

# Human Death as a Concept of Practical Philosophy

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*Death is the end – not of any life – but at least of every human life. Most theories of death agree on this definition. Moreover, due to the fact that human beings are living things, it seems obvious that their lives and deaths must be described in terms of biological processes. But this widespread position raises serious problems in view of the determination of a comprehensive and adequate concept of human death and of the normative evaluation and judgment of how we should appropriately deal with brain-dead or human remains. In the first part of my article, I will argue that human death is not primarily an issue of biology. What characterizes a human being is that he or she is part of a specific interpersonal ‘life-form’, a ‘Lebensform’ (Plessner), which must be primarily represented by concepts of Practical Philosophy. This practical approach I will outline in the second part and show the connection of the concept of ‘life-form’ with those of a person and accordingly a personal death. In the third part I want to demonstrate how this approach might provide an adequate understanding of human death that leads to coherent solutions of current questions of ethics, such as the determination of a criterion for the explantation of organs.*

Death is the end – not of any life – but at least of every *human* life. Most theories of death agree on this definition. Moreover, due to the fact that human beings are living beings and organisms, it seems obvious that their lives and deaths must consequently be described in terms of biological and organic processes. Many theories of death as well as of Applied Ethics commonly take this for granted and state that life and death are primarily concepts of biology and, therefore, it is above all an issue of biology to formulate criteria for determining when human beings are dead.<sup>1</sup> As some theories recently argue, the phenomenon of ‘brain-dead’ people shows quite clearly that biological concepts capture the determination of death more suitable than those that define death as the end of life: Death and dying are better understood as continuously performed crossings and procedural transformations

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1 Cf. e.g. Birnbacher 2012; Stoecker 2010; Quante 2002; Lamb 1985; Olson 1997; DeGrazia 1999.

than in terms of the contradictory relationship in which life and death are placed in traditional definitions. Therefore it seems reasonable to rethink this traditional understanding and possibly abandon it or at least modify it.<sup>2</sup> This consideration has stimulated serious controversies in academic as well as in public debates.<sup>3</sup> In addition, it has raised the question whether it might be necessary – at least in some contexts – to look for a ‘third category’<sup>4</sup> of description that lies beyond life and death. This third category could be useful to grasp the very forms of transition from life to death existing for instance in the cases of brain-dead people.

However, as much as this solution might be convincing at first sight, it raises serious problems concerning:

- (1) the determination of a *comprehensive* and *adequate* understanding of *human* death that also accounts for the specific anthropological dimensions of human existence and
- (2) the *normative*, i.e. the ethical and juridical, evaluation and judgment of how we should appropriately deal with brain-dead donors of organs or human remains (such as corpses).

In the first part of my text I will outline these problems and then challenge the position that death and life are primarily biological concepts. At the end of part I will arrive at the conclusion that there is no need to establish a third category and above all that it is not possible. Instead I will argue that *human* death is *not* even primarily an issue of biology. A human being cannot be appropriately defined as “animal *plus* a certain capacity or feature (like language, thought or reflection)”<sup>5</sup> just as an animal cannot be defined as “plant *plus* e.g. the capacity of movement”.<sup>6</sup> What characterizes a human being cannot be expressed in such an ‘additive model’ of properties; human beings rather perform a specific ‘life-form’ – a ‘Lebensform’ as

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2 For instance, Birnbacher 2012, 4–5; Stoecker 2010, 46, 55; Quante 2002, 127 et seq.

3 Ibid.

4 Cf. Stoecker 2012, 9; cf. Schüle 2012.

5 Cf. Cassirer 2010 (1923).

6 See Gutmann 2008. In contrast to such an “additive” and feature-orientated classification of living beings, as it was already entertained by Aristotle and is still widely applied in the current discussion, Cassirer and Plessner develop an activity-theoretical understanding of life, which here is designated with the term “life-form”. Unlike Gutmann in his interpretation (in Gutmann 2008), I delete the originary practical character from this conception. Thus, it is not primarily the fact of “having a language” which constitutes the transformation into a specific life-form, but the specifically practical use of language, i. e. the use of language as (?) subject to moral requirements. The possibility of the practical use of language, however, from this perspective would not be added as a further feature or a further ability to the other features thus marking the specific difference of a species. It rather marks the peculiarities that can be reconstructed in order to indicate the qualitative transformation of beings that are unable to entertain any practical life-forms into ones that can engage in relationships of mutual obligation and appreciation. In contrast to the life-scientific description the activity-theoretical reformulation of the transition comprises a statement about the particular kind of speech ability as well as a determination of the way in which the indication of properties is relevant in terms of life science in the anthropological and life-world context.

Plessner formulates it: They *lead* their lives.<sup>7</sup> The respective constitutive structures of these ‘life-forms’ must be primarily represented by concepts of *Practical* Philosophy and these ‘life-forms’ are therefore basically subject to normative standards. Hence, *human* death is the end of *this* very ‘life-form’ and is first of all a *practical matter of fact*.<sup>8</sup> Because of this practical dimension the concept of human death is always to be judged as a personal death too and is to be connected with the normative concepts of a person. I will try to outline this practical approach to human life and death in the second part of my article. In the third part I will suggest that *this* approach *might* provide an adequate concept of death, leading to coherent solutions of current questions of ethics, such as the determination of a criterion for death or the explanation of organs.

In reference to the outline of my text I would like to point out that already the understanding of the general concepts produces immediate consequences for concrete social practices and is by no means merely a descriptive issue of ‘theoretical’ philosophy. Considering the current German (and in large part also international) transplantation practice, it can be observed that the so-called dead-donor rule (DDR) plays an important normative role and thus ties this practice to general convictions about death. This is because the DDR stipulates that organs may be removed only from dead people but not from people who are still living. It formulates a conviction that is contained in nearly all established legal systems, namely that the distinction between living people and dead people should entail decisive differences in practice and in the moral and legal judgment. It is true that according to this conviction, for instance the bodies or bodily remains of deceased people are *also* under certain legal protection, but to a far lesser extent than is the living human body. Depending on the outcome of the judgment for instance brain-dead people can be considered to be dying and thus living, or as dead people, or as being in an “intermediate realm”<sup>9</sup> between life and death. Accordingly a different medical and social way of dealing with the body must be considered to be legitimate or justified in each case. The German Transplant Act

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7 Cf. Plessner 2003 (1928).

8 Practical here is not meant in the sense of “pragmatic”, but in the sense of formal, moral-practical argumentation. Already the determination of what is human is not performed via the determination of properties and competences of individual specimens but by referring to the possibility of engaging in living relationships. The performances on their own are subject to moral or legal conditions (that formally restrict all further practices of acting) and constitute a “life-form”. Against this background then also the end of this life-form is to be determined in moral-practical reasoning or also the criteria for determining the end of this life-form are of a primarily moral-practical nature. These, of course, can equally determine certain physiological states or the presence or loss as criteria for the determination of the end of the human life-form. Nevertheless, the reasons here do not lie in the presence or loss of the respective ability, but in the significance that is attributed to it with regard to the human life-form.

9 Cf. Denkhaus & Dabrock 2012, 135–148, 142.

(Deutsches Transplantationsgesetz (TPG)<sup>10</sup> for instance regards it as the duty of medical science and its state of research to determine the concept of death. The concretization within the scope of the merely formal DDR necessarily remains open. To put it in more concrete terms, even though the establishing of the criteria of death as well as the determination of the conditions and methods of applying the respective criteria are based upon normative convictions about human life and human existence, these criteria are primarily justified within the scope of moral or legal-ethical argumentations.

The reference made by the German Transplant Act to the role of medicine and scientific research is substantiated by an argumentation which recently has been applied in the public and current scientific repeatedly. Frequently, in this discussion the view is taken that a distinction needs to be made between the determination of facts – i.e. a descriptive attribution of death that is exclusively based on scientific concepts – and the evaluation of what then, i.e. after and subsequent to the determination of the facts, is allowed or imperative under legal and moral, i.e. normative aspects.

The implied suggestion that the determination of death, as it is made a condition in the DDR, is a matter of science and represents a fact in public debates and also amongst those members of the public who deal with the problem of what decision to make with regard to organ donation, leads to serious confusion: At least in terms of language, but at times also conceptually, the insight that death is in every respect a normative concept is again obscured.<sup>11</sup> For this reason, major consequences evolve concerning how one deals with the question whether it might be reasonable and ethically justifiable to abandon the DDR and replace the condition of death with *other* conditions (such as non-heart-beating, anencephaly,<sup>12</sup> irreversible deficiency of only certain parts of the brain, etc.) on which the removal of organs is permitted. And it equally affects practice, in which particular way the concept of 'death' is defined and how we relate the concepts of life and death to each other.

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10 The German Transplant Act (Deutsches Transplantationsgesetz (TPG)), latest amendment by law of July 15, 2013 (Federal German Law Gazette I, p. 2423) effective from August 1st, 2013, cf. <http://www.gesetze-im-internet.de/bundesrecht/tpg/gesamt.pdf> (visited January 17, 2015): "(1) The removal of organs or tissue, unless deviating provisions are made in §4 or §4a, is only admissible if (1) the death of the organ or tissue donor is determined according to the rules corresponding to the state of knowledge in medical science..."

11 Talking of "death", as Rosenberg (1998) has already clearly demonstrated, suggests the idea of an incident which is unshakably cast in stone. Its determination is entirely independent of normative aspects. Equally problematic, not only in terms of language but also conceptually, however, are equalizations of criteria with the facts. They are meant to determine as in the formulation "Brain death is death", which is frequently put forward in discussions with respect to H. Angstwurm. With this equalization the dependency of death on criteria and the status of brain death as a criterion fades into the background. This makes it appear as if death or brain death were a fact that can be described in scientific terms and as if the criterion for determining this fact no longer had to be normatively justified, but first and foremost serves for the reliable determination of death.

12 Anencephaly refers to a deformity of the newborn that is due to a neural tube defect in the brain region; the cranium and essential parts of the brain are missing or not fully developed, cf. Pschyrembel 1994, col. 1, 66.

## Life and Death: Conceptual Status and Logical Relation

### The 'Old' and the 'New' Debate on Brain Death

Referring to differentiations made by James L. Bernat, Charles M. Culver and Bernard Gert, the Scientific Advisory Board of the German Medical Association (Bundesärztekammer) suggested and substantiated the following determination of human death in 1993: The death of a human being – just like the death of any other animate being – was defined as the end of the existence “as organism in its functional entirety”.<sup>13</sup> The decisive criterion in judging whether or not this end has occurred should be the complete and irreversible failure of the entire brain. This criterion, the so-called ‘brain death criterion’ was adequate because ‘in biological terms’ with the failure of the brain the organism lost its independent existence and activity as a functional unity.<sup>14</sup> The irreversible failure of all brain functions could be unambiguously ascertained in clinical test procedures (such as testing the brain stem reflexes, the so-called apnoea test, etc.) and therefore be regarded as “a safe sign of death”.<sup>15</sup>

This substantiation of the brain death criterion is still controversial amongst other reasons because it determines the organism as a ‘functional unity’ that has to perform an ‘integrative function’ and because it associates the brain exclusively with the control of this integrative performance. Objections against the conviction that the brain exclusively performs the integrative function of the organism were formulated as early as in the 1990s. In the United States most recently – in 2008 to be more precise – an official statement of the so-called ‘President’s Council’ was presented, in which this substantiation (the so-called ‘standard substantiation’) of the brain death criterion is challenged anew.<sup>16</sup> In the declaration of the ‘President’s Council’, arguments are formulated that are based on neurological research in particular by Alan Shewmon. Shewmon in his studies verified that integrative functions, such as the regulation of the body temperature, wound healing, immune defense, and even growth and maturation, remain unaffected even beyond the total and irreversible failure of the entire brain activity, at least in some cases of patients who are brain-dead. In some cases, a pregnancy could be continued despite the occurrence of a brain death, because modern medicine has succeeded in stabilizing brain-dead patients over an extended period of time.<sup>17</sup> Following Shewmon’s argumentation it can therefore be concluded that the integration of the organism obviously is

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13 Cf. Wissenschaftlicher Beirat der Bundesärztekammer 1993, A-1861 / B-1601 / C-1485; cf. also Bernat, Culver & Gert 1981, 389–394, 390.

14 Cf. Collectif 1968. Report of the Ad Hoc Committee of Harvard Medical School to Examine the Definition of Brain Death 1968, 85–88.

15 Ibid.

16 President’s Council on Bioethics 2008.

17 Shewmon 1998.

*not exclusively* performed by the brain. Against this background, though, not only the so-called standard substantiation of brain death starts to crumble but also the conviction that the organism upon the occurrence of brain death is dead in a *biological* sense: The organism very obviously does *not* lose its independent existence and activity as a functional unity upon failure of the brain's activity.

## **'Life' and 'Vitality' in the Biological Research Discourse**

What does it mean within the context of biological research that an organism is dead or living? To answer this question I will take a short look at the current positions in biology and show how *biological theories* determine the two concepts, life and death. I want to point out that this is an ambitious procedure. In biological research the concept of life does not refer to life as opposed to death but to *vitality* in contrast to the inanimateness of lifeless things or matters. Ernst Mayr states that biology actually tries to find out what life is – not 'in itself' – yet how life can be captured with regard to and in contrast to inanimate things.<sup>18</sup> Thus, the primary objective of any theoretical effort in biology is to mark a fundamental difference. But this difference – denoted by the concept of 'life' – is not generated by the existence of a 'substance of life' or a 'vital force' (*Lebenskraft*). The concept 'life' rather refers to specific processes that are performed by, and can be expected from living individuals.<sup>19</sup> Biological theories, on the other hand, try to define the concept of life in a criteriological way that can be explained as follows: the specific processes performed by living individuals can be empirically observed. Subsequently, scientific observations allow us to abstract specific characteristics of these processes as criteria that are considered to be typical of animate things. These criteria can be summarized in a list. Even though not all of the listed criteria differentiate between animate and inanimate beings, the sum total of the respective criteria will be presented in such laws and regularities that can only be applied to animate things. Insofar they must be judged as typical of them.<sup>20</sup> This procedure of attributing criteria allows us to single out animate beings as such. Moreover, the properties listed are complex properties like reproduction, metabolism, motion, motility and existence of a 'genotype and phenotype'.<sup>21</sup>

As a first result, we may now summarize: In the context of the biological language-game the predicate 'life' means 'vitality' and the predicate 'living' means 'animate' and both are attributed in accordance with a list of complex properties or capacities.<sup>22</sup> 'Life' therefore is a 'meta-concept' referring to the items on the

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18 Mayr 1998, 2.

19 Gutmann 2008, 74.

20 cf. Mayr 1998, 44f.

21 cf. Mayr 1998, pp. 44; Toepfer 2005, 164.

22 Mayr 1998, 47.

list and not directly to a given phenomenon. This logical status analysis of the biological meaning of the terms, moreover, shows clearly that the usage of ‘vitality’ in the biological context must invariably be related to certain integrative units in each case and that this usage by no means prefers or prioritizes certain units. The classification as ‘higher’ or ‘lower’ integrative units is merely the outcome of referring to whole entities that – governed by the purpose of the examination in each case – can be determined at will. In this way the predicate ‘living’ in accordance with the sum of the items on the list can be attributed to certain integrative units of an organism even if this is no longer possible for a ‘higher’ integrative unit of the same specimen. On the basis of this method biological research can be conducted without having to answer the question of what is the ‘essence’ of the concepts life or living first.

But what if we want to know the biological meaning of death against this background? For one thing, we must be aware of the following: the attribution of ‘not animate’ meaning ‘has died’ or ‘is dead’ in the biological language-game only makes sense in the following respect and on the following condition, namely some, all, or certain combinations of the items on the list can be assumed as fulfilled. That means, a ‘type’ that represents a certain species of animal (with its typical properties) must have already been generated, for instance: the ‘type’ oak (for the species *Quercus*). Even if this type does not show all features of the items on the list (like in the case of the type ‘oak’: mobility), the sum of the other items allows us to classify oaks in general as animate things. However, in respect of an individual ‘token’ of this type (for instance: the individual oak) it is possible that the listed ‘capacities’ can *no longer* be attributed or *just in parts, or only gradually*. Strictly speaking, the statement ‘x is dead’ in this method means: The integrative unit to which I refer with the corresponding statement in this case, does not fulfill or no longer fulfills the respective criteria for vitality. Applied to ‘brain-dead’ specimens of the species *homo sapiens* this method shows that to certain integrative units of the specimen in question in a biological sense ‘vitality’ can still be absolutely attributed, even if this is no longer possible with respect to the integrative unit of the brain.

What now becomes evident is that both the biological concept of vitality and the biological concept of death do not have the meanings we give them in our everyday communication; further, the biological meaning of these concepts is certainly not the one from which we may expect to obtain a solution in the current discussion of an adequate criterion for *human* death. In the context of the latter discussion the question is not at all at what point in time or under which conditions *all* vitality has disappeared from an organism, or under which condition certain, or actually all levels of integration are ‘dead’ in an organismic sense. Rather, what we derive from it are those conditions under which we should consider the *life of a human being* as having ended.

However, this question cannot be answered at all in reference to the list model of biological research. This is because if we apply the biological method of attributing vitality, for instance, to a ‘brain-dead’ specimen of the species *homo sapiens*, it

means that in a biological sense this individual is *not* dead. In this specimen not only lower levels of integration would definitely still have to be referred to as living. Also the entire organism itself, insofar as the integrative performance of the organism can still be maintained even without brain activity, can still be qualified as living. Viewed in this light, the medical concept of brain death cannot be specified in more detail and precision by applying the biological understanding of the concepts of 'living' and 'dead'. This is because, used in the context of biological meaning, it merely indicates that a certain part but not 'the' integrative unit of a certain organism has died.

Therefore, it is important to notice that in the case of the concepts of life and death we have to undertake a conceptual *mediation* between the biological language-game and other forms like the language-game of our everyday life and our discourse as well as in the actual debate about the criteria of death. In the biological language-game one has to abstract from the very *procedural character* of 'life'. For an individual animal or animate thing which is part of our 'lived' experience, of our so-called 'life-world' or 'Lebenswelt', has to be described in the biological language-game as a *structured organic unity*.<sup>23</sup> This means that if a certain individual as a 'token' falls under the 'type' of a species, then this token is exactly the structured organic unity (and nothing more) as determined by the biological classification. But within the biological language-game the concepts 'animate' or 'vital' can be attributed to the whole organism *as well as* to smallest unities like the individual cell in exactly the way characterized above. And this implies that for animate things it is still possible *to attribute* the term 'vital' or 'animate' to parts of them or to lower unities of their organization – even if in the case of higher unities this is no longer possible. Thus, saying that an individual organism is dead means that the unity of the organization in question no longer fulfills the relevant criteria of vitality. Hence, 'death' in the context of biology is nothing more than the negation of the criteria on the list with regard to a token of a type and therefore is the contradictory concept in relation to life. The concept of death is therefore a 'meta-concept', too, for it refers to the items on the list just like the concept of life. As such, it is the contradictory negation of these items and the contradictory concept to the concept of life.

This argument might sound somewhat complicated, but its results are – in the end – almost simple. First, the crucial point is that in order to define certain capacities and properties of life, biological research has to *abstract intentionally* from the very procedural *character* of 'life' – even if it is this process that we experience in our 'Lebenswelt' which is under scientific investigation. The same applies to the biological concept of death as the negation of life. Therefore, we can conclude: If it were correct that life and death are biological concepts, then they would precisely not be the ones to capture the procedural nature of life and death. For even within biological discourse they are terms that only mark the

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<sup>23</sup> See Gutmann 2008, 77ff.



contradictious logical extremes and therefore not the processes of continuously performed crossings or phased transformations.

As far as those concepts stand in a contradictious relationship and can only be exclusively attributed via the procedure of an ascription described above, there is no logical space for any ‘third category’ beyond life and death, not even within the biological use of these concepts.

Second, the term ‘life’ used in the biological language-game refers to a procedure of attributing a sum of properties and capacities. This implies that the term itself can be completely *replaced* by the very capacities and properties on the list. The biological concept of ‘life’ has to be considered a ‘meta-concept’ denoting a scientific procedure that works without this concept. The same applies to the biological concept of death as the negation of life. Therefore, the biological understanding of these two concepts provides manifold items and a plurality of life-unities for us, but not practicable concepts of life and death that we could use to mark the very end of the unity of an individual human being.

And third: These results show that the conceptual procedures used to mark vital or animate things can be applied and are valid *for all* animate things. So the biological term ‘life’ as well as its negation (‘death’) do not aim at formulating criteria specific to *human* death nor do they lead to specific characteristics of *human life*. The concept of ‘life’ determines what can be classified as animate being. And with regard to an individual organic entity it helps to figure out whether or not it or parts of it are vital. If we want to know, however, when *human* life ends – and not only whether or not there still is some ‘vitality’ in a human body, then the biological concept of life is not helpful. Therefore, the biological determination and use of these concepts do not lead to an adequate comprehensive concept of *human* death and do not provide any normative guidance as to how we should deal appropriately with brain-dead humans whose organs are in parts still functioning.

### **Life and Death as Normative Concepts of a Human ‘Life-Form’**

It seems as if ‘life’ and ‘death’ mean different things depending on whether they are used in the language-game of biology or in the context of the ‘Lebenswelt’, i.e. in the context of human actions and relationships. I will argue in the following that the concept of ‘life’ primarily refers to this context which I call the ‘practical’ context, because we *lead* a life in our ‘Lebenswelt’ and we always do this in a specific human ‘life-form’.<sup>24</sup> Thus, if we want to know how *human* life is characterized, we have to explain the concept of *human* ‘life-form’. In this case, we must not abstract from the procedural character of life and we cannot simply transfer the experienced ‘expressions of life’ into a list of criteria. Moreover, we have to consider the specific

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<sup>24</sup> Plessner 2003 (1928).

human conditions under which these expressions of life are performed. Referring to Cassirer and Kant, I will argue that it is not the property or ability of ‘having language’ that characterizes a human being, nor is it any specific property or ability. In fact, only the ‘practical’ use of such abilities, the practical use of symbols generates the ‘human life-form’ and turns mere vitality into human life; i.e. the use of language under the claims of morality and right at the same time.

The ‘animal symbolicum’ – Cassirer’s formulation – is therefore not an ‘animal plus having language’ or ‘an animal plus the ability to speak or communicate’, but just marks the participation in interpersonal normative relationships and commitments. Hence, the ‘animal symbolicum’ is not another kind of animal. Rather, this term marks the participants of the specific ‘life-form’, a ‘life-form’ that can be performed due to the qualitative practical transformation.

All participants of this very ‘life-form’, the *animalia symbolica*, we can understand as a ‘person’ not because of certain (personal) skills and abilities (like language, thought, self-awareness and vitality) – these are merely necessary conditions for generating this human ‘life-form’. ‘Life-form’ itself does not analytically follow from these skills, but rather is the result of a practical act, i.e. a synthetic act that one has to perform voluntarily and intentionally. In addition, the human ‘life-form’ requires many of these acts. It demands that these acts be repeated through history and become manifest in interpersonal moral and juridical rules and laws. Within interpersonal relationships of the human ‘life-form’ the meaning of life assumes a different meaning than in the biological language-game. Lawful relationships of mutual commitment do not only distinguish the human ‘life-form’ from other ‘life-forms’, but even establish the possibility of asking how the beginning and end of human life are reasonably determined.

So the moral question of how we *should deal* with human beings who have or no longer have certain abilities is by no means answered by mere reference to these abilities. For this to be possible, it would be required that a decision had already been made which abilities a human being *ought* to have in order to be capable of being regarded as a participant in the human life-form – in short as a person. And an evaluative judgment would be needed defining which abilities should be reasons for us to treat a human being in a certain way – namely as a person. Only this normative judgment, substantiated by reasons, can provide information what it means that a human being is a person or should be treated as a person.

The debate has been ongoing for many years in this connection both in theoretical and in practical philosophy. Of course, it is widely ramified and has already reached a high degree of differentiation. Therefore, I would merely like to suggest briefly which definition of the concept of a person I deem suitable for further dealing with the question of human death. Hopefully, I have succeeded in pointing out that their status as persons represents the *reason* why human beings *should* be treated in a certain way. Accordingly the further definition of the concept of a person can only be gathered within the context of a *normative* theory, i.e. as part of a critical reflection on already established moral and legal claims and

standards. Sure enough, in order to realize moral and legal claims we also need to possess certain abilities. However, these abilities then provide the physiological, psychological, or social ‘basis’ for the realization and do not as such legitimize the particular moral and legal claims – and thus equally do not legitimize the claim that we should regard and acknowledge human beings as persons. Regarding and acknowledging human beings as persons and participants of our human life-form accordingly cannot be the same as examining and assessing whether they possess certain abilities. It rather means that we regard both others and ourselves as standing in moral and legal relations and that we should treat both others and ourselves in accordance with the claims prevailing in these relations. The concept of a person in my view expresses precisely this normative transformation of the human being as specimen of the species *homo sapiens* to a participant of the human life-form under the claim of moral and legal conditions.<sup>25</sup> Whilst the expression ‘person’ is in the singular, its conceptual content suggests that this term stands for every individual specimen of the species and that all acts of every individual participant as well as all acts of this community from now on should be justified under the principles, according to which the concrete moral and legal relationships are constituted. The status of a person is a counterfactual status that is awarded by making recourse to ideal interpersonal systems, i.e. under normatively claimed moral and legal conditions. Looking at it from this perspective, the status of a person is ascribed entirely independently of concrete properties and abilities. So even if the particular participant in this community loses particular abilities, he or she still remains a person, continues to have certain rights, and stays under the protection of normative conditions.

This understanding of the concept of a person, of course, differs from everyday speech and psychological usage. What is commonly referred to as a person in the colloquial sense are the character, properties, peculiarities, and abilities developed by a human being leading a life as a person. For the sake of avoiding confusions, it makes sense to designate this individual character of a concrete human life as ‘personality’. The personality developed in each case – in contrast to the status of a person – can also be lost. Severe injuries and physiological or psychological disorders may lead to changes in or even to a loss of one’s own personality. However, because personalities are persons, because personalities develop within moral and legal communities, in which they also acquire importance and value for others, it is understandable that communities commit themselves to protecting the personality even beyond its loss. This is the case in most of our current communities, which provide for a so-called post mortem personality right and demand, for example, that the memory of the personality of a person be respected and protected.

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25 This line of thought does not necessarily end in a ‘speciesism’, but merely accommodates the circumstance that human beings under normal conditions develop the required skills and abilities to be able to enter moral and legal relationships and thus to mutually commit to each other. But this does not exclude putting other living beings or objects under legal protection also and awarding them the status of participants in this community – their rights and duties would then have to be determined according to their abilities.

In which respect can this understanding of person and personality now be helpful in determining human death? On the one hand, as a result of this understanding the normative search for an adequate criterion for human death would have to bear in mind that human beings as persons die and that they develop their personalities as persons and in communities with others. In comparison to this suggestion, referring merely to physiological parameters or biological feature ascriptions as a sufficient criterion for human death, only seems like a reduction. If it is correct that every criterion for human death is the result of a substantiated normative decision, then an adequate criterion in view of all justified claims including the other dimensions of human life must be justified with reference to these. Accordingly, it is also a decision that needs to be justified if the main emphasis in trying to answer the question of the end of human life is placed on the physiological and biological aspects. It becomes clear that the practical consequences also have to be regarded as part of the normative decision. Viewed in this light, the determination of the brain death criterion would also include the decision in favor of the dying in intensive medical care including the burdens entailed for all those involved. It must become accountable which consequences arise from the decision to give that much weight to the physiological basis of human life. Furthermore, it must be clear that these consequences are not the result of anonymous structures or a given nature, but rather the outcome of our evaluative judgment.

## The Concept and Criterion of Death and Organ Removal

The question for the conditions under which the *life of a human being* has ended therefore cannot be answered by making immediate recourse to the state of the organism. To answer this question it first of all has to be decided what is meant by the expression *human life*, which significance is attached to the functionality of the human organism, i.e. biological vitality, and how much weight should be given to other aspects of human life, such as the emotional, intellectual, mental, and social dimension. Should we, for example, consider a human life to have ended when the organism of a human being is living in the *biological* sense, as set out in the above, but the abilities for realizing other dimensions of human life can no longer be sustained? Has human life ended when the sustainment of the organic functions causes all other dimensions of the life of a human being (the ability to communicate, social relationships, etc.) to be completely eliminated? Under these circumstances, may one demand that the functions of an organism be no longer supported or even be actively terminated if a human being has given these dimensions of his or her life a priority over the biological vitality? The determination of the end of human life in searching for an answer to all these questions calls for an *evaluative* judgment. The normative content of this judgment, of course, must be rendered explicitly, critically examined, and justified in each case. Considering human life to have ended with 'brain death' in this context is by no means a mere

statement about the failure of a certain integrative unit but rather an evaluative judgment. The irreversible failure of the brain therein is named as a reason that we should acknowledge when considering the life of a human being to have ended. Whether brain death actually should be this reason that justifies that we ascribe the predicate 'dead' (and then also treat the individual concerned as a dead person, stop any reanimation measures, explant, etc.) or whether it should be other states or circumstances that should be deemed to be such reasons, must equally be examined and legitimized. Such criticism and substantiation of legitimacy of reasons traditionally comes within the domain of ethics (in the sense of a critical reflection upon moral and legal standards). And here it must be reflected upon and re-discussed continuously depending on the changes in the concrete social circumstances.

Consequently, the existence of brain-dead human beings confronts us with the *normative* question of whether we have reasons to regard human life under *these* conditions as having ended and whether we can justify brain death as an adequate criterion also of *human* death. This does not challenge the definition of death as the end of life, since the evaluative judgment precisely concerns those criteria, under which we should apply the definition of death as the end of life to human beings. So it is not the definition but the criteria that require an ethical justification in this case. The question of whether the irreversible failure of the brain should represent a reason to consider human life as having ended, or else the question which significance we should attach to the irreversible failure of the brain for human life, we must therefore determine and justify by making recourse to normative reasons within the context of ethics.<sup>26</sup>

If these considerations are right, then even the irreversible loss of the brain that we currently use as a criterion for human death is a practical criterion. It singles out a certain phase in the process of dying and determines it as the border between life and death. Even if there might still be some vitality in the brain, this criterion assesses that this very individual human life has 'now' come to an end. Certainly, human life in this context refers to the individually performed life-history within interpersonal relationships of the human 'life-form'. Moreover, against this background, it also means that all criteria for death (or life) discussed so far have to take into account that human beings live in communities; that they are emotionally connected with each other; that they care for each other; and finally that for this life the bodily existence of a person is both constitutive and formative.

Let us assume that these results are worth considering: What consequences would arise with regard to the question of how to deal appropriately with brain-dead donors of organs or human remains? First, we must infer that brain death is not the death of a person. A human being, even if it has no more so-called 'personal'

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26 Cf. Gehring 2012, 185–201. Even if Gehring very rightfully criticizes the stylization of death as an act of deciding and unmasking the individualization of this deciding as ideology, this does not change the fact that the concrete ascription of the predicate "dead" is a normative act that requires a justification.

abilities, is still acknowledged as a person and therefore part of the interpersonal relationships of the human 'life-form'.

Thus, persons, even if brain-dead, are protected by rights and deserve to be treated with respect. Certainly, they cannot claim these rights for themselves but their relatives can. And the relatives themselves have a right to be acknowledged in this role and in their outstanding relationship to the dying or even to the dead person. Due to the interpersonal dimension of the human 'life-form', rules that include the vote of the relatives (such as the 'extended consent solution') are the only kinds of appropriate solutions. They are appropriate simply because they offer the opportunity that people who were connected to the life-history of the dying person or the dead can decide and can adjust their decision to the very circumstances of the peculiar situation (for instance the individual dead person or the family situation) – which the person in question might not have been able to anticipate.

Finally, I would like to briefly consider whether the DDR should be retained in the future. What strikes me as problematic about the DDR is that it implies – at least in terms of language – the suggestion that death in connection with organ transplantation is a purely natural event, which has to first be awaited or ascertained by those involved. Only then, as is suggested by the DDR, a decision is to be made concerning the morally valid question whether or not the organs of this human being should be explanted. However, the ascription of the predicate 'dead' is by no means normatively neutral, but represents a central moment in finding an answer in the ethical debate and justification of organ removal. This very fact, though, in my view is not reflected in the clear, but simple version of the DDR. Rather, the DDR lends itself to simplifications that may also be used for obscuring this complex circumstance.<sup>27</sup> It is true that the 'brain death criterion', to which the DDR is currently still linked, because of its tense relation to the phenomenal impressions and its artificial nature, as I see it, can by any means be identified as a normative setting. Speaking of a criterion already indicates on the level of language that it is a question of determining a point in the process of dying, or dying off of the various integrative units, from which certain acts may be performed or must be refrained from. What also appears problematic, though, in this connection is the usage of death and the prevalent equation ('Brain death is death')<sup>28</sup>, insofar as the normative nature of the term is revoked. This could possibly be avoided by referring to brain death as a 'removal criterion' and by proceeding to abandon the DDR. In this case, the absurdity in terms of language involved with the multiplication of modes of death (brain death, cardiac death, etc.) could be dispelled. For this to happen, of course, one would have to recognize that not only our expressions of language

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27 Currently one comes across such simplifications of the issue, which in my view prevent awareness, in particular in some of the international campaigns for the promotion of organ donation. Cf. for instance the campaign: C'mon. Don't be a jerk. You know that's not we're talking about. You'll be dead. It won't hurt (<https://twitter.com/LiveToFightCF>) (visited 18 September 2013).

28 Cf. Angstwurm 2003, 291–297.

but also the underlying concepts do not always and under all circumstances mean the same and the precision with which they mean something may and must vary depending on the context. In some conditions, which again can be determined, of course, the meaning of the concept of human death, for instance, proves vague. In other conditions its meaning seems to be entirely sufficiently determined. For example, certain situations of acting in the medical or legal context require that an exact time of death is determined.<sup>29</sup> For this purpose the end of life must then be defined in further conceptual differentiation and criteria that are as clear cut as possible, such as failure of the complete brain functions. Correspondingly operable measuring methods need to be developed. As far as ‘common’ dying is concerned, though, one can get by with traditional death criteria. The vagueness ensuing from the processuality of dying in this context – at least up to now – does not yet pose a problem that would interfere with the orientation of our acting. In both cases mentioned as well as in all other possible cases, the fact remains: death is the end of life.

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<sup>29</sup> This would, for instance, be the case in the context of inheritance law. Cf. for example the court decision of the Higher Regional Court Frankfurt a. M. File Ref.:20 W 254/95 Decision of July 11, 1997 Source: NJW 1997/46, 3099 with reference to § 1933 S.1 BGB (Civil Code). According thereto the surviving spouse is not eligible to inherit if the bequeather at the time of death files for or has filed for divorce and the other prerequisites for divorce were fulfilled.

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