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# SEPARATION OF CONJOINED TWINS FROM THE COMMON LAW AND *SHARI'AH* PERSPECTIVES: THE LEGAL AND ETHICAL CONUNDRUM<sup>1</sup>

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## **Abstract**

*The birth of conjoined twins is a comparatively rare event, constituting 1 in 100,000 births. Being a product of a single fertilised egg, these twins are believed to be the result of an incomplete division of embryo, which inhibits complete development of various organ systems. As a result, they usually suffer from physical malformation manifested in for instance, conjoined hearts, lungs, livers, limbs or even genito-urinary tracts. Thus, their chronic medical condition tends to require surgical intervention. However, separating them triggers a plethora of legal and ethical issues as separation may involve the possibility of sacrificing one twin if they are sharing organs. This inevitably creates a range of ethical dilemmas, particularly, in choosing between sanctity of life and quality of life as the survival of one twin threatens the life of the other. In certain circumstances, separation may not lead to the demise of the other but may cause severe harm to the other or a possible hazard to at least one twin's cognitive outcome. Nevertheless, in spite of their physical attachment, the twins are legally and morally distinct and are different individuals with competing needs and interests. Legal issues arising from the separation of conjoined twins such as criminal liability, parental autonomy and the determination of the "best interests" criterion has been the subject of much debate in courts. Thus, this research paper seeks to discuss the legal and ethical issues arising from the*

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*separation of conjoined twins from the common law and shari'ah perspectives.*

## **Introduction**

Historically, conjoined twins were regarded with much apprehension due to the anomalies of their physical appearance which did not conform to what society accepted to be a human body. Up until the early part of the 21<sup>st</sup> century, they were still commonly referred to as “monsters” in both medical and legal literature.<sup>2</sup> However, with the development of modern medical awareness, this derogatory term has since been disapproved and discarded.<sup>3</sup> While in the past conjoined twins who survived into adulthood had no choice but to remain in their fused state for the rest of their lives, separation of conjoined twins is now made possible with the advent of technological advancements in the medical field. However, separating them has triggered a plethora of legal and ethical issues as separation means the possibility of sacrificing one twin if they are sharing organs or inflict a possible hazard to at least one of the twin’s cognitive outcome. This inevitably creates a range of ethical dilemmas, particularly, in choosing between sanctity of life and quality of life as the survival of one twin threatens the survival of the other, which makes the decision making by the doctors a very complex process.

## **The Nature of Conjoined Twins**

Conjoined twinning occurs when embryos that develop from a single placenta fertilised from a single ovum fail to separate between 13-14 days of gestation.<sup>4</sup> Conjoined twins are classified according to the anatomical point of fixation. The most common type of conjoined

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<sup>2</sup> For a detailed discussion on the historical development of conjoined twins, see Colleen Davis, *Conjoined twins as persons that can be victims of homicide.*, 19 Med. Law Rev. 430 (2011).

<sup>3</sup> This has been noted in the judgments of Ward LJ in *Re A (children) (conjoined twins: surgical separation)* [2000] 57 BMLR 1 at p. 45 and Walker LJ at p. 105.

<sup>4</sup> Michelle Lee et al., *The Bioethics of Separating Conjoined Twins in Plastic Surgery*, *Plast. Reconstr. Surg.* 128 (2011) 328e, 329e, doi:10.1097/PRS.0b013e3182268c54.



twins is *thoracopagus*,<sup>5</sup> who are fused at the chest (between the neck and the abdomen) and share the same heart (see Figure 1). The case of the 1977 Philadelphia twins<sup>6</sup> and the Lakeberg twins<sup>7</sup> are examples of this medical condition. *Omphalopagus* twins are also common and are connected at the lower abdomen (see Figure 2). Twins who are conjoined at the buttocks so that they are positioned back to back are referred to as *pygopagus* (see Figure 3). In the case of *ischiopagus* twins, the site of union is at the pelvic area (see Figure 4). This was the condition in which the famous Attard twins, Jodie and Mary were born.<sup>8</sup> *Craniopagus* twins such as the Iranian twins, Ladan and Laleh Bijani<sup>9</sup> are fused at the head (see Figure 5). Other

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<sup>5</sup> Jacqueline A. Noonan, *Twins, Conjoined Twins, and Cardiac Defects*, 132 Arch. Pediatr. Adolesc. Med. 17 (1978). *Thoracopagus* twins account for 75% of cases of conjoined twins. See Robert M. Freedom et al., *Neonatal Heart Disease* 2 (1992).

<sup>6</sup> A surgery was performed to separate the twins, upon being authorised by the Family Court in Philadelphia. Unfortunately the weaker of the twins, did not survive the surgical procedure. Her twin succumbed to liver failure three months later. For a more detailed account of their story, see Donald C. Drake, *Siamese Twins - The Surgery: an Agonizing Choice - Parents, Doctors, Rabbis in Dilemma*, IV ASSIA (2001), available at [http://www.daat.ac.il/daat/kitveyet/assia\\_english/drake-1.htm](http://www.daat.ac.il/daat/kitveyet/assia_english/drake-1.htm).

<sup>7</sup> The Lakeberg twins were born in 1993 in Chicago. Doctors knew that Amy, the weaker twin would not survive the surgical separation. Her surviving twin, Angela, remained in the intensive care unit for nearly 10 months after the surgery took place. Although she managed to survive for nearly a year, she died of complications three weeks short of her first birthday. For a discussion of the facts and issues that arose in the case of the Lakeberg twins, see David C. Thomasma et al., *The Ethics of Caring for Conjoined Twins: The Lakeberg Twins*, 26 Hastings Cent. Rep. 4 (1996).

<sup>8</sup> The case of Jodie and Mary sparked intense debate due to the complexity of the ethical and legal issues involved. In what was admitted by the judges presiding over the case to be a very difficult case, the Court of Appeal delivered over 100 pages of judgment in favour of the surgical separation to take place. Consequently, Mary, the weaker twin died upon being separated from her sister. Jodie, now a healthy 14 year old, leads a normal life and survives until today. See *Re A (children) (conjoined twins: surgical separation)*, *supra* note 2; Sarah Boseley, *UK News: Law decided fate of Mary and Jodie*, The Guardian, February 5, 2002, <http://www.theguardian.com/uk/2002/feb/05/sarahboseley>; Frances Hardy & Sam Greenhill, *Siamese twin Gracie Attard tells her story 14 years after the ethical dilemma*, The Daily Mail, October 10, 2014, <http://www.dailymail.co.uk/femail/article-2788685/little-girl-siamese-twin-died-live-gives-inspiring-interview-14-years-ethical-dilemma-gripped-britain.html>.

<sup>9</sup> Born in 1974, the conjoined twins grew up to become lawyers, when at the age of

types of conjoined twins include *cephalopagus* (joined at the face) and *rachipagus* (joined at the spine).



Figure 1

Figure 2

Figure 3

Figure 4

Figure 5

The condition may also involve an incomplete conjoined twin, where either or both twins are born without certain body parts or internal organs. Cases on incomplete twins vary considerably; some have a single head with two incomplete bodies attached such as in the case of Lakshmi Tatma<sup>10</sup>, the Indian girl who was born with four arms and four legs, or two separate heads sharing a single body, for example Abigail and Brittany Hensel<sup>11</sup>. Other rare occurrences

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29 they insisted on undergoing a surgery in Singapore to separate them. They shared the same skull but had two separate brains. However during surgery, doctors discovered that their brains had become tightly fused. Both twins did not survive the operation. See BBC News, *Iranian twins die in surgery*, July 8, 2003, <http://news.bbc.co.uk/2/hi/asia-pacific/3053638.stm>.

<sup>10</sup> Lakshmi Tatma was born in 2010 with a headless parasitic twin that was attached to her lower torso. In 2012, a complex operation to remove her incomplete twin was carried out and since then Lakshmi has made good progress, although she will have to undergo further surgical procedures to treat her scoliosis and correct her malformed hips. See The Daily Mail, *Lakshmi Tatma, 'the girl with 8 limbs', starts school after surgery*, January 9, 2014, <http://www.dailymail.co.uk/news/article-1246431/Lakshmi-Tatma-The-little-girl-limbs-worshipped-deity-starts-school.html>.

<sup>11</sup> The famous Minnesotan twins, Abigail and Brittany Hensel are conjoined in such a way, giving an appearance of two heads sharing a single body. Each twin has individual organs and control of the upper part of her body, such as heart and lungs, while sharing the same liver, uterus, bladder and intestine. They live an active lifestyle as their condition permits and have received considerable media attention. See The Daily Mail, *Conjoined twins Abigail and Brittany Hensel offer a glimpse in to their extraordinary world*, August 29, 2012, <http://www.dailymail.co.uk/femail/article-2195220/Conjoined-twins-Abigail-Brittany-Hensel-offer-glimpse-extraordinary-world.html>.

include that of Manar Maged, whose conjoined *craniopagus* twin had a head but no body.<sup>12</sup> Another unusual type of twinning phenomenon is foetus in foetu, where an abnormally developed parasitic twin is found included within its living twin. The mortality rate in separating conjoined twins differs, depending on the clinical condition in which they are connected. Approximately 40 percent of conjoined twins are stillborn and 33 percent die within a few weeks after birth<sup>13</sup>, while a relatively small number of conjoined twins survive into adulthood without undergoing separation.

### **A Historical Overview of the Separation of Conjoined Twins**

One of the earliest recorded case of conjoined twins dates back to 1100 in England, where a set of twin sisters, Mary and Eliza Chulkhurst of Biddenden in England, were born connected at the hip.<sup>14</sup> They reputedly survived until the age of 34. Undoubtedly, the most famous pair of conjoined twins in history are Chang and Eng Bunker who were born in 1811, and which due to their international fame, led to the coining of the term “Siamese twins” to depict those with a similar condition.<sup>15</sup> They survived well into adulthood and against all odds, managed to lead normal lives, working, getting married and fathering 21 children between them, although society never failed to remind them they were considered to be unnatural beings. Chang and Eng remained conjoined at the breastbone their whole lives until both of them met a natural death. The first successful surgical separation of conjoined twins is said to have been performed as early as 1689 by a German physician named G Konig.<sup>16</sup> Since then, an estimated 250 operations to separate

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<sup>12</sup> Manar’s twin Islaam had a severely underdeveloped body. Although unable to survive on its own, Islaam’s head was fully developed and Islaam was capable of smiling and blinking. At 10 months old, the conjoined twins underwent surgical separation. Although Manar survived, she lost her battle to a brain infection at the age of two. See BBC News, *Two-head girl dies of infection*, March 26, 2006, <http://news.bbc.co.uk/2/hi/4848164.stm>.

<sup>13</sup> Lee et al., *supra* note 3, 329e.

<sup>14</sup> Christine Quigley, *Conjoined Twins: An Historical, Biological and Ethical Issues Encyclopedia* (2003).

<sup>15</sup> *Id.*

<sup>16</sup> J J Paris & A C Elias-Jones, ‘Do We Murder Mary to Save Jodie?’ *An Ethical*

conjoined twins have been performed in countries across the globe.<sup>17</sup> More recently in June 2015, a pair of *pygopagus* twin sisters who shared one lower bowel were successfully separated in Shanghai, China,<sup>18</sup> and in Paris, doctors were able to separate the first set of conjoined twins born in Guinea, after a 10-hour surgery.<sup>19</sup> A manifold of issues need to be considered in the separation of conjoined twins, from balancing the clinical prognosis if the twins were to remain fused with their survival prospects upon separation, to the high risks involved to parental autonomy and ultimately the legality of the proposed medical procedure. The difficulty is compounded by the fact that both medical and legal traditions equate individuality and self-rule with the ability to experience a physically independent existence.<sup>20</sup> Separation of conjoined twins is thus seen to be a justified means of achieving this objective from the standpoint of medical practice and the law.

### **The Inherent Ethical Dilemma from the Common Law Perspective**

In as much as the clinical condition of conjoined twins may vary, the

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*Analysis of the Separation of the Manchester Conjoined Twins*, 77 Postgrad. Med. J. (2001) 593, 593, doi:10.1136/pmj.77.911.593.

<sup>17</sup> CNN Library, Conjoined Twins Fast Facts - CNN.com (2015), <http://edition.cnn.com/2013/07/11/world/conjoined-twins-fast-facts/>.

<sup>18</sup> BBC News, *China: 3D printer helps separate conjoined twins*, June 10, 2015, <http://www.bbc.com/news/blogs-news-from-elsewhere-33077985>

<sup>19</sup> Sarah Zagorski, *Conjoined Twins Doing Great After Surviving 10-Hour Separation Surgery*, LifeNews.com June 11, 2015, <http://www.lifenews.com/2015/06/11/conjoined-twins-doing-great-after-surviving-10-hour-separation-surgery>.

<sup>20</sup> See S Sheldon & S Wilkinson, *Conjoined Twins: The Legality and Ethics of Sacrifice*, 5 Med. Law Rev. (1997) 149, 151, doi:10.1093/medlaw/5.2.149; N. D. Duncan et al., *Conjoined Twins: Bioethics, Medicine and the Law*, 55 West Indian Med. J. (2006) 123, 123.. The traditional approach of medicine towards the concept of conjoined twins has been heavily criticised by modern ethicists, who maintain that the individuality of conjoined twins is partly constituted by their intimate involvement and interdependency with each other. Accordingly, one of the important considerations should be what they would risk to lose in separating them. See for instance, M Q Bratton & S B Chetwynd, *One into Two Will Not Go: Conceptualising Conjoined Twins*, J. Med. Ethics 30 (2004) 279, doi:10.1136/jme.2002.001289.



ethical considerations that may be involved are also determinable on a case to case basis. An attempt to separate conjoined twins who each possess a fully functional and anatomical body, which would only include surgical removal of some muscle or tissue connection, would evidently attract less ethical implications compared to a decision to separate twins who share the same body parts, internal organs or bodily systems which would involve higher risks and more intricate procedures. Indubitably, more complex issues would arise in a situation where the conjoined twins would suffer a severe decrease in life expectancy if left in their present condition, and yet separation of the two would inevitably deprive the weaker twin of life.

***(i) Balancing between Sanctity of Life and Quality of Life***

In cases where the survival of any of the twins are at stake, the doctrine of sanctity of life lies at the heart of the ethical discussion and decision-making process. It embodies the concept that “sees all human life regardless of its type or quality, as of infinite and intrinsic worth”<sup>21</sup>, conferring upon each human being a right to life that is to be treated with utmost respect and dignity, and at the same time the right not to be intentionally killed.<sup>22</sup> The doctrine of sanctity of life however is not absolute. It does not preclude the withholding or discontinuance of treatment where such treatment would clearly not be in the patient’s best interests.<sup>23</sup> In relation to this, the quality of life is a valid consideration. It involves factors such as the patient’s physical, sensory, emotional and cognitive functions, his or her medical prognosis, loss of dignity arising from the present condition and proposed treatment, life expectancy, as well as the risks and side

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<sup>21</sup> Helga Kuhse, *Debate: Extraordinary Means and the Sanctity of Life*, 7 J. Med. Ethics (1981) 74, 75, doi:10.1136/jme.7.2.74.

<sup>22</sup> The English courts however, have time and again reiterated their concurrence that the sanctity of life cannot be absolute and does not obligate the preservation of life at all costs. It is now an established rule of common law that the inviolability doctrine can be superseded by the need to respect the patient’s autonomous choices. See for instance *Re T (Adult: Refusal of Treatment)* [1992] 4 All ER 649; *Airedale NHS Trust v Bland* [1993] All ER 821; *Ms B v An NHS Hospital Trust* [2002] All ER (D) 362 (Mar).

<sup>23</sup> See Lord Goff’s judgement in *Airedale NHS Trust v Bland*, *supra* note 21, 869.

effects of carrying out the proposed treatment.<sup>24</sup> Another qualification to the inviolability principle is in the deliberate taking of life in the case of legitimate self-defense and defense of others.

In the high profile case of *Re A (children) (conjoined twins: surgical separation)*<sup>25</sup>, the issue of sanctity of life constituted one of the primary points in the court's deliberation. The case concerned the Attard children, Jodie and Mary who were born as *ischiopagus tetrapus* twins in August 2000. Conjoined at the lower abdomen, the lower ends of their spines were fused and they shared the same bladder. Each twin had her own brain, heart, lungs and kidneys, but it was Jodie's heart that provided the necessary oxygenated blood circulation for both of them through a common aorta. While Jodie's neonatal development appeared normal for her age, Mary's brain, heart and lungs showed severe abnormalities. The doctors attending to the case were concerned that the stronger twin was not growing at the rate that Mary was, and were of the opinion that if the twins remained conjoined, it was estimated that their life expectancy would be from three to six months due to the strain caused to Jodie's heart. On the other hand, surgical separation would be able to provide Jodie with a long-term good quality life, but would certainly result in Mary's death. The parents of Jodie and Mary were Roman Catholics and held strongly to the belief that every human life was sacred; accordingly they accepted that it was God's will that their babies were born in such a condition and were against the proposed separation. The doctors however sought a declaration from the court that it was in the children's best interests to perform the surgical procedure to separate them.

In addressing the principal issue on sanctity of life, Ward LJ adopted Keown's analysis and averred that it was the worthwhileness of the surgical procedure rather than the twins' lives that had to be taken into consideration.<sup>26</sup> In doing so it was legitimate to factor in

<sup>24</sup> See *McKay v Bergstedt* 801 P. 2d 617.

<sup>25</sup> *Supra* note 2.

<sup>26</sup> According to Keown, the quality of life philosophy is antithetical to the sanctity of life doctrine as it is posited on arbitrariness that some lives are considered more worthwhile than others. The danger in adopting this position, in his view, is that it would appear to justify intentional killing. See the judgement of Ward LJ at pp. 50-51.

the actual quality of life that each twin enjoyed and might be able to experience post-operation.<sup>27</sup> Accordingly, Ward LJ concluded that the surgical separation would give Jodie a positive prospect of a relatively normal life, and while Mary would most likely not survive the operation, she already had, as it is, little capacity to live.<sup>28</sup> Her existence greatly depended on Jodie, and if left in their fused state, “Mary’s parasitic living will be the cause of Jodie’s ceasing to live”<sup>29</sup>. Another ground of ethical reasoning which the court relied on to justify the intervention to separate the conjoined twins was self-defence. It was held that there was no difference between legitimate self-defence in the conventional sense with the act of the doctors in coming to Jodie’s defence and removing the fatal threat

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<sup>27</sup> It is interesting to note that this part of Lord Justice Ward’s judgment appears to be in contradiction to Keown’s earlier analysis which rejects the quality of life as a valid assessment. This has been pointed out and commented on by several ethicists; see for instance John Caldwell, *The English Conjoined Twins: Some Legal and Ethical Issues*, 21 Child. Leg. Rights J. 21 (2001) 24, 27; Andrew Phang, *Conjoined Twins: The Limits of Reason and the Transcendent Hope--Part Two*, 147 Law Justice - Christ. law Rev. (2001): 89, 91-92. In addition, the approach taken by the court in this case has been viewed as a diminution of the traditional conceptualisation of sanctity of life. See John Harris, *Human Beings, Persons and Conjoined Twins: An Ethical Analysis of the Judgment in Re A*, 9 Med. Law Rev. (2001): 221, 228; Caldwell, 26.

<sup>28</sup> In the court’s opinion, Mary was ‘designated for death’ because her capacity to live was, since birth, “fatally compromised”. Part of the justification for this was derived from the opinion of the Rabbis who were consulted in the 1977 case of the Philadelphia *thoracopagus* twins, who shared the same heart. The same issue was discussed i.e. whether it would be morally wrong to kill Baby A so that Baby B could live. After much deliberation, the Rabbis concluded that the surgical separation of the two babies could be performed although it would result in the certain death of Baby A because she had been designated for death. Their decision was made based on an analogy of two men who jump out of a burning plane. Each have their own parachutes; the first one manages to successfully open his and falls safely down, but the other man’s parachute malfunctions and as he plunges past his friend, he desperately grabs the first man’s leg. The parachute is too small to support both of their weights and both are now lunging to their death. In such a case, the Rabbis agreed that it was morally justified for the first man to kick away his friend since they would both die otherwise, and it was the latter who was designated for death since it was his parachute that failed to open. See Drake, *supra* note 8.

<sup>29</sup> *Re A (children) (conjoined twins: surgical separation)*, *supra* note 2, per Ward LJ at p. 60.

that Mary posed to her twin by reason of her dependence on Jodie's heart.<sup>30</sup> Thus, in performing the operation, the doctors were doing so under the plea of "quasi self-defence" which justified such intervention.

**(ii) *Flouting Beneficence and Sanctity of Life Principles***

In the medical context, the inviolability principle is especially significant because of its direct nexus with the ethical obligations of doctors to undertake actions that will benefit their patients (beneficence) and prevent harm to the latter (non-maleficence).<sup>31</sup> In the event of conflict between the two ethical obligations, the duty to prevent harm should prevail.<sup>32</sup> At times however, adherence to these bioethical principles may not be easily manifested in decisions concerning the separation of conjoined twins. For instance, in a case where the separation involves sacrificing one twin in order to save the other twin with a better prognosis, a balance of competing interests would need to be drawn in order to justify the ethicality of such an action.

In its decision, the Court of Appeal reaffirmed the sanctity of life doctrine, recognizing that both Jodie and Mary's lives were of equal intrinsic value. It was accordingly held that "each life has inherent value in itself and the right to life, being universal is equal for all of us"<sup>33</sup>, and this categorical dictum prevailed in spite of a

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<sup>30</sup> Watt disagrees that quasi self-defence is justified in this case. She avers that Mary was not trying to harm Jodie, but did so involuntarily "through no choice of her own...Both twins were harmed by their growing together, and neither chose this harm, for herself or her sister." Helen Watt, *Conjoined Twins: Separation as Mutilation*, 9 Med. Law Rev. 9 (2001) 237, 241-242.

<sup>31</sup> The Hippocratic Oath, which is one of the earliest and widely known codes of medical practice, contains the following sentence which acknowledges the sanctity of life: "I will give no deadly medicine to anyone if asked, nor suggest any such counsel; and in like manner I will not give to a woman a pessary to produce abortion". The first provision of the International Code of Medical Ethics which is based on the Declaration of Geneva (the modern restatement of the Hippocratic Oath), similarly states that "a doctor must always bear in mind the obligations of preserving human life".

<sup>32</sup> TL Beauchamp and JF Childress, *Principles of Medical Ethics* 114 (5th ed. 2001).

<sup>33</sup> *Re A (children) (conjoined twins: surgical separation)*, *supra* note 2, per Ward LJ at p. 50.



person's diminished capacity to enjoy life and any grave impairment of one's cognitive abilities. In addressing the difficult dilemma of whether one twin could be sacrificed to increase the chances of survival of her twin sister, it was decided that a balance had to be drawn between the benefits and disadvantages resulting from the performance or non-performance of the proposed separation. There accordingly existed "competing philosophies"; on the one hand it would be immoral to save Jodie with the real risk of ending Mary's life, and on the other end of the spectrum, it would also be immoral to deny Jodie a real chance at living a good life which she would be able to experience if the proposed operation took place.<sup>34</sup> Since the court found it impossible to reconcile the conflicting interests of the two children, ethics of such sacrifice had to be based on which action constituted the "lesser of the two evils".<sup>35</sup> Consequently, it was decided that the other that the scale weighed heavily in favor of Jodie, and thus the court authorized the operation to be carried out.

In the same case, another perspective to the sanctity of life in relation to the phenomenon of conjoined twins was propounded by Brooke and Walker LJJ, which associated the doctrine with bodily integrity.<sup>36</sup> In the words of Walker LJ, "the right to life includes the

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<sup>34</sup> *Id.*, 102.

<sup>35</sup> Scholars such as Gillon have criticised the stand taken by the court. To a certain extent, he agrees that there are justifiable moral reasons in allowing the twins to remain in the condition that they were born even at the cost of depriving both of them of their lives, in as much as there are legitimate moral reasons in separating them at the expense of one twin losing her life." However, the moral dilemma as to which is "the lesser of two evils" is not resolved. According to Gillon, there is another way of dealing with the issue i.e. to respect the parents' request and thus decide that not killing an innocent baby is instead the lesser of the two evils, "since it is absolutely morally prohibited, even if the baby would in any case die in a matter of months and even if such killing saved the other baby's life." R Gillon, *Imposed Separation of Conjoined Twins--Moral Hubris by the English Courts?*, 27 J. Med. Ethics (2001) 3, 3, doi:10.1136/jme.27.1.3.

<sup>36</sup> This approach has been the subject of much debate among ethicists. Many argue that physical integrity should not be conceptualised to conform to the common and socially accepted notion of the standard human body. According to Davis, conjoined twins "do develop meaning meaningful and adaptive notions of self, identity and embodiment, although these notions do not always accord with outsiders' views of individuality." Davis, *supra* note 1, 460-461. See also Bratton and Chetwynd, *supra* note 19.

right to physical integrity, that is the right to a whole body over which the individual will, on reaching an age of understanding, have autonomy and the right to self-determination”<sup>37</sup>. Thus, in their view, to allow Jodie and Mary to remain in a conjoined state would be to deny them the right to bodily integrity and human dignity. Surgical separation on the other hand, would grant them both the twins “the integrity which nature denied them”<sup>38</sup>. In his judgement however, Ward LJ opined that this contention was untenable, dismissing it as a “wholly illusory goal” as the separation would result in Mary’s death before she would be able to enjoy such independence.<sup>39</sup>

### (iii) *Upholding Autonomy and Self-Determination*

Autonomy is equated with self-determination and self-rule. An individual must be capable of determining his own life in accordance with his values, goals and beliefs. In health, it means a special form of personal liberty, where individuals are free to choose and implement their own decisions, free from deceit, duress, constraint and coercion. In *Airedale NHS Trust v Bland*<sup>40</sup>, the court emphasised that “it is established that the principle of self-determination requires that respect must be given to the wishes of the patient, so that, if an adult patient of sound mind refuses, however unreasonably, to consent to treatment or care by which his life would or might be prolonged, the doctors responsible for his care must give effect to his wishes, even though they do not consider it to be in his best interests to do so . . . To this extent, the principle of the sanctity of human life must yield to the principle of self-determination: and, for present purposes perhaps more important, the doctor’s duty to act in the best interests of his patient must likewise be qualified.”<sup>41</sup> Further, “the patient’s right of choice is not limited to decisions which others might regard as sensible. It exists notwithstanding that the reasons for making the choice are rational, irrational, unknown or even

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<sup>37</sup> *Re A (children)*, *supra* note 2, 118.

<sup>38</sup> *Id.* per Brooke LJ at p. 103.

<sup>39</sup> *Id.*, 47.

<sup>40</sup> *Supra* note 21.

<sup>41</sup> Per Lord Goff at p. 866.

non-existent.”<sup>42</sup> Thus, it can be seen that the current judicial approach is to attach greater weight to the countervailing principle of a patient’s self-determination as it is the right of every human being to make decisions which affect his own life and welfare and to decide on what risks he is willing to undertake. The right to determine what shall be done with one’s own body is a basic human right firmly entrenched in and protected by the common law.<sup>43</sup> The concepts inherent in this right are the bedrock upon which the principles of self-determination<sup>44</sup> and individual autonomy are based and medical treatment carried out without the consent of an adult of sound mind amounts to unlawful touching or battery.<sup>45</sup>

### **The Legal Dilemmas from the Common Law Perspective**

The lawfulness of a surgical procedure to separate conjoined twins is a correspondingly (if not more) intricate issue, particularly where the consequences of the proposed course of medical treatment would profoundly tip the survival scale in favour of one twin over the other. If the separation of conjoined twins would involve sacrificing one infant in order to save the twin with a better prognosis, would it then amount to the criminal offence of murder?

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<sup>42</sup> Per Lord Donaldson in *Re T (An Adult: Medical Treatment)* [1992] 2 FCR 861, 865.

<sup>43</sup> Justice Benjamin Cardozo, in *Schloendorff v Society of New York Hospital* 105 N.E. 92 (N.Y. 1914) stated that “every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient’s consent commits an assault for which he is liable in damages.”

<sup>44</sup> Self-determination involves (1) the right to consent to treatment, to decide who shall treat and to choose the form of treatment; and as a corollary (2) the right to refuse consent.

<sup>45</sup> A battery takes place when there is non-consensual touching. In *Wilson v Pringle* [1986] 2 All ER 440, the Court of Appeal suggested that the touching must be “hostile” in order to constitute battery. The court was prepared to adopt a very wide view of hostility so as not to confine to acts of ill will but a little more than non-consensual touching. The reason for this is the need to eliminate actions in battery as a result of physical contact, which is generally acceptable in the ordinary conduct of everyday life. See further, *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1.

### (i) The Importance of Personhood

Accordingly, in order to be protected under the law, one must first fulfil the born alive rule and secondly, qualify as a person who is capable of being killed. Under the common law, a child is considered to be born alive when such child has a separate existence from the mother's body and shows signs of life.<sup>46</sup> The fact that a conjoined twin is dependent on the other for its survival does not transmute the first requirement; all that needs to be proven is that there is complete extrusion from the mother.<sup>47</sup> In respect of the second requirement i.e. the presence of life, the prevailing view under common law appears to adopt a broader interpretation in that it would include any sign of life such as a heartbeat or breathing.<sup>48</sup> Thus in the case of the Attard twins i.e. Jodie and Mary, it was not disputed that both children were born alive.<sup>49</sup> The criteria to ascertain whether one who is born alive is a person entitled to legal protection is another aspect which has been the subject of much discussion. The widely accepted point of view is that a person is one who possesses a functioning brainstem or some form of brain function.<sup>50</sup> Some ethicists aver that murder victims constitute a different type of legal person than the

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<sup>46</sup> See *R v Handley* (1874) 13 Cox CC 79, 81 and *Rance v Mid-Downs Health Authority* (1990) 5 BMLR 75, 92 (both cases were cited by Ward LJ in his judgment in *Re A (children) (conjoined twins: surgical separation)* *supra* note 2, 45.

<sup>47</sup> *Re A (children) (conjoined twins: surgical separation)*, *supra* note 2, 45.

<sup>48</sup> For a detailed discussion on the born alive rule under the common law and jurisdictions in Australia, see Davis, *supra* note 1, 438-445. In *Re A (children) (conjoined twins: surgical separation)*, Walker LJ in affirming that Mary was born alive, referred to the Births and Deaths Registration Act 1953 in the U.K., which defines a "still-born" child to be one who "has issued forth from its mother after the twenty-fourth week of pregnancy and which did not at any time after being completely expelled from its mother breathe or show any signs of life."

<sup>49</sup> It is submitted that in applying the common law principle, a different kind of treatment would have been given to a parasitic or incomplete twin such as that attached to Lakshmi Tatma due to the absence of any indication of life.

<sup>50</sup> Davis, *supra* note 1, 457-464; Sheldon & Wilkinson, *supra* note 19, 152-153. Sheldon and Wilkinson derive this notion from the concept of brain death which is the accepted medical and legal standard for ascertaining that one is dead. Similarly, they contend that "brain life" should be the determining factor that there is a living legal person.



perpetrators of the crime.<sup>51</sup> The distinction lies in the level of cognitive capacity; for a person to be criminally responsible for his actions, he must have a higher cognitive functioning and is an intelligent and rational human being whose actions are guided by reason. Such individual is morally and legally accountable for what he chooses to do. A lesser standard is required of victims of murder; the basis of its legal personality lies in the biological and metaphysical attributes of humanity, and therefore “[i]ntelligence is not the issue; being human is”.<sup>52</sup> This type of legal person does not require a higher level of reasoning and thus would include those who are cognitively impaired. Accordingly, it is submitted that conjoined twins who meet the born alive criteria would thus qualify as persons falling under the latter category and be entitled to protection under the law.

**(ii) Separation would amount to an Act of Murder**

In *Re A (children) (conjoined twins: surgical separation)*, upon determining that both Jodie and Mary were two separate individuals who satisfied the criteria of personhood, the court then had to evaluate the surgical separation of the conjoined twins against the ingredients of a crime of murder. Brooke LJ concluded that the proposed operation constituted an act of killing as it would directly cause Mary’s death. In dismissing the trial judge’s reasoning that the surgery amounted to an omission i.e. the withdrawal of Mary’s blood supply and would therefore not be unlawful following the decision in *Airedale NHS Trust v Bland*<sup>53</sup>, Brooke LJ held that the surgical procedure, as distinguished from the *Bland* case, would involve a number of invasions of Mary’s body and therefore constituted positive acts. As to whether an intention to kill was present in

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<sup>51</sup> See for instance Ngaire Naffine, *Who Are Law’s Persons? From Cheshire Cats to Responsible Subjects*, 66 Mod. Law Rev. (2003) 346, 362-365, doi:10.1111/1468-2230.6603002; Davis, *supra* note 4, 452-457.

<sup>52</sup> Naffine, *supra* note 50, 362.

<sup>53</sup> *Supra* note 21. In that case, the House of Lords held that the withdrawal of life-sustaining treatment which merely prolonged the life of a PVS patient did not amount to a positive act, since doctors did not owe a duty of care to prolong his life at all costs and it was not in the patient’s best interests to be kept in such condition.

separating the twins, the court found this to be in the affirmative. In arriving at its decision, the court found that in performing the surgery, the irresistible inference would be that the doctors intended to cause Mary's death, even if it was not their desire or wish, as they realised that her death would be a certain consequence of their acts.<sup>54</sup>

Thus, if an operation to separate conjoined twins in which the sacrificial element would be present amounted to intentional killing, what would be the lawful justification for doctors to undertake such surgery and thus be exonerated from criminal responsibility? In the case of Jodie and Mary, the court considered two grounds related to the issue: (1) the doctrine of double effect; and (2) necessity. With respect to the first contention, the majority of judges opined that the doctrine of double effect could not be applied to the surgical separation of the twin sisters since it involved the death of Mary. It could not in any way be regarded that the doctors would be acting in good faith in undertaking a surgery that would benefit Jodie at the fatal expense of Mary. In other words, the good end i.e. Jodie's chance at a better life did not justify the means, which entailed the deliberate assault on Mary that would invariably lead to her death.<sup>55</sup> Walker LJ however dissented and averred that the doctrine of double effect could be used to justify the legality of the operation. According to him, Mary's death though foreseeable, was an "inevitable consequence" of an operation which was necessary to save Jodie's life, and Mary's death was not the intention nor could it be attributed to the surgical procedure, but rather "she would die because tragically her body, on its own, is not and never has been viable."<sup>56</sup>

If the doctrine of double effect was not considered to be an acceptable basis of authorisation for such surgical separation to take place, could the defence of necessity instead be invoked on as a

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<sup>54</sup> This was based on the ratio of Lord Steyn in the case of *R v Woollin* [1998] 4 All ER 103 at p. 113: "Where a man realises that it is for all practical purposes inevitable that his actions will result in death or serious harm, the inference may be irresistible that he intended that result, however little he may have desired or wished it to happen."

<sup>55</sup> The same issue was highlighted by ethicists in the American case of the Lakeberg twins. See for instance Charles J Dougherty, *Joining in Life and Death: On Separating the Lakeberg Twins*, 11 *Bioethics Forum* 11 (1995) 9.

<sup>56</sup> *Re A (children) (conjoined twins: surgical separation)*, *supra* note 2, 122.

lawful justification? Although the doctrine is itself obscure, English courts have consistently held that necessity cannot be a valid legal defence to an act of murder.<sup>57</sup> The court in the famous case of *R v Dudley and Stephens*<sup>58</sup> gravely cautioned against admitting necessity as an excuse for intentional killing and highlighted the danger of inordinate arbitrariness if people were to be allowed to summarily judge the value of one life over another.<sup>59</sup> In *Re A (children) (conjoined twins: surgical separation)*, Brooke LJ was of the view that the decision in *Dudley and Stephens* was not conclusive and sought to distinguish between the policy considerations articulated in the latter case and those that were present in Jodie and Mary's situation. The two main objections posed by Lord Coleridge in *Dudley and Stephens* against necessity was that, (1) it was indistinct as to who had the right to judge necessity and comparatively measure the dignity of lives; and (2) to permit such a defence "would mark an absolute divorce of law from morality. Brooke LJ found them to be inapplicable to the case of the conjoined twins for the following reasons: (1) Mary was "sadly, self-designated for a very early death"<sup>60</sup>; with or without the proposed medical treatment, she was had a very short life span; and (2) the case Attard twins was not one which markedly severed law from elements of morality, as it involved competing philosophies between the immorality of the

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<sup>57</sup> See *R v Dudley and Stephens* (1884) 14 QBD 273 and *R v Howe* [1987] 1 All ER 771.

<sup>58</sup> *Supra* note 56.

<sup>59</sup> In refusing to accept necessity as a defence to murder, Lord Coleridge stated the following reasoning: "Though law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence; and such divorce would follow if the temptation to murder in this case were to be held by law an absolute defence of it ... It is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative values of life to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own... it is quite plain that such a principle once admitted might be made the legal cloak for unbridled passion and atrocious crime."

<sup>60</sup> Per Brooke LJ in *Re A (children) (conjoined twins: surgical separation)*, *supra* note 2, 102.

surgical separation that would involve sacrificing Mary for the sake of Jodie, and the immorality of leaving the condition of the twins as it is which would forfeit Jodie's prospects of surviving. Both Brooke and Walker LJ then referred to the three requirements for the application of necessity under the common law: (1) the act is needed to avoid inevitable and irreparable evil; (2) no more should be done than is reasonably necessary for the purpose to be achieved; and (3) the evil inflicted must not be disproportionate to the evil avoided, and came to the conclusion that all the above elements had been met in Jodie and Mary's case. Accordingly the court, in assuaging the concern over the danger that this would create a precedent where people would hasten to plead necessity as a defence, held that such surgical separation was an exceptionally rare circumstance and in each particular case, doctors would need to seek the approval of the court before attempting such an operation.<sup>61</sup> Walker LJ concurred with such reasoning, and opined that it would not lead to a "slippery slope" situation as the plight of the conjoined twins was unique.<sup>62</sup>

### **(iii) Overriding Parental Consent and the Assessment of the Best Interest Principle**

In the case of patients who are unable to decide for themselves, such as children or the mentally disabled, any act or decision pertaining to the patient's medical treatment during his or her period of incapacity must be made in his or her best interests, and authority is given to the parents or legal guardian to decide on their behalf. In the 1977 case of the Philadelphia conjoined twins, this was not a contentious issue as the parents gave their consent for the surgical separation to be

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<sup>61</sup> Commentators such as Bohlander and Caldwell maintain that despite the court's attempt to limit the impact of the decision, the case of Jodie and Mary would likely result in necessity being used to justify unlawful killing in other situations. See Michael Bohlander, *Of Shipwrecked Sailors, Unborn Children, Conjoined Twins and Hijacked Airplanes—Taking Human Life and the Defence of Necessity*, 70 J. Crim. Law (2006) 147, 157, doi:10.1350/jcla.2006.70.2.147; Caldwell, *supra* note 26, 30. Further, Phang questions the justification of the criteria of necessity adopted by the court; if proportionality is the determinant, how can the court ensure that the defence of necessity is applied "in an objective and fair fashion?" See Phang, *supra* note 26, 99.

<sup>62</sup> Per Walker LJ at p. 119.



performed. However, as previously mentioned, this was not the situation in *Re A (children) (conjoined twins: surgical separation)*. Under the common law, this parental right arises out of parental duty, and thus “the right and duty to give consent to medical treatment is an incident of parental responsibility vested in the parent.”<sup>63</sup> Doctors are therefore obliged to respect the wishes of the parents of the child in as much as they would in the case of an adult patient. However, this parental right is not absolute and is contingent upon it being exercised in the best interests of the child.<sup>64</sup> Otherwise, the court is vested with the power to override the parent’s decision.<sup>65</sup> Under family law, what constitutes the child’s best interests is associated with the welfare of the child.<sup>66</sup> In *Re MB (An Adult: Medical Treatment)*<sup>67</sup>, it was held that the test of a patient’s best interests was not limited to best medical interests and should be broadened to include a welfare-based assessment.<sup>68</sup> Accordingly, the English courts decided that the principle of best interests must incorporate “broader ethical, social, moral and welfare considerations”<sup>69</sup>, and that in cases where a declaration is sought by doctors as to the legality of a proposed treatment, it is for the judge (rather than doctors) to decide whether such treatment would be in the patient’s best interests.

In Jodie and Mary’s case, the court found that the parents of the conjoined twins in refusing the proposed surgical separation had

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<sup>63</sup> Per Ward LJ at p. 41.

<sup>64</sup> See *Gillick v West Norfolk and Wisbech Area Health Authority* (1985) 2 BMLR 11.

<sup>65</sup> See for instance the case of *Re B (A Minor) (Wardship: Medical Treatment)* [1990] 3 All ER 927 and *Re T (A Minor) (Wardship: Medical Treatment)* (1996) 35 BMLR 63.

<sup>66</sup> *J v C* [1969] 1 All ER 788, 820-821.

<sup>67</sup> [1997] 2 FCR 541.

<sup>68</sup> This formulation was applied in *Re A (Medical Treatment: Male Sterilisation)* [2000] 1 FCR 193 and subsequently in *Re SL (Adult Patient: Medical Treatment)* [2000] 2 FCR 452.

<sup>69</sup> *Re S (Adult Patient: Sterilisation)* [2001] Fam 15, 28. Caldwell notes that the best interests test is certainly not elementary as it involves more than just physiological considerations, “and when the vital psychological and emotional considerations are placed in the matrix of a welfare assessment the issue does become more clouded.” Caldwell, *supra* note 26, 28.

failed to take into account their children's best interests. Ward LJ was of the view that the parents had not considered the benefits that such an operation would grant Jodie; accordingly they had failed to recognise that by insisting for the non-separation of their twin girls, they were forsaking their duty to save Jodie's life. While acknowledging the grim dilemma that the parents most unfortunately had to face, Ward LJ averred that they, as responsible caring parents, had no choice but to decide on "the lesser of their inevitable loss".<sup>70</sup>

It is interesting to note however, in the course of delivering his judgement, Ward LJ appeared to suggest that the doctors would not have held liable and it would have been "perfectly acceptable" if they had chosen to respect the wishes of the parents.<sup>71</sup> Those who oppose this approach maintain that it would have been more pragmatic for the court to have adopted a more respectful stance towards the position taken by Jodie and Mary's parents, instead of depriving them of their right to decide on their children's medical treatment.<sup>72</sup> Family policy should always be in acquiescence to the views of loving and responsible parents, who are in a better position to appreciate what would be in their child's best interests, unless there existed a flagrant and unequivocal disregard of the child's welfare.<sup>73</sup> Thus it has been suggested that it would have been more appropriate for the court in Jodie and Mary's case to have declared the parents' wishes to be lawful, and that it would also be legally justified for the surgical separation to be performed on their conjoined twins, should the parents decide to consent to it.<sup>74</sup>

### **The Shari`ah Perspective**

The *shari`ah* or Islamic law is based on two primary sources, the Holy *Qur`an*<sup>75</sup> and the *Sunnah* of Prophet Muhammad (peace be

<sup>70</sup> *Re A (children) (conjoined twins: surgical separation)*, *supra* note 2, 60.

<sup>71</sup> *Id.*, 36.

<sup>72</sup> See for instance David Burnet, *Re A (Conjoined Twins: Medical Treatment) Conjoined Twins, Sanctity and Quality of Life, and Invention the Mother of Necessity*, 13 *Child Fam. Law Q* (2001) 91, 98; Paris & Elias-Jones, *supra* note 15, 598.

<sup>73</sup> Caldwell, *supra* note 26, 26.

<sup>74</sup> Gillon, *supra* note 34, 4; Harris, *supra* note 26, 236.

<sup>75</sup> The Holy Book which Muslims believe to be the word of God Almighty.

upon him)<sup>76</sup>. The guiding principles, rules and regulations in the main sources govern the Islamic way of life, and together with *ijtihad* (deductive reasoning), provide a comprehensive moral and juridical framework to address and resolve issues relating to human conditions.

The moral and ethical obligations laid down in the primary sources of the *shari'ah* form the substratum of the Islamic legal system. Law and morality are therefore intertwined and inseparable in Islam; "the spirit and emphasis of the law is always moral"<sup>77</sup> and purports to create a social order by way of individual and collective moral responsibility. The fundamental difference between the Islamic and Western legal systems is that the former is derived from a divine order from which moral principles are legislated; on the other hand, the Western concept is secular and primarily drawn from human reason and experience, and there exist variable ethical theories on the validity of moral cognition.<sup>78</sup>

#### (i) The Inviolability of Life

The implementation of each legal ruling seeks to fulfil the following objectives, which are referred to as *maqasid al-shari'ah*: protection of an individual's freedom or belief, preservation of life, maintenance of intellect, preservation of honour and integrity, and protection of property.<sup>79</sup> The inviolability or sanctity of life falls into the category

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<sup>76</sup> The words, conduct and tacit approval of Prophet Muhammad (peace be upon him).

<sup>77</sup> Iftikhar Muhammad Chaudhry, *The Relationship Between Law And Morality In Islamic And Common Law Systems*, in 2nd Tuanku Najihah Syariah and Law Lecture 11 (2006), available at <http://ddms.usim.edu.my/bitstream/handle/123456789/1113/The%20Relationship%20Between%20Law%20And%20Morality%20In%20Islamic%20And%20Common%20Law%20System.pdf?sequence=1>.

Iftikhar Muhammad Chaudhry was the former Chief Justice of Pakistan from 2005-2007 and from 2009-2013.

<sup>78</sup> See Avraham Steinberg, Medical Ethics, *Encyclopedia of Jewish Medical Ethics: A Compilation of Jewish Medical Law on All Topics of Medical Interest* 389-404 (2003).

<sup>79</sup> A R Gatrad and A Sheikh, *Medical Ethics and Islam: Principles and Practice*, 84 Arch. Dis. Child. 84, (2001) 72, 73. According to Ibn Ashur, the general rules of *maqasid al-shari'ah* is to preserve the social order of the community and to ensure its healthy process by promoting the well-being and righteousness of that which

of *daruriyyat* or the essentials.<sup>80</sup> According to Muhammad al-Zuhaili, the right to life is the cardinal right of a human being which gives rise to other rights, and without which all other rights would be lost.<sup>81</sup> In other words, the doctrine of sanctity of life forms a fundamental and integral component that ensures the preservation of both individual and public interests. Protection of life thus serves not only a religious purpose but also contributes towards a moral and just order.

Consequently, the sanctity of life sits at the core of Islamic bioethics, a similar position with that of the Western model. However, a marked distinction exists between the two: while modern ethics view sanctity on the basis of the intrinsic value of human life, Islam attributes the sacredness of the principle to the fact that all life comes from and belongs to God, and only God has the right to take it away.<sup>82</sup> Islam believes that everything in this world including life, is a loan from God. Every human being is thus under a religious duty to care for and maintain that trust in not only guarding and defending his own life from harm, but also that of others.

It is therefore axiomatic that the discussion on the Islamic position with respect to the separation of conjoined twins centers on the doctrine of sanctity of life. The ruling that life is inviolate and sacrosanct is ordained in the Holy *Qur'an* in the following verse: "Do not take life which God has made sacred except in the course of Justice"<sup>83</sup>. It is accordingly forbidden for anyone to deliberately end a

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prevails in it, namely mankind. Ibn Ashur, *Ibn Ashur: Treatise on Maqasid al Shari'ah*, trans. Muhammad el Tahir el Mesawi 87 (2006).

<sup>80</sup> Mohammed Hashim Kamali explains that faith, life, intellect, lineage and property are regarded as essentials due to the fact that these elements are seen as absolute requirements to the survival and spiritual well-being of individuals, to the extent that their destruction or collapse would precipitate chaos and the demise of normal order in society. See Mohammad Hashim Kamali, *Maqasid al-Shari'ah Made Simple* 4 (Anas S. Al-Shaikh-Ali & Shiraz Khan eds., 2008).

<sup>81</sup> Muhammad al-Zuhaili, *Huquq al-Insan fi al-Islam* 141-143 (1997).

<sup>82</sup> See for instance FA Khan, *Religious Teaching and Reflections on Advance Directive-Religious Values and Legal Dilemmas in Bioethics: An Islamic Perspective*, Fordham Urb. LJ 30 (2002) 267; Farzaneh Zahedi, Bagher Larijani, & Javad Tavakoly Bazzaz, *End of Life Ethical Issues and Islamic Views*, 6 *Iran J Allergy Asthma Immunol* (2007) 5.

<sup>83</sup> *Al-Qur'an, Surah al-An'am* 6:151.

life: "Whosoever takes a human life, for other than murder or corruption in the earth, it is as if he has taken the life of all of mankind."<sup>84</sup> This prohibition is substantiated in the *Hadith*<sup>85</sup> of the Prophet (peace be upon him), which formed part of his sermon during the Farewell Pilgrimage at Mina: "Verily your blood, your property and your honour are as sacred and inviolable as the sanctity of this day of yours, in this month of yours and in this town of yours. Verily! I have conveyed this message to you."<sup>86</sup>

On the issue of the legality of separating conjoined twins, Muslim scholars hold different views depending on the circumstances. In cases where the surgical separation would not cause harm or deprive either twin of his or her right to life, then such action should be carried out if there is an opportunity to do so, particularly when it would promote a better quality of life.<sup>87</sup> In each situation however, the opinion and recommendation of doctors are of paramount importance in evaluating the harmful consequences that would ensue from the decision whether to separate the twins or to leave them in their fused state. It is therefore a compulsory requirement for doctors to be consulted as they would be in the best position to determine what would be in the best interests of the conjoined twins.

In Islam, the determination of the legality of a medical procedure to separate conjoined twins is associated with the consequences following such an act. This involves the application of the legal maxim "*yuzal ad-darar al-ashaddu bid-darar al-akhaff*" (the greater harm is eliminated by means of a lesser harm), which entails the following approach: (1) if it is possible by way of surgical separation to uphold all the interests involved in the situation, then it must be carried out. If this cannot be achieved, then the option that best furthers the most interests should be chosen; (2) if the situation involves harmful corollaries, then at the outset it is obligatory to

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<sup>84</sup> *Al-Qur'an, Surah al-Ma'idah* 5:32.

<sup>85</sup> The sayings of Prophet Muhammad (peace be upon him) which form part of the *Sunnah*.

<sup>86</sup> Reported by al-Bukhari and Muslim in *Riyad as-Salihin*, Book 18, Hadith 1524, available at <http://sunnah.com/riyadussaliheen/18>.

<sup>87</sup> Faisal Sa'id bi al-A'mshi, *Ahkam al-Tawaim al-Multasiah fi al-Fiqh al-Islami*, in 20<sup>th</sup> Session of the Islamic Fiqh Council 31-32 (2010).



prevent each harm from occurring. If it is not possible to do, then a decision which would inflict the greater harm is to be avoided. In a case where the gravity of harm under each option is of equal value, then it would be permissible to make a choice between such options; and (3) if there exists a conflict between the benefits and the harm arising out of a situation, then at the first instance, the benefits must be realised and the harm averted altogether. If this cannot be achieved, then if upon drawing a balance the benefits outweigh the harm, the option that represents this is to be chosen. However, if the harm involved is greater than the benefit, then the removal of harm takes priority over the preservation of interest, in conformity with the maxim “*dur’ al-masaalihi awla min jalb al- manaafi*” (the prevention of evil takes priority over the attraction of benefit).<sup>88</sup> According to Imam as-Suyuti, the manner of removing harm is contingent upon another legal maxim that states, “*ad-dararu yuzalu wa lakin la bi-darar*” (harm must be eliminated but not by means of a similar harm).

Modern Islamic scholars concur that the surgical separation of conjoined twins is permissible in Islam, and further justify the lawfulness of such medical treatment on the following grounds:<sup>89</sup>

1. At times the need for such an intervention arises for doctors to try their level best, not to change God’s creation, but to return him or her to a more natural human form. This is based on a verse in the Holy *Qur’an* which states, “We have certainly created man in the best of stature.”<sup>90</sup>
2. Each person has the right to individuality and physical independence, and is under a duty of trust to care for and use his or her body according to the tenets prescribed in Islam.
3. Non-separation would hinder conjoined twins from fulfilling their obligatory duties as Muslims such as performing

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<sup>88</sup> Syarfu al-Din, *Al-Ahkam Al-Syar’iyyah lil A’mal al-Tibbiyyah* 78-80 (2<sup>nd</sup> ed., 1987).

<sup>89</sup> See Abdul Nasir Musa Abu al-Basol, *Nawazil Al-Tawaim al-Multasiqah (Al-Ahkam al-Muta’alliqah bi Fasliha wa Murathiha wa Zawajihah)*, in 20<sup>th</sup> Conference of the Islamic Fiqh Council 9-11 (2010).

<sup>90</sup> *Al-Qur’an, Surah al-Teen* 95:4.

prayers and covering their *aurah*<sup>91</sup>, as well as the capacity to satisfy their natural needs such as marital life.

4. The issuance *fatwa* (legal rulings) by legitimate Islamic authorities must always take into consideration the continuous development of medical knowledge and treatment in order to ensure its coherence with current circumstances.
5. Certain important legal maxims (such as those previously discussed) must be observed.
6. The operation can only be performed with the consent of a competent patient. If the conjoined twins are underage or are unable to partake in the decision-making process, then doctors would have to seek parental consent, failing which the matter will be referred to the a court of law.

In addition, the necessity of separating conjoined twins can be appraised from aspects such as to protect a twin from any illness or medical condition which is caused by his or her conjoined condition, the ability of each twin to form decisions or portray his or her own disposition in the fulfilment of his or her own interests without being inhibited by the other twin's needs or desires, and the need to determine the extent of the twins' culpability in the event that a crime has been committed.<sup>92</sup>

### **(ii) Sacrificing One Twin to Save the Other**

On the issue of whether it is permissible in Islam to carry out a surgical separation to preserve the life of one twin which would entail the death of the other, the predominant view is that this would be unlawful, as it is in direct violation of the doctrine of sanctity of life. The analogy drawn in this situation is that of a person who faces a fatal threat from extreme hunger; in such a case, would it be justified for him to kill another person in order to survive? According to Ibn Qudamah, a renowned jurist from the *Hanbali* school of thought, such killing or infliction of harm to another person is

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<sup>91</sup> Parts of the human body that must be covered with clothing as prescribed in Islam.

<sup>92</sup> See Abdul Fattah Muhammad Idris, *Faslu al-Tau'am al-Multasiq wa Mauqif al Fuqaha minhu*, in 20<sup>th</sup> Session of the Islamic Fiqh Council 27-29 (2010).

prohibited on the ground that the one who commits the act and the victim belong to the same human species.<sup>93</sup> Consequently, the legal maxim “*yuzal ad-darar al-ashaddu bid-darar al-akhaff*” (the greater harm is eliminated by means of a lesser harm) cannot be made applicable in the case of a surgical separation of conjoined twins which involves a sacrificial element.<sup>94</sup>

The impermissibility of such an operation is articulated in a *fatwa* issued by religious authorities in Egypt.<sup>95</sup> In a situation where there is a real risk that the separation of conjoined twins would result in the death of one of them, the procedure would be unlawful because there is no legal justification to sacrifice a twin for the sake of the other’s survival. Both their lives are equally sacred and thus the value of one twin’s existence is not superior to that of his or her conjoined half. Modern experts however aver that it is vital for the matter to first be referred to specialists in the medical field, particularly in a case involving an incomplete twin, in order to identify whether the incomplete twin is to be regarded as a person or a mere appendage of the other.<sup>96</sup>

In applying the aforementioned principles to a complex case akin to that of Jodie and Mary, it would appear that from an Islamic standpoint, the preferred decision would be for the conjoined twins to remain in their original state. Under the *shari’ah*, the sanctity of life occupies a more revered position than the Western concept due to the fact that life and death is strictly a divine prerogative that belongs to God and life cannot be taken away except by His Will. Thus, the doctrine cannot be subjugated unless under prescribed circumstances such as the due process of law and in self-defence. Sacrificing one twin so that the other may live does not qualify as an exception; it directly flouts the fundamental dictum that holds life to be sacred. Furthermore, such act would not be justifiable according to the legal maxim “*ad-dararu yuzalu wa lakin la bi-darar*” (harm must be

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<sup>93</sup> 11 Ibnu Qudamah, *Al-Mughni* 79 (1<sup>st</sup> ed. 1984/1405H).

<sup>94</sup> See for instance Faisal Sa’id bi al-A’mshi, *supra* note 86, 32.

<sup>95</sup> Dar al-Ifta al-Missriyyah, Fatwa No. 162/500, (2001) quoted in Abdul Fattah Muhammad Idris, *supra* note 91, 49.

<sup>96</sup> See Nasir Abdullah al-Maimun, *Al-Ahkam al-Fiqhiyyah al-Muta’alliqah bi al-Tawaim al-Multasiqah*, in 20<sup>th</sup> Session of the Islamic Fiqh Council 25-27 (2010).

eliminated but not by means of a similar harm); the threat to the lives of both conjoined twins cannot be circumvented by way of a surgical separation that would cause the death of one of them in order for the other to survive. The decision to not impose medical treatment to separate the twins is also justified on the ground that in Islam, it is permissible for one to either seek medical treatment or to forbear in patience and perseverance in facing illness, as both approaches are sanctioned by the primary sources of the *Shari'ah*.<sup>97</sup>

The moral and ethical philosophy behind the above rulings are accordingly incorporated in the guidelines for doctors in performing a surgical separation of conjoined twins, which were deliberated on at the 20<sup>th</sup> session of the Islamic Fiqh Council<sup>98</sup>, which *inter alia*, include that: (1) there must be a strong prognosis that the operation will not cause the death of both twins or either one of them, or result in a decrease in their life expectancy; (2) the operation must benefit both of them or cause less harm than if they were to be left conjoined to one another; and (3) both twins must provide valid consent for the operation to be carried out. If they are unable to do so by reason of age or any infirmity, then their parents (or another *wali* (legal guardian), as the case may be) will have the legal right to decide on their behalf. The ruler will assume legal guardianship in the event that the conjoined twins' *wali* fails to decide in accordance with their best interests.

### (iii) The Importance of Parental Consent

Parental consent is also an imperative consideration especially when

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<sup>97</sup> One of the authorities for seeking medical treatment is a *Hadith* narrated by Abu Huraira, where the Prophet (peace be upon him) said, "There is no disease that Allah has created, except that He also has created its treatment." (*Sahih al-Bukhari*, Book 76, Hadith 1, available at <http://sunnah.com/bukhari/76>). In the Holy *Qur'an*, it is mentioned that pain and illness are trials to test a Muslim's spiritual standing, and he or she will be rewarded for his or her patience: "And We will surely test you with something of fear and hunger and a loss of wealth and lives and fruits, but give good tidings to the patient, who, when disaster strikes them, say, "Indeed we belong to Allah, and indeed to Him we will return." Those are the ones upon whom are blessings from their Lord and mercy. And it is those who are the [rightly] guided." (*Surah al-Baqarah* 2:155-157).

<sup>98</sup> Abdul Fattah Muhammad Idris, *supra* note 91, 45-48.

it involves the medical treatment of children who have not attained the age of maturity. This is based on the concept of *wali* in Islam, which is mentioned in the following verse of the Holy *Qur'an*: “And test the orphans [in their abilities] until they reach marriageable age. Then if you perceive in them sound judgement, release their property to them. And do not consume it excessively and quickly, [anticipating] that they will grow up. And whoever, [when acting as guardian], is self-sufficient should refrain [from taking a fee]; and whoever is poor - let him take according to what is acceptable. Then when you release their property to them, bring witnesses upon them. And sufficient is Allah as Accountant.”<sup>99</sup> The ruling in the verse concerning the guardianship of a child’s property is equally applicable to medical treatment and other cases involving children. Accordingly, at the 23<sup>rd</sup> session of the Council of Senior Scholars in Riyadh, it was unanimously decided that “it is not permissible to operate on a patient without his or her permission provided the patient is pubescent and sane, whether the patient is male or female. If the patient is not of age or insane, the permission of their *wali* (guardian) must be obtained.”<sup>100</sup> It is incumbent upon a *wali* to carry out his or her responsibilities in the best interests of his or her ward<sup>101</sup>; if the *wali* refuses to consent to medical treatment and such refusal is detrimental to the latter, then the *wali*’s decision shall not be taken into account. In such a case, the right of permission will be transferred to the next *wali* and ultimately to the ruler of the Islamic state<sup>102</sup> (in modern practice this would be a court of law).

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<sup>99</sup> *Al-Qur'an, Surah an-Nisa' 4:6.*

<sup>100</sup> The General Presidency of Scholarly Research and Ifta, *Fatwas on Medical Issues and the Sick* (1984), available at <http://www.alifta.com/Fatawa/FatawaChapters.aspx?language=en&View=Page&PageID=175&PageNo=1&BookID=17>.

<sup>101</sup> This is based on a *Hadith* of Prophet Muhammad (peace be upon him): "Any man whom Allah has given the authority of ruling some people and he does not look after them in an honest manner, will never feel even the smell of Paradise." Reported in *Sahih al-Bukhari*, Book 93, Hadith 14, available at <http://sunnah.com/bukhari/93>.

<sup>102</sup> 1983 Islamic Fiqh Academy, *Resolution No. 67/5/7 concerning Medical Treatment*, in *Resolutions and recommendations of the Council of the Islamic Fiqh Academy 1985–2000* 139–142 (2000).



## **Comparison between the *Shari`ah* and Common Law Perspectives**

In analysing the position under the common law and Islamic perspectives, it can be deduced that similar principles apply, though they may not necessarily lead to the same conclusions. Both legal systems recognise the sanctity of life doctrine as the principal point of consideration in determining whether a surgical separation of conjoined twins would be justified. Although the doctrine is upheld and treated with much deference under the common law and the *shari`ah*, the common law appears to be more amenable to validate actions that may not strictly adhere to the sanctity of life in circumstances where such conformity poses a difficulty, as can be seen from the case of the Attard twins. On the other hand, the inviolability principle is applied in a more consistent and stricter sense in Islam and is subject to the legal maxims of Islamic law. This stems from the fact that unlike the Western interpretation of the concept, the sanctity of life doctrine in Islam does not exist intrinsically, but is part of a divine order; no one but God has the absolute right to grant and take away the life of His creations. In other aspects such as parental consent and the need to ascertain personhood, the two legal systems appear to subscribe to the same view. However, the divergence between the two systems can be discerned when construing notions of ‘quality of life’ and ‘best interests’. Under the common law, quality of life not only constitutes a legitimate consideration to be factored into the decision-making process, but may also in certain circumstances operate to override the sanctity of life. In Islam, a different treatment is given to the notion of quality of life; it forms a legitimate consideration in cases where the separation of conjoined twins does not involve a fatal threat to either of the twin’s lives. However, if the proposed surgical separation would result in certain death for even one of the conjoined twins, the sanctity of life doctrine renders such operation unlawful, even if it would allow the surviving twin to be able to enjoy a better quality of life. Accordingly, the concept of best interests where conjoined twins are concerned is also perceived differently under the common law and Islamic perspectives; while the common law, in balancing conflicting interests, is inclined to decide based on what

would constitute the “lesser of two evils”, under the *shari`ah*, choosing a lesser harm is permissible unless the situation involves the violability of life, in which case the sanctity of life must be upheld. Ultimately, both systems acknowledge that in the separation of conjoined twins, medical expert opinion remains a paramount consideration and the issues involved in the separation of conjoined twins are to be decided on a case to case basis.

### **Conclusion**

The ethical and legal conundrum in the separation of conjoined twins are as intricate as the medical phenomenon itself. Each case is unique and presents its own set of issues and challenges, which further complicate the medico-legal decision-making process. Recent developments show that there is a shift in the traditional perspective in which conjoined twins and the concept of individuality are viewed, in that separation should not always be the preferred option and in some cases, such twins are capable of having a fulfilling existence while remaining connected to one another. In any case, in order to ensure the ethicality and legality of a decision whether or not to separate a set of conjoined twins, doctors must refer each case to the proper forum i.e. the hospital’s ethics committee and/or a court of law, prior to its implementation. Further, cultural and religious perspectives are imperatives that significantly influence the decision-making process, and thus should be given consistent recognition in ascertaining the viability of any medical action concerning the separation of conjoined twins.

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## TRANSLITERATION TABLE

### CONSONANTS

Ar=Arabic, Pr=Persian, OT=Ottoman Turkish, Ur=Urdu

| Ar | Pr | OT | UR | Ar | Pr | OT  | UR  | Ar | Pr              | OT  | UR |                 |
|----|----|----|----|----|----|-----|-----|----|-----------------|-----|----|-----------------|
| ء  | '  | '  | '  | ز  | z  | z   | z   | گ  | —               | g   | g  | g               |
| ب  | b  | b  | b  | ژ  | —  | —   | ʀ   | ل  | l               | l   | l  | l               |
| پ  | p  | p  | p  | ژ  | —  | zh  | j   | م  | m               | m   | m  | m               |
| ت  | t  | t  | t  | س  | s  | s   | s   | ن  | n               | n   | n  | n               |
| ث  | —  | —  | ṭ  | ش  | sh | sh  | ʃ   | ه  | h               | h   | h' | h'              |
| ث  | th | th | th | ص  | ṣ  | ṣ   | ʃ   | و  | w               | v/u | v  | v/u             |
| ج  | j  | j  | c  | ض  | ḍ  | ḍ   | ʒ   | ی  | y               | y   | y  | y               |
| چ  | —  | ch | çh | ط  | ṭ  | ṭ   | ṭ   | ة  | -ah             | —   | —  | -a <sup>2</sup> |
| ح  | ḥ  | ḥ  | ḥ  | ظ  | ẓ  | ẓ   | ẓ   | ال | al <sup>3</sup> | —   | —  | —               |
| خ  | kh | kh | kh | ع  | '  | '   | '   | —  | —               | —   | —  | —               |
| د  | d  | d  | d  | غ  | gh | gh  | ğh  | —  | —               | —   | —  | —               |
| ڈ  | —  | —  | d  | ف  | f  | f   | f   | —  | —               | —   | —  | —               |
| ذ  | dh | dh | dh | ق  | q  | q   | k   | —  | —               | —   | —  | —               |
| ر  | r  | r  | r  | ك  | k  | k/g | k/ñ | —  | —               | —   | —  | —               |

<sup>1</sup> – when not final  
<sup>2</sup> – at in construct state  
<sup>3</sup> – (article) al - or l-

### VOWELS

|            | Arabic and Persian | Urdu                                    | Ottoman Turkish   |
|------------|--------------------|---|-------------------|
| Long       | ا                  | ā                                       | ā                 |
|            | آ                  | Ā                                       | —                 |
|            | و                  | ū                                       | ū                 |
|            | ي                  | ī                                       | ī                 |
| Doubled    | ي                  | īy (final form ī)                       | īy (final form ī) |
|            | و                  | uww (final form ū)<br>uvv (for Persian) | uvv               |
| Diphthongs | و                  | au or aw                                | ev                |
|            | ی                  | ai or ay                                | ey                |
| Short      | ا                  | a                                       | a or e            |
|            | ا                  | u                                       | u or ū            |
|            | ی                  | i                                       | o or ö            |
|            | ی                  | i                                       | ı                 |

### URDU ASPIRATED SOUNDS

For aspirated sounds not used in Arabic, Persian, and Turkish add h after the letter and underline both the letters e.g. جھ jh گھ gh

For Ottoman Turkish, modern Turkish orthography may be used.

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