

中国死刑囚移植についてのアメリカ連邦議会証言

栗 屋 剛

私はここ数年、中国における死刑囚からの臓器移植について、実態調査や法整備の状況等についての調査を行ってきた。その結果はすでに法律時報（第68巻第9号（1996年）28頁以下「中国における死刑囚からの臓器移植」）や、いのちジャーナル（1998年2月号6頁以下「中国・死刑囚からの臓器移植」）などに報告している。この中国死刑囚移植について、1998年5月、アメリカ連邦議会（下院）国際関係委員会と政府改革監視委員会の合同委員会が証言および意見陳述を求めてきた。私はそれに応じて、同年6月4日、合同委員会公聴会において証言および意見陳述を行った。その際、合同委員会は事前に質問事項を示し（末尾添付文書参照）、答弁の内容について、公聴会開催中の質疑応答とは別に、文書で提出するよう要求してきた。それが以下の文書である。私がこの文書で述べている事実や意見のほとんどはこれまで活字にしていないものである。それゆえ、資料として本論叢に掲載していただくことにした。

STATEMENT OF
TSUYOSHI AWAYA, PROFESSOR OF LAW AND SOCIOLOGY
TOKUYAMA UNIVERSITY
before the
INTERNATIONAL RELATIONS COMMITTEE AND
GOVERNMENT REFORM & OVERSIGHT COMMITTEE
of the
UNITED STATES HOUSE OF REPRESENTATIVES

June 4, 1998

1. Japanese patients going to foreign countries for organ transplants.

There are two ways that Japanese patients take to go overseas for organ transplants. The first is to go to a developed country recommended by one's attending physician. The second is to go to a developing country through a broker or by oneself. The developing countries where Japanese patients have been going for organs include the Philippines, China, Korea, India, Bangladesh, Thailand, and Taiwan.

All of the latter type case occurred before the enforcement of the new Japanese organ transplant law, "the Law concerning Human Organ Transplants 1997." Since the law took effect, no such cases have been reported.

There are only a few brokers for the Chinese market. Some brokers stopped their business due to the law. Some are still continuing their business, but no patients come to the brokers' offices, because patients are afraid of punishment by the law. Incidentally, the Philippines market has been stopped completely due to the law.

2. The legal distinction in Japan between "an organ sale" and a package of hospital services that include a transplant operation.

The Law concerning Human Organ Transplants 1997 in Japan prohibits sale of an organ in same way as the American “National Organ Transplant Act 1984.”

If a patient pays money as “valuable consideration” for an organ, this is counted as an organ sale, and so is illegal. But, if a patient pays money for operation fees, drugs, and various other expenses, it is not seen as an organ sale, so it is not illegal. (The same legislation is observed all over the world.) Therefore, even if a patient receives a package of hospital services that include a transplant operation, it is not illegal, unless the patient pays money for the organ as “valuable consideration.” But even in this case, brokers’ business for a package of hospital services is illegal for other reasons. Why? The “mediation” of organ transplants without the permission of the Japanese government is prohibited by the above mentioned law.

Incidentally, If someone provides only information services about the procedure of getting organ transplants in China, as it is not actual mediation of organ transplants, it is not illegal. One Japanese broker has started such an information business recently.

3. Proof that organs transplanted in China come from executed prisoners.

In 1993, the Chinese government admitted that organs used in transplants in China come from executed prisoners (in a statement by Chinese United Nations delegate, Jin Yongjian (United Nations, Report of the Committee against Torture, Forty-eighth Session of the General Assembly, Supplement No.44 [A/48/44], 1993)). I have tried to observe an execution and removal of organs myself, but as yet I have not been able to. But one Hong Kong Chinese doctor, who is referring patients to China, told me that this is true. And one Chinese doctor and one nurse who are working for Japanese transplant patients also confirmed this. Incidentally, many articles also make reference to this fact.

4. The time when Japanese patients started to go to China for organ transplants.

Japanese patients started to go to China for kidney transplants from around 1985.

5. Total number of Japanese patients who have gone to China for organ transplants.

My total from various sources: at least 26.

Sources:

Ota, K., et al, "Present status of organ transplantation to Japanese patients in foreign countries," *Transplantation Today* (Japanese), Vol.10 No.4, July 1997, pp.549-553;

Kubota, K., "Data and complications of the patients on whom kidney transplant operations were performed in Asian countries," *Japanese Journal of Transplantation* (Japanese), Vol. 32, 1997, p.268;

Matsuno, R., "Investigative research on the state of Japanese kidney transplant tours in Asia," *Bioethics* (Japanese), Vol. 8 No. 1, 1998 (under proofreading);

Awaya, T.'s research, including interviews with brokers, patients, doctors, etc.

6. Payment of Japanese patients for an organ transplant procedure.

15,000,000 Japanese Yen = \$ 115,000

25,000,000 Japanese Yen = \$ 192,000

One case that a broker mentioned: Total payment is 15,000,000 Yen = \$ 115,000.

- (1) Chinese hospital: 9,000,000 Yen = \$ 70,000
Japanese brokers say that Chinese hospitals distribute money for the related police, military, court, etc...
- (2) Japanese broker's income: 3,000,000 Yen = \$ 23,000
- (3) other expenses (transportation, accommodation, etc.):
3,000,000 Yen = \$ 23,000

7. Japanese organ brokers.

All brokers who are involved in the organ trade in Japan are Japanese. Some of the brokers have an Internet Home Page. Other means of advertisement are posters inside streetcars or on telegraph poles. Word-of-mouth communication between patients is also an important means of advertisement. Incidentally, newspaper articles and TV programs about their business (even when these criticize the brokers) give a big advertisement for brokers to patients.

The system is simple. A patient makes a telephone call to a broker. After that, payment, date of departure, etc. are decided. Usually patients pay half of the total money before departure to China. After coming back to Japan, they pay the rest. All arrangements for the operation is done with the China side (hospital staff). Incidentally, most of the brokers are very busy. For example, when patients are waiting for operation in China, they take patients sightseeing on a no dialysis day! Brokers want to have a good reputation in order to get more patients/customers. So they are very kind to patients. I met so many organ brokers in India, the Philippines, etc. Most of them were as kind as those Japanese brokers.

But some of brokers are very bad. For example, one Japanese broker recently ran away after collecting 50,000,000 Yen = \$ 385,000 from 4 patients. This is fraud! The police are now investigating this case.

8. Chinese organ transplant hospitals.

There are so many hospitals which conduct organ transplants in China. There are no particular hospitals where Japanese patients typically go. Each broker has his own contacts and arrangements.

Brokers and patients won't tell the name of the hospital, because they think that if the name of the hospital is disclosed, the hospital might have trouble.

9. My own experience.

I wrote several articles about organ transplantation from executed prisoners in China. One of them is Awaya, T., "Organ Transplantation from Executed Prisoners in China," *Horitsu Jiho* (a prestigious law journal in Japan), Vol.68, No.9, 1996, pp.28-34.

I have been to China 5 times since 1995 for my research. Last time was April 1997 with a Japanese broker and patients. The patients got new kidneys. I spent one week with them and I got information. The patients knew the source of the kidneys. They didn't know Chinese laws about organ removal and transplants. Incidentally, there are no laws about organ removal and transplants in China. There are administrative regulations about them.

In general, Japanese patients who get organs not only in China but also in other foreign countries are indifferent about the source of organs. It is not important to them where the organs come from.

I have visited several Chinese transplant hospitals. I have talked with Chinese doctors. I know most of the complete systems of Chinese organ removal and transplants. In fact, details are mentioned in the article, Munro, R., "Organ Procurement and Judicial Execution in China," *Human Rights Watch / Asia Newsletter*, Vol.6, No.9, Aug.1994. In addition, I wrote about the system in my above mentioned article .

10. My opinion

a. Utilization of organs from executed prisoners for transplant medicine.

The thorough utilization and commodification of human body parts has been progressing in the world, as a result of "life-utilitarianism." Transplant medicine is one of the driving force of this.

From a contemporary point of view, utilization of the dead body of executed prisoners for transplant medicine is a special version of the utilization of the human body, similar to the utilization of an anencephalic infant body or an

aborted fetus.

In fact, prisoners' corpses have been utilized for anatomy for centuries all over the world (without their consent). From a historical point of view, the utilization of the dead bodies of executed prisoners for transplant medicine is an extension of the utilization of their corpses for anatomy.

Incidentally, there are cases of organ transplants from executed prisoners not only in China but also in Taiwan, Singapore, USA, etc.

b. The identification of organ transplantation from executed prisoners in China as “organ sales.”

Can organ transplantation from executed prisoners in China be called organ sales? Most articles which appear in newspapers and magazines say so. I don't think so. Why? Executed prisoners in China are never paid for their organs. (In some cases, the family is paid some compensation, but this doesn't make it an organ sale.) Patients pay money for operation fee, drugs, and other expenses, but do not pay money as “valuable consideration” for the organ. Logically, at least, this means that this is not the sale of organs.

c. The consent of prisoners.

In reality have prisoners' consent been given to doctors before organs are removed from their dead bodies? There are four types. First: No procedure to get prisoners' or their families' consent takes place. Second: The procedure is gone through perfunctorily and their refusal to donate is ignored. Third: The procedure is gone through and, if they refuse to donate their organs, compensation is paid to the family in order to change their mind. Fourth: The procedure is gone through and, if prisoners refuse to donate their organs, money for prisoners' expenses (food, lodging, etc.) is demanded in order to make them change their mind.

Organ removal from executed prisoners without their consent is a violation of the Chinese administrative regulation, “Temporary Rules Concerning the Utilization of Corpses or Organs from the Corpses of Executed Criminals.” However this regulation stipulates no punishment. In general, it has been said that organ removal from executed prisoners without their consent is an infringement of the human rights of prisoners. But even if this is claimed, nothing happens. And usually it is said that even if patients get organs from executed prisoners without their consent, it is not punishable because there is no law which punishes it.

From my legal point of view, in general terms, this taking of organs from executed prisoners’ bodies without consent or payment is the stealing of a human body part. Nowadays human body parts (organs, tissues, cells, genes, etc.) have become valuable things which are given freely or for money. When a person is alive, the property of the body belongs to the person. After the death of the person, the dead body is the property of his or her family. (Strictly speaking from a legal point of view, a family’s right to the dead body is not complete property right.) To whom does the prisoner’s dead body belong? It belongs to the family of the prisoner not to doctors or the Chinese government. (There are no laws in China which stipulate that dead bodies of ordinary Chinese people or executed prisoners belong to the Chinese government.) So Chinese doctors are stealing organs! I think they should be punished according to Chinese Criminal Law, Article 264. Japanese patients are receiving stolen organs. It is a crime according to Japanese Criminal Law, Article 256, Clause 1, if they know that the organ is stolen.

How about organ removal from executed prisoners who have given their consent? It is legal to remove organs from executed prisoners with their consent according to the Chinese administrative regulation above mentioned. The regulation admits the organ removal from executed prisoners on condition that there is the consent of the prisoner or his or her family.

How about the ethical view? Here, it is a problem as to whether the prisoner's consent is voluntary or not. There are two way of thinking.

- 1) The prisoner's will to donate organs or not should be respected even if he or she is a prisoner, if his or her consent is given voluntarily.
- 2) The use of prisoners' organs for transplant purposes is unacceptable, whether prisoners give their consent or not, whether their consent is voluntary or not, on the grounds of (a) or (b);
 - (a) a kind of fiction that it is impossible for condemned criminals to give genuinely free consent because they are in a fundamentally coercive situation. (Munro, *op. cit.*, p.33)
 - (b) a consideration from policy that a kind of safety device is needed in order to prevent all the cases in which prisoners do not give genuinely free consent, even if, in reality, there are cases of prisoners giving genuinely free consent. (Awaya, *op. cit.*, p.31)

d. The role of Chinese government.

In China, organs taken from executed prisoners have been used from the starting point of transplant medicine. There are almost no voluntary donors either now or in the past. Neither have the Chinese government or medical societies in China made any real effort to get voluntary donors. It has almost been national policy to use organs from executed prisoners. I imagine that the Chinese government had no hesitation or trouble about using them from the beginning.

Fundamentally, transplant medicine cannot be done unless there are voluntary donors. So, fundamentally, transplant medicine cannot be done in China. This is a case of technology making a nation lose its moral values.

Incidentally, the Chinese government does admit organ removal from executed prisoners with their consent. (It is legal according to the administrative regulation mentioned above.) But in reality, the Chinese government has tacitly admitted organ removal from executed prisoners without their consent, even if, as mentioned above, it means organ stealing.

On the whole, Chinese government has been pushing ahead with organ transplants from executed prisoners, whether they give their consent or not, as a national policy. I believe this policy to be a violation of human rights and to be unethical. As mentioned above, there are no laws in China which stipulate that the dead bodies of ordinary Chinese people or executed prisoners belong to the Chinese government. Therefore, although it has the property rights to Chinese land, the Chinese government has no property rights to dead bodies of executed prisoners!

e. Injection as a method of execution in China.

Recently the Chinese government has been changing the method of execution from shooting to injection. The previous Chinese Criminal Law stipulated shooting as the only method of execution (Article 198). But a new Chinese Criminal Procedure Law 1997 stipulates both shooting and injection as methods of execution (Article 212, Clause 2). So the injection as a means of execution is legal. Execution by injection is very reasonable and convenient for the purpose of taking organs. It goes without saying that this will create a very dangerous situation.

f. Brain death theory and contract-out approach in China.

Recently some Chinese doctors have begun to assert that brain death equals the death of a person. Some other doctors have begun to assert a so-called contract-out approaches; unless the deceased expressed an opposite intention about the removal of his or her organs during lifetime, doctors can

remove the organs after his or her death. What will happen when these approaches are accepted in China? Surely, as great number of organs can be removed from ordinary people, doctors won't need to remove organs from executed prisoners. I imagine, however, that such a solution would generate new, more serious, problems.

質問事項を示した合同委員会からの文書（1998年5月21日付）

On June 4, 1998, at 10:00 am in room 2172 of the Rayburn House Office Building, the House Committee on International Relations and the House Committee on Government Reform and Oversight will hold a joint hearing on “The Sale of Body Parts by the People’s Republic of China.” We are writing to invite you to testify at this important hearing.

Our Committees have been informed that you are an expert on the subject of organ transplantation and are prepared to discuss how wealthy patients are lured to China, where they knowingly receive organs from executed Chinese prisoners.

In addition, we are told that you can tell the Committees how Chinese brokers recruit patients and how much the patients must pay for these “services.” We understand that you will also be able to provide statistics regarding the level of traffic the market for organs from executed Chinese prisoners generates in your nation.

Specifically, we would like you to address the following questions:

1. In October of 1997, the Japanese government passed a law making the buying and selling of human organs by Japanese citizens illegal. Before the passage of this law, to which foreign countries did Japanese transplant patients go for new organs? Since the passage of the law, where have they tended to go? Why?

2. In Japan, what is the legal distinction between “sale” of an organ and a package of hospital services that includes a transplant operation?

3. How do you know that organs transplanted in China come from executed prisoners?

4. For how many years have patients from your country been going to China for kidney and other organ transplants?

5. To the best of your knowledge, how many patients from your country have gone to China for transplant operations?
6. How much does a typical transplant patient pay for an organ transplant procedure in China?
7. Where do the brokers who set up these transplant operations come from, how do they conduct their business and what sorts of fees do they charge?
8. To which Chinese hospitals do Japanese transplant patients typically go?
9. Have you ever spoken with patients who return from China with new organs about their experiences there? Have any of these patients discussed how the organs are obtained and from whom they come? Have any of them discussed the Chinese laws governing organ donation procedures?
10. What are your professional and moral opinions regarding this system which has evolved in China?