

Organ Transplants and Governmental Regulations Restricting Individual Bodies

The shortage of organs is virtually a universal problem. In some countries, organ donations from brain dead donors are hampered by sociocultural factors, and in others, rates of organ donation and kidney transplantation fail to meet the increasing demand.¹ The confluence of these two conditions has led to the development of international black markets for organs, in which human body parts are bought and sold as tradable commodities via business transactions. Not only is this a significant health policy issue, but commercially driven transplantation is also not an appropriate solution for patients suffering from end-stage organ failures. The illegal and unethical trade of organs from living and dead donors often neglects to care for physiological applicability between donors and patients. Also, it essentially lengthens waiting lines of patients in need for therapeutic transplantation; most of them are the underprivileged at the margins of society, exploited as a source of organs for affluent patients.

Recognizing the international shortage of organ supplies and increasing rates of illegal organ trading, the World Health Organization (WHO) declared its member states to implement a new paradigm for national self-sufficiency of organ supplies. It was a call for government accountability to strive to achieve sufficient rates of organ donation and transplantation from within each nation's own population, using the WHO ethics

¹ Yosuke Shimazono, "The State of the International Organ Trade: a Provisional Picture Based on Integration of Available Information," *Bulletin of the World Health Organization* (Vol. 85, No. 12, December 2007), 955.

principles.² Furthermore, the 63rd World Health Assembly resolution promulgated each nation to devise a comprehensive national programme to achieve self-sufficiency, including the following components: a framework of national legislation with regulatory oversight policy; a programme of organ donation integrated into the national health system with resources that sustain the programme; ethical practices of live donation that ensures the donor's safety.³ This concept of national self-sufficiency, however, highlights a strange, yet incomprehensible phenomenon in Japan. Despite the fact that the Japanese medical society has implemented a comprehensive national plan that satisfies all the conditions above for more than 15 years, rates of organ donation from deceased donors and transplantation from living and deceased donors in Japan still remains among the lowest of 98 countries who conduct organ transplantation services.⁴ In addition, there had been only 83 cases of organ donations from living donors-diagnosed as brain dead-during the 10 years since the establishment of the Organ Transplant Law.⁵

While an average of 68 organ transplants are performed in the United States every day, only around 10 transplants are conducted in Japan-every year.⁶ Although it has been almost 20 years since the establishments of the Japan Organ Transplant Network and the Organ Transplant Law, governmental regulations neither routinized procurements, nor facilitated organ donation, but increased crimes of illegal trafficking

² Francis L Delmonico, "A Call for Government Accountability to Achieve National Self-Sufficiency in Organ Donation and Transplantation," *Lancet* 2011 (October 2011), 1414.

³ Ibid.

⁴ According to the 2009 data from the Global Observatory on Donation and Transplantation, Japan was the 4th lowest for the rates of organ donations from deceased donors and transplantation from living and deceased donors; see Ibid., 1415.

⁵ Office of Organ Transplantation, "Enforcement of Amended Organ Transplantation Law," *Ministry of Health, Labor, and Welfare*, June 2011.

⁶ Jessica Ocheltree, "Japan Slowly Learning to Embrace Organ Donation," *Japan Today*, February 23, 2011.

and organ tourism.⁷ Then, what is the major reason for the stagnant state of organ donation and transplantation in Japan? There is no doubt that medical history, cultural and religious perception of deaths, and social value of human bodies, have fomented a great distrust on medical professions, and technologies. In fact, these are the reasons that many scholars give to explain this aberrant phenomenon in the Japanese society.⁸ This paper, however, takes a different perspective on this issue and claims that there are political and structural elements at work as well; the political motivations behind the legislative process of the Japanese medical community lead to the lack of public participation for organ donation and transplantation. Although moral credentials for practices involved in organ transplants are apparently confirmed through legal restrictions and governmental frameworks, in this process, individual voice and rights for their own body parts are constantly ignored and subjugated.

Overview

The objective of this paper is not to evaluate the moral and legal applicability of governmental policies to deal with the deficiency of organ supplies, nor to criticize the Japanese government for its incapability to estimate the impact of those policies. Also, it is not to analyze the role of public relations and behaviors (*omote*)-such as how close to one another people stand, or how one conceives of another-in public organ donation.⁹ Instead, by closely examining the historical establishment of the Japan Organ Transplant Network and enactment of the Organ Transplant Law, it will determine how political

⁷ Akiko Sumida, "The Organ Transplant Law Drawing a Line of Death," *Ritsumeikan Evaluation of Law*, (Tokyo: University of Ritsumeikan, 2011), 4.

⁸ Margaret Lock provides an excellent treatment of this perspective in her publication; see Margaret Lock, *Twice Dead: Organ Transplants and the Reinvention of Death* (Berkeley: University of California Press), 130-146.

⁹ Ian Littlewood, *The Idea of Japan*, (London: Secker and Warburg), xii.

motivations behind these regulations are related to the collusion between politics and medical professions. Here, I follow to the argument of Professor Sumida [Akiko] of Ritsumeikan University that the Japanese organ transplant legislations are unlawful in that they are goal-oriented and the submitted amendments do not fully address the concerns and criticisms of society.¹⁰ This paper is to explore the political perspective of governmental regulations in organ transplants, but it will not deal with any sociological arguments, which, for instance, argue that the biggest obstacle to the number of donation in Japan is simply the lack of a philanthropic ideal; “many Japanese would donate organs to a friend or a relative but not to a stranger.”¹¹ This paper will be organized as follows: I will first provide a historical background of the medical distrust on transplant technology and discuss whether this is a cultural or structural problem, using statistical figures and public opinion surveys on organ transplants in Japan. I will then explain the development of legislative frameworks, the Japan Organ Transplant Network, and the Organ Transplant Law, to prove that political arrangements essentially restricted people’s rights on their body parts, without making significant progress in changing public perceptions of organ donation. Finally, I will attempt to connect this phenomenon with the policy-making structure of the Japanese government, the “Triangle of Corruption” (*fuhai no toraianguru*), by employing Michel Foucault’s concept of biopolitics. In my conclusion, I will claim that in Japan, people’s rights to live or die are restricted through systemized arrangements of law and governmental institution, and these regulations in fact do not address public concerns surrounding the medical implementation of organ transplants.

¹⁰ Sumida, “The Organ Transplant Law Drawing the Line of Death,” 2.

¹¹ Elizabeth Lazarowitz, “Japan’s Brain Death Bill Fuels Debate,” *Los Angeles Times*, May 02, 1997.

The Medical Distrust on Transplant Technology: a Cultural or Structural Problem

In Japan, most organ donation and transplantation, especially of kidneys and livers, are from patients diagnosed of cardiac arrests and biologically dead. Biological death is a condition after clinical death, when a person's heart stops beating; at this time, both blood circulation, and brain cells stop to function due to the lack of oxygen.¹² Considering that the majority of organ transplantation in most other countries is conducted from brain dead patients, this obviously is an unusual phenomenon. Brain death is a condition in which all neurological functions irreversibly cease, but the patient is still biologically active.¹³ There is a historical reason for this trend; it is partially due to the nation-wide distrust of medical professions and technologies, caused by the nation's first heart transplantation, the Wada incident in 1967:

Carried out at Sapporo Medical University, the surgery was controversial on both ethical and medical grounds. Professor Wada Juro who performed the operation was accused of allegedly forcing the patient into a heart transplant surgery and carrying out an inappropriate medical treatment. The patient has died 83 days after the transplantation and this raised public attention, since the surgical procedures were not open to public. It turned out that Professor Wada evaluated the brain death of the recipient and selected the donor by himself. Detractors further asserted that the records of the whole process are questionable, as three physicians who were asked to provide expert reports on the incident gave ambiguous findings.¹⁴

¹² The medical definition of biological death is employed from the website (www.curiosity.discovery.com/question/clinical-biological-death).

¹³ Ibid.

¹⁴ Morris Low, *Science, Technology and Society in Contemporary Japan* (Cambridge: Cambridge University Press, 1999), 184.

To elaborate, the incident led to a cultural trauma against brain death and the public's reluctance to donate organs; the Japanese medical community could not readily implement transplant technology and the medical concept of brain death. However, reasons for the situation not only stem from the initial failure of heart transplantation but also cultural and social beliefs about human bodies and death. By analyzing the results of public opinion surveys from the Japan Organ Transplant Network, I argue that the shortage of organ donation in Japan has more structural causes to it; the lack of available information on organ transplant procedures further exacerbates the Japanese public's distrust on the transplant medicine.

Many people in Japan believe that if it had not been for the Wada incident, there would have been less cultural barriers to recognize brain death as an acceptable condition for procuring organs.¹⁵ Although the incident caused a detrimental impact on public perceptions of transplant medicine, scholars posit that skepticism towards organ donations arises from sociocultural and religious traditions at a greater extent. In her book, *Twice Dead: Organ Transplants and the Reinvention of Deaths*, Margaret Lock asserts that Japan's conservative culture resisting Western medical concepts such as brain death and transplant technology, and social and religious beliefs on human bodies that extend to their spiritual souls, as well as domestic relations, create cultural resistance on the medical use of cadavers.¹⁶ Furthermore, organ procurements from brain dead patients are viewed as unacceptable. Why? Because in Japan, according to Lock, people tend to regard the brain dead as socially dead, for one's personhood is a collective reality of physical operation and social existence.¹⁷

¹⁵ Ibid., 185.

¹⁶ Lock, *Twice Dead: Organ Transplants and the Reinvention of Death*, 369.

¹⁷ Ibid.

However, culture in Japan is a multi-layered and complex system, sometimes artificially constructed and perpetuated by the state.¹⁸ Employing culture to define an unusual phenomenon can overstate the homogeneity and cohesiveness of a nation, generalizing the extent to which different groups of citizens are affected by it. In order to explain this, I turn to the results of public opinion surveys on brain death and organ transplantation conducted between 1996 and 2008. Over these years, the number of participants who indicated their will to donate organs—hearts, livers, and kidneys—in cases of brain death increased from 31.6 percent to 43.5 percent; more participants at the age group of 20 to 30 responded positively, more participants at the age group of 40 to 50 responded neutrally, and more participants at the age group of 60 to 70 responded negatively.¹⁹ This trend shows not only that the concept of brain death is more culturally accepted by younger generations of the Japanese public, but also, how culture can overgeneralize differences in public perceptions of brain death. As a matter of fact, mainstream scholars tend to argue that Japanese culture is becoming less important for younger generations in the face of modernization and social change.²⁰ Thus to some extent, they are less concerned with the cultural and religious impropriety of procuring organs from brain dead patients.

Moreover, given the shared role of sociocultural and religious beliefs, and the medical distrust from the initial surgical failure, it must then be the case that rates of organ donation and transplantation from brain dead cadavers have barely increased. Yet, after the legal recognition of brain death with the enactment of the Organ Transplant Law in 1997, organ donations from patients diagnosed as brain dead have

¹⁸ Duncan McCargo, *Contemporary Japan*, (New York: St. Martin's Press, 2000), 62

¹⁹ These figures can be found at the Japan Organ Transplant Network (JOTNW) website (www.jotnw.or.jp)

²⁰ McCargo, *Contemporary Japan*, 62.

increased from 4 cases in 1999 to 45 cases in 2012.²¹ Despite the small numbers, this shows that harvesting organs from brain dead donors was routinized in a satisfactory manner. With this increase, however, rates of organ donation and transplantation from biologically dead patients-diagnosed with cardiac arrest-have strangely decreased since 1995; in 2012, the number of organ donations from this group was at its lowest of 65 cases.²² The declining trend in the organ donation from biological death is particularly incomprehensible, since most organ transplants in Japan are from this source. Even with the governmental institution, the Japan Organ Transplant Network, and its promotion of transplant medicine and the public acceptance of organ transplants, there was still no significant increase in the overall rate of organ donation and transplantation.

In fact, causes for the present state of the organ transplant technology in Japan cannot all be found in the limits of sociocultural traditions and beliefs. The major reason for the stagnant state of organ transplantation in Japan is simply due to the shortage of organ donors. The problem takes place in a progressive manner. Less organ donation consequently leads to a longer waiting line for patients with dialysis failures, which in turn causes the rate of organ transplantation to lag behind. This obviously is an apparent dilemma. Although a comprehensive national system-the Japan Organ Transplant Network-and framework of national legislation with regulatory oversight policy-the Organ Transplant Law-exist to provide self-sufficient supplies of organs, the problem still continues. In order to reconcile this situation, I examine some of the public's concerns that the Japanese government neglects to deal with. In this process, I argue that the government should first understand the fundamental flaw that

²¹ Office of Organ Transplantation, "Enforcement of Amended Organ Transplantation Law."

²² Ibid.

discourages the public from donating organs, create groups to act for resolution, and then make legislative reforms to cope with it. In this regard, I believe that there is a problem behind the governmental regulations in dealing with the deficiency of organ supplies.

It must be borne into mind that legislative reforms are bound to be ineffective unless both patients and the general public gain adequate amounts of information to understand, “the shared benefit to be derived and shared responsibility to enable transplantation from deceased donors.”²³ In fact, inadequate information on medical procedures involved in organ transplantation is one of the main reasons behind the low participation rates of organ donation, and this is evident from the most recent survey of public opinion on organ transplants in 2008. According to the survey, the majority of individuals, 60.2 percent of the sample group, have shown their interest in organ transplant technology and its performance in Japan.²⁴ This is a significant improvement considering that only 30.9 percent of the sample group in 1998 had shown their interests to communicate with friends and family members about procedures involved in organ transplants.²⁵ For this reason, Lock’s claim that many people remain indifferent to the transplant medicine because so few are directly affected no longer holds. Despite the increase in public interests on organ transplants, however, only 3.4 percent responded that enough information is available, and the majority of the group- 82.9 percent- indicated that they are not getting sufficient information to understand the procedures.²⁶ Even in comparisons to the results from previous years, the participant’s

²³ Delmonico, “A Call for Government Accountability to Achieve National Self-Sufficiency in Organ Donation and Transplantation,” 1416.

²⁴ These figures can be found at the JOTNW website (www.jotnw.or.jp) where annual results and descriptions of public surveys.

²⁵ Ibid.

²⁶ Ibid.

response on the insufficiency of information on organ transplants has not changed. What these figures reflect is either the Japanese government's institutional incapability to devise efficient methods to deliver information, or the deliberate control of information to the public. Either way, the Japanese public's desire to obtain more information is repeatedly and structurally disregarded. Therefore, the fundamental setback for the state of organ donation in Japan is the distrust of transplant medicine due to the limited information. Besides, one of the most efficient ways to increase public engagement is to simply provide adequate information that the public requires: the legal guideline of the transplant medicine, safety and cost of surgical procedures, and most importantly, the national status of the implementation of organ transplantation.

Japan Organ Transplant Network and Organ Transplant Law

Having discussed where the distrust of organ transplant technology stems from, I now turn to the development of governmental policies, the Japan Organ Transplant Network, and the Organ Transplant Law, and how they are used by the Japanese government to control and restrict individual and property rights of human organs. In fact, the governmental institution of the Japan Organ Transplant Network and the legal framework of Organ Transplant Law were not particularly successful in increasing public awareness about organ transplants and preventing organ-related crimes. The Uwajima scandal in 2006 attests this point:

The Uwajima Organ Trade incident, occurred in September 2006, was a direct violation of the article 11 of the Organ Transplant Law, the prohibition of trades of human organs for provisions of benefits. The police arrested a convict who reported that she provided her organ to an acquaintance for money. The

urologist, Manami Makoto (万波誠), of Uwajima hospital, diagnosed a patient for dialysis failure and urged the patient to get an organ transplant because the patient's life is at risk. An arrangement was made between the patient and convict, who at the time had a debt of 200 million yen, to exchange her kidney for 300 million yen and a car worth 150 million yen. It was later found out that the doctor mediated the arrangement in between, and more surprisingly, the hospital had participated in 11 cases of illegal organ trades since 1998. What further drew public attention, however, was the fact that none of the patients and convicts knew that organ trade was illegal.²⁷

To prove how these governmental regulations have transformed human organs into governmental properties through legislative enforcements, I will further analyze incidents and considerations that led to the establishment of the Japan Organ Transplant Network in 1995 and the enactment of Organ Transplant Law in 1997, and its subsequent revision in 2010.

Despite its large economy and its leading role in medical research and technology, Japan had generally been hesitant about the medical implementation of organ transplantation due to its historical perception of death as a cultural and religious event. What further delayed the implementation, however, was the fundamental absence of a proper governmental institution to intervene the removal and transfer of human organs. In Japanese medical society, no administrative infrastructure had existed to legitimately support transplant surgeries and arrange transplants between donors and recipients until the early 1990s. While heart and liver transplants from brain death were legally prohibited, kidney transplants from biological death were arranged

²⁷ "Living Transplantation in the Uwajima Incident," *Yahoo Daily*.

between donors and patients by medical professionals through “organ banks” located in each prefectural government, as well as local university hospitals and medical facilities.²⁸ In this system, when a donated kidney became available a recipient in the same facility was usually given priority.²⁹ Under such circumstances, it was inevitable for doubts to be raised about the obscurity of arrangements among hospitals, doctors, and patients, and about the development of medical crimes.³⁰

Medical crimes, particularly those involving human organs, are detrimental in nature. Not only do they disrupt morals and ethics in the administration process of organ transplants, but they also severely challenge the health security of organ recipients from illegal sources. When an illegally transplanted organ is not compatible with the recipient, rejections would result in a lower take rate, In this case, solid organs, more often than not, are never fully accepted by recipient bodies, and lifelong use of immunosuppressant is necessary”³¹ Therefore, the transplantation essentially fails to extend the patient’s life and satisfy the donor’s good will. Often illegal arrangements of organs are inconsiderate of the physiological applicability of organs between donors and recipients, and lead to the waste of human body parts and the degradation of their physical and material value. Such a situation, however, is unfavorable in Japan, considering the fact that it has the highest prevalence of end-stage renal disease in the world,³² while less than 5% of these patients choose to be registered with hospitals and clinics.³³

²⁸ This is from the JOTNW website on the section about the establishment of the network; see the JOTNW website (www.jotnw.or.jp).

²⁹ This is from the JOTNW website on the section about the establishment of the network; see the JOTNW website (www.jotnw.or.jp).

³⁰ The Wada Incident was the start for this medical distrust.

³¹ Margaret Lock, *Beyond the Body Proper: Reading the Anthropology of Material Life* (Durham: Duke University Press), 224

³² There are around 2,850 patients per million populations suffering from end-stage renal failures in

Since trust in the medical professionals and technology are severely compromised, legislative controls are necessary to routinize organ transplants in Japan. To serve both ethical and medical concerns, the Japan Organ Transplant Network was founded in April 1995, under the guidance of the Ministry of Health and Welfare. Based on the framework of the United Network for Organ Sharing, which had effectively promoted transplantation procedures throughout the United States, the primary purpose of the network was to create a government-authorized institution that can monitor procurement and distribution of organs between donors and recipients at a governmental level.³⁴ At a social level, however, the establishment of the network was to prevent illegal trades of organs, which often involved the underprivileged citizens at the margins of the Japanese society. Before 1995, public sentiment in favor of organ transplants rose with media coverage of the 8 years old girl, Miyuki Monobe, who had traveled to the University of California Los Angeles medical center for a heart transplant,³⁵ and several advertisements of economically deprived citizens trying to sell their organs.³⁶ Recognizing these cases, the network gave a special emphasis on its neutral position in the arrangement of organs through a fair and equal administration. It was thus agreed that all transplants were to be performed through the network, and information and cost of transplants were to become more accessible and manageable to citizens.³⁷ In addition, to advance public awareness on transplant procedures, the

Japan; see the figures on end stage renal dialysis patients 2011 from the Fresenius Medical Care website (www.vision-fmc.com/files/download/ESRD/ESRD_Patients_in_2011.pdf)

³³ The Japan Society for Transplantation: Organ Transplantation Fact Book (Tokyo: The Japan Society for Transplantation, 2006)

³⁴ This from the JOTNW website on the section about the philosophy of the network; see the JOTNW website (www.jotnw.or.jp).

³⁵ Jordan M. Brain, "Death Bill Passes Easily in Japanese House," *The Washington Post*, April 25, 1997.

³⁶ Lock, *Twice Dead: Organ Transplants and the Reinvention of Death*, 179.

³⁷ This from the JOTNW website on the section about the philosophy of the network; see the JOTNW website (www.jotnw.or.jp).

network has conducted regular opinion surveys on its performance since 1998. Although the results of these surveys contradicts,³⁸ the initial aim was to make transparent all practices involved in the harvesting and circulation of organs, and apply the results in consideration for future revisions of the Organ Transplant Law.³⁹

However, the function of the Japan Organ Transplant Network and its use of public surveys are complex. As described by Gosselin in his article, “the Regulation of Poll Reporting,” one of the common uses of public census in contemporary societies is simply to engage the general public in policy issues.⁴⁰ In this regard, it is reasonable to consider the network’s public surveys as strategic measures to increase public interests, and acquire information about potential donors.⁴¹ Realizing the public’s desire to donate organs and their opinion on controversial issues - brain death, expression of one’s intention, and recognition of will from children under the age of 15, and prioritization of family members - allows the network to estimate the possible impact of legal adjustments on the number of potential donors.⁴² An alternative view holds that the availability of information is purposely intervened by the Japanese government and the network to first understand different types of public opinions on policy issues and then contemplate the type that coincides with the government’s intention.⁴³ Thus, the direct role of the network is to facilitate communication between the government and public, by transmitting socio-medical concerns and prompting public participation. The

³⁸ It is already discussed that the results of public opinion surveys by the JOTNW illustrate that the Japanese public are not obtaining enough information about the network’s performance.

³⁹ This from the JOTNW website on the section about the public opinion survey of the network; see the JOTNW website (www.jotnw.or.jp).

⁴⁰ Tania Gosselin and Francois Petry. *The Regulation of Poll Reporting* (Toronto: University of Toronto Press: 2009), 43

⁴¹ The establishment of JOTNW was to increase organ donations and supports for organ transplants, and deal with the scarcity in organ supplies.

⁴² Professor Toma of estimates the number of donors to increase to approximately 400 if these conditions are allowed.

⁴³ Gosselin and Petry. *The Regulation of Poll Reporting*, 43

indirect role, however, is to grasp the totality of beliefs and sentiments on organ transplants of the Japanese citizens. Either way, public opinion surveys are governmentally manipulated as a strategic instrument of communication, creating a sense of trust that the government cares about its citizens and their voice. Yet, the function of the network is to serve as an administrative institution for the Japanese government's systemic control over organ transplants and monitoring of illegal practices.

The establishment of the Japan Organ Transplants Network did not lead to a significant increase in the number of organ donation and transplantation from the general public and patients.⁴⁴ Yet, the network was bound to be unproductive without a legal recognition of brain death as a procurement condition for organs. In point of fact, brain dead patients are a significant source of organs in many other countries including America and Europe, while there were only 215 cases of organ donations from brain dead patients until 2012 in Japan.⁴⁵ The delayed enactment of necessary laws to allow organ procurements from the brain dead, therefore, limited the network to promote only cadaveric kidney transplantation. Furthermore, affluent patients continued to rely on commercially driven practices including illegal organ trafficking and transplant tourism to countries with large black markets such as the Philippines.⁴⁶

The situation of organ transplantation was particularly devastating in 1996; less than 800 kidney operations had taken place, while more than 15,000 patients were

⁴⁴ It seems worth noting here that donors and transplants data prior to 1999 are inaccessible from the JOTNW, and also from the Ministry of Health, Labor, and Welfare.

⁴⁵ Delmonico, "A Call for Government Accountability to Achieve National Self-Sufficiency in Organ Donation and Transplantation," 1415.

⁴⁶ The Philippine government promoted "all-inclusive" kidney transplant packages retailed for roughly \$25,000 until the prohibition in March 2008.

suffering from end-stage renal failures.⁴⁷ Furthermore, approximately 4,000 of them were in need of heart or liver transplants, which could only be performed with organs from brain dead patients.⁴⁸ A bill to resume organ transplants from brain dead patients was submitted in 1994 to the Ministry of Health, Labor, and Welfare, and after continued deliberations, the lower house of the Japanese parliament passed this bill in 1996 with a vote of 320 to 148, with 32 abstentions.⁴⁹ The bill, which later became the Organ Transplant Law, created a new definition of death for citizens: a patient is considered dead when there is no detectable cognitive activity.⁵⁰ The Organ Transplant Law came into effect in May 1997, and it was expected that this would increase the circulation of organs between donors and patients, and thereby prevent further development of illegal organ trafficking. The Ministry of Health, Labor and Welfare and Office for Organ Transplantation outlined the philosophy of the Organ Transplant Law as: respect for one's own will of organ donation, security for voluntary donation, fairness about the chance of transplantation, prohibition of trafficking, and authorization of brain death as a legal condition for organ procurements.⁵¹

In reality, however, the situation did not improve because the law's criteria were too stringent and only a small number of brain dead patients could meet these criteria, which comprised of a written consent by the donor before its death, family member's approval, and two age restrictions (15 to express a will to donate, and 6 to donate organs).⁵² Thus, from the start, these stipulations greatly reduced the possibility of organ transplants to and from young children, and heart transplants to this group were

⁴⁷ Hideki Ishida, Hiroshi Toma, "Organ Donation Problems in Japan and Countermeasures," 127.

⁴⁸ Lazarowitz, "Japan's Brain Death Bill Fuels Debate

⁴⁹ Brannigan M. "On Asking the Right Questions: Personal Death vs. Brain Death in Japan," *Death Study*, (1998: 22), 159.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² The outline for the Organ Transplant Law can be found in the JOTNW website (www.jotnw.or.jp).

virtually impossible. Over the years from 1998 to 2007, the number of organ donations from the brain dead only ranged from 4 to 13 cases each year.⁵³ Even in comparison to the United States and Europe, organ transplantation from the brain dead in Japan accounted for only about 10 percent of all transplant surgeries.⁵⁴ Regardless of whether or not such restrictive conditions of the Organ Transplant Law were a part of governmental attempts to deal with the national resistance against the medical implementation of brain death, the establishment of the law was in the end not successful in preventing illegal trafficking and organ tourism, and issues with the content and implementation of the law were further pointed out.

As matters stood, some doctors, concerned with the deaths of many young patients and media reports on organ tourisms of infants, questioned the negligible impact of the law. Requested by a group of politicians, mostly former medical professionals, two separate bills were submitted to the Ministry of Health, Labor, and Welfare to ease the restrictions of the Organ Transplant Law in August 2005. Plan A asked for the recognition of donor's will without the age restriction of 15, and Plan B requested to lower the minimum age of organ donation to 12, instead of 15.⁵⁵ Despite some differences, both proposals essentially shared one specific purpose, which was to create more potential ways to adopt transferable organs by easing conditions. From these two plans submitted, Plan A was passed in July 2009 with further revisions that allowed organ donations even without the dead patient's consent if family members' consent was given, and prioritized immediate family members in consideration for

⁵³ Office of Organ Transplantation, "Enforcement of Amended Organ Transplantation Law."

⁵⁴ Ibid.

⁵⁵ Masami Ishi, Mieko Hamamoto, "Bioethics and Organ Transplantation in Japan," *JMA Policies*, (2009), 289.

organ transplants.⁵⁶ While the number of organ donations from brain death has undoubtedly increased after the enactment of the amendment in July 2010, the Organ Transplant Law essentially gave up on its original philosophy: to respect for the patient's own will, secure voluntary donations, and provide fair chances of transplants to any members of the society, to increase organ supplies.⁵⁷ Furthermore, according to the argument of Nudeshima, the adoption of Plan A was strategically conducted by the Japanese government to deal with the direct criticism from the World Health Organization (WHO), who criticized Japan for its heavy reliance on international organ markets to satisfy its needs.⁵⁸ In fact, no substantial deliberation had been made until 2009, which is after the WHO's adoption of a new guideline that requested each member states to provide organs for transplants from its indigenous supply of organs.⁵⁹

In conclusion, it is true that cultural beliefs and social values of death and human bodies slowed down the implementation of the transplant technology and the medical concept of brain death. Yet, the systemized arrangements of legislative frameworks, the Japan Organ Transplant Network and the Organ Transplant Law, essentially were governmental interventions to create, employ, and manage people's rights to live or die. This shows that the Japanese government's primary purpose was to deal with the increasing rate of illegal crimes, shortage of an indigenous supply of organs, and international criticism. Through legislative enforcements, human organs turned into governmental properties or commodities. However, while the language of medicine and politics insists that human body parts are material entities, devoid

⁵⁶ Ibid.

⁵⁷ The outline for the amendment to the Organ Transplant Law can be found in the JOTNW website (www.jotnw.or.jp).

⁵⁸ Jirou Nudeshima, "Why does Organ Transplantation from Brain Death Progress in Japan?" *Tokyo Foundation*, (2010)

⁵⁹ Ibid.

entirely of identity whether located in donors or in recipients, they should not be reduced into objects, even in the minds of involved physicians. While the objectification of organs through a complex collection of socially situated biomedical knowledge, and governmental regulations, was inevitable to save lives of patients suffering from organ failures, the Japanese government subjugated the Japanese citizens and their individual and property rights of organs.

Biopolitics and “Triangle of Corruption”: the Chain of Collusive Ties

The development and refinement of tissues and transplant technology have enabled medical professionals to extend human lives by adopting organs from other people as therapeutic devices. At the same time, however, governmental regulations in the transplant medicine have objectified human organs and redefined people’s rights to increase the number of organ donation and transplantation. By focusing on political motivations behind the legislative process on organ transplants in Japan, I hope to show the biopolitical control of the Japanese government on the citizen’s voice for policy issues. I argue that, on the emerging biopolitical scene, the state of organ transplants and legal guidelines are primarily interpreted through the political indices of the Japanese government. Although many laws and policies are enforced in Japanese society, it is a rare for citizens to have a special interest or opinion on policy issues, unless they are directly affected by them. Organ transplants do affect people directly, which is why debates on brain death criteria and organ transplantation have conducted for more than 30 years in sociocultural, medical, and legal spectrums. However, the political relations among the core group who make policy about medicine; medical professionals, family politicians/policy tribes (*zokugijin*), and bureaucrats in the Ministry of Health, Labor, and

Welfare, prove that public voice and opinion are not the primary concerns for their chain of collusive ties, the “Triangle of Corruption” (*fuhai no toraianguru*).

The inevitable sociopolitical consequence that came with the rise of biotechnology was the government’s attempt to control people and their lives and deaths through political motivations. While human lives were traditionally conceived as subjects of religious, metaphysical and cultural backgrounds, governments exerted sovereign power over its citizens to connect problems of humanitarianism to political principles.⁶⁰ In fact, this idea is explained in Giorgio Agamben’s “Homo Sacer,” in his attempt to redefine Michel Foucault’s fragmentary analysis of biopolitics:

The separation between humanitarianism and politics that we are experiencing today is the extreme phase of the separation of the rights of man from the rights of the citizen. In the final analysis, however, humanitarian organizations grasp human life in the figure of bare life as pure beings, deprived of any sociopolitical and human rights. Humanitarian organizations and governments, therefore, maintain a secret solidarity with the very powers they ought to fight.⁶¹

These critical conceptions relate problems of social ethics and morality to the authoritative control and power of governments. Agamben describes how modern nations-states transform the citizens into de facto subjects by reducing their rights to live or die.⁶² To elaborate, in the case of organ transplants in Japan, the Japan Organ Transplant Network operates as an institutional framework for grasping and regulating public opinion. Although human organs are the indisputable properties of each individual, the legislative control of the Organ Transplant Law is able to gain control

⁶⁰ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, (Stanford: Stanford University Press), 133.

⁶¹ Ibid.

⁶² Ibid.

over citizens and their body parts-kidney, liver, hearts, and brain-by classifying the degree to which people can exert individual and property rights. Hence, through the sophisticated, and restrictive tool of biopolitics, the Japanese Government and medical policies on procedures of transplant medicine constantly take over people's rights to live or die, donate, and receive organs.

At the center of these motivations is the Triangle of Corruption, which is the political collusion among medical professionals, politicians, and bureaucrats. The rapid progress and development of transplant technology have required public participation and cooperation to routinize the radical medical concepts of organ transplantation and brain death. In Japan, this was to increase the number of indigenous organ donations and deal with the deficiency of organ supplies. In contrast, however, most of the processes of policy-making have been in the hands of the three groups.⁶³ This traditional structure, frequently reflected in the Japanese political system since the post-war period, reveals how the structural collusion of the three agents obstructs public voice and opinion to achieve policy goals.⁶⁴ Accordingly, Nudeshima points out that the main obstacle for organ transplants is not the cultural barrier, but the medical community.⁶⁵ In fact, the national distrust of medical professionals and technologies is no longer a problem of sociocultural beliefs and values, but of the severely compromised nature of the policy-making process among the Japanese medical community. Yet, this is inevitable considering the hybrid structure of the Japanese

⁶³ Ken Duck, "Now that the Fog has Lifted: the Impact of Japan's Administrative Procedures Law on the Regulation of Industry and Market Governance," *Fordham International Law Journal*, (Vol. 19, Issue 4, 1995), 1700.

⁶⁴ Michael K. Yong, "Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan," *Columbia Law Review*, (Vol. 84, no.4, 1984.)

⁶⁵ Nudeshima, "Why does Organ Transplantation from Brain Death Progress in Japan?"

medical community in which university hospitals are administered through the cooperation of local governments, and the Ministry of Health, Labor, and Welfare.⁶⁶

Three points must be clarified in order to understand the structural relations among the groups and their collusive nature. The first is that the university hospitals and medical professionals responsible for organ transplant surgery are funded by local governments.⁶⁷ The fiscal condition of local governments directly affects local hospitals' business; medical professionals, thus, maintain a close network with the politicians in charge of them. Second, local governments in Japan are responsible for tasks that would normally be in the domain of the state and ministry in America and. In particular, they are burdened with responsibilities for health care, and administrations of hospitals and municipalities taking care of basic health provisions.⁶⁸ Finally, the structural reliance among the three groups creates a bureaucratic autonomy: medical professionals and politicians are constrained by the interests and actions of bureaucrats and other actors, including interest groups, news media, and international organizations.⁶⁹ Therefore, the Japanese medical community is built on the structural dependence to one another at both economic and organizational levels.

Furthermore, in Japan, administrative activities, including the establishment, revision, and abolishment of laws and regulations are conducted by the Minister's Secretariat of the Ministry of Health, Labor, and Welfare.⁷⁰ Although the Ministry has called for special councils-the Brain Death Advisory Council, which created the scientific

⁶⁶ Ryozo Matsuda, "Reform of Local Public Hospitals," *Kinugasa Research Institute*, (Survey 11, 2008).

⁶⁷ *Ibid.*

⁶⁸ This information can be found from the general overview of the Ministry of Health, Labor, and Welfare website (www.mhlw.go.jp/).

⁶⁹ Morten Egeberg, "Causes of Bureaucratic Autonomy: the Impact of Organizational and Cultural Factors," *Arena Working Papers*, (Working Papers 15, 1998.)

⁷⁰ This information can be found from the general overview of the Ministry of Health, Labor, and Welfare website (www.mhlw.go.jp/).

backbone of brain death called, “Takeuchi’s criteria,” Commission of Life and Ethics, and Japan Society of Transplantation⁷¹-in process of deliberations for the establishment of Organ Transplant Law and its revision, most professionals in these commissions excluded members of any representation of the lay public, and any female members.⁷² Such discriminatory membership of the special committees thus eliminated a place for public opinion and voice to stand, creating a structural barrier for the public’s trust in governmental policies. Furthermore, the deliberations of submitted bills that led to the establishment of Organ Transplant Law and its subsequent revision were generally forbidden to the public, unless in rare cases when concurrent but separate public opinions were needed on particular issues such as age restrictions through public opinion polls.⁷³ Reasons for continuing to hold closed meetings may range from a concern that a frank debate will become impossible with the involvement of the public, and the secrecy of potentially patentable procedures.⁷⁴ Whatever the reasons are, ethical and moral principles to consider the Japanese public’s opinion for policy issues of life and death are underdeveloped in Japan. This consequently results in a loss of the Japanese citizens’ trust of the government’s regulation of organ transplants and the low public participation in organ donation.

As reflected in its dominance over legislative reforms, the Ministry of Health, Labor, and Welfare is one of the administrative organizations that enjoys higher privileges and independence. The fundamental instrument that allows the non-transparent and anti-competitive regulatory system is administrative guidance (*gyosei*

⁷¹ Eric A. Feldman, *The Ritual of Rights in Japan*, (Pennsylvania: University of Pennsylvania Law School), 130-140.

⁷² Rhito Kimura, “Organ Transplantation and Brain Death in Japan. Cultural, Legal, and Bioethical Background,” *Animals of Transplantation*, (Vol. 3, No. 3, 1998), 55-58.

⁷³ Ibid.

⁷⁴ Ibid.

shido)⁷⁵: an extra legal tool that compromised 80 percent of the Japanese bureaucratic activities.⁷⁶ Administrative guidance is a process in which the ministry imposes implied threats of future actions to politicians, and thereby achieves an administrative and political goal.⁷⁷ As I have mentioned, despite the continued public debates on the routinization of brain death, submission of bills to ease the condition for organ procurements from brain dead patients was repeatedly put off until 2009. Often, the excuse of the Japanese government was that the ministry needed more discussion and interest of the general public to proceed with further deliberations.⁷⁸ In fact, this was clearly not the case. Not only has transplant medicine been controversial since the Wada incident (1967), but the media coverage of a bogus organ adoption by Kenichiro Hokamura in 2006 has also led to further increase in the general public's interest in the historically paternalistic field of transplant medicine.⁷⁹ Still, the current national assembly in Japan does not have any rules on the validity of legislative deliberations of its members⁸⁰; Japan's informal style of regulatory governance makes it possible for the ministry to impair the decisions of its members and politicians. In addition, the establishment of Organ Transplant Law in 1996 was the first time in the nation's post-war history that the Japanese government demanded its members to decide for themselves rather than vote along party lines.⁸¹ Hence, the legislation processes of the

⁷⁵ Ken Duck, "Now that the Fog has Lifted: the Impact of Japan's Administrative Procedures Law on the Regulation of Industry and Market Governance," 1686.

⁷⁶ Michael K. Yong, "Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan," *Columbia Law Review*, (Vol. 84, no.4, 1984), 954.

⁷⁷ Ken Duck, "Now that the Fog has Lifted: the Impact of Japan's Administrative Procedures Law on the Regulation of Industry and Market Governance," 1733

⁷⁸ Nudeshima, "Why does Organ Transplantation from Brain Death Progress in Japan?"

⁷⁹ Clifford Conan, "Japanese Flock to China for Organ Transplants," *Japan Focus*, (www.japanfocus.org/-Clifford-Coonan/1818), (April, 2006).

⁸⁰ Nudeshima, "Why does Organ Transplantation from Brain Death Progress in Japan?"

⁸¹ Lazarowitz, "Japan's Brain Death Bill Fuels Debate."

Organ Transplant Law in 1997, and its revision in 2010 are essentially unreliable, and also, the bureaucratic role of the Ministry of Health, Labor, and Welfare is questionable.

The Japanese legal system and institutional arrangement of the *amakudari*⁸² further emphasize the informal, close relations among bureaucrats, politicians, and medical professionals, perpetuating the regulatory system, which complies with administrative guidance of the ministry. The *amakudari*, “descent from heaven,” is a system that allows bureaucrats to maintain close ties to politicians and hospitals that they regulate. In fact, Duck [Ken] explains that the Ministry of Health, Labor, and Welfare is one of the ministries that enjoys the most benefit from their *amakudari* placements.⁸³ Serving as a mutually supportive structure, the arrangement allows bureaucrats to obtain one of three types of post-ministry employment: in a private enterprise, the Japan Organ Transplant network, in public corporation or legal entity such as special committees established for Organ Transplant Law, or in politics as family politicians/policy tribes (*zokugijin*).⁸⁴ Every year, between two hundred and three hundred former bureaucrats retire at the age of fifty-five, but into senior positions in above-mentioned three categories.⁸⁵ The family politicians, who represent a particular interest committee, can exert a strong influence on specific areas of policy-making legislations. In the case of organ transplants, they can lobby central authorities and bureaucrats so that policy decisions are made in the direction that is favorable for

⁸² Ken Duck, “Now that the Fog has Lifted: the Impact of Japan’s Administrative Procedures Law on the Regulation of Industry and Market Governance,” 1687-1689

⁸³ Ibid., 1696.

⁸⁴ Morris Low, *Science, Technology and Society in Contemporary*, 184.

⁸⁵ Ken Duck, “Now that the Fog has Lifted: the Impact of Japan’s Administrative Procedures Law on the Regulation of Industry and Market Governance,” 1697.

them and the group of medical professions, which was to ease the conditions for organ procurements from brain dead patients.⁸⁶

It is then reasonable to question, what were the motivations of the Japanese medical professionals behind their attempt to change the existing Organ Transplant Law enacted in 1997? Transplant surgeons, in both procedures of organ transplantation and procurement, face contradictory missions to save one's life with donated organs, and diagnose death to another. For their primary duty is to save as many patients' lives, it is hard to make cautious decisions and take appropriate actions without legislative regulations to assist the diagnosis of the surgeons. Furthermore, procedures of organ transplantation involve complex steps; they must work with other medical professionals and coordinators from the Japan Organ Transplant Network, while dealing the anxiety of patients and their family members.⁸⁷ Upon these conditions, the medical professionals also had to deal with the historical distrust of transplant medicine, increasing rates of illegal organ trafficking and tourism, and sociocultural concerns with the medical use of human body parts and brain death. Therefore, the amendment made in 2010 was an opportunity to lessen their burden of public criticism on the obscure nature of the transplant surgeries. In fact, media reports indicate that the medical professionals and transplant surgeons strived to advance the transplant surgery of brain death up to the international level, to create possible chances that would essentially improve the patient and doctor relationship.⁸⁸

A radical shift in the legislative process of the Japanese medical professionals, politicians, and bureaucrats must occur to develop effective policies to increase public

⁸⁶ This information is retrieved from the article, "the brain death is a legal murder," from the Japanese website (www.mikkyo21f.gr.jp/world-objection/cat43/post-180.html).

⁸⁷ The procedures involved in organ transplantation is described in the JOTNW website, (www.jotnw.or.jp).

⁸⁸ Nudeshima, "Why does Organ Transplantation from Brain Death Progress in Japan?"

organ donations and change the structural distrust of the medical community and transplant medicine. While the public's cooperation is required to promote the medical concepts of organ transplantation and brain death, the political collusion among the agents of the Triangle of Corruption provides no place for public opinion and voices to be heard. This coincides with the response of the public opinion survey of the Japan Organ Transplant Network in 2008, which indicated that more information on the legislative guideline is necessary to enhance the general public's perception on organ transplants. Kimura [Rihito] further suggests that the current Japanese legal system and public policy process do not seriously reflect public participation and open debate, and fundamental human rights of suffering patients and potential organ donors.⁸⁹ It is true that the traditional and cultural beliefs on death and human bodies continue to challenge the stagnant state of organ donation and transplantation in Japan. However, public opinion on governmental regulations must also be considered in the Japanese government's legislation on organ transplants in order to deal with the international criticism on Japan's heavy reliance on illegal practices, and the shortage of an indigenous supply of organs.

Conclusion

Organ transplants have become a common medical procedure in hospitals and clinics in many countries. Serving as an effective therapy for patients diagnosed with end-stage organ failures, transplant technology allowed medical professionals to extend a patient's life by adopting organs from another individual. Yet, the inevitable

⁸⁹ Kimura, "Organ Transplantation and Brain Death in Japan," 55-58.

consequence of the spread of the medical dissection of living and dead bodies was the global scarcity of human organs. Even in developed countries, where rate of organ donation and transplantation tend to be higher than other countries, the organ supplies failed to meet the increasing demand. The ultimate consequence of this situation was the development of illegal activities, including illegal organ trafficking and tourism to international black markets. The situation of organ transplants is particularly stagnating in Japan. Despite its leading role in medical science and technology, the 2009 data from the Global Observatory on Donation and Transplantation shows that Japan was one of the countries with the lowest rate of organ donation from deceased donors, and transplantation from living and deceased donors. Although the Japan Organ Transplant Network and Organ Transplant Law have been implemented for more than 15 years, the number of organ donation from biological death was at its lowest of 65 cases in 2012.

Scholars often interpret this unusual phenomenon in Japan by employing sociocultural and religious beliefs on death and human bodies in Japan, and the initial failure of heart transplantation (i.e., the Wada incident). The incident built a nation-wide distrust on medical professions and technologies, especially on the radical concept of brain death. However, the results of public opinion surveys conducted by the Japan Organ Transplant Network confirmed that the younger age groups of the Japanese public are less concerned with the cultural and religious impropriety of organ procurements from brain dead donors. Besides, the main problem of the Japanese government's regulations to deal with the deficiency of organ supplies is at the lack of public participation of organ donation due to the limited availability of information on legal guidelines and procedures of the transplant medicine. Further historical analysis on the establishments of the Japan Organ Transplant Network in 1995 and Organ

Transplant Law in 1997, and the law's subsequent revision in 2010 has shown that these governmental regulations essentially were the Japanese government's attempts to create, employ, and manage people's rights to live or die. Through the systemized arrangements of transplant procedures, human organs and people's rights were redefined as governmental properties or commodities to deal with the international criticism and shortage of an indigenous supply of organs.

The discussion on the biopolitical conjuncture between the legislative process of the Japanese government and the general public's opinion on policy issues proves that public opinion and voice are not the primary concerns for the groups of the "Triangle of Corruption" (*fu hai no tororianguru*), which consists of medical professionals, politicians, and bureaucrats. At an organization level, the structural dependence of the three groups allows the Ministry of Health, Labor, and Welfare to exert a bureaucratic autonomy on local governments and university hospitals that are responsible for organ transplant surgeries. Therefore, medical professionals and politicians are structurally constrained by the interest and actions of bureaucrats and special interest groups created by the ministry, and international organizations. While the establishment, revision, and abolishment of laws are the dominant rights of the Minister's Secretariat of the ministry, none of the members in the advisory councils for the establishment and amendment of the Organ Transplant Law was a representation of the lay public. In addition, the deliberations of submitted bills were generally forbidden to the general public. Such discriminatory membership and structural barrier in the legislative process result in a loss of the citizens' trust on the governmental regulations in organ transplants, and the low rates of public organ donation. What further exacerbates this structural collusion is the ministry's use of the administrative guidance (*gyosei shido*) on politicians to impose

implied threats to achieve political goals, and the institutional arrangement of the *amakudari* system, which allows medical professionals and politicians of special interest groups (*zokugin*) to lobby central authorities and bureaucrats; so that legislations are conducted in favorable directions. Therefore, the political motivations behind the governmental regulations of organ transplants in Japan reinforce the collusion among the members of the Triangle of Corruption. Whatever the reasons are, ethical and moral principles considering the Japanese public's opinion for policy issues are underdeveloped. To deal with the stagnant state of organ donation and transplantation in Japan, the Japanese government and medical community should enhance the general public's perceptions of organ donation by implementing their opinion on the legislative process of transplant medicine.