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**DEADLY PLURALISM? WHY DEATH-CONCEPT, DEATH-DEFINITION, DEATH-CRITERION AND DEATH-TEST
PLURALISM SHOULD BE ALLOWED, EVEN THOUGH IT CREATES SOME PROBLEMS**

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Abstract

Death concept, death definition, death criterion and death test pluralism has been described as a problematic approach by some. Others have claimed it to be a promising way forward within modern pluralistic societies. This article describes the New Jersey Death Definition Law and the Japanese Transplantation Law. Both of these laws open up for more than one death concept within one and the same legal system. The article discusses a philosophical basis for these laws starting from John Rawls' understanding of comprehensive doctrines, reasonable pluralism and overlapping consensus. It argues for the view that a certain legal pluralism in areas of disputed metaphysical, philosophical and/or religious questions should be allowed, as long as the disputed questions concern the individual and the resulting policy or law or acts based on the policy/law do not harm the lives of other individuals to an intolerable extent. However, whereas this death concept, death definition, death criterion and death test pluralism solves some problems, it evokes other ones.

Deadly Pluralism?

Why Death Concept, Death Definition, Death Criterion and Death Test Pluralism Should Be Allowed, Even Though It Evokes Some Problems

I. INTRODUCTION

During the 1980s in the West, there has been a consensus as regards the accuracy of the whole-brain death criterion, i.e. “the irreversible cessation of all functions of the brain, including the brain stem.”¹ While consensus can still be found at the level of national policies in this regard, the whole-brain death concept and its implications² have been criticised for being theoretically incoherent, internally inconsistent³ and biologically implausible.⁴

Alternative concepts of death have been suggested, such as the higher-brain death concept. Others have argued for the heart-lung death concept. A number of policies and laws have also been established as regards concepts of death, death definitions, corresponding death criteria and tests for death.⁵ In these cases, it has often been assumed that there should be *one* legal concept of death. This, however, is not the case in the New Jersey Death Definition Law and in the Japanese Transplantation Law. Both of these laws open up for more than one death concept within one and the same legal system. Both of them allow individuals who share not particular death criteria to apply alternative death criteria to their *own* deaths. Furthermore, both of them relate preference for a particular concept of death to religious and/or cultural beliefs. It has been said these laws signal “a new direction” as regards policies and laws in this area.⁶

This article argues for pluralism as regards death concepts, death definitions, death criteria and death tests – i.e. pluralism as regards death concepts and their implications – within certain limits. In the first part, it presents certain lines of reasoning in the debate concerning human

¹ *Uniform Determination of Death Act*. 12 Uniform Laws Annotated 320 (1990 Supp.)

² It is important to distinguish between *concepts* of death, which must involve *definitions* of death, corresponding *criteria* for death and *tests* for death. However, when I discuss death concepts, death definitions, death criteria and tests for death, I will allow myself to refer to this as “death concepts and their implications.”

³ Truog, R.D. 1998. Is It Time to Abandon Brain Death? In Caplan, A.L and Coelho, D. H, eds. *The Ethics of Organ Transplantation*. New York: Prometheus Books.

⁴ Shewmon, A. The brain and somatic integration: Insights into the standard rationale for equating ‘brain death’ with death. *Journal of Medicine and Philosophy* 2001; 26: 457-478; Kerridge, I.H; Saul, P.P; Lowe, M; McPhee, J and D. Williams. Death, dying and donation: organ transplantation and the diagnosis of death. *Journal of Medical Ethics* 2002; 28: 89-94.

⁵ See for example the Swedish Committee on Defining Death. 1984. *The Concept of Death*. Stockholm: Swedish Ministry of Health and Social Affairs; President’s Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioural Research. 1981. *Defining Death: medical, legal and ethical issues in the definition of death*. Washington, DC: U.S. Government Printing Office and Goldbeck-Wood, S. Germany Passes New Transplant Law. *British Medical Journal* 1997; 315: 7.

⁶ Olick, R.S. Brain death, religious freedom, and public policy: New Jersey’s Landmark Legislative Initiative. *Kennedy Institute of Ethics Journal* 1991; 1: 285.

death. It also presents the New Jersey Death Definition Law and the Japanese Transplantation Law. This is done in order to explore reasons why legal pluralism as regards death concepts and their implications is positive and why it is also problematic. In the second part, the article argues for death concept, death definition, death criteria and death test pluralism within certain limits. While such pluralism has been argued for before,⁷ this article uses John Rawls' understandings of comprehensive doctrines, reasonable pluralism and overlapping consensus as starting-points in the elaboration of an argument for pluralism as regards concept of death and their implications.⁸ It will be argued that a legal pluralism in areas of disputed metaphysical questions should be allowed, as long as the disputed metaphysical questions concern the individual and the resulting policy or law or acts based on the policy/law do not harm the lives of other individuals to an "intolerable" extent.⁹ In the third part, the article discusses some difficulties that will follow from this pluralism.

II. THE DEBATE: DEATH CONCEPTS AND THEIR IMPLICATIONS

In the Western history, death has been assumed to occur at the moment of irreversible cessation of respiration and circulation.¹⁰ This is the heart-lung death criterion, consonant with the heart-lung definition of death as the "permanent cessation of the flow of vital bodily fluids."¹¹ However, by the 1950s new medical technology made it possible for machines to regulate a patient's heartbeat and breathing, even though the patient had irreversibly lost the capacity to spontaneous breathing. It was then argued that when the functions of the whole brain had been irreversibly lost, the patient was dead – and should be declared dead – even if medical technology could maintain heart-beat and breathing. The first steps towards a general acceptance of the

⁷ Veatch, R.M. The Death of the Whole-Brain Death: The Plague of the Disaggregators, Somaticists and Mentalists. *Journal of Medicine and Philosophy* 2005; 30: 353-378 and Veatch, R.M. 1999. The Conscious Clause: How much individual choice in defining death can our society tolerate? In S.J. Younger, R.M. Arnold, R. Shapiro, eds. *The Definition of Death. Contemporary Controversies*. Baltimore and London: The John Hopkins University Press.

⁸ Rawls, J. 1993. *Political Liberalism*. New York: Columbia University Press; Rawls, J. 1999a. *The Law of People*. Cambridge and London: Harvard University Press. Other philosophical approaches to pluralism are certainly also worth exploring, but I will allow myself to focus on the Rawlsian one.

⁹ Veatch 1999 (*op.cit.* note 7).

¹⁰ This is the secular version of the traditional understanding of death in the West. In the religious (i.e. Christian) version, death is thought to occur when the soul is separated from the body. Of course, this phenomenon cannot be empirically observed but it was, historically, assumed to take place at the moment of irreversible cessation of breathing and/or irreversible cessation of cardiac activity. Compare the Jewish tradition, discussed in foot-note 28.

¹¹ Halevy, A. and Brody, B. Brain Death: Reconciling Definitions, Criteria, and Tests. *Annals of Internal Medicine* 1993; 119: 519-523.

whole-brain death concept were taken by the Harvard Medical School Committee when they developed a set of neurological criteria for determining death.¹²

The concept of whole-brain death is often defined as the irreversible cessation of “the integrated functioning of the organism as a whole”¹³ and the corresponding criterion for death is “the irreversible cessation of all functions of the brain, including the brain stem.”¹⁴ When the concept and its implications were introduced, it was argued that it was primarily the brain that was “responsible for the functioning of the organism as a whole.”¹⁵ When the whole brain was destroyed, the organism had “ceased functioning.” This, it was claimed, proved the biological accuracy of the concept and its implications.

The definition of the concept whole-brain death and the corresponding criterion and tests have, however, been criticised for being theoretically incoherent and internally inconsistent. In order to understand the death debate, it is important to distinguish between concepts of death that should involve definitions of death, operational criteria for death (that make it possible to determine when the definition has been fulfilled) and tests for death (that make it possible to evaluate whether the criteria have been satisfied).¹⁶ Specific criteria for death must correspond to a given definition.¹⁷ The problem in discussions of brain-death, some have stated, is that not all those patients who satisfy the criteria also satisfy the definition. Nor is it the case that all those patients who fulfil the necessary tests also fulfil the criteria.¹⁸ As one example, it has been shown that about 20% of those patients who fulfil the tests for the whole-brain death still demonstrate cerebral electrical activity on electroencephalograms, i.e. they do not fulfil the standard criterion

¹² Ad Hoc Committee of the Harvard Medical School to examine the definition of death. A definition of irreversible coma. *JAMA* 1968; 205: 337-340.

¹³ Halevy and Brody 1993 (*op.cit.* note 11). There are also slightly different formulations, such as death being “the permanent cessation of functioning of the organism as a whole.” Bernat, J., Culver, C., and Gert, B. On the Definition and Criterion of Death. *Annals of Internal Medicine* 1981; 94: 389-394. For discussions of these whole-brain death definitions, see Bartlett and Younger 1988 (*op.cit.* note 14).

¹⁴ *Uniform Determination of Death Act* (*op.cit.* note 2).

¹⁵ J.L. Bernat. The definition, criterion, and statute of death. *Seminars in Neurology* 1984; 4: 45-51.

¹⁶ Truog 1998 (*op. cit.* note 3), 25.

¹⁷ This may sound straight-forward, but it should be noted that the same physiological indicators are sometimes used as criterion and sometimes as parts of definitions. As an example, the ability to experience consciousness can be seen as a marker indicating that someone is alive *or* as the essence of life. M.S. Pernick. 1999. Brain Death in a Cultural Context. In S.J. Younger, R.M. Arnold, R. Shapiro, eds. *The Definition of Death. Contemporary Controversies*. Baltimore and London: The John Hopkins University Press. It should also be noted that in the early discussion of the concept of whole-brain death, whole-brain death criteria were more discussed than were whole-brain death definitions. For a discussion of some such definitions, see Bartlett, E.T and Younger S.J. 1988. Human Death and Destruction of NeoCortex. In R.M Zaner, Ed. *Death: Beyond Whole-Brain Criteria*. Dordrecht: Kluwer Academic Publishers.

¹⁸ Truog 1998 (*op. cit.* note 3), 25.

for the whole-brain death.¹⁹ Furthermore, it has been argued, the concept and its implications are circular. On the one hand, critics claim, the tests necessary for the diagnosis of brain death require that the patient is not hypothermic, i.e. has a lowered body temperature. A hypothermic patient cannot be diagnosed as brain-dead. On the other hand, the same critics state, the absence of hypothermia is evidence of brain function.²⁰

The whole-brain death criterion has also been criticised as being biologically implausible. When the criterion was introduced, it was based on the assumption that death of the brain stem implied the (more or less) imminent death of the whole organism. This is no longer the case, since advanced technology can replace brain stem function and since bodies belonging to brain-dead patients can be kept alive for long periods of time. Furthermore, in the early discussions of brain-death it was assumed that the brain stem was the supreme regulator of the body; this is no longer – critics state – assumed to be the case. Regulation of immunity, haematopoiesis and glucose metabolism, as three examples, take place independent of the brain stem.²¹ For these reasons, it has been said, the whole-brain death criterion is problematic.²²

The controversies as regards the concept of whole-brain death and its implications have led some to argue for a return to the heart-lung death concept. Some others have argued for a higher-brain death concept and the higher-brain death has been defined as the irreversible loss of the human being's consciousness. The core of the matter is the irreversible loss of the patient's conscious life, her/his capacity for remembering, judging, reasoning, and acting.²³ The concept of higher-brain death has also been criticized by those who consider it to be counter-intuitive. It has been criticized for equating death with the irreversible loss of certain mental functions, which

¹⁹ Grigg, M.M; Kelly, M.A; Celesia, G.G. et al. Electroencephalographic activity after brain death. *Archives of Neurology* 1987; 44: 948-954; Halevy and Brody 1993 (*op.cit.* note 11) and Halevy, A. Beyond brain death? *Journal of Medicine and Philosophy* 2001; 26: 493-501.

²⁰ Truog 1998 (*op. cit.* note 3), 26.

²¹ Kerridge et al 2002 (*op. cit.* note 4).

²² It has also been argued that if one equates death with the irreversible loss of the "somatic integrative unity of the organism as a whole," one cannot equate death of the human person with death of the same human being's whole brain since many somatic integrative functions are not brain-mediated. Shewmon 2001 (*op. cit.* note 4). See also Veatch, R.M. 2005 (*op. cit.* note 7). For further discussion of the whole-brain definition, see *Journal of Medicine and Philosophy* 2001; 26: no 5 and *Journal of Medical Ethics* 1991; 17: no 2. However, a distinction can also be made between death defined as the irreversible cessation of all functions of the entire brain, including the brain stem and death defined as the irreversible cessation of all functions of the entire brain, not-including the brain stem.

²³ Younger, S.J. and Arnold, R.M. Philosophical debates about the definition of death: Who cares? *Journal of Medicine and Philosophy* 2001; 26: 527-537. For a discussion of the higher-brain death criteria and the view that death takes place when the integration of bodily and (higher) mental functions are irreversibly lost, see Veatch, R.M. Brain death and slippery slopes. *Journal of Clinical Ethics* 1992; 3: 181-187.

would mean – if strictly applied to patients in persistent vegetative states – that these would in fact be dead, as would anencephalic neonatal children.²⁴

There is also another kind of arguments in the death concept, death definition, death criteria and death test discussion: religious and/or cultural arguments. Such arguments have been put forward by orthodox Jews, certain Buddhists as well as some groups of Native Americans, and by Malay people on the island of Langkawi – as some examples. This kind of arguments will soon be further explored. While it could be claimed that this kind of arguments should be understood as private (as opposed to public, if religion is understood as a private matter) and of little or no relevance to policy- or law-making, it have been considered as important in the discussion that forewent the New Jersey Death Definition Law and the Japanese Transplantation Law. The New Jersey Death Definition Law state “religious beliefs” as a reason why individuals should be allowed to choose between being declared dead upon the basis of heart-lung death criteria and whole-brain death criteria.²⁵ Religious and/or cultural understandings of death also play a role in the Japanese Transplantation Law.²⁶ These two laws are particularly interesting in order to explore reasons why legal pluralism as regards death concepts and their implications is positive and why it is also problematic. Therefore, they will be presented in some length.

Two Examples: The New Jersey Law and the Japanese Law

When the New Jersey state adopted its death declaration law, it was acknowledged that certain religious groups would not endorse the whole-brain death concept, the whole-brain death definition or the corresponding criteria and tests for death. Orthodox Jews was one such group, who argued against the concept of whole-brain brain death, based on a certain understanding of Genesis 7:22. This text describes the story of Noah, his family and the animals that were with them in the Arch when the floodwaters destroyed “every living thing” in the region: “everything on dry land in whose nostrils was the breath of life died.”²⁷ This has been interpreted as an argument for the heart-lung death concept, the heart-lung death definition and the heart-lung

²⁴ Shewmon 2001 (*op. cit.* note 4). Here, it should be noted that some proponents for higher-death definition(s) claim that the irreversible loss of certain mental functions is a necessary but not sufficient criterion for death. See for example Veatch 2005 (*op. cit.* note 7).

²⁵ New Jersey Statutes. Annotated. *Declaration of Death*. 26:6A-5. St Louis, Mo: West Publishing; 1991:232-235.

²⁶ *Zoki no Ishoku nikansuru Horitsu* [The Law concerning Organ Transplantation], July 16th, 1997, Law no. 104 of 1997.

²⁷ Genesis 7:22. *Bible. New Revised Standard Version*. 1989. For an overview of Jewish Death Definition discussion, see Rosner, F. 1999. The Definition of Death in Jewish Law. In S.J. Younger, R.M. Arnold, R. Shapiro, eds. *The Definition of Death. Contemporary Controversies*. Baltimore and London: The John Hopkins University Press. See also Bleich, JD. 1999. *Time of death in Jewish law*. New York: Z Berman.

death criteria and tests.²⁸ As long as one can breathe, as long as the body is warm, and as long as the heart is beating, one is alive.

Should this religious reason for not accepting the whole-brain death concept, the definition or the corresponding criteria and tests be acknowledged as legally acceptable? Should people who for example rejected the whole-brain death criteria still be declared dead in accordance with them, or should they be legally allowed to be treated in accordance with their dissenting view?

The New Jersey state chose the latter approach. The New Jersey Death Declaration Law has an exemption clause that states that people who reject the whole-brain death neurological criteria on religious grounds will not be declared dead on the basis of these criteria. This is an “opt-out” approach, according to which individuals who share not these criteria for a particular kind of reasons – i.e. religious reasons – should not be declared dead on the basis of criteria that they do not approve. It is explicitly stated that the

death of an individual shall not be declared upon the basis of neurological criteria [...] when the licensed physician authorized to declare death, has reason to believe, on the basis of information in the individual’s available medical records, or information provided by a member of the individual’s family or any other person knowledgeable about the individual’s personal religious beliefs that such a declaration would violate the personal religious beliefs of the individual. In this case, death shall be declared, and the time of death fixed, solely upon the basis of cardio-respiratory criteria.²⁹

Consider also the example of the Japanese Transplantation Law. The Japanese discussion of brain death started in 1968, when a heart from a brain dead patient was transplanted. The physician in charge of the transplantation was accused of illegal human experimentation. Criticisms were directed at the whole-brain death concept and its implications. Seventeen years later, the Japanese

²⁸ The traditional view of Judaism is that death occurs upon the separation of the soul from the body. The question *when* this takes place is debated. The Babylonian Talmud (tractate Yoma) states that in order to determine whether someone is dead one should examine the person’s respiration (“his nose”). The Babylonian Talmud also adds that examination of cardiac activity may be necessary (“some say: Up to his heart.”) (See F. Rosner. 1999 *op.cit.* note 27, 210-221). In modern time, some rabbis accept the whole-brain death definition and the whole-brain death criterion, whereas others hold that death occurs when there is an irreversible cessation of respiration (i.e. a heart-lung death criterion). Still others argue that in Medieval Jewish thought, cessation of respiration was only thought to be indicative of prior cessation of cardiac activity. Indeed, respiration without cardiac activity was thought to be impossible. In line with this reasoning, both the irreversible cessation of cardiac activity and respiration are necessary criteria for death. Rabbis who have this view do not accept the whole-brain death definition or the whole-brain death criterion. See J.D. Bleich. Establishing criteria for death. *Contemporary Halakhic Problems*. New York: Ktav & Yeshiva University Press, 1977: 372-393; F. Rosner and MD Tendler. Definition of death in Judaism. *J Halacha Contemp Soc* 1989; 17: 14-31.

²⁹ New Jersey Statutes 1991 (*op. cit.* note 25), 26:6A-4.

committee on brain death and transplantation made a distinction between “medical criteria for brain death” and “the concept of human death.” The latter issue, it was stated, should be decided on the basis of a consensus among the Japanese citizens.³⁰ In the debate that followed, three major arguments were put forward. It was argued that it would be difficult for people to accept brain death since the whole-brain dead person’s body would still be warm – i.e. a psychological argument.³¹ It was also argued that the tests for determining whether the brain death criteria were satisfied would not test the cessation of the function of all brain cells, only the observable functions of the brain – i.e. an argument against the internal consistency of the criteria and the tests.³² Furthermore, it was argued that the Japanese understanding of body and soul is different from the one in the West. In the West, the soul is thought to exist primarily in relation to the mind, whereas the Japanese understanding of the soul implies that the soul is dispersed throughout the body.³³ In line with this reasoning, it was argued that the essence of human beings lies not only in one’s rationality and self-consciousness, but also in one’s body.³⁴ This may have made the focus on the brain stem and functions of the brain less relevant in the Japanese context.³⁵

The final report by the Japanese committee was published in 1992. It stated the majority view according to which brain death implied human death. It also contained the opinion, by the minority in the committee, that brain death should not be considered as human death. The resulting Japanese Transplantation Law, enacted in 1997, opens up for two alternative death concepts. The law gives the patient the opportunity to choose to be declared dead either on the basis of the heart-lung death criteria or on the basis of the whole-brain death criteria. It allows organ donation under certain restricted circumstances from bodies declared dead in accordance with criteria for whole-brain death or heart-lung death. If nothing is known about the patient’s understanding of death, the patient should be declared dead on the basis of the heart-lung death

³⁰ Morioka, M. Reconsidering Brain Death: A Lesson from Japan’s Fifteen Years of Experience. *Hastings Center Report* 2001; 31: 44.

³¹ Nakajima, M. *Invisible Death (Mienai Shi)*. Bungei Shunju, 1985, cited in Morioka (*op. cit.* note 30).

³² Tachibana, T. *Brain death (Noshi)*. Chuo Koron Sha, 1986, cited in Morioka (*op. cit.* note 30).

³³ Bagheri, A. Organ Transplantation Laws in Asian Countries: A Comparative Study. *Transplantation Proceedings* 2005; 37: 4161.

³⁴ Ohnuki-Tierney, E. Brain Death and Organ Donation. Cultural Bases of Medical Technology. *Current Anthropology* 1994; 35: 233-254. Lock, M. 2002. *Twice Dead. Organ Transplants and the Reinvention of Death*. Berkeley: University of California Press, 141.

³⁵ It has also been said that the death definition debate has been largely influenced by certain Confucian-derived beliefs, such as respect for and belief in the ancestors. An anthropological study among Japanese relatives of victims of the Japan Air Lines crash in 1985 showed that relatives agreed that it was important that a corpse should be complete, and be brought home, so that the spirit will not suffer. Namihira quoted in Lock, M. 1999. The Problem of Brain Death. Japanese Disputes about Bodies and Modernity. In S.J. Younger, R.M. Arnold, R. Shapiro, eds. *The Definition of Death. Contemporary Controversies*. Baltimore and London: The John Hopkins University Press

criteria. In this sense, Japanese transplantation law takes the heart-lung death criteria as the default criteria.³⁶

II. WHY PLURALISM? WHICH KIND OF PLURALISM?

Are these laws defensible? What kind of philosophical defence could be given, in order to argue for this kind of legal pluralism? The following line of reasoning could be a starting-point for such a defence: There are obvious difficulties in determining exactly when a human person dies. Whereas medicine can tell when certain biological functions are irreversibly lost, and whereas death is a biological phenomenon, it is not a biological, medical question when a human person is dead. Here, an important distinction is the one between questions such as “which are the necessary criteria for making sure that all the functions of the whole brain or the higher brain functions has been irreversible lost?” and questions such as “when is person P dead?” “should a brain-dead individual be treated as a dead person?”³⁷ or “what are the conditions for our ceasing to exist?”³⁸ Some have suggested that the latter questions can be reduced to a set of moral questions as regards when it is acceptable to terminate life supportive medical technology or when it is acceptable to bury someone’s body. However, and as shown by Jeff McMahan, it is not a moral question whether a particular person who was alive yesterday is also alive today.³⁹ Certain moral questions may be *evoked* depending on the situation in which someone dies, but this implies not that the question when a particular person has ceased to exist is moral. Instead, and in this I concur with McMahan, the question of when a certain person is dead is a metaphysical question, and a philosophical and/or religious question.

Consider the following examples. Some will claim that the human person dies when soul and body are separated, when there is a total loss of the somatic integrated unity of bodily functions.⁴⁰ Others, such as the Malay people on the island of Langkawi, for whom blood has a central place in ideas about life as well as death, will claim that for humans death occurs when all the blood leaves the body.⁴¹ Still others may hold the view that a person’s “punctual” death is

³⁶ *Zoki no Isboku nikansuru Horitsu* 1997 (*op. cit.* note 26); Morioko 2001 (*op. cit.* note 30); Baghieri 2005 (*op. cit.* note 33). See also Lock, M. Deadly Disputes; Hybrid Selves and the calculation of Death in Japan and North America. *Osiris* 1998; 13: 410-429. However, if organ donation should be allowed to take place, the donor must have expressed which death concept and criteria she or he wanted to be used, the wish to donate organs must have been written beforehand, and the family must agree both on the death concept and organ donation

³⁷ Veatch (*op. cit.* note 7), 140.

³⁸ McMahan, J. 1998. Brain death, cortical death persistent vegetative state. In Kuhse, H and Singer, P, eds. *A Companion to Bioethics*. Oxford: Blackwell Publishing, 255.

³⁹ McMahan 1998 (*op. cit.* note 38).

⁴⁰ John Paul II. 2000. *Address to the XVIII International Congress of the Transplantation Society*, Aug 29, 2000. It should be noted that one can accept changed criteria for death without altering one’s comprehensive doctrine.

⁴¹ Carsten, J. 2004. *After Kinship*. Cambridge: Cambridge University Press, 129.

qualified by the relatives' sense of "that person's continuity in the body of another."⁴² This is also the logic behind the view that organ donation can be seen as a way to live on "through another person."⁴³ These are not examples to frown upon, claiming that some people may have these views simply because they do not know better. Those who have these views, or other views, may have an inaccurate understanding of death, but the important point which these examples highlights, is that *we need to address metaphysical issues concerning the nature of reality and the self in order to analyse the issue of death adequately.*⁴⁴

Metaphysics and Comprehensive Doctrines

Metaphysical issues as regards the nature or reality, the self and death may be labelled background beliefs, parts of what Rawls has called "comprehensive doctrines" or what others have labelled "deep values."⁴⁵ Independent of how we label them, these issues do matter to the kind of understanding of death that we consider plausible. These metaphysical issues are important to analyse not only in order to understand arguments for or against a certain understanding of death in the cultures of some orthodox Jews, some Buddhists, Japanese groups or the Malay people on the island of Langkawi. They are also important to examine in order to understand other arguments, possibly more common in the West, for or against different concepts of death.

It should be noted that my aim here is not to argue for or against a particular death concept, a particular death definition or particular death criteria and tests. My aim is to make plausible that the question "when is a human person dead" is a partly metaphysical question and a philosophical and/or religious question. My aim is also to make plausible that metaphysical views matters for which understanding of deaths that we consider convincing.⁴⁶ *If* the exact time of the death of the human person is a metaphysical, philosophical and/or religious question, diversion as regards views on the issue should not be a surprise. Furthermore, I claim, if this is

⁴² Carsten 2004 (*op. cit.* note 41), 102.

⁴³ Crowley-Matoka, M and Lock, M. Organ transplantation in a globalised world. *Mortality* 2006; 11: 173.

⁴⁴ See also Khushf, G. Owning up to our Agendas: On the Role and Limits of Science in Debates about Embryos and Brain Death. *Journal of Law, Medicine and Ethics* 2006; 58-75.

⁴⁵ Rawls 1993 (*op. cit.* note 8); Veatch, R. Abandoning Informed Consent. *Hastings Center Report* 1995; 25: 5-12.

⁴⁶ Consider one example. Assume, as suggested by Georg Khushf, that I consider that the "the subjectively perceived unity of experience has no status beyond the experience itself, and [that] when the biographical continuity integral to perceived self-unity is lost, then nothing of the person remains" (Khushf, G. *op. cit.* note 44, 60). This is a philosophical stand-point, not a medical one. Certainly, I may combine this understanding of the self with different understandings of death, but it will suit some understandings of death better than others. This particular understanding can effectively underpin the view that the death of the human person, "occurs at a certain stage of brain disintegration, when neuronal traces of experience can no longer be united with the self-resonant dynamic associated with the 'I'" (Khushf, G. *op. cit.* note 44, 61). Then, some version of brain-death becomes plausible – more so than the traditional heart-lung death definition.

the case, a certain kind of pluralism as regards death concepts and their implications is not only unsurprising but something that modern democratic pluralistic societies need to accept.

The philosophical basis for the kind pluralism I have in mind takes John Rawls' *A Theory of Justice* and *the Law of Peoples* as its starting-points.⁴⁷ I consider Rawls' theory an appropriate mechanism through which to explore the issue of death concept, death definition, death criterion and death test pluralism, since it does not first look to the actual comprehensive doctrines and "then draw up a political conception that strikes some kind of balance between them"⁴⁸ (a route that may end up not respecting any comprehensive doctrine) but, instead, acknowledges and accepts the differences between comprehensive doctrines and provides a strategy for citizens to live together *with* a reasonable pluralism of such doctrines.

What pluralism?

Rawls states that a pluralism of "incompatible yet reasonable comprehensive doctrines" should be expected within modern societies.⁴⁹ A comprehensive doctrine is a doctrine which includes conceptions of what is of value in human life or of ideals of personal virtues, such as Christianity, Buddhism or different forms of Kantianism or Utilitarianism or some kind of philosophical naturalism. It may be religious as well as secular. Arguably, comprehensive doctrines also include conceptions of when human, personal life begins and when the human person dies.

As citizens of a modern democracy, Rawls explains, we should not expect any comprehensive doctrines to be affirmed by all or even nearly all citizens. Indeed, the consequence of the reasonable pluralism of irreconcilable comprehensive doctrines is that we never can reach a non-oppressive agreement about comprehensive philosophical, moral or religious principles. This being the case, we need to find strategies to live with a reasonable pluralism of such doctrines. In particular, we need to find strategies to handle this pluralism when citizens discuss political questions in the public political forum – in courts, in governmental discourses and in the "discourse of candidates for public office."⁵⁰

In the face of deep disagreement, we need first to examine whether it is necessary to have a uniform policy or law on the particular issue. According to Rawls, the state should try, as far as possible, "to avoid disputed philosophical, as well as disputed moral and religious, questions."⁵¹ This examination of whether a uniform law or policy is necessary should be based on what Rawls labels public reason, i.e. reason based not on the comprehensive doctrines, and the aim of the examination is to reach an overlapping consensus as regards whether a policy or law is necessary or not. If the particular issue under discussion is considered to be an issue where a uniform law or policy is needed, arguments for and against the particular issue discussed need to be brought

⁴⁷ Rawls 1993 and 1999a (*op. cit.* note 8).

⁴⁸ John Rawls. The Priority of Right and Ideas of the Good. *Philosophy and Public Affairs* 1988; 17: 275-276.

⁴⁹ Rawls 1999a (*op. cit.* note 7), 131.

⁵⁰ Rawls 1999a (*op. cit.* note 7), 133-134.

⁵¹ Rawls, J. 1999b. Justice as Fairness: Political Not Metaphysical. In S. Feeman (ed.) *Collected Papers*. Harvard: Harvard University Press, 394.

forward. Again, the arguments should have the form of public reasons. Finally, in discussions of disputed questions where public policy and laws are considered necessary, and where public reason fails to arrive at any decision, citizens must vote on the question according to their “complete ordering of political values.”⁵² The outcome of the vote is to be seen as “legitimate provided all government officials, supported by other reasonable citizens, of reasonably just constitutional regime sincerely vote in accordance with the idea of public reason.”⁵³ Rawls concludes that this means not that the outcome is true, but that it is “reasonable and legitimate law, binding on citizens by the majority principle.”⁵⁴

Each of these steps will now be discussed in relation to the death concept debate. I take it to be evident that a deep disagreement exists on this issue. There are different understandings of what the death of the human person means when it takes place. Furthermore, I will allow myself to assume that the questions of what death of the human person means and when death takes place are philosophical, religious and partly metaphysical questions.

In a first step, if we follow Rawls, we need to determine whether a uniform law or regulative policy is necessary. A pragmatic reason can be given for the need of a law or policy, at all. If medical professionals have no law or policy to rely on, patients may be declared dead on different grounds, and according to different views on death. This could result in an unfortunate arbitrariness, which would probably be experienced as frustrating for the professionals, the relatives and the patients. How will I, as a relative, know that the particular physician in charge does not declare my loved one dead in accordance with her personal death concept, death definition and the corresponding criteria and tests (that I may consider unreasonable)? This reason why a policy or a law is needed is not based on comprehensive doctrines. It qualifies as a public reason.⁵⁵

How uniform need the law or policy be? I will certainly not argue for the desirability of separate laws for different communities within one and the same country. Difficulties with such approaches have been highlighted elsewhere.⁵⁶ However, a uniform law, i.e. a law that applies to

⁵² Rawls 1999a (*op. cit.* note 7), 169.

⁵³ Rawls 1999a (*op. cit.* note 8), 169.

⁵⁴ Rawls 1999a (*op. cit.* note 8), 171.

⁵⁵ A public reason why we need a uniform death definition law is, apart from the possible use and misuse of life-saving support (in order to know what qualifies as misuse we need a death definition law), the need to know when it is legitimate to perform organ transplant, if the donor so wanted when alive.

⁵⁶ For example, it needs to be asked who defines the distinct communities, how dynamic they are and, in mixed marriages, should different laws apply to the different individuals if they belong to different communities, and if two individuals belonging to different communities with contradictory laws are in conflict on a matter regulated differently in these two laws, how should this conflict be solved? For a discussion of different kinds of legal pluralism, see for example Arnaud, A-J. From Limited Realism to Plural Law. Normative Approach versus Cultural Perspective. *Ratio Juris*, 1998; 11: 246-258 and Chiba, M. Other Phases of Legal Pluralism in the Contemporary World. *Ratio Juris* 1998; 11: 228-245.

all citizens of a particular country, can still be a law that accepts three different kinds of death concepts as legal. As long as all citizens are bound by this law, it qualifies as uniform. In the next step, we need to ask what uniform law or policy is needed, and what characterise a desirable procedure for arriving at this law or policy.

The role of metaphysics

In the public political forum as well as in policy- and law-making, Rawls says, public reasons should be brought forward. Reasons based solely on comprehensive doctrines are inappropriate as political conceptions. It should be said from the start that this implies not that Rawls holds that proponents of comprehensive doctrines such as religions or philosophical perspectives should be prevented from influencing public policy and law-making. Rawls makes explicit that it means “only” that proposals from these proponents must not be in conflict with the political conception of justice – and that the proponents need provide publicly accessible reasons for their positions in due time.⁵⁷

This is also the reason why Rawls on the one hand can say that public arguments should i) appeal to “ascertainable evidence and facts open to public view, in order to reach conclusions about what we think are the most reasonable political institutions and policies”⁵⁸ and ii) that public reason is exercised when we deliberate within a framework that we regard as the most reasonable political conception of justice, which we also can expect other free and equal citizens reasonably to endorse.⁵⁹ On the other hand, he also says that

reasonable comprehensive doctrines, religious or nonreligious, may be introduced in public political discussions at any time, provided that in due course proper political reasons – and not reasons given solely by comprehensive doctrines – are presented that are sufficient to support whatever the comprehensive doctrines introduced are said to support.⁶⁰

Metaphysical issues, based on particular comprehensive doctrines, are allowed to be brought forward and proponents for a particular view on a metaphysical issue are allowed to try to influence public reasoning and policy-making within certain limits. However, Rawls claims, the resulting policy should not *solely* be based on reasons from within particular comprehensive doctrine and the reasoning on which it is based should not be *contradictory* to the political conception of justice.

This may seem to be a promising route in order to enable respect for fellow citizens in pluralistic societies. However, for reasons that will soon be explored, it is also a problematic route. In fact, there is a public reason to allow metaphysical issues to influence policy and law

⁵⁷ Rawls 1993 (*op. cit.* note 8), 175, 195-211.

⁵⁸ Rawls 1999a (*op. cit.* note 8), 155.

⁵⁹ Rawls 1999a (*op. cit.* note 8), 140.

⁶⁰ Rawls 1999a (*op. cit.* note 8), 152.

also when reasons are solely based on comprehensive doctrines: this could enable respect for fellow citizens in pluralistic societies to a larger extent than if this is not the case.

Rawls approach has its advantages. Nevertheless, I suggest a departure from Rawls' line of thinking. In order to respect individuals in pluralistic societies but without jeopardizing the possibility of a law or policy, two major modifications are called for. First, metaphysical issues need to be discussed in the public political forum also if reasons brought forward are only based on comprehensive doctrines. Second, instead of voting when consensus is not possible, a reasonable legally regulated pluralism is needed. However, this pluralism must also have clear limits.

A modified version

Why is it important that metaphysical issues are discussed in the public political forum also if reasons brought forward are only based on comprehensive doctrines? Metaphysical issues are, typically, issues where citizens hold different beliefs. Though arguments for a particular metaphysical view can and should be brought forward, we know not (yet) which view is the accurate one. We may argue that some views are less rational than others, that some views are based on inaccurate or bad metaphysics, and/or that some arguments just don't lead to the assumed conclusion. Still, there is uncertainty as regards which metaphysically based understanding of death is the accurate one, and this uncertainty calls for humbleness.

Consider also, as an example, the Japanese citizen who claims that the soul is dispersed through-out the body and that essence of the human being lies not only in one's rationality and self-consciousness, but also in one's body. He may be asked to give reasons for these views, as may all of us. He may answer that this builds on a certain holistic understanding of what it means to be a human being; he may cite religious texts for holding this view. Of course, someone may tell him that he needs to find public reasons to back up his religious views, in due time, but could it really be argued that that this is a good way or, possibly, even one among the best ways to respect his views? I think this is, at least, unclear.⁶¹ I suggest that not only respect, but also understanding, can be better enabled if metaphysical issues and reasons based only on comprehensive doctrines are welcomed, discussed and (to a certain extent, to be clarified below) allowed to influence policy- and lawmaking. This can be a way to enhance the understanding and critical examination of different views that exist side by side in the pluralistic society.

Consider also the issue of voting. Voting on metaphysical issues would result in the majority's view becoming the legal one. Again, I will suggest another route, in order better to

⁶¹ R. Bellamy's criticism of Rawls' views is noteworthy. Bellamy claims that at the heart of Rawls' theory lies a certain conception of citizenship that mainly those already devoted to this political liberalism may endorse: a conception of citizens as individuals who do not consider certain religious or philosophical convictions as crucial to their way of living, or even to their identity, and who therefore may find it comparably easy not to bring in comprehensive doctrines in public political debates. See Bellamy, R. 1999. *Liberalism and Pluralism. Towards a politics of compromise*. London and New York: Routledge.

respect citizens' different beliefs – but without jeopardizing the possibility of a law or policy. What is needed, I shall suggest, is a reasonable legal pluralism as regards death concepts and their implications.

Reasonable pluralism as regards death concepts and their implications

A certain kind of reasonable legal pluralism in areas of disputed metaphysical, philosophical and/or religious questions should be allowed. This view needs also to be qualified: pluralism in areas of disputed metaphysical, philosophical and/or religious questions should prevail as long as the disputed questions concern the individual and the resulting policy or law or acts based on the policy/law do not harm the lives of other individuals to an intolerable extent. As noted by Robert M. Veatch, this is also the view that has been taken in discussions of religious dissent.⁶² This pluralism as regards death concepts and their implications allows individuals who do not share a particular concept of death to apply an alternative death concept to their own deaths. A reasonable legal pluralism allows people to have different views on metaphysical questions. Still, there are limits to this pluralism. I claim not that *any* view of death should be legally acceptable.

III. SOLVES SOME, EVOKES OTHER PROBLEMS

Allowance of pluralism as regards concepts of death, death definitions, corresponding criteria and tests solves the problem with different persons having different conceptions of death. The benefit of this expanded version of Rawls' political liberalism is that it tries to respect citizens' different metaphysical, religious or philosophical beliefs. This is important in modern, pluralistic societies. The New Jersey law and the Japanese Law should not be looked upon as odd examples, but as positive ways forward. Pluralism is acknowledged as regards the question of what death means and when someone is dead – within certain limits. However, two terms need to be discussed: “reasonable” pluralism as regards death concepts and their implications and the “intolerably” harmful consequences to the lives of others.

First, what qualifies as reasonable death concept, death definition and death criterion and death test pluralism? Why are some death concepts, death definitions and death criteria acceptable and not others? According to Rawls, reasonableness means to be “ready to propose principles and standards as fair terms of cooperation and to abide by them willingly, given the assurance that others will likewise do so.”⁶³ At stake here is reciprocity towards other citizens. This needs not imply that everyone shares a particular view; neither does it imply that only one concept of death is legal. Fair terms of cooperation may well take place if it is argued that those who share not the heart-lung death criterion need not be declared dead in accordance with it. However, I suggest that reasonable concepts of death, definitions of death, criteria and tests for death should also be internally coherent and/or logically consistent given the particular world view that it may be based on. Furthermore, reasonable concepts of death and their implications

⁶² Veatch 1999 (*op cit.* note 6).

⁶³ Rawls 1993 (*op. cit.* note 7), 49.

should not contradict accepted contemporary medical knowledge. I suggest that either the heart-lung death concept, or the whole-brain, or the higher-brain death concepts are acceptable.

Second, what does “intolerably” harmful consequences mean? I suggest that the feeling of discomfort that some may have at the thought of death concept, death definition, death criterion and death test pluralism does not qualify as intolerable. Though this pluralism evokes practical problems, these practical problems cannot be seen as intolerably harmful. Still, such practical problems need to be addressed. The pluralism as regards death concepts and their implications implies that potential donors/relatives of the donors should discuss not only whether donation should take place, but also which concept of death the potential donor prefers. This would, in some cases, render the situation more complex. Many people prefer neither to talk nor to think about death, which is problematic for those relatives that will face the question of which concept of death their father/mother/spouse/child etc. had. This may not only be psychologically problematic, but also ethically questionable. On the one hand, it needs to be asked if it is ethically acceptable that these complex issues should be directed at the relatives, at a time when their worlds may just have been torn upside down. On the other hand, not giving the relatives the opportunity to explain and discuss what death concept, death definition and death criteria should be used could be seen as an undesirably paternalistic.

If some people prefer not to contemplate alternative concepts of death, definitions of death and criteria and tests for death should their interest override the interest of those persons who want not to be declared dead on the basis of a concept they reject? For the sake of respecting reasonable pluralism in modern societies, an opt-out scheme could be used. Those who have not contemplated alternative concepts of death and their implications when alive, for different reasons, will be declared dead in accordance with the default version. The default version should be the concept that most persons in the particular country share. This is a sociological reason for a particular death concept and its implications: the default version should be the one that most people can be assumed to have preferred, provided that it meets the previous criteria for reasonableness. This sociological reason says nothing about whether the default version is the most accurate one.

Some may also consider the lack of global consensus as a major difficulty. Consider, therefore, also a second, a bit far-fetched scenario. Someone is declared dead in accordance with the definition of the higher-brain death concept and the corresponding criteria, in a particular country that allows no pluralism as regards death concepts and their implications and in which the higher-brain death concept is the accepted version. Imagine also that, for some reason, this person is driven in ambulance to a near by hospital in another country; this country allows death concept, death definition, death criterion and death test pluralism. Since it is known that the person hold a heart-lung death concept, he is now not dead. Is that not too problematic? This is certainly not an easy situation. The fact that countries already differ as regards death concepts, death definitions, death criteria and death tests does not make it easier. Still, it could be argued that this scenario is an argument for harmonising policies and laws – globally – but it is *not* an argument against the death concept, death definition, death criterion and death test pluralism as such.

There is no culture-independent version of death, at present, that can be taken as a golden standard (which means not that there is not bad metaphysics) and there are variations in views not only between but also within societies. For this reason, the New Jersey Law and the Japanese Law are, as regards the allowance of pluralism in modern states, ways forward.