

THE RIGHTS OF SCIENCE AFTER DEATH

It is with fear that one approaches anything closely or distantly related to the idea of death and the dissection of a body which has held life. To some, giving one's body or an organ is a "taboo" subject. And yet numerous transplants can only be conceived of by starting from a corpse from which one removes the liver, the heart, the lungs, the kidneys, etc... It is thus, for example, that between 15th March 1963 and 15th March 1965, 196 kidney transplants were registered in the world, taken from corpses, with 35.7% of successes.

Again, it is absolutely indispensable to have the use of human corpses for dissection in the teaching of anatomy in faculties of medicine. To what extent does the use of corpses to these scientific or therapeutic ends represent a breach of the cult of the dead or a violation of burial rights?

Belief in the continuation of the personality of a dead man and affection towards the departed, or merely a feeling of social fellowship, lead to the universal practice of funerals. One can add to the various definitions of Man, "Man is a creature that buries his dead with solemnity." This statement is valid whatever the method of burial: whether it be inhumation, cremation,

Translated by Sally Bradshaw.

immersion, ritual exposure which allows carnivores to eat the corpses, or anthropophagic burial, which is still found among the Guyaquils of the Equator and in the Solomon islands. If funerals have the indubitably hygienic aim of making the corpse disappear, as well as the sociological aim of giving social groups a chance to get together and affirm their stability and continuity, they are also invested with a therapeutic value: the possibility of making a physical expression of the excess of emotion occasioned by the bereavement, the sharing of sorrow, etc... This ancient idea of the cult of the dead is one of the factors which can explain hostility towards the removal of organs from corpses for therapeutic reasons, or, even more, towards the donation of the body to a scientific end.

It is also appropriate to refer to the notion of the violation of burial. The cult of the dead and the respect that is owed to them do not remain in the realm of pure ideology: these feelings have always been set about with sanctions. The concern for respect towards the dead is still expressed in a formal clause of the penal code.

An exposé of the principles of the aforementioned code, which dates back to 1810, recalls that the law protects Man from his birth (and even from his conception) until his death and that it does not desert him at the moment when he has ceased to live. One may also read there that the legislator wanted to punish "those who, without respect for the last sanctuary, violate burials, disturb the ashes of the dead, or desecrate tombs." Article 360 of the present (French) Penal Code punishes "anyone who is found guilty of desecration of tombs or graves, without prejudice to the crimes and offences which may be added to these" with from three months to one year's imprisonment, and a fine of from 500 to 1,800 francs. To be defined as an offence of desecration of graves, demands an act which desecrates the respect due to the dead; no matter whether the act is committed on the corpse before or after inhumation, or on the tomb which houses the remains.

Besides the notion of the violation of burial there is also the distaste aroused by autopsies, which are the preliminary stage before any organ can be removed after death. The phobia goes back to the beginning of time, and represents a reaction against what was supremely impure: "touching a corpse." And the term

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“autopsy” means to the public a medical procedure designed to establish or refute criminal intervention in a suspicious death, although clinical autopsy is nothing like a dissection, does not disfigure a corpse, and is done so that anatomical lesions can be compared with clinical observations, and so that the transplant organ can be removed in good condition.

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To what extent does the use of corpses to scientific or therapeutic ends not conflict with the principles set out above, and become permitted? The academician Jean Rostand has placed the problem excellently by saying: “Just like the living body, nowadays the corpse is of value simply because of the advances in the science of biology. In the words of Prof. Dierkens, it tends to take on “a greater and greater importance in the world of the living,” since one can take organs, tissues, tendons, arteries, etc. for grafting purposes from it, for “dead grafting,” or “biological prosthesis,” and, finally, organs (for example, the pituitary gland) which contain precious irreplaceable hormones: certain pituitary secretions, which can cause children to grow, or stimulate ovulation in sterile women, can only be taken from human glands. But if a corpse may be the source of organs, of therapeutic principles which have a high value to the living—and this must to some extent be at the sacrifice of the principle of “the corpse’s inviolability”—the corpse must nevertheless be respected as a “purveyor of cultural values;” it cannot, under any circumstances, be handed over or sold even in part, and any attempts made upon its integrity can only be tolerated insofar as they arise from generous intentions directed towards high and positive ends: clinical, scientific or didactic ones.”

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First of all let us examine the religious and moral point of view. To the Catholic Church, the intangibility of corpses is not dogma. On the 13th May, 1956, Pope Pius XII formally declared as much at a congress which dealt chiefly with the problem of keratoplasty. His argument has a much wider bearing than on the gift of the cornea alone, since it deals with the actual

principle of all breaches of the integrity of a corpse made for medical reasons. The Supreme Pontiff proclaimed:

“With relation to the deceased from whom the cornea is removed, he is not robbed of any rightful possession, nor of his right to any possession. The corpse is no longer, in the true sense of the phrase, a being that has rights” ... “This does not mean that, in fact, there could not be, or is not, a moral obligation, prescriptions or prohibitions, towards a man’s corpse” ... “A body was once the dwelling-place of a spiritual and immortal soul, an essential and constitutive part of a human being which shared his dignity; something of that dignity still invests it: a dead man’s body is intended for Resurrection and eternal Life!” ... “On the other hand it is true that medical science and the moulding of future doctors demands a detailed knowledge of the human body, and that corpses are in demand as subjects for study. Our comments are not in opposition to this; this legitimate course may be taken!

“It is necessary to educate the public and explain with intelligence and respect, that consent to serious breaches of the integrity of a corpse, whether explicit or tacit, in the interest of those who suffer, when there are valid reasons for it, does not offend the piety due to the deceased. In spite of everything, consent may prove a pain and a sacrifice to close relations. But that sacrifice bears a halo of merciful charity towards suffering brothers.”

On the occasion of a talk entitled “Heart transplant and the human person,” given at the Academy of Moral and Political Sciences, the Reverend Fr. Riquet, alluding to the achievements of Dr. Barnard and his emulators, said: “They have embarked on a venture which can only be justified by genuine love of humanity.” And he declared: “Thus no moral principle or religious idea is in opposition to these transplants of organs, of which the recent heart-transplant seems the most spectacular, but which started with the kidney, and by the aid of which, as we know, through a series of lucky experiments, lives which had been hopeless have been saved and transfigured.”

Pastor Marc Boegner, who was present at the meeting, said that he was entirely in agreement with the speaker, and established that from the biological and theological point of view, there is no fundamental objection to the pursuit of medical and

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surgical experiments which might lead to the preservation of human lives.

Chief Rabbi Koplan has expressed the agreement of Judaism with what was said by a representative of the Catholic Church. The agreement is not surprising considering the common patrimony of the two religions. In his opinion, the question of the criteria of judging death should depend upon medicine. He added: "Transplants are in conflict with two interdictions of the Jewish religion: not to interfere with a corpse, and not to profit by a corpse. But it has been admitted that one might infringe these two prohibitions when it is a matter of saving a human life."

René Cassin has, in his own way, underlined the agreement between the ideas of Reverend Father Riquet, and the movement of positive international law. "The last treaty of the Rights of Man, adopted in 1966, contains principles concerning experiments upon the human body which are in accordance with those which have been expressed," he adds. "The approval of the authorities like that of Pope Pius XII, carries a great deal of weight for the international commissions." There is nothing more significant than the warm welcome given to Dr. Barnard by Pope Paul VI. When the latter paid a visit to the Vatican, the Pope encouraged the Cape doctor to persevere in his efforts towards the improvement of surgery in the interests of suffering humanity.

We can do no better, concerning Islam's point of view, than to define it by quoting a passage from a letter recently addressed to us on the subject by Si Hamza Boubakeur, the rector of the Paris Islamic University: "Islam, both in doctrine and in jurisprudence, and by reference to its ancient doctors, legislators, and theologians, is reticent and even hostile to heart transplanting at present, on account of the disrespect for the integrity of the human body which it implies, and also on account of the risks, and the fragmentary nature of the information extant about so vital a problem."

Let us mention that the French regulations pay scrupulous respect to this point of view. In fact, several memoranda forbid removals from the body of a person who belonged to the Islamic faith.

Finally let us quote Savatier, who, in the circumstances, speaks more as a moralist than as a jurist: "It is no disrespect to a

corpse to revive its component parts by grafting them onto a man to save him. For, in the hierarchy of values, those which one preserves in a living man are higher than those of a corpse, which, deserted by the spirit, returns to dust. The memory of the personality which animated it is the only thing which distinguishes it from an object. And it is a fine thing in one who survives this memory, to have given his remains to living men when he dies, so that they can save their lives.”

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It has also been claimed that the Catholic Church is in opposition to autopsies and dissections. What, in fact, is the situation? It is not surprising that Christianity should have been subjected to the heritage of several religions which preceded it, and should have demanded respect for corpses, as witnesses to what the body was before death, and, in the words of Saint Augustine, as the “temple of the soul.” It is natural that its own beliefs should have prompted it to take up secular reverence for the dead on its own behalf. And one must recognise that, at the present time, the Catholic religion has still not managed to dispel the unreasoned fear of the dead and their reprisals harboured by all its practitioners. Be this as it may, it is a fallacy that the religious authorities have systematically forbidden autopsies. It is true that Boniface VIII, in the bull of 18th February 1300 *de Sepulturis* condemned a bizarre custom, of German origin, which consisted in the removal of the entrails from famous people who died far from home, the cutting up of the corpse and boiling of it, and the removal and interment of the flesh. The skeleton alone was then sent back to the dead man’s country. During the crusades, this custom became more frequent. The mortal remains of Frederick Barbarossa met this fate in 1190; likewise Saint Louis, after his death in Tunis in 1270. This interdict against “unfleshing” is really the only intervention made by the Church in this domain. It is perhaps worthy of note to recall that when Saint Francis de Sales thought his end was near, he bequeathed his body to science.

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Let us leave the realm of religion and deal with law. The following remarks are chiefly related to French law, but cannot be

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irrelevant to a foreign reader, particularly as, with a few rare exceptions, legislation in this field is usually non-existent or very scanty. Is it compatible with our legislation to donate a corpse to the benefit of an anatomical institute, or to remove organs from a corpse for the purposes of transplantation? The problem should be examined from three angles:

- the rights of the individual over his own corpse;
- the rights of the family over the corpse of one of its members,
- finally, the rights of third parties over a corpse.

I - Concerning this last point, we are no longer living in the time when Vaugelas bequeathed his body to surgeons to release himself from his debts. His will stipulated that if all his creditors could not be repaid, "in that case, my last will is that my body be sold to surgeons at the greatest possible price, and that the proceeds be used towards the liquidation of the debts I owe society, so that if I have not been able to be useful during my lifetime, I should be so after my death," he wrote. In the XXth century, to say that a person's corpse evades his creditors sounds like a truism. And yet a judgement of the first court of the Tribunal de la Seine, dated the 20th December 1932, had to recall this principle, and say that if the bodies of the deceased are, as far as funeral enterprises are concerned, the object of fruitful exploitation, this in no way alters the fact that, in strict matters of law, it does not bear the character of an object which exists in commerce and which is susceptible to private appropriation. Thus an undertaking business can have no right of retention over a body it is carrying. It was judged that in holding a body in order to obtain the payment of its expenses, the firm had committed an offence liable for payment of damages to the family of the deceased. In the case in point, the firm had wanted to make the return of the corpse dependent upon the settling of a bill whose amount was in question. The company was compelled to pay a sum of 10.000 Francs damages.

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II - Concerning the individual's rights over his corpse, an Order of the French Court of Appeal states that everyone may dispose of his body, in the same way as one disposes of one's estates,

even if "the corpse is not an object of business." In a decision made on 3rd July 1899, the Belgian Supreme Court of Appeal, for its part, declared:

"A man, master of himself during his life, disposes freely of his remains for the time when he will cease to be." A man is free to lead his life according to his religious or philosophic ideas. It is also in order to insist that his wishes concerning his remains should be respected and carried out after his death.

The 3rd article of the Law of 15th November 1887 concerning the freedom of funerals prescribes that "Any major or emancipated minor in a state to make a will, may establish the conditions of his burial, in particular concerning the civil or religious character they wish it to be given, and the *method of burial*." From this text, it is deducible that all men are free to dispose of their bodies, whether they demand inhumation or incineration, whether they bequeathe their remains to an anatomical institute, or give their eyes to an eye bank. The validity of these last two clauses probably requires that they should be subject to the general rules provided by the Civil Code under articles 969 - 971. In other words, an individual's last will and testament should be expressed in terms conformable with the law, that is to say *in the form of a will*, at least in principle.

It may be admitted that the non-respect of the wishes of a person, notably when the gift of body or eyes is in question, is liable to fall under article 5 of the document just quoted. This punishes with a fine of from 500 to 1,000 francs, and in the case of a second offence, with 2 - 5 years' imprisonment, any person who has given an individual's funeral a character which went against his wishes.

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The gift of a body to an anatomical institute constitutes an act of generosity towards one's fellow men. The faculty needs corpses for the training of future doctors. There has always been a dearth of them. Everyone knows about the difficulties into which the illustrious Rabelais got himself in Lyons by dissecting bodies of doubtful origin. He did not persist, considering that "the state of medicine is far too melancholy, and the disciples of Esculapius stink of clysters like a lot of old devils"...

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Nearer our time, in the XIXth century, Professor Knox, a distinguished anatomist from Edinburgh University, experienced the same dearth of bodies. So he approached two purveyors, a certain Durkeel and a certain Hare. These two, to satisfy the illustrious professor's demands, strangled about sixty old and infirm people in nine months. The affair was discovered. Doctor Knox lost his students, and the purveyors were punished by being publicly dissected...

The gift of one's body to an anatomical institute is an undeniable social aid. One could not, therefore, consider it to be against public order or good morals. It would be a different matter if a person asked that his remains be given to animals as food, or if he made a contract to sell his remains. In the same way that a person cannot sell a kidney or part of his skin during his lifetime, it is not legal for him to claim a sum of money in exchange for his corpse. It can only be a free action. And all this simply because the body and the corpse constitute extra-patrimonial goods, which are therefore outside the province of commerce.

The gift of eyes, after death, of course, towards a keratoplasty or corneal graft, was made official in France by the law of 7th July 1949, voted on the initiative of the minister Bernard Lafay. This document contains one solitary article expressed thus: "Anatomic removals effected upon men for the purpose of keratoplasty (corneal graft), may be carried out *without delay and in the place of decease*, whenever the individual has bequeathed his eyes by deed of will to a public establishment or a private institution which practises or aids the practice of that operation."

"In such a case, *the reality of the death must have been previously established by two doctors*, who should employ every procedure considered valid by the Ministry of Public Health and the population. They must sign an *official record* of established decease making clear the date and hour of death, and the procedure employed to confirm its reality."

We have stressed the absolutely disinterested nature which should invest the gift of one's body, one's eyes, or an organ. But, occasionally, the donor lets it tentatively be known that he would not be averse to a just reward, some humble aid. We read in a letter addressed to the Medico-Legal Institute of Lyons "I would be very happy if my skin was bought, as I want to

sell it, if it is possible, it would give me great pleasure..." I need not say that such an appeal would be in vain. No payment can be given for this transaction; and besides, the undertaking to leave one's body is essentially reversible at any moment; such an undertaking would be null and void if it took on an onerous character. "The pound of flesh can have no price!"

All nations do not share this point of view. In the United States, there is still a disposition which holds that buying a corpse is a respectable form of acquisition. It may be paid indirectly by the granting of indemnities or by tips to the operating-theatre personnel who might procure a corpse. In the same way in Sweden the sale of corpses is authorised. Sometimes this leads to complications. In this way a poor fellow who had sold his body to the Royal Institute of Anatomy and subsequently made a fortune, regretted what he had done. In 1955, he introduced a court case to liberate himself from his commitment. It went ill for him, since he was defeated and even condemned to pay a fine because he had had some teeth taken out without previous permission...

The body trade is nonexistent in France; this has not prevented a certain sensationalist publication from insinuating that France buys corpses for the purposes of dissection. One weekly even upheld that "France buys corpses from abroad to obtain foreign exchange." Let us clarify: commerce is authorised only for skeletons. The firms which specialise in this trade buy from the underdeveloped countries.

In Japan, the law has, as in France, admitted the legality of keratoplasty. However, the operation may only be done with the permission of the deceased's family. Relatives are contacted by a middleman who may claim a commission. He is recommended—in typically Japanese fashion—to act with the greatest courtesy. Only those who are duly recognised have the right to intervene. To obtain that recognition, they must produce every kind of guarantee of good morals, and "a programme of commercial activity for the three coming years..."

The gift of one's body to a faculty of medicine is generally inspired by very noble sentiment. We have in mind the foreman who had worked very hard towards the construction of the new Paris faculty of Medicine. He left his body to it, wishing to end where he had worked so many years. There are less pure aims,

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for example the gesture made by the widow who hoped, by not lying beside a disliked husband, to pay him a last bad turn...

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III - The question of the family's rights over the corpse of one of its members is more delicate. Although a corpse is no more than a mass of dead tissues, it continues to represent a moral value. This cannot fall to the dead person's succession like a vulgar piece of material goods. As Professor Dierkens has very rightly underlined, the right of the family over a corpse is not a proprietary right but an extra-patrimonial right, whose principles lie in the bonds of consanguinity and feeling. How free the members of the family are to dispose of the body varies according to what measures the deceased has or has not taken in this respect. The desires of the deceased concerning his remains have first hearing; thus they are imposed upon his relations.

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Let us suppose that an individual has expressed no desire. Indeed, it is improbable that he should express one on his admission to a hospital which he hopes to leave cured. To ask him such a question on his arrival would be against the most elementary humane feelings, and would probably come up against stiff refusal. In this event, the family can dispose of the body, and, for example, give it to an anatomical institute, or authorise removals. For example, here is a moving story taken from a paper in February 1970:

"Paul-Henri's kidneys were given to two people last night: they were a young man of twenty-three, and a man of forty.

It was yesterday morning that a telephone call brought the news to the mayor of Saint Lézin (Maine-et-Loire). On the telephone was one of the four friars of Abbé Fribault. Abbé Paul-Henri Fribault's 4-L was overturned on Tuesday night at the entrance to the village where he had just attended his grandmother's funeral. He had a fractured skull. He was taken in a coma to the Saint-François Clinic in Cholet, but could not be revived. In a state of clinical death, he was kept alive thanks to modern scientific methods.

A nun asked his parents if they would consent to the removal of their son's kidneys.

"If we had been able to ask his permission while he was still alive, we are sure he would have agreed with joy," explained M. and Mme. Fribault. "If we had not agreed to this sacrifice, I think we would have felt remorse for the rest of our lives."

It certainly must have been a sacrifice for these grieving parents to see their son, whose heart continued to beat artificially, transported in an ambulance like one who is merely wounded, then taken in an airplane, and maintained in a state of apparent life as far as the Necker Hospital. There Professor Jacques Crosnier's team had to choose, among the 170 sick people treated by artificial kidney in Paris, the two who were most like the donor."

Again, a newspaper article dated the 21st April 1970, informs us that a carpenter from Isère had had his kidneys grafted in Cologne and in Copenhagen. They were taken to these countries by airplane. And a kidney from a young Swede who died in an accident at Uppsala was transported express by air to London, and transplanted into a man of 30. So international co-operation is beginning to bear fruit. Paris-Transplant, France-Transplant, Euro-Transplant, that is to say, virtual banks for organs have been created on the scale of the capital of France, and even of Europe, with the aim of centralising the demand for organs by the help of an index-system of the characteristics of possible recipients. All this could only be undertaken with the help of the air-line companies. But it would be premature to imagine a real European transplant pool, while a means for preserving organs for several days has not yet been discovered.

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Disagreements may arise among the members of a family. Who should be listened to? In general, priority is given to the one who is supposed to have been most closely bound to the deceased, and who would therefore know his wishes best. This, then would be the surviving marriage partner. Supposing that the partner is already dead, or that the deceased is a bachelor, then in principle the rules governing the devolution of successions will be adhered to. Supposing the deceased died in a hospital where transplants can be effected, one would not expect the

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doctor who wished to effect a removal for therapeutic purposes to obtain the consent of all the members of the family. We must not forget that it is an urgent matter! Nobody is unaware that a transplant demands great speed. A heart, or a liver, or kidney, will only tolerate a very short period of ischemia, or absence of blood circulation.

The French parliament recently discussed a legal proposal which provided that the decision to authorise a removal or to donate a body ought to carry with it the "written permission of all those possessed of legal rights." This legalistic project arises from an incontestably humane impulse, but is unfortunately chimerical. How, when it is necessary to operate within the hour of decease, can one obtain the necessary information about the family situation of an unknown victim of an accident, contact his relations, who may live at a distance, and ask them for a document? All this can not be more than vain, and is likely to impede the salvation of human lives by an excess of formalities.

Professors Dubost and Hamburger have announced that "What is necessary is not to have to discuss this problem at the moment of death: it is awful, painful, inhuman!" Professor Graven, on the occasion of a recent conference organised by opposing magistrates, expressed himself as follows:

"One must remember that it is particularly painful to present a family under stress with such a problem, at a time when it ought to be able to claim a right to peace and self-communion." It is because of this that a decree dated 20th October 1947 ordains:

"...in hospitals figuring upon a list drawn up by the Minister of Public Health and Population, if the chief doctor judges that a *scientific or therapeutic interest* demands it, an autopsy and the removal of organs may take place *without delay*, even in the absence of authorisation from the family. In this case, the death must be confirmed by two doctors of the establishment who must employ all reliable methods recognised by the Minister of Public Health and Population, to establish the reality of the demise. They must sign the declaration of confirmed death, relating its hour and date. A document will be drawn up by the chief doctor establishing the motives and circumstances of the operation."

However, there are *restrictions*: there will be no procedure to an autopsy nor to any removal if those operations might impede a legal autopsy, or if the deceased died as a result of an accident at work, subscribes to the Moslem faith, or has the status of war-victim: in this last case it was the intention both to pay respect to the remains of old soldiers, and to protect the military authority's rights in the case of uncertainty over the cause of death.

During the course of a recent broadcast on television a film by Cayatte called *We are all Murderers* was shown. During the ensuing discussion, which dealt with the advisability of abolishing or keeping capital punishment, several speakers suggested that removals were systematically carried out on the bodies of condemned men immediately after the execution. This is quite untrue. In fact, the Minister of Justice does not consider that he has a right to allow autopsies, even in the cause of the promotion of scientific research, on the bodies of the executed, *without the authorisation of their family*; his position is defined in a circular which appeared in the compilation of administrative acts of 1st July, 1951.

The decree of 20th October 1947 which *presumes the family's consent*, met with a lot of criticism. Several authors wondered whether a mere decree could authorise removals without the express consent of close relatives. There was talk of "official rape of corpses," of "blasphemous" legislation, of "functionalisation of death." It was hinted that the so-called scientific interest concealed the need for corpses for medical students, that hasty autopsies followed by removals were perhaps resorted to as a way of concealing the surgeon's ineptitude... The phrase "wall of documents" was used.

Some feared that, relying on the decree, practitioners desiring to effect grafts or transplantations did not take sufficient care to assure themselves of death. Pommerol wrote in 1935, "It is to be hoped that the unfortunates who are autopsied or dissected after their deaths were painstakingly cared for until their last breath, and that no criminal or negligent hand provoked or speeded their death by action or omission, with the intention of providing the sawbones with flesh for autopsy."

In the case of urgent autopsy, it is certain that the mere certificate of decease would not be a sufficient guarantee of the reality

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of death. It is recommended in these certificates that, as far as possible, the cause of death be given. The doctor could not be satisfied to write: "He fell ill and died." Some old certificates discovered in Nebraska, and quoted in that state's medical journals included some original formulae: "He went to bed healthy and woke up dead" — "I don't know, he died without the help of a doctor" — "He had never been mortally ill before..."

We should be getting beyond our subject if we tackled the great problem of the determination of the moment of death. Let us merely point out that a *circulaire* never published in the *Journal Officiel* (and therefore to be considered the most modest of legal sources) dated 24th April 1968, defined the conditions under which the decree of 20th October 1947 should apply. — It confirmed the authorisation of the practice of autopsies and removals when those operations are justified by a therapeutic or scientific advantage. At the same time, concerning tests of death, it added to the classic methods of arteriotomy, Icard's fluorescein test, and the ether sign, another test: determining by encephalograph the destruction of the central nervous system, which is universally acknowledged as establishing the irreversibility of lesions incompatible with life. Let us note that this memorandum gives no legal definition of death. It limits itself to imposing a certain number of precautions to be observed by the medical profession before they formulate the diagnosis of death. In effect, the diagnosis of death is left to science and to the conscience of the doctor.

But let us return to the problem of the need for the family's consent to the removal of an organ, in the case of a lack of indication of the person's wishes. We have just shown that according to the laws in force in France, a surgeon wishing to perform a transplant may do without the family's consent when there is a therapeutic or scientific interest involved. In fact, these men of the profession do not feel sufficiently protected by the decree of 20th October 1947 and the almost clandestine circular which we have just discussed, as both presume the family's consent. In fact, they fear being taken to court. If our tribunals have not until now had experience of such litigation, this is not so abroad. The press informs us that some Japanese surgeons who had performed a transplant operation were sued. The same happened in Argentina. An eminent German surgeon,

Professor Gütgemawn, is at present sued for damages of 32,000 D.M. by a widow and her daughter on the ground that the removal of the husband and father's liver was carried out without their consent. In Rome, the famous Professor Stefanini, whom we have approached, and his assistants, are being prosecuted for having removed a kidney without respecting the necessary 24 hours delay demanded by Italian law for the establishment of clinical death.

Thus our surgeons now only think it prudent to act with the express authorisation of the person's family. It follows that many "donors'" bodies are useless. Let us suppose that a young inhabitant of Brive-la Gaillarde should be the victim of a fatal traffic accident in the Place Clichy in Paris. His family tree is unlikely to be found on his person. So how can his family be contacted before removing his kidneys which might restore life to ill people whose lives are irremediably forfeit without a transplant? We must not forget that in Paris alone two hundred gravely ill people await kidney-grafts.

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This situation cannot go on. What surgeons not only in France but in several countries where there is no legislation in this field require, in order to be able to proceed with transplantations *ex vivo* or *ex mortuo* in complete security, is not a decree or a quasi-clandestine memorandum, but a law, voted by parliament after public discussion. This future law could only confirm the principle of the presumption of the family's permission for a removal, on the understanding that the person and his family could express their opposition to the operation, and that in such a situation, it would not take place.

Several arguments are in favour of this idea of the presumption of consent:

— The hope of saving a human life is surely more worthy than a feeling of reverence towards a dead person? Professor Savatier, in *The State of Necessity*, writes "This again justifies an act which could be considered illegal if it were not necessary to the saving of a human life."

— The Swiss author, E. Bucher, who is an authority on the subject, considers that it is right, in principle, to authorise the

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removal of an organ post-mortem if, before his death, the patient did not expressly oppose it, or if his relations have not expressed their veto, or even if, in certain circumstances, one can deduce that neither the deceased nor his family would have refused the "green light." He hopes that the family would be sounded as much as possible (we fully approve this suggestion). To demand the formal agreement of the subject or his family would make transplants virtually impossible. The aforementioned author adds that if the surgeon was obliged to ask the patient this question before an operation, or ask his relatives, immediately before or after an operation, the simple fact of tackling the problem would probably do more harm than the operation itself. In fact, Dr. Bucher considers that the authorisation to proceed to a removal with a view to transplantation should not take a positive form, and that it is enough that it should rest on *presumption of consent*.

Let us quote another proposal made 13th March by Lord Denbton, during a conference on transplantation: "the removal of a kidney should be considered legal if there is no reason to think that the person in question might have forbidden it."

During a recent discussion organised by the Association of French Magistrates, the abbé Oraison considered that, in hospitals, the medical team can, in the name of society, decide themselves upon the removal of an organ from a corpse, to help a patient.

From our point of view, what really comforts us is recent opinion-polls. During a survey conducted by the IFOP (French Institute of Public Opinion) between 3rd and 10th January 1968, 71% of people consulted (57% in England) answered in the affirmative to the question: "Are you in favour of permitting doctors to remove part of the body of any dead person, providing that person has not forbidden it?" Only 22% of people consulted in France and 35% on the other side of the Channel replied in the negative. As far as we can tell, many people, like us, see no reason at all why their body, or at least certain organs, should not serve a therapeutic or scientific purpose after their death. Professor Dubost wrote on this subject: "The idea that a bit of our body could be of use to living people after our death is one that most of us would willingly accept."

We have already referred to the opinion-poll undertaken by

the IFOP in January 1968. Among other things, those questioned were asked: "Would you be inclined to allow part of your body to be removed after your death had been certified, in order to save the life of another person?" 65% of people asked replied in the affirmative (in England 80%, and 70% in the United States); only 21% answered in the negative (17% in Great Britain and 23% in the United States).

Finally, we draw on a last argument: the arrangements which have been made in the legislation of countries which are as socially developed as our own, such as Sweden or Czechoslovakia.

In fact, the freedom to remove organs seems to be the rule, and opposition to an interference of this kind, the exception. However, it is in order to take into account the spontaneously expressed opposition of the partner, the mother and father, the offspring and the mistress. This opposition ought to figure on a special register in the hospital. In the case of disagreement between relations of the same degree, it may be disregarded.

One may wonder if the favourable results obtained from the opinion-poll correspond only to "pious wishes." Actually, while the legality of transplantation tends to be affirmed, a paradoxical repugnance towards the donation of organs *ex mortuo* can be observed to grow. This situation was particularly observed by Doctors Huguenard and Rentchnick. Can the disaffection of donors be attributed to certain failures to which the press gave too much publicity? Montaigne could no longer say "Doctors have the great advantage that their failures are underground, but their successes are walking about in the sun." At any rate, on the 24th October 1969, professor Dubost gave a real alarm against the general halt which had happened in France. "All further transplantations have been forbidden us for the last five months for the lack of a donor."

We are in agreement over one point with the writers who do not think a decree is enough. So serious a problem demands a law. Even better, this question of removals *ex mortuo* ought, in our opinion, to be encompassed by a more general document, which would be devoted to the whole subject of transplantation, whether the tissues or organs came from a living or dead body. The legislator must settle the problems which have been raised, and this through a publicly voted and discussed document, dealing with the status and capacity of the people in question, subjects

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which according to most constitutions are the sole right of parliament. Professor Legeais writes: "A very thorough revision of the rules currently in force is the only thing which will give the doctors, on one hand, the right to act in the security which they require, and the laymen, on the other, the guarantee and respect which they may normally hope for at the moment of their death."

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Let us suppose that an individual, perhaps because of his religious convictions or philosophic ideas, has formally opposed himself to an autopsy and the removal of an organ.

The family cannot go against this, whatever their interest in discovering the cause of death. (Is it an hereditary illness?) Doctrine and jurisprudence are in agreement in considering that the rule: *infans conceptus pro nato habetur, quoties de commodo ejus agitur*, extends that protection to include the mortal remains. The tenor of article 360 of the penal code which punishes the offence of violation of burial, and that of article 3 of the law of 29th July 1888, on the press, which is a document penalising defamation or insult to the memory of the dead, militates in favour of this idea.

There is another argument for respecting the will of the dead. The law which has already been referred to, that of 15th November 1887, concerning the freedom of funerals, in fact provides: "Art. 2. - It can never be established, even by means of a decree, that particular prescriptions are applicable to funerals on account of their civil or religious nature. Art. 3. - Any major or emancipated minor, who is in a state to make a will, may control the conditions of his funeral, notably concerning the civil or religious character it should be given, and the method of burial.

He may make one or several people responsible for seeing to the execution of his wishes. His will, expressed in a testament or in a declaration made in the form of a testament, whether in the presence of a solicitor, or under private signature, carries as much force as a testament relating to material goods; it is subject to the same rules concerning conditions of revocation..."

In fact, the rule according to which the last wishes of the

deceased are imposed on those around him is not absolutely strict. It is possible, in exceptional cases, to give preference to family interests, particularly when it is evident that in opposing an autopsy the person could not weigh the disadvantageous consequences of his decision (for example, proof of a relationship between an accident at work and death).

One could hold that the deceased person's body belongs no more to him than to his family, and that the rights of Society ought to go above those of individuals. It is not beyond possibility that we should progress towards a situation in which the body is disposed of in spite of the opposition of the person and his relations. During a conference of cardiologists which was held in Athens in 1968, prof. Lenègre declared: "The risk is to see respect for the individual sink in this whirlpool. So what matters is to establish a new code of medical morals as quickly as possible, in which, thanks to new structures, the minimum which the individual may claim would be defined, as would his right to existence, and the threshold beyond which collectivity exercises its pressure."