

Organ Transplant Agreement Between Donor and Recipient by Notary

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ABSTRACT--Transplantation of human organs is one of the rapidly developing alternative treatments. The imbalance in demand with the availability of organs results in the commercialization of human organs. The use of donors from non-related family is one of the considerations in implementing therapy. It is necessary to have an agreement between the organ giver and the organ receiver so that problems do not occur in the future. The formulation of the problem in this thesis is "How does the implementation of medicolegal organ transplantation from donors use notary agreements to improve body health?" This research uses a normative and empirical juridical approach with descriptive analytical research specifications, normative and empirical qualitative data analysis methods on primary or secondary data.

An agreement is a deal between the two parties to do something. Agreements are very often used in life, both underhand and notary agreements. In the contents of the agreement the parties make it in accordance with the principle of freedom of contract. Under the hand agreements often have problems between parties because the agreement is not binding. For this reason, the role of the Notary is required in making a notarial agreement deed so that the parties can achieve their respective goals and it is safe if one day there is a party who defaults, then the notarial agreement can be used as valid evidence.

Article 1873 of the Civil Code provides an explanation that the responsibility of Notaries as public officials relating to the material truth of the simulation agreement in the form of an authentic deed is civil, as long as it does not cause harm to the parties, the Notary cannot be liable for civil liability. Criminally cannot be prosecuted because it does not meet the aspects of a criminal offense. Based on the Notary Position Regulations, liability can be held if it turns out that the notary does not provide access to a particular law. based on the code of ethics the Notary is personally responsible for the deed he made. Thus, the Notary in carrying out his duties must uphold the code of ethics, and the legality of existing rules. Empirically there are still few notarial agreements implemented by the givers and recipients of organ transplant donors. Informed consent is more widely used in binding organ transplantation agreements. Susalit E (2002) state that kidney organ transplants have been carried out since 1985 in 2 Semarang Hospitals, 58 times in Telogorejo Hospital and 2 times in Dr Kariadi General Hospital, all using informed consent. Alleged sale and purchase of kidneys that was published by Malangtimes.com, leaving the problem of underhand agreements that are still ongoing.

Conclusion: Need to immediately improve regulations regarding donor agreements and organ transplant recipients who are notarized and implemented immediately by the health community. All stakeholders must play an active role in providing input on the implementation of human organ

transplantation so that the benefit of human health can be achieved to the fullest.

Keywords: organ transplantation, notarial agreement, legality

I. INTRODUCTION

Transplantation of human organs has increased from year to year. According to WHO, specifically for kidney transplants alone have been carried out in 98 countries. Currently kidney transplants occupy the top position in organ transplants in humans. Data recorded at WHO, there were about 66,000 kidney transplants, 21,000 liver transplants and 6000 heart transplants carried out throughout the world in 2005.¹

Transplantation has several meanings in the medical world including:

- Substitution of organs or tissues that cannot function again with healthy organs or tissues that originate from the body itself or others.
- The transfer of cells, tissues and living organs from a person (donor) to another person with the aim of restoring lost functions.²

Donating organs is a very noble act in helping others. Transplants of organs and tissues of the human body in Indonesia and various countries are altruistic, namely for humanitarian purposes and are prohibited from being commercialized.

The very limited number of legal donors and the difficulty of finding specific donor organs such as kidneys, heart and lungs make some people look for other alternatives, namely the black market or the black market. More organ supply and the price offered is also much cheaper than the price obtained from the legal process of purchasing organs.

The following prices of human organs on the black market: A pair of eyeballs ± Rp.18 Million, scalp ± Rp.7 Million, liver ± Rp. 1.8 Billion, skull and teeth ± Rp.14 Million, shoulders ± Rp.6 Million, coronary arteries ± Rp.18 Million, heart ± Rp.1.4 Billion, blood per half liter ± Rp.4 Million, lungs lung ± Rp.1.3 billion, spleen ± Rp.6 million, stomach ± Rp.6 million, small intestine ± Rp.30 million, gallbladder ± Rp.14 million, pancreas ± Rp.1.6 billion, hands and forearm ± Rp.4,5 million, kidney ± Rp.3 billion, skin ± Rp.118 thousand per square inch.³

As a result, organ transplants often by giving parts of a person's body to others are misused for the commercial interests of a person / interest group.

In order to protect its citizens from the practice of illegal trafficking and in order to improve the health and survival of their citizens, the method of transplantation is one way to maintain and improve the health status of the community. The rise of organ trafficking in the world community and allegedly has occurred in Indonesia, it is necessary to increase the protection of citizens from illegal organ trafficking practices. Organs with high economic value can make people who live in poverty line sell their organs in meeting their needs, including paying off their debts.⁴

Regulations on transplanting human organs in Indonesia already exist in the Indonesian Criminal Code and outside the Indonesian Criminal Code, namely in the Health Act, the Criminal Act on Trafficking in Persons, the Law on the Protection of Children and Regulations Government on Clinical Corpse Surgery and Anatomical Corpse Surgery.

Regulations contained in the Criminal Code Article 204, Article 205 and Article 206 concerning crimes that endanger the public security of persons or property. This article also describes criminal sanctions for those who sell or offer goods that are known to endanger the lives or health of people, but this article does not regulate the sale and purchase of organs and / or tissues for organ transplantation.

The therapeutic transaction is not known in the Civil Code, but it is included in the category of other agreements, as explained in Article 1319 of the Civil Code, that for all agreements that have a special name, or are not known by a certain name, are subject to general rules regarding engagement in general (Chapter I book III of the Civil Code) and on general regulations concerning agreements that originate from the agreement (Chapter II book III of the Civil Code). Thus, for the validity of therapeutic transactions, the conditions contained in Article 1320 of the Civil Code and the consequences thereof must be fulfilled in Article 1338 of the Civil Code, which contains the basic principles of the treaty law.

In therapeutic transactions often the patient is considered as not mastering medical material so that his position is considered weak in conducting transactions, besides that medical transactions are never written in the form of a memorandum.⁵

II. RESEARCH METHOD

The research method used is analytical descriptive which is describing the facts and discussion of the agreement in organ transplantation in the implementation of therapeutic transactions from medical practice. The method of approach in this study is a normative juridical approach, namely the method of approach or legal research using analysis included in the discipline of law, using secondary data sources in the form of legislation, legal theories, and

opinions of scholars relating with organ transplants, then analyzed to answer the problems examined in this study⁶

Data collection techniques used by means of document study, namely data collection through library material relating to the juridical aspects of organ transplantation.

This research was conducted through the literature research stage, namely analyzing, researching, and studying secondary data relating to the juridical aspects of the implementation of the agreement in the implementation of medical practice. Data collection is carried out through an inventory of various literature obtained from legal materials and from the field, then carried out in a systematic and directed analysis. The data obtained will be analyzed in a qualitative juridical manner, i.e. all data obtained will be reviewed thoroughly and integrated. The research location is in the library and various data obtained from electronic media information regarding legal materials that are relevant to the case under study.⁷

III. FINDINGS AND DISCUSSION

At present, advances in science and technology have improved the implementation of transplants. Transplant rates in China and Indonesia support the above hypothesis. In China, in 1999 there were only 24 liver transplants, in 2000 there were 78, in 2003 there were 356 transplants, and in 2004 the number had reached 507. Not only liver, the total number of organ transplants in China had indeed increased dramatically. At least three times more than the United States.⁸

In Indonesia, one of the most widely performed transplants is a kidney transplant. The total number of kidney transplants ever carried out in Indonesia in the period 1977-2006 was 479 with the highest implementation in PGI Cikini Hospital in Jakarta (277 times) kidney transplants since 1977. In Semarang, kidney transplants have been carried out since 1985 in 2 Hospitals namely 58 times in Telogorejo Hospital and 2 times in RSUP dr. Kariadi.^{9,10}

Transplants have been gaining popularity in the medical world since the mid 50s, in carrying out this technique there is a huge problem and a high risk for the body that is rejection (rejection) of transplanted tissue that can cause complications.

Transplant technology has evolved so that it can be done on organs that previously could not be made to be transplanted. The first successful organ transplant was a kidney transplant between a pair of identical twins. After gaining enough experience with kidney transplants, the medical world began to develop liver, lung and heart transplants. The first successful heart transplant was done in 1967.

Along with the development of medical technology up to now many organs or tissues that can be transplanted include skin, cornea, bones, blood vessels, kidneys, heart, liver and pancreas.^{11,12}

Doctors who practice medicine on patients are in the context of exercising their rights and obligations in a doctor and patient legal relationship. A legal relationship (*rechtsbetrekking*) is a relationship between two or more legal subjects or between legal subjects and legal objects that apply under the rule of law or are regulated in law and contain legal consequences.¹³

In this connection, an agreement arises namely a therapeutic agreement. A therapeutic agreement or agreement is an agreement between a doctor and a patient, in the form of a legal relationship that gives birth to rights and obligations for both parties. In contrast to agreements made by the community, therapeutic agreements have special characteristics that differ from agreements in general, the specificity lies in or regarding the object agreed upon. The object of this agreement is in the form of an effort or therapy for healing patients. So a therapeutic agreement or transaction, is a transaction to determine or attempt to find the most appropriate therapy for patients performed by a doctor. According to the law, the object of the agreement in a therapeutic transaction is not the patient's recovery, but rather seeking the right effort for the patient's recovery.^{13,14}

The relationship between doctor and patient is limited to therapeutic transactions and does not change its relationship and essence, but in terms of the organ giver known as the donor and the recipient of the organ as a recipient there is a specific relationship. Living donors who still have family relationships (related donors) generally do not question the gift and are voluntary. This is in accordance with the understanding / philosophy of altruistic in all medical actions undertaken. But not a few who ask for rewards for giving organs by donors. There are various kinds of compensation. In return for money, health insurance for the donor and even for the donor's family are asked to guarantee their social life.

The case of someone writing in a reader's letter in the newspaper stating that the person concerned sells organs (kidneys) to give to others and asks for compensation in the form of money, this is because of urgent economic needs.¹⁵

The demand for and supply of organs for transplants is unbalanced. This increase in the number of transplants results in an increase in the number of organ requests. Unfortunately, the available organs are not able to keep up with the number of requests. In the end, this imbalance is one of the obstacles to the development of transplants. In Indonesia itself, due to the difficulty of obtaining organ donors, many patients seek treatment abroad such as China and India. It is estimated that more than 1,000 Indonesians who undergo kidney transplants abroad.^{16,17}

The World Health Organization has indicated that increased use of organs in transplants over the past ten years, from the living donations of non-regenerative organs, has spread from the kidneys to the liver and even to the lungs and pancreas in some cases, despite hopes that dependence on living donors can be reduced. There is still

fundamental concern that the market for selling parts of the body (especially the kidneys) has developed over the past few years with people who are vulnerable to being deceived or forced to donate and some recipients traveling with their surgeons to countries where "donated organs can be purchased legally or illegally".¹⁸

Dr. Gracia described various organ donor approval systems based on information used throughout the world to obtain cadaveric organs and tissues for transplantation. In many cases, either a pre-mortem / life approval from a donor, or his family's approval after death, or some combination of both is required in a recipient donor agreement. Dr Gracia believes that, based on the success of undeniable transplants, excellent risk or benefit ratios and ongoing organ scarcity, there is now a need to consider other variations of the information-based consent system he calls "supererogatory permission". The premise underlying such an agreement is that "the organs of the deceased are public goods", and donations must be considered "similar to other compulsory civil obligations" in society. The permit is thus a moral requirement rather than a legal requirement.

Although this recommendation might appear as a "radical solution" and is currently considered "illegal", he concluded that it might be time to start such discussions.¹⁸

What is done between countries differs from one another. Approval for donating organs or tissues of the human body in Indonesia and in Singapore is different. Singapore applies the agreement contained in the MTERA and in the HOTA relating to living organs, provided after the donor has received sufficient informed consent (informed consent) regarding the procedures, consequences and risks that will be faced.¹⁹

Based on the fact the acquisition of organs can be divided into various ways:

1. Voluntary System

This voluntary system is divided into two systems

a. Opt-in (informed consent)

This means that someone voluntarily registered to become a donor. Being a donor is a noble thing, but if you rely on one's kindness, the lack of organ supply will increase. Many countries are currently thinking of changing to an opt-out system, for the sake of increasing organ availability.

b. Opt-out (presumed consent)

This means that it is assumed that everyone wants to become a donor unless they opt out. Singapore is the country that first implemented this system

Various countries follow this pattern and use opt-in and opt-out systems.²⁰

2. sold legally : Only in the such country the sale of kidney organs legally.

3. Replacement System

Singapore applies a system of providing compensation for the consequences of the organ transplant process.¹⁹

4. System of buying in illegal markets. The imbalance between organ demand and organ supply causes people to search on the black market. Organ Tourism is one of the organ trade in the black market.

5. Organ Bank System with a good network : Countries have used organ banks as a means for storing and obtaining organs²⁰

Considering that organs are an important part of life, it is necessary to arrange arrangements for donors and recipients so that in the future there will be no demands on the giver and receiver of transplanted organs.

Indonesian treaty law recognizes two terms derived from the Dutch language, *verbintenis* and *overeenkomst*. *Verbintenis* is derived from the word *verbinden* which means binding, therefore the term *verbintenis* is translated as an engagement, while *overeenkomst* is translated as agreement or agreement.^{21,22}

everyone who is capable of making agreements according to the Civil Code, that is, reaches the age of 21 years and / or has been married, can give donor approval. For each person who is not capable, his family or his agent can give that agreement.

In Singapore, the coverage of HOTA is citizens and permanent residents who have reached the age of 21 years, with the exception of people with mental / mental illness. To be able to give donor approval according to MTERA, it must have reached the age of 18 years. Families can give consent for those who have not yet reached the age of 18 years.¹⁹

Regulations on transplanting human organs in Indonesia already exist in the Indonesian Criminal Code and outside the Indonesian Criminal Code, namely in the Health Act, the Criminal Act on Trafficking in Persons, the Law on the Protection of Children and Regulations Government on Clinical Corpse Surgery and Anatomical Corpse Surgery. Regulations contained in the Criminal Code Article 204, Article 205 and Article 206 concerning crimes that endanger the public security of persons or property. This article also describes criminal sanctions for those who sell or offer goods that are known to endanger the lives or health of people, but this article does not regulate the sale and purchase of organs and or tissues for organ transplants.²³

Regarding the trade in human organs for the purpose of transplantation, there are several laws governing them. The regulation will be in Law number 21th year 2007.²⁴

Law No. 36/2009. All existing laws basically stipulate that the trading of human organs for any purpose is prohibited by law.

In the provisions of Article 64 of Law Number 36 Year 2009 paragraph 2 and 3 it is clear that organ transplants are only allowed for the purpose of improving health and not to be commercialized and are prohibited from being traded for any purpose. Criminal provisions regarding violations of that matter are regulated in the provisions of Article 192 of the Act

Based on Law No. 36/2009 concerning Health in Article 64 paragraph 2: Transplantation of organs and / or body tissues is carried out only for humanitarian purposes and is prohibited to be commercialized.

Article 64 paragraph (3): Organs and / or body tissues are prohibited from being traded under any pretext. Violations of the article are punishable by imprisonment for a maximum of 10 (ten) years and a maximum fine of Rp. 1,000,000,000.00 (one billion rupiah), but there is no clear explanation on what is meant by "humanitarian purposes" and the definition of "commercialization" "So that most law enforcement officers have difficulty conducting legal investigations into cases of organ selling.

Related to this, the rules on organ transplants in Indonesia are still behind compared to other countries. The government's task is to campaign for transplants to be carried out on humanitarian grounds and to take place since the LURD (Living Unrelated Donor) was controlled in 1988, from only 791 kidney transplant patients in 1988 increased to 8,399 patients in 2000. The government should provide funding for compensation loss.²⁵

In the Recipient Donor agreements various Indonesian legal libraries use various terms to translate "*verbintenis*" and "*overeenkomst*", namely:

- a. The Civil Code, and Tjptosudibio use the term engagement for "*verbintenis*" and agreement for "*overeenkomst*".²⁶
- b. Wiryono Projodikoro interpreted the agreement of the word *verbintenis*, while the word *overeenkomst* meant the word agreement.²⁷
- R. Subekti, *verbintenis* is interpreted as a contract / commitment while *overeenkomst* is interpreted as an agreement / agreement.²⁸
- c. Utrecht in his book Introduction to Indonesian Law uses the term abdominal to "*verbintenis*" and the agreement to "*overeenkomst*".²⁹
- d. Achmad Ichsan in his book Civil Law translates "*Verbintenis*" with agreement and "*overeenkomst*" with approval.³⁰

From the description above it is stated that for "*verbintenis*" three Indonesian terms are known, namely: engagement, contract, and agreement.

The implications of the regulations regarding organ and tissue transplantation in Indonesia cause the following:

- a. Transplantation of human organs and or tissues is invalid if there is no consent from the donor concerned that precedes the transplantation. Engagement to donate organs and or body tissues arise due to the agreement.
- b. Transplantation of organs and or tissues of the human body is invalid if certain compensation or trade is agreed.
- c. Approval of donating organs and or tissues of the human body that is not preceded by sufficient

information to prospective donors can be declared invalid because of oversight or coercion.^{31,32}

Based on the existing construction, the relationship between the agreement and the agreement is that the agreement issues an agreement between the two people who made it. The agreement is the source of the engagement, in addition to other sources that can also give birth to the engagement. An agreement is also called an agreement, because two parties agree to do something. The words of the contract, are narrower because they are addressed to a written agreement or agreement.^{26,33}

In certain medical actions there is informed consent as the patient's right to agree unilaterally. The purpose of informed consent is approval or permission by the patient or family that is entitled to the doctor to carry out medical actions on the patient, such as a physical examination and other examinations to establish a diagnosis, give medicine, give an injection, help in childbirth, perform anesthesia, perform surgery, follow up if there are difficulties, and so on. This can be canceled at any time before the agreed medical treatment.³⁴

Notary is qualified as a Public Official, but notary qualifications as a Public Official, not only for Notaries, because now like the Land Deed Makers (PPAT) are also qualified as General Officers and Auction Officers. The granting of qualifications as a public official to other officials other than to the Notary Public is contrary to the meaning of the Public Official himself, because like PPAT only makes certain deeds relating to land with the type of deed specified, and the Bidding Officer is only for auction.³⁵

Notary Public is the only official who is authorized to make an authentic deed regarding all deeds, agreements and stipulations required by a general regulation or by the interested parties to be stated in an authentic deed, guarantee the certainty of the date, keep the deed and give a grosse, copy and quotations, all along making the deed by a general rule are also not assigned or excluded to officials or others.³⁵

Every authority given to a position must have a rule of law as a limitation so that the position can run well, and not collide with the authority of another position. Thus if an official (Notary) performs an action outside the specified authority, it can be categorized as an act that violates the authority. The authority of a Notary Public is stated in Article 15 paragraph (1), (2) and (3) of the Notary Position Law.

Deed made by a notary in the civil law system is a perfect authentic deed so that it can be used as legal evidence in court. Holding an authentic deed will create a strong position before the law so that if at any time sued by another party who does not have strong evidence then it is likely to be able to dispute the lawsuit.

The term or word deed in Dutch is called "acte" or "deed" and in English it is called "act" or "deed". Deed according to Sudikno Mertokusumo is a signed letter containing the events that form the basis of a right or

engagement, which was made intentionally from the beginning to prove.³⁶ According to Subekti, a deed is different from a letter, which is a writing that was deliberately made to be evidence of an event and signed.³⁷ Based on these opinion, it can be concluded that what is meant by deed is:

- 1) Dealing (handling) or legal actions (rechtshandeling)
- 2) An article that is made to be used / used as evidence of legal actions, namely in the form of writing submitted to proof of something.

In the object of the agreement, there are several conditions to determine the validity of an agreement, including:

- a) The object must be certain. This requirement is only required for agreements that arise from the agreement
- b) The object must be allowed, meaning that it is not contrary to law, public order and decency
- c) The object can be valued in money. This is because a legal relationship arising from an engagement is in the property field.³⁸

This deed is made and signed by the parties who made it. In the case of donors and organ transplant recipients, then a deed under the hand is not denied by the Parties, meaning they acknowledge and do not deny the truth of what is written on the deed under the hand, so that according to Article 1857 of the Civil Code the deed under the hand gains power the same proof as an Authentic Deed.

An underhand deed is a deed made not before an authorized official or notary.

In practice, the notary uses various internal rules and codes of ethics. The notary profession code of ethics is determined by the notary organization through lengthy discussions. Examples of codes of conduct adopted by organizations in the local country. For example, the contents of the code of conduct in force in the United States are as follows:

1. The notary must act as an impartial witness and not benefit from any documents or transactions that require notary action, other than the fees permitted by law.
2. The notary must require the presence of each signatory and oath taker to screen each identity and will, and to observe that each of them seems to know the importance of a transaction that requires a notary action.
3. Notary will not run a fake or incomplete certificate, or be involved with documents or transactions that according to the Notary are fake.
4. The notary must prioritize the rule of law over the dictum or expectations of any person or body.³⁹

Patients who need to sign documents have a vigilance, positive identification, the ability to sign and other challenges that will not be found in the Notary handbook.

In this arrangement, the client is in the most vulnerable position. They may need important notarized documents, such as power of attorney, which gives others temporary or long-term power to make medical or financial decisions.⁴⁰

IV. CONCLUSION

The practice of organ donation and transplantation should be immediately poured into national legislation in the form of a law, because it involves human rights; increasing the degree of public health, altruistic and the rights and obligations of citizens;

That the Law was made must be in accordance with the soul of the religious Indonesian people.

Based on the results of the analysis showed that good faith at the pre-contractual stage is interpreted with honesty. Based on the doctrine and jurisprudence obtained a measure for the existence of good faith in the agreement in a therapeutic transaction is the provision of information about medical efforts along with the risks that will arise before a medical attempt by a doctor. If the agreement is not based on good faith can cause abuse of the situation and the agreement can be canceled.

The role of the notary in making therapeutic transactions between donors and recipients is very possible. The task of the notary is to make an authentic deed. The wishes of the parties that have become a collective agreement can be poured into an authentic deed. Authentic deed provides perfect proof for the parties, thus providing legal certainty, especially for medical actions that contain high risk.

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