

This week the RCA Vaad HaHalakhah released a long-awaited report on the subject of Halakhah and braindeath. I am including below a letter I wrote to a colleague when I first heard that this report was in preparation, but I want to preface it with a comment on the peculiar halakhic category of safek bedin, and its relationship to the motto of The Center for Modern Torah Leadership, "Taking Responsibility for Torah".

Safek bedin (doubt as to the law) is a judicial decision that the judge cannot determine what the law is – however, rather than causing the recusal of the judge, it in fact generates a legal decision, based on formal rules as to how to determine the practical law in light of the failure to determine the law in the abstract. For example, one celebrated rule is "safek deoraita lechumra; safek derabbanan lekula", meaning that when the doubt relates to a legal issue under direct Biblical authority, one must in practice follow the stricter position, whereas if it relates to a legal issue arising under rabbinic legislation, one may in practice follow the more lenient position.

Now it is crucial to understand that "safek", doubt, as it applies to matters of law is a constructed category, not an unmediated description of psychological reality. The antithesis of "safek" is "rov", majority, meaning in theory that if one has any reason whatsoever for preferring one side over the other – even if that merely transforms the odds from 50-50 to 50.0001-49.9999 – the case is no longer one of safek. In practice, we generally use a lower threshold, determined ad hoc and informally.

There is one exception that requires mentioning here. In cases of risk to life, we treat any non-negligible risk as significant, even if it is unlikely. In other words, a minority probability is treated as equivalent to a "rov" elsewhere.

All this is perfectly reasonable in the abstract. However, I seek to demonstrate briefly below that there are categories of cases in which the psak of safek yields highly unfortunate results. Here are a few:

- a) Cases where there is a dispute as to which of two methods is preferable, but each side would prefer using the other's method alone rather than the two methods together. In such cases a determination of safek may require the use of both methods, even though both disputants would have seen this as the worst option.
- b) Cases where the result is paralysis. For example, if the outcome of a dispute over what blessing to make over a food is that the food cannot be eaten, since each side holds that making the other's berakhah is both insufficient to allow eating and a forbidden use of the Divine Name.
- c) Cases where the result is cruel. For example, declaring someone a safek mamzer leaves them unable to marry anyone at all, even another safek mamzer. More immediately in our day, declaring a person whom one would not be willing to convert to Judaism a Safek Jew; this leaves them unable to marry either Jews or nonJews.
- d) Cases where the result is immoral or unethical. This brings us back to the RCA report on braindeath, and requires yet another introduction.

The result of safek can in practice be reached two ways:

- a) if a decisor explicitly declares themselves to be in doubt
- b) if one decisor makes a clear decision one way, and another makes a clear decision the other way, so that their shared constituency will treat the matter as safek

This second situation has a particular development, in that it makes it very likely that the constituency will not necessarily see the safek as a static, but rather as a dynamic, equilibrium. In other words, they will "forum shop", or adopt the position they like on a case-by-case basis, rather than consistently applying the rules of safek. Even more problematically, they may condemn others for relying on the lenient position, but reserve the right to rely on it themselves if and when the situation arises for them, with a claim of extenuating circumstances.

My contention is that the situation of brain-death is particularly susceptible to this kind of manipulation as it relates to organ donation. To wit, confronted with the decision of whether to donate, people will rely on the position that braindeath doesn't count as death; confronted with the decision of whether to accept a donation, people will rely on the position that it does count. And yet, to count someone as dead for the purpose of saving your own life, but yourself in the same condition as alive so as not to save his, seems elementarily immoral.

Nonetheless, the RCA report cites several great rabbis as ruling this way. I have not yet been able to look up the citations, and so can't comment on their accuracy (I hope to by next week), but I want to make one preliminary comment, namely that it is no accident that the Israeli Rabbanut HaRashit is the group that maintains a consistent brain-death-position. This is not, regrettably, because of the rabbanut's great insitutional moral sensitivity; rather, it is because they were paskening for a "closed system", in which one largely can only receive organs donated by members of the same constituency. Thus allowing the dynamic of safek would result in no donations, so that allowing receiving organs would be irrelevant. In other words, the rabbanut had no choice but to take responsibility for the consequences of their psak, as they would be felt within their constituency.

American rabbis, however, by leaving open the option of receiving, can evade that responsibility, as the consequences of forbidding donations are distributed throughout the American system, and therefore affect their own consituency very marginally. Again, this would be true even if one categorically declared brain death halakhically irrelevant, as in real life, patients awaiting donations would, and perhaps even be told to, ask a "pro-brain-death" rabbi the question.

There is much room to question whether my own response to date, refusing to pasken the issue lemaaseh either way, is any more responsible. I suspect not.

That is as much as I can say this week – I hope to have more next week. Please read the letter below, with the caveat that I hope to present a more comprehensive and nuanced analysis of the issues it discusses in the near future, esp. with regard to the first paragraph. You are also encouraged to look at the actual (110 page report) and at the response on the Hirhurim blog, among others.

For a previous dvar Torah on Vayigash, please click [here](#).
Comments as always are welcome.

Shabbat shalom!
Aryeh Klapper

Dear Rabbi X,

Some years ago Rabbinic organizations such as the RCA and the Rabanut HaRashit accepted "brain death" as an adequate criterion for determining death according to Halakhah. This acceptance was largely based on representations to them that "braindeath" reflected specific physical phenomena, such as lysis of the brain. As a student of R. J. David Bleich shlita, and on the basis of my own conversations with knowledgeable medical ethicists, I was never comfortable with this acceptance, and have generally refused to address sh'eilot that were affected by this issue. It has since become clear that the representations were empirically false, and that the criteria for braindeath were and are devised with the primary aim of permitting the effective harvesting of organs for transplant, rather than of accurately locating the phenomenon of death. It is accordingly deeply problematic to directly rely on those criteria halakhically, or even to treat positions that rely on those criteria as halakhically viable.

However, a mature halakhic appraisal of the situation requires acknowledgment that many, many lives are saved each year by means of transplanted organs. While the halakhic principle that one may not commit murder to heal is unchallenged, the certainty of healing may shift the burden of

proof at least partially. This seems to me the basis of R. Mordechai Willig's comment to me approximately twenty years ago that braindeath should be accepted for the sake of allowing transplants but for no other purpose. The decision to prevent donation of organs that will certainly save lives must be taken only after every possibility of allowing such donations has been exhausted.

Furthermore, the issue of whether it is permitted to receive such donations must be revisited in depth. Organs are often harvested with specific donors in mind, and allowing Jews to include themselves on such lists must be seen as incitement to murder, if one sees the harvesting as murder. There are also considerations of *mishum eivah*, of the dangerous social consequences were it to become known that Jews are willing to receive but not donate the organs of braindead patients. Finally, *mishum eivah* in this case as in others may reflect a deep moral intuition whose source is in the highest realms of *kedushah*.

I see several avenues of halakhic analysis that deserve investigation and might suffice to permit at least some, and perhaps many, of the transplants currently permitted on the basis of braindeath. This list is I'm sure not comprehensive, and I would look forward to seeing the thoughts of many scholars greater than I on this issue.

1) Tzitz Eliezer 13:89 argues that RAMO does not, as is often claimed, argue that the distinction between "hasarat moneia" and "hakravat mitah" is parallel to that between "shev v'al taaseh" and "kum aseh". Rather, he sees RAMO as distinguishing between patients who have "independent life" and those who have only "externally supplied life", as we see the "external supply of life" as preventing natural death rather than as keeping the patient alive, and therefore removing it as "hasarat moenia". Both he and R. Chaim Dovid HaLevi in *Techumin* 9 suggest that there are patients whom Hashem wishes dead, so that beings who prolong their lives are acting against *Ratzon Hashem* and against *Halakhah*.

The implication of Tzitz Eliezer's argument is that one may kill patients in such condition by any means that does not increase their suffering, and I suggest that the means include causing death in a manner unconnected to the artificial supply of life. In other words, if it is the phenomenon of life per se that is the obstacle, any means of causing death is merely *hasarat moneia*. And if this is the case, then the death resulting from the harvesting procedure is *hasarat moneia*, and harvesting organs from such patients could be permitted.

R. Waldenberg and R. HaLevi are just examples of the construction of "third categories" between alive and dead, which may have unique *halakhot* associated with them.

2) The *halakhot* of suicide include circumstances, perhaps including the avoidance of torture or public shaming, in which it is permitted. *Tosafot* take the

position that one may give up one's life rather than commit a non-yehareg v'al yaavor sin. Maharik allowed a woman to commit adultery in order to save the lives of a caravan, and it may follow that one may commit suicide to save numerous others as well. There may be ways then to allow the harvesting of organs to save many others on the basis of prior permission from the patient.

3) The principle that one may not heal via bloodshed is based on the principle "who can say that your blood is redder than his". It can be argued that this principle applies only when there is no objective reason for believing that one person's blood is redder; this is the simplest means of reconciling the Mishnah in Ohalot that permits therapeutic abortion with this principle, although there are of course many other reconciliations, esp. following Rambam's position. Note particularly Avi Ezri's matter of fact claim that a tereifah and a fetus have the same status with regard to rodef, that one may not kill the rodef to save them. See also Beit Yitzchak YD 162:3.

None of these arguments are well-developed, and obviously a developed version would have to be adopted by a posek of significant stature for them to have any probative halakhic value. I myself find the third approach deeply disturbing.

At the same time, I think we need to be honest with ourselves about the implications of not accepting any such approach. If we really believe that harvesting organs is murder, plain and simple, we need to act accordingly. Implications include banning kohanim who are transplant surgeons from duchaning, and generally banning anyone involved with such transplants from all synagogue honors as murderers; forbidding financial support to institutions that engage in such transplants, particularly Shaarei Tzedek Hospital; and using what political influence we have to prevent what we genuinely see as mass murder, on the order of the Catholic opposition to abortion. If we are unwilling to do so, then we need to be honest about what we believe. If what we really believe is that this should be permitted, but we haven't yet found the sevara to permit it, perhaps we are best off being silent, and hanach lahem leYisroel – im lav nevi'im heim, bnei neviim heim.

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