

# THE END OF HUMAN LIFE AND ITS LEGAL REGULATION: A CRITICAL APPROACH

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**Abstract:** The end of human life derives from the death which constitutes not only a biological but a legal fact too, as death implies very important legal consequences in the field of succession and human personality law.

The differentiation between death and cerebral death became a source of confusion in law science. This confusion got worse by the fact that "classical" death is certified in a different way (law 344/1976) than cerebral death (law 2737/1999) whose provisions should be improved in a future legal reform.

Greek legislation protects the end of human life: not only the human body which is considered a remains of the human personality but other expressions of this personality, such as honor and privacy.

## INTRODUCTION

### **The end of human life and its legal regulation: a critical approach**

The end of human life is first of all, a biological fact which must be certified by medical means. It also constitutes a significant legal fact as death implies very important legal consequences in the field of succession and human personality law. The last ones will be analyzed in the following paragraphs.

### **Introductory Notes (Prolegomena): The human personality. The notion of personality.**

When we use the term "personality" in law science, we mean two different things. Primo, the law capacity, which means the capacity of a person to be subject of rights and obligation. Secundo, the term "personality" means the worth, the merit that every person has: this merit is the resultant of physical, moral and spiritual components that compose the human being. Greek legislation gives emphasis to the principle of the absolute protection of the human merit constitute the primary obligation of the state "(article 2 paragraph 1). As it is declared: "every person has the right to improve freely his personality as well as to participate to the social, economic and political life of the country..." (article 5 paragraph 1). On the other hand, Civil Code refers to the global protection of personality: according to the 57 article "anyone that has been illegally offended to his personality has the

Provisions of penal and civil law concerning organs transplantation respect this attitude too: in fact, the Greek legislator has adopted the law system based on relatives' consent: its aspects are critically analyzed in this paper.

**Key words:** death, cerebral/brain death, decerebrate, human body, body, personality, transplantation.

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right to the offence abrogation as well as to its non-recurrence".

Actually, there is no definition of the "right to the personality" commonly admitted by law science. It would be defined as the authority of a person concerning free evolution of his corporal, moral and spiritual components which constitute its uniqueness as well as the authority to exclude activities of other persons which (:activities) offend this uniqueness. Furthermore, it must be clarified that "personality" in law does not mean that a person has particular qualifications or talents. According to the law, every human being has the right to his personality: talented or not, educated or not, ill or healthy, working or unemployed, loyal or outlaw, alive or dead.

### **Expressions of the personality protected by the law.**

There are five expressions of the human personality protected by greek law: a) life, physical integrity and health, b) free evolution of the personality, c) mental and emotional world of the human being, d) honour and free will and d) privacy (1). The above mentioned protection concerns living persons. Some of these expressions, however, are legally protected even after the end of human life.

## **1. The death of the human being.**

### **a. "Classical" and "cerebral" death: a false distinction.**

In law science, when we talk about death we mean that the life of a person is over: that means that, according to specific clinical tests, basic functions of brain and other important organs (e.g. heart, liver, kidneys) do not exist anymore (2).

It is obvious that death is proved by medical means. According to Bleck's Law Dictionary classical definition (3) death comes with the non reversible and catholic pause of both vital functions, blood circulation and respiration and then, in a few minutes, brain necrosis occurs. However, nowadays medical technology evolution enables preservation of the above mentioned functions in cases when brain has definitely ceased to function. So the term "cerebral death" has been adopted to define this new situation. That is when basic brain functions – and more specifically those of the brain stem- and their restart, by use of contemporary medical means, cannot be obtained. However, this brain stem necrosis does not exclude, as it has already been mentioned, the function of some organs- for a short period of time.

Thus, heart may keep on working, kidneys produce urine and liver metabolizes normally. However, when mechanical support of these organs stops, even though this support continues, it is certain that these organs will cease to function very soon-and then "classical" death will come. That means it is possible to have a short period of time between cerebral and "classical" death (4) during which there is no brain function at all but some organs still work for a little – always by means of mechanical support.

Thus, the adoption of the term "cerebral death" has created a confusion to the public opinion, according which there are two kinds of death (5): this happens because, in case of a non reversible damage of the brain stem, physical presence of the human body and technically supported heart and respiration functions give the wrong impression that human being still exists. However, intellectual possibilities such as intelligence and perception as well as capacity for autonomous respiration do not exist anymore. The diagnosis, therefore, of the total and irreversible destruction of the cerebral stem means a death diagnosis.

As this point, it is necessary to clarify that the case of people called "plants" is totally different: these individuals are not dead: their brain stem still works – for this reason their respiration and blood circulation are self-reliant, that means without any mechanical support (6).

The wrong distinction between death and cerebral death is very important as far as it concerns transplantations, since the organs can be taken only by a decerebrate donor.

Thus, a wrong impression has been set: "classical" death has different consequences from cerebral death: the decerebrate donor is not completely dead since he is the only one who is able to be a donor. A brilliant jurist considered that "the question arising from transplantations is very serious: in this case a physician who attends to a patient believes that he is alive if his heart keeps on working. On the other hand, a physician who is interested in his organs for transplantation purposes considers that the same patient is dead" (7). Another one thought that "...concerning heart transplantations there is a rule according to which the person from whom the heart is taken off must be so dead as it is necessary –but his heart must be as much alive and strong as possible...".(8)

Unfortunately, it is quite regrettable that even nowadays public has not been convinced yet that death is one and unique without further distinctions. Medical science agrees that death is "the irreparable loss of the capacity to use consciousness as well as the irreparable loss of automatic respiration capacity" (9).

At this point, it is interesting to underline that one definition for death emanated from law science deletes the distinction between death and cerebral death and clarifies that "a person is dead since the non reversible pause of both blood circulation and respiration functions has medically been established. In case of their mechanical support since the non reversible pause of all cerebral functions, including these of the brain stem, has been established" (10).

### **b. Death certification according to greek legislation**

Law 344/1976 concerning registrations provides that for the issue of a death certificate a justified certification of death is necessary. This certification must be done by a physician, either by this who had attended to the patient or by another one set by the police authorities. If the above mentioned persons are absent, certification can be done by police authorities only.

In this certification the physician has to declare the probable cause of death. He has to mention the initial illness as well as the final symptom that caused the death. If a physician violates this legal obligation he is punished by a six months imprisonment or by fine or both (11).

The purpose of this strict regulation is obvious: punctual definition of time of death is very important for law security – this, because very

important legal consequences arise from death : succession, non existence of an action against a dead person, non-existence of a judgment against a dead etc (12).

If death is caused by a heart arrest , the above mentioned regulations are applied. However, if death is caused by a non reversible destruction of the brain stem, then law 2737/1999 has to be applied. Thus, when the physician who attended to the patient makes a diagnosis of brain stem necrosis, if some organs functions are preserved by technical means he has no right to make the death certification by himself only. Instead, he has to collaborate with an anesthesiologist and a neurologist or neurosurgeon for this certification. Physicians-members of the transplantation team are absolutely forbidden to participate to the procedure of certification.

This regulation was criticized (13) not only by eminent jurists (14). At first, because the term "necrosis" of the brain stem is wrong: the physician is not able to make a diagnosis of brain stem necrosis: for such a diagnosis a concrete microscopic picture of histologic and pathologoanatomic preparations is necessary. Therefore, the term "non reversible destruction of the brain stem" seems to be more proper(15).

Secondly, according to the law provisions, the above mentioned diagnosis has to be made only by one physician, this who attended to the patient. However, according to a firm legislative practice in Europe-an Union countries (16), clinical and laboratory tests for the establishment of the non-reversible destruction of the brain stem are made by two physicians work independently. In others an unanimous diagnosis for the issue of death certification is required.

It must, also, be noticed that the phrase "since the functions of some organs are supported by medical means" is wrong. In fact, there is no case of a cerebral death diagnosis without technical support. If the last one does not exist, death is established by respiration and blood circulation pause. This specification, therefore, should be completely erased: the word "since" should be replaced by the word "eventhough" (17).

## **2. The human body after the end of life: legal qualification.**

Legal qualification of dead human body was a question that many theories tried to affront in the past. Is it an element of the human personality or is it a simple "thing" according to the law of property, just an object with material substance that can be transferred to other people?

According to a theory, dead human body is a "thing" but the possibility for its transfer to other

people is quite restricted as burial is its exclusive destination (18).

Another opinion supports that dead body is a "res" (:thing) out of transaction : that means that it cannot be transferred to somebody as an inheritance or legacy (19).

A third opinion alleges that dead body is a "res out of transaction": however, sometimes a sort of right to use, incision or amputation for scientific purposes can be set on it (20).

Finally, according to another suggestion death makes the human body a "res nullius" that is a thing which belongs to none (21).

However, the opinion that seems to be more compatible with law of personality is that according to which the dead body is "a remains of the human personality" (22). In fact , there is no provision in the greek law that seems to consider the dead body as a "thing" or even a "res nullius". On the contrary, formulation as well as teleology of all legal provisions referring to human body point out that the greek legislator consider it as a "remains of the personality" of the individual who lived in it before his death.

## **3. Legal protection of a person after the end of his life.**

### **a. Protection of the dead body as a "remains of the personality" : penal provisions.**

Greek Penal Code includes a number of provisions relating to the dead human body, pointing out that the penal legislator has adopted the above mentioned theory according to which body is a remains of the human personality.

Thus, article 201 defines that if someone takes arbitrarily a dead body or parts of it or its ashes from those who have in relation with the above mentioned body or parts or ashes or a grave is punished by imprisonment going from ten (10) days to two (2) years.

At this point it must be clarified that if inquiry authorities take a body for postmortem autopsy purposes, even if relatives do not wish this autopsy, this action is not a criminal offence (23).

An offensive or insulting action is one which shows gross contempt to the dead or his grave (24) – generally speaking, every action that offends public sense of respect and devoutness for the dead (25).

Greek courts have judged that an indecent assault on the dead body of a woman which was guarded in the morgue constitutes a reviling action on the dead body (26). However, videotaping the last moments of a person and publication of them after his death does not constitute a reviling action on him (27).

According to the article 373 of Penal Code, everyone who commits a grave robbing in order to acquire

illegally property benefits is considered to commit a theft.

Taken articles can be either those that had been used for the dead's dressing or even artificial parts of the dead body such as golden teeth (28). This act is punished by imprisonment going from three (3) months to five (5) years- if taken articles are particularly precious imprisonment may range from two (2) years to five (5) years.

Article 443 of Penal Code provides that:

a) everyone who buries or dissects a dead body without the required permission of police authorities,

b) everyone who contravenes the provisions concerning the prohibition of premature burial or eliminates a dead body or dissects it is punished by a fine or a three (3) months imprisonment.

Elimination is the act because of which authorities get incapable to make an autopsy to the dead body (29) and can be done by burning of the last one (30).

These provisions have been set in order to avoid concealment of criminal acts as well as accidents due to premature burials.

### **b. The dead body as an object of donation by the person who lived in it.**

Everyone, while still alive, can express his will to donate his body or his organs after his death for experimentation or transplantation purposes. This is the so called posthumous right to self -deter -mination which is considered to be a specific post mortem expression of the right to free evolution of personality (31).

Husband's or companion's consent to the their wife's or companion's artificial insemination constitute such an expression too, when this procedure concerns a post-mortem insemination, that is after their death by means of their sperm specially preserved for this purpose (32). To make sure that this consent is absolutely valid, law provides that consent must be given through notarial deed only.

### **c. Protection of the dead person as organs and tissues donor.**

It is easy to understand that is not possible to remove tissues or organs from a dead body without the consent of the person which (: consent) had to be given while this person was still alive. Moreover, this consent must have been given freely and consciously during his living either expressis verbis (:explicitly) or by non refusal according to the system in force in every country which concerns post mortem organ donation (33).

According to article 12, paragraphs 2,3,4 and 5 of law 2737/1999 relating to "human organs and tissues

transplantation" the prerequisites for an organ removal are the following: "...organs removal can be done only if the potential donor had already consented to this procedure while he was still living. This consent must be written. Removal is absolutely forbidden if this person had expressed his refusal to give his organs while he was living through a written document, during every census adults can note in a specific document transmitted to the National Organization for Transplantations (34) if they consent or not to the removal of their organs for transplantation purposes after their death (...) if the potential donor had not expressed his consent or refusal, removal can be done only if his wife / her husband, his/her major children, parents or brothers and sisters consent to this procedure. Consent or refusal are always freely revocable. Consent or refusal are given always by majors who have legal capacity and can express freely their will". That is the greek legislator adopts the relatives' consent system to remove organs for transplantation purposes.

In our opinion, criticisms against these provisions are not proper. In fact, according to one opinion (35), greek law does not clarify whether relatives who can express their objection to organs removal are defined according to their more or less relationship with the donor. The same opinion considers that relatives are noted upon their more or less close relationship with the donor. Thus, the following question must be answered: what will happen if the husband or wife consents but a son or sister refuses his/her consent? Law 2737/1999 Preamble (36) explicitly defines that there is no priority order among relatives mentioned in this provision- the equal protection of their personality implies this solution. Therefore, our opinion is, whoever the refusal is, organs removal is absolutely prohibited.

In contrary, a point that has to be commented is the formulation of the Preamble according which "the obligation to inform relatives exists only for a proper period of time". This provision is obvious and reasonable because, even if some organs are mechanically supported, they cannot keep on working for a long time - and then there is no question of removal any more. However, a large part of the public opinion seems to have some objections to this provision. In fact "...every foreigner, immigrant, unknown or abandoned decerebrate...who happens to be in a hospital after an accident, without relatives at all, is automatically considered as a donor". This opinion pretends that, in case, "not refusal" constitutes "a coercion of the conscience".

In spite of objections that can be formulated with this point of view, the fact is that it seems reasonable and true.

Furthermore, law does not clarify what happens when the decerebrate has distant relatives others than

these mentioned by article 12, paragraph 4: uncles, for example, cousins or nephews. In these case physicians may wonder what to do: should they have the right to or are they absolutely prohibited to proceed to organs removal no matter if these distant relatives consent or refuse this procedure (37)? In fact, this question can emerge –and then either precious organs may be lost or a question of civil and penal liability of the medical team that operates organs removal may arise with very serious consequences not only for this team but also for the hospital where this operation takes place (38).

In any case law formulation causes many obscurities which must be clarified in the future. It is suggested that the recourse to relatives' consent does not constitute the best solution to problem of organs' lack due to relatives' refusal (39). The most proper solution to this problem seems to be the adoption of a system called "the explicit refusal": everyone is considered as a potential donor if, during his whole life, he never expressed any objection to his organs donation after his death. Several researches have pointed out that in countries which have adopted this system only a minimum rate of the population expresses its explicit refusal (thus, e.g. in Belgium this rate is lower than 1,5%). On the other hand quite satisfactory results regarding organs disposal have been obtained (more than double rate in comparison with other countries (40).

#### **d. Posthumous legal protection of other expressions of human personality.**

Penal and Civil Code are specially referred to the protection of the personality of the dead person. Thus, according to article 365 of Penal Code anyone who infringes upon the memory of a deceased by vulgar or malevolent insult or by defamatory insult is punished by punishment going from ten (10) days to six (6) months. In this case, deceased's spouse and children and, if not existed, deceased's parents and brothers have the right to claim the punishment of the person who has committed this infraction.

According to article 57, paragraph 1 alinea b of Civil Code, in case of offence against the personality of a dead person his/her spouse, descendants, brothers, sisters and heirs have the right to claim the abrogation of this offence.

Regarding the above mentioned enumeration, this must be considered as indicative (41). In fact, it seems quite reasonable that everyone who was close to the dead during his life must have the right to claim the abrogation of every offence against his memory. However, it is quite probable that may exist persons not expressly noted by the law, who yet are very close to the deceased. The existence or not of a more or less close attachment is a question that must be resolved

by courts. In any case the fact that somebody is a testamentary heir, although he is not an intestate one constitutes a criterion of close attachment to the deceased.

It is easy to understand that some expressions of the deceased's personality do not need to be protected any more as they do not exist any more. This goes for life, body integrity, health and emotional world. However, some others, such as honour as well as privacy can be offended even after the end of human life. In these cases, persons who are authorized by the law to intervene in order to obtain the deceased's protection can act by use of means that the deceased would have used if he was alive. Thus, if courts have to decide about the legacy of the publication of a photograph or the correspondence or the archive which belongs to a (usually famous) dead person, they have to check if the deceased, when he was still living, had expressed his objection, when he was still living, had expressed his objection to such a posthumous publicity of his personal data or he had consented to this (42).

#### **Conclusion**

As it is already has been shown the greek legislator applies all constitutional imperatives for protection of the human merit even after the end of human life. The contradiction between the imperative for post mortem protection and the necessity for transplantation promotion seems illusory: when the public opinion is ready to accept the new bioethic necessities the future legislator must proceed to the appropriate changes in order to keep on protecting human life without degrading legally its end.

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