

# **HALACHIC AND HASHKAFIC ISSUES IN CONTEMPORARY SOCIETY**

## **SERIES 2: 4 - ORGAN DONATION**

**OU ISRAEL CENTER - FALL 2021**

### **A] THE HISTORIC AND ONGOING CHALLENGE IN ISRAEL**

- Around 40% of people in Western countries carry donor cards. In the US, in 2019 it was 54%. However, in 2006 only around 4% of Israelis carried cards! A new law on organ donation was introduced in Israel in 2008<sup>1</sup> and the number of registered organ donors has now risen to around 14% - still far short of the international average for similar countries<sup>2</sup>. Why is there such a disparity?
- Israel has a chronic shortage of donated organs and was historically expelled from the European Union Organ Donor Network for failing to donate organs, making the problem worse.
- The 2008 law defined brain-respiratory death as the relevant determiner of death for organ donations and provided for various benefits to living organ donors. The law also criminalized organ trafficking.

### **B] OPT IN OR OPT OUT?**

- A number of countries now have 'Opt Out' systems whereby a person is assumed to agree to donate their organs unless they explicitly state that they do not wish to. This dramatically increases the availability of organs for donation.<sup>3</sup>
- More countries are now adopting an opt-out policy<sup>4</sup>. The UK adopted such a law in 2019<sup>5</sup>. The US and Israel still have opt-in systems.
- Countries have different legislation concerning the rights of family to permit or prevent organ donation after the death of their relative.

### **C] ETHICAL ISSUES**

- When is the moment of death - is this a medical/legal/religious decision?
- Who should decide when death has occurred - doctors, rabbis/priests?
- Who should choose 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?

### **D] HALACHIC ISSUES**

- The imperative to save life, wherever halachically permitted.
- Time of death in Jewish law; harvesting organs before halachic death is murder! But when is halachic death?
- Disrespectful treatment of a human corpse.
- The obligation to bury the dead.
- Is there a mitzva to give organs after death?
- Is there a mitzva to give organs while alive (eg a kidney).

1. The Organ Transplant Act and the Cerebro-Respiratory Death Act - <https://www.hods.org/pdf/law51%20Braindead.pdf>

2. See *Ten years of Israel's organ transplant law: is it on the right track?* - <https://ijhpr.biomedcentral.com/articles/10.1186/s13584-018-0232-1>

3. For example, Germany, which uses an opt-in system, has an organ donation consent rate of 12% among its population, while Austria, a country with a very similar culture and economic development but which uses an opt-out system, has a consent rate of 99.98%!

4. The following countries have an opt-out system: UK (2019), Argentina (2005), Chile (2010), Colombia (2017), Spain (1979), Austria, Belgium.

5. The Organ Donation (Deemed Consent) Act. Those wishing to opt out can do so on line at <https://www.organdonation.nhs.uk/register-your-decision/do-not-donate/>

## 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 that simply superstition?
- Would a Jew be allowed to accept a donor organ from an animal?
- There are 4 different situations for organ donation and the halachic issues will differ in each:
  - (i) Donation of organs by a live donor<sup>6</sup>.
  - (ii) Removal of organs from a person clinically diagnosed as being 'brain dead', but whose heart is still beating.
  - (iii) Removal of organs from a person whose heart has stopped beating.
  - (iv) Removal of organs from a cadaver after certain death.

**E] THE MITZVA TO SAVE LIFE**

1. לפיכך נברא אדם יחידי - ללמדך שכל המאבד נפש אחת [מישראל] מעלה עליו הכתוב כאילו איבד עולם מלא. וכל המקיים נפש אחת מישראל מעלה עליו הכתוב כאילו קיים עולם מלא.

סנהדרין לו.

*Chazal state that saving one Jewish<sup>7</sup> life is equivalent to saving the entire world.*

2. לא תעמוד על דם רעך אֲנִי ה' (רש"י - לראות צמיחתו ואתה יכול להילולו. כגון טובע צנור, וחייה או לסטים צאים עליו. אני ה' - נאמן לשלם שכר, ונאמן להפטר)

ויקרא יט:טז

*There is a Torah prohibition not to stand by when one could help to save a life.*

- As we will see below, these imperatives could work in **both** directions - encouraging, and indeed obligating, us to do what is possible to save the live through organ donation, at the same time as ensuring that life is never compromised in obtaining those organs.

3. ולפי הטעם שכתבתי דלאו ד'לא תעמוד על דם רעך' הוא בדין כל הלאוין, אין לחייב לאדם ליכנס בספק סכנה להצלת חברו מודאי סכנה. דהא להנצל מעבירת כל הלאוין ודאי לא רק שאינו צריך אלא שגם אסור להכניס עצמו לספק סכנה. דאדרבה הא מחללין שבת אף לרפאות מספק סכנה וכ"ש שאסור להכניס עצמו לספק סכנה להנצל מחלול שבת ומכל הלאוין. וא"כ אין לחייבו להכניס עצמו לספק סכנה גם בשביל להציל נפש חברו. אבל מסתבר שיהיה חלוק לאו ד'לא תעמוד על דם רעך' משאר לאוין לענין איסור.... אבל להציל נפש חברו אף שג"כ הוא רק באיסור לאו יהיה מותר להכניס עצמו בספק מאחר דעכ"פ יוצל נפש מישראל.... ואף שכתבתי דאף שאין האדם מחוייב להכניס עצמו לספק סכנה בשביל הצלת נפש חברו מ"מ רשאך דל"ד לענין זה לשאר לאוין שאסור, מאחר דניצול עכ"פ נפש מישראל.... ומש"כ כתר"ה שאין לחייב גם ליקח אבר ממת ממש מצד שהוא בזיון.... לדינא האמת שליכא חיוב.... אבל מצוה ודאי איכא שאף שטבע האדם להצטרע טובא על מתו יותר מעל כל ממונו מסתבר שחיוב ליכא ע"ז ולכן מצוה שלא יצטרע טובא ויציל נפש באבר של מתו. וגם הא מדת חסידות איכא אף לחתוך אבר של עצמו כדי להציל נפש ישראל כדאיתא ברדב"ז, וממילא להניח לחתוך אבר מהמת הוא גם מצוה. דלחתוך מחי אין לומר שיהיה מצוה מאחר שהוא צער מוכרח דכל אדם מצטרע בזה ולא שייך לומר שלא יצטרע....

שר"ת אגרות משה יורה דעה חלק ב סימן קעז

*R. Moshe Feinstein rules that, while it is not usually permitted to put oneself into potentially life-threatening danger in order to observe a mitzva (even Torah prohibition), this is NOT true of the mitzva of lo ta'amod al dam re'echa. For this mitzva one IS permitted, although not obligated, to endanger oneself in order to save a Jewish life. R. Feinstein understands that, for organ donation after death, there is an even stronger mitzva (although not a full obligation) to do so!*

- For post-mortem organ donation, on whom is this mitzva incumbent? It is conceptually difficult to say that the deceased has any mitzvot after death, although the mitzva may at least be facilitated during life, by arranging the circumstances for the donation.
- Alternatively, the mitzva may be incumbent on the family members. Would this include permitting an organ donation even against the wishes of the deceased?<sup>8</sup>

6. We will not deal with this case in depth in this shiur but will be'H examine it in more depth in a future shiur.

7. Note that the are variant texts of this Gemara in which the word 'meYisrael' is omitted, so extending this principle to all human life. Although this is not a halachic source, it does impact on the hashkafic framework.

8. R. Ya'akov Etlinger (shu't Binyan Tzion 170-171) rules that, since the laws governing kavod hamet are designed to protect the honor of the deceased who no longer has the obligation of pikuach nefesh, even pikuach nefesh cannot justify nivul hamet unless the deceased has consented in advance. Note however Nishmat Avraham YD 349, p. 264, who quotes R. Shlomo Zalman Auerbach to the effect that we do not follow this ruling of the Binyan Tzion.

**F] HALACHIC ISSUES OTHER THAN 'TIME OF DEATH'****F1] BURIAL**

4. כב וְכִי־הִיָּה בְאִישׁ חָטָא מִשְׁפָּט־מוֹת וְהוּמָת וְתִלֵּית אֹתוֹ עַל־עֵץ: כג לֹא־תִלֵּין נִבְלָתוֹ עַל־הָעֵץ פְּי־קִבּוּר תִּקְבְּרֵנּוּ בַיּוֹם הַהוּא פְּי־קִלְלֵת אֲלֵקִים תִּלְוִי וְלֹא תִטְמֵא אֶת־אֲדָמְתְּךָ אֲשֶׁר ה' אֱלֹקֶיךָ נָתַן לְךָ נַחֲלָה.

דברים כא:כב-כג

The Torah includes a mitzva to bury before night a capital criminal who was executed and subsequently hung<sup>9</sup> on a tree. Chazal learn from here a prohibitions both of burial and also of nivul hamet - treating the body disrespectfully.

5. **שלא ילין הצלוב על העץ וכן המת בביתו אלא לכבודו**  
שלא נעזוב התלוי שילין על העץ, שנאמר (דברים כא: כג) לֹא־תִלֵּין נִבְלָתוֹ עַל־הָעֵץ. ולשון ספרי כאן, לא תלין נבלתו על העץ - זו מצות לא תעשה. כל ענין המצוה כתוב במצות עשה ג' שבסדר זה [תקל"ז] ....

ספר החינוך פרשת כי תצא מצוה תקלו

There is a negative Torah prohibition not to leave a body unburied overnight, unless this is for the honor of the deceased.

6. **מצות קבורה לנהרג על פי בית דין וכן לכל מת**  
(א) לקבור מי שנתלה ביום ההוא, שנאמר (דברים כא:כג) פְּי־קִבּוּר תִּקְבְּרֵנּוּ בַיּוֹם הַהוּא וגו'. ולשון ספרי כאן - כי קבור תקברנו ביום ההוא, מצות עשה. ....  
מדיני המצוה מה שאמרו זכרונם לברכה שאין מצוה זו בנתלה לבד אלא אף כל הרוגי בית דין מצוה לקוברן ביום הריגתם, גם בכלל המצוה לקבור כל מת מישראל ביום מותו..... ועובר על זה והלין את המת שלא לכבודו ביטל עשה זה, מלבד שעבר על לאו כמו שנכתוב בסדר זה בעזרת השם [מצוה תקל"ז].

ספר החינוך פרשת כי תצא מצוה תקלו

There is also a positive Torah mitzva to bury a Jewish body as soon as possible, preferably before the night is over.<sup>10</sup>

7. **תקברנו - כולו ולא מקצתו. תקברנו - מיכן שאם שייר ממנו לא עשה כלום שנאמר פְּי־קִבּוּר תִּקְבְּרֵנּוּ**

תלמוד ירושלמי (וילנא) מסכת נזיר פרק ז הלכה א

Chazal learn in the Yerushalmi that the mitzva to bury includes ALL parts of the deceased at the time of death<sup>11</sup>. Failure to bury even a part of the deceased will be a breach of the mitzva of kevura.

**F2] NIVUL HAMET - DISGRACING THE DEAD**

8. **תא שמע: הלינו לכבודו, להביא לו ארון ותכריכין - אינו עובר עליו. .... כי אמר רחמנא לא תלין נבלתו על העץ - דומיא דתלוי דאית ביה בזיון. אבל הכא, כיון דלית ביה בזיון, לא.**

סנהדרין מז.

The Gemara learns from the mitzva of burying the body that there is a prohibition of desecrating or disgracing the dead.

9. **וכי תימא דבדקינן ליה, הא קא מינוול! וכי תימא משום איבוד נשמה דהאי נינווליה, וניחוש שמא במקום סייף נקב הוה.**

חולין יא:

This Gemara is discussing a murder trial. The suggestion is to perform an autopsy on the victim to establish if the victim had a prior fatal disease (independent of the murder wound) which would prevent the execution of the murderer<sup>12</sup>. 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 actual pikuach nefesh.

9. For English grammar aficionados, 'hanged' is the correct participle only where death is caused by hanging, which is not the case in halacha.

10. This is an example of where the Torah learns a mitzva as a kal vechomer from an in extremis situation. Even the lowest criminal deserves burial, all the more so a regular person. Other examples are the mitzva to treat a Jewish wife properly - learnt from a situation where a man marries an Amalvria; even the lowest status marriage requires full attention and appreciation. A third example is the mitzva of tzniut which is learnt from the Torah mitzva to maintain dignity in the battlefield bathroom. It applies all the more so in regular life.

11. The halachic obligation is to bury all parts of the body which were present at the time of death. (As many will know, the Israeli organization Zaka - Zihui Korbanot Ason - is dedicated to finding all traces of the bodies of those who die in tragic circumstances.) There is however no requirement to keep parts of the body for later burial if they were removed during life - such as teeth, hair or nails. As to the halachic issues concerning burial of amputated limbs, see <https://www.torahmusings.com/2018/12/amputated-limbs/>. Although there is no halachic obligation according to most poskim to bury limbs or organs which were removed from a living person there are many minhagim relating to such matters, even the burial of the placenta after a birth. It is said that R. Yechezkel Landau appeared to his son in a dream after his death and asked him to bury his tooth which he told his son could be found on a certain shelf. And so it was. There is a similar story about the Rambam who appeared to someone in a dream after his death and asked him to bury his toe that had been amputated some time earlier, and told him where it could be found. His wish was apparently fulfilled and the toe was placed in his grave in Tiberias (see Yabia Omer 9:35).

12. Murder of a victim with a pre-existing fatal condition - a treifa - is still considered to be halachic murder, but the murderer is not liable for capital punishment.

10. עוד הביא כבוד מעלתו ראייה מסוגיית דחולין (יא): ..... הרי דלכליל הרולח היה מותר לנוול הכרוג. וכ"ת דשם ודאי הללך הוא וכאן ספק הוא שירפאו הרופאים פעם אחרת ע"י כך, שם ג"כ ספק הוא שמא ימלא טריפה. ועוד דגם ספק פיקוח נפש דוחה כל איסורין שצתורה חוץ מתלת. .... ועוד דאי אמרינן שלעולם לא יכרג הרולח בלי צדיקת הנכרג איכ ניוול זה הוא לכבודו של הנרלח וכל מה שהוא לכבודו אין צו משום ניוול. את כל אלה כתבתי לפי דבריכם שאתם קורים זה פיקוח והללת נפש. אבל אני תמה הלא אם זה יקרא אפילו ספק הללת נפשות איכ למה לכם כל הפלפול ... שאפילו ספק דוחה שצת החמורה ... ואמנם כ"ז ציש ספק סכנת נפשות לפנינו, כגון חולה או נפילת גל ...

שו"ת נודע ביהודה מהדורה 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 desecration of the body, but an honor for it! However, it must be for a real case of pikuach nefesh lefaneinu - before 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? Does the modern ability to transport organs around the world to any recipient effectively make all cases of organ donation 'pikuach nefesh lefaneinu'?*

### F3] BENEFITING FROM THE DEAD

11. מה מת אסור בהנאה, אף זבח נמי אסור בהנאה. ומת גופיה מנלן? אתיא 'שם' 'שם' מעגלה ערופה. כתיב הכא: (במדבר כא) וַתָּמָת שָׁם מִרְיָם [וַתִּקְבַּר שָׁם], וכתב התם: (דברים כא: ד) וְעָרְפוּ אֶת-הָעֵגְלָה בְּנַחַל. מה להלן אסור בהנאה, אף כאן נמי אסור בהנאה. והתם מנלן? אמרי דבי רבי ינאי: כפרה כתיב בה כקדשים.

עבודה זרה כט:

*Chazal learn that it is prohibited to derive benefit from the dead. This is derived<sup>13</sup> from a gezeira shava analogy between the death of Miriam and the Egla Arufa - the heifer whose neck is broken.*

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

שולחן ערוך יורה דעה סימן שמט סעיף א ושך שם

*There is a prohibition of deriving benefit from a dead body, whether Jewish or non-Jewish.*

• Again, the definition of 'benefit' will be complex. As with the prohibition of *nivul hamet*, in the event of direct pikuach nefesh, this halachic concern will be removed.

### F4] ATONEMENT THROUGH BURIAL

13. איבעיא להו: קבורה משום בזיונה הוא, או משום כפרה הוא? למאי נפקא מינה? דאמר: לא בעינא דליקברוה להווא גברא. אי אמרת משום בזיונה הוא, לא כל כמיניה. (רש"י - דזיון הוא לקרוציו). ואי אמרת משום כפרה הוא, הא אמר לא בעינא כפרה.

סנהדרין מו:

*Chazal are clear that an important element of burial is not only the honor for the deceased (and their family) but also atonement for the soul of the deceased.*

14. כפרה מאימתי קא הויא - מכי חזו צערא דקברא פורתא ...

סנהדרין מו:

*Chazal understood that the atonement after death only starts after the initial 'pain' of burial.*

### F5] TAKING ORGANS WITHOUT CONSENT (FROM WHOM?)

15. אפילו הוא בסכנת מות וצריך לגזול את חברו 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 rule that taking organs without the permission of the donor is prohibited, even to save life. The donor can however give permission during their life<sup>14</sup>.*

13. There is a discussion in the poskim as to whether this prohibition is min haTorah or miderabbanan.

14. See Shu't Binyan Tzion 170.

## F6] TECHIYAT HAMETIM

• Many people think that organ donation is problematic in that it may prevent the resurrection of that person. In fact, this is NOT a halachic issue<sup>15</sup>. Techiyat Hametim apparently does not require organs to be intact at that time; if so, no one would qualify! Either it is a supernatural phenomenon, or a natural one that can be effected without the preservation of the body<sup>16</sup>.

## G] 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 theoretical possibilities for a legal definition of death:-

(i) brain-stem death - cessation of spontaneous respiration.

(ii) cessation of heart beat.

(iii) full body death - approximately 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.

## G1] THE GOSES

16. הגוסס הרי הוא כחי לכל דבריו (ש"ך - ואסור לעשות דבר במקרב מיתתו). אין קושרין לחייו, ואין סכין אותו, ואין מדיחין אותו ... ואין מעמציני עיניו עד שתצא נפשו. וכל המעמץ עם יציאת הנפש, ה"ז שופך דמים. ... הגה: ... וכן אסור לגרום למת שימות מהרה, כגון מי שהוא גוסס זמן ארוך ולא יוכל להפד, אסור להשמת הכר והכסת מתחתיו ... וכן לא יזינו ממקומו..... אבל אם יש שם דבר שגורם עכוב יליאת הנפש, כגון שיש סמוך לחותו בית קול דופק כגון חוטב עלים ... ואלו מעכבים יליאת הנפש, מותר להסירו משם, דאין צוה מעשה כלל, אלא שמסיר המונע.

שולחן ערוך יורה דעה הלכות ביקור חולים ורפואה ונוטה למות וגוסס סימן שלט סעיף א

*A person who is in the final stages - even the final moments - of life is considered in halacha to be fully alive. Any active step which may shorten that life is considered to be murder. However, the Rema rules that there is no requirement to prolong the life of a goeses and it is therefore permitted to remove an external stimulus preventing the onset of death.*

• End of life issues are often halachically complex. While active intervention to shorten life is always prohibited, non-intervention - ie a decision not to medically intervene to prolong life - may be permitted. Whether removal of existing life support is halachically considered a prohibited act which shortens life or a permitted act of non-intervention, is sometimes a matter of halachic dispute.

## G2] 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".

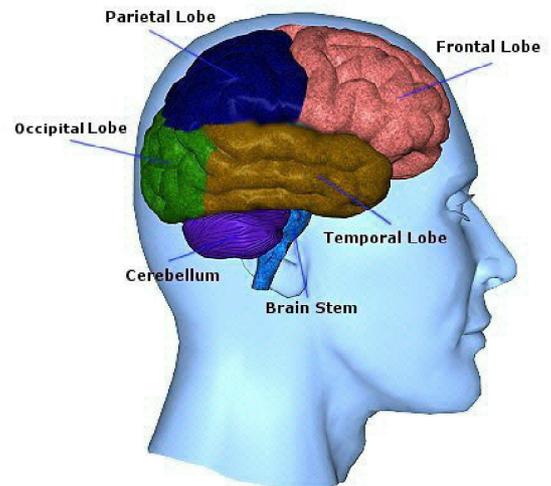
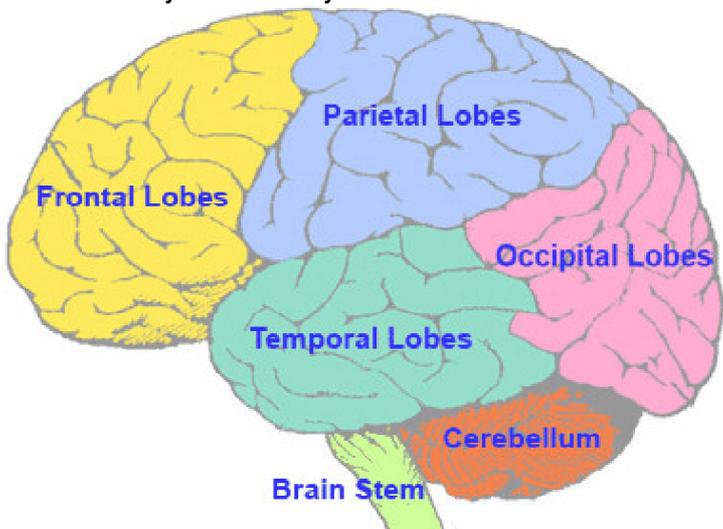
15. See however shu't Tzitz Eliezer 13:91. R. Waldenburg quotes from the Chatam Sofer (YD 336) who understands that someone who willfully harms part of their body, in life or after death, will not have use of that limb after techiyat hametim. It is not clear if the Chatam Sofer would say this even if the person did so in order to fulfil a mitzva.

16. R. Aryeh Kaplan suggests that techiyat hametim may be effected by cloning, using residual DNA or even the genetic sequencing as revealed by Eliyahu HaNavi! See <http://rabbimanning.com/wp-content/uploads/2016/08/Mashiach-3-Techiyat-Hametim.pdf>

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 far more difficult 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) many people see the switching-off of a brain dead patient as an act of mercy, not murder, and are motivated by genuine kindness in seeking to help the family avoid further trauma<sup>17</sup>.

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/PVS<sup>18</sup>. 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 as long as the heart is receiving oxygen through a respirator. Cardiac activity can continue for days after brain-stem death. However, according to some studies, even after brain-stem death there may still be activity in other areas of the brain.



- Is a patient who is brain-dead considered halachically to be (i) a goses; (ii) a met or (iii) a safek goses/met. Only in case (ii) will it be permitted to remove organs.

### G3] THE SUGYA IN YOMA

17. כָּל אֲשֶׁר נִשְׁמַת־רוּחַ חַיִּים בְּאַפֵּי מְכַל אֲשֶׁר בְּחַרְבָּה יָמוּ.

בראשית ז'כב

*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 breathing/respiration?*

18. 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 כָּל אֲשֶׁר נִשְׁמַת־רוּחַ חַיִּים בְּאַפֵּי.

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 we are permitted to clear (and in so doing break Shabbat)? 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 a 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?*

17. Haktav Vehakaballa on Bereishit 9:5 specifically learns from the verse that this is also prohibited.

18. See [www.bbc.co.uk/news/health-20268044](http://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.

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

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!*

20. תנו רבנן עד היכן הוא בודק? עד טבורו ויא' עד חוטמו (ר"ן - מחלוקת דהנך תנאי, דמר אמר עד טבורו ומר אמר עד חוטמו). רי"ף יומא דף ה.

*The wording quoted in the Rif and the Ran is that of the Yerushalmi! This is also the wording quoted in the Rosh.*

21. [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.*

22. אפ"י 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

*Shulchan Aruch rules according to the first opinion - we 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.

23. ... 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 life.<sup>19</sup>*

24. 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?*

25. ... ודבר ברור מאוד שאין נשימה אלא כשיש חיות כלב, שממנו ולורכו 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.*

26. 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 והכל האברים ומהרמב"ם בספר מורה נבוכים.

אגרות משה י"ד ח'ב ס' קמ"ו

*In this source, R. Moshe Feinstein was not prepared to interpret the emphasis of the Gemara in Yoma upon breathing as watertight proof that life is defined by respiration, but, like Rashi, just that breathing is often the most identifiable test in such circumstances (but see below for other statements by R. Feinstein).*

19. See Shu't Chacham Tzvi no. 77.

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-stem death as the relevant criterion. According to the Rif and Rosh there is potentially more support from this sugya for brain-stem death as halachic death.

27. אבל כל שאחר שמוטל כאצן דומם ואין צו שום דפיקה ואם אח"כ צטל הנשימה, אין לנו אלא דברי תורתנו הקדושה שהוא מת.

ש"ת חתם סופר חלק ב (יר"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 Steinberg<sup>20</sup> 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.

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.

#### G4] THE MISHNA IN OHALOT

28. אדם אינו מטמא עד שתצא נפשו ... ואפילו גוסס ... וכן בהמה וחיה אינו מטמאין עד שתצא נפשם. הותזו ראשיהם אף על פי שמפרכסים טמאין כגון זנב של לטאה שהיא מפרכת

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.*

29. אמר רב יהודה אמר שמואל: נשברה מפרקת ורוב בשר עמה - מטמא באהל; וא"ת: אותו מעשה דעלי מפרקת בלא רוב בשר הוא? זקנה שאני, דכתיב: (שמואל א' ד: יח) וַיִּהְיֶה כְּהִזְכִּירוֹ אֶת־אֶרְוֹן הָאֱלֹהִים וַיִּפֹּל מֵעַל־הַפֶּסֶא אַחֲרָיִת בְּעַד יַד הַשָּׁעַר וַתִּשְׁבֶּר מִפְּרָקָתוֹ וַיָּמָת כִּי־זָקָן הָאִישׁ וְכַבֵּד וְגו'.

חולין כא.

*The Gemara rules that if a person c.v. breaks their neck and most of the flesh around it, they are considered to be dead, irrespective of other bodily movement.*

30. וכיון שאתה אומר שעתה איכא נסיון שרופאים גדולים יכולין לברר ע"י זריקת איזו לחלוחית בהגוף ע"י הגידים לידע שנפסק הקשר שיש להמוח עם כל הגוף. שאם לא יבא זה להמוח הוא ברור שאין להמוח שום שייכות להגוף וגם שכבר נרקב המוח לגמרי והוי כהותז הראש בכח. שא"כ יש לנו להחמיר באלו שאין מרגיש כבר בכלום אף לא ע"י דקירת מחט ואף שאינו נושם כלל בלא המכונה, שלא יחליטו שהוא מת עד שיעשו בדיקה זו. שאם יראו שיש קשר להמוח עם הגוף אף שאינו נושם יתנו המכונה בפיו אף זמן גדול. ורק כשיראו ע"י הבדיקה שאין קשר להמוח עם הגוף יחליטו ע"י זה שאינו נושם למת.

ש"ת אגרות משה יורה דעה חלק ג סימן קלב

*R. Moshe Feinstein rules that if expert medical investigation shows NO physiological connection between the brain and the body AND the patient is no longer able to breath without ventilation, they are considered to be halachically dead.*

31. א. אם מה שמכנים הרופאים מיתת המוח נחשב מיתה הנה נכדי הרה"ג מוהר"ר מרדכי טענדלער שליט"א, דיבר אתי באריכות בכמה מהספיקות והחקירות שנתחדשו אצל ידידי, מחמת הכרעת הפסק של הערכאות הראשיות בנוא יארק, לקבל את מה שמכונה אצלם "מיתת המוח" כהגדרת מיתה. למעשה, כפי ששמעתי מחתני הרב הגאון מוהר"ר משה דוד טענדלער שליט"א, הערכאות קיבלו רק את הגדרת המוות שהיא גם צודקת לדינא, הגדרה שקוראים לה הרופאים "הארבערד קריטיריא" (התנאים לקביעת ההפסקה המוחלטת והסופית של פעולת המוח, שנקראת מיתת המוח, שהתקבלו בהארבערד) שנחשב ממש כ"נחתך ראשו" ר"ל של החולה, שכאשר מתקיימים תנאי הארבערד המוח כבר ממש מתעכל ר"ל. והנה אף שהלב עדיין יכול לדחוף לכמה ימים, מ"מ כל זמן שאין להחולה כח נשימה עצמאית נחשב כמת, וכדיבארתי בתשובתי באגרות משה יו"ד ח"ג סימן קלב"ב.

ש"ת אגרות משה יורה דעה חלק ד סימן נד

Here, R. Feinstein rules that the halachic definition of death is dependant on independent respiration, which in turn depends on the functioning of the brain stem. He references the 'Harvard Criteria' which were issue in 1968 to define brain-stem death<sup>21</sup>.

32. Based on the position of Rav Moshe Feinstein cited above, Rabbi M. Tendler ..... 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.

## **H] IS BRAIN DEATH ACCEPTABLE AS THE 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, but not all, 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, appear to support brain-stem death as a definition.
  - The positions of R' Shlomo Zalman Auerbach and R' Moshe Feinstein<sup>22</sup> 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 and there are oral accounts<sup>23</sup> which differ from the written records. In the case of R. Feinstein 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 R. Shaul Yisraeli, R. Mordechai Eliyahu, R. Zalman Nechemia Goldberg, R. Avraham Shapira, R. Dr Abraham Steinberg.

See the Halachic Organ Donor Society (HODS)<sup>24</sup> website for much more information on the arguments for and a list of those Rabbis who are in favour.

### **AGAINST:**

1. Halacha requires cessation of cardiac activity. Many brain dead patients still 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 R. Eliezer Waldenburg, R. Yitzchak Weiss, R. Yosef Shalom Eliyashiv and R. Shmuel Wosner. Many poskim of the Centrist Orthodox community - including R. Mordechai Willig, R. J. David Bleich, R. Herschel Schachter and R. Aharon Lichtenstein oppose it (either as definite murder, or at least a serious doubt). R. Moshe Feinstein himself is not clearly in favor. In fact he makes other statements indicating that removing organs is murder. (The pro-camp suggest he was taking about PVS not brain-stem death).

21. <https://hods.org/English/h-issues/documents/ADefinitionofIrreversibleComa-JAMA1968.pdf>

22. A detailed analysis of R. Feinstein's and R. Auerbach's approaches, together with those of many other senior poskim, can be found at [http://www.rabbis.org/pdfs/Halachi\\_%20Issues\\_the\\_Determination.pdf](http://www.rabbis.org/pdfs/Halachi_%20Issues_the_Determination.pdf)

23. R. Shlomo Zalman Auerbach is reported as requiring brain death AND also cessation of heartbeat. He is only prepared to accept halachic death once the body is entirely devoid of motion and activity.

24. <https://hods.org/>. 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,

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 Israel or chu'l) to abide by the guidelines in the face of pressure to supply organs?

The RCA has a 110 page analysis<sup>25</sup> of the medical and halachic issues. Its overall approach is against brain-stem death.

## **I] POST-MORTEM ORGAN TRANSPLANTS**

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 NOT halachically dead (ie CPR is not considered 'tehiat hametim'<sup>26</sup>!)

## **J] IS IT PERMITTED TO ACCEPT ORGANS BUT 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<sup>27</sup>.

2. In any event, there are many authorities who rule 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 did not donate organs. If this is the case, refusal by Jews to donate may result in other Jews dying due to lack of available, or allocated, organs. Compare chilul Shabbat which is permitted in some cases because of 'eiva' - the possibility of antagonizing<sup>28</sup> the non-Jews so much that Jews will eventually suffer.

## **K] ORGAN DONATION TO NON-JEWS**

- The obligation of לֹא תִעֲמָד עַל-יְדֵם רֵעֶךָ apparently applies to 're'echa' - fellow Jews to whom one owes a higher level of commitment since they are family.<sup>29</sup>
- The prohibitions of nivul hamet, non-burial and other halachic concerns (see above) are overridden by considerations of pikuach nefesh. In strict terms this will apply only to the rescue of a Jew.
- However, R. Moshe Tendler asserted that one is obligated to donate organs to save lives even if the probable recipient will be a non-Jew, since all mankind is created in the image of God<sup>30</sup>.

25. [http://www.rabbis.org/pdfs/Halachi\\_%20Issues\\_the\\_Determination.pdf](http://www.rabbis.org/pdfs/Halachi_%20Issues_the_Determination.pdf)

26. If it were, this would have seriously implications for the revived patient, who would find that all their belongings may have passed in the meantime to their inheritors!

27. R. Yitzchak Breitowitz, in his article on organ donation (see below), writes "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 participate does not cause or facilitate a death that would otherwise not occur. If the death will occur with or without a given recipient's participation, there is no exclusionary principle that would prohibit benefiting from the transgression after the fact."

28. Some poskim are concerned that where Jews are known to NOT donate organs, this may (even subliminally) impact on the decision making process by non-Jewish doctors concerning who should receive organs for life-saving treatment.

29. The halachic position on saving non-Jews is very similar to the secular legal position in most jurisdictions - that it is a meritorious act, but not an obligation, to save the life of others. Since Jews are required to consider all other Jews as family, the level of responsibility is increased to an obligation to intervene to save life; way beyond the normal requirements of civil law. In some civil jurisdictions there is a limited obligation to intervene and assist where possible. 'Good Samaritan' laws sometimes impose such a responsibility and usually indemnify the rescuer against any liability for harm unintentionally cause during the course of the rescue.

30. As to how this works halachically in the context of the laws of pikuach nefesh, R. Yitzchak Breitowitz makes a number of suggestions in an article in Jewish Action 2003. He comments that, in his view, none of these are conclusive: (i) If Jews do not give to non-Jews, there is a possibility that non-Jews will not give to Jews and future Jewish lives will thereby be endangered. (ii) There is a possibility that the recipient will be Jewish and, even if that possibility is unlikely, the laws of pikuach nefesh are not limited by the principles of rov (assuming majority status). See, e.g. Shulchan Aruch OH 329:2. (iii) Removal of internal organs may not constitute nivul hamet on a Torah level because, at least in some cases, the external appearance of the body remains intact. (iv) From the perspective of the donor and his family, the actual desecration of the corpse is being done by the transplant surgeon and his team. The donor has no way of knowing who the transplant surgeon is and under Jewish law, could presume that he will be non-Jewish, at least in the United States. A non-Jew does not have a prohibition of nivul hamet even towards a Jewish corpse. Accordingly, the only sin the family is committing is authorizing desecration, which may be a

## **L] LIVE DONATION**

Live donation of organs is certainly permitted and is an enormous mitzva, provided that there is not an excessive<sup>31</sup> level of health risk to the donor. Where there is some level of danger (eg kidneys) there may be a mitzva, but no obligation. If the level of danger is very small (eg bone marrow and blood) there may be a full obligation to donate.

## **M] A DIMINISHING PROBLEM?**

- It is hoped that the current chronic shortage of organs available for donation will in the future be met by limitless non-human supplies! In particular, by the 2030s it is hoped that these will include:
  - Xenotransplantation - use of animal organs, in particular pig or baboon organs.
  - 3D printing of organs<sup>32</sup>
- As long as these procedures are likely to be medically successful, they present no halachic problems.

33. Transplant-ready pigs could do far more than just provide organs. Eventually, they could be used to produce the islet cells – clusters of hormone-producing pancreatic cells – needed by people with diabetes. Pig blood could be used to give transfusions to trauma patients and people with chronic diseases like sickle cell anemia, who often develop antibodies against human blood cells because they have had so many transfusions. Even dopamine-producing cells could be made by pigs, and transplanted into patients with Parkinson's disease, says David Cooper, who co-directs the xenotransplantation programme at UAB [University of Alabama at Birmingham].

Using animal organs in humans: 'It's just a question of when' - Karen Weintraub, The Guardian - 3 Apr 2019<sup>33</sup>

## **N] THE 2008 ISRAELI LEGISLATION**

- 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.
- Adopted 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%.

rabbinic prohibition (amira l'akum) that can yield for the pikuach nefesh of even a non-Jew. For the full article see <https://jewishaction.com/health/halachah-say-organ-donation/>

31. This is not easily or objectively defined.

32. <https://www.bbc.com/future/article/20210601-how-transplant-organs-might-be-printed-in-outer-space>

33. <https://www.theguardian.com/science/2019/apr/03/animal-global-organ-shortage-gene-editing-technology-transplant>