

# LEGAL PROBLEMS RELATING TO THE ORGAN TRANSPLANTATION

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## I. *Preface*

### 1. The subject

The transplantation of kidneys among all other human organs is popular, as the world has already experienced over 1,200 cases of transplantation, but, as regards the transplantation of heart, the world has seen only 20 cases in the past since the first experimental operation was carried out in South Africa near the end of 1967, and, in only one case the recipient is now apparently gaining health, but, anyway, the diffusion of heart transplantation is a question of time, and the cases of such operation will increase more and more in future. In this sense, the problem of transplantation, whether renal or cardiac, has a great significance.

For the transplantation of an organ, there are two parties, the donor who gives an organ and the recipient who receives it. The donor is either a living or a dead person. There is no legal problem conceivable in particular about the recipient, because he is in a position not very different from that of an ordinary patient who undergoes surgical operation. As for the donor, however, his rights may be in danger of being violated and, therefore, it is a legal question under what condition an organ transplantation should be permitted. This problem had been taken up by the medical circles in Japan before the first cardiac transplantation was carried out in South Africa. It was in 1966 when the transplantation of kidneys just reached the stage of its practical use. The Japan Society for Transplantation picked up, as the subject of a special lecture for the Second Meeting held in the fall of that year, "Legal Problems Relating to the Organ Transplantation" and requested me to deliver a lecture on that topic. What I state below on the same topic is the gist of that lecture, including cardiac transplantation which was developed after that time.

The legal problems concerning the transplantation have both aspects, civil and criminal. There is no need, however, to explain much about the civil aspects of this problem, because the transplantation is generally permissible with the consent of the person who has the right to consent, unless it is against public order or morals. On the other hand, viewed from the criminal aspects of the problem, the transplantation is permissible if only there are justifications for it, but there are some controversial problems as to what conditions may justify the transplantation. And, naturally, this affects the solution of civil problems in some aspects. In this paper, therefore, attention is to be focused on the criminal aspects of the problem.

The reason why I limit the theme to the transplantation of organs is that, in such cases as where a part of the skin is transplanted, any problems concerning the skin transplantation

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can easily be solved by applying the theory on the organ transplantation to them, and whenever necessary, I wish to refer to another kind of transplantation.

## 2. Problems regarding recipients and those regarding donors

There is no special problem conceivable about recipients in connection with the transplantation of organs, except that the general problems of surgical operation are thinkable for recipients in the case of transplantation as well. In this case the judgment as to whether the operation is legal or illegal must be made by weighing various factors such as (1) the probability (percentage) of success of the operation and (2) the degree of risk of the operation. The operation is permissible, however risky it may be or however low its rate of success may be, if there should be any possibility of lessening or preventing such injuries as would be inflicted upon the life or body of a patient but for the operation. However, in the case of transplantation, especially when the organ of a human corpse or that of an animal or an artificial organ is to be transplanted, it sometimes happens that the recipient concerned feels repugnant and, in such a case, it is considered necessary that the doctor should explain to the recipient about the organ to be grafted.

On the contrary, the problem of taking an organ out of the body of a donor is not so simple because such an act itself is not a medical treatment for the benefit of the donor. In this sense, no one is authorized to do it without an exceptional ground for justification. In short, all legal problems pertaining to the organ transplantation arise only in connection with the donor. I shall, therefore, limit my argument to the requirements for justifiable transplantation and I will try to clarify the limits within which it may be performed.

## II. *Main Problems*

### 1. The act of taking out human organs

The act of taking an organ out of the body of a donor exactly comes under Article 204 of the Penal Code which provides for the crime of bodily injury, if the donor is living. And if the donor is dead, it comes under Article 190 of the same Code which provides for the crime of mutilation of corpse. As the former comes under "A person who inflicts bodily injury..." and the latter "A person who mutilates, destroys, ... a dead person", either of these acts apparently satisfies all the elements prescribed in the provision concerned.

However, the mere fact that a certain act satisfies the elements prescribed in the provision does not mean that it is a crime. For the realization of a crime, it is necessary that the act is illegal in substance and that the perpetrator is responsible for the act, in addition to the fact that the act satisfies all the elements prescribed in the provision. In other words, all of these three requisites must be met to form a crime. For this reason, in order that the act of taking an organ out of the body may not form a crime even when the act satisfies all the elements prescribed in the provision, it must not meet at least one of the two remaining requirements. To sum up, the theme of this paper resolves itself into the problem of what conditions may make an act of transplantation legal or under what conditions it may be justified.

## 2. Theory of a justifiable act

In the criminal law, there prevails the "theory of a justifiable act". Let me explain it, for convenience' sake, dividing justifiable acts into three categories; an act done pursuant to law or ordinance, an act done in the course of due business, and an act otherwise justifiable. (a) As a good example of an act done pursuant to law or ordinance, we may point out the act of taking cornea out of a dead body for the purpose of transplantation. As this act is based on "the Law concerning Corneal Grafting" now in force, it is legal and does not form the crime of mutilation of corpse. (b) As regards an act done in the course of due business, many examples are found in acts of medical treatment in general (In Germany, however, there is an influential opinion that no surgical operation constitutes the crime of bodily injury). (c) There are many acts which are not illegal, even if these are not done neither pursuant to law or ordinance, nor in the course of due business. Laws and ordinances cannot enumerate all of the acts which, in spite of the external applicability of the provision, are not illegal in substance, that is, "justifiable acts". Among all other justifiable acts, only those major ones which can easily be defined are described in law or ordinance, and this does not mean that there exists no other justifiable act. The justifiable acts of such kind exist outside the scope of statutory provisions. To illustrate, as a good example, the illegality of an act is to become extinct in the case of certain crimes with the consent of the person who has the right to consent. The consent as required here has much to do with the problem of organ transplantation and I will dwell upon it later in this paper.

In addition to the acts done pursuant to law or ordinance or in the course of due business, there are many other justifiable acts that are not explicitly provided for. Among them we can find various matters, and it is of course also true of medical matters. As a good example of this, I can cite a criminal case which took place a year before the promulgation and enforcement of the Law concerning Corneal Grafting in 1958. In this case, the police conducted investigation into the transplantation of cornea performed by Professor I., professor of ophthalmology of *Iwate* Medical College and sent the case to *Morioka* District Public Prosecutors' Office on a charge of having committed the crime of mutilation of corpse. At that time, as I was interested in this problem, I examined some records and documents to find that a number of corneal transplantations had been performed in our country since the end of the last century but none of them developed into a criminal case. Also, shortly after the *Morioka* case, it was widely reported by the news agencies that according to the will of a certain distinguished person, his eyeballs were taken out of the corpse to use the cornea for the transplantation. Notwithstanding that the news was known to the public at large, no one was surprised at it nor did the investigative authorities even show any interest in it. The act like the above should not be regarded as a crime simply because no law explicitly authorizes it. I think it is proper that the theory of an extra-statutory justifiable act should be a theoretical basis for the justification of such an act. I presented this view in some law journal at that time (the "Jurist", 1958, No. 146, pp. 51), and as it was already the talk of the town, I also stated in a radio broadcast that it should not be a crime. Later I have heard that the Director of *Morioka* District Public Prosecutors' Office decided not to prosecute Professor I. under the instruction of the Public Prosecutor General. What attracts our attention in this case is that, notwithstanding that the law concerning corneal transplantation was not yet established at the time, there prevailed the legal philosophy that the act of taking eyeballs out

of the corpse for the purpose of corneal transplantation should not be regarded as a crime. This basic concept could also be extended to the transplantation of organs in general.

### 3. Requirements for the legalized operation on a donor

Under what conditions is an operation performed on the donor justifiable under the Penal Code? There are two requirements: (a) It must serve highly cultural or ethical purposes, (b) it must be performed with the consent of the person who has the right to consent. Let me explain below more about these two requirements:

#### (A) Serving highly cultural or ethical purposes

It may be said that the "ethical purposes" are, if not expressly spelled out, included in the words "cultural purposes" in a wider sense. The word "ethical" is added here because there is likelihood that the ethical aspect of organ transplantation may often be questioned in view of the nature of the problem. As an example of the case where it meets the ethical purpose, it is conceivable that a near relative donates a part of his body, from affection, to save the life of a patient. Even if it is not a near relative but a friend, there is no reason to oppose to such a donation, nor is there any reason why a person who has no connection with the patient should not do the same thing from humanitarian considerations. It is the general tendency of jurists to limit the scope of donors to as narrow as relatives, etc., so there may be some dissenting opinions among them to enlarging the scope so widely, but in view of the nature of this problem, I do not think there is any reason why we should make such a narrow interpretation.

On the other hand, there are some people who want to donate their organs not from affection for others but simply from such cultural purposes as the "advancement of medical science." Considering from the fact that many of those who want the autopsy of their bodies after their death express such wishes purely for such scientific reasons, there is no reason to condemn the offer of organs not only from a dead body but even from a living body. And although there is no reason, either, why the offer in such a case must be gratis, it seems that the public in general tend to be in favour of donating organs gratis and to reject the onerous transaction of organs. In this connection, I think more information and public education activities will be necessary to make them understand the unreasonableness of rejecting the onerous transaction. This point is made clearer when we compare the two arguments currently at issue, one for the onerous transaction of blood and the other for the gratuitous donation of blood. Although there have recently been stronger movements for giving more weight on the gratuitous donation rather than on the onerous transaction, the sale of blood itself should not be rejected and what is to be rejected is the offer of blood of bad quality and also the manner in which blood is offered to the detriment of the health of the donor. However, the authorities do not seem to have a correct understanding of the nature of the problem and they call out to the public only for the donation of blood without giving any kind of compensation for the valuable offer of blood. Naturally, the authorities cannot secure the necessary amount of blood. It is true that the undiluted spirit of gratuitous donation must be respected, but the thought that the human body is sacred and even a part of it should not be transacted onerously reflects too much the spiritualistic thought. Since blood and a few other things are made objects of sale and there is much rationale in selling them, the idea of paying for transplanted organs should not totally be denied. Of course, it is

needless to say that every care should be taken to prevent those evil practices which are likely to accompany the onerous transaction of organs in the light of the bitter experience with regard to the sale of blood, but the utilization of disused organs such as a part of a dead body without giving harm to any others should not be regarded as illegal, whether it be onerous or gratuitous. There is no reason, either, why the giving a part of a living body should be regarded as illegal, whether it may be onerous or gratuitous, except when it does substantially affect the health of the donor as in the case of the onerous transaction of blood.

As regards the requirement that the donation must serve highly cultural or ethical purposes, it is natural that the distinction should be made by whether the donor is living or dead. While this requirement should strictly be held in the case of transplantation from a living body, it need not be held so strictly in the case of transplantation from a dead body, because, needless to say, a living body is the bearer of more important interests protected by law than a dead body.

(B) Necessity of consent by the person who has the right to consent

There is a principle of *volenti non fit injuria* (No legal wrong is done to him who consents), but this is only applicable to the interests which are at the disposal of a person who has the right to dispose of them. Therefore, though this principle is applicable to the case which belongs to the interests of an individual person, it is not applicable to the case of national or public interests, in which case the consent of an individual does not always make lawful an act affecting such interests. Suppose, for example, that a person damages or destroys a property belonging to another. The crime of destruction of property is not realized, if he has obtained the consent of the owner or the person who has otherwise the right to dispose of the property. But, it is different, for example, with the crime of staging an indecent performance. Here the crime is constituted even if all the spectators are readily consent or even pay charges to see it. This is because it is a crime against public morals which is among the crimes against public interests. Besides, even in cases which injure merely the interests of an individual, there are some exceptions. For example, in cases where the act of taking another's life, that is, the act of depriving the most important interests of an individual, the law does not pass it by but steps in, even if it is done with his consent. In other words, as we all know, a person is severely punished for the crime of homicide when he kills another without the latter's consent, but he is also punished for the so-called crime of "homicide with consent" even when he obtained the consent of the victim for killing (killing upon request or with consent or bringing about suicide through instigation or assistance, etc.), though the punishment in such a case is much lenient than in the case of homicide. But, the crime is constituted, anyway.

I have explained above about the consent of a person who has the right to consent by citing simple examples which everyone may easily understand. Let me next try to apply this theory to the problem of organ transplantation.

a) When the donor is living

In this case, it is absolutely necessary to obtain the consent of the donor, and at the same time, the operation must be of such a nature as the safety of the health of the donor is ensured. To perform an operation upon a living body for taking an organ out is an act satisfying all the elements prescribed in the provision of bodily injury. The question here is whether the act of inflicting injury is legalized or not with the consent of the donor

undergoing the operation. If it be an act satisfying the elements of the provision for the crime of homicide, it is clear that, even if consent is given, the crime of "homicide with consent" will be realized, as the Penal Code explicitly provides for it in Article 202. But the act of inflicting injury with consent arouses an academic controversy, as there is no explicit provision of law. It does not follow, however, that such an act done with consent should be regarded as legal because there is no explicit provision to prohibit it. Since such an act affects a much more important interests of the donor than the destruction of his property, it cannot be left outside the boundary where law can step in. The legal feeling of the general public on which the law is based won't permit such a demand as of Sheylock who forces the fulfillment of a cruel contract to be left unpunished under the Penal Code. Thus, a person's consent to the infliction of bodily injury upon him does not always remove the illegality of the act of infliction. Of all the acts of inflicting bodily injury, where should we draw a line to distinguish those which are to be legalized with the consent of the victim from those which are not to be legalized even with his consent? As to the criterion for the distinction, there are some arguments. One opinion argues that it should be determined by whether the particular act is against public order or not, but I would rather support the opinion that the determining factor is whether the injury is serious or slight. I won't elaborate here upon the theoretic grounds for my contention about this point, because it would deviate afar from the theme of this paper. Anyway, one thing that is very clear is that the consent alone wouldn't unconditionally permit the removal of important human organs.

Suppose that a person has one of the two kidneys taken out. There will be much probability that he may continue to lead a healthy life, but, when it should happen later that the remaining kidney suffers an unexpected disease or injury, his life would be in greater danger by the fact that one kidney has previously been removed. Therefore, there is no doubt that the operation of this type is an act of inflicting serious bodily injury. In nature, it is an act satisfying the elements of the provision of bodily injury, even if done with the consent of the person to be injured. Only exceptionally, there leaves some room for justifying it when it serves highly cultural or ethical purposes. The meaning of the consent must be interpreted in this light. Although the removal of an organ affects only the personal interests of the donor himself, his consent does not by itself justify the act of removal, since it is the infliction of serious bodily injury. Nevertheless, his consent must be obtained in the case of organ transplantation.

Now, it is essential that such an indispensable "consent" must, of course, be based on the real intention of the donor and if, as is the case with a child or idiot, the donor is incapable of knowing the true meaning of this matter, his consent will have no effect. This is also true of such a person as is remarkably disturbed mentally because of serious illness. Furthermore, since the removal of a healthy organ is not a medical treatment given to the donor, it is absolutely necessary to obtain his consent, and no one else, including the person who has parental power over him, is entitled to give consent. Actual problems in this regard arise in the case of organ transplantation between monozygotic twins. As the organ transplantation between monozygotic twins shows a very high success rate in theory and in practice, the operation will seem to a medical doctor most desirable. But this transplantation, too, is impossible if the twin-donor is an infant. It is reported that there has actually been performed organ transplantations between twin infants in the United States, but I don't think that anyone can prove the legality of such operation theoretically. An infant is an independent

person as well and not a personal belonging of its parents. There is no reason why such an operation should be permitted that might cause a serious defect to the perfectness of the body of an infant, even though the consent is given by the person who has parental power over the infant. Then, what should be the age at which the consent of a person is to be regarded as valid? According to the general rule of the civil law, it is at twenty years of age that a man's capacity to perform a juristic act is to be approved. Things are much easier in civil matters than in criminal matters, because a juristic act performed by a person under 20 may be made valid with the consent of the person in parental authority over him. In the criminal field, however, it is impossible to define the age at which consent is to be regarded as valid and which is applicable in all cases. Theoretically, it should be fixed case by case. If a man is old enough to understand as a sound member of society the true meaning of the operation performed upon him, that is sufficient. Normally, I'd say that the age at which a person completes the compulsory education is old enough for this purpose. As a matter of course, it depends upon the capacity of individual persons and also upon the types of operation to be performed. In my opinion, however, the lowest age would be just around it. To be more careful, we might set the age at 20, the legal majority in the civil law, but, as I mentioned earlier, the consent of a person, even if over 20 years of age, has no meaning in cases where he is feeble-minded or otherwise mentally defective.

(b) When the donor is dead

The crime of mutilation of a corpse, being a crime against public morals, is harmful to the public interests protected by law, and, therefore, the act of mutilation cannot be justified even when the consent is given by the person who has the right to consent. In this sense, it is rather complicated but it does not mean that the consent has nothing to do with this, because whether consent is given or not has connection with the public morals relating to the disposal of a corpse. As the crime of mutilation of a corpse has been prescribed by law to protect the established custom of not assuming a disrespectful attitude toward a corpse, this should be the main consideration when we argue about this crime.

The legal concept underlying the disposal of a corpse is admittedly that the person who has the right to consent should be limited to the bereaved family. Personally, I am of opinion that the will of the donor before his death should be respected more than that of the bereaved family. Under the present legal system, however, weight is given to the will of the bereaved family and that of the donor before his death is not taken into consideration. This principle is endorsed in both the Law for Corneal Transplantation and the Law for the Dissection and Preservation of Corpses. The reasons are, as I guess, that (1) an individual is recognized under the law as a legal personality only when he is alive but, once dead, he is no longer regarded as a subject of rights and duties and therefore, the disposal of a corpse should be left to the bereaved family, and (2) even the donor cannot dispose of his own corpse when he is alive. Of these two reasons, the first one is agreeable to my opinion as it is quite reasonable in the light of the whole structure of our legal system and is in accord with the modern scientific thought, but I do not agree to the second one which ignores the will of the person expressed before his death regarding the disposal of his own corpse. Considering that a testament has legal effect with regard to the disposal of property, I think it reasonable that a testament regarding the disposal of one's own remains should also be given legally binding force. It seems, however, that the existing laws are not based upon such a

thought. The laws presently in force refer only to the will of the bereaved family and do not refer at all to the will of the deceased person which is expressed before his death. They are based on the idea that the right to consent to the disposal of a corpse must be given to the bereaved family.

Then, who are the bereaved families? As the meaning of a bereaved family is not always the same under various laws, it is likely to arouse controversy as to who, among all the members of the bereaved family, has the right to consent to the use of an organ of the dead body. Generally speaking, it is interpreted in most cases that the members of a bereaved family are those registered in the family register of the deceased person at the time of his death, and, in the case of transplantation as well, this may be a criterion for defining a bereaved family in a way. If this criterion is strictly followed, the consent of all the members of the bereaved family is to be required. It cannot be otherwise if we respect the feelings of all the members of the bereaved family, but that is impractical in the case of transplantation where urgent disposal is necessary. It is of course desirable, as a matter of feelings, that the disposal should be made with the consent of all the members of the bereaved family, but I would think that it is sufficient, legally, if consent is obtained from the person who is in a position to represent all the members of the bereaved family. Needless to say, the representation here does not mean the legal power of representation expressly given by all the members of the bereaved family, but it means that, seen from his status among all the other members, he is in a position to represent all the others. The Civil Code provides in Article 897 Paragraph 1 that "the ownership of genealogical records, utensils of religious rites and tombs and burial grounds is succeeded to by the person who, according to custom, is to preside over ancestral worship. If, however, the person succeeded to designates the person who is to preside over ancestral worship, such person shall succeed to that ownership." From the spirit of this provision, it may safely be said that the chief mourner is in a position to represent all the other members of the bereaved family as regards the disposal of the remains.

In this regard, too, it should not be forgotten that, since the crime of mutilation of a corpse is against public morals, that is, against public interests, the concept of a person who has the right to consent under the Civil Code, etc. should not necessarily be applied to this case. The fundamental spirit which should govern the transplantation is that the respectful feelings toward the corpse must be maintained and that we must take caution not to harm the public morals and feelings toward the disposal of a corpse. It is a problem of public morals to pay consideration not to hurt the feelings of the bereaved family. From this standpoint, it may not be unreasonable to interpret that all the members of the bereaved family have the right to give consent, but I think it is a more reasonable interpretation that among all other members of the bereaved family, the key member who presides over the funeral is the most important, and therefore, it is sufficient only to obtain his consent. Of course, the consent by proxy is acceptable, in the case he is an infant.

In short, although the mutilation of a corpse belongs to the crimes against public interests, it is also necessary, as in case of a crime against personal interests, to obtain consent in order to overcome the unlawfulness that violates the public morals regarding the disposal of a corpse. As the necessity of consent is not for determining any legal relations in the private law, I think that the problem of who has the right to consent should be solved by placing stress upon the custom of respecting the chief mourner than by strictly interpreting who should have such a right.



How much does the will of the deceased person expressed before his death have to do with this problem? The philosophy underlying the existing laws takes no account of his will. This way of thinking means that since man has no legal personality after death, the disposal of his corpse should be left to the will of the bereaved family, regardless of the will of the deceased person himself. But the thought like this is shaped only when we consider the right of disposing a corpse from the standpoint that only a living person can be a subject of rights and duties. I'd like to advocate that due regard should be paid to the will of the deceased person expressed before his death, considering from the existence of the provision for the crime of mutilation of a corpse which is designed to protect the custom of respecting a dead person. In my opinion, the evaluation of an act of disposing a corpse from the standpoint of criminal law should be made in primary consideration of the will of the deceased person. But this is a new problem which has never been studied in the past, so I am not sure if a majority of people would support my opinion. The point is that an act which is not harmful to the custom of respecting a dead person can be a justifiable act. In order that an act of mutilation may not be disrespectful to the deceased person, compliance with his will can be a very strong factor for justifying such an act, and compliance with the will of the bereaved family has the same effect. As a practical problem apart from the theory of law, the fact that the will of the deceased person is clear will be one of the most influential factor in obtaining the consent of the bereaved family.

As regards the disposal of a corpse, there is also conceivable such a question as whether the consent given by the bereaved family before the death of the donor can have any effect after his death, in the light of the accredited principle that the consent of the deceased person expressed before his death is regarded legally to have no special meaning. For the purpose of organ transplantation, it is desirable that the consent of the bereaved family given before the death of the donor should be valid, because it is often indispensable to take organs out immediately after his death. As regards this problem, I have heard that an official in charge of the Ministry of Welfare gave a negative answer in "Question and Answer Column" of a certain medical magazine, but I don't think to agree with the answer. I presume that the official concerned, as a representative of the administrative authorities, must have given this answer in a very safe manner to prevent any doubt, and I admit that some share such opinion, anyway, but, except when the consent of the bereaved family given before the death of the donor is later withdrawn, I do not see any reason, theoretically, for nullifying the consent. Especially, the validity of consent should be considered solely from the standpoint of respecting the public morals and customs. Therefore, there is no reason why we should be so particular about the time when the consent is given.

(c) Cardiac transplantation and the boundary between life and death

Soon after it was reported that a cardiac transplantation succeeded, the question of the boundary of life and death was brought to the attention of the persons interested. In the actual practice of clinical medicine, it has been customary to announce death when the respiration, the beating of the heart and the pupillary reflex all stop, and the beating of the heart has been considered as the most important factor. However, it is necessary, in a cardiac transplantation, to use the heart taken out before or immediately after the stoppage of its beating. But, viewed from the method hitherto in use for confirming death, the taking out of the heart before the stoppage of its beating is seen as nothing but an act of killing.

I do not, however, think it reasonable to adhere blindly to the stoppage of the heart. Suppose that the brain was crushed to pieces in a traffic accident or for some other reason. Since it is absolutely impossible to restore the brain to the original state, the person can no longer continue to live as an integrated individual. Therefore, even though the heart still beats for some time, he should, as an integrated individual, be regarded as dead at the moment the brain was crushed. In this case, the fact that the heart still continues to beat for some minutes does not mean that the man is living; it only means that a part of his body is living. Generally speaking, even after the stoppage of beating, it is very often observed that other parts of the body are still alive. From the standpoint of legal medicine, it is recognized that, under normal conditions, a human body is partially alive for almost 24 hours or so after the stoppage of beating of the heart, and it is well known that the length of period of such a time may be extended if we take some special measures. Viewed from these facts, it is clear that the decision of whether a person is living or dead should not depend upon whether or not parts of the body are still living. Whether a man is alive or dead should be judged as an integrated body, therefore, it must be a distorted view to take special account of the function of heart. We must not regard an individual as living merely because the heart is beating, though it is a phenomenon of partial living. In a hypothetical instance cited above, I think that the person should be regarded as dead, even though the heart is beating. If we think this way, it will help us enlarge the possibility of cardiac transplantation and, moreover that, such a way of thinking is of course proper and reasonable. Although this view is formed in order to change the existing view which adheres too much to the beating of heart, we do not intend to use it as a desperate measure of making the cardiac transplantation possible. The successful instances of the cardiac transplantation have given us the opportunity of reconsidering the thought prevalent in the past and, as a result, we have now been enabled to know the boundary of life and death more reasonably. But here I have one thing to warn to the medical circles. Even among the members of medical circles themselves, this is being pointed out by thoughtful doctors. That is, doctors must not hastily confirm that a person is dead, being too eager for the successful transplantation. When it is too early to do so, the result will be detrimental not only to the medical ethics but to the society at large. This is a question of conscience and medical ethics for doctors. If it should be dangerous to leave this to medical ethics, some kind of legal control might be required.

### III. *Supplementary Remarks*

1) There may possibly be some exceptional cases of the organ transplantation which do not realize any crime. By this I mean the organ transplantation done as an act to avert imminent danger (Article 37 of the Penal Code). Such exceptional cases of emergency transcend the various requirements mentioned above. An act to avert imminent danger is permissible only in unavoidable and emergent cases, and it is required that the conditions of emergency prescribed in the aforesaid article must be fulfilled. For this purpose, it must closely be examined whether there exists the necessity of averting imminent danger in the actual case in question. Whether a particular situation is so clearly exceptional or not cannot be defined simply by the vague cognizance of urgent necessity. As regards such exceptional cases, it will be necessary to argue separately from this paper. In this paper, I have limited my

argument to the ordinary cases that are usually expected to arise.

2) In connection with the problem of transplantation, there are a few points which are to be considered for the drafting of law.

- a) If we could enact a special law for the organ transplantation after the pattern of the Law Corneal Transplantation, the carrying out of the organ transplantation would be made easier in actual cases, because it would be performed on a basic law as such.
- b) As regards the organ transplantation from a dead body, it is desirable that an explicit provision is set forth in a law, paying more respect to the donor's will expressed in his lifetime. This is not unreasonable, considering that the will of a deceased person is respected for inheritance. In my opinion, if the will of the bereaved family does not coincide with that of the deceased donor, priority should be given to the latter, and the will of the former should be followed in case that of the deceased donor was not clear.

3) I think it is also desirable that an explicit provision which authorizes the use of a part of a dead body, immediately after death, for the purpose of transplantation should be incorporated in the above new legislation. But if the new Code is not enacted, it is also desirable to insert the similar provision in the existing Law for Dissection and Preservation of Corpses. Under the present Law, "preservation" as a specimen is permitted but "use" is not. And the Law seems also inadequate, because professors and assistant professors of surgery are not listed among the doctors who are authorized to hold an autopsy without the permission of the Chief of the Health Center. The amendment of the Law on this point should also be given an impetus, if the provision is deemed really inadequate from the professional standpoint of medicine.