

**ALTERNATIVE CHOICE OF ORGAN DONATION IN THAILAND:
A STUDY OF OPT-OUT AND MANDATED CHOICE SYSTEMS***

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Abstract

In today's societies, there is a continuing increase in the number of people who suffer from various ailments. More and more people are in need of organ transplantation, which provides the opportunity to save lives, increase life expectancy, and improve the quality of the recipients' lives. However, the major obstacle to organ transplantation is that there is a shortage of organ donors. With organ donation, an organ donor, alive or dead, allows for the transplant of their organ to another person. With regard to organ donation, Thailand uses a voluntary system or so-called "opt-in" system that relies on the express consent of the donor to donate an organ. No specific law deals specifically with organ donation, but the basic principles are provided by the Medical Council and the Red Cross. The problem of shortages of organ donation finds its roots in religion, culture, and emotions. The author presents herein various legal frameworks for organ donation in the United States of America, Singapore, France and regulations and theories related to the opt-in, opt-out, and mandated

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choice systems to solve organ deficiency problems and increase organ donor rates in these countries.

Keywords: Organ Donation, Opt-Out, Mandated Choice, Organ Transplantation

1. Introduction

The concept of replacing a part of the body for treatment has been around for a millennia¹. The development of organ transplantation for treatment has been rapidly growing and driving more demand for organ transplants. In today's societies, there is a continuing increase in the number of people who suffer from various ailments. Organ transplantation is the best treatment for patients who are suffering from organ failure. Most of the patients suffering from organ failure tend to sit on the organ's waiting list for a long period. Delays may lead to the death of patients in waiting. Also, organ transplantation provides the opportunity to save lives and improve the quality of the recipients' lives². However, an important fact of organ transplantation is the availability of potential donors. In recent years, the major obstacle to organ donation is the organ shortage crisis. As a result, the demands of patients who need organ transplants have seen a major increase. Even when medical technology has increasingly advanced, but the number of organ donations is unsatisfactory.

As for Thailand, no specific laws deal specifically with organ donation, but the basic principles are laid down by the Medical Council and the Red Cross³. The voluntary system (opt-in) that Thailand is currently using is based on a voluntary system or a so-called "opt-in system".

Hence, the organ donation system relies on donor's expression of consent in advance of their death. This system results in a problem of shortage in organ donation. Even though many people wish to become

¹ Clyde F Barker and James F Markmann, 'Historical Overview of Transplantation' (2013) < <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3684003/>> accessed 20 November 2019.

² Kidney Health, 'Organ and Tissue Donation and Transplantation Fact sheet' (*Kidney Health*, July 2017) <<https://kidney.org.au/uploads/resources/organ-and-tissue-donation-and-transplantaion-fact-sheet.pdf>> accessed 10 November 2019.

³ Sukit Thatsanasunthornwong, 'Organs Transplantation and Organs Donation in Thailand' (*OK Nation*, 4 September 2010) <<http://oknation.nationtv.tv/blog/sukit/2010/09/04/entry-3>> accessed 30 June 2020.

donors, they often forget or refrain from registering because of their lack of knowledge about organ donation and/or they still have not made a clear decision yet. This is one of the reasons why the number of organ donors is quite low and cannot keep up with the demand.

2. The basics of organ donation

Organ donation is the process whereby an organ donor, alive or dead, has given permission to transplant their organ to another person. The removal and the placing of the organ into someone else's body to treat the recipient who suffers from a damaged organ is called transplantation. The process of organ transplantation requires explicit consent to donate, whether from the relatives or from people who have expressed their consent prior to their death. The system of donating is divided into three systems. The system is “opt-in” or express consent and “opt-out” or presumed consent and mandated choice is a situation required for obtaining consent.

3. The shortage of organ donation in Thailand

Approximately 45,648 potential donors have registered in Thailand, but they have been only 122 donations, and there remain 5,840 patients registered on the organ waiting list and only 268 transplant recipients listed from the 2019 Annual Report of an organ donation center in Thailand⁴. Most Thai people still believe that it would be a problem to be born with incomplete organs in their next life and that organ donation will cause suffering to the deceased donor. Religious beliefs in this regard are very important to this day in Thai society. As such, the problem is not merely the low rate of organ donors, but the overall rate of organ transplants partly because many people decide not to register for donation. The results

⁴ ‘Raignam Prachumpee 2562 Suun Rap Bawrih jaak Awaiwa Saphakachat Thai [the 2019 Annual Report of organ donation center in Thailand] (รายงานประจำปี 2562 ศูนย์รับบริจาคอวัยวะสภากาชาดไทย)’ (*Organ Donate*, 2018) <<https://www.organdonate.in.th/assets/files/odc2562.pdf>> accessed 5 August 2020..

showed that the opt-in system cannot solve the problem without an effective law to boot.

4. Issues concerning organ donation legislation in Thailand

The main issue with the legislation determining organ donation and transplantation principles is not easily available and there currently exists no law passed by the Parliament that deals with the subject. There is thus a gap in the law for this important topic. Additionally, the current system for the enforcement mechanism is weak. There exist regulations on organ donations under medical ethics rules, the Thai red cross and organ donation centers. Yet these rules and regulations are fragmented. Also, the medical ethics rules still lack clarity regarding the status of the donor, heir, or relative, also the legal obligation of physicians. The medical council regulations did not specify the status of the donor and the rights of the relative clear enough. Moreover, the medical council regulations provide doctors must ask for consent from a relative before removing an organ even if that person has made an intention with the organ donation center according to article 53(3). Thus, the right of the donor's relative may be conflicting with the intent of the donor.

5. Legal frameworks in other countries

Many countries amended their law to respond adequately to the increasing demand for organ transplantation and the problem of the supply of organ donors.

In Singapore, organ donation is organized into two systems: opt-in and opt-out⁵. The opt-in is covered by the Medical (Therapy education and research) Act (MTERA). The Opt-out is covered by the Human Organ Transplant Act (HOTA). The HOTA provides the hard opt-out system that

⁵ 'What is HOTA all about?' (*Singapore Government Agency Website*, 21 August 2013) <<https://www.gov.sg/article/what-is-hota-all-about>> accessed 1 October 2020.

allows only for the removal of kidneys, livers, hearts, and corneas from all citizens and permanent residents who have died in Singapore. This method gives utmost importance to the donor's intent.

In the State of New York, organ donation is governed by the system of Mandated choice⁶. The Mandated choice is a system of voluntary consent, but this system differs from a presumed consent policy. Under mandated choice, all citizens would be required to decide to be donors or non-donors at the mandated time. The state set up the law for the operation situation or scenario in which required people to making-decision in advance. For example, In New York, the state will ask for an organ donation as one of a process during renewing driver's license. Even though, people might hesitate to decide to donate their organs in the time of life. This method can see people's real intentions to donate an organ.

In France, the system for organ donation is opt-out presumed consent. All adults in France are presumed to be organ donors except when they have registered to object to being a donor or if they are under someone else's guardianship⁷. The opt-out in France is a soft opt-out. Thus, the doctors in France will always be asking consent with the family in practice before the surgery and they receive a refusal in about one-third of the cases. The family felt pressured are less willing to donate. Even in France where the opt-out system is used, low organ donation rates remain low due to a relatively high rate of refusal by the relatives.

6. Conclusion

To approach the topic of organ transplantation, Thailand should enact specific laws concerning organ donation and organ transplantation that prescribes rules and procedures for physicians in the same law. The

⁶ Britta Martinez, 'Uniform Anatomical Gift Act (1968)' (*Embryo*, 5 August 2013) <<https://embryo.asu.edu/pages/uniform-anatomical-gift-act-1968>> accessed 21 July 2020.

⁷ 'The French legal system' (*Ministry of Justice*, November 2012) <http://www.justice.gouv.fr/art_pix/french_legal_system.pdf> accessed 23 December 2019.

opt-in system currently used is not effective with regard to the number of donations needed. New rules should also set accurately the duties and responsibilities of physicians. Therefore, the alternative of implementation to solve organ shortage problems should enact in a mixed system with opt-in and mandated choice to increase organ donation as follows:

6.1 Opt-in for all organs

To achieve the improvement of the number of organ donors, the author suggests that Thailand should adopt the Singapore approach to the opt-in system for all organs. There should be a specific law to govern organ donation systematically and set the standards, qualifications, and obligations of the donor. It should define the status of the donor as well.

6.2 Mandated choice for only kidney

Also, the author suggests that there should be an adoption of mandated choice that applies only to kidneys. In Thailand, the most commonly identified causes of renal disease are kidney transplants 6,125 cases were available total waitlist organs from a total 6,417 of organ recipients of the Thai transplant society report on December 31, 2019⁸. Also, patients with kidney disease or kidney failure have been challenged by expensive medications. To improve the efficiency of their health care, the transplant is the best treatment. Thus, mandated choice models that select only kidney may provide a possible method of increasing donation. New York creates a mandated choice to increase donors through the renewal of driver's licenses. However, the author thought it remains difficult to recognize the intention of people who do not drive. In this regard, the author suggests that Identification card (ID card) renewal should recognize

⁸ Thai Transplantation Society, 'Annual Report 2019 Organ Transplantation in Thailand' (*Thai Transplantation Society*, 2019) <<http://www.transplantthai.org/upload/editor/file/Registrybook-62Final.pdf>> accessed 6 November 2020.

the intention of people that decided to donate an organ or refuse at that time. Therefore, an approach such as mandated choice may be part of a possible solution to address the shortage of organs for transplantations.

Bibliography

Websites

‘Raignarn Prachumpee 2562 Suun Rap Bawrih jaak Awaiwa Saphakachat Thai [the 2019 Annual Report of organ donation center in Thailand] (รายงานประจำปี 2562 ศูนย์รับบริจาคอวัยวะสภากาชาดไทย)’ (Organ Donate, 2018) <<https://www.organdonate.in.th/assets/files/odc2562.pdf>> accessed 5 August 2020

‘The French legal system’ (Ministry of Justice, November 2012)<http://www.justice.gouv.fr/art_pix/french_legal_system.pdf> accessed 23 December 2019

‘What is HOTA all about?’ (Singapore Government Agency Website, 21 August 2013) < <https://www.gov.sg/article/what-is-hota-all-about>> accessed 1 October 2020

Barker C F and Markmann J F, ‘Historical Overview of Transplantation’ (2013) <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3684003/>> accessed 20 November 2019

Kidney Health, ‘Organ and Tissue Donation and Transplantation Fact sheet’ (Kidney Health, July 2017) <<https://kidney.org.au/uploads/resources/organ-and-tissue-donation-and-transplantaion-fact-sheet.pdf>> accessed 10 November 2019

Martinez B, ‘Uniform Anatomical Gift Act (1968)’ (Embryo, 5 August 2013) <<https://embryo.asu.edu/pages/uniform-anatomical-gift-act-1968>> accessed 21 July 2020

Thatsanasunthornwong S, ‘Organs Transplantation and Organs Donation in Thailand’ (OK Nation, 4 September 2010) <<http://oknation.nationtv.tv/blog/sukit/2010/09/04/entry-3>> accessed 30 June 2020

Thai Transplantation Society, 'Annual Report 2019 Organ Transplantation in Thailand' (*Thai Transplantation Society*, 2019) <<http://www.transplantthai.org/upload/editor/file/Registrybook-62Final.pdf>>, accessed 6 November 2020