What Does Halachah Say About ORGAN DONATION?

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Transplant surgery is one of the wonders of modern medicine. People who, in the past, would have died because of the failure of their hearts, livers or kidneys can now have years added to their lives. Persons who would have been condemned to blindness can now have the gift of sight.

Horribly disfigured burn victims can begin the return to a normal and productive life with the aid of skin grafts. The tragic death of one person can give life and hope to as many as eight people. At one time, heart transplant surgery had such a low probability of success that Rav Moshe Feinstein ruled that removal of the diseased heart constituted murder of the recipient; it was more likely that the recipient would live longer with the bad heart than with its replacement! Today, with the development of improved surgical techniques and anti-rejection drugs, the prospects of at least some degree of success are quite high.2

Because of the great value Judaism places on the saving of a life—“He who saves a single [Jewish] life is as if he saved an entire world”3—it would appear that organ donation ought to be encouraged, provided the medical procedures do not otherwise entail violations of halachah. To the extent such donation is halachically permissible, the unease and discomfort the family might feel at the dissection of their loved one’s body should be overridden by the value of pekuach nefesh (saving a life) and by contemplating the great spiritual merit that would accrue to the niftar (the deceased) whose generosity has enabled others to live.4 Conversely, to the extent halachah prohibits the choice, our feelings of sympathy for those in need of a transplant would simply be immaterial. The commands of God cannot be set aside because others or we perceive them as inhumane or politically incorrect.

Organ donation7 cannot be declared dead if neurological tests confirm total cessation of brain function (including a brain-stem function such as respiration) even if, as a result of mechanically supplied oxygen, the heart continues to beat and blood continues to circulate. (It must, of course, be emphasized that even under the brain-death criteria, persons who lack higher mental functioning, such as those in a coma or in a persistent vegetative state, are unequivocally alive and therefore, their organs cannot be used.) Whether halachah allows a determination of death to be made based on clinical brain-death criteria is a matter of sharp debate among posekim. Some analogize brain death to anatomical decapitation, which is unequivocally deemed “death”; others assert that while true destruction of the brain would be equivalent to death, clinical tests do not unequivocally establish such destruction; still others rule that as long as the heart is beating, the person is alive irrespective of the brain, and a final group asserts that a brain-dead person’s heart can have any status of a safeh mev-te-safeh goses (possibly dead but possibly alive, though death is deemed certain and relatively immi- nent). Although there may be no mitzvah to prolong the life of a get (such a life cannot be terminated by affirma- tive action such as the removal of a vital organ.8 Moreover, the brain-death standard itself has already been questioned.9

Both the Israeli Chief Rabbinate and the Rabbinical Council of America have accepted brain-death criteria in allowing organ donation.10 Rabbi Dr. Moshe Tendler, in particular, has argued that this is also the position of his revered father-in-law, Rav Moshe.11 Many posekim, however, differ.12

Jewish Action is not the forum to fully explore the intricacies of this halachic debate. The issues are compli- cated and the stakes are high. If brain death is not halachic death, removal of the organs is murder. If brain death is halachic death, failure to remove the organs could indirectly condemn people who could otherwise be saved to death. This is the single most difficult problem in the organ donation process, and it is essential that one consult with his posek before making a decision to donate one’s organs.

Fortunately, in the long term this may be a diminishing problem. As superior methods of preserving organs are developed, removal could be deferred until cardiac death as well as cessation of brain function is established. Moreover, the increased utilization of artificial organs, possibilities of transgenic transplants (i.e., from animals) as well as stem cell research and therapeutic cloning may eliminate the need to rely on human donors and would not only resolve the brain-death quandary but would also greatly enhance the organ supply.

I. Donations from Brain-Dead Donors

The traditional legal definition of “death” was irreversible cessation of respiratory and circulatory functions, i.e., a person could not be declared dead until there was both cessation of breathing and circulation of blood as evidenced by the absence of a heartbeat and respiration.22 This definition would make transplants extremely difficult since organs deteriorate rapidly once they are cut off from a blood supply (warm ischemia). Accordingly, American law in all fifty states now recognizes the concept of “brain death” (called “brain-stem death” or “whole brain death”), which means a person...
of respiration and heartbeat constitutes ‘death’ only when that cessation is irre-versible. If the patient is capable of hav-ing breathing and heartbeat restored, the patient is not dead even during the period of time he is not breathing. Since within two to three minutes there is still the possibility, albeit remote, of auto resuscitation (and certainly recon-nection to life-support), and within that time the brain stem has not yet been destroyed, removal of organs might actually be an overt act of homo-cide even according to those who regard brain-stem death as death. On the other hand, waiting until brain-stem destruction is irreversible would render the organs useless. It thus appears to this writer that organ donation pursuant to the existing NIHBD protocols is halachically prohib-ited. 16 (Note, however, that only three percent of transplants involve NIHBDs.)

III. Donations from the Dead

Certain organs or body parts are retrievable from persons who are clearly dead under all halachic criteria, and there is no issue of retzichah (murder). These organs and body parts are:

1. Organs of the brain stem or brain.
2. Organs in the abdomen.
3. Certain organs or body parts are exempt from the prohibition of retzichah.

Generally, Jewish law prohibits dissection of corpses, autopsies or the removal of body parts. 17 This is considered a desecration of the dead (retzichah), a violation of the positive mitzva of burial and a source of anguish and humiliation to the soul of the departed, which will be unable to find repose. 18 Nevertheless, like many of the other restrictions of the Torah, these prohibitions yield when their viola-tion can save a life (pitkun nefesh). 19

General anatomical experimentation or “leaving one’s body to science” does not qualify as pitkun nefesh even though information that could save a life in the long run might be obtained. 20 As a minimum, there has occurred an unnatural removal, although the Noda B’yehudah implies that removal of organs would never be permitted unless there is a designated beneficiary at the time of the removal rather than someone who materializes at a later date, it has been convincingly argued that as long as the probability is strong that a choleh will receive the organ, it is permissible whether he is specifi-cally identified at the time of the removal or not. 21 The key factor is that the organ be used for the choleh rather than for general experimenta-tion or educational purposes. 22

Assuming that pitkun nefesh will furnish the appropriate halachic justifi-cation for organ removal, three issues remain to be considered: 1. Is there an obligation on a donor to authorize the removal of his organs after his death? After all, once a person is dead he is exempt from mitzvot. Does the family have an obligation to use organs with-out an explicit direction from the decedent concerning what about over his objection? 23 2. Can organs be donated to non-Jews? 24 3. What is pitkun nefesh? Corneal transplant recipients can prevent blindness, but a person can live without sight. Similarly, skin grafts are not always essential for survival. In cases where the recipient can survive without the organ, would there not be a prohibition of retzichah? Posekim have generally been lenient in this regard, but each proposed use must be considered on its merits. 25

IV. Live Donors

Organ donations are not only from the dead or the near dead. Live donors can contribute as well. Since human beings can live with one kidney, one can donate his second kidney while alive. Moreover, because a liver can regenerate with as little as twenty percent of its original tissue, placing a donor can com-promise some of his liver as well. 26 While donations from live donors do not involve issues of nisuf hameter or potential nisufh, they too pose halachic issues.

• Self-Engagement point: Even partial removal of an organ poses potentially serious risks and constitutes placing oneself into safek sakhanah (potential danger to life). This is true both because of the potential strain on the reduced capacity that is left and because of the risks associated with general anesthesia and surgery. As a general rule, the Torah does not permit a person to place himself in a situa-tion of sakhanah. On the other hand, the person who needs the organ is also in sakhanah, and there is a mitzva of lo tama’ul ad dam neyacha. Indeed the risk to the patient if he doesn’t get an organ is likely to be much greater than that to the donor who provides one. Am I permitted, or even obligated, to remove an organ from a living donor that potentially will save the life of another? There is a mitsvahloke (controversy) among the posekim regarding the matter. The Talmud Yerushalmi states that it is obligated to place himself in a potential sakhanah in order to save someone who is presently in definite sakhanah, but such a ruling is not explicitly cited in the more authorita-tive Talmud Bavli. The posekim debate whether the Talmud Bavli would agree with the Talmud Yerushalmi’s premise. 27 The consensus appears to be that one is not obligated to put oneself in a potential sakhanah to save another, but to do so is laudable and meritorious, particularly if the danger to the rescue is relatively slight and commensurate to other risks that he commonly assumes (e.g., driving, flying, etcetera). 28 Thus, live organ donations can never be compelled or demanded but only requested as an act of gemilut chasadim (loving kindness) and midat chassidut (piety). 29

• Informed Consent: Since one is not obligated to donate organs, they can be removed only with the person’s consent. Obviously live organ removal cannot be sanctioned by someone who is mentally incompetent, comatose or in a persistent vegetative state. (Though organisms can be removed once there is a diagnosis of clinical brain death depends on whether halachah accepts “brain death” as “death.”) But this would also mean that even a consenting minor could not author-ize removal of his organs. Consider the case of an adolescent who needs a kidney transplant and the only suitable donor is a younger sibling who has not yet reached his Bar Mitzvah. Both the younger sibling and his parents want the removal of the extra kidney for transplantation. Nevertheless, given the reality that this would pose a sakhanah to the younger child and that he could not be obligated to place himself in a potential sakhanah, would not allow the donation even if the minor consented? 30 Nor could the parents consent on his behalf. The parents’ right to make medical decisions for their child is limited to decisions that benefit the child. A parent is not authorized to endanger one child in order to save another.

This should not be confused with the well-known Ayala case. Ten years ago, a young woman needed a bone marrow transplant. There was no suitable donor in the registry nor were her parents compatible donors. The parents decided to try to conceive a child (even though that is not a halachic transplan-tant. There was no suitable donor in the registry nor were her parents compatible donors. The parents decided to try to conceive a child (even though that is not a halachic transplant). Even corneal transplants have been validated because of the potential life-threatening dangers of blindness even in one eye. 33 Second, the late Rabbi Isser Yehuda Unterman, a former chief rabbi in Israel, ruled that it is not a violation of the donors consent to derive benefit from the organ occurs when it is attached to a living body and begins to function, “benefit,” as such, is not derived from that which is dead but from tissue that is alive. 34 Third, there are some views that per-mit even direct benefit from a corpse that is of non-Jewish origin 35 and, in the absence of evidence to the con-trary, at least in the United States, one can assume that the organs received are from non-Jews. 36

• Facilitating Murder: The second issue is more troubling. To the extent that one takes the position that clin-ical brain death is not halachic death and the removal of organs from a brain-dead donor is murder, a patient allowed to receive the product of an illicit, immoral act? Once again, while there are dissenting voices, the majority of posekim have permitted such an act, as it is prohibited to kill. It is prohibited to indirectly cause the death of another. 37 However, there is no causal link between putting one’s name on an organ list and a donor’s death. Given the realities that the demand for organs outstrips the supply, and even if a given individual takes his name off the list, the organ will be removed anyway, a decision to donate one’s organs cannot cause or facilitate a death that would otherwise not occur. 38 If the death will occur with or without a given recipient’s participation, there is no exclusive principle that would prohibit benefiting from the transgres-sion after the fact. 39

Although God is the ultimate source of all healing, we are commanded to do what we can to alleviate suffering, discomfort and pain. 40 The concept that human intervention via new technolo-gies somehow constitutes an impermissi-ble usurpation of Divine prerogatives is foreign to the spirit of the Torah, which sees mankind as God’s collaborator in tikun olam. 41 Nevertheless, the license granted to man is must be exercised pur-suant to the limitations and conditions imposed by its Creator. These limita-tions can be ascertained only through
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30. See Rabbi Yitzchok Zilberstein, Halachah U’Refuah 4, (5745): 156-157. But see Rav Moshe Hirschler, Halachah U’Refuah 2, (5746): 126 who writes that an exception might exist where the recipient is someone who provides care and sustenance to the minor or incompetent, e.g., a parent.
33. Shulchan Aruch YD 349:1 rules that the prohibition against benefit does apply to non-Jewish cadavers but Pinhah Teshuvah YD 349:1 suggests that the prohibition is only rabbinic and, as such, can be waived even in cases of non-life threatening illness. See Iggerot Moshe YD 1, no. 229 (6). The Gra in his commentary to YD 349:1 cites the view of Ra’ah that hana’ah from a non-Jewish corpse is permitted. See also Midrash Le’elech, Halichot Avel 14:21.
34. There are two other reasons why at least in some cases there may not be a problem of deriving benefit. First, the use of cadaver organs for transplantation might be considered “not in the ordinary manner of benefit” (shelo kederch hana’ah) and, therefore may be permissible. See Tevuوت Raduta II, no. 548 and Rabbi Yisroel Peretz Frank, Har Tzvi YD, no. 277. But see comments of Rabbi Akiva Eger, YD 349:1 and Iggerot Moshe YD 1, no. 229 (3). See also Tzitz Eliezer XIV, no. 84. Second, in the case of skin grafts, some posekim rule that there is no issu hana’ah at all. See Tosafot, Niddah 55a, s.v. Shema and Yabia Omer YD III, no. 23. Most, however, rule that deriving benefit from skin is prohibited. Ibid.
35. See Nishmat Avraham (app. vol.) YD 339, pp. 134-150.
36. An analogy would be the permisibility of utilizing the scientific data derived from Nazi experimentation. Although the experimentation itself was barbarous, once the evil act is done one is permitted to derive benefit from whatever useful good it might provide. Bleich, Contemporary 4, p. 231.
37. Baba Kama 85a.
*Readers interested in obtaining more comprehensive endnotes should contact the Jewish Action office.