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*Religio*. 2019, vol. 27, iss. 2, pp. [269]-290

ISSN 1210-3640 (print); ISSN 2336-4475 (online)

Stable URL (handle): <https://hdl.handle.net/11222.digilib/142223>

Access Date: 27. 11. 2024

Version: 20220831

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# *Boundaries of Life and Death from the Viewpoint of Shi‘i Islamic Jurisprudence and the Consequences in the Field of Islamic Bioethics*

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When does human life begin? When does the human foetus actually become a human? And conversely, when does human life end? These and similar questions have usually been resolved within theological or philosophical considerations. However, the modern era has transferred them to an important legal level that has a clear and factual impact on every individual. Two important circumstances have contributed to this situation: the first is the development of medical technologies and the second is the development of the concept of human rights. Thanks to these factors, answering these previously theoretical questions has created not only a general ethical framework, but has also had a profound impact on people's decisions and behaviour; it forms the basis for prohibiting or permitting the termination of early life (abortion), disconnection from medical devices (euthanasia) and organ donation from patients with acute brain damage.

The science that deals with these ethical issues in medicine and biomedical technology is called bioethics. It is an interdisciplinary field in which medicine, ethics, law and other sciences meet. Every culture has its own historical and cultural background that influences its specific position in relation to bioethics.<sup>1</sup> In Muslim countries, notably in the more conservative ones, Islamic law (specifically Islamic jurisprudence, ar. *fiqh*<sup>2</sup>) and general principles of Islamic law are the principles of medical ethics as well. This means *fiqh* plays an essential role when determining if procedures are permitted or prohibited. As a result, the field of bioethics in

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\* This study is a result of the research funded by the Czech Science Foundation, grant nr. 19-13824S and supported by Al-Hikmah Institute, University al-Mustafá in Qom, Iran.

1 For example, the key principles of Western bioethics (beneficence, non-maleficence, justice and autonomy) are stated and explained in detail in this classic book from the field of medical ethics, published in the 5<sup>th</sup> reprint edition: Tom L. Beauchamp – James F. Childress, *Principles of Biomedical Ethics*, New York: Oxford University Press 2001.

2 Arabic and Farsi technical terms and all titles are fully transliterated with diacritical marks. Personal names are written without diacritics in accordance with English norms.

Muslim countries has acquired such specific elements that we can refer to it as “Islamic bioethics”. In Muslim countries this field is also known as “medical ethics” (ar. *akhlāq tibbiyya*) or “medical law” (per. *fiqh-e pezeškī*) in Iran.<sup>3</sup>

Islam does not hold a unified viewpoint on this matter. Opinions vary depending on the branch of Islam, the country, and the individual. Since Islamic bioethics from the Sunni perspective is fairly well documented in secondary literature, this article will focus on the situation in Shi‘i Islam in the *imāmiyya* branch (followers of twelve Imams), specifically in the present-day Islamic Republic of Iran. Islamic bioethics is a very widely discussed topic in contemporary Iran (as the leading Shi‘i Islam country). This area not only concerns the authorization or prohibition of certain medical practices and technologies – there is also a high degree of overlap in social and cultural terms, and in some cases even in relation to legislative changes.

The aim of this paper is to define the boundaries of human life (the beginning and end of human life) from the viewpoint of Iranian Shi‘i jurisprudence and on this basis to evaluate the possibility of allowing or prohibiting the termination of early life (abortion), euthanasia and organ donation of patients after acute brain damage. Due to the strong heterogeneity of the legal views of Shi‘i religious jurists (ar. *fuqahā*), it is necessary to provide an overview of the various opinions of a selection of the highest Iranian Shi‘i clerics and jurists<sup>4</sup> on these bioethical issues. These

3 In addition to its standard sources, other principles and rules are also applied to Islamic medical jurisprudence. According to Atighetchi, Western “ethics of principles” are included in basic sources of Islam; nevertheless, the Western approach is challenged by some general principles of Muslim law (Dariusch Atighetchi, *Islamic Bioethics: Problems and Perspectives*, Dordrecht: Springer 2009, 21-23). For an interesting comparison between the above-mentioned four principles presented by Beauchamp and Childress and Islamic ethical theory, see Yassar Mustafa, “Islam and the Four Principles of Medical Ethics”, *Journal of Medical Ethics* 40/7, 2013, 1-5. For more about the Islamic Principles of Bioethics including Shi‘i attitudes to these principles, see for example Abdulaziz Sachedina, *Islamic Biomedical Ethics: Principles and Application*, Oxford: Oxford University Press 2009, 45-75. Most Muslim scholars agree that Islamic bioethics is based on “duties and obligations” stemming from original sources (compared to individual rights in Western bioethics); see D. Atighetchi, *Islamic Bioethics...*, 22, and Mohammad Ali Shomali, “Islamic Bioethics: A General Scheme” [online], *Journal of Medical Ethics and History of Medicine* 1/1, 2008, <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3713653/>>, [2 July 2019].

4 So-called ar. *marja’ at-taqlīd*, pl. *marāji’ at-taqlīd* – the highest Shi‘i religious authority, source of following / reference in religious matters. Several important personalities of several dozen Iranian *marāji’ at-taqlīd* were selected to illustrate different opinion groups – Ali Khamenei (the Iranian leader and great supporter of biotechnologies), Lotfollah Safi Golpaygani (a traditionalist and Khamenei supporter), Makarem Shirazi (a traditionalist, sometimes supporting Khamenei), Vahid Khorasani and Gerami Qomi

high-ranking Islamic jurists seldom explain the process or give reasons on how they have reached their legal decisions. Therefore, the background is explained based on consultations with experts in bioethics who studied in the seminaries (ar. *hawza*) of Qom, where all knowledge and procedures are transmitted personally and rarely ever published.<sup>5</sup>

The opinions and attitudes of the highest Shi'ī clerics have an important impact on Iranian society. There are three primary reasons for this. Firstly, they form the basis for religiously minded people's personal decisions.<sup>6</sup> Secondly, the same support is provided for institutions (e.g. medical clinics) in order to claim that their services and technologies are in accordance with religious law (in cases where official law is absent). Thirdly, when there is consensus among a majority of *marāji' at-taqlīd* regarding a certain topic, the position becomes one of the sources for official state legislation (such as the case of the Therapeutic Abortion Act, as will be shown in the study below).

### **Beginning of human life**

The dispute over the very beginning of human life concerns not only legal science, theology or philosophy. Frankly speaking, this border is also not entirely clear in biology or medical science. According to these fields, life begins with the fertilization of the oocyte and the creation of a new human cell (zygote), which has a different characteristic and is unique, creating a new distinctive human organism. It is obvious, however, that every single zygote does not develop into a new human being, and many leave the body naturally. The zygote only holds the potential for human life. This is why some physicians and biologists tend to hold the opinion that human life begins with the implantation of the zygote in the uterine wall, while others see human life only from certain stages of embryo-

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(ultra-traditionalists and opponents of Khamenei), Yousef Sanei (a reformist and leading critic of the Iranian regime), Sadeq Hussaini Rouhani (a reformist) and Ali Sistani (a traditionalist; although he is the most senior cleric in Iraq, he is of Iranian origin and has many followers in Iran. Moreover, he has very rare opinions that need to be presented in this debate).

- 5 Key consultants were: Dr. Abbas Ali Vashian (Dept. of Religion and Health, Medical Law and Jurisprudence Al-Mustafa International Qom University), Dr. Sayyid 'Ali Alavi Qazvini (Dept. of Medical Jurisprudence, Al-Mustafa International Qom University), Dr. Husein Habibi Tabar (Dept. of Jurisprudence and Law, Al-Mustafa International Qom University), Hojjat-ul-Islam 'Alireza Alebooyeh (Academy of Islamic Sciences and Culture, Qom).
- 6 Every religiously minded Shi'ī person follows the views of his chosen *marja' at-taqlīd*. In the event of any uncertainty related to religion, he/she can find the answer in collections of legal opinions (*fatāwā*). These legal opinions are nonbinding, only recommendations. Nevertheless, they strongly influence public opinion and individual choice.

logical development (for example from the development of the nervous system or when the heart begins to beat). There is also a view that human life begins at birth, as a separate existence from the mother.<sup>7</sup>

Similarly, Islamic legal science has developed several theories on the beginning of human life.<sup>8</sup> Each of these theories has a subsequent legal implication, for example on the permissibility of contraception, the possibility of embryonic cell research and the approval of a therapeutic abortion. According to these theories, the beginning of human life can be:

- 1) Sperm/gametes: Even separate gametes (oocyte, sperm) can be considered as the beginning of human life. This results in pressure to protect them. From the basic sources of Shi'i jurisprudence we learn that gametes have higher value than other standard cells. They are believed to be the essence of the soul, the source of possible future life and should not be lost in the wrong way, such as within extramarital coitus, anal or oral intercourse or masturbation.<sup>9</sup> Currently, only very few Muslim jurists believe in this theory, which prohibits all forms of contraception, any interruption of pregnancy and embryonic cell research.<sup>10</sup>
- 2) A fertilized oocyte (ovum): The definition of fertilization means the connection between the sperm and the oocyte. Each gamete carries only one set of chromosomes (haploid cells) and when they connect, a new and unique set of diploid cells is created. This generally known fact has challenged assumptions in medieval Islamic law, when a man was considered to be the sole procreator, the bearer of life and the dominant partner in the fertilization process, with the woman acted on only as the provider of the environment necessary for the creation and development of the child. Today, it is clear that the male and female roles in fertiliza-

7 For the history of the entire debate among embryologists in the US, see for example Fred de Miranda – Patricia Lee June, “When Human Life Begins” [online], *American College of Pediatricians* 2017, <<https://www.acpeds.org/the-college-speaks/position-statements/life-issues/when-human-life-begins>>, [24 June 2019]. For the position of distinguished bioethicist Arthur Caplan on science and the beginning of human life, see John Lynch, *What Are Stem Cells? Definitions at the Intersection of Science and Politics*, Tuscaloosa: University of Alabama Press 2011, 83-88.

8 A. Alavi Qazvini, personal consultation, 7 February 2019.

9 A. A. Vashian, personal consultation, 5 February 2019. For several *aḥādīth* of Imam Sadiq and Imam Hasan about the special position of sperm – see Muhammad bin Hasan al-Tusi, *Tahdhīb al-aḥkām* X, Tehran: Dār al-kutub al-islāmiyya 1365 (1986), 59, *ḥādīth* 6; Muhammad bin Hasan al-Hurr ‘Amili, *Wasā’il al-Shi’a* XXIV, Qom: Nasāye Publications 1380 SH (2001), 169, *ḥādīth* 4.

10 More in Mojtaba Elahian – Nasrin Fattahi – Maryam Khademi, “Therapeutic Abortion: Ensuring the Health and Survival of Mothers”, *Religious Inquiries* 3/6, 2014, 69-89: 73-74, or D. Atighetchi, *Islamic Bioethics...*, 79-82. Moreover, there are other *aḥādīth* (and *akhbār*) that clearly state that *coitus interruptus* as a form of contraception is permissible and the vast majority of Islamic jurists (Sunni and Shi'i) believe that some forms of contraception and birth control are acceptable.

tion and the creation of a new child are shared.<sup>11</sup> The theory that human life begins with the fertilized oocyte is not widely accepted, but unlike the previous theory it allows for the use of contraceptives (including post-coital contraception) and ejaculation outside the uterus as a form of contraception.

- 3) A fertilized oocyte implanted in the uterine wall: The implanted zygote, as the very early stage of embryogenesis (ar. *nutfā*), which is referred to as the “early embryo”, is assumed to be the beginning of human life by most Shi‘i legal experts.<sup>12</sup> This theory allows for all forms of contraception. Embryonic stem cell research is also permitted because it works with fertilized but not implanted oocytes.

To summarise, according to the majority of Shi‘i Islamic legal experts and clerics, human life begins with a fertilized oocyte implanted on the uterus wall. At this moment, human life and its protection according to basic human rights, especially the right to life, begins. Nevertheless, this early embryo is still not a full-fledged human being. This happens after ensoulment.

### **Embryo development and ensoulment**

It is well known and has been published several times that the Qur’an can be read to describe the whole course of human embryonic development.<sup>13</sup> Some sources divide this Qur’anic human embryogenesis into seven phases,<sup>14</sup> others into five phases.<sup>15</sup> Each of these stages lasts 40 days:

11 A. A. Vashian, personal consultation, 5 February 2019.

12 Sayyid Mohammed Rizvi, “Is Abortion Permissible [sic!] in Islam?” [online], *Islamic Research and Information Center*, <<http://www.irc.org/tabid/112/articleType/ArticleView/articleId/359/Is-Abortion-Permissible-in-Islam-.aspx>>, 21 June 2014 [11 February 2019].

13 See Qur’an, verses 16:4, 18:37, 22:5, 23:13-14, 35:11, 36:77, 40:67, 53:46, 56:58, 59, 75:37, 80:19. Key verses are in sura al-Mu’aminūn 23:13-14: “Thereafter We made him (the offspring of Adam) as a *nutfā* (mixed drops of the male and female sexual discharge) (and lodged it) in a safe lodging (womb of woman). Then We made the *nutfā* into a clot *‘alaqa* (a piece of thick coagulated blood), then We made the clot into a little lump of flesh (*mudgha*), then We made out of that little lump of flesh bones (*‘iẓām*), then We clothed the bones with flesh (*lahm*), and then We brought it forth as another creation” (Muhammad Taqi-ud-Din Al-Hilali – Muhammad Muhsin Khan, *Interpretation of the Meanings of the Noble Qur’an in the English Language*, Riyadh: Dar-us-Salam Publications 1985, 488-489).

14 D. Atighetchi, *Islamic Bioethics...*, 92-93.

15 Kamyar M. Hedayat – Peiman Shooshtarizadeh – Mohsin Raza, “Therapeutic Abortion in Islam: Contemporary Views of Muslim Shiite Scholars and Effect of Recent Iranian Legislation”, *Journal of Medical Ethics* 32/11, 2006, 652-657. The shortened version

- 1) *nutfa* – a drop of (seminal) fluid and/or mixed drops of the male and female sexual discharge, i.e. zygote or embryo (1<sup>st</sup>-40<sup>th</sup> day of pregnancy);
- 2) *'alaqa* – a clot or a piece of thick coagulated blood or a clinging mass (41<sup>st</sup>-80<sup>th</sup> day of pregnancy);
- 3) *mudgha* – flesh or a little lump of flesh or a fleshy tissue or foetus (81<sup>st</sup>-120<sup>th</sup> day of pregnancy);
- 4) *'iẓām* – bones (121<sup>st</sup>-160<sup>th</sup> day of pregnancy);
- 5) *lahm* – flesh, “we clothed the bones with flesh” (161<sup>st</sup>-200<sup>th</sup> day of pregnancy).

Although these Qur’anic phases do not correspond to biological facts about human embryogenesis (it especially does not correspond to organogenesis), in terms of Islamic jurisprudence they are essential, and these stages (and the original Qur’anic terms above) are used in legal judgment.

Here, the second crucial boundary of human foetus<sup>16</sup> development appears – so-called “ensoulment”, the breathing of the soul (ar. *rūh*) into the foetus. Through ensoulment, two important aspects of the human being are merged, *nafs* and *rūh*. By the breathing in of the soul, the development of the human being is completed. Before ensoulment we have basic human life; after ensoulment we have a full-fledged human being with more complete human rights. The boundary of ensoulment is important in legal practice, especially for the possibility of a therapeutic abortion (which is addressed below). Ensoulment occurs on the 120<sup>th</sup> day (i.e. approximately the 4<sup>th</sup> month of pregnancy, or 19 weeks of gestational age) of prenatal development according to the Qur’anic tradition.<sup>17</sup> From a practical point of view, ensoulment is associated with the movements of the child, i.e. ensoulment occurs when the mother feels the first movements of her child (usually in the 4<sup>th</sup> to 5<sup>th</sup> months of pregnancy).

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omitted phase 0, called “quintessence of clay”, and the last phase, called “development of another creature”; the basis of the Qur’anic embryogenesis is the same.

16 Embryo – early stage until the 9<sup>th</sup> week of pregnancy. Foetus – from the 9<sup>th</sup> week until birth.

17 Sura al-Hijr 15:28-29: “I am going to create a man (Adam) from sounding clay of altered black smooth mud. So, when I have fashioned him completely and breathed into him (Adam) the soul which I created for him ...” (M. T. Al-Hilali – M. M. Khan, *Interpretation of the Meanings...*, 375). Similarly Q. 32:9, 38:72, 17:85.

### Termination of early life – abortion

The Qur'an speaks clearly and comprehensibly: it is forbidden to kill human offspring.<sup>18</sup> Nevertheless, this refers to the killing of a child after birth. Apart from this, the *ḥadīth* of the Prophet is preserved, which speaks of the Prophet's solution for an accidentally induced miscarriage.<sup>19</sup> We have no other support in the main sources of Islamic law that deals with real abortion, i.e. deliberate interruption of pregnancy.<sup>20</sup>

Based on previous facts about the beginning of human life, however, the conclusion is clear and all Shi'ī clergymen and lawyers agree on it: abortion (as a deliberate interruption of an ongoing pregnancy with the result of foetal death)<sup>21</sup> is forbidden.<sup>22</sup> Ayatollah Vahid Khorasani is slightly more specific when he adds that this basic premise applies when both parents or just one of them are Muslims. If they are non-Muslim, it is better to avoid abortion as well.<sup>23</sup> This is a primary and general legal decision (ar. *aḥkām awwaliyya*). Under situational law, i.e. in a specific legal situation, so-called "secondary law" (ar. *aḥkām thānawiyya*), there is an exception in Shi'ī jurisprudence according to which abortion is permitted. These are so-called therapeutic abortions, meaning the termination of

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18 Q. 6:137 and 151, 17:31, 60:12, 6:40; verses against the killing of female offspring: Q. 81:8-9, 16:59.

19 For pre-modern debates, see Marion Holmes Katz, "The Problem of Abortion in Classical Sunni fiqh", in: Jonathan E. Brockopp (ed.), *Islamic Ethics of Life: Abortion, War, and Euthanasia*, Columbia: University of South Carolina Press 2003, 25-50: 27.

20 For the overview of Sunni and Shi'ī sources, see A. Sachedina, *Islamic Biomedical Ethics...*, 129-133, for only Sunni sources see Mohammed Ali Al-Bar – Hassan Chamsi-Pasha, *Contemporary Bioethics: Islamic Perspective*, London: Springer 2015, 164-167.

21 This article does not deal with a spontaneous miscarriage that cannot be influenced. It does not deal with the controlled removal of the foetus and its further artificial maintenance in the incubator (this medical possibility is allowed); see for example Ali Khamenei, "Seqt-e janīn" [online], <<http://farsi.khamenei.ir/treatise-content?id=113#1266>>, [13 February 2019].

22 The situation in Sunni *fiqh* is different. The range of opinions on the permissibility of abortion prior to ensoulment (i.e. during the first 120 days of pregnancy) varies greatly across a broad spectrum: an absolute ban on abortion, permission for serious health reasons (very similar to Shi'ī), and a very surprising abortion permit for no serious reason up to day 40/80/120 of pregnancy as well. For an overview of all Sunni attitudes, see M. Elahian – N. Fattahi – M. Khademi, "Therapeutic Abortion...", 72-74, or M. H. Katz, "The Problem of Abortion...", 31-32, or D. Atighetchi, *Islamic Bioethics...*, 95-99. There is absolute consensus that abortion after ensoulment is not permitted (except due to a threat to the mother's life) in Sunni *fiqh*.

23 Vahid Khorasani, "Aḥkām-e seqt-e janīn" [online], <<http://wahidkhorasani.com>>, 1386 (2008) [15 February 2019].



pregnancy for health reasons.<sup>24</sup> Let us therefore look at these special legal situations in detail and present the views of important clerics on them.

### Therapeutic abortions

A therapeutic abortion (i.e. the interruption of an ongoing pregnancy for medical reasons of the child or mother) is inherently the only legal reason for abortion in Iranian Shi'i jurisprudence. From the point of view of medical ethics, there are different relevant medical situations that are explained below.

Let us start with cases in which the health complications of the mother or child (or both) are so serious that they can result in the death of at least one of the participants. In these cases, the legality of abortion is usually determined as follows:

- There is a certainty that both the mother and her child will die – in this case nothing can be done, and an abortion cannot change the situation, abortion is prohibited.
- There is a concern that the mother or her child might die – it is not a certainty, and so the doctors attempt to save both lives.
- There is a certainty of the mother's death and concern about the child's death – the mother's death is inevitable, doctors try to save the child; abortion is prohibited.
- There is a certainty of the child's death and concern about the mother's death – the child's death is inevitable, doctors try to save the mother; abortion is permissible.
- There is the choice: mother or child – doctors are worried for the lives of both; they do not know which, but only one of them can survive. This is the most complicated situation; here it has to be decided which life is more important. Most of the Shi'i clerics agree that the mother's life is of greater value, because she can have another baby. The mother's life is a priority, and therefore abortion is permissible.<sup>25</sup>

The legal decision depends on the phase of pregnancy as well:

- The pregnancy is in the phase before ensoulment (120<sup>th</sup> day of pregnancy) – most clerics agree that if the abortion is the only way to save mother's life, then it is allowed.<sup>26</sup>

24 A poor economic situation is not a justified reason for an abortion; there is full consensus on this.

25 A. A. Vashian, personal consultation, 5 February 2019.

26 Both Sunni and Shi'i jurists agree on this point.

- The pregnancy is in the phase after ensoulment – disparity in views and conditions grows here, because of the conflict between the necessity to protect human life and the prohibition of killing a human being.<sup>27</sup> For example, ayatollah Sistani says that therapeutic abortion in this phase is prohibited<sup>28</sup> and some others agree.<sup>29</sup> The key argument is that we have two people and two souls; we cannot prefer one over another. Other *marāji'* hold the opposite view – according to them the mother herself has the right to defend her life, which is threatened. It means the abortion even at this stage is allowed and ayatollah Khu'i<sup>30</sup> explicitly used the word “defence” in such a case.<sup>31</sup> Another group of clergy argues that if the mother dies, then the foetus will die automatically as well.<sup>32</sup> That is why ayatollah Khamenei says that if the continuation of pregnancy threatens the mother's life and consequently also the foetus (which cannot be saved), then the life of the mother must be preferred even in the stage after ensoulment.<sup>33</sup> Ayatollahs Sanei and Sadeq Rouhani agree that if the presence of a foetus is a source of health complications and only abortion can save the mother's life, it is possible to perform the abortion even after ensoulment.<sup>34</sup> Sanei concurrently asks for as much evidence as possible and the most accurate medical prognosis so that it can be decided in this way.<sup>35</sup>

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27 A. A. Vashian, personal consultation, 5 February 2019.

28 Ali Sistani, “Seqt-e janīn” [online], <<https://www.sistani.org/persian/qa/0934/>>, [16 February 2019].

29 For example, Lotfollah Safi Golpaygani, “Seqt-e janīn” [online], <[saafi.com/book/5938](http://saafi.com/book/5938)>, [16 February 2019].

30 Ayatollah Khu'i was one of the most influential Shi'i *marja' at-taqlīd*, and died in 1992.

31 Yousef Sanei, “Goftegū bā marja' 'ālīqadr tashā'o ḥadrat-e āyatollāh Jūsuf Šāne'ī” [online], <<http://saanei.xyz/?view=01,02,04,64,260>>, 4 Mehr 1387 (25 September 2008) [13 February 2019]. A. Alavi Qazvini, personal consultation, 7 February 2019.

32 If the foetus could be removed and artificially kept alive, it would be another case (no abortion).

33 A. Khamenei, “Seqt-e janīn...”.

34 Y. Sanei, “Goftegū bā marja'...”; Sadeq Rouhani, “Seqt-e janīn” [online], <<http://www.rohani.ir/fa/srch?%u0633%u0642%u0637%20%u062C%u0646%u06CC%u0646&type=istefa>>, 1397 (2019) [14 February 2019]. Ayatollah Makarem Shirazi expresses his view very similarly (Naser Makarem Shirazi, “Seqt-e janīn” [online], <<https://makarem.ir/main.aspx?reader=1&pid=61769&lid=0&mid=1057&catid=0>>, [17 February 2019]).

35 Y. Sanei, “Goftegū bā marja'...”. Sunni jurists mostly agree with performing abortions after ensoulment if the pregnancy is demonstrably threatening the mother's life (M. Elahian – N. Fattahi – M. Khademi, “Therapeutic Abortion...”, 80).

Another group of legal circumstances within the rubric of therapeutic abortions deals with maternal health complications due to pregnancy. Most clerics agree that abortion is allowed only in very serious cases such as illnesses that need to be treated immediately and especially if this treatment might lead to foetal deformity. This consent to abortion is issued only before ensoulment.<sup>36</sup> AIDS, anaesthesia during pregnancy or a series of X-ray irradiations etc. are not considered to be sufficiently serious illnesses; pregnancy contraindicating medical treatment is also not a sufficient reason for therapeutic abortion.<sup>37</sup> Severe pregnancy weakness, nausea etc. also naturally cannot be reasons for abortion.<sup>38</sup> Ayatollah Sistani is an exception to this view – he insists that no illness, severe suffering or pain gives the mother the right to an abortion (i.e. only in cases of a threat to her life).<sup>39</sup>

The next group of legal cases concerns various medical problems in the foetus, both mental and physical.<sup>40</sup> According to the ayatollah Khamenei, it is possible to perform a therapeutic abortion in the phase before ensoulment if the child unambiguously suffers from a disease that will cause life-long health problems (such as diabetes, haemophilia and phenylketonuria).<sup>41</sup> Most other scholars agree with this view and examples of serious damage include Down syndrome,<sup>42</sup> abnormalities in development,<sup>43</sup> illnesses with serious social consequences (retardation, blindness) or diseases for which there is no treatment. If the diagnosis is ambiguous, if it is difficult to confirm the diagnoses or if the disability is not really serious, then abortion is not allowed.<sup>44</sup> Ayatollah Sistani holds a different attitude again; he claims that even a very serious medical complication of the foetus (i.e. when it is obvious that the child will die near birth) gives no right for an abortion. In his words, a defect of the foetus

36 A. Sistani, “Seqt-e janīn...”.

37 *Ibid.*; L. Safi Golpaygani, “Seqt-e janīn...”; A. Khamenei, “Seqt-e janīn...”.

38 A. Khamenei, “Seqt-e janīn...”.

39 A. Sistani, “Seqt-e janīn...”. Some *madhabs* or jurists of Sunni jurisprudence allow such abortions without defining illness or threat level (A. Al-Bar – H. Chamsi-Pasha, *Contemporary Bioethics...*, 166).

40 Prevention is the main recommendation of Shi‘i jurisprudence in this issue. Therefore, genetic testing is mandatory before marriage which should reveal any potential problems. If serious concerns arise the marriage is not recommended or embryo donation is recommended.

41 A. Khamenei, “Seqt-e janīn...”.

42 Y. Sanei, “Goftegū bā marja’...”.

43 Muhammad Ali Gerami Qomi, “Seqt-e janīn” [online], <<http://www.ayat-gerami.ir/data.asp?L=4&id=3185>>, 1397 (2019) [17 February 2019]; N. Makarem Shirazi, “Seqt-e janīn...”.

44 For example, the possibility of HIV transmission to the child; see L. Safi Golpaygani, “Seqt-e janīn...”.

does not allow anyone to abort it.<sup>45</sup> If the foetus has undergone ensoulment, abortion is prohibited even in cases of the most serious diagnoses and disorders of the foetus' development. Here there is full consensus among the *marāji'*; ayatollah Sadeq Rouhani explicitly states that an abortion after ensoulment under such circumstances would be "the murder of a human".<sup>46</sup>

A special case is the discontinuation of ongoing pregnancy in the context of treatment of infertility and the use of assisted reproduction technologies. Multiple pregnancies often occur (due to the use of up to 5 or 6 embryos). Then a therapeutic reduction is necessary, as the chance of survival of at least some embryos needs to be increased. Only Ali Khamenei gives his opinion on this case and permits such reduction with the highest degree of caution (in order not to threaten all the embryos).<sup>47</sup>

Another case that deserves special attention is the possibility of abortion for a pregnancy resulting from sexual offense (rape).<sup>48</sup> In this case, the pregnant woman often refuses to carry the foetus because the pregnancy itself reminds her of the act of violence and because such pregnancy is socially problematic (especially for single or divorced women).<sup>49</sup> There is no consensus among clerics whether abortion is permitted or not. Ali Khamenei insists that abortion is not allowed in this case.<sup>50</sup> Other clerics incline to the view that the situation itself causes severe psychological harm to the woman (the same as severe physical harm) and therefore the abortion should be allowed, of course before ensoulment.<sup>51</sup> For example, ayatollah Haeri argues that if a woman is pregnant because of the crime of

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45 A. Sistani, "Seqt-e janīn...". At the same time, he admits this possibility as a reality, because he states simultaneously that if the abortion occurs, a religious fine has to be paid.

46 S. Rouhani, "Seqt-e janīn...". Sunni *fiqh* has basically the same attitude concerning malformation of the child. Nevertheless, some Sunni jurists allow this type of abortion only up to the first 40 days after conception (a completely insufficient time to confirm foetal malformations) or do not allow termination of pregnancy at any stage (Mohammed A. Albar, "Induced Abortion from an Islamic Perspective: Is It Criminal or Just Elective?", *Journal of Family and Community Medicine* 8/3, 2001, 25-35).

47 A. Khamenei, "Seqt-e janīn...".

48 For more details, see Hiroo Abravesh, "Seqt-e janīn dar bārdārī nāshī az jarāyem-e jensī dār partōve qānūn-e seqt-e darmānī" [online], *Medical Law Journal* 5/17, 2011, <<http://ijmedicallaw.ir/article-1-498-fa.html>>, [5 February 2019], 141-171.

49 Post-coital contraception is usually recommended to minimise the risk of such a pregnancy.

50 A. Khamenei, "Seqt-e janīn...".

51 One of the principles of Islamic Shi'i jurisprudence is the principle of "no hardship" and mental hardship is deemed just as severe as physical hardship, so abortion should be allowed in such cases (A. Alavi Qazvini, personal consultation, 7 February 2019).

rape and the result is serious social suffering, there is no sin on her when she asks for an abortion before ensoulment.<sup>52</sup>

The legal arguments used for permitting therapeutic abortions are based on the general principles of Shi'i jurisprudence (*qawā'id fiqhiyya*).<sup>53</sup> Primarily, the principle of "no harm" (*lā ḍarār wa lā ḍirār fī Islām*) is used here,<sup>54</sup> which is a very common principle when dealing with medical situations in which a life is threatened. This principle has multiple meanings, and the rule used here states: "wherever necessary, decisions that occasion the least harm are to be given priority over decisions that occasion greater harm".<sup>55</sup> The solution is that an abortion (even after the ensoulment of the foetus) is a lesser evil compared to the loss of the mother's life.<sup>56</sup> As mentioned above, in the situation of a threat to life, the mother can abort her child even after its ensoulment because it is self-defence, and the principle of "legitimate defence" is mentioned by some jurists. The principle of "preference of the primary" might be added here in cases of pregnancy

52 Kazim Haeri, "Musā'il fi-l-ḥamle wa-l-talqīḥ wa-l-ijhād" [online], <<http://www.alhaeri.org/main.php?p=qa&cid=64#qa>>, [15 February 2019]. Ayatollah Kazim Haeri is the Iraqi cleric who does not fit into this article methodologically. Nevertheless, only very few clerics express their view on the issue of abortion due to rape. Therefore, his interesting opinion is presented here. There is the same uncertainty about the legality of abortion in the case of rape in Sunni *fiqh* (D. Atighetchi, *Islamic Bioethics...*, 115-119).

53 Shi'i jurists search for a legal answer within the original sources of law: first – the Qur'an, the Sunna, consensus (*ijmā'*) and intellectual reasoning (*'aql*). If there is no reference to the legal problem, the jurists use the general principles of jurisprudence. For more about the Shi'i system of jurisprudence, see Alireza Hoda'i, *An Introduction to Methodology of Islamic Jurisprudence (Uṣūl al-Fiqh): A Shiite Approach*, Qum: Al-Mustafa International Translation and Publication Center 2014, or Mohammad Ali Shomali, *Principles of Jurisprudence: An Introduction to Methodology of Fiqh*, London: Centre for Cultural and Ethical Studies 2006.

54 M. A. Shomali, "Islamic Bioethics: A General Scheme...".

55 Ayatollah Sayyid Fadhel Hosseini Milani, *Thirty Principles of Islamic Jurisprudence*, Qum: Ansariyan 2011, 39.

56 The same principle of a "lesser evil", which is included in two legal maxims called "injury must be removed" and "hardship begets facility" and states that necessity overrides prohibition, is often used in Sunni *fiqh* when dealing with the same legal problem. One more legal maxim is also used in Sunni *fiqh* in the same situation – "deeds are judged by intentions", which states that the intention of therapeutic abortion is to protect the life of the mother (which has higher priority) (see M. A. Al-Bar – H. Chamsi-Pasha, *Contemporary Bioethics...*, 119-127; D. Atighetchi, *Islamic Bioethics...*, 98; Donna Lee Bowen, "Abortion, Islam, and the 1994 Cairo Population Conference", *International Journal of Middle East Studies* 29/2, 1997, 161-184: 164-165; Abdulaziz F. Alkaabba, "Abortion for a Young Single Female: A Cultural and Islamic Perspective", *Journal of Clinical Research and Bioethics* 7/3, 2016, 1-4: 2, or K. M. Hedayat – P. Shooshtarizadeh – M. Raza, "Therapeutic Abortion in Islam...").

prior to ensoulment, when the mother's life as an already complete human being has higher priority than the foetus in its early stages.<sup>57</sup>

The second principle frequently used in medical *fiqh* is the principle of "eliminating hardship" (*lā ḥaraj*),<sup>58</sup> the aim of which is to protect a person from any kind of distress, harm or loss.<sup>59</sup> Malformed children usually die soon after birth, and the whole situation only causes much pain and suffering to the mother; if such a malformed child lives longer, the special care represents a huge burden on the family and society. The hardship caused by these severe illnesses is regarded as being a much more serious problem than the termination of pregnancy before ensoulment.<sup>60</sup> The principle of "public interest/benefit" (*maṣlaḥa*) is also sometimes mentioned in these cases.<sup>61</sup> Nevertheless, the majority of Shi'i jurists do not recognise the principle of "public interest" as the accepted source of Shi'i *fiqh*.<sup>62</sup>

As shown in the analysis above, the majority of Iranian Shi'i *marāji'* is in consensus regarding therapeutic abortions. Whether traditionalists or reformists, pro-government supporters or critics of the Iranian regime, their affiliation does not play any role in dealing with this issue. Ayatollah Sistani is one that is clearly opposed to therapeutic abortion, and accepts it only when the mother's life is clearly threatened. It should also be pointed out that Shi'i clerics are more strict on abortion compared to the Sunni view; we cannot find anyone who would allow abortion without serious reason in the period prior to ensoulment, and some conditions for allowing therapeutic abortion are tougher as well (e.g. problems threatening the mother's health).

As stated in the introduction, when there is consensus of clergy, the opinion might be reflected in official state legislation. The Iranian parlia-

57 M. Elahian – N. Fattahi – M. Khademi, "Therapeutic Abortion...", 77-78.

58 *Ibid.*, 77.

59 A. S. F. Hosseini Milani, *Thirty Principles...*, 45-49.

60 The principle of "no hardship" is used in Sunni argumentation in the same way. For more arguments connected to this principle, see Abdulrahman Al-Matary – Jaffar Ali, "Controversies and Considerations Regarding the Termination of Pregnancy for Foetal Anomalies in Islam", *BMC Medical Ethics* 15/10, 2014, <<https://bmcomedethics.biomedcentral.com/articles/10.1186/1472-6939-15-10>>, [4 July 2019].

61 Seyyed Mohammad Taghi Ayatollahi, "Islamic Medical Jurisprudence, Part I: General Aspects and Principles" [online], *Medical Journal of the Islamic Republic of Iran* 7/2, 1993, 123-131, <<http://mjiri.iums.ac.ir/article-1-1444-en.pdf>>, [3 July 2019]. In Sunni *fiqh*, there is the principle of "public interest", which is used very frequently in contemporary *fiqh* and especially in bioethics, as well as the principle of "necessity", which allows for unlawful acts to become permissible if there is a serious necessity.

62 A. S. F. Hosseini Milani, *Thirty Principles...*, 7. In contrast to Shi'i *fiqh*, Sunni *fiqh* mostly recognizes *maṣlaḥa* as a standard principle.

ment approved the so-called Therapeutic Abortion Act in 2005.<sup>63</sup> Abortion is allowed in the first 4 months of pregnancy in cases of severe mental and physical damage of the child or mother after a clear diagnosis is made by three experts and after confirmation by the Legal Medicine Organisation.<sup>64</sup>

### The price of abortion

As already mentioned above, the human embryo or foetus has certain human rights from the moment of its implantation. If a termination of pregnancy is carried out intentionally, a fine must be paid according to religious law – so called “blood money” (ar. *diya*).<sup>65</sup> For therapeutic abortions, the situation is slightly more complicated. Most clergymen agree that this religious fine must be paid for all the medical reasons mentioned above.<sup>66</sup> In some exceptional cases, the view is that *diya* is not paid if the abortion is conducted for severe medical reasons (e.g. the life of the mother is at risk).<sup>67</sup> Some clerics say that for therapeutic abortions *diya* payment is the responsibility of the mother;<sup>68</sup> according to others, the individual responsible is the one who performed the abortion, i.e. the mother if using the abortion pill, or the doctor if a classical abortion was performed. If the mother is responsible, the fine is paid to the father of the child. If it is another person, *diya* is paid to the father and mother.<sup>69</sup> If both parents are responsible for the decision (they cannot pay each other), they have to pay this religious fine to the state.<sup>70</sup> *Diya* should be paid within one year.<sup>71</sup>

63 The majority position of Sunni clerics was officially confirmed as well in the fatwa issued by the Islamic *Fiqh* Committee of the Muslim World League in Makka, held on the 10<sup>th</sup> to 17<sup>th</sup> of February 1990. For the list of confirmed lethal foetal anomalies, see Saleh Al-Alaiyan, “An Islamic Legal Perspective on the Status of the Malformed Fetus and the Previae Infant”, *Journal of Palliative Care and Medicine* 4/174, 2014, 1-4: 3.

64 For a list of these diagnoses see “Padide-ye seqt-e janīn dar Irān wa fatawā-ye marāḡe taqlīd” [online], *Shia News World Service*, <<http://www.shia-news.com/fa/news/>>, 9 Dey 1393 (30 December 2014) [15 February 2019]. For more about the whole trend of “decriminalization of abortion” in Iran, see Mahmoud Abbasi – Ehsan Shamsi-Gooshki – Neda Allahbedashti, “Abortion in Iranian Legal System: A Review”, *Iranian Journal of Allergy, Asthma, and Immunology* 13/1, 2014, 71-84.

65 For example, if someone hurts a pregnant woman and she has a miscarriage as a result of it. If the embryo or foetus was miscarried non-intentionally, the fine is not paid.

66 A. Khamenei, “Seqt-e janīn...”; V. Khorasani, “Aḡkām-e seqt-e janīn...”, and many others.

67 A. A. Vashian, personal consultation, 5 February 2019.

68 A. Khamenei, “Seqt-e janīn...”.

69 V. Khorasani, “Aḡkām-e seqt-e janīn...”.

70 A. A. Vashian, personal consultation, 5 February 2019.

71 L. Safi Golpaygani, “Seqt-e janīn...”. In addition to this fine, Safi Golpaygani recommends repentance in the form of a two-month fasting period and feeding 60 poor people.

The amount of *diya* depends on the level of embryonic development: in the phase of *nutfa* it is a fine of 20 dinars; in the phase of *'alaqa* 40 dinars; and in the phase of *mudgha* 60 dinars. The next stages are not determined exactly – sometimes it is said that the stage of *'izām* shall cost 80 dinars and all body organs 100 dinars. The *diya* for the child after ensoulment is calculated at the same level as for an adult person, i.e. 1000 dinars for a male foetus, 500 dinars for a female foetus. There is full consensus among Shi'ī clerics about the amount of *diya*.<sup>72</sup>

### End of human life – death

The boundaries of the end of human life (death) must be clearly defined in the law as well. Rights and duties are bound to the living person, and the right to inherit emerges after death. From the perspective of Islamic philosophy, the end of human life is the moment when one aspect of the human being separates from the other (separation of *nafs* and *rūh*).<sup>73</sup> Nevertheless, questions remain concerning how to define this moment in terms of recognizable symptoms. For example, from a common-sense viewpoint, it is the moment when a person stops breathing, his/her heart ceases to beat, and he/she becomes blue and cold and the bodily fluids leave the body.<sup>74</sup>

From the perspective of medicine and subsequently from the view of Islamic jurisprudence, there are few specific cases where an expert decision is needed to determine whether a person is dead or alive. One such specific situation is a patient with acute brain damage (traumatic or non-traumatic); specifically, we are speaking about a patient in a coma, in a vegetative state or in a state of brain death.<sup>75</sup> The coma and the vegetative

72 Compare this to the Sunni system of *diya* penalty that distinguishes whether the aborted child is born alive or stillborn – for the child after ensoulment born alive the full *diya* should be paid; for the child after ensoulment stillborn only *ghurra* (1/20 or 1/10 of the *diya*). Some *madhabs* recognize different stages of pregnancy before ensoulment and determine the payment of *ghurra* by these stages; other *madhabs* do not require payment of blood money for the foetus before ensoulment (D. Atighetchi, *Islamic Bioethics...*, 101-103).

73 A. Alebooyeh, personal consultation, 13 February 2019. For more about death in the Qur'an, see A. Sachedina, *Islamic Biomedical Ethics...*, 146-149.

74 Death is a gradual process, because even if the heart does not beat, it is still sometimes possible to resuscitate the patient. This, however, has minimal impact on legal judgment; after a maximum of 10 minutes it is clear whether the person is alive or dead.

75 The patient goes into a coma after suffering acute brain damage. When coma lasts longer than a month, the patient usually falls into more serious states: into a vegetative state or into a brain death. We will not deal with minor differences between different types of brain disabilities such as: chronic coma, Locked-in syndrome, persistent vegetative state etc., as they do not affect legal decisions.



state (although distinct from the view of medicine) have common characteristics for the legal framework – the patient is unconscious, has to be fed artificially, suffers from permanent incontinence, breathes independently and his/her heart beats without any support, his/her brain works partially, and he/she has involuntary, vegetative movements. It is still possible for the patient to attain consciousness and return from the stage of coma; this possibility, however, decreases in the various types of vegetative states. Brain death is significantly different; both hemispheres of the brain are affected, all brain functions (including in the brain stem) have ceased, and the brain does not transmit any signals to other organs such as the heart. A brain-dead patient would die without life support devices. This stage of the patient is irreversible, i.e. no person is known to have recovered from brain death.

All Shi‘i *marāji‘* fully agree that the person in a coma and vegetative state is still a living person because his/her heart and brain (partially) still function. Such a person is in a different state of life but is definitely not dead. Brain death raises more debate. The essential and fundamental question concerns whether human life is linked to brain activity or to heart activity. One group of clerics (headed by Makarem Shirazi) claims that human death is associated with brain death (i.e. the disappearance of all brain functions),<sup>76</sup> and therefore a brain-dead person is dead. Brain death is assumed to be a new kind of death.<sup>77</sup> Second group of clerics (Sistani, Gerami Qomi, Vahid Khorasani) insists that the heart of the brain-dead patient is still beating (albeit with technical support) and therefore we cannot consider the person to be dead, i.e. he/she is still a living person.<sup>78</sup>

76 Some Sunni clerics take the same position, arguing that death is determined by the complete loss of any electrical activity in the brain. According to others, brain death is determined by the death of the “higher brain” only (A. Sachedina, *Islamic Biomedical Ethics...*, 158). Muslim jurisprudence is not consistent in the perception of the term “brain death”. For the history of discussion in different Muslim countries, see A. Al-Bar – H. Chamsi-Pasha, *Contemporary Bioethics...*, 234-235.

77 H. Habibi Tabar, personal consultation, 12 February 2019. Naser Makarem Shirazi, “Ehdā’-e ‘oʻzv che ḥukmī dārad” [online], <<http://hadana.ir>>, 1395 (2016) [4 March 2019].

78 This view is taken, for example, by ayatollah Gerami Qomi, as he explained that we can never be sure that a person in a state of brain death cannot live again, “a miracle might happen and we can never be sure” (Gerami Qomi, personal consultation, 9 November 2016). H. Habibi Tabar, personal consultation, 12 February 2019; A. Alavi Qazvini, personal consultation, 7 February 2019. Analogical discussions on brain vs. heart can be found in Sunni jurisprudence, but the majority assumes brain death to be the key determinant of death (Hassan Chamsi-Pasha – Mohammed Al Albar, “Do Not Resuscitate, Brain Death, and Organ Transplantation: Islamic Perspective”, *Avicenna Journal of Medicine* 7/2, 2017, 35-45). The discussion continues; see Mohamed Y. Rady – Joseph L. Verheijde, “Brain-Dead Patients Are Not Cadavers: The Need to Revise the Definition of Death in Muslim Communities”, *HEC*

## Euthanasia and organ donation after acute brain damage

The borderline of human death after acute brain damage has the following important and particular legal consequences – the question of the possibility of disconnecting the patient from medical devices (euthanasia) and the question of the possibility of organ donations.<sup>79</sup>

Euthanasia is strictly forbidden from the viewpoint of Shi'ī jurisprudence and is considered to be murder. This prohibition includes all of types of euthanasia, including disconnecting the patient from the necessary medical devices (inactive or passive euthanasia).<sup>80</sup> Euthanasia is not allowed even in the case of severe suffering due to illness.<sup>81</sup> All Shi'ī clergy agree on this attitude. The main argument is the fundamental principle of Islamic law – the necessity of saving human life,<sup>82</sup> followed by secondary concerns about the possibility of the abuse of such a situation. Based on the considerations described above, it is clear that if a person is in a coma or a vegetative state, any disconnection from life support devices or failure to provide adequate care (food, medication, etc.) is strictly prohibited. All possible care should be given to the individual. Of course, any kind of organ donation is not allowed.

The situation is more complicated in cases of brain-dead patients. For example, ayatollahs Gerami Qomi and ayatollah Sistani insist that such a person is alive (because his/her heart is still beating). Therefore, we cannot

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*Forum* 25/1, 2013, 25-45; Ahmet Bedir – Şahin Aksoy, “Brain Death Revisited: It Is Not ‘Complete Death’ according to Islamic Sources”, *Journal of Medical Ethics* 37/5, 2011, 290-294; Mohammed Ghaly, “Religio-Ethical Discussions on Organ Donation among Muslims in Europe: An Example of Transnational Islamic Bioethics”, *Medicine, Health Care and Philosophy* 15/2, 2012, 207-220, or Mohammed Y. Rady – Joseph L. Verheijde, “A Response to the Legitimacy of Brain Death in Islam”, *Journal of Religion and Health* 55, 2016, 1198-1205.

- 79 Organ donation for transplantation purposes is done in several ways: from living donors, from dead donors and from brain-dead donors. Donation from brain-dead people is essential; it is the only way to obtain vital organs in best condition.
- 80 According to some Sunni jurists (confirmed by several *fatāwā*), active euthanasia is forbidden, while passive euthanasia can be permissible under some conditions; according to others, any kind of euthanasia is against the principles of Islam and strictly prohibited (D. Atighetchi, *Islamic Bioethics...*, 286-290).
- 81 For example, Ali Khamenei clearly states that it is prohibited to allow someone to “die well”, even those without any hope and experiencing severe suffering; doctors thus have to reject such requests for euthanasia. Ali Khamenei, “Ḥukm-e shar’ī otānāzī motābeq bā fatwā-ye maqām-e mo’zzam-e rahbarī” [online], <<https://www.yjc.ir/fa/news/5754333/>>, 6 Shahrivar 1395 (27 August 2016) [3 March 2019], or id., “Ḥukm-e otānāzī” [online], <<http://www.leader.ir/fa/book/64/>>, [3 March 2019].
- 82 Based on Qur’an, sura Āl-‘Imrān 3: 145: “And no person can ever die except by Allah’s Leave and at an appointed term” (M. T. Al-Hilali – M. M. Khan, *Interpretation of the Meanings...*, 127).

disconnect him/her from the devices and we cannot use his/her body for organ donations.<sup>83</sup> However, other contemporary Iranian jurists (for example Makarem Shirazi)<sup>84</sup> are of the opinion that a brain-dead patient is dead (because the activity of the brain is crucial), so we can disconnect this person from support devices (i.e. this is not euthanasia), and it is also possible to use the body for organ donations (under certain conditions).<sup>85</sup>

The key legal argument of Shi‘i *marāji‘* for recognizing brain death as decisive for human death lies in the use of one of the main sources of Shi‘i jurisprudence – intellectual reasoning (ar. *‘aql*). The intellect/reason encourages clerics to follow medical science that has identified brain death with biological death. The most common *fiqh* principles used while arguing the legality of organ donation from brain-dead patients is again the principle of “no harm” (*lā ḍarār wa lā ḍirār fī Islām*).<sup>86</sup> The acceptance of organs from brain-dead patients is the only chance to survive for some very seriously ill patients; there is no other solution for them than to die.

The current Iranian Shi‘i *marāji‘* are not in consensus that brain death is real death and that subsequent organ donation is allowed; the political affiliation of these clerics again plays no role in their assessment of this issue. Nevertheless, the Iranian Parliament confirmed the official Brain Death and Organ Transplantation Act in 2000 and implemented it in 2002. The traditionalist clerics (Sistani, Vahid Khorasani and Qerami Qomi) reject this attitude and insist on the heart’s activity as determinative. The position of Shi‘i jurists concerning brain death, organ donation and euthanasia is slightly more stringent than that of Sunnis, as they only recognize the absolute death of the brain stem as a determining factor and all of them clearly reject both active and passive forms of euthanasia.

## Conclusion

Determining the beginning of human life is very important, as it relates to the moral entity of the implanted embryo and foetus and to the precise definition of its protection. According to Sunni jurisprudence, the moral-legal status of the foetus remains unresolved; the foetus in the mother’s

83 H. Habibi Tabar, personal consultation, 12 February 2019; Gerami Qomi, personal consultation, 9 November 2016; Ali Sistani, “Ehdā’-e ‘oẓv” [online], <<https://www.sistani.org/persian/qa/search/9922/>>, [9 February 2019].

84 N. Makarem Shirazi, “Ehdā’-e ‘oẓv che ḥukmī dārad...”.

85 The family is about to confirm consent to organ donation.

86 Sunni *fiqh* uses the same principle of “no harm” and completes it with the principle of “lesser evil” (Mohammed Ali Albar, “Islamic Ethics of Organ Transplantation and Brain Death”, *Saudi Journal of Kidney Diseases and Transplantation* 7/2, 1996, 109-114, or M. Ghaly, “Religio-Ethical Discussions on Organ Donation...”).

womb “has no independent claim to life”<sup>87</sup> because it is not separately viable and has only “limited rights”,<sup>88</sup> which are undefined and unexplained. Some Sunni jurists think that the legal status of the human being is defined by the “ability to enter into relationships ... by rights and obligations, with others”<sup>89</sup> and it is clear that the foetus is not able to realize this fully. Moreover, according to the teachings of Islam (for both Sunni and Shi'i) the foetus without a soul will not be resurrected and there is nothing clear about its destiny. If such a foetus is miscarried, it should only be simply buried, should not be named and no funeral prayer should be offered. This vague moral-legal status of a foetus prior to ensoulment results in differing opinions about the possibility of abortion in Sunni *fiqh*, including the possibility to terminate early pregnancy without any serious medical reason.<sup>90</sup> Equally unclear in Sunni *fiqh* is the payment of blood money in this period.

In comparison to Sunnis, Shi'i jurists have more consistent views on the moral-legal status of the foetus before ensoulment. Although there is no precise definition of the beginning of human life, and an implanted embryo and early foetus are obviously completely dependent and do not have a human shape at all, their potential to become a full-fledged human being is recognized and presents a fundamental point in this respect. Thus, there is clear consensus that the implanted embryo must be respected and receives first protection immediately after implantation into the uterine wall.<sup>91</sup> This is the main argument for Shi'i clerics to agree that abortion is prohibited in all stages of pregnancy (except for therapeutic abortions).

The rights of the foetus are not very clear in either branch of Islam. Based on all the evidence and discussions, we can generally summarize that the implanted embryo/foetus has:

- 1) The relative right to live. According to Islamic penal law, a pregnant woman cannot be executed until she gives birth and the newborn is fed by a wet nurse (the rule is valid throughout the whole pregnancy including the months before ensoulment). The right to live increases during the pregnancy; ensoulment is an essential point. The increase in the value of monetary compensation for abortion corresponds to this growth of the foetus's value and the growth of its rights. Protection of the foetus in the period before ensoulment is stronger in Shi'i Islam.

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87 A. Sachedina, *Islamic Biomedical Ethics...*, 125-126.

88 A. Al-Matary – J. Ali, “Controversies and Considerations...”.

89 M. H. Katz, “The Problem of Abortion...”, 38.

90 For example, A. Sachedina, *Islamic Biomedical Ethics...*, 140.

91 The status of the embryo prior to implantation (e.g. in the context of assisted reproduction technologies or embryonic stem cell research) differs from the status of the implanted embryo and foetus.

Most Sunni and Shi‘i clerics agree that the foetus’ right to live is less of a priority than the right to life of its mother throughout the whole pregnancy.

- 2) The right to health. For example, pregnant women are relieved of some religious duties that could potentially endanger the healthy development of the child (e.g. fasting). This rule is valid throughout the whole pregnancy.
- 3) The economic rights. The foetus has full rights of inheritance and can be the subject of a last will or testament if born alive. This applies to the foetus at any stage, as it has to pass through ensoulment anyway.

The next point of the conclusion concerns the overall attitude of Shi‘i Islamic bioethics. Islamic bioethics is supposed to include the rulings of Islamic jurisprudence and prescriptions of Islamic ethics.<sup>92</sup> Nevertheless, in assessing the boundaries of human life and death, decisions are based mainly on rulings of Islamic law – jurists follow the standard methodology of Shi‘i legal science only; Islamic ethics or theology have not been taken into account. Moreover, apart from traditional sources (Qur’an, Sunna and consensus) the intellect/reason (ar. *‘aql*) is used as a main source and the fixed part of the methodology of Shi‘i jurisprudence – i.e. legal decisions are based on suggestions from medical science and biology as well, and are in conformity with them.<sup>93</sup> Therefore, most Shi‘i legal experts have taken a rational, pragmatic and technocratic attitude to questions concerning the beginning and end of human life, and consequently other bioethical issues such as therapeutic abortion and organ donation from brain-dead patients.

It should be pointed out that the attitude of Islamic theology and ethics (which is meant to be another source of Islamic bioethics) might be very different towards some issues. As an example, let us consider the question of the beginning of human life and the possibility of therapeutic abortion. Islamic theology and ethics looks at the position of human beings in the universe broadly speaking and claims that only this perspective allows us to understand this issue better. Basically, Islamic theology accepts and agrees with all the phases of embryogenesis and ensoulment described above. However, it adds that the human being is quite different and is exceptional from all other creations. Firstly, the human being has a soul from God, which no other creature in the world has, and the human being deserves to be respected for this. Further, God created man with both his

92 M. A. Shomali, “Islamic Bioethics: A General Scheme...”.

93 In addition, it is highly recommended by modern legal methodology to discuss the nature of medical technology first with medical experts, then to create a legal solution based upon this.

hands, which means God used all his power (Q. 38:57). Man has the ability to learn, and therefore God has given him priority among all other creatures (Q. 17:70). God also promoted man over the angels (Q. 39:71-72, 15:29/30) because man has an intellect that gives him the ability to distinguish between good and evil and between truth and lies. Only man has the ability to receive faith in God (Q. 33:72). Therefore, the conclusion of Islamic theology is that a human being is a very exceptional being and gift from God from the first moment of fertilization.<sup>94</sup> Human life is valuable and unique, so abortion of any kind is prohibited. Neither of the previously-discussed legal exceptions can be applied. A physically or mentally damaged child is still a human being and its non-perfection does not give us the right to kill it.<sup>95</sup>

It is therefore clear that there is a contradiction in the views on permitting therapeutic abortions due to malformations of the foetus. Shi'i Islamic jurisprudence (according to most clerics) allows such abortions on the basis of standard and valid legal principles. In contrast, Islamic theology and ethics forbids this. A similar contradiction can be found in the assessment of brain death; Islamic jurisprudence considers it a real death based on its basic sources, while Islamic ethics is against this assessment. However, in the final decision, the importance of Islamic jurisprudence prevails, and for now Islamic ethics plays only a supporting role in Shi'i bioethics.

The question of determining the boundaries of human life and death is not a closed case; it is likely to be reopened soon either because of an increase of the importance of Islamic theology and ethics within Islamic bioethics or due to the results of ongoing experimental medical studies and research.

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94 A. Alebooyeh, personal consultation, 13 February 2019.

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## SUMMARY

**Boundaries of Life and Death from the Viewpoint of Shi'i Islamic Jurisprudence and the Consequences in the Field of Islamic Bioethics**

The article provides an overview of the various opinions, theories and debate concerning the boundaries of human life (the beginning and end of human life) in Shi'i Islam and the important consequences in terms of the use of different medical technologies. It considers this issue from the perspective of Shi'i jurisprudence in contemporary Iran, in particular on the basis of the published legal decisions of important high-ranking clerics and based on the knowledge shared within the Islamic seminaries in Qom.

The study first describes various theories concerning the exact beginning of human life and the phases of Qur'anic embryogenesis. The issue of therapeutic abortions is then described and the different views of important Iranian clerics are presented on whether therapeutic abortions can be allowed or not and under what conditions and based on which *fiqh* arguments. The study further addresses the definition of human death, specifically the very extraordinary case of people with acute brain damage (coma, vegetative state and brain death). It discusses whether brain activity or heart activity is essential for determining human death and presents the views of the clerics on this issue and consequently whether disconnection from medical devices (euthanasia) and organ donation are allowed in these cases. This article draws conclusions on the status of the human foetus (especially before ensoulment) and addresses the reflection over the sources of Shi'i Islamic bioethics, in which Islamic jurisprudence has obviously prevailed over Islamic ethics. Together with the modern methodology of Shi'i jurisprudence and using rationality (*'aql*) as a basic source, this becomes the basis of a pragmatic and rational attitude towards medical biotechnologies.

**Keywords:** human life; human death; Islamic law; Islamic jurisprudence; Iran; Shi'a; abortion; brain death; euthanasia; organ donation.

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