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Is brain death enough? RCA says maybe

By Michael Orbach

After a lengthy debate, the Rabbinical Council of America has come out with its position regarding organ donation and brain death: it doesn't have one, but everyone else does.

Whether brain death is dead enough to halachically allow organ donation is a highly contentious topic. One view is that brain death, when the brain stem can no longer control the lungs or the diaphragm, is death and organs can be used for transplants. The stricter, or more machmir, opinion, believes that death only occurs when there is cardiorespiratory failure and the heart stops pumping blood. The two opinions decide whether Orthodox Jews can donate their organs in the case of brain death.

The RCA, in their release on Jan. 7, noted both sides.

"It is true that many halachic authorities of our day, including Rav Hershel Schachter, Rav Mordechai Willig, Rav J. David Bleich and others maintain that brain stem death does not satisfy the halachic criteria for the determination of death," said the RCA statement. "It is also true, however, that many other halachic authorities, including Rav Gedalia Schwartz, Rav Moshe Tendler, and the Chief Rabbinate of Israel maintain that brain stem death does qualify for the determination of death in Jewish law."

RCA's statement or non-statement was sparked by the New York Jewish Week's discovery of a 110-page report issued by the RCA's Vaad Halacha about brain death. The study, authored by Rabbi Asher Bush, Rabbi Kenneth Auman and Rabbi Tzvi Flaum, was intended only for internal purposes. It leaned heavily towards the stricter opinion, according to several rabbis who read the study. The publication engendered strong criticism of the organization, especially from Rabbi Moshe Tendler, the son-in-law of Rav Moshe Feinstein and the most prominent proponent of the view that brain death is halachically considered death.

"The report was written with an agenda..." Rabbi Tendler told The Jewish Week. "[To] push the point that brain death is not acceptable, despite the fact that the Chief Rabbinate [in Israel] approved it and Reb Moshe [Feinstein] approved it."

He said that the stricter opinion "defames Judaism and exposes every Jew to the hatred of non-Jews." "It is saying that a Jew can take a vital organ from a non-Jew even though Jews consider him alive — that his life doesn't count," Rabbi Tendler said. "How could you justify such a ruling?"

Rabbi Avi Shafran, Director of Public Affairs for the Agudath Israel of America, said that the organization did not have an official position on the matter, but praised the RCA study.

"The RCA document is a thorough, fair and accurate portrayal of the gamut of halachic opinions on the matter," Rabbi Shafran said. "It accurately portrays the consensus among the great majority of the most respected poskim of the past and the present that vital organs should not be harvested from patients declared brain dead (and certainly from those declared 'brain stem' dead -- which diagnosis does not preclude the cessation of brain activity in higher parts of the brain).

"Our only official position is that Jews should have the option of following the rulings of their personal poskim in such things."

Rabbi Moshe Kletenik, president of the RCA, stressed that the study was not meant to be a definite opinion.

"It was an educational piece for the benefit of our membership," he said, "This is not intended as a psak halacha, it's to provide an information for our membership and to use it as a tool when they reach conclusions.... The RCA does not have a position, we recognize complex issues where there are differing views and we leave it to our individual members and how they see fit.... We don't take a position on all matters of halacha."

Robby Berman, the founder and director of the Halachic Organ Donation Society, said that the initial study should be retracted because it was "highly tendentious and made numerous counterfactual medical and historical statements." He praised the RCA clarification.

"The new RCA announcement is very encouraging in that it states unequivocally that its own Av Bet Din, Rav Gedaliah Schwartz, the Chief Rabbinate of Israel and many other rabbinic luminaries accept brain death and support organ donation," Berman said via email. Since the statement's publication, over 80 Modern Orthodox rabbis have signed an online petition endorsing the view that brain death is considered death. Posted by Rabbi Dov Linzer, Dean of Yeshivat Chovevei Torah on Jan. 7, the petition has garnered some impressive signatories, including Rabbi Shlomo Riskin of Efrat and Rabbi Haskel Lookstein of Congregation Kehilath Jeshurun on the Upper East Side.

"Brain stem death is a halakhically operational definition of death," the statement said. "As such, organs may be removed for transplantation under strict halakhic supervision and guidance.

The petition added that, "to adopt a restrictive position regarding donating organs and a permissive position regarding receiving organs is morally untenable... Such an approach is also highly damaging to the State of Israel, both internally and in regards to its relationship with the larger world, and to the Jewish People as a whole."

Rabbi Linzer said it was "time to make a statement," and that the problem the brain death proponents faced was a mistaken belief.

"Even non-Halachic Jews feel that within the halachic community the standard is cardiac death and brain death is a questionable position," he said. "This does a terrible disservice ... and it's a tremendous tragedy for the lives that could be saved."

Rabbi Linzer said that he believed that the definition of brain stem death is the one that was used throughout history.

"[Death] was always determined by whether a person was still breathing," he explained.

He wasn't certain what the repercussions of the RCA's study would be.

"It could be that it will do some good," Rabbi Linzer said. "I don't know whether this is ultimately going to strengthen those who oppose brain death or whether it's going to be a catalyst for those who back brain death."

Agudath Israel of America did come out against the online statement. "The recent 'Rabbinic Statement Regarding Organ Donation and Brain Death' signed by several score 'Orthodox rabbis and rashei yeshiva' is decidedly unorthodox in its approach to the halachic process," the statement said. "In fact, it makes a mockery of that process, by asking other rabbis to accept one particular halachic view regarding a complex issue pertaining to matters of life and death on the grounds that the times, in the signatories' estimation, require a certain result."

In England, Lord Rabbi Jonathan Sacks and the London Beth Din issued an edict that brain stem death is not considered death and that religious Jews are forbidden from carrying organ donation cards.

"There is a view that brain stem death is an acceptable Halachic criterion in the determination of death," the statement said. "This is the view of some Poskim (Halachic decisors). However it is the considered opinion of the London Beth Din in line with most Poskim worldwide, that in Halacha cardiorespiratory death is definitive."

Berman said that there was a case of organ donation two months ago in London, where the London Beth Din told a family of a brain dead patient not to donate the organs. Berman criticized the ruling.

"Rabbi Sacks has the right to reject the ruling of major gedolim and to be of the opinion that brain death is not death and Jews can't donate upon brain death," he explained. "But why did he not also state Jews can't take organs from brain dead patients. If Rabbi Sacks thinks a Jew who is brain dead is alive, is not a gentile who is brain dead similarly alive?"

Berman also pointed out that the rabbi who gave Rabbi Sacks smicha, Rabbi Nachum Rabinovitch, is a card-carrying member of the Halachic Organ Donor Society.