

**KIDNEY TRANSPLANTATION AGREEMENT BETWEEN  
FOREIGN DONOR AND INDONESIAN RECIPIENT  
ACCORDING TO THE LAW OF THE REPUBLIC OF  
INDONESIA CONCERNING HEALTH**

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# KIDNEY TRANSPLANTATION AGREEMENT BETWEEN FOREIGN DONOR AND INDONESIAN RECIPIENT ACCORDING TO THE LAW OF THE REPUBLIC OF INDONESIA CONCERNING HEALTH

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## RINGKESAN

Kasapukan antara donor asing jeung panarima Indonésia anu merlukeun "ginjal" atawa organ séjén pikeun cangkok organ manusa mangrupa kasapukan pribadi antara pihak. Ieu kusabab perjanjian terapi sareng undang-undang sareng peraturan anu aya hubunganana sareng kaséhatan henteu ngatur hubungan anu ngalibetkeun perjanjian pribadi antara donor sareng panampi. Aya hiji artikel dimana hiji jalma nyumbang ginjal-Na ka panarima merlukeun sarta narima sababaraha duit salaku wujud syukur. Tindakan anu dilakukeun ku donor dina hal éta ngalanggar nilai kamanusaan anu diwajibkeun dina hukum kaséhatan tapi henteu ngalanggar hukum. Ieu ngabuktikeun yen perda di Indonésia teu acan aya aturan ngeunaan cangkok organ ku donor hirup di luar kulawarga jeung teu aya panyalindungan hukum pikeun donor.

**Saur Konci:** Kasapukan, Organ, Donor, Panarima.

## ABSTRAK

Kesepakatan antara donor asing dan penerima Indonesia yang membutuhkan "ginjal" atau organ lain untuk transplantasi organ manusia adalah kesepakatan pribadi antara para pihak. Hal ini karena perjanjian terapeutik dan peraturan perundang-undangan terkait kesehatan tidak mengatur hubungan yang melibatkan perjanjian pribadi antara donor dan penerima. Ada sebuah artikel dimana seseorang mendonorkan ginjalnya kepada seorang penerima yang membutuhkan dan menerima sejumlah uang sebagai bentuk rasa terima kasih. Tindakan yang dilakukan oleh donatur dalam kasus tersebut melanggar nilai-nilai kemanusiaan yang disyaratkan dalam undang-undang kesehatan tetapi tidak melanggar undang-undang. Hal ini membuktikan bahwa peraturan Indonesia belum memiliki aturan mengenai transplantasi organ oleh donor hidup di luar kekerabatan dan belum ada perlindungan hukum bagi donor.

**Kata kunci:** Perjanjian, Organ, Donor, Penerima.

## **ABSTRACT**

*The agreement between a foreign donor and an Indonesian recipient who needs a "kidney" or other organ for human organ transplantation is a private agreement between the parties. This is because therapeutic agreements and health-related laws and regulations do not regulate relationships involving private agreements between donors and recipients. There was an article where a person donated his kidney to a recipient in need and received some money as a form of gratitude. The actions taken by the donor in that case violated the humanitarian values required in the health law but did not violate the law. This proves that Indonesian regulations do not yet have rules regarding organ transplants by living donors outside of kinship and there is no legal protection for donors.*

**Keywords:** Agreement, Organ, Donor, Recipient.

## **INTRODUCTION**

Health is a state of physical, mental, spiritual, and social well-being that enables everyone to live more productive socially and economically in carrying out their lives in society. Even in society there is a very famous motto, namely "In a healthy body there is a strong soul". This shows that health is actually the main and most important need for every human being to live their daily lives. This shows that health is actually the main and most important need for every human being in living their daily lives, the health that a person has is not only seen in terms of physical health. A person's health is holistic, namely physical and mental health.<sup>1</sup> Therefore, health is indispensable.

Health services basically aim to make efforts to prevent and treat an illness, including medical services that are based on a personal relationship between a doctor and a recipient who

needs to cure his illness.<sup>2</sup> Doctors are parties who have expertise in the field of medicine or who are considered to have the ability and expertise to perform medical actions. While the recipient is a sick person who does not know the disease he is suffering from and entrusts himself to be treated and cured by a doctor. Therefore, doctors in carrying out their duties as medical personnel are obliged to provide the best possible medical services for recipients, as well as develop the treatment of a disease.

One of the medical actions that is an advancement in the world of medicine and greatly guides the practical anatomical skills of a doctor but is very vulnerable to the rule of law is the transplantation of human organs and organs, or better known by the term society as human organ transplantation is a series of medical actions to transfer tools or bodies and or human body tissues originating from one's own body or the body of another person in the

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<sup>1</sup> Diana Delvin Lontoh, *Pelaksanaan Perjanjian Terapiutik Dalam Persetujuan Tindakan Medis Pada Kondisi Pasien Dalam Keadaan Tidak Mampu Dirumah Sakit Telogorejo Semarang*, Tesis, Semarang: Fakultas Hukum Universitas Diponegoro, 2008, Hlm. 15.

<sup>2</sup> Priharto Adi, *Kebijakan Formulasi Hukum Pidana Dalam Rangka Penanggulangan Tindak Pidana Malpraktek Kedokteran*, Tesis, Semarang: Fakultas Hukum Universitas Diponegoro, 2010, Hlm. 12.

context of treatment to replace tools and or body tissues that are not functioning properly.

As the success rate of organ transplantation increases, the demand for human organs and tissues to be used as donors will also increase. At the beginning of the development of human organ transplant technology, the source of donors came from family only, but it can also increasingly begin to expand to a wider circle, so that if the recipient does not get a donor from the family, the recipient is forced to look for other people who are willing to donate their organs.<sup>3</sup>

In recent years, the buying and selling of toiletries and tissues in cyberspace or what is commonly called the internet has become more open, what used to be a secret is now like the process of buying and selling electronic goods.<sup>4</sup>

Based on this explanation, it illustrates that organ transplantation is also a bioethical problem that is also quite complicated, considering that the need for human body tissue is increasing every day, while the supply of organs is increasingly limited because some organs must be taken from the bodies of those who have died or are still alive, even though not every family of people who donate their organs gives permission to hospitals or doctors to carry out organ transfer actions without a fair price.<sup>5</sup> Economic pressure is one of the fundamental reasons to justify the actions of organ sellers, as well as the vagueness of the law governing the concept of organ

trafficking, so many parties have a wrong view of the law.

## PROBLEM IDENTIFICATION

Based on the description above, the author tries to formulate the problem of whether the agreement made by foreign donors and Indonesian recipients is valid according to the applicable law in Indonesia and what the legal consequences are and whether the Law of the Republic of Indonesia Number 36 of 2009, especially article 64 which regulates transplantation, has provided fair legal protection for donors and recipients.

## RESEARCH METHODS

The research conducted is Normative Juridical research, which is research focused on examining the application of rules or norms in positive law.<sup>6</sup> This type of research is juridical-normative because this research is conducted by analysing laws and regulations relating to efforts to cure and restore health conditions with transplants and existing treaty law in Indonesia. The approaches used include: First, the statutory approach method, second, the conceptual approach method, third, the case approach method, to discuss and answer the problem formulation in a systematic and integrated manner so that in the end it can explain, describe, and analyse the problem of agreements made by donors and recipients who need organs.

<sup>3</sup> Frengky Andri Putra, *Analisa Yuridis Perundang-Undangan Terkait Tindak Pidana Jual Beli Organ Tubuh Untuk Kepentingan Transplantasi Organ Ginjal (Studi Perbandingan Antara Indonesia Dengan Filipina)*, Skripsi, Malang: Fakultas Hukum Universitas Brawijaya, 2013, Hlm. 18.

<sup>4</sup> Epafra Yosua Woriassy, *Efektifitas Ketentuan Hukum Tentang Tindak Pidana Jual Beli Organ Dan Atau Jaringan Tubuh*, Skripsi, Yogyakarta:

Fakultas Hukum Universitas Atmayaja Yogyakarta, 2012, Hlm. 4.

<sup>5</sup> Alexandra Indriyanti Dewi, *Etika dan hukum kesehatan*, Yogyakarta: Pustaka book publisher, 2008, Hlm. 83-84 .

<sup>6</sup> Johnny Ibrahim, *Teori Dan Metodologi Penelitian Hukum Normatif*, Surabaya: Bayumedia Publishing, 2006, Hlm. 295.

## DISCUSSION RESULT

Living donor organ transplantation is a very risky surgical procedure that is subject to legal regulations. Because in addition to uncertain results, in a transplant there must be several parties involved and participate in the transplant effort. The parties involved in a living donor transplant are the living donor, the donor's family and heirs, the recipient, doctors and other health workers. The relationship created between the three parties is a therapeutic relationship.

The relationship built between doctors, recipients in performing organ transplants is part of a therapeutic transaction or what is commonly called a therapeutic agreement can also be called a therapeutic contract. Therapeutic transactions are agreements between doctors and recipients and donors, in the form of legal relationships that give birth to rights and obligations for both parties.<sup>7</sup> According to Hermie Hadiati Koeswadi, the definition of therapeutic contract uses the term therapeutic transaction for therapeutic contract, according to her, therapeutic transaction is a transaction to determine or find the most appropriate therapy for the recipient and doctor. In a therapeutic transaction, both parties must fulfil certain conditions, and if the transaction has occurred, both parties are involved in the rights and obligations agreed upon by both.<sup>8</sup>

Although the therapeutic transaction is categorised as a service agreement, based on its development it is a service relationship based on trust, and based on the principle of providing

assistance, so it is referred to as the relationship of providing medical assistance. Based on the principle of providing assistance, doctors are not allowed to provide medical assistance beyond the needs of the person being helped, because the provision of assistance aims to restore the ability of the patient to be able to manage himself as well as possible. Thus, medical services provided to recipients must be orientated towards the interests of the recipient.<sup>9</sup>

It can be described that in a therapeutic agreement, what happens is that the doctor provides medical services based on knowledge, competence, skills and experience with the aim of health and recovery of the recipient. It can be said that the doctor gives something to the recipient and donor, namely medical services. The recipient and donor must also give something, namely honesty in providing information on the course of their illness, following the doctor's recommendations, supporting the health or recovery of the recipient and also the comfort of the donor.<sup>10</sup>

Based on the therapeutic agreement, each party involved in efforts to cure and restore health with transplantation has their respective rights and obligations, because there is a reciprocal relationship such as the Guidance-Cooperation relationship pattern, which is seen with the doctor's obligation to provide medical services and the recipient is obliged to obey what is recommended by the doctor for his recovery, while between the recipient and

<sup>7</sup> Bander Johan Nasution, *Hukum Kesehatan Pertanggungjawaban Dokter*, Jakarta: Rineka Cipta, 2005, Hlm. 11.

<sup>8</sup> H.Salim Hs, *Perkembangan Hukum Kontrak Diluar Kuhperdata*, Jakarta: Raja Grafindo Persada, 2007, Hlm. 45-46.

<sup>9</sup> Veronica Komalawati, *Peran Inform Consent Dalam Transaksi Terapiutik (Persetujuan Dalam*

*Hubungan Dokter Dan Pasien) Suatu Tinjauan Yuridis*, Bandung: Citra Aditya Bakti, 2002, Hlm. 140-141.

<sup>10</sup> Dyah Silviaty, *Sahnya Perjanjian Terapiutik Antara Dokter Dan Pasien Menurut Kitab Undang-Undang Perdata*, Tesis, Semarang: Fakultas Hukum Universitas Katolik Soegijapranata, 2009, Hlm. 69.

the donor there is an imbalance between rights and obligations. This can be seen in the donor's obligation to provide his organs but there is no right to receive compensation from the recipient because it does not fulfil the human element and is only bound by the doctor who carries out the treatment.

Meanwhile, the obligations and rights between the parties to their personal needs must be in accordance with justice, decency and legality. Every human being has the human right to act, express an opinion, give something to another person and receive something from another person or from a certain institution. Therefore, the better a person's life is, the more necessary it is to understand these obligations and rights so as to form a mutual respect for the rights and obligations of others and create a peaceful life.

Regulations governing surgery in the context of healing and restoring an illness with transplantation are a form of regulation and synchronisation of the interests of the parties so that no one can harm one party to another. The laws and regulations in Indonesia that regulate or are related to the parties involved in living donor transplantation include:

#### **1. Law Number 36 Year 2009 On Health**

The act of curing diseases with transplants relating to donors and recipients is regulated in Law No. 36 Year 2009 on Health Article 64 paragraph 1, paragraph 2, and paragraph 3. Health Law Article 64 paragraph 1, paragraph 2, and paragraph 3. Based on the article above, it can be seen that the act of transplantation actually aims purely to treat disease. This lies in the words

"humanitarian purposes" found in paragraph 2.

This can be interpreted that the purpose of transplantation must be for the benefit of those in need, equality of rights and obligations between the recipient and the donor who provides the organ, tolerance between the recipient and the donor, and the willingness to provide organs from the donor to the recipient, and there is no desire to seek personal gain in the involvement between the recipient and the donor. Although in the Health Law the notion of humanitarian value in transplantation is not explained and defined in detail and concretely in the explanation section.

Commercialisation of organ transplantation activities is certainly very contrary to the humanitarian value that is the focus of the main objective in performing organ transplantation, especially for living donors. Commercial is an activity related to trade or an item that is intended to be traded and can also be of high value which sometimes sacrifices other values including humanity. Therefore, commercial itself is actually better known in the world of business and trade, but because commercial is related to trade, it must be related to profit. As we know, the focus of trade is basically profit. Therefore, the assumption that everyone who becomes a donor but is orientated to gain personal profit after giving their organs to patients in need can also be said to be commercial. In addition, it fulfils the element of the notion of sacrificing social values, namely sacrificing the value of the willingness to give.

Based on the case in the background where the donor

benefits, it can be said that the donor receives benefits in lieu of his efforts to provide a kidney to a recipient in need. Although the form is not in the form of an award but a thank you from the family.

## **2. Government Regulation No. 18 Of 1981 Concerning Clinical Cadaver Surgery, Anatomical Cadaver Surgery, And Transplantation Of Human Body Organs And Or Tissues**

Other articles in the government regulation that also regulate the relationship between recipients, donors and living donor transplant doctors are found in articles 15, 16 and 17. Articles 15, 16, and 17 of Government Regulation No. 18 Year 1981 reads that the regulations that focus on regulating living donors are contained in articles 16 and 17.

Based on the sound of article 16, it can be seen that what is regulated in the article is about donors who in the process of organ harvesting lose their lives in connection with compensation and compensation due to the death of the donor and the donor's family. This is expressly stated in the words "who dies". In Article 16, there is something interesting about the wording of the article. The interesting thing lies in the wording of the article in the sentence "Donors and donor families who die" and in the sentence "are not entitled to any material compensation in lieu of transplantation". According to the author, the general meaning of Article 16 is that donors and donor families who die during organ transplantation are not entitled or in other words are not allowed to request compensation

for the death of the donor either for hospital fees, medical expenses, and funeral expenses for the deceased donor. So that the donor and his family must fulfil and meet all the costs incurred when the donor dies without the intervention of the patient who acts as a recipient.

The elucidation in Article 17 states that the human body is a gift from God, so seeking profit through the sale and purchase of human body parts and tissues is an act that goes against human values and is therefore prohibited in Indonesia. In fact, seeking profit from body tissues is not only by buying and selling, but also by utilising the debts of recipients who need organ donors to obtain rewards or compensation. This also confirms that the health law on curing diseases and restoring health by organ transplantation is prohibited only from seeking profit by selling organs. Meanwhile, the commercialisation of organs in other forms has not been regulated in either laws or government regulations.

## **3. Regulation Of The Minister Of Health Of The Republic Of Indonesia No. 38/2016 On The Organ Transplantation Programme**

Article 13 reads in part "paragraph 1 if there is a party who is willing to donate their organs and does not receive compensation, it is allowed, paragraph 2 the person who provides the donor may be alive or brain dead, paragraph 3 the person who provides the donor may or may not be related by blood to the recipient of the donor."

Article 14 reads in part "People who donate organs while still alive are called living donors, and people who donate organs while still alive can

only give one of their kidneys, part of the pancreas, lungs, and liver.

If we continue to the next article, Article 15 explains the essence of "paragraph 1, people who donate their organs after being declared brain stem dead are called brain stem dead donors, paragraph 2, while still alive the donor must have been registered with the national transplant committee, paragraph 3, those who declare brain stem dead must be a different team of doctors from the team of doctors who carry out the transplant". Article 16 core "1st paragraph, people who donate and have blood relations can give their organs to certain donor recipients, 2nd paragraph, fathers, mothers, children, and siblings are blood donors". Article 17 "The National Transplant Committee has the right to determine the recipient of donations from donors who are not related by blood". Article 18 "Administrative and medical requirements are the conditions for registering as a donor" Article 19 the essence of "paragraph 1 the conditions referred to are a. health certificate, b. identity card, c. statement of willingness to donate organs without compensation in writing, d. propose to give their organs free of charge, e. get approval from the biological family, f. there is a written letter that the donor has already donated the organs. there is a written letter that the donor has donated his organ. there is a written letter that the donor understands the procedures before, during and after the operation including all the risks that may occur, g. there is a written letter that between the donor and the recipient of the donor does not make any transactions, paragraph 2 the blood relationship between the donor and the recipient of the donor must be

proven by a letter from the entitled local government".

Meanwhile, when referring to the provisions of Article 24 paragraph (1) letter (d) of the Regulation of the Minister of Health of the Republic of Indonesia Number 38 of 2016 concerning the Implementation of Organ Transplantation, it is stated that "submit a statement not to purchase organs from prospective donors or make special agreements with prospective donors, as outlined in the form of a notarial deed or written statement legalised by a notary."

#### **4. Code Of Civil Law**

The legal relationship between the doctor and the recipient is a relationship based on law because it is basically regulated in law, while between the recipient and the donor is regulated privately in the agreement of the parties concerned, so that the legal basis still uses civil law.

In civil law an agreement can be said to be valid if it fulfils the subjective conditions and objective conditions in accordance with Article 1320. This article provides four conditions for an agreement to be legally valid, namely agreement, ability, certain things and halal causes. The legal actions carried out by the parties are very contrary to the halal causes desired by the law because they are contrary to human values as the main purpose of transplantation as stated in Article 64 of the Health Law. Whereas the Government Regulation does not expressly regulate this matter. Therefore, the agreement is not a valid agreement in the eyes of the law.



The juridical consequence of a causa that is not legally valid, such as the legal act performed by the Indonesian recipient and the foreign donor in the background case, is that the agreement in question has no legal force. In other words, an agreement without legal causes will be a null and void agreement<sup>11</sup> Thus there is no basis to demand the fulfilment of the agreement before the judge, because from the beginning it is considered that there was never an agreement. This can also mean that the parties have no right to demand the fulfilment of any rights or achievements if at any time something untoward happens in the relationship of the parties.

Legal protection can be defined as rules or provisions made by the government to regulate and protect the community or its citizens as legal subjects when carrying out legal acts.<sup>12</sup> Legal protection is also a guarantee given by the state to all parties to be able to exercise their legal rights and interests in their position as legal subjects, so that citizens and communities living in the state can realise their respective rights and obligations and create public order in social relations that occur in community life.<sup>13</sup>

Similarly, the health law and related regulations are certainly made to provide legal protection to the parties involved in efforts to cure and recover from diseases through transplantation. Therefore, existing legal regulations must fulfil the principles and elements of legal protection. However, in reality, the elements of legal protection in health law

cannot be fulfilled because the certainty of orientation in health law relating to organ transplants has not been fulfilled, because as discussed earlier, the law does not specify the word "commercial" as intended, and the recipient's act of thanking the donor in the form of money is not regulated in the law. This is because the focus of unlawful acts regulated in the law and government regulations is only on commercial acts in the form of buying and selling organs, other matters outside of buying and selling organs have not been clearly regulated.

This also affects the achievement of the principles of protection contained in the health law and the protection in government regulations relating to transplantation. Therefore, it is necessary to improve the supporting factors that can cause problems in the future due to legal vagueness that occurs in the laws and regulations related to transplantation. In addition, it is necessary to develop a substitute treatment for organ transplantation to stem cell transplantation so that the need for organs for transplantation can be reduced.

## CONCLUSION

The agreement between the donor and recipient which is carried out orally is invalid because it fulfils the commercial elements contained in Article 64 of Law Number 36 of 2006 concerning Health, and does not fulfil the elements of the validity of the agreement in the Civil Code Article 1320, because basically the donor is prohibited from receiving

<sup>11</sup> Munir Fuady, *Hukum Kontrak*, Bandung: Citra Aditya Bakti, 2001, Hlm. 75.

<sup>12</sup> Irma Haida Yuliana Siregar, *Perlindungan Hukum Bagi Perawat Gigi Dalam Melakukan Pelayanan Asuhan Kesehatan Gigi Di Praktik Mandiri*, Tesis, Semarang: Fakultas Hukum

Universitas Katolik Soegijapranata, 2011, Hlm. 35.

<sup>13</sup> Derita, *Peraturan Staff Internal Medis Rsu Karawang Dan Perlindungan Hukum Bagi Staff Medis Dari Gugatan Malpraktek*, Tesis, Semarang: Fakultas Hukum Universitas Katolik Soegijapranata, 2009, Hlm. 45.

compensation, because the purpose of transplantation is for humanity, if the donor receives benefits from organ donation, it can be said that the act is contrary to human values even though it is in the form of gratitude, so that the legal consequences of the agreement are null and void and cannot be held accountable before a judge. Meanwhile, Government Regulation Number 18 of 1981 concerning Clinical Corpse Surgery, Anatomical Corpse Surgery, and Transplantation of Human Organs and or Tissues articles 2 letters A and B, 15, 16, and 17 only regulate the prohibition of providing compensation for donors who die during transplantation to recipients.

When referring to the provisions of Article 24 paragraph (1) letter (d) of the Regulation of the Minister of Health of the Republic of Indonesia Number 38 of 2016 concerning the Implementation of Organ Transplantation, the deed of human organ transplantation must be made by an authentic deed because its form is determined by the Law / Legislation (wettelijke vorm) and made by or before an authorised public official (openbaar ambtenaar), namely Notary. Notarial deeds are perfect and binding evidence which means that the truth of the things written in the deed must be recognised by the judge, the notarial deed is considered correct as long as the truth cannot be proven otherwise by the other party. The most important function of a deed in law is the deed as a means of proof.

Law Number 36 of 2006 concerning Health Article 64, in conjunction with Government Regulation Number 18 of 1981 concerning Clinical Corpse Surgery, Anatomical Corpse Surgery, and Transplantation of Human Organs and or Tissues articles 2 letters A and B, 15, 16, and 17. It has not provided adequate legal protection for donors and recipients because the legal certainty in regulations relating to living donors has

not met the certainty of orientation in its regulation, because in the health law article 64 does prohibit commercialisation in any form including buying and selling but in Government Regulation Number 18 of 1981 paragraph 16, the focus is only on donors and families of donors who die in the organ transplant process who are not allowed to ask for compensation to patients who receive the organ. Therefore, the benefits of transplant regulations that expect donors to voluntarily give their organs have not been achieved. This can make patients who need organs to treat their illnesses less appreciative of this regulation so that the parties override this rule. In addition, it is possible that recipients and donors do not appreciate or recognise the existence of regulations governing living donors so that legal awareness in recipients and donors is insufficient.

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### LETTER OF ACCEPTANCE

Dear Author(s): **Geta Ilham Adi Prasetyo<sup>1</sup>, Habib Adjie<sup>2</sup>**

We are pleased to announce that your abstract titled: **“KIDNEY TRANSPLANTATION AGREEMENT BETWEEN FOREIGN DONOR AND INDONESIAN RECIPIENT ACCORDING TO THE LAW OF THE REPUBLIC OF INDONESIA CONCERNING HEALTH”** has been accepted for an oral presentation at the **7<sup>th</sup> event of International Seminar on Border Region** with the theme **“Border Sustainability: Community Empowerment in the Post-Covid-19 Era”** on 20 – 22 February 2023 in Kuala Lumpur, Malaysia.

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