

## THE CRIMINAL LAW'S FUNCTIONALIZATION AGAINST THE TRAFFICKING OF KIDNEYS FOR TRANSPLANT PURPOSES

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### **Abstract**

*Kidney transplant is a complete therapy for people with terminal renal failure. The number of cases of terminal renal failure was not proportional to the available donors. Due to the lack of kidney donors, some people take advantage of this opportunity by commercializing their kidneys. In Indonesia's laws and regulations, it is clear that there is a prohibition on the trafficking of organs and or tissues for transplant purposes. Until now, cases of buying and selling of body organs or tissues have never reached the Court. Therefore, it is necessary to formulate a formulation regulating legal protection for all parties concerned. This article aims to analyze the criminal law's functionalization against the trafficking of kidneys for transplant purposes. The research was carried out with a normative juridical approach in a formulated policy structure, namely reviewing and analyzing regulations both in the Criminal Code including the draft criminal law of 2005 as an *ius constituendum* and outside the Criminal Code, specifically regarding the regulation of trade in organs or tissues for transplant purposes. The result of this research is the functionalization of criminal law in the implementation of kidney trade to benefit transplants. Criminal law enforcement is to make criminal law functioned by legally processing the facts of organ trafficking in the field. This repressive action is intended to create a deterrent effect and is a long-term preventive measure so that it is hoped that there will be no more cases of trafficking in organs in the future. It is necessary to understand that the threat of punishment must remain an *ultimum remedium*, and is enforced if social control is not yet effective.*

**Keywords:** *Transplantation, Kidney Trafficking, Policy Formulation*

### **A. INTRODUCTION**

In the Preamble to the 1945 Constitution, the national objectives of the Indonesian nation are stated, namely: forming a state government of Indonesia that protects the entire Indonesian country, advancing public welfare, educating the nation's life and participating in implementing world order based on independence, eternal peace and social justice based on *Pancasila*.<sup>1</sup>

The birth of Indonesian law coincided with the advent of the Republic of Indonesia (NKRI) on August 17, 1945, when the Indonesian nation declared its independence. At the time of the proclamation, the Republic of Indonesia was officially born, covering its territory from Sabang until Merauke. The Unitary State of the Republic of Indonesia stands on the 1945

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1 The preamble of Constitution 1945, paragraph 2.

Constitution in which *Pancasila* is the basis of its philosophy. Then on August 18, 1945, the 1945 Constitution was enacted. The proclamation was significant to make Indonesia an independent and sovereign country and establish Indonesian law where the 1945 Constitution is the basis of all laws in force in the Republic of Indonesia. With the existence of the 1945 Constitution, it is written about the main lines of Indonesian law.<sup>2</sup>

Human development generally aims for the welfare of society which is carried out sustainably. In the 1945 Constitution as the basis of the Republic of Indonesia (after the I to IV amendments), the provisions on Human Rights (HAM) are listed in Articles 28 A to 28 J.<sup>3</sup> From a human rights perspective, the health aspect has received particular attention in contemporary historical developments. Article 28 and 34 of the 1945 Constitution have stipulated, among others: everyone has the right to live and has the right to defend his life and life; every child has the right to survive, grow and develop; everyone has the right to establish themselves through the fulfilment of their basic needs, to improve their quality of life; Every person has the right to live in physical and spiritual prosperity, to have a place to live and to have a good and healthy living environment and to have the right to obtain health services; the state is responsible for the provision of health service facilities.

There are several health problems from the perspective of human rights in Indonesia that stand out, including disparities in health status and access to health services between various regions and between different socio-economic strata; cloning and genetic medicine technology; health experiments on the human body; organ transplants, generally of live human origin and euthanasia.<sup>4</sup>

Kidney transplantation is a complete therapy (Total Renal Replacement Therapy) in patients with GGT or end-stage renal failure because kidney function is only 5% - 15% and cannot be treated with conservative treatment (with diet and medication). Both kidneys were tiny and dense in size. At this stage, the patient needs therapy by replacing the damaged kidney with dialysis. Unfortunately, it is not possible to be analyzed for the complete replacement of kidney function. The kidney function as an organ for the formation of red blood cells and bone metabolism cannot be replaced by dialysis, which is why kidney transplantation is the ideal and most appropriate choice at this time.<sup>5</sup>

Many studies related to the legal action of kidney trade for transplantation have been carried out, including Frengky Andri Putra,<sup>6</sup> who

2 Yulies Tiena Masriani, *Pengantar Hukum Indonesia*, Sinar Grafika, Jakarta, 2004, page 8

3 Muladi, *Hak Asasi Manusia, Hakekat, Konsep & Implikasinya dalam Perspektif Hukum & Masyarakat*, Refika Aditama, Bandung, 2005, page 3

4 Message from the Indonesian Minister of Health at a Seminar and Workshop on Health and Human Rights in Jakarta 19 to 20 March 2003.

5 Speech from Tunggul D. Situmorang (Direktur RS PGI Cikini, Jakarta Pusat) in *4-Anniversary of Indonesia Kidney Care Club* in Auditorium RS PGI Cikini, Saturday, 31 May 2008.

6 Frengky Andri Putra, *Analisis Yuridis Perundang-Undangan Terkait Tindak Pidana Jual Beli Organ Tubuh Untuk Kepentingan Transplantasi Organ Ginjal (Studi Perbandingan Antara*

researched the crime of buying and selling organs for transplantation. The results of this study are the development of organ transplants, especially kidney organs, so it is necessary to have special regulations outside the health law in dealing with the transplantation of organs and human tissues to prevent criminal acts of trafficking in human organs. Regulations in Indonesia do not yet have rules regarding organ transplantation by living donors outside of kinship, and there is no legal protection for donors. Furthermore, research conducted by Ruslan Abdul Gani and Yudi Armansyah<sup>7</sup> tries to reconstruct the issue of law enforcement related to cases of trafficking in human organs in Indonesia. Although, the law regarding the prohibition of buying and selling or transplanting organs illegally has been issued by the government. But the facts do not make organized crime disappear. Therefore, it is necessary to have a new reformulation to get to the root of the problem. Then, the research conducted by Ferian Alfrianto<sup>8</sup> aims to find out how the kidney trade for the benefit of transplantation occurs and how the criminal sanctions apply to the kidney trade for the use of transplantation. Furthermore, research on transplantation and buying and selling human organs is seen from the perspective of legislation in Indonesia, which was carried out by Bayu Purnomo Setyawan and Danang Agus Setiawan Untung Saputra.<sup>9</sup> This study indicates that the implementation and law enforcement of transplantation and the sale and purchase of human organs is still not or less effective because there are still legal violations committed by people who buy and sell human organs for transplants for various reasons. Then the research was conducted by Romi Saputra,<sup>10</sup> who concluded that Indonesia should make further rules regarding the criminal act of trafficking in human organs in the form of laws and regulations such as the law on trafficking in human organs and sanctions by providing appropriate sanctions against these crimes. Lastly, research was conducted by Raffaello A. Mandagi, Roy R. Lembong, Max Sepang.<sup>11</sup> This study is to find out how the regulation of the prohibition of buying and selling human organs in the legislation in Indonesia and how

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Indonesia dengan Philipina), *Jurnal Hukum: Sarjana Ilmu Hukum Universitas Brawijaya*, 2013, page. 1-18.

- 7 Ruslan Abdul Gani and Yudi Armansyah, Penegakan Hukum Kasus Jual Beli Organ Tubuh Di Indonesia: Model Integratif Dengan Pendekatan Hukum Islam & UU Kesehatan, *FENOMENA*, Vol.8, No.2, 2016, page.159-180.
- 8 Ferian Alfrianto, Pemberlakuan Sanksi Pidana Terhadap Perdagangan Ginjal Untuk Kepentingan Transplantasi, *Lex Crimen*, Vol.IV, No.5, July 2015, page.79-85.
- 9 Bayu Purnomo Setyawan and Danang Agus Setiawan Untung Saputra, Analisis Yuridis Normatif Terkait Transplantasi & Jual Beli Organ Tubuh Manusia Ditinjau Dari Peraturan Perundang-Undangan, *Seminar Nasional Hasil Penelitian (SNHP)-VII Lembaga Penelitian & Pengabdian Kepada Masyarakat Universitas PGRI Semarang*, 2017, page.22-32.
- 10 Romi Saputra, Pertanggungjawaban Pidana Terhadap Tindak Pidana Perdagangan Organ Tubuh Manusia Untuk Kepentingan Transplantasi Organ Dalam Hukum Pidana Indonesia, *JOM Fakultas Hukum*, Vol.III, No.2, October 2016, page.1-15.
- 11 Raffaello A. Mandagi, Roy R. Lembong and Max Sepang, *Prospek Formulasi Hukum Pidana Dalam Pelarangan Jual Beli Organ Tubuh Manusia Untuk Kesehatan Demi Kelangsungan Hidup*, *Lex Crimen*, Vol.X, No.6, May 2021, page.176-186.

the prospects for the formulation of criminal law against the practice of buying and selling human organs for health for survival.

The difference between previous studies and this research is that this study tries to provide a new perspective in regulating legislation that allows particular kidney trade for patients with thermal kidney failure. In the laws and regulations in Indonesia, it is clear that there is a prohibition on the business in organs or tissues for transplant purposes. Until now, there has never been a case of buying and selling organs or tissues before the Court. Therefore it is necessary to formulate a formulation that regulates legal protection for all parties involved. This problem arises due to the increasing number of cases of terminal renal failure that are not comparable to available donors. Due to the lack of kidney donors, some people take advantage of this opportunity by commercializing their kidneys. Thus, this article aims to analyze the functionalization of criminal law against trafficking in kidneys for transplant purposes.

## B. RESEARCH METHODS

Types of Research In this study, a normative juridical legal research is used, the namely legal analysis that focuses on positive legal norms (law in book) in the form of statutory regulations as support.<sup>12</sup> Sources of data used in this normative legal research are secondary data, consisting of: a) primary traditional materials; in the form of statutory regulations whose order is in accordance with the procedures for the formation of applicable statutory regulations (positive law), among others; The 1945 Constitution, the Criminal Code (KUHP), Act No. 21 of 2007 concerning the Eradication of the Crime of Trafficking in Persons, Act No. 36 of 2009 concerning Health, Government Regulation Number 18 of 1981 concerning Post-mortem clinical and anatomical post-mortem and transplanting of tools and or human body tissue, Minister of Health Regulation Number 38 of 2016 concerning Organ Transplantation; b) Secondary Legal Materials Secondary legal materials; is a traditional material that includes legal facts, doctrines, legal principles and legal opinions in literature, journals, research results, documents, newspapers, internet, and scientific magazines related to the object under study; c) Tertiary Legal Materials; In the form of dictionaries about common languages and Indonesian which are used to complement the analysis of primary legal materials and secondary standard materials.

This research is normative legal research or literature law research, namely research conducted by examining library materials or secondary data alone.<sup>13</sup> This research is a normative study, which primarily examines the legal norms in positive law. Data collection was carried out utilizing normative legal analysis. Namely, by studying the laws and regulations, literature, previous research and interviews with several experts can be used to compare primary data in research. Such as interviews with several donors

12 Soerjono Soekanto, *Pengantar Penelitian Hukum*, UI Press, Jakarta, 1984.

13 Bambang Sunggono, *Metodologi Penelitian Hukum*, PT Raja Grafindo Persada, Jakarta, 2001.

and donor recipients, doctors, and the police regarding the object under study to obtain additional secondary data<sup>14</sup>.

This research data analysis technique uses qualitative research, namely research that intends to understand the phenomena experienced by research subjects such as behaviour, perception, motivation, action, etc. holistically and using descriptions in the form of words and language, in a particular natural context. And by utilizing various natural methods.<sup>15</sup> This research is presented and analyzed qualitatively, namely the analysis of data obtained based on information obtained from literature, articles, and websites so that the data obtained are shown in logical sentences to receive answers to the problems studied, using the deductive thinking method, namely legal reasoning that starts from the general proportion whose truth has been known and a conclusion (new knowledge) of a specific character is obtained.<sup>16</sup>

## C. RESULTS AND DISCUSSIONS

### 1. Functionalization of Criminal Law in the Context of the Rule of Law

As a positive direction, *Pancasila* law grows from within or is made by the Indonesian people to regulate and create a just order in social life in Indonesia. Therefore, the *Pancasila* Law can also be called the Indonesian (National) Law. The process of forming favourable legal regulations can be done through community members' real actions in carrying out their daily lives. In this case, an unwritten law was created. The formation of legal regulations can also occur deliberately through official decisions, jurisprudence and legislation. The product of the whole process of developing favourable legal regulations embodies legal order.<sup>17</sup> One of the essences of the rule of law is the appearance of the law's fundamental role as a central point in state and social life towards a just and prosperous life. For this reason, the main components of the legal system need to be strengthened as the main pillars in law enforcement.<sup>18</sup>

Theoretically, the concept of the rule of law adopted by Indonesia is not in a formal dimension, but in a material sense or commonly used in terms of the welfare state or prosperity state. Therefore, in line with the above context, the goal to be achieved by the Indonesian state is the creation of a just and prosperous society both spiritually and materially

14 Ong Argo Victoria & Myska, Doctor's Contributions in Transportation Monitoring During COVID-19 Pandemic, *KnE Social Sciences*, Dubai-Uni Emirates Arab (UEA), Vol. 5 No. 1, 2021, page. 598–618.

15 Soekanto and Mamudji, *Penelitian Hukum Normatif*, Rajawali Press, Jakarta, 2006, page. 6

16 Moleong. L. J., *Metodologi Penelitian Kualitatif*. Rosda, Bandung, 2007

17 Speech from Tunggul D. Situmorang (Direktur RS PGI Cikini, Jakarta Pusat) in *4-Anniversary of Indonesia Kidney Care Club* in Auditorium RS PGI Cikini, Saturday, 31 May 2008.

18 T. Subarsyah Sumadikara, *Penegakan Hukum (Sebuah Pendekatan Politik Hukum & Politik Kriminal)*, Kenvana Utama, 2010, page 16.

based on *Pancasila* so that it is also called the rule of law with independent characteristics.<sup>19</sup>

Concretely, this independence is studied from applying the concept and pattern of the rule of law in general according to the conditions of the Indonesian nation with the standard being *Pancasila*. Therefore, Indonesia's state is a state of law (*rechtstaat*) based on *Pancasila* and the 1945 Constitution. Sjachran Basah states that: "..... *the quo constitutional state is a state of prosperity based on laws based on Pancasila, both as the basis of the state and as a source of direction by rejecting absolutism in all forms*"<sup>20</sup>.

The commitment of the Indonesian state itself to protect human rights can be found in Article 28A to Article 28J of the 1945 Constitution and its organic laws (Act No. 39 of 1999 concerning Human Rights, Act No. 26 of 2000 concerning Human Rights Courts. Human) and the provisions of Article 28I paragraph (5) of the second amendment of the 1945 Constitution clearly states that upholding and protecting human rights is following the principles of a democratic rule of law.<sup>21</sup>

Besides, in the rule of law, everyone is treated equally before the law (equality before the law). Soenawar Soekawati argued that: The definitive definition of the principle of equality before the law in the meaning of *Pancasila* has differences from the principles adhered to by Western democratic countries, namely that equality of position and freedom in Indonesia is responsible freedom.

Criminal law's functionalization can be interpreted as an effort to make criminal law function, operate or work and be realized concretely. So the term functionalization of criminal law can be identified with the term operationalization or concretization of criminal law which is essentially the same as the definition of criminal law enforcement. Starting from this definition, the functionalization of criminal law such as the functionalization or process of law enforcement generally involves at least three interrelated factors: statutory factors, law enforcement or law enforcement factors and legal awareness factors. The division of these three factors can be related to the division of three components of the legal system, a namely legal substance, legal structure and traditional culture.<sup>22</sup>

In Article 27 paragraph (1) of the 1945 Constitution, it is also implied that law enforcement is not merely the duty of the law enforcement apparatus, but has become the obligation and commitment of all components of the nation. This commitment can be consistently

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19 Lilik Mulyadi, *Pembalikan Beban Pembuktian Tindak Pidana Korupsi*, PT Alumni, Bandung, 2007, page 64

20 Sjachran Basah, *Perlindungan Hukum Terhadap Sikap Tindak Administrasi Negara*, PT Alumni, Bandung, 1992 page 3

21 Lilik Mulyadi, *Pembalikan Beban Pembuktian Tindak Pidana Korupsi*, PT Alumni, Bandung, 2007, page 37-38

22 Muladi & Barda Nawawi Arief, *Bunga Rampai Hukum Pidana*, Alumni, Bandung, 2007, page. 168-169

implemented, especially when the Indonesian government tries to rise to overcome the multidimensional crisis. The role of law is to regulate people's lives and secure the course of national development and its results. Therefore, law enforcement must be carried out firmly and consistently because legal uncertainty and a decline in legal authority will give birth to a legal crisis that impacts the disruption of political, economic, social, cultural, defence, national and state security.<sup>23</sup>

Law enforcement is a part of all life activities that are essentially interactions between various human behaviours and represent different interests within a framework of rules mutually agreed upon in an applicable regulation, both in writing and writing. Joint arrangements in writing contained in a statutory product are intended to regulate the community, nation, and state's life order so that it is more orderly and has legal certainty.<sup>24</sup> In a micro sense, law enforcement is limited to judicial practice situations, such as the process of investigation, investigation, prosecution and implementation of court decisions that have permanent legal force.<sup>25</sup>

The need for crime prevention efforts to be integrated with the overall social policy and national development planning, strategic problems that must be addressed are problems or social conditions directly leading to or become the proliferation of crime (social defence planning). In consideration of the resolution regarding crime trends and crime prevention strategies, it is stated, among others: a) That the problem of crime hinders progress towards achieving a quality of life that is appropriate for all people; b) That a crime prevention strategy must be based on eliminating the causes and conditions that give rise to crime; c) Whereas the leading causes of corruption in many countries are social inequality, racial discrimination and national discrimination, low living standards, unemployment and illiteracy (ignorance) among large groups of the population.<sup>26</sup>

## 2. Factors Affecting the Functionalization of Criminal Law

The statutory factor that should be examined is the legislative policy factor. Reviewing this issue is very important because the legislative policy is the most strategic initial stage of the overall planning process for the functionalization of criminal law or the operation of criminal law enforcement. The legislative policy stage is the formulation stage which forms the basis, foundation and guidelines for functionalization, namely the application stage and the execution stage. Therefore, the formulation stage can also be called the legislative policy

23 D. Veronica Komalasari, (1), *Hukum & Etika Dalam Praktek Dokter*, Pustaka Sinar Harapan, Jakarta, 1989, page 2

24 Djoko Prakoso, *Masalah Pemberian Pidana dalam Teori & Praktek Peradilan*, Ghalia Indonesia, Jakarta, 1984.

25 Dwidja Priyatno & Muladi, *Pertanggungjawaban Korporasi Dalam Hukum Pidana*, Sekolah Tinggi Hukum Bandung, Bandung, 1991.

26 H. Ridwan Syahrani, *Rangkuman Intisari Ilmu Hukum*, Citra Aditya Bakti, Bandung, 1999.

stage, the law enforcement stage in abstract by the legislative body. The application stage is implementing criminal law by law enforcement officials, starting from the police to the courts. This stage can also be called the judicial policy stage. The execution stage is concretely implementing criminal law by the illegal executing apparatus. This stage can be referred to as the executive or administrative policy stage.<sup>27</sup>

In the material sense, laws are written regulations that are generally accepted and made by the legal central and regional authorities. Accordingly, the Law includes a) Central Regulations that apply to all citizens or a particular group or generally applicable in parts of the country; b) Local regulations that only apply in one place or region.<sup>28</sup>

There are several principles so that the Law is effective, these principles are: a) The Law is not retroactive; means that the Law may only be applied to events mentioned in the Law after the Law is declared effective; b) Laws made by higher authorities have a higher position (*lex superior derogat legi inferiori*); c) Laws of an exceptional nature override laws of a general nature (*lex specialis derogat legi generalis*); d) The Law that was in effect recently cancels the Law that was in effect earlier (*lex posterior derogat legi priori*); e) The Law is inviolable; f) The Law is a means to achieve spiritual and material welfare for both society and individuals.<sup>29</sup>

The leadership of law enforcement officers is very much determined by the consistent leader's attitude, has the commitment, and always has competence in tackling criminal acts. In addition to professional abilities, no less important is the form (performance) of law enforcement officials who are clean and authoritative not to abuse their authority.<sup>30</sup> The term law enforcer is very broad because it includes those directly or indirectly involved in law enforcement. Law enforcers referred to here are involved in the fields of "law enforcement" and "peace maintenance", which includes those who work in the judiciary, police, lawyers and prisons.<sup>31</sup>

Sociologically, every law enforcer has a position (status) and a role. A particular function can be translated into the following elements: 1) The ideal role; 2) The expected role; 3) Perceived roles; 4) actual role.<sup>32</sup>

Fostering public legal awareness by law enforcers can include the following ways: 1) Issue functions, duties, powers and authorities of

27 Is. Heru Permana, *Politik Kriminal*, Universitas Atma Jaya, Yogyakarta, 2007.

28 Soerjono Soekanto, *Faktor-faktor yang Mempengaruhi Penegakan Hukum*, PT RajaGrafindo Persada, Jakarta, 2002, page. 7

29 Peter Hoefnagels, *The Other Side of Criminology*, Kluwer-Deventer, Holland, 1973

30 Siswanto Sunarso, *Wawasan Penegakan Hukum di Indonesia*, PT Citra Aditya Bakti, Bandung, 2005, page 100.

31 Hermien Hadiati Koeswadji, *Hukum Kedokteran (Studi tentang Hubungan Hukum dalam mana Dokter Sebagai Salah Satu Pihak)* Penerbit Citra Aditya Bakti, Bandung 1998.

32 Mochtar Kusumaatmadja, *Pemantapan Cita Hukum & Asas-asas Hukum Nasional di Masa Kini & Masa Akan Datang*, Makalah, Jakarta, 1995.



institutions tasked with enforcing the law according to the proportion of their respective scope and is based on a sound cooperation system considering coordination, integration, simplification and synchronization (KISS); 2) Strengthen the attitudes and behaviour of law enforcers and capabilities to improve the image and authority of the law as well as law enforcement officials so that they can become role models for citizens; 3) Additional and equal distribution of law enforcement officers; 4) Completion of administrative operations; 5) Realizing the provisions of Article 4 paragraph (2) of Act No. 14 of 1970 concerning "Basic Provisions of Judicial Power.",<sup>33</sup> (LN 1970 Number 74-TLN Number 2951 reads: justice is carried out, quickly and at low cost. The explanation says that the judiciary must meet the expectations of justice seekers who always want a trial that is fast, precise, fair and quiet cost. Convoluted examinations can lead to years of process, sometimes even having to be continued by the heirs of justice seekers. Low price means the lowest possible price so that the people can bear it. This is all without sacrificing thoroughness in seeking truth and justice 6) Improve the smooth implementation of court decisions, especially in civil cases; 7) Strengthen and improve legal consultation and legal assistance (litigation) for justice seekers who are not or less capable; 8) Confused decisions do not guarantee legal certainty.<sup>34</sup>

### **3. Functionalization of Criminal Law against Trafficking of Human Organs, Especially Kidneys for Transplant Purposes**

It has become a universal consensus that human organs should not be bought and sold even though the operating costs are so expensive that not everyone can afford them. Failure to increase the supply of organs will lead to continued illicit trade, in which the poor sell their parts to the rich.<sup>35</sup> Transplantation of organs and or human body tissue is a very beneficial medical procedure for severe organ disorders. Transplantation is a replacement therapy (alternative) which is the best effort to help patients with organ failure because the results are more satisfactory than conservative treatment. Although organ and or tissue transplants have long been known and are still developing in medicine, this medical procedure cannot be done just like that. It must be considered from a non-medical perspective, namely from a religious, legal, cultural, ethical and moral philosophy. Another obstacle faced by Indonesia today in determining transplant therapy is the limited number of family donors (Living Related Donors = LRD) and donations of corpse organs. Therefore, it requires mutually supportive cooperation between

33 Act No. 14 of 1970 concerning Basic Provisions of Judicial Power is no longer valid and has been replaced by Act No. 4 of 2004 concerning Judicial Power (LN 2004-8, TLN 4358) revokes Act No. 14 of 1970-74. The last one was promulgated in 2009 Number 48 concerning Judicial Power and repealed Act No. 4 of 2004.

34 Sjachran Basah, *Tiga Tulisan Tentang Hukum*, Armico, Bandung, 1986, page 11-13

35 R. Valentina Sagala & Ellin Rozana, *Memberantas Trafiking Perempuan & Anak*, Institut Perempuan, Bandung, 2007.

relevant experts (law, medicine, sociology, religious leaders, community leaders) with the government and the private sector.<sup>36</sup>

Registration for donations varies from country to country. Still, in many parts of the world, organ shortages are caused by the family refusing to provide the deceased's organs even though the dead wants to donate organs.<sup>37</sup> One of the solutions to overcome the shortage of organs is an opt-out system. In this system, all citizens are considered to be donating their organs after death unless the person concerned registers not to donate their organs. In contrast to the opt-in system, a system in which a person registers to donate organs after death, the family is not against the decision. Countries that run the opt-out system are Austria, Argentina, Belgium and Spain.<sup>38</sup>

To get donors quickly, the families of patients who need transplants go to transplant tourism, often used for illegal organ sales. In 10 cases of transplants, 1 case of transplantation went to transplant tourism to get organs illegally. One of the destination countries for transplant tourism in China is China does not recognize any law violation. China allows the harvesting of organs from prisoners who have already been executed or will enable clinics to collect organs from victims of traffic accidents. China is precisely the first to issue a regulation with banning trafficking in human organs. People who need a transplant can go to other places, for example, to Pakistan. The Lancet cites that in poor villages, hardly anyone has two kidneys. As long as the demand for organs exceeds the supply, the punishment will be ineffective, and the illicit sale of organs will continue in secret.<sup>39</sup>

Patients with kidney failure and their families creatively find ways to get donors, in various ways, including making requests personally on television or radio, registering options related to transplantation and even sending letters to their friends or anyone via e-mail, some even go straight to a medical tourist spot in the hope of getting a donor soon.<sup>40</sup>

A criminal act means an act for which the perpetrator is subject to criminal penalties. Because of the Criminal Code, the subject of a criminal act is a human being as a person.<sup>41</sup> Criminal elements consist of: a) Subjective elements, namely the actions of a person which cause consequences that are not desired by law. This subjective element gives priority to actors who can consist of one person or several people; b) The objective part, namely an action or action against the law and causes

36 M. Jusuf Hanafiah & Amri Amir, *Etika Kedokteran & Hukum Kesehatan*, Penerbit Buku Kedokteran EGC, Edition- 3, 1999, page 111.

37 Wila Chandrawila Supriadi, *Hukum Kedokteran*, CV. Mandar Maju, Bandung, 2001, page 22

38 R. Valentina Sagala & Ellin Rozana, *Memberantas Trafiking Perempuan & Anak*, Institut Perempuan, Bandung, 2007.

39 Subekti & Tjitrosudibio, *Kitab Undang-Undang Hukum Perdata*, print-36, PT. Pradnya Paramita, Jakarta, 2005.

40 T. Tjahjo Widyasmoro & Muhammad Sulhi, *Selamatkan Kerabat dengan Berbagi Ginjal*, Intisari, No 527

41 Wirjono Prodjodikoro, *Asas-asas Hukum Pidana di Indonesia*, Edition- ketiga, Refika Aditama, Bandung, 2003, page 59.

consequences that are prohibited by the threat of punishment. The main point of the objective element is the action or action.<sup>42</sup>

According to Satochid Kartanegara, the element of offence consists of an objective component and a subjective part. Objective factors are elements that exist outside of humans, namely: 1) An action; 2) A result and 3) Condition (*omstandigheid*). All of these are prohibited and punishable by law. Subjective elements are elements of an act which can be in the form of 1) The ability to be accountable (*toerekeningsvatbaarheid*), and 2) Error (*Schuld*).<sup>43</sup>

Regulations regarding organ transplants are regulated in a) Act No. 23 the Year 2002 in conjunction with Act No. 35 the Year 2014, Articles 47, 84 and Article 85; b) Act No. 21 of 2007 Article 1 number 7 and Article 2, 3, 4, 5, 6 and Article 7; c) Act No. 36 of 2009, Article 64 paragraph (1), (2) and (3), 65 paragraph (1), (2) and (3), 66, 67 section (1) and (2) and Article 192. Article 192 of Act No. 36 of 2009 regulates criminal sanctions; d) Government Regulation No. 18/1981 concerning Clinical Corpse Surgery and Anatomical Corpse Surgery and Transplantation of Human Bodies Tissues.

The Criminal Code draft as a prospect of regulating organ transplants is handled in crimes against the Public Interest point D regarding Crimes in the Health and Pharmacy Sector Article 394. The Draft Criminal Code also clearly discusses the issue of organ transplants and criminal sanctions and fines.<sup>44</sup> Act No. 23 of 2002 in conjunction with Act No. 35 of 2014 concerning Child Protection, Article 47, reads 1) The state, government, families and parents are obliged to protect children from attempts to transplant their organs for other parties; 2) The state, government, family and parents are obliged to protect children from acts; 3) Harvesting of a child's organs or body tissue without paying attention to the child's health, which consists of: a) Buying and selling of the child's organs or tissues, and b) Health research that uses children as research objects without the consent of the parents and does not prioritize the child's best interests.

Article 47 of Act No. 23 of 2002 in conjunction with Act No. 35 of 2014 explains that the obligation of the state, government, family and parents to protect children from taking organs or tissues of children without paying attention to children's health, buying and selling of body organs or tissues children's bodies and health research with the object of research using children. Article 84, reads: Every person who illegally transplants a child's organ or tissue for another party to benefit himself or another person, shall be punished with imprisonment of up to 10 (ten) years or a maximum fine. IDR 200,000,000 (two hundred million rupiah).

Criminal law sanctions have a preventive effect on violations of legal norms. It should also be remembered that one of the functions of

42 Yulis Tiena Masriani, *Pengantar Hukum Indonesia*, Sinar Grafika, Second Printing, Jakarta, 2006

43 Leden Marpaung, *Asas-Teori-Praktik Hukum Pidana*, Sinar Grafika, Jakarta, 2005, page 10.

44 Draft Criminal Code, 2005

criminal law is subsidies, meaning that criminal law should only be implemented if other efforts are unsuccessful, this is a tool of 'social control'.<sup>45</sup> This harsh sanction in criminal law differentiates it from other legal fields. Criminal law deliberately imposes suffering in maintaining the norms recognized in law. Therefore, criminal law can be considered optimum remedial, namely the last remedy if the sanctions or attempts at other law branches do not work or are deemed ineffective. Therefore, its use must be limited, if there are different ways, do not use criminal law.<sup>46</sup>

The problem of criminal law enforcement in general and in Indonesia, in particular, will affect the question of overcoming crime in society. Criminal politics is a rational community effort in tackling crime operationally, which can be implemented either through penal or non-penal means. These two facilities are an inseparable pair. It can even be said that they complement each other in efforts to tackle crime in society.<sup>47</sup> Law is a system, namely a system of norms. Criminal law is part of the legal system or norms system. As a system, criminal law has the general nature of a system. Namely, wholeness has several elements; all elements are interrelated and form a structure.<sup>48</sup>

Criminal law's functionalization can be interpreted as an effort to make criminal law function, operate or work and be realized concretely. So the term functionalization of criminal law can be identified with the term operationalization or concretization of criminal law which is essentially the same as the definition of criminal law enforcement. Starting from this definition, the functionalization of criminal law such as the functionalization or process of law enforcement generally involves at least three interrelated factors: statutory factors, law enforcement or law enforcement factors and legal awareness factors. The division of these three factors can be related to the division of three components of the legal system, a namely legal substance, legal structure and traditional culture.<sup>49</sup>

#### **4. Implementation of Trafficking in Human Organs, Especially Kidneys for Transplantation Purposes**

Kidney transplants in the Philippines are carried out at the Philippine Kidney Center and the National Kidney Institute. The success rate of transplant surgery in the Philippines is very high, attracting Japanese people to carry out organ transplants, especially kidneys in the Philippines. The regulations in the Philippines prohibit the trafficking of

45 Sudarto, *Hukum Pidana I*, Badan Penyediaan Bahan-bahan Kuliah Fakultas Hukum Universitas Diponegoro, Semarang, 1987/ 1988, page 12-13.

46 Soedarto, *Hukum Pidana & Perkembangan Masyarakat*, Sinar Baru, Bandung, 1983.

47 Sudargo Gautama, *Pengertian tentang Negara Hukum*, print-3, Alumni, Bandung, 1983.

48 Ni'matul Huda, *Negara Hukum, Demokrasi & Judicial Review*, Penerbit UII Press, Yogyakarta, 2005.

49 Muladi & Barda Nawawi Arief, *Bunga Rampai Hukum Pidana*, Alumni, Bandung, 2007, page 168-169

organs. Based on the quote from the spokesman for the Philippine Ministry of Health above, this is seen as a purely ethical violation. The Philippine government has formulated a program that regulates compensation and protection for the life of donors, among others, by providing balance and officially donors are not paid and receive free health services.<sup>50</sup>

Kidney transplants (along with kidney prices) are the cheapest in China, even though they are ethically constrained. In this country, agents have sales networks to foreign countries that foster the practice of transplant tourism. Starting on May 1, 2007, China began to limit transplant tourism. Doctors involved in transplant tourism will receive sanctions in the form of suspension from their work. Hospitals that are allowed to carry out transplants must also have a certificate to carry out transplants. Removing organs without donor consent is a criminal offence.

Organ transplantation in America is a medical procedure that has been followed. Organs that are often transplanted are the kidneys, liver, heart, pancreas, cornea, skin, bones and lungs. The organs that are repeatedly transplanted in America are the kidneys and then the cornea. The United States requires adult citizens to sign a donor card or affix the donor's commitment to a driver's license (SIM) application and expect them to donate their organs if they die (opt-out), but in reality, after death, the potential donor's family many do not allow it.<sup>51</sup>

The results of the research conducted by Indrawati Sukardis, coordinator of the Kidney Transplant Team at PGI Cikini Hospital, Jakarta, regarding the location and costs of transplants for post-transplant patients from 1996 to 2006, are as follows: of the 20 post-transplant patients for that year, 15 patients underwent transplantation at home. Domestic hospital (in Indonesia) with details that, ten patients underwent transplants at PGI Cikini Hospital, five people underwent transplants at other hospitals in Indonesia, and the remaining five patients underwent transplants abroad, namely in China Singapore. The kidney transplant team consists of kidney disease specialists, urological surgeons, nutritionists, social workers, coordinator teams, and related specialists. Kidney transplantation in Indonesia is not yet a favourite thing for people with terminal kidney failure. The number of patients is quite large, and this country has entered 31 years since the first transplant was performed at RSCM and RS PGI Cikini in 1977.

In terminal renal failure, renal function decreases, the end products of protein metabolism customarily excreted into the urine accumulate in the blood. Uremia occurs and affects every system of the body. The more waste products pile up. The more severe the symptoms will be. An essential thing in the case of terminal renal failure that

50 R. Valentina Sagala & Ellin Rozana, *Memberantas Trafiking Perempuan & Anak*, Institut Perempuan, Bandung, 2007.

51 Padmo Wahjono, *Indonesia Negara Berdasarkan Atas Hukum*, Penerbit Ghalia Indonesia, Jakarta, 1983.

matters is the prevention program. Kidney failure is mostly the result of modern diseases that tend to afflict modern society. This lifestyle also increased by people with diabetes and hypertension. When a person is exposed to both disorders, there is a 30 per cent risk of developing kidney failure.

It is hoped that a healthy lifestyle, such as exercising every day, can prevent this possibility. It also needs to be supported by a nutritious diet, not fat and balanced nutrition. Meanwhile, adults who have started 40 years do not seem to hesitate to carry out routine checks. Routine health checks can determine the function of organs, including the kidneys. By doing regular health checks, of course, you can detect abnormalities in the body's organs from an early age, including kidney disorders. No matter how rich, if the kidneys fail to carry out their function, be prepared below. Not to frighten, but that is the fact. At least it can trigger people to maintain kidney health, starting now.

Moreover, Chronic Kidney Disease (CKD) is known as "the silent disease". Patients only see the decline in kidney function when the function is only 25 to 10 per cent. Patients with kidney failure or their families believe that kidney failure can lead them to poverty.

## **5. Legal Problems that Arise in Trafficking of Human Organs, Especially Kidneys for Transplant Purposes**

In the Health Law, the Law on the Crime of Trafficking in Persons and the Child Protection Law and Government Regulation Number 18 of 1981 regulates the prohibition of buying and selling of organs both domestically and abroad and criminal sanctions for these acts. In the transplant implementation, there are 4 (four) parties involved, namely: donors, recipients, doctors and hospitals.

The kidney transplant process is a series of actions as follows: a) Determine suitable potential donors and recipient candidates; b) Physical examination of donors; c) Laboratory examination; d) supporting examination; e) Surgery to move the kidney from a healthy donor to the recipient; f) Short-term and long-term anti-rejection drugs. Before doing a transplant, the patient's rights and obligations (donor and recipient) must be fulfilled as well as the treating doctor and the hospital who is competent in handling kidney transplants. If each party's rights and obligations are not fulfilled, there can be legal problems in the future.

Friedman (1972) states that a change in value causes several previously blameless actions and not prosecuted to become criminal acts deemed despicable and need to be punished. When confronted with the current Criminal Code (as the old criminal Law), this is a new offence that cannot be prosecuted at all, even though society views it as an evil act (violation) that deserves to be convicted.<sup>52</sup>

52 Rusli Effendy, Andi Zainal Abidin Farid & Berny C. Manaroinson, *Masalah Kriminalisasi & Dekriminalisasi Dalam Rangka Pembaharuan Hukum Pidana*, delivered at the National Criminal Law Reform Symposium organized by the National Law Development Agency of the

The criminalization policy is a policy determining an act that is not originally a criminal act (not being convicted) becomes a criminal act (an action that can be sentenced). So in essence, the criminalization policy is part of the criminal procedure using the penal law, especially the policy formulation.<sup>53</sup> The existence of trafficking of organs, especially kidneys for transplant purposes, has not been implicitly implied in the Criminal Code. Therefore criminalization is necessary because the act of trafficking in human organs, especially kidneys for transplant purposes, has not been accommodated in the existing criminal law provisions. It is also necessary to consider the existence of clarity regarding the act of trafficking in human organs, especially kidneys for the benefit of transplants in new laws or amendments to existing regulations governing the transplantation of organs or body tissues by synchronizing existing laws, such as the Law on Health, the Law on the Crime of Human Trafficking and the Law on Child Protection and the Government Regulation Number 18 of 1981 concerning Clinical Corpse Surgery.

The regulation of kidney trade for the benefit of future transplants is to regulate legal protection for donors, recipients, doctors who carry out transplants and hospitals so that there is legal certainty. Donors and recipients are obliged to register themselves with kidney donor banks in their area. If you have found a suitable donor, screening is carried out by a nearby hospital (referral hospital or satellite hospital). A preoperative stage is carried out by involving various disciplines. A statement letter states that the kidney to be transplanted does not come from the sale and purchase results signed by the donor and recipient with the knowledge of the team leader of the doctor who will carry out the transplant and sign the informed consent. At that time, donors were included as the Community Health Insurance participants, which received health care insurance after transplantation. It is necessary to prepare about post-transplant donor nutrition so that the life expectancy of the donor increases and prevents post-transplant infection. The Minister of Health and the Indonesian Ulema Council (MUI) can reformulate the body donor, which has not been mutually agreed upon.

#### D. CONCLUSION

Various regulations regarding the prohibition of trafficking in organs already exist. Still, none have regulated legal protection for donors, recipients, doctors who carry out transplants, or hospitals to ensure legal certainty and justice so that each party in carrying out its obligations receives proper legal protection. Criminal law's functionalization in the implementation of kidney trafficking for the benefit of transplants or criminal

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Ministry of Justice in collaboration with the Faculty of Law, Diponegoro University, from 28 to 30 August 1980 in Semarang, page 64.

53 Barda Nawawi Arief, *Pembaharuan Hukum Pidana dalam Perspektif Kajian Perbandingan*, Bandung, Citra Aditya, 2005, page 126. See in Barda Nawawi Arief, *Tindak Pidana Mayantara, Perkembangan Kajian Cyber Crime di Indonesia*, Jakarta, RajaGrafindo Persada, 2006, page90.

law enforcement is to make the criminal law functional by legally processing the facts of organ trafficking that occurs in the field. This repressive action is intended to create a deterrent effect and is a long-term preventive measure so that it is hoped that there will be no more cases of trafficking in organs in the future. It is necessary to understand that the threat of punishment must remain an *ultimum remedium*, and is enforced if social control is not yet effective. Regulation of the kidney trade for the benefit of future transplants is to regulate legal protection for donors, recipients, doctors who carry out transplants and hospitals so that there is legal certainty.

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