

REFORMING CRIMINAL POLICY ON HUMAN ORGAN TRAFFICKING IN INDONESIA

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Abstract: Health technology has advanced rapidly, especially in finding treatments for many diseases. One notable advancement is the development of a new type of treatment: organ transplantation. This comes at a time when societal pressures and economic disparities have recently intensified, particularly in Indonesia. However, the demand for organs does not correspond with the number of donors. The study highlights that the legal arrangements for human organ trafficking in Indonesia are suboptimal, as there remains a potential for traffickers to exploit the absence of specific regulations governing transplantation and organ donation from living donors, whether through kinship or solidarity connections. Currently, there are no regulations governing the funding of organ transplants and donations.

Keywords: human organs trafficking; transplantation of human organs; criminal sanctions; bioethics; legal arrangements.

INTRODUCTION

Along with the high success rate of the transplant treatment, there is a growing interest in it. However, behind the high success rate of this new treatment are obstacles such as limitations in situations where donor organs are readily available and the absence of specific regulations on organ transplantation and donation, which results in organ scarcity due to organ reserves that are disproportionate to the high demand. The scarcity of resources for these organs is inseparable from the increasing practical and material conditions resulting from the economic rise of the population. The economic struggle that generates a win-lose situation for both the wealthy and the poor contributes to the degeneration of these organizations' bureaucracies. There are wealthy people with substantial financial means and poor people who require organs to survive and ease the burden of life; meanwhile, the poor require financial resources to carry and ease their life's difficulties.¹ Thus, between consumers and producers, providers, and people in need, laws are created (supply and demand).

According to the Indonesian Transplant Society,² as of the latest data in 2024, since 2010, liver transplantation has been performed with a life expectancy of 87%. Meanwhile, the total number of kidney transplants performed in Indonesia is 629 across 12 transplant centers, with a life expectancy exceeding 95%.³ Given the recent depression and economic inequality affecting Indonesian society, coupled with a demand for organs that surpass-

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¹ ALNOUR, H., SHARMA, A., HALAWA, A., ALALAWI, F. Global Practices and Policies of Organ Transplantation and Organ Trafficking. *Experimental and Clinical Transplantation*. 2022, Vol. 20, No. 8, pp. 717–731.

² Statistik keberhasilan. Perkumpulan Transplantasi Indonesia. In: *InaTS* [online]. [2024-05-10]. Available at: <<https://www.inatransplant.or.id/index#blog>>.

³ SUPIT, T., NUGROHO, E. A., SANTOSA, A., SOEDARSO, M. A., DANISWARA, N., RAIS ADDIN, S. Kidney transplantation in Indonesia: An update. *Asian Journal of Urology*. 2019, Vol. 6, No. 4, pp. 305–311.

es the number of donors,⁴ there is a potential for the emergence of illegal organ trading. Widodo et al.⁵ noted that “Organ Transplant Tourism” has evolved into an international treaty prohibiting the trade in human organs. However, due to the high operational costs, not everyone can access legitimate transplantation services.⁶ Consequently, the inability to obtain organs through legal means may lead to the illegal sale of organs, with impoverished individuals selling their organs to the affluent in order to survive.⁷

In 2023, there were a total of 23,286 donors globally, comprising both deceased and living donors.⁸ This had a significant impact, given the urgent demand for organ transplants, with a total of 103,956 individuals awaiting lifesaving organ transplants, out of which 58,849 were active waiting list candidates. Therefore, the donors constituted approximately 22.40% of the total waiting list candidates. Based on these numbers, it is apparent that the supply of organs for many individuals, particularly those with conditions such as diabetes, polycystic renal disease, lupus, and others, is insufficient. Consequently, certain economically disadvantaged groups resort to using the Internet or other platforms to advertise and exchange human organs. Those involved in organ trading often utilize online platforms to advertise organs for sale, providing contact information for interested buyers. Additionally, some potential donors offer their organs directly to those in need for a fee. In such cases, compensation offers are made from parties in need of organs to willing donors. Therefore, the study focuses on issues related to establishing the legal framework for the criminal regulation of human organ trafficking.

I. BIOETHICAL CONSIDERATIONS IN ORGAN TRANSPLANTATION

Bioethics, as outlined by Beauchamp and Childress, provides a framework for analyzing moral issues in healthcare.⁹ When it comes to organ transplantation, their principles of autonomy, beneficence, nonmaleficence, and justice are applied. In the context of living organ donation, the principle of autonomy is often regarded as “first amongst equals,” which emphasizes the importance of respecting the donor’s wishes and decisions.¹⁰ Additionally, the consideration of beneficence and non-maleficence is important in balancing the potential benefits and risks associated with donation surgery.¹¹

⁴ ALFATIH, M. H., SUSIATININGSIH, H., HANURA, M. Indonesia’s Collaboration with UNICEF in Addressing Child Trafficking Cases in Indonesia (2009-2014). *Journal of International Relations*. 2017, Vol. 3, No. 3, pp. 38-47.

⁵ WIDODO, W., UTAMI, U., MUSTIKA, U. D. Involvement of Indonesian citizens in transplant tourism in globalization transportation: Prevention in health law perspective. *AIP Conference Proceedings*. 2022, Vol. 2573, No. 1.

⁶ MULLER, E., DOMINGUEZ-GIL, B., MARTIN, D. The declaration of Istanbul on organ trafficking and transplant tourism. *Clinical Journal of the American Society of Nephrology*. 2019, Vol. 103, No. 2, p. 217.

⁷ IQBAL, M. Perkembangan kejahatan dalam upaya penegakan hukum pidana: penanggulangan kejahatan profesional perdagangan organ tubuh manusia. *Proceedings Universitas Pamulang*. 2017, Vol. 2, No. 1, pp. 307-324.

⁸ Data and trends. United Network for Organ Sharing. In: UNOS [online]. [2024-05-10]. Available at: <https://unos.org/data/>.

⁹ SHEA, M. Principlism’s balancing act: why the principles of biomedical ethics need a theory of the good. *The Journal of Medicine and Philosophy: A Forum for Bioethics and Philosophy of Medicine*. 2020, Vol. 45, No. 4-5, pp. 441-470.

¹⁰ MAMODE, N., et al. Donor autonomy and self-sacrifice in living organ donation: an ethical legal and psychological aspects of transplantation (ELPAT) view. *Transplant Internasional*. 2022, Vol. 35, p. 10131.

¹¹ Ibid.

Autonomy emphasizes respecting individuals' rights to make decisions about their own bodies. In the context of organ transplantation, this principle underscores the importance of informed consent.¹² Patients must have comprehensive information about the risks, benefits, and alternatives of the transplant procedure, enabling them to make autonomous choices regarding donation or receipt of organs. Raza and Neuberger¹³ advocate for a 'multi-factor approach' to enhance the process of obtaining informed consent in transplantation. This approach encompasses understanding risk, effective communication, and robust review processes to ensure that patients can autonomously navigate each stage of the consent process. For instance, prioritizing the comprehension of risks is crucial in informed consent; patients must be fully apprised of the risks associated with the transplant procedure to make informed decisions.

Personalized identification and communication of risks are imperative, considering both the objective clinical perspective and the subjective perception of risks by patients and their families.¹⁴ This personalized risk assessment aligns with the principle of autonomy, empowering patients to base decisions on their individual understanding and preferences. Furthermore, Raza and Neuberger emphasize the paramount importance of effective communication throughout the consent process. This entails ensuring that patients possess a comprehensive understanding of the risks, benefits, and alternatives associated with organ transplantation, while also considering their social and cultural beliefs, cognitive abilities, and emotional state. In essence, the 'multi-factor approach' delineated in the article underscores the significance of autonomy in the consent process for organ transplantation by highlighting risk understanding, effective communication, and robust review processes.

Beneficence directs healthcare providers to act in the best interest of the patient. In organ transplantation, this involves maximizing the chances of successful transplantation while minimizing harm.¹⁵ Healthcare professionals must ensure that organ donors are treated respectfully and that recipients receive appropriate medical care before, during, and after the transplant. Meanwhile, nonmaleficence obligates healthcare providers to avoid causing harm to patients. This principle raises ethical questions regarding the allocation of organs.¹⁶ Organ scarcity necessitates careful consideration of allocation criteria to ensure fair distribution while avoiding harm to individuals or groups. Additionally, transplant procedures must be conducted with precision to minimize the risk of complications for both donors and recipients. Alcorn¹⁷ discusses key ethical principles in organ allocation, including equity, utility, personal autonomy, procedural justice, and nonma-

¹² DeGRAZIA, D., MILLUM, J. *A Theory of Bioethics*. Cambridge: Cambridge University Press, 2021, pp. 97–137.

¹³ RAZA, F., NEUBERGER, J. Consent in organ transplantation: putting legal obligations and guidelines into practice. *BMC Medical Ethics*. 2022, Vol. 23, No. 69.

¹⁴ RAZA, F., NEUBERGER, J. *Consent in organ transplantation: putting legal obligations and guidelines into practice*.

¹⁵ RAMOS, H. C., MCCUALEY, J. Ethical issues in organ transplantation. In: Carlo Gerardo B. Ramirez – Jerry McCauley (eds.). *Contemporary Kidney Transplantation. Organ and Tissue Transplantation*. Cham: Springer, 2018. See also KATZ, A. L. Ethical considerations for organ transplantation. In: Kathirvel Subramaniam – Tetsuro Sakai (eds.). *Anesthesia and Perioperative Care for Organ Transplantation*. New York: Springer, 2017.

¹⁶ ALCORN, J. Continuously balancing the ethics of organ allocation. *Current Transplantation Reports*. 2024, Vol. 11, pp. 7–14.

¹⁷ Ibid., pp. 7–14.

lefidence. These principles often intersect and may require compromises to achieve balance. The continuous distribution framework aims to address these ethical challenges by providing a structured system for evaluating and prioritizing candidates based on various attributes. Engaging diverse stakeholders within the transplant community is vital for crafting inclusive organ allocation policies. Unlike prescribing a fixed ethical balance, the continuous distribution model allows stakeholders to express preferences regarding ethical tradeoffs.

Justice pertains to fairness and equity in healthcare allocation and delivery. In organ transplantation, justice requires establishing transparent and equitable organ allocation systems.¹⁸ This involves considering factors such as medical urgency, waiting time, and likelihood of success, rather than socioeconomic status or other discriminatory criteria. Moreover, justice extends to addressing broader systemic issues such as disparities in access to transplantation services.

Engelhardt¹⁹ highlights the challenge of establishing a definitive account of morality, justice, fairness, and equality due to the multitude of competing views on what constitutes the right course of action. This diversity of perspectives, stemming from differing moral premises and rules of evidence, contributes to persistent disagreements that are difficult to resolve through rational argument. Engelhardt²⁰ further emphasizes the limitations of secular moral philosophy in establishing a singular vision of justice that can be universally applied. He questions the feasibility of coercively imposing a specific moral framework on individuals, especially in the face of deep moral and religious disagreements.

The concept of enforced equal access to transplant operations is critiqued by Engelhardt²¹ as an act of immoral coercion, involving the imposition of a specific secular moral vision over competing moral perspectives. Engelhardt²² argues that such actions disregard individual freedoms and the complexities of moral pluralism, advocating instead for a recognition of unequal access to transplantation and the existence of a market for human organs. Engelhardt²³ contends that a secular moral polity should accept these inequalities rather than enforce a singular moral vision.

II. ORGAN TRANSPLANT POLICIES FOR HUMANITARIAN HEALTH RECOVERY

The *McFall v. Shimp* case (1978) established that organ transplants had taken place in the state of Pennsylvania. McFall, afflicted with an illness, urgently needed a bone marrow transplant to survive. After an extensive investigation, it was found that only his uncle, Shimp, was a suitable donor. Despite the absence of immediate life-threatening danger,

¹⁸ LEBRET, A. Allocating organs through algorithms and equitable access to transplantation—a European human rights law approach. *Journal of Law and the Biosciences*. 2023, Vol. 10, No. 1.

¹⁹ ENGELHARDT, H. T. The injustice of enforced equal access to transplant operations: Rethinking reckless claims of fairness. *Journal of Law, Medicine & Ethics*. 2007, Vol. 35, No. 2, pp. 256-264.

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

²³ Ibid.

Shimp refused to donate his bone marrow due to the highly painful nature of the procedure. In response to his uncle's refusal, McFall initiated legal action, feeling threatened by his uncle's decision.

However, the court rejected McFall's claim, asserting that there was no legal authority to compel someone to donate their bodily organs to another individual. This sentiment was echoed by Judge Brennan at the Supreme Court level, who stated that "to force somebody to give his or her body to someone else would infringe on individual privacy and autonomy".²⁴ Indirectly, mandating organ donation would violate constitutional rights. In contrast, Judge Bork offered a dissenting opinion, suggesting that there was no constitutional prohibition against forced organ donation. He argued that if a legislature were to pass such a law, it would be constitutional.²⁵ Judge Bork's perspective emphasized the need to examine whether an activity was regulated under legislative provisions to determine its constitutionality.

The concept of the right to one's body has been subject to scrutiny, particularly in cases where ecclesiastical or religious courts have weighed in. Declarations regarding bodily autonomy have emerged in countries with conventional legal systems. For instance, the Common Law and Equitable Courts have relinquished jurisdiction over deceased bodies,²⁶ citing precedents such as Haynes's Case (1614) and Exelby v. Handeyside (1749). These rulings underscore the evolving understanding of bodily rights within legal frameworks.

The rationale for this perspective contrasts with the Roman concept of ownership known as "dominium," which acknowledges a person's complete control over an item they possess. In contrast, common law distinguishes between ownership and possession.²⁷ Ownership in the common law tradition entails a broad range of rights akin to "dominium," granting the owner extensive control over the property, including the ability to use, manage, and transfer it freely.²⁸ This notion of ownership is often referred to as Property Rights in legal terms, as it empowers the owner to exercise authority over the object, whether in whole or in part. Rahardjo (2012) characterizes this relationship between a person and their property as the essence of ownership. It emphasizes the owner's robust and forceful control over their possessions. In summary, within the common law framework, the concept of ownership entails comprehensive rights over property, including the human body, allowing the owner to exercise authority and control over it.

Imagine applying this idea to the body and its components; the relationship between an individual and their body is akin to a property relationship. Under this property right framework, all relevant civil law provisions apply. The body, much like a person's wealth, holds a specific economic value. Humans possess complete control over their bodies, including the freedom to donate their organs. This understanding suggests a notion of unlimited personal rights, wherein individuals are protected in their ability to pursue their

²⁴ CALABRESI, G. Do we own our bodies? *Health Matrix Clevel*. 1991, Vol. 1, No. 1, pp. 5–18.

²⁵ CALABRESI, G. *Do we own our bodies?* pp. 5–18.

²⁶ DEVEREUX, J. (ed.). *Australian Medical law. 1st Edition*. Abingdon-on-Thames: Routledge-Cavendish, 2002.

²⁷ *Ibid.*

²⁸ *Ibid.*

desires regardless of moral or other values. Calabresi²⁹ underscores this point, suggesting that if individuals truly owned their bodies as they do property, they would conceivably be able to sell all their body parts. However, such a scenario is not expected, as the human body and its components are not treated as commercial goods.

Feminists have offered a distinct interpretation of the right to the body, framing it as a form of “ownership” by proposing a separation between the concepts of self and body. Farsides³⁰ articulates this perspective, stating that women view the body as something separate from the self, needing to be controlled, but capable of causing devastating consequences when it goes out of control. Women’s experiences, such as menstruation and pregnancy, form the foundation of feminist discourse on the right to the body. However, this definition focuses on the body’s frequently uncontrollable nature rather than its inherent necessity and value as goods. Consequently, feminists’ arguments fall short in sustaining the concept of the right to one’s body as “ownership.”

III. HUMAN ORGAN TRAFFICKING POLICY IN INDONESIA

Organ trafficking in Indonesia is prohibited by Law Number 23 of 1992 of the Republic of Indonesia concerning Health, which was later amended by Law Number 36 of 2009. This prohibition is articulated in Article 64 paragraph (3) of Law Number 36 of 2009, which stipulates that organs and/or body tissues are prohibited from being “traded” under any pretext. Previously, Law Number 23 of 1992 Article 33 paragraph (2) only stated the prohibition of organ/tissue transplants for commercial purposes. The term “traded” encompasses a broader scope than “transplantation for commercial motives is prohibited.” Criminal provisions related to the prohibition of trading in organs/tissues are explicitly stated in Article 192 of Law Number 36 of 2009, which states:

“Everyone who deliberately trades organs or body tissues under any pretext, as referred to in Article 64 paragraph (3), shall be subject to imprisonment for a maximum of ten years and a fine of a maximum of Rp1,000,000,000.00 (USD 63,131).”

Whereas, if the act that was violated involved trafficking in persons to harvest human organs, the legal provisions for this act and the perpetrators are regulated in Law Number 21 of 2007 concerning Eradication of Human Trafficking Crimes, referring to the definition of trafficking in persons as stated in Article 1 paragraph (1) and Article 7 of the law:

“Trafficking in persons is an act of recruiting, transporting, harboring, sending, transferring, or receiving a person through threats of violence, use of force, kidnapping, confinement, forgery, fraud, abuse of power or position of vulnerability, debt bondage, or giving payments or benefits, to obtain approval from the person who has control over the other person, whether it is done within the country or between countries, for exploitation or causing people to be exploited.”

In Philippine law, distinct mechanisms exist for the exchange of human organs. Organ trade is forbidden, and the penal sanctions for organ trading are governed solely by

²⁹ CALABRESI, G. *Do we own our bodies?* pp. 5-18.

³⁰ FARSIDES, C. Body ownership. In: Shaun McVeigh - Sally Wheeler (eds.). *Law, Health and Regulation*. Sydney: Dartmouth, 1992.

organ transplantation regulations.³¹ Organ transplant laws include the Republic of the Philippine Department of Health Revised National Policy on Living Non-Related Organ Donor and Transplantation and its Implementing Structure, and an Act to Institute Policy to Prohibit Commercial Dealings in Human Organs, Tissue, and/or Parts, Providing Penalties Therefore for Its Violations, and for Other Purposes. This is due to the extensive practice of organ trading inside the Philippines, which formed the foundation for the complexity of organ transplantation in the Philippines. The Philippines' legal statutes impose stringent controls on the implementation of organ violations. The objective is to end organ trafficking in the Philippines because of medical tourism policies in Asia and to prevent organ trafficking that ends in or is conducted through organ destruction. Organ extraction is only permissible in the Philippines if the donor and recipient share a close kinship, and both the donor and recipient are Filipino citizens.³²

The implementation of regulations against human organ trafficking in Indonesia allows for organ transplants to be performed on both deceased (cadaver) and living donors, with the consent of the donor or guardian required prior to a transplant. Indonesia's consent procedure follows an "opt-in" approach, where donor agreement constitutes informed consent.³³ In contrast, in India, the donor must provide written informed consent before their death. However, if a person fails to make a declaration agreeing to or refusing organ harvesting until their death, they are considered to have consented to the harvesting of their organs for transplant therapy. Therefore, it could be said that India's system combines opt-in and opt-out approaches.³⁴

In Indonesia, regulations regarding organ transplants remain normative due to the absence of specific guidelines governing the technical aspects of transplantation procedures. Although organ transplants in Indonesia are currently regulated by Government Regulation Number 18 of 1981, these laws lack detailed procedures concerning the entire process, from organ donation to transplantation. Furthermore, the reliance on this regulation as the legal framework for organ transplants is no longer appropriate, as Health Law Number 36 of 2009 now governs health-related matters, including organ transplantation. This newer law stipulates that the implementation of organ transplants is to be further regulated by government regulations. According to the transitional provisions of Law Number 36 of 2009, 'legislation prescribing the execution of this law shall be enacted no later than one year from the date of its publication.' This law came into effect on October 13, 2009, and consequently, the one-year deadline specified in the transitional provisions has elapsed without the enactment of the necessary legislation.

The absence of specific laws governing organ transplantation techniques hampers the ability of competent institutions, committees, and stakeholders to effectively implement

³¹ DELMONICO, F. L. et al. Living and deceased organ donation should be financially neutral acts. *American Journal of Transplantation*. 2015, Vol. 15, No. 5, pp. 1187–1191.

³² DE CASTRO, L. D. The declaration of Istanbul in the Philippines: success with foreigners but a continuing challenge for local transplant tourism. *Medicine, Health Care and Philosophy*. 2013, Vol. 16, No. 4, pp. 929–932.

³³ WIDODO, H. S. *Legalization of giving compensation to donors in transplanting humans organs in Indonesia*. Surabaya: UNTAG 1945 Surabaya, 2020.

³⁴ DIEN, R. A. Sanksi pidana terhadap korporasi yang memperjualbelikan organ atau jaringan tubuh manusia menurut Undang-Undang Nomor 36 Tahun 2009 tentang Kesehatan. *Lex Crimen*. 2018, Vol. 7, No. 8.

and manage organ transplants in accordance with legal requirements. Additionally, only twelve hospitals in Indonesia currently meet the standards for performing organ transplants. According to Friedman's theory of legal systems, the transplantation of law cannot effectively occur in Indonesia due to the lack of synergy between legal structure, substance, and cultural context.

Indonesia and the Philippines share similar perspectives on organ transplantation, as stipulated by their respective national laws. In Indonesia, as per Article 64, paragraph 2 of Law Number 36 of 2009, organ and/or body tissue transplants are strictly permitted for humanitarian purposes only and are prohibited from commercialization. While Indonesia generally regulates the illegal trade of human organs, the Philippines has explicit provisions delineating the duties and responsibilities of perpetrators involved in such illicit activities. Due to the complexity of the individuals involved, the Philippines classifies human organ trafficking as organized crime.³⁵

In the Philippines, kidney transplant processes are governed in greater detail by legislation enacted by senators and the executive branch. Administrative arrangements for human organs are outlined in the Administrative Order of the Republic of the Philippines Department of Health Revised National Policy on Living Non-Related Organ Donor and Transplantation, along with its Implementing Structure. This document delineates administrative arrangements for the process and stages of donor organs to be transplanted, as well as the fundamental rules governing the operations of health institutions providing kidney organs.

The regulations prohibiting the purchase and sale of organ transplant procedures have evolved over time, reflecting societal values and concerns. In Indonesia, the 1945 Constitution affirmed the right to life and the prohibition of actions endangering it. Government Regulation Number 18 of 1981 established detailed procedures for organ transplants, emphasizing informed consent, medical oversight, and the prohibition of commercialization. Subsequent laws such as Law Number 23 of 2002 on Child Protection and Law Number 21 of 2007 on the Crime of Trafficking in Persons further strengthened protections against organ trafficking, particularly targeting vulnerable populations like children.³⁶ Law Number 36 of 2009 on Health provided comprehensive guidelines for organ transplants, emphasizing safety, medical ethics, and criminal penalties for organ trafficking. Even in the Draft of Criminal Law Code, provisions were made to criminalize organ trafficking, underscoring the severity of such exploitative practices. Through these legal frameworks, Indonesia has sought to safeguard the dignity and well-being of its citizens while combating the illicit trade in human organs and tissues.

IV. WEAKNESSES IN INDONESIAN LAWS ON HUMAN ORGAN TRAFFICKING

When comparing Indonesian and Philippine regulations on organ transplants and donors, Indonesia's laws present both advantages and disadvantages. Indonesia excels in

³⁵ EFRAT, A. Global efforts against human trafficking: The misguided conflation of sex, labor, and organ trafficking. *International Studies Perspectives*. 2016, Vol. 17, No. 1, pp. 34-54.

³⁶ PERDANA, P., SANTOSA, P. B. Efektivitas lembaga birokrasi dan tingkat korupsi terhadap investasi pada enam negara ASEAN (Filipina, Indonesia, Malaysia, Myanmar, Singapura, dan Thailand) tahun 2004-2010. *Diponegoro Journal of Economics*. 2012, Vol. 1, No. 1, pp. 251-261.

granting rights and obligations to patients, even those receiving basic health services, and imposes strict criminal sanctions and fines for violations related to kidney transplantation and organ donation. However, there are shortcomings in Indonesian legislation that need addressing for future improvement:

- Lack of specific rules regarding organ transplantation and donation from living donors based on kinship and solidarity.
- Absence of clarification on the types of living donors permitted for kidney organ transplants and donations.
- Missing guidelines for implementing organ transplants from living donors.
- No provisions for operational structures to facilitate kidney organ transplants and donations.
- Lack of regulations concerning funding support for kidney organ transplants and donations.

Upon analyzing comparative criminal acts related to organ transplantation and human body tissue, researchers suggest that Indonesia's future transplant regulations may be influenced by its civil law legal system rather than the colonial legal system introduced by the Netherlands. In civil law nations, the written constitution holds top hierarchy in statutory regulations, followed by statutes and rules. This legal perspective emphasizes state sovereignty in setting standards for societal regulation. According to this viewpoint, law is obeyed because it reflects the government's will and authority, a concept developed by Hans Kelsen.³⁷ Kelsen argued that people comply with the law not solely due to the state's desire but also because of a sense of obligation to governmental orders.

Regulating organ transplants, particularly kidney transplants, begins with formulating criminal law or legislative policy. The next steps involve implementing criminal law through law enforcement personnel such as police, prosecutors, courts, and civil service officers, followed by the execution phase, which involves penal and non-penal policies.³⁸ The success of the application and execution stages relies on the legal structure, content, and culture of society, as well as law enforcement institutions, supporting facilities, institutional work culture, and regulatory frameworks governing legal material used as standards.³⁹ New laws are built upon cooperation, enforcement, and justice. Adjusting criminal punishments can facilitate collaboration and law enforcement. Moreover, extradition agreements with various nations regarding organ trafficking crimes are necessary for judicial matters related to organ transplantation. Such agreements determine applicable criminal jurisdiction and ensure offenders face justice in their home countries. To supplement existing laws on organ transplantation, additional regulations are needed, including strict prohibitions on organ sales and purchases, as well as procedures for transplants from living donors not related to the patient. These measures can prevent

³⁷ CARROZZA, P. Kelsen and contemporary constitutionalism: The continued presence of Kelsenian themes. In: Peter Langford – Ian Bryan – John McGarry (eds.). *Kelsenian Legal Science and the Nature of Law*. Cham: Springer, 2017.

³⁸ HANDAYANI, T. *Fungsionalisasi hukum pidana terhadap perbuatan perdagangan organ tubuh manusia*. Bandung: Mandar Maju, 2012.

³⁹ HANDAYANI, T. *Fungsionalisasi hukum pidana terhadap perbuatan perdagangan organ tubuh manusia*.

and control crimes associated with kidney organ trafficking while safeguarding patients' human rights and promoting social welfare in medical care delivery.

In the Philippines, proponents of positive law assert that detailed regulations and a classification system for criminal acts related to the commercialization of human organs offer clarity and aid law enforcement in combatting such offenses. Additionally, there exists a separate institution accountable to the Minister of Health, tasked with meeting the legal and procedural requirements for kidney organ transplants. However, the health budget, exceeding P20 billion pesos annually, poses a challenge, as it must cover the expenses of existing kidney organ supply facilities.

In Indonesia, kidney transplantation follows a procedural framework from pre-transplantation to post-transplantation stages, unlike the situation in the Philippines. Despite this, the availability of kidney organs in Indonesia does not meet the increasing demand. Lack of dedicated organ donation institutions places the burden solely on individuals with kidney failure, while procedures and lengthy waiting lists may be exploited by irresponsible parties.

Urgent positive legal reforms are needed in the healthcare sector to ensure compliance with current and future regulations. Meanwhile, legal scholar Lawrence M. Friedman divides the legal system into three components: legal structure, legal substance, and legal culture. The legal structure encompasses the methods used to create and enforce rules, while legal substance refers to the regulations themselves, whether formal or customary.⁴⁰

When assessing the legal framework as a whole, it becomes evident that crimes related to kidney organs lack comprehensive categorization under positive legislation. To address this gap and to exempt brokers and facilitators involved in organ trade from criminal penalties, it is crucial to refine the Health Law (Law Number 36 of 2009) by categorizing subjects of the crime of buying and selling organs, including legal entities, associations, and assemblies, alongside individuals. Additionally, the classification of criminal acts involving organs should encompass various aspects such as promoting, facilitating, offering, and renting out locations for organ trade. This classification would allow for varying degrees of punishment based on the severity of the offense. Furthermore, establishing a legal foundation for both blood-related and unrelated kidney donors is essential. This ensures equitable interactions between donors and recipients based on their respective needs.

In Indonesia, addressing the demand for kidney organs necessitates the creation of a dedicated kidney organ provider agency. This agency, mandated by the Minister of Health's regulations, would be responsible for administratively registering and distinguishing between living donors who are blood relatives of the recipient and those who are not. A database system for potential donors would simplify the selection process for recipients. In addition to the administrative aspect, a supervisory body must be established to assess the effectiveness of meeting kidney organ needs and prevent misuse.

⁴⁰ PAWESTRI, O. A. Analisis kebijakan hukum pidana terkait perbandingan organ tubuh ginjal dalam komparasi hukum kesehatan di Indonesia dan Filipina. *Jurnal Hukum Pidana dan Penanggulangan Kejahatan*. 2017, Vol. 4, No. 2, pp. 167-174.

The Ministry of Health holds direct accountability for both the provider and supervisory organizations. Collaborative efforts between the police, alongside monitoring and evaluation by the supervisory agency, are crucial to curbing illicit organ trade. Community education on cultural matters is also essential to ensure procedural adherence to organ donation protocols through affiliated medical facilities.

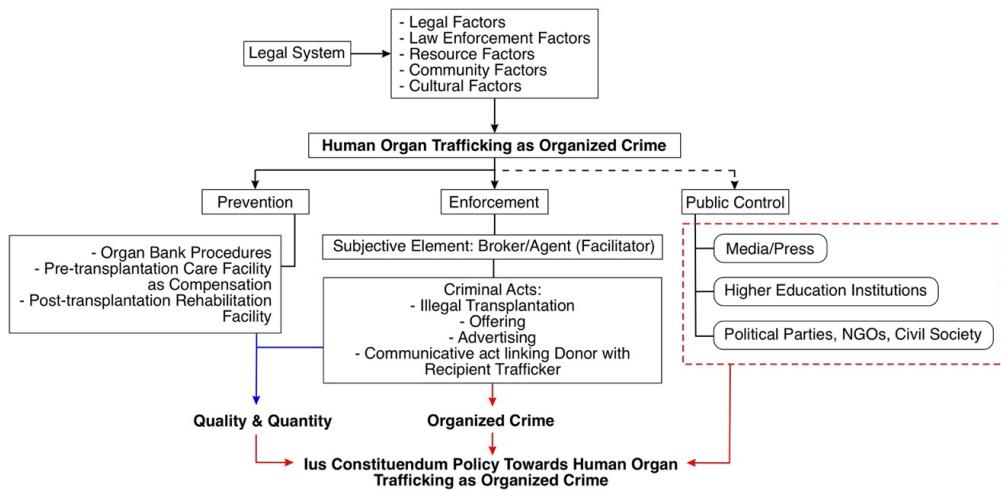


Figure 1. Framework for Addressing Human Organ Trafficking as Organized Crime

Figure 1 illustrates the comprehensive framework for addressing human organ trafficking as organized crime through the concept of *ius constituendum*. The figure delineates the interconnected components within the legal system, comprising legal, law enforcement, resource, community, and cultural factors. At the core of the framework lies the recognition of human organ trafficking as a form of organized crime, depicted prominently in the upper section. The lower section outlines three main pillars of action: prevention, enforcement, and public control. Prevention strategies encompass measures such as organ bank procedures, pre-transplantation care facilities, and post-transplantation rehabilitation centers. Enforcement efforts target subjective elements like brokers and agents, as well as criminal acts such as illegal transplantation and advertising. Public control mechanisms, facilitated through media, higher education institutions, and political parties, are essential in raising awareness and fostering societal engagement. The figure emphasizes the synergistic relationship between prevention, enforcement, and public control in shaping the quality and quantity of the *ius constituendum* policy towards combating human organ trafficking.

Efrat⁴¹ discussed several critical elements for international cooperation in combating organ trafficking. Firstly, compared to other forms of trafficking, organ trafficking

⁴¹ EFRAT, A. *Global efforts against human trafficking: The misguided conflation of sex, labor, and organ trafficking*. pp. 34–54.

requires relatively modest enforcement efforts due to the limited number of prohibited transactions and the identifiable locations where illegal transplantations occur. Secondly, the nature of organ trafficking, often taking place within hospitals, makes it easily detectable and traceable. This visibility extends to the identities of transplant surgeons and patients involved, facilitating enforcement efforts and reducing associated costs. This intricate interplay between enforcement, detection, and policy balancing underscores the complexity of combating organ trafficking on an international scale.

Media, higher education institutions, and political parties play crucial roles in combating organ trafficking. The media's responsibility lies in informing the public, including potential donors and vulnerable members of society, about the risks associated with these crimes and their rights (Resolution 25/1). Higher education institutions also have a significant role to play, particularly in research and education. Investigating how *de facto* academic freedom is influenced or compromised by political institutions can provide valuable insights into preventing and combating organ trafficking.⁴² Additionally, political parties can influence policy and legislation related to organ trafficking.

There is a pressing need for a harmonized approach to combat human organ trafficking, which involves developing a clear policy framework, referred to as *ius constituentum*, to address the complexities and overlaps between organ trafficking and human trafficking laws. The proximity and overlap arise from the legal definitions of organ trafficking and human trafficking for organ removal. To effectively address this issue, there is a call for harmonizing the application of both trafficking frameworks to minimize the risk of double prosecution and punishment.

Gawronska et al.⁴³ emphasize the importance of developing a coherent *ius constituentum* policy that aligns the enforcement of laws related to organ trafficking and human trafficking. This policy should aim to prevent double prosecution and ensure that offenders are prosecuted under the most appropriate legal framework. Additionally, international judicial cooperation in prosecuting illicit organ removal cases must be prioritized. Furthermore, there is a need for clear guidance on how to prosecute illicit organ removal cases, whether categorized as human trafficking or organ trafficking. Members of the judiciary and law enforcement should receive proper training on the nuances of prosecuting illicit organ removal cases. This training is essential to ensure a uniform and effective approach to combating human organ trafficking under the *ius constituentum* policy.

CONCLUSION

The formulation of criminal policies against organized crime related to trading in human organs in Indonesia, specifically targeting perpetrators involved in trafficking human organs as part of organized crime, is imperative. The study highlights the complexities and shortcomings of Indonesia's legal framework on human organ trafficking, particularly

⁴² BERGGREN, N., BJØRNSKOV, C. Political institutions and academic freedom: evidence from across the world. *Public Choice*. 2022, Vol. 190, pp. 205-228.

⁴³ GAWRONSKA, S., CLAES, L., VAN ASSCHE, K. Double prosecution of illicit organ removal as organ trafficking and human trafficking, with the example of Belgium. *European Journal of Criminology Policy Research*. 2022, Vol. 28, pp. 503-524.

in comparison to the more structured policies in the Philippines. While Indonesia has established legal prohibitions against organ trade through various laws, including Law Number 36 of 2009 on Health and Law Number 21 of 2007 on Human Trafficking, the country still lacks clear and comprehensive regulations on organ transplantation procedures, donor eligibility, and enforcement mechanisms. The absence of a specialized organ donation and transplant regulatory body further exacerbates the issue, limiting the effectiveness of legal enforcement and leaving room for illicit activities.

A key weakness in Indonesia's current legal framework is the lack of detailed guidelines for living donor transplants, including kinship-based and altruistic donations. Additionally, the country lacks operational structures to facilitate legal kidney transplants, leading to inefficiencies and potential legal loopholes that traffickers may exploit. It is important to recognize that the scope of individuals engaged in the crime of buying and selling human organs extends beyond those motivated solely by economic gain. It also includes legal entities, organizations, and associations. These policies should aim to identify and address various actions such as promotion, facilitation, offering, and renting of places to curb the criminal activities associated with trafficking in human organs. Therefore, a comprehensive classification of prevention and prosecution components could yield more effective outcomes.

In strengthening Indonesia's efforts to combat human organ trafficking, legislative reforms are essential. These should include establishing a dedicated organ transplantation regulatory body, enforcing stricter classifications of criminal offenses related to organ trade, and introducing extradition agreements to prosecute cross-border offenders. Additionally, refining Indonesia's Health Law to clearly define organ trafficking offenses and impose differentiated penalties based on crime severity is necessary. Beyond legal measures, protecting both donors and recipients from fraudulent or coerced transactions requires the implementation of appropriate organ donation mechanisms. In addition to existing regulations governing organ transplantation, there is a need for additional measures that strictly prohibit the sale and purchase of organ transplants. Furthermore, procedures concerning organ transplants from living donors who are not relatives of the patient should be outlined to serve as preventive measures and control mechanisms against organ trafficking. These actions are necessary to ensure that criminal laws and regulations are adaptable to the specific conditions of the present (*ius constitutum*) and the future (*ius constituendum*).