

**REFORMULATION OF THE CRIMINAL POLICY AGAINST THE ORGANS AND/OR
BODY TISSUES TRAFFICKING IN INDONESIA**

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Abstract: Trafficking of organs and/or body tissues in Indonesia is categorized as a crime. The criminal policy has been carried out, but the cases are still increasing. In order to prevent crime, it is necessary to reformulate criminal policy in Indonesia based on Hoefnagel's theory. There are 2 research problems, namely how to formulate a non-penal policy, and a penal policy. This study uses criminology and legal research methods. The data was collected by desk research technique, and then analyzed using the content analysis technique. The results of the study, (1) non-penal policies were formulated by several authorized Ministries by revising strategies to influence public views on organ trafficking through mass media and social media; improve social welfare and mental health; increase per capita income; improve the content of administrative law and civil law governing organ transplantation. (2) The penal policy is carried out by amending the contents of Article 92 of the Health Act so that recipients and organ donors who are indicated to be buying and selling organs can be punished; creating internal regulations within criminal law enforcement agencies so that they only use the Health Act to prosecute perpetrators of trafficking in organs and/or body tissues.

Keywords: reformulation, criminal policy, trafficking, organs, body tissues

INTRODUCTION

Indonesian citizens have the right to obtain health services, and everyone who is sick has the right to be healed. One way to heal people who are sick in the final stages is to transplant organs and/or body tissues, by transferring certain organs or body tissues from the donor to the recipient (Peraturan Pemerintah Nomor 53 Tahun 2021 tentang Transplantasi Organ dan Jaringan Tubuh, 2021). Countries around the world believe that organ and/or tissue transplantation is an effective therapy for healing end-stage patients who experience organ and/or tissue failure. (Fauziyat, 2017).

In the perspective of Indonesian law, transplantation of organs and/or body tissues carried out under the law is a legal activity, so since 1977 kidney transplants have been carried out (Marcelino et al., 2018) until 2022. The number of transplants in many authorized hospitals is more than 629 (Supit et al., 2019). Even though it is legal if the transplanted organ and/or tissue is obtained illegally (e.g., through buying and selling process or coercion or murder) then the transplant activity is categorized as a crime. Trafficking in organs and/or body tissues for the purposes of transplantation is prohibited under criminal law, as regulated in Article 64 juncto 192 of Act no. 36 of 2009 concerning Health (hereinafter referred to as the Health Act); Article 2 of Act Number 21 of 2007 concerning the Eradication of the Crime of Trafficking in Persons (hereinafter referred to as the Act on the Eradication of Trafficking in Persons; and Article 84 of Act No. 23 of 2002 concerning Child Protection (hereinafter referred to as the Child Protection Act).

Even though the Indonesian government has made efforts to prevent and punish perpetrators of organ trafficking (as an application of criminal policy), covert trafficking activities of organs and/or body tissues are still happening and the numbers are increasing. There are several cases of organ trafficking in which Indonesian citizens become

victims, for example, the kidnapping of a child who was later found in Tokyo but one of his kidneys was missing and his tongue was cut off (Setiawan, 2014). there are 80 cases of organ trafficking carried out by syndicates (Setiawan, 2014). Cases of selling children's organs also occurred in various modes in three regions, namely in Bogor, Tangerang, and Central Java (Okezone.com, 2016). Many perpetrators of organ trafficking have been convicted, including 4 people who were sentenced by the Central Jakarta District Court in 2016, with 15 cases of organ trafficking (Putusan Pengadilan Negeri Jakarta Pusat, 2016). The crime of trafficking in organs and/or body tissues is not only in Indonesia, illegal organ trafficking is suspected to have occurred in many countries including Turkey, India, Brazil, Pakistan, Nepal, Philippines, Iran, Kosovo, China, and several former Soviet countries in Indonesia. Eastern Europe (Freedomunited.org, 2020). Indeed, it turns out that the prohibition on the commercialization of organs is not as strict as that in the law, so there is still room for the practice of commercializing, procuring, and transferring organs and/or body tissues (Lenk & Beier, 2012).

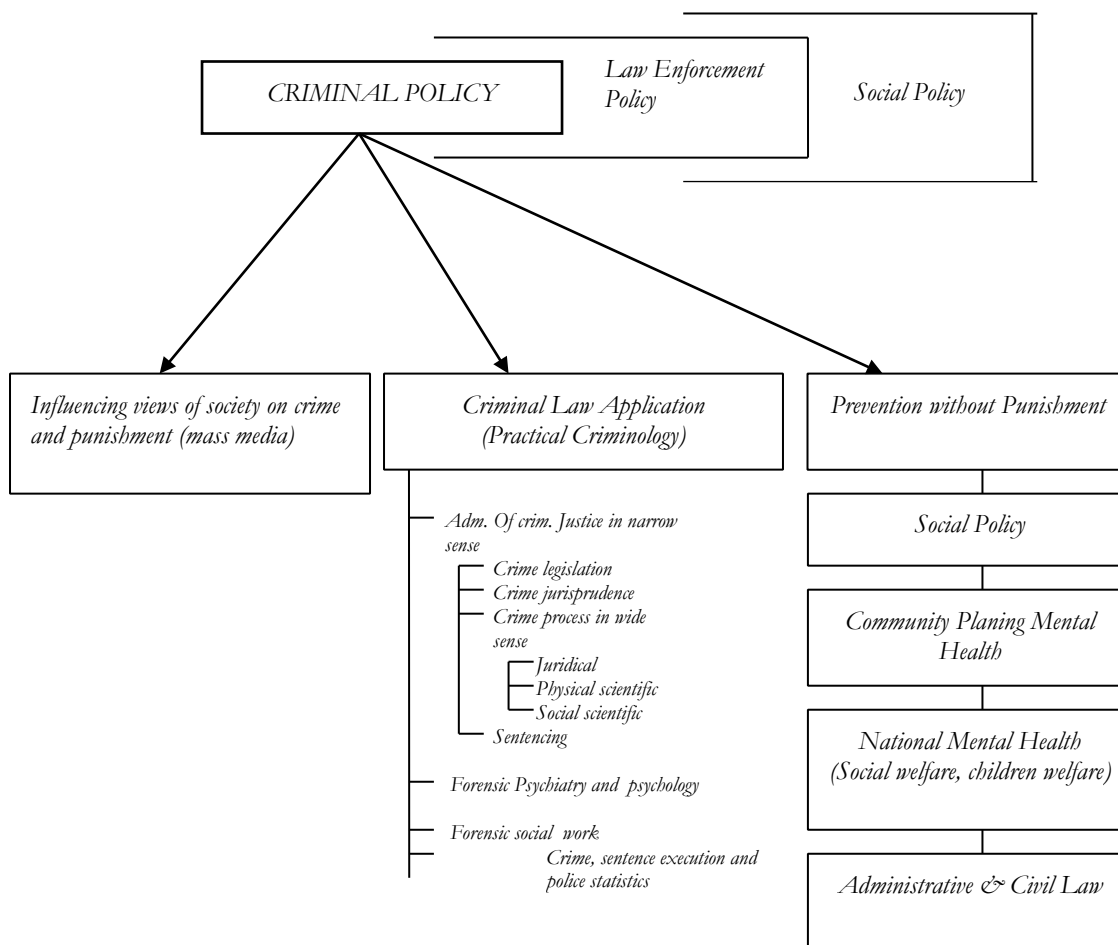
These crimes that have not been completely eradicated can harm the health of the people, especially the health risks after selling their organs and/or tissues, and poor people who need organ transplants but cannot afford to buy organs or body tissues as a means of healing disease.

In order for these crimes to be eradicated in Indonesia, it is necessary to reformulate criminal policies in Indonesia through 2 sub-policies, namely non-penal policies, and penal policies. The essence of the notion of criminal policy reformulation is the process of reformulating a written crime eradication framework based on the results of a review so that the revised strategy will be obtained so that crime eradication policies can achieve their goals efficiently and effectively. The criminal policy outlines the government's framework for tackling the crime of trafficking in organs and/or body tissues, whether carried out using a non-penal policy or using penal policy. The ultimate goal of criminal policy is to eliminate crime for the sake of social welfare.

Based on this line of thought, and so that the reformulation of criminal policy can be prospective, the Indonesian government needs to use the results of scientific research in the fields of criminology and law. Therefore, the results of this study will be useful, because researchers will evaluate the implementation of criminal policies, and finally will recommend what policies should be carried out by the government so that the eradication of organ trafficking can be efficient and effective. In order for the findings of this study to support the formulation of criminal policies, it is necessary to discuss in depth the 2 problem formulations in this research, namely (1) How to formulate non-penal policies in Indonesia in order to prevent the occurrence of criminal acts of trading organs and/or body tissues? (2) How to formulate a prospective penal policy so that it can be used as a basis for convicting perpetrators of criminal acts who trade organs and/or body tissues?

THEORETICAL FRAMEWORK

Government policies to tackle crime in society can be called criminal policies. In order to tackle every crime, a solid strategy from the state and society is needed. According to Hoefnagels, the criminal policy is not a standalone policy but is formed based on the conception of several disciplines, (Hoefnagels, 1973) which is carried out with two kinds of sub-policies, namely penal policy, and non-penal policy. The theory of criminal policy can be described in the following diagram.



Based on the analysis above, it can be understood that the penal policy is the prevention of crime by using criminal law. The policy is operationalized by implementing criminal law, namely material law, formal law, and penance law in society. The operationalization of the penal policy includes criminalization, decriminalization, penalization, and depenalization. The enforcement of criminal law is highly dependent on the development of legal politics, criminal politics, and social politics. Therefore, law enforcement does not only pay attention to autonomous law but also pays attention to social problems and the science of social behavior. (Hoefnagels, 1973)

While the non-penal policy is carried out by influencing the public's view of crime and punishment through mass media and prevention without using a criminal. This policy has a very broad scope. Based on the Hoefnagels scheme above, it can be seen that several forms of non-penal policies are (1) social policy, (2) community mental health planning and development, (3) national mental health improvement, may include efforts to create social welfare and children's welfare, and (4) application of administrative law and civil law. The main objective of efforts within the scope of the non-penal policy is to improve certain social conditions, which directly or indirectly have an influence on crime prevention.

The human body and its parts in a broad sense are considered non-commercial objects (Lenk & Beier, 2012). Trafficking in persons is a modern form of slavery. Trafficking in persons occurs both nationally and internationally and is a violation of human rights that needs to be addressed by all countries (UN.GIFT - United Nations Global Initiative to Fight Human Trafficking, 2015) The United Nations Global Initiative to Fight Human Trafficking (UN GIFT) stipulates that organ trafficking is a crime that occurs in 3 categories of modes. (a) traffickers coerce or trick victims into giving away their organs. (b) When the victim formally or informally agrees to sell the organ, then is conned or not paid for the organ sold, or is paid less than the agreed price. (c) The potential victim is treated like a

sick person, even though he is not sick. After that, the organs were removed without the victim's knowledge. Victimologically, people who are vulnerable to selling organs include migrant workers, the homeless, or the illiterate. With regard to trafficking in organs and/or body tissues, Indonesian criminal law (namely the Health Act, Child Protection Act, and the Criminal Act of Trafficking in Persons) has prohibited the commercialization of organs and/or body tissues, for any reason. Article 92 of the Health Act uses the prohibition term "trading in organs or body tissues," and the Trafficking in Persons Act uses the prohibition term "exploitation of people". Meanwhile, the Child Protection Act explicitly mentions the prohibition term "selling and buying body organs and/or body tissues." The terms 'organ trafficking', 'illegal organ trafficking', 'organ buying', 'transplant tourism' and others are often used interchangeably to refer to trafficking in persons for the purpose of harvesting organs (UN.GIFT - United Nations Global Initiative to Fight Human Trafficking, 2015). The term commercialization of human organs or tissues refers to the provisions of Article 64 (3) of the Health Act which strictly prohibits organs or body tissues from being traded under any pretext. Thus, the notion of trading organs and/or body tissues is the same as the term commercialization of organs and/or body tissues. The prohibition on trading applies to all trading activities, whether for transplant purposes or for other purposes.

The regulation on the prohibition of organ trafficking in Indonesia is as follows. Article 64 juncto 192 of Act no. 36 of 2009 concerning Health, Article 192 which stipulates, that anyone who intentionally trades organs or body tissues under any pretext as referred to in Article 64 paragraph (3) shall be punished with imprisonment for a maximum of 10 (ten) years and a fine of a maximum of IDR 1.000.000.000,00 (one billion rupiahs). Even according to the Health Act, the perpetrators of criminal acts in the trade of organs and/or body tissues, are not only individuals (humans) but also corporations, including hospitals (Mahasena, 2018)

Article 2 of Act Number 21 of 2007 concerning the Eradication of the Crime of Trafficking in Persons, that any person who recruits, transports, harbors, sends, transfers, or receives a person by means of threats of violence, use of force, kidnapping, confinement, forgery, fraud, abuse of power or position of vulnerability, debt bondage or giving payments or benefits despite obtaining the consent of a person who has control over another person, for the purpose of exploiting that person in the territory of the Republic of Indonesia, shall be punished with imprisonment for a minimum of 3 (three) years and a maximum of 15 (five) years. twelve) years and a minimum fine of Rp. 120,000,000.00 (one hundred and twenty million rupiahs) and a maximum of Rp. 600,000,000.00 (six hundred million rupiah).

Act No. 23 of 2002 concerning Child Protection, 84 regulates the prohibition of the law against child organ transplants for their own benefit. Article 85 paragraph (1) regulates the prohibition of buying and selling children's organs, that anyone who trades organs and/or body tissues of children shall be punished with imprisonment for a maximum of 15 (fifteen) years and/or a fine of a maximum of Rp. 300,000. .000,00 (three hundred million rupiahs).

METHOD

This article was written based on the results of criminology and law research. This study focuses on the application of law and the contents of positive law from the internal side in the form of criminal law which regulates the prohibition of trading organs and/or body tissues, and its implementation in court. The legal materials used are (a) primary materials, namely in the form of Indonesian laws and regulations, international law, and court decisions, and (b) secondary materials in the form of annual reports of government agencies and the ministry of health as well as scientific articles, and (c) news tertiary materials. and reviews in the mass media. All legal sources were searched using desk research techniques. The contents of the three types of legal materials were analyzed using technical content analysis and legal comparisons. The results of the legal analysis and its implementation are analyzed on an ongoing basis through internal and external analysis in order to obtain systematic findings on criminal policies against the sale and purchase of organs and/or body tissues. The framework that researchers will find is in the form of evaluation results and prescriptions.(Soerjono, Soekanto. Sri, 1995)

RESULTS AND DISCUSSION

(a) Overview of the phenomenon of organ trafficking in Indonesia

Based on studies of legal materials in the mass media, court decisions, and official announcements from ministries or law enforcement, it is known that in Indonesia there have been cases of trafficking in disguised organs from 1993 to 2019. In 1993 there was an Indonesian Migrant Worker abroad who became a victim of an organ theft case, namely Ati Wardiyati. His body was sent to Indonesia, whose organs were not complete (Putri, 2019). Between 2003 and 2004, there were at least 80 cases of child trafficking with the mode of adoption involving a domestic syndicate. (Sitanggang, 2019). From 2010 to 2011, in the Bangka Belitung area, there were 24 cases of organ sales. (Sitanggang, 2019) In 2012, in Malaysia, there were three shooting cases of Indonesian workers, and it turned out that there were missing organs. (BBC.com, 2017a). In 2013, there were discoveries of human organs, namely the lungs and hearts of humans in Minas District, Siak Regency, Riau which were suspected to be related to a syndicate of trafficking in

Qatar (Republika.co.id, 2013). From 2014 to 2015 there were 15 people who had become victims of trafficking/kidney organ transplantation in West Java. In 2016, there were cases of selling children's organs in human organs (Republika.co.id, 2013). In 2014, the Directorate for the Protection of Indonesian Citizens handled the case of Sri Rabitah, who allegedly had her kidney removed while working in various modes in three areas, namely in Bogor, Tangerang, and Central Java. A 10-year-old boy was returned to his family near the borders of Jayanti (Tangerang) and Cikande (Serang), Banten with a condition without a kidney and heart. (Kementerian Pemberdayaan Perempuan dan Perlindungan Anak Republik Indonesia, 2016). In 2016 the body of Dolfina Abuk (Indonesian Workers Abroad from North Central Timor Regency) was returned full of stitches. (BBC.com, 2017a). In 2019, the Central Jakarta Court convicted 4 kidney trading brokers. The description of phenomena and cases as described above is an indicator that trafficking in organs and/or body tissues has occurred in Indonesia and cannot be eliminated optimally, either by using non-penal policies or by means of penal policies.

(b) Non-Penal Policy Reformulation on Trafficking in Organs and/or Body Tissues

Referring to Hoefnagel's theory, the non-penal policies that have been carried out by the Indonesian government to tackle trafficking in organs and/or body tissues are as follows.

The process of influencing the public's view of crime and punishment through the mass media has been carried out. This policy is carried out by the government together with community organizations, religious organizations, and stakeholders by providing legal counseling. Conventional and electronic mass media, including government agency websites and social media, have been utilized. However, its implementation has not been well coordinated in a complete work program, and there has been no measurable evaluation of the success rate of socialization and efforts to influence the public's view of organ trafficking.

Prevention of crime without the use of punishment in the form of planning and developing community mental health, improving mental health nationally, including efforts to create social welfare and children's welfare has been carried out. This step is necessary because the intervention is very important for the Indonesian government to educate the public to increase transplant knowledge and motivation.

The application of administrative law and civil law has been carried out. In 2021, the President of the Republic of Indonesia will create Government Regulation Number 53 of 2021 concerning the Transplantation of Body Organs and Tissues. The contents of the regulation are very good in regulating the requirements, procedures, and handling of organ and/or tissue transplantation, compared to the contents of the previously applicable health ministerial regulation, namely the Regulation of the Minister of Health of the Republic of Indonesia Number 38 of 2016 concerning Organ Transplantation. This new Government Regulation has indeed been mandated in Article 65 paragraph (3) of the Health Act.

Indonesia has also established a National Transplant Committee as the sole institution in Indonesia that oversees and is responsible for organ donation, transplant allocation, and practice to ensure standardization, traceability, transparency, quality, safety, justice, and public trust. The formation of the committee is based on the Decree of the Minister of Health. Number HK.01.07/MENKES/139/2021 concerning the National Transplant Committee. However, there is no national evaluation of the results of implementing Government Regulations and the performance of the National Transplant Committee.

(c) Penal Policy Reformulation on Trafficking in Organs and/or Body Tissues

The penal policy is applied by using substantive criminal law, procedural criminal law, and penitent law. Before the Health Act, the Act on the Eradication of Criminal Acts of Trafficking in Persons, and the Child Protection Act, the crime of buying and selling organs was regulated by the Criminal Code to adjudicate cases of buying and selling organs and/or body tissues. Penal policies through the application of criminal law by law enforcement officers have been implemented in Indonesia as follows.

In 2016, the Central Jakarta District Court sentenced perpetrators to participate in the trafficking of human organs under the Criminal Act of Trafficking in Persons. The perpetrator, namely Dedi Supriadi Bin Oman Rahman, was sentenced to 5 years and 6 months, and a fine of 200 million. Yana Priatna Alias Amang was sentenced to 5 years and 6 months, and a fine of 200 million. The donors who received the money were Pery Jayanto, Dasep, Ipan Sopian, Edi Midun, and Jajang Jumara (Putusan Pengadilan Negeri Jakarta Pusat, 2016) and all of them were not convicted because they were considered victims of criminal acts. The number of victims of kidney buying and selling who requested legal protection from LPSK is around 30 people. Provisions in the criminal act of trafficking in persons cannot be used as a means to criminalize organ donors who are indicated to sell organs, namely receiving around 90 million per person from recipients of organs that have been transplanted.

In 2017 the Kupang Court convicted 15 defendants for being legally and convincingly proven to have “illegally dispatched Indonesian Migrant Workers (TKI) on behalf of Yufrinda Selan, who is in fact a victim of organ trafficking in Malaysia. (BBC.com, 2017b) The legal provisions in the Criminal Act of Trafficking in Persons can be used as a means to punish all perpetrators because if there are indications of organ sales, the recipient of the money is positioned as the victim, not the perpetrator.

Finally, in 2019, the Central Jakarta Court convicted 3 perpetrators of buying and selling kidneys with 11 victims based on Article 192 of the Health Act, on behalf of Agung Setiawan Alias Agung Bin Agus Samsudin, Deni Fajar Muharam alias Defa, and Ahmad Junaedi alias Ahmad, legally proven and convincingly participate in the trading of organs or body tissues as regulated and subject to criminal sanctions Article 192 in conjunction with Article 64 paragraph (3) of Act Number 36 of 2009 concerning Health relating to (juncto) Article 55 paragraph (1) number 1 of the Criminal Code with a criminal offense the same, namely each with a prison sentence of 2 years and 6 months, and a fine of Rp. 250,000,000 (two hundred and fifty million Rupiah) each, if the fine is not paid, it will be replaced with imprisonment for 1 (one) month.

The provisions in this Health Act are also not used by judges as a basis for criminalizing organ donors (who receive around 80-90 million rupiah per person) from organ recipients (who give money between 200-300 million rupiah per person) because criminal law enforcers consider that the recipient of the proceeds from the sale (donor) is a victim of a crime, and the recipient of the donor is a patient who is sick and wants to recover. The parties who receive money and give money which they then hand over to each other and receive a kidney through a transplant are: (a) the name of the donor Ade (Banten) the name of the donor recipient Chen (Bangka Belitung), (b) the name of the donor Ikhsan (East Java) the name of the recipient donor Wisnstien (Jakarta), (c) name of donor Ferry (East Java) name of donor recipient Martin (Jakarta), (d) name of donor Munir (East Java) name of donor Anto (west Java), (e) name of donor Sawavo (West Java) the name of the donor recipient Gugun (West Java), (f) the name of the donor Dedi (Jakarta) the name of the donor recipient Kristo (Bangka Belitung), (g) the name of the donor Panji (West Java) the name of the donor recipient Rooby (West Java), (g) name of donor Ahmad (Yogyakarta) name of

donor recipient Hersa (West Java, and (i) name of donor Edy (West Java) name of donor recipient Sugih (central Sulawesi)

Based on the court's decision as a manifestation of the implementation of the penal policy in Indonesia, it can be understood that the law violators who are convicted are brokers of buying and selling organs, and no one is indicated to sell organs and people who buy organs are sentenced to crime in Indonesia. Whereas the evidence, based on the court's decision, the recipient of the organ has paid the broker or donor in order to obtain the organ (kidney) for the needs of the transplant. Kidney donors are also proven to have received money from donor recipients or brokers in exchange for the delivery of their organs. Indeed, the police stated that the recipient of the kidney would not be a suspect because as a sick person, they always try to recover (Beritasatu.com, 2016), and the recipient of the money is a victim of a crime.

Based on these facts, it turns out that there are weaknesses in the content of the law that prohibits organ trading and there are weaknesses in the law enforcement process. Criminological, to tackle these crimes, it is still necessary to improve the legal provisions and the enforcement process. According to the Health Law, the perpetrators of the crime of organ trafficking are not only individuals but also corporations, and it turns out that so far no corporation has been convicted (Mahasena, 2018).

In general, the provisions of the criminal law governing organ trafficking are adequate, namely the Health Act, Child Protection Act, and the Act on the Eradication of Trafficking in Persons. However, if examined in terms of substance, the more laws that regulate the prohibition of organ trafficking (i.e. 3 la Acts), the greater the risk of disparity in sentencing by courts and disparity in interpretation by law enforcement officials. If compared, based on the severity of the criminal threat, the threat of imprisonment and fines for perpetrators of trafficking in organs and/or body tissues as regulated in the Criminal Act of Trafficking in Persons is lighter than the criminal threats in the Health Act and Child Protection Act. Based on the norm target, there will be more people who can be convicted under the Health Act, not only sellers, buyers, people who help, people who advocate, and people who participate, but also health service facilities involved, because of the Health Act every corporation is also a criminally liable party.

In order for the penal policy to be effective, the criminal provisions governing the prohibition of trafficking in persons and the threat of punishment are more severe, and it is necessary to change the contents of Article 92 of the Health Act. This article needs to be discussed because the criminal provisions for perpetrators of trafficking in organs and/or body tissues are more complete than the Act on Child Protection and the Act on the Eradication of Trafficking in Persons. The reformulation of the contents of the rules is as follows.

- (1) It is necessary to add 1 paragraph in Article 92 of the Health Act so that the contents of Article 192 are as follows. (1) Any person who deliberately trades organs or body tissues with any pretext as referred to in Article 64 paragraph (3) shall be sentenced to a maximum imprisonment of 10 (ten) years and a maximum fine of Rp. 1,000,000,000.00 (one billion). rupiah). (2) In the event that the crime as regulated in paragraph (1) is committed against a child, the criminal penalty shall be increased by 1 (one) time.
- (2) It is necessary to add an explanation in Article 92 paragraph (1) of the Health Act so that the contents of the explanation are as follows. Editor's explanation of Article 192 (1) of the Health Act, "donors and recipients of organ and/or human tissue donors who are proven to have received or given money or other materials in exchange for transplants are included in the category of criminals regulated in this article."

Penal policy reformulation by amending the provisions of Article 192 of the Health Act can be used by criminal law enforcement as a means of punishing donors and recipients of organ and/or body tissue donors who have actually received and given money to each other. Then, law enforcers in their respective environments (i.e., the police, prosecutors, and courts) make internal regulations that can encourage the use of Article 192 of the Health Act to prosecute perpetrators who trade organs and/or body tissues for both transplantation and other purposes. This opinion is in line with the finding that there are many laws in a country that have not been able to deal with organ trafficking, (Madsen, 2013) so it needs to be critically evaluated. (Ambagtsheer et al., 2013)The increase in the

severity of criminal threats as referred to in Article 192 paragraph (2) needs to be done because in criminal law it is necessary to define in detail the elements of behavior and perpetrators along with criminal threats that the state can use as a basis for judging. The criminal provisions resulting from these changes can support the welfare of members of the community because the health Act has an important role in the context of human health care, especially in efforts to prevent and force people to comply with health standards, (Yeung & Horder, 2014) and determine the limits of applicable legal jurisdiction (Mchale, 2013).

The criminal policy reformulation is in accordance with the mandate of the Istanbul Declaration on Organ Trade and Transplant Tourism in 2008 that each country or jurisdiction must develop and implement laws and regulations to regulate organ recovery from deceased and living donors and transplant practices, in accordance with international standards.

If the Indonesian government carries out criminal policy reformulation measures, then Indonesia has implemented WMA Resolution 44.25, that the World Health Assembly asks countries to prevent the buying and selling of human organs for transplantation. The regulation on the prohibition of organ trafficking in criminal law is in accordance with the provisions of the United Nations, WHO, and the Istanbul Declaration of 2008. The establishment of cooperation between countries to combat trafficking in organs and/or body tissues is also in line with international law because of all countries, including Indonesia (Madsen, 2013).

CONCLUSION

Based on the discussion above, it can be understood that although the Indonesian government has carried out criminal policies, it turns out that cases of trafficking in organs for transplants occur in Indonesia. In order for the crime of trafficking in organs and/or body tissues to be minimized, reformulation of non-penal policies is needed, namely preparing a crime prevention plan by involving stakeholders so that community member who has the potential to commit crimes understand the dangers and legal risks, improve people's mental health, increase income per capita, and improve administrative and civil law relating to organ transplantation. Meanwhile, the penal policy was reformulated by amending the contents of Article 92 of the Health Act, making regulations within the Police, Prosecutors, and courts to always use the Health Act as a basis for prosecuting perpetrators. The criminal policy reformulation plan in the non-penal sub-policy is stated in a written document made by the ministry of health, ministry of social affairs, and ministry of communication and information so that it can be used as a basis for the President in revising Government Regulations. Meanwhile, the criminal policy reformulation plan in the penal sub-policy is stated in a written document made by the Ministry of Law and Human Rights so that it can be used as a basis for the President in issuing Government Regulations, and proposes a revision of Article 92 of the Health Act.

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