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# How Ethics, Bioethical Thought, Laws and Restrictions are Imposed on Those Wishing to Donate Human Organs and Tissue

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## 1. Introduction

The man is protected by the State from his conception. It is a modality of the American *welfare state*. During intra-uterine life the foetus is favoured with all the protection needed and if it is molested by abortive practices, those not considered legal, the agent of it will answer for the criminal action. If the mother, under the influence of the puerperal state, causes the child's death, it will be considered infanticide. The birth launches the child's reception in to society and the insertion of them into the protective measures of the infancy and youth legislation. On reaching the legal age, the citizen is covered by all the rights given by the constitutional laws and becomes a socioeconomic development collaborator of the collective, as well as developing strategies for their personal, familial and professional achievement. On finishing the labour period, they reach retirement and become a member of the Senior Person's Statute, which gives them a differentiated surplus of rights. In all the stages there is always exists the concern of the State in providing health conditions that are efficient.

The name transplant or transplantation is given to the surgical procedure which inserts into an organism which is denominated the host, a tissue or organ, collected from a donor. An Autotransplant, or Autoplastic transplant, is when the transfer of tissues is made from one place to another, in the same organism, as happens in the case of "bypass operations". Homotransplant or homologous transplant is when it happens between individuals of the same species. Xenotransplant is when the transfer of an animal organ or tissue to a human being occurs. Of course despite the progress of medical technoscience, Xenotransplants still need to accomplish a lot of tests to find a result that is considered satisfactory. More than that: if the project develops, many ethical problems will be eliminated because the human body will stop being the source of organs.

Man wants, at all costs, to prolong his life. It can even be a natural vocation to try to live more and, to do this, he tends to correct his imperfections to gain a richer existence, in regards to spiritual values, freedom, human dignity and social solidarity, and this is an eternal recreation. In order to live longer, besides therapeutic procedures, he also deems organs, tissues and other parts of his fellow man's bodies, worthy. Medicine detects the sick organ, and, soon afterwards, through a reparative-destructor-substitutive intervention, it gets to manipulate a healthy organ, collected from another organism, correcting the one compromised in its functionality.

Biotechnology and biotechnoscience, with immeasurable advances, offer, in a short space of time, resources so that man can have not only his aspired longevity, but at the same time a better quality of life which gives a human person dignity, based on these self-established parameters he is able to reach his objectives. If the goal it is to reach a stage of harmonic life, very close to happiness, all efforts should be addressed towards this.

The human body, in this way, becomes a repository of tissues and organs, but it is clear the state will interfere in the disposition of the person's will regarding the donation of their organs in vita or post mortem. The availability of the body has its limits and can only happen when, for therapeutic and humanitarian ends, the necessity of the case must be clear. Even though it requires the sacrifice of one body in favour of another, the progress of medical techniques make a replacement possible with considerable margins of success.

Such an objective, by itself, causes an increase in the need for the supply of organs for transplant, because the number of people on waiting lists is far superior to the organ supply and it causes the rise of the black market trade of human organs. Despite the World Health Organization (WHO) rejecting the parallel trade, which observes the rule written in the Universal Declaration of Human Rights regarding the sense that the human body and its parts are *extra commercium* goods, without any trading profile; it is well-known that there is a growth of groups centred on illicit activity. Therefore the permission for the accomplishment of a transplant should obey rigorous criteria, with tireless legal control.

The donor, that transcends their own human nature, accomplishes the noblest humanitarian action, just like a pelican that makes free their blood to feed their nestlings. In this principal, the person, in a certain way, not only exposes themselves to risks, but renounces the integrity of their organism to help another, in both cases with the state approval. Between physical integrity and human dignity, the Law supports the latter, because the altruistic disposition of the body, perfectly justifies the necessary state.

The impression is that when it comes to mentioning the subject of organ transplants the individual feels an attack on their body, identity and dignity. But, in reality, with the evolution of medicine and the progressive pace of the patient in taking a decision in regards to the new therapeutic perspectives, the action of transplant is integrated into the citizen's life, presenting itself as a solution for many chronic diseases until then incurable. The simple exercise of study or research does not warrant the sacrifice of a healthy body and of course when all conditions are analysed, the removal of an organ is only recommended to replace another that is compromised, taking into account the beneficence principal, consolidated in the *malum non facere*.

In the same way that, in therapeutic treatments the patient's autonomy prevails, the availability of the body, the parts and organs are, with equal reason, governed by the individual. Once the body belongs to them, they could, when they are lucid and conscious, direct it towards any purpose they judge convenient, regarding a therapy of no major importance. But, in reality, they do not have exclusive possession of their body. If they are above legal age, capable of taking decisions, they will freely be able to dispose of their body for therapeutic ends or for transplant in a spouse or consanguineous relatives until the fourth degree. If they intend to benefit another person, they should obtain judicial authorization, to avoid the parallel commercialization of human structures.

Like this, once again, the prevalence of the state interest occurs, to the detriment of the citizen's individual will. It is not referring to a prohibitive rule, but to the discipline of the procedure. The individual's intention to donate organs to a determined person post mortem

will not have any sway, because the will that prevails is the State's, which will regulate and indicate the patient to be benefitted. It is also not a "nationalization of corpses", but a way to ensure the correct distribution of organs and human tissue to the registered people who await a transplant in order to have a chance at a worthy life. The principal of equality before the law or the equality among people is put into practise, whilst also taking into account the gravity and urgency of the disease.

The human body is an organ repository that can accomplish the substitution with considerable margin of success, providing man, on being done, a better quality of life. The thinking being can be its own wolf, but the corpse presents itself as an offering of organs to whom so needs. The donation, in its essence, is the act that transcends human generosity and it can happen, ironically, that the organ that is transplanted becomes an enemy of the donor. Without forgetting that modern technology makes the connection of devices to organs and human tissues possible, as in, for instance, artificial hearts, pace-makers, etc., which are attached to the human body by electronic circuits.

All of these considerations will be approached throughout this present study that had, as its basis, an analysis of the Brazilian legislation and the specific regulations applied to organ donations in *vita* and *post mortem*, as well as the criminal procedures that can be perpetrated in the process of receiving and distributing organs. Brazilian legislation respects and gives prestige to organ donation and creates safety mechanisms to correctly reach the purposed objectives.

But, if on one side there is the opening to favour the donation of organs, tissues and human body parts, transforming the donor in life into the licensee, there are also imposed limitations to this. In the same way, if in life they intended to create public or private documents anticipating their will in donating their organs, in *post mortem* the manifestation of this, will have no validity, because for the documents to be legitimate they need the authority of the relatives and spouses.

The reiterated transformations of medicine, which are constantly evolving, oblige the creation of more laws to attend countless solicitations that continually arise in the field of transplants. New strategies in capturing donators, always of a voluntary nature, also favour the understanding of society. The country is seeing a significant growth in the accomplishment of transplants, with highly significant results, proven by data officials.

## 2. The ethics

Ethics is the human being's moral line. Many thinkers and philosophers have unveiled into society their definitions of ethics, however, each time the concept has been presented in different apparel. This is due to the changeable nature and dynamic character of ethics, which evolves according to social transformations. But the central idea embedded in the word's etymology keeps its essence, emphasizing it as a lineal thought, with its eyes always facing forward, tracing a straight line, without any swinging movement, in the search for new harmonic spaces to be inhabited by man. Through its Greek origins, "Ethikós" symbolized the way of being, the character, the morals, and the good habits of an individual. So much so, that, in its original application, it was demanded of those who were engaged in public activity and representatives of the *res public* ("public issue" or "public matter") carers.

According to Oliveira Júnior, "Ethics still isn't concluded, it is a thought in constant evolution, which in the course of time, keeps improving. Ethics is not the result of codified

conducts, it does not revoke, nor is it repelled, even partly. It is the result of man's own evolutionary thought, which, in his essence, searches for happiness and perfection."

Therefore, the human sensor is able to know how to detect precisely when a certain kind of behavior, conduct or procedure fits into the established molds accepted by the community. The individual's evaluation receives the homologation of the collective in relation to previous ethical approval. By rule, whatever is good, necessary and convenient for man, gets the *placet* from the community and starts to integrate itself into the way of life, without any restriction.

Ethics carries two propellers: one of them, collective, where the thought becomes one and widespread, this is a result of reiterated common-law practices that consolidate from generation to generation. Man himself transfers the concepts he received by adopting it and passing it forward. Another propeller is the individual, where the intimacy sphere establishes its own evaluation criteria and acceptability, which, can even be contrary to the common thought, but reveals the person's status of independence and autonomy.

Autonomy is consistent in life's regent faculty. It comprehends the familiar, social, professional and spiritual existence however it does not cease to be an ethical achievement and in addition a revelation of free-will that reigns among beings endowed with intelligence. The will is a preponderant factor in which man affirms himself as a thinking and independent being. Oneness is the form in which man presents himself before a social group and acquires the quality of a human being and in so doing becomes known, for his virtues, attributes and imperfections; it is a vital characteristic in the valorization of human beings. At the same time that it is an indivisible and irreplaceable unit, the human being carries the universal seed of his genetic patrimony, which will ensure the continuity of humanity.

The creative Law of Humanity's Ethical Progress projected by the Spanish philosopher Marina marks itself in an intelligent way and without contestation:

"Any society, culture or religion, when it is liberated from the five obstacles - extreme poverty, ignorance, fear, dogmatism and hate of one's neighbour - heads for a common ethical pattern, that is characterized by the affirmation of individual rights, the fight against unjustified discrimination, the people's participation in political power, the initiation of rational dialogue, the legal and political guarantee of assistance".

Descartes's famous philosophical saying, "*cogito, ergo sum*", translates in an unequivocal way the fusion between the being and the knowledge, it puts value on the human intelligence, the space where human beings cogitate and decide. But this premise can be considered true as an introduction to philosophical thought, however judicially it cannot prevail by reason of the principal of equality before the law that grants equal treatment to all people. It cannot in any way conclude a "*contrariu sensu*" that the person that does not think, the mentally deficient, for instance, does not exist. Regarding the removal of organs, tissues and other human body parts for transplant and treatment ends, the law no. 9434/1997 presents a correct and coherent assertion in which it establishes, as obligatory, in the 3<sup>rd</sup> article:

"The *post mortem* removal of tissues, organs or human body parts destined for transplant or treatment should be preceded by the diagnosis of encephalic death, verified and registered by two doctors who were not participants of the removal and transplant teams, by the use of clinical and technological criteria defined for resolution by the Federal Council of Medicine."

The human body, in this way, is nothing more than a clinical instrument, a perfect articulation of the biochemical and organic system, regulated by the decisions of the brain



that becomes the actions commander of the nervous centre. A true Dom Quixote like shield-bearer. It brings to mind the sincere and realistic narration made by emperor Adriano a Marco, in Yourcenar's work: "This morning, for the first time, the idea occurred to me that my body, this faithful companion, this safe friend and more my acquaintance than my own soul, is nothing but a sly monster that will end up devouring his/her own owner".

Szaniawski observation is also pertinent, comments on and concludes the Spanish's lesson by Antonio Borrel-Maciá, in the sense that "the right to dispose of one's own body would be subordinate to the norms that determine the use of the things. "Livestock" should be used and the power of disposal is governed in agreement with its nature and purpose. Identically, the use of the human body should be according to its nature and purpose, conserving the individual, in relation to this fact, his/her free will and his/her moral responsibility. The intervention of the legislator would only have as an objective to limit or denounce the practice of material or juridical actions that they constituted a social danger".

Within this view, man is the curator of his own autonomy. Although not entirely, because the concept of liberty on the whole is ambiguously independent. For us to say that liberty reigns in its philosophical concept is an excessively utopian idea as it needs to establish limits among people in order to promote social harmony. What remains is the individual's internal liberty which due to being located in the intimate exclusive sphere cannot be invaded, however, it appears outwardly, passing through the filter of social acceptance and it can be contradicted.

### 3. Bioethic thought

The person's autonomy of will appears as a necessary consequence of *principium individuationis* and receives bioethic assent that institutes it as one of the basic principles. The New Science had its roots hurled into the debate in the year of 1947, in the Nuremberg Trials, in reason of the reflections related to the barbarities perpetrated during the world wars involving research using human beings, without any criterion and authorization. In the following year the Universal Declaration of Human Rights and the Nuremberg Code were edited, creating documents which generated a new age for the rights of the individual and collective, with a more dignified and human dimension regarding the person. The expression "Bioethics" was introduced for the first time by the oncologist Van Rensselaer Potter, in the book "*Bioethics. Bridge to the Future*", in 1970 and it presents itself as a multidisciplinary universe with the purpose of discussing various aspects of human life through plural reflections, in order to generate transforming interventions, more appropriate and convenient for mankind to reach his objectives, as in the concepts established by Aristotle when he idealized the "supreme good".

The conscious will, that it is the result of a coordinated operation by the brain, forms an ideomotriz action that is nothing more than the accomplishment of conducts in favour of the person, as well as exerting the function of social life. It could even affirm that it awakens the consciousness of the human being's purpose. Its mind and body are interlinked and both are promoters, when in interaction, of the quality of healthy and harmonic life. The space of the humans' coexistence implants general rules and has the power to discipline the individual's behavior. This is the law exercising its primordial function of regulation.

But the individual will cannot be put upon by the established rules of society. It should be, before everything, respected so that it always prevails in the interests dictated by the community. "Everything in nature, made explicit by Kant, acts according to laws. Only a

rational being has the capacity to act according to the representation of the laws, that is, according to principals, or: only he has a will. For to derive the actions of the laws, the reason is necessary, the will is nothing else but the practical reason."

The "*principium individuationis*", is the one that proclaims the predominance of the individual's will which is not absolute and nor can it be, in a society that is composed by numerous individuals. Each one owes respect to the other and freedom will only be reached when the same social objective is reached by all. In that respect the German philosopher Adorno, founder of the School of Frankfurt, proclaimed, with a lot of authority, the following:

"Sometimes the individual opposes himself against society as an autonomous being, although private, still capable of rationally pursuing his own interests. In and beyond this phase, the question of freedom is a genuine one for knowing if society allows the individual to be as free as they promise him/her to be; and, with that, the question is to know if he/she really is so".

To incorporate the political animal, as Rousseau defines it, man needs to receive the necessary tutelage against aggression and interference in his/her intimacy, protecting him against any abuse; in particular the state power should actively participate in the choosing of the rules that will regulate their conduct in the social environment to form the general will and to be detainer of the necessary financial conditions for the satisfaction of the fundamental demands of material life, for the fulfilment of a worthy life and to respect, above all, his/her freedom.

The constitutional proposal of the democratic State of Rights was instituted In this same principal with the purpose of "... to assure the exercise of the social and individual rights, the freedom, the safety, the well-being, the development, the equality and the justice as supreme values of a fraternal society, pluralist and without prejudices..." (Preamble of the Constitution of the Federal Republic of Brazil)

The continual progress of medical researchers, the medical-surgical instrumentalisation, the formation of highly specialized teams, the search for new alternatives for decreasing, stabilizing and even curing various diseases that afflict humanity have put in prominence the human body, transforming it into an inexhaustible source of replacement tissues and organs. The human body acts as both the donator and the receiver, through the surgical act denominated as the transplant, which inserts into the living host organism a donated organ or tissue. It is in the new medicine that on one side emerges the destructor of a sick organ and on the other, triumphant in its functionality, it reemerges as the one that substitutes and mends.

The philosopher Aristotle dedicated a great part of his work to biology and added to the body, the illustration of the human soul figure, which becomes the shape of the body, and strives to affirm that the soul cannot exist independently of the matter. "The body which the soul gives form to, is not, however, any matter; it is the form in relation to the tissues and organs, without which, it would not be this "organized body that has the life in all its potency", the one in which the soul, that is the culmination of a hierarchy of forms, comes to give life and takes it".

#### 4. The autonomy of the will

The corporeity comes to express the singular reality of mankind. It is him who is the owner of a patrimony called the human body, detainer of its acts, administrator of this

inexhaustible latifundium, that comes overlaid with a special tutelage that gives to it personality and turns it into a subject of rights and obligations. At the same time that it is an individualized patrimony, it suffers interference regarding its entire utilization. In a more convenient expression and attending to a more recent concept of "man's-body", we can say that "...for body (the word body) we understand it as that dimension of Mankind in whose base it institutes itself into the structure of empiric entity. In this sense, it is something that can be observed and something that can be the aim of experience, whether on its structure or on its behavior. However, it is not about a local collocation, an extrinsic, but the radical and original, in which it has defined its origins and constitution, its maintenance, its decline and its end".

The new Code of the Brazilian Medical Ethics, introduced by the Resolution of the Federal Council of Medicine no. 1931, of September 17, 2009 taking in to account the world thought that governs the subject established a truthful and active communication channel between the doctor and the patient. The inquiry, which is constantly reiterated, tries to discover to where the autonomy of the patient's will goes to. It is known that the doctor is endowed with a specialized knowledge in a certain area and their word is of vital importance for the effective, low cost solution of the presented disease in a minimal time. It can, sometimes, not coincide with the patient's opinion who opts for a certain procedure, due to the existent liberty in the "Patient Self-Determination Act". This decision partnership that is formed regarding the most appropriate treatment is nothing more than the conjugation of the alternatives of actions presented by the doctor and the free and autonomous choice of the patient. If, by fortune, it is announced that there is only one possibility for treatment, there is nothing to say about the exercise of the right of the autonomy of will. It is a peremptory decision, it does not accept another choice accepting of course the patient's refusal of the suggested treatment.

This way, in the circle of his autonomy, man, in theory, is the lord of his own body. This is a reckless affirmation because he cannot make use of or dispose of it in some specific situations. The Universal Declaration of Human Rights proclaims in itself that the human body and its parts are *extra commercium* goods, which is reiterated in the Brazilian Constitution and the common legislation.

The availability of the body, analyzed through the viewpoint of bioethics, is possible, but only if you follow the basis and principles of both autonomy and beneficence, there is an existing agreement from the donor, the purpose is therapeutic or humanitarian, and reverts itself into a significant benefit with a minimum risk. There is a severe evaluation between the assets that are in play and the proportionality of what is more beneficial and this will dictate the right conduct of behavior.

Every capable person is gifted with ample conditions for managing his/her actions in civil matters. The individual can do whatever is allowed and no one can be obliged to perform what the law does not command, according to the constitutional (article 5º, II, CF). What occurs is that the public power (the ruler or government) imposes restrictions on the people whilst also granting relative freedom.

The Brazilian Federal Constitution, after ensuring that health is everyone's right and the State's obligation to maintain it, thoroughly establishes in regard to human organs removal the following, in article 199, paragraph 4:

"Law provides the conditions and requirements for the removal of human organs, tissues and substances for transplants, research and treatment, as well as the collection, processing



and transfusion of blood and its derivatives; whilst prohibiting any kind of commercialization”.

The man as an end and value in himself, a centre and point of convergence for all of the actions, endowed with a volitional and intellectual capacity, detainer of his own supremacy, exerts in his condition as moral subject, with a personal decisive autonomy, looking for all of the means for the development of his inalienable dignity. Therefore the Federal Constitution, when it establishes the Federal Republic objectives does not make any distinction regarding the human being, considering the equality within him and prohibiting prejudice against origin, race, gender, colour, age and any other discrimination forms. (Article 3rd, parenthesis IV of the Federal Constitution).

The text reflects the constitutional legislator's concern in specifying in only one paragraph various conducts involving the transplant of human organs. In the first plan it appears that organ removal will only be allowed when the purpose is for the realization of a transplant, research or treatment, if they are within the patterns proposed by the common law, which will establish all the conditions and requirements. In the second, it makes it clear that the collection and processing of blood and its derivatives will be managed by the loose law. In the third, the prohibitive rule is inserted that will be reiterated at a later point in the legislation in a sense that any kind of commercialization of the material collected is prohibited.

The progress and evolution of society, its habits, the incessant development of research in to human beings, the beginning to the end of life, the choice of the child's sex, human cloning, genic therapies, methods of aided human reproduction, substitutive maternity, eugenics, euthanasia, dysthanasia, orthotanasia, the choice of the time to be born and to die, genetic engineering, gender reassignment surgery in cases of trans-sexuality, the use of DNA recombinant technology, the use of the embryonic stem-cells, transplant of organs and human tissues, biotechnology and many other scientific progresses that are not mentioned here, have opened an immense sphere of medical actuation, mainly in the research and laboratory area. New technologies that seem unattainable are offered to the big medical centres and they are made available for use in human beings. The perplexity crosses the boundaries of curiosity and it causes the creation of a new field where it merges together medical ethics, bioethics and human volition, all in search for the definition, direction and solutions for their conflicts. It brings to mind Pitigrilli, in their unforgettable book "O Homem que inventou o amor" (The Man that invented love)", when it prophesied that as much as medicine as much the right have the need for mountains of victims to progress a few meters.

The whole summation of the technological resources exercise direct influence in man's evolution, turning him, from generation to generation, into a more refined specimen containing the databases of his species. This deposit of information reveals the environment in which his ancestors lived and it provides a guide to survival which is more suited to the rational of human nature. "What is special about DNA, affirms Dawkins, proclaimed in 2005 as the most influential British intellectual by Prospect magazine, teacher at Oxford University, England, and author of fundamental works on 'evolutionary biology,' is the fact that it survives not in its own matter, but in the form of an indefinite series of copies. As occasional mistakes of copy happen, new variants can still survive even better than their predecessors, and like this the database with the information that codify recipes for survival gets better through the course of time. These improvements will show in the form of better

bodies and other resources and solutions for the preservation and propagation of the codified information. In essence, the preservation and propagation of the DNA information will usually mean the survival and the reproduction of the bodies that contain it.

## 5. The legal restrictions

The Brazilian Civil Code (Law n. 10.406, of 10/01/2002), in its turn, in the chapter that deals with personality rights, describes in the sole paragraph of its article 13, the following rule:

Art. 13. "Except for medical demand, the act of the disposal of our own body is prohibited, when it results in permanently diminishing its physical integrity, or contradicts good customs".

Sole Paragraph. "The action described in this article will be admitted for transplant purposes, in the form established by special law".

The rule is the prohibition *in vita* of the disposal of the body that belongs to you, according to what can be deduced from the legal text, in the cases that cause any damage to the physical integrity or resist the rules of good customs. It is the prohibitive commandment like rule of the exercise of disposal of our own body. It puts an end to any questioning in regards to the absolute property of the body, unless it is due to medical exigency, which, in addition, must be previously delineated by the State. If, from one side, there is the individualized legal tutelage of the citizen, from the other, there are restrictions imposed by reason of the moral and ethical objectives deriving from the legislation.

The legal permissive inserted in the paragraph points to the realization of the transplant, in the pattern established by special law. The understanding of the written law is that our bodies are unavailable to us, being accepted, as an exception, the intervention by means of a transplant. The State would present itself, in this circumstance, as a co-owner of the individual body.

The organ and tissue donations in Brazil are regulated by the Law, number 9.434/1997. In the *intervivos*, where any capable person can consent to, or in the situation where they are unable to, his or her legal representative can, as long as they are double organs (kidneys, for example), or renewable parts of the human body, for therapeutic purposes or for transplants for a spouse, consanguineous relatives until the fourth-degree, or any other person, depending in this case on judicial authorization; being exempt from this only is the case of a bone marrow transplant. The donation must in every account be free in reason of the orders within article 199 § 4<sup>th</sup> of the Federal Constitution and the Law 9.434/97, in its 1<sup>st</sup> article.

The legal norm appears to be that the *inter vivos* donation is allowed, since the purpose is the accomplishment of transplants or therapeutic ends, as long it is about double organs or renewable parts of the body, involving a capable person, or his/her legal representative for the due authorization and that the beneficiary is the spouse, or consanguineous relatives until the fourth degree. If it is for someone that is not from the specified family, there is a need to obtain judicial authorization, as the consent of the capable person or his/her legal representative no longer has any value. But if the person who will donate is judiciously unable, even after his/her immunological compatibility has been verified in the cases of bone marrow transplant, despite the authorization of the parents or the one legally responsible, it must follow that judicial authorization should come as a *plus* guarantor of the action. And, if in the case that one of the genitors is declared absent, the other will request judicial consent for the other genitor in their place.

The availability of the own body in its altruistic purpose seeks, on one side, to protect and to limit risks to the donor and, on the other, to avoid eventual commercialization of organs. But the law, which may have been edited with a certain urgency, may have forgotten to contemplate the donation of human organs and tissues in the cases of adoptions.

Regarding the free disposal of the own body, *post mortem*, it is established in article 14 of the Civil Code:

"It is valid that, with a scientific or altruistic objective, the body can be freely disposed, in the whole or partly, after death.

Sole paragraph: "The act of disposal can be freely revoked at any time."

The donation *post mortem*, in its turn, will be executed with the spouse's authorization or a capable relative, in the familial line straight or collateral until the second degree, and the law demands that the responsible medical team declare the patient's encephalic death, in reason of the ceasing of the cells responsible for the central nervous system. It remains, however, that the heartbeat, indispensable for the removal of organs or tissues continues. The Law n. 9.434/97 defined the concept of death, adjusting it to the encephalic failure and not to the biological life, governed by the heartbeat. The ancient romantic ones used to put the hand on the chest to watch the beats of the heart. Today, rationalism rules it. Without encephalic activity, there is no life. The pulsing of the heart is irrelevant therefore, if life has already abandoned the body. In this there is nothing further to discuss about the practice of euthanasia if encephalic failure has already been declared and the doctor has turned off the life support device that maintained the patient's biological activity.

Brazil regulated that the beginning of human life starts with the conception *in uterus*, meaning therefore, when it regards *in vitro* fertilization, with the manipulation of the masculine and feminine gametes and the consequent freezing of the embryos, there is no life but a group of reproducing cells. From the moment that the transfer to the uterus happens, the *spes vitae* begins. Death happens in reason of the bankruptcy of the encephalic activity, permitting from this point the announcement of the human organs and tissues for extraction.

Law demands that the act has to be representative of human solidarity, always encased in gratuitousness. Otherwise, it would be open to the possibility of accomplishing the trade of human organs and tissues, attracting so called investors through the trivialization of the human being. Sometimes, it can be seen in newspaper announcements that a person puts up for sale, alleging financial need, one of his/her kidneys, leaving their address for the negotiation. A legal project was discussed, through legislative process, to make it possible for the convicted to serve as an organ donor and in exchange he/she would receive commutation of his/her sentence. These are situations which conflict with the ethical principle that surrounds the human being in his/her dignity by depreciating the human race. Man continues being his own wolf, in Thomas Hobbes's expression.

The rigorous legislative demand has its foundation in the control of the medical procedure that, based on the principle of justice, it provides everyone with the right to receive human organs or tissues, independently of his/her financial situation. Otherwise, only the favoured ones would have access to the regenerative procedure. Even so, with such rigidity, the system has been manipulated and organs are diverted to patients that are not on the waiting lists, or, if enrolled, they do not occupy a primary place. It is a true criminal task that, to reach its aims, it counts on the active participation of some health professionals who should care about an efficient way for the reception process and insertion of organs, should strictly

obey, the donor list for the ones that have been in the queue for a long time awaiting the procedure and, with preference, those in a more precarious health situation.

The Medical Ethics Code (*Resolution of Federal Council of Medicine n. 1931, of September 17, 2009*), in its article 44, demands that the doctor responsible for a procedure is obliged to enlighten the donor, as the receiver, or, if it is the case, their legal representatives, of the current risks of the exams and surgical interventions in the realization of the organ transplant. Such determination marries with the bioethics principle of the patient's autonomy of will.

It is interesting to observe that the law that regulates transplants has determined a donation presumption, known as the "silent consent", which is, that every person would originally be a donor, unless he/she expressly manifested on his/her Identity card or on the National Driving License, with the expression: "not an organs and tissues donor". In so being, the donation is an act of human solidarity and is spontaneous, it cannot be coerced.

In order to eliminate the obligatory nature of the previous law, in the Law n. 10.211/2011, the following was made explicit:

Art. 4<sup>th</sup> "the removal of tissues, organs and parts of the deceased person's body for transplant or other therapeutic purpose, will depend on the spouse's authorization or the relative's, over the legal age of maturity, obeying the successive, straight or collateral line, until the second degree; as well as the provision of a document signed by two witnesses present at the time as to the verification of the death."

This way, if the person in life, left registered document in the sense that he/she intends to donate his/her organs *post mortem*, it is possible that a revision of the decision on the part of the relatives, could be made to annul it entirely. This demonstrates that the autonomy of the person's will, suffers severe limitation in putting himself/herself as an eventual donor. The Brazilian Civil Code, in its article 1857, allows the realization of the testator's will, that, in possession of a sound mind, establishes the disposal of the totality of his/her goods or part of them and even regarding non-patrimonial will, in the case, for instance, of child's recognition or of stable union. In this, his/her will is respected and executed. This is not valid, however, regarding *post mortem* donation of organs.

The encephalic death will be declared after the termination of neurological exams done by two doctors that are not participants in the reception teams or transplant, being one of them a neurologist or neurosurgeon. It comes regulated by the Resolution n. 1.480 / 1007, of Federal Council of Medicine. After this, the notification will be made to the Notification, Reception and Distribution of Organs Headquarters, that it will be responsible for the indication of the receiver's name, properly registered.

All health establishments are forced to notify the reception headquarters of an encephalic death occurrence. If the authorization has been checked and the establishment is not accredited to do the human organ or tissue removal, it should allow the patient's removal or, if this is impossible, to franchise the access to a transplant medical-surgical team and those responsible for the removal of organs.

If, in life, the patient manifests that he/she had the intention of being an organ donor, the relatives feel more comfortable in deciding to sign the medical term of consent. Otherwise, it will always be more difficult and it will demand the formation of a family committee to make decisions regarding the donation. As it is known, in practice, it is not a good moment for making such an important decision, because, at the same time as there is the announcement of encephalic failure, the body registers vital signs and there is the impression that they are being asked to rush the death, through the practice of euthanasia.



There are a considerable number of patients without a chance of recovery that are not sought by the specialized medical teams in the announcement of encephalic death. According to data from the Brazilian Medical Association Magazine, about 60% of the population agrees with organ donation, however intensive care professionals and emergency services notify just one out of eight potential donors.

The rationale of law rests exactly in this crucial point. Through the principles of proportionality or of reasonability, a death is decreed when a body no longer responds to excessive therapeutic appeals and it gives prestige to the other patient who has a real possibility of recovery and will be able to live their life to the full. For this, there has got to be a need for efficient work regarding the decreeing of encephalic death, not meaning in so doing, the extirpation or elimination of human life, pure and simple. But with the necessary professionalism and above all, with the awareness that a death is already announced by a knowledgeable medical professional, it is to give resurgence to the other life, by reason of the consented donation.

The relatives are extremely connected by the family bond and are not prepared to reflect on the donation of organs, for even comprehensible reasons. When the encephalic death is announced, the relative knows that the body is being moved by driven biological propulsion and there is always the hope of revitalization.

The organ donation campaign in Brazil is still timid in its transmission of advertisements, as to the providences to be taken by the relatives. It is right that the most important providence is the dialogue between them for making a concerted decision and in agreement with the will of each one, before the event of death. However the public appeal for the donation to a certain person is forbidden. In relation to the appeal for funds to finance the transplant or graft, the National Management organization should make understandable campaigns and explanations regarding the donation of organs.

The president of the Brazilian Association of Transplant of organs, Bem-Hur Ferraz Neto, in his end of year message to the class, with a clear sensation of unrestrained hope, regarding the reached results manifested himself as such: "In the year of 2010, ABTO started a new challenge, the one of knowing the results of transplants accomplished in the Country, in which it refers to the rates of patient and graft survival. The only way of obtaining success in this was to stimulate our associates to make this challenge their own, which we did through a vigorous campaign and e-mails. We finished 2010 with a quite favourable allegiance with the associates and transplant teams, but we still cannot say that we know all the data, exception being the pancreas transplants and pancreas-kidney, because these teams communicated 100% of their results. Therefore, these teams deserve our congratulations and the recognition of a commitment to the society".

Berlinguer e Garrafa mention some forms in which people are persuaded into donating organs: "In a Congress that had the theme Ethics, justice and the trade of transplants, the Transplantation Society described, in 1990, five possible ways of obtaining living people's organs: a) relatives' donation; b) donations from people emotionally linked to the receiver; c) donations with altruistic ends; d) paid donations; e) aggressive trade."

The Tribunal of the Justice of Rio Grande do Sul had an interesting initiative to receive through a link in its website the personal information of donor candidates which could later be printed in the format of a certificate. Of course the document, by itself, is not covered by validity; however it is enough to represent the person's will and intention before the relatives.



The project Transplant Living, being worldwide, has the appropriate recognition. Known by the acronym U.N.O.S. (United Network for Organ Sharing) it is a non-profit organization and maintains the National Corporation of Harvest and Transplant in direct cooperation with the Health Resources and Services from the United States Department of Health and Human Services.

The Public Health System in Brazil is the biggest promoter of transplants: it finances about 95% of it, besides also financing immune suppressor medicines. According to the Brazilian Medical Association, Brazil is "the second in the world for renal transplants losing out only to the United States. When that number of transplants is presented in relation to part of the GDP, Brazil is the one with the highest performance in the world".

The auto-transplant was also contemplated in the legislation and it would only be possible to accomplish if the individual offers his/her authorization in a consent document, or if the person is judicially unable or is not in a favourable health condition, the consent will be given by one of the parents or someone legally responsible.

On the other hand, the consent of the receiver or of his/her legal representative if he/she is judicially unable or does not possess the conditions for manifesting his/her own will, enrolled already on the waiting list, after taking into account the exceptional nature of the measure and of the risks of the procedure, will be offered in a free and illustrious way.

When the corpse is not identified or claimed by the public authorities, in the period of thirty days, the Law n. 8501/1992 rules on it, assigning it to medical schools, for teaching means and scientific research.

## 6. Illicit penalty

The Law n. 9.434 / 1997, maintaining the penal rule of the *lex specialis derogat a lex generali*, also establishes a charge of criminal premeditated conduct, when the agent has full knowledge of the illicit character of the fact, and other administrative ones.

It is like article 14 expresses:

To "remove tissues, organs or parts of a person's body or corpse, in disagreement with the dispositions of this Law:

Penalty - reclusion, from two to six years, and a fine of 100 to 360 a day."

It is noticed, in the reading of the text, that the core of the penal type is sustained by the verb to remove, that, in its origin expresses a movement back, to arrange to remove something from a place, to remove, to take, to suppress, and to separate. In the case *sub studio* it means the transfer that is done of a certain organ from a person to other. Therefore the legislator was careful in differentiating the removal *inter vivos* and *post mortem*. The first of them demands the living person's manifestation or of his/her legal representative, while the second, the relatives' consent. As it is a crime that can be practiced only by those that have the legitimate right to remove organs, tissues and parts of the human body; the members of the transplant team who perform the procedure will be held criminally responsible.

It is an absolute certainty that the *ratio legis* seeks to prohibit any removal of tissues, organs or parts of a person or corpse, without obeying the criteria established in law. In this, the *contrario sensu*, filled out the legal conditions, that, the action is lawful, because it is supported by the law. The Code of Medical Ethics, already referred to, in its article 45, instead of using the verb "remover", it opted for the verb "retirar", both, however, have the same meaning.

Article 15 of the law that disposes of the removal of organs, tissues and parts of the human body for transplant ends and treatment, prescribes it like this:

To "buy or to sell tissues, organs or parts of the human body:

Penalty - seclusion, from three to eight years, and a fine of 200 to 360 a day.

Sole paragraph. It incurs the same penalty on those who promote, intermediate, facilitate or gain any advantage from the transaction."

The act of buying or selling referred to by the legislator comprehends the illicit practice of trade acts, having as a reference the *res*, the *pretius* and the *consensus*, in the acquisition and sale of tissues, organs or parts of the human body. The illicitness of the action consists of contradicting the prohibition of considering the human body as a trade object. Contractual freedom is an instrument recognized by the law that allows a party to circulate private wealth and grants authorization to one of the parties to transfer the goods of his/her property to another person. But the goods that he/she intends to trade should be viable and judicially possible for the business to receive the seal of the State. When it refers to organs, tissues and parts of the human body, they are considered *extra commercium* goods, removed from any commercial initiatives. Regarding organ trafficking in Brazil it is recommended to read the book *Kidney for Kidney*, by the publisher, Record, in which the researcher Júlio Laudemir presents an interesting report on foreign and Brazilian people involved in the black market and illegal trade of human organs.

The penal responsibility does not only centre on the people who accomplish the purchase and sale, it can even be the health professionals, but it expands and it reaches to other people that direct or indirectly, in any way, promoted, intermediated, facilitated or gained any advantage from the transaction. The intended benefit is not just exclusively financial, but any other one that results in earnings or benefit .

Article 16 describes it as the following:

To "accomplish a transplant or graft using tissues, organs or parts of the human body whilst having the knowledge that it was obtained in disagreement with the dispositions of this Law:

Penalty - seclusion, from one to six years, and a fine, from 150 to 300 a day."

The type of charge in question is aimed at the professionals that accomplish a transplant or graft and that have the knowledge in advance that the organs, tissues or parts were obtained illicitly. Despite the consciousness of the illicit conduct, they premeditatedly accomplish the medical action regardless. Interesting to notice that the special law did not predict this guilty conduct, in the areas of incompetence, imprudence or negligence, and because of this the transplant can only be accomplished in the field of legality by being a procedure that should be followed strictly, phase by phase, with conscious adhesion to the accredited medical team.

Article 17 emphasizes:

To "collect, to transport, to keep or to distribute parts of the human body in the knowledge that it had been obtained in disagreement with the devices of this Law:

Penalty - seclusion, of six months to two years, and a fine, from 100 to 250 a day."

The *voluntas legis* strays away from those that accomplish the transplant act and it invades the performance sphere of those who are in charge of collecting, transporting, keeping or distributing parts of the human body. It is an illicit act practiced through multiple conducts seeking to reach the professionals that, although they do not accomplish the fact, are subject to a more serious penalty, develop other activities that will favour the illegal transplant. The

accomplishment of a conduct already characterizes the crime. He/she is an offender, the agent that has a full knowledge that the parts of the human body that are being collected, transported, kept or distributed, were obtained in an illicit way, without obeying the established criteria of law.

Article 18 proclaims:

To "accomplish a transplant or graft in disagreement with the determination in the art. 10 of this Law and its sole paragraph:

Penalty - detention, from six months to two years."

The law intends to protect the patient having in its sight the principle of the receiver's autonomy of will, giving him all of the necessary information regarding the exceptional nature and the risks of the procedure. After being properly enlightened about it, he/she will sign the consent that authorizes the conduct.

The protection is extended in the cases in which the receiver is judicially unable or when his/her condition of health restrains or prevents his/her freedom to express the valid manifestation. The law demands that the consent can be supplied by one of the parents or one legally responsible.

Article 19, finally, emphasizes:

To "fail in recomposing the corpse and returning him/her to their rightful aspect, for burial or to fail to give or to delay his/her delivery to the relatives or interested parties:

Penalty - detention, from six months to two years"

The crime therefore highlights the need for tutelage in the respect of the dead and their relatives. Despite the fact that it is a corpse, without human life, it preserves all the affection of the family and friends. The *ratio legis* of a crime occurs when the corpse is submitted to any procedure for organ extraction or even forensics and the responsible professional does not return it in the rightful physical aspect, that is, with his/her normal human appearance, so that it is buried and remembered like this by the relatives and friends. In the same way the professional is punished who does not return the corpse, without justified reason, of course, or delays its delivery to the relatives. In both actions, it is configured that the illicit act has as its passive subject, the relatives of the dead.

## 7. Conclusions

The scientific evolution means that man is getting closer to life longevity. Man is not searching for immortality like the character Conde Fosca, who overcame death in the book "Todos os homens sao mortais", by Simone Beauvoir.

Man is aware of his finiteness and intends to prolong his existence, making use of therapeutic resources and even of the several modalities of transplants of organs, tissues and human body parts.

Ethics and bioethics monitors this and will establish the limits of reasonability. Ethics, being responsible for the correct conduct, which is socially adjusted, searches for a harmonious approval of the procedure. Bioethics, for its turn, will analyse if its reparative conducts through the transplants are necessary and convenient for man. It would be a balance of the cost and benefit, always giving prestige to the margin of safety and warranty for man, in the limits of the *primum non nocere*.

The judicial positioning, finally, will regulate and execute the ethical and bioethical thoughts, consecrating them in a pattern of laws. It is known, from when Montesquieu

wrote "O Espírito das Leis", that the law exercises a restrictive function and, at the same time, a cogent one, in order to assist its social purposes.

The autonomy of the person's will suffers limitations in the legislation regarding the transplant. If, in the civil area, the person has the freedom to affirm public or private documents regarding donation of their goods or even recognition of an illegitimate child, with total legitimacy and acceptability, the same action of will does not produce any effect regarding organ donation.

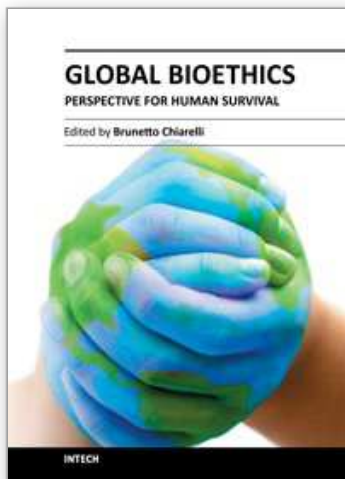
There is clear state intervention in preventing excessive donations in vita and post mortem, in agreement with legal order. Besides the legal requirements pointed out for the transplant realisation, those who are health professionals or their auxiliaries and even others that in a conscious way, defraud its rules will be subject to a criminal process, with the application of the restrictive penalties that incur the loss to the right of freedom. Such restrictions appear as inevitable and have the purpose of avoiding the illegal practice organ and human tissue trade.

But, even like this, as is shown in the presented graphs, transplants in Brazil are demonstrating an expressive growth, with the unquestionable tendency of extensively overcoming the numbers reached up until now.

The fact that the community is now understanding the restrictions imposed on their autonomy of will with regards to what they can and cannot do, as well as the specialization of more receiving and organ distribution teams and the authorization granted to the other centres to practice these procedures, are all indicative factors of the approval and good results reached by the transplant teams in Brazil.

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Two new factor have been added to the ideological change in the second half of the past century: the “ecological impact” of humankind on the environment due to the population increase; and the “ innovative impact of science, first with atomic physics, which introduced the scission of the fundamental unit of matter, the atom, and then witch molecular biology, which led to the decoding of genetic information and intervention of biological engineering that annihilate our concepts of individual and species as fundamental units in biology. This stage of fundamental rethinking is however overshadowed by the threat of ecological disaster and catastrophic population increase, which not only impose limits to development, but undermine the very survival of Humankind. The future survival our species in fact depends on the interaction between its reproductive characteristics and the productivity of the territory, which, even if increased by the intellectual capability of the human brain, has intrinsically limits. The adaptive choices (which are also biotechnological and biomedical) of the interaction between human population and the natural ambience is the conceptual basis of the new discipline “Global Bioethics”.

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