

## 2. Criminal Law and Procedure

### **Organ Transplantation Law**

**Law No.104. Promulgated on July 16,1997. Effective on October 16,1997.**

#### *[Background of the Legislation]*

The prior law on organ transplantation was the Transplantation of Cornea and Kidney Law of 1979. It addressed the transplantation of the cornea or kidney from a dead body that the heart stopped beating based on the concept of death at that time. In determining whether there was consent to remove the organs there were two requirements ; the consent of the family of the deceased with documents and the consent of the deceased himself or herself with or herself a document and lack of opposition of the family of the deceased.

When the problem of brain death arose, the special commission called "Noshi-Rincho" concluded in 1992 that brain death should be determined to be death medically, socially and legally. The commission proposed that two requirements should be met for organ removal. First, the will of the deceased himself or herself was to be superior to the wills of his or her close relatives. Second, the will of the deceased himself or herself was to be most highly respected and when the deceased himself or herself had refused to have his or her organs removed, even if the close relatives consented to remove the organs, it was not permissible to do so. People tried to solve the problem of consent in the Transplantation of Cornea and Kidney Law. After it was actively debated whether brain death is the death of a human being and problems of the consent of the family and the deceased were considered, this law was passed.

#### *[Main Points of the Act]*

This law has the purpose of bringing about the proper practice of medical transplantation (Article 1). Organs covered by this law are the

heart, lungs, liver, kidneys, and other specified internal organs, as well as eyeballs (Article 5). It respects the will of the deceased himself or herself most highly (Article 2 (1)), and provides a duty for doctors to explain to the donor and his or her family (Article 4).

With respect to removing organs from the deceased, it is possible to do so when he or she expresses the wish in a document while alive, and when the family doesn't reject removing the organ. Brain death is recognized as one form of death of a human being (Article 6 (1)). As the document to express the wish, Ministry of Health and Welfare publishes a donor card. As factors to determine brain death, it is required in addition to have the consent of the deceased himself or herself in a document, and that the family doesn't reject it (Article 6 (3)). More than two doctors who have knowledge and experience must determine brain death (Article 6 (4)). This law prohibits the buying and selling of organs (Article 11), and a person who commits such an act is to be punished by penal servitude for under five years and/or by a fine of up to 5,000,000 yen (Article 20 (1)).

Further, because of the enactment of this law, the Transplantation of Cornea and Kidney Law was repealed (Article 3 of the Additional Rule). To remove an eyeball or kidney can be done only with the consent of the family of the deceased (Article 4 (1) of the Additional Rule).

### *[Comment]*

This law is significant in two ways : to clarify the wish to remove organs and to acknowledge brain death to be a form of death in cases of organ transplantation (but there is no rule which defines brain death as death in general). Formerly, the death of a human being had been considered based on three signs ; irreversible cessation of breathing and pulse and the expansion of pupillary dilation. In recent years, because of the development of science and technology, there arises a state in which breathing and pulse don't cease for a certain period but all functions of the entire brain, including the brain stem, irreversibly cease. Therefore, a theory of brain death is to be asserted the considers irreversible cessation of all functions of the entire brain as the death of a human being. Because this law acknowledges brain death to be one

form of death of a human being, it is possible to perform organ transplantation from brain dead bodies without falling under the elements of an offense of homicide (Article 199 of the Criminal Code).

It is for the purpose of organ transplantation that brain death is acknowledged to be a form of death. When the deceased express in advance his or her wish to remove the organs, it is possible to acknowledge brain death to be death and to remove the organs under certain conditions. However, when the deceased doesn't express his or her wish or when the deceased expresses a wish to do it but the family rejects removing the organ, it is impossible to determine brain death, and the doctor must wait until the heart ceases functioning to determine the death, even if the deceased has lapsed into brain death: The situation may arise in which brain death may be initially determined medically to be death on the one hand, but not on the other hand for the purpose of organ transplantation, and thus the concept of death is relative.

A person who commits bodily injury when the victim consents to do so is not punishable in principle, and physicalness and liberty can be determined by the will of the victim himself or herself. While Article 202 of the Criminal Code provides that a person who acts as a participant in suicide or homicide with consent is punishable, and life can't be determined by the will of the victim himself or herself. Therefore, in opinions and criticisms of this law, there is criticism that to make the concept of death relative and to change the standard of death can not be explained from the perspective of self-determination because the will of the family is considered, and might be inconsistent with Article 202 of the Criminal Code, providing that life can't be determined by the will of the victim himself or herself.

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