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A Reply to Łukasz Dominiak's and Tomasz Szczęsny's *Brain Death in Japan: A Critical Approach*

Odpowiedź na artykuł Łukasza Dominiaka i Tomasza Szczęsnego *Brain Death in Japan: A Critical Approach*

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Abstract:
In this rejoinder I will critically evaluate Dominiak's arguments as they unravel in his exquisite and well-argued paper *Brain Death in Japan: A Critical Approach*, which was, incidentally, co-authored by Szczęsny. The order of my replies will reflect the order of Dominiak's points in his original paper. Moreover, I will not only point to some inaccuracies appearing there but also will try to illuminate their sources and ramifications. Finally, I will indicate whether the criticism is theoretically or practically oriented since at times theoretical problems will prove to be irrelevant as far as the medical practice goes.

Keywords: philosophy, brain death, identity, bioethics

Słowa kluczowe: filozofia, śmierć mózgu, tożsamość, bioetyka

1. An alternative to essentialist theories of identity

Dominiak rightly starts with the observation that "in the context of *brain death* we are always concerned with the question about death of a particular human being and never with the question about death of any other entity (…)". Afterwards, he promptly shows commitment to essentialist creed by saying (in other words) that the identity of an entity x is preserved as long as this very entity is still of the kind K. Dominiak enumerates what values K-variable can assume: "[If] a given patient is essentially a brain, embodied mind, human organism (…)". And then Dominiak smoothly concludes (his second thesis) "that each and every answer to the question about human death necessarily presupposes some theory of identity".

The minor problem with all that is that the only interesting issues emanating from theories of personal identity is personal identity *over time*. To say that the entity e is identical with itself at any given time t is to say literally nothing. To inquire into what makes the entity e the same entity over time is to inquire into the idea of survival. Perhaps the reason why Dominiak does not put this point explicitly is that he does not consider any *relational psychological* theory of identity (especially the Parfitian Psychological Account). It seems that according

to Dominiak, K (a g*enus proximum*) of a given person is some substance (functioning in a certain way). So, if a given person is essentially their functional brain, then whenever this very same brain stops functioning, the entity (in this case, the person) dies. Generally speaking, the logic is as follows: if e is of a kind K, K being a specifically organized substance, then whenever K ceases to be instantiated in e, e is no more. [1]

When it comes to relational Psychological Account [2], looking at consecutive moments will not do without studying the relation between a given entity at distinct moments. Let's assume there is an entity p1, who is a person. To be able to start at all, p1 would have to be individuated in terms of his or her body. Generally, to be able to study personal identity over time, we need some minimal conception of what a person or an individual is. I won't dwell on this subject but treat it as a given. Then, Psychological Account holds that to establish sameness of a person over time it's insufficient to observe p1 at t1 and p2 at t2 separately. What counts is the *psychological relation* between p1 at t1 and p2 at t2. If p2 remembers virtually all the experience of p1 at t1 (let's assume t1 is Monday and t2 is Tuesday), p1 and p2 is the same individual over time. So, now it doesn't matter whether p1 and p2 are instances of K. We are not impressed whether or not the same substance is still exemplified in those two individuals. What we are concerned with instead is whether the relation between p2 and p2 is that of psychological continuity.

In conclusion, death on the grounds of Psychological Account wouldn't mean the momentaneous cessation of the workings of some essential substance (be it the brain or organism etc.) but it would rather imply the non-exemplification of psychological continuity. In other words, death of a person would reduce to the termination of the psychological relation and not the fatal disintegration of some substance. I realize that to distinguish death on the grounds of the theory I adhere to from the ones considered by Dominiak, we would have to invoke some larger-than-life scenarios. Yet, Dominiak throughout his thought-provoking paper shows the pretense that he solves both theoretical and practical problems at a stroke. So, what would be the consequence of the theory of identity I am a proponent of? The answer is that death occurs when at some moment onwards there is nobody (say, at t9) who would be psychologically continuous with p8 at t8. Yet, the relation of psychological continuity might be conceivably instantiated again when p8's body is scanned and p8 is rebuilt from some different organic matter at, say, t20. Then p20 at t20 is the same individual as p8 at t8. The odd consequence is that we cannot ever say that anybody ultimately dies because somebody might have scanned our brain and we might always survive as our replicas. I am not arguing that it is doable in practice. What I am doing instead is demonstrating the theoretical problems with conceiving of death as the cessation of the essential substance (the individual's *genus proximum*).

1 There is still the haunting question to answer, that is how it is possible to pinpoint the moment when K is not instantiated in e. For, according to essentialism, it doesn't make sense to speak of e any longer when K disintegrated. It only shows that we resort to more primitive criteria when speaking of individuals and that is probably the very same body (spatio-temporal criterion would be still operating here). Later on, I will argue that such primitive criteria would be practically sufficient for a physician who would be freed from having to answer controversial questions about personal identity.

2 D. Parfit, *Reasons and Persons*, Oxford University Press, Oxford 1986.

2. Throwing doubt on essentialism as such and *a fortiori* essentialist theories of identity

The second theoretical objection refers to the above-quoted fragment, in which Dominiak enumerates the possibilities of what a person essentially is. For the sake of convenience, let us quote that crucial excerpt again: "A proponent of this position [DPA- Death as a Process] could hold that because we cannot say if a given patient is essentially a brain, human organism or whatever, we cannot say the exact moment of his death". Then Dominiak dismisses this sort of intuition by appealing to live-by-the-sword-die-by-the-sword predicament. Allegedly, the denial of essentialism throws the baby out with the bathwater because "(…) how our imaginary proponent of a non-essentialist interpretation of DPA can know that he is considering the same patient at all?". On the face of it, it looks as though Dominiak cannot see any alternative to essentialism when it comes to personal identity. First, let us indulge in showing an inherent problems of essentialism as such and afterwards I will attempt to demonstrate that the question of what we essentially are cannot matter practically (the physician's position).

First off, theoretically speaking, the problem haunting essentialism as such (and thus the essentalist interpretation of personal identity) is the relation between *genus proximum* and essential properties. Let's make the minimal assumption that we already know what an individual is. Essentialists claim that for the individual i to exist over time is to remain of the kind K (K being I's *genus proximum*). Yet, belonging to some (and not the other) kind is determined by I's essential properties. And now, if we investigate I's properties what means can we resort to when determining I's essential properties other than pointing to I's *genus proximum*? It seems to be an insuperable obstacle in the form of *circulus vitiosus:* I's *genus proximum* is K because of such and such essential properties E's. And why does I have the essential properties E's (and not any other set of properties)? Because they are determined by I's *genus proximum*. It looks as though we haven't started and we are running in circles. To my mind, it looks as if *the way of referring* to an individual has a bearing on that individual's essential properties. Functional objects would serve as an appropriate illustration. Before exemplifying our point, let's note that I'm not claiming that anything can be of any possible kind but that concession is quite irrelevant to my main thrust. The very possibility of multiple predication of a given individual is sufficient to at least cast some doubt upon essentialism. Let's take an object which would be conventionally regarded as falling into the category DESKS. As long as that very individual is conceived of as a desk, its essential properties are as follows: (to name but a few) one could pile up solid objects on it, it should be large enough to keep, say, a personal computer on it, a printer etc. Fair enough, but what happens if we refer to this very item as a sort of a writing board on which one can carve letters. Then, the previous essential properties are invalidated and new essential traits emerge: as long as the item is a writing board, one should be able to put symbols on it. Now, the item does not have to be large to perform its function etc. Therefore, the way of referring to a given individual seems to be conducive to its unique set of essential properties.

Now, let's take this analogy further. Now we have an individual conventionally referred to as a human person. If we

believe that a human person is essentially a minimally functional organism, then we wouldn't find him or her dead when he or she is brain dead because that individual wouldn't be then deprived of his or her essential traits, that is a rudimentarily functional organism. If, on the other hand, we are essentially our brains, such a person would be pronounced dead immediately his or her brain is irrevocably dead. Let me new relinquish my skepticism and supersede with some confidence as far as practical matters go. Before I draw any conclusions, let me introduce a thought experiment.

3. A Dying Patient Thought Experiment

Let's imagine Paul was delivered a nearly fatal blow by a football hooligan. Paul is now in the hospital and pronounced brain dead. Two of his friends (George and John) are at his bed now immersed in sorrow. The doctor acquaints them with the full description of Paul's condition. Paul is brain dead; so, Paul is irrevocably unconscious but with a little help of a ventilator, his lungs move and some of his organs (e.g. kidneys) work when properly ventilated. Paul's friends know all the relevant factual details but they still differ in terms of finding Paul dead or alive. George is a rather cheerful person and he says:

– Luckily Paul is a person and persons are minimally functional organisms; so, however miserable Paul might be now; thankfully, he is still alive.

And John, being rather pessimistically inclined, gloomily replies:

– Paul was essentially a rational agent and once his brain is virtually dead, he has no capacity to reason; so, John is gone for good.

Let's assume the facts stated by the doctor are uncontroversial, which derives from the undeniable authority of that very doctor. But how should we account for the different stances of Paul's friends? And why do we intuitively feel that one reaction (John's) is more natural than the other (George's). My main thrust now is that the pronouncement of death is *not only descriptive* but it also contains *some ethical judgment.* Since predicating death of somebody seems to be a mixture of descriptive and normative language, legal consequences would follow from the latter use. That is to say, when the patient is found dead, their moral status change and 'when' in the previous clause is purely definitional and not consequential. Still in other words, the part of the meaning of death of a patient is that from now onwards the patient's organs can be harvested. On the grounds of this account, death of a person doesn't add anything factual to the pronouncement of his or her brain death. What it merely says then are the legally recognized ways of dealing with brain-dead patients (obviously, any other criteria might be employed but they reflect what matters, as will be explained below). This account also helps to explain the ever-changing definitions of death. There is a telling instance of the above alluded to by Peter Singer.[3] In 1991, there was a conference hosted by Melbourne's Royal Children Hospital entitled *Anencephalics, Infants and Brain Death. Treatment Options and the Issue of Organ Donation*. In Australia back then, there was a haunting problem of what to do with the irreversibly comatose patients occupying hospital beds while these patients cannot possibly serve as

3 P. Singer *Rethinking Life and Death*, Oxford University Press, 1995, p.38–57.

organ donors for those in need[4]. The committee, whose member was Peter Singer himself, tried to solve the problem by redefining death so that the irreversibly comatose patients could be considered dead and thus could be legally unplugged. The solution seems bizarre in the extreme. The only real issue at stake is legal or ethical by nature. The problem is what to do with patients in irreversible coma or what value is there in those patients?[5] The solution proposed by the committee looks awkward because it tries to justify some action by the 'proper' use of language. Mind you, nothing changes in the reality; the condition of those patients was known to everybody – the patients were considered to be in the state of irreversible coma and somehow the use of the predicate 'dead' somehow was to make all the practical difference. This reconstruction seems to get things backwards. It is not upon finding a patient dead when such-and-such legal actions are justified. It is just the opposite. It is when the ethical judgment was made and the corresponding legal actions are implicitly understood that the pronouncement of death is due. Thus, Peter Singer's reply in the case scrutinized here was brilliant in its simplicity: "The suggestion I made to the panel was that instead of changing the definition of death so as to declare legally dead anencephalic infants and infants whose cortex had been destroyed, it would be better to make it lawful to remove organs from living, precisely defined and indubitably diagnosed, anencephalic infants whose cortexes have been destroyed".[6]

This wonderfully insightful remark shows the predominance of what matters over conceptually complex issues of life and death. And what matters in the case under dispute is consciousness – if not occurrent, then at least potential. The idea of what matters also smoothly explains why in our thought experiment John's description of Paul's condition is more natural than George's. For it is the former that stresses the importance of consciousness and not the latter. John found Paul dead only because the property which matters, that is consciousness, is no more instantiated in John. By the same token, George's overoptimistic approach should be discarded simply because the human organism devoid of conscious life is not normally morally valued.

To give some additional boost to my arguments, I would like to resort to the fact that in recent moral philosophy, *person* is a concept cutting across species.[7] I contend that nowadays *person* is an ethically charged concept predicating a special moral standing of a certain sort of beings. These days, persons might include, for instance, dolphins and apes simply because they are all the bearers of the *property that matters alone*, that is the ability of self-consciousness. Of course, it might be retorted that the concept of *person* is after all descriptive, however abstract; but it must be borne in mind that the very motivation of singling out persons from the rest of ani-

4 P.Singer *Rethinking*...p.47.

5 In fact, the story cited by Singer is about cortically dead and not brain dead infants, for even anencephalics are not entirely brain dead because their brain stems work, however improperly. Yet, and that is the key, cortically dead patients underline even more radically the point I am arguing for and that is that what matters is the consciousness and cortically dead patients satisfy the condition for the incapacity for consciousness. Brain death criterion would be too broad here, so the story by Singer is highly relevant even though it does not strictly related to brain death.

6 P. Singer *Rethinking*...p.52

7 J. Glover *Causing Death and Saving Lives*, Penguin Books, 1990, p.126–128.

mate entities was based on the property of self-consciousness, which seems to be of utmost importance alone.

4. Deflating the idea of personal identity from the practical vantage point

Now for Dominiak's "If there is no criterion of identity available for the purpose of determination of death of a given patient, how there can be such a criterion available for the purpose of determination of the doctor deals with the same patient then" as considered from the practical angle. My objection is fairly simple. How can it matter practically whether a given patient (as distinguished by the body lying in, say, the bed no.1) in a given hospital ward is the same patient over time or not? Practically speaking, the doctor deals with the spatio-temporally continuous body doing his or her best to, let's say, restore consciousness to the body by operating on the brain.[8] Philosophically speaking, the bracketed considerations need not bother us at all. The doctor may observe the very same body over time with his aim being to improve the condition of that body at any time. That would be really peculiar to imagine a doctor concerned with the question of a possibly changing identity of the very same body lying in the same bed.

Let's take a functional-object analogy again. A mechanic is trying to repair a Mercedes which is so devastated that it takes many spare parts to install and some refined adjustment to its overall structure. Whatever the criteria of identity of inanimate objects are, it might be claimed that once repaired, the emergent car is not the same as the original one. Fair enough, but the mechanic would not be impressed by such a philosophical subtlety. What he is concerned with is to bring the wreck to life. In such practical cases, the question of identity seems superfluous.

5. The qualitatively identical vs numerically identical

Now, I would like to examine Dominiak's Transplantation Thought Experiment and his claim that DPA fails on logical grounds. I'm not entirely convinced by his argument but let us first quote the afore-mentioned thought experiment at large: "Imagine you suffered a fatal head injury and were pronounced brain dead by physicians (…). Surgeons grafted your heart into a body of a patient A, your liver into a body of a patient B and your kidneys into a body of a patient C". And then Dominiak goes on to say that contending that you now 'in a sense' live in those three bodies leads to logical inconsistencies: "Since you are identical with yourself and relation of identity is transitive, it would mean that A, B and C are identical with you and with one another. This of course is a false conclusion since A, B and C are three different persons and are not (numerically) with one another. But then it means that you are not identical with any of them and so you cannot be alive after the organ procurement".

First thing to be noticed is that the argument is of *reduction ad absurdum* form – by showing the apparent absurdity of the conclusion (" (…) A, B and C are three different persons and are not (numerically) identical with one another"). Therefore, if it is false, then the original persons cannot live in those three bodies. So far, so good but I think that two seri-

8 In this example we assume that either the patient is not irreversibly unconscious or that there's some technological advancement which would allow for the above-stated optimism.

ous objections can be raised. I think that Dominiak's seemingly impeccable argument does not work because he does not explicitly distinguish between *the qualitatively identical* and *numerically identical*. It is only because Dominiak out of the blue invokes *the concept of numerical identity* that his argument apparently invalidates the hypothesis that the original person lives in a sense in three host bodies. If we take DPA seriously, we can readily imagine that the original person's genotype radiates into three host bodies and thus we could say that the original person is somehow qualitatively (in the relevant sense) or genetically identical with *all of them*. Dominiak's victory is too easy because when he is apparently disproving DPA in Transplantation Thought Experiment he needs to picture the scenario in which there are *at least two* host bodies because then numerical identity will kick in and save the day. Let's imagine then the more austere version of the same argument – this time without C. Then, there can be no relation of identity between (however identical they might be) the original person and either of the two host bodies merely because they are *two*! Let's continue our story. What if there is *one* host body who will be graciously endowed with the original person's liver. Now it seems that DPA can work and the relation of identity might hold between the original person and the recipient of the original person's liver. So, paradoxically enough, the number of host bodies makes all the difference. Dominiak's resorting to the concept of numerical identity would actually disprove as illogical any scenario in which the original person splits into at least two identical (in any relevant sense) copies because the numerical identity would come in handy and would invalidate *any* one-to-many relations. This is definitely too strong and it does not disprove DPA as such since Dominiak's argument is basically about *the logic of identity*. Then again, by these means he would disprove *any* theory of identity in which the original entity splits into at least two identical or psychologically continuous or whatever entities. In conclusion, Dominiak did not disprove *genetic theory of identity*. His argument merely dismisses any one-to-many relation as non-identity because identity is by definition only one-to-one relation. Nothing more, nothing less. It remains true that the original person is identical with all three host bodies in a sense and it remains true that the host bodies are distinct bodies after all and so they are not numerically identical. But why should it matter? Perhaps we should follow Parfit and conclude that identity is unimportant since any person splitting in two psychologically identical and continuous persons cannot be a worse outcome than the original person continuing to live.[9]

The second objection is that even if we play into Dominiak's hand and stick to numerical identity, we needn't *necessarily* accept his conclusion. The original person might be numerically identical with A and A might be numerically distinct from B and C and thus the original person might be at the same A and not-B and not-C. Or, the original person can be B or (disjunctively) C, simultaneously not being numerically identical with the other two. Let's represent it more rigorously referring to the original person as X.

"=" is a relation of numerical identity

"≠" is a non-exemplification of the relation numerical identity; it is also necessary that

A≠B≠C

9 D. Parfit, *Reasons and Persons*, Oxford University Press, Oxford 1986.

The ≠ relation is not transitive, so there is a chance that if A is not numerically identical with B and B is not numerically identical with C but C is still numerically identical with A. So, let's add the condition that

A≠C but then, the following is possible

X=A≠B≠=C and the scenario is logically coherent. X can be numerically identical with only one host body while the host bodies are not numerically identical with one another. Of course, it is arbitrary whether x is numerically identical with A, or B, or C. We cannot say but we should not be bothered. We are now concerned with logic alone.

Thus, Dominiak's inference is not necessarily true. After the organ procurement, the original person can 'in some sense' live in *one* host body at the same time not living in the other two.

6. Conclusions

My critique of Dominiak's *Brain Death in Japan: A Critical Approach* involved, first, the general doubt cast upon essentialism as such, which must *a fortiori* cast at least equally strong doubt upon essentialist theory of personal identity. Second, the alternative to essentialist theory of identity was presented, that is the Psychological Account, which is *relational* by nature. Then, the concept of identity was somehow deflated by demonstrating that it cannot matter when there are transculturally recognized methods instructing doctors what to do under which circumstances to *any* patient. Finally, Dominiak's attempts to argue against the genetic theory of identity (which is presumably presupposed by DPA) on logical grounds was proved either too strong (or misfired because it argues basically not against *the substance* of a particular theory of identity but its *logic*, which is 1-to-1 relation and the latter is true of *any* theory of identity) or not necessarily true (after all, the original person after organ procurement might survive in *one and only one* host body).

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