

Legal Insights about the Moment of Death: Biology, Democracy and the End of Life.

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1. Introduction

The end of life is a relevant law issue with consequences in law of successions, of obligations and many other law subjects. However, the main concern in this paper are problems related to bioethics and Medical Law that have emerged from a radical redefinition of the death concept and that can be seen as a menace to the formal concept of autonomy, in the sense of self-legislation and thus to the democratic principle assured in modern western societies.

Autonomy here is treated as formal because the substantial requirements for an autonomous decision of an individual, like the plausibility of autonomy understood on the Kantian sense of free will, therefore the influence that empirical factors sure have in individual decision making processes, although extremely relevant, lie beyond the scope of this article.

The approach herein presented includes how the concept of death has been redefined in the last fifty years and the intimate relation of this process with the advance of biological knowledge over the human body. This can be seen as a result of an accentuated dualistic view of the relations between body and soul, with basis on the platonic dualism and the more radical formulation of Descartes or to a reinforced monist approach of this relations, reducing the human to the *physis* by identifying the ideas of "conscience", "soul" or "mind" with the physical structure of the human brain or to causal relations derived from brain activity. In short, both views represent a new arise of the *man-machine* concept, and not just as a metaphor.

Afterwards, there will be a concise analysis of what problems biological reductionism brings to the democratic state, assumed as

theoretical background for the discussion about a legal definition of the moment of death based on the “brain death” criterion.

Finally, the role that personal autonomy plays, or should play, in questions of life and death may be elucidated, considering the requirements for the objective validity of norms, being objective validity defined as the possibility of considering them binding on others, even dissenters.

2. The brain death concept

The history of the brain death concept can be led to the year of 1968, with the report of the *Ad hoc committee of the Harvard Medical School to examine the definition of brain death*, published in the *Journal of the American Medical Association* in august of 1968 (Kuhse and Singer, 2003), obtaining full recognition as an authorized document by the medical community and the society.

It is interesting to investigate the motivations of the Committee to redefine death as “brain death”, and these reasons are clearly exposed on the report. Quoting:

Our primary purpose is to define irreversible coma as a new criterion for death. There are two reasons why there is a need for a definition: (1) Improvements in resuscitative and supportive measures have led to increased efforts to save those who are desperately injured. Sometimes these efforts have only partial success so that the result is an individual whose heart continues to beat but whose brain is irreversibly damaged. The burden is great on patients who suffer permanent loss of intellect, on their families, on the hospitals, and on those in need of hospital beds already occupied by these comatose patients. (2) Obsolete criteria for the definition of death can lead to controversy in obtaining organs for transplantation.

As stated above, the motivations of the Committee are headed to the satisfaction of collective goals or interests, and lies on an utilitarian approach of the definition of the moment of death. In any moment the report defines brain-dead-diagnosed-people as “dead” because they are so.

Its goals are to fulfill an economic based instrumental rationality for a better reallocation of medical resources or to promote an increase in the collect of transplantable human tissues.

This particularly causes some concern, for this is an issue in bioethics which has obtained an extremely high level of acceptance in western societies, although its consequences have directly affected the moral and legal *status* of individuals whose brains, in the limits of contemporary knowledge of medicine, have permanently lost its most basic functions.

Law, in the lack of a proper definition of death, has just absorbed the medical one, which can be seen in many statutes regarding the removal of transplantable human tissues and the limits of the efforts and duties of care of hospitals and doctors (*e.g.* United Kingdom, Mexico, and Brazil).

For Singer this acceptance of the brain death definition is a *stealth revolution*(2003), basically because of what could be called a second level semantic "cloud" that obscures and muddle the clearly view of three separated questions, all extremely important, that often arise in discussions of brain death and related issues. These questions are (Singer, 2003, p. 300):

1. When does a human being die?
2. When is it permissible for doctors intentionally to end the life of a patient?
3. When is it permissible to remove organs such as the heart from a human being for the purpose of transplantation to another human being?

The answer to the first question, until 1968, was: when the circulation of the blood stops permanently, with the cessation of breathing, heart pulsing *et cetera*. The answer to the second question was: never; and to the third question was: when the human being is dead.

The brain death concept allows to, by changing the answer to the first question, assuming that it comes just from an updating of a concept of death rendered obsolete by technological advances, to hold constant the answers to the questions two and three. This change has meant that for warm, breathing, pulsating human beings will not be given further medical

support, and if their relatives consent (or in some countries if they have not registered a refusal of consent) hearts can be removed from. Thus, no ethical question appeared to be at issue.

In Singer's opinion, since the House of Lords ruling in *Airedale NHS, Trust v. Bland*¹ and other cases, the idea of sanctity of life had been abandoned. For this, the redefinition of death concept as brain death has no more utility and the issues related to the three basic questions listed above could be solved without reference to it.

The reasoning of Singer conducts to a path, though, that is so, or more dangerous as the one led by the brain death criterion. As a modern utilitarian thinker Singer bears his conclusions in an ultimate cognitive criterion for moral decision: the principle of utility. Of course, his version of the principle of utility has been reshaped, and does not correspond to the formulation of Bentham.

Singer elaborates his principle of utility version through the idea of interest, and not properly overall good, as Bentham, but his idea of interest contains itself a biological approach like the brain death criterion. It appears very clear, for example, in his accusations of "specism", published in "Practical Ethics" and "Animal Liberation", regarding the exclusion of animals with relative high cognitive brain functions of the moral community and the inclusion of any human being despite his cognitive skills (like severed-brain-injured newborns).

In fact, Singer proposes that the *Bland* decision says nothing about questions one and three, but changes in a radical way the answer to the question two. In his words "*the simple 'never' now becomes 'when the patient's continued life is of no benefit to her': and if we ask when a patients life is of no benefit to her, the answer is: 'when the patient is irreversibly unconscious'*" (Singer, 2003, p. 300), which clearly means a substitution of the idea of *sanctity* of life for the one of *useful* life.

Of course, the goal of this paper is not to sustain the idea of sanctity of life, simply because each one's conclusions about this issue can derive

¹ In this Case, the House of Lords allowed the interruption of medical support for a young man named Tony Bland which lived in an unconscious state derived from a permanent loss of activity in his brain cortex, although he was not diagnosed as dead by the brain death medical definition, since he could hold spontaneous heart beating and breathing, but needed artificial life support for nutrition and else.

form very different metaphysical and religious approaches, and in the field of law in a democratic and pluralistic state it is not possible to establish a previous hierarchy of fundamental rights, what could might well convert them into duties.

What is presupposed here is that even abandoning the idea of sanctity of life, which was muddled by the brain death criterion, we cannot just substitute it for the idea of useful life, which is grounded, also, in a biological determinacy of normative contents, like the rights and duties towards unconscious human beings.

The most curious about this debate is that the most resounding criticism of the brain death criterion is based on the same premise, but with a much wider range that can give new breath to old ideas that classifies human lives in useful and useless. But how did it come to this point?

3. The new arise of the man-machine

Until the IV century the Christian philosophers, under the influence of a Neo-Platonist view had to deal with two revealed truths that seemed, in that context, a paradox: the incarnation and resurrection of the bodies (Mammi, 2003). The problem was, basically, how could the divine (the spirit) incarnate, pass through a process of corruption, die, resuscitate and remain divine? And so, how could the bodies, being substance, become incorruptible and eternal?

It was Saint Augustine (Mammi, 2003) that established a new ground for the approach of these questions, inverting the terms of the problem. He avoids the formulation of absolute concepts of body and spirit (or soul) and a combination of them and elaborates a concept that condenses the mixture of soul and body, which would be the reality of human nature and sign of its imperfection. Departing from this premise, he investigates how the human nature could be oriented to its spiritual or material side. Thus, there would not be souls imprisoned in bodies and the apparent dichotomy would be result of the original sin and the consequent corruption of mankind.

The Augustinian doctrine had influenced latter conceptions of the relations between body and soul in the direction of no separation (Mammi, 2003), but it was with Saint Thomas Aquinas, under the influence more of

Aristotle than Plato, that the accidental and contingency character of this relation gave place to the concept of *substantial unity*, which defines the traditional monist approach of the human nature, with emphasis on the sacred and transcendental constitution of man (Mammi, 2003).

It is in the renaissance that emerges a new conception of these relations, with the conceptions of Vesalius and, more important, Descartes (Brandão, 2003).

The renaissance art portraits time, space and nature disconnected of the sacred, and this perspective will also be applied to the body. As an example, we can see "The lesson of anatomy of Mr. Pulp", painted by Rembrandt.

In the medicine, the Dutch physician, Vesalius, implements in his practice such theoretical approach, deviating the attention from the text to the dissected body, from the reflection to the empirical observation (Brandão, 2003). The body, as a representation, is disconnected of the negative field of death and its comprehension is assimilated, progressively, to objective mechanical, physical and chemical processes. Vesalius works over a body-artifact, deprived and separated of the soul or spirit (Brandão, 2003).

The project of Vesalius is very close to the Cartesian one. In the theory of the automata of Descartes, body and universe, both totally distinct of the *cogito*, that constitutes the subject, are reduced to *res extensa* and the geometrical and mechanical properties that can be apprehended and manipulated by the spirit, which means that the subjectivity of the soul does not introduce itself in the automata extension of the body (Brandão, 2003).

Since then, a Cartesian dualism had prevailed in western cultures, becoming the body an object of medicine, and emerging the notion of body-machine.

Even though, nowadays, there is a different arising conception that does not just separate the body from the soul, spirit or conscience, but equates them. In fact, it is a radicalization of the Cartesian dualism, which can be better understood on its various aspects if the ideas of La Mettrie, an enlightenment philosopher, are brought in.

The expression man-machine is, indeed, derived from of a 1748 manuscript of the French Doctor in Medicine Julien Offray de La Mettrie: *The Man-Machine*, considered, latter, his most important book (Rouanet, 2003).

The thesis of La Mettrie is a radicalization of the Cartesian ideas, for who the animals are just machines because they have no soul. Pushing this idea to unimaginable extremes by the author of the "Discourse of Method", La Mettrie claimed that men are in every aspect close to the animals, and have no soul either. They are merely machines, purely material without any spiritual substance like intended Descartes.

This is what brings La Mettrie to contemporary days. He is undoubtedly the ancestor of the biological reductionism that occupies the center of debates in many issues in practical ethics and law. His radicalization of Descartes is the "seed" of the actual monist approach over the human being, abandoning the dualistic tradition, but without returning to the Christian monist approach, that emphasized the sacred nature of men, and disregarding many aspects that establishes self-comprehension as human beings².

For example, La Mettrie sure endorsed the idea of autonomy of the human species face any kind of heteronomous transcendental contents, like religion, but reduced the idea of individual autonomy to the notion of act in accordance to its own nature, or biology determined behavior. He claimed about the truth of nature in opposition to the fakeness of culture.

4. Biological reductionism and democracy

The actual biological reductionism in matters of bioethics, and more specifically, on the issue of life and death can be criticized in many aspects. But the central concern of this work is the political authoritarianism it endorses, resulting in a radically antidemocratic view on these subjects.

The decisions on normative issues regarding the end of life would no more be taken by the "sovereign people". The idea of self-legislation,

² For example, La Mettrie claimed that a murderer or a dishonest man could not be considered guilty, since his actions would be determined by his own nature, his particular or natural inclination for acts of such kind. It's relevant to note that Tancredi (2005), brings exactly the discussion about the need of rethinking the concepts of civil and criminal liability face the new discoveries of neuroscience.

presupposed by the democratic states (which implies the recognition that any person is able to make a reasonable and rational normative judgment regarding personal and public affairs) is replaced in practical ethics and law by the claim that in a rational State, and each day more complex world, there is a need for scientific criteria and specific Knowledge on the regulation of these matters. Criteria and Knowledge held by scientists and doctors.

The danger of biological reductionism is that the scientific data and the biological Knowledge over the body can be taken as "facts" or "norms" that must be endorsed on the legislative and judicial levels and not as tentative normative claims in a public discourse.

This can lead, in a radical and simplified example, for the consideration that homosexuality is wrong, because it is in disagree with the genetic or natural constitution of a person, and must be corrected, against fundamental liberties of a democratic state and the very conception of "person" it presupposes, as someone able (because rational and autonomous) to have its own conception of "praiseworthy life" and to pursuit the realization of this project or, in the words of the U.S Constitution, the "pursuit of happiness".

5. Autonomy as self-legislation

To elucidate the role that autonomy (both personal and political) should play in defining the moment of death will be adopted, as explained in the introduction, a formal concept of autonomy as self-legislation.

5.1 Personal (or individual) autonomy as a decision-making process

According to Sieckmann (2007), "autonomous reasoning consists in the balancing of normative arguments based on the interests of autonomous agents". Normative arguments require a result of this balancing, that is a normative judgment stating that a norm is definitively valid. Therefore, four characteristics of autonomous reasoning can be enumerated (Sieckmann, 2007):

1. The result of the balancing cannot be inferred from given norms, but must be established by autonomous judgment.
2. Normative arguments are the result of claims that autonomous agents make based on their interests.
3. Normative arguments include requirements for validity, that is, they demand that a particular norm be accepted as definitively valid.
4. The structure of requirements for validity implies that normative judgments include a claim to the normative necessity of the established result.

So, the general idea of autonomy as self-legislation implies that it means establishing the definitive validity of a norm by one's own normative judgment, and an agent has autonomy if he is in a position to take a normative decision that is not determined in its result but is bound by normative arguments.

Of course, this explains only subjective validity of norms as the normative pretensions of the agent himself, with no one else bound by his judgment. Therefore, it is still necessary to argue about the possibility that autonomous reasoning can establish objective validity of norms, which means binding norms in general.

5.2 Political autonomy as a decision making process of establishing objective validity of norms

The objective validity of norms means, for the present, that the acceptance of a norm or judgment is not merely subjective, requiring that validity is in some way independent of individual acceptance. Objectivity, in this sense, means that the norm in question is binding on its addressees (Sieckmann, 2007).

Considering that other definitions of objective validity (like objectivity as "truth" or as a reference to a metaphysical world) are disregarded here, if it is possible to establish binding norms, collective autonomous reasoning and acceptance of these norms by autonomous agents are necessary.

The two ways of collective acceptance to be considered are either consensus or convergence.

For Habermas (2005) who establishes a semantic principle of universalizability (the "U" principle), reconstructed in terms of the Principle of Discourse ("D") when referring to objective validity in the sense here exposed, consensus, being the highest degree of acceptance of a norm, is the preferable criterion. However, since any agent who did consent to the norm might change his mind and reject its validity, consensus would be destroyed and it would not be possible to establish binding norms³.

The alternative for consensus is the criterion of reasonable convergence, which consists in a prevailing and increasing degree of acceptance of the norm by autonomous agents.

This would happen in situations that a binding norm seems to be mandatory and there is a distribution of opinions in favor of two incompatible norms being possible to establish an intermediate norm with a considerable degree of acceptance. If this situation occurs, support for the intermediate solution increases, possibly encouraging more agents to accept this solution. Thus, a tendency towards increasing acceptance of a certain result may be reinforced (Sieckmann, 2007).

Of course, in order to establish binding norms, such convergence must also be reasonable, that is, it must be the result of a process of inter-subjective reflection that includes correct individual balancing, but also reciprocal consideration of the normative conceptions of other autonomous agents (Sieckmann, 2007).

Certainly, the perspective of supporters and opponents of a norm can be different even face a reasonable convergence criterion. So, reasonable convergence alone cannot establish binding norms, since the opponents who reasonably deny the validity of the norm still can claim that it is not binding on them because it would fail to respect their autonomy.

Alternatively, as suggests Sieckmann (2007), dissenters, though rejecting the bindingness of a norm backed by reasonable convergence, must reasonably accept the correctness of the claim to bindingness *if a*

³ As Sieckmann (2007) states, this also holds for modified criteria for consensus, like the criterion that every reasonable agent might possibly consent to a norm (because in this case, the criterion is too weak to establish binding norms since can be satisfied by incompatible norms) or the criterion that every reasonable agent would consent to the norm (because if used as a criterion for normative validity, and not as an empirical prediction, it presupposes criteria that determine the result of the balancing , excluding autonomy as self-legislation).

commonly binding norm is needed, in case that the norm must be considered as binding on all agents, even dissenters.

This claim of bindingness is objectively justified in the strict sense, and does not amount to objectivity in the sense that every reasonable agent must accept the norm as valid. Opponents may still hold a contrary view against the generally accepted judgment, claiming a competing norm as valid, but are subjected to the stated norm.

Therefore, a norm can be correctly claimed to be binding even on its dissenters with the satisfaction of two conditions (Sieckmann, 2007):

1. The norm is backed by reasonable convergence;
2. It is necessary to have a commonly binding norm.

Recalling the central subject of this work, the question to be discussed is: does the brain death criterion meet these two conditions?

6. The bindingness of the "brain death" criterion

As explained above, the danger of biological reductionism (or determinism) lies in the consideration of scientific Knowledge as norms prescriptions, and not as normative claims based on interests.

In complex societies – which have overcome the barrier of a religious or metaphysical background as basis for the role of social integration that Law must play – legal issues, such as death moment, lie in the center of the ideas of personal autonomy and dignity of the human being and cannot be ruled by a moral cognitivism based upon biology. Nevertheless, the life deadline of a person cannot be imposed in order to somehow adjust or control access and distribution of medical resources. Death, itself, is not restricted to the biological phenomena, but involves cultural and social activities in which the definition of the moment of death and the moral and legal duties facing patients with a brain death diagnosis are particularly relevant to everyone.

Considering this, one must argue if the brain death criterion satisfies the two conditions mentioned above for the consideration of its objective validity.

6.1 The necessity of a commonly binding norm for the moment of death.

According to the idea of self-legislation autonomous agents can make normative claims based on interests on a decision making process that can be individual or collective. But the question if there is a need of a commonly binding norm is, itself, a normative issue that may, like the validity of a norm, be disputed.

Nevertheless, it might sure be easier to obtain a high degree of acceptance about the necessity of a yet non determined commonly binding norm than about the validity of a specific normative claim, at least regarding the determination of the moment of death⁴.

In fact, normative claims about the objective validity of the brain death criterion can be brought into discussion, for example, because of the interests on increasing the availability of human transplantable organs. But this normative claim will never be accepted as valid and necessary for Jehovah Witnesses, who does not accept to receive organs based on religious beliefs.

So, the first step is to determine if a commonly binding norm regarding the moment of death can be backed by general acceptance of its necessity. At this stage, the reasons why autonomous agents demand a commonly binding norm are not relevant, due to the indetermination of the contents of the normative claim that might be supported to the level of objective norm prescription.

End of life is a relevant law issue with consequences on Law of Successions, Law of Obligations and many other law subjects. Recent scientific studies brought new matters related to Medical Law and Bioethics. As a matter of fact, the accurate determination of the moment of death is relevant because it indicates the moment a human being is no longer, in law, considered a "person", as an individual having certain legal rights and responsibilities.

⁴ In fact, the normative issue about the necessity of a commonly binding norm is a common dispute regarding public and private issues, and most times lies in the center of the debate between liberals and communitarians.

Thus, the pool of interests is so broad and heterogeneous regarding an accurate determination of death that raises innumerable subjective normative claims, for the necessity of a commonly binding norm can be assumed. So, one of the two requirements is met.

6.2 Is the "brain death" criterion backed by reasonable convergence?

In order to analyze if this requirement is fulfilled, the three questions pointed on the item two must be separated. The issues of when is permissible to end a life of a patient and of when is permissible to retrieve transplantable organs from human beings are, in fact, independent normative issues, that are not logically or necessarily attached to definition of the moment of death. One could, therefore, argue even if there is a necessity for a commonly binding norm on these two issues, since they were never properly brought into discussion, but assumed as logical consequences of the redefinition of the moment of death.

When these issues are separated, most of the normative claims for defining death through the "brain death" criterion erode for internal incoherence or lose part of their "weight", since the interests they are based on are connected to other normative issues, and so, cannot be equally balanced with other normative claims directly related to the issue on deliberation.

At this point, some survey data acquire relevance. In a study of doctors and nurses who work with brain death diagnoses patients in Cleveland, Ohio – US (Youngner, 1990), one in three of them said that these people should be considered dead because they were "irreversibly dying" or had an "unacceptable quality of life". Should people who have bad quality of life be considered dead?

Even Biology based normative claims can be supported in opposition to the brain death criterion. For example, brain dead diagnosed women can become pregnant and give birth to healthy babies. In 1994, the San Francisco Chronicle reported: "Brain-Dead Woman Gives Birth, then Dies" (*apud* Singer, 2007). Therefore, one must state that the moment of death shall be the irreversible cessation of heart-beating, breathing and decrease of body temperature.

Regarding cultural aspects, it is remarkable that the *status* attributed to brain-dead patients is surely not the same as to dead people who are no longer considered persons. It is not acceptable those ones be sent to medical schools for anatomy classes, for example.

Therefore, brain death criterion does not seem to reflect an intermediate normative claim which reinforces the tendency for its acceptance.

7. Conclusion

Considering autonomy as self-legislation and the criteria for establishing binding norms, the moment of death, for law purposes, that satisfies the two requirements for collective autonomous reasoning should be the irreversible cessation of heart-beating, with the consequent cessation of blood circulation, breathing and decrease of body temperature.

The normative issues related to the cessation of medical efforts and retrieval of transplantable organs must be object of independent decision making processes in order to its admittance on brain-dead patients.

Although, these decision-making processes cannot be developed through collective autonomous reasoning, despite the communitarian normative claims about the necessity of a binding norm on this issues, because in this case the existence in democratic societies of a previous binding normative prescription, the principle of the dignity of the human person which is intrinsically connected to the idea of personal autonomy, reshapes this reasoning about the necessity of a binding norm in an interpretative reasoning, also by convergence.

So, the questions two and three shall be answered directly by personal or individual decision making processes from the higher degree affected by the conclusion for the subjective validity of the norm resulting from the balancing.

Bibliography

BRANDÃO, Carlos Antônio Leite. O corpo do renascimento. In: NOVAES, Adauto [Org.]. *O Homem-Máquina: a ciência manipula o corpo*. São Paulo: Companhia das Letras, 2003, p. 292

HABERMAS, Jürgen. *Facticidad y validez: sobre el derecho y el estado democrático de derecho em términos de teoría del discurso*. 4 ed. Madrid: Trotta, 2005.

HARVARD MEDICAL SCHOOL. Ad hoc Committee, to examine the definition of brain death. A Definition of Irreversible Coma. 05/08/1968. In: KUHSE, Helga, SINGER, Peter [Orgs]. *Bioethics; an anthology*. Oxford: Blackwell, 2003, p. 287-291.

KUHSE, Helga; SINGER, Peter. *Bioethics: na anthology*. Oxford: Blackwell, 2003.

MAMMI, Lorenzo. O espírito na carne: o cristianismo e o corpo. In: NOVAES, Adauto [Org.]. *O Homem-Máquina: a ciência manipula o corpo*. São Paulo: Companhia das Letras, 2003, p.111

ROUANET, Sergio Paulo. O Homem-Máquina hoje. In: NOVAES, Adauto [Org.]. *O Homem-Máquina: a ciência manipula o corpo*. São Paulo: Companhia das Letras, 2003

SIECKMANN, Jan-R. The concept of autonomy. In: *Law and Legal Cultures in the 21st Century – Diversity and Unity: Plenary Lectures, 23rd IVR World Congress, August 1-6, 2007, Cracow, Poland*. Wolters Kluwer: Warszawa, 2007, p 149-170.

SINGER, Peter. Is the sanctity of life ethic terminally ill? In: KUHSE, Helga, SINGER, Peter. [Orgs]. *Bioethics; an anthology*. Oxford: Blackwell, 2003, p.295

TANCREDI, Laurence - *Hardwired Behavior: What a Neuroscience Reveals about Morality*, New York, Cambridge University Press, 2005

YOUNGNER, Stuart, *et aliters*. Brain Death and organ retrieval: a cross-sectional survey of knowledge and concepts among health professionals. In: *Journal of the American Medical Association*, v. 261, 1990.