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Position on the Criteria of Brain Death in the Documents of the Roman Catholic and Evangelical Churches in Germany

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Abstract

Organ transplantation is one of the most successful forms of medicine of the 20th century and can save and prolong many lives. Due to the fact that there are not enough organs for transplantation, the question of the criteria by which the organs are allocated was raised. In Germany, since 1970, rules have been developed regarding the reallocation of organs. Both the Roman-Catholic Church and the Evangelical ones accompanied this process of formulating these rules through studies and debates. The current study tries to present the main texts of these two great confessions in Germany, which present the position of each Church regarding organ transplantation, as well as a more delicate issue of brain death. The position of each Church is also formed by confronting medical studies regarding this problem. One of the most important texts, based on which the Churches have formulated their position regarding brain death, is the study of the German Council of Ethics from 2015, a study that is based on a study “The White Paper” of the Presidents Council of Bioethics from the USA from 2008. Analysis of this study and the texts of the two Churches will reveal to us how they relate to the criterion of brain death proposed by medical science in this two studies.

Keywords:

bioethics, organ transplantation, brain death, Roman-Catholic Church, Evangelical Churches, German Council of Ethics

I. Introduction

Organ transplantation is one of the most successful forms of medicine of the 20th century and can save and prolong many lives. Because a healthy organ is not available for every patient, problems arise again and again with organ procurement criteria and with the distribution of organs to those who need them. In order to reach a decision in such serious cases, a working group of the Scientific Advisory Board of the German Medical Association developed rules for organ allocation as early as the 1970s¹.

Subsequent considerations and developments led to the introduction of a Codex by the working group founded in 1984 of transplant centres in Germany. This Codex has long been in use in the FRG, and the transplant rules that were tried and tested in it served as the basis for discussions for the Transplantation Act² (TPG) adopted by the German parliament in 1997.

The development of important regulations and the legal framework for organ transplantation was accompanied by both churches (Evangelical and Roman Catholic), as Bishop Wolfgang Huber, president of the Evangelical Churches of Germany (EKD) at the time, said in his lecture on organ transplantation³.

EKD has spoken about organ transplants several times and on different occasions. The most important texts on the subject are the joint statements of the EKD and the German Roman Catholic Bishops' Conference (DBK): "God is the friend of life" (1989)⁴ and "Organ transplants" (1990)⁵, the

¹ Bundesärztekammer 2007: Richtlinien zur Organtransplantation, 9. https://www.bundesaerztekammer.de/fileadmin/user_upload/_old-files/downloads/pdf-Ordner/RL/RiliOrgaWlOvLeberTx20190924.pdf (accessed 30.10.2021)

² Bundesministeriums der Justiz 1997. <https://www.gesetze-im-internet.de/tpg/TPG.pdf> (accessed 30.10.2021)

³ Wolfgang HUBER, *Was ist vertretbar? Ethische Probleme der Organtransplantation*, Berlin, 2001. http://www.ekd.de/vortraege/vortraege_huber_010911.html (accessed 29.10.2021).

⁴ EKD/DBK, "Gott ist ein Freund des Lebens: Kirchenamt der Evangelischen Kirche in Deutschland", Sekretariat der Deutschen Bischofskonferenz (Hg.), *Gott ist ein Freund des Lebens. Herausforderungen und Aufgaben beim Schutz des Lebens*, gemeinsame Erklärung des Rates der EKD und der DBK, (1989) Sonderausgabe, Paulinus-Druckerei GmbH, Trier, 2000.

⁵ EKD/DBK, "Organtransplantationen: Kirchenamt der Evangelischen Kirche in

statement of the then EKD Vice President Dr. Barth on the Transplant Law adopted by the German parliament (25 June 1997)⁶ and Bishop Wolfgang Huber's sermon "What is justifiable? Ethical issues of organ transplantation" (11 September 2001)⁷.

Other, more recent, texts on this bioethics topic from EKD are: Evangelisch-lutherische Kirche in Bayern (2014): "Leben und Sterben im Herrn. Handreichung zur Organspende und Organtransplantation der Evangelisch-lutherischen Kirche in Bayern. München"⁸; Evangelische Frauen in Deutschland (Hg.): "Organtransplantation" Positionspapier 2013⁹; Evangelische Kirche im Rheinland (Hg.) (2013): "Transplantation: Kontrolle und Ordnung müssen verlässlich sein"¹⁰; Evangelische Landeskirche in Baden (Hg.) (2014): "Organtransplantation. Fragen und Impulse für eine persönliche Entscheidung" Karlsruhe¹¹ as well as the joint text of the two major Christian denominations in Germany: "Sterbebegleitung statt aktiver Sterbehilfe", second extended edition, May 2011¹², edition containing no less than 27 position papers over time, both

Deutschland", Sekretariat der Deutschen Bischofskonferenz (Hg.), *Organtransplantationen, Erklärung der Deutschen Bischofskonferenz und des Rates der EKD*, (Gemeinsame Texte 1) 1990.

⁶ Hermann BARTH, *Wie können wir auf die Herausforderung des niederländischen Sterbehilfegesetzes antworten - Ein Beitrag aus kirchlicher Sicht*, Hannover, 2001; in: Ispas RUJA, *Die kirchliche Reaktion auf bioethische Probleme in der Bundesrepublik Deutschland und in Rumänien. Ein Vergleich*, EB Verlag, Berlin, 2015, p. 160.

⁷ Wolfgang HUBER, *Was ist vertretbar?...*

⁸ Evangelisch-lutherische Kirche in Bayern, *Leben und Sterben im Herrn. Handreichung zur Organspende und Organtransplantation der Evangelisch-lutherischen Kirche in Bayern*, München, 2014.

⁹ Evangelische Frauen in Deutschland (Hg.), *Organtransplantation. Positionspapier 2013*. http://www.evangelischefrauen-deutschland.de/images/stories/efid/Positionspapiere/organtransplantation_positionspapier%202013.pdf [27.01.2015].

¹⁰ Evangelische Kirche im Rheinland (Hg.), *Transplantation: Kontrolle und Ordnung müssen verlässlich sein*, 2013, <http://www.ekir.de/www/service/organspende-16323.php> [27.01.2015].

¹¹ Evangelische Landeskirche in Baden (Hg.), *Organtransplantation. Fragen und Impulse für eine persönliche Entscheidung*, Karlsruhe, 2014, p. 215

¹² *Sterbebegleitung statt aktiver Sterbehilfe*, 2., erweiterte Auflage Mai 2011, Herausgegeben vom Kirchenamt der Evangelischen Kirche in Deutschland, Herrenhäuser Straße 12, 30419 Hannover, und vom Sekretariat der Deutschen Bischofskonferenz, Kaiserstraße 161, 53113 Bonn <http://www.dbk->

from the EKD, or from the DBK as well as the joint texts composed by the two Churches. Also a joint text of the two Churches is the “Christliche Patientenvorsorge”¹³.

On behalf of the Roman Catholic Church, the most extensive text on organ transplantation, which we will refer to in this presentation, is “Hirntod und Organspende” from 2015¹⁴.

Last but not least, the text produced by the German Orthodox Bishops’ Conference entitled “Organ donation and transplantation”¹⁵ expresses the Orthodox position on this issue.

In 2015 a study by the German National Ethics Council is published: “Brain death and the decision to donate organs”¹⁶.

This text is important and will be analysed in this talk for several reasons: firstly because it provides a broad analysis of the phenomenon of brain death and its link with organ harvesting, secondly because this document has influenced the bioethical debate within the two major churches in Germany.

This text is also important because leading theologians and bioethicists from the two churches participated in its preparation, two of whom I would like to single out, namely the late Professor of Catholic Moral Theology Eberhard Schockenhoff from Freiburg and Professor of Systematic Theology and Ethics Peter Dabrock from the University of Erlangen¹⁷.

[shop.de/media/files_public/40b0d4f1072edf88f14d94e1afa5c156/DBK_6202_Patientenvorsorge.pdf](https://www.dbk-shop.de/media/files_public/40b0d4f1072edf88f14d94e1afa5c156/DBK_6202_Patientenvorsorge.pdf) (accessed 30.10.2021).

¹³ DBK und EKD, *Christliche Patientenfürsorge*, https://www.dbk-shop.de/media/files_public/40b0d4f1072edf88f14d94e1afa5c156/DBK_6202_Patientenvorsorge.pdf (30.10.2021).

¹⁴ *Hirntod und Organspende*/hrsg. vom Sekretariat der Deutschen Bischofskonferenz - Bonn 2015 - 29 S. - (Die deutschen Bischöfe - Glaubenskommission; 41)

¹⁵ <http://www.obkd.de/Texte/OrganspendeundTransplantation-ro.pdf>

¹⁶ Deutscher Ethikrat, “Hirntod und Entscheidung zur Organspende. Stellungnahme” (24. Februar 2015, Berlin), <https://www.ethikrat.org/fileadmin/Publikationen/Stellungnahmen/deutsch/stellungnahme-hirntod-und-entscheidung-zur-organspende.pdf> (accessed 30.10.2021).

¹⁷ Deutscher Ethikrat, “Hirntod...”, p. 172.

II. EKD position on brain death and organ transplantation

EKD has a positive attitude towards organ transplantation and sees it as a sign of love for others. This perspective must also be maintained in relation to the risks and legal and ethical issues that transplantation entails. In the case of a living donor, this raises few objections, as the donor can give his or her own consent. In the case of a dying or brain-dead donor, the complexity of the factors contributing to an ethical decision increases and can facilitate a transplant without social or economic pressure.

Organ donation “can be an act of charity beyond death”¹⁸ which is why the Evangelical Church encourages transplantation and, at the same time, pays attention to the protection of the human life of all involved: donors, recipients as well as their relatives and doctors.

Organ donation is first regulated in view of the living donor. It involves high risks for the donor and is only possible if two pairs of organs are involved. Organ donation must always be voluntary. No material or emotional pressure can be exerted. An interesting aspect is the link that is created between the recipient and the donor through psychological dependence: “To receive an organ is to owe the donor survival; a rejection reaction can be interpreted as a sign of ingratitude”¹⁹.

Following the regulation of organ donation in the case of a living person, the EKD is examining in its documents the issue of organ removal from the deceased. A first issue is the safe determination of death. To avoid misunderstandings, a distinction is made between heart death and brain death. With heart death, circulation stops and there is the impression of a single event.

Brain death means “complete and permanent loss of all brain activity under intensive care conditions, including artificial ventilation”²⁰.

In brain death, medicine assumes that the essential vital functions of my brain are irreversibly lost: conscious experience, the breathing reflex and reaction to some stimuli, for example the swallowing reflex. But brain

¹⁸ EKD/DBK, *Gott ist ein Freund des Lebens*, p. 103.

¹⁹ EKD/DBK, *Gott ist ein Freund des Lebens*, p. 103.

²⁰ EKD, *Organtransplantationen...*, 14.

death is not the natural boundary between life and death, only a specific medical notion that is required for organ harvesting.²¹

This term brain death has caused much debate over the years and there are now medical criteria for its determination. The onset of brain death can be detected using medical devices. Its determination, in the case of organ removal, must be made independently by two doctors who have no connection with the transplant. "Proof of brain death is evidence of an already existing fact, not an assessment of the future course of the disease, not a mere legal declaration of death"²².

EKD leaves it to medicine to determine the death of a human being, and in the matter of brain death, it sees the death of the whole brain as the beginning of human death²³. This position is also reflected in Bishop Wolfgang Huber's statement on the Organ Transplantation Act (OTG), adopted in 1997. First of all, it is noted in this statement that the adoption of the law increases the approval of organ donation because many ambiguities and questions are now legally regulated and misunderstandings and fears are avoided in this way. The second point concerns brain death. The law avoids the tendency to equate brain death with human death²⁴ and leaves open a definition of death. This creates space for new medical knowledge to be acquired over time. Approval of organ harvesting in accordance with the presumed will of a deceased person's relatives can easily be given with the help of this law.

The position of the Evangelical Churches emphasises the voluntary nature of organ donation and the aim to provide and encourage a rational and fair distribution of organs. The EKD texts on organ transplantation have spoken of the spirit-brain connection, thereby linking spiritual life exclusively to the functions of the brain²⁵. By using the notion of spirit, the document enters the realm of Christian anthropology.

²¹ Evangelische Landeskirche in Baden, *Entscheidungshilfe zur Organytransplantation*, 2014, Abschnitt 5. https://www.ekiba.de/texte-impulse/texte/detail/nachricht-seite/id/4468-/?cataktuell=&default=true&stichwort_aktuell= (accessed on 29.10.2021)

²² Evangelische Landeskirche in Baden, *Entscheidungshilfe zur Organytransplantation*, 2014, Abschnitt 5.

²³ EKD/DBK, *Gott ist ein Freund des Lebens*, p. 104.

²⁴ H. BARTH, *Wie können...*

²⁵ EKD, *Organtransplantationen...*, 15.

The meaning of life, more precisely in this case, the meaning of life prolonged by transplantation, is interpreted from a Christian perspective through biblical arguments and, at the same time, described in relation to respect for the body of the deceased, which is the temple of God.

These views do not stand in the way of a transplant when it is carried out within a medical, legal and ethical framework, but on the contrary, this medical procedure is seen by EKD as a sign of love for the person in need. Another commonality between the two Churches can be seen in the effort to encourage their own members to become organ donors.

Love provides the basis for any organ donation and it must bring both actors, donor and recipient, into a loving communion, following the model of the Church.

Professor of Moral Theology and Bioethics Sebastian Moldovan points out a small detail in the BOR's position on transplantation, which goes further than the EKD texts, namely that not only the commitment of the donor is a sign of love, but also the gratitude of the recipient represents the sharing of the same love²⁶.

Death has many meanings for Christians, it has many facets and it can be seen from the analysis of the texts that the EKD has in mind the spiritual aspect of death, when reflecting on the meaning of the therapeutic possibilities of medicine through organ transplantation, that it remains in the light of preserving man's communion with God, in the light of man's salvation.

III. German Ethics Council: Brain death decision to donate organs (Hirntod und Entscheidung zur Organspende) (2015)

Since all the texts of the Evangelical and Roman Catholic Churches take this study as a point of reference in dealing with the criterion of brain death for organ removal, we think it appropriate to present briefly and especially

²⁶ The Romanian Orthodox Church's document on transplantation also adds that organ transplantation must be "fulfilled in the love of the recipient"; see Sebastian MOLDOVAN, "Organ Transplantation and the Christian-Orthodox Argument of Love", in: *Romanian Journal of Bioethics*, 7 (2009), no. 4, p. 89.

with reference to this aspect the document drawn up by the German Ethics Council (CGE). It is an extensive document, comprising 189 pages, which attempts to clarify the problems that have arisen in connection with the definition and criteria of brain death in the case of postmortem organ donors. The origin of this extensive study is the “White Paper” published at the end of 2008 by the US President’s Council on Bioethics entitled “Controversies in Determining Death”²⁷. The National Conference of Commissioners on Uniform State Law proposed in 1981 a legal definition of death that, in addition to “classic” cardiovascular death, expressly included whole brain death as human death. However, the dispute over this equating of brain death with human death has not ceased, but has been continually fueled by new medical, philosophical, and bioethical research.

The CGE study, which deals exclusively with post-mortem organ donation, focuses on two central issues.

First, the basis of post-mortem organ donation, the concept of brain death, is subject to detailed analysis. The German Ethics Council wants to develop the discussion on several levels and present the different perspectives and arguments in a transparent way. It mainly concerns the Dead-Donor-Rule, i.e. the rule applied in German law that the donor must be dead when the organ is removed²⁸.

Secondly, the concept of brain death is also a communicative challenge, i.e. on the one hand, the general public must be informed about post-mortem organ donation and, on the other hand, there must be information and concrete discussions with those around a brain-dead person²⁹.

After a short introduction to the history of transplantation³⁰, the following is a presentation of how transplantation is carried out in Germany. According to the Transplantation Act, the removal of organs from postmortem donors is only permitted if the death of the donor has been determined in accordance with the state of the art in medical science. Removal is also inadmissible according to § 3 paragraph 2 no. 2, unless

²⁷ Deutscher Ethikrat, “Hirntod...”, p. 10. See also President’s Council on Bioethics, *Controversies in the determination of death*, Washington DC, December 2008.

²⁸ Deutscher Ethikrat, “Hirntod...”, p. 12.

²⁹ Deutscher Ethikrat, “Hirntod...”, p. 13.

³⁰ Deutscher Ethikrat, “Hirntod...”, pp. 14-17.

it is established that the organ donor's brain, cerebellum and brainstem have definitively, irreversibly failed in general function according to the procedural rules. This state of final failure of the functions of all parts of the brain (even if the heart is supported in its circulatory function) is known briefly as "brain death"³¹.

According to the rules of the College of Physicians as well as in clinical practice, brain death is also defined from the perspective of the Transplantation Act defined as human death³². This means that the legal regime for the treatment of the organ donor also changes at the time when brain death is determined. The rights of the patient are no longer relevant; custody of the deceased applies to relatives.

This equivalence has given rise in Bioethics to two contradictory positions on brain death as a criterion for a person's death. The two views are also reflected in this study, which attempts to analyse them thoroughly and find common ground between them in order to facilitate organ procurement for postmortem donors.

IV. Position of the supporters of the brain death criterion in the German Ethics Council

The German Ethics Council mirrors the controversy that also exists in modern society about the criterion of brain death as the appropriate criterion for determining the death of a person. Thus, there is a position³³ (the majority position) within the GEC that brain death is a sure sign of death, but also a position against it.

According to the concept of brain death, which is supported by most ESC members, by the Organ Transplantation Act (OTA) and by the

³¹ Deutscher Ethikrat, "Hirntod...", p. 18.

³² Wissenschaftlicher Beirat der Bundesärztekammer, "Richtlinien zur Feststellung des Hirntodes", in: *Deutsches Ärzteblatt* 95, Heft 30, 24 Juli 1998, A-1861. <https://www.nieren-transplantation.com/fileadmin/uro-welten/ak-nierentransplantation/pdf/gesetzgebung/hirntodpdf.pdf> (accessed on 29.10.2021)

³³ Among the members of the German Ethics Council who adopt this view is the Roman Catholic Professor of Moral Theology Eberhard Schockenhoff. Deutscher Ethikrat, p. 72 and p. 172.

guidelines of the Chamber of Physicians, understood as the irreversible cessation of the general functioning of the encephalon, cerebellum and brainstem, it is the sure sign of death. When the brain functions are extinguished forever and when they can be diagnosed on the basis of brain death criteria, then according to this Conception we are entitled to accept that the person is dead³⁴.

This does not mean that the death of this organ is the death of man, but only that this fact indicates it. In other words, there is no relationship of identity between a man's life and the functional "vitality"³⁵ of his organism. From the cessation of the brain's functions it can be concluded that the person in question is dead.

This is procedurally identical to the case where the cardiovascular system is irreversibly damaged, the criterion preferred by critics of the brain death criterion.

Irreversible failure of all brain functions is regarded as a sure sign of death and is thus indicated and appropriate as a criterion of death³⁶.

One of the main arguments is the view that the brain provides the necessary integrative function of the whole body, without which it could not exist as a whole body and soul. This integrative service encompasses both mental and organic aspects because, the document states, mental processes are inconceivable without an organic basis.

The death of a person, according to this view, implies the irreversible extinction of this integrative capacity of the brain, a condition which is sufficiently fulfilled by brain death. The fact, cited by critics of the concept of brain death in this context, that other organs also contribute to the maintenance of the whole organism does not contradict this. The brain is the central organ of integration, regulation and coordination.

The internal processes of the living organism are essentially made up of its constant confrontation with its environment³⁷. These interactions

³⁴ Deutscher Ethikrat, "Hirntod...", p. 72.

³⁵ See Anderheiden M. (2012): Hirntoddebatte und Recht. In: Anderheiden, M.; Eckart, W. u. (Hg.): Handbuch Sterben und menschenwürde. Band 1. Berlin/Boston, 175-198. In Deutscher Ethikrat, "Hirntod...", p. 72.

³⁶ Deutscher Ethikrat, "Hirntod...", p. 72.

³⁷ This statement is accepted by representatives of both positions. Deutscher Ethikrat, "Hirntod...", p. 73.

with the environment are largely based on sensory perceptions that are processed and represented in the brain, which in turn contribute to changing brain functions and structures and lead to a specific reaction or behaviour. Any kind of specific behaviour, understood as an expression of interaction with the environment, is controlled by the central nervous system and is thus dominated by the brain. This self-initiated, self-directed, active and reactive physiological behaviour is precisely the central category that defines life:

“While the specific functions of other organs can technically be maintained or replaced temporarily and sometimes over long periods of time, the functions of the brain cannot be replaced; rather, only partial elements can be maintained at a rudimentary level by external substitution”³⁸.

Brain functions are understood as a prerequisite for the living human being to adapt and react to changing functional requirements and can be seen at all levels of the organism. To explain this complex control mechanism, a systems biology approach is used, which uses the term organism for a complex system organised on several levels (molecules, cells, tissues, organs, body, etc.), its components functionally integrated with each other³⁹.

After the final cessation of brain activity, there is no longer any question of self-controlled integration of (all!) individual organs into the body. If artificial respiration and artificial maintenance of blood circulation and other functions cease to exist, cardiac arrest occurs and the process of decomposition begins. It is true that after the occurrence of brain death through artificial maintenance of respiration and other functions of the body, not all partial functions in the body have been extinguished, but nevertheless the unity of the body as a living whole is irrevocably broken, say the proponents of this view.

As presented above, the criterion of brain death does not define death as an anthropological phenomenon, but designates a scientifically proven

³⁸ Deutscher Ethikrat, “Hirntod...”, p. 74.

³⁹ Deutscher Ethikrat, “Hirntod...”, p. 74.

criterion for when the end of human life as a vital whole has been reached. Being alive can only be attributed to an organism that can produce and guarantee the central integration of all body functions into an organic unity⁴⁰.

The paper also supports this position with an American text, namely the 2008 US President's Council Opinion, which confirms the concept of brain death, especially in view of the empirical information gathered by Shewmon⁴¹ on the partial integration achievements that occur in the brain dead body with artificial maintenance of ventilation and further maintenance of the body. Body functions can therefore run on. The "White Paper", as this paper is called, focuses on the specific activity of the living human organism in relation to the environment. According to the paper, three features are specific to the vital activities of a living organism, which it performs in interaction with its environment and which can only be performed by the brain. These three are as follows:

- "1. Openness to the world, i.e. the body's receptiveness to stimuli and signals from the environment;
2. the ability of the organism to act on the environment to satisfy basic vital needs, and
3. a fundamental, felt need of the body, which allows it to maintain its unity and wholeness"⁴².

⁴⁰ It is therefore misleading, even at the medico-biological level of description, to ignore the failure of the body's ability to integrate and to describe a brain-dead person as 97% alive, where only the brain functions have failed. See, for example, Linus S. GEISLER, *Die lebenden und die toten*. http://www.linus-geisler.de/art2010/201001universitas_tote-spender-regel.html [accessed 29.10.2021]. : "Brain dead are people with 97 percent of their bodies alive, only three percent - their brain - is dead".

⁴¹ A. D. SHEWMON, "The Brain and Somatic Integration: Insights into the Standard Biological Rationale for Equating «Brain Death» with Death", in: "Journal of Medicine and Philosophy", 26 (5), 2001, pp. 457-478.

⁴² 1. Openness to the world, that is, receptivity to stimuli and signals from the surrounding environment. 2. the ability to act upon the world to selectively obtain what it needs. 3. the basic felt need that drives the organism to act as it must, to obtain what it needs and what its openness reveals to be available (President's Council on Bioethics 2008, p. 61).

By its third feature, this document thus draws attention to the decisive anthropological difference between the body of a living person and the artificially ventilated body of a brain-dead person⁴³, the members of the German National Ethics Council note.

To summarise the position of those who support the criterion of brain death, it can be noted that the anthropological justification for this follows from the fact that the individual organs of the human body come together only through the activity of the brain as the central coordinating point for the integrated unity and wholeness of an organism. Human death occurs when the integrative principle, which guarantees the unity of the organism, can no longer perform its functions for the organism and its parts begin to break down.

V. Position of those who disagree with the brain death criterion

As stated at the beginning of the discussion on brain death, there is some dissent in the German Ethics Council due to the fact that some of its members argue that this is not a sufficient condition for human death⁴⁴. Representatives of this position consider the above argument to be insufficient.⁴⁵ It is true that there is agreement that “mental death” is a necessary condition for human death. However, there are fundamental differences of assessment on the question of whether a person with irreversible brain failure can already be described as organically dead⁴⁶.

Representatives of this position consider the irreversible and complete cessation of all brain functions in view of intensive medical treatment that makes possible complex biological functions not so significant that the

⁴³ Deutscher Ethikrat, “Hirntod...”, p. 80.

⁴⁴ Among the members of the CGE who support this position is the evangelical bioethics professor Peter Dabrock, one of the strongest voices in the German bioethics landscape. Deutscher Ethikrat, “Hirntod...”, p. 172.

⁴⁵ See the position of Petre Dabrock, professor of evangelical bioethics in: “Organspende - ja oder nein? Theologe Peter Dabrock gibt Empfehlung”, *Sonntagsblatt*, 4 June 2021, <https://www.sonntagsblatt.de/artikel/psychologie-ratgeber/organspende-ja-oder-nein-peter-dabrock-vom-ethikrat-antwortet> (accessed 31.10.2021)

⁴⁶ Deutscher Ethikrat, “Hirntod...”, p. 84.

threshold is exceeded, beyond which the body is considered as disintegrated and thus regarded as dead.

Biologically speaking, the brain is not an irreplaceable centre of integration and coordination of the body, argue the proponents of this position.

Likewise, the fact that the body's unity is sustained only by using intensive care measures, such as artificial respiration, is not seen as a critical, decisive moment for determine whether a body is considered biologically dead or alive. Of course, without medical support it would undoubtedly be dead, but it still isn't, because it is kept alive with machines and medication.

Life can be understood as a kind of systemic community, as the result of interaction between different and specific components on different functional levels, with the whole organism being involved at the top level. There is also an interaction between these levels and the environment. Thomas Fuchs talks about horizontal and vertical circular causality⁴⁷ or in other words the heart supports itself by supporting the functioning of the other organs: the liver, lungs and kidneys and each other. The concept of the body as a system is therefore essentially based on the idea of feedback and interaction, not on the principle of central control, as postulated by those who support the concept of brain death.

Even after brain death, the body, provided it undergoes intensive medical measures, can still have a variety of functions that have not only a 'partial' but an integrative effect on the body as a whole.

Shewmon lists these integrative functions in a 2001 article in the *Journal of Medicine and Philosophy*, functions that can be found in at least some people diagnosed with brain death⁴⁸.

⁴⁷ Deutscher Ethikrat, "Hirntod...", p. 85.

⁴⁸ *These functions are: 1. Maintaining the balance of a diverse physiological inter-parameter acting through the function of the liver and kidneys, cardiovascular and hormonal system, and other organs and tissues; 2. Elimination, detoxification and cellular recycling of wastes throughout the body; 3. Energy balance, which includes an interaction between the liver; hormonal system, muscle and fat; 4. Body temperature control, albeit at a lower level than usual; 5. Wound healing, whereby the ability to do so is distributed throughout the body and, at the body level, interactions between blood cells, capillary endothelium, soft tissues, bone marrow, vascular*

In order for all these functions to manifest themselves, it is necessary, in the case of brain death, that the respiratory function, so important, is supported by medical equipment. On the other hand, the basic functioning of the integrative cellular processes of the organs is a prerequisite for the effectiveness of intensive medical measures. Specifically, the apparatus that supports respiration pumps the necessary oxygen into the lungs, but this would be ineffective if the oxygen were not transported by blood cells throughout the body (so-called cellular respiration)⁴⁹.

The significance of what Shewmons wrote and discovered, as well as attempts to disprove it, resulted in the US Presidential Bioethics Council dedicating an entire document to it in 2008. This Bioethics Council, which favoured the concept of brain death, brought things to a common denominator: these mechanisms

“motivate the maintenance of the health of vital organs in the bodies of patients diagnosed with complete brain failure and go a long way towards explaining the long survival of such patients in rare cases. In these cases there is a coordinated activity of different systems, all geared towards the functioning of the body as a whole. If to be alive as a biological organism implies, to be a whole, which is more than the sum of its parts, then it can hardly be denied that the bodies of some patients with complete brain failure can still be alive, at least in some cases”⁵⁰.

modifying peptides, coagulation and anticoagulant factors included (supported by liver, vascular endothelium and circulating leukocytes brought together in a single dynamic balance of synthesis and degradation); 6. Fight infection and foreign bodies through interactions between the immune system, lymphatic system, bone marrow and microvessels; 7. Development of a febrile response to infection; 8. Stress reactions in the cardiovascular system and hormones in surgery for organ removal without anesthesia; 9. sexual maturation of a child; 10. child rearing; See, A. D. SHEWMON, “The Brain and Somatic Integration...”, p. 467 f.

⁴⁹ Deutscher Ethikrat, “Hirntod...”, p. 88.

⁵⁰ “These mechanisms account for the continued health of vital organs in the bodies of patients diagnosed with total brain failure and go a long way toward explaining the lengthy survival of such patients in rare cases. In such cases, globally coordinated work continues to be performed by multiple systems, all directed toward the sustained functioning of the body as a whole. If being alive as a biological organism requires being a whole that is more than the mere sum of its parts then it would be difficult to deny that the body of a patient with total brain failure can still be

It thus proves that, in order to maintain the functional unity of the complex organism, no functional group or organ is indispensable, although the brain is that organ through which the personality and consciousness of an organism is expressed.

VI. Discussion on the viability of the self-monitoring criterion

In an attempt to support the **self-control criterion**, the American document names three prerequisites that must be met cumulatively in order to speak of a person's death:

1. without signs of consciousness (awareness),
2. Lack of spontaneous breathing and
3. the irreversibility of these findings⁵¹.

These criteria overlap with the diagnosis of brain death. While the condition of irreversibility is indisputable, the former can only be approved if, according to the White Paper, the concept of consciousness actually includes any form of sensory perception, thought form and decision-making abilities.

Another important thing is the second criterion above, spontaneous breathing. Spontaneous respiration is an essential function of higher animals, making metabolism and all other vital functions possible in the first place. Spontaneous respiration shows an organism's receptivity to the world and at the same time its ability to act upon it. Here, in fact, is shown the third fundamental faculty that distinguishes a living organism from a dead one, namely the internal experience of a need⁵².

White Paper distinguishes between spontaneous breathing as a natural, natural work on the one hand and artificial breathing, which no longer shows the sign of an action of the organism itself and no sign of life.

alive, at least in some cases", *Presidents's Council on Bioethics*, 2008, p. 57, <https://repository.library.georgetown.edu/bitstream/handle/10822/559343/Controversies%20in%20the%20Determination%20of%20Death%20for%20the%20Web.pdf?sequence=1&isAllowed=y>. (accessed 30.10.2021)

⁵¹ *Presidents's Council on Bioethics*, p. 64.

⁵² *Presidents's Council on Bioethics*, p. 61.

In this categorical differentiation between active personal activity and artificial maintenance of vital functions, the argument of the President's Council on Bioethics intersects with the majority view of the German Ethics Council of those who support the criterion of brain death. This position is largely based on the fact that in brain death "failed vital functions, such as breathing or blood circulation, are maintained by artificial measures and thus replaced". In this case, the integration of the human body into a functional unit is no longer an individual contribution of this organism. "Self-regulation of breathing" can no longer be achieved by the brain-dead. But being alive can only be attributed to an organism that can produce and guarantee the central integration of all bodily functions into an organismic unity "as active self-performance".

Most of the authors of the White Paper give the failure of self-controlled brain activity another important significance to their thesis. According to it the brain is that indispensable organ which is responsible for the organism's exchange with the environment⁵³.

If interaction with the environment is no longer possible independently, a fundamental function of human life is extinguished. Against this argument, it has been argued that interaction with the environment is reduced to the brain alone, whereas there are so many biological processes of response and interaction with the environment of the brain-dead organism that take place even in the absence of brain control.

The link between irreversible cessation of whole-brain function and irreversible failure of active self-regulation, particularly through the ability to breathe spontaneously, is an insufficient approach to justifying the criterion of brain death, leading a minority of the National Ethics Council to assert that the brain death connective arguments are not viable⁵⁴.

Related to this discussion on the assumption of brain death in organ donation is another important aspect to be mentioned, namely the dead-donor-rule, which is adopted in Germany by the Organ Transplantation Act of 1997.

The minority in the German Ethics Council, which rejects the concept of brain death, also doubts the strict validity of the deceased donor rule.

⁵³ *Presidents's Council on Bioethics*, p. 61.

⁵⁴ Deutscher Ethikrat, "Hirntod...", p. 95.

It believes that the removal of vital organs from people with irreversible whole-brain failure is ethically and constitutionally legitimate under certain conditions. And for proponents of this position, brain death is an important normative turning point. Once brain death has been diagnosed, the doctor's duty (and right) to take therapeutic measures no longer applies; instead, from that point on, the will of the patient concerned now becomes of decisive importance. His decision to end his life not only by stopping life-sustaining interventions but by an act of organ donation can and should be respected⁵⁵.

Critics of the concept of brain death, impute to it a change of moral status, in so far as the moment in which it is determined also describes the boundary that allows the removal of organs. The presence or irreversible insufficiency of the brain's mental functions does not justify the status of living or dead, they argue, but they are very important for justifying life-sustaining measures and thus for legitimising medical interventions. Life-prolonging measures are no longer applied to such a patient as they are to other coma patients.

With the removal of vital organs from a patient with irreversible damage to the whole brain, a high-level goal is pursued, which he himself recognises as such, because of his desire to donate organs, to save one or more lives, to which the doctor intervenes even in the last phase of death⁵⁶.

The proposal to reject the concept of brain death, but to assign it the function of an organ harvesting criterion for pragmatic reasons, i.e. the permission to remove organs such as heart, lungs or whole liver from the person who is then considered to be still alive, is in the view of most members of the German Ethics Council⁵⁷ unacceptable, both from an ethical and a legal point of view. The same applies to the view that brain death is only likely to bring about a change in the moral status of the human person insofar as the moment of diagnosis also describes the boundary that allows the removal of organs with the consent of the person concerned.

Life is morally and legally under the special protection of the prohibition of killing.

⁵⁵ Deutscher Ethikrat, "Hirntod...", p. 97.

⁵⁶ Deutscher Ethikrat, "Hirntod...", p. 99.

⁵⁷ Deutscher Ethikrat, "Hirntod...", p. 104.

A murder remains a murder even if the appearance of death has been postponed beforehand. A living person cannot be killed under any circumstances, even as a dying person, for reasons of benefit to others. This contradicts the protection of life required by the German Constitution and violates the human dignity protected by Article 1(1) of the Constitution, which is inviolable. Neither the moral reason to save the lives of others nor the consent given by the donor can change anything in this case. This is why proponents of the concept of brain death support the deceased donor rule for organ removal⁵⁸.

Transplant law is also based on the deceased donor rule. Organ donation is allowed only if death has been previously determined in accordance with the rules corresponding to the state of the art in medical science. The law leaves room for subjective ethical beliefs if the brain dead are not yet dead. One can speculate that anyone who is dead according to a generally applicable rule may also be treated as dead, even if he himself has previously assessed his current condition differently, i.e. from that of someone who is still alive. Such persons can opt for a donor certificate and thus donate their organs post-mortem if the objective criteria of the Transplantation Act are met. Last but not least, each person can, without having to justify it, exclude the possibility of being an organ donor after brain death by making a declaration during life.

The dead donor rule, as a crucial prerequisite for organ procurement, is also an essential basis of professional medical ethics⁵⁹. If this rule as a prerequisite for organ donation is not valid and those who are brain dead are considered alive, then doctors would be prevented from harvesting organs according to their professional status.

Another aspect to be carefully considered is that organ donation by a deceased donor is also allowed even if there is no declaration of consent during life, but the relatives or the person of trust designated during life by the organ donor approves it. The relatives' right to consent or refuse derives from their right to care for the deceased, which arises in the event of someone's death. In the context of caring for the dead, only consent to organ donation from a deceased child who has not yet been able to

⁵⁸ Deutscher Ethikrat, "Hirntod...", p. 106.

⁵⁹ Deutscher Ethikrat, "Hirntod...", p. 107.

submit a declaration of organ donation during life is accepted. Most organ donations so far have taken place on the basis of the consent of relatives⁶⁰. If the donor in question was not declared dead, based on the concept of brain death, then relatives and family would not be able to give their consent in the case of a living person.

The deceased donor rule thus supports the criterion of brain death as the criterion of death of the person concerned, the CEG study states. This Council finally advocates this and the concept of brain death, with all the objections, which have been raised by some of its members. If this rule were disregarded, then the medical, legal and ethical challenges and issues would be even more complicated, as shown above. That is why the Transplant Act adopted it and uses it to harvest organs from the brain dead.

VII. The position of the Roman Catholic Church in Germany

The most recent position of the Roman Catholic Church in Germany is the document “Brain death and organ donation” from 2015. We will therefore refer in particular to it and the way in which the Church argues its position.

The law governing decision-making in the Transplantation Act of 12 July 2012 has created a new situation for many German citizens regarding organ donation, as state and private health insurers are now obliged to confront all insured persons from the age of 16 about their personal attitude towards post-mortem organ donation. The context of this 1997 amendment to the law is not only the ever-increasing need for organs, but also an attempt to specifically promote the potentially latent desire among the population to donate through a direct but open request for decision-making⁶¹.

⁶⁰ Deutscher Ethikrat, “Hirntod...”, p. 109.

⁶¹ See *Gott ist ein Freund des Lebens. Herausforderungen und Aufgaben beim Schutz des Lebens*. Gemeinsame Erklärung des Rates der Evangelischen Kirche in Deutschland und der Deutschen Bischofskonferenz in Verbindung mit den übrigen Mitglieds- und Gastkirchen der Arbeitsgemeinschaft Christlicher Kirchen in der Bundesrepublik Deutschland und Berlin (Gütersloh/Trier 1989), 102-105 and *Organtransplantationen*. Erklärung der Deutschen Bischofskonferenz und des Rates der Evangelischen Kirche in Deutschland. Gemeinsame Texte Nr. 1 (Bonn/Hannover 1990) u. ö.

Although the Catholic Church has repeatedly spoken out on issues related to organ donation, it considers itself entitled to offer advice and guidance to its faithful on the various issues related to organ transplantation.

The considerations of the Roman-Catholic position are based on the hypothesis that transplant medicine is, in practice, an appropriate means, compatible with the Christian faith, to alleviate the various situations of those seriously ill patients whose quality of life and survival depends to a large extent on the preservation of a donor organ.

For a better understanding of the multi-layered debate about so-called brain death, it is useful, this paper proposes, to distinguish between three different levels of discussion, which are marked by questions about **definition**, **criterion** and **diagnostic testing** procedures for its determination.

The discussion in recent decades about an adequate understanding of death is not so much about the first level of a more comprehensive definition of death, but rather about the second level question of whether and to what extent the so-called brain death introduced in 1968 leads to it. The question arises whether this new concept is a scientifically reliable criterion for determining a person's death by replacing the old valid criterion of cardiovascular death⁶².

Occasionally the mistaken impression has been given that the introduction of the brain death criterion was a problematic attempt to redefine human death for strategic reasons. On the one hand, this misunderstanding resulted from the fact that there was insufficient distinction between the two levels of the definition of death and the criterion for determining death⁶³.

Regardless, however, it must be stressed that there is only one death, the Catholic document states, which can be determined on a criteriological basis that proves to be medically and anthropologically plausible in equal measure.

A third level of the problem concerns diagnostic procedures for determining death, the specific implementation of which is regulated in the scope of German law. This legislation is based on the relevant guidelines of the German Chamber of Physicians and which are updated at regular intervals according to the latest state of medical knowledge.

⁶² *Hirntod und Organspende*, p. 10.

⁶³ *Hirntod und Organspende*, p. 11.

The 2015 paper, takes up the reflections of the Federal Chamber of Physicians from 1993⁶⁴ and will reflect the majority position of the study to be published a few months later by the German Ethics Council on the concept of brain death⁶⁵. According to this reasoning, an organism is dead “when the individual functions of its organs and systems, as well as their interrelationships, are no longer irrevocably combined to the higher-level unity of the living being in its functional entirety and are no longer irrevocably controlled by it”⁶⁶. The point of reference for determining human life and death is therefore the human being as a whole and not any organic sub-function, with the brain as the central instance of control and integration assuming the role of a necessary premise for the vitality of the organism of the affected individual.

Although this position seems to pose no problems of acceptance, there are nevertheless some irritating phenomena which, although they indicate that a person is in the process of dying, are not yet complete and therefore cannot objectively be considered dead. These phenomena include the completion of pregnancies in brain-dead women. Some find it particularly irritating that several cases of successful pregnancies in brain-dead women have been described worldwide. However, this text notes, it must be taken into account here that the ability to maintain an existing pregnancy is by no means a performance independent of brain death alone, but rather the result of complex intensive medical interventions to stabilise certain highly unstable residual life phenomena, which as such are not located throughout the body⁶⁷.

Even if arguments can be brought against the criterion of brain death that question its validity, especially because of these irritating phenomena mentioned above, the Roman Catholic document sees in this criterion

⁶⁴ BUNDESÄRZTEKAMMER, “Der endgültige Ausfall der gesamten Hirnfunktion (“Hirntod”) als sicheres Todeszeichen. Stellungnahme des Wissenschaftlichen Beirates der Bundesärztekammer, in: *Deutsches Ärzteblatt* 90 (1993), A 2933.

⁶⁵ After the completion of this text, the extensive CEG: DEUTSCHEN ETHIKRATES study “Hirntod und Entscheidung zur Organspende. Stellungnahme” (24. Februar 2015, Berlin); *Hirntod und Organspende*, p. 28. See also *Hirntod und Organspende*, p. 17.

⁶⁶ *Hirntod und Organspende*, p. 10.

⁶⁷ *Hirntod und Organspende*, p.15.

the best and most reliable for the determination of the death of a man⁶⁸. Medicine does not currently have a better or similar criterion that is more convincing.

After these reflections on this much-discussed credo, the text under review makes some observations from its moral perspective on transplantation. Organ donation is an act that is morally possible and, because of its altruistic motivation and the great benefit expected for the organ recipient, seems particularly praiseworthy, but therefore not morally obligatory or necessary. It is a freely consented act.

In order to encourage organ donation, two essential premises must be taken into account: firstly, its strictly voluntary nature and, secondly, the obligation to provide the donor with full information⁶⁹.

The Roman Catholic Church supports the solution of close consent, because the individual determination of the donor's will, documented in writing, allows the greatest possible certainty of action for all involved (patients, doctors, relatives) and should therefore be regarded as the normality in this regard⁷⁰. In the case of children, an indirect parental decision must be made for the brain-dead child. Especially in these psychologically sensitive situations, anything that parents might later interpret as manipulation or misuse of their emotional situation should be avoided.

As a practical guideline above all, the Roman Catholic Church considers it important that relatives not only be given medical explanations about the condition of brain death, but that they be guided to accept the condition as death and be given sufficient space to say goodbye to the dead. Specifically, relatives and friends should be offered, at their request, the opportunity to say goodbye to the deceased before and after explantation⁷¹. Ritual and liturgical elements can also help to cope appropriately with the death of a loved one. In general, it is about maintaining a culture of death, despite the understandable urgency that may be required with a transplant.

⁶⁸ *Hirntod und Organspende*, p. 19.

⁶⁹ *Hirntod und Organspende*, p. 20.

⁷⁰ *Hirntod und Organspende*, p. 20.

⁷¹ *Hirntod und Organspende*, p. 26.

In these particularly psychologically sensitive circumstances, treating the body of the organ donor with respect should be a matter of course.

At the end of this paper on transplantation, some recommendations and reflections are made from the perspective of Christian faith. For believers, the issue of organ donation is placed in the context of faith in God as Creator, Redeemer and Giver of life. Christian faith consists in the grateful confession that God has given us life, but above all in the confident certainty that we humans cannot be separated from God's love by any power in the world, not even by death, which has been revealed in Jesus Christ (cf. Rom 8, 38 f.).⁷²

For Christians, organ donation is a manifestation of love for one's neighbour, which opens up opportunities for a fellow human being even in death. As an act of free love of neighbour that cannot be taken for granted, such an act cannot, however, be expected as a general duty or even forced by moral pressure.

On the other hand, however, the willingness to accept the finiteness of life can also grow out of the confidence of being held by God in all situations of life, even in death, for those waiting for an organ⁷³. The Christian message can also help those who cannot obtain a donor organ and wait in vain not to despair, but to focus their hopes on God-given eternal life.

VIII. Position of the Orthodox Churches in Germany

In addition to the positions of Germany's two major historical denominations, there is also the position of the Orthodox Churches in Germany, which through its central body, the German Orthodox Bishops' Conference, has commissioned a theological commission to draft an Orthodox position on organ transplantation in response to the 2012 amendment to the Organ Transplantation Act.

⁷² *Hirntod und Organspende*, p. 27.

⁷³ *Hirntod und Organspende*, p. 28.

The text appeared in 2014 and deals in 11 paragraphs with the issues raised by organ transplantation and the concept of brain death⁷⁴.

The Orthodox Church, like the other Churches, sees the act of organ donation as a sign of love and sacrifice for one's neighbour, of following Christ, and supports organ transplantation as a medical practice, if certain medical and legal frameworks are respected.

On the issue of brain death, the document reiterates the position of the other Orthodox Churches, including the Romanian Orthodox Church⁷⁵, which takes up the criterion of brain death as a medical criterion for establishing death:

“Acceptance of the removal and explicit determination of death are absolutely necessary conditions for the donation of organs from the deceased. Brain death is today the widely accepted medical criterion for the determination of death. It is defined as a state in which the functions of the whole brain are irreversibly extinguished. The legal determination of death is a matter for medicine and is specified, according to the current state of medical research, in the law on organ transplantation. A correct determination of death is of the utmost importance in order to avoid possible abuse or misdiagnosis”⁷⁶.

So we can see that the position of the Orthodox Churches in Germany is along the same lines as the other two historic Churches in Germany, without the latter necessarily influencing the Orthodox position.

For some Orthodox Christians, the criterion of brain death is questionable, as they see the function of the heart as well as other bodily functions - such as breathing - as an indication of the presence of the soul. The Orthodox Church believes that, despite these discussions, the above-mentioned criterion of brain death is of real help. Every person, who has

⁷⁴ <http://www.obkd.de/Texte/OrganspendeundTransplantation-ro.pdf> (accessed on 01.11.2021)

⁷⁵ <http://patriarhia.ro/transplantul-de-organe-1451.html> (accessed on 01.11.2021)

⁷⁶ <http://www.obkd.de/Texte/OrganspendeundTransplantation-ro.pdf> §9 (accessed on 01.11.2021)

doubts about this criterion, must have the freedom to decide for or against organ donation for his or her own person⁷⁷.

In conclusion we note that the three Great Christian Confessions: Orthodox, Roman Catholic and Evangelical adopt the criterion of brain death as the criterion for determining the death of a person, even though they are aware that there are certain problems with this concept. I do not see the definition of brain death as defining the death of a person, but only that brain death is an important criterion for determining the death of a person and for the removal of organs.

⁷⁷ <http://www.obkd.de/Texte/OrganspendeundTransplantation-ro.pdf> §11.