

HALACHIC AND HASHKAFIC ISSUES IN CONTEMPORARY SOCIETY

13 - ORGAN DONATION OU ISRAEL CENTER - SUMMER 2016

A] THE CURRENT PROBLEM IN ISRAEL

- 30-40% of people in Western countries carry donor cards. In 2006 only around 4% of Israeli's carried cards! This has now risen to around 14%. Why is there such a disparity between Israel and other countries?
- Israel has a chronic shortage of donated organs and was in fact expelled from the European Union Organ Donor Network for failing to donate organs, making the problem worse.
- New Israeli law on Organ Donation came into force in 2008, defining brain-respiratory death as the relevant determiner of death for organ donations and providing for various benefits to living organ donors. The law also criminalizes organ trafficking.

B] ETHICAL ISSUES

- When is the moment of death - is this a medical/legal/religious decision?
- Who should decide when death has occurred - doctors, rabbis?
- Who should chose whether to donate organs - the donor (donor cards)? the family? doctors?
- Should the law default to permit donation unless the donor specifies otherwise or vice versa?
- Should donors be able to determine who receive organs - do we prioritize or deprioritize certain groups?
- Should organs be sold?
- Moral utilitarianism as a determinant of legal definition?
- Animal organ donation?

C] HALACHIC ISSUES

- Time of death in Jewish law; harvesting organs before death is murder.
- Disrespectful treatment of a human corpse.
- Obligation to bury the dead.
- Is there a mitzvah to give organs after death?
- Is there a mitzvah to give organs while alive (eg one kidney).

Other points to consider:-

- Does Jewish law require a person to be buried whole?
- Could organ donation have any impact on the Jewish concept of resurrection?
- Does carrying a donor card invoke some kind of 'evil eye' or is this just superstition?
- Would a Jew be allowed to accept a donor organ from an animal?

D] POTENTIAL HALACHIC ISSUES ASSOCIATED WITH REMOVING ORGANS

1. כב וְכִי־הָיְתָה בְּאִישׁ חֲטָא מִשְׁפֹּט־מוֹת וְהוּמָת וְתִלֵּית אֹתוֹ עַל־עֵץ: כג לֹא־תִלֵּין נְבִלָתוֹ עַל־הָעֵץ פִּי־קִבּוֹר תִּקְבְּרֶנּוּ בַּיּוֹם הַהוּא פִּי־קִלְלַת אֱלֹקִים תִּלְוֶי וְלֹא תִטְמֵא אֶת־אֲדָמַתְךָ אֲשֶׁר־ה' אֱלֹקֶיךָ נָתַן לָךְ נַחֲלָה

דברים כא:כב-כג

There is a mitzvah in the Torah not to leave out the body of a hanged criminal overnight but rather to bury the corpse. Chazal learn from here an issur of nivul hamet - treating the body disrespectfully

2. וכי תימא דבדקינן ליה, הא קא מינוול; וכי תימא משום איבוד נשמה דהאי נינווליה, וניחוש שמא במקום סיף נקב הוה

חולין יא:

The Gemara is discussing a murder trial. The suggestion is to perform an autopsy on the victim to establish if the victim had a fatal disease (independent of the murder wound) and thereby prevent the execution of the murderer. In the end the Gemara concludes that such an autopsy may be pointless and therefore cannot be done, but it is clear that nivul hamet would be set aside for a real pikuach nefesh

3. עוד הביא כבוד מעלתו ראייה מסוגיא דחולין (יא)..... הרי דלהציל הרוצח היה מותר לנוול ההרוג וכ"ת דשם ודאי הצלה הוא וכאן ספק הוא שירפאו הרופאים פעם אחרת ע"י כך, שם ג"כ ספק הוא שמא ימצא טריפה ועוד דגם ספק פיקוח נפש דוחה כל איסורין שבתורה חוץ מתלת. ועוד דאי אמרינן שלעולם לא יהרג הרוצח בלי בדיקת הנהרג א"כ ניוול זה הוא לכבודו של הנרצח וכל מה שהוא לכבודו אין בו משום ניוול. את כל אלה כתבתי לפי דבריכם שאתם קורים זה פיקוח והצלת נפש. אבל אני תמה הלא אם זה יקרא אפילו ספק הצלת נפשות א"כ למה לכם כל הפלפול ... שאפילו ספק דוחה שבת החמורה ... ואמנם כ"ז ביש ספק סכנת נפשות לפנינו כגון חולה או נפילת גל ...

שו"ת נודע ביהודה מהזורה תנינא - יו"ד סימן רי

The Nodeh Beyehudah (R. Yechezkel Landau 1713 - 1793) makes it clear that we would set aside the issur of nivul hamet for pikuach nefesh - indeed such a purpose would not be a nivul to the met but a kavod for the met! However, it has to be a real case of pikuach nefesh lefaneinu - in front of us. That would exclude using a body for medical research (even though that may save lives in the future). Would this also exclude harvesting an organ for a transplant operation that has only a very slight chance of success?

4. מת, בין עובד כוכבים בין ישראל, תכריכיו אסורים בהנאה. (ש"ך - דכתיב ותקצר שם מרים וילפינן שם שם מעגלה ערופה מה עגלה ערופה אסורה זכנאה אף מת וכל תכריכיו אסורים זכנאה)

שולחן ערוך יורה דעה סימן שטט סעיף א ושך שם

There is an issur to derive any benefit from a dead body, Jewish or non-Jewish. Again, this issur would be waived in the event of pikuach nefesh.

There is also a mitzvah to bury the dead as soon as possible. This includes even parts of the body (i.e. organs) present at the time of death. Again, this will be overridden in the event of pikuach nefesh. Furthermore, in the case of transplant the organ will eventually be buried

5. אפילו הוא בסכנת מות וצריך לגזול את חבירו כדי להציל נפשו, צריך שלא יקחנו אלא על דעת לשלם

שולחן ערוך חושן משפט סימן שנט סעיף ד

The Shulchan Aruch rules that stealing, even to save life, is only permitted on the understanding that one will pay back the theft. Thus many poskim hold that taking organs without the permission of the donor is assur, even to save life. The donor can however give permission during his life (see Shu't Binyan Tzion 170)

E] TIME OF DEATH IN HALACHA

Time of death in Jewish thought is absolutely clear - it is the moment of separation of the body and the neshama. The problem in halacha is defining that moment.

In secular terms, time of death is not a medical definition, but rather a legal and ethical one. The body goes through various processes of gradual death and decay - somatic death, brain death, molecular death. The law must decide at what point the doctor has no further obligation to try to revive the patient and thus the patient can be pronounced dead in law, with all the consequences of that decision (e.g. inheritance, murder). There are a number of main possibilities for a legal definition of death:-

- (i) brain-stem death - cessation of spontaneous respiration
- (ii) Cessation of heart beat
- (iii) Full body death - approx 3 days after breathing stops. This is far later than most legal definitions of death.
- (iv) Death of the cerebral cortex - loss of consciousness but independent breathing and pulse. Almost all legal systems define such a patient as alive, but in a coma or PVS (persistent vegetative state)
- (v) 'Clinical Death' - which is temporary and reversible.

The main halachic debate is between (i) and (ii).

There are 3 major life-support systems in the body (i) **Brain** (ii) **Respiratory - breathing** (iii) **Cardiac/Circulatory - heart**. Before modern times, only breathing and heartbeat were detectable and thus defined death in common law. From the late '60s to the present, the definition of death has moved to include reference to brain activity, which can now be scanned. The halachic question is whether death is defined by reference to brain-death/cessation of spontaneous respiration whilst cardiac activity still continues.

E1] WHAT IS BRAIN DEATH?

There are different states of brain inactivity. Some of the current secular recommended legal definitions of death are:

"Irreversible cessation of circulatory or respiratory function OR irreversible cessation of all function of the entire brain including the brain-stem" ; or "Irreversible loss of the capacity for consciousness, combined with irreversible loss of the capacity to breath"

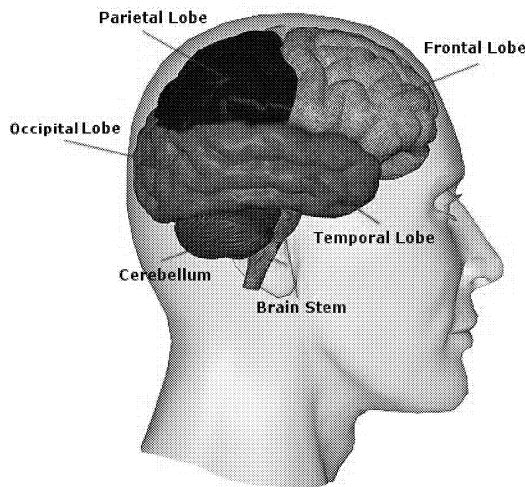
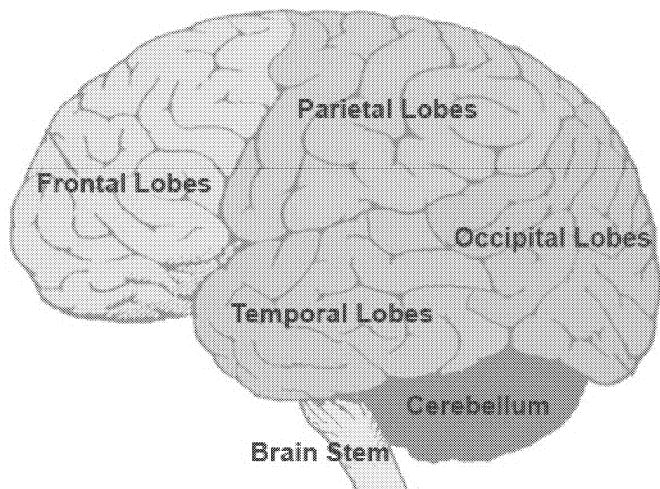
In either case, brain-stem death would satisfy these criteria. This will mean that a patient can be declared dead, even though they still have independent cardiac activity. This brings the moment of legal death much earlier than it was previously. Some have suggested that the following issues have given an impetus to this move:-

- (i) organs can be successfully harvested from a brain dead patient only where they remain fully oxygenated. It is practically impossible to harvest them from a patient who has unquestionably ceased to have any cardiac activity.
- (ii) triage and economic pressures on hospital beds dictate against keeping alive, at enormous expense, people who are brain dead when the resources could be used to save other patients.
- (iii) People see the switching-off of a brain dead patient as a merciful act, not murder, and are motivated by genuine kindness in seeking to help the family avoid further trauma¹.

The brain-stem is responsible for basic reflex actions such as pupil and gag reflex and spontaneous respiration. The upper brain is responsible for higher consciousness. Loss of activity in the upper brain alone is NOT regarded as death, but rather a deep coma/PVS². Once the brain-stem is deprived of oxygen for around 4 minutes, its death is irreversible and the body can no longer breathe on its own. Brain-stem death usually comes about as a result of extra-cranial damage or intra-cranial swelling which can prevent blood reaching the brain once the cranial pressure exceeds blood pressure. Whilst brain-stem death must result in the irreversible failure of spontaneous respiration, it does not cause the heart to stop. Cardiac activity can continue after brain-stem death for days. According to some studies, even after brain-stem death there may still be activity in other areas of the brain.

1. Haktav Vehakaballa on Breishit 9:5 specifically learns from the passuk that this is also assur.

2. See www.bbc.co.uk/news/health-20268044 for a case recorded in Nov 2012 of a PVS patient previously thought to be 'unconscious' but found to be able to communicate through brain scans



E2] THE SUGYA IN YOMA

6. כָּל אֲשֶׁר נְשָׁמַת-רוּחַ חַיִּים בְּאַפֵּיו מִכָּל אֲשֶׁר בְּחַרְבָּה מוֹתוֹ

בראשית זכב

The people killed in the Flood are described as 'all those who had the soul-breath of life in their nostrils'. Does this mean that life is to be defined by respiration?

7. תנו רבנן: עד היכן הוא בודק? עד חוטמו, ויש אומרים: עד לבו. ... אמר רב פפא: מחלוקת ממטה למעלה, אבל ממעלה למטה, כיון דבדק ליה עד חוטמו - שוב אינו צריך, דכתיב כל אשר נשמת רוח חיים באפיו

יומא פה.

The Mishna discusses the case of a collapsed building on Shabbat. One is allowed (and indeed required) to break Shabbat to clear away the rubble in the hope of finding survivors. When a body is found, the Gemara asks how much of the body are we allowed to clear to establish if it is alive? There are two opinions:- (i) up to the nose i.e. to see if there is breathing; and (ii) up to the heart i.e. to see if there is heartbeat. The Gemara concludes that the machloket is only if the body is uncovered from the legs up. Do we stop at the heart if there is no heartbeat and conclude that the person is dead, or do we go further, even if we find no heart beat, and check for breathing?

8. ונפלה בו מפולת, מפקחין עליו בשביל ישראל שלשם. עד איכן? תרין אמורין - חד אמר עד חוטמו וחורנה אמר עד טבורו

תלמוד ירושלמי מסכת יומא פרק ח דף מה טור ב /ה"ה

This debate is also brought in the Talmud Yerushalmi but with one major difference. There, the two opinions are (i) up to the nose (to detect breathing) and (ii) up to the navel (perhaps meaning to detect breathing through the rising of the diaphragm). If so, no mention is made of heartbeat at all!

9. תנו רבנן עד היכן הוא בודק? עד טבורו ויא' עד חוטמו (ר"ן - מחלוקת דכך תנאי - דמר אמר עד טבורו ומר אמר עד חוטמו)

רי"ף יומא דף ה.

The wording brought in the Rif and the Ran is that of the Yerushalmi! This is also the wording brought in the Rosh

10. [The heart is the] root of all faculties and gives the faculties of nutrition, life, apprehension, and movement to several other members. [It is the] movement in the heart and arteries which takes the form of alternate expansion and contraction, whereby the breath becomes subjected to the influence of the air inspired.

Avicenna (11C) - Canon of Medicine

It should be noted that, until the 17th Century, medical opinion was that the heart was actually an organ for breathing! Only later was it understood as a separate circulatory system. This could indicate that there is no clear Talmudic basis for a definition of death other than respiration

11. אפ"ל מצאוהו מרוצץ, שאינו יכול לחיות אלא לפי שעה, מפקחין ובודקים עד חוטמו; אם לא הרגישו בחוטמו חיות, אז ודאי מת לא שנה פגעו בראשו תחלה לא שנה פגעו ברגליו תחלה

שולחן ערוך אורח חיים סימן שכט סעיף ד

The Shulchan Aruch rules like the first opinion - that we always check the nostrils for breathing even if there is no heartbeat.

On the basis of the above analysis, some authorities (such as R. Moshe Tendler) have concluded that heart activity is not halachically relevant to define time of death.

12. ... דמר אמר: כלבו יש להבחין, אם יש בו חיות, שנשמחו דופקת שם, ומר אמר: עד חוטמו דזימנין דאין חיות ניכר כלבו, וניכר בחוטמו

רש"י יומא פה. ד"ה הכי גרסינן:

However, others (such as Rabbi J. David Bleich) point out that Rashi's position seems otherwise. Rashi explains that the opinion favoring breathing as the evidence of life does not consider heartbeat to be irrelevant. Rather, heartbeat is sometimes difficult to detect through the chest, especially if faint, and, as such, is unreliable. However, in situations when we can ascertain cardiac activity, this is also evidence of life³

13. עד היכן הוא בודק - אם דומה למת שאינו מזיז איבריו, עד היכן הוא מפקח לדעת האמת?

רש"י יומא פה.

Furthermore, Rashi makes it clear that the tests applied in Yoma 85a are only when there is no other sign of life. Are we to apply the criterion of breathing alone when we know that there is a clear heartbeat?

14. ... ודבר ברור מאוד שאין נשימה אלא כשיש חיות בלב שממנו ולצורכו היא הנשימה

שו"ת חכם צבי סימן עז

The Chacham Tzvi (1660 - 1718) makes it clear that breathing and cardiac activity are part of the same test

15. וכוונת הקרא דנשמת רוח חיים באפיו לא על עצם רוח החיים שזה ודאי ליכא בחוטם, אלא הרוח חיים שאנו רואים איכא באפיו אף שלא נראה באברים הגדולים אברי התנועה, וגם אחר שלא ניכר גם בדפיקת הלב ולא ניכר בטבור... וליכא שוב שום סתירה מהזוהר שמביא החכ"צ שהלב הוא נותן החיות והכח לכל האברים ומהרמב"ם בספר מורה נבוכים

אגרות משה יו"ד ח"ב סי' קמ"ו

Rav Moshe Feinstein was not prepared to interpret the emphasis of the Gemara in Yoma upon breathing as a proof that life is defined by respiration, but, like Rashi, just that breathing is often the most identifiable test in such circumstances

Thus the sugya in Yoma is NOT conclusive in either direction. It does not directly address the modern-day scenario of heartbeat without respiration. According to Rashi's understanding it is cannot easily be used as a support for brain death as the relevant criterion. According to the Rif and Rosh there is potentially more support from this sugya for brain death as halachic death.

16. אבל כל שאחר שמוטל כאבן דומם ואין בו שום דפיקה ואם אח"כ בטל הנשימה אין לנו אלא דברי תורתנו הקדושה שהוא מת

שו"ת חתם סופר חלק ב (יו"ד) סימן שלח

The Chatam Sofer (R. Moshe Sofer - 1762 - 1839) clearly states that failure of respiration is only relevant as a sign of death after it has been established that there is no heartbeat. He gives a three stage test: (i) cessation of movement; (ii) cessation of heartbeat; (iii) cessation of breathing.

Professor Rabbi Abraham Steinberg⁴ takes the view that, in fact, the relevance of heartbeat, according to the Chatam Sofer, is NOT as an independent test but rather as a way of establishing that cessation of respiration is IRREVERSIBLE.

3. (see Shu't Chacham Tzvi no. 77)

4. Israel Prize laureate, Chairman of the Ethics and Supervision Committee of the Israeli Association for Pediatric Neurology, head of the Medical Ethics Unit, Shaare Zedek Medical Center, Jerusalem.

In the case of decapitation (see below) this is obvious. In a standard death it may not be, thus the need to wait for the heartbeat to stop. In the case of brain-stem death medical opinion is firmly that cessation of respiration IS irreversible. As such, according to Rabbi Steinberg (and other opinions - see below), this should be the halachic definition of death, irrespective of continuing heartbeat.

E3] THE MISHNA IN OHALOT

17. אדם אינו מטמא עד שתצא נפשו ... ואפ' גוסס ... וכן בהמה וחיה אינן מטמאין עד שתצא נפשם. הותזו ראשיהם אף על פי שמפרכסים טמאין כגון זנב של לטאה שהיא מפרכסת

משנה מסכת אהלות פרק א משנה ו

The Mishna states that decapitation is clear evidence of death. Even if the body is twitching, such movement is not evidence of life, but merely involuntary movement caused by spinal cord activity

18. Based on the position of Rav Moshe Feinstein cited above, Rabbi M. Tendler, one of the authors of the present essay, has introduced the concept of physiologic decapitation as an acceptable definition of death in Judaism even if cardiac function has not ceased. The thesis is: that absent heartbeat or pulse was not considered a significant factor in ascertaining death in any early religious source. Furthermore, the scientific fact that cellular death does not occur at the same time as the death of the human being is well recognized in the earliest biblical sources. The twitching of a lizard's amputated tail or the death throes of a decapitated man were never considered residual life but simply manifestations of cellular life that continued after death of the entire organism has occurred. In the situation of the decapitated state death can be defined or determined by the decapitated state itself as recognized in the Talmud and the Code of Laws. Complete destruction of the brain, which includes loss of all integrative, regulatory, and other functions of the brain, can be considered physiological decapitation and thus a determinant per se of death of the person.

Dr Fred Rosner, *Journal of Halacha and Contemporary Society*, No. XVII, Spring 1989, pages 14-31.

F] IS BRAIN DEATH ACCEPTABLE AS A HALACHIC DEFINITION OF DEATH

This is a dispute between contemporary poskim. In each case one will need to understand how the poskim learn the relevant sugyot (some of which are mentioned above) in coming to their conclusions.

The main arguments for and against are:-

FOR:

1. Halacha defines death as cessation of respiration. This is equivalent to brain-stem death.
2. Halacha defines decapitation as definite death. Brain-stem death is equivalent to decapitation.
3. Some poskim, particularly R. Moshe Feinstein, as quoted and understood by certain commentators, seem to support brain-stem death as a definition.

However, note that the positions of R' Shlomo Zalman Auerbach and R' Moshe Feinstein⁵ are often quoted as being supportive of brain-stem death as a definition of halachic death. In fact, their halachic stance is much more complex than is often presented. There are oral accounts which differ from the written record. In the case of Rav Moshe there is also a controversial letter published after his death which seems to support brain death, in contrast to his previous position. A great deal of ink has been split as to the authenticity and reliability of this letter.

4. The Israeli Rabbanut certainly supports the definition. Many senior poskim in the Religious Zionist world and beyond have endorsed brain-stem death as the relevant criterion. This include Rav Shaul Yisraeli, Rav Mordechai Eliyahu, Rav Zalman Nechemia Goldberg, Rav Avraham Shapira, Rabbi Dr Abraham Steinberg.

See the Halachic Organ Donor Society (H.O.D.S.)⁶ website for much more information on the arguments for and a list of those Rabbis who are in favour:- www.hods.org

5. A detailed analysis of Rav Moshe's and R' Shlomo Zalman's approaches, together with those of many other senior poskim, can be found at http://www.rabbis.org/pdfs/Halachi_%20Issues_the_Determination.pdf

6. However note that HODS is clearly driven by an agenda (positively motivated!) to increase organ donation and its presentation of the sources does reflect that, To download more source sheets and audio shiurim visit www.rabbimanning.com

- AGAINST:**
1. Halacha also requires cessation of cardiac activity. Brain dead patients have independent cardiac activity.
 2. Anatomical decapitation is not the same as physiological decapitation - by analogy, an animal with a missing organ may be a treifa, whereas with a nonfunctional organ it is not.
 3. Many senior poskim of the last generation in Israel opposed brain-stem death as halachically definitive. These included Rav Eliezer Waldenburg, Rav Yitchak Weiss, Rav Eliashiv and Rav Wosner. Many poskim of the Centrist Orthodox community - including Rav Mordechai Willig, Rav J David Bleich, Rav Herschel Schachter and Rav Aharon Lichtenstein z'l oppose it (either as certainly murder, or at least a serious safek). Rav Moshe himself is not clearly in favor. In fact he makes other statements indicating that removing organs is murder. (The pro-camp suggest he was talking about PVS not brain-stem death).
 4. Some poskim regard a patient being artificially respired as halachically 'breathing'

Other major concerns of those 'against' include:-

5. How reliable are the tests to establish brain-stem death.
6. How trustworthy are the hospitals (in E.Y. or chu'l) to abide by the guidelines in the face of pressure to supply organs?

The RCA has a 110 page analysis⁷ of the medical and halachic issues. Its overall approach is against brain-stem death

G] POST-MORTEM ORGAN TRANSPLANTATION

Organ transplantation following full and natural cessation of cardiac function is certainly permitted and recommended. Currently this is rarely technically possible (other than for corneas and kidneys) but the technology is developing fast. Note that this is NOT the same as 'DCD' - Donation After Cardiac Death - which is much more problematic as the heart is made to stop (in situations where it could be restarted) and then organs are removed. A patient who is 'clinically dead' but could be revived is almost certainly NOT halachically dead (ie CPR is not 'techiat hametim'!)

H] IS IT HALACHICALLY PERMISSIBLE FOR A PERSON TO ACCEPT ORGANS WHEN THEY WILL NOT DONATE

Yes, for a number of reasons:-

1. Even if the removal of an organ was definitely murder, the recipient will not be guilty of murder or even causing murder.
2. In any event there are many authorities who hold that it is permitted to define brain-stem death as halachic death - it is surely permissible to rely on them in a situation of pikuach nefesh.

BUT the fact that Jews accept organs but do not donate may result in a situation whereby Jewish people are treated with lower priority in organ transplants. Israel was expelled from the European Union Organ Donor Network because, year after year, they accepted organs but didn't donate organs. If this is the case, our refusal to give may result in Jews dying due to lack of organs. Compare chillul Shabbat which is muttar in some cases because of 'eiva' - the possibility of antagonizing the non-Jews so much that Jews will eventually suffer

I] LIVE DONATION

Live donation of organs is certainly permitted and is a mitzvah, provided that there is not an excessive⁸ level of health risk to the donor. Where there is some level of danger (eg kidneys) there may be a mitzvah, but no obligation. If the level of danger is very small (eg bone marrow and blood) there is a full obligation to donate.

7. http://www.rabbis.org/pdfs/Halachi_%20Issues_the_Determination.pdf

8. Not easily or objectively defined

נ] ISRAELI LAW - 2008

- Intended to balance the needs of medical ethics and the demands of Jewish law
- Supported by the Israel Medical Association (IMA) and the Israeli Chief Rabbinate
- Adopts brain-stem death as the legal and halachic definition of death
- Lower-brain death and the halt of breathing can be determined only by a pair of doctors who have received authorization from a steering committee appointed by the ministry director-general. The steering committee will be comprised of three physicians recommended by the IMA; three rabbis recommended by the Chief Rabbinate, at least one of whom must be a physician as well; an expert in ethics; an expert in philosophy; and a legal expert recommended by the president of the Supreme Court (one of the last three must be a doctor, while another must be a member of a recognized religion who is not Jewish).
- Steering committee members are to be appointed for a five-year term and be eligible for an additional term. The committee will decide on ways to train doctors in a short course and approving them for determining the moment of lower-brain death. The training course for the doctors will include the aspects of medicine, law, halacha and ethics relevant to the subject.
- When an approved doctor sets the moment of death - after which the patient can be disconnected from life support devices and organs may be removed for transplant - he must inform the family of the patient's lower-brain-death status. The family are entitled to receive all documentation and to consult with a clergyman before deciding whether to give organs. If accepting lower-brain death is regarded as forbidden by the patient according to information from the family, the ventilator will not be disconnected - until the patient's heart stops beating.
- Dealing in organ sales is illegal, whether carried out in Israel or abroad.
- It is hoped by the government that this will increase the number of potential organ donors to at least 20%.