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The search for organs: *halachic* perspectives on altruistic giving and the selling of organs

J D Kunin

Does Jewish law prohibit the sale of organs and should it encourage altruistic donation of organs?

Organ transplantation has now evolved to be standard and life saving therapy for a wide variety of illnesses. One of its major limitations, however, is a shortage of donor organs. Over the last ten years, the need for organs has grown nearly five times faster than the number of available donors. The number of patients dying while awaiting transplantation in the United States alone is estimated to be 6000 annually.¹ Although brain stem dead donors are a critical source of donation, the donor pool is insufficient and other means of procuring organs are continually being sought. These sources include organ harvesting from non-beating heart donors and from living healthy adults. The latter is the subject of this paper.

Organ procurement from the healthy donor may be divided into two categories: 1) altruistic giving in which there is no monetary reward, and 2) selling organs for profit. In the ethical literature, altruistic donation is universally accepted and widely praised as a virtue. Healthy persons, usually relatives of end stage renal failure patients, have been donating kidneys for decades. This is well accepted medically because it entails extremely low risk to the donor and has a high success rate for the recipient. Although donation of a lobe of a liver or lung carry higher risk to the donor than does a donor nephrectomy, advances in surgical care have resulted in sufficiently low risk to make donation of these partial organs from living volunteers medically acceptable. Unlike altruistic donation, however, the practice of selling organs is banned in the vast majority of countries and its ethical status is very much open to question.

In Jewish law (*halacha*), these methods are of particular interest because donation from brain dead patients is highly controversial. (Publication is pending of a paper by myself on this subject entitled: *Brain death: reconsidering the rabbinic opinions in light of current medical knowledge*.) From the viewpoint of *halacha* the acceptability of either type of giving is not a simple question. Is altruistic giving a proper course that should be encouraged? As well, does *halacha* prohibit the sale of organs? In

Abstract

Altruistic donation of organs from living donors is widely accepted as a virtue and even encouraged as a duty. Selling organs, on the other hand, is highly controversial and banned in most countries. What is the Jewish legal (*halachic*) position on these issues? In this review it is explained that altruistic donation is praiseworthy but in no way obligatory. Selling organs is a subject of rabbinic dispute among contemporary authorities.

the following pages both of these ethical dilemmas will be examined from a *halachic* perspective.

ALTRUISTIC DONATION

It is widely assumed that saving human life is an absolute value in Jewish law. Saving another life is indeed a mitzvah (commandment) of the Torah as Maimonides states: "Anybody who is able to save someone else and fails to do so transgresses the mitzvah of 'Do not stand idly by the blood of your brother'".² This being so, perhaps it would not only be allowed to give an organ to save a fellow human being but would be mandatory to do so to fulfil this Torah commandment. The problem is that in the case of donating an organ, there may be conflicting obligations that would overrule the mitzvah to save another's life. One such potential conflict is the mitzvah to preserve one's own life (Maimonides,² ch 11 p 4).³ Inclusive in this mitzvah is the prohibition of placing oneself in danger. With this potential conflict, which mitzvah takes precedence? The Talmud records a dispute between Ben Peturah and Rabbi Akiva.⁴ A case of two men dying of thirst in the desert is brought before the sages. One of them has a jug of water that is sufficient to get him alone to safety. If they share the water, however, they will each live a little longer, but they will both eventually die in the desert. Ben Peturah rules that the owner of the jug should share his water because otherwise he would be denying his friend temporary life, and thus he will be hastening, albeit indirectly, the death of his friend. Rabbi Akiva rules that the owner may drink it all himself, stating "one's own life takes precedence over his friend". The Talmud leaves the dispute unresolved, but one of the major

medieval codifiers of *halacha* (Rosh,⁴ *Bava Metzia* 62a) rules according to Rabbi Akiva.⁴ Rabbi Moshe Feinstein of the modern era rules that the *halacha* unequivocally follows Rabbi Akiva.⁵

If this is so, however, what of the policeman or fireman or soldier who risks himself for the sake of another? In fact, there are clear examples of self sacrifice in the Bible and the Talmud that seem to contradict this prohibition on sacrificing one's own life for another. The most famous example of sacrificing one's own life is the suicide of King Saul. Suicide is considered a subcategory of murder by *halacha* and is unequivocally prohibited. There is considerable controversy among the authorities whether King Saul was acting properly in committing suicide. One authority concludes that King Saul may have committed suicide in order to save the lives of his fellow Jews.⁶ What emerges from this debate is a principle that self sacrifice may be permissible if it is for the sake of saving one's country, or, in practical terms, even the saving of a community—that is, many lives.

The question with regard to organ donation is, however, much more restrictive. Here, the issue is not sacrificing one for the many, but one individual sacrificing for the sake of another individual. It is in such a circumstance that the above quoted talmudic rule, "Your life takes precedence over your friend's," might apply and one would not be permitted to donate the organ. This principle was codified into law in the modern era by the well accepted 16th century responsum of Radbaz who wrote on the question of placing oneself in danger to save another: "[In trying to save another life,] if there is any doubt of threat to [your] life, [saving another's

life over your own] is piety of idiocy because your possible danger takes precedence over your fellow man's definite danger".⁷

While this responsum may apply to a case where there is a high probability of danger to one's life, the *halacha* is not so clear cut on the question of placing oneself in possible but unlikely danger in order to save another person. The majority of opinions hold that when danger to oneself is unlikely there is permission but no obligation for self sacrifice. On the other hand, there are two notable opinions that mandate saving a person who is in definite danger, even if one must put oneself in possible, although unlikely, danger. Radbaz himself, in another responsum, states that so long as one's likelihood of dying is less than 50% one is obligated to save a person in definite danger (Ben Zimra,⁷ 1582). The *Jerusalem Talmud* also teaches that it is incumbent upon someone who is only in possible danger to proceed and save somebody in definite danger (Maimonides,² ch 1 p 4).

Fortunately, the concern of danger to the life of the organ donor is not much of a *halachic* problem today. In the current state of medicine, operations to harvest a kidney are of minimal risk of mortality and long term morbidity. Such procedures cannot even be considered "possible danger" in a *halachic* sense. This is supported by studies of peri-operative mortality and long term morbidity. In a US national survey, the mortality rate was measured to be a mere 0.03%. In a 20 year follow up of patients who had donated kidneys, all criteria measuring possible renal disease, including abnormal creatinine clearance, hypertension, and proteinuria, were similar compared to siblings.⁸ Therefore, even going by the opinion that one may not place oneself in any substantial danger, in the current state of extremely low mortality from organ donation, the concern over one's own danger is not sufficiently strong to exempt one from the obligation of saving another life by donating an organ. It would appear then that *halacha* would mandate somebody to donate an organ to save another life.

There is, however, another potential *halachic* conflict when considering the mitzvah of saving another's life. This is the prohibition on injuring oneself. Donating an organ is by definition self injury. Is this permissible? Again, here is a conflict between two Torah obligations. On the one hand there is an obligation to save another life. On the other hand, one is prohibited from self injury. In resolving this conflict it is important to appreciate the unique strength of the mitzvah of saving a life.

The commandment of saving a life is a higher priority mitzvah than almost all other *mitzvot* of the Torah. This is emphasised by the many areas in *halacha* where "*pikuach nefesh*," (the saving of a life) overrides even stringent prohibitions such as Sabbath observance and the fast of Yom Kippur. By this reasoning the prohibition of wounding oneself should probably be deferred for the sake of *pikuach nefesh* (Feinstein,⁵ Part II, ch 174, s 4). However, the obligations of *pikuach nefesh* also have limitations. Exactly how much one needs to sacrifice to fulfil the mitzvah of saving somebody else's life, be it monetary loss or pain and suffering, is a matter of considerable *halachic* controversy. All agree, however, that there are limits to the obligation. No authority suggests—for example, that one would be required to sacrifice an organ to save another life. This is above and beyond what is mandated. (Likewise, one is not mandated to spend all of one's wealth to save another's life.) Therefore, the *halachic* conclusion is that because of the force of the mitzvah of saving another life, it is *permissible* to injure oneself but is not *obligatory*. So too it is permissible but not obligatory to donate an organ.

Indeed, Radbaz in his responsum cited above permits self injury to save another life. His emphasis is, however, telling. In no uncertain terms he states that there is no *obligation* to sacrifice an organ, even for the saving of another life. Writing on the question of a sadistic murderer who gives an ultimatum, "give me your arm or I will kill your friend," he writes "The law of the Torah must agree with reason and logic. How is it possible to make a person blind, or cut off his hand so another doesn't die? Therefore, I see no reason to rule that this sacrifice is anything but an act of piety, and praiseworthy is his lot, who is able to perform them".⁷

This widely accepted responsum is the basis for the permission to donate an organ to save another person.

It is worth mentioning that in discussing the permissibility of donating an organ to save another person, Rabbi M S Klein, a senior judge of the influential rabbinic court of Rabbi S H Wosner of Bnei Brak, Israel, downplayed the wording of Radbaz that it is "an act of piety". He said the *halacha* is simply that it is permissible. Period. In current ethical trends it is considered a great virtue to donate an organ. This attitude is so pervasive that one could conclude that if someone chooses not to donate an organ he or she could be considered negligent in their duty. There could well be an expectation by family members that one

should donate an organ and refusal would be a great shame. Therefore, says Rabbi Klein, the *halacha* says only that organ donation is permissible and should not be construed in any way as obligatory. In other words, such donation, even to save a life, is above and beyond what is necessary to fulfil the law of the Torah.

Selling organs

The ethical literature is quite divided on the permissibility of selling organs. The arguments against selling organs include the concern that the possibility of selling an organ may undermine a poor person's status as an autonomous individual—that is, given the opportunity to sell an organ, a desperately poor person may be compelled to sell. The permissibility to sell an organ raises the concern that the wealthy may exploit and coerce the desperately poor.⁹ Deontological principles play substantial roles in the arguments against the sale of organs. One such line of reasoning is that by permitting the sale of organs, society would make the parts of human beings and, by extension, people themselves, commodities. This may dehumanise society.¹⁰ It is argued that donation should be limited to altruistic giving because altruism is a value that ought to be encouraged in society. By legalising the sale of organs and establishing a commercial market, altruism may be undermined.¹¹ Arguments that have been put forward in favour of selling organs tend to be more utilitarian. The most obvious is that selling organs may be a strategy to increase supply.¹² While it may be argued that permitting organ sales is exploitation of the poor, the opposite can be cogently argued: prohibiting the selling of organs is depriving a poor person of a legitimate means of achieving a financial goal. Finally, if the purpose of banning the sale of organs is to preserve the principle of autonomy, is there ever true autonomy? Is not altruistic giving also fraught with the risk of pressure from family members, thus also compromising personal autonomy?^{13–15}

From a *halachic* perspective, selling organs presents similar questions to those mentioned above in connection with altruistic giving. Here again, the primary problem is the prohibition on injuring oneself. As was stated, the prohibition on injuring oneself may be lifted when fulfilling the mitzvah of saving another life. Here, however, in selling for financial gain, one does not have the countervailing force of the mitzvah of saving a life because this is in no way the intent of the action.

When a new question arises, *halachic* authorities, much like secular courts,

rely upon related precedents and prior rulings. Deriving a precedent from the Talmud is ideal because this great tome is by the far most authoritative source for all of Jewish law and thought.

The source for adjudicating the problem of self injury is in the talmudic tractate *Bava kamma*, (*Babylonian Talmud*,⁴ tractate *Bava kamma* 90a, 91b), which must be studied in detail to understand the problems involved in the *halachic* question of selling organs. It states there directly that one is prohibited from injuring oneself. The Tosafot, the classic mediaeval school of talmudic commentary, teaches that even if one wishes to injure oneself because of a material need such as preventing monetary loss, one is still prohibited from doing so. The Talmud itself, however, subsequently discusses a case that seems to take exception to the prohibition on wounding oneself for financial considerations. It relates an incident where Rabbi Chisda, one of the sages of the Talmud, needed to pass through a field of thorns. He lifted his clothing in order to avoid irreparably damaging it. In so doing he allowed his legs to be wounded. Rabbi Chisda in explaining his actions, stated: "My wounds will heal, my clothes will not". This incident seems to contradict the previous ruling of the Talmud that one may not injure oneself. Tosafot unfortunately does not directly comment on this obvious contradiction of the Talmud. The exact understanding of the story of Rabbi Chisda is pivotal in rendering a *halachic* decision as to whether one may sell an organ for profit.

The important 18th century commentator, P'nei Yehoshua, resolves the paradox by arguing that Tosafot's prohibition on self injury was for a small need, whereas the case of Rabbi Chisda, not directly commented on by Tosafot, was for a relatively great need.¹⁶ The degree of need is determined by comparing the loss and gain in any particular circumstance. In the case of Rabbi Chisda, as he himself argues, his property would be irreparably damaged and the reversible wounding of his legs was worth the relatively small suffering in order to save his clothes. In other words, the self injury was justified because of the greater loss of his clothing. Following this line of logic a general principle may be derived—that is, the prohibition on self injury is relative and depends on the particular circumstance. Understanding the Talmud in this way, we may rule that for a poor person with a dire need and who can substantially profit from selling an organ, perhaps the self injury is worth the resulting reward and may be *halachically* acceptable.

The P'nei Yehoshua's understanding of the Talmud seems to be accepted by Rabbi Yosef Shalom Elyashiv of Jerusalem, the pre-eminent living *halachic* authority, who allows selling of organs under restricted circumstances. Rabbi Yaakov Weiner of the Jerusalem Center of Research in *Halachah* and Medicine recently asked Rabbi Elyashiv this specific question and relayed this answer to me. He rules that the need must be great and the sale must accomplish the financial goal, otherwise it cannot be considered of sufficient value to override the prohibition of injuring oneself. For example, if one has a \$10 000 debt that if not paid would result in imprisonment, and the sale of the kidney would result in a net profit of \$10 000, then it may be authorised. If, however, the debt is \$100 000 then a sale for only \$10 000 would not be permitted, as the self injury could not be justified by the partial benefit. In a case that was recorded by Cameron and Hoffenberg, an impoverished man sold his kidney in order to provide medicine for his sick daughter.¹⁴ According to the reasoning of Rabbi Elyashiv, there would be an even stronger argument here for approving the sale because there is an additional factor of saving another life.

Other authorities, however, do not come to the same conclusion. Rabbi Wosner does not permit the sale of organs. His understanding of the story of Rabbi Chisda is that he did not lift his garments for the express purpose of injuring himself but rather only to avoid damaging the garments. Moreover, it was not absolutely certain he would even be injured—that is, it was only an anticipated possibility. His goal was only to avoid damaging his garments and it was not *necessary* that he be injured in order to fulfil that goal. Quite the opposite is true with the sale of an organ where the benefit of the action only comes from the injury itself, and therefore the injury was wholly intended. Thus, in selling an organ there is a direct, intentional violation of the prohibition against injuring oneself. This is not permissible, argues Rabbi Wosner. It may be noted that this approach is in conflict with the opinion of P'nei Yehoshua who explicitly allows for intentional self injury so long as the need is great.

The late Rabbi Moshe Feinstein, another of the great contemporary *halachic* authorities, seems to take a third approach. While he wrote extensively on *halachic* questions in medicine, he did not directly rule on the sale of organs. Some indication of his thinking, however, can be appreciated from a related responsum on the question of

the permissibility of cosmetic surgery (Feinstein,⁵ part II: 66). At first glance, cosmetic surgery seems also to be a violation of the prohibition on injuring oneself. In understanding the story of Rabbi Chisda, Rabbi Feinstein also disagrees with Pnei Yehoshua. He writes that it is distorting the plain meaning of the Talmud and the accompanying Tosafot teaching "to distinguish between a small need and a great need. This distinction was never written explicitly". So, Rabbi Feinstein asks: "How is it permissible for Rabbi Chisda to go through the field of thorns?". In trying to explain the Talmud he explicitly rejects the idea that the injury was not certain—that is, he disagrees with Rabbi Wosner on this point, and says: "Therefore, one needs to say that the prohibition of injuring oneself is only when [the injury] is to degrade oneself...He walked [through the field] for a need and this [in itself] was not degrading and there is no prohibition. One needs to say that [the actions that] are prohibited...are things that are done for the purpose of causing distress, like [a mourner] wounding himself [which is done for the express] purpose of causing pain. This is prohibited because the will and the need is the distress [itself] and this is degrading."

In this responsum, Rabbi Feinstein permits cosmetic surgery because it is not the type of injury intended in the *halachic* prohibition on self injury—that is, it is not an injury intended to degrade, but rather to improve oneself. Of course, what Rabbi Feinstein would have ruled in the question of selling an organ is speculative. It would seem, though, that by following his reasoning, he would have argued that a person who submits to an operation to sell an organ is definitely intending to injure himself and gain benefit from the injury itself, as in the case of the mourner, which is clearly prohibited. In this sense it is not comparable to Rabbi Chisda who did not *require* the injury to achieve his intended result of avoiding injury to his garments. From this perspective, he seems to agree with Rabbi Wosner. Also, organ donation is not similar to cosmetic surgery where the injury itself is for the good of the person undergoing the cosmetic surgery. With organ donation, while a person may profit monetarily, the injury itself cannot be construed in any way as benefiting him. After all, it results in the loss of an organ, pain from the surgery, scarring, etc. I would conclude, with trepidation, that Rabbi Feinstein would also prohibit organ donation for profit.

There remains another potential argument in favour of selling organs. When all is said and done, lives are saved by

selling organs. So the question may be posed, if the sale of an organ results in saving of a life, even if that is not the intention of the donor, would it not be permissible? That is to say, just as with altruistic giving where the prohibition on self injury may be lifted for the sake of *pikuach nefesh*, why should it not be lifted here too if it results in saving a life? Does the intention of the donor really matter when in the end a life is saved? As mentioned above, this question is also debated in the secular literature, with some saying that maintaining the spirit of altruism is important and others, adopting a more utilitarian perspective, saying the intent of the donor should not matter.

This question of profit affects many areas of *halacha*. Does a mitzvah remain a mitzvah even if one profits from its performance? One example offered by the Code of Jewish law is the question of whether a scribe who writes sacred documents such as a Torah scroll, but is also making his livelihood from this, is considered to be involved in a mitzvah. If the scribe writes when no money is involved this is unquestionably considered a mitzvah. This is true to the extent that so long as he is writing he is released from any other daily obligation such as praying. Is the same true if he is earning money for his writing? The Code of Jewish law rules that so long as he has some intention that he is performing a mitzvah, the fact that he may also be profiting from his action does not nullify the mitzvah. If, however, he is writing with no substantive intention of performing a mitzvah, then his motivation for profit may well cancel the mitzvah (Caro,³ *Shulchan Aruch, Orech chaim* 33.8). So too, if someone wishes to donate an organ and get some monetary compensation, the mere fact that he requests some remuneration may not cancel the mitzvah of saving a life. Indeed, even by the more stringent standards of Rabbi Wosner, this may be permissible. According to the decision of

Rabbi Wosner, however, and in keeping with the analogous case of the scribe writing, if his intention is purely for profit, it would be problematic and perhaps forbidden.

In summary, there is a difference of opinion among the great *halachic* authorities on the permissibility of selling organs. Certainly, a major figure in the person of Rabbi Elyashiv allows sale under specific circumstances and one is surely on solid footing in relying on this opinion. As is recorded by A S Abraham, the late Rabbi Shlomo Zalman Auerbach, another of the great contemporary authorities, seems to agree. He writes that even if a donor's primary motive is for profit, the donation is permissible because it saves a life.¹⁷ It cannot be overemphasised, however, that in Jewish law even if this more lenient opinion is used, in practice, a legislated policy permitting organ sale would not obviate the need for an individual to obtain a rabbinic approval, making certain that the need was sufficiently great; that the goal was achievable in order to justify the prohibition against injuring oneself, and that the person was physically fit so there would be no concern about any health consequences. Moreover, as Grazi and Wolowelsky have written, the ultimate permissibility of selling organs "is inextricably connected to solving a series of pragmatic problems, such as creating a system that ensures that potential vendors and donors are properly informed and not exploited ...[and] regulation of payments so they reasonably reflect compensation for pain and suffering".¹⁸ One such system has recently been proposed in Israel¹⁹ where there would be a central registry in which people could sell organs, and where direct purchase of organs would be illegal. In this proposed system priority would be given to medical need rather than ability to pay. Again, it is worth emphasising that even if such a policy is instituted, while in principle it would

be permissible by some rabbinic authorities, from a *halachic* perspective it would nevertheless require adjudication on a case by case basis, as is true in all areas of Jewish jurisprudence. In this way potential abuse of such a public policy could be averted.

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