al Fasi, Moses Maimonides (1135-1204) wrote the *Mishneh Torah* (the second Torah) with the intention to write a code that made all other codes and sources superfluous.\(^{670}\) No legal scholar dismisses the brilliance of Maimonides – known as Rambam – as he brought great order and logic to the vastness of legal sources. From the beginning, however, his code divided opinions. Maimonides presented final codified legal decisions in order to produce a convenient legal handbook, but this caused great dispute because it thwarted the traditional decision-making process of the *posek* who needs to engage with all the different perspectives, that the legal tradition preserves. The code led to the legitimate fear that the study of the tradition would become superfluous if codified laws could simply be looked up. Particularly problematic is the fact that Maimonides did not give references to the legal material and the authorities he was using nor did he include contradictory arguments.\(^{671}\) The debates surrounding Maimonides’ code give great insight into the tensions that exist to this day in Jewish legislation, which is particularly relevant to modern bioethical cases. Maimonides is widely celebrated as one of the leading and most authoritative thinkers, bringing order into the multitude of sources, and he no doubt wished to preserve the tradition from distortion by less qualified legal scholars. Yet, by writing a codification of the law, Maimonides acted against the Jewish tradition that sees value in the preservation of discourse. Judaism holds that truth can be found in opposing views and rabbinic scholars faced with new problems in their time can only creatively innovate and interpret if the different legal perspectives from the past are preserved with equal authority. Jewish law is intentionally non-monolithic, there is thus a deep tension between conservative preservation and creative non-dogmatic innovation, which will be discussed in more detail shortly.

\(^{670}\) Feldman, *Marital Relations*. 5, 6

\(^{671}\) Twerski, *Introduction to the Code of Maimonides (Mishneh Torah)*. 97-108
This thesis cannot do justice to the many scholars who followed Maimonides over the centuries, each adding layer upon layer of commentary on the *Talmud*, but one other code is vital for the study of procreation. The *Iggeret HaCodesh*, written in the second half of the twelfth century is often attributed to R. Moses ben Nahman - Nahmanides, known as Ramban (as opposed to Maimonides who is known as Rambam). This code discusses sexual relations and is vital for bioethical concerns regarding procreation. According to Rabbi Sylvia Rothschild, rabbinic decision-making falls into two categories today; some Rabbis are highly trained and consult the primary legal sources in order to develop their own interpretations; other rabbis with less training rely heavily on legal codes and summaries, especially on the code of *Shulchan Aruch* (the prepared table) by Yosef Caro (1488-1575). This code reflects the laws and customs of the Jewish Sephardic tradition (Jews from the Southern hemisphere). Ashkenazi Jews (from the northern and eastern hemisphere) will use a version of this code that has been adapted to Ashkenazi laws and customs by Rabbi Moshe Isserles; it is known as the mappah (the tablecloth).

**Responsa:**

As well as the sacred written text, the collection of oral law, the *Talmudic* debates, the commentaries and codices, there is a final section of legal sources called the responsa literature that requires explanation. The responsa are not unlike the collection of *fatawa* in the Islamic tradition. Here, individual legal scholars have given their legal ruling on a specific, difficult case. The responsa are used to interpret the law creatively as discussed above. The detailed insight into individual cases demonstrates the considerable room for interpretation that *poskim* (plural of *posek*) have executed over the centuries and can thus illuminate the contemporary debate. To give an insight into the magnitude of the responsa literature, it is worth noting that Ramban’s most outstanding pupil R. Solomon ben Aret, alone published 3,000 responsa.

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672 Feldman, *Marital Relations*. 9-11  
673 Rabbi Sylvia Rothschild, Interview 4.11.2019  
674 Feldman, *Marital Relations*. 17, 18  

319
Three Models of Legal Interpretation which Explore the Divergent Hermeneutic Approaches to Jewish Bioethics and Law

The legal debates demonstrated that scholars, jurists and poskim often use the same sources to come to radically diverging opinions on what is permissible because they differ in their hermeneutic approach to law and ethics. In order to understand the root of these differences, beyond the denominational differences which often do not suffice, this thesis considers three models that attempt to explain these diverging approaches. In essence all models enquire, firstly, how the interpreter, faced with a modern case, chooses legal precedents and laws from the tradition; secondly, what he believes the metaphysical quality of the law and the interpreter is, whether both are ahistorical and objective, or in history and subjective, and thirdly, what methods of analogy or interpretation he considers appropriate in order to apply his findings and legal interpretation to the modern case that confronts him.

The first model follows the research of Louis E. Newman and tries to understand the great scope of legal approaches in light of two biblical versions of the covenant. This model explores the relationship between law and ethics in Judaism.

The second model considers Maimonidean jurisprudence and attempts to reveal the difference that the teleological approach to law makes in Judaism. This model considers the role of human reason, which is pivotal in the bioethical debate.

The third model returns to the research of Newman, but, in this instance, explores the different approaches to the metaphysical quality of law.

Each of these models overlap at times and cannot do justice to the considerable and deliberate variations within the Jewish bioethical debate, but together they will provide a deeper understanding and greater perspective of our subject matter.
Model 1: The role of covenant and the difference between law and ethics

Lord Immanuel Jakobovits, often referred to as the father of modern Jewish bioethics, differentiates Jewish from secular bioethics in this way:

Secular medical ethics seeks to turn ethical guidelines or rules of conscience into law... the law is the product of moral intuition or consensus. Jewish medical ethics operates in reverse. Out of legal verdicts presented as law in legislation or rulings we distill the ethical guidelines and principles responsible for the legal judgements. Jewish medical ethics derives from legislation; it does not lead to legislation, or at least not commonly so. For us the legislative rulings have been given as Halakhah.675

Lord Jakobovits' view is insightful in that it demonstrates the extent to which he understands the source of Jewish biomedical ethics as other to secular ethics, despite the fact that many laws in secular countries also have their roots in biblical beliefs, albeit in Christian ones. It is also of interest that ethics according to Jakobovits derives from legislation; morality and law do not appear to be one and the same, but medical ethics seems a product of legislation. This is not universally accepted within Judaism. In cases of medical emergencies, ethics can even take precedence over legislation; - the laws of Shabbat which forbid the doing of work, are readily set aside to save life. In this case the demands of Jewish ethics may not just be understood as a product of the law.

Despite the many legal sources that give scope to a variety of legal interpretations it also remains unclear why within Orthodoxy so many different views can be generated from laws that, according to this view, are already in existence and simply need be applied. As demonstrated in the case of ma’aseh and severah the opinion of the individual posek does play a significant role, but the question remains in what way the moral intuition of the legislator plays a part in Jewish bioethical law-making and why some Jewish bioethicists distinguish between law and ethics, whilst others

including David Bleich do not appear to do so, or at least see ethics simply as a ‘facet of Halakhah’.  

Professor Louis E. Newman offers an insightful approach: Judaism defines itself through the biblical covenant with God, but the underlying implications of this covenant are not universally shared within Judaism. Rather than segmenting legal scholars into Orthodox, Conservative or other denominations, Newman suggests that two parallel concepts of covenant coexist that lie at the heart of the fundamental differences that can be found across the denominations. The first is based on Exodus 19:5

...And now, if you obey Me and keep My covenant, you shall be to Me a treasure out of all peoples, for Mine is the entire earth (Exodus 19:5).  

In this model of covenant Newman recognises a contractual relationship with God that is compatible with a post Kantian sense of autonomy. Although God’s power far outweighs that of his people, there is a sense that Jews as a community can choose to enter into this mutually beneficial agreement with God.  

Exodus 19:7-8 confirms the sense of the tribal discussion and subsequent acceptance of the covenantal relationship:

‘Moses came and summoned the elders of Israel and placed before them all these words that the Lord had commanded him. And all the people replied in unison and said, "All that the Lord has spoken we shall do!" and Moses took the words of the people back to the Lord. (Exodus 19:7-8)  

In contrast Deuteronomy 4:35-40 gives a very different model.

You have been shown, in order to know that the Lord He is God; there is none else besides Him.

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676Bleich, *Bioethical Dilemmas*.xii
From the heavens, He let you hear His voice to instruct you, and upon the Earth He showed you His great fire, and you heard His words out of the midst of the fire,

and because He loved your forefathers and chose their seed after them, and He brought you out of Egypt before Him with His great strength.

(Deut. 4:35-37)\textsuperscript{680}

In these biblical verses, the covenant appears not as a matter of an autonomous people choosing a contract, but \textit{a priori}. The Jewish people are tied to God in a pre-existing relationship. This may be understood as a gift, but there is also a moral debt on the side of Israel because God has saved them from Egypt and is eternally their protector.\textsuperscript{681} There is thus a tension in the understanding of the relationship with the divine that has its origins in the Hebrew bible. Even if the image of a parental model of God is shared across the divides, different individuals will still understand this relationship either as a chosen gift or an inescapable kinship.

The question of whether God presents Israel with instructions that need to be followed by the letter, or whether the commandments are loving suggestions, is the consequence. Deuteronomy 4:44-45 and Deut. 28:1-68 present the covenant in highly legalistic terms:

\begin{quote}
And this is the teaching which Moses set before the children of Israel: These are the testimonies, statutes and ordinances, which Moses spoke to the children of Israel when they went out of Egypt. (Deut.4:44,45)\textsuperscript{682}
\end{quote}

This includes the threat of punishment in Deut. 28:58-60 if God's commands are not observed: and a further warning in Deut.4:3-4.\textsuperscript{683}

\textsuperscript{681} Newman, \textit{Past Imperatives},.68


\textsuperscript{683} Louis E. Newman, Past Imperatives,70
Your eyes have seen what the Lord did at Baal Peor, for every man who went after Baal Peor, the Lord your God has exterminated from your midst. But you who cleave to the Lord your God are alive, all of you this day. (Deut. 4:3-4)

In contrast Deuteronomy 10:12 speaks in far gentler terms demanding love and a willingness to keep God’s commands gladly for the sake of Israel.

And now, O Israel, what does the Lord, your God, demand of you? Only to fear the Lord, your God, to walk in all His ways and to love Him, and to worship the Lord, your God, with all your heart and with all your soul.

(Deut. 10:12)

As these two models coexist in the Torah, so they continue to influence the way in which Jewish scholars interpret their relationship with God. Conservative Judaism tends to favour the model that allows for greater autonomy and a more holistic relationship, which seeks to understand the underlying principles of the law. As this view is not a consequence of the schism between Conservative and Orthodox Judaism the same sentiments can also be found amongst some modern Orthodox scholars.

When we read about ‘keeping God’s commandments, statues and ordinances’, we are in realms of covenant as contract. When we read about ‘walking in God’s ways’ and being a people holy to the Lord,’ we are in the realm of covenant as interpersonal relationship. These two views of covenant appear to coexist within the tradition, albeit in tension with one another.684

As every human being experiences interpersonal relationships in his or her unique way, so the way in which the relationship with God is experienced is equally varied. Some scholars understand the covenant to be like an inter-human relationship that is dynamic, thus allowing for personal interpretation of the law; others stress the otherness of God, which demands greater humility in man’s inability to grasp the reasons behind Torah, demanding thus a more punctilious fulfilment of the law.685

684 Louis E Newman, Past Imperatives, 71
685 Louis E Newman, Past Imperatives 70,71
Law and ethics

This leads to different views on law and ethics. Elliott Dorff, a Conservative bioethicist, holds that rabbis have always modified existing laws according to their moral norms. In his view, the covenant is a relationship with God that calls for a certain ethical and moral attitude against which the law itself must be tested, as in the case of saving a life on Shabbat. Covenantal relationship and the law are thus not identical, but at times in conflict with one another. In every case, the legitimacy of the written law must thus be tested against the moral code demanded by the covenant in order to ensure that the law is ethical. A good example for this can be found in the food laws that clearly state that chicken is kosher as long as it is fed and slaughtered in a kosher way. A punctilious observance of the law may not look further than this, but a covenantal moral approach may suggest that God also commands the care for other creatures, which includes kindness and tenderness towards animals. This may lead to a legal interpretation that states that chickens are kosher only when they are reared with the welfare of the chicken in mind. The ethical demand, therefore, tests the strictly legal demands of the written law and finds it insufficient. In such a case ethics is not simply a product of the law.

In contrast to Dorff, both the eminent Orthodox bioethicist Rabbi Bleich, mentioned above, and David Weiss Halivni see no difference between law and ethics. The divine law by its very nature is ethical. If it does not appear to be ethical, then it has not been understood correctly. Law and ethics in this latter model are thus by their very nature eternal and not dependant on the moral norm of the interpreter. In the case of the welfare of chickens, it could also be argued that, through the command to show kindness to animals, the welfare of kosher chickens was also instilled in the law from the beginning and has today merely been uncovered.

Model 2: Maimonidean jurisprudence and the role of reason

The relationship between law and ethics leads to a discussion about the role of reason. The question posed is whether humankind must use its God given reason in

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686 Louis E Newman, *Past Imperatives* 75
687 Louis E Newman, *Past Imperatives* 75
order to check whether there is a difference between law and ethics, whether a law that exists is ethical in a new situation and if it does not appear to be ethical in this new situation, whether an established law can be adjusted in this new situation in order to be just and ethical. Maimonides in the *Guide for the Perplexed* distinguishes between laws that create a better society, which fulfil the basic needs for humankind (thus serving the body), and laws that serve the spirit of humankind through learning. Some laws are given clearly, others are given in a more complex format in order to make them knowable to men of different intellect. Maimonides acknowledges that theologians are divided between viewing all divine laws as based on the wisdom of God and those who argue that the laws simply reflect the will of God. Maimonides agrees that many laws are difficult to comprehend logically and these laws are referred to as *hukkim* in Judaism, but he insists that the object of all commandments is teleological and thus there is reason in the commandments, even if this reason eludes humankind for some laws:

Consequently, there is a cause for every commandment; every positive or negative precept serves a useful object; in some cases, the usefulness is evident, e.g., the prohibition of murder and theft; in others the usefulness is not so evident, e.g., the prohibition of enjoying the fruit of a tree in the first three years. (Lev. xix. 23)

Legal interpretation using Maimonidean jurisprudence involves three steps. In any unprecedented case, the jurist must firstly establish a relevant legal precedent or law, secondly the moral principle behind this law needs to be understood and distilled through human reason, and, thirdly, the moral principle needs to be applied to the new case.

Whether or not all laws are teleological matters greatly, especially in the area of bioethics; if a legal interpreter sees reason at the base of the law, then he will seek to understand this reason and if he sees the principles of this reason compromised, even if the law is apparently being correctly applied to a given situation, then he will

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feel compelled to change the law in order to protect the law, or at least the moral principles that are at the heart of this law. This was the case mentioned earlier of whether a pledge could be taken from a widow, which saw R. Judah denying this possibility because of the law mentioned in Deuteronomy, whilst R. Simeon allowed it because he interpreted the teleological meaning of the law and thus re-interpreted the literalist meaning. This is also the case mentioned above of the chickens that may not be kosher even if they are slaughtered correctly if the welfare of the animal has been neglected. It is also the likely reason why Maimonides demanded the study of logic, mentioned earlier, before the study of metaphysics, and why he declared that his love for God grew as he studied Creation and understood God to a deeper level.

According to Maimonides…The more knowledge the soul acquires, the more it is able to fulfill the commandment (Deuteronomy 6:5) to love God. The biggest stumbling block to love of God is the belief that the only way to remain true to the Bible is to interpret it literally. The result of literal interpretation is a material conception of God, which, in Maimonides’ opinion, amounts to idolatry.691

If, on the other hand, a jurist believes that laws simply reflect the will of God and are not teleological, then laws can be enforced, even if they appear potentially immoral. This is the case if jurists today allow a ruling on the principle of *de minimis non curat lex* in areas that are clearly not visible to the eye, but may have devastating effect with the scientific knowledge we have today. In the extreme case, chemical weapons, for example, are often not visible to the eye, even if the effects they have are. Jurists who rule on the basis that many of these laws were created before the use of microscopes, and must thus be adjusted, will differ with those who deny that the law is teleological and permit it on the grounds that this is the literally stated will of God. The difference is thus between a teleological and a legal positivist approach to law and both exist in Judaism.

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In order to discern under what circumstances jurists have the authority to adapt and change Jewish law, Maimonides splits law into two categories. David Novak, who has written extensively on Maimonidean jurisprudence and appears to follow in its footsteps, explains that Maimonides regarded all but the laws found in scripture, as rabbinic law. Whilst scriptural law was normative, rabbinic law needed to be tested in every situation anew through the application of reason and a distinction needed to be made between theory and practice:

... with rabbinic law we are engaged in the more practical and less restrained pursuit of imitating God’s purposes. Theory influences practice and practice transcends theory, that is, when we take the purposes we have discerned from the Torah – and the rest of created nature (especially from the heavenly spheres) – and apply them to the task of law-making for a society committed to the divine, purposeful law is epitomized by the Torah.692

Maimonides himself defended his beliefs against the charge of Hellenistic influence by anchoring his approach to the writings of the fourth century Babylonian sage Rava, who stressed the importance of reason in the application of both revealed and Rabbinic law.693 Novak explains that:

For Maimonides, the law of the Written Torah is a divine creation. The law is not divine; it is a datum from God. God is therefore not directly present in the law he has already given. Like other created data, the law itself does not usually proclaim its own ends in specific matters. Rather, it is the task of the interpreter of created data to discover those implicit ends through patient research, using the scientific methods developed by human reason as its discursive language.694

Although Jewish law has never been stagnant, more conservative authorities contemporary with Maimonides disagreed with him and rejected any repeal of laws in two instances. They ring-fenced laws that were either meant to protect the laws of Torah itself from distortion and those laws that were passed with great public

693Novak, "Jurisprudence,“
694Novak, "Jurisprudence,“.223, 233-4
support, even if at a later date there was an equal level of public support against the law. The authority of the past, therefore, trumped the authority of the present. Maimonides rejected both these proposals in that he gave far greater credence to the practical reason of the rabbis in every generation. Even biblical law could be temporarily repealed in an emergency when the teleological purpose of *Halakhah* was at risk. This demonstrates that tensions surrounding innovation in law between legal positivism and a more flexible moral reasoning have always been part of the tradition.\textsuperscript{695}

**Model 3: The divine origin of the law**

The increasingly secularised society of modern Europe and the *Shoah* transformed traditional Jewish societies beyond recognition. Up until the twentieth century, many Jewish communities - especially in Eastern Europe - lived within a wholly religious framework that changed little for centuries.

Torah was the source both of metaphysical truth and of practical wisdom.\textsuperscript{696} Gershom Scholem explains that the foundation of this life rested on the belief that an answer to every new or old moral question could be found by the rabbis by turning to Torah - because everything that was needed had somehow already been revealed to Moses at Sinai:

Not only was it given along with revelation, but it was given in a special timeless sphere of revelation, in which all generations were, as it were, gathered together….The achievements of every generation…was projected back into the eternal revelation at Sinai….According to this doctrine…the effort of the seeker after truth consists not in having new ideas, but rather in subordinating himself to the continuity of the tradition of the Divine word and in laying open what he received from it in the context of his own time.\textsuperscript{697}

\textsuperscript{695}Novak, "Jurisprudence.,".223, 233-4
\textsuperscript{696} Newman, *Past Imperatives*. 186
\textsuperscript{697} Gershom Scholem in Newman, *Past Imperatives*. 186
As God’s will was understood to be unchanging, the moral code by which Jews lived was not understood to be based on historical circumstance.\(^{698}\) In a period of time when life changes very little over generations, this view is easier to uphold than in an epoch of rapidly changing circumstances. In our time, when the parameters of life and scientific knowledge are rapidly changing, some jurists will question apparently antiquated parameters to a far greater extent than at times of little change, whilst others may approve the upholding of tradition out of a fear of change rather than a particular approach to law.

Newman refers to the classical approach to Jewish law as traditionalist and finds it continued today in the interpretation of scholars such as the frequently mentioned Orthodox J. David Bleich, whose work is of great importance for Jewish bioethics. Bleich writes:

… a person who seeks to find answers in the Jewish tradition…must examine them through the prism of Halakhah, for it is in the corpus of Jewish law as elucidated from generation to generation that God has made his will known to man. \(^{699}\)

In this traditionalist approach, the legal scholar consults the traditional legal sources that were summarised above, but no distinction is made between law and ethics. Neither the subjectivity of the interpreter nor their historical context is expected to influence the legal interpretation and decision of scholars such as Bleich. This is the mode of interpretation that rejects new parameters for medical categories such as the aforementioned goses (a patient who is likely to die within a fixed time period).

The second approach to law is termed the legal model by Newman and may be viewed as neotraditional. Emanuel Rackman is a prominent scholar who follows this model. He shares with traditionalists the view that Jewish ethics are legal concerns that can be answered through an interpretation of the traditional legal sources. He differs, however, with scholars, such as Bleich, in that the historical context of past

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\(^{698}\) Newman *Past Imperatives* 189-7

\(^{699}\) Bleich in Newman *Past Imperatives* 187
and present legal decisions is taken into consideration. Rackman also accepts that it is difficult for any jurist to be truly objective and that the law is immutable.\textsuperscript{700}

Rackman proclaims that the law develops and changes for three reasons throughout time:

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\ldots \text{one is logic, the second is the sense of justice; and the third concerns the needs of society.} \textsuperscript{701}
\]

Rackman gives the example of the biblical ruling to cancel all debts after seven years. Even in \textit{Talmudic} times the sage Hillel adapted this law to the needs of society.

In order to ensure that people would still be willing to lend money to the needy as the seventh year approached the sage Hillel created a legal fiction that circumvented the biblical rule.\textsuperscript{702}

Rackman applies this same approach to bioethics when he considers that modern concerns of overpopulation may lead to a re-examination of the \textit{halakhic} prohibition against abortion and birth control in the future, here his three steps are clear to see:

\[
\text{I see no possibility yet, under Jewish law of what is called infanticide or abortion. It is forbidden [sic] by Jewish law. The question, however, is whether Jews may not come to certain conclusions with regard to population growth. Such restrictions may not be good for the Jewish people; we have had too many losses, and we have to repopulate the earth. But at least we have an open mind with regard to it and may become more liberal with regard to planning parenthood and the circumstances under which abortion may be permitted.}\textsuperscript{703}
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Newman’s third approach is called the covenantal model and it echoes what has been mentioned before about interpersonal relationships. In this approach, the relationship with God carries a greater weight than traditional legal sources.

\textsuperscript{700} Newman \textit{Past Imperatives} 189
\textsuperscript{701} Rackman in Newman \textit{Past Imperatives} 189
\textsuperscript{702} Newman explaining Rackman’s argument, in Newman, \textit{Past Imperatives}, 190
\textsuperscript{703} Rackman in Newman \textit{Past Imperatives}, 190
Proponents of this are scholars such as the Orthodox Rabbi Irvine Greenberg to whom Newman attributes a liberal leaning. Greenberg understands the covenant in terms of a Jewish responsibility to better the world. What distinguishes this approach is not only that it looks beyond the Jewish legal sources, but it also concerns itself with the moral welfare of the world beyond Jewish borders. Ethics and law are by no means identical and a messianic focus aims at improving this world for a messianic age:

The Jewish people's mission is to teach the world not to settle for the present structure of reality, which is characterised not by triumph of life but by sudden sickness and death, by oppression, inequity and injustice.\(^{704}\)

There is an unmistakable tone of mission in these words, which aim to bring Jewish covenantal morality to the rest of the world. This feels somewhat unusual in the Jewish rhetoric and it is very much joined with an enthusiastic endorsement of scientific discovery. Science in the word of Greenberg is very much the divinely gifted tool for a betterment of society, but there is also an acknowledgement of the dangers of science and power. The same concern can be found in the traditionalist approach of Bleich, but whilst in Bleich the necessary restrictions to science are found in Halakhah, in Greenberg it is the morality of the covenantal relationship that safeguards against the excesses of scientific ambitions:

All in all, work, productivity and medical power constitute a religious calling. But the key to constructive use of power is partnership.\(^{705}\)

This covenantal approach is, therefore, highly dialectic. It takes into consideration the historical context, the subjectivity of the agents, the need of the Jewish and of the non-Jewish society. Legal Jewish sources are taken into consideration, but there is a distinction between law and ethics and Halakhah is seen to adapt. For a legalist, this approach is unlikely to be robust enough to protect Jewish ethics from the unethical demands of the modern world.

The legal debates in Part III have demonstrated the different approaches in greater detail and explored their strengths and weaknesses, but a short bioethical example

\(^{704}\) Greenberg in Newman Past Imperatives 192

\(^{705}\) Greenberg in Newman Past Imperatives 192
neatly summarises the points made above. In keeping with most traditional halakhists Bleich opposes all types of abortion, unless the life of the expectant mother is at risk. Although the early embryo is legally often classed as mere water, nevertheless it is protected when it is implanted in the uterus, unless it constitutes a danger to the life of the mother. Rackman is more lenient than Bleich, in that he is willing to consider abortion in cases where the unborn child is known to carry a seriously debilitating disease, such as Tay Sachs. Greenberg goes further still in that he is even willing to consider whether the psychological welfare of an expectant mother or unwanted child should be taken into consideration to allow abortion in certain cases.706

The problems that arise from the first, traditionalist, approach in medical ethics are that legal precedents can be used from the past that were reasonable assumptions in their time, but are highly problematic today.

One example is the prenatal screening of embryos in utero during a routine pregnancy that is typically performed from the 12th week onwards, but may include an amniocentesis at later stage. Strict Orthodox authorities like Bleich, do not allow screening if the reason for the screening is to identify and abort embryos that suffer from diseases. In comparison, the Orthodox Rabbi Waldenberg who died in 2006 took into consideration the suffering of parents and children and allowed abortions of children who were affected by Tay Sacks up to the seventh month of pregnancy. His legal opinion on the matter is still occasionally quoted as authoritative today, but it was given in 1975.707

It is my opinion…that an abortion may be performed immediately upon the discovery through a conclusive test that the fetus is a [Tay-Sachs] fetus, even upto the seventh month of pregnancy. 708

Waldenberg cites Joseph Trani (seventeenth century) and Jacob Emden (eighteenth century) as authorities who had previously given permission to abort in order to

706 Newman Past Imperatives Chapter 9


708 Jewish Law, Elon ed.612-613
prevent ‘great pain’ when there was no danger to the health of the mother.

Waldenberg also cites the permission given by Joseph Hayyim (nineteenth century) to abort a visible pregnancy of five months that involved a married woman, who had committed adultery, because:

There is a basis for the argument that abortion is highly necessary when there would be a family stigma and shame and a desecration of God’s name if the pregnancy continued. 709

It is possible that Waldenberg in the 1970s classed the fetus into the legal medical category of a nefel (non-viable child) because premature babies in the 1970s may not have survived at seven months and Waldenberg states that,

… the case is overfull with pain and suffering, and the child’s death is certain within a few years.710

By 2006, however, 77% of premature babies survived at 26 weeks gestation.711 This demonstrates the problem of halakhic opinions that are not put into historical context. The beginning of the seventh months of gestation could take a pregnancy up to the 26th week, which means that today either the euthanasia of a born child with Tay Sachs is halakhically permissible - which it undoubtably is not, according to all halakhic authorities - or the opinion of Waldenberg - that an abortion of a seven months fetus with Tay-Sachs is permissible - is wrong or at least outdated. Although David Bleich is classed as traditionalist by Newman, he is critical of the use of Waldenberg’s ruling, but, rather than classing it as a medically surpassed opinion, Bleich suggests that it is contrary to other contemporary halakhic opinions, including that of Rabbi Feinstein. Rosner does not devalue any of the former opinions, but suggests instead the testing of adults before pregnancy in order to establish whether they are carriers of the Tay-Sachs gene and the use of IVF and PGD in order to test embryos for the condition before they are implanted into the uterus.712 These two modern approaches can avoid late abortions and are less problematic because of

709 Jewish Law, Elon ed.
710 Jewish Law, Elon ed.
712 Rosner, "Jewish Medical Ethics: Genetic Screening and Genetic Therapy,.."
the aforementioned *halakhic* ruling that embryos *in vitro* have a much lower status than an embryo *in utero*.

At the other extreme of this argument, legal scholars fear that the reformation of *halakhic* principles and opinions may lead to a sacrifice of the core principles that form the foundation of the Jewish legal tradition. If a covenantal model allows for a far greater level of personal autonomy in law making, then the pressures of modern society may make religious principles buckle. A good example is the ordination of women in Judaism as rabbis. Jonathan Sacks does not object to the discussion of the subject as such and proves that Orthodox Judaism does not uniformly reject the role of women in religious leadership:

As to whether a woman may be a *morah horah* (rendering decisions), a number of authorities would apply affirmative.713

Sacks does, however object to a legal reasoning in favour of women’s ordination that argues in terms that are alien to Judaism and reflect only the values of a modern secular society.

The rabbinate of these (Conservative) responsa belongs to the value framework of contemporary America, not of classical Judaism.714

It is thus not the case that Orthodox Judaism rejects the ethical and moral demands of the modern world, but it seeks to justify them within and through its own legal parameters.

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713 Jonathan, "Creativity and Innovation in Halakha." 61
714Jonathan, "Creativity and Innovation in Halakha." 161
The Importance of Protecting Embryonic Life both *in vivo* and *in vitro* According to David Novak in Comparison with the View held by David Bleich

The legal view of the Conservative scholar David Novak is entirely different to that of Rabbi David Bleich (which is elaborated on in the main text of this thesis) in that he does not automatically assume that an established legal norm is ethical and therefore authoritative in this situation. Like Bleich, Novak discusses the legal status of embryos in a chapter on the harvest of embryonic stem cells and concludes that killing embryos is unethical even if *Halakhah* may appear to allow it.

Embryos could not exist outside the womb until the modern era and so every analogy that has been brought forth to demonstrate their lack of legal protection is tested by Novak and found to rest on an antiquated understanding of science.  

> There are acts that maybe permitted, from the silence of the tradition as it were, - and still ought not to be done, even if we now know how to do them where our ancestors did not. Think of our moral revulsion when some scientists insist that what can be done must be done in cases of their new discoveries…regardless of the moral problems they involve.  

Against the assumption that early embryos outside the body deserve less protection than those inside the body or those that are more mature, Novak suggests that all carry the full genetic potential to develop into a living human being:

> The commonality in kind between a zygote and an embryo…outweighs any difference in degree between their respective staged of pre-natal development.  

Novak is not simply arguing for the potential of embryonic life, but for a sanctity or inviolability of life from conception:

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715 Novak, *The Sanctity of Human Life*. Chapter 1
716 Novak, *The Sanctity of Human Life*.69
717 Novak, *The Sanctity of Human Life*. 2
The argument for the inviolability of embryonic life is not because it has potential for life, it is a human life that already had all the potential, all the unique DNA it needs for its natural development...unless someone or something external interferes...by killing it. 718

His legal reasoning and historical context demonstrate that the moral principle of the law calls for a protection of early embryos. Novak’s reasoning develops into a Jewish version of Natural Law in that he urges Jews to search for an a priori sanctity of life that protects nascent life, because the creation of life only to destroy it is immoral:

Does our reverence for human life as the image of God not require that we treat every human life as the image of God, ... even the minuscule human life of the newly conceived embryo with what the tradition calls ‘human dignity’ (kvod ha-beriyot)? 719

Novak argues that any halakhic reasoning that speaks for a gradual progression into personhood is erroneous because it is based on the false assumption that only the womb sustains life and after birth a child is no longer dependent for its survival:

It is hard to see how drawing any line later than the moment of conception itself is not purely arbitrary. Surely the difference between the vital independence of an embryo, a fetus, or an infant is a matter of degree rather than kind, as anyone who knows a nursing mother can easily recognise. 720

Whilst Novak appears to follow the Maimonidean model of law with its emphasis on reason, he seems to differ with Maimonides' aforementioned opinion that Mishnah Oholot 7:6 provides clear instructions on when life begins for certain; without this certainty Novak will not condone the destruction of embryos.

718 Novak, The Sanctity of Human Life.68
719 Novak, The Sanctity of Human Life.68
720 Novak, The Sanctity of Human Life.29
The *Halakhic* Debate of Mitochondrial Replacement Therapy (MRT) in Context of a Genetic Understanding of Judaism

The debate about MRT in Judaism has focused on the medical, covenantal and *halakhic* implications of altering the germline. In context, Jewish scientists are currently exploring the genetic markers that may identify a Jew. Because converts have always added to the Jewish gene pool, this research is highly problematic and the focus on racial markers is itself highly divisive. Despite ethical and legal concerns, the possible existence of Jewish genetic markers has brought the implications of a genetic heritage to the *halakhic* debate. In the male lineage the focus has been on the priestly cast of the *Cohanim*, who trace their ancestral line back to the biblical priest Aron, the brother of the Moses. Scientists have indeed found distinct Y-chromosome haploid groups that suggest that:

Most of the former may be traced back to a common ancestor in the paternally-inherited Jewish high priesthood (Cohanim) at the time of the Assyrian conquest of the kingdom of Israel.

Studies into the matrilineal line have focused on mitochondrial DNA (mtDNA). As Judaism is passed through the matrilineal line, the use of donated mtDNA has logically led to *halakhic* questions concerning the effects of donated mtDNA on the Jewish status of the child and the *halakhic* status of the mother. This debate is similar to the debate surrounding donated ova both from Jewish and gentile donors and demonstrates why from a *halakhic* perspective mtDNA may have a significance beyond the functioning of bodily cells.

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The *halakhic* responses of Rabbi David Bleich and Rabbi Moshe Tendler to the use of MRT (Mitochondrial Replacement Therapy)

The aforementioned Rabbi Bleich approaches the topic of MRT as an expert in Jewish law and bioethics whilst Rabbi Moshe David Tendler, is a specialist in medical Jewish ethics, but with a background of being a professor of biology. Neither of them claims the title of *posek* (legal decider). Both Tendler and Bleich hold the title of *Rosh Yeshiva* (dean) at Yeshiva University and their views often differ, giving a good insight into the breadth of the debate and the importance of the *halakhists’* personal hermeneutic horizon; Rabbi Tendler is the son-in-law of the great Moshe Feinstein.

The safety of MRT – the seven branches of knowledge versus the concept that it may be better not to be created

Rabbi Bleich opposes MRT for a number of reasons and begins with a quote from the *Talmud* stating the aforementioned concept:

> There are three partners in the genesis of a person: The Holy One, blessed be He (who provides the soul) his father and his mother.

MRT changes this concept to an even larger extent than AID and IVF, because a child conceived through MRT is no longer created from one male, one female and God. Bleich warns that because MRT crosses the germline, it may create a legal precedent that could allow eugenic practices of nuclear DNA (nDNA) engineering in the near future.

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723 The difference between Jewish bioethics and Jewish medical ethics is not always clear. In the case of Rabbi Tendler, he appears to refer to himself as a specialist of medical ethics because he is affiliated to the medical school of Yeshiva university.


Rabbi Tendler also speaks of a ‘red line’ that has been crossed in the United Kingdom. Although he acknowledges the concern of leading biochemists for the wellbeing of future generations, he accepts as a biologist that, having crossed this line, eugenic practices will become a reality, with goals that go far beyond the healing of incurable diseases:

Biotechnology is developing so rapidly now that cloning and stem cells are no longer the leading edge of cell research. They are being replaced by the development of gene editing and other research, referred to as "synthetic biology." The goal of synthetic biology is to combine chemicals to make a complete set of DNA, put it into a cell envelope, and thus create a new living organism.727

Although Tendler accepts the potential danger posed by unforeseen medical side-effects as well as the potential misuse by humans, he justifies this scientific research halakhically by referring to a number of sacred and Rabbinic sources that claim that the heavenly Torah can only be fully understood if humankind studies the natural world without being limited by these concerns.

The Mishnah states that:

Who is wise? One who learns from every person.  
(Mishnah Avot 4:1)

Tendler thus justifies the research into synthetic biology and MRT from a halakhic perspective, by relating the meaning of the seven-armed candelabra known as the menorah, which represents the seven branches of human knowledge. A midrash (commentary), which elaborates on the biblical instruction of God to the Israelites on how to build the tabernacle, tells the story of God who asks Moses to create the first menorah from one solid piece of gold.728 Despite several attempts and instructions Moses is unable to fulfil God’s command because his ungodly life in Egypt has

728 Midrash Rabbah Numbers
corrupted him. Only a young boy called Betsalel, born in the wilderness and uncorrupted, is able to create the menorah and achieves the task without difficulty.

Because Moses grew up in Pharaoh’s palace, he knew the amoral society of Egypt. It was unthinkable for him to represent the secular branches of knowledge intimately, in one unit, with the Torah.\(^\text{729}\)

The meaning of this midrash is said to reveal God’s intent that humanity must strive to increase human knowledge of Creation through the menorah (candelabra).

The central branch represents the Torah, and the six branches represent all of secular knowledge…. The Gaon of Vilna taught that if you don’t know the six secular wisdoms, you will not know the seventh, the Torah, because our composite understanding of the Torah requires our knowing details of scientific fields such as agriculture, physiology, psychology, veterinary medicine, and astronomy. We need this knowledge in order to understand how Torah mitzvot (commandments) function in our lives. But if we don’t know the seventh, the Torah, it isn’t worth learning the other six branches of knowledge.\(^\text{730}\)

Tendler cites a number of Talmudic Sages who insisted on learning about permanent and temporary blemishes and injuries from shepherds and hunters before they felt fit to rule on the identification of kosher animals. He cites the example of his father-in-law, Moshe Feinstein, who insisted on learning from doctors and neuroscientists before he would pass his halakhic judgement on end-of-life matters. Only in this way can Jews, according to Tendler, fulfil their obligation to heal and to improve the society they live in. The methodology of understanding and treating mitochondrial diseases is thus justified through the examples of past authorities, the biblical midrash of the menorah and, finally, the mitzvah to heal and to benefit society.

\(^{729}\) Tendler, “Gene Editing Research: Halakhic Parameters.”

\(^{730}\) Tendler, “Gene Editing Research: Halakhic Parameters.”
The good that can be done in giving a mother a healthy child far outweighs the risks taken by the treatment.\textsuperscript{731}

A critical view of these arguments may suggest that the halakhic endorsement to study the natural world should be limited to research and does not permit dangerous procedures with unknown future implications. It would seek at least to limit the risk that is permissible in order to birth a healthy child and question whether the methods can guarantee an improved society.

Although Tendler distinguishes between healing mitochondrial defects and creating designer babies, he does not accept that Halakhah shares the Western secular bioethical concerns for the autonomy of the child. Children are the responsibility of their parents and Tendler appears to argue for the right of any parent to choose what they consider the best genetic future for their children.

This possibility of infringing autonomy is being widely discussed in secular bioethics publications. From the Torah vantage point, we don’t see such a problem. The Mishnah says that a new-born baby is an open book. The first chapters of the book are written by the parents. As the child matures, we hope that he or she will continue the storyline in the way we like. But in the child’s early years Jewish parents have the right to decide what is best for their child. Autonomy is superseded by our responsibility to perform the mitzvah of hinukh, to educate our children and care for their physical development.\textsuperscript{732}

Whilst a child’s autonomy is also a divisive debate in the secular world, Tender’s emphasis on the extent to which halakhists understand their moral principles on autonomy as independent from and in contrast to secular bioethics is significant.

\textsuperscript{731} Quote from a personal phone call with Rabbi Moshe Tendler autumn 2019

\textsuperscript{732} Tendler, “Gene Editing Research: Halakhic Parameters.” 61-76.
Interview with Rabbi Dr J. Shindler (summary)

Orthodox Rabbi Dr. Shindler is Director, Marriage Authorisation Office.

Office of the Chief Rabbi, London

Rabbi Shindler kindly agreed to be interviewed by me in June 2019, I was introduced to Rabbi Dr. Shindler by Michael Roodyn of the London School of Jewish Studies (LSJS).

On the subject of the genetic engineering of embryos and the use of Crispr-cas9:

Rabbi Dr. Shindler is a former research biochemist who is well aware of the new Crispr cas9 technology. He discussed reading about the side effects that can occur at this early stage of using gene therapy based on Crispr.

From the perspective of Jewish law Rabbi Shindler pointed out that within Judaism a person was not permitted to risk his health unnecessarily and for no good reason. (eg: hang-gliding, base-jumping)

If, however a patient was in mortal danger and no other therapy was available, that could save their life, then Rabbi Shindler felt a new therapy based on Crispr or any other new technology, would be permitted. Presumably the same would be the case in early embryos; - if they suffered from a potentially life-threatening condition then gene therapy may be permitted, otherwise it would not be permitted at this early stage of development.

If gene editing became safer (cf transplant surgery) then Rabbi Shindler could foresee its use for hereditary conditions that threaten the life or health of the child. Rabbi Shindler did not think that Halakhah would condone any genetic editing of physical attributes such as height or eye colour commenting that a perfectly good life could be lived ‘a few inches shorter.’

On the subject of MRT Mitochondrial Replacement Therapy (three parent baby)
Rabbi Shindler mentioned that, as far as he is aware, no case had so far been brought to the London Beth Din asking for permission to use MRT, but that the subject had been discussed by members of the Beth Din. Apart from health considerations, the main issue is the Jewish status of such an embryo.

Rabbi Shindler is aware that Rabbi Professor A Steinberg argues that MRT ought not to compromise the Jewish status where the nuclear DNA is donated from a Jewish mother into the denucleated ovum of a non-Jewish woman on the grounds that her mitochondrial DNA would be nullified on the ground of *Bitul B’rov*. Rabbi Shindler explained that the concept of *Bitul B’rov* is applicable in situations where for example a drop of milk has fallen into a pot of chicken soup. In this case the drop of milk can be nullified and the soup remains kosher, because the effect on the soup is not noticeable. However, whole organisms are not subject to this principle of *bitul*, nor are agents which have a disproportionate effect in relation to their amount. This includes such things as some colourings and flavourings and enzymes such as rennet. Rabbi Shindler avers that the donor cell which contains the healthy mitochondria plus many other active constituents may therefore also not be subject to the principle of *bitul*. If so, a child conceived by MRT where the cell containing the mitochondria is donated by a non-Jewish woman might need to undergo conversion later on. Subject to this caveat, plus any safety concerns, Rabbi Shindler presumed that MRT would probably be permitted in order to enable a woman with a mitochondrial disorder to have a healthy child. As this case has not been presented to the Beth Din it is at present an opinion not a decision of Rabbi Shindler.

**On the subject of AlH (artificial insemination with the husband’s sperm)**

Whilst there is no imperative in Jewish law for this, Rabbi Shindler saw no *halakhic* problem with this procedure, as long as the wife’s health was not put at significant risk.

**On the subject of AID (artificial insemination with donor sperm) and IVF with donor sperm or ovum**

According to Rabbi Shindler the use of donated gametes is permitted both from Jewish and non-Jewish donors. Whilst Jewish status passes down the female line, the donation of a non-Jewish ovum does however require the subsequent conversion of the child to Judaism, even if the birth mother is Jewish.
The use of donated sperm does not constitute adultery, because no sexual act between donor and recipient has occurred, therefore no wrongdoing has been committed. This is the opinion of the 20th century authority, Rabbi Moshe Feinstein. Rabbi Shindler also referenced the episode mentioned in the Talmud re: a woman becoming impregnated in a bathhouse. (Possibly Ben Sira conceived by the prophet Jeremiah’s daughter in a bath/ Midrash Likutei Maharil by Rabbi Jacob Moellin Segal or Rabbi Perez ben Elijah of Corbei ‘a married woman who becomes impregnated in a bathhouse is not forbidden to her husband because there has been no prohibited intercourse involved.’) Whilst this possibility is virtually inconceivable (no pun here) medically speaking, the discussion raises the theoretical possibility of IVF.

Rabbi Shindler mentioned that the Talmud classed early embryos in the halakhic category of ‘mere water’. Although early embryos have the status of potential life (and therefore routine abortion is proscribed by Jewish law), where the mother’s health is seriously at risk, or if the baby is known to have a serious degenerative medical condition such as Tay-Sachs disease, Rabbi Feinstein allows abortion early in the pregnancy.

On the subject of Donated sperm

Where a Jewish woman conceives from donated sperm other than her husband, this would impact only on the child’s family pedigree which is inherited via the father. For example, if the father is a Cohen but his wife was impregnated with donor sperm from a non-Cohen, a male child thus conceived would not be considered a Cohen.

Rabbi Shindler said that in the case of a donated ovum the birthmother was considered the halakhic mother but if the donor was a non-Jewess, the child would nevertheless need to be converted later.
Interview with Rabbi Sylvia Rothschild (summary)

Rabbi Sylvia Rothschild was Rabbi of Bromley Reform Synagogue from 1987 to 2002, and Rabbi of Wimbledon and District Synagogue in south west London, from 2003 to 2014, and is at the time of the interview the Rabbi at Lev Chadash in Milan.

Rabbi Sylvia Rothschild kindly agreed to be interviewed by me in November 2019, in Orpington / London. I was introduced to Rabbi Rothschild by Sister Margaret Shepherd and Dr. Jonathan Gorsky at the Sion Centre for Dialogue and Encounter.

Background information for the interviewee:

In the 2nd half of the twentieth century opinions on the use of donor sperm were deeply divided:

R. Feinstein permitted the use of donor sperm in cases of extreme urgency, because it could be legally justified, whilst he forbade the use of Jewish donor sperm,

R. Teitelbaum condemned donor sperm as adultery which could not be dismissed on purely legalistic and technical terms as an act that did not count, nor could the sperm of a gentile be considered a neutral product which fathered children that were legally fatherless. Instead, the teachings surrounding conception and adultery had to be considered as a whole.

In 1984 Rabbi Jakobovits considered donor sperm as:

… not morally acceptable, even if technically it constitutes no adultery nor imposes the disabilities of illegitimacy or bastardy on a child. The objections lie in the profanation of marriage, the deception of the public whereby the paternity of the child is fraudulently registered in the barren husband's name … the possibility of incestuous unions between parties closely related through the donor … the immorality of paying donors who will never know or care for their own natural offspring, and the debasement of human generation to stud-farming methods. The erosion of the family founded on marriage, as the basic unit of society is a greater social and moral evil threatening the stability of society … then the suffering of individuals caused by disease or childlessness. (Rabbi Jakobovits)
Today Rabbi Gideon Weitzman (Puah) and Rabbi Shindler (office of the chief Rabbi) both accepts donor sperm from Jewish and gentile donors and Rabbi Weitzman says that the reactions to donor sperm have changed dramatically in the last 10 years.

Questions to Rabbi Rothschild:

Question 1
What would be your advice to a couple who is considering the use of donor sperm?

How did you experience the changing attitude in the last 10 years to the use of donor sperm? Was it a grassroots development?

Answer:

Rabbi Rothschild explains the importance of making decisions on a case-by-case basis and refrains from giving any general guidelines concerning the use of donor gametes. It is important for her to discover the right path to fertility for the individual couple and her greatest concern initially is for the child. Whilst she does not rule out the use of any donor gametes Rabbi Rothschild expresses concerns about the psychological impact which an unknown genealogy may have on the child’s identity in the future. She explains that the Jewish attitude to the use of modern fertility treatments has indeed changed as genetic testing becomes more widely available and is used by couples before they get married. This has vastly improved the chances of couples avoiding passing on genetic conditions such as Tay Sacks, which have hitherto been a problem and it can also rule out incestuous marriages. The new sciences are therefore predominantly viewed as a positive tool to solve problems in the community.

R. Rothschild explains that Judaism is focused on the needs of the individual and does not follow a dogmatic approach in contrast to Roman Catholicism, although Ashkenazi Jews have been influenced by the example of the Vatican and can at times display a more authoritative approach because of it. Ultimately the community gives authority to the rabbi, a rabbi is not forced onto the community, he or she therefore needs to be able to fulfil the needs of the community.

The rules of mamzerut (unkosher lineage), cannot simply be dismissed, because their authority is biblical. R. Rothschild explains that in her Community of Reform Judaism, the solution has been to declare every single person a mamzer, because
no man or woman can guarantee with certainty that no illegitimate union has ever
happened in their ancestry. As a mamzer can legally marry another mamzer the
problems surrounding the prohibition to intermarry are thus solved.

[This of course implies that any prohibition against the use of donor gametes which
is rooted in the fear to bear a mamzer is no longer of concern. This approach is not
found in Orthodox communities and Reform Judaism tends to be found in the
diaspora rather than in Israel.]

Regarding the responsa mentioned above, R. Rothschild says that she has
historically favoured the opinion of R. Feinstein and agrees that the use of gentile
sperm avoids many of the halakhic concerns and obligations that Jewish donor
sperm would entail.

The other views of R. Jakobovits and R. Teitelbaum are contextualised by R.
Rothschild as belonging to men who were deeply traumatised in the Shoah. R.
Jakobovits grew up in eastern communities that no longer existed after the war. So
many souls were lost during the war that the preservation of family, community,
tradition and life became the central focus for men like Jakobovits. R. Rothschild
relates her own experience of the difficulties experienced by the hospice movement
in the Jewish community in London when R. Jakobovits was Chief Rabbi. His
extreme desire to preserve all Jewish life at all cost and at all times, made it difficult
to give only palliative care to the dying and thus the hospice movement struggled.

By extension his view on fertility prioritised the upholding of Jewish family values and
structures which he feared could be lost. Procreation was part of this traditional
approach and could not be modernised.

The change that has occurred in the Jewish community toward a less traditional and
more modern view of fertility treatments and family structures is, according to
Rothschild, a result of a grassroot movement that wanted a more modern approach
and this desire lay at the heart of choosing Rabbi Lord Sacks as the successor to R.
Jakobovits as the next Chief Rabbi. Although R. Sacks was chosen specifically to
modernise the community by those who felt the need for it, Sacks faced significant
resistance by those who feared it. Rabbi Jakobovits had been born in Eastern
Europe into a distinguished Rabbinic family. His authority was rooted in his
traditional Yeshiva education. By contrast Rabbi Sacks came from the secular
academic background of both Oxford and Cambridge and his family was not Rabbinic. The difficulties experienced by Rabbi Sacks demonstrate a worrying countertrend to both the grassroots movement that wishes to modernise Judaism and the traditional pre-Shoah approach to Halakhah which Rothschild terms as casual authenticity. The significance here is that although Jakobovits stood for ‘the traditional way of doing Halakhah’ in fact much of the gentle undogmatic legal reasoning which existed in the pre-Shoah Jewish world was lost in Jakobovits’ generation, because of the trauma which they experienced. This war generation tried to preserve the Judaism which was lost, but in doing so a rigidity and legal reductionism crept into the approach to Halakhah which is in fact not authentic.

According to R. Rothschild, the punctilious approach to law is today driven by rabbis in Israel and as a result the casual authenticity of bygone poskim and their depth of spiritual knowledge has been all but lost. As this zealous literalism and legalism is spreading, it threatens to undermine the way law used to be done by those that were comfortable and confident in their halakhic tradition. R. Rothschild draws parallels to the Salafist movements and gives two examples one from the past and one from the present:

In the past she recalls the dilemma of a rabbi who knew that a man who was a mamzer wanted to marry a Jewish woman in his community and by biblical law he could not marry them. He suggested the couple visit a rabbi in another village where their genealogy was not common knowledge and advised them to visit ‘that rabbi to whom I never write’.

The second tale happened recently in Italy. (R. Rothschild is today the rabbi of a Jewish community in Milan and thus knows the Jewish community of Italy well.) She explains that Italy is home to the oldest continuous Jewish diaspora, a small community that predates the Mishnah and possibly settled in the 2nd century BCE. Although it is uncertain whether any remnants of this ancient community still exist, their traditions and customs are proudly upheld, especially in the preparation of certain food dishes. One of these traditions is a dish served in Rome and it is called the Jewish artichoke, consisting of an artichoke flower which is battered and deep-fried. Jews have been eating this dish for millennia, but recently the Chief Rabbinate of Israel declared the dish un-kosher, because small insects may be trapped amongst the flowers and mistakenly eaten. This has led to a fierce controversy in
Italy and it demonstrates in a microcosm the tensions created by this new punctilious legalism.

Another symptom of this divisive approach is the fact that in Israel religious authorities are classing Israelis into the distinctive categories of Dati and Hiloni, often translated as religious and secular; but this says Rabbi Rothschild, is misleading. Dati is correctly translated as observant of religious law. The erroneous implication here is that anyone who is not in the category of dati, is therefore less religious, but whilst Halakhat clearly holds a central position in Judaism it is according to R. Rothschild a misleading assumption that those referred to as Hiloni are not religious. Many Israelis classed as Hiloni may not lead lives according to strict Halakhat, but many still observe religious festivals and cultural rituals. Many would class themselves as religious believers even if they do not follow the stringent laws of the Chief Rabbinate or wish for a clearer distinction between religious authorities and the political State of Israel. It is therefore important to distinguish between secular atheism and the category of Israelis which are classed as Hiloni. This classification is thus another sign of the modern punctilious legalism which has crept into Halakhat, that may consider those who are living more outwardly restrictive religious lives as better Jews.

Regarding the further question to Rabbi Rothschild of what resources rabbis use to draw ethical parameters – the boundaries beyond which they will not go and why? R. Rothschild explains that many rabbis today who are not trained to a high enough standard do not use primary biblical sources at all. Instead, they simply use legal codes especially the code of Shulchan Aruch (the prepared table) by Joseph Caro (1488-1575)

In her Rabbinic training R. Rothschild was encouraged to find her own answers; her approach is thus more ambitious and qualified in that she will turn to the primary sources of the biblical texts and the authority of the classical authorities and sages. In order to arrive at new answers, she will apply the four stages of interpretation known as Pardes (paradies). These consist of:

**Peshat** the plain meaning
Remez the allusion within the text

Derash the embroidered story

Sod the mystical and foundational meaning only open to the learned

The sources used for this legal interpretation are the same that Orthodox poskim would consider, but as a Reform Rabbi, Rabbi Rothschild would not consider the authority of past sages ‘out of time’, but view their opinions in the historical context in which these opinions were formed. This is especially important in matters concerning women’s bodies as many of the sources are from a time where sexism was accepted as norm and the classical poskim were men.

When making a halakhic decision there are therefore no legal or ethical boundaries which Rabbi Rothschild would not cross, other than clear biblical commands, but as seen in the case of the mamzer status (mamzerut) these too can be adapted. Unlike Orthodox Judaism, Reform Judaism does not, according to Rabbi Rothschild, desire the rebuilding of the Temple in Jerusalem. This means that those parts of Halakhah which are relevant to the running of the Temple in Jerusalem, have been modified. An example given is the status of those members of the congregation which belong traditionally to the Cohen (priestly tribe) and the tribe of Levi. Whilst Orthodox communities would allow members who are Cohen to read before members who are Levi, in the Reform synagogues no distinction would be made.

Further background: This is relevant because special permission has been given to a Cohen family in Israel to conceive only girls from donor sperm. This is because the son of a Cohen is expected to read in the synagogue as he too is a Cohen, but if he was conceived by donor sperm he cannot be declared a Cohen. This means that the father would have to admit that his son was not his biological son and that he was unable to sire children. Therefore, the permission was given to the Cohen family to discard male embryos in favour of female embryos. When making a halakhic decision there are therefore no legal or ethical boundaries which Rabbi Rothschild would not cross, other than clear biblical commands, but as seen in the case of the mamzer status (mamzerut) these too can be adapted. Unlike Orthodox Judaism, Reform Judaism does not, according to Rabbi Rothschild, desire the rebuilding of the Temple in Jerusalem. This means that those parts of Halakhah which are relevant to the running of the Temple in Jerusalem, have been modified. An example given is the status of those members of the congregation which belong traditionally to the Cohen (priestly tribe) and the tribe of Levi. Whilst Orthodox communities would allow members who are Cohen to read before members who are Levi, in the Reform synagogues no distinction would be made.
Question 2:

Background:
In many questions surrounding fertility treatments, such as the definition of adultery, many rabbis appear to judge in favour of fertility treatments. Successfully having a child appears to trump many other concerns, even the safety of the mother. Dr. Susan Kahn describes in her book *Reproducing Jews* that extreme care is taken during the harvesting of ova not to cause any bleeding from the uterus, even if this means that some of the eggs cannot be retrieved. This is because some rabbis would then not allow the implantation of the fertilized eggs a few days later, as the bleeding caused by the medical procedure would class the woman as a *niddah*.

Question to Rabbi Rothschild:

Why do you think that some rabbis are so strict in this case where the blood is clearly not menstrual blood, but blood caused by a small injury?

What would your advice be in this circumstance?

Answer:

Rabbi Rothschild explains that for her this would not fall into the category of *niddah*, but kashrut (abnormal blood or bodily fluid from an injury). This too has implications, but generally she understands the situation described above as a desire to control women’s bodies, which goes against normative *Halakhah*, because the health of the woman should be prioritised in procreation. This according to R. Rothschild is why the *mitzvah* to procreate is not addressed at women, because childbirth is a dangerous event, so a woman must not be forced into childbirth.

This desire to create new Jewish souls at all costs, even at the cost of the mother’s health, is understood as a new modern phenomenon, which focuses only on the outcome. It should be understood in terms of the trauma of the *Shoah* and the desire to replace lost souls.

To better understand the subject of ritual purity and blood, R. Rothschild recommends Lawrence Hoffman’s book on circumcision.

By implication R. Rothschild would not be concerned with bleeding caused by a medical treatment and would prioritise the well-being of the woman.
Question 3:

Background:

The majority of *poskim* appear to give no legal protection to embryos that are created *in vitro*. Rabbi Tendler amongst others suggests that no legal protection is required because life outside the body cannot mature, Elliot Dorff grants some respect ‘They should not be used as cat food’ but agrees with Tendler that they can be used for scientific research et. David Bleich and David Novak disagree, they call for the protection of embryos outside the body.

Question to Rabbi Rothschild:

What is your position on the ‘mere water status’ and the difference between life *in vivo* and *in vitro*? What do you expect would happen if embryos could be gestated outside the body to full term?

Answer:

Rabbi Rothschild considers embryos *halakhically* in limbo (metaphorically). She is inclined to agree with Elliot Dorff that they require some respect, but feels that in the past few years she is less rather than more inclined towards accepting that they should be protected from the moment of fertilisation.

Rabbi Rothschild does not think that a potential problem exists between gestation *in vivo* or *in vitro*; she does not fear that life gestated *in vitro* could be abused if gestated to full term.

Regarding the question whether Rabbi Rothschild thinks that the fact that the birth-womb can determine whether an embryo is considered human or not human, could, in the future, be abused to undermine the rights of human beings bred outside a human womb (my assumption is based on an article published by Rabbi Bleich).

Rabbi Rothschild disagrees with the logical reasoning of the concern mentioned above, for further clarification she has written to rabbi Bleich and asked for a *responsum*. 
Question 4:

Background:

Britain was recently the first country to permit the use of mitochondrial replacement therapy (MRT) known as the three-parent baby. In the Jewish world two questions appear to have dominated the discussion, firstly the question was raised whether mitochondrial DNA was such a small percentage of what made a human, compared to nuclear DNA, that the donation of it was classed in the category of Bitul brov. Other authorities disagreed and felt it was significant and could not be classed as such.

Secondly MRT has raised concerns about the position of halakhic motherhood, a problem which also applies when egg donations are used, either from gentile or Jewish donors.

Question to Rabbi Rothschild:

What is your position on MRT? Is the category of Bitul relevant here?

Is this (the maternal identity/Jewish status of the child) a question that concerns you.

Would you advise for or against donor eggs and would you consider a conversion of the child necessary?

Answer:

Generally, R. Rothschild would allow anything that enables life including MRT.

Rabbi Rothschild does not think that the category of Bitul is relevant here, because the effect of MRT is still not fully known, but argues that there is a need for a new category, because the mitochondrial DNA is clearly important.

According to R. Rothschild, Judaism is passed down the maternal line, so that a child with a Jewish birthmother will be Jewish, if however, there is any concern about the Jewish status of the child because of donor gametes or donor mitochondria then Rabbi Rothschild suggests a tevilah, which converts the child (if necessary) through a ritual immersion in water. This is how it has always been done and, in her opinion,
should be done in all cases of concern for ease of mind. It is halakhically known as giyur lechumra - ie a "conversion" to specifically remove any doubt of status, rather than a conversion from one status to another.

**Question 5:**

**Background:**
MRT changes the germline of the embryo and is by some experts considered germline editing.

**Question to Rabbi Rothschild:**
Do you think MRT is an important precedent for the editing of embryos in the future (designer babies)

**Answer:**
Rabbi Rothschild, acknowledges that certain halakhic categories are quite permissible, but refers to Maimonides’ quote ‘you should live by them’ to explain, that just because something could be legally justified, it does not mean that it will be done. She is not overly concerned that the precedents set today will lead to a culture of genetically modified children and positive eugenics. Israelis who are less halakhically minded may desire designer babies, but will have their ambitions curtailed by the Rabbinic courts of Israel whilst the more halakhically minded, especially the Haredi tend to be most accepting of children with disabilities and so are unlikely to demand the perfection of children. In the diaspora Jews will be limited to what is permitted in the country of residence. Rabbi Rothschild does not seem concerned with the concept of editing the germline as long as it is safe and says that rabbis should not necessarily concern themselves with this, because the safety is not their expertise.

**Question 6:**

**Background**
Scholars such as Dr. Susan Kahn, Daphne Birenbaum-Carmeli and Meira Weiss all describe the pros and cons of the pronatalist environment in Israel, which appear to be backed by Orthodox rabbis. On one hand this has enabled huge scientific
advances in the area of fertility treatments and many infertile couples have been able to conceive, on the other hand they describe a social and religious pressure to create large numbers of healthy and flawless children in Israel. This can lead to abortions of children with minor disabilities (cleft lip) and also to an increasingly invasive medicalised procreation industry, which may harm the health of the mother. The routine genetic screening of IVF embryos, which is condemned by many nations as a eugenic practice, appears to be viewed in positive terms in Israel as a way to avoid later abortions.

**Question to Rabbi Rothschild:**

What is your reaction to this, how do you view the relationship between Halakhah and fertility in Israel and the Jewish diaspora?

Does the leniency towards donor gametes and the genetic screening of IVF embryos point towards the genetic editing of embryos in the future? (see above for answer)

Is this a positive development and part of the covenantal responsibility of man? What does it say about Judaism, is there such a thing as a Genetic Jewish identity and what does this mean?

**Answer:**

Rabbi Rothschild does not think in terms of a racial or genetic Jewish identity. She does say that Jews of the diaspora (for example in London) understand themselves as part of the biblical people of Israel not of the nation State of Israel, whilst Israeli Jews, understand themselves firstly in terms of an Israeli peoplehood. Rothschild feels that in Israel the focus on genealogy is shifting away from the type of family genealogy that existed throughout the exile and is going back to a more biblical model which was far ‘messier’. Rothschild explains that children and families in biblical times were often adopted into tribes; children were born of slaves or servants and integrated into the family line. The example of Abraham and Sarah ‘making souls’ by gathering people around them, is being invoked both by the religious and political authorities in Israel and this is driving the fertility industry with the priority to enable as many Jewish souls to be born as possible. The reasons for this are the high number of Palestinian children who are born leading to a desire not to be
outnumbered and the desire to continue to replace the souls lost during the Shoah. Once more the situation should be understood a consequence of the trauma of the Shoah.
Question: Is it permissible to use donor sperm if the husband is infertile and the couple are suffering because they want a child? (Question submitted by Vanessa Goodwin, 2. Feb. 2022, answer received 17. Feb. 2022)

In the Name of Allah, the Most High

If a stranger’s sperm is inserted directly in a woman’s womb, it is absolutely forbidden. But if the insemination takes place out of her womb with another man’s sperm and then the fertilized eggs are placed in her womb, it is not harām by itself, although it is against precaution. However, since this act involves looking at the woman’s private part, it is not permissible in cases where it is not necessary. And if a woman has a child, it is forbidden for her to go for another insemination that involves a stranger looking at her private part. In any case, the child will not belong to the husband, it will be that of the owner of sperm. Therefore, the husband cannot register the child in his own name and as his own child.

May Allah grant you success

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