

The Prosecutor's Opportunity Principle to Organ Buyers

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ABSTRACT

The principle of opportunity is a principle that allows prosecutors to prosecute or not prosecute a case in the public interest. This principle is a tool that prosecutors have to filter out non-usefulness in criminal prosecution. In the case of purchasing organs in Decision Number 587_Pid.Sus_2019_Pn.Jkt.Pst carried out by Hersa Audi Pratama, there are indications that there is no benefit in imposing a crime in this case so that the case must be set aside based on the principle of opportunity. In order to examine the coherence and rationality of whether or not it is necessary to apply the principle of opportunity to this problem, it is necessary to carry out an in-depth discussion of this matter. The research method used is a type of normative legal research which analyzes using secondary data/library materials sourced from legislation, legal literature and non-legal literature descriptively and analytically. The research approaches used are the statutory approach, case approach and conceptual approach. In this research the author found that in the case of purchasing organs carried out by Hersa Audi Pratama in Decision Number 587_Pid.Sus_2019_Pn.Jkt.Pst there was a public interest in getting health services to achieve general welfare, a public interest in avoiding useless crimes that could damage the general welfare, and the interests of the state and nation to protect society from useless crimes that could damage the general welfare. Therefore, this case must be set aside by the Attorney General using the principle of opportunity.

Keywords	Affiliate; Celebgram; Online Gambling
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Manuscript History: <u>Received:</u> May 21, 2024 <u>Accepted:</u> October 7, 2025 <u>Corresponding Author:</u> Ahmad Subhan, ahmadsubhan177179@gmail.com	 Legal Spirit is Licensed under a Creative Commons Attribution-ShareAlike 4.0 International License Indexed:    Layout Version: V8.2024

PRELIMINARY

Article 1 paragraph (3) of the Constitution of the Republic of Indonesia states that Indonesia is a state of law (rechstaat). The concept of the rule of law adopted by Indonesia stems from Arsitotle's idea of a good state. A well-organized state is a state based on the constitution and law.¹ In a state based on law, there are legal objectives that should be

¹ Ridwan H.R, *Hukum Administrasi Negara*, Cetakan Ke-16, PT Rajagrafindo Persada, Depok, 2020, h. 2.

realized by the state.² These legal objectives include legal certainty, legal justice and legal expediency.³ To achieve justice, benefit and legal certainty, the law needs to be enforced. Therefore, law enforcement plays a vital role in realizing the objectives of the law.⁴ In order to realize these objectives, law enforcers must carry out their roles properly in accordance with the scope of the corridors contained in the applicable regulations.⁵

The implementation of the duties of law enforcers in realizing justice, certainty and legal benefits sometimes finds conflicts in implementing the objectives of the law itself. For example, if the enforcement of the law is carried out as it should, it will cause side effects in the form of the existence of uselessness produced by the law because the losses incurred if the law is applied are greater than if it is not applied. In addition, there is also a situation/condition/subject where if a law is applied properly, then the law does not fulfill a sense of justice or benefit to the community.

This is understandable, because the law is a rule that regulates in general and it is possible that it does not provide justice and benefits as it should if applied to certain circumstances/conditions/subjects. In addition, according to Mahfud MD, law is a political product so that it is possible that there is a discrepancy between the procedure for making and the substance of the material with the regulations governing the provisions regarding the making of legislation. Such conditions are possible, because the law (in the sense of the Act) is a crystallization of various competing political interests either due to compromise or hegemony.⁶

The solution to these problems can be overcome using the standard priority principle initiated by Gustav Radbruch, that the first priority is legal justice, the second is legal expediency and the last is legal certainty.⁷ When in a case there is a clash between legal certainty and legal expediency, then what must be chosen by law enforcement is legal expediency.⁸ The standard priority principle is very important to be applied by criminal law enforcement officials. This is because punishment is the last resort and remedy in overcoming crime. Therefore, its use must be done carefully and cautiously. Prudence in applying is solely so that pain is always considered.

The standard priority principle is very important to be applied by criminal law enforcement officials. This is because punishment is the last resort and remedy in overcoming crime. Therefore, its use must be done carefully and cautiously. Prudence in applying is solely so that pain is always considered. Criminalization should not be used if it does not provide benefits to avoid the emergence of conditions that are worse than if the punishment is not used. In addition, the choice of using punishment as the last resort must be examined, if there are other healing efforts that can be done then punishment as the last resort does not need to be used. Jeremy Bentham once stated that it is prohibited to use/apply punishment if it is "groundless, needless, unprofitable or inefficacious".⁹ Punishment is only justified if it is useful for the needs of society.¹⁰ Conversely, punishment

² Oksidelfa Yanto, *Negara hukum : kepastian, keadilan dan kemanfaatan hukum (dalam sistem peradilan pidana Indonesia)*, Cetakan Ke-1, Pustaka Reka Cipta, Bandung, 2020, h. 27.

³ *Ibid.*

⁴ *Ibid*, h. 5.

⁵ *Ibid.*

⁶ Ibnu Sina Chandranegara, *Hukum Acara Mahkamah Konstitusi*, Cetakan Pertama, Sinar Grafika, Jakarta, 2021, h. 7.

⁷ Achmad Ali, *Menguak Tabir Hukum*, Cetakan Ke-4, Kencana, Jakarta, 2023, h. 88.

⁸ *Ibid.*

⁹ Nigel Walker, *Sentencing in a Rational Society*, 1972, h. 15. Dikutip dari *Ibid.*

¹⁰ *Ibid.*

is not justified if it causes harm to society.¹¹ In addition to this, the measurement of restrictions on criminal sanctions is based on the interests and values that embody it.¹²

In terms of law enforcement, especially the prosecutor's office, the standard priority principle is projected on the principle of opportunity which prioritizes the aspect of legal expediency compared to the aspect of legal certainty. According to AZ Abidin, the principle of opportunity is a legal principle that forms the basis of the authority for the Public Prosecutor to prosecute or not prosecute criminal offenders who have fulfilled the formulation of the offense, either individuals or corporations, with or without conditions in the public interest.¹³

The principle of opportunity is implemented in the form of seponering a criminal case. Seponering or terjizde leggen which means setting aside.¹⁴ Discontinuation of prosecution of criminal cases based on considerations using the principle of opportunity is called beleidssepot or discontinuation of cases based on policy.¹⁵ In Indonesian legislation, the means of law enforcement which is the result of the application of the principle of standard priority and the principle of opportunity is the authority of the Attorney General to set aside cases in the public interest which is regulated in Article 35 letter c of Law Number 11 of 2021 concerning the Prosecutor's Office of the Republic of Indonesia which reads,

"The Attorney General has the duties and authorities: ... c. Setting aside cases in the public interest." The elucidation of the article explains, "what is meant by "public interest" is the interest of the nation and state and/or the interest of the wider community. The Attorney General shall take into account the advice and opinions of the bodies of state power that have a relationship with the matter."

As stipulated in Law Number 17 Year 2023 Articles 123 and 124 paragraph (1) stipulates that organ/body tissue transplantation is carried out as an effort to cure disease and restore health and is intended only for humanitarian purposes. For the sake of humanitarian purposes, all forms of commercialization or buying and selling of organs and / or body tissues for any reason are not allowed.¹⁶ To ensure the upholding of these values, the state regulates the imposition of penalties for acts that commercialize organs.¹⁷ Local governments are responsible for improving organ and/or tissue transplantation efforts, which includes providing socialization and increasing public participation in becoming voluntary donors.¹⁸

The regulation of health law on organ services is a form of implementation of the guarantee of the constitutional rights of citizens to live in physical and mental prosperity, to obtain a good and healthy environment and to obtain health services.¹⁹ In addition, there is also a state obligation to protect the promotion of public welfare contained in the preamble of the constitution. The urgency of the need to conduct this research is because there is a

¹¹ *Ibid.*

¹² *Ibid.*

¹³ A.Z. Abidin, *Bunga Rampai Hukum Pidana*. Cetakan Ke-1, PT. Pradnya Paramita, Jakarta Pusat, 1983, h. 89.

¹⁴ Luqman Wahyudi, "Seponering atukah Deponering?? Sebagai kewenangan Diskresi Jaksa Agung" MAKALAH disampaikan dalam forum diskusi LSO JW (Judicial Watch), Fakultas Hukum Universitas Muhammadiyah Malang, 18 Mei 2012; dikutip dari Darmono, *Penyampingan Perkara Pidana Seponering Dalam Penegakan Hukum*, Cetakan I, Alta Utama, Depok, 2017, h. 44.

¹⁵ *Ibid.*

¹⁶ Pasal 124 ayat (3) Undang-Undang Nomor 17 Tahun 2023.

¹⁷ Pasal 431 dan 432 Undang-Undang Nomor 17 Tahun 2023.

¹⁸ Pasal 131 dan 132 Undang-Undang Nomor 17 Tahun 2023.

¹⁹ Pasal 28 H ayat (1) Undang-Undang Dasar Negara Republik Indonesia.

conflict of public interest in the imposition of punishment for organ buyers in a special situation. The special situation is when the organ buyer commits the act of buying and selling by force due to the absence of organ stocks in health service institutions. Whereas the availability of organ stocks is the responsibility of the government. These special circumstances are found in the case of organ purchase committed by Hersa Audi Pratama in Decision Number 587/Pid.B/2019/PN.Jkt.Pst.

The conflict of public interest in this case is a conflict between the public interest to impose punishment on organ buyers in order to tackle and prevent the commercialization of organs²⁰ and the public interest of citizens to live in prosperity both physically and mentally and obtain health services²¹ which is carried out by buying organs by force for the purpose of curing the disease or restoring the health of the person because of the unavailability of organs at health institutions. The forced purchase of organs is caused by the government's failure to mobilize and preserve organ donors so that the organs needed are not available at the relevant health service agencies.²² In addition, there is also the general interest of the government to carry out the mandate of the constitution and its responsibility in the concept of state administration which adheres to the welfare state to strive for the achievement of maximum health status in society in general and every citizen in particular.

In order to overcome the conflict of public interest and legal objectives, the researcher wants to find a solution through the principle of opportunity owned by the Attorney General. In addition, the researcher wants to examine whether or not the principle of opportunity can be applied to the event and the form of its application concretely if it can be done. For this reason, there are two questions related to this matter that the researcher wants to use to explain clearly, namely:

1. What are the qualifications of acts that are classified as organ trafficking based on Indonesian laws and regulations?
2. How is the application of the prosecutor's principle of opportunity to organ buyers based on the concept of law and legislation in Indonesia in the case contained in decision number 587/Pid.Sus/2019/Pn.Jkt.Pst?

To find the answer to this question, the researcher will try to find the meaning of public interest that can be used as a basis for setting aside cases that can be found in other legal provisions that regulate public interests that must be maintained and given protection even though they have to set aside criminal cases.²³ If the meaning of public interest is not also found, then the meaning of public interest must be looked back at the meaning of active public interest in the form of legal ideals reflected in Pancasila and the 1945 Constitution.²⁴

The objectives to be achieved by this research, namely:

1. Knowing the characteristics of actions that qualify as the crime of buying and selling organs;
2. To find out the implementation of the Prosecutor's principle of opportunity for blood and organ buyers in Indonesia contained in the case in Decision Number 587_Pid.Sus_2019_Pn.Jkt.Pst.

²⁰ Pasal 431 dan 432 Undang-Undang Nomor 17 Tahun 2023.

²¹ Pasal 28 H ayat (1) Undang-Undang Dasar Negara Republik Indonesia

²² Pasal 6, 115 ayat (2) huruf b, 118, 131, 132 Undang-Undang Nomor 17 Tahun 2023.

²³ Darmono, *op.cit.*, h. 79.

²⁴ *Ibid.*

METHOD

This research uses normative legal research. Normative legal research is a type of legal research that conducts research on a legal problem based on literature or secondary data.²⁵ The reason for using this type of normative legal research in this study is because the object of research is a problem of empty legal rules in regulating a situation. The approaches taken in this research are the statutory approach, case approach and conceptual approach.

The statutory approach is used by examining all rules that have a relationship to the issue that is the object of research.²⁶ By studying the ratio legis of laws and regulations, researchers will be able to understand the philosophical basis for making laws. The laws and regulations that researchers use are as follows: Law Number 17 of 2023 concerning Health; Law Number 11 of 2021 concerning Amendments to Law Number 16 of 2004 concerning the Prosecutor's Office of the Republic of Indonesia; Law Number 16 of 2004 concerning the Prosecutor's Office of the Republic of Indonesia; Law Number 8 of 1981 concerning the Criminal Procedure Code; Criminal Code; Government Regulation Number 53 of 2021 concerning Organ and Tissue Transplantation.

RESULT AND DISCUSSION

Analysis of Organ Purchasing Based on Indonesian Legislation

Article 1457 of the Civil Code stipulates that a sale and purchase is an agreement by one party to bind himself to provide an item to another party and the other party provides payment for the item.²⁷ Even though the delivery of goods and payment for goods have not yet been made, however, the sale and purchase has been carried out when Based on this understanding, then, buying and selling is included in the obligation that is born due to consent.²⁸ An agreement is considered valid if four conditions are met, namely: the agreement of the parties to the agreement; the capacity of the parties to make an agreement; the existence of a certain subject matter; the cause of the agreement is not prohibited.²⁹ In connection with the condition of a certain subject matter, there is a regulation in Article 1332 which stipulates that only goods that are not prohibited from being traded can become the object of approval.

The act of trading organs is a transaction carried out by the donor and recipient that is financial in nature.³⁰ However, there is also a transaction in a series of organ transplant processes that is permitted, namely, the transaction of reimbursement of organ processing costs that must be paid by the recipient to the hospital where the organ transplant is carried out, namely:³¹

1. the cost of checking the eligibility and compatibility of the recipient and donor;
2. organ transplant surgery costs for donors and recipients;
3. postoperative care costs for organ transplantation for donors and recipients; and
4. dues or health insurance funds and death insurance for the donor.

The purchase of Ahmad Saifudin Rafsanjani's kidney by Hersa Audi Pratama at a price of Rp250,000,000 to be transplanted to him including the act of purchasing organs. This is

²⁵ Soerjono Soekanto dan Mamudji, *Penelitian Hukum Normatif Suatu Tinjauan Singkat*, PT. RajaGrafindo Persada, Jakarta, 1995, hal. 15; dikutip dari *ibid*, h. 47.

²⁶ *Ibid*.

²⁷ Lihat Pasal 1458 KUHPerdata.

²⁸ Lihat Pasal 1233 KUHPerdata.

²⁹ Lihat Pasal 1320 KUHPerdata.

³⁰ Lihat Pasal 3 ayat (3) serta penjelasannya Peraturan Pemerintah Nomor 53 Tahun 2021 tentang Transplantasi Organ dan Jaringan Tubuh.

³¹ Lihat Pasal 114 Undang-Undang Nomor 17 Tahun 2023 tentang Kesehatan.

because the act is a transaction carried out by the donor and recipient that is financially related to the kidney as regulated in Article 3 paragraph (3) and its explanation in Government Regulation Number 53 of 2021. The purchase of a kidney is classified as an organ purchase because the kidney is included in the internal organs of the body.³²

In addition, the payment for the kidney does not include payments for the Organ Transplant Fee Package that are allowed to be given to the hospital as regulated in Article 15 paragraphs (1) and (2) of Government Regulation Number 53 of 2021. For the purchase of the kidney, Hersa Audi Pratama is threatened with a maximum imprisonment of 7 years or a maximum fine of two billion rupiah as stipulated in Article 432 paragraph (2) of Law Number 17 of 2023.

Application of the Concept of the Principle of Opportunity in Indonesian Legislation Against the Purchase of Body Organs

The principle of opportunity according to A.Z. Abidin is a legal principle that forms the basis of the authority for the Public Prosecutor to prosecute or not prosecute criminal offenders who have fulfilled the formulation of the offense either individuals or corporations with or without conditions in the public interest.³³ In line with this, R.M. Surachman stated that the principle of opportunity or prosecutorial discretion is the principle of allowing the prosecutor not to prosecute a criminal case if based on his consideration the prosecution of the case will harm the public interest or the government.³⁴ This principle is adopted, among others, by France, Indonesia, Thailand, Israel, Sweden, Norway, the Netherlands, South Korea, Japan, Belgium, the Philippines, the United States, Scotland, England, Singapore.³⁵

Bemmelen & Venn argue that discussions about the urgency of the right of opportunity emerged in the 19th century.³⁶ The mindset at that time was that prosecution could not be carried out properly if the Public Prosecutor did not have the authority to exercise discretion in the face of the facts he encountered.³⁷ The principle of opportunity has the aim of softening the sharp principle of legality which requires that the Public Prosecutor prosecute every criminal offender if there is supporting evidence.³⁸

This objective correlates with the thought of A. Karim Nasution that basically the prosecution of criminal cases is carried out based on public interest.³⁹ However, the reality is that the public interest that must be given protection by criminal law does not require that all criminal cases be prosecuted. This is because there are also criminal cases which, although strong evidence has been obtained, if prosecuted, then the benefits obtained from the prosecution are lower than the benefits to society.⁴⁰ Based on this thinking, a negative view of the principle of opportunism has also developed, which means that the Public

³² Agustin, *Mengenal Sistem Organ pada Manusia dan Fungsinya*, <https://www.alodokter.com/mengenal-sistem-organ-pada-manusia-dan-fungsinya#:~:text=Organ%20adalah%20kumpulan%20jaringan%20yang,tubuh%20adalah%20hidung%20dan%20kulit> (diakses pada 11 Desember 2022, pukul 21.00).

³³ A.Z. Abidin, *op.cit.*, h. 89.

³⁴ R.M. Surachman, *Mozaik Hukum I*, Cetakan Ke-1, CV. Sumber Ilmu Jaya, Jakarta, 1996, h. 70.

³⁵ *Ibid.*

³⁶ *Ibid*, h. 70.

³⁷ *Ibid.*

³⁸ Ansori Sabuan, Syarifuddin Pettanasse dan Ruben Achmad, *Hukum Acara Pidana*, Angkasa, Bandung, 1990, h. 142-143.

³⁹ Arin Karniasari, "Tinjauan Teoritis, Historis, Yuridis dan Praktis Terhadap Wewenang Jaksa Agung Dalam Mengesampingkan Perkara Demi Kepentingan Umum," Tesis, Fakultas Hukum Universitas Indonesia, Depok, 2012, h. 46.

⁴⁰ *Ibid.*

Prosecutor is authorized not to prosecute a case as long as the trial has not begun if the public interest does not require it.⁴¹

Currently, the regulations governing the principle of opportunity are contained in Article 35 letter c of Law Number 11 of 2021 which reads "The Attorney General has the duty and authority: c. To set aside a case in the public interest". In the explanation of the article, it is stated that what is meant by "public interest" is the interest of the nation and state and/or the interest of the wider community. The Attorney General pays attention to the advice and opinions of state authority institutions related to the issue in determining the fulfillment of the public interest element.

The implementation of the principle of opportunity in Indonesia works in the form of setting aside cases in the public interest, which can only be done by the Attorney General. Therefore, "public interest" occupies a vital position in determining whether or not a case should be set aside. The author finds that in the case of the position on the crime of Purchase of Body Organs in Decision Number 587/Pid.B/2019/PN.Jkt.Pst committed by Hersa Audi Pratama, there is a public interest.

The public interests that must be protected by the principle of opportunism by setting aside the case, namely:

1. public interest in obtaining health services in order to achieve general welfare;
2. It is in the interest of society to avoid unwholesome crimes that can damage public welfare;
3. 3. The interests of the state and nation to protect the public from unwholesome crimes that can damage public welfare.

The arguments for these reasons are presented in detail in the following discussions. First, in the case of the organ purchase position in Decision Number 587/Pid.B/2019/PN.Jkt.Pst, Hersa Audi Pratama or referred to as the buyer, bought an organ because he suffered from kidney failure in 2012 and never found a kidney donor so he had to do dialysis twice a week which took about 5-6 hours. Four years later, in 2016, the buyer found a person who was willing to donate a kidney to him, albeit for a fee of Rp250,000,000.

In this case, there is a responsibility of the government to promote the general welfare and fulfill the constitutional rights of everyone including Hersa Audi Pratama to obtain health services which include organ transplants including kidneys. The fulfillment of this constitutional right is done by the government maximizing the availability of organs by increasing donations.⁴²

So when Hersa Audi Pratama, who suffered from kidney failure, tried to find a kidney to be transplanted to him for free to cure his disease and restore his health, he was able to obtain a kidney. However, the unavailability of kidneys in health facilities caused Hersa Audi Pratama to have to wash his blood twice a week which took about 5-6 hours during the period from 2012 to 2016.

To end this unpleasant condition and to restore his health and fulfill his human rights in order to achieve prosperity, Hersa Audi Pratama was forced to buy a kidney for Rp250,000,000 which he could have obtained for free if the government had carried out its responsibilities properly. Based on this explanation, the criminal offense committed by Hersa Audi Pratama was forced to be committed to obtain his constitutional rights, namely, the right to obtain health services which include organ transplants and to protect and obtain his general interests which are also the interests of society, namely, achieving welfare in terms of health. Therefore, the principle of opportunity must be implemented by the

⁴¹ *Ibid.*

⁴² Lihat Pasal 4 ayat (2) Peraturan Pemerintah Nomor 53 Tahun 2021 tentang Pelayanan Darah.

Attorney General in order to protect the interests of the community, which in this case is Hersa Audi Pratama.

Second, the discussion on the argument of public interest to avoid useless punishment that can damage public welfare. The principle of opportunity works by setting aside criminal cases that, if prosecuted, will bring greater harm than benefit to society. Consideration of the benefits of punishment is important because punishment is only justified if it is useful for the needs of society.⁴³ Conversely, punishment is not justified if it is harmful to society.⁴⁴ In line with this, Jeremy Bentham once stated that it is prohibited to use/apply punishment if it is "groundless, needless, unprofitable or inefficacious".⁴⁵

Therefore, in the next discussion, the author will analyze the requirements of criminal expediency if applied to the case of organ purchase case committed by Hersa Audi Pratama in Decision Number 587/Pid.B/2019/PN.Jkt.Pst. So that later an answer will be obtained as to whether or not criminal prosecution is appropriate and beneficial. So that later an answer will be obtained as to whether or not criminal prosecution of these cases is appropriate and beneficial.

Ted Honderich argues that punishment can be called an economical deterrents if it meets the following conditions.⁴⁶

1. Criminalization is a real deterrent. The purchase of organs is punishable by a maximum imprisonment of 7 years or a fine of 2 billion rupiah as stipulated in Article 432 paragraph (2) of Law Number 17 Year 2023. Despite the criminal penalties, Hersa Audi Pratama still bought a kidney for Rp250,000,000 to cure his kidney failure disease that made him have to wash his blood for 4 years. The two reasons why the buyer committed the criminal act were so strong and important because it involved human life and dignity, so even though the punishment was threatened against the act. This did not deter the buyer from purchasing organs.

Some of these reasons are almost equivalent to the reasons for nullifying punishment due to force by emergency and some are equivalent. Compulsion is an excuse to nullify punishment as stipulated in Article 48 of the Criminal Code. In the theory of psychological coercion or *vis compulsiva*, a person is forced to commit a criminal offense due to a compelling psychological force, although physically the person can still restrain it, however, the force is so great that it is understandable if the person cannot restrain it.⁴⁷ According to Van Hattum, psychological coercion is an excuse because a person cannot determine his will freely due to an emergency.⁴⁸ In line with this opinion, Moeljatno argues that the actions of a person affected by coercion can be excused because his mind cannot function normally due to external pressure. Therefore, his guilt can be forgiven.⁴⁹

If it is related to the reason for criminal nullification due to coercion, the case of organ purchase committed by Hersa Audi Pratama is almost close to the element of coercion. Because there are circumstances that are almost as strong as coercion, namely, the kidney failure disease that he has suffered for 4 years. Although he can live by doing dialysis. However, the length of time it takes to do dialysis, the side

⁴³ Barda Nawawi, *Bunga Rampai Kebijakan Hukum Pidana: (Perkembangan Penyusunan Konsep KUHP Baru)*, Cetakan Ke-1, Kencana, Jakarta, 2008, h. 33.

⁴⁴ *Ibid.*

⁴⁵ Nigel Walker, *op.cit.*, h. 15; dikutip dari *Ibid.*

⁴⁶ Ted Honderich, *Punishment*, 1971, h. 59; dikutip dari Barda Nawawi, *ibid.*, h. 32.

⁴⁷ Moeljatno, *Asas-Asas Hukum Pidana*, Cetakan 9, Rineka Cipta, Jakarta, 2018, h. 151.

⁴⁸ *Ibid.*, h. 154.

⁴⁹ *Ibid.*, h. 155.

effects of dialysis that can arise such as shortness of breath, abdominal cramps, muscle cramps, nausea or vomiting, anemia, hernia⁵⁰ and the desire to recover from kidney failure made Hersa Audi Pratama continue to buy organs even though the act was punishable by law.

2. Criminal punishment does not cause a more dangerous condition/cause greater harm than if the punishment is not imposed. Criminalization of organ purchase committed by Hersa Audi Pratama causes harm compared to if the punishment is not imposed. This is because it is contrary to the purpose of organ transplantation and does not protect the value to be protected by the criminalization of organ buying and selling regulated in Law Number 17 Year 2023.

Bassiouni states that the objectives to be realized by punishment generally lie in the values contained in certain social interests that must be protected. These social interests include the protection of society against crime, harm or danger that cannot be justified by someone.

Article 124 of Law No. 17 of 2023 stipulates that organ transplants are intended for humanitarian purposes, curing diseases and restoring health and are not to be commercialized / traded. In order to prevent the commercialization / buying and selling of organs, punishment is regulated in 432 paragraph (2) of Law Number 17 of 2023.

The values that lie in the social interests to be protected by the criminalization of the sale and purchase of organs are humanitarian values to help each other voluntarily to others in need in order to cure diseases and restore health and not to seek financial gain in organ transplantation efforts. Because organs are a gift from God Almighty, it is inappropriate to be used as an object of sale and purchase and is contrary to humanitarian principles.⁵¹

The criminalization of organ purchase committed by Hersa Audi Pratama is considered to cause greater harm than if the punishment was not imposed. This is because the imposition of punishment in this case hinders the realization of the goals of organ transplantation.

The argument for this is based on the alignment between the motives of the perpetrators and the purposes of organ transplantation. Hersa Audi Pratama bought organs to cure his kidney failure disease that he had suffered for 4 years. These motives are in line with the objectives of organ transplantation, namely, to cure disease and restore health.

Therefore, if punishment is applied to it, it will not only hinder the purposes of organ transplantation, but also worsen the conditions of the recipient because he cannot receive the organ transplant he needs and is subject to punishment. Therefore, to prevent these bad things from happening, punishment should not be applied.

In addition, the case of organ purchase carried out by Hersa Audi Pratama and does not violate the values contained in the social interests to be protected by the criminalization of the act of buying and selling organs. This is because the purchase

⁵⁰ Agustin, Ini Efek Samping Cuci Darah yang Perlu Diketahui, 7 Juni 2020, <https://www.alodokter.com/ini-efek-samping-cuci-darah-yang-perlu-diketahui>, diakses pada 31 Maret 2024.

⁵¹ Lihat Pasal 114, 124 Undang-Undang Nomor 17 Tahun 2023 tentang Kesehatan, Pasal 3 Peraturan Pemerintah Nomor 53 Tahun 2021 tentang Transplantasi Organ dan Jaringan Tubuh dan Pasal 1 ayat 1 dan Penjelasan Bagian Umum Peraturan Pemerintah Nomor 7 Tahun 2011 tentang Pelayanan Darah.

of organs carried out by Hersa Audi Pratama was not intended to gain financial benefits, but only to cure diseases and restore health.

Thus, it does not violate the values contained in the social interests to be protected by the criminalization of the act of buying and selling organs, which includes humanitarian values to help each other voluntarily to others in need for the sake of healing diseases and restoring health and not seeking financial gain in organ transplantation efforts.⁵² Thus, the imposition of punishment in these cases is more detrimental than if it is not imposed. This is because it harms the perpetrators, hinders the purposes of organ transplantation and does not protect the values it seeks to protect.

3. There is no other punishment that has less danger/harm that can prevent effectively. The element of criminal expediency is similar to the reasons for using the principle of opportunity in the Netherlands, which is a country that adopted the principle of opportunity to Indonesia.

In the Netherlands, the use of the principle of opportunism by the Public Prosecutor must be guided by the National Prosecution Guidelines issued by The Board of Procereurs-Generaal which allows for the setting aside of cases if there are reasons, namely:⁵³

- a. there are other more effective measures other than punishment, such as disciplinary, administrative, civil actions;
- b. prosecution would be disproportionate, unfair, or ineffective if it is related to the nature of the crime such as the crime does not cause harm and no punishment is required.

If the element of expediency of this type of punishment is associated with the position case, then, there are other means other than punishment with less harm/damage to prevent the purchase of organs by Hersa Audi Pratama. The reason why Hersa Audi Pratama bought an organ (kidney) worth Rp250,000,000 is because the kidney needed to cure his kidney failure is not available in health facilities. Therefore, the solution to this problem that is more effective and does not cause greater losses other than criminal is that the government must be more vigorous in socializing, mobilizing and/or preserving voluntary donors so that the organs needed are available at health facilities. So that people who need it can get it without having to buy it. This is the responsibility of the government which has been regulated in Articles 14, 118, 131 and 132 of Law Number 17 Year 2023.

Based on these arguments, it can be concluded that the imposition of punishment for cases of organ purchase that The crime committed by Hersa Audi Pratama is not beneficial because it does not fulfill the elements of criminal expediency in Ted Honderich's theory. So in this case, the government through the Attorney General must set aside the case using the principle of opportunity in order to protect the interests of society from the imposition of punishment that is not needed, not required, not justified and harmful to people's lives. This needs to be done solely for the realization of public welfare to avoid useless punishment that must be implemented by the government because it is a constitutional mandate.

⁵² Lihat Pasal 114, 124 Undang-Undang Nomor 17 Tahun 2023 tentang Kesehatan, Pasal 3 Peraturan Pemerintah Nomor 53 Tahun 2021 tentang Transplantasi Organ dan Jaringan Tubuh dan Pasal 1 ayat 1 dan Penjelasan Bagian Umum Peraturan Pemerintah Nomor 7 Tahun 2011 tentang Pelayanan Darah.

⁵³ Peter J.P. Tak, *The Dutch Criminal Justice System Organization and Operation*, WODC, Den Haag, 1999), h. 42-43.

Third, the discussion on the argumentation of the interests of the state and nation to protect the public from useless crimes that can damage public welfare. One of the government's efforts to tackle crime is through penal measures, namely, the provision of punishment which has the aim of preventing criminal acts by enforcing legal norms for the protection and protection of society.⁵⁴ The use of punishment as a means of preventing crime should not be applied arbitrarily because punishment is a dangerous and painful thing for someone who is subjected to it so that its use must be seriously considered.

In addition, punishment is not the only means of overcoming crime because in addition to penal means there are also non-penal means to overcome crime. These non-penal means include controlling crime through social norms, eradicating factors that cause crime such as poverty, unemployment, illiteracy, and other legal means such as civil, state administration, and religion.

In connection with this, Barda Nawawi stated that punishment is only justified if it is useful for the needs of society.⁵⁵ Conversely, punishment is not justified if it is harmful to society.⁵⁶ This opinion is reinforced by Jeremy Bentham's statement which explains that it is prohibited to use/apply punishment if it is "groundless, needless, unprofitable or inefficacious".⁵⁷ This view is based on the utility approach.⁵⁸

In criminal law, there is a means to prevent the uselessness of imposing punishment by using the principle of opportunity that can be used by the prosecutor as the owner of the case. Because by using the principle of opportunity, the prosecutor can consider aspects of the benefits of criminal prosecution for the public interest. The argument is in line with the opinion of R.M. Surachman who stated that the principle of opportunity or prosecutorial discretion is the principle of allowing the prosecutor not to prosecute a case if based on his consideration the prosecution of the case will cause harm to the public interest or the government.⁵⁹

If the meaning and urgency of the use of the principle of opportunity are juxtaposed with the use of punishment as a means of preventing crime by the government to therefore, a statement can be made that the use of punishment by the government to tackle crime must be carried out carefully and filtered using the principle of opportunity. In other words, the punishment to be used to tackle crime must be truly beneficial so that it can realize the welfare of society, if the criminal prosecution is considered not beneficial because it will cause greater harm, then, the prosecution must be ruled out using the principle of opportunity in order to avoid public suffering due to the imposition of punishment that has no benefit.

This argument is strengthened by the information contained in the explanation of Law Number 11 of 2023 which states that:

"...In exercising state power in the field of prosecution, the authority of the Prosecutor's Office to be able to determine whether or not a case can be submitted to the court has an important meaning in balancing between the rules that apply *rechtmatigheid* and interpretations that rely on the purpose or principle of expediency (*doelmatigheid*) in the criminal justice process..."

⁵⁴ Lihat 51 Undang-Undang Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana.

⁵⁵ Barda Nawawi, *op.cit*, h. 33.

⁵⁶ *Ibid*.

⁵⁷ Nigel Walker, *op.cit*, h. 15; dikutip dari *Ibid*.

⁵⁸ Barda Nawawi, *op.cit*, h. 32.

⁵⁹ R.M. Surachman, *op.cit*, h. 70.

The obligation of the government, in this case the Prosecutor, to always filter the use of punishment using the principle of opportunity has been expressly regulated that the Attorney General has the duty and authority to set aside cases in the public interest in Article 35 letter c of the Prosecutor Law Number 11 of 2021. The meaning of "public interest" in the explanation of the article is the interest of the nation, state and/or society.

In relation to the meaning of public interest which is the basis for the Attorney General in setting aside the organ purchase case committed by Hersa Audi Pratama in Decision Number 587/Pid.B/2019/PN.Jkt.Pst. which is the subject of discussion, it has been presented in the previous discussions in detail which in essence obtained conclusions, namely:

1. There is a public interest in obtaining health services in order to achieve general welfare. The reason for the purchase of organs by Hersa Audi Pratama is to fulfill the human rights of every person to obtain organ transplants and the general interest of the community to achieve welfare in terms of health which also includes the buyer. The purchase was forced due to the government's inability to carry out its responsibilities in providing organs needed by the purchaser to cure diseases and restore health;
2. There is a public interest in avoiding useless punishment that can damage public welfare. Because the punishment against A. Andy Chandra and organ purchase by Hersa Audi Pratama did not fulfill the requirements of criminal expediency in Ted Honderich's theory because the punishment did not really prevent, caused greater harm than if the punishment was not imposed and there were means to prevent organ purchase that were more effective with less harm than punishment.

Thus, based on the arguments that have been put forward by the author, it can be concluded that the crime of organ purchase committed by Hersa Audi Pratama must be set aside by the Attorney General to provide protection for the public interest of the state, nation, and/or society. In addition, this is also the duty of the Attorney General as well as the Attorney General. The government's public interest in realizing the welfare of the community by protecting the public against useless punishment and the conditions for setting aside cases in the public interest which function as a filter to prevent useless criminal prosecution have been fulfilled.

CLOSING

Based on the study of laws and regulations, it is known that the sale and purchase of organs is a transaction carried out by the donor and recipient that is financial in nature, except for the transaction of reimbursement of organ processing costs that must be paid by the recipient to the hospital where the organ transplant is carried out. The organ purchase conducted by Hersa Audi Pratama in Decision Number 587/Pid.B/2019/PN.Jkt.Pst has been proven to have been carried out if based on Indonesian legislation because the act is a transaction carried out by the donor and recipient that is financial in nature for the kidney. In addition, the payment for the kidney did not include payments for the Organ Transplant Fee Package that were allowed to be given to the hospital.

The Attorney General is obliged to set aside the organ purchase case committed by Hersa Audi Pratama in Decision Number 587/Pid.B/2019/PN.Jkt.Pst because the Attorney General has the duty to set aside cases in the public interest or filter the expediency of each criminal case prosecution carried out and in these cases there are public interests that must be protected. These public interests are the interests of the community to obtain health services in order to achieve public welfare, the interests of the community to avoid useless crimes that can damage public welfare, the interests of the state and nation to protect the public from useless crimes that can damage public welfare.

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