

Brain Death

by: Rabbi Jeremy Rosen

I [wrote recently](#) about the sad, premature death of a wonderful man I knew. He needed a lung transplant to survive. One was available. But the transplant could only work if the organs were removed while the brain-dead donor's heart was still beating. [Rabbinic authority in Israel was consulted and refused to allow removal before the heart stopped.](#) Attempts were made to find an alternative halachic ruling, but by then it was too late. Two people died where one could have lived.

You might have thought it obvious that a life should have been saved and the spirit should have overruled the law. But [things are never as simple as they seem](#). For thousands of years Judaism has made the moment the heart stops and the body ceases to breathe the defining moment of death. Until that happens anything that hastens death is not acceptable. This is based not on scientific evidence but simply a long established tradition that has become the accepted law.

About fifty years ago the [debate began in halachic circles over the issue of brain death](#), particularly in regard to [harvesting organs to save other lives](#). Initially, those who supported considering brain death, such as the American [Rabbi Moshe Tendler](#), were excoriated. Only when he was joined by the late [Rabbi Moshe Feinstein](#), his father-in-law and a universally accepted halachic giant, did the furor die down. But still the Israeli ultra-Orthodox rabbinate, almost to a man, refused to accept brain death as the end of life.

Opposition was initially based on horror stories of people being declared brain dead and then coming back to life. But as technology improved such considerations fell away. Over the years more and more rabbis have come to accept brain death under most circumstances—of course, always treating each case on its own merits. That is the halachic way.

However in Israel the weight of ultra-Orthodox opinion remains opposed. Why? During the 1950's the Ministry of Health in Israel was run by left-wing secular Jews who made fun of what they saw as the primitive taboos of both the Orthodox and the oriental Jews, with regard to the human body after death. They were happy to use corpses for medical practice, to perform autopsies as training, and too often human remains ended up in trash cans. (Incidentally, the [Alder Hey scandal in Liverpool](#), only a few years ago, shows how common it is for hospitals to take body parts without consent, and illegally, for all kinds of purposes. A current case in the USA involves a [large-scale criminal enterprise](#) providing body parts from funeral homes to American medical institutions.)

This behavior on the part of the secular medical authorities resulted in a bitter war between rival camps over autopsies, in which the ultra-Orthodox position was that all autopsies are forbidden altogether, while the other camp insisted that autopsies were needed both for medical and criminal

reasons. It was a long and bitter battle that reflected the polarized nature of Israeli society. From this experience, the ultra-Orthodox world learned that if one will have to compromise politically, anyway, it makes sense to start from as extreme a bargaining position as possible.

It is this mentality that has such a profound effect on religious life in Israel. Start from an implacable and immovable "no", scream your way to "maybe", and fight for concessions all the way to a final "yes". And that is the approach of all sectors of Israeli political life—possibly all politics, full stop. But that is why change and development in halacha come more readily from those rabbinic authorities not caught up in the Israeli political mindset (or the few outstanding experts who have remained independent).

The fact is that in all legal systems there are variables and the mindset of judges is subjective within the framework of the system. For example, under Bush more right-wing conservative judges were appointed to the Supreme Court of the US and the decisions of the court swung towards a Republican and Christian agenda, whereas now, no doubt, under Obama the opposite will happen. Does this mean that Supreme Court Judges are dishonest manipulators? Not necessarily. You can have different ways of interpreting the same rules, genuinely held conflicting views.

In Judaism the obvious example is [Hillel and Shammai](#), the religious leaders of Judaism 2100 years ago. One tended to take a lenient, inclusive approach. The other was strict and exclusive. And both, says the Talmud, were "the word, the will, of God". You have divergences nowadays in Hassidism between those who reach out and those who turn inwards. It is hard to say only one is right.

My initial starting point was that it was a tragedy that brain death was rejected in this case. Of course I would have chosen to save Yossi's life. But that does not mean the negative decision was morally or halachically wrong. I am not in their league, as far as knowledge is concerned; but judgment and knowledge are two different qualities. The rabbis who took it were no doubt genuinely and honestly of the opinion that they were doing God's work and that strictness was and is the only way of combating the destructive forces of self-indulgent modernity.

The only good thing I can derive from this is that it shows that Jewish law is dynamic, and struggles with current issues, and it is capable of development. I only hope that in the years ahead choices and decisions such as this one will increasingly veer towards life instead of death.