

The family-oriented priority organ donation clause in Japan—Fair or unfair?

An analysis using the theory of ethics of unity and difference

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ABSTRACT:

The revised Organ Transplant Law in Japan allows individuals to prioritize family members to receive their donated organs after death, although the revised law maintains the original law's fairness clause. The prioritization policy, however, does not seem to have morally offended the Japanese sense of fairness. It may be explained by the theory of ethics of unity and difference conceptualized by Tetsuro Shimizu. The prioritization policy may serve as an example that the interpretation of the fair opportunity rule, a basic rule of organ transplantation, may differ between cultures.

INTRODUCTION:

The revised Organ Transplant Law that took effect in Japan in 2010 has brought the country somewhat closer to others on the issue of transplantation, while at the same time adding an uncommon aspect to the country's system of organ transplantation. The legal revisions now allow organ procurement only with family consent, unless the brain-dead person has previously refused to be a donor. The revisions also allow organ procurement from brain-dead children under the age of 15. For these purposes, Japan has legally discarded its unique dual conditions on brain death, accord-

ing to which brain death constitutes death only when the patient has given prior written consent to be an organ donor, and the family does not oppose the donation. The revisions were made in an effort to increase the number of organ donors (Aita 2009: 1403–4), although inconsistencies inherent in the concept of whole-brain death adopted by the US and many other countries including Japan have become evident with the advancement of intensive medical technology in the past few decades (Chiong 2005: 20–30, President’s Council on Bioethics 2008, Shewmon 1998: 1538–45, Truog 1997: 29–37). The original Organ Transplant Law, enacted in 1997 and valid through June 2010, resulted in a very small number of brain-dead donors: 86 nationwide in over a dozen years. As part of the effort to increase this number, another legal revision was made and the family-oriented priority organ donation clause was included in the law. This clause is believed to be unusual in the international community of organ transplantation (Aita 2011: 489).

PRIORITIZATION POLICY

Under the priority donation policy, the priority for organ donation is limited to blood-related parents and children and legally married couples. Adopted children are eligible only when they have cut all legal ties with their biological parents under the Special Adoption System. Under this system, which is designed to support the well-being and protect the rights of children who are not cared for by their biological parents, children below the age of six years at the time of adoption are registered in the family registry system as the adoptees’ natural (biological) children. Those adopted outside this system are registered as adopted children and thus are not eligible under the priority donation system. This strict limit is intended to prevent the abuse of the priority donation system, including secret organ trades under the guise of adoption (Aita 2011: 490).

The priority is realized when the deceased has left a written statement of his/her wishes regarding his/her organs. People cannot designate a specific family member in the statement but can only state “priority donation to the family.” If the donor has written a statement of his/her wish for a family-oriented priority donation but no eligible family member is on the semi-governmental organ waiting lists at the time of donation, then the organs will be given to unrelated people on the waiting lists on the

basis of medical needs and waiting period in accordance with the government guidelines. If, however, the donor candidate has stated that his/her organs should only be given to family members, then no organ donation is performed (Aita 2011: 490).

The legal revisions, including the priority clause aimed at increasing organ donation from cadavers, were proposed by a group of lawmakers including Taro Kono, a Liberal Democratic Party member who had donated part of his liver to his father Yohei Kono, a former LDP president. Many observers predicted that the priority clause would lead to no notable increase in organ donor candidates; however, Taro Kono told the parliament that the clause should be added as it may appeal emotionally to the public and more Japanese may think positively about organ donation (Aita 2011: 490).

Prior to the enactment of the family-oriented priority clause, the nation's health and welfare ministry hastily revised its guidelines to state that those who are believed to have committed suicide in order to provide their organs for their family members will not be able to serve as organ donors. This addendum was made in response to public concerns that the new priority clause would invite suicides in people desperately wishing to save their family members even at the cost of their own lives. Among those who voiced such concerns were the Japanese Circulation Society (JCS), one of the most respected, traditional, and largest academic organizations in the field of medicine in Japan. The society has 22,000 members including more than 10,000 heart specialists across the nation. In October 2009, the JCS filed a petition with the health ministry requesting that the heart should be excluded from organs that come under the family-oriented priority clause; otherwise, "the clause might result in suicides or murders by contract" (The Japanese Circulation Society 2009). Medically, it would be unrealistic to become brain dead intentionally; yet, the JCS, like some segments of the public, was concerned about this possible risk.

At the time when Japan introduced the family-oriented priority donation policy, Israel introduced a different type of prioritization policy, designed to rectify the problem of free riders who are willing to receive but unwilling to donate organs (Lavee et al. 2010: 1131). Under the Israeli prioritization policy, people who sign a donor card receive priority points, as do their family members; as a result, donors and their families are prioritized in the queue for organs should they later require one. In other words, in Israel, priority benefits go to donor-card holders and their families; while in Japan, body parts go first to the donor's family under the prioritization policy (Aita 2011: 490).

COMPROMISING FAIRNESS?

The revised law retains the original law's fairness clause as one of the fundamental principles of organ transplantation, stating that organ distribution and transplant operations should be conducted in a fair manner. This stipulation is in line with bioethical principles concerning organ transplantation (Veatch 2000: 287–310). Under the law, the Japan Organ Transplant Network, a government-affiliated entity, has taken measures to ensure fair opportunities for people to receive organ transplants based strictly on medical needs and the waiting period. As a result, some Japanese critics have voiced concerns that the family-oriented priority clause would violate the fair opportunity rule. The issue, however, has not drawn much public attention. It was almost outside the legislative debate that focused on whether to uniformly recognize brain death as legal death to allow organ procurement only with family consent and whether to allow organ procurement from those under the age of 15 (Aita 2011: 490). Furthermore, the issue was not on the agenda of the health ministry's working group that discussed the necessary preparations for the enforcement of the revised law. Instead, the panel talked about who would constitute the eligible family members under the priority clause.

The priority clause does not seem to have caused any major moral challenge in Japanese society, suggesting that setting the priority does not morally offend the Japanese sense of fairness. Why might the average Japanese accept the family-oriented priority clause as fair? No quick explanation seems to exist, but a possible argument for the acceptance of the fairness of the clause relates to the boundary of self. Who falls within the boundary of self in the mind of the Japanese? As the government panel concluded, for the average Japanese, it is first-degree relatives. In other words, most Japanese consider their closest relatives an inseparable part of themselves. Transplanting their body parts to their loved ones may be akin emotionally to transplanting their right hand when they themselves need a left hand. If that is the case, it would be irrelevant to question the fairness of prioritizing organ donation for their close relatives.

A POSSIBLE EXPLANATION: THE ETHICS OF UNITY AND DIFFERENCE

The boundary of self and the relative sense of fairness of the Japanese can be explained by the theory of ethics of unity and difference. Conceptualized by Tetsuro Shimizu, a Japanese philosopher, this theory proposes that ethical codes vary depending on how close the relationship is among the parties concerned (Shimizu 2010: 157–64). The ethics of unity (or togetherness) is characterized as an attitude of mutual support based on the perception that we are companions. The ethics of difference is an attitude of mutual noninterference based on the realization that we are strangers to each other. The ethics of difference is interpreted in a code stating, “One may do anything freely so long as it brings no harm to others”, that is, the principle of “live and let live”. The characteristics of the ethics of difference are found in those of the Harm Principle, proposed by J. S. Mill in *On Liberty*.

The ethics of unity is interpreted in the corresponding code of mutual help, termed the principle of “live by helping each other”. The principle is associated with the unity of those concerned who depend on each other. The ethics of unity works most powerfully among people with the closest relationship, while the ethics of difference works most predominantly among those with the remotest relationship. According to Shimizu, people who share a strong sense of togetherness also share or feel the need to share things and thoughts.

In my view, people who share the strongest sense of togetherness, or unity, would like to (or feel the need or pressure to) do everything they could for those closest to them, even sharing their body parts in an emotional sense.

I believe this has resulted in Japan having by far the largest number of living-donor liver transplantations in the world. As of December 31, 2010, a total of 6,097 liver transplants involving living donors were performed in Japan, while only 98 liver transplants involving cadaveric donors were conducted. Parents accounted for 95 percent of the living donors, 1,166 mothers and 952 fathers, in 2,224 partial liver transplants in which the recipients were younger than 18. For recipients aged 18 and over, in 3,875 transplants (including two dual graft cases), about 43% of living donors were the recipients’ children, 23% spouses, 18% siblings, and 11% were parents (The Japanese Liver Transplantation Society 2012). A study in Japan that examined the

decision-making processes of living liver donors reported that their decision-making model is one of having no other choice but to donate their body parts (Fujita et al. 2006: 774).

If we recognize the ethics of unity at work here, then it is little wonder why the Japanese accept the family-oriented priority clause as fair and also why the Japanese government has called for suicide prevention to be addressed as part of the priority clause.

The ethics of unity and difference coexist, but the balance between the two differs among countries and cultures. I believe that the principle of “live by helping each other”, or the ethics of unity, carries more weight than that of “live and let live”, or the ethics of difference, in East Asian countries, including Japan; while the reverse is true in Western countries. The two principles can also be found in other theories of ethics, which are structured according to different frameworks, including the ethic of care from the gender perspective that was proposed by Carol Gilligan (1993), in contrast to the ethic of justice.

I believe that one characteristic of the ethics of unity can also be found in the familial interdependency, particularly between mother and child, which is described by Takeo Doi (2001: 45–162), a Japanese psychiatrist. When a very strong sense of unity or togetherness within a family works negatively in a crisis, it can result in the tragedy of family suicides (Veatch 2002: 22). In Japan, at times, a mother in a crisis has killed her child and committed suicide.

CONCLUSION

The revised Organ Transplant Law in Japan, which was amended to boost the number of organ donors, includes the family-oriented priority donation policy that allows people to prioritize a close relative to receive their organs after death including brain death. Since the revised Organ Transplant Law took effect in July 2010, the number of brain-dead donors was 29 as of April 2012. Thus far, a kidney and a cornea donation from cadavers were reported under the priority policy, but no priority donation from a brain-dead donor has been reported. The priority donation policy is a measure intended to appeal emotionally to the public so that more Japanese will think positively about organ donation. Some critics assert that this prioritization policy involves an ethical problem; that is, fairness may be compromised in organ allocation. The prioritization policy, however, does not seem to have morally offended

the Japanese sense of fairness. The sense of fairness of the Japanese may be explained by the theory of ethics of unity and difference conceptualized by a Japanese philosopher. The prioritization policy may serve as an example that the interpretation of the fair opportunity rule, a basic rule of organ transplantation, may differ between cultures.

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