

COMMERCIAL KIDNEY ORGAN TRANSPLANTATION FROM THE PERSPECTIVE OF POSITIVE LAW AND ISLAMIC LAW

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ABSTRACT

In the medical world, commercial practices in kidney organ transplantation often occur, with economic motives as the background. This practice is prohibited by positive law, both at the national and international levels, as well as by Islamic law. There are differences of opinion between positive law and Islamic law in regulating organ transplantation. Therefore, the author will discuss the legal regulation of kidney organ transplantation from the perspective of positive law and Islamic law. This study aims to analyze the legal regulation of kidney organ transplantation from the perspective of positive law and Islamic law, as well as the application of sanctions for perpetrators of illegal transplantation and preventive measures that can be taken. The method used is normative juridical legal research with a legislative and conceptual approach. The data sources used include primary, secondary, and tertiary data. The results of the study indicate that kidney transplantation must be carried out voluntarily, without coercion or compensation. The practice of organ trafficking is prohibited by positive law and Islamic law. However, there are differences between positive law and the views of the four schools of thought; positive law allows healthy donors, while the schools of thought prohibit transplantation in healthy or dying conditions. This study recommends that the government prevent organ trafficking by improving the economic welfare of the community.

Keywords: Legal Regulation, kidney transplantation, positive law and Islam.

A. Introduction

A significant increase occurred in patients with terminal kidney failure in Indonesia. Every year, patients with terminal kidney failure increase by around 4,400 people, while the total number of terminal kidney failure sufferers in Indonesia currently is more than 66,000 people. One of the factors causing the increase in kidney failure patients is uncontrolled hypertension which results in decreased kidney function, the end products of protein metabolism that are normally excreted into the urine accumulate in the blood, so that hemodialysis/dialysis is needed to prevent patients from falling into emergency.

This hemodialysis action is a kidney replacement therapy, but unfortunately, hemodialysis cannot replace all kidney functions. In the case of kidney function as one of the organs for the formation of red blood cells and bone metabolism cannot be replaced by hemodialysis, then a kidney transplant is needed which is the most ideal and most appropriate choice for patients with terminal kidney failure, to maintain their lives.

Kidney transplantation is a complete therapy (Total Renal Replacement Therapy) to help patients with kidney failure, so that patients no longer feel kidney disease and can live normally, and are superior in terms of procedures, quality of life, dependence on medical facilities, costs, and are believed to increase life expectancy without having to undergo hemodialysis/blood dialysis again.

In relation to kidney organ transplantation in Indonesia, donors obtained come from living donors and cadaver organ donations. In living donors who still have family ties (living related donors), the kidney transplant process is easier to do because they have blood and tissue compatibility and an almost similar immune system, so that it can minimize rejection (rejection by the body's organs) that can occur immediately on the operating table, which is then expected to have a fairly high success rate in this operation.

However, the obstacles faced in obtaining living donors, many parties are not willing to give one of their kidneys to the recipient, because of concerns about their health in the future. This results in a shortage of parties willing to become donors, where the need for transplants continues to increase and the unavailability of cadaver kidney organ donations, resulting in many terminal kidney failure patients having difficulty in carrying out organ transplants in medical efforts. This situation is exploited by some people (living unrelated donors) to encourage the practice of buying and selling kidney organs, with the aim of obtaining large profits from the act of buying and selling kidney organs.

Basically, positive Indonesian law allows organ transplantation in terms of medical treatment, this is clearly regulated in Law No. 17 of 2023 concerning Health. Article 123 states that "In order to cure diseases and restore health, organ and/or tissue transplantation, cell-based therapy and/or stem cells, and reconstructive and aesthetic plastic surgery can be carried out". The article above states that transplantation is one of the efforts to cure diseases that can be carried out by medical personnel in Indonesia.

Research Methods

A study cannot be called research if it does not have a research method.¹ Research methods are one of the factors of a problem that will be discussed.² The study was conducted using secondary data which was analyzed qualitatively using the Desk Research Method.³ The literature materials used in writing this research are several references originating from research results, studies, and reviews of several writings which are then summarized into a scientific paper.⁴

B. Discussion

1. Legal Regulation of Commercial Kidney Organ Transplantation Based on Positive Law and Islamic Law

Organ transplantation is the transfer of organs or body tissues from one person to another person who needs them, through a medical procedure that is very beneficial for patients who have organ failure. Kidney transplantation or transplantation is the most popular and widely known among other organ transplants, there are 4 types of organ transplantation methods:

- a. Autologous transplantation, which is the transfer from one place to another in the person's own body, carried out before chemotherapy is given;
- b. Allogenic transplantation, which is the transfer of a body part to another body of the same species (for example, a heart transplant from one person to another), where the graft can be used from people who are still related or not related;
- c. Signetic transplantation, which is the transfer of a body part from one individual to another identical individual, for example, a transplant between identical twins; and
- d. Xenograft transplantation, which is the transfer from one individual's body to another individual of a different type or species

In performing organ transplantation, the authorized medical party must have competent ability in carrying out organ transplantation and must pay attention to the rights and obligations of donors and recipients, prospective donors will also go through a series of very strict procedures that will be carried out by an advocacy team consisting of several psychiatrists who

¹ Koto, I., Hati, L. P., Manurung, A. S., & Siregar, A. S. (2024). Islamic Holy Days: The Contention of Rukyatul Hillal and Hisab Hakiki Wujudul Hilal Disputes for Muslims in Indonesia. *Pharos Journal of Theology*, 105(2).

² Hanifah, I., & Koto, I. (2025). Legal Protection for Workers with Fixed-Term Employment Agreements Before and After the Job Creation Law. *Kosmik Hukum*, 25(2), 245-256.

³ Simatupang, R. S. A. (2024). Pelaksanaan Sistem Peradilan Pidana Anak Di Indonesia Perspektif Nilai Keadilan. *Jurnal Yuridis*, 11(1), 54-63.

⁴ Perdana, S., & Koto, I. (2024). Providing Legal Protection for Consumers Against Standard Clauses/One-sided Agreements Made by Business Actors. *DE LEGA LATA: Jurnal Ilmu Hukum*, 9(1), 23-30.

will interview prospective donors to evaluate their level of maturity and also ensure that there are no violations of the law related to the kidney transplant, if there is suspicion of criminal acts of organ trafficking or commercial activities against organs and there are threats or coercion from the donor, then the hospital must refuse the implementation of the organ transplant. After the results of the cognitive evaluation and the donor's decision-making ability are known when the donor agrees to the transplant operation process, at this stage an organ donor agreement will be drawn up which will then be signed before a notary to validate the organ transplant process.

Article 28 H paragraph (1) of the 1945 Constitution of the Republic of Indonesia states that: Everyone has the right to live in prosperity physically and mentally, to have a place to live, and to have a good and healthy living environment and has the right to receive health services. The government is obliged to fulfill the right to public health and also pay attention to the human rights of the community, especially for people living in remote areas and to receive equal justice.

2. Sanctions Against Commercial Kidney Organ Transplant Performers Based on Positive Law

Law Number 17 of 2023 concerning Health replaces Law Number 36 of 2009. This law strengthens regulations regarding human organ transplantation, especially the prohibition of organ commercialization practices which are a global issue, including in Indonesia. The government is trying to create a stronger and more comprehensive legal framework to regulate organ transplantation, in order to prevent misuse and ensure that practices are carried out ethically. It is hoped that this law can provide better protection for the public and ensure that every action related to organ transplantation is carried out responsibly and in accordance with the law.

Law Number 21 of 2007 concerning the Eradication of Criminal Acts of Human Trafficking (UU TPPO) is an important step by the Indonesian government in combating human trafficking. This problem has become a serious challenge both in Indonesia and throughout the world. Human trafficking involves various forms of exploitation, such as labor and sexual exploitation, as well as illegal organ harvesting. This crime often violates human rights and creates cruel and inhumane treatment.

Human trafficking often violates human rights through means such as the threat and use of violence, abduction, forgery, fraud, abuse of power, and debt bondage. One of the main causes of victims of Human Trafficking (TPPO) is economic vulnerability. These economic factors can force individuals or groups to make risky decisions, including becoming victims of

human trafficking. Financial instability, lack of access to education, and limited employment opportunities often increase their vulnerability.

The government ensures that hospitals comply with established standards and will impose severe sanctions on medical personnel, hospitals, and brokers involved in illegal practices. These sanctions are expected to provide a deterrent effect and prevent future violations. In addition, increased surveillance operations by the police, the Ministry of Health, and BPJS are part of this strategy to identify suspicious medical practices. The government can also conduct border surveillance and international cooperation, considering that illegal kidney transplantation is a transnational crime involving human trafficking. This action has negative and immoral impacts, so the public has the right to criticize and reject this practice.

C. Conclusion

The legal regulation of kidney organ transplantation from a positive legal perspective has gone through a long process at the national and international levels. This regulation prohibits commercial practices and only allows voluntary transplantation without coercion. In the perspective of Islamic law, there are differences of opinion among scholars from four schools of thought. The Shafi'i and Hanbali schools of thought permit transplantation after death, while the Hanafi and Maliki schools prohibit it from both living and deceased donors. All schools of thought agree that transplantation from healthy donors is prohibited because it poses a risk to the donor's safety, and transplantation in a coma is also prohibited because it can accelerate the donor's death.

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