

The Journal of Halacha and Contemporary Society

Number XVII

Pesach 5749
Spring 1989

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DETERMINING DEATH

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Death According to the Halacha

Rabbi Ahron Soloveichik

*The following was written by Rav Soloveichik in response to
Mr. Chaim Dovid Zwiebel, counsel to Agudath Yisrael.*

QUESTION: I. What constitutes death according to the halacha?

ANSWER: Years ago I delivered a lecture at Yeshiva University before the Rafael Society in New York. I delivered the same lecture at Kinus Torah SheBa'al Peh in the Fifth Avenue Synagogue four years ago. In this lecture I established the thesis that according to the halacha, total death is determined by the termination of the three basic functions in life; namely respiration, cardiac activity, and brain activity.

That termination of respiration is a necessary prerequisite to the determination of death is explicitly mentioned in the Gemara *Yoma* 85a; and the termination of respiration being indispensable to the determination of death is based upon the verse in the Torah of "...all that had the breath of life in his nostrils." That termination of cardiac activity is indispensable toward the determination of death is mentioned by the Rambam in *Moreh Nevuchim* Book I, chapter 39, and by the *Kuzari* and by the *Chacham Tzvi* and the *Chatam Sofer*; it is also mentioned by Rabbenu Bechaye in his commentary on the Torah on the verse "and you shall love the Lord your G-d with all your heart..." That termination of brain activity

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is indispensable towards the determination of death is mentioned by the Rambam in his *Commentary to the Mishnah, Oholot*. This legal ruling is also implicit in the Rambam, *Hilchot Avel*, no. 5.

In that lecture I pointed out that while all the *Rishonim* agree that death occurs only upon total termination of all three basic and vital functions of life – respiration, cardiac activity and brain activity – there are still two separate bodies of opinion as to the significance of the three vital functions as life factors.

According to Rashi in *Yoma* 85a, the *din* (law) mentioned in the Gemara that if a person is found beneath a pile of stones and found to be devoid of respiration, he is presumed dead and we are not allowed to desecrate the Sabbath for him, is only applicable in a case where in addition to being devoid of respiration, he was also found to be lying motionless like a stone; whereupon the *Chatam Sofer* makes the comment that Rashi herein is pointing out that cessation of respiration is not in itself a criterion for death, but rather that cessation of respiration coupled with being motionless like a stone creates a presumption that the person is completely dead and that all other vital functions have ceased. The *Chatam Sofer* points out that this obviously implies that if a person is devoid of respiration but manifests cardiac activity, he is considered alive. If someone kills him, he is a murderer (רוצח). And I pointed out in that lecture that it follows from Rashi that even if the person is found to be devoid of respiration and cardiac activity but he produces waves on the machine, he is also considered alive. In other words, according to Rashi, death is constituted by the termination of the three vital functions in life – respiration, cardiac activity, and brain activity. This is the position of Rashi.

However, according to the Rambam, as I pointed out in that lecture, death is a process rather than a state which occurs in a split second. The process of death begins with cessation of respiration and it ends with the total termination of all the three vital functions in life – respiration, cardiac activity, and brain activity. The language of the verse (גוירת הכתוב) “all that the breath of life in his nostrils” implies that when a person becomes devoid of respiration, the process of death has begun and the person is not considered fully alive. However, he is not considered fully dead either,

inasmuch as there is cardiac activity in him or brain activity. A person who becomes devoid of respiration but who still has cardiac activity is considered semi-alive and semi-dead. Consequently, if someone will kill him, he will be considered a murderer. Hence, it is absolutely forbidden (יהרג ואל יעבור) to cut out the heart of that person even though the removal of the heart of the donor is indispensable to the preservation of the life of the donee.

This is the gist of the lecture I delivered before the Rafael Society and at the Kinus Torah SheBa'al Peh.

As I have indicated, the principle that a person who still possesses cardiac activity is considered alive is mentioned by the Rambam in *Moreh Nevuchim*, by Rabbenu Bechaye, and by the *Kuzari* among others. Rashbatz in his *Sefer Yavin Shemuah* writes:

וכוחות הלב הם כח החיים כי לפעמים יתקיים האדם בלא
מזון ויתקיים בלא חוש ותנועה, אבל אם יתבטלו מתנועותיו
ויתקרר הב"ח ימות לבו בקרבו ויהי לאבן וכן כתיב מכל
משמר נצור לבבך כי ממנו תוצאות חיים.

Rabbi Yosef Shaul Nathanson in his *Divrei Shaul* (to *Yoreh Deah* 394) says, among other things,

כי ברור כשמש דקביעת החיות הוא הדופק על הלב והנשמת
אף

And it is as clear as the sun that the determination of life is the beating of the heart and the breath of the nostrils.

And the *Chacham Tzvi* in *Responsum 77* confirms the view of the Rambam in *Moreh Nevuchim* to the effect that the primary factor in life is the functioning of the heart. He writes:

גם הרב האלקי כמוהר"ר ר' יצחק לוריא וצוק"ל אשר רוח
אלקים דבר בו הסכים למה שהוא מפרסם לכל אנשי העולם
שהלב הוא משכן לנפש החיונית והוא המת לאחרונה אחרי
מיתת כל האיברים הרחוקים והקרובים אליו.

Also that heavenly rabbi, Rabbi Yitzchak Luria, may the memory of the pious and the holy be a blessing, in

whom the spirit of G-d spoke, agreed to what is publicized to all people of the world, that the heart is a sanctuary for the soul of life, and it [the heart] is the last to die, after the death of all the limbs which are far or near to it.

It is obvious that the so-called "Harvard criteria" do not conform to halacha. It is contrary to what the Rambam said in *Moreh Nevuchim*, to what Rabbenu Bachaye said, to what the *Chacham Tzvi* said, to what the *Chatam Sofer* said, to what the *Tumim* said, and to what R. Yosef Shaul Nathanson said. And last but not least (אחרון אחרון חביב), the Harvard criteria are contrary to what Rav Moshe Feinstein said in his *Iggerot Moshe*, to wit, that a heart transplant operation involves a double murder, a murder as against the donor and a murder as against the donee.

Any analogy between גיסטרא and brain death has no basis. גיסטרא involves an organic physical decapitation whereas what is called brain death at most could involve only a functional non-activity of the brain. Furthermore, how can the doctors be sure that if a person's brain does not produce waves on the encephalograph machine that this demonstrates conclusively that there is total non-activity of the brain? There may be faint brain activity which is too minute to be picked up by the encephalograph machine.

QUESTION II: Assuming that brain death is death according to the halacha — is it proper to impose this view upon those who follow the contrary view?

ANSWER: In order to answer this question I have to have recourse to my imagination. Without recourse to imagination it is impossible for me to assume even for a moment for argument's sake that the Harvard criteria conform to the halacha, in view of the fact that all *Rishonim* and *Acharonim* say that as long as a person has cardiac activity he is not considered dead. But as I said, I am resorting to my imagination for a moment and I am assuming that the Harvard criteria conform to the halacha. Even so, it would be repugnant to the halacha to impose one's halacha-true opinion upon someone who follows a contrary view.

The Rambam in *Sefer HaMitzvot* says that even when the Supreme *Bet Din* (High Court) renders a decision that a certain type

of fat (חלב) is permissible, but a certain scholar is convinced that the Bet Din made a mistake, then that scholar is not allowed to act contrary to his own halachic opinion and be lenient; rather he must act according to his own opinion. However, if the scholar came before the Supreme *Bet Din* and presented his arguments before them, and the High Court rejected his arguments and told him exactly why they rejected his view, then that scholar is obligated to cancel his view and to submit to the opinion of the High Court. How much more obvious it is (ק"ו בן קל וחומר) that no *posek* today, can impose his opinion upon any person who follows a (legitimate) contrary opinion.

QUESTION III: Assuming brain death is halachic death – are Jews permitted, not only to receive organs, but also to make their organs available for transplantation into others?

ANSWER: Assuming that brain death is halachic death (and again in order to assume such a preposterous supposition, I am forced to resort to my imagination) then it follows that in a case where the donor – while he was in sound mind and in a state of being able to make a rational decision – bequeathed an organ for transplantation, and in addition the family of the donor without being pressured by the doctors has given its approval for transplantation, then it is permissible according to all *poskim* (not only the *Nodah Biyehuda* who is generally lenient in this area but even according to the *Binyan Zion* who is generally strict in this area) for doctors to use the organ in transplantation.

QUESTION IV: If brain death is not halachic death, is one allowed to benefit from organs donated by others? You quoted a certain Rabbi as saying: "You cannot declare removal of a liver or heart from a brain dead patient as murder, and then allow one of the members of your congregation to benefit from such murder... It would mean that young men of the Orthodox Jewish Faith, now waiting for liver transplants from Dr. Stazell of the University of Pittsburgh, must be told to go home. They cannot participate as accessories before or after the fact in an act of murder."

ANSWER: The statement made by the aforementioned distinguished Rabbi, to wit that one is not allowed even for the purpose of preserving his life to participate as accessory before or

after the fact in an act of murder, is halachically inaccurate inasmuch as it runs counter to the Gemara in *Nedarim* 229 (to which I will return momentarily).

The law that murder is absolutely forbidden (יהרג ואל יעבר) only implies that in a case where an act of murder is committed, even if it is for the purpose of saving a human life, one is not allowed to participate in this act either directly or as a causative factor. However, in the case of a heart transplant or a liver transplant the donee does not in any way participate either directly or as a causative factor (גורם) in the act of removing the heart or the liver from the brain-dead patient. Unfortunately, under the permissive, utilitarian climate prevailing in modern society, doctors are determined to remove the heart or the liver from the brain-dead patient regardless of the identity of the donee. They don't know and they don't want to know who the donee will be. Whether a certain potential donee puts his name on the list or not, the heart or the liver is removed from the brain dead patient anyway. It is the surgeon who commits the act of murder directly. It is the doctors and the nurses who help the surgeon to remove the heart or liver who are effective causes, or abettors, in the act of murder (רציחה). However, the potential doctor of the potential donee who puts his name on the list as a potential donee or the donee is not a participant in the act of murder in any way.

Let me quote the Gemara in *Nedarim* 229:

When Ulla went up to Eretz Yisrael, he was joined by two inhabitants of Chozai [the modern Khuzistan] one of whom arose and slew the other. The murderer asked of Ulla: "Did I do well?" "Yes," he replied, "moreover, cut his throat clean across." When he came before Rabbi Yochanan, he asked him: "Maybe, G-d forbid, I have strengthened the hands of transgressors?" He replied: "You have saved your life."

From this we see clearly that it would be permitted even to strengthen the hands of murderers in order to save one's life. Certainly it is permitted for a person to put his name on a list as a potential heart or liver donee, which cannot even be considered

“strengthening the hands of murderers,” in order to save his own life.

Furthermore, even if the remark by the aforementioned distinguished Rabbi had been halachically sound, it would be irrelevant to the question of whether brain death is halachic death. Assuming that the halacha is that a Jew is obligated to give up his life and not be a beneficiary from an act of murder – would that force us to the conclusion of justifying brain death legislation? This would be adopting a utilitarian approach in halacha. G-d forbid to use such an argument. It is incredible that the aforementioned distinguished Rabbi made such a statement. In all probability it was a slip of the tongue on his part.

In conclusion I would like to mention a poignant remark that was made by Reb Yacov Tzvi Meklenberg in his work *Haktav veHakabala* in connection with the verse

וְאֵת דַּמְכֶם לְנַפְשׁוֹתֵיכֶם אֲדַרְשׁ מִכָּל חַי אֲדַרְשֶׁנּוּ וּמִיַּד
הָאָדָם מִיַּד אִישׁ אַחִיו אֲדַרְשׁ אֶת נַפְשׁ הָאָדָם (בראשית ט"ה).

However, your own blood of your souls will I require;
at the hand of every living creature I require it and at
the hand of man; at the hand of man's brother will I
require the soul of man.

The question arises as to why this redundancy – “at the hand of man... at the hand of man's brother.” *Haktav Vehakabala* says that herein the Torah describes two kinds of רציחה or murder. The expression “at the hand of man” is descriptive of a murder that is done with malice, or with pecuniary or lustful greed. The expression “at the hand of man's brother” is descriptive of a murder that is grounded in a motive of brotherhood or mercy. The Al-mighty will mete out retribution against both kinds of murder. The murder involved in the removal of a heart or liver from a brain-dead patient for the purpose of saving the life of a donee is a murder implicit in the expression of “ומיד איש אחיו” – at the hand of man's brother.”

It is incumbent upon all those who have ethical sensitivity to protest against those who are trying to implement the Harvard criteria through a heart or liver transplant because of brotherhood

and mercy. I have the greatest respect and reverence for the few distinguished and revered Rabbis here and in Israel who expressed themselves in favor of the Harvard criteria. However, as the *Ba'al HaMaor* in his introduction says וכבר אמר הפילוסוף אהוב מכולם or as the proverb is expressed in Latin, "Amicus Plato sed amigas amica veritas." "I love Plato but the truth I love above everything else." I hope that this brief note will answer your queries.