

Human Organs and Thai Law: Should the Sale of Human Organs Be Permitted

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Abstracts

Nowadays, organ transplantation is currently considered to be the best way to save lives of many patients who have abnormal organ function or organ failure. While the acquisition of transplantable organs is restricted by stringent criteria and restrictions, organ shortages have resulted in a shortage of transplantable organs. As the shortage of organs for transplantation has become a major factor in organ trading. Although Thailand is one of the countries against the sale of organs and paying for organ donations. Nevertheless, there is no law that prohibits or defines the sale of organs as an offense. Also, in view of saving human lives, it cannot be denied that legal organ trading may be the only way to save lives of many patients who awaiting organ transplants and it is the only way possibly to address the shortage of organs for transplantation. Therefore, this thesis will study the topic "Human Organ and Thai Law: Should the Sale of Human Organ Be Permitted" by comparing Thai, Philippine, and Iranian laws to make observations for future research and suggest ways to regulate when human organ trading can be done legally by law on the following issues 1. The definition of property and non-commercial property; 2. The capacity of the counterparty to enter a purchase and sale contract; and 3. Objectives of the purchase. The study found that human organs are assets that can be sold if the counterparty has the ability and follows the form of the contract. However, there is still a problem that the purpose of the contract may not be contrary to public order and good morals, which needs to be further studied in the future.

Keywords: Human Organs; Thai Law; The Sale of Human Organs

Introduction

Organ transplantation is currently considered to be the best way to save lives of many patients who have abnormal organ function or organ failure. While the acquisition of transplantable organs is restricted by stringent criteria and restrictions, organ shortages have resulted in a shortage of transplantable organs.

As organ transplantation is the procedure of replacing diseased organs, parts of organs, or tissues with healthy organs or tissues. (Chinmay & Akshay, 2020, p126) The transplanted organ or tissue can be obtained either from the patient himself, another human donor, or an animal (Xenograft). (Melissa, 2021) However, human organ transplantation is limited by the compatibility of tissues between the healthy organ owner and the organ waiting for transplantation. (Siripha, 2018, p950-962) Wherewith, compatibility of "Human Leukocyte Antigen (HLA)" (Anand, 2017) must be considered in order to prevent organ rejection, (Jitphinan, 2020, p255-261) resulting in limited availability of organs which can be used for transplantation as one of the significant factors leading to organ shortage and organ trading smuggled in order to the patients to receive an organ transplant as soon as possible. Thus, human organs for

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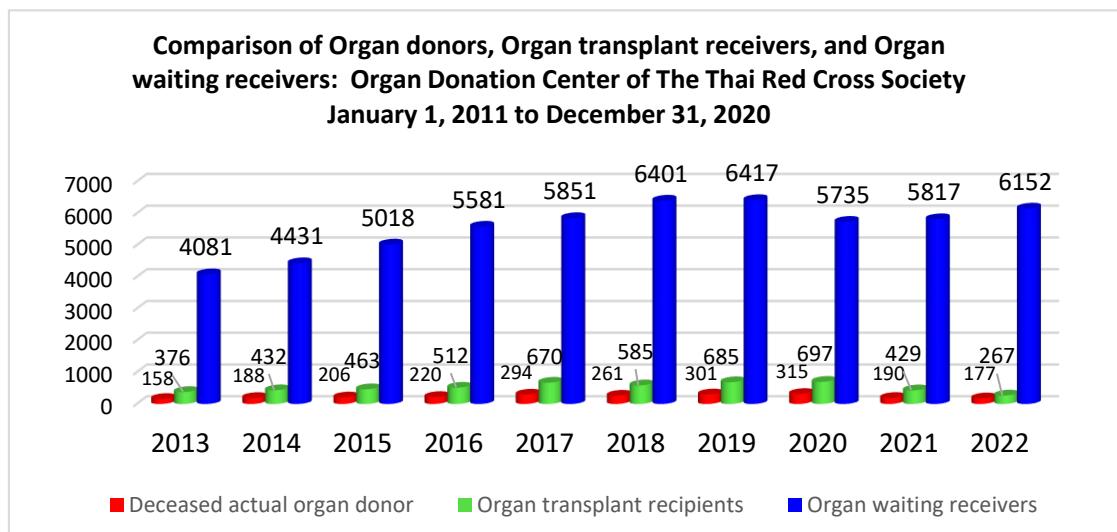
transplantation can be categorized as two types of donors: living related donors and cadaveric donors or deceased donors. (Abbas & et al., 2020)

1. Living donor: For a living donor, the use of a living person's organs for transplantation is delicate and fragile. The primary matter to scrutinize is the donor and patient must have a relative relationship (consanguineous). Nonetheless, organs which can be donated must not cause death to the donor after surgery. In Thailand, The Thai Red Cross Society where requires the donors who are still alive can donate only kidneys, livers, and bone marrow only. However, if the organ recipients do not have relatives or married couple who can donate their organs due to the blood type being incompatible, the organ tissues are incompatible, or the donor is incompletely healthy. As such, organ recipients are required to wait for organs to be donated from brain-dead donors. (The Thai Red Cross Society, 2023) According to the regulations of the Thai Red Cross Society on the Thai Red Cross Society Organ Donation Center, if the organ donor is still alive, they can donate to a consanguineous, or to a married couple who has been legally registered for at least 3 years or has a child born from that husband and wife only. (Thai Red Cross Society, 2023)

2. Cadaveric donor (Deceased donor): A cadaveric donor, or deceased donor, is a person who is diagnosed with death from a "brain death". According to doctors, a "brain dead" person is a person who has died with a diagnosis that they are deprived of returning to life even if the heart and lungs are still functioning by the ventilator, nonetheless, if the ventilator is shut off, the heart and lungs will stop working unquestioningly. (Wongkarnpat, 2023)

While, Thailand is one of the countries facing a shortage of organs for transplantation. These affects the number of people waiting for a large number of organ transplants can be lead for observing from the statistics that are considered to be presented below.

Figure 1: Chart of comparison of Organ donors, organ waiting receivers and Organ transplants recipients:



Source: Organ Donation Center of The Thai Red Cross Society (2023)

As mentioned above, the number of organs waiting lists is increasing every year. Even in 2020, the number of people waiting for organs was declining; however, the number remains high. On the other hand, the number of organ transplant recipients from 2013 to 2022 was low, this was noticeable for the number of organ transplant recipients, which was no more than 700 people per year. Furthermore, the average number of organ transplant recipients per year from 2000 to 2022 was 332 persons. While, the average transplant recipient from 2013 to 2022 was 511 people, with at least 4,000 organs in waiting lists per year. Grievously, if we consider the number of deceased actual organ donors from 2013 to 2022, which is less than 350 persons per year, that is a very insignificant number compared to the number of organs waiting lists. This clearly describes the situation in Thailand where is experiencing a severe organ shortage that is unlikely to subside in a short time.

The shortage of organs for transplantation has become a major factor in organ trading. While the illegal trading of organs causes many problems, such as illegal organ trading, human trafficking for removing organs, organ theft, organ smuggling and etc. Additionally, medical procedures to remove organs from the human body are often performed processing incorrect medical standards. In particular, the standards of cleanliness and hygiene affect to long-term health of the victims. Moreover, the victim may die during a non-standard medical procedure.

Confidently, if medical purposes to save human life, legal organ trading may be the only way to save the lives of many patients who are awaiting organ transplants, and it is the only way possible to address the shortage of organs for transplantation. This is to legitimate for legalizing the sale of human organs for medical purposes and save the lives of patients. The researcher chose to study on the Civil and Commercial law of Thailand for comparison with the Civil law of the Philippines and the Civil law of Iran on sale contracts. Finally, the observation has been focused by the researcher to suggest the way of regulating when human organ trading can be done legally by law.

The researcher asserts Philippine civil law as a case study because the Philippines is one of the countries facing problems with all forms of organ trading. While the Philippine government has expressed its strong opposition to organ trafficking, there is also no law prohibiting the sale of human organs, which is similar of Thailand. On the other hand, the researcher studies Iran's Civil law because Iran is understood by many people to be the only country in the world where human organs can be legally traded. The study will be divided into three issues: 1. Subject matter: property 2. the capacity of the counterparty; and 3. The objectives of the contract, as follow;

1. Subject matter: property: In this issue, the researcher would like to compare the laws, especially in terms of the definition and classification of property, according to the laws of each country in order to obtain the property status of human organs because the property status of human organs is a significant matter in the validity of the sale contract.

2. The capacity of the counterparty: The capacity of a person to bind legal relations is another issue that is absolutely necessary for all types of contracts because the capacity of a person to enter into a contract inevitably affects the validity of the contract. It is not only sales contracts but also other types of contracts. If the counterparty has disabilities or their capacity is limited by the effect of the law, it will affect the validity of the contract. As for the seriousness of the breach, it depends on the degree of the disabilities and the laws of each country.

3. The objectives of the contract: Owing to general contracting principles, the counterparty has "freedom to contract," which can be concluded as agreed upon by two or more parties. As long as the counterparty continues to comply with the terms of the contract, there will be no dispute. Although the counterparty is free to determine the conditions of contracts, the laws of many countries also impose restrictions. For example, Thailand is clearly prohibited in Section 150 of the Civil and Commercial Code that contracts are made to against the law or whose purpose is against public order and good morals will be void, and etc. Therefore, in terms of the purpose of the contract, it must be taken into consideration.

Research Objective

To study the problems, circumstances, theories, and principles related to the background on sale contracts and human organs trade.

1. To study Sale Contracts on Human Organs in Thailand, the Republic of the Philippines, and the Islamic Republic of Iran.
2. For comparative analysis of contracts for the purchase and sale of human organs according to the Thai Civil and Commercial Code, the Civil Code of the Republic of the Philippines, and the Civil Code of the Islamic Republic of Iran.
3. To give recommendations for domestic law by providing observations on the topic "Should the sale of human organs be permitted?" and giving suggestions to control and supervise when selling organs is legal.

Research Methodology

This thesis is prepared in the format of qualitative research by comparative law, which has the following methodology based on documentary research from both primary documents such as the Thai civil and commercial code, the civil code of the Philippines, the civil code of Iran, and judgments. As well as secondary documents such as textbooks, academic articles, journals, and research reports. Those are covered both in published documents and electronic media, with informative content related to the issues of this research study. an in-depth interview with academic dignitaries in order to push for the recommendation to be of help in resolving and developing this legal problem.

Results and Discussion

In this section, the researcher will discuss the results of the study on the following topics: 1. subject matter: property 2. the capacity of the parties to the contract; and 3. the objectives of the contract. As follow;

1. Subject matter: property:

Table 1: SUBJECT-MATTER OF SALE CONTRACTS (PROPERTY)

SUBJECT-MATTER OF SALE CONTRACTS (PROPERTY)			
Country Topic	Thailand (Civil and commercial code)	The Republic of the Philippines (REPUBLIC ACT NO. 386)	Islamic Republic of Iran (Civil code of Iran)
THINGS	-Section 137.		
PROPERTY	-Section 138.		
TYPES OF PROPERTY	-Types of property 1. Immovable property: Section 139 2. Movable property: Section 140 3. Divisible things: Section 141 4. Indivisible things: Section 142 5. Things outside of commerce: Section 143	-Article 414. All things which are or may be the object of appropriation are considered either: (1) Immovable or real property; or (2) Movable or personal property. (333) *Immovable property Article 415 *Movable property Article 416	-Article 11. Property is of two kinds, movable and immovable. *Immovable property Article 12 *Movable property Article 19
RES EXTRA COMMERCIA	-Section 143. Things outside of commerce....	-Article 1347. All things which are not outside the commerce of men....	-Article 348. ...Something which is not (describable as) property...

As a result, when considering the human organs in terms of the contract's object (property), when the human organs are completely separated from the human body; thus, human organs become an object with value and the ability to hold the organs, resulting in the characteristics of property according to the law. Furthermore, if it is the case of "the human body," which is also assembled as a person, whether in the legislation of Thailand or the Philippines, Iran is not treated as a property. However, if the human body is completely separated, the organs have the characteristics of movable property because they can be moved from one place to another without having the characteristics of immovable property, resulting in the organs being considered movable property in the researcher's opinion. In addition, when considering human organs, it is found that human organs are not in the nature of property outside the commercial that is prohibited from selling and buying. Therefore, when considering the law on the sale of organs under the Thai Civil and Commercial Code, including the Philippines Civil Code and the Iran Civil Code, it can be seen that organs can be an object of a sales contract.

2. The capacity of the parties to the contract:

Table 2: CAPACITY OF THE COUNTERPARTY ON SALE CONTRACTS

CAPACITY OF THE COUNTERPARTY ON SALE CONTRACTS			
Country Topic	Thailand (Civil and commercial code)	The Republic of the Philippines (REPUBLIC ACT NO. 386)	Islamic Republic of Iran (Civil code of Iran)
CAPACITY OF HUMANS TO MAKE CONTRACTS	-Section 153. An act, which does not comply with the requirements concerning capacity of person, is voidable.	-Article 1489. All persons who are authorized in this Code to obligate themselves, may enter into a contract of sale, saving the modifications contained in the following articles. Where necessaries are those sold and delivered to a minor or other person without capacity to act, he must pay a reasonable price therefor. Necessaries are those referred to in article 290. (1457a)	-Article 211. In order that a contract may be valid both parties to it must be of age, must be in their proper senses and must have reached puberty. -Article 212 A transaction between people who are not of age, nor in their proper senses nor mature is invalid because of their incompetence.
AGE OF MAJORITY	-Section 19. A person, on completion of twenty years of age ceases to be a minor and becomes <i>sui juris</i> . -Section 20. A minor becomes <i>sui juris</i> upon marriage, provided that the marriage is made in accordance with the provisions of Section 1448.	-Article 402. Majority commences upon the attainment of the age of twenty-one years. The person who has reached majority is qualified for all acts of civil life, save the exceptions established by this Code in special cases. (320a) -Republic No 6809: An act lowering the age of majority from twenty-one to eighteen years, amending for the purpose executive order numbered two hundred nine, and for other purposes	-Article 1210. No one, when reaching the age of majority, can be treated as under disability in respect of insanity or immaturity unless his immaturity or insanity is proved. Note 1 - the age of majority for boys is fifteen lunar years and for girls nine lunar years. Note 2 - The properties which had belonged to a minor who has now reached the age of majority may be given to him only if it has been proved that he has full legal capacity.

when a person is born with a personal condition, he or she has legal rights, but to exercise those rights, he or she must do in accordance with the rules prescribed by law. As for contracts or civil juristic acts under the laws of the three countries, the criterion of competence is considered a priority. Thereby, in order to have the ability to be civil, it is necessary to be a person of legal age. It also means the completeness of the person in other parts, such as not being an insane person, incompetent person, quasi-incompetent person, or bankrupt person,

which is outside the scope of study in this thesis. (assuming that the parties are complete and attain legal age only.) Therefore, if considering the contract for the sale of one's own organs, when it turns out that the parties have the legal capacity and are of legal age, they have the right to enter into a sale contract. Moreover, in conjunction with the status of human organs as movable property, as analyzed in the preceding section, humans of legal age are legally entitled to enter into contracts for the sale of their organs.

3. The objectives of the contract:

Table 3: OBJECTIVE OF SALE CONTRACTS

OBJECTIVE OF SALE CONTRACTS		
Thailand (Civil and commercial code)	The Republic of the Philippines (REPUBLIC ACT NO. 386)	Islamic Republic of Iran (Civil code of Iran)
<p>1) Objective of sale contracts -Section 149. Juristic act are voluntary lawful acts, the immediate purpose of which is to establish between persons relations, to create, modify, transfer, preserve or extinguish rights. -Section 150. An act is void if its object is expressly prohibited by law or is impossible, or is contrary to public order or good morals.</p>	<p>1) Objective of sale contracts -Article 1306. The contracting parties may establish such stipulations, clauses, terms and conditions as they may deem convenient, provided they are not contrary to law, morals, good customs, public order, or public policy. (1255a) -Article 1409.</p> <p>The following contracts are nonexistent and void from the beginning: (1) Those whose cause, object or purpose is contrary to law, morals, good customs, public order or public policy;</p>	<p>1) Objective of sale contracts - Article 10. Private contracts shall be binding on those who have signed them, providing they are not contrary to the explicit Provisions of a law. 2) limitation of court's jurisdiction -Article 975. The court cannot enforce foreign laws or private agreements which are contrary to public morals or which may be considered by virtue of injuring the feelings of society or for other reasons, as contrary to public order, notwithstanding the fact that the enforcement of such laws is permissible in principle.</p>

A juristic act or a civil contract under the Thai Civil and Commercial Code must be complete in terms of form, and the competence of the parties, including the contract, must not be against the law, public order, or good morals. If the contract is made as a contract with an objective prohibited by law or contrary to public order and good morals, the contract will be void. This is similar to the civil law of the Philippines, which allows parties to contract freely; however, contracts cannot be made against the law, morals, good customs, public order, or public policy. If the contract violates the said terms, the contract is void. The same applies to the civil and commercial laws of Thailand. On the other hand, Iranian law does not specify the rules of the contract, interrupting the public and the good morality of the people; it only stipulates that the contract will not conflict with the law. However, the rules of public order appear in the

terms of the exercise of the right to decide the court case, and as a result, the courts cannot force private agreements that are contrary to public order and good morals to be enforceable.

Researcher's opinion

According to the researcher's information and findings, human organ shortage is one of the primary determinants of both voluntary and involuntary organ trading. However, organ trading is still illegal nowadays when considering a comparative study of the legal principles and laws of Thailand, the Philippines, and Iran. Even though there is no law to prescribe that the sale of organs is illegal in each country and there is no court judgment to define social norms, in Thailand there is a high probability that the court will adjudicate that the contract for human organ sale is contrary to public order and good morals. While the Philippines does not have a law banning the sale of human organs, the government is utterly opposed to organ trading (Ma. Teresa Montemayor, 2022). Finally, in Iran, the sale of human organs is classified as a special form of contract known as an "on-reward contract," which differs from the contract of sale, while the sale of organs is likewise opposed. All of this makes the sale of human organs highly likely to be considered illegal in each country.

Decidedly, the researcher has a different opinion because the researcher views that the problems related to human organ trade, shortage of human organs, time spent waiting for organs to be transplanted, mutilation, extortion of organs, or human trafficking for organs also include preventing and reducing problems and dangers to life and health that may arise from substandard medical procedures in the black market of organ trafficking. Those need to be addressed critically by allowing the legal trading of organs, provided they are properly regulated. Especially if it is the sale of human organs for medical purposes to preserve human life, hence, there is no deniable reason why the sale of human organs should have become legalized under the control of effective law and enforcement.

Conclusion

After researching this thesis, it answers the research hypothesis that Thailand does not have laws directly related to the sale of human organs from individuals who are voluntary and of legal age. In addition, the law on trading under the Thai Civil and Commercial Code does not cover human organs, which have the status of property when they are completely separated from the human body. For this reason, the sale of human organs is possible and should be permitted. This assumption was inconclusive at the time of this thesis study. The researcher studied through the four research objectives as follows:

1. Study the problems, circumstances, theories, and principles related to the background on sale contracts and human organs trade.
2. Study Sale Contracts on Human Organs in Thailand, the Republic of the Philippines, and the Islamic Republic of Iran.
3. Comparative analysis of contracts for the purchase and sale of human organs according to the Thai Civil and Commercial Code, the Civil Code of the Republic of the Philippines, and the Civil Code of the Islamic Republic of Iran.
4. Give recommendations for domestic law by providing observations on the topic "Should the sale of human organs be permitted?" and giving suggestions to control and supervise when selling organs is legal.

From the study, in the first part of the conclusion about problems and situations related to organ trading, it is discovered that: In fact, the shortage of organs for transplantation is the main factor causing all forms of organ trading, whether it be a voluntary sale and buy, forcibly taking organs, human trafficking, or organ theft, etc. Human organ trading in any form was condemned by the international community and declared unlawful. However, the problem of trading human organs was not solved and also resulted in clandestine trading. The removal of organs from the human body is often carried out illegally (on the black market) and can lead to long-term health consequences and, in serious cases, death during organ removal.

Therefore, the researchers think that organ trading should be brought "to light" and legalized. It also needs to be implemented through standardized medical services to address organ shortages and reduce the risk of health problems and mortality, as well as prevent and reduce the problem of smuggling organs, which may be forced and violently removed from the human body.

The second part is a conclusion about the law: the study found that the sale of human organs under the Civil and Commercial Code has legal issues that are: 1) the definition of property and non-commercial property; 2) the capacity of the parties to the sale contract; and 3) the sale contract and the purpose of the sale contract.

The first legal issue on the definition of property and non-commercial property: found that a human organ, when completely separated from the human body, takes on the status of a tangible object under Section 137, which has value and is appropriated, resulting in that human organ being considered a legal property under Section 138. In addition, considering that organs that are completely separated from the body can be moved from place to place, human organs are classified as movable properties under Section 140. Finally, when considering the definition of non-commercial property, which states that non-commercial property is a property that cannot be taken or property that is prohibited by law from being transferred, therefore, human organs are not within the scope of non-commercial property according to Thai law under Section 143, which results in human organs as assets that can be objects of contracts by the Civil and Commercial Code of Thailand.

The second legal issue is related to the capacity of the parties to the sales contract: found that owing to the Civil and Commercial Code, in order for a person to do a juristic act, it is necessary to be a person with the ability as required by law; if that person is *sui juris* and complete and is not restricted by law due to being insane, an incompetent person, or a quasi-incompetent person, they shall have the power to do legal acts under civil and commercial law. Consequently, since the contract of sale is considered a civil act, anybody who is *sui juris* and whose capacity is not limited by law has the right to enter into a sales contract.

Final legal issues in regard to sales contracts and the objective of sales contracts: found that the Thai Civil and Commercial Code is not clearly defined the definition of public order and good morals. The study found that this issue cannot be clearly defined because the principles of Public order and morals are always changing depending on social conditions, the economy, social beliefs, government policies, and others that must be considered during that time. This, if considered in the modern era that has studied this thesis on the sale of human organs, whether in a voluntary form or being forced to intimidate, is not accepted at a world-class level that is against all forms of organ trade. However, when humans have ownership of themselves and can do anything with their own bodies, when they enter into a legitimate sales contract, considering the sale of organs for medical purposes to a person who urgently needs

organs and cannot wait for an organ from the donation. If it is necessary to save human lives, will it be against public order or not? In this section, it is still an observation that the researcher would like to leave this question for research when social conditions and other factors affecting the principles of public order change over time.

From the legal issues that were taken into consideration, it could be concluded that, at present, the sale of human organs cannot be done legally in accordance with Thai civil and commercial law. Although human organs are legally tradable assets, the parties enter into a contract in accordance with the law on the right to enter into a civil contract. But the tendency for trade in human organs to be improper and socially opposed is greater. Even if there is no clear law on this matter and there is no ruling or judgment used to determine the legal guidelines of Thailand on this matter, at this time it is enough to infer from studies and global trends that oppose the sale of human organs that contracts for the sale of human organs may be void because the contract is intended to be contrary to public order and good morals.

Suggestion

From the study, the researchers concluded that selling organs, even if it is a "Necessary evil" would still be viewed as evil and therefore should be properly controlled. The researcher will divide the recommendation into two parts. In addition, the researcher would like to make observations for future research as follows.

Part One: Legal Recommendations

Legal issues regarding the definition of property and non-commercial property: Because the Civil and Commercial Code of Thailand, in terms of the definition and classification of property, is clearly defined and can be applied comprehensively to the interpretation of human organs, The researcher considers that during this period, this part does not need to be adjusted, changed, or corrected.

Legal issues regarding the capacity of the counterparty in the contract: In terms of the ability of the counterparty to enter into a general sale and purchase agreement, the researcher views that, according to the civil and commercial law of Thailand, the criteria are appropriate. However, if it is an organ sale contract, additional requirements, and criteria are required for the sale of human organs. For example, the person needs to have the status of a patient or a relative of a patient whose doctor considers an organ transplant necessary as soon as possible. and cannot wait to receive organs from the donation or have a certificate as a person who can be an organ seller, etc. It is defined as the qualification of a person who can enter into an organ purchase contract.

Legal issues regarding the objective of the sales contract: Because the principles of public order and good morals are not fixed. Being constantly changing and tied to the discretion of the judges, it is a rule that has no fixed norms. The researcher, therefore, thinks that the principles of public order and good morals should be made more "concrete" by defining clear definitions and defining boundaries that are consistent with Thai social conditions. However, in order to achieve a definitive answer, it is necessary to study the underlying principles and conduct further research.

Part Two: Policy Recommendations

In the future, when organ trading can be done legally (currently not possible), it should be regulated and supervised by: in the opinion of the researcher, selling organs is even A "necessary evil" is still viewed as evil during this time and therefore should be properly regulated.

Establish an organization to control and supervise, which may arise from the cooperation of the public and private sectors. Non-Governmental Organizations (NGOs) have the duty to operate and operate independently in order to achieve fast, convenient operations and to be able to receive services and allocations according to the patient's needs. While government agencies have a duty to check and balance their power to prevent corruption, unreasonable profit, or unreasonable exploitation of organ sales.

Establish clear guidelines and criteria suitable for the legal sale of organs, for example, requirements for eligible urgent patients for allowing to buy an organ, requirements for persons wishing to sell organs, execution methods, requirements, pricing methods, and price ceiling, and measures to take care of and follow up on the principle of organ cutting to monitor symptoms and take care of the health of both buyers and sellers, etc.

Determine penalties in cases of violation or fraud for the purpose of profit or seeking benefits from the duty for which one is responsible by imposing civil, criminal, and professional penalties for the person concerned. which should cover buyers, sellers, medical personnel, and all other people involved, such as brokers and private sector personnel in various processes, including relevant government officials.

Part Three: Observations for Future Research

The researcher would like to make observations and guidelines for resolving as follows: legal issues in regard to the objective of sales contracts: From all that the researcher has presented, first of all, the researcher would like to make observations and then make recommendations.

To determine whether the sale of human organs by a voluntary and competent person is a sale whose purpose is contrary to public order and good morals. Considering the social situation and the reaction of the world, it is undeniable that there is a tendency towards resistance, which results in even the voluntary sale of organs being contrary to public order and morals.

For the Thai civil and commercial code, contracts with the objective of violating public order and good morals are void. However, the researcher would like to point out that in a situation where there is a global shortage of organs for transplantation, a large number of patients die while waiting for their organs. If organ sales are legal, it could result in increased patient survival.

Therefore, the researcher would like to remark on this issue that in the near future, if the sale of human organs takes place for urgent medical purposes, such as for critically ill patients who do not have much time to live and can extend their lives through organ transplants, can the sale and purchase of organs in such cases be done legally under civil law?

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