RIGHTS OF THE DEAD

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Chapter 5
Dead bodies

5.1 Introduction

In this chapter we will focus on five arguments. First, the concept of a corpse will be addressed from a multi-disciplinary point of view of philosophy, law, sociology and anthropology. Second, we will discuss the fundamental issue, derived from the first discussion on corpse, of whether or not dead human bodies are commodities and explain the symbolic aspects of a dead body and its commodity-like features from a perspective based upon the thesis of "social characteristics". Third, we will examine a legal question: "is the right to disposal of a corpse that of the living or the dead?" and another question "how and why is the concept of "rights to disposal of a corpse" different in Japanese and English legal discourse?. Fourth, we will discuss the conflict between the dead's rights to disposal of their corpses and their relatives' rights of consent regarding disposal of the corpses. In this discussion it will be explicated how an intention to donate an organ and an objection to remove it are identified as a right. The fifth and final argument is on remedies available for an infringement against the dead—what remedies are available if organ removal without consent is tortuous. The above diverse debate will arrive at the conclusion that, when a corpse is considered as a symbol and part of the human, the living human's social characteristics are accepted as embedded in both the corpse and the dead

person. Therefore a corpse is in a sense an extension of a human and will justify rights of the extensive entity after death.

5.2 What is a corpse?

5.2.1 An approach to understanding a corpse

A corpse is a body deprived of life.[118] A corpse is not a body that brains are conscious of, but one of lost life. We can base one after universal understandings on natural science. This is to physically and chemically understand a body and, in other words, to measure and quantify it (Yōrō 1996). A good example for this is a corpse that has undergone modern clinical examinations (ibid.). However such a quantified finding as "a diamond is composed of carbon" seldom matters to those who have an interest in a corpse located in socio-cultural meanings. The corpse is embedded by socio-cultural meanings and implications of symbolism,[119] so that there exist as many understandings of a corpse as there are societies and cultures. Namely, cultural differences are resulted in a proliferation of definitions of death.

A corpse understood by natural science refers to a cognitive object based on objective scientific data. This interpretation of a corpse has no relevance to a symbolised body deeply associated with culture and society. When alive, one

[118] Contemporary life science takes it for granted that death is not an instant event but a gradual process. A molecule geneticist addresses that the state of being alive and that of being dead are evidently different but the process from being alive to being dead is a continuity (Tada and Kawai 1991). He also mentions that a stage of some cells' death and other stages of all cell's deaths in a human body are continuous and therefore that a controversy on an individual's death lies in the following; what is the point where in the process of death the death is accepted. Foucault (1973) claims that human death exists as a distribution.

[119] E.g., in *Encyclopaedia of Bioethics* (1995) edited by W. T. Reich the understanding of a body is attempted, under the "embodiment" thesis, i.e., the phenomenological tradition, by three approaches: the body in medicine and philosophy; social theories; and cultural and religions perspectives. However, there is no attempt to modulate these complicated controversies.

can understand one's *social cultural* body by one's own ability of recognition, but after one's death one's body can be an object understood by the perception and recognition of those who are influenced by society and culture. Therefore a corpse has a social and cultural background embedded by symbolic meanings as much as a living body does. Society and culture do not exclude death and corpses from their concern, but can include them. Death is not a loss of existence but a part of life. Death causes a living body to lose its biological functions but not to lose its existence. A corpse exists in society, culture and time. It is apparent that people's attitudes toward a living body and its continuity, i.e., the corpse, can be differentiated by the socio-cultural backgrounds.[120] Also from a point of view based on the thesis of "social characteristics" there is a case where the social characteristics that an individual held give symbolic meanings to his/her corpse. In some countries, for example, public executions and the body exposure of offenders can be ascribed to the illegal actions of the offenders or the social characteristics they held while alive. In this regard it would be evident that their social characteristics continue to exist after their death and that those cause such a horrible treatment of their dead bodies.

Said in that way, it would be almost impossible to find a universal definition in a social and cultural corpse. A simple example is that since whether or not brain death is accepted is determined by people's judgements—although the

[120] A body is partially dying in terms of time and space. If the biological concept of life and death suggests they are continuous, determining a line which death draws between life and death relies upon multiple judgements such as social, cultural and ethical standards. Thus confusion on the definition of a corpse takes place as a corpse is sometimes regarded as alive and sometimes as dead. The typical confusion bears brain death and organ transplantation. This suggests, for example, the complexity of whether or not a body in which there coexist dead brains and living heart and liver should be identified as dead. Furthermore, such a problem on the borderline of life and death may expand itself by cultural diversity. An example A. M. Hocart (1971 [1929]) illustrates that there is, in Melanesia, a culture which regards even illness and decline of aging as death. In the toraja community of

judgements are influenced by society and culture—one who does not accept brain death regards a brain dead body as a living one which has not arrived at death and others who accept brain death conversely regard a brain dead body as being dead. Even if law determines brain death as human death, opponents against brain death never dare to consider a brain dead body as being dead outside the legal sphere on the basis of social and cultural reasons.

Although it is possible to seek universality from a biological body and to develop perspectives on body from the objectivity of the biology, doing so is beyond the limited scope of this thesis because of the wide variety of viewpoints on the body. Therefore we will focus on specific approaches to understanding the *rights of the dead*. In this thesis, as restated in previous chapters, a corpse will be briefly examined by the perspective in which body arguments are converged toward the sociological concept of "social characteristics" used to justify the *rights of the dead*, and mainly from multidisciplinary viewpoints such as philosophy, law, sociology and anthropology.

5.2.2 The corpse and philosophy

Philosophy explores the human mind. In general, therefore, it shows a passive attitude toward discussion on the corpse which lacks mind. Philosophical debate on the body assumes the dualism between "body and mind". Even criticism of this dichotomy assumes that there is a relation between body and mind. However, discussion on the corpse has to bear themes that have little to do with mind, whilst it often deals with the problems of how one considers a corpse as an object of observation by one's mind, and how one has a relation with the object.

Ujung Pandang, Indonesia (Yamashita 1992) there is a specific culture that considers bodily

Thus the exploration of how one can understand a corpse as a philosophical object will arrive at the fundamental question: "is an ontology of corpse *per se* possible?"

In Western discourse there are two persistent debate lines on the body. One line rose from Descartes's most celebrated dictum *cogito ergo sum* which is the starting point of his system of knowledge. The ontological modes of body and the relation of body and mind were considered from a point of view of a rigid body/mind dichotomy. This line leads to a French line of philosophers such as Bergson (1911) and Merleau-Ponty (1963) who basically argued that there is an issue regarding body and mind founded on the basis of epistemology. Since the key terms of this line are "mind", "rationality" and "their relation with body", there are seldom any suggestions that this French line understands the mode of existence of a dead body which has lost its "mind" and "rationality".

Another line rose from John Locke's "self-ownership" thesis (1988 [1690]). On the conviction that labour *per se* is the labourer's property, Locke sought to justify the grounds for his argument on the premise that produce should be ascribed to its producer. Moreover, on a further conviction that since a human is both an embodiment of potential labour and the owner of its body, Locke sought to justify the grounds for the claim that labour is the owner of the body's property. The *self-ownership* thesis presents self-ownership of a body as an axiomatic basis of property rights—a natural right. The thesis has been developed by C. B. Macpherson (1962), John Rawls (1973), Robert Nozick (1974) and G. A. Cohen (1981). Self-ownership is a right by which one can exclusively control one's own body and abilities. Strictly speaking, the subject of this ownership is one's mind,

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death as illness unless a relevant ceremony is finished.

i.e., self, that is supposed to exist independently from one's body. Said in that way, one's corpse, i.e., a posthumous mode of body, is no more than an existence separated from one's mind in terms of time. It may follow therefore that there are almost no suggestions that the discussion of this line give for understanding the mode of a corpse.

Then, is philosophy irrelevant to a corpse? Can philosophy grasp it or how it can do so? The two philosophical lines attempt to understand a body from the perspective of its relation with the self—the subject of the body. However such an understanding must be frustrated by death. To reiterate, it is so because the mind of the subject becomes extinct by death and the dead body remains separated from the mind of the subject. Philosophical debate on a transformed corpse may be no longer interesting. As Turner addresses, "[t]he human body is subject to processes of birth, decay and death which result from its placement in the natural world, but these processes are also "meaningful" events located in a world of cultural beliefs, symbols and practices" (1984, 58). In the similar way, we can recognise a corpse as a meaningful event by cultural religious beliefs, symbols, burials and ritual practices based on the social characteristics that survive death. In that sense the dead body is always socially formed and located. What and how it is to be a corpse, i.e., its meanings, functions and existence, is defined and formed by the medium of socio- cultural values.

Nevertheless if, recognising the separation between the dead body and its antemortem subject, we attempt to understand the association between one and one's dead body, the debate on the corpse would be philosophically possible and feasible. Thus this chapter concentrates on answering some questions such as "is my body my property?" and "what is the association of me with my

posthumous body?". For answering them, we will have to go back to the second line discussion on self-ownership.

Starting from the presupposition that my body is mine is not self-evident. The debate on self-ownership has been traditionally and historically developed by at least five camps arguing differing perspectives on the debate about "who owns my body?": (1) *self-ownership* thesis, (2) *economic efficiency* thesis, (3) *human dignity* thesis, (4) *limited ownership* thesis and (5) *person* thesis.

The *self-ownership* thesis argues that self-ownership can be justified as a natural right (Locke 1988 [1690], Part 6). A right of self-ownership is based on apparent facts. In general the concept of self-ownership refers to the rights of each person to control his/her own thoughts, talents, capacities, actions and body (Thomas 1988, 8). The concept here refers, in a narrow sense, to a natural right as an exclusive power[121] which everyone has over his or her self (and labour) even in a state of nature, prior to the creation of the nation (Morimura 1995, 18-24). Robert Nozick (1974) presents a more radical view in which he re-establishs Locke's thesis (1988 [1690]) by incorporating the criticism of John Rawls's theory (1973) on distributive justice. Nozick's view is mainly based on thorough liberalism.

However, there are several criticisms of the Lockean thesis of self-ownership. Munzer (1990, Chapter 3) criticises on the basis that here the substance of self-governing named self-ownership refers to a moral right but not to a proprietary right. The claim that a living body is an object for a moral right may lead to another applied claim that its continuity, i.e., a dead body, can be an

[121] In plain speech it would be "because my life is mine, I am the only one entitled to determine its course". The use of the possessive "my" in these contexts clearly connotes more than a mere phenomenological relation (as in "my" mother or "my" fears); the "my" in

object for a moral right. Human bodies are not regarded as a proprietary thing as for instance a chair or a desk is. They are not an object for commercial dealings. As, with some exceptions such as hair and bodily fluids (e.g., blood and semen), we fail to buy or sell inner organs, or enter into a slavery contract, or sell human life on the grounds of self-ownership. We fail to regard a corpse as an object for commercial dealings. The term "fail" here refers not to being factually impossible but to being morally and legally avoidable or prohibitable. Yet, aside from commercial dealings, it is socially acceptable during the course of one's life to donate certain parts of our bodies. Additionally, a person may donate parts of their corpse or their entire corpse after their death. However, even in these cases, human tissue is not considered a pecuniary object but rather an object for which no charge is made, or should be made, for any surplus parts; when given away, they are given with an altruistic attitude. Thus the reason why a person's life, liberty and body are distinct from property dealings is that they are intimately connected with the person's personality. This criticism emphasises the argument that, since self-ownership, i.e., rights to self-ownership, is a moral right that can not be basically alienated or at least alienated for payment, it is totally different from proprietary rights. In this way it should be noted that philosophical debate can deal with a corpse as an object of a moral right.

Secondly, the *economic efficiency* thesis (e.g., Posner 1981) connects utilitarian arguments to economic efficiency. Here one's body is functionally valued as an object for the proprietary right. That is to say, the property right in human tissue can be justified in virtue of its connection with social institutions such as economic markets. In the last two decades, this perspective rests on the

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"my" life is strongly proprietorial, it indicates what I "own" and what therefore I have a right to

practice, persuasiveness and demand of and for organ transplants and the interest in allocation of human organs. Here a corpse can be justified as property by the *economic efficiency* perspective and can be treated as well as other properties of inheritance are treated. Therefore, the argument based on this thesis has little interest in social characteristics and symbols that a corpse was inherited from its living body.

Thirdly, the *human dignity* thesis advocates that a human body should not be thought of as property at all (e.g., see Gold 1996, chapter 7). This rejects the theses of both self-ownership and economic efficiency. It opposes the beliefs discussed above that first, the human body can be wholly an object for property rights and second that the value of the human body should be grasped from an "economic efficiency" point of view. Ryan raises two principal objections: "[t]he first is a pure moral objection. It is simply disgusting, obnoxious or otherwise to be deplored if bodily parts are made the objects of commercial transactions," and "[t]he second objection is less a matter of an intuitive dislike of dealing in what ought not to be dealt in than distaste for the injustice of the bargains which are struck." (Ryan 1987, 111-2). Why is it that regarding a human body as an object of property is to mar human dignity? One prevailing conviction that underlines most human rights is that all human beings have intrinsic value precisely as human individuals. This value bears on, as mentioned previously, the two kinds of human dignity. Since the vital ground for protecting the value is rights, rights are strongly linked to the concept of human dignity. All human individuals have, in a variety of ways and modes, potential abilities for the free development of their character, rationality, will and emotions. If one is subject to coercive

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control" (Jones 1994, 108).

interference then one's attempt to fulfil one's human potential, one's human dignity, is violated, possibly even dehumanised by the actions of others. Therefore, if and when others use physical force against one to make one do something against one's will, then they are violating one's human rights by not treating one as a human individual. The human dignity of a body would be the sum of rationality, will and emotion, based on an individual's religious beliefs, philosophy, ethnical values and culture, which s/he has as an individual human being. Therefore, coercive interference with one's beliefs results in a violation of human dignity. The *human dignity* thesis is a concern relating not only to an individual but to the community. Our bodies and body parts are loaded with cultural symbolism (Synnott 1993,1). The norms that guide the disposition of body tissue reflect community ideals and social priorities (Nelkin and Andrews 1998, 36). Therefore, to force those who believe in certain cultural symbols or interests to do something against their beliefs is to infringe their human dignity. Explained in this way, a corpse, namely a postmotem continuous entity of a living body, can be considered as an entity which has dignity. That is to say, the *human dignity* thesis is opposed to regarding the human corpse as property in that to do so results in violating the dignity of the dead, the dignity which is regarded as an intrinsic value.[122]

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[122] The *human dignity* thesis does not necessarily deny the *self-ownership* thesis. Once the owner has given consent, his/her property such as blood and hair can be removed and disposed of by others. Since the thesis links with the concept of community, it is necessarily influenced by communal interests. In order to resolve issues of human freedom and well-being which are linked with rights in society, the *human dignity* thesis often compromises the theses of *self-ownership* and *economic efficiency* for the benefit of medical development, for example, which is supposed to result in improving human welfare. The *human dignity* thesis underestimates the volume of organ donation for transplantation based upon market policy in contrast to that based upon the foundation of altruism. The reason for this under-estimation is that such donations, especially in the case of donors who respect cultural and religious values, frequently meet the expectations instantiated by these values and thus consented to them, rather than that altruism is universally more valuable than economic efficiency.

Fourthly, the *limited ownership* thesis is a compromise position in which it is argued that insofar as one takes an overall view, people do not own, but have some limited property rights to their bodies (Munzer 1990, 45). Munzer (ibid., 49) subdivides property rights into two categories: a strong property right and a weak property right. The former involves a choice to transfer for value (recompense, payment, reward); the latter involves only a choice to transfer gratuitously. However, substantively whether property rights are strong or weak is a matter of rhetoric. Irrespective of "strong or weak", once an object is categorised as a thing and is vested with the attributes of property rights, we have to categorise it as property. Munzer suggests "provisionally, that persons do not own their bodies but that they do have limited property rights in them" (ibid., 41). This is because, whilst the thesis of self-ownership has a condition of "a natural state" and it argues that a person has an unlimited right to his/her own body,[123] Munzer points out "too many incidents are lacking" (ibid., 43). Therefore, whilst persons say that they own their bodies, it must be right to argue: "[r]estrictions on transfer and the absence of a liberty to consume or destroy, for example, indicate that persons do not own their bodies in the way that they own automobiles or desks" (ibid.). However, a question arises here as to whether the conclusion that persons have limited property rights to their bodies is correct. If we apply this thesis to a corpse, we would argue that one has limited property to one's dead body. Can it be justified? At this point, we should refer back to one of the criticisms of Locke's thesis of self-ownership. The criticism was that self-ownership is not a property right but a right of character. The view based on a

[123] Strictly speaking, as Nozick (1974) and Morimura (1995) argue, there is a view that claims having a power to one's own body is an example of freedom, but there would be another view that claims the power can be considered a strong normative character of an attribution of self-ownership.

right of character does not consider as property, rights over one's body which one can hold, use and exclude from other's interference. It considers them as a kind of character. If we have doubts, despite whether property rights are strong or weak, about both the position in which the proprietary rights in a body can be claimed, and the view of economic efficiency based upon Utilitarianism, then we have to seek a third way. This leads us to the conclusion that a view derived from the concept of morality based on character can provide significance to an individual both as a subject of morality and as a member of the moral community. In the inherited form from a living body even a corpse has social characteristics and can be also a symbol.

Thus we arrive at the fifth thesis—the *person* thesis. This asserts that property can be connected to personhood, exactly social characteristics. Ryan (1987) lucidly explains the position as follows:

> "[t]he individual must be a member of a moral community which both recognises the sanctity of the individual and sustains a view of the good life which will give meaning to the individual's existence. What mankind values is not merely happiness but the happiness which comes from a consciousness of having done one's duty, and having been rewarded according to one's merits. As many writers have observed, it is not unhappiness which maddens us but injustice; by the same token, it is not mere pleasure which gratifies us but what one might call 'deserved well-being'...[This perspective] does not, however, see individual rights as 'trumps'; we have rights as members of a community, and our rights cannot 'trump' the highest good of that community. It follows that property rights must be assessed by way of their contribution to a society in which personality is most adequately expressed. Durkheim, who thought a conception of this kind was embedded in modern consciousness and ought therefore to be expressed in contemporary institutions, insisted that a merely utilitarian conception of individual property could not account for the outrage we feel at their violation; something close to 'sanctity' clings about them" (ibid., 70-71).

The long quotation above suggests three things. First, it urges a discussion of the question "what does "sanctity" mean here?" "Sanctity" here is another name for the inviolability of an individual right of property. This "inviolability" can be ascribed to the impossibility of substituting the property. On the other hand it

would be very likely that all we grasp from the concept of property is the relationship between a person's body and him/herself, as a subject of interest and a power, who is able to exclusively use the property. However, the "sanctity" stems from rights of character. This is because, as mentioned in Chapter 4, we assert that even gravestones and *ihai* have the potential to possess social characteristics. Second, it is suggested that this retains the dignity and protects the unviolability of rights of the individual, whilst at the same time ensuring there would be body parts or whatever available. Any social institutions associated with rights regarding a body have to reflect the desires of persons, whilst at the same time upholding and promoting social interests. This is a discussion on "how we consider the "inviolability" of the right of character[124] in a body" rather than a discussion on "how to discover the value of the property right of a body". Third, even if "[w]hat mankind values is not merely happiness but the happiness which comes from a consciousness of having done one's duty, and having been rewarded according to one's merits", the property right determined in the process of the consciousness is strongly associated with the right-holder's personality. When we see individual rights as those of character rather than "trumps", we recognise that such a consideration is already incorporated into English and Japanese law. Thus the sanctity of an individual's dead body can be ascribed to the characteristics that the individual held, and the characteristics can be evaluated by people's judgements, social attachments or desires. It follows that

[124] Ohba (1991) explains a different perspective. He argues, for example, that the preciousness of character should be released from the way of thought that regards preciousness as the inviolability of rights of subjects who own their life. Rather the focus of discussion should be on the impossible withdrawal of the mutual actions of harming and being harmed. Based on such a genealogical perspective as Nietzsche's and Foucault's, Kawamoto (1992, 82) notices the etymological associations amongst own, owe and ought.

even after its subject is extinct a body still represents a part of the antemortem subject's characteristics amongst relations with the living.

5.2.3 The corpse and law

Law deals with a corpse in a different way from a thing. Although a corpse is physically a thing, it is not so in terms of social and cultural values. To reiterate it is an existence embodied by symbolic meanings. Since society and its members place much value on corpse's symbolic meanings, law takes great account of a corpse and shows respectful attitudes toward it. In other words law vests a specific position in a corpse. The position refers to a position as an extensive existence of a human.

In comparison between Japanese and English law their Acts and Regulations on dealing with a corpse are not so much different. As addressed in footnote 47, law functions for a national register of all deaths, a certificate stating the cause of death, an authority for disposal of the body, etc. Such similarity suggests that the contexts under legal consideration are similar between Japanese and English regulations. In the recent heated debate on brain death and organ transplantation, however, the two countries show different attitudes toward the agenda because of their socio-cultural differences. There are slightly different standards or requirements for determining brain death and organ transplants between both nations.

A corpse is a symbolic entity which has social characteristics inherited from the antemortem individual. This symbolism makes law to show different attitudes toward a corpse from a thing. If it were pervasive to assume that a corpse is a mere thing, then there would be seldom need in provisions of

penalties for infringements against corpses. A corpse *per se* cannot enjoy interests in human life but can be ascribed to some interests which can be justified by culture and social order. We will examine how destroying corpses (Art. 191 of the Japanese Criminal Code) infringes interests regarding corpses, and how the infringement is related to the characteristics of the corpse and the circumstances located by the corpse and results in the difference of law's attitudes.

Arguments associated with the concept of the corpse and the crime of destroying the corpse [125] support arguments for legal interests to protect corpses.[126] Through the provisions of Chapter 24[127] of the Japanese Criminal Code, for example, Japanese legislation protects "devoted" feelings, as a form of the social order and custom, on behalf of the deceased, under the maxim "offences regarding sacred places for worship and burial". The provisions concerning abandoning corpses (Art. 190 of the Criminal Code) or/and destroying corpses (Art. 191) are an embodiment of the dead's legal interests. Penalties for infringements against corpses are clearly stated in Article 190:

> "A person who damages, abandons or appropriates the dead body, bones or hair of a deceased, or any other objects conserved in a coffin shall be punished with penal servitude for a period not exceeding three years".

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[125] The provision of the present article of the Criminal code is an inheritance of Article 264 (on the crime of abandoning a corpse) of the old criminal code that punished the action of abandoning a corpse which should be properly buried. The interest of this crime has been generally understood as protecting social order and custom. However, as for the protected interest, there has recently been similar controversy to that of the interest that was stated in the discussion on "defamation of the dead" in Chapter 2. To sum up, 1) the protection of the social order and custom (the leading view); 2) that of the devoted sentiments toward the deceased that of the bereaved's devoted feelings toward the corpse; 4) that of the people's freedom to religious activities; and 5) that of both social feelings toward the corpse and the interest of the dead and his/her bereaved who wish the corpse peace. See Ohya 1990.

[126] Destroying, unfairly disposing of and dealing with a corpse are considered offences of common laws as evidenced in the following American cases, State v. Bradbury, 136 Me. 347, 9 A. 2d 657 (1939); State v. Hartzler, 78 N. M. 514, 433 P. 2d 231 (1967).

[127] Crimes concerning places of worship and graves (Articles 188-192).

It is commonly argued that the primary aim of this provision is to protect ritual customs, and consequently, a living person's devoted sentiments toward a corpse (Ohya 1990, 491). In short, prohibiting actions such as destroying corpses protects the feelings of the living.

The possessiveness about corpses and ashes is not confined to Japanese culture;[128] in fact, it can be seen in many different cultures and appears to be global. However, the various forms of attitude towards corpses and ashes are relative to culture (Namihira 1990). In other words, from a philosophical point of view, the form is embodied in dualism, that is, soul and body. This has been argued in many religions and value systems since, for example, medieval times (Kobayashi 1993, 84). Ishihara (1984, 92) points out, in order to justify actions against corpses, such as organ transplantation, the legitimacy of the purpose is required. For example, legitimacy may stem from highly regarded cultural and ethical values such as maintaining life and the recovery of health. Additionally, in this context an integral, if not related, part of the idea of legitimacy is to minimise damage whilst removing an organ (e.g., the eyes) and go some way to repairing that damage (e.g., replacing the removed eyes with artificial eyes) (Uematsu 1978a, 70). This is intended to salve the feelings of those devoted to the dead person whose corpse has been subjected to transplant material removal.

Furthermore, Ishihara (1984, 92) claims that a corpse's relatives should provide assurances as part of the justification. For example, a person's consent

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[128] E.g., according to a newspaper report (Yomiuri Shinbun, 23. 1. 1996), some Serbians had dug up their family graves and travelled with their relative's corpses in November-December of 1995 before Serbian residential areas in Sarajevo, the capital of Bosnia-Herzegovina, came under Bosnia's control. The Serbians carried away about twenty dead bodies, which were not only ashes but also decaying corpses. The reason why, despite knowing that the action was against the Serbian Orthodoxy, they had exhumed the graves was that they had strong desires to take their relatives' corpses with them. At least

to his/her organ removal and transplants should be required. Also, there should be no objection by his/her next of kin. The law for the removal or transplantation of human organs in many nations stipulates such consent. Hence, we can see how the action that organs removed without consent by medical experts is an action accused of being legally arbitrary (Iwashi 1985, 52-53). However, it does not necessarily follow that destroying the corpse can be justified only by consent and from prior acceptance by the deceased and his/her bereaved family. Or rather, the issue is why it is that the deceased's *personal* consent is required in order to justify the offence against what should be protected as a social or *public* interest.

Uematsu (1978b) provides the following answer. Pre-death consent constitutes an exception to the traditional custom regarding disposal of a corpse. Additionally, if the bereaved consent, this plays a significant role in reducing feelings which otherwise would be felt by the action against the traditional custom; consequently, the degree of illegality decreases. Thus, Uematsu would argue that even pre-death *personal consent* is an element that can influence general attitude towards social customs and that we should understand the offence governing the destruction of corpses as chiefly based on protecting social and legal interests. However, Ishihara (1984, 93) is not satisfied with this answer because Uematsu does not explain why such consent reduces the feelings and the degree of illegality. Ishihara's criticism of Uematsu is accurate.

The dead's antemortem intention to donate organs and relatives' intention to consent are autonomous. They are human wills for performing purposes by their rationality, so that they are deeply related to human dignity. It is so because

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we can understand that the dead have a place in the life of the family who feel very attached

in a case where the intentions are thwarted and frustrated, the dignity of who declared the intentions comes to be harmed. Otherwise we need to understand the substance of the dignity from the strong bonds of relations between removed organs and the removed dead person and between the removed organs and the dead's relatives. These organs were placed in the body. What was located inside the body has symbolism even if the subject of the body was extinct or the organs were separated from the self-ownership. This suggests the symbolism that the dead person is a continuous part of an individual which survives death. This does not mean that we can imagine the person from his/her appearance, but that the factual existence of the organs evokes our historical relations with the dead or memories of him/her. The removed organs are irreplaceable and precious to the relatives. It is understood, therefore, that as far as the dead autonomously express their intention to dispose of their continuity, their intentions are embodied in the continuity and are united with it. Said in that way, we can reject the illegality of damaging a corpse when the dead's intention to donate organs and accept transplantation is supportable evidence of protecting the dead's dignity.

For Ishihara (1984, 99-100) destroying corpses is a crime against social and legal interests. Moreover, it offends the deceased's personal interests insofar as the deceased had wished post-death peace for those bereaved (see Yamamoto 1999, 92-93). The prevailing practice of organ transplants has played a vital role in highlighting some of the personal aspects involved in understanding the legal interests in human bodies. We can say that the two different interests, that is, private or personal and public interests, are compatible. The former, in

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to their dead relatives.

accordance with the deceased's wishes, is to save others. The latter, which goes beyond a personal interest of protecting the bereaveds' devoted feelings, is to include stabilising the rights to self-determination that derive from the character rights of the deceased. In addition to the two kinds of interest, we might add that the provision of the crime of destroying a corpse protects our expectation that our corpses will not be destroyed after our death.[129] Yet, even if the personal and public interests are reconciled, this is contingent upon the legal attitudes of the nation's lawmakers and the peoples' beliefs.

5.2.4 The corpse and sociology

Sociology literally refers to "the wisdom or knowledge (*logos*) of friendship (*socius*)" (Turner 1984, 11). If Turner's understanding is accepted that "[t]he task of sociology is to analyse the processes which bind and unbind social groups, and to comprehend the location of the individual to the social world" (ibid.), the location of a corpse would not be a minor one. Such an understanding implies that, by taking advantage of ritual practices (e.g., funerals and burial), religion (e.g., Christianity and Buddhism) has been in a deep and long time association with humans and society in terms of norms and regulations. As far as a corpse has a particular locus in the mode of social life, it functions as being normative in light of its appearance, characteristics and images.

Death thwarts the living's association with society. In that regard a corpse is a completion of frustration. Since a dead body (excluding a brain dead body) is physically an inactive chunk of meat it cannot function in such a way as human

[129] This third protection of interests does not stem from mysticism such as an awe toward the dead but from that which is generated by a presupposition that a person's characteristics can survive after the person's demise. The thesis has been repeatedly

activities. However, a corpse is a continuum of a living body. When an individual faces a corpse as well as he/she faces others, the corpse can be a reality to the individual. It is a completion of human activities and at the same time is externalised. The externalised corpse which was given its meanings by the living transfers from a biological objective structure to a subjective one of consciousness. In other words, even after that completion a corpse generates a new association with society by signifying its locus. The relation between the corpse and society has been unveiled by the surviving ritual practices and other new relations made by medical practices of organ transplants.

Historical reviews suggest that there have been *private* meanings or values and *public* meanings or values in a corpse. Death of a family member is an eternal deprivation and a severe frustration to his/her survivors. It follows that his/her dead body in front of the relatives is a symbol of deprivation and frustration and a harsh reality to them. The relatives find *private* meanings and values in the corpse. Simultaneously the corpse is open to public evaluations. The body does not only receive an evaluation by members of the community but also can be a social phenomenon or communal event by collective rites held in the community. Namely, this means that through the association with the community, society looses an individual as a part of society rather than the individual looses society. When inner organs or parts of a body, are related to society, such dual meanings and values can be taken into account.

In this way a dead body sociologically illustrates an association between itself and society through *private* and *public* meanings and values and how the social characteristics of the body represented in the society. An extreme figure

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claimed in this dissertation, the protection of interests stems from the concern about to what

that we can show as the dead's social characteristics is a body who died from anorexia. The essence of the social characteristics of an anorexia sufferer is the bodily state of affairs generated by refraining from eating. For example extreme slimming is associated in puberty with a rejection of sexuality through the suppression of menstruation. An extremely slimming figure *per se* is a seemingly extraordinary object for observation and its observers are likely to fix their images of anorexia. It would be possible sociologically to understand that anorexia, a women's assumptive disease, is "part of symbolic struggle against forms of authority" (Turner 1984, 202). Turner also states that anorexia is "an attempt to resolve the contradictions of the female self, fractured by the dichotomies of reason and desire, public and private, body and self" (ibid.).

A phrase from Lukács (1971) suggests that the paradoxes of anorexia reproduce the antinomies of bourgeois thought (Turner 1984, 185). Anorexia can be understood as "a search for individual freedom and individualism from the "golden cage" of the middle-class, over-protective family and a quest through rigours of secular asceticism for personal perfectability" (ibid.). Of course, the paradoxes are resonant with the culture of consurmerism, sexual symbolism of body and "the patristic norms of slender feminine" (ibid.). At last anorexia results in a rebellion that often ends in death. The miserable figure of a dead person that suffered from anorexia illustrates that the whole person is so confused and dialectically divided. Thus the social characteristics of the body are recognised as a consequence united by a social cultural exercise and a natural one such as "the loss of weight, deformities of bone structure, loss of menstruation, hyperactivity, malnutrition, hypersthenia and anaemia" (ibid.). From here a

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extent the interest of a living person should be legally protected.

rights-based claim for a remedy will be made because the dead person failed to exert control over his/her own body and character. The starved to death anorexia figure has a more normative power than an ordinary dead body has.

If it is acceptable to understand that, as far as one has a body, one is a part of nature, and, as far as one has a mind, one is a part of society, then a dead body as a continuous entity of the living body is a part of nature and, at the same time, of society. Yet in that case, since there is found no consciousness and perception in a corpse, a corpse is not conscious of society but related with society through the living's conscious. The sociology of a corpse has a role in analysing the relation between corpses and society so that we will focus on that point in the below sections.

5.2.5 The corpse and anthropology

In most cultures and civilisations a corpse has symbolic meanings and values. If it were not for the symbolism imbued in a corpse, then the corpse would be drastically treated as a mere thing. Although there were times when dead bodies had been badly treated, this was a difference in the degree of treatment. In light of a continuum from a living body to its dead body, we would say that there are no cases where we are not conscious of the corpse as a symbol.

Here symbolism refers to a state of affairs where a power in a material is embedded by the character of the previous owner or a power that symbolises the embodiment of the character. It includes what is stemmed from the sacred characteristics of the corpses, the sacredness which can be constructed in the context of religious practices. A corpse as a symbol affects people's consciousness and continues to sustain a power of expression. The Amazonian

aborigine Apinayé have a belief that spirit is embedded in blood or that blood is the equivalent of spirit (Matta 1982). Even in contemporary society there is a religious belief that blood is taken as a symbol and the symbol plays a vital role in being a norm for human behaviour. One's corpse is a strongly influential symbol to one's relatives, so that the relatives have a belief that they cannot alienate the body as a commodity.

The belief in a symbolised body is inseparably associated with the interpretation that a dead body is relevant to the character of the antemortem owner. This belief is that a body is a symbol which evokes, even after death, the diverse attributes, characteristics and features of an individual. In his *Golden Bough* (1936) Sir James George Frazer explained what he called "Contagious Magic". Contagious Magic is based on "the notion that things which have once been conjoined must remain ever afterwards, even when quite dissevered from each other, in such a sympathetic relation that whatever is done to the one must similarly affect the other" (ibid., 174). The most familiar example Frazer took is "the magical sympathy which is supposed to exist between a man and any severed portion of his person, as his hair or nails" (ibid.). This magic is not regarded as a punishable offence both in England and Japan, but in specific times and areas the people believed in its effect. Even if a part is severed from an individual body, it is believed that the characteristics of the individual are embedded in the part.

Even in contemporary society people acknowledge that a corpse still retains the character of the antemortem person and that the strongly symbolised entity is not transferable. On the other hand, we know a social reality that despite such strong symbolism, organs of a corpse are as a gift distributed from donors

to recipients. Why do organs become transferable? This question may be answered by the comparison of gifting and bargaining. In general bargaining the personal details of buyers/sellers and groups related by business and their relationships with each other are not taken into consideration. The relations of buyers/sellers are allowed to be anonymous and temporary. On the other hand gifting generally takes past relations and interactions into account. A commodity as a gift functions for maintaining, modifying and advancing the relation. A mere thing is, through a gifting action, incorporated into the intimate relation and comes to be a symbol of the relation. When a gift shows a power of the maintenance and modification of the relation, it can be regarded as a transferable symbol.

This can be understood by the relation between donors and recipients of organ transplantation: how a body and its parts which have an untransferable symbol become transferable. For his/her relatives the corpse of the donor holds strong power as a symbol. The donor's irreplaceable relation with his/her relatives is embedded in the body so that it can evoke the relatives' memory of the deceased. Although the organs cannot be transferred if they still have strongly symbolic meanings and values, it would be possible to be transferred in the mode of "a gift of life". For organs are incorporated in the relation between organ donors and their recipients and they are symbols of the relation. When people expect the communal bond and the maintenance of social relations to be strengthened by organ transplantation, organs can be transferred from donors to recipients. In this way the symbolism located between donors and their relatives moves to a new relation that donors and their recipients created through transplantation procedures. The relation symbolises organs and changes the

untransferablity of organs to being transferability. Thus the transferability of organs can be justified.

The brief anthropological review would suggest that we cannot take a simple paradigm that, because an organ is considered as a commodity, organ donation is acceptable but, because an organ is considered as a symbol, organ donation is not acceptable. The relatives respect for the donor's will and intention to donate and their own wish the donor's organs to be alive in the recipient's body even after the donor's death. Such things may persuade organ donation. In this case, despite the anonymity of organs, they can be regarded as a symbol by both a donor and recipient.

5.3 Is my dead body mine?

5.3.1 Issues

In the previous section the concept of a corpse has been explained from multidisciplinary viewpoints such as philosophy, law, sociology and anthropology. In this section we will discuss both whether a corpse can be a commodity and how the symbolism and commodity of a corpse are from the main perspective of "social characteristics". The question "Can a corpse be a commodity?" can be substituted with another question "Can a corpse be regarded as a mere thing?" At the level of law such discussion on the commodity of a corpse is the equivalent of the discussion on how a corpse can be justified as a strong symbolised existence.

5.3.2 Two diverging positions

The belief or assumption that our bodies are our own does not necessarily lead us to the conclusion that our dead bodies are actually our own. Whilst the belief or assumption can be justified by several of the perspectives discussed above, for example the theses of *self-ownership*, *economic efficiency*, *human dignity*, *limited ownership* and *person*, two essential, incompatible aspects exist in the justification of ownership of the dead body. First, a dead body is a continuation from a living body, notwithstanding that a living and dead body differ in a biological sense. However, when the continuation of both bodies is emphasised, it is natural to argue that, if and only if a person owned their living body, then should they also own their dead body. Second, an entitled owner should be a subject of rights. Nevertheless if we argue that the person can still hold the ownership of his/her dead body after his/her death then the dead person should have legal capacity or be a subject of rights as the owner of their dead body. Clearly, the arguments of the first and second aspects are incompatible. Furthermore, the conflict between them is further complicated by will or intention.

The first question of this section—"is my dead body mine?"—can be substituted with another question "is a dead body a thing?". Based upon the moral perspective, this debate requires expansion to encompass analytical arguments, the necessity for this shift stemming from the fact that a dead body due to its lifelessness is not a moral entity. In this analytical debate two competing positions emerge: one that regards a dead body as a thing; the other that does not regard a dead body as a thing. Japanese substantial law is based on the first position and English law on the second. To explicate the two camps, three approaches for justification of their own arguments are reviewed below.

The first approach asks the question "when a dead body is regarded as a thing, what is the justification for the assumption that a person can, even after death, dispose of his/her own dead body through his/her survivors as well as other property related to their succession?". This question may be associated not only with economic efficiency but also with traditional values. The second approach asks a different question "when a dead body is not regarded as a thing, what are the grounds for institutions such as will and intestacy by which a person's dead body can be succeeded to by his/her survivors?". Three answers could be posited: first, the body becomes unowned upon death and afterwards his/her survivors can obtain it; second, the survivors' respect for the dead; and third, the survivors' character. The third approach is to cast another question "when a dead body is not considered as a thing, what is the justification for the assumption that the intention of a person can survive his/her death and exercise the power to control, dispose of and interfere with the dead body?". Some important derivative questions will emerge such as "what should be regarded as a thing?" and "what is the association with intention or will?". Since death extinguishes the character of a person, we need to review how the dead person's determination to dispose of the person's body is associated with the intention of the bereaved and the right-holders responsible for burying the dead person. We also have to think about how possible disposal of the body is, unless the circumstance is that there was no will written by the dead person. In the following section we will examine how Japanese and English substantial law and legal discourse discuss whether a corpse and its parts can be regarded as a thing.

5.3.3 Japanese law

Japanese law is in the first position and thus views the corpse as property. Whilst the law *per se* has been influenced by German law[130] which does not view the corpse as property, Japanese law regards a corpse as an object possessing the rights of property and the rights to burial. The perspective that regards a corpse as an object for the right to burial has for a long time justified its view in pragmatic terms.

First, in addition to the German argument based on rights to burial, the old Japanese view that the corpse is considered as an object for rights to burial has been argued on the same grounds. The view is that, regarding it as the corpse, it is an object of the customary management and rights/duties to hold ritual ceremonies and it should not be regarded as property. Namely that the corpse's characteristics are not appropriate for business dealings, that people have negative attitudes and beliefs toward the property rights of the corpse, and furthermore that corpses have been regarded as an object deserving special rights, e.g., the right of the deceased's bereaved to bury the corpse (Wagatsuma 1965,203; Ikuyo 1984, 157; Nakajima 1922).[131] A recent modified view (Hoshino 1992, 196-197) claims that there are some problems with the laws relating to

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[130] In general, German law does not in terms of real property view the corpse as a thing, but as an afterimage of rights of character of the dead (see Chapter 2; Ashitomi 1980, 51). This was a leading view amongst Germany lawyers, based on the federal court decision that held the rights of general character could survive a human's death. In the Japanese law under the strong influence of the German Civil Code, however, the view of "an afterimage of the dead", forms a minority view where there is no legal tradition of direct protection of the interests of the dead (Kondō 1932, 137). The contents of "rights regarding the corpse" are, in this view, drawn from the contents of two kinds of rights which are associated with the living's bodies: rights of excluding any infringement against the bodies and rights of disposal. Insofar as such rights of the living with respect to their bodies have some grounds for being protected, they are converted into "rights regarding the corpse" and survive after death. As for the removal of organs which we will discuss later, what should be taken into consideration at the time of the removal are issues of rights of character of the dead. It follows that, if a person, before death, directs how his/her corpse should be disposed of, the direction will be respected insofar as it is not against public order and good morals (Iwashi 1985, 56).

corpses. These problems in particular pose difficulties for the practicalities of dealing with a corpse, such as who has the power to manage it and who pays the funeral expenses. Proponents of this modified view thus criticise the view that regards the corpse as property. Rather, the modified view argues that, in accordance with custom, entitlement for corpse management should be held by those who are responsible for the disposal of the dead, their funeral arrangements including any religious or memorial services.

Thus the leading Japanese view regards the corpse as an object that possesses the rights of property. There are three main variants of this view. First, the corpse is regarded as an object for succession.[132] This view is longstanding (Nagashima 1920). It argues, analogously to the Germanic view, that the living body is transformed into a thing called the corpse after death and can be an object of succession. However, this view fails to account for how and why the living body can *on death* be transformed into an object for succession whilst the *living body* is at the same time held to be an object for rights of character, and thus it cannot be considered property to be owned and used by the living.

The second view is that the corpse is regarded as unowned property, concern and regard for which is the responsibility of the bereaved. The bereaved can perform the enforcement of their right to property insofar as it is not against the prevailing customs. This view (Ichimura, 1910) is, despite its relative unimportance, worthy of evaluation. It suggests that the bereaved's rights to the disposal of the corpse are not necessarily confined to the scope of burial and, as a result, include other rights, such as that of giving consent to dissection. However, the principal weakness of this view is that it appears to argue that since

[131] See judgement of Supreme Coourt, 8 July 1989 (Kasai-geppō 41-10-18).

a body becomes ownerless on death, then a situation is created whereby it would be permissible for the body to become the property of whoever made the first claim for it. Substantively therefore, it would thus be possible for physicians to be free to remove organs from the dead who die at their medical institutions.

The third view (Wagatsuma 1965, 203; Ikuyo 1984, 157) is that of the current mainstream practice for dealing with the dead in Japan. It contends that the corpse should be owned by those (generally the chief mourners) who hold, in accordance with public order and good morals, the right to burial. But, as Iwashi (1985, 49) points out, even in this case, the freedom to deal with the corpse is strictly delimited and the practical exercise of rights to property is confined to authority over and duties relating to burial, worship and memorial services. Thus we cannot clearly distinguish between the third and second view that regards the corpse as an object for rights to burial. In short, the leading view regards the corpse as property, and "rights regarding the corpse" are not deemed to be those of the dead *per se.* The *rights of the dead* is at best converted into rights to burial in accordance with the prevailing customs. Therefore, the action of burial basically stems from rights to property and rights to burial, including other rights of disposing of the corpse.

Needless to say, however, such an outmoded view of the corpse was formed at a time when the corpse was medically useless and hence was regarded merely as an object for rapid disposal. Approaches for dealing with the dead were in most cases confined to actions of burial. The value of the corpse to the living was certainly low. As Iwashi (1984, 103-107) points out, the right to burial is merely a sort of duty of burial and the right-holder refers to no more than

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[132] See Judgement of Supreme Tribunal, 5 July 1921 (Minroku 27-1408).

those who are responsible for burial. This traditional value has been radically altered by the advent of organ transplant practices.[133] The corpse is viewed not only as an object for burial and worship but is also something which plays a significant role as a valuable utility in society and more importantly medicine (ibid.).[134] Likewise, Campbell (1992, 34) describes, in the introduction to an elegant paper named *Body, Self, and the Property Paradigm*, that "[t]he remarkable developments in biomedical research and technology of the past quarter century have made the human body not simply a subject of study and observation, but an object of manipulation in revolutionary ways". This technological manipulation has generated provocative paradigms for whether or not the human body should be regarded as property. He points out "[i]n light of the many potential lifesaving uses of the body in medicine, we cannot avoid questions about whether the human body is a form of private property and whether persons own their bodies" (ibid.). Thus evidently the issue of organ removal and transplant has focussed attention not only on issues relating to burial but also on issues of character in order to understand the right to disposing

[133] A leading view before the positive value of organ transplantation from a corpse was taken up for discussion, had argued that, when the corpse is actually being buried or due to be buried, there are no rights of property in the corpse that can be protected by provisions related to the punishments of property crime. In this case, the infringement of the right to burial would be applied. So far as that view is presupposed, the point at which the corpse was refused permission for burial would be a determinant for distinguishing the crime on theft (Art. 235 of the Japanese Criminal Code) and the crime of appropriating a corpse (Art. 190). For example, a criminal court judgement (Judgement of Supreme Tribunal, 7 March 1939 (Keishū 18, 93)) accepted as *obiter dictum* the 1921 civil court decision, as the judgement of footnote 132 illustrates, that proprietary rights of a corpse and its ashes can be ascribed to the heirs by succession. Any property from the remains that have been cremated such as gold teeth, insofar as the bereaved do not claim them, are ascribed to the municipality that runs the crematorium (See Machino 1993, 53).

[134] The issue of the corpse as a valuable utility in society is, in Japanese law, associated with the relevant issue on who manages and disposes of the corpse. In terms of contexts of rights, there is a difference between a "disposing" person connected with the right to donating organs and other "disposing" persons connected with the right to burial. The former is associated with the right of character because donating organs explicitly implies saving another's life. The right is similar to the right to speech based on spiritual co-

of a corpse from the viewpoints of political and moral philosophy (see Shinomia and Nōmi 2000, 133) and law.

5.3.4 English law

Previously slaves and villains were the objects of property (Magnusson 1993) and at one time a wife was considered to be the property of her husband. However the present situation is that English courts work on the principle that nobody can have proprietary rights in the living body of another person. As for the corpse, English law supports an applied rule stemming from the rule relating to the living body, i.e., that there is no property in a dead body. This rule is applied both to buried and unburied bodies. However, the principle rule on dead bodies does, in terms of the practical uses of corpses, reveal its relatively weak grounds of justification. For example, the question "what are the grounds for medical institutions possessing cadaveric specimens or tissue removed from a living or dead body?" is apparently unanswerable. Historically, the question of proprietary rights in human tissue is confined to consideration about the treatment of a corpse and cadaveric specimens. But, as Magnusson (ibid.) emphasises, this situation has now changed dramatically. He points out, in the same vein as Campbell's (1992, 34) discourse, "[t]he rise of tissue banks, biotechnological engineering and human reproductive technology has brought with it problems which require for their resolution a determination of the legal status of tissue removed from live donors" (Magnusson 1993, 251). Likewise, as we will discuss in the rest of this chapter, a drastic change in perceptions of the dead body has taken place in Japanese legal discourses on this issue.

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operation with the dead. The latter, on the other hand, is associated with those who are a

In England some common law cases have dealt with the issue of whether or not a dead body has property rights. *Haynes's Case* [135] in 1614 created the "no property" rule. The court held that "the shroud in which a body is wrapped still remains the property of the person who owned it before the body was buried, and, therefore, a person may be guilty of stealing a shroud provided the true owner is referred to in the indictment" (Smale 1994, 47). The court ruled as such precisely because it recognised that "the corpse itself was not capable of having property in the sheets, although this appears to have been misunderstood by later commentators to mean that a corpse itself was not capable of *being* property" (Magnusson 1993, 239) (original italics). Influential commentators such as Blackstone and Sir Edward Coke perpetuated the view that there was "no property in a corpse". Albeit, the "no property" rule was not actually referred to in that case. The next case in 1749 was *Handyside's*,[136] which was an action in trover brought against a doctor for the bodies of two children joined by a birth defect. East notes that "Lord C. J. Willes held the action would not lie, as not person has any property in corpses",[137] but this case did not reach such a level as to be considered a binding authority for future cases to follow (ibid.).

In the late eighteenth and nineteenth centuries, some cases on the disturbance or exhumation of buried corpses were taken up by the courts. Two cases, *R. v. Lynn*,[138] and *R. v. Sharpe*,[139] in particular showed the corpse "did not belong exclusively to the ecclesiastical jurisdiction, and that civil courts would intervene to prevent the exhumation of bodies for dissection, or for reburial

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successor of rites or a chief mourner (see Bai et al. 1997, 24).

[135] 12 Co. Rep. 113.

[136] 2 East P. C. 652.

[137] Ibid.

[138] (1788) 2 T. R. 733; 100 E. R. 394.

[139] (1856-1857) Dears & Bell 160, 163; 169 E. R. 959, 960.

according to different rites" (Magnusson 1993, 240). "In *Lynn's* case, counsel moved in arrest of a judgement against the defendant for disinterring a body for the purposes of dissection, quoting Coke's dictum[140] that a corpse belonged to no-one" (ibid.). Whilst, in fact, the court did not make comments on Coke's proposition, it held that the removal of a corpse from any burial ground without lawful authority was, whatever the actual motive for the removal might be, a highly indecent and indictable misdemeanour at common law.

In the case of *Sharpe*, it was held that the law does not recognise any property in a corpse and that any unauthorised disinterment, notwithstanding unconsecrated ground and any justifiable motives, is a misdemeanour at common law. The defendant was, in this case, charged with removing his mother's remains from a graveyard belonging to a group of dissenters from the Anglican church, to rebury them in another cemetery. The statement made by Erle J., would suggest that because of the "no property" rule the indictment against the defendant was not defeated by any proprietary rights asserted by the defendant over his deceased mother (ibid.). Therefore, it is highly unlikely that the right the defendant was asserting to his mother's body was asserted as a proprietary right to the whole body as a chattel (ibid.).

In *Williams v. Williams*,[141] the friend of a deceased person sued his executors to repay the cost of removing his body from unconsecrated ground and of cremating it in Italy. In a codicil to his will, the deceased person had directed the plaintiff to cremate his body and his executors to repay the plaintiff's costs for so doing. On his death, however, the executors, subject to his family's wishes, had the body buried. Kay J. found against the plaintiff on several grounds (ibid.,

[140] See 3 Co. Inst. 203: translated: "The burial of the corpse (i.e., flesh given to

241). Having quoted at length the opinion of Erle J. in *Sharpe's* case, he stated that since there was no property in a dead body, the deceased could not by will dispose of his own body (ibid.). It is highly unlikely, however, that the deceased had intended to dispose of his body as a chunk of property, by giving it to the plaintiff as a gift.

The famous case in which the English court authorised the "no property" rule is *R v. Price*,[142] the case where a father, a doctor, was charged with attempting to cremate the dead body of his five-year-old son. In the remark of Stephen J., he mentioned that the burning of a dead body, instead of burying, was not a crime at common law, unless it was done in such a way as to cause a public nuisance. His lordship also remarked, *obiter*, the "no property" rule.

Thus for a long time the "no property" rule was thought to be still effective in England and Wales, but it has not necessarily been viewed as absolute. The general rule was recently affirmed by two appeal cases: *Dobson v. North Tyneside Health Authority*,[143] a civil case in 1996, and R v. Kelly,[144] a criminal case in 1998. In the former case the Court of Appeal held that the justification in the Australian decision *Doodeward v. Spence*,[145] which the court acceded preservation of a two headed stillborn child in a bottle of spirits as "quasi-property", cannot be applied to the *Dobson* case. The reason for it was that the brain of the child had not been preserved for medical educational purposes, neither was the case akin to a stuffing or an embalming for retaining the part as a specimen. In the *Kelly* case, the defendant was charged with the theft of many

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worms) belongs to no-one and therefore belongs to the ecclesiastical jurisdiction".

[141] (1882), 20 Ch. D. 659.

[142] (1884) 12 Q. B. 247.

[143] [1996] 4 All ER 474, (1996) 33 BMLR 146.

[144] [1998] 3 All ER 741.

[145] (1908) 6 Commonwealth Law Report 406.

parts of corpses originally in the possession of the Royal College of Surgeons as anatomical specimens. Despite accepting the existence of the general rule, the Court of Appeal gave to the case the first authority that parts of human corpses constituted property in law. The reason of the decision is that since the body parts "had acquired different attributes by virtue of the application of skills such as dissection and preservation techniques, for exhibition or teaching purposes" (Price 2000, 126), they constituted "property" within S.4 of the Theft Act 1968.

In this way the rule "a dead body is not the subject of property" bears the arguments of recognising property rights in the dead body when it becomes a corpse, and cadaveric specimens are preserved and kept within an artificial environment (Magnusson 1993, 247). English regulations authorise the retention of the dead bodies for anatomical examination and medical instruction insofar as this is not contrary to the deceased's own expressed wishes and the wishes of the deceased's close family. One of several good reasons for this is, as Sir James Fitzjames Stephen (1883, 127) pointed out, that anatomical specimens could constitute personal property. In an alternative view which accepts the "no property" rule, it could be argued that retention by anatomy schools and museums of bodies and specimens should not be regarded as retention of property, but rather as a mere possessory right. Justified on the basis that such rights would be "subject only to the claims of a person with a better right to possession or a right to insist upon burial or disposal" (Magnusson 1993, 249), this English position is basically similar to the Japanese view previously mentioned.

5.3.5 Competing positions

As addressed in the previous sections, Japanese law finds property in a corpse but English law does not do so. But the Japanese position does not follow that by applying the character of general property Japan is distributing corpses in markets. In Japan as well as England corpses and their parts are not open to markets. As a matter of fact, the property right of a corpse is so related to the succession right, especially that of burial and that of disposal of the corpse (traditionally burial but not organ donation), that the property of the corpse is supposed to make the relatives to work out burial well. In addition the legal concept *kōjyo ryōzoku* (public order and good morals) in Article 90 of the Japanese Civil Code and people's conventional attitudes toward death and a dead body functions to refrain Japanese from distributing corpses and their parts as a mere commodity to economic markets.

However, the property of a corpse that we are examining within Japanese law has a great deal of differences from general property rights in terms of their characteristics and power. The main difference lies in the impossibility that a corpse and its parts cannot be dealt with in markets. For a human corpse has a distinguishing character as a thing, namely holding strong symbolism, and therefore to a corpse, exercising a general right of property causes morally serious problems. Contrary to the Japanese position, the English "no property" rule stands on the basis that, whilst the rule excludes all possibility of property in a dead body, it copes with the incoherence by using the concepts "rights of burial" and "rights to disposal of a corpse". Logically the rule seems unstable and somewhat inconsistent.

In other word, Japan and England are facing a similar problem on the property of a corpse. It would be impossible to synthesise both the Japanese rule "property can exist in a corpse" and the English one "property cannot exist in a corpse" under any conditions. However despite two opposed positions they substantially would have similar perspectives. Therefore we note that contemporary debate should not be related to a dead body as an object of burial and worship in the discussion associated with rights of burial, but to a dead as socially positive values suggested by the discussion on rights to disposal of the corpse and its parts.

To reiterate our position, it is as follows. The consistent argument in this thesis is that part of the living's rights can be succeeded to in a form of *rights of the dead.* Furthermore, insofar as we cannot regard the living body as property, we cannot regard the dead body as property. In plain language being a human continues to be so even after death in symbolic terms. The contents of rights regarding the corpse should be deemed to be part of the living's personality or character which has, as the leading German view on the corpse argues, been succeeded to after his/her death. These however are not "real rights" at all. There are two kinds of rights associated with living bodies: one is a right of protecting against any infringement against the body, the other is a right of disposing of the body. Insofar as it is possible to do so the rights provide justification for protection of the body, the physical part of the living person which survives death. Said in that way, the property-based view comes to be unnecessary. Even another view, which argues that a corpse should be regarded as property in terms of succession, comes to be necessary. A corpse is a continuum of a living body and a factual being and that a human changed, by

death, remains human but with different and the same characteristics as when it was living. The dead and living bodies possess a strong symbolism that evokes the diverse a person's attribute of character and features. Thus the point is that, in the heated debate on the removal and transplantation of organs, the consideration taken by the present Japanese and English law is about the "dead's character" that embodies their consent in disposing of their own bodies. As a person's character or personality can be ascribed to him/her when he/she is alive, so even after death the character of the deceased can be ascribed to the deceased *per se*, insofar as the view that the character of the living can be transformed into that of the dead is acceptable.[146]

Therefore, if the argument in this thesis on the transformation of the character of the living and the dead is valid, then it could be appropriate to think that, with respect to the character of the dead for example punishing an offence against corpses (Art. 190 of the Japanese Criminal Code) can be justified in order to protect their rights. As one of the rights of character, to exclude any infringement against the corpse, but as discussed in a following section, there are, in Japanese legal discourses, many controversial interests competing in any construction of crimes against dead bodies.

5.3.6 The body and intention

We are involved in and with our bodies regardless of our will and intention quite simply because we are in our bodies. What we do with our bodies and therefore our life is the result of will and intention. In other words, our involvement in our

[146] It would be worth noting that the draft of the Anatomy Act 1984 used the phrase "any party having lawfully the custody of the body" rather than "the person lawfully in possession of his body".

living bodies is one of realisations of our will and freedom. This assertion forms the fundamental position of this dissertation. However, it is not possible to then apply this position to the posthumous situation that we will all one day be involved in. For it is self-evident that we cannot dispose of our own corpse. In the case where we desire to dispose of our own corpses in a particular way, we need first to explicitly declare our intention that counts for our desire to others. This intention and its contents are personally or officially exercised by our surviving family or executors upon or after our death. Thus our pre-death desires may or may not be realised according to how faithfully the executive power is exercised.

In other words our pre-death intention or will survives and enables us to dispose of our corpses. The reason why the intention or will can be realised upon or after death and why the entitled successors can exercise it is that, in the case where they are realised by the exercise of the written will or other documents, or even in a case where they are no more than oral promises which are legally binding on the parties, the intention or will has a power that obligates successors to exercise the pre-death intention or will.

As previously suggested in the discussion of self-ownership, one continues to use one's body for the whole of one's life. A person realises his/her character during life by using his/her intention or will. However, insofar as the person cannot exist as a subject after death, even if the intention or will can survive by taking advantage of diverse legal devices, the influence of their intention or will has ultimately to be different from that of when they were alive. After death the lack of subject status differentiates their previous and current

situation, in which moreover they are no longer able to control their body by *direct* communication of their intention.

Therefore when we think about our own posthumous disposition of our bodies there may be an immediate awareness that the disposition of the corpse to a great extent depends on and is influenced by the successors' intentions. The factors underpinning this influence include not only the survivor's preference for the disposition but also memories and reminiscences about the dead person, which cannot be changed by the dead although they could be changed by facts that might emerge after the person has died.

If such a view is warranted, we will have to admit that the dead's dependency on their successors suggests that the relationship between ourself and our living body and that between ourself and our dead body are different, and at the same time the latter is a far weaker relation than the former. On the other hand, however, it could be possible to argue that since our pre-death intention which can survive our death can influence the disposal of our dead bodies there *is* the possibility of the development of our post-death wish or desire within the relationship of our intention and dead bodies. This development would imply that, taking one's pre-death intention into consideration, one's successors can use one's dead body to make medical and social contributions. However, it cannot be denied that, even if there are many different ways to dispose of a corpse and even if discussion on the corpse can be applied to the theses of self-ownership, economic efficiency and human dignity, the declaration of intention that guides how the corpse should be disposed of takes priority over everything. In the case where there is no declaration of intention, the intention expressed by others has been regarded as a kind of pattern of consensus and embodied in the

present legal system. However, even the legal system cannot intervene in the intention unless there are valid reasons to impose restrictions on the expressed antemotem intention. We will take up discussion of this last point below.

5.3.7 Pre-death or post-death economic efficiency

The issue over an intention and characters to a corpse bears how the difference between the living and dead body can be differentiated in the thesis of economic efficiency and its thesis of dignity. For the contemporary political agenda on medicine requires body frameworks which have a range of making economical use of corpses. To realise an economical use and social medical contributions, it would be required to resolve a difficult issue related to the *human dignity* thesis that competes with the *economic efficiency* thesis in the light of values of the corpse's symbolism and dignity. An answer is a view that there are different characters and features of a living and dead body between the *economic efficiency* thesis and the *human dignity* thesis.

Clearly a living body has a moral existence whereas a dead one does not. Whilst the problem of human dignity should be taken seriously, the problem it poses to the dead is not so serious. For what the moral existence means, e.g., freedom, responsibility, equality, etc., is irrelevant to the dead body. However, it is relevant in the case where one's pre-death intention survives after one's death and this intention is relevant to the disposition of the corpse.

The corpse *per se* has no human dignity based on freedom, responsibility and equality. Even if the corpse's dignity is insulted, it cannot physically perceive the insult. What is insulted is the dead person's dignity. For the corpse is not a moral entity and therefore it has no human character. When we use a phrase

"characteristics of a dead person", it refers to characteristics of the dead that survivors can perceive of as what was succeeded from the once living person. Therefore an expression "defame the corpse" is a kind of rhetorical expression. The purely moral view that takes the thesis of dignity as justification emphasises the dignity of *living* human bodies. In order to apply this justification to situations in which the dead body is regarded as an object of commercial transactions requires discussion based on the thesis of human dignity on whether it is appropriate to regard the dead body as an object.

The thesis of dignity is not based, to a greater extent, upon a logical necessity but upon people's assumptions, moral standards and religious beliefs. The thesis is to some extent situational. If we take a brief glance at human history, we become aware that there were times in which any dignity to the corpse was absent. Moreover, there were even times in which the dignity of a person's living body was completely disregarded because of the person's social position and social role within society.[147]

Since the *human dignity* thesis links with the concept of community, it is necessarily influenced by communal interests. In order to resolve issues of human freedom and well-being which are linked with rights in society, the *human dignity* thesis often compromises the theses of self-ownership and economic efficiency for the benefit of medical development, for example, which is supposed to result in improving human welfare. The *human dignity* thesis underestimates the volume of organ donation for transplantation based upon market policy in contrast to that based upon the foundation of altruism. The reason for this under-estimation is that such donations, especially in the case of donors who

respect cultural and religious values, frequently meet the expectations instantiated by these values and thus consented to them, rather than that altruism is universally more valuable than economic efficiency. That is to say, the *human dignity* thesis is opposed to regarding the human body as property in that to do so results in violating the dignity of those who regard dignity as an intrinsic value. Therefore in cases where this dignity is not violated, as when consent is given, the *human dignity* thesis partly concedes the property concept of a human body.

The *economic efficiency* thesis is coming near the view that regards the inner organs of a corpse as an object of commercial trade. However it does not intend to argue that a general property right is vested in a corpse and its parts and they should be contributed in commercial markets. Most countries prohibit commercial dealings of a corpse and its inner organs. Therefore the *economic efficiency* thesis requires devices for procurement and encouragement. Many cases of organ transplant practice in the USA show that, even if the relationship between a donor and his/her recipient is not directly associated with commercial trade, for example, the donor's expenses of hospitalisation before the death are likely to be partly exempted by the medical institution in exchange for donating the corpse for medical study. Also a programme in Pennsylvania offered up to three thousand dollars directly to the families of deceased organ donors (Murray 2002).[148] This exchange may be, in a sense, categorised as a financial transaction. We seem to accept the objectification of such trade. However, strictly speaking, this must be against the intention of the voluntary donation of

[147] For example, the dissection of criminals after capital punishment, including the gibbeted head has been practised throughout the world (see Foucault 1977).

[148] Murray's article is available in <http://www.medicalpost.com/mdlink/english/members/medpost/data/3825/25A.HTM>.

corpses. Whilst we may understand that the offer of money is the real motivation for donation whatever the actors really might have thought, that the hospitals make such an offer suggests that if they did not do so they would not receive enough dead bodies. In this way the society which requires organs of corpses for transplantation is likely to make a compromise between the *human dignity* thesis and the *economic efficiency* thesis. The compromise would suggest that there is a difference of the locus of human dignity between a living body and a dead body. For, except for extremists of the *economic efficiency* thesis, there is no one who claims to apply all of the *economic efficiency* thesis on a dead body to a living body.

A living body has a moral existence. A dead one does not. Since a living body has a moral existence, it is said that it evidently has a dignity intrinsic to and of itself. A corpse however does not necessarily have the same degree and meaning of dignity as the living body, although in most circumstances the corpse is respected by living persons. We are here, irrespective of whether a person is conscious or not, attempting to differentiate between their living and dead body in terms of the meaning of dignity. In so doing we are led to examine how the meaning of dignity differs between the two.

First, if the contention that the social characteristics of a person can survive his/her death, as asserted in this dissertation, is warranted, it should be possible to understand that the dignity of a corpse is part of, or an inheritance of, the previously living person's dignity which survives death., This "surviving" dignity is not therefore the whole of the living person's intrinsic dignity, but a part of it: given certain aspects of dignity are only relevant to living persons. For example privacy related to a living person's intrinsic values they can enjoy *ipso*

facto they are alive is not relevant in forming an understanding of the dignity pertaining to corpses. Thus we must accept that, in comparison with the dignity of the living, the dead or at least the corpse is accorded a lower degree and value of dignity.

Given this it would be unreasonable therefore to entertain a thesis of dignity which asserted the same standards of dignity for both the living and the dead. When this principle is applied to the case of organ transplants, in general what we have to take into consideration is the medical endeavour to prolong the life of the dying donor and, to same degree, other endeavours to prolong that of the recipient. The emphasis is upon the life of both. It is self-evident that irrespective of brain death the donor cannot donate until after his/her death and that insofar as the donor continues to be alive, the recipient cannot receive the organ from the donor.[149] The main reason for the medical endeavour for the two persons is that they both have dignity equal in values and character *ipso facto* they are both alive. Posthumously removed inner organs meanwhile have value but the social character of their own. They retain the dignity that remains after death. More precisely however this dignity does not remain in the organs, but in the survivor's minds. In other words, the organs have a strong social character as a symbol that functions as a mental bridge amongst people involved with the organs. If the organs were badly handled, such treatment may harm the dignity

[149] The combination of brain death and organ transplants contains something alien to morality. The fact of a consistent scarcity of donors presupposes that, at the final stage when a donor should have their life prolonged, medical treatment changes in favour of the recipient. We can not therefore separate brain death from removal/transplantation any more than the medical doctors involved in the transplantation projects can drastically separate them. For example, in 1996, 60 minutes, an American television programme, broadcasted a story about the ethical appropriateness of the procedure, pointing out that organ donor patients were being given drugs that would shorten their life in order to improve organ quality (Youngner et al. 1999, 14).

of the survivors but not the dead person. The expression "the dignity of the dead is harmed" is rhetorical.[150]

5.4 Consent and the right to dispose of a corpse

5.4.1 The form of intention and the right of disposal

This section provides a debate on rights to dispose of a corpse relating to the *rights of the dead.* The debate will be subdivided into three: first, "does the right to disposal of a corpse belong to the living or the dead?"; second, "how is it associated with the relatives' rights of consent?"; and third, "how is it socially and culturally influenced?". This subsection will focus on the first debate. By the fact that a dead person is the subject of rights, does the right to dispose of a corpse belong to the once living person or to the dead person *per se*? If the former, then how is the difficulty having to reverse time resolved? When a right to dispose of a corpse is infringed against, we have to sort out the difficult question "is it impossible that the infringed interests or protection can retroactively belong to the living person?"

One of the most important issues relating to the removal and the transplantation of human organs is that of an individual's will. This issue is integral to any review not only of the idea of consent for those who have rights regarding corpses but also of the rights concerning the disposal of corpses. When an organ is removed from a corpse, the person who consented to the removal is dead. Thus, the question "how can it be justified that the will of a

[150] The contention that the dignity of the body can be ascribed to the minds of the survivors through the dead person has some links with cases of the defamation of the dead. When people's expectations are directed to the posthumous dignity and reputation, the expectation deserves legal protection. Bad treatment of the deceased's organs is considered not only as direct harm to the corpse but as the crime of infringement against the expectation of a living person (see Hirano 1972, 79).

living person survives the person's death?" increases in significance. Consent given by relatives refers to the characteristics, degree and orders of the relatives' rights. Those alive who lack legal capacity may rely on their parents or guardians in a kind of vicarious role. On the other hand, when thinking about the dead, the English and Japanese traditionally view the bereaved or relatives as subjects of prior rights.

Some competing views on the right to disposal of a corpse exist in Japanese law. First, a corpse is an example of property and this right can be passed on. Since this view concedes a corpse as property, the right to disposal of it belongs to the dead's successor through the procedure of succession. Second, this right belongs to those who administrate the rights of a deceased person. This view is a leading one that started with arguing from the turning point of the post-war amendment of the Civil Code (Hoshino 1992, 196). Third, a corpse is not property but merely an object of burial associated with the family in the Civil Code. The corpse cannot be treated as an object of trading, that is, freely using is and gaining profits from it. Also one is not allowed to abandon it or to give up rights and duties of burial. Fourth, it is an after-image[151] of the right of the dead's character (see Chapter 2). Generally, the first and second perspectives have been extensively written about in academia, moreover, since the advent of transplant technology, the corpse has become the subject of serious study, observation and practice. The controversy surrounding organ

[151] K. Bai (1971) argues that a person can dispose of his/her own body as an embodiment of the right of character. In addition, Bai argues that this is limited insofar as it does not undermine public order and good morals (ibid.). Can this right of disposal be valid after the person's death? Bai's response (ibid.) is that "since it [the right to disposal] is a proprietary right, the simple analogy to the will for property is not necessarily appropriate. But the right can still have validity, as a post-effect of the right to character" (ibid., 126). However, even if the right to disposal can survive the person's death, it must be restricted not

transplantation resulted in taking the right of self-determination more seriously. Thus two additional perspectives are taken up here: first, the use of a corpse should be discussed within the confines of a well developed notion of informed consent, i.e., with respect to authorisation of consent to medical treatments and terminal services; and second, a right to self-decision should be regarded as the equivalent to a will in succession law.

5. 4. 2 The living's rights or the dead's rights?

Thus in this subsection the question "to whom does the right to dispose of a corpse belong" will be examined. Our argument is that rights, to exclude the infringement and to determine disposing of one's body, which belong to one while alive, insofar as the rights can be justified and are worth protection, can partly survive death. The debate will develop in this way.

Suppose that Smith has an intention to dispose of his dead body after his death. Whether he makes a will in order to authorise the intention of the disposal, or whether he orally requests his family members to dispose of his body, his intention is expressed whilst he is alive. It is physically impossible for him to determine his intention *after* his death. It follows that the intention regarding Smith's disposal of his dead body is his antemortem intention. When we talk about his intention after his death, we talk about his antemortem intention. Legally speaking, the intention is no more than a result of effectuating the intention after his death. It is a mere legal assumption that his intention is effective after his death. We will find its grounds. When Smith, the subject of intention, dies, evidently he cannot be the subject of intention after his death.

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only by public order and good morals (Tsubaki and Itō, 1995), but also, by the relative's right

After his death he exists as an entity who is physically unable to determine his own intention. Legally deceased Smith coexists with his posthumous intention after his death. If the antemortem intention is effective after his death, the surviving intention that coexists with the Smith who posthumously exists as an existence who lost the subject of the antemortem intention, would be effective as well. Namely, even if the intention lacks its subject, law has to admit that the intention can survive the death of the subject and be effective after his/her death. In that case, however, how do we understand the relation between Smith, as a dead person, and his antemortem intention? We are left wondering if there is no relevance between the dead Smith and his intention that he made whist alive.

After his death, the deceased Smith and his surviving intention can co-exist. When the intention fails to be fulfilled, who will suffer from the loss caused by the non-fulfilment? It should be noted that the intention in question is that relevant to rights to dispose of his corpse. If we observe the intention in terms of time, as mentioned, it seems that a presumption of his antemortem intention to dispose of his corpse survives his death can be justified. However an obstacle of discussion is that the intention is different from another intention that he expressed in order to pay back a debt after his death. The difference between the two cases is that the intention of disposing of his corpse is embedded in his corpse.

The loss caused by the infringement against Smith's intention of disposing of his body may be recognised when the removal and transplantation of Smith's organs are without his and his relatives' consent. If in that case the harmed interest is retroactively ascribed to the living Smith, inconsistency arises. For he

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based on custody etc.

does not exist as a living person at the time of the infringement. The entity that exists at the time when Smith's interest is infringed is the deceased Smith. Then it follows that the deceased Smith comes to suffer from the damaged interest. This conclusion seems to be bizarre because in general legal discourse the dead are not regarded as the subject of enjoying interests and suffering from losses.

To restate, according to the above perspective, we are lead to identify the living who no longer continue to exist at death as subjects who hold a right regarding the posthumous harm to the interest. It follows therefore that the posthumous interest should be ascribed to the living, an antemortem entity. If it is acceptable to argue that the posthumous interest cannot be ascribed to the dead because the dead cannot exist as the living, it must be illogical to, instead of ascribing the posthumous interest to the dead who posthumously exist, ascribe the interest to the living who do not exist after death. Unlike the case of ascribing an antemortem interest, the problem of ascribing a posthumous interest raises complications both before and after death.

The necessary conditions for entitlement to be a subject of a posthumous interest thus need consideration. Even if a dead person can be involved in an interest, such cases are restricted in comparison with those of living persons. Cases where involvement can be obtained have been identified and discussed in the previous chapter; these included defamation of the dead, protection of a corpse, cadavic posthumous organ transplantation, and posthumous performance of a promise or will (we will discuss the posthumous unfulfilment of promises in Chapter 6). All these are relevant to interests in what is done or not done after death. Even the orthodox theory of rights that opposes the concept of interests of the dead has no controversy, apart from over the issue of whom a

posthumous interest can be ascribed to, over whether an interest can survive death. Therefore the vital problem is whether posthumous interests can be ascribed to either the dead or the living. In short, regarding as rights to dispose of a corpse, the question is whether the rights belong to the dead or the living. Unless it is possible for a dead person to be ascribed a posthumous interest, then the conclusion that the right relevant to the interest cannot be established must be drawn. However, on the basis of this situation a new conclusion is entailed that *rights of the dead* is thus merely for the living. However, such a conclusion generates its own problems. The living do not exist when dead. If there were no possibility that an interest can be ascribed to a dead person, one conclusion would be that either there is no one to whom the interest can be ascribed or that the interest can be ascribed to someone except that that someone cannot be a dead person. Put that way, if that "someone" is a living person, then he/she is, as a matter of fact, no more than a living person who does not exist when dead, i.e., his/her continuum, exists.

The question therefore is: "can a dead person be a subject of interests?" In Chapter 2 we provided some positive arguments in relation to defamation to suggest that a dead person can be a subject of interests. Due to the intrinsic characteristics of the actions of defamation and of reputation, the object for protection, it is possible for the interest to be ascribed to a dead person. However, orthodox theorists assume that a dead person exists as a symbol but not as a subject. That is the reason why in the orthodox theory a right cannot be ascribed to the dead person. Nevertheless we have shown that a perspective which emphasises interests enables us to maintain the position that argues there are some rights which can be ascribed to a dead person. Moreover, the position

which emphasises interests is markedly different from the opposing position which emphasises agency: indeed attempts have been made based on the former position to vest rights to non-human animals and even nature (see Chapter 1).

A further question arises: for instance, is it absurd to use the phrase "a plant has interests" when a person provides the plant with water? People indeed may feel such a question is bizarre. Alternatively, when cases of non-human animals such as dogs are considered, we do not necessarily think it bizarre to say "a dog has an interest in being provided with water". Presumably the reason the latter case is not perceived as bizarre is due in part at least to the idea and movement of animal rights which has permeated through society over the last three decades. People instinctively therefore accept the expression "an animal has a self-regarding interest". The ground for this acceptance is, we consider, based on an assumption that since animals are *living* creatures they have interests. Moreover, even those who believe that an animal has interests would reject the use of an expression "a dead animal has interests".

To be a subject of an interest is to be the centre of the interest. The subject does not necessarily possess a capability to perceive the interest. This point was explained earlier in our example in which a patient in an irreversible coma and a dead person were compared in a debate on whether they were harmed when their hair was cut without their consent (see Chapters 1 and 2). Our discussion of this example led us to conclude that both were harmed. Both were subjects who at the time their hair was cut lacked the capability to perceive the harm done. In this regard the necessary conditions for harm were the same for both subjects notwithstanding one was living and the other dead. We argued

that in a case where the contents of the interest and the manner for providing the interest are the same, it is absurd to say that the patient is entitled to enjoy the interest whilst at the same time the dead person is not entitled to enjoy the interest.

The concept of life enables us to instinctively understand that living non-human animals have an interest. However, the dead do not enjoy life *ipso facto* when they are dead. Nevertheless, we argue that despite the lack of life, the dead can be argued to have interests and even rights (see Chapter 4). Our argument and support for it are based on the recognition that the social characteristics of the living can survive their death and the dead retain part of them after death. In supplementing the lack of life, these characteristics can play an important role in vesting the dead with a status for *enjoying* interests. Explained in this way, it is the dead whom the interest of the fulfilment of rights to dispose of the dead body is ascribed to. That is to say, the intention of the right to dispose of a corpse can be understood as the dead's intention. As a matter of fact, if the fulfilled act based on the right to disposal is to remove organs and transplant them, it is the corpse of the organs who is physically fulfilled with the interest and who suffers from the infringement. For the antemortem subject of the interest does not exist when its organs are removed.

5.4.3 Social characteristics and vicarious protection

We argued, in the previous subsection, that the concept of social characteristics can play an important role in vesting the dead with a status for *enjoying* an interest. To restate, even if human intention can survive death in, for example, the form of advance directives (e.g., a will) made before death, the fact of death

entails that the subject of the intention who made the advance directives is dead. Therefore the subject and the corpse are clearly distinguished by the line of the past and the present. Moreover the subject cannot have a real feeling that he/she possesses his/her own corpse because this feeling can only be generated after his/her death, when, since they are dead, they can not feel or experience anything. In other words since a living person is in terms of time and space distinct from his/her corpse, when it would be argued that his/her corpse is property or that it is an object of rights of disposal, the grounds for self-ownership should be justified by the relations of the living person and his/her corpse but not by the living person and his/her living body.

We attempted to explain this relation by the concept of the dead's social characteristics which stem from the living. However, a dead person is not merely a continuum of a living person (see Chapter 4). We have argued that, insofar as he/she is an existence produced by the event of death, he/she has an independent justification to that of when they were living, i.e., the dead *as dead persons* have their own social characteristics.

For example, to those who have decided to donate their organs when they die, their corpses as objects for donation have their social characteristics as donor corpses. However, it would not be appropriate to say "the donor corpses have their social characteristics". Rather, it should be said "the dead persons have their social characteristics as donors". For we need to compare the relation between a living person and his/her living body with that of between a dead person and his/her corpse.

If this comparison is valid, then a dead person together with his/her corpse holds not the social characteristics of the living body, but rather the social

characteristics of a dead body that has an existence independent of the previously living body. For example, the social characteristics of a dead person who made an advance directive are a posthumous role in which he/she donates part of or the whole of his/her corpse for organ transplants. To those who regard a corpse as a mere thing or as a mere symbolic existence, there is no need to explain a corpse as an existence associated with social characteristics or social roles. We oppose this perspective which regards a corpse merely as a thing that serves a purpose. We maintain that a dead body, although a thing in itself, is intimately associated with the dead person who holds independent social characteristics succeeded from the previously living person.

The dependency of the characteristics would suggest that people's attitudes toward living and dead bodies are different. This difference in attitudes is not only rooted in culture but also in the difference between the characteristics of a living and dead person. Advance directions that one makes when one is alive take effect after one's death. Under the directions a posthumous performance can be executed after death. Thus the intention of a donor of organ transplants can be performed after death.

Moreover even if the ownership of a corpse can be ascribed to the previously living person, the difference in the ownership relation between the living person and his/her living body and the living person and his/her dead body lies, first, in the difference of whether the exercise of the ownership is performed antemortemly or posthumously, and second, in the different attributes and social meanings held by the living body and the dead body, both of which the right of ownership is based upon. Although a dead body is the continuum of a living body, after death the previously living body not only turns into something different

from the living body but also assumes the social meanings and attributes of a dead body. Third, the difference in ownership of a living body and a dead body lies in the point that because there is a temporal and physical remoteness between a living and dead body, the dead body, which is attributed to be more of a thing than a living body requires, *ipso facto* of its attribute of a thing, greater protection.

Thus the impossibility in the situation apart from the subject requires justification for inducing indirect vicarious protection to be rendered by the living. Assuming that their intentions can survive death, this concept of indirect vicarious protection is a form of duty corresponding with a right. Others have a duty to refrain from interfering with the property without the consent of the owner (e.g., the previously living and the bereaved). Also survivors have a duty to dispose of a corpse according to the directions which the dead person made whilst alive. This duty is not only in correlation with a living's right based upon the surviving intention but in accord with a further duty deduced from the social characteristics of the dead person. *Rights of the dead* and duties of vicarious protection are such a correlation.

5.4.4 The role of the intention of donation

Can the intention of donating a corpse justify benefiting from it? As for a person's intention regarding the disposal of his/her own corpse, there is a need to review the possibility of analogising another intention such as the making of a will. The document in which a person declares himself/herself an organ donor is different from a will. Our concern is whether the living or dead body is an object of property. If a body is deemed to be a thing such as a desk or chair, then there

will undoubtedly be serious moral objections. If a person consents in writing to the post-death disposal of his/her corpse, can the will alone act to justify this autonomous action of providing for his/her own body in a way which undermines any conception or argument that the body is donated as a thing, or an object of property? In other words, we have doubt as to whether documentary consent in a will can necessarily avoid the fact that he/she effectively is donating his/her own body as property. Therefore, we need to identify a source of justification which permits donation of the body for organ transplant but in such a way as to circumvent objections that we are reducing the body to no more than an object or property, which can in turn be owned, and by extension, traded. Perhaps volunteering for donation is the ultimate good that circumvents the act of treating a corpse as a proprietary thing. Or put another way, it is both the purity of the purpose and the intention of donation that precludes the dead body being viewed as property.

Therefore attention should be given to responses to the question, "what can justify the action of donation?" Little discussion has been attempted so far to address this question. Our response is that it can be justified if such donations under such circumstances embody a spirit of volunteering. This embodiment of the spirit can moderate our unease about treating a body as a thing.

When a person decides to donate his/her own corpse for the treatment of others, the body is treated as part of the purpose. It is the fulfilment of this expectation or desire that the living ask of others. By implication this right binds others. However, Utsuki says it could be argued that "the donor's declaration of intention may mean a proclamation in which he/she autonomously provides

others or the society with his/her own body and allows its use" (1997, 51). This intuitive description is worthy of note.

5.5 Conflict between rights of disposal and rights of consent

5.5.1 Outline of the second debate

The second debate on rights to dispose of a corpse is "how are the rights associated with the relative's rights of consent?" or "how are they competing each others?". Before answering these questions we will have to examine whether it is possible to use the concept "rights", e.g., "rights" to dispose of a corpse in Japanese discourse at the same level of the Western discourse on rights. The reason for the pre-examination is that since the concept *kenri* (rights) has been persistently influenced by Japanese society and culture, there is a strong belief that "the assertion of rights is fundamentally incompatible with Japanese legal, political, and social norms" (Feldman 2000, 1).

From his presupposition that Japanese legal consciousness is different from the Western one, Takeyoshi Kawashima (1967) asserted that the Japanese legal system was based upon duties and lacked a concept of rights and therefore that there were far fewer lawsuits in Japan than in Western countries under right-based systems. His perspective raised a number of pros and cons. For example, Haley (1978) challenged Kawashima's arguments on Japanese legal uniqueness and pointed out that the fewer number of litigations was due to defects in the legal system and could not be explained as a reflection of the specific nature of Japanese society and culture (see Dean 1977, 3-59). As an example of opposed Japanese scholars, Ohki (1983) argued, against Kawashima's claim that there was the concept *kenri* in Japan before the Meiji era

(1868-1912), although the word *kenri* did not exist up to the time when Rinsho Mitsukuri introduced it from a Chinese text. Recently Feldman (2000) examined the debate on the *kenri* consciousness from an analysis of social and legal phenomena on AIDS and brain death in Japan and refuted the *Japanese legal consciousness* thesis that, he argued, stands on somewhat easy assumptions. He argues:

> "Without examining the meaning of "rights" in Western European legal systems, Kawashima assumes there is a uniform and coherent conception of rights, one that does not (and could not) accurately describe Japan. If that is so, his argument can be reconceptualised as saying that there is a concept of rights in Japan different from the concept in the West, and the two must be distinguished" (ibid., 154).

In his related essay Feldman recommends an approach that "[w]hen comparing assertions of rights in the United States and Japan, it is necessary to distinguish between rights, rhetoric about rights, and rights rhetoric" (1997, 216). For something to be a right, it should be guaranteed by substantial law endorsed by legal enforcement. He argues that, in both the United States and Japan, "there is much jurisprudential literature on precisely what rights are and how they should best be defined" (ibid.). So it is in England. Rhetoric about rights refers to "the relative importance attributed to rights in a particular society" (ibid.) by members of that society. Rights rhetoric refers to "the politics of rights" relating to "the examination of how rights are used to frame, discuss and debate issues relevant to social policy" (ibid.), for example. Feldman precisely points out that Japanese discussion on rights has not been rightly categorised in that way ever since Kawashima started with the *Japanese legal consciousness* thesis based on the socio-legal analysis (discussion on that is not our purpose of this section).

As regarding a question "is it possible to use the concept "rights to dispose of a corpse" in Japanese discourse at the same level of the Western discourse

on rights?", the concept in Japan is the same one in the West. As regarding rhetoric about rights, the right to disposal has been affected by Japanese society and culture and its realisation and roles seem to be, to some extent, different from Western ones. This right was deeply associated with rights of burial and it was likely to be considered as the relatives' duty of burial rather than a right. However, the more the topic on brain death and organ transplantation has been discussed in legal and social discourse, the more rights have been emphasised by the position relating to rights of self-determination. The topic was often supported by *nihonjin-ron* perspectives. As regarding a question "how are rights used in light of the politics of rights?", rights are used for promoting brain death and organ transplantation practices within the framework of political rights agenda. The second and third point will be discussed in the following sections.

5. 5. 2 Rights to dispose and rights of consent—Japan

In Japanese discourse rights to dispose of a corpse have always been discussed in relation with rights of burial. As far as a corpse is considered as an object of burial, its social value is passive and confined to matters relating to burial (Iwashi 1984, 106). Burial is a duty-based custom rather than a rights-based one. The rights-holder has a responsibility for burial. However, the advent of organ transplantation dramatically altered traditional values. The positive values of use were found in human corpses.

The Japanese general understanding before the advent of organ transplants was that rights to disposal refers not to the dead person's rights but to his/her successors' or relatives' property rights or customary rights to burial. It was very rare in Japan that one makes and leaves one's intention to dispose of

one's own dead body whilst alive. Moreover, even if one does so whilst alive, the effectiveness of the intention is often limited by moral comparison between the dead's interests and his/her relatives' ones and by the concept of *kōjyo-ryōzoku* (public order and good morals).[152] This manner was applied to the provisions of the *Law on the Transplantation of Cornea and Kidneys* (Law No. 68, 1979; repealed in 1997).

Article 3 of the Law requires the written consent of the dead's relatives before transplantation. In addition, some exceptional cases are permitted in which a person gives his/her consent to an organ donation and at the same time the person's relatives do not express an objection to the consent or there are no relatives of the person (Art. 3). The possibility of accepting the deceased person's rights to disposal may be found in Article 3. But even if there is the person's consent and only if his/her relatives express an objection to the consent, the provision prescribes that the removal is not feasible—the person's right to disposal can be rejected. In addition even if the person explicitly rejects the organ donation whilst alive and if only the relatives give their consent to the donation, the removal is feasible. Apparently, in this way, this provision gives priority to the relatives' rights to disposal over those of the dead.

On the other hand, the *Law on organ transplantation* (1997) generally respects the autonomy of individuals with regard to donating their bodies (Art. 2). More precisely, organ removal from a dead person is authorised if that person expressed in writing the intention to donate, and, his/her relatives who were informed about the will do not object to his/her body being donated or there are no such relatives (Art. 6). However, over-emphasis of respecting individual

[152] For the details on the limitation of rights see William 1997.

autonomy might lead to a dearth[153] of transplant providers. This can happen in the following cases: first, where a person, pre-death, objects to donating his/her organs. Second, where a person fails to make a will despite having expressed his/her intention to donate. Third, where a person expresses his/her intention in writing but the written document has not complied with the formal requirements for testamentary disposal (e.g., a personal note in one's diary or a letter to a friend), this can enable his/her relatives to dispute the request. Thus by the enforcement of the Law an antemortem intention to donate is definitely respected more than in *Law on the Transplantation of Cornea and Kidneys*. Even if a person rejects the organ removal in the latter law but if the person's relatives give a consent to removal, the removal is feasible. But in the former law it is either not feasible or impossible because the person's will is respected by any means by the enforcement of the law.

Also a conflict between a person's right to disposal and his/her consent is recognised as a clear conflict between a testator's intention and his/her relatives' intention. It is suggested that the provision for respecting the autonomy of individuals in Article 2 of the new law functions as an *address* of recommendation for all relevant persons including relatives (Utsuki 1997, 48). Even so, however, a conflict is inevitable. This conflict may come in two guises. One is that a person expresses his/her intention to donate and his/her family makes an objection to it. The other is where a person objects to becoming a donor and his/her family intends to donate his/her corpse.[154] As for the latter, the new law

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[153] As of March 2003, based on this law 24 donors whose organs were removed and transplanted have been reported.

[154] The second conflict was related to the interpretation of Article 3 of the old law. Although a detailed explanation will be avoided here because of its complexity, the provisions of the Article were insufficient in that the consent of the relatives is provided as a necessary condition but not as a sufficient condition, which resulted in a conflict of

presumes any removal as illegal. Yet the former would suggest that the basic idea embodied in the law, that is, respecting the autonomy of individuals, works inadequately.

Thus, there is in the practice of Japanese law the possibility that a dead person's right of character may be overridden after his/her death, by *Totensorgerecht* (a relative's right to protect the deceased).[155] A perspective seeking to protect a dead person's moral right might object to the suggestion that the relative's moral right (i.e., protecting his/her grief and sentiments of devotion) is relevant, because any relevance attached to a relative's moral right in this example would harm the dead's moral right (Kanazawa 1984, 94-97). It could be argued that the relative's right to reject the deceased's surviving moral right is not acceptable on the grounds of legal order and peace (ibid., 96). Whilst the formal making of a will plays a vital role in protecting an individual's pre-death intention, the legal order is frequently inconsistent, for example, if the relative's right to dispose of the body overrides the individual's declaration of intention for potential donation (ibid.).

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interpretation. It was interpreted that it would be logically possible to remove organs even in a case of the person's objection. However, an opposing view which supports the individual's intention claims that their intention should be respected more in the case of the individual's objection than in that of the consent so that Article 3 of the new law should be interpreted under the condition of the consent of the relatives (Utsuki, 1997). Thus the new law can avoid this conflict more effectively than the older piece of legislation.

[155] In Japanese law where the dead's intention can be overridden by his/her relative's intention at the time of removing organs, a further problem arises in relation to minors who have limited legal capacities in general and no legal capacity regarding donation of organs. The problem is that even if a minor expresses an intention to donate his/her organs and obtains consent from his/her parent, the removal of the organs from the minor's body is not permitted (see Art. 3 of the Law on Organ Transplantation, 1997). When an adult's intention not to donate their organs is overridden by his/her relatives the law respects and prioritises the relative's intention more than that of the deceased's. Therefore, if the justification for this action is acceptable as it would appear to be, then it should also be justifiable to say that in the case of removal of organs from a minor's body, the relative's intention, that is the parents', should be respected by the law. It is illogical that due to the lack of legal capacity, especially, of intention, the minor's intention of consent of the removal cannot be realised by that of his/her relatives or parents.

In the process of seeking grounds for the relative's power of overriding the dead's intention, S. Hoshino (1984, 114) puts the character and roles of the relatives into three categories from legal and social viewpoints. First is economic disadvantages. The relatives have the economic vulnerability of losing rights to be supported and incomes when their bread winner dies. Second is the care of a corpse. The relatives have a duty to take respectful care of their family member's corpse, have the death registered, hold a funeral rite for the dead, bury the corpse or the ashes, if any, and manage to maintain the deceased's tomb. Third is deprivation. The relatives such as parents, spouses and children are deprived of close relations with the deceased by his/her death. According to Hoshino's argument of the relatives' consent based on the above three points, the first one cannot be justified. It would be possible to justify the second one because of regarding the consent as a right to dispose of a corpse. Making much of the third point, Hoshino argues that we have to look not only at the communality that the family members share with their daily life full of diverse domestic activities and tasks but also at the mental interpenetration that they interact with each other as an individual with personality and involve themselves deeply with each others' lives. Such mental interrelations enable the relatives to regard the dead body with strong symbolism and to "feel deeply attached to and inseparable from the corpse" (Bai 1968). Thus the grounds for the relative's power which can override the dead's intention can be argued to lie in the co-operation stemming from the relationships between the dead and his/her relatives (Hirabayashi 1984, 133-4). Moreover it could be argued that the relatives, as living people, have an autonomous power to determine their own lives, thus they have a self-determination to autonomously dispose of their next

of kin's corpse (ibid., 135). Compromise views may however be possible. Ishihara (1991), for instance, suggests that neither the dead's intention nor their relative's intention is overridden and that:

> "[O]nly in some cases where the explicit intentions of both sides are not contrary to each other and they are in accordance with co-operation for organ transplantation, will the medical practices gain popularity amongst people and develop as a vital medical remedy for securing recipients of organs based on the donor's good-will" (ibid.: 43) [my translation].

In the case, therefore, where the relatives object to organ removal and this objection conflicts with the dead's intention, this conflict is acknowledged in the present Japanese law and organ removal should not be permitted. On the other hand, in different other cases where the relatives give consent for removal and yet this consent is against the dead's intention, the present Japanese law can be interpreted to permit removal. However, in terms of legal interpretation, the dead's objections to removal should not be overridden by the relative's consent for removal.

The *Law on Organ Transplantation* (1997)[156] attached importance to the dead's intention more than *Law on the Transplantation of Cornea and Kidneys.* Behind the change of the law's attitude is the fact that Japanese society came to accept the definite intention that an individual makes. The Japanese individual's positive attitude to express his/her own intention advances the freedom in disposing of his/her corpse. Since in general Japanese have great respect for the ritual act such as laying the ashes in the tomb and its ground and the maintenance of family tombs for ancestor worship, they have been for a long time taking it for granted that ashes should be kept in the tomb. However a recent social movement of scattering ashes would illustrate the awakening of

[156] For a detailed explanation on the law, see, e.g., Morioka 2001, 41-46.

rejecting the idea of "succession of the family tomb and its ground" (Yasuda 1992). As mentioned in footnote 23, scattering ashes can be understood as a traditional way of funerals and burial. Emperor Junna ordered his ashes scattered on a mountain in 840. *Manyōshū* has two elegies regarding the scattering of human ashes. Such an ancient custom was related to those of re-burial, but the claim, in contemporary Japan, for scattering ashes can be considered as an expression of an individual's intention to dispose of his/her corpse. By the representation of the intention an individual can claim for rights of self-determinations.

Such a claim based on the freedom of making an intention has been almost disregarded in the traditional debate on rights to burial. Whoever thinks of "my" corpse should not be "myself", but "my" relatives. "I" do not claim anything about the disposal of "my" corpse at all. "I" take the trust of "my" relatives for granted. This traditional attitude toward posthumous disposal would suggest that the ritual tradition imposes a duty of ancestor worship including "me" on descendants and relatives and that the *Ie* idea confines "me" to the frame of the maintenance of traditional household (see 1. 2.4).

Said in this way, we can understand that the dead's right to dispose of his/her own corpse is deeply associated with the society and culture of the times. Scattering ashes in contemporary Japan is based upon the new formation of the individual's consciousness that the individual wants to manage his/her death and posthumous situation involved with his/her corpse. It follows that individuals emancipated from the traditional *Ie* system have been claiming their freedom and self even after death. A recent relevant new claim (Mori 1993, 245-7) is one that Japanese housewives do not want to lay their ashes in their husbands' tombs.

Mori analyses this trend of dislike as a fact that the idea of rejecting the *Ie* system has been steadily spreading amongst Japanese women. It is an evidence of the emergence of the female's new consciousness that they do not want to be restricted by the Japanese traditional idea *Ie*.

When we review the connection between the collapse of the *Ie* system and the right to dispose of a corpse, it would be possible to understand that the intention to donate organs is a representation of the intention and freedom that an individual wants to be emancipated from restraint or the like.

5.5.3 Rights to dispose and rights of consent—England

In debate on the intention to donate organs after death in English law we will note the concept of "request" in *the Human Tissue Act 1961*, which provides for two methods of body disposal: first, where the deceased has lawfully expressed a request for the disposal of his/her body and second, a procedure or condition under which, even without the deceased's consent, the removal is legal. The first provision is relevant to our discussion. Section 1 (1) provides:

> "If any person, either in writing at any time or orally in the presence of two or more witnesses during his last illness, has expressed a request that his body or any specified part of his body be used after his death for therapeutic purposes or for purposes of medical education or research".

How is the concept of *request* linked with the intention to donate organs?

Utsuki (1997, 51) taking a functional approach divides the intention to donate that he identifies with a request *into two parts*. The first is a desire of a person that his/her own body be used as a means for a certain purpose or purposes; the second, concerns giving directions on how it is to be used. The first point suggests death does not extinguish the right held but gives new characteristics and meaning to the body. It also suggests that the person's

desire, as a result, makes recipients of his/her organs and the relevant medical authorities undertake a creative action: organ transplants.

If this interpretation can be developed, it would follow that something held before death such as a right to control one's own body can be transformed in death, into the positive activity of intention based on the spirit of volunteering. But it is not based on the way in which relatives succeed to the deceased's estate, that is, through posthumous transmission of property. It can be argued that the will's effect lies in changing the legal characteristics of a corpse (ibid.), and moreover that what changes is both the characteristics of the dead body and the will of the person which can dominate over his/her post-death body. The second classification, concerning a person's directions on how to use his/her organ, gains feasibility by virtue of the first functional element—desire. However, since an organ is part of the body and regarded as a thing, the relatives have a right to determine the method of disposal, burial, etc. It seems plausible, in this sense, to call the relatives "donors". If such an argument is acceptable, then it can be understood that the kinds of purity—purpose and intention—can exclude, by using the term "request" as stated in Section 1 of *the Human Tissue Act 1961*, the idea of selling and buying a corpse.

English case law, as mentioned previously, supports the view that there is no property in a dead body. The common law principle was enshrined in *the Human Tissue Act 1961*, by which a donor cannot bequeath his or her body. Section 1 of the Act would appear to give the highest priority to a donor's request. Conversely, Japanese Law gives a considerably lower priority to such a request. For example, for organ transplantation, there are cases in which a relative's wish may override that of the donor. Whilst in England a relative's right under *the*

Human Tissue Act 1961 is not as strong as it is under Japanese law, there are still cases in which at the time of donation the relative's wishes have to be taken into consideration. Under Section 1 (2), notwithstanding any request from the deceased person, "the person lawfully in possession of the body may authorise the removal of any part thereof for the above purposes [for the therapeutic purposes or for the purposes of medical education or research] if, having made such reasonable enquiry as may be practicable, he has no reason to believe:

> (a) that the deceased had expressed an objection to his body being so dealt with after his death, and had not withdrawn it; or
> (b) that the surviving spouse or any surviving relative of the deceased objects to the body being so dealt with".

This provision highlights the point that a role is given to the deceased's relatives. It is very important to notice that although Section 1 of the Act prescribes that "the person lawfully in possession of the body may authorise the removal" of organs, this construction does not use the term "must". Therefore in terms of legal interpretation, there is a possibility that the person lawfully in possession of the body may not authorise the removal of organs despite the request of the deceased person. Any interpretation of English law, merely on the basis of this aspect, could conclude that it does not necessarily give the highest priority to the deceased's intention for potential donation.

Organ removal by medical doctors is done with the *authorisation* of the person lawfully in possession. Therefore, English law does not admit proprietary rights in human tissue but "a *mere possessory right* subject only to the claims of a person with a better right of possession or a right to insist upon burial or disposal" (Magnusson 1993: 249) [original italics]. *Williams v. Williams*[157] decided that, since there was no property in a corpse, the deceased *can* dispose

[157] (1882), 20 Ch. D. 659.

of his/her own body via a will. This is the duty of the deceased's executor. In other words, the executor has a right to possession of the corpse. Persons lawfully in possession are frequently discussed as having duties. In summary, Japanese and English law utilise different perspectives when viewing the proprietary problem of a body. Unlike the former, the latter has been discussed from the point of view of duties rather than rights.

Moreover, where a surviving wife, for example, is the person lawfully in possession, despite the husband's request for potential organ donation, it would be possible for the wife not to authorise the removal of the husband's organs. If the wife objects, a prudent lawyer would advise the person lawfully in possession that the wife can sue, she is the one who can cause trouble, and she is the one who can go to the newspapers (Blumstein 1995, 180). Nevertheless, even if, in England as happens in Japan, a possibility arises that a relative's intention to permit donation would override the deceased's intention not to give permission for organ donation, some English cases suggest that English law always respects the deceased's objections to having organs removed. Where, therefore, a relative has the power to authorise the removal of organs from the corpse, this power is limited either to cases where the deceased person made a donor's request, or to cases where there is neither a request by the deceased person not to permit organ donation nor a reason to believe that he/she, whilst alive, objected to the removal. It follows that if the deceased person whilst alive objected to the removal of organs after their death, then irrespective of the intention of the relatives, organ removal is not permissible under any circumstances.

5.6 Social cultural basis of rights to disposal

5.6.1 Issues

Due to the medical advent of organ transplants, the traditional debate on issues surrounding the rights of burial has dramatically entered upon a new phase. However it is assumed that as rights of burial were influenced by cultural factors, so the rights on the new phrase, i.e., intentions to donate organs, are affected by them. Here in this section we will discuss how the rights have been influenced by society and culture.

5.6.2 Reasons for the passive attitudes

Debate on the intention to donate organs and the influence of wider cultural issues reveals the Japanese specific persistent belief based on the cultural uniqueness, or the *Nihonjin-ron* arguments, that Japanese traditional values are inherently incompatible with the concept and practice of brain death and organ transplants.[158] In examining this assumptive belief, we will be able to explain how the right to dispose of a corpse for transplants, which has a seemingly different character from its English counterpart, functions in Japanese society.

A sufficient number of journalists, philosophers, attorneys and others attack the idea of brain death and its consequent practice of organ transplantation by pointing out complex cultural reasons. Examining a number of references relating to this subject, Ogiwara (1992) in particular discusses emotional and moral reasons for rejecting the idea. Five decisive reasons that he came up with are based on culturally comparative perspectives and the *Nihonjin-ron* discourse:

1. The idea of Western Cartesian dualism (the formulation of the body and "soul/mind") is often cited as an assumption that in Western society a human body is regarded as a sort of machine or an aggregation of its diverse parts and that, since a dead body seems a "cast-off" of the soul/mind, it is allowed to be transferable. However, the majority of Japanese consider human remains and ashes as the locus of spirit or soul[159] and have a strong attachment to dead bodies, so that they have aptness to feel morally reluctant to transfer the bodily parts to others.

2. The old concepts of the evil consequence and ancestral connections still remain prevalent in the contemporary Japanese society. Japanese seem to believe that unless a person's complete body is cremated, then the person's spirit or soul does not die peacefully. They often think that if person's organs are harvested when he/she is in the boundary between life and death, the person cannot rest in peace and resultantly the evil consequences arise. Even in contemporary Japan religious commercialised services are often provided by temples and shrines for suppressing a curse of unfortunate souls of aborted babies and dead pets.

3. Generally Japanese do not adopt "unnatural"[160] things. They understand death as a natural process. Receiving harvested other's organs and thereby continuing to be alive are "unnatural" and therefore people think that they should die in a natural way and should refrain from having an artificial operation such as organ transplants in order to extend life.

4. Whilst philanthropic ideas based on the Christian idea of "neighbourly love" often enable a person in the Western countries to sacrifice his/herself and transfer his/her own organs to others who have no connection with him/her, Japanese people hesitate to do so because they love their family members, relatives and others, to whom the person has an obligation, rather than utter strangers. Contrary to the "neighbourly love", Japanese have been traditionally

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[158] For a detailed explanation on Japanese disputes about brain death, bodies and organ transplantation, see Lock 1999, 239-256; Seewald 2000, 72-76.

[159] A recent survey <http://www.ne.jp/asahi/koto/buki/bukkou/syukyo/syukyo.htm> (in Japanese) illustrates that 941 students responsed that they believe in the existence of *reikon* (soul/spirit) and that 603 students responsed that they do not believe in that.

[160] In this regard see the most extreme position (Umehara 2000). Also Kawai (1991) is one of those who argue the Japanese uniqueness of attitudes toward death and a corpse. He understands from a persuasive perspective (Lifton et al 1979) that generally speaking Japanese attitudes toward death are emotionally an acceptance of the resignation of universal order and intellectually that of the natural and/or the cosmic order. Both acceptances are under the background of a culture that did not place emphasis on the severe separation between the living's daily life and death. Death is a natural event, but Japanese eyes toward the nature were overlapping with those toward death. The Western modernity regarded the nature as an opposite object of humans and has gotten accustomed to definitely distinguish humans and the nature. Japanese, otherwise, think of humans and the nature as a unit and therefore that both are intrinsically equal or in harmony and have no universal standards despite there being degrees of values. This interpretation can be applied to attitudes toward death, so that they take it for granted that they evaluate human death and other entities' death at the same level of the nature perspective. In short, to Japanese the boundary of life and death is thin and they would concord with the ambiguous boundary of human and other entities that are never rigidly defined by Japanese, and even with that of self and other self (Kawai 1991). For Japanese discourse on unnatural death, see Lock 1997.

> respecting some ideas of Buddhism and Confucianism such as filial duty (*kō*) or loyalty (*chū*) as a standard of behaviour. Japanese ethical ideas and the normative values of the old times somewhat persist in the contemporary Japanese minds.

Another aspect for the culture connections is related to ancestor worship. Feldman points out that "[a] central tenet of ancestor worship in Japan is the conviction that the welfare of the living dependent upon paying homage to the dead" (1996, 237). Therefore, regarding brain death as an individual's death and damaging a corpse to harvest his/her organs, may infringe against the respectful feelings held towards the recently deceased ancestor (see Fujii, 1993, 540-543; Backnik 1995, 108-142).

Despite a good number of the justifications supported by the cultural connections with the Japanese reluctance towards the practices of brain death and transplants, a sociologist points out that most of the traditions and values relating to death have vanished (Nudeshima 1991). By efficient evidence of drastic changing city life since World War II, he argues that many customary ideas about funerals, burial and ancestors, which the *cultural uniqueness* thesis grounds its justification on, have not only changed but also such a thesis is not worthy discussion. Wöss (1992, 73-100) also underpins Nudeshima's conclusion in a recent summary of eleven public opinion polls carried out between 1953 and 1987 concerning Japanese attitudes toward death. According to the summary, for example, it seems that more people in German than in Japan believe in reincarnation (ibid., 87-89).

Whilst the Japanese tradition and culture have to some extent influences on the contemporary Japanese views of death, they are not decisive factors for determining the Japanese attitudes toward death and a corpse. They are an inadequate explanation of main reasons for having delayed the practices of brain

death and transplants in Japan. The chief reason for it is the mistrust of physicians. A compiled book (Watanabe and Abe, 1994) edited by medical doctors who denounced the bill of the *Law on Organ Transplantation*, provides us with diverse reasons why patients are mistrustful of physicians. The publication suggests that there have been not only many scandalous concealments, by physicians and their hospitals, on the practical judgement of brain death and the practice of organ transplantation since the medical scandal of Dr Wada and his team's first heart transplant in 1968 (see Kyōdōtsūshinsha shakaibu 1998), but also that the practice in daily medical services has led to mistrust of medical doctors because of the extremely low level of disclosure of information. This, it would seem, is a practice based on paternalism.

In addition there are emotional and moral reasons for the reluctance. A journalist who was involved with the formation process of the *Law on Organ Transplantation* (1997) is of the opinion that contemporary medicine is likely to lack consideration for patients and their relatives' feelings whilst they pay strong attention to inner organs and diseases, and therefore that disregarding their feelings in the front of organ transplants results in leaving a deep scar in minds (of the relatives) (Nakajima 2000, 133).

Another reason can be deduced from the assumption that donating organs is a good conduct which does not require a reward to the actor's self. The conduct is a far higher moral action called supererogation. From the moral construction based on some concepts such as reciprocity, equality and impartiality the conduct is not regarded as a duty but as a high virtue of a kind of responsibility. Contemporary Japanese lack the consciousness of this virtue. For they have a regrettable experience that their purely self-sacrificial conducts

for the sake of the nation and their companies historically came to nothing in many occasions. Thus they are likely to reject the self-sacrificial conducts for the nation and companies. They acquired a kind of wisdom that self-sacrifice conduct is wrong and as a result have little interest in the supererogation or volunteer act such as donating their organs for others who need organ transplants.

5.6.3 Presumptive reasons for the positive attitudes

Contrary to the cultural connections for explaining the Japanese reluctance to accept the practices of brain death and their passive attitudes toward organ transplants, we will presume that the cultural uniqueness, if any, reversely change their passive attitudes into the positive ones.

First, we can provide with an explanation derived from a body project perspective (Frühstück 2000). To illustrate the Japanese extreme attachment to human remains in cases of aeroplane clashes more than attitudes in other cultures (see 1.3.4; Sabata 1979; Miyata 1988; Namihira 1990), proponents of the cultural uniqueness thesis use the obsessive attitudes toward remains in order to justify their position. It is, however, a one-sided justification. Or rather, it should be understood that the strong attachment of Japanese people to a dead body does not only lead to the reluctance of the donation and transplantation of organs but also to the positive attitudes, which can be regarded as an attractive body project, toward them.

At least in the Meiji period, the Japanese people seem to have held deep persistent interests in human bodies in terms of the comparison with the shapes of Westners' bodies, the improvement of Japanese bodies, etc (Frühstück 2000).

Their concerns about the bodies of others have been incorporated into their own perceptions of their own bodies within a framework called "body project" (ibid.). Shilling (1993) contends that the project of the self in modern society is the project of the body. Using the term "the reflexity of self", Giddens (1991) explicates the association with the idea that the body seated in modern society expresses the self by the medium of cosmetic surgery, body transplants and implants, diets, keep-fit regiments, etc. In this way, it is possible to think that the Japanese located in the range of the body project may shift their deep interests of bodies to organ transplants.

According to a survey (Shī dī ai 1986), about half of the questioned Japanese of all ages felt a complex concerning their faces and/or bodies. Their dissatisfaction with their own bodies ranges any parts of the body such as skin, teeth, noses, weight, stomach, waist, hips, etc. Clients of aestheticians and surgeons seek to create a beautiful body and to make themselves more attractive. This body-orientation results in a radical change in their lives. The lifestyle is associated with their wishes to change themselves and will influence a set of values and interests in daily life. The value of organ transplants may be incorporated into this set of values of the body project. In short, those who recognised the limitation of their own body project or who were not able to work off their frustration in their lives, may desire to develop their organs to continue to be alive after their death —as a *new* body project. Thus organ transplants would imply manifestation of the emancipation from the Japanese perception of the inferiority of bodies. They wish to expand their lives and complete their attractive body project even after death.

This is an understanding of emotions and perceptions rather than in terms of philosophical, ethical and rational points. At almost the same level of paying attention to a stylised image of the body in consumer culture, advertisements, the popular press, television, etc., people take part in the project relating to organ transplants (even a new way of disposal of a corpse such as scattering ashes). They desire after death to give vent to the frustration generated in contemporary stress society by regarding organ transplants as emancipation from their frustrated feelings and bodies. The expectations of the posthumous emancipation are oriented to the body project of organ transplants.

Secondly, Japanese people have a habit of attempting to accept anything new. It would be said that on occasion, without full consideration as to whether something will be acceptable in the cultural and spiritual climate of Japan, Japanese people introduce new things into Japanese society. In introducing this new object or idea, the basic test seems to be whether or not it projects a good image. And unless the object is up to this standard, it is rejected by society or required to be at best modified or aborted. For example, at the time when Dr Wada and his team carried out the first heart transplant in Japan, mass media and general people showed enthusiastic attitudes toward this advent, with extremely high expectations and a warm welcome. Furthermore once something is introduced into society, the people show a respect for the maintenance of its images. In that sense Dr Wada's case, where he and his team are accused of murder, ended up centring a totally bad image to heart transplantation and it can be argued that this resulted in the delay of the enactment of the *Law on Organ Transplantation* of 1997. In short Japanese behaviour can be dictated by emotions or feelings, rather than be based on a rational assessment of the

object. The consequence being that if only its image becomes good, the project of organ transplants will be considered as a kind of trend which can be easily accepted by the Japanese. In that regard the spread of donor cards may be seen as an "image war".

Thirdly, for more understanding of the cultural connections we may make use of the concepts *uchi/soto* (inside/outside) which Jane M. Bachnik (1994) proposes as the key Japanese organisational locus for "self, social order and language" (ibid., 3). We concur with her view that the organising of self and society is situationally given meaning by the indexing of *uchi/soto* orientations. Therefore the Japanese social relation between self and others can be in many occasions understood by the application of the concepts *uchi/soto*.

> "We concur with her [Jane M. Backnik] that *uchi* is an actor found in a collectivity, not an individual (Bachnik 1994, 26). *Soto* is a relationally defined concept with uchi. Both are interchangeable depending on a speaker's deictic reference" (Hayashi and Kuroda 1997, 24).

An *uchi* situation is inside a household and a *soto* one outside the household. In most cases Japanese language usage an *uchi* speech is rougher than in *soto* speech. So are daily greetings. It is a business custom that workers with a company (*uchi*) do not use honorific expressions when they talk about their bosses (*uchi no hito* / insiders) with their customers (*soto no hito* / outsiders). In this way Japanese take into account the relation and language usage under the standard of *uchi/soto*.

We can now relate the competing concepts *uchi/soto* to organ transplants. To donate organs is, except for living donation within family and relatives, to do so to *soto* persons. Japanese are apt to feel reluctant to donate organs to people in the *soto* situation. They tend to respect the inner relational bond rather than to make a supportive contribution to society. However, we challenge this

assumption. The basic paradigm of *uchi/soto* can be applied to any situations and any human relations in Japan, so that the boundary of *uchi/soto* is inevitably uncertain. The structure of *uchi/soto* is so complex that we can find *soto* in *uchi*, and *uchi* in *soto*. For example, a household is situated in *uchi*, but if a person is a stepmother, then it seems to her son that she is a person situated in *soto*. The situated *uchi/soto* in society is, as well, uncertain in terms of the boundary of usage. Donating of organs by children under the age of fifteen is prohibited in the *Law on Organ Transplantation*. Children requiring organs have no alternative but to seek for medical operations abroad. To gain a sufficient amount of money for the costs of attending transplants abroad, the family is forced to raise funds for the undertaking in the *uchi* situation such as father's work place or the neighbouring community, or through news papers or other mass media. Those who sympathise with the patient have, despite any geographic distance, a feeling that they are involved with the *uchi* relation. In this manner the consciousness of being in *uchi* that should be an obstacle to the *soto* orientation plays a vital role in pulling the *soto* people to the *uchi* world.

Fourthly, we will apply the concept "wrapping culture", which Hendry (1993) provided as a framework for characterising Japanese society, to explain the positive attitudes that Japanese people have toward organ transplants. Although there can be found, of course, "wrapping cultures" in other nations, it is only Japan that has such a wide variety of modes and kinds of wrapping *per se*, as opposed simply to different kinds of the wrapped contents.

If the word "wrapping" is regarded as a metaphorical expression or as analogous of the paradigm posed in the use of objects, especially gifts, then we may imagine that organs for transplants are wrapped by a human skin. Organs

that are donated to recipients are wrapped by the donor's skin in a way that has a number of implications for protecting organs. This gift of life represents donor's wishes and feelings in a way that organs wrapped by a skin are donated. Aranami and Taguchi, associated with an organisation for protecting children who suffer from the gallbladder illness, point out an inconsistency of Japanese character (Tōkyō daigaku igakubu nōshi ronsō wo kangaeru kai 1991, 162-164). Japan has a national characteristic of caring much for gifts. Amongst almost people, gifts are exchanged in the seasons of the Bon Festival and the year-end. However, Aranami addresses that the majority of those who gift something as a seasonal gift wish to have a return award. He suggests that the donation of the organs is a conduct that asks nothing in return, gifting organs and customary gifting are fundamentally different (1991, 162-164).

Understanding the practices of brain death and organ transplants in association with the Japanese culture connections suggests that cultural influences are apparent in rights to dispose of a corpse. However, even if the cultural factors are somewhat influential, it is not necessarily persuasive to argue that the factors have a power by which organ transplants are rejected or promoted. Except for the Japanese culture factors, there are three reasons for the reluctance to donate organs. First, the people have emotions or feelings that they do not like to donate their organs. They have a strong rejection for accepting their relative's death. They habour ill feelings toward the fact that medical doctors regard the interests of recipients as more important than the side of donors. Secondly, unlike the objectionable emotions, the people who face a sudden death of their relatives hesitate to give consent to donation or do not give it because they cannot understand or do not want to understand the situation and

the following procedure. Thirdly, medical personnel involved with the donation fail to persuade donation. Our argument is thus that the intention to donate organs has an extremely multilayered structure and that a compilation of negative reasons results in the passive attitudes of Japanese people toward organ transplants. In the next section we will discuss the cultural and social basis behind the attitudes of the English toward the disposal of the corpse.

5.6.4 Western discourse on the rights

The concept "brainstem death" is developed strictly in England, and an Act relating to the concept has been enacted (Pallis 1983). Although this concept is not accepted in other nations, whether "brainstem death" or "whole brain death" or whatever, the concept "brain death" is accepted in many Western countries. There is little controversy on the concept of brain death and its practice. Yet a minority of scholars (Tröndle 1999; Truog 1997; see Nakayama 2000) argue that the concept of brain death *per se* is wrong and point out that there is a serious imbalance between the definition and the standard used in practice, and that physicians and general people are still confused by the meaning of brain death (Bernat 1998).

Japanese philosophers, lawyers and journalists assume that the Western discourse of organ transplants including in England, adopts the Cartesian dualism of the body and soul/mind. The thought is understood to focus attention on the brain as the centre of the living person. Its emphasis is on rationality. A human can be divided into two, i.e., body and soul/mind, and the latter is definitely superior. On the other hand a body is a mere material which is a mechanism subject to physical rules. This thought was a starting point of

modern medicine. To justify the advance of surgery, the Cartesian dualism was used because surgery removed a mechanical part of an illness or disease and thereby the patients recovered bodily functions. A difference between body and soul/mind should be noted. Existence excluding soul/mind is a material. Animals and plants which have no spirit are considered as materials. Thus all of them are viewed as an object fit for being controlled by humans. However, it is common sense that contemporary philosophy does not adopt the dualism (see Merleau-Ponty 1963). The dualism focuses on the demarcation of the body and the soul/mind, and recognises that there is no correlation between the two. Evidently, however, the efficient explanation by the modern psychology concludes with the wrong of that simple paradigm.

There are many similarities between English people's attitudes toward a corpse and the view of the Japanese. A good number of examples prove that English people daily regard a corpse and its parts as something symbolised more than materials. Their strong attachment to a corpse represents the resistant to dispose of it as a mere thing. It is noted that such attachment is not a Japanese speciality. Princes Diana died due to a traffic accident in Paris at the end of August 1997. Despite possible rational advice, based on the Cartesian dualism, that her dead body should be buried or cremated in Paris, the body was transferred to England and buried in her home. Her grave yard is considered as a symbol which evokes people's memory to her. It is understood from this episode, that her dead body functioned as a symbol whose power refrained from dealing with the corpse as a mere thing.

The medical scandal on the use of baby's corpses without their parents' permission was disclosed at Bristol Hospital in 1999. The fact was revealed that

hearts, lungs and other organs were removed from 179 dead babies without permission and were used for medical education and research. English law prescribes that, except in cases of instructions by coroners, organs of children should only be removed if there is the permission of the parents. However, Bristol Hospital removed them without consent, so that parents had to bury their babies without many of original organs, with a full burial only being performed once the fact was revealed and the organs were returned. If the parents had believed in the Cartesian dualism, then they would have reacted so strongly against the wrongdoing of the hospital. However, the majority of the parents unanimously expressed a strongly regrettable comment that they wished the babies to have gone to Heaven with complete organs.

Other medical scandals are revealed that there have been removed 2087 hearts from dead babies at Alder Hey Hospital, Liverpool, over a period of forty years and that there are 3000 organs removed from 500 baby bodies and preserved at the University of Liverpool from 1988 to 1995.[161] These organs kept at the university were eventually returned to their parents and reburied. Parents interviewed by mass media mentioned that they had already held a burial rite for their children but would have to do the same thing again. This comment suggests that they regarded their babies' organs as a far more valuable symbol than a mere material. In a report published by a health authority at the end of 2001, an animistic comment was made by a victim's parent to the extent that we believe people's hearts are a representation of their souls (Deguchi 2001, 169).

The above incidents may indicate that, whilst people can logically understand brain death represents the point of an individual's death, their

thoughts on death cannot be separated from the traditional views and cultural influences and that considering organs of a corpse as a symbol more than a thing leads to a resistance or reluctance to donate organs. In short, although there is a difference of the degree, the debate on the Japanese cultural connections with death can be applied to the debate over English cultural ones.

Unlike the belief that organs *per se* are regarded as an animistic symbol, the practices of organ transplants are deeply associated with the recipient's body and mind. Unlike in a simple way that parts of machines are replaced or exchanged, the practice of organ transplants affects the recipient's mind and identity. A dancer who had an operation of heart transplantation published memoirs where she struggled with the confusion in her own identity (Sylvia and Novak 1998). Austrian scholars questioned persons with experience of heart transplants as to whether their character was changed by the transplants. The practice was reported to influence the character to some extent (Bunzel et al. 1992). Motomiya (1996) argues that the consciousness of "self" is the whole bodily consciousness. It exists only within the body which acts and the mind is seated in the body, and the body contrarily in mind. The body and mind are not of a separate essence, but a unit which interacts with each other. Therefore there is no recognition that organ transplants do not affect spirit or mind (ibid., 28-29).

Based on the above discussion, we will conclude that whether or not the Japanese attitudes toward death and a corpse are, in comparison with those of the English or other nations, unique is an undecided question. Rights to dispose of a corpse are characterised by diverse factors in society. The intention to

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[161]For articles on Alder hey organ scandal, see

donate organs is no more than a choice of "yes or no", but it is motivated by diverse reasons and factors. For example when we observe the possible fact that the mental pressure from advertisements or a community which support organ transplants would interfere with the intention to refrain from donating organs, we cannot ascribe the diverse reasons for such an intention to one.

Said in that way, it is noted that the theme of the debate should be transferred to the point that rights to dispose of a corpse have competing concepts in both Japan and the Western countries: the dead's intention to donate organs and the relative's intention to reject the donation, i.e., the competing structure of the intentions of two sides. This debate will answer a question how the rights to dispose of a corpse can be identified.

5.7 Public interests

5.7.1 Comparison of the interests

Two competing public interests should be taken into consideration. Saving a person's life by transplanting any available organs, should be contrasted with the need to respect the relative's "devoted sentiments" for their deceased. For example, where a human faces death and there is no alternative other than an emergency transplant, then the removal of potential organs without the relative's consent may be permitted (see Iwashi 1985, footnote 15).

5.7.2. Conflict between public and personal interests

However, this view has been rejected in Japan. Organ removal that is not authorised by a relative leaves the remover of the organ open to an action in tort

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<http://society.guardian.co.uk/alderhey/story/0,7999,450736,00.html> available.

(Art. 709 of the Civil Code). The action stands on the chief mourner's right to burial based on custom that has an effect equivalent to law. But since society as a whole has an interest to save and protect the lives of individuals the social significance of utilising human organs cannot be ignored. If, based on the social interest, the availability of organs can be justified, what kind of rights or whose rights do the social interests have to overcome? Here, it can be argued that a relative's intention plays a functional role as a representative of the private, whilst the will of the deceased plays a different functional role as a representative of the public or society. In other words, whilst a person's intention to donate his/her body for potential recipients is often supported by social interests, the intention of his/her relatives is likely to be based on private matters if they object to his/her will.

In addition to the personal factor above, a further point to be considered here is the social contribution of recycling a corpse.[162] When a corpse is

[162] The provisional investigation committee on brain death and organ transplantation (Rinji nōshi oyobi zōkiishoku chōsakai 1991, 40) suggests that at the present stage of organ transplants the treatment has a serious problem and that it should be noted that: "transplanting a body part with a particular physiological system into another living body with another physiological system must result in a strong rejection if any proper medication is not taken. This fact implies that the rule of nature tells us the importance of the personality of human life. By getting immunosuppressive drugs into the recipient of organ transplants for suppressing organ rejection, the medication resultantly causes the recipient to lose a physiological function for protecting against germs and to suffer from an infection" (ibid.). Moreover what should be pointed out is that the medicine used in organ transplants includes a sort of immorality because the medicine requires brain-death-stated organs such as hearts and livers (ibid.). In other words in order to succeed in the operation of the transplant, it is required to remove fresh organs so that it would be required to declare the brain death of a donor as soon as possible. The medical practice used in the transplants would have included such a request as the need to hasten the donor's death. In this respect it would be right to say that the medical practice is contrary to traditional practice where people delayed making the judgement of death in order to provide every opportunity for the patient to be brought back to life. Another possibly immoral aspect in relation to the medical practice would be that, in order to make the transplantation have an increased probability of success the dying person may be given medical treatment to specifically prepare the organ for transplantation, this treatment would be directed towards the welfare of the organ as opposed to the welfare of the patient *per se*. In other words as Kass points out, "[s]ymbolically, the "aliveness" of the organ requisite for successful transplantation bespeaks

considered as a potential social or medical resource, the justification for the utility of the corpse would come from the realisation that the corpse is a potential resource, and that given an appropriate development in social and medical consciousness a corpse could therefore be viewed and accepted in society and law as having a utility to advance medical practice with concomitant social benefits.

First, those accepting the assumption "recycling is a modern concept" (Chadwick 1994, 54), might no doubt, be rather more reluctant to agree with the slogan "recycling the corpse is a modern concept." H. E. Emson, not so reluctantly, argues "our bodies are part of a total pool of elements and molecules which is the biomass of our planet, and which interacts with its organic mass" (1987, 125). As Chadwick (1994) points out, Emson's view, based on the "ashes to ashes, dust to dust" tradition, would not be supported by the mass populous. Many changes in our thinking are required before there is a societal majority supporting the concept of recycling the corpse (e.g., organ transplantation).[163] Advocates of "the utility of the corpse" are however rather more blunt in their comments. Kass (1995, 156) does not mince words when he states "[we cannot deny] that the dead human body has become a valuable resource which, rationally regarded, is being allowed to go to waste—in burial or cremation".

Needless to say, there are many advantages and disadvantages to the recycling concept. For example, particular advantages might include: increasing longevity; the legitimacy of recycling *per se*; the embodiments of collaboration

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also the expansive liveliness of the donor—even, or especially, after his death" (Kass 1995, 164).

[163] E.g., in this discussion, cultural, religious and ethical reviews should be a requisite. But American references in the discussion relating to the organ transplants only include three kinds of religions, i.e., Judaism, Catholic and Protestant (Yonemoto 1985, 66). See Hanerwas 1978.

and love for humanity; and the contribution to scientific technology. Conversely, particular disadvantages might include: religious reasons[164]—although organ removal and transplants are accepted by almost all religions, Islam however, one of the largest religions, prohibits the dissection of a corpse—; egoism; the traditional morality; the disbelief in the dogmatic doctrine of the scientific technology; the population problem and medical costs for specialist surgery. The examples cited are hotly contested, nonetheless, we can distil from this that their justification is associated with the role of ideas. These ideas and their justification direct human actions such as recycling corpses.

Given the competing positions of moral evaluation and that there is no reconciliation amongst them, the community would require a consensus. However, even though it would be possible to, as a *fictitious* consensus, legislate by majority decision, this is unacceptable. John Harris (1985, 119) suggests that if we think the interest in establishing truth, for example by carrying out an autopsy, outweighs the wishes of relatives, then it is irrational to allow the relatives preference to take priority where organ transplantation is the issue. By embodying the interest of our society into legislation and practically enforcing the law on life and death, issues of legal coherence and its relevance to organ transplantation need to be considered. A consequentialist might argue that because there is a high probability that an organ transplant saves a person's life, and the donee's relatives wish to receive the donor's organs for his/her transplant, this is a good thing. This position can be categorised as a desire. The value of the organ transplantation is contingent upon a personal desire. Why is it that there is seldom a discussion on the allocation and distribution of

[164] Almost all religions espouse the practice of organ transplantation but some reject

organs since they are a limited resource? If desire is based on humanism there is no cost-calculation in the analysis.

In addition, where social requests for potential organ donations are permitted, further problems can arise. For example, where organs are available to save a person's life, but the relevant consent is withheld, do we accuse those not consenting of killing the potential donee? We hence return to the debate on personal and moral values. The question is: "why, despite being against our own morals or beliefs do we have to, as a potential organ donor, save another's life?" If the answer is "we have to save another's life"—can this answer satisfy the question—"do we still have to save another's life when the life in question is that of the neighbour who has given us absolute misery ever since the day we moved in?" Perhaps the answer lies in the value of social interests, i.e., saving the person's life is regarded more highly than the respect for personal choice.

It would appear that where people believe and therefore value corpses as things, any social purposive utility of dead bodies can be feasible. Where humans value corpses as disused articles, it is conceivable to envisage one rational economic perspective in which corpses are offered for sale in warehouses (Kobayashi 1993, 83).

These are of course crude examples. The point we are trying to make is, any recycling of corpses must lead to ethical and legal reviews pertaining to the use and treatment of corpses: humans have to survive not only as natural creatures, but, also as social entities.[165] The idea of recycling corpses may need to be properly theorised and legalised as a vital concept for human society, a

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it, see <http://www.life-source.org/religion.html>

[165] Whether organ transplants can be regarded as the exchange of parts or as that of the being is therefore not necessarily a resolved issue. The exchange of organs would suggest that of "I". The thought of owning a body can be controversial in that regard.

system for living. Humans may envisage the long lasting continuity of the past, present, and future through the practice of organ transplantation. However, if we are unable to find an ultimate meaning to the action of organ transplantation that is decisive in form, such action will not be accepted. In relation to the continuity of time, it could be argued that the desire for surviving beyond the physical death comes from another desire for having more important purposes than those we can find on the earth for the sake of ourselves or roles in performing in another world, perhaps the one after death. To think about the chance of posthumously participating in creative activities or even to try to find a path for the possibility of doing so may be a pleasant experience. To conclude, we cannot disregard the role of ideas that direct human actions. In the following section, problems that arise from organ removal and organ transplantation will be discussed.

5.8 Remedies available for an infringement

5.8.1 Without consent

If organ removal without consent is tortious, what remedies are available? In Japan, a tortious action is only available where the wrong committed is against the will of the deceased's relatives. As previously mentioned, rights held by relatives are proprietary or customary in a right to burial. Obviously, remedies are only available for infringements of those kinds of rights. In situations in which there is an infringement against the right of burial, relatives may demand the restoration of the *status quo*. But where organ removal and transplantation has been completed, the availability of the remedy is too late. If a remedy can be

agreed based on Article 710 (Non-pecuniary damage)[166] of the Civil Code, then the remedy may comprise monetary compensation for a relative's emotional loss. It should be noted, however, that a *right of the dead* is not permitted even in this Article.

Secondly, if the infringement is proprietary in nature, the remedy is the same. If the removed organ has been fully transplanted the availability of an injunctive remedy or demanding the replacement of the organ in the donor is neither feasible nor realistic. As for monetary compensation, the corpse now lacks the characteristics of an entity able to engage in trade. Moreover, monetary evaluation of the organ for compensation might be taken as suggesting trading in organs is allowed despite being against national emotions and/or morals. Thus an achievable goal would be to claim for damages of non-pecuniary loss only (Art. 710), i.e., compensation for loss of interest damaged by the unauthorised removal.

5.8.2. Possible remedies

If there is an infringement of *the Human Tissue Act 1961*, what are the legal implications and what liability is imposed on the infringer? There is no punitive provision in *the Human Tissue Act.* Bai (1988, 18-20) refers to a notification issued by a minister, that since there is the possibility of an offence, criminal proceedings may be taken. In one particular English case[167] an unqualified doctor removed the eyes from a corpse and was accused of infringing S.1(4) of

[166] "A person who is liable for damages in accordance with the provisions of the preceding article must compensate even where damage is non-pecuniary, irrespective of whether such injury was to the person, liberty or reputation of another or to such person's property rights".

[167] R. v Lennox-Wright [1973] Q. C., May 18, (1973) *Crim. L. R.* 529.

the Human Tissue Act. The court held that an action in common law was also available based on "accusation by misdemeanours". As for the remedies in question, Magnusson (1993) explains the English situation as follows:

> "In...the UK, proprietary remedies are necessary since no specific legislative offences exist for the maltreatment or destruction of validly donated tissue. Similarly, torts against the person can provide no protection for the maltreatment of removed tissue, or for the use of tissue for unauthorised purposes. The tort of battery, for example, is inappropriate, since nothing which is done to the *removed* tissue can constitute interference with the "person" if the donor" (ibid., 252) [original italics].

We will now discuss compensation for organ removal from dead bodies in the context of *the Human Tissue Act.* Since a corpse is not regarded, in English law, as property, torts such as trespass to goods, conversion and detinue, are not considered causes of action. An action lies in the tort of negligence. According to Bai (1988, 20-21), a plaintiff who seeks to bring an action must be either: (1) the person in possession and the person lawfully in possession of the body after the death; or (2) a relative. However, if the basis of the right of a possessor arises via his/her duty of appropriate care and burial of the corpse, even if there has been a procedural error in the removal, it follows that there is no major hurdle to cross to perform the actual burial. Moreover, neither the person in possession nor the person lawfully in possession can bring an actionable claim as a victim. Even if the relatives have a potential right to object, it is doubtful that any disregard of this right would lead to a claim for monetary compensation. Bai (ibid., 21) concludes that the answer depends on the interpretation of whether or not the person is held to have "made such reasonable enquiry as may be practicable". To determine this issue would involve investigating both the person lawfully in possession of the corpse and the medical doctors for possible acts of negligence. Another relevant point Bai makes is whether someone suffering from nervous shock (Kennedy 1976, 53) can bring an actionable claim. Whilst it

is possible some of the torts could be applied, similarly to the way in which they have been in Germany, the urgency for saving a life may override the relative's intention.

5.8.3 Limitations

In Japanese and English law, despite the availability of actionable torts, in some cases these remedies nevertheless seem wholly inadequate. This is because once an organ is transplanted, to restore it to the corpse and hence restore the right is near impossible. The remedy is merely financial. Therefore, the sensible solution for a relative appears to be in their ability to anticipate and thus pre-empt the tort. In the light of its impact on social co-operation, human death is negatively considered. On the other hand, organ removal and transplantation, in the sense of social co-operation, plays a positive role in the utilisation of a corpse. This fact is precisely the reason why an objectively justifiable base such as an interest or *right of the dead* is required rather than a foundation based on mere respect for the corpse or a relative's sentiments.

In Japanese law, particularly, the conflict between the deceased's intention and that of his/her family or other bereaved persons is a problem to which attention has been drawn. The family's or the bereaved's intention is regarded as a standard for medical determination in lieu of any known intention stated by the deceased. Moreover, in some circumstances the relative's power to override the confirmed intention of the deceased has sometimes been allowed. The *Law on Organ Transplantation* (1997) prescribes that, unless a person holds a licensed donor's card that provides a written will in which the person admits his/her whole-brain death should be regarded as the point when their death as an

individual occurs and, irrespective of his/her antemortem intention on the acceptance of brain death criteria, should his/her family or relatives object to the brain death criteria, the traditional criteria of death should be regarded as the point when the individual's death occurred. Also with respect to the disposal of the corpse the standard is based on the bereaved's intention and determination. The reason for this is, as mentioned in the previous sections, that Article 190 of the Japanese Criminal Code is interpreted to protect not only the family's devoted feelings toward the society but also their devoted sentiments toward the corpse and their rights to disposal. On the contrary, even if a person expressed, whilst alive, an objection to the posthumous removal of his/her organs, the relative's explicit consent would effectively permit actual removal. Thus the Japanese way differs from the English way in which the deceased's self-determination is respected (Hirabayashi 1984, 131-7). Although it may be pointed out that the Japanese way is against the article of the constitution in which the individual's dignity is guaranteed, there is no possibility of any change of the traditional domestic resolution until a review for any modification of the *Law on Organ Transplantation.* Thus, that a deceased person's relatives can disregard their intention will remain contentious and unresolved until a forthcoming reform.

The individual's intention expressed before his/her death is in some cases rejected or undermined post-death for diverse and frequently ambiguous reasons such as social consensus; convenience for those living; family consensus, and other standards. Thus a *right of the dead* is needed to act as a palliative to this potential abuse. The right here refers to the right of a deceased person to have their intentions regarding the posthumous disposal of their own body carried out

faithfully. The principle in modern private law is individual autonomy. This means that self-determination by the subject of rights is the key. The principle can be applied to post-mortem disposal. Even if a dead person's capacity to act is extinguished at death, a legal device that makes the post-death will effective is demanded.

5. 9 Conclusions

Focussing on six questions, the first about "what is a corpse?", the second about "the symbolic aspects of a corpse and its commodity", the third about "whose intention determines the consent to donate organs?", the fourth about "how is the donation of organs influenced by the cultural factors?", the fifth about "the conflict between dead's rights to disposal of their corpses and their relatives' rights of consent regarding disposal of the corpses" and the sixth about "remedies for the infringement against the dead", we have discussed in this chapter several significant issues relating to *rights of the dead.*

First, we discussed the definition of a corpse from a multidisciplinary point of view, we explained that the symbolism and social characteristics of a corpse give a strong influence on people's perceptions. In such contexts of the discussion we focused on the question "can a corpse be considered as a commodity?". After reviewing responses to "who owns my body?" from the viewpoint of a variety of traditional justifications such as Locke's thesis of self-ownership, we concluded that our involvement in our living bodies is a realisation of our will and freedom; and this concept of ownership is connected with a moral right. We postulated that the question "is my dead body mine?" can be replaced by a different question "is a dead body a thing". We examined both Japanese

and English substantial law to resolve this question. Japanese law still views the corpse as property based on the right to burial. English law however works on the principle, based on common law, that there is no property in a dead body. In this thesis we have provided a perspective, influenced by German law, that, whilst we cannot regard the dead body as property, the contents of rights relating to the corpse should be deemed to be part of the living's personality or character which has been succeeded to after his/her death. This view necessitated we review the issue of damaging a corpse, especially the crime of destroying a corpse (Art. 190 of the Criminal Code).

Leading the discussion on the intention to be disposed of and the characteristics of a corpse, to the other discussion "how the difference between the living and dead body can be differenciated in the thesis of "economic efficiency" and the competing one of "human dignity", we examined both dignity and market incentives. We argued, taking the view that the social characteristics can survive death, that the dignity of the living is succeeded to after death. Yet it is understood that in death both the degree and values of dignity are attenuated.

In the discussion on the cultural connections with death, we pointed out that there are strong cultural influences in both Japanese and English rights discourse on the disposal of a corpse, and that the differences between them were not quite as extensive as the *Japanese uniqueness* thesis contends. Based on such debate, we identified the conflict between the individual's intention and his/her relatives' consent regarding the removal of organs and organ transplantation with the conflict between public and personal interests. We argued that when we review both how the contribution is possible and how body recycling could be legitimated, we would recognise that it would be required to

theorise and legalise the concept of body recycling not only from an economic perspective but also and importantly by something that gives an ultimate meaning to the action of organ transplantation that is decisive in form.

Finally, in the discussion on the relief of the dead, we discussed the potential tortious cases of how the dead are harmed, for example, by the removal of organs without their consent and what remedies might be available. In Japanese and English law, despite the availability of actionable torts, in some cases these remedies nevertheless seem wholly inadequate. However, the demand for and value of utilising the dead body have recently been considerably enhanced. This trend will thus require legal means to sort out the complicated issue of intention, an essential element of the *rights of the dead.*

Not only in Japan and England but also in most nations when organ transplants are practiced, a universal view is that a dead body inherits symbols, cultural meanings and implications, and part of the social characteristics that the living held. People do not reject such symbolism of a corpse. They believe that a corpse continues to be considered as a human in terms of representing a social immortal existence or a symbol to the survivors. This belief cannot be led by logic. It can be derived from, perhaps, religious beliefs, and other beliefs based on daily life. However, insofar as we recognise the dignity of a human and his/her continued entity, it is impossible to be disconnected with such beliefs. As a matter of fact, the law has been developing diverse devices in order to make the dead and dead bodies continue to be treated as a "human". The continuity of being treated as a human is continuity of the intention. Law carries out the device by which the living intention can be effective even after death.

Some forms of legal device in Japanese and English law, e.g., a will (*Igon*) and bequest (*Shiin-zōyo*) are explicit embodiments of the autonomy of individuals. Whilst a deceased's property can be inherited by his/her relatives, his/her post-death body and its parts can be "inherited" by others who are neither blood related nor bequeathed it in the deceased's will. Therefore, this position appears to be based on emotional grounds rather than an acquisition of property. This is led by the symbolism that a dead is a "human" even after death. Donation of the body and/or organs becomes possible on the assumption that human organs are not objects of trade. A person's desire that his/her own body or its parts may be used for the sake of saving others and that his/her transplanted organs continue to be functional as an organ attached to another body is in essence what the person desires. In other words how being a "human" after death, is a way of making the contribution of donating organs possible. One cannot think of organ transplants from a "mechanical parts" perspective. One recognises that after one dies one can exist as a human called a dead person or dead body. That is one of the main reasons why transplantation has to be supported by more positive and powerful intentions than is the case with burial. These intentions are not supported by myths but they are a conclusion deduced from the existence of the dead bodies and the social relation between the dead and the living. Our goal should be to establish a theoretical framework to enable performance of the individual's intention even after his/her death and to find a legal remedy when this performance is breached.

Chapter 6
An antemortem promise and its posthumous performance

6.1 Introduction

In this chapter we discuss the concept of an antemortem promise and its posthumous performance. This concerns whether a promisor is obliged to a deceased promisee by the promise that the promisor made to the promisee before the promisee's death. In the first half of the chapter, some theories of promising will be briefly reviewed. Particular attention will be paid to the competing perspectives of both *Will Theory* and *Reliance Theory.* During this discussion a question will be addressed: "why is it that a person is bound by a promise which s/he made?" We provide a compromise perspective based on the traditional two theories. Whereas we respect the justification of the traditional *Will Theory*, we take advantage of the concept of "social characteristics of a person" in order to justify *Reliance Theory* based on the notion of reliance. In the second half of this chapter, following on from the discussion several questions will be interrogated: "is a promise between a living and dead person different from a promise between two living people?" "What kind of promises can be made to a dead person?" Finally, "what binds a person to keep a promise made to a dead promisee?" The discussion will focus on the involvement of the dead person and his/her promise, and furthermore on the interrelation of the *harmed dead* thesis (Chapter 2) and the *social characteristics of the dead* thesis (Chapter

4) by using perspectives relating to debate on promising. A key notion that benefits debate will be the characteristics both that a promisor has and that a promisee retains after death. It will also be explained that the reason why a person is obliged to keep a promise with his/her promisee even after the promisee's death is that the ground for this is based on the rights that the dead promisee *holds*.

6.2 Debate on promising

6.2.1 Four grounds for binding

David Hume argues a promise is an example of natural law which was generated as a means for making human coexistence and prosperity feasible, much like transferring property with consent (1911, 219-227; Fried 1981,1). He described the difficulty in grasping the notion of a promise as follows:

> "[S]ince every new promise imposes a new obligation of morality on the person who promises, and since this new obligation arises from his will; it is one of the most mysterious and incomprehensible operations that can possibly be imagined, and may even be compared to *transubstantiation* or *holy orders*, where a certain form of words, along with a certain intention, changes entirely the nature of an external object, and even of a human creature" (Hume 1911, 220) [original italics; footnote omitted].

The action of promising that Hume expressed as "mysterious and incomprehensible operations" generated considerable discussion in fields as diverse as philosophy, legal-philosophy, law, psychology, etc. Examples of the questions that these fields have examined are "what is a promise?" "What does it mean by the declaration "I promise to do X"?". "When is a promise made?". "Why do promises bind people?". And "why is it that people are obliged to keep a promise?".

It is worth noting that most discussions on promising have tended to focus on the promises made between two living people. In the circumstance where a

person made a promise to a dead person, or more exactly, another living person whilst alive, and yet s/he had to perform his/her promise after the promisee's death, a difficult discussion on an antemortem promise and its posthumous performance appears to arise. However the discussion is no less than a derivative of the debate of the living's promise to another living person. Promises made to a dead person will be focused upon later.

Our discussion starts with a brief review about which approaches have been taken to resolve the fundamental question "why a promise binds a person?" Many philosophers and lawyers have taken up this question and have developed their own perspectives. Although none of the following four theories of enforcing promises that Pound (1959) categorised can provide an adequate justification for the theoretical four positions by which the whole enforcement of promises are covered, it would be reasonable to say that American and English legal philosophy and contract law adopt his categorisation as outlined below (ibid., 151-4)[168]:

> (1) *Will Theory*[169] which argues that a substantial reason for making a promise binding is that the intention agreed between the parties takes effect;
> (2) *Bargain Theory* which argues that insofar as a promise is a mutual bargain it can bind the parties;

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[168] Although these theories were categorised on the basis of the substantial law of contract liability, we are attempting to apply the theories to a general discussion on promising. In contract law, a legal enforcement of promising, *Will Theory* has been accepted as a leading view, especially on the Continent. However, contemporary lawyers tend to support the perspective that respects the representation of the legal action of the promisor rather than the act of the mind attending the promisor's words.

[169] R. Pound (1959) believes that in English and American law the pure *Will Theory* is impossible, because "we do not give effect to promises on the basis of the will of the promisor" (ibid., 151). However, *Will Theory* is, to some extent, embedded in English and American contract law. A promise as a representation of an intention is admitted as a necessary condition, but it is not enough to be its sufficient condition. The sufficient condition that gives legal enforcement to this representation of the intention is not only *seal* but *exchange* based upon consideration, *benefit* attached to past consideration and moral consideration or *reliance* as the base of promissory estoppel. Said that way, the four theories which differ on the surface are different yet overlapping at the foundations of their justification. The elements justifying *Reliance Theory* and *Will Theory* also coexist in the concepts of promises and contracts in Japanese law (see Morimura 1989: 147-200).

(3) *Equivalent* [sic] *Theory* which argues that a promise is an exchange of equivalent or similar interests; and
(4) *Injurious-Reliance* (or *Reliance*) *Theory* which argues that, in a case where a party relies upon another party, the reliance binds the other party.

Of the four theories, generally *Will Theory* and *Reliance Theory* can be distinguished as competing. With regard to the other two theories, it is possible to understand that *Bargain Theory* is a form of *Will Theory* and probably a development of *Equivalent Theory*. As a ground for enforcing a promise, we do not find *Equivalent Theory* sufficient. The principal reason for this is that bargains involved in promises are in most cases not based on an equal exchange between both parties involved. Since, irrespective of whether or not the bargains in promises are equivalent, the parties obey the fulfilment of their promise, as they are bound by their promises.

6.2.2 *Will Theory*

Will Theory is a position that contends the substance of promising lies in the promisor's intention that binds him/herself. For example, in a case where person A promises person B to do X, A autonomously, by their own will, creates an obligation to perform X. It follows that, even if a precondition of acceptance by B is required as a presupposition for making a promise, the substance of promising and that of the obligation by which A keeps the promise is nevertheless A's intentional action by which A binds him/herself.[170]

Modern natural lawyers provided through practical/substantive law, e.g., contract law, a model of *Will Theory*, in particular the continental lawyers, who to

[170] *Will Theory* also respects the autonomous choice of how members of society act. The theory stands on the position that views central legal functions as giving a legal power to members of society. Since the theory considers the functions of contracts to be the autonomous creation of legal rights and duties, it views the substance of contracts based on promising as an autonomously self-binding action of the parties.

a great extent, established the underpinning theoretical studies. Influenced by *Will Theory*, many lawyers in English and American law hold to a view that the first element of contract is the party's agreement of intentions for the creation of legal relations.

Will Theory is ubiquitous even in contemporary discourses.[171] Take for example A. Reinach's (1953, S. 21-86) perspective on promising. Whereas there are no English versions available to his readers, we can approach his perspective through some of the summaries that Japanese lawyers have made. According to Kobayashi (1985, 92-3), whilst Reinach's legal thesis is the abstraction of an *a priori* legal base for promising by Phenomenological intuition, a review of his perspective on promising would highlight its similarity to John Austin's (1962) idea of promising as a "performative".

Reinach (1953) argues that, when person A promises person B to do X, A has the intention to do X but that promises nevertheless do not refer to informing the intention to perform X. In other words, just as the action of questioning is not to a question, the action of asking is not to a desire. Promising is not the declaration, to a possible promisee, of the internal experience that exists independently from the action of promising but, rather, a self-binding action that can be instantiated through a certain speech act (Searle, 1969) and bodily actions. It is an action which makes A create A's obligation to perform X and which makes B create a right corresponding with the obligation or duty. However, even if promising is not a declaration of an intention, an internal

[171] As a new espouser of *Will Theory*, C. Fried's view (1981) should be noted. He proposes the principle from a Kantian perspective of *Will Theory*, the principle by which persons may impose on themselves obligations where none existed before (ibid., 1). Whilst he develops his version of the classical view of contract proposed by *Will Theory*, he concedes, unlike the classical view, that some non-promissory elements such as benefit,

experience in parallel with the declaration is immanent in the act of promising, namely, the intention that obligates the self. Reinach contends that, to make a promise, needless to say, even if any actions of speech are required, the substantial element of promising should be regarded as the intention that binds the promisor. His criticism of *Reliance Theory* will be examined in a later section.

Reinach's version of *Will Theory* is resonant of John Austin's perspective (1962) that views promising from the position of *Will Theory*. Austin argues that a speech act such as "I promise to do X" is not a description but rather *performative*, and that when a certain action of speech act is regarded as a promise, certain constitutive rules are presupposed by the interlocutors. As detailed below in the section explaining *Reliance Theory*, from the position of *Reliance Theory* perspective and given Austin's argument, the phrase "I promise to do X" is a description of intentions. The binding power of promising is not generated by this illocutionary action but by its perlocutionary force or element, in this instance reliance. However, Austin considers promising to be a commitment to bind oneself, that is to place oneself under certain rules. It follows from this that the speech act of promising made in particular circumstances directly generates an obligation.

6.2.3 *Reliance Theory*

What is *reliance* in a promise? Since, in this section there is no space for a comprehensive discussion on the definition of reliance, a single example based on the analysis of German philosopher N. Hartmann will have to suffice. Hartmann (1932) attempted to divide reliance into *Zuverlässigkeit* (reliability), that

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reliance and distribution to some extent play a vital role in the sphere of contract (ibid., 5; 69-

is the ability to make promises, and *Vertauen* (trust). The ability to keep promises refers to an ability that guarantees an unrealised affair (i.e., a fulfilment of the promise) corresponds with a certain given speech act. Therefore, the value of the ability to keep promises lies in the certainty of future action to entail they are kept. A person held to be reliable is one who vouches for his/her word by his/her deed. S/he does not change his/her intention until the promise is fulfilled so that the ability to keep promises basically refers to a moral power of personality by which s/he performs his/her future behaviour or action to instantiate the terms of the promise. The promisor conceives that s/he can impose burdens on him/herself through not only their present intention but also their intention with respect to future action. The identity of the intention and the personality is a principal ground of the trustworthiness of the person.

Understood, in this way, that ability is an aspect of reliance, Hartmann explains the concept of *Vertauen*, that is trust to others. We assume the trustworthiness of a person and we then by extension trust the person. This is the "trust to others" which Hartmann refers to. We do not trust the person after we have investigated whether the person is trustworthy. Therefore trust has a negative side: there is an element of risk involved. Human relations are based on this kind of trust. In this regard, *Reliance Theory* put us on the road to contractualism. A form of contractualism which is quite close to Kantian tenet (1998 [1785]), for example, is the simple view that moral rules on promising are those which rational egoistic beings could agree to promote as public rules of conduct.

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Reliance Theory maintains that the ground by which a promise binds does not lie in the promisor's intentions, but in the reliance that the promisee generates as the cause of promising. Utilitarians in most cases, adopt this view. According to this perspective, the promisor's intention that binds him/herself could not be created by itself. The reason why promises have a binding power is that the promisee's reliance is generated by the action made by the promisor and that breach of the promise causes mental or physical damage to the promisee. Therefore, insofar as the potential promisee does not rely on the promise, any breach of the promise does not cause, in terms of the Utilitarian viewpoint, an evil result and consequently the promise does not create a binding power.

Since *Reliance Theory* considers reliance a main ground for the obligation of a promise, it regards as the substance of promising the factual relations between a promisor, who declares an intention to keep a promise, and a promisee, who relies upon the declaration and suffers some damage by any breach of the promise. *Reliance Theory* emphasises the social relations between the declaration of an intention and reliance on that declaration. *Reliance theory* is thus a competing perspective to *Will Theory,* the perspective which regards the subjective element of intention as the substance of a promise obligation.

6.3 The discussion on a *mere fact*

6.3.1 Recognising the fact

The point we have to recognise in order to understand the main difference between *Will Theory* and *Reliance Theory* is that both camps require a *mere fact* to justify obligations generated by promising. To *Will Theory*, the *mere fact* is the

self-binding declaration of the promisor's intention; to *Reliance Theory*, the fact is both the declaration of the promisor's intention and the creation of the promisee's reliance derived from that declaration. As suggested by a Hume's Law "One cannot derive an "ought" from an "is"', a normative relationship of rights and duties cannot be derived from a mere fact (Mackie 1977, 64).[172] Therefore the reason why a relationship of a right and a duty on promising is generated between Persons A and B is firstly that there is a certain factual relationship between A and B, secondly that a social and legal rule signify the existence of the relationship, and finally that the rules endorse a certain social or legal effect to the relationship.[173]

Stated thus, the difference between *Will Theory* and *Reliance Theory* lies in the difference between grasping the certain factual relationship as one in which A's intention places an obligation upon A or, alternatively, grasping it in terms of the generation of B's reliance. It follows from this point that the binding power of promising lies not in the factual relationship itself but in the rule that endorses normative effect to this kind of relationship.

This leads to the question: "what rules are assumed in the theories?" *Will Theory* assumes the rule that a person who creates a certain obligation by his/her intention morally ought to perform that obligation. *Reliance Theory* assumes a different rule—that the protectable and unprotectable reliance should be distinguished and legal effect should be endorsed to the former (Kobayashi 1985, 88-89). However, in this section we will not expand on the review of the

[172] The challenge to Hume's Law is not only from J. Searle's five steps of premises but also the rules of chess or the analysis of the declaration of "ought" (Mackie 1977, 66-71). All of the attempts commonly suggest that a *mere fact*, as a matter of fact, conceals an "ought" within the fact *per se*.

discussion of what makes rules binding. The focus of the review will be upon the binding power of promising.

6.3.2 The meaning of "endorse"

John Searle (1967, 101-114) attempted, in the debate on promising in the context of obedience to rules, to defend *Will Theory*[174] by trying to demonstrate the possibility of logically deriving a moral "ought" from an "is". As far as this attempt is concerned, the assumption should be accepted that an action of promising gains effect by virtue of the rule that constitutes a certain speech act as a promise. Even if this rule is presumed to underpin Searle's five step argument, A nevertheless has to endorse the rule of promising as binding in order to make a promise and create an obligation to perform it. Therefore, insofar as that assumption does not hold, the five steps are not legitimate.

However, we have to consider a further question: "what is meant by endorsing the assumption that Person A considers a rule of promising as being binding?" (Kobayashi 1985, 90-1). In a discussion, provided by H. A. Prichard (1949, 169-179), which J. Rawls (1973) says contains all the essential points (ibid., 347), Prichard regards the base of the endorsement as a higher promise. That is, each binding power of promising is derived from an assumption of a general and higher promise that if I do a certain speech act (promising) then I am obliged to perform the contents of the speech act. Nevertheless it should be

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[173] For the reason the party of the promise is at the least endorsing the institution of promising. In so making a relation with the institution the party has, as it promised, to continue to endorse the promising institution (see ibid., 70).

[174] J. Searle (1967, 101-114) presents the following argument: (1) Jones uttered the words "I hereby promise to pay you, Smith, five dollars". (2) Jones promised to pay Smith five dollars. (3) Jones placed himself under an obligation to pay Smith five dollars. (4) Jones is under an obligation to pay Smith five dollars. (5) Jones ought to pay Smith five dollars.

pointed out in drawing this argument to its logical conclusion it has to be logically presumed that the ultimate promise does not assume any higher promises. In this case we have to posit an *a priori* premise—the premise that a person who promises to do X is obliged to fulfil it (Kobayashi 1985, 90).

In contrast to the binding rule approach, the second approach would be feasible from a Utilitarian perspective which argues that the social utility of a rule can be a basis of the binding rule (see ibid., 91). This view contends that a rule is created naturally as a result of the mutual relations of expectation that members of society hold amongst each other. Accepting a rule as an assumption means to explicitly abide by the rule (see ibid.). This view resultantly claims that the ground of the binding promise does not lie in an acceptance of the binding rule but rather because of the rule's basis as a social utility.

A third perspective derives from the viewpoint of fairness (see Rawls 1973, 112; Morimura 1989, 186). This view argues that the ground for the binding rule is not in the social interests generated from the consensus of members of society or inherent in the concept of a rule *per se*. Rather it is predicated in the notion of unfairness which means that, despite disobedient attitudes toward a rule, s/he gains a benefit from other persons abiding voluntarily by the rule. Therefore, when this logic is applied to promising, and hence escaping the duty of keeping a promise is perceived as being somewhat unfair; we not only enjoy the passive interests of a promise but also positively take advantage of its positive attributes.

When stated in this way, even if the ground for a rule as being binding is the binding rule *per se*, or the social utility of the rule or the viewpoint of fairness, that the rule is binding is assumed by the institution of promising. Based on the

discussion of the binding rule, our review can go further, and consider the advantages and disadvantages of the competing *Will* and *Reliance Theo*ries on promising in order to clarify the differences between the two perspectives. Five points of controversy will be pursued in the following sections.

6.4 Advantages and criticisms of *Will Theory* and *Reliance Theory*

6.4.1 The first point of controversy

The first point is related to the creation and alteration of rights and obligations. When observing the action of promising from the viewpoint of the legal relation and the characteristics of a contract, we can recognise that law allows us to create and alter the relation of contractual rights and obligations based on our own intentions. In this regard, the contractual relation based on promising would be essentially different from other involuntary legal relations. This observation may illustrate the principle that incorporates the tenets of *Will Theory*.

However, there is no need for *any* promise to be legally binding. There are occasions where keeping a promise, in terms of morality, is not only unnecessary but also undesirable for the necessity of being legally binding. That is, most promises are not just commands that should be fulfilled by any means but are sufficient only if they are kept.

Nonetheless, when we think of an "ought-to-be-kept" promise, as mentioned in the previous sections, we recognise that an intention to do X, that is, an intention to bind oneself inheres in the promise. For this reason, it follows that the substantial element of promising is an intention to bind oneself and furthermore that the intention can create and alter any rights and obligations of promising.

It is worth considering Reinach's criticism (1953) of *Reliance Theory* in order to discuss the issue of the creation and alteration of rights and obligations. Reinach points out that the theory is likely to confuse an obligation derived from promising with other obligations under which a person ought not to break the promise or cause damage.

Reinach characterises the two obligations in this way. Whilst one obligation binds a person to keep a promise that is based on the ethical rightness of the promising action. The other obligation of fulfilling a promise is not based on the ethical aspect of the action of fulfilling but on an obligation produced by the action of promising itself. Even if there is a situation where an obligation that requires a promisor to do X can be invalidated by another overriding obligation, the original promise nevertheless continues to exist. Thus this criticism may lead us to the recognition that the premise of "an obligation on fulfilling a promise is derived from the action of promising" is an *a priori* synthetic premise and therefore that, even if a promise is fulfilled by any subjects or, for instance, by an angel or even a devil, insofar as they can really make a promise and endorse it, rights and obligations will be created by any of them (Reinach 1953).

So far we have understood that *Will Theory*'s position is that rights and obligations of promising are created by intentions to make a promise and that they are not generated by the fact of reliance placed on the promisor. However, D. Hume (1911, 219-227) contends that it is absurd to will any new obligation. He (ibid., footnote 1, 220) argues:

> "To will a new obligation is to will a new relation of objects; and therefore, if this new relation of objects were formed by the volition itself, we should, in effect, will the volition, which is plainly absurd and impossible. The will has here no object to which it could tend, but must return upon itself *in infinitum*. The new obligation depends upon new relations. The new relations depend upon a new volition. The new volition has for its object a new obligation, and consequently new relations, and consequently a new volition; which volition, again, has in

> view a new obligation, relation, and volition, without any termination. It is impossible, therefore, we could ever will a new obligation; and consequently it is impossible the will could ever accompany a promise, or produce a new obligation of morality" [original italics].

This raises a question of whether or not it is so absurd, as Hume argues, to consider a promise as an intention by which a promisor is bound. It will be argued, in this thesis, that an intention to bind oneself, as applied by Kant's thought of casual relations, can be considered as an *a priori* premise—although *a priori* immanent in a certain legal culture—when an action is interpreted to be a promise. This discussion bears on the second point—the effect of reliance.

6.4.2 The second point

Reliance Theory believes that the effect of reliance provides the ground of a binding promise. In a situation where a new relation of reliance is not created by an act of promising, it would be meaningless to say an act of promising had actually taken place. When a promise is established between promisor A and promisee B, A tries to fulfil A's promise because A expects B to rely on A's promise.[175] Conversely, B places his/her reliance on A's promise precisely because B expects A to have this expectation. Said thus, an act of promising potentially possesses considerable advantages to the parties involved in the act. It is a means by which any uncertainty associated with another's choice of action can be removed. At any rate, however, real society is composed of many uncertain and unpredictable human actions. The institutional rule of promising

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[175] This ground of reliance has been admitted ever since Prichard (1949) took it up. For instance, John Rawls (1973) states:

> "I have also assumed ... that each person knows, or at least reasonably believes, that the other has a sense of justice and so a normally effective desire to carry out his bona fide obligations. Without this mutual confidence nothing is accomplished by uttering words. In a well-ordered society, however, this knowledge is present: when its members give promises there is a reciprocal recognition of their intention to put

enables us to introduce the relation of reliance into uncertain situations to generate a situation where members of the society can predict other's actions, chose their own actions, seek their interests and simultaneously generate situations where the interests of the whole society are upheld.

Moreover, *Reliance Theory* bears powerfully on a perspective that views the obligation of a promise as obedience to the sanction which would be imposed should there be a breach of promise. For example, in a case where A promises B to do X, A's obligation to the promise can be ascribed as an obligation to the sanction imposed should there be a breach of performing the promise. The extent and degree of imposition are determined by the degree and effect of B's reliance on A. In this perspective, however, the effect of reliance is weak as an element in the creation of a new promise based obligation. Rather, it should be considered a ground of any imposition of sanction against a breach of promise. That is to say, *Reliance Theory* suggests the obligation of a promise can be reduced to obedience to a sanction against breaking the promise. Only in this regard, *Reliance Theory* is close to consequentalism, although in Gewirth (1982), for example, the reason why promises should be kept is that if promises are not kept then this will interfere with an agent's ability to successfully achieve its purposes and for this reason each agent must claim a right to the keeping of promises or contradict that it is an agent.

Nevertheless people do not necessarily take into consideration an attitude of keeping a promise on the ground that they will accept the consequences if they breach the promise. The reason why they keep a promise, especially an insignificant one, is no less than that they promised. The consequence of their

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themselves under an obligation and a shared rational belief that this obligation is

actions of promising is expected in their future and yet they are thinking of their past about the promises they made (see Dancy 1991, 220).

When we recognise that a promisor has no intention of fulfilling the promise, we must recognise that the promise is invalid, especially in a contractual promise. Yet is the promise *per se* invalid? Our answer is "Yes". The reason for this is both the lack of the promisor's intention and the lack of the promisee's reliance. Yet in circumstances apart from such an extreme case, a promise should be valid even if there is some uncertainty as to whether or not the promise will be fulfilled.

A promisee does not rely, as N. MacCormick (1982) suggests, on the fact that a promise creates a binding obligation. Rather, s/he relies on the promisor's intention to do what the promisor has promised. Even if, for instance, the promise was unknown to be binding, and/or if societal members do not recognise the binding promise, they will sometimes rely on statements and signs of intention and through the subsequent reliance may suffer a loss. There is in society "a virtuous circle in which promises and actual reliance reinforce each other" (Atiyah 1981, 38).

MacCormick's interpretation of promising is useful to discuss what exists behind intention and reliance. A key concept is the social characteristics of humans that we have been constantly arguing for in this thesis. As discussed in 6.5., the characteristics is a vital factor by which a promise binds its promisor. It is the social role and status of a promisor in this context. Therefore, in a society where a promisor and a promisee exchange a promise, the promise is bound not

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honoured" (ibid., 347).

only by the intention and reliance entailments of a promise but also by the social characteristics of the promisor and the promisee.

6.4.3 The third point

This point was proposed by D. Hume (1911, 225-6). He criticises the view that one thinks of a promise as an intention by which a promisor is obliged. He argues that this intention should be denied as an absurd concept.

According to D. Hume, whilst an obligation of the performance of a promise is derivatively based on a self-regarding interest, it departs from the interest after the institution of promising is established and endorsed. Thus through amongst other things public interest, education and the statutes of law, the attitude that obliges a promise as a promise is generated. On the other hand, since the declaration of the determination and intention cannot explain either the use of words or signs or the process of the performance of the obligatory promise, an everyday attitude is generated by which people think that the ground of the obligation lies in the mental activity (promising): that is, intention to will the obligation. Moreover, people are likely to think that any basis of a moral obligation lies in intention.

Needless to say, however, a promise is not only made on the basis of a person's intention. Rather, the use of words or signs is a necessary condition and, for example, even if it were not for the will to perform an obligation, words or signs often create an obligation. Conversely, if words or signs are used and yet a promisor does not know their meaning or in the case where words or signs are used for fun, there can arise cases in which a promise has no binding power over

its promisor. Hume explains that the obligation of promises is not natural but an invention for the interests of society.

6.4.4 The fourth point

Will Theory must address a criticism raised by the metaphysical character of the concept of intention (Cohen 1933, 575). The metaphysical difficulty of this view is that "[m]inds or wills are not in themselves existing things that we can look at and recognise" (ibid.). In thinking of an intention of promising as an event in the mind that wills the performance of the promise, we can recognise that intention itself is vague.

However, against the criticism of the metaphysical difficulty of intention, Morimura suggests that considerable attention should be paid to the voluntariness of a contractual action (1989, 168). In reality the event or situation in the human mind that wills the performance of the promise would be, in many cases, no different to the process of composing a capricious and vague concept. To those who do not know each other, an accidental correspondence of their intention does not lead to the establishment of a promise. After studying some articles of the Japanese Civil Code, especially its chapters on legal actions, we find that the articles do not use the term "intentions" but the term "declaration of intentions". The classical *Will Theory* should perhaps grasp intentions not as a raw psychological event but as the voluntariness of accepting the explicit relation of rights and obligations that should be conveyed to each party (ibid.).

6.4.5 The fifth point

With regards to promising both *Will Theory* and *Reliance Theory* display a polarity of thinking in the debate "which theory can justify the responsibility of the breach of promising?". The substance of a binding promise lies in *commitments* (Morimura 1989). A promise binds its promisor even if either of the parties of the promise reneges on their intention to fulfil the promise. Given that the promisor is allowed to breach the promise due to the absence of his/her intention, there would be no need to discuss the performance of a promise.

This raises the question: "how can *Will Theory* explain why a promise binds its promisor who has lost or reneged on their intention to perform the promise?". The promisor's role in the promise is not only that the promisor fulfils the future promise but also that the promisor is bound by the promise even if s/he reneges on the intention to keep it in the future. However, Morimura disagrees with such a view. The intention of the promisor who feels unwilling to perform the promise is not only that of an unwillingness for performance but also a further, third intention which does not want to be bound to an intention made in the past which *ipso facto* binds the self's future (ibid.).

Thus we can recognise that the past intention to fulfil the promise and the present intention—an unwillingness to fulfil the promise—compete in the circumstance where the promisor reneges on their intention to keep the promise. However, why should their past intention have priority over the present one? If the answer should be that it is because the promisee *relied* on the promise, *Will Theory* has become another version of *Reliance Theory*. A pertinent answer would be that when the promise was made the promisor held an obligation to future performance so that the promisor cannot avoid the relation of rights and

obligations of promising. Therefore when the promisor invalidates the promise, s/he has to take responsibility for their action. Nevertheless the issue taken up here is why the past intention binds future intention, why responsibility can be attributed to the promisor when a change in interests leads to a reneging on a promise made in the past and therefore a breaking of future intention. Put in that way, we cannot assume the rights and obligations of promising. This issue leads to a further question as to whether a promisor is obliged by the promise to the present promisee. This will be discussed below in 6.6.

6.5 *Relation Theory*

6.5.1 Commitments

It follows from the above discussion that a compromise perspective will be proposed. When observing the relation between a promisor and a promisee, one would define, drawing upon both *Will Theory* and *Reliance Theory*, a promise as an act, in which the promisor gives to the promisee a right—although not necessarily a legal one—to expect or claim the performance or non-performance of some particular thing. An obligation to another is not just created by a promisor's desire to be obliged, for example, "my present intention will bind my future self," or by stating the desire (see Morimura 1989, 185). Such a statement may generate the question "what *morally* binds oneself?".[176] However it also gives others a right by which they can expect to make a claim.

In addition mere reliance does not create a relation imbued with rights and obligations. Even if a promise is not based on the reliance of a statement but on

[176]A vow is an example. To regard a vow as a self-binding promise is rhetoric. What we discuss here is a promise related to the future performance of the promise between a person and others.

the intention of promising, it binds the promisor. The reason for this is not concerned with whether or not the desire of the promisee is relied upon—reliance is not clear to the promisor, but that the commitment of the promisor results in the promisor undertaking the performance of the promise. Thus this element of commitment is essential, it is the means by which a right is given to the other party and by which the promisor is bound.

Mackie (1977) however views a promise differently. He claims that basically what constitutes a promise is an institution.[177] The claim to an obligation of promising is directly associated with a claim toward the institution and a recognition of the institution:

> "A promise, and the apparent obligation to keep a promise, are created not merely by a speaker's statement of intention in conjunction with the desire of the person to whom the promise is made that it should be fulfilled, or even by these together with the hearer's reliance on the statement and the speaker's expectation that the hearer will, and intention that he should, so rely. What creates the institution of promising is all these being embedded in and reinforced by general social expectations, approvals, disapprovals, and demands: promising, in contrast with the stating of an intention, can be done only where there is such a complex of attitudes" (ibid., 81).

Despite viewing promising as a commitment or an institution, we have to understand a promise as that associated with the relation between a promisor and a promisee. If we recognise that the relation was created at the causal point of intention, we accept *Will Theory*; if we recognise that the relation was created through reliance we accept *Reliance Theory*. However, as discussed in the previous sections, neither theory provides sufficient justification for their own positions. This is precisely why a third perspective which can mediate the two is demanded. To construct such a perspective will be the main endeavour of this section.

6.5.2 Intention

Will Theory views the substance of promising as the promisor's intention which binds him/her. It contends that the obligation of performing a promise and a promisee's claim to it can be created by the action of the intention that binds the promisor. Additionally, a contract is legally granted the claim to obligation. In applying the principles expounded in the discussion on intention of a will (see 3.3) to that of promising, we would define intention as a power to determine a motive and a reason. Therefore the intention of promising is a power to determine a motive and reason for promising.

Making a promise is composed of two mental activities. The first, desire. Although desire does not imply intention, it is a mental process in which a certain moral or juristic effect, such as a performance of a future action X, is desired emotionally (see Finnis 1991, 38). This mental activity is a form of motive that urges a person to do something, in this case to create a promise. The second mental activity is determination. This enables realisation of the desire. Therefore a speech act of promising includes both desire and the means to realise the desire.

Suppose that husband A, a heavy smoker, promises his wife B to give up smoking. A's mental activity of promising is firstly a desire to abandon the daily addictive habit of smoking. In this case A's desire is to want to do (i.e., abandon) what A does not want to do (i.e., smoke). Presumably this desire is based on reasons such as health, saving money, and preventing harm to others. Whatever the reason most of them are interpreted to be social. In other words, the reason why A wants to give up smoking is based on A's own social

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[177] This argument is similar to J. Raz's perspective (1977).

characteristics. To reiterate, social characteristics refer to the roles that a person plays in society and from which it is justified to demand performance in certain circumstances, based on the stipulations of a moral "ought" (Chapter 4). A's new role therefore is one in which on the grounds of social reasons, he is required to refrain from smoking in both his domestic environment and wider society.

If the above explanation is plausible, then it would be reasonable to say that A's desire is based on his own social characteristics. For A's motive to quit smoking is associated with his role as a smoker. There is no requirement for science-based evidence relating to the damaging effects of smoking in this discussion. Rather the issue here is the desire that A generates from his belief that smoking is a harm to himself and others which is a mental activity.

Only if A refrains from smoking, will A save the cost of purchasing packs of cigarettes. Only if A gives up smoking will there be no occasions where, due to indirect smoking of A's cigarettes, A's wife and other members of the family are harmed. Only if A refrains from smoking will be prevent contaminating himself with tar and nicotine. If such diverse reasons generate A's desire to give up smoking, then apparently A holds some social characteristics which are required to fulfil his desire. That is to say, in a case where A has a desire to quit smoking, A's desire expresses his social characteristics associated with smoking and non-smoking. In this thread A's social characteristics can be ascribed to both his domestic circumstances and the wider society requiring him to refrain from smoking.

The second mental activity immanent in A's action of promising is a determination which enables the realisation of the desire to quit smoking. In addition to the first mental activity of the mere desire to quit smoking, the second

mental activity enables a speech act of promising. This is also identified with the mental activity that seeks a means by which the desire can be realised. Thus again, irrespective of words or signs, a promise is made, it includes a means for the realisation of the desire, the mental activity. To be concise, there is a manifestation of the speaker's social characteristics in his/her mental activities of promising and the characteristics are associated with the action of promising. This line of argument suggests that intention cannot be separated from perceiving this as a social matter.

6.5.3 Reliance

Reliance on an action of promising bears on the promisor's social characteristics. Take for example the case of smoker A's determination to give up smoking. A's promise to his wife B is to quit smoking forever. According to *Reliance Theory*, the binding power of the promise is created by B's reliance on A's speech act. If A is a person who has no hesitation in repeatedly breaking a promise and, for example, A has failed to keep a promise to quit smoking many times in the past, then B would not rely on A's action of promising insofar as she is not a simple-minded person. This logic leads us to the conclusion that A is not bound by his action of promising. This is absurd. A's action of promising assumes his future performance of the promise. Therefore even A at the present time is not confident that his promise will be fulfilled in the future. Although B is also not confident of the realisation of the performance, B would believe that since she often experienced A's breach of promise the present promise will be broken as usual.

However, B's attitude not to rely on A's promise due to B's negative expectation does not necessarily lead to the fact that A is not bound by his own promise. Even if he is labelled a promise-breaker, he may on this occasion be very keen to keep the promise. Therefore except in a case where his speech act of promising is insincere, the promise that A tries to keep this time must bind him. Also even in a case where his speech act of promising is insincere, the promise that A tries to keep this time must bind him, because B might nevertheless place reliance upon A's promise. As a matter of fact, even if he breaks the promise three days after making it and he manages to quit smoking for two days, the fact is that he keeps the promise for a short time at least. This means that he is bound by the promise in that short period. It follows from this that the ground of binding does not lie in B's reliance on A's action of promising.

In a sense reliance may cement A's determination not to smoke. If B says to A, "I trust you" and even if at a later point A breaks the promise, the promise would be kept longer than if B does not say anything to A. However, the fact that B's distrust for A weakens the binding power does not reduce the fact that reliance was involved in the act of promising.

However, how different is this view from a vow? How does it differentiate from vowing to give up smoking to gods or swearing to oneself to stop smoking? As mentioned in the previous sections, if a commitment that a promisor makes gives a right to others and which binds the promisor is the substance of promising, the promise should be interpreted in the context of the relation with other parties. Vowing to gods or to oneself would be meaningless in the discussion that assumes a right and an obligation between a person and others.

Insofar as a promise is made in relation with other persons, the binding power of promising has to be understood from the viewpoint of relations.

6.5.4 Relations

In furthering this discussion we will revisit the case of smoker A's promise. A is a notorious person who breaks every promise to stop smoking. Whilst his wife B, the promisee, expects that A will break the promise as usual, she nevertheless accepts his promise. B's reliance is therefore hardly placed on the worth of A's promise. Nonetheless A's promise is valid and if performance of the promise is breached, A will have to take responsibility for the breach and be subject to certain sanctions such as social accusation.

The ground for the binding power of promising in a situation where A's promise is not relied on by B is neither in A's intention nor his mental activity. The institution of promising itself or the nature of things is effective as a demand for keeping a promise. An agent feels bound to a promise, and yet this is not by his/her own desires or by any specifiable institution or by the promisee's attitude. At any rate not only these but also some intrinsic qualities of promising are required to support the promising institution. The power can be identified in the relation between A and B. The relation is one between a promisor and a promisee, and in our example the promisor is a husband and the promisee his wife. In such cases, *per* our construct of the social characteristics, we could change the casting of a husband and a wife to a grandfather, child, or a friend. When a promise of non-smoking is established, the promisor and the promisee can recognise that they both possess social characteristics in terms of the contents of the promise. For example, in a case where the promisor that

promises to quit smoking is a husband, his social characteristics as a husband is associated with the social characteristics of his wife.

What are A and B's social characteristics related to promising? Although the definition of the characteristics will not be repeated here (see Chapter 4), A's social characteristics refer to that of a promisor so far as promising is concerned. That is a characteristic of those who make use of an institution of promising. Those who use the institution have a role and status that requires they abide by the institution. On the other hand, B's social characteristics refer to a role that requires acting in the event of a breach of the promise. She may impose a sanction on A's breach of the promise, claim for compensation or abandon a right for the failure, for example. Understood in this way, A and B's social characteristics must be what binds the promise that was originally made by A.

Insofar as an action of promising itself is a social institution, A and B are connected by the relation associated with the institution. This is a role that A and B are required to assume in the society where the institution is available. Moreover, since the institution of promising has an interest that the promise made by the promisor be kept, that interest is the very one which is reflected in the promisor's right to promise. This interest is therefore the basis for the relation between a promisor and a promisee. Thus, insofar as the institution of promising assumes a binding power of promising it would be impossible for A and B to disconnect themselves from their roles on promising, the roles which the institution assumes. If it were not for such roles then the binding power of promising would not and could not be generated.

To sum up, we can justify the creation of a promise by *Will Theory*. Further *Reliance Theory* can justify the function of reliance in promising, which

strengthens the binding power of promising. *Relation Theory*, which this thesis strongly supports, pays considerable attention to what lies behind intention and reliance. That is, the social characteristics of the promisor and the promisee. We argued that the relation associated with the parties' social characteristics could justify a binding promise. However, in order to apply our perspective to the dead, we will have to review the characteristics of promising in the context of the dead. For human death often frustrates a promise. In the next section, a brief discussion on the dead will be provided. The first question to be addressed is "why does a person keep a promise with a deceased person?". Whilst we have discussed some cases relating to a promise between two living persons, some posthumous cases of promising will require review in order to apply the principles developed in our discussion in the first part of this chapter.

Taking advantage of the concepts "will", "reliance" and "relation", in the above debate, we have examined the grounds of promising. And the dicusion has been initiated by the model of "person A promised person B to do X". However, what it suggested is that a question arises "is the debate on the model in reality useful?". It would be evident that the contents of the concept of promising can be reduced to the key concepts "will", "reliance" and "relation" between the promisor and the promise. Yet at the same time, it is pointed out that the above debate has avoided almost any social circumstances which are associated with the practice of promising and which lie behind it. Only the concept "social characteristics" discussed in the *relation* thesis illustrated the social factors should be used for the further discussion. Our attempt in the following sections shall be to supplement the philosophical debate with sociological perspectives.

6.6 A promise with the dead

6.6.1 Death of the promisee

In the discussion on the binding power of promising, *Will Theory* was understood to contend that a promisor gives a right to the promisee as a result of the promisor's mental activity—intention. By contrast *Reliance Theory* argues that the binding power of promising is rooted in the promisee's reliance placed on the promisor's action of promising but not in the promisor's intention. Both theories come into conflict at the point of justifying the binding power. As argued in this thesis, *Relation Theory*, a compromise perspective of both theories, has proposed a claim that the binding power of promising can be justified by the relations based upon the social characteristics that the parties of the promise hold. In order to explain the binding power of a promise to the dead, we first need to address the question "how do the three theories respond to the death of the promisee?"

Suppose that husband A promises his wife B to do X, but B dies before A's fulfilment of the promise. Since *Will Theory* grounds the power of binding in A's own intention, the action of promising may or may not be influenced by B's death. However, the ground for binding A's promise is unlikely to be denied by the influence of B's death. Since B who had placed her reliance on A's promise dies before the fulfilment of the promise, *Reliance Theory* will be able to recognise that the ground for the binding power is lost. However, if it is possible to argue that the binding power of promising is created by B's reliance on A's action and even after B's death A is still bound by the promise, this version of *Reliance Theory* may be adopted as a justifiable perspective.

Relation Theory considers the relation based on the parties' social characteristics as the ground for the binding power of promising. Construing intention and reliance from the viewpoint of the social characteristics, *Relation Theory* can validate both as effective grounds for binding a promise. *Relation Theory* claims that binding the promisor even after the death of the promisee is due to the social characteristics of the parties. For as an entity that holds social characteristics the promisee is still bound to the promisor even after the promisee's death.

Before presenting a detailed explanation of *Relation Theory* it is important to discuss the characteristics of a promise itself. We have previously discussed a promise on the assumption that a promise is made between two living persons. We have not yet discussed whether a promise between two living persons is different to a promise between a living and dead person. We will explore this question below.

6.6.2 Posthumous promise

A promise between two living persons can in terms of the vitality of the parties go forward to its fulfilment or its purpose. However, once the promisee dies, the promise may be frustrated; or the contents of the promise may be changed due to the death. Indeed, such situations may occur daily. We will first discuss the issue as to whether a promise remains valid after the promisee's death.

For a fruitful discussion, we will use three cases to illustrate our argument:

> Case 1: Husband A promised his wife B to take care of Alice, B's cat, before and after B's death. B dies and Alice lives.
> Case 2: A's promise is the same of Case 1. Both B and Alice die at the same time.
> Case 3: A promises to give B a diamond ring on her forthcoming birthday in April. B dies just before her birthday.

Case 1 is that of a promise which is performable both when promisee B is alive and after she dies. Irrespective of B being alive, insofar as the cat continues to be alive, A is bound to keep his promise with B. It follows therefore that A's fulfilment *per se* of his promise is not influenced by B's death. In Case 2, on the other hand, the fulfilment would be feasible when B is alive and it would be impossible after B's death. However, B's death is not relevant to A's performance of the promise. In Case 3 the performance is feasible when B is alive, but the promise would be frustrated by B's death.

With regard to Case 3, further discussion on the act of performing the promise is required. For example, A purchases the diamond ring as promised for B even though she has died. He even puts the ring on her finger. These actions raise the question: "can A's action be regarded as the sufficient fulfilment of the promise even though B was dead when she was given the ring?" At this point, a different interpretation can be made in Cases 1 and 2. These two cases suggest that despite B's death A's action is effective as a performance of the promise because the recipient, in Cases 1 and 2, of the benefit from the performance of the promise is the third party, i.e., the cat, rather than promisee B. Whilst A's promise to take care of the cat results in generating reassurance for B, the subject who substantially derives benefit by fulfilment of the promise is the cat.

Case 3 is different from Cases 1 and 2 because the promisee herself is the beneficiary. Yet upon B's death she, as a living person, is not the subject of the benefit. In the discussion on whether or not the action by which A puts the ring on B's finger can be regarded as a sufficient performance of the promise, the contents of the promise are that A buys a diamond ring for B and gives it to her. A in fact performs his promise out of respect and honour for B. Moreover he

buys a ring with a diamond, B's birthday stone. If there should be a problem concerning the performance, it would be because in carrying out the action A actually presents the ring to his *dead* wife. In the present discussion it is assumed that the dead wife is a continuity of the living "her" and she can be said to continue to have a birthday that she had whilst alive.

Even if the action appears to be a performance of A's promise, it is substantially no more than a matter of rhetoric. Succession law suggests that the proprietary right to the ring is not possessed by wife B but by her husband, the promisor, who gave the ring to B. Thus in a case where the beneficiary is the dead promisee, the characteristics, that is death, of the promisee frustrates the performance of the promise, just as would occur in the case of a contract.

6.6.3 Monetary promise

How do we understand a monetary promise which is not associated with the characteristics of the dead beneficiary? Again we can best illustrate this by example:

> Case 4: Person C promises to pay back D £100. D dies before C pays back the money owed.

The mode of the promise obligation in Case 4 is considered a normative correlativity of rights. The relation between lending and borrowing money indicates that the claim of lender D corresponds with the obligation of borrower C. Consequently, when we are aware that there is an obligation on the borrower, then we, of necessity, come to be aware that the lender holds the right to make a claim on the borrower.

How can the correlativity of rights and obligations operate when dealing with the relationship between the living and the dead? In Case 4 dead person D has no rights as a direct agent of rights in this argument. Suppose that C borrows money from D before D dies. D's death is a cause of succession. Therefore, C's fulfilment of an obligation to D will be performed for the purpose of the benefit of D's successor and not D herself. This means that D's death can change the correlation of D's right and C's obligation into the correlation of D's succession rights and C's obligations.

Therefore, even if C wished to return the money directly to D, D has no legal capacity to receive the money from C. In other words, the entitlement to accept the fulfilment of C's obligation is transferred from dead D to D's successors. It follows from this point that, at the time of D's death, D loses the entitlement to be the object of an obligation.

However, C may find this correlation strange. For example, suppose that C, who does not know of D's death, continues to send money by mail to D's address every month in accordance with an agreed instalment plan. Needless to say, the right to this money passes from D to D's successor. However, even if the correlation of the right and the obligation is the same, the obligation in this case is different to the first type of obligation in terms of its substantive content. This is because C's intention as the agent of obligation (i.e., the intention to return money to D because of C's moral obligation to D) is frustrated. The result is that, if C learns of D's death, he may feel less inclined to fulfil his obligation, suggesting that the feeling of obligation that C has for D's successor is different to that of the feeling of obligation that C has for D when she was alive. The question is whether this difference in feeling affects the legal obligation.

Taking advantage of the institutional device of succession, C's debt to deceased person D is resolved by paying D's successors. Strictly speaking, a problem still remains. If the content of the promise was to pay D *directly*, paying D's successors may not be regarded as sufficient performance. However, such performance in a strict sense is not necessarily unsatisfactory to us as an instance of the frustration of promising. In comparison with the breach of the promise in Case 3, we can accept the alteration of the action and contents of promising. Insofar as it is physically impossible for C to return money directly to deceased D, and insofar as C's debt cannot be exempt from repayment upon death, it would be acceptable to regard C's performance to D's successor as that to D herself.

6.6.4 Meaning of the performance

Case 3 can be further used to deal with another issue: "what is the meaning of fulfilling a promise with a dead person?" So far the meaning has been vague. One can understand that an emotional action such that of a husband putting a ring on his dead wife and saying, "At last I have performed the promise with you" does not, as a matter of fact, mean that the promise has been fulfilled.

First, a gift is a mutual act of promising. For a person to give a gift to another person requires a recipient because there are two parties involved in this action, that is a person who gives and a person who receives.

Second, an action such as the putting of the ring on B's finger is not considered a performance of the promise due to its association with a further problematic issue, the posthumous performance of promising. Due to the death of B, she cannot *recognise* the performance. To those who contend that the

performance of any promise should accord with the promisee's recognition of the performance, the posthumous performance of any promise is not feasible. As observed in Case 4, the continued repayment of money after the promisee's death does not mean the performance is for the sake of the promisee. Rather it is an indirect performance which takes advantage of the legal institutional devise of succession.

Nevertheless *Will Theory* would enable us to regard the action of putting a ring on B's finger as the performance of the promise. *Will Theory* views the binding power of promising as that which endorses an action which vests a power to B. Therefore what binds A by the commitment "I promise to give a diamond ring to you" is A's intention of presenting B with the ring. One can say therefore that B, the promisee and recipient of the gift cannot use this binding power to bind A. If this argument is warranted, then it would be possible on the basis of A's intention, to perform the promise even after B's death.

On the other hand, *Reliance Theory* assumes that reliance generated by A's action of promising enables B to accept the promise and meet this promise with agreement. Thus, the action of promising cannot directly produce reliance; and the reliance does not necessarily bind the promise. *Reliance Theory* argues, for instance, that the reliable relation between a husband and his wife generates reliance and is the basis of the binding of the promise. This reliance can survive the wife's death and it remains in the husband's mind even after her death. Even when alive the wife does not always, at least explicitly express her reliance on her husband. Also insofar as the promisee does not propose alterations to the promise, or until she determines to reject the performance of the promise, it would be possible to assume that the promisee relies upon the promisor's action.

Said thus, one may conclude that even after the promiseer's death, her reliance on the promisor must be valid. Within the framework of *reliance theory* therefore there would be no doubt that A's action of promising, i.e., putting a diamond ring on B's finger, can be regarded as a substantial performance of the antemortem promise between A and B.

6.6.5 Social characteristics of the parties

According to our position, *Relation Theory*, both the intention which grounds the promise and the reliance which is grounded on intention are based upon the social characteristics of the parties.

In general a promise has connotations. For example, one would perceive in Case 3 that A's intention to present a ring to B was a social motivation not necessarily uncommon in modern society. If buying your wife a ring is considered as an expression of a husband's affection, such an action can be justified as an event happening in daily life. In most cases, as a husband's conventional social role suggests, the intention is likely to be affected by their roles if there are financial resources available. In such a sense, promising has a social connotation. Therefore it would be possible to say that even the intention may be social and that the intention is deeply embedded within society. Since it is impossible for the promise to be separate from any social situations that the promise is involved in and insofar as the promise is a social rule or institution, the action of promising *per se* should be categorised as a social action.

Moreover, reliance is endorsed by social actions. Social actions such as a husband's promise to give a ring to his wife, are based upon the reliance between the matrimonial couple whilst they are both alive. Although in case 3

there arises a situation where the husband gives it to her despite lack of the reliance, this situation is not common in society. In most cases the promise binds A on the assumption that B puts her reliance on A's promise and A perceives her reliance. Put in that way, the reliance between A and B is generated by the matrimonial relationship so that, even if the reliance is extinguished upon B's death, A who holds social characteristics derived from the matrimonial relationship is thus still associated with the relation between A and the now deceased B. It would be reasonable therefore to argue that, on the assumption that the reliance can survive the promisee's death, the promisor binds himself to a promise that he made when the promisee was alive.

However, the strength of reliance is situational. In comparison to the case where the promisor always breaks his promise to stop smoking, is the case of when he *first* promised to stop smoking. The question this raises is "was A's promise more reliable at the first time of making?". Our position is that whilst the promisee relies on the promisor the first time he made the promise, she can hardly have reliance on him in subsequent situations when he promises to stop smoking.

There is, as observed in this case, no difficulty in arguing that the reliance of promising is established on the ground of the promisor's social characteristics, such as the social statuses and roles the promisor holds in society. Promisors who are not relied upon by others seem to have low self estimation of their social characteristics.

To sum up, if the posthumous performance of an antemortem promise requires the promisee's recognition of the performance, it is impossible to perform the promise after the promisee's death. A dead person cannot

physically recognise or conceive anything. However, since it can be argued that the performance to be feasible requires only the promisor and the promisor's, but not the promisee's, recognition, it is therefore possible to perform the promise even after the promisee's death. Although there are situational variations. For instance, as mentioned in Case 3 the characteristics of the dead wife frustrates performance of the promise, whilst performance of the posthumous repayment in case 4 is possible.

6.6.6 An association with defaming

The problem of the recognition or perception of promising is connected with the discussion on "defamation of the dead" in Chapter 2. There we discussed the difference between the defamation of a person in a coma and a dead person. The issue was whether or not the coma patient and the dead person can be harmed by defamation. Our conclusion was that they could be harmed. Insofar as one defamed the patient and the dead person, one actually committed a harmful action and therefore harmed them.

Our position regarding the defamation of the dead can be applied to the discussion on promising with a deceased person. When a promisee dies, it is evident that she cannot perceive or recognise the performance of the promise by the promisor. This failure in recognition is conceptually analogous to the failure in the case of the coma patient. To illustrate this case 3 can be somewhat modified. Husband A promises to give his wife B a ring on her birthday. However, she is involved in a traffic accident just before her birthday and resultantly she falls into an irreversible coma. A puts the ring on the finger of B in her bed.

In this modified case, evidently B is unaware of the ring being placed on her finger. She cannot recognise the performance of the promise at all. If one accepts in this case there has been a performance of the promise in a circumstance which is nevertheless characterised by a lack of the promisee's perception and recognition, then one has logically to go on and accept that the action in which A puts the ring on dead B's finger is also a performance of the promise.

Now, our position argues that the performance of promising is an action of the promisor. It is not uncommon that a promise requires the agreement or accordance of a promisee and a beneficiary. For example, keeping something secret is a performance of promising. It must be a performance of promising for a promisor to perform the contents of the promise that s/he made. Thus it would be plausible to argue that even if a person is in an irreversible coma or is dead, fulfilling the contents *per se* can be regarded as a sufficient performance of the promise, whether it be with a coma patient or with a dead person.

6.7 The action of promising and the social characteristics of the dead

6.7.1 A breach of a promise

Our concern in this section bears on the problem of breaking a promise. In general there is no need to keep all promises. Although there are contractual promises in which law vests a legal binding power on the promisor, there are many other promises which do not necessarily bind their promisors. There are also cases in which, even if a person does not actually intend to make a promise, s/he does so nevertheless. If a promisor breaks such a promise they may be

subject to social sanctions however slight; or, alternatively, if the promisor is not sanctioned, s/he may regret the breach and feel the need to apologise.

In most cases when a promise between two living persons is broken, irrespective of the degree of sanctions, the promisor is subject to diverse judgements and reactions in relation to the extent to which the promise is broken. Other people's attitudes, as reflected by such judgements and reactions, are also likely to bind the promisor. However, in the case of a promise between a living and a dead person, it is evident that the dead person can neither exhibit their disappointment or other reactions to a broken promise, nor can they impose sanctions. It could be said, therefore, that the binding power of a promise with a deceased person is, in a sense, weaker than that with a living one.

By contrast, there are cases in which the binding power of a promise with a dead person can be stronger than that of a promise with a living person. These cases possess a moral binding power. For instance, this is a feature of cases where the circumstances of the promisor and the characteristics of the promisee have influence over the binding power of promising. This can be illustrated through the following example:

> Case 5: Wife B makes a promise to her husband A that after his death she will scatter his ashes at sea. The scattering is a religious wish of A who is a faithful believer of certain religious doctrine. A accepts B's promise.

In this case, as far as the promise is based on A's religious belief, for B to breach the promise with A means to damage A's character or dignity. If A's belief is harmed by B whilst A is alive, the harm can be recognised as an action by which B harmed A. However, after A's death, if B does not keep the promise, A, when dead, can neither complain about her breach of the promise, nor feel disappointed, nor take remedial action as A is of course dead. For remedy against such a possible breach it might have been possible for A to ask someone

to take action if B breaks, or looks as if she is going to break the promise, or to impose an appropriate sanction on B if she breaks the promise. However, suppose that the promise is a verbal agreement between B and A based on their mutual reliance.

Since A who is dead at the time of B's performance of the promise cannot conceive B's action of scattering his ashes at sea, B's breach of the promise with A is, in a sense, no longer significant to A. Nevertheless, A when making the promise with B expected his wife to be reliable and keep the promise; in other words to scatter his ashes at sea.

6.7.2 A binding power of the action

Since the deceased A cannot perceive of anything, whether B scatters A's ashes at sea or whether B buried A's body in a way that A did not desire, which harms A's dignity unknown by A, in that sense, B's failure to keep the promise cannot be seen as a significant action to A. A further issue which requires discussion is what power nevertheless binds such an action as the scattering of ashes at sea. Addressing this question will assist us to draw a conclusion from the discussion to establish the grounds for the binding power of a promise which we have mentioned frequently in earlier sections. In order to do so we will apply the principles of the three competing theories to Case 5.

Will Theory grounds the binding power on B's intention. By declaring the intention to scatter A's ashes at sea, B vests a power in A who is alive at the time of the agreement of the promise in question. The power is what is executed by B after A's death. The right to claim B's performance of the promise cannot be executed by the dead A, except through his legal representatives. Therefore if B

does not autonomously fulfil the promise or is not enforced to do so, A has no power to take action against any breach of the promise. It follows therefore that should a breach occur, there are hardly any remedies available to A. Insofar as the promise is moral but not legal, remedies have to hinge upon B's sense of morality.

Reliance Theory would seek to explain Case 5 as already indicated, on the basis of the husband's reliance on his wife's action. *Reliance Theory* claims that by placing his reliance on his wife the promise binds her. It is a perspective based upon the reliance between the husband and his wife. The wife promises her husband to scatter his ashes at sea after his death; and he puts reliance upon her speech act. As a result the binding power of the promise is manifested. Therefore, B's nonfulfilment of the promise is not only a betrayal of A's reliance but also harm to the dignity of pious A. It is also an immoral act. Since after A's death A who placed his reliance on B no longer exists as a living entity—although according to our central argument A does continue to exist but as social characteristics—the ground of the binding power of reliance is weakened. For the ground is based upon A's reliance on B's speech act. It would be plausible to say that the power, based on the reliance, which the promisee holds is extinguished or weakened upon and after B's death.

Relation Theory, as has been argued in this thesis, is a compromise of both *Will Theory* and *Reliance Theory*. *Relation Theory* aims at providing reasons why the binding power of promising can survive the promisee's death. Its emphasis lies on, as mentioned in the previous sections, the social characteristics of parties involved in a promise, characteristics which are assumed in both *Will Theory* and *Reliance Theory*. Since the parties have their

own social characteristics, even if the promisee dies, the promisor is bound by her promise to A given our argument that part of the characteristics of the promisee is succeeded to by the deceased promisee.

6.7.3 The binding power of the social characteristics

The explanation for the moral binding of promises has been attempted and provided by varied perspectives. The grounds for the binding have been sought for "will" and "reliance", for example, and the idea "justice" which regulates the action of promising as a conventional practice or "autonomy". However, whilst a promise is a norm which functions in the form of the accordance of society with the promise, it contains a norm which is generated during practicing promises and others which are produced by the parties and the contents that compose the promise. A typical example of the norm generated by the parties of the promise is "social characteristics" as a norm. That of the norm produced by the practice of the promise is the accomplishment of agreement, the solidarity of promising, the performance of planning, the legitimacy of measures, and so forth. Since any promise equally contains such norms, we have to examine each case.

We will employ once again the details of Case 5, in which wife B promises her husband A to scatter his ashes at sea after his death and A accepts B's promise. In this case, the social characteristics are interpreted as social roles of wives and husbands. In addition the husband has a different social character, "religious believer", from his wife's. On the ground that he has the social characteristics relating to a tenet, scattering human ashes, it is possible to argue that the characteristics are normative in the sense that they are profoundly connected with making and keeping the promise. To point out that contents of

the promise are a norm means that, since the contents of the promise, i.e., scattering ashes at sea, contain specially religious and social meanings, and the religious connotations function as a norm, contents function as a norm in the sense that the husband took the contents as promising. And suppose that this promise between the spouses is not altered, the solidarity of promising is created; the plan proceeds after the husband's death; and the norm generated in the process of promising can begin to function. There are two ways B can choose to act after A's death: either to fulfil the promise or to breach it. In a case of breaching it, A's character and dignity, as a faithful believer, are harmed, but there is no remedy for the breach. Since the promise is a personal one between A and B, if B does not autonomously perform the promise, the promise remains unperformed. If B breaches the promise, dead A has means neither to express his complaint about the nonfulfilment nor to enforce fulfilment. If B does not scatter her husband's ashes at sea or instead not necessarily places the ashes in his family tomb or a garden of remembrance, the promise is breached. Alternatively B can scatter A's ashes at sea, an action which evidently entails the performance of the promise because B fulfils the context of the promise. Although dead A does not conceive or recognise that his ashes are scattered at sea, B's action will be generally regarded as a performance of the promise.

At this point two problems should be considered. First, B's justification for the performance and non-performance is very likely to be based on the third moral version of *Will Theory* and *Reliance Theory—Relation Theory*. The version is similar to the concept of reliance that *Reliance Theory* is grounded on but at the same time essentially different. It is not characterised as a reliance generated when the promisee is alive but as a mental matter that the

characteristics of the deceased promisee generated in the promisor. It is close to possessing the belief "since my husband is dead and the promise cannot now be re-negotiated I cannot now break the promise I made with him". The social characteristics of being dead may cement the wife's conscience that then binds the promise, it plays an important role in her obedience to the promise. This normative role would be an example of norms generated in the process of promising.

The binding power of promising can be derived from the social characteristics that a promisee holds after death. After death a person gains a position and role as a dead person which is assumed in society. The dead person performs this role, as a norm, in people's memories. The same is true in a case of copyright. A copyright holder of deceased person's works is likely to refrain from modifying the works whatever the reasons might be to do otherwise. In the case where some corrections or modifications are required by a publisher, the holder would declare they wished to publish the works just as they were written by the deceased even if some corrections are required. It is assumed that the reason for this is that the holder not only wants to respect the moral rights of the deceased author but also wants to ensure moral considerations that no one gains any credit for the work based on their modifications of the deceased author's work are involved. In short, taking the deceased's position and role into account, the holder decides whether modifications should be made. This moral norm of behaviour is based on the social characteristics of the dead author.

Said in this manner, amongst various religious, ritual and moral assumptions, the fact of being dead can function as an influential ethical standard in society. Supposed another example, say, a situation where a naked

newborn baby is left on the side of the road, we surely regard the babe *per se* as a strong norm which determines our behaviour. We will not stride over the baby or depart from it soon. At least we cannot help recognising that the situation is a scene that controls our behaviour. The fact of being dead, although it also means that the dead have social characteristics, plays a normative role for our standard of determining action.

6.7.4 The whereabouts of the intention

The second problem bears on the whereabouts or focus of husband A's intention. A's intention that his ashes be scattered at sea, insofar as A addressed, may reflect his character or personality and dignity as a believer of religion. Alternatively, it may reflect his philosophy and principles. Of course, it might just be a fad or a fantasy that had recently popped into his mind. Whatever the reason, one can understand that A's intention as conveyed to his wife B in the form of the promise to some extent at least, reflects part of A's characteristics or dignity.

How does this kind of intention remain after death? The intention can survive death and remains in the frame of the social institution of the promise. Only if the intention can survive death, does B need to scatter A's ashes at sea. What suggests the need for the action of scattering A's ashes is A's antemortem intention. Since the intention can survive death, it binds the promisor to the action of scattering ashes. A's intention persists beyond the time of his physical death. Of course, even if one assumes that the promise *per se* binds B, one also can understand that A's intention can survive his death.

A was the creator of the intention because he had the social character or dignity deeply relevant to the intention. Whilst alive he was able to modify or indeed withdraw his intention in the same way as he could with any other intention. He was able to govern his intention himself. As mentioned in the previous sub-section, A's intention survives A's death in the form of a promise. More exactly, there is a possible form here in which the intention can endure: A's intention or desire is symbolised in the action of scattering his ashes at sea. A's intention is centred on the action but not on the actions of others. Therefore, the power over the choice of the action is held by B after A's death. That is to say, the intention is symbolised in the action of scattering, which has to be chosen or determined by B as A's representative.

The action of scattering is impossible before A's death. For A is still alive and there are therefore no ashes to be scattered. One may critique this discussion on the grounds that it is mere argument based on a conditional promise. Nevertheless one can understand that A's death generates a new relation regarding the action. Therefore A's antemortem intention can normally survive his death and even after his death it can be an intention which binds B's action.

It would be correct to say that A's antemortem intention was held by A himself but his posthumous intention is held by his wife B. Whilst alive, A can withdraw his intention and control it anytime he likes to do so. By contrast, after his death, it is impossible for him to do so. A cannot exist as a subject of his intention after his death and instead the intention is held by B. In other words A's antemortem intention is embedded in B's action of scattering his ashes at sea.

Put in that way, it follows that the form suggests intention can survive death, albeit in a different form to that of an antemortem intention.

Another explanation is possible in this way. The ashes *per se* generated by a death are a norm. They have a religious meaning and become a norm as something symbolised which evoke the relative's memories to the deceased. Therefore the ashes *per se* which are indispensable objects for performing the promise, i.e., scattering the ashes at sea, functions as a norm internalised in the promise in the process of practicing the promise. Put in that way, the normativeness of the ashes, of scattering them, and of the social characteristics derived from the relation of the wife and her husband leads the wife to act in accordance with the norm or not.

6.8 The obligation of promising and the social characteristics of the dead

6.8.1 Reasons for the binding power

In the previous sections we have discussed such questions as "is a promise between a living and dead person different from a promise between two living persons?", "what kind of promises can be made with a dead person?" and "what binds a person to keep a promise made with a dead promisee?". On the basis of such discourse, we will proceed to further examine the binding power of a promise with a dead person.

It could be argued that there are three reasons why a promise with a dead person has a binding effect. First, keeping a promise is, given the social value of doing so, significant to the promisor. This remains true even in a case of promising with a dead promisee. Keeping a promise and fulfilling it are virtuous actions. Although we will not attempt to discuss the Utilitarian argument on

justification for the breach of a promise, in general members of society take it for granted that those who keep and fulfil a promise deserve respect and conversely those who do not do so deserve to be stigmatised. Therefore, since a promisor respects the value of keeping a promise and since the promisor pays regard to the fairness of keeping a promise, s/he endeavours to keep and perform the promise. On this point a promise with either a living or deceased person is generally required to be performed in society.

The second reason for a promise having binding effect is that a promise is an institution which is used daily by the parties and whose utility they recognise well. The first and second reasons are therefore associated. If a promise is defined as an institution that, by mutual agreement at a certain time, determines a future's right and obligation (Morimura 1989, 122), then the binding power of promising is composed of the expectation held by the promisee and the present commitments made by the promisor who places reliance upon the institution of promising.

Commitment to a promise may fluctuate. Once one has made a promise, one may regret making it, or one may cement one's intention to keep it, or one may hesitate to keep it until the time of fulfilment. Nevertheless, it is essential to keep in mind that one considers, in most cases, a promise as an institution. As such, one expects the promisor to perform the promise in much the same way as when one oneself is a promisor and intends to carry out the promise. The reason why one does so is that in society co-operation through promising is recognised as of vital interest and value to the parties of promising. In addition, escaping the duty of keeping a promise is perceived as being somewhat unfair; because we

not only enjoy the passive interests from the institution but also take positive advantage of its function.

The first and second reasons are justifiable both for a promise with a living person and with a deceased person. This is because both are based on the institution of promising and on regard to the fairness to the parties. A promise with a deceased person cannot disregard either the institution or the fairness element. However, a different reason may be required to justify the binding power; despite standing on *Will Theory*, which argues that an action of promising is produced by the will activity of the promisor, and *Reliance Theory*, which argues that the binding power stems from the reliance between the promisor and promisee, the action of promising in the context of deceased persons must be associated with rights and obligations. Thus the promise to a dead person should be justified by the concepts of rights and obligations.

Promising is not to inform of one's intention to perform a future action. It is an action by which a promisor gives a promisee a right on the basis of which the promisee can expect to make a claim, on the one hand, and the promisor autonomously assumes the obligation of the promise, on the other hand. The concepts of rights and obligations are therefore immanent in promising. A promisee has a claim against a promisor. However, were it not for mechanisms of legal enforcement for the performance, the death of the promisee entails the promisee neither has mental capacity nor the power to enforce the promisor to perform the promise. Unless pre-death the promisee makes arrangements to enforce fulfilment, by, for instance, written documents and legal representatives, the right is regarded as being extinct upon death. Thus only the obligation remains with the promisor.

In other words, the promisee's death alters the mode of rights and obligations. In the case of the death of a promisee who has a claim on another for the repayment of a debt, the claim, as discussed in the previous sections, can be succeeded to by her successors; and the nation protects the procedure in succession law. However, in other cases where, apart from legally binding promises, the only obligation is a posthumous one vested in the promisor, can we nevertheless say that what binds the promisor is a right in correlation with a obligation? Or can we say that it is nothing but the binding power of an obligation?

Therefore, it can be presumed the third reason for the posthumous binding power of promising incorporates the obligation of the promisor and the right of the promisee. As for the obligation upon the promisor the question "where is the obligation derived from?" is the most important in relation to discussion of the third reason. We conclude this obligation can be justified by the concept of the social characteristics. In addition, it is important to examine whether or not the right of the promisee can survive death; and if we find that it can, then how and by what means can we justify it?

Since we have had much discussion on the relation between rights and the social characteristics of the dead in chapter 4, we will not repeat it here. The conclusion was that since a dead person has social characteristics and moreover governs them, s/he therefore has rights. When this conclusion is applied to promising, it entails that part of the social characteristics of a promisee, which can be in most cases identified with normative roles and statuses, can survive the promisee's death through the promisor's memories, recollections and recognition. As argued by J. Dabin (see 4.6), the concepts of "governance" and

"ascription" enable the concept of social characteristics to mirror the concept of rights. In this thesis, on the other hand, obligation as well as rights can be justified by the concept of social characteristics. Therefore employing the concept of social characteristics, we will further examine the obligations or duties of promising.

6.8.2 Obligations on promising

Agents keep promises. They are not only moral beings who have intentions, but they also possess characteristics formed by their intentions and perceptions. Although the contents of promises vary, in most cases they are of a social context. It would be almost impossible for the contents to be distinct from their social meanings. Promises are intimately associated not only with the characters and social attributes formed by the parties in society but also by the motivations, preferences and expectations formed by the parties' social involvement.

Since a promise is an institution connected with rights and obligations, it is evident that some mental or social elements such as the character and attributes of the parties involved are associated with rights and obligations. Moreover, insofar as such complicated elements are associated with society, the subjects of rights and obligations related to a promise may be understood from a perspective which highlights the importance of social influences.

In a case where a promisee dies and there is no means to enforce the posthumous performance of the promise, the moral obligation remains solely with the promisor. If the only reason for binding the promisor is this moral obligation, it might be argued that the promisor has insufficient reason to fulfil the promise. Although the reason to fulfil the promise can be possibly justified by Kant's

famous formulation of the categorical imperative, we should nevertheless deduce the reason from the features or attributes of the promise and the relation between the parties. Basically, an obligation is not attractive to a person (Morimura 1989, 23). Therefore, it is not really plausible to suggest that obligations should be fulfilled simply for the sake of keeping an obligation. In order to impose the obligation of fulfilling a promise on a promisor, we have to ground the reason on the correlative relation between rights and obligations, or at the least on the consequence that the obligation produces.

If the principles of this discussion are applied to Case 1 in the previous section, the following development occurs. If husband A does not like Alice, his wife B's cat, the "consequence" itself is not attractive to A. Since the promise is a personal one established between A and B, there are no means by which B can enforce A to fulfil the promise after her death. Nonetheless, if A should fulfil his obligation by taking care of Alice in the circumstances, what is this obligation based upon?

6.8.3 Obligations and social characteristics

Our conclusion in this thesis is that the obligation is based upon the social characteristics of the promisor. In this subsection we examine how it is possible to deduce an obligation from the social characteristics.

A promisor and promisee are placed within a relationship through an act of promising. This relationship may be defined by the promisor's role when the promise is regarded as being dynamic, and by the promisor's status when the promise is regarded as being static. Taking the contents and importance of the promise into account, the promisor is likely to exhibit contingent obedience

toward the roles and statuses. Therefore the promisor may regard him/herself as obliged to meet the promisee's expectations of the promisor's role. On the other hand, a promise is a social institution. It is utilised daily in society, plays a functional role in maintaining the social order and cements social bonds between social members (Morimura 1989). Since a promisor is involved in the promisory relationship, which is recognised and institutionalised, s/he cannot be apart from that relationship.

The notion of social characteristics, based upon social roles and statuses, is an abstract one. The characteristics here refer to the promisor's roles and statuses; and allow a person to act within the scope of the promise. That is to say, the social characteristics related to promising is a notion that is not dependent on the specific character of any particular promise, promisor or promisee. In other words, if one party is unable to fulfil a promise others who could fulfil the promise may take their place though this is not applicable to all promises.

A problem which needs to be addressed however is how the substitutable characteristics of promising which produce an obligation on promising can be justified. Most promises can be fulfilled in a substitutional way. For example, in the case of Alice the cat, a different carer could be substituted for the husband. Looking only at the context of the action from the viewpoint of acting, we can recognise that the action can be repetitive, regular and consistent. Therefore the action of promising is a sort of patterned set of acts that a promisor and a promisee mutually orient toward for the reason that it assumes ordered social arrangements. Said thus, it could be argued that, in a broad sense, the social

characteristics related to the action of promising assume an oriented social framework.

The above explication will enable us to understand that actions, social relations and roles related to the action of promising are formed by and within a social framework. Insofar as they all assume the social framework, they have, to some extent, common standards and these standards normatively serve to bind the promisor normatively. If the expectations of the role are not met, sanctions can be imposed on the promise-breaker and therefore accordance with the yardstick of appropriate behaviour is required. That is, since fulfilling a promise is highly valued in society, the recognition of this value binds the promisor. Thus the social characteristics of the promisor are imbued with norms. Yet, these norms are not necessarily obligations or duties. More precisely, norms refer to conventional modes of behaviour and orientation that underpin society.

Insofar as a promise is a social institution, it will be underpinned by the generalised value system that members of the society hold and the value orientation that their social characteristics have. Such values and orientation give moral significance to the promise. This significance binds the promisor to the expectation of the promise, as mentioned earlier, in societies whose members have such expectations. Therefore, an action of promising is feasible within the framework of society and the social characteristics of a promisor can be normatively framed by the society in which the promisor is involved.

6.8.4 The base of obligations

From the viewpoint of a promisee, one would consider a promise not only as an expectation of the social characteristics and patterns of substitutive actions but

also as a claim or right included in, as mentioned in chapter 4, the social characteristics: a promise is based upon the mutual expectations that are standardised and recognised in a society. However what needs to be examined at this point is, in a case where a promisee who by the very nature of being a promisee must hold rights ceases to exist, does the right as well as the holder cease to exist. Obviously in such posthumous cases no claims for enforcing the performance of the promise can or will be made by the dead promisee.

Insofar as the death of the promisee frustrates such a claim, promise fulfilment is dependant upon the obligation on the promisor. What then is this obligation based upon? First, the obligation is based upon the type of obligations that require a necessary condition such as a good deed. For instance, one can regard as good the consequence of taking care of a cat after a promisee dies. This positive consequence would justify the norm and the obligation of promising and thus the promisor is bound by the norm and the obligation. However, the obligation is not necessarily reduced to such positive consequence, as Utilitarians argue. The legitimacy can be interpreted to lie in normative grounds such as social justice and fairness. At this point the third reason we have discussed in this subsection is associated with the first and second reasons for binding the promisor.

How is this good to be understood in connection with the social characteristics of the parties? The dead promisee, *ipso facto* she is dead, can no longer make any rights claims but she can exist as a set of social characteristics in the promisor's memory. These characteristics can be understood to illustrate the reciprocal relation in which the promisor believes that the promisee is allowed to rely on the action of promising even after the promisee dies. In the case of

taking care of the cat, despite whether the wife's affection for the cat is natural or not, her social characteristics contain the obligation through the fact that the characteristics were once recognised by the promisor. The promisee's characteristics that survive her death illustrate her desire-orientation, i.e., taking care of the cat; and the promisor undertakes as his social characteristics the role of taking care of the cat.

The second thing upon which the obligation of promising is based is the social characteristics of the parties. The characteristics are that which satisfies the desire-orientation of both parties. The object for desire is, in Case 1, to take care of the cat; and the promise is utilised as a means or facility of fulfilling the desire. Insofar as a promise is a facility or means, the promise is accompanied not only by costs but also by sanctions. It reflects the allocation of the social power of the promisor and promisee. At this point the power also reflects the social characteristics of the parties. For instance, the promisor may be bound by the impression that the promisor makes on the promisee's characteristics. Therefore the posthumous social characteristics of the promisee have a binding power as a norm of behaviour for fulfilling the promise.

6.8.5 The relation between the two theses

In the above discussion we have explained how the *social characteristics* thesis evokes rights and duties in the promise between the living and the dead. In Case 5, however, we should examine the possible situation where wife B breaches the promise, i.e., scattering A's ashes at sea, buries A's body in another way and resultantly harms his character and dignity as a believer of the religion. In reviewing the heated debate provided by Feinberg and his opponents (see

Chapter 2), we asserted the *harm of the dead* thesis. This thesis argued that the dead can be harmed and that the dead have interests. In this section further discussion will be provided by answering the question of how the *harm of the dead* thesis and the *social characteristics of the dead* thesis are associated with each other under the conditions of Case 5. The discussion on this question will lead to the conclusion that the harm of the dead refers not only to the harm of his/her social characteristics but also to the harm of other characteristics which are generated by death.

There were three points by which Partridge counterargued Feinberg's *harm of the dead* thesis (see 2.3): since the person is dead, s/he does not influence any events; s/he has no interests; and he/she is not harmed. Interpreting these three points through Case 5, discussion will be developed in this way. Wife B breaches the promise of scattering her husband A's ashes at sea. One of the nonfulfillments is to harm A's character / personality or dignity as a faithful believer of a certain religion. Needless to say, since the breach is a posthumous event for A, the deceased can be exemplified in this manner. Since A is dead, 1) after his death he does not influence the promise; 2) as a dead person, he has no interest in scattering ashes; and 3) deceased A's character and dignity, as a dead person, are not harmed by the breach of the promise.

(1) The deceased husband does not influence the promise after his death

To iterate, since a deceased person has no life, s/he cannot autonomously move at all. Therefore, unlike a living person, there are no phenomena by which the dead arise or change social events by their actions. In Case 5, it is physically impossible for the deceased husband to declare and cancel the promise by any

action. Namely the dead cannot make any action, after the condition of the promise, to cancel it and persuade the promisor to perform the promise as soon as possible—i.e., the action which effects the promise.

If the meaning of "no influence" is confined to the above examples, the dead would influence nothing. However, let us rethink the concept of "influencing after death". Is it confined to the action that the living make a promise or alter it as a social action? If it is allowed to broaden the interpretation of "influencing after death"—e.g., including the influence that dead husband A gives a psychological influence to wife B and persuades her, as a function, to keep the promise, then it would be plausible to say, in general, that the dead influence someone or something after death.

When a person passes the boundary of death, s/he becomes an existence of the dead. The dead and the living share the same body. The dead body is a continuum of the living one and part of the dead's social characteristics are derived from the living's ones. Yet, unlike the living, the dead have an existential power of being dead. In terms of religion, customs and society, the dead make people to understand the meanings of being dead. As a symbol for provoking the relative's memory of the deceased, through the corpse, the dead function in the relative's minds. Additionally, it is noted that they exist as a strong norm. That is why the norm of the husband being dead may have influenced his wife to persuade the performance of the promise, as a religious act, i.e., scattering ashes at sea.

Moreover, the husband is embedded in his ashes which are the objects of the promise. In Case 5 the contents of the promise between A and B are that B

scatters A's ashes at sea. In this regard we recognise that A's ashes *per se* exist as a norm by which B's action of performing the promise is influenced.

In addition husband A does not play the role of a norm, as a dead person, in the relation of the spouses, but also, if the society is dominated by patriarchy, A's characteristics, as part of living A's character, play a more normative role than in other societies. Inevitably, deceased A who holds two kinds of the social characteristics as a husband under patriarchal society and as a dead person strongly affects, as a twofold norm, his wife B who holds the social characteristics as a wife. Thus we would argue that the dead influence the living by his/her power of the norm.

(2) As a dead person, he has no interest in scattering ashes

To scatter ashes at sea is an interest in this context. It was whilst A was alive that A requested B to scatter A's ashes at sea after his death. Since the action will be carried out after A's death, to A the performance of the promise was in his future at the time of promising. A question here arises: can the interest of the performance be ascribed to living A or dead A? Whilst alive A predicted the interest would be performed after his death, and accepted the promise from B. On the other hand B expected that she would be able to fulfil A's interest, and made the promise with him. The promising action of scattering A's ashes at sea was planned as a project of A's prediction and B's expectation. At the outset of the project, the future interest was what A who accepted the promise predicted and what B who made the promise expected. If B breaches the promise, the time of the breach must be after A's death. At that time, A's character and dignity

are harmed and A's interest was unfulfilled. The fact that the interest *per se* is harmed is undeniable.

The frustrated interest is associated with both living A and dead A. For A's ashes are produced by disposing of A's dead body, which is a continuum of the living one, the intention of the promisee, i.e., A, is embedded in the ashes, and a piece of evidence of A being dead lies in A being ashes. However, A's association with the treatment of the ashes does not necessarily lead to A's holding the interest. In short the association *per se* and the ascription of the interest is a different matter.

A was a living body. Since soul/mind is produced by the activity or function of brains, part of the body, the body was A. However, by his death the physical function was made extinct and the only body without life was left. It is dead A who is deeply connected to A's dead body, for deceased A can be identified with A's dead body. Therefore A's ashes, i.e., his cremated body, are deeply relevant to deceased A, for the ashes can be identified with deceased A. Put in that way, disposing of A's ashes means to dispose of deceased A who was identified with the ashes. This would be the same logic by which the interest in undergoing a medical operation for A's living body identified with A can be ascribed to A. Thus deceased A has an interest and the frustrated interest, for example, non-fulfilment of the promise, can be ascribed to deceased A.

(3) *Deceased A's character and dignity, as a dead person, are not harmed by the breach of the promise*

In the philosophical debate (see Chapter 2) there was an assertion that a person's reputation can be harmed after his death but the dead person *per se*

can not be harmed. We, however, contended the *harm of the dead* thesis. In Case 5, evidently, the breach of the promise is against the intention made by A whilst alive. Despite the fact that A's character/dignity is harmed, the dead cannot recognise this fact at all.

Return to the discussion on the matter of living A, and suppose that A is defamed by his friend in front of the public. Apparently A's character and dignity seem harmed. The observers trust that A is defamed but a question arises: whether or not, if A does not feel defamed, A is defamed. If, despite feeling so, A is harmed, then we are wondering what is in reality harmed. What is harmed by defamation would be the defamed person's mind. However, others cannot conceive of whether or not the hurt mind is really harmed. In general, if most think that an action deserves slander and if only the slandered person says that he does not think he is slandered, is he not defamed?

Supposed that, contrary to the fact, A thinks that there is slander; he recognises the slander, and his character and dignity are harmed. In addition to thinking, he actually carries out emotional act such as beating the person who defamed him. Here we have to think of his own character. In the previous paragraph, the recognition of being harmed does not always refer to being harmed. If other requirements are needed, then what are they?

Next, suppose that, unlike harming the character, husband A was stabbed in his arm with a knife. His arm is bleeding and his skin was torn. A and other observers can recognise the fact that A was physically hurt. In this case how are we to understand his harm if A says that he is not hurt. Unlike the previous mental harm, this statement is ridiculous. For if only the observers recognise the fact, it is proven that A was hurt. In short the hurt mind is an invisible state of

psychological harm and is therefore different from the visible state of physical harm of the latter case.

Said in that way, the fact that a person's character is defamed by slander and the person is actually hurt requires both his recognition of the fact and the perception of being hurt. Thus by perceiving that his character or dignity is harmed by slander, the person can understand that what is harmed is his character or dignity. Once what is harmed is his character or dignity, it does not matter whether he can conceive of or recognise the harm, because what is harmed is the social characteristics or character that can be identified with the person.

Returning to the debate over whether deceased husband A can be harmed, we will answer it in this way. In Case 5, wife B promised A to scatter A's ashes at sea. The posthumous action was A's desire. However B broke the promise. B harmed A's social characteristics as a faithful believer of religion by the breach. Deceased A is socially still alive, as an existence of being dead, in B's and others' minds. This husband can be identified with his social characteristics. The characteristics that survived death are not only what can be identified with the husband, such as age, name, appearance, nationality, etc., but also the social characteristics as the dead. Since the action of scattering his ashes at sea represents his social characteristics as a dead person, the failure to scatter his ashes at sea hurts his social characteristics in that it hurts him whom can be identified by the characteristics. Namely, insofar as a person can be identified with a bundle of social characteristics, once the bundle is harmed there is no advantage to regarding the harm as that of the person.

6.9. Conclusions

In Chapter 4 we explained that the concept of the social characteristics of a living and dead person includes the notion of rights. In this chapter, in furthering discussion on the concept of a promise, it was explicated that the characteristics include not only rights but also obligations. That is to say, the reason for performing a promise with a dead person is based upon the rights that the dead person holds; whilst the binding power of a promise is based upon the obligation that is derived from the characteristics of both the promisor and the promisee, irrespective of whether the latter is alive or dead.

Chapter 7
Concluding remarks

7.1 Introduction

In this thesis much debate on rights or interests of the dead has been provided by taking advantage of the five approaches: the *defamation of the dead* approach in Chapter 2; the *will and succession* approach in Chapter 3; the *social characteristics* approach in Chapter 4; the *body* approach in Chapter 5; and the *posthumous promise* approach in Chapter 6. Our primary focus on the "dead" of *rights of the dead* suggested the appropriation of the approach, and we believe that such an approach and undertaking is wholly pertinent. On the other hand, however, if instead the "rights" of *rights of the dead* had been the primary point of focus, then another direct approach focused on the rights *per se* would have been feasible. The approach would have generated some important questions, for example, "which theory can justify rights, *Choice / Will Theory* or *Benefit / Interest Theory*?" In order to answer this question, the two traditional theories could have been employed to provide a framework for the examination of rights. Such theories are generally linked to the debate on "life" rather than that on "death". It may have been interesting to know how rights can be established when such competing theories are linked to the debate on "death". Moreover, in the perspective based on the characteristics of the dead, we would have connected the dead to society or communities and derived some bases of rights from the position of *Interest Theory*. In this concluding chapter, in addition to

examining whether it is possible to apply the traditional theories to justifying *rights of the dead*, we will seek to further our debate on the relationship between the *harm of the dead* thesis and the *social characteristics* thesis and then set out to our concluding remarks to this dissertation by examining some duty-based perspectives.

7.2 The framework of the debate on *rights of the dead*

7.2.1 *Will Theory*

Justifying *rights of the dead* by *Will Theory* may have sooner or later been frustrated. For it would be possible to say that using the concept of *Will Theory* in a discussion of the dead is absurd itself. In *Will Theory*, *rights of the dead* cannot be justified, quite simply because a dead person has no capacity to have a will or intention. For example, *Choice Theory*, a version of *Will Theory*, identifies a right-holder as an agent who, by choice and autonomy, claims the performance of the duty and leaves it unenforced. Since the theory stems from attributes accorded to living beings, such as autonomy and power, which the dead do not possess, it cannot be applied to the dead quite simply, for the sake of reiteration, because the object for the application of *Choice Theory* is and can only be a living person who has autonomy of choice.

Will Theory is an identification of rights grasped by a philosophical concept. Abstracting all the social interdependency from rights, the theory places the origin of rights and their grounds for justification in the centre of purely individual relations relating to a human's freedom and will. Therefore, the rights-based relationship reveals itself as a relationship of a person and others. Rights exist before all the recognition of the legal order. They can exist independently

not only from all the representations of their subject's intentions but also from all substantial intentions. As a matter of fact, even if the defamed person does not claim to stop the defamatory action, those who harm a person's reputation actually harm the rights of reputation. Besides, even if the subject of the right lacks capacity of intention, has no substitute for him/her, or does not know that he/she has the right, he/she can hold the right. However, a question will arise from *Will Theory*: if there is an intention, in the context of the discussion, that should protect the harmed reputation as a right, whose intention is it?

The legal order protects the interests that the subject of rights claims. The reason why a right to reputation, for example, exists in certain societies is that there is in the society a conviction that the right is worth being protected. Then where does the intention, by which the right is conceded and protected, exist? At least, it is not the intention that its subject makes, because it requires binding the action of refraining from defaming other persons. Suppose that the intention of the legal order is made by law makers, it can be contained within the order as the intention of beneficiaries involved with the interest. However, in a case of the rights being infringed (here, defamation), the intention can stand only for the purpose of making others respect the rights.

Then how is it possible that, irrespective of the situation where an interest cannot be subjectively enjoyed by its beneficiary, those who do not have their own intentions or substitutes hold their rights? As a matter of fact, can we sustain the view that the rights have the substance? Even if a person does not know the fact that the person has certain rights he/she can be its beneficiary. Also even if the person does not accept the right or recognise it, it can not be denied that he/she holds the right. Moreover, there are some cases where those

who were given a right without knowing it have no capacity of rejecting the right (e.g., a bequeathed child).

How does an intention of the subject appear in the sphere of a right? It appears when the subject enjoys the interests. It also appears when the right is infringed on, when a legal remedy is claimed, and when the enforcement of the law is carried out. However, as already conceived, rights can exist before the infringement against the rights or the performance of the intention. For example, a right to life can exist without any representation of claiming the right—if only the fact of a person's life is given—insofar as the person is alive since his/her birth. Conversely, since a right to life already exists, the claim for the infringement or remedy is carried out as a practice of determining intentions or enforcing a legal measure.

A right of reputation can exist on the basis of the fact that a person has a reputation worth being protected. Therefore, when the person's reputation is harmed, the right can represent his/her intentions for the remedies against the defamation. It would be a significant point that the fact of there being rights, the existence of intentions, and the representation of the intentions should be differentiated. Actually the right *per se* and its exercise can be different. Although the intentions of the right-bearer are required for their exercise, logically, this exercise cannot be dispensed with, as the existence of the rights are a social or legal reality.

An intention would be defined as a desire by which the exercise of rights is required. However, as indicated by a right of reputation, a right does not require any action or any enforcement in the situation of "there being rights". Namely the fact that a person holds a right of reputation means that the person is satisfied

with merely holding reputation or enjoying the holding. Whilst, if the reputation is damaged, the person claims for any legal remedy against the infringement or confronts the violator, the person's right of reputation exists independently from such an exercise of the intention. Even if, despite any defamation or damages of the reputation, a person does nothing about the infringement, the right does not become extinct or void. Still the right is held by the person. Even if there is not an exercise of the right carried out by the person's intention, the right is never extinct but still remains held by the right-bearer. In other words, rights seem to exist apart from the intention of the subject.

The insane can exercise rights of freedom. Especially the physical exercise of rights does not necessarily require the spirit or intention of the rights-holder. Although a subjective body is assumed for a rationality-based action, even if it were otherwise, the rights *per se* are not to be damaged. In a person's physical actions in society, this is often found.

If it is accepted, in this manner, that the lack of intentions does not influence any substance of the rights, we are likely to conclude, at the least, that the fact that a deceased person has no capacity of holding intentions does not damage its rights. It is also likely to assert that rights exist on the side of the dead insofar as the defamation of the dead is concerned. Reputation which exists in the dead exists apart from the exercise of the rights, the awareness of them and the intention of them. Thus rights of reputation can exist in the dead.

In a case of defaming the dead, the physical impossibility, i.e., the dead's inability to exercise their intentions, results in using substitutes for the sake of the dead. Then a vital question relevant to this vicariousness will arise: what is the intention by which the substitute acts for the dead? Is it the intention of the social

or legal order? In previous sections we have argued that the social characteristics such as reputation play a normative role, which has a power, in society. The characteristics not only exist as a reality or a fact, but also as a norm that influences or binds a person's behaviour or acts. Therefore we would say that damaging the characteristics can be identified with damaging a norm. Damaging a person's name or reputation, or attacking their races or age is a kin to damaging what functions as an effective symbol or a social norm. In addition even the side of those who damaged the reputation can recognise the damage. So, in this way, damaging the reputation of the dead is irrelevant to the existence of the intention. The wrongdoer is actually harming the right of reputation that exists in the dead. Thus, the *Will Theory*'s criticism of the *harm of the dead* thesis can be overcome by the counterargument of the *Will Theory*'s grasp of the substance of rights.

7.2.2 *Interest Theory*

Suppose that *rights of the dead* is defined as "interests of the dead that are protected by law". This definition may suggest that *rights of the dead* seems to be already established. According to *Interest Theory*, the essence of rights is that there are interests that the subject of the rights gains by the other party's performance of obligation or duty. We ground rights on utility, assets, values and interests. Such goods would be objectively identified with the values and subjectively with interests ascribed to an individual as a beneficiary. Protecting such values and interests means to protect the values and interests of individuals who can independently act in society. Therefore, if the character of reputation can be identified with assets, values and interests, hurting a reputation refers to

hurting assets, values and interests. Although, in a case of defamation, the exercise of the right is realised by a lawsuit, the exercise is no less than to guarantee the enjoyment of an interest or the expectation of it. Rights serve as a protective capsule for interests.

However, this interest appears to determine the intention of the rights-holder by the enjoyment of the interest. Although an intention generally plays a role to exercise rights and defence which relate to the enjoyment of interest, the role is a secondary one of rights. Before the exercise, rights exist. Since requiring rights is a measure for enjoying interests, in *Interest Theory*, a requisite for rights ends up in an interest. It is possible that interests can be enjoyed when the state of rights exists, but not possible that rights can be exercised without their enjoyment.

The criticism to *Interest Theory* was, first, that the theory vests rights in those who lack the capacity of intentions and therefore that it challenges the tradition of the human-centred rights justification. Also another criticism is given to the political viewpoint that *Interest Theory* caused the inflation of rights and the conflicts between rights in society. If rights can be derived from interests, an apprehension arises that the government or nation can arbitrarily form and establish rights because they have an authorised power and role for protecting rights. Admittedly if rights are identified with protected interests, the intention of the subject can play a role in exercising rights, but rights *per se* would have no such role. Therefore, in a case where the subject confronts the nation, the criticism seems to be appropriate. However, the apprehension remains despite a lack of decisive grounds. Originally, in the level of substantial law, rights *per se* are intrinsically dependant upon the nation's intention by which the nation makes

law. With the recognition of the nation, protective interests end up in protective rights. In this regard, the structure of rights is functionally associated with interests and the intention of the nation and the subject. Besides, what *Interest Theory* regards as interests includes not only diverse goods in the level of materials, but also anything of human goods such as human character, freedom, reputation, family bonds, and so forth. In this sense it would be suggested that *Interest Theory* contains *Will Theory* which places the centre of values in the individual's intention.

In this way, if human character and freedom are, in *Interest Theory*, accepted as rights worthy of protection, the social characteristics can be qualified for an interest and furthermore possibly for a right. If they are led to interests that are worth being protected as a right, what actually are they? The social characteristics are basically personal and the issue is one of protective interests that should be guaranteed to humans, but they are not the essence or the substance of law, but concepts of sociology. Reputation that lacks legal protection is a mere fact, and other examples of the social characteristics, say, name, age, gender, are themselves mere facts. When they are included in the exercise of rights in a lawsuit, they obtain a place, as protective interests, amongst other rights. Said in that way, are there substantial elements of the right of reputation in a lawsuit for remedy against defamation? Our answer is "no". For, even if there are no lawsuits, the right to reputation can exist as a right. In other words, the right of reputation can exist as a right in the process of becoming a protective interest. And by gaining legal guarantees it becomes a right. Thus, it can be argued that interests and laws are a basis of grounds of rights.

The right of reputation might be a compound structure of purposes and measures. As the whole of the structure, the purpose (i.e., enjoyment) of the right is major and the measures (i.e., protection) are minor, that is, no more than a formal element. Then, a question will arise: how is it possible that the interference of the measures can change reputation, a mere fact, into a right?

First, the measures (protection) reveal that reputation is an interest worth being protected. Once damages are given, all interests guaranteed by sanctions for compensation construct rights. The legal protection can recover rights and differentiate rights from mere interests, but can not form rights *per se*. The fact of reputation being itself protected has not always led to reforming a right. By being accepted as worthy of being a right, an interest is to be a right. Therefore, some questions such as "where in interest does a right exist?" and "how are interests identified with rights?" still remain unsolved.

Remote from their functions or purposes, we have to define rights from a grasp of an inherent existence. If a right were possible to be identified with a real measure, we would define them by other qualities. The essence or substance of a right to reputation is reputation *per se*, but not an interest of reputation or an enjoyment of reputation. Interests come first before law. Since the protection of interests is a measure assuming rights, it can be realised by law. Then, rights are likely to exist somewhere between the interests and their protection. Needless to say, we do not argue that rights are irrelevant to interests or that beneficiaries of the interests have no entitlement to the rights. Our claim is that holding rights refers neither to the intention of desire nor the enjoyment of the rights. Rights such as right to reputation are something that despite the lack of the intention of the rights, the enjoyment of the rights and the use of the rights by

the holder are still retained in the sphere of rights. What is the "something" identified with?

Even if this question remains unanswered, what we have obtained from the above review of the debate on interests would be a conviction that the reputation of the dead, an example of social characteristics, is accepted as legally a protective value and that, if it has an objective norm that can enhance it as a right, it can function as a right. This objective norm is produced from the belief of society, and reflects the emergence of numerous sophisticated theories of human development—cultural, social, intellectual and psychological—over the past two hundred.

We have already found the answer to this question by tying the concepts of "ascription" and "governance" to the concepts of "social characteristics" and "Allsein" (see 4.4.6 and 4.6.1). Since the embryo-fetus retains its social characteristics an embryo-fetus has a right. Irrespective of the lack of the intention, enjoyment and use of the right, the concepts of "ascription" and "governance" enable the right to exist as a right. Thought in that way, *rights of the dead* can overcome the criticism of *Will Theory* that the dead have no capacity of intentions and the criticism of *Interest Theory* that they fail to enjoy their interests.

7.2.3 The attempt of the third perspective

The approach adopted in this thesis has explained that a person's will can survive his/her death. This means that this dissertation has argued, as a version of *Choice Theory*, that will can survive death. In Chapter 6, for example, a presumption was explicated that, if there is an object or person to embed an

intention in (e.g., a person's action; see 6.7.4), then the intention can survive death. In addition a further presumption was explained that in order to maintain the intention, the object or person would have to endure in some form. If it were not for these two elements, that is, an object and an actor to perform the promise, then the intention could not survive death. An intention can survive a person's death by being embedded in the object and the actor and being successfully performed. The survival of the intention assumes both that the intention is embedded in the object and the actor and that persons who have interests in the intention recognise it. This is one of our thesis's central tenets.

In Chapter 3 we examined intention and succession. It was explained that even on the arguments of traditional *Will Theory*, intention, as a basis of human rights, can survive death and the resultanting rights can be exercised. In this sense rights require legal enforcement after death. However, what can be noted is that traditional *Will Theory* suggests the intention of the posthumous performance is not that of the dead but that of the living. If such an explanation is warranted, it is valid, in terms of a right-holder who is an agent, to argue that *rights of the dead* are not those which the dead hold but a version of the living's rights.

Unlike this position, however, this thesis has sought to justify *rights of the dead*, the rights which the dead hold. It has argued that *rights of the dead* is not rights of the living which survive death but ones which are ascribed to the dead. Whilst there is some basis for possible discussion as to whether or not they can be called true rights, the debate on "can the dead be harmed?" in Chapter 2 justified that the dead have, at the least, an interest in themselves after their death. We concluded that the dead have posthumous interests which can be

harmed. Presumably when a right-holder is regarded as a beneficiary and even if the beneficiary has no status as a subject, he/she could have the possibility of being a right-holder. This line of argument has previously been explained in the debate on defamation of the dead (see 2.7.6). However, this is a justification based on *Interest Theory.* Our position in this thesis is beyond the two traditional theories. To reiterate, this position runs in the form of unifying the sociological concept of "the social characteristics of the dead", the ontological concept of *Allsein* and the legal concepts of "ascription" and "governance". Thus these concepts enable us to explain the relationship between the *harm of the dead* thesis and the *social characteristics* thesis (see e.g., 4.6.3).

7.3 Rights of the dead and duties of the living

In the discussion set out in Chapters 1 to 6, we hope the reader will have developed a reasonably clear picture of our position. There are a number of areas and issues which we have only touched on in a cursory way, and others which we have not dealt with at all. This thesis has grappled with issues intimately linked with death, one of the most difficult subjects in human history, through a focus on *rights of the dead* as an object for explication. We do not purport to have presented a definitive product, not only because of the difficulties involved with explaining the concept of death and the richness of human involvement in death but also because of the complicated nature of the concept of rights *per se.*

In this section, however, to complete the picture of the concept of rights of the dead, we need to attend to a further elaboration based on duties of the living. Therefore, the further discussion is relevant to the explication of the possibility of

whether or not *rights of the dead* can be established by duties of the living. However this is a colossal task and one which is impossible to address here in the limited space of the concluding remarks. Nevertheless, we will present some argument of duties[178] closely linked to each Chapter. In so doing we will provide further clarification for the concept of *rights of the dead* and hence draw the long journey taken in these pages to a close.

7.3.1 Duties to the dead

Both of the two competing theories recognise that usage of the term "*rights of the dead*" is logically incorrect (see footnote 1). This term actually suggests "rights" that the dead hold or have. In this case, if the words "hold" and "have" imply a physical ability to have something, or the power to dispose of something, then it is impossible for the dead to have or hold something, or indeed anything. However, as mentioned in Chapter 4, the concept of "ascription" as used by Dabin (1977) enables the dead to have or hold rights. The rights based on the concept of "ascription" require duties by which the living do not violate these *rights of the dead.*

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[178] In his essay *The Moral Status of Human Embryo and Fetus* (2000), D. Beyleveld applies Gewirth's theory to the debate on the moral status of the human embryo and fetus. A sixfold classification schema for the protection of the embryo-fetus, based on the concept of "indirect vicarious protection", enlightens us to seek to further our discussion on justifying the protection of the dead. Beyleveld's framework provides an insight to explain the embryo and fetus as a future agent. This is clearly suggested by the title given to Part Two "Arguments for derivative status". Although he developed this debate in the application of Gewirth's theory, we can nevertheless understand that the embryo-fetus holds a status derived from something. In a strict sense the embryo-fetus is not an agent but something which holds th ; : e derivative status of an agent. This kind of perspective would suggest that derivative-status holders cannot protect themselves as a subject of rights and therefore the phrase "indirect vicarious protection" that he presents in his essay is appropriate. On the other hand, a dead person and a dead body are to some extent and degree a spatio-temporal and qualitative continuity, especially shortly after death, of a living person and a living body, and thus of an agent. Insofar as the argument of this thesis, i.e., that we hold characteristics which survive death, is endorsed, we can understand that the dead

Irrespective of the diversity of approaches such as the five explicated in this thesis and those characterised in the traditional theories, they all have one point or problem in common: how to handle the relationship between rights and duties. However, any relationship between rights and duties is not so efficiently explained as the correlativity of rights and duties in dealings, such as is logically explained in contractual action.[179] All rights do not always entail correlative duties. Furthermore, many criticisms of Hofeld's (1919) explanation on rights clarify that duties do not always entail correlative rights. We cannot always provide the status of correlativity to rights and duties.

Thus, as all rights do not always entail correlative duties, so all duties of the living for the dead do not always entail corrective rights. We have to examine which duties are possible to contribute to the realisation of rights and what requirements the possible rights based on duties have as rights in society. The living's duties relating to the dead have, as pointed out in this thesis, more limited modes than the living's rights. The dominant reasons why the living have duties to the dead and duties for protecting the dead would be as follows:

1. Community networks of (rights and) duties
2. The succession of the social characteristics
3. The posthumous effect of the intention
4. The characters of the dead
5. Human nature
6. Social, cultural and political reasons

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analogously to embryo-fetuses are entities who hold attributes of the derivative status requiring indirect vicarious protection.

[179] The right of the traditional contract is a product of human choice and consequently a private transaction amongst individuals. Those contracts and the rights that protect them are normally conditional, so that, if the right lacks certain conditions on the part of the rights-holders, the corresponding duty may lapse.

7.3.2 Community networks of (rights and) duties

Whilst all duties do not entail corresponding rights, evidently some do. If we regard protection of the dead's honour as a duty that survivors must perform, then it would be possible to establish its corresponding right. As a matter of fact this right is legalised in many nations, whilst in other nations a high possibility of legalisation exists. Legalisation can be justified by the social context. If there is such a mode as *rights of the dead*, the social duty supporting the corresponding right would be, as mentioned before, generated only in the community or societal context. The right can be justified not only by the attributes and characters of rights *per se* but by the undertaking of duties performed by members of a society or community. Individuals, born as they are into societies and die as they generally do in societies, partake by that fact in networks of rights and duties (see Freeden 1991, 80). In a relevant discussion, Freeden says:

> "Initially those do not attain the status of moral imperatives but are more in the nature of existential ones. The system of mutual dependence gives rise to expectations and kinds of conduct without which human action and survival are inconceivable and that system may conveniently be described and shored up in terms of rights and duties" (ibid.).

Here an historical viewpoint may be required. In his remarkable publication *L'homme devant la mort*, Ariès (1981, 602-614) categorises the meanings of human death and people's attitudes toward death into five models of death from the early Middle Ages to the present times: (1) Tame death; (2) the death of the self; (3) remote and imminent death; (4) the death of the other; and (5) the invisible death. All these models illustrate that the meaning of death has been, through history, changed by socio-cultural factors.

In the regard of (1), dating back to the early Middle Ages of Europe back to the ancient times, an individual's death was an event in the community and ritually signified, in different forms of religious beliefs in the after death (e.g.,

Heaven and Hell). In the Middle Ages in Japan, as explained in a previous section, when the concept of *Amida* permeated the civil society, religious sects placed human death in the centre of their tenets and their believers were more interested in the posthumous world than in this world. Generally, people assumed that fundamentally there was no discontinuity between life and death and were taught to consider death as acceptable without complaint. This attitude of tamed death in the community may be identified with the duty of community members who were required to hold funerals and their ancestors worship.

The invisible death, the opposite of the tamed death, is a contemporary feature. It can be said that death has been deprived of its cultural status in the community and changed into being "untamed". It is a reality that a dying person in hospital is not informed their imminent death and death is treated as if it does not exist. Many devices by which people tamed death have faded away. The fear of the untamed death mercilessly falls on lonely dying individuals in hospital rooms. On the other hand, it is noted that death is characterised by culture and death and attitudes[180] toward death differ in the forms of duties.

Human history up to the present time suggests that the fact that the dead occupy their place and role in the community requires duties be performed by community members such as their relatives and survivors. The duties have been generated on the basis that problems occuring in community should be resolved by cultural and social relations between the living and the dead. For example, the following duties are imposed: the duty to dispose of dead bodies, the performance of funerals, the succession of the inherited assets, the continuity of social status and other rituals to ensure peace for souls such as ancestor

[180] E.g., in the United States, embalmed dead bodies are often exhibited in funerals.

worship. In short, individuals are required to perform duties in order for the dead to *socially* exist in society after their death.

On the other hand, individuals in the community are required to resolve psychological problems through the performance of these duties. Insofar as a person's death causes relatives and close friends to grieve, their survivors are also required to escape this unstable situation and change into the stable one. A typical model is the process where, seeing death as the symbolic continuity of life, people hold funerals or other rites in honour of the dead, i.e., the conduct based upon duties to the dead, to resolve their grief, for example.

The survivors are also required to reconstruct the social, legal and political disorder caused by death in society or community. The smaller a community in which a human death occurs, the more disruptive it is. When the social characteristics of a person are greatly valued in their community, his/her death has an impact. Thus, we would argue that it is the duty of the survivors to hold a ritual ceremony for the dead. This is not only for the resolution of any problems caused by the death but also for forming a new social order in their community.

The duty relating to the practice of organ transplantation (e.g., the performance of the intention to donate organs) is closely associated with the concept of community. Since transplantable organs are a part of the network of the donors, recipients and persons concerned, the picture of the relationship is one of an overlapping network of rights and duties. The duty to perform the intention of the donor is that people protect the public values that individual's personal things were changed into. By the spread of organ transplants, individuals came to belong to the category which represents "impersonal" or "public". They are given a status of a human being as a resource of technology

for serving the public. Therefore, to maintain the utility is an almost necessary requirement in the society of organ transplantation. In short, the duty was produced in the process where the dead gained a place of being public in the community. Since this duty is relevant to the dead's intention of donation and the consent of the relatives, it is very often understood to correlate with a right.

As far as the grounds for duties are emphasised on community, community here refers not to the diverse models of historical community but to, despite the surviving practice, the civil society constructed by human relations that assume the independence of individuals. Or rather, the relation of the family composed of parents, children or spouses, minimal units of community are altered by the mode of the civil society and the grounds for duties and affected by the ideology of the civil society. This society refers to a society dominated by the ideology of economy. It would follow that duties in the society yield to the principle of market economy and link to the ideology by which the recycling of corpses is to be justified. Organ transplantation is not an incidental occurrence, but was being considered at the beginning of modernity (Imamura 1991). It is argued therefore that if it were not for people's spirit and attitudes, relating to the society based on the rationality of productivity, that can accept the view that regards human bodies as parts of machines in a sense and as changeable, processed and reproductive, any perspectives of organ transplantation and the technical developments of transplantation would have not been generated. To manage such things, the society necessarily functions for gaining and promoting rights relating to organ transplantation by changing our attitudes toward death and a corpse into duty-based ones. Therefore, duties here can be interpreted to be in the network corresponding with rights in community called civil society.

7.3.3 The succession of the social characteristics

Regarding as the previous reason, Freeden suggests here that any valid theory for the *rights of the dead* must presuppose that the living will accept such rights, and especially that they will need to perform the correlative duties. As a matter of fact, the declaration "the dead have rights" suggests three things: (1) the morally desirable requirement to identify some vital aspects of the dead; (2) the moral attractiveness of such an approach; and (3) the normative requirement that people behave towards each other in a mutually co-operative manner.

However these three points are not logically entailed; rather, they are based upon our valuing the decisive role that the dead play in their society. By this we are referring to such attributes as their social characteristics, their association with the living, the significance of their existence, and their function when they were alive (see Chapter 4). This evaluation is also dependant on our being influenced by the dead in the way that we lead our lives. If such influence is feasible then the *rights of the dead* might be morally translated into codes of legally enforceable action.

However, the concept of rights of the dead has an analogy with human rights. What makes this analogy possible are the shared attributes between the living and the dead (i.e., the social characteristics). As mentioned in Chapter 4, this is because the attributes of the dead continue to be those they held when living. As explained in Chapter 3, an historical study of the rights of succession suggests that as a device for transferring rights, it is partly the attributes of the living that are passed on.

Our position pointed out that the social characteristics of the dead can be identified not only as those gained from being a living person but also new

characteristics established from the fact of being dead. This difference from existence has a role as a norm of the living's behaviour. Thus the dead and corpses create duties for the living, because there is self-evidence that the dead cannot protect their own characteristics and their own bodies by the means of their intentions and physical power.

A dead body is a continuum of a living one. In the body, shortly after death, a number of cells still remain alive as the organism begins the process of final decay. When these cells die, the body becomes totally different in appearance to the previous entity. The fact, for example, that the similarity of figure and form between A's dead and A's living body persists for a while after his/her death is evidently because his/her dead body is an altered continuum or derivative of their living body. The reverse is of course impossible. Therefore, the duty to protect a dead body is based in this seamless continuum from a living to a dead body.

The transformation process of a living body to a corpse is impossible to reverse. Neither is it possible to reverse the effect of damage or insult against a dead body in the same way as damage or insult against a living person could be. Even if the effect of damage or insult is directed against the derivative of the body, the previously living person cannot perceive or recognise the posthumous situation. The only thing the living can do is to observe situations where damage or insult is made posthumously against another dead person and through this observation come to understand how the person is dealt with posthumously by members of society or the community. It is, therefore, common for a living person to have interests or values in how his/her corpse will be posthumously dealt with and, if he/she presumes the possibility of posthumous abuse against

his/her corpse, to set in place and claim proper treatment of his/her corpse and/or take measures against the possibility of improper treatment.

However, even in a case where a person does not take such measures, others have a duty to refrain from abusing his/her corpse. Generally, how a corpse is treated (e.g., burial) is of value and interest to the living. The corpse should therefore be worthy of protection based upon such a value and interest. At the same time this forms the basis of a duty for living persons to protect dead persons and where appropriate their corpses. All those living will die at some point and, remain only in the immediate aftermath of death as corpses and for a limited duration in the memories of the living. Such an inevitable posthumous situation has therefore a profound meaning as a value and interest for humanity.

There may be those who have no interest in their posthumous situation. Also there may even be those who are not worried about how their corpses will be disposed of, for example, even if their body is dismembered. Yet, apart from the belief that the corpse as derived from the living is a continuum of the previously living person, it is also possible to argue that a person and his/her posthumous continuum are connected with each other from the psychological or sociological point of view. Furthermore, this continuum from the living person is not only comprised of the corpse but also of the social characteristics that the dead held whilst alive (see Chapter 4). The social characteristics are not only objects for the living's recognition but also what gains the substance only through other people's memories and symbols. This continuum warrants protection for the benefit of all, the living and dead alike. Therefore, the social characteristics partially transferred from the living to the dead are worthy of protection and includes the concept of duty.

Thus, for the dead, as a part of the continuum of their living body, the living's values, ways of thinking and attitudes of how one can do good for the continuum will be decisive in what may or may not happen to the dead. The values and thoughts on the continuum are based upon the concept of duties. However, if duties can be deduced from rights, then we have to confer a right on a dead person. There is however a diversity of reasons to reject this (see Chapter 1). Alternatively, the view that a right can be deduced from a duty suggests that the duty cannot be held by *rights of the dead* but by those of the living. That is to say, the answer would be that the subject who has a right to be protected as the agent in/of the posthumous continuum is the living but not the dead person. In other words, this view would suggest that the right which demands the protection of the dead as a part of the posthumous continuum is held by the living but not by the dead.

Nonetheless, the duty does not necessarily correlate with the concept of the living's rights based upon orthodox rights theory. In the case of protecting the continuum of a living person, one uses a common phrase "I have a duty to do X for the sake of the dead person". This implies that the interest which is provided by the duty is directed towards a dead person. This is more than rhetoric (the interest of the dead was explained in Chapter 2). Whilst it would suggest that a living person has an interest in his/her posthumous situation, the perspective that the interest is actually the living's would disregard the fact that he/she does not exist if and when the interest is thwarted after his/her death. Rather, our claim is that it is a dead person who has damaged interests.

In terms of the continuum from a living to a dead body, a further point to be considered is raised by the following question: "does the justification for

protecting a living body as a right necessarily lead, although on a specific level, to the conclusion that the dead can be justified by the concept of rights?" The orthodox theory of rights cannot furnish a justification for *rights of the dead* whereby the dead body has a right to be protected.

Whilst we as living persons believe that we have, as a matter of fact, a duty to protect dead bodies, we do not believe that the reason for this is that the dead hold a right which demands us to protect them. To reiterate, we understand that the reason why we can demand of others a duty to protect our own bodies as a right is that rights are predicated on a compelling view of human functions and abilities. Attributes regarding human life demand a duty to protect human living bodies. Therefore, the dead cannot demand a duty correlating with a right. If the demand, although indirect, is possible, then the right would be justified on account of shared attributes with the living. We attempted to identify these attributes with the social characteristics and pointed out that these attributes include rights and duties (see Chapter 4). And we maintain that what is worthy of protection for a dead body or person is in fact something beyond the worth of protection of a corpse *per se*, i.e., the social characteristics that survive death.

7.3.4 The effect of the intention

Whether an agent owns a part or the whole of his/her body, in terms of the treatment of a part or the whole of the posthumous continuum, is one of the contested issues in bioethics. We support a restricted *self-ownership* thesis (see Chapter 5). From the expression "property of a living's continuum", we cannot derive an argument that a *dead* person holds his/her own bodily property. Even

on the basis of our position, it could be argued that the intention of property can survive death and that the living have rights to property in a part or the whole of their own posthumous body. There is therefore support for the argument that the dead person does own their body, if and only if the dead person is *the* continuum of the living person. Nevertheless, there is no possibility that the dead, as a reality, possess their own bodies themselves.

However, even if property rights can survive death, the right-holder cannot protect his/her property by him/herself. When one claims that one's body is one's own, one can recognise the unity of one's body and mind. Aside from cases, for example, of those who are in an irreversible coma or infants born with no cerebral cortex (anencephalics), we can, at least to some extent, perceive of the unification of our body and mind.

Since, however, a corpse is an existence that has lost the subject of the intention, it has no consciousness of holding its own body. The grounds for the argument that, even if a dead person is deprived of the intention of ownership and has no capacity of intentions, it still has the property right to the body has been explained by the social concept of "social characteristics" (see 5.4.3).

Thus the dead require duties of vicarious protection to be rendered by the living. Assuming that their intention is guaranteed by legal device, the memory of the living, or moral bindings that it can survive death, the duty is a form of duty in correlativity to a right. Others have a duty to refrain from interfering with the property without the consent of the owner (e.g., the previously living and the bereaved). Also survivors have a duty to dispose of a corpse according to the directions which the dead person made whilst alive. This duty is not only in correlation with a living's right based upon the surviving intention but in

accordance with a further duty deduced from the social characteristics of the dead person (see 5.4.3).

An unwritten promise without corroboration by any formalised statement in or as part of a will may or may not be carried out after death. The grounds for binding such a promise have been explained by *Will Theory*, *Reliance Theory* and *Relation Theory* (see Chapter 6). Each theory admits that a posthumous promise obliges its promisor to fulfil it. Generally this promise is understood as a duty correlating with a right which demands a promisor to keep or fulfil the promise. However, it has a role independent of the right. We will justify the protection of the dead promisee on the basis of the concept of an independent duty to fulfil a promise.

In our discussion of promising we concluded that, irrespective of the impossibility of the promisee to recognise the promise, the promise can be performed even after the promisee's death (see Chapter 6). The posthumous promise demands a duty which is independent of a right to demand the promisor to fulfil the promise for the sake of the promisee or the beneficiary. The promisor has a duty to fulfil the promise after the promisee's death. Irrespective of whether or not one desires to do what one has a duty to do, the duty is necessarily imposed on one: it is one's duty. The duty to perform a posthumous promise is binding independent of the will or goals of its subjects.

In such a canonical view, therefore, justifying a claim that a duty to keep a promise binds, its promisor requires showing, or needs to be aware of what good the duty does and what purpose it serves, or to recognise obedience to the duty. The purpose must direct to serving the interest of someone. However it should be noted that moral dilemmas are created when duties come into conflict, and

there is hardly mechanism of colving them. When the interest of a promise is sufficient for it to be performed and as much as the promisor is bound by a duty, the promisee has a right. Said thus, it follows that duties derive from rights. If and only if the promisor is bound to perform a promise, the promisee has a right to the interest that the performance of the promise respects or promotes.

This canonical argument concerning the promise has a number of flaws. As J. Raz (1989, 7) points out, a doubt arises: can there be no duties to oneself? An orthodox view would lead us to the conclusion that, since the duties on promising impose restraints, these are in need of justification; their justification must be based on the rendering of benefits to others (see ibid.). However, if one has duties which arise from the performance of a promise towards oneself, then not all the duties involved can arise from rights because it is clear that one cannot have rights to claim against one's own performance of promising (ibid.).

Second, in applying Raz's perspective (ibid., 9) to our discussion on promising, we can regard promising, an institution, as common goods. The orthodox position has not necessarily paid attention to the fact that the benefits of public goods such as promising are available to all and furthermore no member of the community can be excluded from them without denying the good to all others. Whilst one has no right to the benefits of promising between others, the interest that individuals have in the existence or preservation of an institution of promising does not normally demand or depend on many people having or indeed exercising a duty to behave in the way which is required for its production or preservation. In other words the institution of promising persists regardless of how it is substantively used or works. Nevertheless it cannot be denied that

individuals have a duty to provide and preserve the common good such as promising.

In our view, the dead have an interest in posthumous promises. However, they have no rights to that which owns the interest. There are some cases where the dead do not need to have rights to enjoy an interest. For example, the reason why a dead person has an interest in being properly buried in an appropriate place may not be that s/he has a right but that the survivors bury their dead with respect and dignity. This implies a limitation to attempts to justify rights of the dead, and especially where confrontational relations such as rows in the family are to be avoided, rights of the dead may have no place at all. It is therefore worth noting that if a matter, such as respect, help, friendship, love or other special emotive issues require a solution, except insofar as they directly relate to rights, then invoking rights which are results oriented is misplaced. However, this criticism is applicable not merely to rights of the dead but also to rights of the living. It follows that if a person's interest is realised so is his/her right and if the fulfilment is not realised by a duty correlated with the right but by a particular consideration such as love, the right is not necessarily required.

7.3.5 The characters of the dead

Whilst a corpse has a role as a functioning symbol, the feature, i.e., being decaying, imposes the duty of disposing of it on the relatives. This duty may be justified by the basis of scientific reasons.

By realisation of the technology of organ transplantation, the feature of the dead body is one as a resource for organs, especially, shortly after death. People involved in the practice have required duties based on this feature; the

realisation of the intention to donate organs; the protection of the donor's privacy; the restoration to the body of removed organs (e.g., artificial eyes), etc. Donors, recipients and people involved in the medical practice are required duties on extending the possibility of the welfare and the medical development. This is to impose new duties based on the significance that the character the dead's organs have is supported by the technology of organ transplantation and the system of brain death and organ transplantation. So far human death has been regarded as negative, as the deprivation of life and this has not been overcome, but at last humans are imposed duties for effectively utilising death.

7.3.6 Human nature

In the previous section, it was argued that the disposal of a corpse is carried out in a form of the living's duty based on the intention of the dead, for example, advance directives (e.g., a will). As far as this duty is based on the intention that survives death, it is correlated to the right based on the living's intention. However, at the same time, this duty can be identified with the social characteristics, as a dead person, that is the normative existence.

This existence as being dead is a value to individuals, as a symbol derived from the human relations in society. Therefore, it can be said that to show disregard for a symbolised dead body or person is evidence of a depraved character. Although a dead body or person has no intrinsic moral status, it is nevertheless somewhat similar to humans in the sense that they are a continuum of their past moral status—agents. Moreover, they have an important similarity to the living in that they are an entity, and one which retains part of their social characteristics. Since this symbolic continuum has a value intrinsic in the culture

and society where it exists, it can be justified that the living have duties that a dead body or person should not be badly treated. Generally, imposing duties should serve the correlative rights or good consequences that duties result in. Duties to decently deal with a dead person or body are also grounded by the living's attributes such as a virtue.

Arete, a Greek term, is a state in which a person makes full use of his/her capacities to do a certain action. In Greek literature four fundamental virtues are highlighted: prudence, temperance, justice and courage. *Virtus*, a Latin term, expresses manliness, courage and strong will. Therefore, virtues could be defined as a state in which human attributes or capacities are maximised by social and moral exercises or practices. In Catholicism, for example, proper Christian behaviour is made manifest by the qualities of the seven virtues such as faith, hope and love (see I Corinthians 13) in addition to the Greek four virtues. In ancient China, virtues were not regarded as a realisation of the natural capacities of humans or as something good *per se*, but as good that can be prescribed and gained under the social and political order.

Through all ages, virtues have been understood in different ways. In society, on the one hand, virtues make humans better and enhance the good inside humans, and on the other hand they are needed for exercising good except that good is described in terms of "virtues". From the point of view that a dead person *was* an agent and *is* an entity with a part of the living's social characteristics, insensitivity to the dead will correlate with relative insensitivity to, at least, the rights of human agents. Moreover, sensitivity to or respect for an assumption that a dead person has an interest might be a means to maintain the virtue of being sensitive to any infringement against the dead person.

This justification by using of the concept of virtues makes much of duties rather than rights. To repeat, whereas legal rights or moral rights, require their correlative duties, duties that have no correlative rights are feasible. For example, there are duties not to abuse animals, duties to improve oneself, and duties based on virtues, as mentioned above, etc. Such duties can be accepted because they serve the protection of fundamental rights in certain forms and realise such rights, but not necessarily establish the particular right of the dead.

On the other hand, an example of the Japanese common perception of duties to the dead is to hold daily services for the dead person symbolised by an *ihai*, a small wooden "memorial tablet" enshrined in a family Buddhist altar. However, rarely does anyone claim that the correlative right stems from the duty. Indeed, there are some cases in which duties can be justified not by rights, but by social and religious conventions and practice—for example, holding a memorial service or funeral for the dead in a particular way. Namely, as the concept of duty contains supererogatory elements such as those associated with private charity, not every duty entails a right that is met by corresponding a duty (Feinberg 1970, 244; Freeden 1991, 77).

Rights serve the interests of those who hold rights. However, a person does not have a right to all of what the person has an interest in having. One may have an interest in reading a book borrowed from a library, but it does not follow that one has a right to it. Our thesis argued that the dead have an interest (see Chapter 2). In order to give rise to a right, an interest must be sufficient to justify the existence of a duty on another person to behave in a way which serves the interest of the dead (see Raz 1989, 11). Raz makes some relevant comments for our discussion:

> "Whether or not such a duty is justified depends not only on the interest of the right-holder but, at the very least, also on that of the person who is to be subject to that duty. ... [R]ights are based on evaluating the interests not only of their beneficiaries, but also of others who may be affected by respect for them" (ibid.).

The protection of sensitivity can be taken as an example of the living's interests which are effected by respect for rights. Most human agents have strong protective feelings towards dead persons or bodies, especially those of their relatives. To disregard proper protection of the dead is to cause great distress, even perhaps psychological damage to those who expect naturally occurring human emotional responses from others. To cause such damage is to violate the interest of the human agents who are affected by respect for the interest of the dead.

In Chapter 2, we justified that the dead have an interest in defamation. Based upon that justification, it could be argued that the dead can be granted protection as a means to protect the interest in protecting agents' sensitivities.

A dead body or person is the continuum of their previous purposive human existence. S/he has no intrinsic moral status as a human agent. However, s/he was once a person who enjoyed such moral status. When s/he was alive, the declaration of any intention that he/she wanted to realise after death required realisation or protection by the means of indirect instructions, given their posthumous situation precludes the possibility of direct realisation.

A dead person does not do any acts which are directly connected to him/herself. The antemortem intention is relevant to indirect self-connected protection in the case where the maker of the intention dies. Therefore by protection of other dead bodies or persons, because this sets a precedent, a normative social response, and expectation, the protection of a person's interests can be feasible even after the person's death.

Almost without doubt, it is believed that when the intention that others declare is of value and interest to themselves, one is under a duty to respect, treat and act on it in an appropriate way. The very same considerations establish that one has a duty to respect and protect the posthumous intentions of others. Therefore one may argue that, although such a duty seems to be derived from considerations for the dead it is, in fact, a self-regarding duty, i.e., a duty that each person owes to him/herself. Said thus, the protection of the dead by the living works effectively to protect the living and, at the same time, to fulfil the living's own well-being.

It is an undeniable fact that there still, even in contemporary society, remain some conventional duty-based practices succeeded from the old society—e.g., a form of duties without the recognition of rights. Although the ownership of inherited cultivated fields that were legally succeeded generation by generation is justified by rights, successors often interpret the ownership as sort of duties. They may imagine that the ownership is a succession from the past to the future. In terms of their legal consciousness, there are both sides of rights and duties relating to the succession. This double-sided legal consciousness seems to be that the consciousness of general property rights is changed into that of duties by the owner's traditional ontological sense of property. Although this consciousness does not represent the clear correlativity of rights and duties, they are, to some extent, correlative. It may be supposed that the donation of organs in the process of organ transplantation has a similarity of the sense of this soft correlativity of rights and duties. Moreover, when we conceive that the success or failure of the medical operation is determined by destinies or fates or that rights and duties are influenced by a power that we cannot control, we would

recognise that we think our organs as far more than our own property and others are deeply connected with our organs. This feeling of duty being imposing on us is, therefore, associated with the core of being alive. In plain words, our bodies are property but not our own property. It is a persistent assumption that Japanese have recognised this ever since ancient times. Therefore we would understand that a person has a persistent desire to find any meanings in death by any means.

Thus, we do not accept that *rights of the dead* can be ascribed to the living. *Rights of the dead* is in important ways independent from the living because the rights are based upon the social characteristics and attributes of the dead who are different entities to the living.

7.3.7 Social, cultural and political reasons

One of the chief features of human behaviour is that one never ends up in the biological death. Without leaving the physical death, one holds funerals or other rites for respecting the dead. This is a common human feature. Why does one imagine the posthumous world? Why does one talk about the past, where there are full of the dead and to which one cannot go back, and learn from it? Rather than the biological and poor, in a sense, universality, one regards death as a vital problem which is required amongst cultures, and views the feature of death within the rich areas of meanings of the individual's deaths (Yamashita 1992). With regard to human death, the knowledge of science attempts to disregard the aspect of "personal". It is not concerned about "my death" and "my relative's death". Accepting science's attitude, one interweaves the aspect of "personal" with daily life and would consider the protection for the dead as a duty.

In some African tribes a name is given to a newborn body from the name stocks, i.e., the dead's names. This practice would suggest that death is not a termination but something in the sphere of reproduction of life. The interpretation of a death as a reproduction of life is found in mythical stories told in the agrarian society in the tropical regions. The stories contain a myth that useful products are generated from the killed goddess. Japan has a similar myth that the remains of Oogetsuhime killed by Susanoo is the origin of the five cereals, such as a rice from her eyes, millet from her ears, adzuki beans from her nose, wheat from her sex organs and soy beans from her hips. Such myths do not consider death as the end of life but as the origin of the turning point in life. Such a perspective, viewing death and dead person as the rich possibility of life in the culture system, requires the survivor's duties to manage the system well (ibid.).

As previously mentioned, the definition of death is a cultural and political compromise. It is possible that death defined by one culture is categorised as life in other cultures. If the difficulty of the dead related to organ donation is a political compromise, the logic that regards brain death as human death is an extremely dubious business under the consideration of the process of organ transplantation. For the logic is a convenient realisation that reduces human death to the functional cessation of brains and regards a "living" body, in a sense, as dead and in addition lets organs "live" for use as things for medical purposes (Nishitani 1992).

However, it should be pointed out that the four attributes (see Chapter 4) are not fixed in the way that can and will be expressed at any given point in time. They are instead ideological, conventional and political expressions of social opinion. This is because the dead, as well as the living, are situated in the larger

scheme of things, within an historical, social and evolving system of society. That is to say, they are located in a social system which is comprised of changeable norms, customs, traditions, values, roles and statuses. These attributes of the dead and the way in which they are interpreted by society, are factors that we can only grasp through experience in society. Therefore, it is almost impossible to be wholly successful in a rational and logical deduction of *rights of the dead* through these attributes alone (e.g., in a sort of Gewerthian transcendental argumentation process), and hence the moral argument is doomed to failure unless underpinned by an analysis of society as well. Thus it can be said that *rights of the dead*—and correlative duties of the living—do not necessarily rely upon a moral argument.

7.4 Conclusions: establishing *rights of the dead*

Our main theme in this thesis has been that the dead have an interest and therefore *rights of the dead* can be justified. The theme has been rigorously set out and explored through the five approaches addressed in Chapters 2 to 6. In addition the previous section provided a supplement to our argument from the perspective of duty. Based on this discussion, we will conclude this thesis by examining the following question: "how do the living cross over the line of death and establish *rights of the dead* or what quality or characteristic is it of the living which crosses this line?" Three answers will be presented.

The first answer: an intention of the living may survive death by a legal device and be posthumously admitted as a right. For example, the legal action which takes effect after the maker of the will dies must be based upon his/her right by which the will was made. That is, whilst the right is considered that of the dead, it is, in fact, based upon that of the living. Therefore discussion on "the subject of rights" suggests that in a strict sense it should not be regarded as the posthumous *right of the dead.* Nevertheless we do recognise that such a perception can and does occur. However, that it does is in our view the result of a mistaken perception that intention related to the rights that are adopted after death is apparently an antemortem declaration of intention and that on death the subject of the will no longer exists. Thus the substantial point here is whether or not the antemortem intention is realised after death.

An intention can survive death by virtue of the power of a right, a form of legal device. This means that, if the intention of the will takes effect by a legal device (e.g., a legal fiction), then the power of the effect should be based on a right because the intention takes effect under the posthumous circumstance

which is separate from the antemortem circumstance. Said that way, such rights clearly take effect after death, and hence *rights of the dead* would be established. This right provides perfect protection for the rights of the previously living person by virtue of the fact that it recognises and protects these rights after death. In other words the will should be considered as forming the substance of *the rights of the dead* in the way that it continues to rule and control the living. It is not incoherent that the right which effects remains after death can be identified with *rights of the dead.*

The second answer: taking a human life generates the existence of the dead and rights exist to be protected and also to provide protection. These rights would be, in a strict sense, called *rights of the dead.* The point that the dead are protected by rights which they hold is different from the first answer, i.e., *rights of the dead* justified by the legal device. This distinction is most clearly exemplified in cases of defamation of the dead. All living persons ultimately attain the status and existence called the dead. The way by which the living person passes from life to death entails that "something", a quality or characteristic, passes in this transition from the living to the dead. The "something" is in this thesis deeply related to the social characteristics. That is, the part of the social characteristics of the living which can and does survive death. The dead have the attributes of a dead person. As a typical attribute of a dead person, we provided *sabetsu-kaimyō*. Due to the peculiarity that *kaimyō* is given after death, it was justified to argue that the infringement against the moral right by posthumous discrimination is that directly against the dead who exit after death. It follows that defamation of the dead is an infringement against the social characteristics and attributes of the dead. Defaming a dead person harms not that person's antemortem existence

but rather their posthumous existence. Thus we argue that it is a dead person him/herself who is now harmed by the action of defamation of the dead.

The third answer: under the circumstance where the first and second answer can be justified, *rights of the dead* exists after death. The best example of this is post-death donation of internal organs. Any posthumous donation of organs is subject to the antemortem intention of the donor. That is, although post-death organs for donation are located in a body no longer capable of decision making, donation of the organs was and is nevertheless determined by the intention of the donor whilst alive. On the other hand our argument also suggests that in addition to the situation where intention can survive death, in many instances, including that of donors, part of the social characterisitics which the living person held are retained in death and hence pertain to the dead person and their statuses as a dead person, i.e., as a donor, as an author, etc. Strictly speaking, these organs are harvested from a dead body, but not from a living one. There should be a conviction that, even if organs work by life-support system, once the organs are removed from a brain dead patient, they are harvested from a corpse. By this conviction, people involved in organ transplantation can emotionally and cognitively understand that the organs are ascribed to the dead and governed by the dead.

Given this explanation, the ground for requiring *the rights of the dead* and their right to character is on the basis of a perfect protection of the rights of the living and their right to character. Whether and to what extent a person's character is protected before and after death effects the actions, emotions and way of life of other people in society. If it were not that the right to character is protected before *and* after the right-holder's death, then protection to right of

character would not and could not be complete or effective: it would hardly be satisfactory to have a situation where defamation of a person was only illegal up to the point of their death, to have such a circumstance would be essentially to nullify the worth of pre-death protection. This comprehensive protection which persists in life and death is then the most important ground for justification of *rights of the dead*. Therefore, on this basis we hold and argue that if the dead's privacy is infringed and their honour defamed, they are protected in the right-based legal system and there should be no grounds to disregard their rights and entitlement to protection. Where a person's right is performed after his/her death, the dead person's position therefore has entitlement to be reasonably protected as a right. It is on this crucial point that the main tenet of our thesis rests. Besides, based on the ontological recognition that the dead are dead, we have provided a perspective that places the dead at the centre of the dissertation and attempted to explain the justification different from the living-centred one. The dead can exist merely *as dead*.

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