Criminal Law Protection Policy for Victims of Malpractice Crimes in the Medical Field

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ABSTRACT

This research was conducted with the aim of (1) Finding out and analysing the current criminal law protection policies for victims of criminal acts in the medical field. (2) To find out and analyze the ideal criminal law protection policy for future victims of criminal acts in the medical field. This study uses primary data by conducting a literature review, namely on the Criminal Code (KUHP), Law no. 36 of 2009 concerning Health, and Law no. 32 of 2004 concerning Medical Practice, Jurisprudence. The results of this study indicate that: (1) The legal protection policy for victims of criminal acts in the medical field in positive criminal law in Indonesia is currently carried out by imposing sanctions on perpetrators of criminal acts based on the Criminal Code, Law no. No. 36 of 2009 concerning Health, also UU. No. 29 of 2004, concerning Medical Practice and supporting regulations that apply, it turns out that in practice there are still weaknesses in both the formulation of criminal acts, the formulation of criminal liability and the formulation of crimes and punishments. (2) Regarding future legal policies, namely legal policies Through reformulation and reorientation of criminal legislation in the field of health and medical practice which of course can provide legal certainty and legal protection for victims of malpractice due to negligence of doctors as an effort or form of overcoming the crime of medical malpractice in Indonesia.

Keywords: Legal protection; Victims of Criminal Acts; malpractice; Medical Field

ABSTRAK

Penelitian ini dilakukan bertujuan untuk: (1) Untuk mengetahui dan menganalisa kebijakan perlindungan hukum pidana terhadap korban tindak pidana di bidang medis saat ini. (2) Untuk mengetahui dan menganalisa kebijakan perlindungan hukum pidana yang ideal terhadap korban tindak pidana di bidang medis yang akan datang. Penelitian ini menggunakan data primer dengan melakukan kajian Pustaka, yaitu pada Kitab Undang-Undang Hukum Pidana (KUHP), Undang-Undang No. 36 Tahun 2009 tentang Kesehatan, Undang-Undang No. 32 Tahun 2004 tentang Praktik Kedokteran, Yurisprudensi. Hasil Penelitian ini menunjukkan bahwa : (1) Kebijakan perlindungan hukum bagi korban tindak pidana bidang medis dalam hukum pidana positif di Indonesia saat ini dilakukan dengan mengenakan sanksi bagi pelaku tindak pidana berdasarkan KUH Pidana, UU No. No. 36 Tahun 2009 tentang Kesehatan, juga UU. No. 29 Tahun 2004, tentang Praktek Kedokteran dan peraturan-peraturan pendukung yang berlaku, ternyata dalam pelaksanaannya masih terdapat kelemahan baik dalam perumusan tindak pidana, perumusan pertanggungjawaban pidana, serta perumusan pidana dan pemidanaannya. (2) Mengenai kebijakan hukum yang akan datang yaitu kebijakan hukum Melalui kebijakan reformulasi dan reorientasi perundang-undangan pidana bidang kesehatan dan praktek kedokteran yang tentunya dapat memberikan kepastian hukum dan perlindungan hukum bagi korban malpraktik karena kelalaian dokter sebagai upaya atau bentuk penanggulangan tindak pidana malpraktik kedokteran di Indonesia.

Kata Kunci: *Perlindungan Hukum; Korban Tindak Pidana; Malpraktik; Bidang Medis*

INTRODUCTION

Protection and law enforcement in Indonesia in the health sector is lacking. One by one there are several examples of cases where a patient did not get proper care, the worst, and sometimes it will end in death (Setiawan, 2017). Cases of criminal acts in the medical field that occur a lot and are exposed in various media are only a few cases that have evaporated, so it can be said that they are like an iceberg. *(iceberg)* (Coal, *et.al*, 2016). The disappearance of criminal cases is also a sign of progress in society, regarding their awareness of their rights relating to health and medical services, as well as awareness of their rights to obtain equal legal protection in the health sector.

The Applicability of Law no. 23 of 1992 concerning Health, provides opportunities for users of services or goods to file lawsuits/lawsuits against business actors if there is a conflict between customers and business actors who are deemed to have violated their rights, are late in doing/not doing/late in doing something that causes harm for users of services/goods, either loss of property or injury or it could be death (Sumiati, 2009).

This means that patients as consumers of health services can sue the hospital, doctors or other health workers in the event of a conflict. In today's global era, medical staff is one of the professions that get the public's attention, because the nature of their service to society is very complex (Athani & Citra, 2013). Lately, a lot of people have focused on the performance of medical personnel, both the highlights that were conveyed directly to the Indonesian Doctors Association (IDI) as the main organization of doctors, as well as those that were broadcast through print and electronic media. Most people are unable to understand that many other factors beyond the control of medical personnel can affect the results of medical efforts, such as the stage of the disease, physical condition, endurance, quality of drugs and also patient compliance to obey the doctor's advice (Mahlia, 2018). These factors can result in medical efforts (even the best) being meaningless. Therefore it is not wrong to say that the results of a medical effort are full of uncertainty and cannot be calculated mathematically.

Likewise, the process of diagnosis (finding and defining health problems), is essentially the most difficult part of the work of medical staff. Even though many sophisticated tools have been created to facilitate this work, it does not rule out the possibility of error rates (clinical differences and clinical autopsy diagnoses) in various hospitals in developed countries. As is the case with therapeutic measures, the results of an incorrect diagnosis also do not automatically lead to a crime (Njoto, 2011). Research must be carried out beforehand on whether the malpractice is a result of not implementing standard diagnostic procedures.

In reality, people often hear complaints about the quality of services received from hospitals. These complaints include inpatient services that are considered uncomfortable, rare/absence of visits by specialist doctors or the facilities received are not by the high costs incurred by patients. There were also complaints about the receptionist who required a down payment for the next 10 (ten) days. Complaints were also submitted regarding the services of the emergency room/emergency room which were considered inept and inhumane. It complained that emergency room staff did not immediately assist traffic accident patients

because they were waiting for their close relatives. After the patient's immediate family arrived, the officer asked them who was responsible for the hospital fees. These complaints are not entirely true, for example in the case of the emergency room staff.

Factually, officers cannot be blamed if they ask patients whether they have brought money or not, not because they are worried that patients will not pay for treatment/care, but because there are prescriptions which are quite expensive and must be redeemed at the pharmacy. It also turned out that the patient was not neglected, even first aid was given, and the next step was waiting for the redemption of the prescription.

In addition, the hospital is always blamed if bad consequences occur to the patient during or after receiving treatment/treatment/medical action in the form of worsening disease, injury or even death. The problem is that if a medical worker is deemed to always be responsible if a bad consequence occurs to the patient, or does not succeed in curing the patient, then this can be detrimental to the patient concerned (Jada, 2017). The patient's assessment of the hospital/medical personnel who complained above, of course, is not entirely correct and is subjective. However, this complaint in fact cannot be simply ignored so as not to cause a protracted and tiring legal conflict.

Malpractice cases are like an iceberg, with only a few surfaces. There are many actions and medical services performed by doctors or other medical personnel that have the potential to constitute malpractice reported by the public but not legally resolved. For the community, this seems to indicate that law enforcers are not on the side of patients, especially the lower class, whose position is certainly not on an equal footing with doctors (Domopolii, 2017). It will be very difficult sometimes for patients who are victims of malpractice or other ordinary people to understand why it is not so easy to bring this medical malpractice problem to legal channels (Faisal, Hasima & Rizky, 2020). The community then took the judgment that law enforcement officials were not taking this medical malpractice case seriously enough. Designating a suspect or defendant is certainly not an easy thing, especially for malpractice cases involving medical aspects which are sometimes not well understood by law enforcement (Susila & Soularto, 2016).

An example of a malpractice case is the death of the artist Sukma Ayu, which disturbed the public's view of the medical profession. The case began when there was a wound on the patient's arm, then was operated on but it did not improve and even caused the patient to be in a coma for months and ended in death. This raises a lot of questions in the community, considering that in the beginning, it was to heal small wounds, but it resulted in death. A similar case happened to a patient named Santi Mulyasari, Santi was declared dead in 2019 after a doctor performed surgery *cesarean section* (the procedure for giving birth to a baby by making an incision in the abdominal skin and opening the uterus), the problem, in this case, is that the doctor treating the patient for the fourth time has handled the cesarean section in a patient with HB status*(Hemoglobin)* 9 (Nine). Which resulted in the patient experiencing bleeding and eventually dying. Even with such a risky operation, a doctor should pay attention to the indications of each action.

Such cases are examples that illustrate the carelessness, inaccuracy, recklessness and carelessness of medical personnel, both committed by doctors and another hospital medical personnel, which is often known as medical malpractice. *(medical malpractice)*. Malpractice actions cause both material and immaterial losses on the part of the patient or the patient's family as a victim. Existing malpractice cases often lead to patient suffering. For this reason, it is necessary to examine how efforts to provide legal protection for patients, especially those related to the problem of the patient's legal relationship with the hospital, the rights and obligations of the parties, responsibilities and aspects of law enforcement

RESEARCH METHODS

Legal research *(legal research)* that will be carried out is normative juridical research (Zaini, 2011). Normative legal research consists of primary legal materials, secondary legal materials and tertiary legal materials. The legal materials are arranged systematically and then a conclusion is drawn about the problem under study. The science of law has a distinctive character. The hallmark of the science of law is its normative nature.

In this paper, the approach method that will be used is the normative juridical research method *(legal research)*, namely by studying or analyzing secondary data in the form of legal materials, especially primary legal materials and secondary legal materials by understanding law as a set of rules or positive norms in the statutory system that regulates human life.

FINDING & DISCUSSION

A. Formulation of Criminal Law Policy to Overcome Medical Malpractice Crimes in the Future

1. Reorientation and Reformulation of Victim Protection

a. Formulation of Criminal Acts in the Medical Field

Criminal policy in the protection of victims of criminal acts in the medical field is manifested in the form of criminalization, actions that were originally not criminal acts are changed to criminal acts which result in the imposition of criminal sanctions (Wahyuni, 2008). In the laws and regulations relating to criminal acts in the medical field, the number is very limited and the scope that is regulated is also still very limited. Material law only refers to the Law on Medical Practice and the Law on Health as well as the Criminal Code, while procedural law is the same as the criminal procedural law in general, namely by referring to Law Number 8 of 1981 concerning Procedural Law. Criminal.

In-laws that materially intersect with criminal acts in the medical field, basically only regulate the subject of the medical profession or subjects of ordinary people who do not intersect with the medical profession, even though doctors in carrying out their profession are closely related to other medical professions, including nurses, midwives. , medical radiologists, pharmacists and other medical professionals, all of whom can play a role in the occurrence of criminal acts in the medical field. Until now, several actions of medical personnel have been criminalized in the health law, actually, the provisions in the health law itself still have restrictions that cause the actions of other medical personnel not to be included in criminal acts,

for this reason, in the future, it is necessary to criminalize the actions of medical personnel. other medical non-doctors that can lead to criminal acts in the medical field. Based on the law on medical practice, it can be predicted which actions will need to be criminalized in the future to provide public protection in the field of medical personnel services.

b. Formulation of Criminal Liability for Criminal Acts in the Medical Field

Criminal acts can be identified with the emergence of losses which then result in the birth of criminal liability. So criminal liability is a form of legal protection for victims of criminal acts or the losses they suffer (Saint. 2012). Criminal responsibility by prioritizing and establishing the perpetrators of criminal acts as subjects of criminal law in statutory provisions so that perpetrators of criminal acts can be held accountable for all legal actions they have committed as a manifestation of responsibility for their mistakes against other people (victims).

The accountability of the subject of criminal law will certainly provide a deterrent *effect* not committing a crime, to prevent the occurrence of a crime and directly prevent the victim of a crime in the future.

In Law Number 23 of 1992 concerning Health the formulation of criminal responsibility for criminal acts in the medical field functions as protection for victims of criminal acts in the medical field as contained in articles 80 to 83, which is accompanied by criminal liability and sentencing patterns (Bawono, 2020). In Law Number 29 of 2004 concerning Medical Practice, the formulation of criminal responsibility for criminal acts in the medical field functions as protection for victims of criminal acts in the medical field as contained in articles 76 to 80, accompanied by criminal liability and sentencing patterns.

Regarding the problem of criminal liability, the Draft Criminal Code does not apply absolutely to the principle of guilt, because the Draft Criminal Code also provides the possibility in certain matters to apply the principle of "*strict liability*" and basic "*vicarious liability*".

Strict liability according to Curzon based on the following reasons (Muliadi and Barda, 1998:141):

1. It is essential to ensure the observance of certain important regulations which are necessary for the welfare of society;
2. Proof of existence *mensrea* it will be very difficult for those offences related to the welfare of society;
3. The high level of social harm caused by the actions concerned.

Barda Nawawi Arif views strict *liability* as an exception to the principle of "no crime without guilt". Restrict *liability* the maker is still filled with errors, namely errors in the normative sense (Chairul Huda, 2008:87). Basic possible strict *liability* against certain crimes in the Draft Criminal Code, it is possible that this can be effective if it is applied to the difficulty of proving wrongdoing in criminal offences in the medical field and errors in the legal subject. In addition, remember that victims of criminal acts in the medical field, in general, can not only

be detrimental to victims and their families but also related to sources of material capital and have enormous psychological effects on families in the future.

In essence, looking at the description above, the formulation of criminal liability for criminal acts of malpractice in criminal legislation related to medical and health issues that currently applies still has weaknesses, so in practice criminal, law enforcement on health and medical criminal acts in the medical field seem to have experienced immunity. This obstacle is also increasingly emphasized by the fact that the harmonization of legislation in the medical, health and medical practice fields is not working properly, due to the absence of a uniform and consistent pattern in the regulation of criminal liability.

Therefore, it is necessary to reformulate the provisions regarding a criminal responsibility system that is uniform and oriented towards victims of criminal acts in the medical field. Reorientation and reformulation of these provisions as a first step can be carried out on legislation outside the Criminal Code relating to criminal offences in the applicable medical field, before the results of criminal law reform can be enacted in the form of codification and unification of Indonesian criminal law (Draft Criminal Code) which still under development and design.

c. Formulation of Criminal Cases and Punishment of Criminal Cases in the Medical Field

The objective of the policy of establishing a sanction is that establishing a criminal sanction cannot be separated from the objective of criminal politics in its entire meaning, namely "protection of society to achieve prosperity" (1998:91). One form of public protection is legal protection not to become a victim of a crime, or legal protection if you have become a victim of a crime. Regarding the issue of victim protection.

The criminal legislation currently in force (*right established/right operated*), more victim protection as "abstract protection" or indirect protection. This is because criminal acts according to criminal legislation are not seen as acts that attack/violate the legal interests of a person (victim) personally and concretely, but are only seen as violations of "law order".*in abstract*". In other words, the system of sanctions and criminal responsibility is not focused on direct and concrete victim protection, but only indirect and abstract victim protection. So, criminal responsibility for the perpetrators is not directly and concretely responsible for the loss/suffering of the victim but is more focused on personal/individual accountability. Individual criminal responsibility also contains protection for victims indirectly, especially protection for potential victims or potential victims. This can be seen, for example, in the main punishments in the form of the death penalty and imprisonment for liberty. Likewise additional types of punishment in the form of "revocation of certain rights", "deprivation of certain goods", and "announcement of a judge's decision".

Related to formulating a victim protection policy, cannot be separated from the sentencing policy in determining the most appropriate criminal sanction to provide a sense of justice for the victim and cause a deterrent *effect*. Through the renewal of criminal law, one of the reasons for the penal system in the Draft Criminal Code is the idea of a balance between the punishment that is oriented towards perpetrators and victims. This can be seen in the

formulation of the penal system, namely by making the type of criminal sanction compensation a general policy of sentencing for all offences with the status of one type of additional punishment.

In connection with the formulation of the compensation criminal sanction, Barda Nawawi Arif explained as follows (Barda Nawawi, 2007:63):

"Even though the compensation penalty has the status of an additional crime (i.e. imposed together with the main punishment), it can also be imposed independently in addition to (as an alternative to) the main punishment, that is, if the offence in question is only punishable by a single fine (Article 56 concepts). The formal criteria in article 56 of the RKUHP are not satisfactory. Therefore, it is suggested to add victim-oriented material criteria, namely:

a. If the delict occurs, it results in a loss for the victim; and
b. If the convict is a capable person, while the victim is classified as an incapacitated person.

That is, if the material criteria are met, then the punishment for compensation should be imposed as an additional punishment or as an independent punishment (alternative punishment) in addition to the main punishment. This is different from the current Criminal Code, in which the type of criminal sanction for compensation does not have any status as a type of criminal sanction. Compensation in the Criminal Code is only a condition for a person not serving a sentence (ie as a conditional sentence).

The general policy of formulating a criminal punishment system in the Draft Criminal Code can certainly provide access to direct protection in the form of "compensation" for a wider range of victims of all offences. Considering that the concept of victims of malpractice crimes is closely related to the concept of loss and death of a person, the determination of criminal sanctions in the form of providing compensation to victims and repairs that must be made for physical disabilities is the most effective type of alternative criminal sanction that can provide access to direct protection against victims' losses. / the victim's family and a sense of justice, it is even very relevant that financial sanctions in the form of compensation are based on experience that crimes in the field of malpractice are usually committed for reasons of not complying with standard medical ethical procedures, and not least for business reasons, which the patient must want surgery on him.

Thus the policy formulation in legislation does not only look indeed, the *doer* but the victim (victim). Included in this case is the formulation of the law on criminal acts in the medical field because criminal acts in the medical field are very closely related to the concept of victims due to the impact of non-fulfilment of treatment standards as stipulated in the legislation.

In this case, *first*, it is necessary to explicitly formulate the application of this type of compensation criminal sanction as a punishment policy because it can provide direct and concrete protection to victims. This includes both actual and threatened loss and damage. This is because it must be understood that loss or damage in criminal acts in the medical field often does not occur immediately or can be easily validated. So that there are so-called categories of

victims that are concrete and there are abstract (nerve damage that has not been identified when the victim is declared as a disabled victim of a crime in the medical field).

Besides that, in special rules/delicts, such as Law Number 24 of 2004 concerning Medical Practice, it is possible to formulate victim-oriented sanctions (*victim oriented*), namely making the type of criminal sanction compensation the main punishment or as an additional punishment that is imperative for certain offences.

Second, formulating a cumulative-alternative sanction system gives judges the flexibility to choose the right punishment for criminals in the medical field, not as "those who give orders or those who act as leaders". *Third*, make alternative criminal provisions, if the perpetrators of criminal acts do not want to carry out the fine decision and/or the orderly action.

B. Formulation Policy for Protection of Victims of Criminal Acts in the Medical Field Through Penal Mediation

Formulation/legislative policy as a part of the functional/operationalization of criminal law policies in the prevention and control of criminal acts is inseparable from efforts to protect by justice for victims of crime. Policy formulation can be said to be the most strategic initial access to provide protection and justice for victims of criminal acts. Substantive reform of criminal law needs to be carried out considering that there are weaknesses in the formulation policy for the protection of victims of criminal acts in the medical field in current legislation in the field of health and medical practice related to the substantive reform of criminal law to provide protection and a sense of justice for victims of criminal acts in the field of medically, then this can be related to the theoretical discourse in the development of criminal law reform in various countries today, namely using penal *mediation* as an alternative solution to problems in the field of criminal law.

The background of this thought is not only related to the ideas of criminal law renewal (*penal reform*) but some are associated with problems of *pragmatism*. Background ideas" *penal mediation"* These include the idea of victim protection, harmonization ideas, ideal restorative *justice*, the idea of overcoming behaviour/formality in the existing system, the idea of avoiding the negative effects of the existing criminal justice system and criminal justice system, especially in seeking other alternatives to imprisonment and so on.

Background *pragmatism* among other things reduces stagnation or accumulation of cases, simplifies the judicial process and so on. Sometimes it can be said that the motivation for using alternative dispute resolution is referred to as the principle of problem-solving disputes by working together. It is also said that alternative dispute resolution can achieve better results than the justice system.

Penal mediation is an alternative form of dispute resolution outside the court which is commonly known as ADR (*Alternative Dispute Resolution*). The ADR method has been used by traditional communities in Indonesia for a long time to resolve disputes between them. They usually take deliberations to reach a consensus in various disputes. They do not realize that actually, deliberation for consensus is the embryo of ADR. Traditional ADR is considered very effective and it would be a mistake if the dispute was opened in the community. In many

disputes, people prefer a dialogue/deliberation, and usually ask a third party, the village or tribal head, to act as a mediator/intermediary, or even as an arbiter.

Regarding the issue of ADR in criminal cases in the medical field, it is a response to the limitations of the court institution in handling the number of criminal cases and in many cases, malpractice disputes that are resolved through the courts often do not satisfy the parties to the dispute. The victim is in a weak position because it is difficult to submit evidence.

The backlog of cases in court has also motivated the use of ADR. Legally ADR has been regulated in article 83 paragraphs (1), (2) and (3) of Law Number 29 of 2004 concerning Medical Practice. This is an advantage of Law no. 29 of 2004 compared to Law no. 23 of 1992 concerning Health because this law has not yet formulated ADR.

The concept of penal mediation as a form of ADR can be made possible as a policy to *establish the right* to protect victims of corporate crime in the medical field, because the concept of victims of malpractice crimes is closely related to the concept of loss and death (the loss of a person's life, due to carelessness in medical practice and treatment), of course, penal mediation is an alternative solution to problems in the field of law Criminal law is theoretically more efficient, both in terms of cost, effort and time, and has the potential to be able to produce a more effective agreement in-win *solution*. A deal-win-win *solution* guarantees the continuation of good punishment between the parties to the dispute. Sustainability is very important because there is resistance in the community towards the presence of business/practice activities in medicine which is very much needed in everyday life. This is often experienced by doctors, nurses, pharmacists as well as midwives in carrying out their business profession or activities. Regarding the penal mediation policy, of course, it is necessary to have a legal umbrella as a manifestation of the principle of legal certainty, namely that it can be integrated into material criminal law or formal criminal law.

CONCLUSION

1. The process of investigating corruption cases carried out by the Sungguminasa District Attorney's Office was carried out based on the applicable criminal procedure law, namely that apart from being based on the Criminal Procedure Code, the investigation was also carried out based on Law Number 31 of 1999 as amended by Law. No. 20 of 2001 and if it is related to bank secrecy it is carried out based on Article 42 of Law Number 10 of 1998, and if an investigation is carried out on the Regional Head and Deputy Regional Head and DPRD Members, Law Number 32 of 2004 is applied. In general, if the person acting as the Investigating Prosecutor also acts as the Public Prosecutor, the pre-determination sometimes does not work effectively.
2. Influential factors in the investigation of corruption cases at the Sungguminasa District Attorney's Office, namely normative rules that are so weak, attitudes and behaviour are also due to the weakness of the human resource management system of government administrators, starting from the recruitment system, career, and promotion and work evaluation up to the assessment of remu regeneration. The factors that influence the legal

prevention of corruption eradication are structural, cultural factors, and instrumental factors.

SUGGESTION

1. The legal protection policy for victims of criminal acts in the medical field in positive criminal law in Indonesia is currently carried out by imposing sanctions on perpetrators of criminal acts based on the Criminal Code, Law no. No. 36 of 2009 concerning Health, also UU. No. 29 of 2004, concerning Medical Practice and supporting regulations that apply, it turns out that in practice there are still weaknesses in both the formulation of criminal acts, the formulation of criminal liability and the formulation of crimes and punishments.
2. The future criminal law formulation policy is taken from positive law in this case the Indonesian Criminal Code, Law Number 23 of 1992 juncto Law Number 36 of 2009 concerning Health, Law Number 29 of 2004 concerning the Practice of Doctors after the Court's decision Constitution. Regarding future legal policies, namely legal policies Through reformulation and reorientation of criminal legislation in the field of health and medical practice which of course can provide legal certainty and legal protection for victims of malpractice due to negligence of doctors as an effort or form of overcoming the crime of medical malpractice in Indonesia

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