



Legalization of Giving Award to Organ Donors in Indonesia (In Perspective of Law No. 36 Year 2009 Jo Minister of Health Act No. 38 Year 2016)

Heri Sugeng Widodo; I Nyoman Nurjaya; Slamet Suhartono

Faculty of Law, Universitas 17 Agustus 1945 Surabaya, Indonesia

<http://dx.doi.org/10.18415/ijmmu.v7i1.1351>

Abstract

Indonesia as a country included in the scope of the United Nations (UN) in making and drafting legislation can adopt international policies. Buying and selling human organs illegally is a threat of crime for humanity or "*Crimes against Humanity*". The UN then formulated the practice of trafficking in human organs carried out by means and purposes illegally constituting transnational crime. Based on the formulation of the *Thereto Protocol*, it is explained that theft, coercion and exploitation in the practice of human trafficking, including human organs are prohibited and must be eradicated. The *Thereto Protocol* does not prohibit the giving of compensation to donors by the recipient and does not specifically regulate the sale and purchase of organs which specifically prevents coercion and exploitation of humans in all its forms, including exploitation or forcible removal or removal of organs, and this is what is said illegal and deserves punishment. Providing compensation/awards to donors in Indonesia should not be prohibited and can be legalized to obtain the right to welfare and health for the loss of organs donated without coercion. The right to obtain welfare is regulated in Article 28H paragraph (1) of the 1945 Constitution of the Republic of Indonesia NRI of the Republic of Indonesia (hereinafter abbreviated to the 1945 Constitution Republic of Indonesia) as follows. Every person has the right to live in physical and spiritual prosperity, to live, and to have a good and healthy environment and to have health services. The awarding of donors to donors as stipulated in Law No. 36 of 2009 in conjunction with Minister of Health Regulation No. 38 of 2016 requires protection, supervision and guarantees of legal certainty from the Indonesian government in the form of a central and or regional transplant commission so that donors are not criminalized as organ sellers as a prohibition on organ trading as stipulated in Article 64 of Regulation No. 36 of 2009.

Keywords: *Organ; Legal; Protection*

A. Preliminary

1. Background Issues

Indonesia as a country¹ included in the scope of the United Nations (UN) in making and drafting legislation can adopt international policies. Buying and selling human organs illegally is a threat of crime

¹ Tomy Michael, Korupsi Dan Mao Tse-Tung, *MIMBAR YUSTITIA Vol. 1 No.1 Juni 2017*, Universitas Darul Ulum Lamongan.

for humanity or "*Crimes against Humanity*". The UN then formulated the practice of trafficking in human organs carried out by means and purposes illegally constituting transnational crime. Based on the formulation of the *Thereto Protocol*, it is explained that theft, coercion and exploitation in the practice of human trafficking, including human organs are prohibited and must be eradicated.

The *Thereto Protocol* does not prohibit the giving of compensation to donors by the recipient and does not specifically regulate the sale and purchase of organs which specifically prevents coercion and exploitation of humans in all its forms, including exploitation or forcible removal or removal of organs, and this is what is said illegal and deserves punishment. Providing compensation/awards to donors in Indonesia should not be prohibited and can be legalized to obtain the right to welfare and health for the loss of organs donated without coercion. The right to obtain welfare is regulated in Article 28H paragraph (1) of the 1945 Constitution of the Republic of Indonesia NRI of the Republic of Indonesia (hereinafter abbreviated to the 1945 Constitution Republic of Indonesia) as follows. Every person has the right to live in physical and spiritual prosperity, to live, and to have a good and healthy environment and to have health services.

Legal protection for welfare and health is one of the objectives of the state listed in the 4th alenia of the opening of the 1945 Constitution of the Republic of Indonesia as a manifestation of the "legal ideal" (*rechtsidee*) that controls the basic laws of the country, both written and unwritten basic laws².

The law³ is an instrument or tool to protect and regulate people's lives in behaving and interacting with the community and the state including legal protection for health as regulated in Regulation Number 36 Year 2009. After the enactment of Regulation Number 36 Year 2009 the welfare of organ donors in obtaining awards/compensation for loss of organs that can interfere with their work and livelihood after organ transplantation becomes unclear, even Article 64 paragraph (3) of Regulation Number 36 Year 2009 regulates the prohibition organ trading as follows, "it is prohibited to trade organs/or body tissue under any pretext".

Words under any pretext emphasize that the granting of compensation and / or profit compensation to donors as a form of appreciation / compensation for loss of organs becomes ambiguous and multiple interpretations and even there is no harmonization with Minister of Health Regulation No. 38 of 2016 which regulates the awarding of organ donors in Indonesia and allows giving awards in the form of compensation.

Giving awards to donors of organ transplants in Indonesia to date has not yet been regulated, even Regulation Number 36 Year 2009 until now there is no Government Regulation and there is no *legal ratio* and List of Problems and there is no academic text of the Law Number 36 of 2009 so that what often occurs is the awarding of organ transplants is criminalized as the sale and purchase of organs aimed at commercialism and the following pros and cons, the pros and cons of providing compensation in the organization of organ transplants must be resolved so that the organization of organ transplants is increasingly clear and supported by laws and regulations. The state as the guarantor (provider), regulator (regulator), and supervisor (umpire) so that the goal of welfare can be achieved. The state must make the rule of law the basis of the actions taken by the state, as well as provide maximum benefit to the people.⁴

The laws and regulations governing the awarding of compensation in the form of compensation are supported by the state for the welfare of the people. Legal objectives are made to achieve three

² Titik Triwulan Tutik, *Konstruksi Hukum Tata Negara Indonesia Pasca Amandemen UUD 1945*, Kencana Prenada Media Group, Jakarta, 2008, p. 61.

³ Law enforcement is an absolute requirement for efforts to create a prosperous Republic of Indonesia. If the law is upheld, the legal objective, specifically legal justice will be achieved, Tomy Michael, *Penegakan Hukum Dalam Otentisitas Katolik (Keniscayaan Yang Kekinian)*, Jurnal Akrab Juara Volume 3 Nomor 3 Edisi Agustus 2018 (64-71), ISSN: 2528-5130, E ISSN: 2620-9861.

⁴ Tunjung Herning Sitabuana, *Berhukum di Indonesia*, Konstitusi Press, Jakarta, 2017, p. 3.

objectives, namely justice⁵, certainty, and expediency⁶. Giving awards in the form of compensation is anything received can be physical or non-physical and must be calculated and given to someone⁷. Efforts to avoid the practice of buying and selling illegal or "under the hand", while strengthening oversight of the quality of organs and has long been discussed and invited comments pros and cons. Martin Wilkinson of the *University of Keele* and Chair of the New Zealand Bioethics Council, said that, "*selling human organs should no longer be a crime, arguing that punishing people for selling their organs violates the right to decide what they should do with the body*" *"People who are desperate to lie down are open to exploitation and lies, organ sellers are exploited and deceived on the black market. The answer to this problem is to regulate the market, not to drive underground"*⁸.

Brian Woods and Kate Blewett believe that "partial legalization" is the only way forward in controlling the following, "We think the world is murky with fraud. But, in reality, you find many people who think it should be legalized. If not, unregulated brokers prone to uncontrolled buying and selling "some kidney specialists in the UK believe that only the legalization of trade will stop seeking profits and minimize risk. This is reflected in the opinion confirmed by Nadey Hakim, a transplant surgeon at *St. Mary's Hospital* in London, and at the same time the President of the *Royal Society Medical Transplant Committee*, urged the government to license the sale of human organs in the UK as a way to erode transplant tourism outside the UK.

The State of Pennsylvania, in 1999 offered US \$ 300 in return for donors. Rewards are not paid in cash, but in the form of funeral costs for donors. Lloyd Ratner, transplant experts do not agree with that method. Ratner views the method as less effective. He emphasized that; "The best solution is to attract the interests of surviving donors. But, this must be accompanied by a greater amount of rewards ". Israel even "jumped" further by making inroads to overcome the problem of the need for organ transplants by giving incentives to people who were willing to become donors. The Israeli Organ Transplant and Donation Center in collaboration with the *Donor Card Institution* requests that payments be made to donors and their families.⁹

The Republic of Indonesia in its positive law regulates the organization of organ transplants voluntarily. But the problem is that it is unclear what the best form is for the process of providing compensation to donors who have voluntarily provided their organs. The government must pay attention to donor health and at the same time make good monitoring efforts.¹⁰ With the increasing number of patients who need transplants, there will certainly be a tendency for the increasing phenomenon of the occurrence of these problems, namely cases of organ transplants with an agreement under the hand that will actually be very detrimental to each other if a denial occurs.

The phenomena that occur and the pros and cons with various reasons for the way of providing compensation in the conduct of organ transplants should be resolved. So that in the future the implementation of organ transplants in Indonesia will be increasingly clear and supported by comprehensive laws and regulations. The state must act at the same time as a guarantor (*provider*), regulator, and supervisor (*umpire*) so that the goal of prospering the people can be achieved. The state

⁵ *In Indonesia in Article 28H paragraph (1) of the Constitution of the Republic of the Republic Indonesia of 1945 (1945 Constitution) explained that anyone has related rights live in prosperity physically and mentally, have a place to live, and get good and healthy environment and have rights in health services. When everyone is interpreted as a person then that person is a legal subject without discriminating his identity*, Tomy Michael, *Bolehkah Jenis Kelamin Dalam Donor?*, *Egalita: Jurnal Kesetaraan dan Keadilan Gender* Volume 14, No 1, Tahun 2019.

⁶ Mahfud MD, *Penegakan Hukum dan Tata Kelola Pemerintahan yang Baik*, Bahan pada acara Seminar Nasional *Saatnya Hati Nurani Bicara*, DPP Partai HANURA, Jakarta, 2009.

⁷ Handoko T. Hani., *Manajemen Personalia dan Sumberdaya Manusia*, BPFE Ed. 2, Yogyakarta, 1987, p. 53.

⁸ <https://www.scribd.com/doc/131725621/Donor-Dan-Transplantasi-Organ-Dirdas-Etika>, accessed February 23, 2018.

⁹ *Ibid.*

¹⁰ Adami Chazawi, *Malpraktik Kedokteran; Tinjauan Norma dan Doktrin Hukum*, Bayumedia Publishing, Malang, 2007, p. 181.

must make the rule of law the basis of the actions taken by the state, as well as provide maximum benefit to the people.¹¹

2. Problem Formulation

Based on the background as described above, the formulation of the problem that will be examined and raised is "How is the arrangement of compensation for donors in transplanting human organs in Indonesia"?

3. Methodology

This study uses normative juridical but not purely, purely interpreted the existence of this organ donor legal interpretation¹². Then the conceptual approach.

B. Discussion

1. Arrangements of Giving Compensation to Donors in the Transplantation of Human Body Organs in Indonesia

Arrangement for the provision of compensation to donors in transplanting human organs in Indonesia is regulated in Minister of Health Regulation No. 38 of 2016 concerning the implementation of organ transplantation, but in its implementation until now the government has not formed an organ transplantation committee at the central or provincial level. Awards/compensation to donors are not protected and guaranteed by the government and are even considered to trade organs as the prohibition regulated in Article 64 of Regulation No. 36 of 2009.

Giving awards/compensation to donors who are not protected by government commissions as stipulated in the Minister of Health Regulation No. 38 of 2016 resulted in the case of organ trading in 2017, "there is no black and white in that I have to repay debt."¹³ A similar case also occurred at Cipto Mangunkusumo Hospital as a place for kidney transplant operations related to the kidney trade case¹⁴ The obscurity of giving compensation is also a concern of the Minister of health as follows, "if indeed there is an organ trade and it is found that we submit it to the police"¹⁵.

Regulation No. 36 of 2009 also regulates criminal provisions concerning violations concerning trafficking in human organs. Article 192 of this regulation states "Anyone who deliberately trades organs or body tissues under any pretext as referred to in Article 64 paragraph (3) shall be liable to a maximum imprisonment of 10 (ten) years and a maximum fine of Rp. 1.000.000.000.00 (one billion rupiah)".

Legally the human organs must not be traded, even under any pretext, but the health of donors who need treatment costs after the transplantation must also be protected and guaranteed welfare, especially if donors in difficult economic conditions and materialistic provision of rope, compensation or compensation that would certainly be very useful for donors who may have voluntarily provided organs

¹¹ Tunjung Herning Sitabuana, *Berhukum di Indonesia*, Konstitusi Press, Jakarta, 2017, p. 3.

¹² Tomy Michael, Otonomi Teks Dalam Permenhub Nomor PM 12 Tahun 2019 Tentang Pelindungan Keselamatan Pengguna Sepeda Motor. Yang Digunakan Untuk Kepentingan Masyarakat, EDUTECH CONSULTANT BANDUNG Jurnal AKSARA PUBLIC Volume 3 Nomor 3 Edisi Agustus 2019 (26-34).

¹³ <http://Malang Times.blogspot.co.id/2012/04/Tubuh Tersayat, Ginjal Terambil, Utang Tak Juga Lunas>, accessed February 12, 2018.

¹⁴ <http://www.solopos.com/2016/02/08/perdagangan-organ-lpsk-siap-lindungi-saksi-dan-korban-jual-beli-organ>, accessed March 11, 2018.

¹⁵ *Ibid.*

for recipients by providing donors in the form of organs to save human lives, regardless of whether or not there is a reward. However, this will certainly be increasingly difficult to do in the future, with high levels of *supply and demand* and mutual benefit.

C. Closing

The awarding of donors to donors as stipulated in Law No. 36 of 2009 in conjunction with Minister of Health Regulation No. 38 of 2016 requires protection, supervision and guarantees of legal certainty from the Indonesian government in the form of a central and or regional transplant commission so that donors are not criminalized as organ sellers as a prohibition on organ trading as stipulated in Article 64 of Regulation No. 36 of 2009.

The government regulates the Implementation of Regulation No. 36 of 2009 which regulates organ translation and conducts an assessment of Article 64 of Regulation no. 36 of 2009 in conjunction with PMK No. 38 of 2016 which regulates the legal certainty of the mechanism for giving compensation or "rewards" to donors by recipients must be explicitly stated in legislation, which is done in writing so that it is expected to protect donors against denial by recipients.

References

- Adami Chazawi, *Malpraktik Kedokteran; Tinjauan Norma dan Doktrin Hukum*, Bayumedia Publishing, Malang, 2007.
- Handoko T. Hani., *Manajemen Personalia dan Sumberdaya Manusia*, BPFE Ed. 2, Yogyakarta, 1987.
<https://www.scribd.com/doc/131725621/Donor-Dan-Transplantasi-Organ-Dirdas-Etika>, accessed February 23, 2018.
- <http://Malang Times.blogspot.co.id/2012/04/Tubuh Tersayat, Ginjal Terambil, Utang Tak Juga Lunas>, accessed February 12, 2018.
- <http://www.solopos.com/2016/02/08/perdagangan-organ-lpsk-siap-lindungi-saksi-dan-korban-jual-beli-organ>, accessed March 11, 2018.
- Law enforcement is an absolute requirement for efforts to create a prosperous Republic of Indonesia. If the law is upheld, the legal objective, specifically legal justice will be achieved, Tomy Michael, *Penegakan Hukum Dalam Otentisitas Katolik (Keniscayaan Yang Kekinian)*, Jurnal Akrab Juara Volume 3 Nomor 3 Edisi Agustus 2018 (64-71), ISSN: 2528-5130, E ISSN: 2620-9861.
- Mahfud MD, *Penegakan Hukum dan Tata Kelola Pemerintahan yang Baik*, Bahan pada acara Seminar Nasional *Saatnya Hati Nurani Bicara*, DPP Partai HANURA, Jakarta, 2009.
- Titik Triwulan Tutik, *Konstruksi Hukum Tata Negara Indonesia Pasca Amandemen UUD 1945*, Kencana Prenada Media Group, Jakarta, 2008.
- Tomy Michael, *Korupsi Dan Mao Tse–Tung*, *MIMBAR YUSTITIA Vol. 1 No.1 Juni 2017*, Universitas Darul Ulum Lamongan.
- Tomy Michael, *Bolehkah Jenis Kelamin Dalam Donor?*, *Egalita: Jurnal Kesetaraan dan Keadilan Gender* Volume 14, No 1, Tahun 2019.

Tomy Michael, Otonomi Teks Dalam Permenhub Nomor PM 12 Tahun 2019 Tentang Pelindungan Keselamatan Pengguna Sepeda Motor Yang Digunakan Untuk Kepentingan Masyarakat, Edutech Consultant Bandung Jurnal AKSARA PUBLIC Volume 3 Nomor 3 Edisi Agustus 2019 (26-34).

Tunjung Herning Sitabuana, *Berhukum di Indonesia*, Konstitusi Press, Jakarta, 2017.

Copyrights

Copyright for this article is retained by the author(s), with first publication rights granted to the journal.

This is an open-access article distributed under the terms and conditions of the Creative Commons Attribution license (<http://creativecommons.org/licenses/by/4.0/>).