



Proceeding Book



**International Scientific Seminar
Law Enforcement and Human Right
Comparative Study Law Enforcement And Human Right
Between Indonesia & Thailand
THAMMASAT UNIVERSITY THAILAND
Bangkok, 6 September 2019**



Program Pasca Sarjana, Universitas Borobudur Jakarta, Indonesia



Proceeding Book



**International Scientific Seminar
Law Enforcement and Human Right
Comparative Study Law Enforcement And Human Right
Between Indonesia & Thailand
THAMMASAT UNIVERSITY THAILAND
Bangkok, 6 September 2019**



Program Pasca Sarjana, Universitas Borobudur Jakarta, Indonesia

Book of Proceeding

International Scientific Seminar Law Enforcement and Human Right

Theme : Comparative Study Law Enforcement and Human Right
Between Indonesia & Thailand

Program of Doctoral Legal Studies Universitas Borobudur, Indonesia
Bangkok, 6th of September 2019, Thammasat University Thailand

Editor :

Prof. Dr. H. Faisal Santiago, SH, MM

Prof. Henning Glasser

Prof. Dr. Ade Saptomo, SH, MSi

Binsar John Vic S.

I Putu Gde Sosiantara

Commitee :

Chief : Binsar John Vic S.

Steering : Prof. Dr. H. Faisal Santiago, SH, MM

Supporting admin : I Putu Gde Sosiantara

Accommodation : Zulfikar

Team Reviewer:

Prof. Dr. H. Faisal Santiago, SH, MM

Prof. Henning Glasser

Binsar John Vic S.

I Putu Gde Sosiantara

Edition II: 2019

ISBN: 978 -602-17520-5-0

Printed by: Postgraduate Program, Universitas Borobudur, Jakarta, Indonesia

Intellectual property protected by the Law of Republic of Indonesia:

Don't be allow for enlarges, print, distribute, copies and for all thinks in this book
(paper/proceeding) and for all reasons, and without permission from writers and editor/printing
company.



Proceeding Book



**International Scientific Seminar
Law Enforcement and Human Right
Comparative Study Law Enforcement And Human Right
Between Indonesia & Thailand
THAMMASAT UNIVERSITY THAILAND
Bangkok, 6 September 2019**

Program Pasca Sarjana, Universitas Borobudur Jakarta, Indonesia

Introduction

Head of Doctoral Program of Legal Studies, Universitas Borobudur, Indonesia.

In the development of ASEAN free market conducted by one country to other country in South-East Asia zone so called ASEAN Economic Community then, it demand us to follow business development in South-East Asia zone.

Then, in line with such South-East Asia free market, we are as law practicing and Legal Studies Doctoral program to understand aspects of Law Enforcement and Human Right at South-East Asia zone.

In this chance Borobudur University by Legal Studies Doctoral Program take a occasion for knowledge sharing through International Scientific Seminar in which there is scientific collaboration and synergy between 2 (two) countries , is, Indonesia and Thailand, and legal students specially in scope of increasing knowledge and illustration on Law Enforcement and Human Right between Indonesia and Thailand toward ASEAN Economic Community.

Finally, we would like to thank for all parties who had assisted this international seminar performance, in this case : German-Southeast Asian of Excellency for Public Policy and good Governance CPG-Thammasat University, Bangkok-Thailand, steering committees and all students of Legal Studies of Doctoral Program, Borobudur University, Jakarta-Indonesia.

Thank you,
Jakarta, 6th September 2019.

Prof. Dr.H.Faisal Santiago,SH.,MM.

Foreword

Assalamualaikum Warahmatullah Wabarakatuh, Shallom, Om Swastiatu, Namo Budhaya, Salam Sejahtera

Thank to The Almighty God, by His mercy and guidance and performance of International Seminar as collaboration results between Doctoral Program of Legal Studies with the German-Southeast Asian of Excellency for Public Policy and good Governance CPG-Thammasat University, Bangkok-Thailand, the topic in this case is “Law Enforcement and Human Right” (Comparative Study between Indonesia and Thailand) performed on Saturday, 6th September 2019 at Thammasat University.

In the name of steering committee of International Seminar We would like to thank for participation of co-students of Doctoral Magister Program of Law Science of Borobudur University as participants as well as to German-Southeast Asian of Excellency for Public Policy and good Governance CPG-Thammasat University, Bangkok-Thailand.

And also thank to Borobudur University in this case represented by **Prof. Dr.H. Faisal Santiago, SH.,MM**, Head of Doctoral Program of Legal Studies of Borobudur University by his guidance and direction we may finish this international scientific seminar activities kindly.

We realize our restrictions for some cases, so, allow us to send as big as possible pardon wishfully, this scientific activity may achieve its target in scope of succeeding ASEAN Economic Community and to make Smart the Indonesian People.

Thank you,
Bangkok-Thailand, 6th September 2019

Binsar Jon Vic S

Contents

Introduction

Head of Doctoral Program of Legal Studies of Borobudur University, Indonesia.	i

Foreword

Binsar John Vic S.....	ii

Contents	iii

Consumer Protection As State Liability Based On Law Number 8 Of 1999 Concerning Consumer Protection

Rita Herlina, Faisal Santiago.....	1

Prevention Of Environmental Pollution In The Indonesian Sea

A. Somad	7

Law Making In Regard To National Legal Reforms In Era Of Democracy

Anwar Musyadad	15

Law Enforcement Mechanism In Children's Rights Protection Efforts

Arin	23

Fulfillment Of Human Rights On Suspected In The Investigation Process

Abdul Kolib	29

Legal Protection On Victims Of Women In Domestic Violence In Human Rights Perspective

Abraham Arimuko	35

Human Rights Perspective In Legal Protection Of Children As Victims Of Sexual Violence

Adolf Setiabudi	41

Human Rights Perspective Review Of Legal Protection Of Patients HIV / AIDS

Agus Patmono	47

Legal Analysis About Loss Authority In The No. 38/2014 About Nursing

Agus Sutarman	75

Legal Perspective Of Agreement Between Doctors And Patients In Ortopedic Surgery

A.J. Didi	79

Legal Protection On Rights For Children's Workers

Amin Ibrizatul	85

Implementation Of State Responsibilities For Patients Of Disorders Of Skizofrenia Souls On Fulfillment Of Rights Associated In Family Disease Patients By Family Based On Act Number 18 Of 2014 Regarding Mental Health And Act Number 36 Of 2009 Regarding Health

Andjar Bhawono	91

Legal Protection Against Doctors For Lawsuits Filed By Patients For Malpractice

Andreas Andri Lensoen	99

Legal Aspects Of Informed Consent In Tarapeutik Transactions	
Asrofi Sueb Surachman	105
The Legal Review Of Euthanasia In The Perspective Of Human Rights Particularly The Right To Life	
Arief Widya Taufiq	111
Legal Protection Of Doctor Profession Against The Adverse Event In The Hospital	
Bambang Dwi HS	117
Harmonization Of Laws On Tax Dispute Settlement With The Justice Power System In Indonesia	
Bambang Sriwijatno.....	125
Challenges Facing Soes And Soe Subsidiaries Toward Law Enforcement And Human Rights Protection (Post Constitutional Court Decision Number 01/Phpu-Pres/Xvii/2019)	
Binsar Jon Vic S	131
Analysis Of Criminal Law Enforcement "Intentionally Producing Or Distribute Cosmetic Pharmaceutical Supplies Without Production Permit And Distribution Licence" According To Law Number 36 Of 2009 On Health	
Budi Gunawan, Bambang Dwi Hasto, dan Faisal	135
Legal Analisis Of Determination Of The Court In Children Gender Based On Child Protection Law (Case Study)	
Dana Nur Prihadi	143
Guidance Of Work Skills For Convicted Person As A Right Fulfilment During Punishment Period In Correctional Institution	
Danial Rasyid	151
The Right To Education As Human Rights For Children	
Daryrahman Diyan Baskoro, Hadi Purnomo, Sientje Kurniawati.....	159
Legal Issue Of Medical Home Visit Through Online Application Systems Based On Positive Laws In Indonesia	
Defri Aryu Dinata	165
Protection Of Poor Patient By Law, In The Implementation Of Medical Action In Hospitals Reviewed From Law Number 44 Of 2009 Concerning Hospital And Law Number 29 Of 2004 Concerning Medical Practice	
Didin Syaefudin	171
Law Enforcement For Pilot With Narcotics Abuse In Aviation	
Dominiques Reggy Marfilan.....	179
Informed Consent Implementation In Terapeutic Agreement As A Legal Protection Efforts For Doctors	
Dwi Heri Susatya	185

Human Rights And Law No. 29 Year 2004 As Legal Protection Doctor On The Case Of Emergency Edi Prasetyo	193
Legal Position Of Doctors On Informed Consent In Therapeutic Agreements Errawan Ramawitana Wiradisuria	201
Legal Liability Of Nursing For Delegation Of Clinical Privilege In Health Services Hanrizal Satria	209
Law Enforcement And Enforcement Of Human Rights To The Problem Of Human Rights Violations In The Life Of The Community, Nation And State Hendrik Marthen Rumasayor	217
Resolution Of The Bogor City Regulation Dispute Through A Non-Litigation Mechanism And Its Impact On Regional Autonomy Hery Chariansyah	227
Legal Protection For Digital Application Users Based On The Law Of The Republic Of Indonesia Number 19 Year 2016 And The Law Of The Republic Of Indonesia Number 8 Year 1999 I Putu Gede Sosiantara	235
The Role Of Medical Records In Enforcing Diagnosis To Suppress Malpractices In Hospitals Jajang Edi Priyatno	243
Law Enforcement For Domestic Violence In Indonesia Julia Bea Kurniawaty	251
Law Enforcement In Tax Court In Completing Tax Disputes In Indonesia KMS. Herman, Yudi Apriadi	259
Aspect Lawindependence Organizers Social Security Agency (Bpjs) In Relation Health Services Lukman Ma'ruf	269
Shift In Indonesia's Islam Inheritance Law With Giving Wajibah Will To Non Muslim Heir Maman Suparman	279
Rights Of Women Workers In Human Rights Perspective Mariska	285
Juridical Review Of Legal Protection On Workers / Workers Who Work With Outsourcing System Mirza Alfaris, Eni Agustina	291
Juridical Review Of Dead Penalty In Human Rights Perspective And Their Application Of Criminal Actors Of Terrorism Moch. Eko Setiyo Budi Utomo, Zudan Arief F.....	297

The Role Of The Indonesian Medical Disciplinary Board In Resolving Disputes In Doctors' Discipline As An Effort To Create Doctors Who Are Professional And Have Integrity	
Mohamad Birza Rizaldi.....	303
Protection Of Women's Human Rights Due To Repudiation Divorce By Husband Based On Decision Of Religious Court	
Muhamad Wakhid	311
Evidence In The Concept Of Protection Human Rights In Indonesia	
Nasrun Umar	317
Legal, Ethical, And Religion Aspects Of Islam About Organ Transplantations In Indonesia	
Nirwan Arief, Tjatur Winarsanto.....	325
Protection Of Victims Of Human Rights Violations	
Nyimas Enny Fitriana , Megawaty Barthos.....	335
The Right To Citizenship For Mixed Marriages In The Perspective Of Human Rights	
Prasetyo Edi	343
Implementation Of Tele-Radiology In Context Of The Implementation Of General Principles Of Good Governance (Aupb) To Realize Justice In Access To Health Services In Indonesia	
Prijo Sidipratomo, M. Nasser, Antonius PS Wibowo	349
The Regulation About Cardiologist Placement To The Right Hospital Would Bring Potentially Vertical Law Conflicts	
Prihati Pujowaskito	357
Legal Review Of Implementation Of Ratification Of Women's Discrimination (Cedaw) Evaluation Of Women's Empowerment Efforts In Indonesia	
Rachmanto Heryawan	363
Human Right Protection For Doctors In Performing Medical Practices: Review Of Doctor's Workload After The Issuance Of Law Number 40 Year 2004 Regarding Social Security System	
Raden Muhammad Arif Qomarullah	373
Legal Aspects Of Medical Disputes In Health Services Between Doctors And Patients	
Roedi Djatmiko	385
Criminal Responsibility Of Money Counterfeiters And Counterfeit Money Dealers And The Causes	
Rusdin, Nuno Guilhermino Pacheco Magno, Bernhard L. Malau.....	395
Human Rights And Law Enforcement In Indonesia	
Rusdiyanto	401
Humanism Approach As Non-Penal Work To Diminish Crimes And Thugs	
Santyo Widayatmo	407

Human Rights On Victims Of Narcotics Abuse Based On Law Number 35 Year 2009 On Narcotics	
Sukarman	411
Arbitration Through Consumer Dispute Resolution Board (Bpsk) As An Option For Resolving Medical Disputes In Positive Law In Indonesia	
Sukirman	417
Legal And Human Rights Review Of Rape Abortions To The Right Of Life For The Child	
Sultan Finekri Arifin Abidin	425
The Enforcement Of Criminal Law Over Corporate Crime Conducted By State-Owned Corporations Manager	
Tb. Boy Ariffin	431
Legal Aspects Of Sponsorship In Health Workers In Preventing Gratification	
Tjatur Winarsanto, Nirwan Arief	445
Legal Protection Against A Child Who Deals With Law In The Human Rights Perspective	
Wijoyo Hadi	453
Human Rights To Street Children In Indonesia	
Willy Muljono	461
Application Of Legal Sanctions On Reference Of Mandatory Immunization Based On Law In Children's Protection	
Yenny Purnama	467
The Application Of Law, Going To The Law Enforcement (An Analizing Of The Riil Scientific)	
Yuhano	475
Legal Protection On Fulfillment Of Human Rights For Persons With Disabilities Reviewed From Law Number 8 Year 2016 Concerning Disabilities	
Zama Kurniati Martina Wulansari, , Evita Isretno Israhadi	479
Moral Philosophy In Legal Renewal Based On Justice And Legal Certainty In Indonesia	
Abd. Kadir	485
Death Penalty Evaluated From Human Rights Prespective	
Zulfikar.....	491
The Development Of Legal System Policies In Indonesia Of Post-Reform	
Koesnan Abdul Halim, Zudan Arief F.....	497
Business Law In The Free Market Era	
Airindari Nancis Koesnan, Faisal Santiago	505

CONSUMER PROTECTION AS STATE LIABILITY BASED ON LAW NUMBER 8 OF 1999 CONCERNING CONSUMER PROTECTION

Rita Herlina

Student of Legal Studies Doctoral Program, Universitas Borobudur
kayethr@gmail.com

Faisal Santiago

Faculty of Law, Universitas Borobudur
faisalsantiago@borobudur.ac.id

Abstract

Business players are required to provide clear information for consumers as stated in the Act Number 8 Article 8 of 1999 concerning Consumer Protection. In relation to problems regarding labels, particularly food labels, the community needs to obtain valid, clear and complete information regarding the quantity, content, quality and other information of various food sold in the market. Various violations were found regarding this labelling regulation, one of which is the use of labels that were not written in Indonesian language or the use of other letters than English alphabets for imported products. Some labels were stucked on the packages and absences of various information such as expiration date, composition, net weight, product code MD, ML, or P-IRT, unclear nutritional facts, and no information about the address of the importers/producers.

Keywords: Protection, Consumer, Business Actors, Label, Food.

A. INTRODUCTION

Consumers' position as a weak party is nationally acknowledged under UN General Assembly Resolution Number A/RES/39/248 of 1985 Concerning *Guidelines For Consumer Protection* : "Taking into account interest and needs of consumers in all countries particularly those in developing countries recognizing that consumers often face imbalance in economic terms, educational levels, and bargaining power, and bearing mind that consumers should have the right of access to nonhazardous products, as well as the right to promote just, equitable and sustainable economic and social development".¹

Given the advanced science and technology, consumer protection is materially and formally considered as being increasingly important. Common impacts felt by consumers include quality of goods and unclear, misleading, or counterfeiting information. Among various information about goods and services needed by consumers, it seems that the most current influential information sourced from business people, especially in the form of advertisements and labels. The obligation of businesses to provide clear information to consumers is seen in Article 8 of Law Number 8 of 1999 concerning Consumer Protection.²

In relation to issues regarding labels, especially food labels, the community needs to be provided with valid, clear and complete information regarding the quantity, content, quality and other information about food products distributed in the market. Labels allow consumers to obtain brief information about

¹ Susanti Adi Nugroho, 2008, *Proses Penyelesaian Sengketa Konsumen Ditinjau Dari Hukum Acara Serta Kendala Implementasinya*, Kencana Prenada Media Group, Jakarta, page. 3

² Happy Susanto, 2008, *Hak-Hak Konsumen Jika Dirugikan*, Visimedia, Jakarta, page. 39

the product.³ The information in the labels also allow consumers to precisely select best products before consuming them. Without proper information, violations can occur.⁴

Problems regarding food often occur in Indonesia. Up to this present time, some food products distributed in the markets are not yet provided with proper labelling, creating anxiety among consumers. The distribution of expired date, use of non-food grade food coloring, use of formalin, excessive amount of preservatives and other violations bring negative impacts for the community. Those violations threaten the health and lives of the community, especially in children.⁵

Some products had already provided complete information, but the information could not be understood by the community as it is written in foreign language. Currently, imported products can be easily found in the market, which labels are still written in their country of origin languages such as Chinese and Japanese.⁶

The most frequent violation that occurred relates to the use of non-Indonesian language and non-English letters for food products, especially imported products. Other issues also relate to the use of labels which are not directly printed on the packages, unavailability of information about expiration date, food composition, net weight, product codes such as MD, ML, or P-IRT, inconsistent nutritional facts and unclear information about the address of the producers/importers.⁷

B. DISCUSSION

1. Label as a Form of Consumer Rights in Obtaining Information Based on Government Regulation Number 69 of 1999.

Provisions regarding labeling are arranged in the laws and regulations including Law Number 8 of 1999 concerning Consumer Protection, Law Number 18 of 2012 concerning Food Ads, Regulation of Ministry of Trade Affairs Number 22/M-DAG/PER/5/2010 concerning the Obligation to Include Labels on Goods, Law Number 36 of 2009 concerning Health, Decree of Minister of Health Number 924/Menkes/SK/VIII/2009 concerning the Amendments to Decree of Minister of Health of Republic of Indonesia Number 82/Menkes/SK/I/1996 concerning the Inclusion of “Halal” Writing on Food Labels, Regulation of the Minister of Health Number 180/Menkes/Per/IV/1985 concerning Food Expiration which has been amended by Director General of Drug and Food Supervisory in the Decree Number 02591/B/SK/VIII/91, and Law Number 33 of 2014 concerning Guaranteed Halal Products.

Law Number 8 of 1999 does not specifically regulate the labeling, especially on food products. More specific arrangements are found in Government Regulation No. 69 of 1999. Article 1(3) of Government Regulation No. 69 of 1999 determines that food label is any information about food in the form of pictures, writings, combinations of both, or other forms included, attached, presented along with food packaging. Furthermore, Government Regulation No. 69 of 1999 also arranges that:

- (1) Every person producing or incorporating packaged food into Indonesian territory for trading has to include a label on, attached, or packed with food;
- (2) The inclusion of label as referred to in Paragraph (1) shall be carried out in such a way that it is not easily separated from the packaging, is not easily faded or damaged, and is located on the part of the food packaging that can be seen easily.

³ Purwiyatno Hariyadi, 2009, “*Mencermati Label dan Pangan*”, retrieved from <http://www.republika.co.id>, on June 29, 2017.

⁴ Yusuf Shofie, 2000, *Perlindungan Konsumen dan Instrumen-Instrumen Hukumnya*, Citra Aditya Bakti, Bandung, page. 15

⁵ Dedi Barnadi - YLBK (Yayasan Lembaga Bantuan Konsumen), Konsumen Cerdas Majalengka, 2009, “*Makanan Jajanan (Street Food) Anak Sekolah*”, retrieved from <http://www.konsumencerdas.co.cc>, on June 30, 2017.

⁶ Sudaryatno, 1999, *Hukum & Advokasi Konsumen*, PT Citra Aditya Bakti, Bandung, page. 15

⁷ Konsumen Cerdas, 2009, “*Hasil Kajian BPKN di bidang Pangan Terkait Perlindungan Konsumen*”, retrieved from <http://www.konsumencerdas.co.cc>, on August 15, 2017.

Nonetheless, Article 3 of Government Regulation Number 69 of 1999 determined that:

- (1) The label as referred to Article 2 paragraph (1) contains the concerned food information;
- (2) According to paragraph (1), information at least includes:
 - a. Product name;
 - b. Ingredients;
 - c. Netto;
 - d. Name and address of producer or distributor;
 - e. Expired Date.

The label is not a brand. According to Article 1 paragraph 1 of Law Number 20 of 2016 concerning Trademarks and Geographical Indications, a brand is a sign in the form of images, names, words, letters, color arrangements, or a combination of these elements which have distinguishing features. Trademarks are used in the trade of goods or services. Brand functioned solely as identification, differentiator, and promotional means for a product. Meanwhile, the label serves as a more complete source of information for consumers because it contains representations, warnings, and instructions for a product.

Consumers need to always carefully check labels. Unfortunately, the results of the study conducted by the National Consumer Protection Agency (In Indonesian *Badan Perlindungan Konsumen Nasional* abbreviated BPN) showed that consumers gave less attention to labeling issues, with only 6.7% of consumers reported paying attention to the completeness of the label. Furthermore, the provisions in Article 1 number 3 of Government Regulation Number 69 of 1999 concerning Labels and Food Ads which presents a meaning of label using the word “attached” was found to be a problem. The use of the attached word gives the impression that labels can be attached at any time. Labels are an inseparable part of the packaging.

Hence, if the label is in the form of a sticker, it will be easily faked and revoked by a fraudulent business actor. The opportunity to develop and increase business for a liable business actor can be realized by taking action against business actors who commit fraud in their business activities. The benefit principle in consumer protection law emphasizes that all efforts to protect consumers have to provide the maximum benefit for consumers and business actors as a whole. Additionally, consumer safety and security principles emphasize that consumer safety and security in the use and utilization of goods and/or services consumed or used are guaranteed by law.

2. Strict Liability of Business Actors in Food Label Violation

Liability for food label violations committed by business actors is sanctions stipulated in Law Number 8 of 1999 concerning Consumer Protection, Food Law, and Government Regulation Number 69 of 1999. These sanctions can be in the form of civil, criminal, or administrative sanctions. If the business actor violates the prohibitions as stipulated in Article 8 of Law Number 8 of 1999 concerning Consumer Protection, the sanctions can be broadly divided into 2 (two), namely:

- a. Prohibition on the product that does not meet the appropriate requirements and standards for used by consumers;
- b. Prohibition on the availability of incorrect, inaccurate, and misleading information. This includes a prohibition on violations committed by business people in labeling.

Responsibilities from the obligations of business actors related to labeling can be seen in the Articles of Law Number 8 of 1999:

Article 20

“Advertising business actors are liable for the advertisement produced and all the consequences along with the advertisement.”

Article 24 paragraph (1)

“Business actor who sells goods and/or provides services to other business actors are liable for claims for compensation and/or consumer claims in the case of a. Other business actors sell the goods and/or services to consumers without making any changes from the initial goods/services provided by the business actor; b. Other business actors in trade are not aware of any changes in goods and/or services carried out by the business actor which makes the goods and/or services do not match the sample in terms of their quality and composition”.

The liability of the country in efforts to protect consumers is very important because according to Article 7 of Consumer Protection Law, a joint effort is based on five relevant principles in national development, such as:

1. The principle of benefits is where consumer protection has to provide maximum benefit for consumers and business actors as a whole.
2. The principle of justice is intended to optimally realize people's participation and provide opportunities for consumers and business actors to obtain their rights and carry out their obligation fairly.
3. The principle of balance is intended to provide a balance between consumers, business actors, and the government in the material and religious sense.
4. The principle of consumer safety and security is intended to provide security and safety to consumers in the use and utilization of goods and/or services.
5. The principle of legal certainty is intended to make both business and consumers obey the law and obtain justice in the implementation of consumer protection and the state provides legal certainty.

Liability cannot be separated from the important principles of liability to protect consumers. The general principles of liability according to the applicable law are:

- a. The principle of liability based on fault in which a person can be held legally accountable if there are elements of fault he committed;
- b. The principle of presumption of liability in which the defendant is always considered liable until he can prove that he is innocent. This principle is made under Article 19, 22, 23, and 28 of Consumer Protection Law;
- c. The principle of presumption of nonliability in which in contrast to the principle of liability. In this principle, the defendant is considered always irresponsible until he is proven guilty;
- d. The principle of strict liability in which generally used to ensnare business people under consumer protection law such as in product liability. Business actors are liable and can be sued if:
 - 1) committing a breach of warranty. For example, the benefits caused by product do not match the information stated in the product packaging;
 - 2) having an element of negligence. For example, the producer fails to meet the standard of making good products;
 - 3) implementing strict liability.
- e. The principle of limitation of liability in which very favored by business people as an exoneration clause in the standard agreement made. According to Law Number 8 of 1999, business actors may not unilaterally determine clauses that harm consumers, including limiting their maximum responsibilities.

3. Consumer Dispute Settlement Agency

Theoretically, dispute resolution can be done in two ways. First, using litigation in the court. Second, developing dispute resolution through cooperation outside the court. Per the provisions of Article 2 paragraph (1) and paragraph (2) of the Consumer Protection Law, it is stated that consumers who are harmed can sue the business actor through an institution tasked with resolving disputes between consumers and business actors or through courts in the general court. Disputes settlement between consumers and business actors can be done in a court or outside the court. Non-court dispute resolution that meets the criteria for a win-win solution is through the Consumer Dispute Settlement Agency (In Indonesian *Badan Penyelesaian Sengketa Konsumen* abbreviated BPSK. However, the decision made by BPSK is not executorial. Therefore, court ratification is needed to determine the executorial nature of the BPSK decision. The BPSK decision can be tested to court according to the decision of Indonesian Supreme Court Number 649/K-BPSK/2016. The settlement of disputes between consumers and businesses made by BPSK can be tested to the court decision of the Supreme Court.

C. CLOSING

1. Conclusions

Provision on labeling food products as stipulated in Government Regulation No. 69 of 1999 has not fulfilled the principles of consumer protection such as the principles of benefit, justice, balance, safety and legal certainty. Besides, the meaning of the label itself still causes problems. The use of the word "attach" gives the impression that the label can be attached at any time. The label is an inseparable part of the packaging. The use of the word label also seems to be separate and can be faked. Besides being able to be falsified, labels that are only in the form of sticker labels which can be easily revoked and replaced by fraudulent business actors. It is possible to exclude the use of Indonesian language which has caused consumer protection principles to be overlooked.

The dimension of legal protection for consumers can cover various aspects. It can be done with various instruments such as civil law, criminal law, and legal administrative instruments. Violations conducted by business actors regarding food labels can be subjected to civil, criminal, and administrative liability or sanctions. Civil and criminal sanctions are often less effective if not accompanied by administrative sanctions. An administrative sanction is more effective than civil and criminal sanctions because it can be applied directly and unilaterally. Secondly, civil and criminal sanctions often do not bring deterrent effects to the wrongdoers. The value of compensation and imprisonment may be nothing compared to the profits achieved from the negative actions of the producer. Not to mention the complicated decision-making mechanism that requires a long process conducted by consumers. It makes consumers impatient. Consumers are faced with a bargaining position that is not always profitable (for civil claims) that requires a long process so consumers who are not always profitable.

Currently, BPSK needs to be developed considering its decision is expected not to cause conflict between business actors and consumers.

2. Suggestions

- 1) The government need to provide better consumer protection in food labeling problems;
- 2) The government and related institutions need to make efforts to increase consumer awareness about the label and organize consumer education program;
- 3) Regulation of the Minister of Trade Affairs Number 06/m-DAG/2/2017 concerning BPSK should be accommodated in the form of Government Regulation.

REFERENCES

- Dedi Barnadi - YLBK (Yayasan Lembaga Bantuan Konsumen), *Konsumen Cerdas Majalengka*, 2009, "Makanan Jajanan (Street Food) Anak Sekolah", retrieved from <http://www.konsumencerdas.co.cc>, on June 30, 2017.
- Faisal Santiago, 2014, *Pengantar Ilmu Hukum*, Cintya Press, Jakarta.
- Faisal Santiago, 2016 *Bunga Rampai Catatan Hukum*, Cintya Pess, Jakarta.
- Faisal Santiago, Implementation of The Role of Notary Through Capital Market In The Era of Asean Economic Community. *International Journal of Civil Engineering and Technology*, 8(8), 2017, pp. 1054–1059.
- Happy Susanto, 2008, *Hak-Hak Konsumen Jika Dirugikan*, Visimedia, Jakarta.
- Purwiyatno Hariyadi, 2009, "Mencermati Label dan Pangan", retrieved from <http://www.republika.co.id>, on June 29, 2017.
- Susanti Adi Nugroho, 2008, *Proses Penyelesaian Sengketa Konsumen Ditinjau Dari Hukum Acara Serta Kendala Implementasinya*, Kencana Prenada Media Group, Jakarta.
- Sudaryatno, 1999, *Hukum & Advokasi Konsumen*, PT Citra Aditya Bakti, Bandung.
- Yusuf Shofie, 2000, *Perlindungan Konsumen dan Instrumen-Instrumen Hukumnya*, Citra Aditya Bakti, Bandung.
- Konsumen Cerdas, 2009, "Hasil Kajian BPKN di bidang Pangan Terkait Perlindungan Konsumen", retrieved from <http://www.konsumencerdas.co.cc>, on August 15

PREVENTION OF ENVIRONMENTAL POLLUTION IN THE INDONESIAN SEA

A. Somad

Student of Legal Studies Doctor Program, Universitas Borobudur
anwarmusyadad@yahoo.com

Abstract

Indonesian waters are the territorial sea of Indonesia and its archipelagic waters and inland waters. The Indonesian Exclusive Economic Zone (ZEEI) is a line outside and bordering the Indonesian territorial sea as stipulated under applicable laws concerning Indonesian waters covering the seabed, below ground, and water above it with the 200 nautical mile outer limit measured from the line base of Indonesia's territorial sea. The high seas are part of the sea that are not included in the Indonesian Exclusive Economic Zone (ZEEI). The research conducted in this study is a normative juridical approach. The normative juridical approach is research carried out by first examining the library materials that are relevant to the problem under study. Normative legal research supported by empirical data in this study focuses on the prevention and control of environmental pollution, especially on Indonesian seas based on legislation. The specification of this study is descriptive analysis, which describes the applicable laws and regulations related to legal theories and the implementation of positive laws concerning problems. Coastal countries are permitted to protect their marine environment by specifying special provisions to prevent pollution from ships in special situations, for example with technical reasons that are recognized as being related to requirements relating to the field of ecology and oceanography, as well as the use of resources and characteristics. special nature of shipping traffic. It is also based on the unique nature of the marine environment, based on the consideration of the existence of a special value system in each country. For the protection of the marine environment in very large areas, it is likely that certain areas of the marine environment are a priority, because it is not possible to protect the area of the marine environment as a whole. Sensitive coastal areas can be prioritized, in this area needed.

Keywords: Inland waters, nautical mile, marine environment.

A. INTRODUCTION

The existence of a large number of countries in the world is an irrefutable reality. Each of the more than one hundred and fifty independent states is included, both coastal and non-coast countries have special interests over the sea, depending on their geographical, economic, historical and other conditions attached to the sea. Law in this case the law of international sea, acts as a tool to regulate relations or issues related to the use of the sea for the benefit of various nations. Indonesian waters are the territorial sea of Indonesia and its archipelagic waters and inland waters. The Indonesian Exclusive Economic Zone (ZEEI) is a line outside and bordering the Indonesian territorial sea as stipulated under applicable laws concerning Indonesian waters covering the seabed, below ground, and water above it with the 200 nautical mile outer limit measured from the line base of Indonesia's territorial sea.

The high seas are part of the sea that are not included in the Indonesian Exclusive Economic Zone (ZEEI), Indonesia's territorial sea, Indonesian archipelagic waters, and inland waters of Indonesia. The Indonesian continental shelf is the seabed and the land beneath it, outside the territorial waters of the Republic of Indonesia to a depth of 200 meters or more, where exploitation of natural resources is still possible.

For its geographical location Indonesia is at 6° North Latitude - 11° South Latitude and 95° East Longitude - 141° East Longitude. Indonesia is located in Southeast Asia, whose territory is very strategic if seen from the location of its territory Indonesia is flanked by two oceans and two continents. Indonesia is located between the Pacific Ocean and the Indian Ocean and the continents of Asia and the continent of Australia. The very strategic location of Indonesia allows many ships to come through or come anchored inside Indonesian waters. many ships that pass through and dock in Indonesian waters in the context of the realization of cross-country trade, namely foreign trade vessels from other countries entering in Indonesian territorial waters. This is due to the increasing cooperation of Asian countries with European and American countries and including Indonesia also involved in collaborations in special economic fields in the field of trade.

For years people have not cared about sea pollution because of the large volume of sea water, and their ability to dilute all types of foreign substances so that they have almost no impact at all. Therefore the sea is considered a waste disposal site. However, this view began to gradually change. This is caused partly because the waste discharged into the sea is getting more and more and in high concentration, so that due to environmental pollution on a local scale occurs. If waste disposal into the sea is continuously carried out, it is feared that there will be a global impact of marine pollution.

According to Article 1 number 14 Law Number 32 of 2009 concerning Environmental Protection and Management states that, "Environmental pollution is the entry or entry of living things, substances, energy, and / or other components into the environment by human activities so as to exceed prescribed environmental quality standards. "Pollution in the sea can also be in the form of non-biodegradable plastic. The amount of this waste is getting bigger and bigger, and until now the exact environmental impact has not been known for a long time, besides its aesthetic impact which is clearly detrimental.

Other marine pollution also occurs from chemical waste from factory waste which is dumped into rivers and flows into the sea. Disposal of tailings or waste residues from mining activities into the sea also causes pollution, because the tailings that are supposed to settle on the seabed can be carried to the sea surface by reversing currents from under the sea. Because the tailings contain heavy metals that are dangerous like mercury, the adverse environmental impacts will be accumulative throughout the food chain.

The mining industry is an unsustainable industry because it depends on non-renewable resources. Environmental management in mining operations should cover all phases of the mining activity, starting from the exploration phase, production phase, to post closure. The phenomenon that occurs in the mining industry in Indonesia, in fact the mining company has the immunity to disobey environmental regulations and can freely commit pollution without fear of getting sanctions. Another behavior is the practice of mining waste disposal in primitive ways, disposing of tailings directly into rivers, lakes and the sea.

If viewed from the point of view of prohibited actions, someone will be held accountable for these actions, if the action is against the law and there is no justification or forgiving reason and the elimination of the illegal nature of the crime he committed. If seen from the point of view of the ability to be responsible, only someone who is capable of being responsible can be held responsible for his actions.

This is the principle of criminal liability, therefore, in the event that a person commits an act as threatened, this depends on the issue whether the perpetrator has committed an error or not. In Law Number 32 of 2009 concerning Protection and Management of the Environment, regarding the application of the element of error according to the Criminal Code (KUHP), it is different from the element of error if it is associated with Law Number 32 of 2009 concerning Environmental Protection and Management. The difference, seen from the provisions of Article 88 of Law Number 32 Year 2009 concerning Protection and Management of the Environment, stated that, "Every person whose actions, business, and/or activities use B3, produce and/or manage waste B3, and/or which poses a serious threat

to the environment is absolutely responsible for the losses incurred without the need to prove the element of error. "

A good and healthy environment is part of the human rights of every Indonesian citizen as mandated in Article 28 H of the 1945 Constitution. The mandate of the 1945 Constitution is carried out based on the principles of sustainable development and environmental insight. Companies or corporations in Indonesia today have not fully looked at environmental issues as conceptions of development that are environmentally sound as an obligation as mandated by the Act, thus causing increasingly decreasing environmental quality that threatens the survival of human life and other living things. Based on the explanation above, the authors are interested in raising this research with the title, "**Prevention of Environmental Pollution in the Indonesian Sea**".

B. RESEARCH METHODS

The research conducted in this study is a normative juridical approach. The normative juridical approach is research carried out by first examining the library materials that are relevant to the problem under study. Normative legal research supported by empirical data in this study focuses on the prevention and control of environmental pollution, especially on Indonesian seas based on legislation. The specification of this study is descriptive analysis, which describes the applicable laws and regulations related to legal theories and the implementation of positive laws concerning problems. The choice of this research method is expected to be able to provide a detailed, systematic and comprehensive description or description and analyze it regarding the prevention and control of Indonesia's marine pollution.

C. PROBLEM FORMULATION

Based on the background of the problem, the writer declines the problem in the form of questions. The formulation of the problem in this study is:

1. How is the implementation of prevention and overcoming pollution of the Indonesian marine environment ?
2. How does International Law regulate the prevention and control of marine pollution ?

D. DISCUSSION

1. The Implementation Of Prevention And Overcoming Pollution Of The Indonesian Marine Environment

Research must be accompanied by theoretical thoughts, because it has a reciprocal relationship between theory and activities of data collection, construction, data processing and data analysis. While the data is based on facts in the field. Theory describes the way of the mind according to a logical framework which means that it places research problems that have been formulated in the relevant theoretical framework, which is able to explain the problem. Before looking at the legal principles that are based on the opinions of legal experts, we will first see the definition of legal principles in several legal dictionaries. According to Sudarsono, what is meant by basic legal principles, basic and basic ideals. Legal principles are principles that are considered to be the basis or foundation of law. These principles can also be called notions and values which are the starting points of thinking about law. These principles are also the starting point for the formation of laws and the interpretation of the law.

To solve the problems in this study the author uses theories and principles of applicable law. The theories that the authors use in this study are as follows: Theory or the so-called basic theory in this study is the theory of marine pollution by Mochtar Kusumaatmadja which states that:

Marine Pollution is a change in the marine environment that occurs due to the inclusion of humans directly or not energy materials into the marine environment which results in such bad consequences that it is a loss to biological wealth, danger to human health, disruption to activities in the sea including fisheries and other reasonable sea uses, deterioration of the quality of sea water and declining settlements and recreation areas.

Pollution can be interpreted as a form of Environmental impairment, namely the existence of interference, change, or destruction. Marine Pollution is a problem faced jointly by the international community. Its influence not only reaches all activities that take place at sea, but also involves activities that take place in the coastal area, including river estuaries associated with the sea. Basically the sea has a natural ability to neutralize the pollutants that enter it. However, if the pollutants exceed the limit of the ability of sea water to neutralize them, then the condition is categorized as pollution.

Whereas the definition of marine pollution stated in Article 1 paragraph (4) of UNCLOS 1982 which states that, Pollution of the marine environment means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which result or is likely to result in such deleterious effect as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment or quality for use of sea water and reduction of amenities.

The above definition implies that "Pollution of the marine environment" means the inclusion of humans, directly or indirectly, of materials or energy into the marine environment, including quality, which results in or may bring adverse consequences in such a way as damage to the biological wealth of the sea and life in the sea, a danger to human health, disruption to marine activities including legitimate fishing and marine use, a decrease in the quality of seawater use and a reduction in comfort. "

In line with that, sea pollution is essentially decreasing the quality of seawater because human activities intentionally or unintentionally include certain amounts of pollutants into the marine environment (including river mouths) which have a negative effect on biological and vegetable resources in sea, human health, activities in the sea, and for the survival of living resources in the sea.

The concept of pollution prevention is the use of processes, the practice of energy materials to avoid or reduce the occurrence of pollution. Pollution prevention fundamentally shifts the focus of environmental protection from overcoming through end-of pipes which is reactive to the treatment of pollution after pollution to preventive front-of-process thinking by emphasizing that pollution should not occur, including pollution of the marine environment as a result of international shipping facilities on the territorial waters of a country.

Based on the understanding of the above pollution, the authors conclude that sea pollution is a situation where the decline in the quality of sea water caused by the entry of pollutant substances by human activities, both intentionally and unintentionally related to the utilization of marine functions, thus causing losses to marine natural resources, human health, and various disruptions to human activities at sea. Efforts to prevent pollution of the marine environment can be carried out by Indonesia with consideration based on the 1982 Law of the Sea Convention and the Precautionary Principle, also based on Indonesian National provisions such as Law No. 6 of 1996 and Government Regulation No. 37 of 2002. In addition to the ratio for the interests of coastal countries, this ratio actually applies to the safety of ships on their voyages, and ultimately to the interests of the international community as a whole.

Legal protection is a preventive and repressive government action. Preventive legal protection aims to prevent the occurrence of disputes, which directs government actions to be careful in making decisions based on discretion, and repressive protection aimed at resolving disputes, including the handling in the judicial institution.

Referring to the legal protection theory above, it is associated with a careful problem regarding the legal protection of a non-libelous marine environment from the equality before the law language. In the legal context both of them use their rights as legal subjects to claim and defend rights. The language is very simple but needs to be examined critically, because to apply the Equality Principle before the law depends on the paradigm of the subject of the law itself. Derived into a legal theory adopted by the ilmiator. Besides that, the most important thing is the legal apparatus in its enforcement. The concept of Equality before the law in the Pancasila state. Pancasila recognizes the existence of equality before the law, as a legal state with human rights principles.

Proof of Indonesian Marine Pollution in the inspection phase is carried out by the investigator with evidence found in the suspect or the crime scene (TKP) and based on verification of the conditions in the field regarding the size of the environmental damage resulting from the actions of the perpetrators of pollution of the marine environment. The proof is very helpful in this investigation because it is used as a guide and as a basis that strengthens in investigations in the crime of environmental pollution, especially on the Indonesian Sea.

2. International Law Regulate The Prevention And Control Of Marine Pollution

Criminal responsibility as one of the criminal policies is a matter of choosing from various alternatives. Accountability (criminal) leads to the conviction of an act, if it has committed a criminal offense and fulfills the elements specified in the law. Viewed from the point of view of an act which is prohibited (required), a person will be held accountable for these actions if the action is against the law (and there is no omission of lawlessness or rechtsvaar-digingsgrond or justification).

S.R. The secretary also mentioned that what someone said was able to be responsible if in general:

a. His Soul Condition:

- 1) Not disturbed by continuous or temporary illness (temporair);
- 2) No defects in growth (doubtful, idiotic, imbecile and so on); and
- 3) Not disturbed by surprise, hypotism, overflowing mandate, the influence of the unconscious / reflexe beweging, over / slaapwandel, delirious because of fever / koorts, cravings and so on.

b. His Soul Ability:

- 1) Can realize the nature of his actions
- 2) Can determine his will for the action, whether it will be implemented or not, and
- 3) Be aware of the accident of the action.

Penalty is a form of torture or suffering which is given by a criminal law to someone who violates a norm determined by law and the torture or suffering with a judge's decision is made against the person who is blamed. The nature of torture or suffering must be given to punishment (criminal), because violations committed by a person against the norm determined by the criminal law constitute a violation or rape of legal interests protected by the criminal law.

The addition of law enforcement jurisdiction to coastal countries is based on the effects felt by coastal countries in the event of pollution of the marine environment. However, it should also be noted that before a coastal country or port country enforces the law against foreign vessels, the flag state must be given the opportunity to carry out its jurisdiction and obligations in accordance with international provisions. This provision clearly creates a contradiction if the vessel is polluting the

marine environment of a coastal country that requires immediate action in overcoming pollution of the marine environment.

Flag countries carry out inspections within 5 (five) years so that the ships using their flags receive the International Oil Pollution Prevention Certificate (IOPP). The next inspection time can vary but the minimum inspection time is every five years. This certificate shows that the ship is suitable for sailing and has fulfilled "MARPOL'S Standards". The port country also has the authority to inspect ships that dock in the country by looking at whether the vessels have met the standardization contained in MARPOL by looking at the IOPP certificate. The port country can carry out a thorough inspection if the vessel does not have a certificate, also if there are doubts about the condition of the ship which at that time was no longer compatible with the MARPOL standard as stated in the IOPP certificate.⁶¹ Interesting events in the need for port countries tightened law enforcement with conducting inspections of ships entering the port of a country is Erika Case's event.

The protection of the marine environment, both in the form of prevention and prevention of pollution originating from ships, covers the activities of various fields from the relevant agencies. Relevant agencies in each country can be different. But in general, the protection of the marine environment will be related to :

1. Military (or naval) department
2. Maritime transport department
3. Environment protection department
4. Coast guard
5. National committee

Even though in each country it is different in terms of the authorized institution, what is needed is the protection of the marine environment to achieve success, so that there is a need for integrated coordination efforts between the relevant agencies. Coordination between institutions that deal with issues of the marine environment is very important, not only to compile legislation needed for the effectiveness of protection of the marine environment, but especially for law enforcement.⁷¹ The reality can be seen that each agency in each country has limited and different authority, for example concerning the authority of agencies in the sea and agencies in ports. So that a formula is needed by forming a broader coordinator / body. At the very least, the body must be an authority body with an "expert" who has the skills needed to protect the marine environment. Expertise needed in the field of marine salvage, ship operations, meteorology and imaging, aircraft operations, scientific expertise of various types, fisheries, environment protection, civil engineering, and legal. If there is little spillage of pollutants, then the mitigation efforts can be carried out at the local / national level. If pollution occurs on a large scale, the mitigation efforts are needed at the regional and international level. Regional success in law enforcement was demonstrated by European countries with the signing of the "Memorandum of Understanding on Port State Control" (PSU MoU). Thus, the authority of the coordinating body is needed to coordinate the issue of protecting the marine environment with the competent agencies / agencies of other countries.

The existence of integrated coordination with a definite legal basis, then avoid the existence of sectoral egos from each agency so that efforts to prevent pollution of the marine environment can be done. Even if there is pollution of the marine environment, action can be taken immediately, so that pollutants do not spread to other marine areas. Immediate action is also needed so that the impact of pollution can be minimized.

E. CONCLUSION

Coastal countries are permitted to protect their marine environment by specifying special provisions to prevent pollution from ships in special situations, for example with technical reasons that are

recognized as being related to requirements relating to the field of ecology and oceanography, as well as the use of resources and characteristics. special nature of shipping traffic. It is also based on the unique nature of the marine environment, based on the consideration of the existence of a special value system in each country. For the protection of the marine environment in very large areas, it is likely that certain areas of the marine environment are a priority, because it is not possible to protect the area of the marine environment as a whole. Sensitive coastal areas can be prioritized, in this area needed.

REFERENCES

A. Book

- Abdul Aziz Hakim, State of Law and Democracy in Indonesia, Yogyakarta: Student Library, 2011
- Ahmad Tanzeh, Introduction to Research Methods, Yogyakarta: Terrace, 2009
- Atje Muhjiddin Misbach, Water Law Status of the Indonesian Archipelago for Foreign Shipbuilding Rights, cet1. Bandung: Alumni, 1993
- Barda Nawawi Arief, Criminal System in the General Provisions of the 2004 Criminal Code Draft Bill, Jakarta: Gramedia, 2004
- Indonesian Ministry of Justice, Research on the legal aspects of Regional and International Cooperation in the Prevention of Marine Pollution, Jakarta: National Law Development Agency, 1998
- Juajir Sumardi, Transnational Marine Pollution Law, Bandung: Citra Aditya Bakti, 1996
- Mochtar Kusumaatmadja, Potpourri Hukum Laut, Bandung: Bina Cipta, 1978
- _____, Introduction to International Law, cet to 4. Bandung: Bina Cipta, 1992
- Moleong, Lexy. J, Qualitative Research Methodology, Bandung: Youth Rosdakarya, 2000
- Mukti Fajar ND and Yulianto Achmad, Dualism in Normative & Empirical Legal Research, Yogyakarta: Student Library, 2007
- Phillipus M. Hadjon, Legal Protection for the Indonesian People, Surabaya: Bina Ilmu, 1987
- Roeslan Saleh, Stelsel Pidana Indonesia, Jakarta: New Literacy, 2008
- Ronny Hanitijo Soemitro, Legal and Jurimetry Research Methods, Jakarta: Ghalia Indonesia, 1990
- Sianturi, S.R, Criminal Law Principles in Indonesia and Their Implementation, Jakarta: Babinkum TNI, 2012
- Silalahi, M. Daud, Environmental Law in Indonesian environmental law enforcement, Bandung: Alumni, 2001
- Soerjono Soekanto, Introduction to Legal Research, Jakarta: University of Indonesia Press, 1984
- Soerjono Soekanto and Sri Mamudji, Normative Legal Research; A Brief Review, Jakarta: Raja Grafindo Persada, 2009
- Sudarsono, New Edition Legal Dictionary, Jakarta: Rineka Cipta, 2007
- Sudarwan Danim, Becoming a Qualitative Researcher in the Design of Methodology, Presentation, and Publication of Research Results for Students and Beginner Research in the Field of Social Sciences, Education, and Humanities, Bandung: Youth Rosdakarya, 2002
- Sudikno Mertokusumo, Legal discovery of an introduction, Yogyakarta: Liberty, 2009

B. Legislation

- Law Number 1 Year 1946 jo Law Number 73 of 1958 concerning the Criminal Code (KUHP)

- Law Number 8 of 1981 concerning the Criminal Procedure Code (KUHP)
- Law Number 32 of 2009 concerning Environmental Protection and Management
- Government Regulation Number 21 of 2010 concerning the Protection of the Marine Environment
- Government Regulation Number 27 of 2012 concerning Environmental Permits

C. Website

- "Indonesian Geographical Position", available at <http://id.wikipedia.org/>. Downloaded on June 16, 2019.

LAW MAKING IN REGARD TO NATIONAL LEGAL REFORMS IN ERA OF DEMOCRACY

Anwar Musyadad

Student of Legal Studies Doctor Program, Universitas Borobudur
anwarmusyadad@yahoo.com

A. INTRODUCTION

In the era of direct democracy, one of the demands for reform of national law is the making of laws that regulate all walks of life. Formally and substantially, the law should reflect the people's aspirations (responsiveness) so that in their making process also involves active participation of the people themselves and Pancasila values should color, inspire legal reform in Indonesia, either at a substantial (material law), structural (legal apparatus) or cultural (legal culture) levels.

As a country that has chosen the principle of democracy and is integrated with the principles of the rule of law, Indonesia will organize orderly life and life in a society, nation and state using democratic legal rules.¹

The making of laws is part of the activity of regulating a society consisting of a group of human individuals with all their dimensions, so designing and making laws that acceptable to the wider community is a difficult job.² This difficulty is located in the fact that the activity of making a law is a form of communication between institutions which make that is the holder of legislative power with the people in a country.³ Difficulties in the making of laws, now more felt by the Indonesian people who are facing various social problems, are fundamentally based on structural and cultural problems that are multi-dimensional in nature.

The making of law will follow the socio-political structure of each country. For a country that adheres to an authoritarian political configuration, then the making of the law will show the characteristics that are also authoritarian. Whereas when the process of making a law (legislation) is placed in the context of the socio-political structure of a democratic country, inevitably there will be a compromise of conflicts of different values and interests in society.⁴

Based on the description that has been described presented before, the problem is formulated: How is the making of laws in the course of renewing national law in the era of democracy and public participation in democratic law makings?

B. DISCUSSION

1. Theory of Democracy

From the etymology view point the democracy derives from the words demos (people), and cratein (governing). So, literally the word democracy can be interpreted as the people rule.⁵

According to interpretation of R. Kranenburg in his book "Inleiding in de vergelijkende staatsrechtwetenschap", democracy which is derived from two Greek's words means the way to rule by the people.⁶

¹ Hans Kelsen, *General Theory of Law and State*, New York: Russel & Russel A Division of Atheneum Publisher, Inc., 1961

² Irawan Soetjito, *Law Making Techniques*, Jakarta: Pradnya Paramita 2003

³ Pierre Andres Cottee, *The Interpretation of Legislation in Canada*, 2nd Edition, Les Editions Yvon Balais, Inc. Quebec, 1991

⁴ Yudi Ibrahim, *Legislation and Democracy: Interaction and Confirmation of Legal Politics in Law Making in Regions*, Malang: In-TRANS Publishing, 2016, 1945 Constitution

⁵ Hestu Cipta Handoyono, *Constitutional Law, Citizenship & Human Rights*, Yogyakarta: Andi Offset, 2013

The term democracy itself conceptually carries basic values which is the focus of its orientation, namely, welfare, security, equality, participation, and universalism. That is, the new democracy building is considered successful if these basic values can be realized. These values are then referred to as the essence of democracy or the quality of democratic civilization.

At the level of practice, the essential values of democracy should be realized through the development of democratic procedures that can be accounted for. The procedural aspects of democracy that can not be held accountable possibly can not realize these essential values. Thus, both essential and procedural aspects of democracy occupy strategic positions. It is two sides of the same coin.⁷

Meanwhile, in Dictionary Websters defines democracy as a government by the people where the highest authority is in the hands of the people and is carried out directly by them or their elected representatives under a free electoral system.

According to Dahlan T'haib:⁸

"Democracy is a system of government in which the power for governance comes from those who are governed or democracy is a pattern of government that involves the people in the decision-making process by those who are authorized, then the government's legitimacy is the will of the people to elect and control it."

Afan Gaffar, in his book title "Indonesian Politics; Transition Towards Democracy", that in other view the democracy as a political idea is a universal notion so that it contains elements as follows:⁹

1. Administrator of power comes from the people;
2. Every position holder elected by the people should be held accountable the policies that he/she wants and has taken;
3. Realized directly or indirectly;
4. Rotation of power from a person or group to another person or group in a democracy the opportunity for the rotation of power should exist and be carried out regularly and peacefully;
5. The election process in democratic countries is conducted regularly in guaranteeing the political rights of the people to elect and be elected; and The existence of freedom in human rights enjoying the basic rights in democracy, every citizen can enjoy their basic rights freely, such as the right to express opinions, gather and associate and so forth.

Ni'matul Huda, in his book entitled "Indonesian Constitutional Law", that to implement democratic values needs to be held by several institutions, namely:¹⁰

1. Accountable government;
2. A House of Representatives representing groups and interests in the society and those elected by free and confidential elections and on the basis of at least two candidates for each seat;
3. A political organization that covers one or more political parties;
4. Press and mass media that are free to express opinions.
6. Free justice system to guarantee human rights and uphold justice.

Nevertheless, a country can be said to be democratic at least fulfilling the elements, namely:

⁶ Syahrul Pranoto, *Democratic Government System*, Bandung: Eresco, 2017

⁷ Ahyar Syahrani, *Implementation of Regional Autonomy in Good Governance Perspective*, Yogyakarta, Pustaka Pelajar, 2009

⁸ Dahlan Thaib, *Pancasila Juridical Constitutional*, Yogyakarta: UPP AMP YKPN, 1994

⁹ Afan Gaffar, *Indonesian Politics; Transition Towards Democracy*, Yogyakarta: Pustaka Pelajar, 2005

¹⁰ Ni'matul Huda, *Indonesian Constitutional Law*, Jakarta: Raja Grafindo Persada, 2007

1. There is freedom to establish and become a member of an association;
2. There is freedom to express opinions;
3. There is the right to vote in voting;
4. There is an opportunity to be elected or occupy various titles in government or state;
5. There is a right for political activists to campaign for support or votes;
6. There are various sources of information,

There are free and fair elections:

1. All institutions tasked with formulating government policies should depend on the will of the people.

2. Making of Laws in Regard to the Reform of National Law in the Era of Democracy

In its position as the basis and ideology of the state that is no longer questioned and even very strong, the Pancasila should be as a paradigm (frame of mind, source of value, and direction orientation) in the development of the law, including all its reform efforts. Pancasila as the basis of the state indeed has a juridical connotation in the sense of giving birth to various laws and regulations that are arranged hierarchically and sourced from it.

As a legal development paradigm. Pancasila has at least four guiding principles that should be used as guidelines in the making and enforcement of law in Indonesia, namely;

Firstly, the law should protect the entire nation and guarantee the integrity of the nation and therefore other laws planting disintegration seed should not allowed.

Secondly, the law should be able to guarantee the social justice by providing special protection for the poor in order that they may not be exploited in free competition against the strong ones.

Thirdly, the law should be made democratically at the same time building the democracy in line with nomocracy (nation of laws).

Fourthly, the law should not be discriminative based on any primordial bonds and should encourage the creation of religious tolerance based on the humanity and existence.¹¹

Pancasila as the root of the ideals of the Indonesia nation's law gives the consequence that in the dynamics of the life of the nation and state, as a way of life that is adopted will provide coherence and directions to thoughts and actions. Legal ideals are ideas, intentions, inventions and thoughts regarding the law or perceptions of the meaning of the law, which in essence consist of three elements namely justice, use and legal certainty. The nature of the law is formed in the minds and hearts of humans as a product of the combination of way of life, religious beliefs and social reality. In line with that, Indonesian law and regulations should rely on and refer to legal ideals.¹²

In the National Law Convention it is was concluded the importance of the Grand Design and Political System of National Law in the course of developing national laws and based on the foundation of the Pancasila philosophy and state constitution, namely the 1945 Constitution. Grand Design System and Politics of National Law is a comprehensive design that guides all stakeholders covering all elements from planning, legislation, dissemination and legal culture of the society.

According to Barda Nawawi Arief, Grand Design is a big design or pattern. Grand Design of national law means a great design in the development of a national legal system that covers all components in the legal system, namely components of substance, structure and legal culture.

¹¹ Moh. Mahfud MD, *Building Legal Politics, Upholding Constitution*, Jakarta: Raja Grafindo Persada, 2010

¹² Arief Supratman, *Legal Science*, Bandung: Ganesha Press, 2014

Grand Design of National Legal Politics Systems should be based and directed at the Preamble of the 1945 Constitution. Grand Design of the Systems and the National Legal Politics should remain based on the Pancasila paradigm, namely:

- a. Moral-religious paradigm
- b. Humanistic paradigm,
- c. Unity/nationalistic paradigm
- d. People/democratic paradigm
- e. Social justice paradigm

In the context of legal politics, the law to be made is clearly influenced by legal politics which is an official policy of the state related to legal enforcement.

According to Satjipto Rahardjo, legal politics is an activity of choosing and the way to be used to achieve a certain social and legal goal in society.¹³

According to Moh. Mahfud MD, legal politics is the state's legal policy regarding laws that to be enforced or would not be enforced (making the new rules or revoking the old rules) to achieve the state's objectives.¹⁴ "Democratic political configuration will give birth to legal products having characteristics being responsive or autonomous, while an authoritarian political (non-democratic) configuration will produce legal products having characteristics of conservative/orthodox or oppressive."¹⁵

This process of legal reform has been going on for a long time. The making of the national law meant in this matter is the making of national law and regulations which are products of lawmakers (legislative bodies), which are based on values that live in society and are recognized as a living law. This is seen in everyday life still there are various activities of human life which are actually is a living law in society, but there is no any law and regulations that govern them. Such conditions can be understood, because the human's life needs and the activities of human life are very many and diverse, and changing and developing very fast, while law and legislation possibly may not accommodate all aspects of human life as complete and clear as possible.

Changes in law are always felt to be necessary be started since there is a gap between circumstances, events, and relationships in society, with the laws that govern them. Nevertheless, principle of law is impossible to be separated from the things that are regulated, so that when things that should be changed in such, surely legal changes to adjust so that the law is still effective in its regulation are demanded.

Reform of the law needs to be carried out comprehensively, covering all components of the legal system which according to Friedman consist of substantial components, structural components and cultural components. There is a very close attachment between reforms at the substantial components and the cultural components. Substantial components should be built on the cultural component of the nation.¹⁶

Changes in values or basic rules in society demand legal restructuring so that they may always adjust to society. The issue of legal adaptation toward the changes that occur in the society, particularly what intended is written law or legislation (in the broad extent). This is related to the weaknesses of laws and regulations that are static and rigid.

The process of the making the law in a democratic perspective requires that inputs that are taken into consideration for the determination of the law come from and constitute the aspirations of the

¹³ Satjipto Rahardjo, *Legal Science*, Bandung, Citra Aditya Bakti, 1999

¹⁴ Moh. Mahfud MD, *Building Legal Politics, Upholding Constitution*, Jakarta: Raja Grafindo Persada, 2010

¹⁵ Moh. Mahfud MD, *Building Legal Politics, Upholding Constitution*, Jakarta: Raja Grafindo Persada, 2010

¹⁶ Lawrence M. Friedman, *The Legal System A Social Perspective*, translated by Satjipto Rahardjo, La, Community, and Development, Bandung: Alumni, 2002

communities/ people which cover a variety of their life interests. The aspirations of citizens are channeled through people's representatives who are truly observant and responsive to the demands of the community's conscience that they represent. These aspirations are then processed in a legislative body which will eventually produce political products in the form of laws that truly reflect the aspirations of the people.¹⁷

With such mechanism, the demands imposed on the law makers are as follows.

- Capability to communicate with the communities it represents to understand and absorb their desires, aspirations and demands, with truly representative transparent attitude.
- Transparency is needed here, because the aspirations of the people sometimes appear in the form of proposals but also in the form of criticism, both towards the government as the bearer of the people's interests and as law enforcers, and perhaps toward the prevailing legal rules that they consider do not reflect and their aspirations
- Ability vocally conveying points of proposals regarding the interests of the people he/she represent in the forum of people's representative / legislature with representative, systematic and radical attitude.
- Ability to formulate or articulate the agreed aspirations to be set forth in the form of legal rules. For example, being a law, a regional regulation.
- Ability in the sense of mastering the basic (theoretical) knowledge and experience (practical) regarding strategy review (telstra), strategic planning (renstra), strategic monitoring (monstra), strategic potential (polstra), strategic prediction (kirstra), control as well as deterrence.¹⁸

The making of law will follow the socio-political structure of each country. For a country that adheres to authoritarian political configuration, the making of the law will also show an authoritarian characteristics. That is why democracy calls for broad public participation in all state actions, while at the same time this democratic system does not allow discrimination against a group within the community.¹⁹

A law that is made unilaterally by the legislator, it is very likely that its presence will be rejected because it is not in accordance with the sense of justice in the community. This is where the importance of people participation is involved in the process of making the law. Participatory democracy is expected to guarantee the realization of responsive legal products because the community contributes to the creation of a law.

The existence of people participation in the making of this law will also make the community more meaningful and the government is more responsive in democratic process, so giving birth to a good government and citizens responsible in society.²⁰

The making of a law that contains the life order of in a society, nation and state is part of a public decision-making process. The public decision in the form of this law will bind and apply to all people in a country. Its making must provide public space for the broader community to participate in its making process.²¹

3. Forms of People participation in the Making of Democratic Laws

In the 1945 Constitution of the Indonesian Republic of Indonesia Article 28 states that freedom of association and assembly, expressing opinion verbally and in writing and so forth is

¹⁷ M. Solly Lubis, *Politics and Law in the Era of Reform*, Bandung: Mandar Maju, 2000

¹⁸ Ibid, page 31

¹⁹ Satjipto Rahardjo, *Legal Science*, Bandung, Citra Aditya Bakti, 1999

²⁰ Samuel P. Hutinton, Translator Sahat Simamora, *Political Participation in Developing Countries*, Jakarta: Rieka Cipta, 1994

²¹ Saifudin, *Public Participation in Law and Regulation Making*, Yogyakarta: III Press, 2009

stipulated by law. It means that our constitution (1945 Constitution of the Republic of Indonesia) has provided a guarantee of protection for the public in expressing thoughts, both verbally and in writing especially to make law and regulations.²²

Law No. 12 of 2011 concerning the making of law and legislation also provides guarantees to the people to participate in the making of a law which in Article 96 reads as follows:

- (1) The community has the right to provide opinions verbally and / or in writing in the Law and legislation making.
- (2) Input verbally and/or in writing as referred to in paragraph (1) can be made through; a. public hearing; b. work visit; c. socialization; and / or seminars, workshops, and / or discussions.
- (3) The peoples as referred to in paragraph (1) are an individual or group of people who have an interest over the substance of a bill.
- (4) To make it easier for the people to provide input verbally and / or written as referred to in paragraph (1), every bills should be easily accessible to the public. "

People's participation in the making of this law can be carried out individually or collectively by the community outside the public titles.²³ Actors of people participation are community strengths included in political infrastructure such as the press, community leaders, pressure groups, interest groups, universities and political parties that do not have their representatives in representative institutions. These political infrastructure strength can provide control and influence on various public decisions to be e issued through the legislature.²⁴

The law making process basically can be divided into three stages, namely. ante legislative stage, legislative stage and post-legislative stage. In these three stages, basically the people may participate in giving their inputs according to their will. The people can participate in entire stages of the process of law making and choosing only one stage. However, the forms of people participation are different even though there is also the common things between one stage and the other. That is, the form of public participation in the pre-legislative stage is certainly different from the form of public participation in the legislative and post-legislative stages. So, the forms of people participation in the process of making a law are adjusted to the stages being carried out.²⁵

People participation in the ante legislative stage consists of:

1. People participation in the form of research
2. People participation in the form of discussions, workshops and seminars
3. People participation in the form of an initiative proposal
4. People participation in the form of drafting a law
 - a. People participation in the legislative stage consists of:
 1. People participation in the form of hearings / RDPU in the DPR
 2. People participation in the form of alternative legislation
 3. Participation of the community in the form of registration through print media
 4. People participation in the form of input through electronic media
 5. People participation in the demonstration
 6. People participation in the form of discussions, workshops and seminars.

²² Article 28 1945 Constitution

²³ Ramlan Surbakti, *Understanding Political Science*, Jakarta: Gramedia Widiasarana Indonesia, 1999

²⁴ Saifudin, op. cit .page 100.

²⁵ Saifudin, ibid, page. 306.

- b. People participation in the post legislative stage consists of.
 1. Demonstrations against a new law
 2. Demands for the review of a law
 3. Socialization of a law

C. CONCLUSION

Based on the description that has been presented previously, then some conclusion can be made as follows:

1. Reform of national law is directed at realizing a law based on the will of the people (democratic), so the law which represents one part of the national legal system in its making process should reflect democratic values that are characterized by involving actively and thoroughly all levels of society in order to take part in it.
2. Forms of people participation in the making of democratic law include:
 - a. People participation in the ante legislative stage.
 - b. People participation in the legislative stage.
 - c. People participation in the post legislative stage.

REFERENCES

- Afan Gaffar, Indonesian Politics; Transition Towards Democracy, Yogyakarta: Pustaka Pelajar, 2005
- Ahyar Syahrani, Implementation of Regional Autonomy in Good Governance Perspective, Yogyakarta, Pustaka Pelajar, 2009
- Arief Supratman, Legal Science, Bandung: Ganesha Press, 2014
- Dahlan Thaib, Pancasila Juridical Constitutional, Yogyakarta: UPP AMP YKPN, 1994
- Hans Kelsen, General Theory of Law and State, New York: Russel & Russel A Division of Atheneum Publisher, Inc., 1961
- Hestu Cipta Handoyono, Constitutional Law, Citizenship & Human Rights, Yogyakarta: Andi Offset, 2013
- Irawan Soetjito, Law Making Techniques, Jakarta: Pradnya Paramita 2003
- Lawrence M. Friedman, The Legal System A Social Perspective, translated by Satjipto Rahardjo, La, Community, and Development, Bandung: Alumni, 2002
- Moh. Mahfud MD, Building Legal Politics, Upholding Constitution, Jakarta: Raja Grafindo Persada, 2010
- -----, Legal Politics, Yogyakarta: Gama UP Press, 2007
- -----, Political and Legal Wrestling in Indonesia, Yogyakarta : Gama Media, 1999
- M. Khozim, Legal System of Social Science Perspective, Nusa Media, 2009
- M. Solly Lubis, Politics and Law in the Era of Reform, Bandung: Mandar Maju, 2000
- Ni'matul Huda, Indonesian Constitutional Law, Jakarta: Raja Grafindo Persada, 2007
- Pierre Andres Cotte, The Interpretation of Legislation in Canada, 2nd Edition, Les Editions Yvon Balais, Inc. Quebec, 1991
- Ramlan Surbakti, Understanding Political Science, Jakarta: Gramedia Widiasarana Indonesia, 1999
- Syahrul Pranoto, Democratic Government System, Bandung: Eresco, 2017
- Satjipto Rahardjo, Legal Science, Bandung, Citra Aditya Bakti, 1999
- Samuel P. Huntington, Translator Sahat Simamora, Political Participation in Developing Countries, Jakarta: Rieka Cipta, 1994

- Saifudin, Public Participation in Law and Regulation Making, Yogyakarta: III Press, 2009
- Yudi Ibrahim, Legislation and Democracy: Interaction and Confirmation of Legal Politics in Law Making in Regions, Malang: In-TRANS Publishing, 2016 1945 Constitution

LAW ENFORCEMENT MECHANISM IN CHILDREN'S RIGHTS PROTECTION EFFORTS

Arin Krisnawati

Student of Legal Studies Doctor Program, Universitas Borobudur
arinshmkn@gmail.com

Abstract

Children are a vulnerable group, the issue of child protection in Indonesia is the high number of children who are dealing with the law (ABH). Conceptually, children who are faced with the law are interpreted as someone under the age of 18 facing KPAI, who recorded a quarterly complaint of violence involving children up to 15 percent in 2016 with a total of 645 quarterly reports, and there were about 167 cases children face legal problems, such as theft, bullying, and other criminal acts. understanding of law enforcement officials regarding the number of witnesses in the PKDRT Law and understanding the definition of victims, the difficulty of breaking through law enforcement bureaucracy and the rejection of law enforcers against victims' reports with different jurisdictions and many law enforcement officials who refuse to issue temporary protection provisions for victims, and not yet there is a judge's decision to impose the heaviest sanctions as stipulated in article 50 of the PKDRT Law.

This journal has a problem problem is 1. how to apply the law as a norm of concretization in society, and 2. how to apply it to children. The research method used in this study is normative research law, with the data used in the form of library material or secondary data which includes primary legal materials, namely Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning the Protection of Children regulate child protection. children face the law. Secondary legal materials include reference books relating to the protection of children's rights dealing with law, as well as tertiary legal materials in the form of articles, dictionaries and other literature available in accordance with the writing of this journal.

Keywords: Law Enforcement, Protection Of Children

A. INTRODUCTION

Explained in Article 5 paragraph 3 of Act Number 39 of 1999 concerning Human Rights (HAM) that everyone who is included in the vulnerable population has the right to receive more treatment and protection with regard to their specificity. Vulnerable groups of people are the elderly, children, the poor, pregnant women and people with disabilities.

Whereas according to the Human Rights Reference stated that those belonging to vulnerable groups are: a. Refugees; b. International Displaced Persons (IDPs); c. National Minorities; d. Migrant Workers; e. Indigenous Peoples; f. Children; and g. Women¹. The existence of vulnerable groups which includes children, women, people with disabilities, and minority groups has important meanings in society that still uphold human rights values.

Children are a vulnerable group, the issue of child protection in Indonesia is the high number of children who are dealing with the law (ABH). Conceptually, children who are faced with the law are interpreted as someone under the age of 18 facing KPAI, who recorded a quarterly complaint of violence involving children up to 15 percent in 2016 with a total of 645 quarterly reports, and there were about

¹ Iskandar Hoesin, Protection of Vulnerable Groups (Women, Children, Minorities, Isolated Tribes, in the perspective of human rights

167 cases children face legal problems, such as theft, bullying, and other criminal acts.² Referring to the ABH data from the Directorate General of Corrections, the Ministry of Law and Human Rights, it was known that in May 2018, there were 3,163 prisoners consisting of 845 children (821 children, 24 children), while the number of prisoners 2,318 children (2,274 children, 44 children).

According to the results of monitoring the Indonesian Child Protection Commission (KPAI), there are at least 3 (three) main causes of the number of children in Indonesia dealing with the law, namely: First, there is a very strong doctrine of life in our society, with the view that all children are wrongly punished, and the intended sentence means being judged as an adult. Secondly, the culture of law enforcers in Indonesia who prefers formal justice processes to children, rather than other actual paths is also possible through the process of restorative justice and diversion (transfer of punishment). Third, there are state regulations that indeed criminalize children, namely the provision of juvenile justice as reflected in Law Number 3 of 1997 concerning Juvenile Justice.

In this case children have specific characteristics compared to adults and are one of the vulnerable groups whose rights are still neglected, therefore children's rights are important to prioritize. Children who are faced with the law (violating criminal law) which are then processed means that the child has to deal with a criminal justice process, namely a continuum that describes events that progress regularly: from investigation, arrest, detention, prosecution, examination by the court, decided by a judge, convicted and finally returned to the community³. The emergence of stigma not only makes it difficult for children to do resocialization, but also will inhibit the growth and development of children and even the ideals and hopes of children in the future.

Besides children, women are also vulnerable groups that need protection in the law enforcement process. Women often experience violence but weak law enforcement leads to increasing cases of violence against women. Data on violence against women shown in the Annual Note, National Commission on Violence Against Women in 2018 is based on data on cases or cases handled by the Religious Courts or Religious Courts of 306,535 cases.

Domestic violence or in Indonesia known as crime of domestic violence (KDRT) has specificity compared to other forms of violence against children and women, due to the existence of relations relating to power (power relationship) between victims and perpetrators. The psychological burden experienced by children and women victims of domestic violence is still quite high because the power relations always contain elements of trust and also elements of dependency to a certain extent. In addition to feeling the existence of abuse of power by the owner of the power, victims also generally experience fear, reluctance, and helplessness towards power intimidated by the perpetrators to report to the authorities. As a consequence, the number of domestic violence can never be recorded properly, so the of domestic crimes to be high.⁴

Law enforcement officials have not prioritized the interests of victims so that access to justice for victims is hampered and even victims lose their rights to get protection as stated in Article 10 of the PKDRT Law. Other obstacles that prevent victims from seeking justice include the understanding of law enforcement officials regarding the number of witnesses in the PKDRT Law and understanding the definition of victims; The difficulty of breaking through law enforcement bureaucracy; the rejection of law enforcers against victims' reports with different jurisdictions; there are still many law enforcement

² Yopi Setyabudi, Violence against Children Increases in the Quarter, 2016

³ Maidin Gultom, Legal Protection for Children in the Child Criminal Justice System in Indonesia, Bandung: Refika Aditama, 2013, page. 83

⁴ Ridwan Mansyur, Penal Mediation Against Domestic Violence Cases (Domestic Violence), Jakarta: Gema Yustisia Indonesia Foundation, 2010, page. 6

officials who refuse to issue stipulations for temporary protection of victims; and there has not been a judge's decision to impose the heaviest sanctions as stipulated in article 50 of the PKDRT Law.

With this obstacle adding to the burden on the victim, because it imposes a victim with limitations he must present witnesses, other evidence, pay post mortem, seek protection independently, and prove himself as a victim. According to Article 8 of the Law on Human Rights, the protection, promotion, enforcement and fulfillment of human rights are the responsibility of the government as well as the public. The government has issued various laws and regulations and ratified various conventions, such as the convention of children's rights, the convention on the elimination of all forms of discrimination against women and others, but has not been supported by a strong joint commitment to implement these instruments.

B. RESEARCH METHOD

The research method used in this study is normative research law, with the data used in the form of library materials or secondary data covering primary legal materials, namely Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection regulating protection of children facing the law. Secondary legal materials include reference books relating to the protection of the rights of children dealing with law, as well as tertiary legal materials in the form of articles, dictionaries and other literature available in accordance with the writing of this journal.

C. PROBLEM FORMULATION

In this writing the author discusses the problem as follows :

1. How to apply the law as a norm of concretization in society ?
2. How the application of the law to law enforcement is applied to children?

D. DISCUSSION

1. Application of Law As a Norm of Concretization in Society

Penegakan hukum dalam perlindungan hak anak yang berhadapan dengan hukum, dalam hal ini anak adalah bagian dari generasi muda sebagai salah satu sumber daya manusia yang merupakan potensi dan penerus cita-cita perjuangan bangsa, yang memiliki peranan strategis dan mempunyai ciri dan sifat yang khusus, memerlukan pembinaan dan perlindungan dalam rangka menjamin pertumbuhan dan perkembangan fisik, mental, dan sosial secara utuh, serasi, selaras, dan seimbang.⁵

This fact raises concern in the community, especially the elderly, because until now in a planned manner children are considered as objects to commit a crime, both as a tool and the victim itself. Attention to children who commit criminal acts has long been in line with human civilization itself which is growing from day to day. This can be seen from international instruments (declarations, resolutions, conventions or still guidelines / guidelines) to guarantee or protect children's rights in the juvenile justice system.⁶

2. Application Of The Law To Law Enforcement That Is Applied To Children

The international community as expressed in the Convention on the Rights of the Child (*Convention on the Rights of the Child*) secara tegas menyatakan bahwa: "*In all actions concerning children, whether undertaken by public or private social welfare institution, courts of*

⁵ Mohammad Taufik Makarao, dkk , Law on Child Protection and Elimination of Domestic Violence, Jakarta: Rhineka Cipta, 2013), page. 1

⁶ Abintoro Prakoso, *Pembaharuan Sistem Peradilan Pidana Anak*, Yogyakarta, Laksbang Grafika, 2013), page. 3

law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration”.

In Article 37 of the Convention on the Rights of the Child, the principles of criminal law protection against children are contained and in accordance with the protection of child offenders also contained in Article 66 of the Human Rights Law.

In Article 64 of Law Number 35 Year 2014 concerning Amendments to Law Number 23 Year 2002 concerning Child Protection regulates the protection of children who are faced with the law.

Every child who is faced with the law has the right to obtain his rights both physically, mentally, spiritually and socially. In carrying out its duties law enforcement agencies and related agencies or institutions need to pay attention to the principles of the Convention on the Rights of the Child and the Law on Child Protection, namely the principle of non-discrimination, the best interests of children, the right to life, survival and development, and respect for children's opinions . In essence children cannot protect themselves from various types of actions that cause mental, physical, social harm in various fields of life and livelihood. Children must be helped by others in protecting themselves, given the situation and conditions, especially in the implementation of juvenile justice that is foreign to themselves.

In Article 28B Paragraph (2) of the 1945 Constitution, it is explained that children have rights like humans or adults in general, namely the right to survival, the right to grow, the right to develop, and the right to protection from violence and discrimination . In order to implement Article 28B Paragraph (2) of the 1945 Constitution, the government of the Republic of Indonesia has ratified, among others, Law Number 4 of 1979 concerning Child Welfare, Law Number 3 of 1997 concerning Juvenile Justice, Law Number 23 of 2002 concerning Child Protection as amended by Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002, and Law No. 11 of 2012 concerning the Child Criminal Justice System.

The background of the establishment of the Child Criminal Justice System Law (UU SPPA) is because so far, in its implementation the child has been positioned as an object, and the treatment of children facing the law tends to harm the child⁷. The SPPA Law uses a restorative justice approach carried out by means of diversion (diversion), as one of the solutions that can be taken in handling cases of child crime. A British criminologist Tony F. Marshall in his writing "Restorative Justice an Overview" said restorative justice is a process in which parties interested in certain violations meet together to solve problems together how to resolve the consequences of these violations in the interest of the future front.⁸

In the concept of state law, the function of law enforcement plays an important role because it is part of the process of national legal activities. Law enforcement itself is usually intended as a supervisory activity against irregularities, investigations, investigations, prosecutions, judgments and convictions or determination of judges' verdicts and activities for the execution of verdicts and re-correctional activities.⁹

Law enforcement is closely related to 4 (four) factors, namely: legislation, law enforcement (such as police, prosecutors, and judges), facilities and the community and local culture. In connection with the four factors above law enforcement is seen from the process that involves

⁷ Jefferson B. Pangemanan, Child Criminal Responsibility in the Indonesian Criminal Justice System, *Lex et Societatis*, Vol. III No. 1 (Jan-Mar 2015): page: 104

⁸ Marlina, Child Criminal Justice in Indonesia, Concept Development *Diversi dan Restorative Justice*, (Bandung: Refika Editama, 2012),page: 88

⁹ Jimmly Asshdiqie, Indonesian State of Law: Legal-minded State Implementation and National Development Paradigm

humans in it. Here human factors are very involved in efforts to enforce the law. Law enforcement is not just a logical process but is full of human involvement in it.

Protection in law enforcement means talking about the operation of the criminal justice system. Criminal justice system (criminal justice system) is a system in a society to overcome the problem of crime. The components that cooperate in this system are mainly agencies or bodies known as the police, prosecutors, courts and correctional institutions. These four components are expected to work together to form what is known as the Integrated Criminal Justice Administration¹⁰

The operation of this system includes the pre-adjudication stage, the adjudication stage, and the post adjudication stage¹¹. Looking at the objectives of the system, the criminal justice system is essentially a system that seeks to maintain the balance of protection of interests, both the interests of the state, society and individuals, including the interests of criminal offenders and victims of crime.

For children who are already dealing with the law, they will certainly face a juvenile justice system as an effort to enforce the law as a guarantee of legal certainty. The juvenile justice system is the whole process of resolving child cases dealing with the law, starting from the investigation phase up to the guiding stage after undergoing criminal acts (Article 1 of the SPPA Law). The term criminal justice system refers to legislation, norms and standards, procedures, mechanisms and provisions, institutions and bodies Basically there are 4 (four) coverage components of the criminal justice system, including:

1. The substance of criminal law (substantive criminal law) which focuses on determining the types of actions that qualify as wrong or illegal actions;
2. Criminal responsibility which focuses on determining the criteria for determining a person can be responsible for the crime he committed and can bear sanctions for the crime. This determination is based on mental elements or the capacity to commit a crime;
3. Criminal process, which focuses on the method used to determine the rule of criminal law that is violated and identifies a person convicted of a crime committed;
4. Criminal sentencing, which focuses on punishments that must be borne due to a criminal act committed by a person and the types of criminal penalties that are in accordance with the crime he committed.

Referring to these four components and relating them to the principle of the best interest for children, the specificity of the juvenile justice system must include the four components of the criminal justice system. This specificity is to assert that the law governing children who are dealing with law is a separate legal regime (*sui generis*). Because the legal substance whose basis must be *lex specialis*.

The juvenile justice system is used in a number of institutions incorporated in the court, which include the police, public prosecutors and legal counsel, supervisory institutions, child detention centers, and child development facilities. The role of law enforcers in UUSPPA from the point of view of investigators and prosecutors plays a greater role in shaping the prosecution of cases that are weighted according to age, error and the level of criminal offenses carried out by considering the interests of the community and children's rights by attempting to use restorative justice and diversion solutions

¹⁰ Mardjono Reksodiputro, Human Rights in the Criminal Justice System, Jakarta: Pusat Pelayanan Keadilan dan Pengabdian Hukum (d/h Lembaga Kriminologi) Universitas Indonesia, 2007), page: 85

¹¹ Muladi, Kapita Selekta Criminal Justice System, (Semarang: Universitas Diponegoro, 1995), page: ix

E. CONCLUSION

The criminal justice system is essentially a system that seeks to maintain the balance of protection of interests, both the interests of the state, society and individuals, including the interests of criminal offenders and victims of crime. So that children who commit crimes who commit child crimes are given space for children in accordance with international instruments (declarations, resolutions, conventions or still guidelines / guidelines) to guarantee or protect children's rights in the juvenile justice system and in Indonesia, and law enforcers in UUSPPA from the side of investigators and public prosecutors play more roles in shaping the prosecution of cases that are in accordance with the age, error and level of criminal offenses committed by children.

REFERENCES

- Iskandar Hoesin, "Perlindungan terhadap Kelompok Rentan (Wanita, Anak, Minoritas, Suku Terasing, dll) dalam Perspektif HAM"
- Yopi Setyabudi, "Kekerasan terhadap Anak Meningkatdi Triwulan 2016".
- Maidin Gultom, *Perlindungan Hukum terhadap Anak dalam Sopistem Peradilan Pidana Anak di Indonesia*, (Bandung: Refika Aditama, 2013).
- Ridwan Mansyur, *Mediasi Penal Terhadap Perkara KDRT (Kekerasan Dalam Rumah Tangga*, (Jakarta: Yayasan Gema Yustisia Indonesia, 2010).
- Mohammad Taufik Makarao, dkk, *Hukum Perlindungan Anak dan Penghapusan Kekerasan dalam Rumah Tangga*, (Jakarta: Rhineka Cipta, 2013).
- Abintoro Prakoso, *Pembaharuan Sistem Peradilan Pidana Anak*, (Yogyakarta, Laksbang Grafika, 2013).
- Jefferson B. Pangemanan, "Pertanggungjawaban Pidana Anak dalam Sistem Peradilan Pidana Indonesia", *Lex et Societatis*, Vol. III No. 1 (Jan-Mar 2015): 104.
- Marlina. *Peradilan Pidana Anak di Indonesia, Pengembangan Konsep Diversi dan Restorative Justice*, (Bandung: Refika Editama, 2012).
- Jimmly Asshdiqie, "Negara Hukum Indonesia: Paradigma Penyelenggaraan Negara dan Pembangunan Nasional berwawasan Hukum
- Mardjono Reksodiputro, *Hak Asasi Manusia Dalam Sistem Peradilan Pidana*, (Jakarta: Pusat Pelayanan Keadilan dan Pengabdian Hukum (d/h Lembaga Kriminologi) Universitas Indonesia, 2007).
- Muladi, *Kapita Selektta Sistem Peradilan Pidana*, (Semarang: Universitas Diponegoro, 1995).

FULFILLMENT OF HUMAN RIGHTS ON SUSPECTED IN THE INVESTIGATION PROCESS

Abdul Kolib

Student of Legal Studies Doctor Program, Universitas Borobudur
kolib78@yahoo.com

Abstract

Human Rights is one of the important elements that must exist in a state of law which is a set of basic human rights as a gift from God Almighty. In the process of settling criminal cases, Human Rights for a Defendant's Suspect, and a convict must continue to be upheld from the Investigation to Examination stage in the trial, but on the exposure of reality, often these rights are not fulfilled, especially for the Suspects at the Investigation and Investigation stage where the mistreatment of the suspect is carried out under the pretext of obtaining preliminary evidence, while the recognition of the rights of a suspect, defendant and convict has also been stated in Law Number 39 Year 1999 concerning Human Rights which places the same position before the law, so this research will discussing what basic rights must be met against the Suspect in the Investigation process, as well as how legal efforts can be made in fulfilling these rights. This study has 2 (two) formulation of the problem, first; what rights must be fulfilled for the suspect in the investigation process ?, and second; how can legal efforts be taken in fulfilling the suspect's human rights? The research method used is juridical-normative legal research, where the data studied are library materials or secondary data which includes primary legal materials, namely the 1945 Constitution of the Republic of Indonesia, the Criminal Code, Criminal Procedure Code, and Law Number 39 Year 1999 concerning Human Rights, materials secondary law which includes legal journals, scientific research, textbooks, and other legal materials relating to human rights, as well as tertiary legal material which includes language dictionaries, encyclopedias, and other materials.

Keywords: Human Rights (HAM), Suspects, Investigators, Investigations, Pretrial Mechanisms.

A. INTRODUCTION

Human Rights are upheld in the State of Indonesia because Human Rights are one of the important elements that must exist in a state of law where human rights are legally included in the articles of the Constitution of the Republic of Indonesia, namely the 1945 Constitution of the Republic of Indonesia (Constitution of the Republic of Indonesia 1945) as a set of basic rights or basic human rights as a gift from God Almighty that has existed since birth and must be protected and respected in order to protect the dignity and dignity of every human being.

Some of the human rights that will be discussed in this study are Human Rights in Article 27 of the 1945 Constitution of the Republic of Indonesia which places the same citizenship before the law and through amendments to the 1945 Constitution, Article 28D paragraph (1) of the 1945 Constitution which states that every Indonesian citizen has the right for the recognition, guarantee, protection, and fair legal certainty and equal treatment before the law, and Article 28G paragraph (1) and (2) of the 1945 Constitution of NRI which emphasizes that every human being has the right to be protected and free from torture or treatment degrading human dignity, and the Law which specifically regulates human rights, namely in Law Number 39 Year 1999 concerning Human Rights.

Likewise in the process of resolving criminal cases where criminal procedural law as a set of criminal law regulates the procedure for enforcement of material criminal law, so that if there is a

violation of material criminal law, the enforcement uses formal criminal law. In other words, criminal procedural law is a law that regulates how law enforcers and the public conduct themselves in proceedings before a criminal court.¹

The process in criminal cases starts from Investigation, Investigation, Prosecution and Court Examination, where Human Rights must continue to be upheld from the Investigation to Examination stage including Human Rights for a Defendant, and the convicted person. Recognition of the rights of a suspect, defendant and convict has also been stated in Law Number 39 Year 1999 concerning Human Rights which places the same position before the law.

However, on the presentation of reality, often Human Rights for Suspects, Defendants and convicts are not upheld by Law Enforcement Officials, especially against Suspects in the Investigation and Investigation stage as the initial stage in criminal proceedings, where ill-treatment by investigators of suspects is under the pretext of obtaining preliminary evidence is not in accordance with human rights while clearly stipulated in Article 422 of the Criminal Code (KUHP) that: "an official in a criminal case uses a means of coercion, both to extort confession, and to obtain information, threatened with imprisonment of a maximum of four years ", so that this study will examine what human rights are owned and must be met against the Suspects in the Investigation Process, and what legal measures can be taken so that the fulfillment of human rights for the Suspect can be realized.

B. RESEARCH METHOD

In this study, the research method used is juridical-normative legal research, where the data studied are library materials or secondary data that includes primary legal materials, namely the 1945 Constitution of the Republic of Indonesia, the Criminal Code, Criminal Procedure Code, and Law Number 39 Year 1999 concerning Rights Human Rights, secondary legal material which includes legal journals, scientific research, textbooks, and other legal materials relating to Human Rights, as well as tertiary legal material which includes language dictionaries, encyclopedias, and other materials.

C. PROBLEM FORMULATION

The formulation of the problems that can be discussed in this study are as follows:

1. What basic rights must be met against the suspect in the process of investigation?
2. What legal efforts can be made in fulfilling the suspect's human rights?

D. DISCUSSION

1. Suspect's human rights in the process of investigation

Related to Human Rights, that based on Article 1 paragraph (1) of Law Number 39 Year 1999 concerning Human Rights, which reads "Human Rights is a set of rights that are inherent in the nature and existence of human beings as God Almighty beings and constitute His gifts which must be respected, upheld and protected by the State of law, the government, and every person of honor and protection of human dignity. "Human Rights are universal gifts from God Almighty who must be protected, respected, maintained or may not be confiscated by anyone."²

Due to the universal nature of human rights, human rights must be met for every human being, including in criminal proceedings where the focus of the discussion in this study is human rights to suspects in the investigation process. Based on the provisions of Article 1 point 2 of the Criminal Procedure Code states that "Investigation is a series of investigative actions in terms of and

¹ Ilhami Bisri, 2004, *Sistem Hukum Indonesia, Prinsip-Prinsip dan Implementasi hukum di Indonesia*, PT Raja Grafindo Persada, Jakarta, hal. 46.

² O.C. Kaligis, 2006, *Perlindungan Hukum Atas Hak Asasi Tersangka, Terdakwa dan Terpidana*, Alumni, Bandung, hal. 10.

according to the method stipulated in this law to find and collect evidence that occurs and to find the suspect". An investigator is a person who conducts an investigation, in which an investigator is a state police officer of the Republic of Indonesia or a certain civil servant who is given special authority by law to conduct investigations (Article 1 point 1 of the Criminal Procedure Code). The Police Institution is an institution formed by the state to create order and security in the community both in terms of prevention, eradication or prosecution, while the Suspect itself is a person who because of his actions or circumstances, based on preliminary evidence should be suspected of being a criminal (Article 1 point 14 KUHAP). Thus, the suspect is someone who underwent preliminary examination, where the correctness or failure of actions taken by a suspect must be proven in an honest judicial process by prioritizing the principle of equality before the law.

Preliminary Evidence as referred to in Article 1 number 14 of the Criminal Procedure Code is not specifically regulated in the KUHAP but is further regulated in Article 1 point 21 of the Regulation of the Head of the Indonesian National Police Number 14 Year 2012 concerning Management of Criminal Investigation, which reads: evidence in the form of a Police Report and 1 (one) valid evidence, which is used to suspect that someone has committed a crime as a basis for arrest. "Based on this definition, that with a police report and a valid piece of evidence one can determined as a suspect and can be arrested for him.

The violation of human rights that often occurs against suspects is when the investigator wants to find sufficient preliminary evidence so that the suspect can be arrested and so that the file can enter the next stage or the Prosecution stage where the suspect is treated as an object to be investigated and forced to plead guilty by force, pressure or threats. Though the suspect as a human being should not be treated as an object but as a subject that must still be respected for their dignity and values as clearly stipulated in Article 52 and 184 paragraph (1) of the Criminal Procedure Code which essentially states that the objective of the investigation is not to get a suspect's confession but to obtain statement of the suspect regarding the criminal incident that was alleged to him.

Human rights that must be fulfilled in criminal proceedings have been legally juridically stipulated in several articles in the Criminal Procedure Code, with the following descriptions:

- a. The right to get a warrant for detention or further detention or judge's decision (Article 21 paragraph (2) KUHAP);
- b. The right to receive a copy of the arrest warrant or further detention or judge's decision (Article 21 paragraph (3) KUHAP);
- c. The right to file an objection to the extension of detention (Article 29 paragraph (7) of the Criminal Procedure Code); The right to receive compensation (Article 30 KUHAP);
- d. Right to immediately get investigator's examination (Article 50 paragraph (1) jo Article 122 KUHAP);
- e. The right that the case be immediately brought to court and tried (Article 50 paragraph (2) and paragraph (3) of the Criminal Procedure Code); The right to request an explanation which is alleged (Article 51 letter a);
- f. The right to give information freely (Article 52 and Article 117 of the Criminal Procedure Code);
- g. The right to get legal assistance (Article 54 of the Criminal Procedure Code);
- h. The right to contact and request a personal doctor's visit (Article 58 of the Criminal Procedure Code);
- i. The right to be notified of detention (Article 59 of the Criminal Procedure Code);
- j. The right to contact or receive family / family relations visits (Article 60 KUHAP);
- k. The right to receive and send letters to legal counsel or relatives (Article 62 paragraph (1) of the Criminal Procedure Code);

- l. The right to contact and receive a Christian visit (Pasl 63 KUHAP);
- m. The right to request derivative Examination News (Article 72 of the Criminal Procedure Code);
- n. The right to request an examination of the validity or failure of arrest or detention (Article 79 and Article 124 of the Criminal Procedure Code);
- o. The right to file an objection to the detention and type of detention (Article 123 paragraph (1) of the Criminal Procedure Code).

Furthermore, according to Law No. 39 Year 1999 concerning Human Rights relating to the human rights of suspects in the KUHAP that must be protected by the government, among others:³

- a. Personal, family, honor, dignity and property rights.
- b. Security and peace of mind and protection against the threat of fear of doing or not doing something.
- c. The right to be free from torture, punishment or cruel, inhuman, degrading treatment and dignity of humanity.
- d. The right not to be arbitrarily treated either in the process of arrest, detention or in the case of being exiled or ostracized or made arbitrarily.
- e. The right not to be tortured which can cause great pain or suffering both physically and spiritually with the interest to obtain recognition or information.
- f. The right to obtain justice without discrimination by any party.
- g. The right to be considered innocent during or until the error can be proven.
- h. The right not to be prosecuted unless based on regulations that existed before the crime was committed.
- i. The right to get legal assistance from the beginning of the examination comes to the process of making a decision in court.

The suspect's human rights above are stipulated in the Criminal Procedure Code and Law No. 39 Year 1999 concerning Human Rights is the basic rights of the suspect that must be obtained and fulfilled at the time of the initial examination of the suspect suspected of being the perpetrator of the crime until the final examination. In addition, it is even more important that the criminal proceedings from beginning to end must uphold the principle of the Innocent Presumption which is one of the important principles regulated by Law No. 4 Year 2004 concerning Judicial Power, the elucidation of which is in the Criminal Procedure Code that anyone suspected, arrested, prosecuted and confronted before a court must be considered innocent before a court ruling declares his guilt and obtains permanent legal force.

2. Legal Efforts in Fulfilling the Rights of Suspects

As explained in the previous section, which is related to the human rights of the Suspects in the Investigation process, one of the legal measures that can be taken to protect the rights of the Suspect is one of which is a pretrial mechanism which is regulated in the Criminal Procedure Code with the aim of protect suspect's human rights. Since Law Number 8 Year 1981 concerning the Criminal Procedure Code was promulgated, this pretrial institution was formed to avoid the arbitrariness of officials as law enforcement officers, especially investigators and prosecutors.

Provisions regarding pretrial in the criminal justice system in Indonesia are regulated in the Criminal Procedure Code, Government Regulation Number 27 Year 1983 concerning the implementation of the Criminal Procedure Code and its amendments and in additional guidelines for the implementation of the Criminal Procedure Code. In the Criminal Procedure Code, pretrial is

³ See Articles 17, 18, 28-30 and Article 33-35 of Law No. 39 of 1999 concerning Human Rights.

regulated in Article 1 number 10 KUHAP, Article 77 KUHAP, Article 78 KUHAP, Article 79 KUHAP, Article 80 KUHAP, Article 81 KUHAP, Article 82 KUHAP, Article 83 KUHAP, Article 95 verse (2) and verse (5) KUHAP, Article 97 paragraph (3) KUHAP, and Article 124 KUHAP.

The pretrial mechanism as stipulated in Article 1 number 10 of the Criminal Procedure Code is carried out to examine several things, namely:

- a. The validity of an arrest and / or detention at the request of the suspect or his family or other party with the power of the suspect;
- b. Whether or not the termination of the investigation or termination of the prosecution is valid at the request for the establishment of law and justice;
- c. Request for compensation or rehabilitation by the suspect or his family or other parties for his power whose case was not brought to trial.

Based on this, it should be noted that several matters in the pretrial mechanism, whether the detention carried out has been based on the objectives specified in Article 20 of the Criminal Procedure Code, that detention can only be carried out for the purposes of investigation, prosecution or examination in a court session. The interests of the Investigator to detain the suspect at the investigation stage is in order to find and collect evidence with evidence that makes it clear about the crime and to find the suspect (Article 1 point 2 of the Criminal Procedure Code), so the Investigator does not need to detain the suspect if the evidence making the light of a criminal act can be collected without the detention and / or suspect of a criminal act can be found without detention.

It should be noted also regarding whether there is a reason for detention, where in Article 21 paragraph (1) of the Criminal Procedure Code states that detention orders or further detention is carried out on a suspect or defendant suspected of committing a crime based on sufficient evidence, in the event that raises fears the suspect or defendant will flee, damage the evidence and / or repeat the crime. Then the last is whether detention is carried out according to the procedure or procedure specified in the Criminal Procedure Code, where the period of detention is required in the detention order from the investigator so that detention of the suspect is still within the limits of the statutory limit and is not more than the limit limitative so that the suspect's rights can be fulfilled, also the identity of the suspect must be specified, the reason for detention, a brief description of the alleged criminal act, and the place of detention (in the case of detention of state detention houses).

E. CONCLUSION

Based on the explanation of the discussion mentioned above, the conclusions that can be given to this research are that related to human rights for the suspect must be started from the moment of the initial examination of the suspect suspected of being the perpetrator of the crime until the final examination, so that the Suspect as a human being it should not be treated as an object of investigation but as a subject that must still be respected for its dignity and dignity, where human rights are regulated in the Criminal Procedure Code and Law Number 39 Year 1999 concerning Human Rights, and legal efforts can be made to fulfill the rights One of the suspects' rights is a pretrial mechanism in which this mechanism aims to examine the validity of an arrest and / or detention at the request of a suspect or his family or other party with the suspect's power, whether or not the investigation is terminated or terminated s request for the upholding of law and justice, and requests for compensation or rehabilitation by the suspect or his family or other parties for his power whose case was not submitted to the court (Article 1 point 10 of the Criminal Procedure Code).

REFERENCES

A. Book

- Ilhami Bisri, 2004, *Sistem Hukum Indonesia, Prinsip-Prinsip dan Implementasi hukum di Indonesia*, PT Raja Grafindo Persada, Jakarta.
- O.C. Kaligis, 2006, *Perlindungan Hukum Atas Hak Asasi Tersangka, Terdakwa dan Terpidana*, Alumni, Bandung.

B. Legislation

- Indonesia, The Constitution of the Republic of Indonesia Year 1945
- _____, Law Number 39 Year 1999 concerning Human Rights
- _____, Law Number 8 of 1981 concerning Criminal Procedure Law (Criminal Procedure ode).
- _____, Indonesian National Police Chief Regulation Number 14 Year 2012 concerning Management of Criminal Investigations.

LEGAL PROTECTION ON VICTIMS OF WOMEN IN DOMESTIC VIOLENCE IN HUMAN RIGHTS PERSPECTIVE

Abraham Arimuko

Student of Legal Studies Doctor Program, Universitas Borobudur

arimuko@gmail.com

Abstract

The Indonesian state highly respects and provides protection for human rights for every citizen without exception because as a rule of law, one of the most important elements is the enforcement of human rights. Protection of women's rights is regulated in more detail in laws and regulations specifically discussing domestic violence, namely in Law Number 23 Year 2004 concerning the Elimination of Domestic Violence. Although it is clear that violence is very contrary to human rights, in reality there are still many cases of domestic violence in Indonesia (based on the Note on Violence Against Women in 2018 (CATAHU 2019), so further discussion in this study is about victims' rights Domestic violence in legislation and legal protection that can be given to victims of domestic violence so that human rights for victims of domestic violence can be fulfilled. This study has 2 (two) formulation of the problem, first: how are the rights of victims of domestic violence in legislation, and second: what kind of legal protection can be given to victims of domestic violence. The research method used in this research is juridical-normative, where the data studied is in the form of library material or secondary data which includes primary legal materials, secondary legal materials, and tertiary legal materials, where the primary legal material used is the 1945 Constitution of the Republic of Indonesia, UU-Un dang Number 39 of 1999 concerning Human Rights, and Law Number 23 Year 2004 concerning the Elimination of Domestic Violence, secondary legal materials namely textbooks, legal journals, scientific research, and sources from the internet, as well as tertiary legal materials namely language dictionaries Indonesia, legal dictionaries, encyclopedias, and other legal materials.

Keywords: Human Rights (HAM), Domestic Violence, Women, Legal Protection.

A. INTRODUCTION

The Indonesian state highly respects and provides protection for human rights for every citizen without exception because as a rule of law, one of the most important elements is the enforcement of human rights. Human Rights in the 1945 Constitution of the Republic of Indonesia are regulated in a separate Chapter, namely in Chapter XA Article 28A-28J. There are rights that cannot be reduced under any circumstances (non derogable rights) based on Article 28I paragraph (1) of the 1945 Constitution of the Republic of Indonesia, which reads as follows: *"The right to life, the right not to be tortured, the right to freedom of thought and conscience, religious rights, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted on a retroactive basis are human rights that cannot be reduced under any circumstances."*

Based on the article above, it can be seen that every human being has non-derogable human rights which consist of the right to life, the right not to be tortured, the right to freedom of mind and conscience, religious rights, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted on the basis of retroactive law, where such rights must be fully fulfilled, including the acts of violence against every human being. In this journal, the focus will be more on violence in the household or it can be referred to as domestic violence where victims of domestic violence are women and children, especially for women who are vulnerable to violent behavior.

Protection of women's rights is regulated in more detail in laws and regulations specifically discussing domestic violence, namely in Law Number 23 Year 2004 concerning the Elimination of Domestic Violence. In principle, based on the section weighing letter b of Law Number 23 Year 2004 concerning the Elimination of Domestic Violence, which reads as follows: *"that all forms of violence, especially domestic violence, constitute violations of human rights and crimes against dignity humanity and the form of discrimination that must be abolished."* This law strongly opposes domestic violence because it is against human rights.

Although it is clear that violence is very contrary to human rights, in reality there are still many domestic violence cases in Indonesia. The National Commission on Violence Against Women (Komnas Perempuan) launches the Note on Violence Against Women in 2018 (CATAHU 2019), in CATAHU 2019, Komnas Perempuan recorded 406,178 cases of violence against women reported and dealt with during 2018, up from the previous year with 348,466 cases, of which 13,568 cases were handled by 209 service provider partner institutions spread in 34 provinces, and as many as 392,610 cases originating from data on cases or cases handled by the Religious Courts.¹ So that related to the violence that occurs in the household, it is necessary to have further discussion in this study regarding the rights of victims of domestic violence in the legislation and legal protection that can be given to victims of domestic violence so that human rights for victims of domestic violence can be fulfilled.

B. RESEARCH METHOD

The research method used in this study is juridical-normative, where the data studied are in the form of library material or secondary data which includes primary legal materials, secondary legal materials, and tertiary legal materials, where the primary legal material used is the 1945 Constitution of the Republic of Indonesia. Law Number 39 of 1999 concerning Human Rights, and Law Number 23 Year 2004 concerning the Elimination of Domestic Violence, secondary legal materials namely textbooks, legal journals, scientific research, and sources from the internet, as well as tertiary legal materials namely language dictionaries Indonesia, legal dictionaries, encyclopedias, and other legal materials.

C. PROBLEM FORMULATION

The formulation of the problems to be examined in this study are as follows:

1. What are the rights of victims of domestic violence in legislation?
2. What legal protection can be given to victims of domestic violence?

D. DISCUSSION

1. Rights of Victims of Domestic Violence in Legislation

Based on Article 28 Paragraph (1) the 1945 Constitution of the Republic of Indonesia states as follows: *"Every person has the right to personal, family, honor, dignity and property protection under his authority, and has the right to security and protection from threat of fear of doing or not doing something that is a human right "*. This article is actually the basis for the government to uphold human rights for every citizen, including women not to get violent treatment both physically, psychologically and sexually because security is a human right that must be protected and guaranteed by the state.

With the enactment of Law No. 23 Year 2004 concerning the Elimination of Domestic Violence aimed at eliminating domestic violence in Indonesia, in Article 1 paragraph (2) of Law Number 23 Year 2004 concerning the Elimination of Domestic Violence, it is stated as follows: *"Elimination of*

¹ <http://www.tribunnews.com/nasional/2019/03/06/kasus-kekerasan-terhadap-perempuan-meningkat-14-persen-dari-tahun-sebelumnya>, accessed on 7 June 2019 at 15:00 WIB.

Violence in a household is a guarantee given by the state to prevent domestic violence, take action against perpetrators of domestic violence, and protect victims of domestic violence."

Domestic violence often afflicts weak people, namely women. Based on Article 1 point 1 of Law Number 23 Year 2004 concerning the Elimination of Domestic Violence, which reads as follows: *"Domestic violence is any act against someone, especially women, which results in physical, sexual, psychological misery or suffering. and / or neglect of households including threats to commit acts, coercion or deprivation of liberty against the law in the household sphere."*

The scope of the household referred to in the article is explained further in Article 2 paragraph (1) of Law Number 23 Year 2004 concerning the Elimination of Domestic Violence, which reads as follows: *"The scope of the household in this Act includes:*

- a. husband, wife and child;*
- b. people who have family relations with people as referred to in letter a because of blood relations, marriage, dairy, care, and guardianship, which are settled in the household; and / or*
- c. people who work to help the household and settle in the household."*

Domestic violence starting from the promulgation of the laws and regulations until now still seems to lack serious attention among the community because until now the community still believes that domestic violence is a private domain rather than public so that it tends not to be seen and covered, and domestic violence occurs in a legal institution, namely in a marriage. This makes the people ignorant and unconscious and raises the wrong view of the community that the husband must be able to control his wife.²

The rights inherent in a woman are the same as the rights inherent in a man because Human Rights are the property of every human being regardless of their sex. Women are human beings who are born independent and have the same dignity as a man so that there should be no discrimination in any field between women and men. This understanding is based on the provisions of Article 1 of the World Declaration on Human Rights which states as follows: *"all people are born independent and have the same dignity and rights. What is meant by human rights is: the rights inherent in our nature as human beings, which if not impossible we will be able to live as human beings."*³

The rights referred to possessed by victims of domestic violence, especially women, are guaranteed in Law Number 23 Year 2004 concerning the Elimination of Domestic Violence, which in this law is the first regulation governing the rights of victims. As stipulated in Article 10 of Law Number 23 Year 2004 concerning the Elimination of Domestic Violence, which reads as follows: *"Victims are entitled to:*

- a. protection from the family, police, prosecutors, courts, lawyers, social institutions, or other parties both temporarily and based on the stipulation of court protection orders;*
- b. health services according to medical needs;*
- c. handling specifically relating to the confidentiality of victims;*
- d. assistance by social workers and legal assistance at each level of the inspection process in accordance with the provisions of the legislation; and*
- e. spiritual guidance service."*

² Aroma Elmlna Martha, 2003, *Perempuan: Kekerasan dan Hukum*, UII Press, Yogyakarta, page. 30.

³ Muladi, 1997, *Hak Asasi Manusia. Politik dan Sistem Peradilan Pidana*, Universitas Diponegoro, Semarang, page. 37.

2. Legal Protection That Can Be Given To Victims of Domestic Violence

Understanding of Protection based on Article 1 point 4 of Law Number 23 Year 2004 concerning the Elimination of Domestic Violence, which reads: *"Protection is all efforts aimed at providing security to victims carried out by families, advocates, social institutions, police, prosecutors, courts, or other parties both temporarily and based on court decisions."* Legal protection according to Satijipto Raharjo is to provide protection for human rights that are harmed by others and that protection is given to the community in order to enjoy all the rights granted by law.⁴

Legal protection against victims of domestic violence is not only the responsibility of the Government but also the responsibility of all people as stipulated in Article 15 of Law Number 23 Year 2004 concerning the Elimination of Domestic Violence, which reads as follows: *"Everyone who hears, sees, or knowing the occurrence of violence in the household is obliged to make efforts in accordance with the limits of his ability to:*

- a. prevent the occurrence of criminal acts;*
- b. provide protection to victims;*
- c. provide emergency assistance; and*
- d. assist the process of submitting a request for protection. "*

The need to implement and guarantee legal protection against victims of domestic violence aims to protect human rights for victims of domestic violence. The protection referred to is regulated in Article 16 paragraph (1), (2) and (3) of Law Number 23 Year 2004 concerning the Elimination of Domestic Violence, where the contents of these articles are as follows:

- (1) Within 1 x 24 (one twenty-four) hours from knowing or receiving reports of domestic violence, the police must immediately provide temporary protection to victims.*
- (2) Temporary protection as referred to in paragraph (1) is given no later than 7 (seven) days after the victim is received or handled.*
- (3) Within 1 x 24 (one twenty-four) hours as of the giving of protection as referred to in paragraph (1), the police must request a letter of stipulation for a protection order from the court.*

In addition to the protection that can be done by the Government, it is necessary to have legal protection in terms of recovery from victims of domestic violence because domestic violence can cause suffering both physically and psychologically which can occur for a long time, and can be traumatized by the forms of treatment that will affect continuity his life. For this reason Article 39 of Law Number 23 Year 2004 concerning the Elimination of Domestic Violence also regulates the recovery of victims of domestic violence, which reads as follows: *"For the sake of recovery, victims can obtain services from:*

- a. health workers;*
- b. social worker;*
- c. volunteer companion; and / or*
- d. spiritual guide. "*

In addition to the form of legal protection and restoration of victims of domestic violence, other protections that can be given to victims of domestic violence is to impose sanctions on perpetrators of domestic violence where enforcement of criminal sanctions is part of law enforcement that needs to be explicitly applied in order to reduce domestic violence cases it can even be abolished so that it is able to provide justice for the victims who have suffered and been harmed by the acts of domestic violence, as the aim of the enactment of Law Number 23 Year 2004 concerning the Elimination of

⁴ Satijipto Raharjo, 2000, *Ilmu Hukum*, CitraAditya Bakti, Bandung, page. 54.

Domestic Violence. The imposition of sanctions for perpetrators of domestic violence is specifically regulated in a separate chapter in Law Number 23 Year 2004 concerning the Elimination of Domestic Violence, namely in Chapter VIII Criminal Provisions Article 44 to 53 of Law Number 23 Year 2004 concerning the Elimination of Domestic Violence Stairs.

E. CONCLUSION

The conclusion that can be given to this study regarding human rights for victims of domestic violence, especially women, is that the rights inherent in a woman are the same as the rights inherent in a man because human rights belong to every human being regardless of their sex so that there should be no discrimination in any field between women and men, and these rights are guaranteed in Article 10 of Year Number 23 Year 2004 concerning the Elimination of Domestic Violence, then legal protection for victims of domestic violence is not only the responsibility of the Government but also everyone's responsibility, and the form of legal protection that can be provided also includes the restoration and sanction of perpetrators of domestic violence as stipulated in Law Number 23 Year 2004 concerning the Elimination of Domestic Violence.

REFERENCES

A. Book

- Aroma Elmlna Martha, 2003, *Perempuan: Kekerasan dan Hukum*, UII Press, Yogyakarta.
- Muladi, 1997, *Hak Asasi Manusia. Politik dan Sistem Peradilan Pidana*, Universitas Diponegoro, Semarang.

Satjipto Raharjo, 2000, *Ilmu Hukum*, CitraAditya Bakti, Bandung.

B. Legislation

- Indonesia, The Constitution of the Republic of Indonesia Year 1945.
- _____, Law Number 39 Year 1999 concerning Human Rights.
- _____, Law Number 23 of 2004 concerning the Elimination of Domestic Violence.

C. Internet

- <http://www.tribunnews.com/nasional/2019/03/06/kasus-kekerasan-terhadap-perempuan-meningkat-14-persen-dari-tahun-sebelumnya>, accessed on 7 June 2019 at 15:00 WIB.

HUMAN RIGHTS PERSPECTIVE IN LEGAL PROTECTION OF CHILDREN AS VICTIMS OF SEXUAL VIOLENCE

Adolf Setiabudi Soeprajogo

Student of Legal Studies Doctor Program, Universitas Borobudur
adolfncps4@gmail.com

Abstract

The state of Indonesia as a legal state guarantees the welfare of each citizen, including the safeguarding of the child's well-being, where it needs to be protected against the rights of the child as a human right. The child is safe and merciful by god. Assurance of child protection has been secured in article Article 28B paragraph (2) of the 1945 Constitution of the Republic of Indonesia and certain laws that provide child protection. But despite such assurance for child protection, the exploitation of children is in fact still occurring, especially in child sexual abuse, where according to kpai, photos of child rights violations over the years have been fluently documented. Therefore, it is worth discussing the forms of sexual violence that can occur with the child, as well as legal protection from the child victim of sexual violence. The research method used in this study is a study of *yuridis-normatif* law, which includes primary legal material, the Constitution of the Republic of Indonesia Year 1945, Law Number 39 Year 1999 of Human Rights, Law Number 35 Year 2014 on changing the Law Number 23 Year 2002 on child protection, and Law Number 23 Year 2004 on the elimination of domestic violence, then a secondary legal material that covers books of the law, scientific journals of previous research related to the same theme as this study, the Internet, and so on, then finally a tertiary legal material that includes an encyclopedia, and an Indonesian dictionary.

Keywords: Child protection, human rights, sexual violence.

A. INTRODUCTION

The state of Indonesia as a legal state guarantees the welfare of each citizen, it is clearly stated in the opening of the Constitution Of The Republic Of Indonesia (UUD NRI) Year 1945, especially in paragraph IV, which bottom line is that it aims to promote public welfare, to brighten the lives of nations, and to share in the order of a world based on freedom, everlasting peace and social justice. Of course, the meant welfare is not limited to some or class individuals but to all Indonesian citizens, including children. For welfare to be acquired by the child, the child must be protected due to the protection of the child's rights as a human right that every human should have.

The child is safe and merciful by god. Within him is inherent in his dignity and dignity as a whole man. The child also has human rights recognized by the peoples of the world nations. Admittedly, physical and mental growth requires special care, protection, and legal protection, both before and after birth. Admittedly, the family is a natural environment for the growth and well-being of the child.¹ Arif Gosita by Moch. Faisal salam expressed child protection as efforts to support the exercise of rights and obligations. A child gaining and maintaining the right to grow and to thrive in a balanced and positive way of life means being treated fairly and avoiding harmful threats. Efforts to protect a child can be an act of law resulting from the law, thus sparing the child from abusive parents.²

¹ Ermanita Permatasari, *Perlindungan Terhadap Anak Korban Eksploitasi Seksual Dalam Perspektif Yuridis-Normatif Dan Psikologis (Studi Kasus Wilayah Hukum Polres Lampung Timur)*, Jurnal AL-'ADALAH Vol. XIII, No. 2, Desember 2016, page. 215.

² Moch. Faisal Salam, 2005, *Hukum Acara Peradilan Anak di Indonesia*, Mandar Maju, Bandung, page. 1.

The guarantee of child protection is guaranteed in Article 28B paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which states: "every child is entitled to survival, growth, and development and right to protection from violence and discrimination. "To realize the guarantee of child protection, some legislation specifically provides child protection, including some legislation specifically designed for child protection, found in the Law Number 35 Year 2014 on child protection.

The State's obligation to provide protection for children is found in Article 59 paragraph (1) of Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection, which reads: "The Government, Regional Government and other State Institutions are obliged and responsible for providing special protection to children. "Special protection as referred to in the article is explained further in Article 59 paragraph (2), which reads:" some special protection for children referred to in paragraph (1) is given to children in situations emergency, children facing the law, children from minority groups and isolated, also children who are exploited economically and / or sexually. "Therefore, it can be seen that children need special protection because children are in a position that is weak and vulnerable to exploitation.

However, even though such guarantees have been given for the protection of children, in reality the exploitation of children continues to occur, especially for acts of sexual violence against children. It cannot be denied, for a long time sexual violence against children in various forms and qualities has been fertile in the Indonesian community. Every day a number of cases of sexual violence against children with varying degrees of sadism are presented in front of their eyes, both through print media and electronic media.³

According to KPAI, portraits of cases of violations of children's rights from year to year occur fluctuatively in which from year to year, cases of complaints entered at KPAI, in 2015 amounted to 4,309 cases, then in 2016 reached 4,622 cases, in 2017 totaled 4,579 cases and in 2018 reached 4,885 cases, where in 2018, cases of Children Against the Law (ABH) still ranked first, which reached 1,434 cases, then followed by family-related cases and alternative care reached 857 cases. Furthermore, pornography and cyber cases reached 679 cases.⁴ With the many cases of violations of human rights against children, it is necessary to discuss in this study the forms of sexual violence that can occur against children, as well as forms of legal protection for children victims of sexual violence.

B. RESEARCH METHOD

The research method used in this study is a study of *yuridis-normatif* law, which includes primary legal material, the Constitution of the Republic of Indonesia Year 1945, Law Number 39 Year 1999 of Human Rights, Law Number 35 Year 2014 on changing the Law Number 23 Year 2002 on child protection, and Law Number 23 Year 2004 on the elimination of domestic violence, then a secondary legal material that covers books of the law, scientific journals of previous research related to the same theme as this study, the Internet, and so on, then finally a tertiary legal material that includes an encyclopedia, and an Indonesian dictionary.

C. PROBLEM FORMULATION

Based on the Background above, the formulation of the problem will be discussed as follows:

1. What forms of sexual violence can occur to children?
2. What are the forms of legal protection for children victims of sexual violence?

³ Elvi Zahara Lubis, *Upaya Perlindungan Hukum Terhadap Anak Korban Kekerasan Seksual*, Jurnal Pendidikan Ilmu-Ilmu Sosial 9 (2) (2017), page. 142.

⁴ <http://www.kpai.go.id/berita/kpai-sebut-pelanggaran-hak-anak-terus-meningkat>, accessed on June 16, 2019 at 15:30 WIB.

D. DISCUSSION

1. Forms of Sexual Violence That Can Happen to Children

The child is a legacy and a gift of the almighty god, within whom there is a measure of dignity and dignity as a whole man. The child is a young generation as the successor to the national ideal of struggle, in addition to the child's strategic role and special characteristics and qualities that ensure the continued existence of nations and countries in the future, where in time the child will be able to assume the responsibility, thus becoming fully available for optimum development and development, both physically, mentally and socially and morally.⁵ Children's definition according to article 1 point 2 of Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection, namely: "a child is someone who is not 18 (eighteen) years old, including a child who is still in the womb."

Violence is the equivalent of English English term violence, which is etymocally a combination of "vis" meaning power or power and "latus" derived from the word "ferre" which means to bring, so that violence is an act of force to force or non-physical pressure.⁶ But violence is not only physically defined, but also mentally even passively (disregard) in the sense of not doing anything can have the same effect that violence causes.⁷

Child sexual abuse is an example of human rights violation, especially right of child rights. The fact that many cases of child sexual abuse indicate that they tend to lack attention, protection, and are often overlooked. The reality that age and psychological and mental maturity factors are often marginalized in the process of policy making.⁸ Sexual exploitation of children is a fundamental violation of children's rights. The transgression consists of sexual violence by an adult, a third person, or others. The child was treated as a sexual object. Child sexual exploitation is a form of coercion and violence against children, and leads to forms of forced labor and slavery.⁹

Sexual harassment is any form of behavior that is oriented or leads to sexual things done unintentionally and is unexpected by the person being targeted, causing such negative reactions as shame, anger, hatred, offense, and so on of the individual who is the victim of the harassment.¹⁰ Related to the form of child sexual violence, according to Terry E Lawson who claimed that forms of child violence, from abandonment to rape and murder may be classified in 4 kinds of being:¹¹

- a. Physical abuse shows the injury found in a child not because of an accident but the injury results from beating with objects or multiple repeated attacks.
- b. Physical neglect. This category of violence can be identified in general from a child's sluggishness, pallor and malnutrition. Children are usually in a dirty / unhealthy condition, inadequate clothing. It must also be seen from the social and economic conditions of a family.
- c. Emotional abuse, shows a case where parents / guardians fail to provide a loving environment for someone to grow, learn and develop. These failures are manifested by not caring, discriminating, terrorizing, threatening or frankly rejecting the child.
- d. Sexual abuse, refers to any sexual activity.

⁵ Irma Setyowati Soemitro, 1990, *Aspek Hukum Perlindungan Anak*, Bumi Aksara, Jakarta, page. 3.

⁶ Maidin Gultom, 2012, *Pelindungan Hukum Terhadap Anak dan Perempuan*, Refika Aditama, Bandung, page. 14.

⁷ *Ibid.*, hal. 83.

⁸ Abdul Wahid dan Muhammad Irfan, 2001, *Perlindungan Terhadap Kekerasan Seksual (Advokasi Atas Hak Asasi Perempuan)*, Refika Aditama, Bandung, page. 224.

⁹ Ahmad Sofian, 2006, *Memerangi Pariwisata Sex Anak: Tanya & Jawab*, ESPAT International, Bangkok.

¹⁰ Ladin, 2016, *Pelecehan seksual antar Anak Dalam perspektif hukum pidana*, AHKAM, Volume 4, Nomor 2, November 2016, page. 299.

¹¹ Maidin Gultom, *op.cit.*, page. 95-96.

If examined in Law Number 23 Year 2004 concerning the Elimination of Domestic Violence, it can be seen that those included as forms of sexual violence are based on Article 8 of Law Number 23 Year 2004 concerning the Elimination of Domestic Violence, which reads: "Violence Sexuality as referred to in Article 5 letter c includes:

- a. coercion of sexual relations carried out against people who reside within the household;
- b. forcing sexual relations with one person within the household with another person for certain commercial purposes and / or purposes.

Related to forms of action that can be categorized as acts of sexual exploitation of children, based on the Explanation of Article 66 of Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection, it reads as follows: "What is meant by" sexually exploited "is any form of utilization of sexual organs or other organs of the child to obtain benefits, including but not limited to all prostitution and sexual abuse activities."

2. A Legal Protection Against The Child of a Victim of Sexual Violence

The child in receiving sexual explosive acts is positioned as a victim because it's on the weak side. According to Arief Gosita's definition of the victim's problem, the victim is "those who suffer physical and spiritual asa result of the actions of others, who seek self-fulfillment or others, contrary to the interests and rights of suffering."¹² Because it is necessary to protect the child in order to eliminate exploitation of the child.

One form of protection that can be given to children for sexual violence is by performing the protection of repressive laws whereby the protection of repressive laws is the ultimate protection given when an issue or has been committed, in order to give them a deterrent effect. On the deterrent effect, Bentham noted that there is a 3 (three) strategy for preventing a person from doing more crimes, as follows:¹³

- a. Eliminating the potential for physical strength to commit a crime.
- b. Eliminating desire and desire to commit evil.
- c. Making it deterrent to committing a crime.

There are several articles in Law Number 35 Year 2014 concerning Amendments to Law Number 23 Year 2002 concerning Child Protection which provide a prohibition on sexual violence against children, as follows:

Article 76D of Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection, which reads: "Everyone is prohibited from committing Violence or threats of Violence forcing Children to have intercourse with or with other people."

- a. Article 76E of Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection, which reads: "Everyone is prohibited from committing violence or threats of violence, coercion, deception, conducting a series of lies, or persuading the child to do or allow lewd acts to be committed.
- b. Article 76I of Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection, which reads: "Every person is prohibited from placing, allowing, committing, ordering, or participating in economic and / or sexual exploitation of Child."

The prohibition on sexual abuse of children against perpetrators is sanctioned as stipulated in the following articles, which can be described as follows:

¹² Siswanto sunarso, 2012, *Viktimologi dalam Sitem Peradilan Pidana*, Sinar Grafika, Jakarta, page. 31

¹³ Barbara A. Hudson, 2003, *Understanding Justice: An introduction to Ideas, Perspectives and Controversies in Modern Penal Theory*, Open University Press, Philadelphia, page. 19.

- a. Article 81 of Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection, which reads:
- b. Any person who violates the provisions referred to in Article 76D shall be sentenced to imprisonment for a minimum of 5 (five) years and no later than 15 (fifteen) years and a maximum fine of Rp.5,000,000,000.00 (five billion rupiahs).
 - (1) The criminal provisions as referred to in paragraph (1) also apply to Any Person who intentionally commits deception, a series of lies, or persuades the Child to have intercourse with him or with other people.
 - (2) In the case of a criminal offense as referred to in paragraph (1) carried out by Parents, Guardians, Child caregivers, educators, or education personnel, the penalty shall be added to 1/3 (one third) of the criminal threat as referred to in paragraph (1).
- c. Article 82 of Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection, which reads:
 - (1) Any person who violates the provisions referred to in Article 76E shall be punished with imprisonment for a minimum of 5 (five) years and a maximum of 15 (fifteen) years and a maximum fine of Rp.5,000,000,000.00 (five billion rupiahs).
 - (2) In the case of a criminal offense as referred to in paragraph (1) carried out by Parents, Guardians, Child caregivers, educators, or education personnel, the penalty shall be added to 1/3 (one third) of the criminal threat as referred to in paragraph (1).
- d. Article 88 of Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection, which reads: "Anyone who violates the provisions as referred to in Article 76I, shall be punished with imprisonment for a maximum of 10 (ten) years and / or a maximum fine of Rp. 200,000,000.00 (two hundred million rupiah). "

In addition, other forms of legal protection that can be given to victims of child sexual violence as a form of special protection for victims are regulated in Article 69A of Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection, which reads: "Special Protection for children who are victims of sexual crimes as referred to in Article 59 paragraph (2) letter j, they are carried out through the following efforts:

- a. education about reproductive health, religious values, and moral values;
- b. social rehabilitation;
- c. psychosocial assistance during treatment until recovery; and
- d. providing protection and assistance at every level of examination starting from investigations, prosecutions to examinations in court.

E. CONCLUSION

Based on the discussion above, the conclusions that can be given are related to the theme in this study, namely sexual violence against children, that the forms of sexual violence that can occur against children can be seen from several laws and regulations, namely in Law Number 23 Year 2004 concerning the Elimination of Domestic Violence and Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection, while the form of protection that can be given to children victims of sexual violence is in the form of sanctions imposed on perpetrators of acts of sexual violence as stipulated in articles 81, 82 and 88 of Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection in order to cause deterrent effects to the perpetrators and by providing Special Protection to children victims of sexual crimes as stipulated in Article 69A Invite - Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection.

REFERENCES

A. Book

- Abdul Wahid dan Muhammad Irfan, 2001, *Perlindungan Terhadap Kekerasan Seksual (Advokasi Atas Hak Asasi Perempuan)*, Refika Aditama, Bandung.
- Ahmad Sofian, 2006, *Memerangi Pariwisata Sex Anak: Tanya & Jawab*, ESPAT International, Bangkok.
- Barbara A. Hudson, 2003, *Understanding Justice: An introduction to Ideas, Perspectives and Controversies in Modern Penal Theory*, Open University Press, Philadelphia.
- Irma Setyowati Soemitro, 1990, *Aspek Hukum Perlindungan Anak*, Bumi Aksara, Jakarta.
- Ladin, 2016, *Pelecehan seksual antar Anak Dalam perspektif hukum pidana*, AHKAM, Volume 4, Nomor 2, November 2016.
- Maidin Gultom, 2012, *Pelindungan Hukum Terhadap Anak dan Perempuan*, Refika Aditama, Bandung.
- Moch. Faisal Salam, 2005, *Hukum Acara Peradilan Anak di Indonesia*, Mandar Maju, Bandung.
- Siswanto sunarso, 2012, *Viktimologi dalam Sitem Peradilan Pidana*, Sinar Grafika, Jakarta.

B. Journal

- Elvi Zahara Lubis, Upaya Perlindungan Hukum Terhadap Anak Korban Kekerasan Seksual, Jurnal Pendidikan Ilmu-Ilmu Sosial 9 (2) (2017).
- Ermanita Permatasari, *Perlindungan Terhadap Anak Korban Eksploitasi Seksual Dalam Perspektif Yuridis-Normatif Dan Psikologis (Studi Kasus Wilayah Hukum Polres Lampung Timur)*, Jurnal AL-‘ADALAH Vol. XIII, No. 2, Desember 2016.

C. Legislation

- *Indonesia, the 1945 Constitution of the Republic of Indonesia.*
- _____, *Law Number 39 of 1999 concerning Human Rights.*
- _____, *1945 Constitution, Law Number 39 of 1999 concerning Human Rights.*
- _____, *Law Number 35 Year 2014 concerning Amendment to Law Number 23 of 2002 concerning Child Protection.*
- _____, *Law Number 23 of 2004 concerning the Elimination of Domestic Violence.*

D. Internet

- <http://www.kpai.go.id/berita/kpai-sebut-pelanggaran-hak-anak-terus-meningkat>, accessed on June 16, 2019 at 15:30 WIB.

HUMAN RIGHTS PERSPECTIVE REVIEW OF LEGAL PROTECTION OF PATIENTS HIV / AIDS

Agus Patmono

Student of Legal Studies Doctor Program, Universitas Borobudur

dragus.patmono@gmail.com

Abstract

The spread of HIV / AIDS in Indonesia is increasing rapidly so very worrying for health development. HIV / AIDS spread in 407 (80%) from 507 districts / cities in all provinces in Indonesia, West Sulawesi province the last reported in 2012. In 2015, the cumulative amount HIV infections as many as 191,073 cases and 77,112 cases of AIDS were identified and 90,000 to 130,000 people with HIV / AIDS live in Indonesia. Law as a means of social guarding is expected to provide protection sufferers of HIV / AIDS, with values of non-discrimination, tolerance, and empathy. The author reviews the review of laws in the field of human rights, namely Law No. 11 of 2005 and Law No. 12 of 2005, also Law No. 36 years old 2009, Law No. 29 of 2004, and Law No. 44 of 2009. As well as knowing and reviewing the behavior of health workers at the hospital and analyzing legal conditions and the behavior of health workers in the Hospital has reflected culture law in providing protection of rights for people with HIV / AIDS. The author gets a concluding study of the conclusion that health workers are not fully serves to provide protection for the rights of people with HIV / AIDS. The reality of the HIV / AIDS often experiences a variety of discrimination, no empathy, nothing protection and other negative treatment, while the legal substance and behavior of the hospital implementing apparatus is not yet complete function in encouraging the birth of a culture of protection of the rights of people with HIV / AIDS. The hospital has not reflected the values of tolerance, empathy and non-discrimination.

Keywords: Legal Protection, Right for People with HIV / AIDS

I. INTRODUCTION

A. Background

Protection of human rights is one of the characteristics of a state of law.¹ Another feature of the state of law is the division of power,² government based on the law and the state administrative court.³

Law is in society. The law regulates human life since being in the womb until death. Law regulates all aspects of people's lives (economic, social, political, cultural, defense and security, etc.). None of the aspects of human life in society are escape from the law.

Indonesia is a legal state. The statement as a legal state, explicitly stated in Article 1 paragraph (3) of the 1945 Constitution which reads "Indonesia is a legal state". Provisions regarding the rule of law are emphasized in Article 28D paragraph (1) of the 1945 Constitution which states "Everyone has the right to

¹ Prinsip *rechtsstaat* yang dikembangkan oleh Julius Stahl tersebut di atas pada pokoknya dapat digabungkan dengan ketiga prinsip *rule of law* yang dikembangkan oleh A. V. Dicey. Dalam pandangan *The International Commission of Jurist*, prinsip-prinsip negara hukum itu dilengkapi dengan prinsip peradilan bebas dan tidak memihak (*independence and impartiality of judiciary*), negara harus tunduk pada hukum dan pemerintah menghormati hak-hak individu.

² Moh. Kusnardi dan Bintang Saragih, *Susunan Pembagian Kekuasaan Menurut Sistem UUD 1945*, Cet. 7 (Jakarta: Gramedia, 1994), hlm. 27.

³ Oemar Seno Adji, *Indonesia Negara Hukum dalam Seminar Ketatanegaraan UUD 1945*, dalam dalam Padmo Wahjono, *Indonesia Negara Berdasarkan Atas Hukum*, (Jakarta: Ghalia Indonesia, 1986), hlm. 7.

recognition, guarantee, protection and fair legal certainty and equal treatment before the law".⁴ As a legal state (rechstaat) means every attitudes, policies and behaviors of state instruments and residents must be based on law.

Functionally, the law is expected to function to do social control and as a tool to engineer social life (law as a tool for social engineering). Law as a means of social supervision is expected to provide protection for the rights of people with HIV / AIDS, with values of non-discrimination, tolerance and empathy. However, at this time there is still a gap between *das sein* and *das sollen* in protecting the rights of sufferers of HIV / AIDS. Weaknesses in protecting HIV / AIDS sufferers have an impact on increasing HIV / AIDS sufferers.

Transmission of the HIV / AIDS virus spreads rapidly among adolescents due to free sex (30 percent) and drug needles (50 percent). This group is very vulnerable, considering that adolescents are psychologically in a phase of emotional instability, high aggressiveness and often take quick action without careful consideration. The worst impact of HIV / AIDS transmission is the death of the sufferer. From year to year, deaths caused by HIV / AIDS tend to increase. This is illustrated in the following matrix.⁵

An increase in the number of people with HIV / AIDS encourages a country's government to revise its policies. The policy changes made by each country are affected by concerns about the threat of the disease. Changes in policy are also driven by the fact that there are often acts of discrimination against people with HIV / AIDS and that anti-virus has not been found which can prevent its development.

**Tabel 3. Jumlah Kematian AIDS yang Dilaporkan
Menurut Tahun, 1987-2015**

No	Years	AIDS Mortality
1	1987	1
2	1988	1
3	1989	2
4	1990	1
5	1991	2
6	1992	-
7	1993	4
8	1994	4
9	1995	7
10	1996	40
11	1997	4
12	1998	19
13	1999	22
14	2000	86
15	2001	34
16	2002	69
17	2003	113
18	2004	324
19	2005	589

⁴ Isi Undang-Undang Dasar Negara Republik Indonesia Tahun 1945

⁵ Kementerian Kesehatan RI, *Laporan Perkembangan HIV-AIDS Triwulan IV Tahun 2015*, Direktorat Jenderal Pengendalian Penyakit dan Penyehatan Lingkungan (Jakarta: DITJEN PP & PL, 2015).

20	2006	873
21	2007	920
22	2008	1,077
23	2009	1,225
24	2010	1,393
25	2011	1,329
26	2012	1,780
27	2013	1,366
28	2014	666
29	2015	379
anonym		11
total		12,341

Adopted : Provincial Health Office, 2015

An increase in the number of people with HIV / AIDS encourages a country's government to revise its policies. The policy changes made by each country are affected by concerns about the threat of the disease. Changes in policy are also driven by the fact that there are often acts of discrimination against people with HIV / AIDS and that anti-virus has not been found which can prevent its development.

Community vulnerability to HIV / AIDS transmission is also influenced by biological, social, cultural, economic and legal conditions.⁶ Other influences on the vulnerability of certain groups of people to HIV / AIDS are due to legal status. This has resulted in difficulties in realizing civil, political, economic, social and cultural rights.⁷ Understanding of human rights is intended to be the rights possessed by humans not because they are given to them by society, not based on the applicable positive law, but based on his dignity as a human being.

The protection of the rights of people with HIV / AIDS in reality has not fully fulfilled the values of human rights. This condition is influenced by the behavior of health workers related to the protection of people with HIV / AIDS, for example in hospitals.

Health workers in hospitals, tend to be discriminatory towards people with HIV / AIDS. Many cases in hospitals with HIV / AIDS do not receive good health care even until refusal of treatment occurs. The hospital's rejection of HIV / AIDS sufferers was carried out with various arguments, such as the limitations of health facilities and other impressive reasons for not doing treatment.⁸

On the other hand, the development of HIV / AIDS has raised many new problems such as prejudice, ignorance, and discriminatory attitudes. Discrimination against people with HIV / AIDS is sometimes also expressed as a second disease.⁹

The issue of human rights in relation to public health has in principle been the topic of discussion in international law and public health. In 1946, the world health organization (WHO) proclaimed that the highest success of achieving goals.

⁶ Anand Grover, *HIV/AIDS and The Law*, (New Delhi: Speech at the National Human Rights Conference, 2000).

⁷ Hak Asasi Manusia adalah hak dasar yang secara kodrati melekat pada diri manusia, bersifat universal dan langgeng, oleh karena itu harus dilindungi, dihormati dipertahankan, dan tidak boleh diabaikan atau dirampas oleh siapapun.

⁸ Miriam Maluwa, *HIV/AIDS and Human Rights: The Role of National Human Rights Institutions in the Asia Pacific* (Melbourne: tanpa penerbit, 2001).

⁹ Hon. Justice Michael Kirby AC CMG, "Courts and Judges in the Era of HIV/AIDS (adapted and updated from earlier version published in *DC Jayasuriya*", *HIV Law, Ethics and Human Rights*, (New Delhi: UNDP, 1995), hlm 3.

Public health standards are the success in handling the fundamental problems of human rights.¹⁰ The basic principles of human rights with HIV / AIDS are not separate, but interrelated rights.¹¹ Human rights issues that are closely related to people with HIV / AIDS include are the right to health, the right to education, the right to life, the right to freedom and security, the right to information and freedom of expression, the right to marry and form a family, the right to equality and service between men and women, and the right to be free from discriminatory actions.¹²

Discrimination against people with HIV / AIDS cannot have an impact on the sufferers themselves, but it also poses a high risk to the family environment of sufferers and other social environments. Discriminatory actions are often carried out by the families of sufferers themselves, the work environment, health workers and other general public.¹³ Discriminatory treatment by the families of sufferers is generally done by isolating family members who have HIV / AIDS. This action was based on the shame of the family who assumed that HIV / AIDS was a disease that brought shame to the family as a whole.¹⁴

Protection of people with HIV / AIDS in Indonesia has not received maximum attention and treatment, both from the government and various other relevant parties. This can be seen at least from three things. First, the development of HIV / AIDS in Indonesia based on existing data is known to be increasingly widespread and continues to increase to almost infect various human populations in Indonesia. Second, the existing laws and regulations specifically related to the protection of people with HIV / AIDS in Indonesia are not yet adequate.

Third, the protection of the human rights of people with HIV / AIDS has not been fully addressed, it is known from the many found discriminatory treatment experienced by people with HIV / AIDS.¹⁵

Strengthening the legal substance and legal culture of law enforcement is one solution to provide protection for the rights of sufferers of HIV / AIDS. this protection can foster self-confidence and individual responsibility, which in time can help the community as a whole to overcome the spread of HIV / AIDS.

Legislation related to HIV / AIDS sufferers becomes a guideline and legal basis to protect and guarantee the rights of every individual.¹⁶ One aspect of the interrelationship between human rights and

¹⁰ Mary Ann Torres, *Public Health And International Law: The Human Right to Health, National Courts, and Access to HIV/AIDS Treatment: A Case Study from Venezuela*, Chicago Journal of International Law, (Chicago: Spring, 2002), hlm 1.

¹¹ *HIV/AIDS and Human Rights: International Guidelines*, United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS, Geneva, September 1996)

¹² Peter Piot, *"Human Rights dan HIV/AIDS" Speech to the United Nations Human Rights Commission, Joint United Nations Programme on HIV/AIDS*, April 1996

¹³ 13 Peter Aggleton, *Comparative Analysis: Research Studies from India and Uganda, HIV and AIDS-related Discrimination, Stigmatization and Denial*, (United Kingdom: Thomas Coram Research Unit, Institute of Education, University of London, 2000), hlm 10-11.

¹⁴ Zubairi Djoerban, *Membidik AIDS: Ikhtiar Memahami HIV dan ODHA*, (Yogyakarta: Galang Press dan Yayasan Memajukan Ilmu Penyakit Dalam, 2000), hlm. 174-178

¹⁵ Secara teoritis AIDS (*Acquired Immune Deficiency Syndrome*) merupakan gejala penyakit yang disebabkan Human Immunodeficiency Virus (HIV), dimana virus tersebut merusak sistem kekebalan tubuh manusia yang berakibat terhadap menurunnya daya tahan tubuh sehingga mudah terjangkit penyakit infeksi. Virus HIV ditemukan dalam cairan tubuh, terutama dalam cairan sperma, cairan vagina, dan darah. Penularan virus HIV umumnya terjadi melalui hubungan seksual yang tidak aman, transfusi darah, penggunaan jarum suntik yang tidak steril, transplantasi organ atau jaringan, dan penularan dari ibu hamil ke janin yang dikandungnya. Lihat Komisi Penanggulangan AIDS Nasional: *Strategi Nasional Penanggulangan HIV/AIDS 2003-2007*. (Jakarta: Kementerian Koordinator Bidang Kesejahteraan Rakyat, Komisi Nasional Penanggulangan AIDS Nasional, 2003), hlm 1. Lihat juga, Dana Richter, *Medical Professionals and Their Refusal to Treat HIV/AIDS Patient*, (Washington University, Seattle: Law and Psychology Review, 1999), hlm 3.

¹⁶ Helena Nygren-Krug, *25 Questions and Answers on Health and Human Rights*, (World Health Organization, 2002), hlm. 9.

public health can be clearly seen from the refusal of HIV / AIDS sufferers to prevention programs and protection of people with HIV / AIDS in the form of consultation, testing, treatment, and support. This is because sufferers assume that implementing the program means facing acts of discrimination. Rejection of some of these programs occurs due to the absence of legislation that can guarantee the confidentiality of the status of individuals with HIV / AIDS, and there are no legislation that can anticipate the occurrence of negative things that are very worried by individuals with HIV / AIDS.¹⁷

As a member of the United Nations (UN) and as a party that participates in international agreements on human rights, every human being has an obligation to respect, protect and guarantee human rights. The obligation to respect human rights requires every country to refrain from direct and indirect intervention in the application of human rights.¹⁸ The obligation to protect human rights requires every country to take actions that anticipate third parties in intervening human rights.¹⁹ The obligation to provide guarantees also requires that each country adopt appropriate legislation,²⁰ financial management, justice systems and other actions in order to realize human rights fully.²¹

The concretization of HIV / AIDS protection carried out by each country is done by curbing specific legislation on HIV / AIDS or by making changes to several existing regulations, which are related to the protection of HIV / AIDS sufferers. These rules can be national, or local.²²

The enactment was also responded to by the UN Human Rights Commission as follows:

*Protection of the rights of people with HIV / AIDS related to Employment Law, Education Law, Family Law, Insurance Law, Health Care Law, Criminal Law, illegal acts (Tort Law), and Public Health Law has undergone changes since the development of HIV / AIDS.*²³

The development of HIV / AIDS in various countries has also significantly affected the Indonesian government in providing protection for the rights of people living with HIV / AIDS.²⁴ One of the government's steps is outlined in the national HIV / AIDS prevention strategy.²⁵ The policy clearly illustrates the phenomenon of HIV / AIDS the Government of Indonesia is not only concerned about

¹⁷ Lihat, *Office of the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS: Second International Consultation on HIV/AIDS and Human Right* (New York and Geneva: United Nations,

¹⁸ Sebagai contoh penghormatan hak asasi manusia, setiap negara harus dapat menahan diri dalam mengidentifikasi atau membatasi akses yang sama untuk semua orang, termasuk tahanan, kelompok minoritas, migran ilegal yang diduga mengidap HIV/AIDS, petugas kesehatan dan perawat, atau menahan diri untuk tidak memaksakan praktek-praktek diskriminasi yang merupakan kebijakan pemerintah.

¹⁹ Sebagai contoh, mengadopsi peraturan perundang-undangan untuk memastikan akses yang sama dalam perawatan kesehatan dan servis-servis yang berkaitan dengan kesehatan yang diadakan oleh pihak ketiga, diantaranya mengontrol pemasaran obat-obatan dan alat-alat kesehatan, serta memastikan bahwa praktisi-praktisi di bidang kesehatan dan tenaga-tenaga profesional lainnya di bidang kesehatan memenuhi standar pendidikan, kemampuan, dan etika dalam bertindak.

²⁰ Sebagai contoh, bagaimana negara dapat menghasilkan suatu kebijakan nasional dalam bidang kesehatan dengan rencana yang terperinci, diantaranya mempromosikan pendidikan tentang HIV/AIDS termasuk juga menginformasikannya dan melakukan penelitian dalam mencari vaksin penanggulangannya.

²¹ Miriam Maluwa, *HIV/AIDS and Human Rights: The Role of National Human Right Institutions in the Asia Pacific*, (Melbourne, 2001).

²²

²³ Robert M. Jarvis, Michael L. Closen, Donald H.J. Hermann, Arthur S. Leonard, *AIDS Law in a nut Shell* (USA: West Publishing Co., St. Paul Minnesota, 1991).

²⁴ Komisi Penanggulangan AIDS Nasional, *Strategi ... loc. cit.*

²⁵ Strategi Nasional penanggulangan HIV/AIDS pertama kali dirumuskan pada tahun 1994, dan perkembangan *epidemic* dan cara penularan HIV/AIDS, cara penanggulangan HIV/AIDS, perubahan tata pemerintahan, dan keterkaitan terhadap kesepakatan internasional merupakan alasan pemerintah Indonesia untuk memperbaharui strategi penanggulangan yang telah ada.

health, but also touches on other issues. Therefore, policies compiled in mitigation efforts naturally cover various aspects that grow and develop in the community. Protection of human rights for people living with HIV / AIDS must pay attention to religious values, culture / norms of the people, and activities are directed at maintaining and strengthening family resilience and welfare.

The protection of people with HIV / AIDS can be organized by the community, government and NGOs. Based on the principle of partnership, the community and NGOs become the main actors while the government is obliged to direct, guide and create a supportive atmosphere.

HIV / AIDS prevention is a social problem on a national scale, therefore a national movement is needed to deal with it. At the national level, the issue of HIV / AIDS has been regulated in Presidential Decree No. 36 of 1994.²⁶ This decision was revoked and declared invalid after the enactment of Presidential Regulation Number 75 of 2006 concerning the National AIDS Commission. At the world level, on 10 June 2001 the political commitment of state leaders was declared at the UN AIDS Summit in New York. This commitment concerns efforts to intensify comprehensive HIV / AIDS prevention at the community level.

As one of the implementing agencies for the protection of HIV / AIDS sufferers, the National AIDS Commission makes a national HIV / AIDS prevention strategy. The latest strategy released by KPA is 2007-2010. This national strategy emphasizes prevention and protection, especially in anticipating the transmission and spread of HIV / AIDS related to risk behavior.

The policy formulated by the National AIDS Commission as a national HIV / AIDS prevention strategy has essentially accommodated various issues relating to the problem of HIV / AIDS.

These problems include discrimination, confidentiality, informed consent, work, syringes, education, prostitution and family.²⁷

Viewed from a human rights perspective, the authors argue that there are still gaps in providing protection for the rights of people with HIV / AIDS. The problem is, First, the national HIV / AIDS prevention strategy has not been fully supported by adequate legal substance. Secondly, the national HIV / AIDS prevention strategy has not been provided by adequate institutions, although there have been several institutions that have duties and functions in HIV / AIDS prevention efforts, but their performance still needs to be improved. Third, a legal culture that has not fully supported HIV / AIDS protection. This problem is actually reflected in the occurrence of discriminatory treatment against HIV / AIDS sufferers.

The complexity of the problem of HIV / AIDS is generally caused by the absence of legal substance in providing support for protection for people with HIV / AIDS.

In general, the author will try to convey a study of legal substance in Indonesia in providing protection for the rights of sufferers of HIV / AIDS. Especially the legal norms that regulate HIV / AIDS prevention and institutions that act as the spearhead in carrying out HIV / AIDS prevention, as well as legal culture related to efforts to protect the rights of HIV / AIDS sufferers.

B. General Review

It is said that criminalized behavior is a problem that can directly cause a person to get HIV / AIDS such as unprotected sex, injecting drugs with unsterile needles together and changing needles; do not apply universal precaution; intentionally distributing blood / tissue organs that have been infected with HIV to other people. Behavior that can hinder HIV / AIDS prevention efforts is not holding information / counseling on prevention of HIV / AIDS and drugs, not checking the health of workers who are under

²⁶ Keputusan Presiden Nomor 36 Tahun 1994 tentang Pembentukan Komisi Penanggulangan AIDS (KPA) yang secara umum bertujuan untuk mengkoordinasikan antar lembaga Pemerintahan dalam melaksanakan tugas menanggulangi HIV/AIDS di Indonesia.

²⁷ Ibid.,

their supervision, not redirecting one's HIV status, providing health services in a discriminatory manner, opening HIV status / AIDS is a person but does not take any medical action to improve the awareness and quality of life of PLWHA. The subject of criminal law consists of everyone; communal groups, health workers, laboratory staff, medical doctors and government officials; private legal entity or public legal entity.²⁸

The formulation of criminal acts is in accordance with the theory of criminalization, including protection of the public interest; efficiency and effectiveness, especially cost and benefit principles; greater benefit aspects and legal aspects of morality. Criminalization of certain criminal acts is not formulated clearly and definitively according to the principle of *lex certa* and *lex stricta* so that it can lead to multiple interpretations among law enforcement and the public.²⁹

Criminalization and the formation of criminal norms have not paid attention to the substance, structure and legal culture aspects so that it is difficult to enforce.

The author is not just looking at the problem of mitigation in terms of legal substance, but further than that, how HIV / AIDS prevention has been regulated in various other regulations, not only regional regulations but also at a higher level, namely laws and other regulations.

The author also examines the synchronization and harmonization in each legislation in carrying out efforts to overcome the spread of HIV / AIDS in terms of the material content of each of the laws and regulations. This, the authors do because it is well-known in the context of HIV / AIDS prevention has been regulated in many laws and regulations, not only regulated by the Regional Government, therefore the author states that the research that the author is doing is more complete and comprehensive than existing research.

From the aspect of legal culture, the author generally highlights the effectiveness of legal substances or legal authorities and legal structures or institutions that are authorized to deal with HIV / AIDS.

C. Theory of Protection of the Rights of HIV / AIDS Patients

The problem of protecting people with HIV / AIDS (PLWHA) is something complex and causes various kinds of further problems that can not always be limited individually, but must be jointly and the solution becomes a joint responsibility.

Some opinions give limitations, about HIV / AIDS protection as follows:

Inten Soeweno stated that "Protection Law is a law , (written or unwritten) that guarantees that HIV / AIDS sufferers can truly exercise their rights and obligations and are a result of interaction due to interrelations between existing and influencing phenomena. "³⁰ Inten also added: Ignoring the problem of protecting HIV sufferers / AIDS will not strengthen national development. Due to the absence of protection will lead to various social problems that can disrupt order, security, and national development. So this means that the protection must be sought if we want to pursue satisfactory national development.³¹

Azyumardi Azra stated that, in discussing the issue of protection of PLWHA, the protection should grow out of a sense of justice.³² Furthermore, it was stated by Irsan that, justice is a condition where everyone can carry out their rights and obligations rationally, responsibly and beneficial.⁵⁰ Whereas according to Romli Atmasasmita argues that justice when associated with the protection of people with

²⁸ *Ibid.*, hlm. 146.

²⁹ *Ibid.*, hlm. 147.

³⁰ Inten Soeweno, *Kapita Selekt Kesejahteraan Sosial*. (Jakarta: Bumi Aksara, 1988), hlm. 53

³¹ *Ibid.*, hlm. 18

³² Azyumardi Azra, *Demokrasi Hak Asasi Manusia Masyarakat Madani*. (Jakarta: Prenada Media, 2003), hlm. 46.

HIV / AIDS, then where there is justice there should be good protection. HIV / AIDS sufferers are protected from being able to exercise their rights and obligations rationally and responsibly.³³

From the explanation above, it is very clear that the protection of HIV / AIDS sufferers is a legal action that brings legal consequences, therefore it is necessary to have legal guarantees for the protection activities that can be realized in the form of legal rules. Legal certainty needs to be endeavored for the continuation of HIV / AIDS sufferers' protection activities and preventing fraud that brings undesirable negative consequences in carrying out activities to protect HIV / AIDS sufferers. Protection of human rights (HAM) is the most important element in overcoming HIV / AIDS. We all know that the rapid development of HIV / AIDS has exacerbated the situation, which in turn opens the way for various forms of human rights violations that afflict people with HIV / AIDS (PLWHA).

Legal and human rights aspects are two very important components and also influence the success or failure of the prevention program implemented. It is known that one of the common characteristics of the HIV / AIDS phenomenon lies in its uniqueness in its transmission and prevention. In contrast to some other infectious diseases whose transmission is helped and influenced by the environment, HIV / AIDS is precisely transmitted and prevented is related to and / or depends on human behavior. Human behavior is always in contact with law and human rights. Law is a tool with two main functions, namely as social control and social engineering.

As a legal social control it is used as a tool to control certain behaviors in the community so that these behaviors do not harm themselves and other members of society. As a social engineering, law is used as a tool that can engineer a society according to the wishes and ideals of the law.

The two fundamental human rights related to the HIV / AIDS epidemic are: the right to health and the right to be free from discrimination. Compared to the right to health, this solution to the problem of discrimination against people with HIV / AIDS is far more complex and difficult.

In many cases, sufferers can finally make peace with the fact that they do have HIV and may die with and because of AIDS. Will still suffer even worse because of the stereotypes imposed on them. Infected people are often associated with cursed people (amoral) because of their deviant behavior and indeed must suffer as karma for their sins. Not only in the form of stereotypes, but in many places there are also various human rights violations in the form of stigmatization and discrimination, and even torture and torture. Various human rights violations and the law as illustrated in the end is a social fact that is part of the suffering of infected people and is even a secondary / non-medical cause for their deaths.

Basically, everyone has the right to health. The problem of HIV / AIDS is strongly related to the right to health. The right to health is the main asset of human existence because it is related to the certainty of the fulfillment of other rights, such as education and employment.

Broadly speaking, the HIV / AIDS Law needs to be regulated regarding:

Principles of HIV / AIDS prevention and repetition, namely the principle of humanity, persistence, position in law and government, justice, legal certainty, benefits and gender equality.

The purpose of regulation in law, namely to increase the promotion of clean and healthy behaviors, ensure continuity of efforts to prevent the spread of HIV / AIDS, provide a system of care, support, treatment and assistance to ODHA (HIV patient), organize recovery efforts and improve the quality of life for PLWHA.

Efforts to carry out HIV / AIDS prevention and control.

Protection of people with HIV / AIDS, including: the right to health services, the right to information, the right to confidentiality, the right to medical approval.

³³ Ramli Atmasasmita, *Reformasi Hukum, Hak Asasi Manusia dan Penegakan Hukum*, (Bandung: Mandar Maju, 2001), hlm. 85.

Obligations and prohibitions for people with HIV / AIDS.

The participation of the community, including healthy behavior, increasing family resilience, preventing discrimination against PLWHA, creating a safe and comfortable environment for PLWHA, being active in the activities of promotion, care, support, treatment and assistance to PLWHA.

The purpose of regulation in law, namely to increase the promotion of clean and healthy behaviors, ensure continuity of efforts to prevent the spread of HIV / AIDS, provide a system of care, support, treatment and assistance to PLWHA, organize recovery efforts and improve the quality of life for PLWHA.

Efforts to carry out HIV / AIDS prevention and control.

Protection of people with HIV / AIDS, including: the right to health services, the right to information, the right to confidentiality, the right to medical approval.

II. LITERATURE REVIEW

A. Overview of HIV/ AIDS

1. Development of HIV / AIDS in Indonesia

Indonesians began to recognize HIV and AIDS in 1987, when the first case of this infection was found in Bali. Perhaps before this infection had already existed, but it was unknown. The first reported case occurred in a foreign man who was in the AIDS phase, namely when a number of symptoms of the disease attacked the body due to decreased immunity due to HIV. Noldy found that the notion of human immunodeficiency virus (HIV) is a virus that attacks the human immune system and causes the syndrome to decrease the body's immune system, commonly called acquired immune deficiency syndrome (AIDS).³⁴

Before the Indonesian people reached the level of understanding of HIV / AIDS as it is today, the public's understanding of HIV / AIDS was also formed by news in the mass media both print and electronic media. The understanding of HIV / AIDS by Scortino is divided into the following four paradigms.³⁵

In the first sirlus (1983-1986), HIV / AIDS was considered to be non-existent. Even though at that time a joint team from the University of Indonesia and RSCM had found three people who were HIV positive in 1986.

At that time HIV / AIDS was considered not a problem, even in the news in various mass media it was mentioned that we did not need to worry about HIV / AIDS in Indonesia. This indifference was reinforced by news from abroad about HIV / AIDS among gays in New York, San Francisco and Paris and news about the events of the death of film star Rock Hudson due to HIV / AIDS.³⁶

The second paradigm, states that HIV / AIDS is "a disease of Caucasians". Many moralistic statements condemn Western lifestyles, so that it is said that HIV / AIDS cannot spread in Indonesia whose lifestyle is different from Europe and America. In 1987, the first HIV / AIDS case was reported to be experienced by foreign tourists in Bali and the second case was male Canadian citizens in Jakarta, thus strengthening this paradigm. A strong Indonesian culture is considered to be able to ward off our nation from this "amoral" disease. Because both cases occur

³⁴ Noldy, Yusuf Rey. *Betapa Mahalnya Obat Infeksi Oportunistik*. Lentera. Juli 2006. (Denpasar: Sloka Institute, 2007).

³⁵ Danny Irawan Yatim, *"Dialog Seputar AIDS"*, (Jakarta: PT. Gramedia Widiasarana Indonesia, 2006), hlm. 28-29.

³⁶ Ibid., hlm. 31.

in gay men and they are thought to have had contact with Indonesian men, the perception of this disease has changed.³⁷

The third paradigm, states that the bearers of this disease are not only foreigners, but gay men in general. This also includes transgender people, who by most Indonesians are often equated with gay.

The fourth paradigm is the opinion that HIV / AIDS is a disease of CSWs (Commercial Sex Workers), because in November 1991 there was shocking news about the presence of two commercial sex workers in Surabaya who were HIV positive after surbeing. The notion that HIV / AIDS is a disease of homosexuals is changing and now there is a new stereotype that sex workers are spreading HIV / AIDS.

The results of M. Leennen's (1994) study show that the AIDS epidemic in Indonesia has been on an exponential phase with very rapid growth.³⁸ For each positive HIV / AIDS case detected, there are considered to be one hundred people who have been infected with HIV / AIDS but have not been detected. This is known as the "iceberg phenomenon", the part of the ice that appears above the sea surface or seen, is only a small part, that is, at its peak, while those under the sea or which are not visible, no one can expect it. Likewise with HIV / AIDS cases, only a few are known or reported, while there are actually more people in the community.

1) The Right To Know Theory

The right to know is the right to know all the two-way information between health workers and patients. Information in this sub-chapter emphasizes information about the status of HIV / AIDS, for example if a health worker is infected with HIV / AIDS, then before handling the patient, what should he tell the patient's HIV / AIDS status. And vice versa, when a patient knows that he is infected with HIV / AIDS, he must notify the health worker who checks or treats him.

a) The Right to Know of Patients

One way to transmit HIV / AIDS is through the patient's body fluids, such as blood. Health workers, especially those who often carry out invasive actions on patients, namely medical treatments that can directly affect the integrity of body tissues, such as surgeons, have a high risk of infecting and are infected with HIV / AIDS.³⁹ Doctors who carry out invasive actions on patients, it turns out that they have HIV / AIDS, it becomes a problem. In this case, there are two problems facing each other. Patients on the one hand, are parties prone to contracting HIV / AIDS by the doctor. Therefore, patients need information from the doctor concerned about their HIV / AIDS status.

Patients who know about a doctor's HIV / AIDS status and how they are transmitted, these patients have the right to continue to use the doctor's services or not. On the other hand, if the doctor notifies his / her HIV / AIDS status, the doctor will lose privacy about the disease because maybe the patient in question will tell someone else and eventually the doctor can lose his job. The case that happened in America, a dentist in Florida has infected a patient with HIV infection. In January 1991, the following two patients were

³⁷ Ibid., hlm. 32.

³⁸ J.H. Syahlan et al, *AIDS dan Penanggulangannya*, cet. 3, (Jakarta: Pusat Pendidikan Tenaga Kesehatan, Departemen Kesehatan RI dan The Ford Fondation, 1999), hlm. 20.

³⁹ Direktorat Jenderal Pemberantasan Penyakit Menular dan Penyehatan Lingkungan, *Pedoman Tata Laksana Klinis Infeksi-HIV di Sarana Pelayanan Keehatan*, (Jakarta: Departemen Kesehatan dan Kesejahteraan Sosial RI, 2001), hlm. 9.

infected again by him. The examination showed that the virus strains found in the three patients were the same as those found in the doctor.⁴⁰

Possible that can be explained in the above case is the transfer of the virus into the blood in the circulation of the oral cavity. Viruses can also be transmitted through blood-contaminated instruments from other patients. Failure to change gloves in handling some patients may also occur. The patient filed a claim with the doctor and in the end the doctor was convicted on charges of carrying out a deadly weapon. The event invites debate in medical and legal circles in America, regarding whether a surgeon infected with HIV / AIDS must stop working and about applying the right to know of patients.

b) The Right to Know of Health Workers

Patients with HIV / AIDS who entered the hospital initially did not realize that he had been infected with HIV / AIDS. Generally they go to the hospital because of other infections which are opportunistic infections of HIV / AIDS, such as tuberculosis, pneumonia, karposi sarcoma, and so on. After going through further examinations by health workers, it was discovered that the patient was infected with HIV / AIDS.

Patients who enter the hospital with symptoms of opportunistic infections that indicate HIV / AIDS or those who are at high risk of being infected with HIV / AIDS, such as drug users, commercial sex workers, etc., tests are conducted to find out if the patient is infected with HIV / AIDS, then further treatment and treatment can be hastened.

Patients who go to the hospital and know from the start that they have been infected with HIV / AIDS have a different pattern. In cases like this, not a few of them keep their HIV / AIDS status confidential to the health workers who care for them. The action was carried out because they were afraid that they would not be accepted at the hospital concerned.

Each patient, based on Circular of the Director General of Medical Services No. YM.02.04.3.5.2504 concerning the Guidelines on the Rights and Obligations of patients, doctors, and hospitals on June 10, 1997, has an obligation to provide information honestly and completely about the illnesses suffered by the treating doctors. Still based on the same ederan letter, a doctor also has the right to get complete information from the patient he is caring for or from the family (the right to know).

Complete and honest information from patients about the disease, especially regarding the status of HIV / AIDS will greatly help the health workers, patients themselves and other third parties. This information is useful for anticipating transmission to health workers, other patients and other people who are around the patient, as well as for the treatment of the patient himself.

The edited letter does not regulate matters related to sanctions that can be given to the patient if indeed he is proven to have deliberately concealed his HIV / AIDS status. The Ministry of Health has yet to receive reports of HIV / AIDS transmission to health workers or other patients, as a result of patients suffering from HIV / AIDS who hide their HIV / AIDS status. Until now there has never been a demand from the health workers or the hospital to such patients.

In essence, even if it is proven that there are patients who hide their HIV / AIDS status, it will be very unlikely that transmission will occur to health workers or other patients if health workers always apply universal precaution in dealing with all their patients.

⁴⁰ Herkutanto, *"Aspek Hukum Antara Pengidap AIDS dan Kekhawatiran Masyarakat"*, Makalah Penyuluhan Anti AIDS di Indonesia, (Jakarta, 22 April 2002), hlm. 5.

2) Informed Consent Doctrine

The relationship between patients, doctors and hospitals, besides being shaped as a medical relationship, is also shaped as a legal relationship. As a medical relationship, the medical relationship will be governed by medical rules; as a legal relationship, then the legal relationship will be governed by legal rules. One of the legal institutions in the legal relationship between doctors, patients and hospitals is what is known as an informed consent body.⁴¹

In 2008 PerMenKes No. was enacted. 290/2008 concerning Approval of Medical Measures. The legal rules contained in Permenkes no. 290/2008 is very simple, but the problems are the rules in Minister of Health Regulation no. 290/2008 is still often misunderstood. In addition, there are still many things that have not been regulated in Minister of Health Regulation no. 290/2008, which raises doubts. In terms of informed consent, implicitly included information and consent, namely approval given after the patient is informed. It can be said that informed consent is "informed consent".⁴²

Doctors who take medical actions (i.e. an action taken on a patient in the form of a diagnostic or therapeutic), especially invasive action to the patient, must first provide information about the action and get informed consent from the patient.

Complete and correct information about medical actions must be carried out by a doctor, whether requested or not by the patient.

According to Leenen, the information given in general is a diagnosis, choice of therapy, how the work is used, the experience of the doctor in the case, the immediate or side risks, the pain and unpleasant feeling that may occur, the therapeutic benefits, the possibility the possibility of alternatives and prognosis, the course of the disease, and the origin of the disease.⁴³

This information can be given orally but does not rule out the possibility of information being given in writing. Information is absolutely necessary, because in criminal law is a requirement for granting approval, where approval is a basis for removing the nature of conflict with the law.

Civil law regulates that if a doctor does not provide information, then the doctor concerned can be prosecuted with an unlawful act. Information must be given by the doctor by paying attention to the condition and ability of the patient. Four groups of patients who do not need information from a doctor, namely: first, if therapy requires this, for example Placebo therapy (suggestive therapeuticum). Second, if it is detrimental to the patient, for example a heart disease patient who can experience shock.

Third, if the patient suffers from mental illness so that he cannot be invited to communicate, and fourth, if the patient is not yet mature, then information can be conveyed to the parent or guardian.⁴⁴

⁴¹ Pasal 1 (a) Permenkes no.290/2008 menetapkan: "Persetujuan tindakan kedokteran adalah persetujuan yang diberikan oleh pasien atau keluarga terdekat setelah mendapat penjelasan secara lengkap mengenai tindakan kedokteran atau kedokteran gigi yang akan dilakukan terhadap pasien.

⁴² Hal yang mengatur tentang *informed consent* ini tertuang dalam Peraturan Menteri Kesehatan RI Nomor 290/MENKES/PER/III/2008 tentang Persetujuan Tindakan Medik.

⁴³ Fred Amelyn, *Kapita Selekta Hukum Kedokteran*, Cetakan 1, (Jakarta: Grafikatama Jaya, 1991), hlm. 46.

⁴⁴ *Ibid.*, hlm. 65

New medical actions can be implemented after a doctor provides complete, correct information and obtains consent from the patient in writing (especially for high-risk actions), or verbally.

Approval can be stated directly by the patient or indirectly (for example after the doctor gives information to the patient) to do the injection, the patient immediately rolled his sleeve. Although from the patient's mouth there are no words of refusing or accepting, of course, from that action he can be assumed to approve the medical action). Permenkes No. 290/2008 regulates the very basic provisions, namely as follows:

- Obligations of health workers to provide information, both requested and unsolicited; adequately given the need for medical action and the risks it can cause;
- Information is given orally and the delivery method must be adjusted to the patient's condition and situation. Doctors must provide complete information unless the doctor assesses that the information to be given is detrimental to the patient or the patient refuses to receive information, in this case, with the patient's consent, the doctor can forward information to the closest family of the patient and be accompanied by a nurse / paramedic.

The problem that often arises, is the notion of informed consent itself which is misunderstood by patients, doctors and hospitals. The doctor / hospital is of the opinion that if the patient has given approval for medical action, it means that the doctor / hospital will be free from the demands / claims of the patient, because the consent has been given, meaning the patient has given up the right to sue and vice versa. who have lost the right to sue and sue. The construction of this thinking is wrong, because the agreement given by the patient to the doctor / hospital is an agreement to take medical action on him.⁴⁵

The doctor / hospital must ask the patient for approval, for example if the doctor / hospital performs surgery without the patient's consent can be categorized as an act of abuse and according to civil law the doctor can be sued for having committed an unlawful act. So, there is no need for doctors to force patients to take medical action. If in the implementation of medical action, the doctor makes a mistake / negligence, even though he has.

patient informed consent is given to the doctor / hospital, even if written explicitly in the informed consent form, that the patient agrees not to sue / sue, if something goes wrong, still the doctor / hospital can be sued and / or sued . Can be prosecuted / sued by doctors there is no connection with informed consent, violation of the obligation of informed consent, doctors / hospitals "only" given administrative sanctions in the form of reprimand until revocation of practice permits. In the case of a doctor making a mistake / negligence, then the error / negligence causes harm to the patient, which means there is a causal relationship between errors and losses, the patient has the right to sue / sue the doctor / RS.⁴⁶

Another problem is about the amount of information that can / must be given to patients.

Leenan, a professor of health law from the Netherlands gave an opinion about the content of information that can / should be given to patients: diagnosis, therapy (with possible alternative therapies), about how the doctor works and experiences, risks, the possibility of pain or other feelings (for example hives), therapeutic benefits, and prognosis. Then another problem in providing information is the language used by doctors to convey information. As is known, most patients are laymen in the language of medicine and not all medical terms can be easily translated into the language of ordinary people. The doctor always uses language

⁴⁵ *Ibid.*, hlm. 69

⁴⁶ *Ibid.*, hlm. 71

that is easily understood by patients and patients who do not understand do not hesitate to ask questions to the doctor. The next problem with information, is about the interdependence of families in providing information. Peraturan regulates, information is given to patients, in the event that doctors assess patients will not be able to receive information, then information can be delivered to the closest family, but with permission from the patient. Often doctors give information to the patient's family far more detailed than what is given to the patient, even without the patient's permission. This is the same as opening secret positions and being threatened with criminal penalties.⁴⁷

Minister of Health no. 290/2008 has clearly determined that those who are over 21 years of age / have been married and are mentally conscious and healthy have the right to give consent.

In practice, there are many doctors / hospitals that require in addition to the patient concerned, also the presence of a third party (close family, including husband / wife) who must participate in giving approval. Sometimes the requirement to include a third party (family) creates a problem, namely in the event that there is no agreement between the patient and family regarding the medical action to be carried out. It must be admitted that there are many problems regarding informed consent that make doctors / hospitals very dizzy, also because there are still many things that have not been regulated by the Minister of Health no. 290/2008.

It is better that the government cq the health department form implementing regulations in the form of government regulations regarding informed consent as soon as possible, so that legal uncertainty does not occur, which will ultimately harm patients and doctors / hospitals in particular and the general public.⁴⁸

Doctors who take medical actions, especially for invasive actions without the patient's consent, the doctor can be convicted of persecution based on Article KHUP, because the doctor has injured other people. Therefore, to avoid accusations of persecution, the person who injures gives approval, the medical action is based on a medical indication and is aimed at a concrete goal and the medical action is carried out according to medical science.

The hospital is also responsible for the implementation of informed consent made by the person who works in it for each patient.

Doctors who do not carry out informed consent procedures, the hospital can be held accountable. Approval or rejection from the patient's side of a medical action, the hospital provides a form (both the consent form and the rejection form) that must be signed by the patient and the hospital representative.

Informed consent given to HIV / AIDS patients is the same as ordinary patients. However, there is little additional information that must be given when someone decides to take an HIV test.

The information is in the form of counseling provided by experienced counselors (doctors, nurses, psychologists, social workers and other people who can understand, are encouraged and trained to provide counseling) .⁴⁹

Counseling was done twice, namely before (pre-test counseling) and after (post-test counseling) HIV testing was carried out. Given that HIV / AIDS has a bad stigma from the community and until now no cure has been found, the information provided to patients with

⁴⁷ *Ibid.*, hlm. 75

⁴⁸ Peraturan Menteri Kesehatan RI Nomor 290/MENKES/PER/III/2008 tentang Persetujuan Tindakan Medik

⁴⁹ Fred Amelyn, *Kapita ... op. cit.*, hlm. 81

HIV / AIDS must be accompanied by psychological counseling by the counselor, which is certainly somewhat different from the information given to other patients.⁵⁰

In pre-test counseling, it is discussed about risk behavior, behavior change, about HIV testing itself, the results of the test and the effect on the client and the plan that will be done if the results are positive. Post-test counseling, which is planned is a treatment and support program and behavior change.

Post-test counseling must be carried out even though the test results show negative. The benefit of post-test counseling in this situation is to maintain a negative result by applying an inappropriate behavior.⁵¹

For comparison, in the United Kingdom, adequate pre-test counseling is absolutely given by health workers before taking blood for HIV testing. If not given, it is considered as a negligence and can be processed legally, even though the patient has given consent for the test. Without pre-test counseling, patients will not understand the nature and quality of the action, and the doctor will ethically be guilty of not giving the pre-test counseling.⁵²

2) Obligation to Report Patients with AIDS Symptoms and Medical Confidentiality

Ministerial Instruction No. 72 / MENKES / INST / II / 1988 states that every case of symptoms of AIDS experienced by a person must be reported to related parties only by health workers or health service facilities. Restrictions on those who are obliged to report are caused by two factors. First, it is difficult to find out someone has symptoms of AIDS (someone who suffers from symptoms of AIDS is almost indistinguishable from physically healthy people, therefore an integrated laboratory examination is needed). Second, the protection of confidentiality for sufferers (the protection of the confidentiality of AIDS patients will be easily carried out by health workers, because they are carried out by their oath).⁵³

Health workers who know and / or find someone with symptoms of AIDS, must report to the nearest health care facility immediately and pay attention to the patient's personal confidentiality. Health service facilities that find someone with AIDS symptoms, must immediately report confidentially through certain procedures to the Directorate General of Eradication of Communicable Diseases and Settlement of Environmental Health (Dirjen PPM and PLP).

Reporting carried out by the health workers and the hospital seemed to seem not to pay attention to the patient's rights regarding medical confidentiality (medical secrets). The secret of medicine, according to article 1 of Government Regulation No. 10 of 1966 concerning the obligation to keep medical secrets, is everything that is known by a doctor when doing his work as a doctor. The right to medical secrets includes all the secrets that the patient consciously or unconsciously conveyed to the doctor, and everything that the doctor has known when carrying out his work in the medical field (treating and treating patients).⁵⁴

Data on patients with HIV / AIDS who are treated in health facilities must be kept confidential. Reporting issues as stated in the Minister of Health's Instruction No. 72 / MENKES / INST / II / 1988 concerning the Obligation to Report Persons with Symptoms of

⁵⁰ *Ibid.*,

⁵¹ Samsuridjal Djauzi, "*Prosedur ... op. cit.*", hlm. 5.

⁵² Collin A.M.E.d'Eca, "*Medico-Legal Aspects of HIV Infection and Disease*" dalam AIDS, A Guide to the Law, Haigh, Richard and Dai Harris, ed., (New York: Routledge, 1995), hlm. 115.

⁵³ Agus Hariadi, "*Analisis Isi (Constant Analisis) Terhadap Beberapa Peraturan Perundang-Undangan di Bidang HIV/AIDS*", Majalah Hukum Nasional (Januari 1999), hlm. 184

⁵⁴ *Ibid.*

AIDS, basically having to pay attention to the confidentiality of sufferers' identity (Article 4)

⁵⁵

B. Overview of the Protection of Human Rights

1. Basics of Human Rights

The term human rights is a translation of the *Droits de L 'homme* (France), Human Rights (UK), and *mensekelije rechten* (Netherlands). In Indonesia, human rights are better known as human rights or can also be called fundamental rights.⁵⁶

The term human rights was born monumental since the French revolution in 1789 in the "Declaration des Droits de L 'hommeet du Citoyen" (human rights and French citizens), with the slogan *Liberte* (Independence), *Egalite* (Equality) and *Fraternite* (Brotherhood).⁵⁷

The term rights has many meanings. Rights can be said as something that is right, authority, power to do something, or it can also be interpreted as power to do nothing and so on.

Whereas fundamental means is basic or basic or can also be interpreted as fundamental. So that human rights are basic or basic rights that are owned by humans, such as the right to speak, the right to life, the right to protection and so forth. Human rights are inherent rights to humans naturally. Recognition of human rights is born from the belief that all humans are born free and have the same dignity and dignity between one human being and another human being. In addition, humans are created with reason and conscience, so that humans in treating other humans must be kind and civilized.⁵⁸

According to Prof. Koentjoro Poerbapranoto, human rights are fundamental rights, meaning that the rights possessed by humans are natural and cannot be separated from humans themselves so that they are sacred.⁵⁹

So it can also be said that human rights are the basic rights possessed by someone as a gift from God born from For people who are religious and believe that humans are the gift of God Almighty, human rights are inherent rights to human beings and are rights granted as gifts from God. Because all human rights are given by God, no one can revoke and omit other than God.

So that human rights need to get protection and guarantees by the state or government, and for anyone who violates them, they must get strict sanctions without exception. Scott Davidson⁶⁰ argues that international concern for human rights is a relatively new phenomenon, although we can refer to a number of international agreements that affect humanitarian issues before World War II.

In Indonesia alone, concern about human rights in the period of the Indonesian state administration's agreement, only became evident and lively after the wave of reform in 1998. Before the reform era, the understanding of human rights in Indonesia was still limited to science without being followed real practice.

The description of the concern for human rights as stated by Scott Davidson, in particular the guarantee of systematic human rights protection in the new international system is evident after the enactment of the UN charter in 1945.⁶¹ However, domestic efforts to guarantee legal

⁵⁵ Fred Amelyn, *Op. Cit.*, hlm. 50.

⁵⁶ Budiyanto, *Dasar-Dasar Ilmu Tata Negara*. (Jakarta: Erlangga, 2000), hlm. 56.

⁵⁷ *Ibid.*,

⁵⁸ Masyhur Effendi, *Dimensi dan Dinamika Hak Asasi Manusia dalam Hukum Nasional dan Internasional*, (Jakarta: Ghalia Indonesia, 1994), hlm. 3.

⁵⁹ Budiyanto, *Dasar-Dasar ... op.cit.*, hlm. 58.

⁶⁰ Scott Davidson, *Hak Asasi Manusia*, (Jakarta: PT. Pustaka Utama Grafiti, 1994), hlm 30.

⁶¹ *Ibid.*, hlm. 33.

protection for individuals against excesses the arbitrariness of the ruler of the state has actually existed before international protection of human rights. Furthermore, it was said that all international instruments require that the constitutional system of each country provide adequate compensation to every person whose rights are violated.

Human rights can be declared as a universal paradigm that must be considered by every civilized, democratic and sovereignty government. Every government of a civilized country must include guarantees for the protection of human rights in its constitution. Article 1 of the universal declaration of human rights states that all people are born independent and have the same dignity and rights. They are endowed with reason and conscience and should associate with each other in brotherhood.⁶² Adnan Buyung Nasution said that the declaration of world human rights contained dual meanings, both outside (between nations), and into (intra-nation states).

The meaning of exit is in the form of a commitment to respect and support the dignity and human dignity of nations so that they are protected from falling into disasters in war that can destroy human values while at the same time meaning in understanding that the declaration of world human rights must always be objective criteria by the people of each country in assessing every policy issued by the government.

The view above implies that protection and respect for human rights are not intended solely to citizens, but must be developed and aimed at everyone who is in a country, regardless of whether each person is a citizen or citizen foreign country.

Human rights are important in the constitutional life of a country, because they are an ethical and legal means to protect weak individuals, groups and groups against giant forces in modern society.⁶³ Human rights are important not because they are regulated or given by a country, but because of human consciousness that has dignity and dignity as a virtuous and created creature of God Almighty.

2. Development of Human Rights Thought in Indonesia

The issue of upholding human rights is not only a problem faced by certain countries, but has become a global problem. This means that this problem will always be faced by the international community, including Indonesia. Thus, the issue of human rights contains universal and cross-cultural aspects.⁶⁴

The discourse of human rights is not a foreign discourse in political and constitutional discourse in Indonesia. We can see it clearly in the course of the history of the formation of this nation, where talk of human rights is a part of it. Long before independence, the pioneers of this nation had sparked thoughts to fight for better human dignity and dignity. This fragment of mind can be read in the letters R.A. Kartini entitled "*Habis Gelap Terbitlah Terang*".

Political essays written by H.O.S. Cokroaminoto, Agus Salim, Douwes Dekker, Soewardi Soeryaningrat, petitions made by Sutardjo in the Volksraad or Soekarno's pledoi entitled "Indonesia Sues" and Hatta under the title "Independent Indonesia" read before the Dutch East Indies court. The spark of thought during the independence movement, which was crystallized with Indonesian independence, became a source of inspiration when the constitution began to be debated in the Indonesian Provision for Independence (BPUPKI) Investigative Body. It is here

⁶² Deklarasi Universal Hak-Hak Asasi Manusia, diterima dan diumumkan oleh Majelis Umum PBB pada tanggal 10 Desember 1948 melalui resolusi 217 A (III).

⁶³

⁶⁴ Franz magnis Suseno, *Hak Asasi Manusia Dalam Perspektif Budaya Indonesia*, (Jakarta: Gramedia Pustaka Utama, 1997), hlm. 20.

that the founders of this nation have realized the importance of human rights as a foundation for the state.⁶⁵

This sub-chapter seeks to trace the development of human rights discourse in political discourse and constitutionalism in Indonesia, at least in the period after independence. The discourse on human rights was marked by a very intensive debate in three periods of constitutional history, starting from 1945, as the initial period of human rights debates, followed by the Constituent period (1957-1959) and the early period of the rise of the New Order (1966 - 1968). In these three periods the struggle to make human rights the center of the life of the nation and state took place very seriously.

But unfortunately, in those golden periods, human rights discourse failed to be stated in the basic law of the State or the constitution.

The struggle took a long time to succeed, namely until the coming of the reform period (1998-2000). This period began with the overthrow of Suharto from the seat of the Indonesian President by the reform movement. This is a very "friendly" period for human rights, marked by the acceptance of human rights into the constitution and the birth of legislation in the field of human rights.

In accordance with the explanation above, the following presentation will begin with the first period of discussion. When drafting the UUD 1945 Constitution, there was a debate about whether citizens' rights need to be included in the articles of the UUD ? Soekarno and Supomo proposed that citizens' rights need not be included in articles of the constitution. On the contrary, Mohammad Hatta and Muhammad Yamin firmly argued that it was necessary to include articles on freedom of association, assembly, and issue thoughts in oral and written terms in the Constitution. The debate in the BPUPKI sessions was an important milestone in the discussion of human rights in Indonesia, which provided a basis for the development of the discourse on human rights in the following periods.⁶⁶

In this period of reform there was a re-emergence of debate about the constitutionality of the protection of human rights. Debate is no longer conceptual questions regarding human rights theory, but on the question of its legal basis, is it determined through the MPR TAP or UUD ?

The idea of the Charter of Human Rights which had emerged at the beginning of the New Order reappeared. Likewise the idea to include it in the articles of the Constitution also reappeared in the discourse of the human rights debate at that time. Because of the strong demands of the reform groups at that time, the debate led to the establishment of MPR Decree No. XVII / MPR / 1998 concerning Human Rights. Its contents do not only contain the Charter of Human Rights, but also contain a mandate to the president and high state institutions to promote the protection of human rights, including mandating to ratify international human rights instruments.⁶⁷

With the existence of the MPR Decree No. XVII / MPR / 1998, in 1998 The Indonesian government and various supra components of other political structures take various steps to formulate and implement human rights as stated in the Universal Declaration of Rights Human Rights Article 1 MPR Decree No. XVII / MPR / 1998 explicitly states:

⁶⁵ B. Hestu Cipto Handoyo, *Aspek-Aspek Hukum Administrasi Negara Dalam Penataan Ruang*, (Yogyakarta: Universitas Atam Jaya, 1995), hlm. 19.

⁶⁶ Rhona K.M. Smith et. Al., *Hukum ... op. cit.*, hlm. 238

⁶⁷ Presiden Habibie membuat Rencana Aksi Nasional Hak Asasi Manusia (RAN-HAM) 1998- 2003, yang memuat agenda pemerintahannya dalam penegakan hak asasi manusia, meliputi pendidikan dan sosialisasi hak asasi manusia serta program ratifikasi instrumen internasional hak asasi manusia.

"Affirming to State and all Higher institutions Government apparatus to respect, enforce and disseminate understanding of human rights to all people".

Furthermore Article 2 of the MPR Decree No. XVII / MPR / 1998 states ⁶⁸:

"Assigning the president of the Republic of Indonesia and the House of Representatives of the Republic of Indonesia to ratify various instruments of the United Nations concerning Human Rights insofar as they do not conflict with Pancasila and the UUD 1945".

3. Protection of Human Rights in Law Number 39 of 1999

Undang-Undang Law No. 39 of 1999 is often referred to as a breath of fresh air to guarantee the protection of human rights in Indonesia, although at that time the 1945 Constitution was still considered sufficient to guarantee the protection of human rights. Law No. 39 of 1999 provides more detailed arrangements regarding the promotion and protection of human rights. Based on universal human rights principles as set out in the Universal Declaration of Human Rights, this Law guarantees the protection and implementation of human rights for every citizen. These principles include, **First**, this Law emphasizes the commitment of the Indonesian people to uphold human rights and human freedom (Article 2).

It is stated that the State of the Republic of Indonesia recognizes and upholds human rights and human obligations as natural rights that are inherent and cannot be separated from humans. This right must be protected, respected and enhanced for the sake of enhancing human dignity, prosperity, happiness and intelligence and justice. For this reason, the state is called the main element in the promotion and protection of human rights.⁶⁹

Second, emphasizing the principle of non-discrimination (Article 3 and Article 5). Every person is born with the same dignity and equal, so that they are entitled to recognition, guarantee, protection and equal treatment before the law.

Third, guarantee of protection of rights that cannot be reduced in any situation (Article 4). The rights included in this category are the right to life, the right not to be tortured, the right to personal freedom, mind and conscience, the right to religion, the right not to be enslaved, the right to be recognized as a person, equality of law and the right not to be prosecuted legal basis retroactive.⁷⁰

a. Equality before Law and Impartiality (Article 5)

Everyone has the right to sue and be tried by obtaining the same treatment and protection before the law. Everyone without exception, including those belonging to vulnerable groups, has the right to receive fair assistance and protection from an objective and impartial court.

b. Protection of Indigenous Peoples (Article 6)

The diversity of indigenous peoples in Indonesia who already have customary law which is also part of Indonesian law has contributed to the guarantee of the protection of human rights for the rights of indigenous peoples. In the context of upholding human rights, the differences and needs of indigenous peoples must be considered and protected by law, society and the government. Cultural norms of indigenous peoples, including land rights, must be protected in harmony with the times.

⁶⁸ Majelis Permusyawaratan Rakyat RI, *Ketetapan Majelis Permusyawaratan Rakyat Republik Indonesia Nomor XVII/MPR/1998 Tentang Hak Asasi Manusia*.

⁶⁹ Rhona K.M. Smith et. Al., *Hukum ... op. cit.*, hlm. 254

⁷⁰ Rhona K.M. Smith et. Al., *loc. cit.*

The protection of human rights for indigenous peoples is recognized internationally, including in the International Covenant on Economic, Social and Cultural Rights (KIHESB) or the International Covenant on Economic Social and Cultural Rights (ICESCR).

The cultural diversity possessed by Indonesian indigenous peoples is one of the things that must be protected, but this is limited to indigenous peoples who still strongly hold their adat law firmly, where these rights do not conflict with the principles of a legal state with the core of justice and people's welfare.⁷¹

Protection of customary rights of indigenous peoples has previously been regulated and guaranteed in Law No. 5 of 1960 concerning the Agrarian Law.⁷²

c. National and International Legal Efforts (Article 7)

Everyone has the right to use all national legal remedies and international forums for all human rights violations guaranteed by Indonesian law and international human rights law that have been accepted by Indonesia. What is meant by legal effort is a way which can be taken by any person or group of people to defend and restore their rights provided by Indonesian law.⁷³

In relation to international forums, this Law also does not oppose any efforts made to international forums in the framework of protecting human rights if the efforts made in the national forum do not get a response.

It means that those who want to uphold human rights and basic freedoms are obliged to take all exhaustion of local remedies before using forums at the regional and international levels.⁷⁴

d. Government Responsibilities (Article 8)

The protection, promotion, enforcement and fulfillment of human rights are the responsibility of the government, the 1945 Constitution has also mentioned this.⁷⁵ In its implementation the Indonesian government has made an Action Plan for Human Rights (RANHAM) which includes protection and enforcement efforts. human rights at the central to regional level carried out through education, counseling and outreach both for law enforcement, government agencies, students and students.

Legal guarantees, among others, are carried out by completing various laws and regulations relating to the protection of human rights, among others, by ratifying various international instruments relating to human rights.⁷⁶ But unfortunately even though there have been many international legal instruments ratified by Indonesia, these regulations as if it was "mere decoration" because it was not followed by the establishment and implementation of implementing legislation so that enforcement and protection of human rights were not effective.

⁷¹ Penjelasan Pasal 6 UU Nomor 39 Tahun 1999 tentang Hak Asasi Manusia.

⁷² Pasal 3 UU Nomor 5 Tahun 1960 tentang Pokok-Pokok Agraria berbunyi: "Pelaksanaan hak ulayat dan hak-hak yang serupa itu dari masyarakat-masyarakat hukum adat, sepanjang menurut kenyataannya masih ada, harus sedemikian rupa sehingga sesuai dengan kepentingan nasional dan negara, yang berdasarkan atas persatuan bangsa serta tidak boleh bertentangan dengan undang-undang dan peraturan-peraturan lain yang lebih tinggi.

⁷³ Misalnya oleh Komnas HAM atau oleh pengadilan termasuk upaya banding ke Pengadilan Tinggi ataupun mengajukan kasasi dan peninjauan kembali ke Mahkamah Agung terhadap putusan pengadilan tingkat pertama dan tingkat banding,

⁷⁴ Penjelasan Pasal 7 Undang-Undang Nomor 39 Tahun 1999 tentang Hak Asasi Manusia.

⁷⁵ Pasal 28I ayat (4) UUD 1945 amandemen 2 : *Perlindungan, pemajuan, penegakan dan pemenuhan Hak asasi manusia adalah tanggung jawab negara, terutama pemerintah.*"

⁷⁶ Hal ini pun tertuang dalam RANHAM 2004-2009 yang di antaranya memprogramkan sosialisasi peraturan perundangan yang terkait dengan HAM serta memasukkan HAM dalam kurikulum pendidikan dari tingkat dasar hingga pendidikan tinggi termasuk instansi pemerintah dan militer. Lihat RANHAM 2004-2009.

The government also has an obligation to carry out dissemination regarding the understanding of human rights to the public from various walks of life (both the general public, government agencies, board members, academics, law enforcement practitioners, the armed forces and the police).⁷⁷

4. Human Rights Values (HAM) in the Protection of the Rights of People with HIV / AIDS

Human rights values are a concrete value in community interaction. The aim of human rights is to create harmony and harmony and prevent conflict to a minimum. Discussion on human rights means to discuss the most basic and fundamental human rights. Every human being on earth has the right to protect human rights.

Human rights values have been formulated in the constitution and laws and regulations. In relation to the protection of the rights of people with HIV / AIDS there are three very basic values, namely non-discrimination, tolerance and empathy. The following paragraphs will limit the third understanding of these human rights values.⁷⁸

a. Non-Dictrimation Value

One of the values of human rights that are universal is non-discrimination. however, in reality there is still discrimination, because there are negative views that treat someone unfairly based on their prejudice on someone's "vulnerable group" status. Behavior that shows that discrimination can be seen from the behavior of hospital staff who refuse to provide health services to people with HIV / AIDS. Behavior discrimination can also be seen from the attitude of superiors who provide their employees based on their status or prejudice on their HIV status, or their families / communities who reject those who live, or are believed to live, with HIV / AIDS.⁷⁹

Behavior that shows that discrimination can be seen from the behavior of hospital staff who refuse to provide health services to people with HIV / AIDS. Discrimination behavior can also be seen from the attitude of superiors who provide their employees based on their status or prejudice on their HIV status, or their families / communities who reject those who live, or are believed to live, with HIV / AIDS. Such acts of discrimination are a form of violation of human rights and of course acts of discrimination like this conflict with Law 39 of 1999 concerning Human Rights.

Theoretically, there are two forms of discrimination, namely institutional and individual. Individual discrimination, namely being unfair to others is only for personal reasons. This discrimination is usually carried out by individuals, as well as a teacher who does not pay attention to a child.

While institutional is an unfair treatment of a person or group of people from a certain group, especially from a group minority, within government or private institutions or organizations.⁸⁰

b. Tolerance Value

Understanding in general, tolerance is a term in a social, cultural and religious context which means attitudes and actions that prohibit discrimination against groups that are different or cannot be accepted by the majority in a society.

⁷⁷ *Ibid.*,

⁷⁸ Penjelasan UU Nomor 39 Tahun 1999 tentang Hak Asasi Manusia

⁷⁹ Suharso dan Anna Retnoningsih, *Kamus Besar Bahasa Indonesia*, (Semarang: Penerbit Widya Karya, 2009), hlm. 579.

⁸⁰ *Ibid.*, hlm. 133

An example is religious tolerance, where adherents of a majority in a society permit the existence of other religions. The term tolerance is also used by using a broader definition of "group", for example political parties, sexual orientation, and others. Until now there are still many controversies and criticisms regarding the principles of tolerance, both from liberals and conservatives.

Understanding from the perspective of HIV / AIDS, tolerance is a value that is implemented in attitudes and actions that provide protection for the rights of sufferers of HIV / AIDS. Meanwhile, empathy is a caring attitude towards the rights of people with HIV / AIDS. While non-discrimination is a value that does not provide equal treatment and does not discriminate between people with HIV / AIDS.

Every person is born free with equal and equal human dignity and dignity and is gifted with reason and conscience to live in a society, nation, and state in the spirit of brotherhood. The sentence stated in Article 3 paragraph 1 of Law Number 39 of 1999 means that every human being born before this earth is guaranteed freedom and independence without any other party having the right to disturb or uproot it because it is a gift given directly by God along with its existence in the world.⁸¹

The substance of the article is in line with those stated in Article 1 of the Universal Declaration of Human Rights (UDHR) which states that all people are born independent and have the same dignity and rights. They are blessed with reason and conscience and should associate with each other in brotherhood.

Furthermore Article 2 of the Universal Declaration states that every person has the right to all the rights and freedoms contained in this Declaration with no exceptions, such as differences in race, color, sex, language, religion, politics or other views, origins nationality, community property, birth or other position. From the elaboration of the article, it is increasingly clear that in carrying out the rules regarding human rights, there must be no exceptions with any reason.

A value taken for granted in human rights is tolerance (tolerance). Tolerance comes from Latin *tolerare*, meaning restraint, being patient, letting people think differently, and being broad-minded towards people who have different opinions. A tolerant attitude does not mean justifying the allowed view, but acknowledging the freedom and human rights of the adherents.

In the declaration of the principles of tolerance of UNESCO, it was stated, "Tolerance is the appreciation, acceptance and respect for the diversity of humanitarian ways, forms of expression and culture".

Tolerance means to endure without protest. Tolerance is a value itself and not just a lower ugliness that must be tolerated under certain conditions.

In the Big Indonesian Dictionary, tolerance means broadness of the chest or getting along well with anyone, letting people argue or have other opinions, not wanting to interfere with other freedom of thought and belief.

True tolerance is based on respect for human dignity, conscience and the sincerity and sincerity of any other religion, ethnicity, class, ideology, or viewpoint. A tolerant person dares to conduct interviews or dialogue with an open attitude to seek understanding and truth in the experience of others, to enrich his own experience without sacrificing the principles he believes.

c. Empathy Value

⁸¹ *Ibid.*, hlm. 492.

In the Big Indonesian Dictionary, empathy means a mental state that makes a person feel or identify himself in the same state of feeling or thought as someone else.

Empathy is very much related to sympathy, namely love, agreeing or a tendency towards attitude towards certain conditions. Sympathizing means putting love on someone's condition.

Meanwhile, empathy is the ability to understand others, as if they were themselves. The ability to understand the way of thinking, argumentation and appreciation of others. Empathy is the manifestation of human affection. Imagine if there was no empathy in the world, there would be no friendship, kinship, love, love and justice. Empathy is defined as a complex affective and cognitive response to other people's emotional distress. Sympathetic empathy and trying to solve problems, and take the perspective of others.

Simply stated, it can be empathetic to do (have) empathy. Technically it can be stated if someone is able to understand the feelings and thoughts of others, meaning that he is capable. If empathy is interpreted literally that by empathizing, someone enters into another person and becomes someone else to be able to feel and appreciate others, then an assessment arises that it is impossible that the person can do it without breaking away from himself, so that there is me and I come out and become someone else.

This is also impossible if it occurs in ordinary circumstances because if it happens it means there is a division (splits personality, schizophrenia) which actually becomes a sign of a serious obstacle in a person's personality. On the side, empathy is an effective way of trying to recognize, understand and evaluate others because it is possible.

III. SUMMARY

Based on a review study providing protection for people with HIV / AIDS conclusions can be formulated as follows:

1. Law on the field of human rights, namely Law Number 11 of 2005 concerning Ratification of the International Covenant on Economic, Social and Cultural Rights and Law Number 12 of 2005 concerning Ratification of the International Covenant on Civil and Political Rights has reflected social values in the form of tolerance and non-discrimination . However, in the Law there has not been any empathy because there is no attitude that gives concern to people with HIV / AIDS. This is because the Act is not directly related to the problem of HIV / AIDS. Whereas in Law Number 36 of 2009 concerning Health, Law Number 29 of 2004 concerning Medical Practice, and Law Number 44 of 2009 concerning Hospitals. it already reflects social values in the form of empathy and tolerance. However, in reality there are still many practices in hospitals that have the potential to harm the human rights of patients, including those with HIV / AIDS.
2. Health workers have not fully functioned to provide protection for the rights of sufferers of HIV / AIDS. In fact, people with HIV / AIDS often experience various discrimination, no empathy, no protection and other negative treatment.

Hospitals sometimes reject patients affected by this virus, delay treatment, violate patient confidentiality. Another fact, the operation could be canceled because it was suspected that the candidate who would be operated on had HIV / AIDS. This is due to the lack of understanding of the rights of sufferers of HIV / AIDS, which makes a person prejudiced against HIV / AIDS sufferers. In addition, an economic culture is also formed in the handling of a patient. Some hospitals are of the view, if handling patients suffering from HIV / AIDS other patients will be left out of fear of contracting it.

3. The legal substance and behavior of health workers in the Hospital has not fully functioned in encouraging the birth of a culture of protection of the rights of HIV / AIDS sufferers. The Hospital has not fully reflected the values of tolerance, empathy and non-discrimination.

Protection of the rights of people with HIV / AIDS should be reflected in the substance of the regulation and behavior of health workers in hospitals. However, at present the protection of the rights of new HIV / AIDS sufferers is reflected in the health status of people living with HIV / AIDS, arrangements for making prior consent for examinations, and equality of health services are a must. On the other hand, health workers have not been able to implement the principle of equality before the law and the principle of non-discrimination before the law for people with HIV / AIDS. HIV / AIDS sufferers are often exiled, get cynical views and avoid if they meet even with the family. The sufferers of social relations from the community are feeling depressed, humble and aloof.

REFERENCES

- Aboagye-Kwarteng, Tamara dan Rob Moodie, ed, *Tindakan Masyarakat dalam Menangani HIV- Buku Pedoman bagi Pencegahan dan Perawatan HIV*, Cetakan Pertama, Melbourne: Aus AID, 1997.
- Aggleton, Peter. *Comparative Analysis: Research Studies from India and Uganda, HIV and AIDS-related Discrimination, Stigmatization and Denial*, United Kingdom: Thomas Coram Research Unit, Institute of Education, University of London, 2000.
- Agus, Budi Riswandi dan M. Syamsudin. *Hak Kekayaan Intelektual dan Budaya Hukum*, Jakarta: PT. Raja Grafindo Persada, 2004.
- Amelyn, Fred. *Kapita Selekta Hukum Kedokteran*, Cetakan Pertama, Jakarta: Grafikatama Jaya, 1991.
- Amirin, Tantang. *Pokok-pokok Teori Sistem*, Jakarta: Raja Grafindo Persada, 2003.
- Ann, Mary, Torres. *Public Health And International Law: The Human Right to Health, National Courts, and Access to HIV/AIDS Treatment: A Case Study from Venezuela*, Chicago Journal of International Law, Chicago: Spring, 2002.
- Arief, B. Sidharta. *Refleksi Tentang Struktur Ilmu Hukum: Sebuah Penelitian tentang Fondasi Filosofis dan Sifat Kelilmuan Ilmu Hukum sebagai Landasan Pengembangan Ilmu Hukum Nasional Indonesia*, Bandung: Mandar maju, 2000.
- Arief, Dikdik M. Mansur dan Elisatris Gultom. *Urgensi Perlindungan Korban Kejahatan Antara Norma dan Realita*, Jakarta: RajaGrafindo Persada, 2007.
- Atmasasmita, Ramli. *Reformasi Hukum, Hak Asasi Manusia dan Penegakan Hukum*, Bandung: Mandar Maju, 2001.
- Azra, Azzyumardi. *Demokrasi Hak Asasi Manusia Masyarakat Madani*. Jakarta: Prenada Media, 2003.
- Budiyanto. *Dasar-Dasar Ilmu Tata Negara*. Jakarta: Erlangga, 2000.
- Budiyono, Kabul. *Pendidikan Pancasila untuk Perguruan Tinggi*, Bandung: Alfabeta, 2009.
- Buyung, Adnan Nasution. *Instrumen Internasional Pokok-Pokok Hak-Hak Asasi Manusia*, Jakarta: Yayasan Obor, 2006.
- Brugink, J.J.H. *Refleksi tentang Hukum*, terjemahan Arief Sidartha, Bandung: PT Citra Aditya Bakti, 1999.
- Campbell, Henry. *Black Law Distionary*, St. Paul: West Publishing co, 1990.
- Citrawinda, Cita Priapantja. *Budaya Hukum Indonesia Menghadapi Globalisasi: Studi Kasus perlindungan Rahasia Dagang di Bidang Farmasi*, Jakarta: Universitas Indonesia, 1999.
- Darmodihardjodan, Dardji dan Shidarta. *Penjabaran Nilai-Nilai Pancasila dalam Sistem Hukum Indonesia*. Jakarta: Raja Grafindo, 1996.
- Davidson, Scott. *Hak Asasi Manusia*, Jakarta: PT. Pustaka Utama Grafiti, 1994.

- Direktorat Jenderal Pemberantasan Penyakit Menular dan Penyehatan Lingkungan. *Pedoman Tata Laksana Klinis Infeksi-HIV di Sarana Pelayanan Kesehatan*, Jakarta: Departemen Kesehatan dan Kesejahteraan Sosial RI, 2001.
- Djauji, Samsuridjal. “*Prosedur Tes HIV*”, Support (Februari 2001).
- Djumhana, Muhammad. *Hukum Ekonomi Sosial Indonesia*, Bandung: PT. Citra Aditya Bakti, 1994.
- Djoerban, Zubairi. *Antara HAM dan HIV*, Health-Kompas, Jakarta, 1 Desember 2011.
- -----, *Membidik AIDS: Ikhtiar Memahami HIV dn ODHA*, Yogyakarta: Galang Press dan Yayasan Memajukan Ilmu Penyakit Dalam, 2000.
- Effendi, Masyhur. *Dimensi dan Dinamika Hak Asasi Manusia dalam Hukum Nasional dan Internasional*, Jakarta: Ghalia Indonesia, 1994.
- Friedman, Lawrence M. *The Legal System: A Social Science Perspective*, New York: Russell Sage Foundation, 1975.
- Ginting, Grenaldo. “*Hak Paten Untuk Memperoleh Pelayanan Kesehatan Di Rumah Sakit Ditinjau Dari Hak Asasi Manusia*”, Jurnal Hukum, Edisi Khusus No. 2 Vol. II, (2014).
- Grover, Anand. *HIV/AIDS and The Law*, New Delhi: Speech at the National Human Rights Conference, 2000.
- Grusin, Sofia dan Daniel Tarantola. *Health and Rights* dalam *The Oxford Textbook of Public Health*, 4th ed. Edited by Detels, United Kingdom: Oxford University Press, 1997.
- Hadiati, Hermien Koeswadi. *Hukum Kedokteran: Studi tentang Hubungan Hukum dalam mana Dokter Sebagai Salah Satu Pihak*, Bandung: Citra Aditya Bakti, 1998.
- -----, *Hukum Untuk Perumahan*, Bandung: Citra Aditya, 2001.
- Hariadi, Agus. “*Analisis Isi (Content Analysis) Terhadap Beberapa Peraturan Perundang-Undangan di Bidang HIV/AIDS*”, Majalah Hukum Nasional (Januari 1999).
- Herkunto. “*Aspek Hukum Antara Pengidap AIDS dan Kekhawatiran Masyarakat*”, Makalah Penyuluhan Anti AIDS di Indonesia, (Jakarta, 22 April 2002).
- Hestu, B. Cipto Handoyo. *Aspek-Aspek Hukum Administrasi Negara Dalam Penataan Ruang*, Yogyakarta: Universitas Atma Jaya, 1995.
- Indonesia. Peraturan Menteri Kesehatan RI Nomor 290/MENKES/PER/III/2008 tentang Persetujuan Tindakan Medik.
- Indonesia. Keputusan Presiden Nomor 36 Tahun 1994 tentang Pembentukan Komisi Penanggulangan AIDS (KPA)
- Indonesia. Majelis Permusyawaratan Rakyat RI, *Ketetapan Majelis Permusyawaratan Rakyat Republik Indonesia Nomor XVII/MPR/1998 Tentang Hak Asasi Manusia*.
- Indonesia, Undang-Undang Dasar 1945.
- Indonesia, Undang-Undang Republik Indonesia Nomor 39 Tahun 1999 tentang Hak Asasi Manusia.
- Indonesia, Undang-Undang Republik Indonesia Nomor 11 Tahun 2005 tentang Pengesahan *International Covenant on Economic, Social and Cultural Rights* (Konvenan Internasional tentang Hak-Hak Ekonomi, Sosial dan Budaya).
- Indonesia, Undang-Undang Nomor 12 Tahun 2005 tentang Pengesahan *International Covenant on Civil and Political Rights* (Konvenan Internasional tentang Hak-Hak Sipil dan Politik).
- Indonesia, Undang-Undang Republik Indonesia Nomor 36 Tahun 2009 tentang Kesehatan.
- Indonesia, Undang-Undang Republik Indonesia Nomor 29 Tahun 2004 tentang Praktik Kedokteran.

- Indonesia, Undang-Undang Republik Indonesia Nomor 36 Tahun 2014 tentang Tenaga Kesehatan.
- Indonesia, Undang-Undang Republik Indonesia Nomor 44 Tahun 2009 tentang Tenaga Rumah Sakit.
- Irawan, Danny Yatim. *"Dialog Seputar AIDS"*, Jakarta: PT. Gramedia Widiasarana Indonesia, 2006.
- Irsan, *Membangun Masyarakat Memberdayakan Rakyat Kajian Strategi Pembangunan Kesejahteraan Sosial*. Bandung: Refika Aditama, 2005.
- Jarvis, Robert M. Michael L. Closen, Donald H.J. Hermann, Arthur S. Leonard. *AIDS Law in a nut Shell*. USA: West Publishing Co., St. Paul Minnesota, 1991.
- Justice, Hon. Michael Kirby AC CMG. *"Courts and Judges in the Era of HIV/AIDS (adapted and updated from earlier version published in DC Jayasuriya"*, *HIV Law, Ethics and Human Reghts*, New Delhi: UNDP, 1995.
- Kaelan. *Pendidikan Pancasila*, Yogyakarta: Paradigma, 2010.
- Kementerian Kesehatan RI. *Laporan Perkembangan HIV-AIDS Triwulan IV Tahun 2015*, Direktorat Jenderal Pengendalian Penyakit dan Penyehatan Lingkungan, Jakarta: DITJEN PP & PL, 2015.
- Kasim, Ifdhal dan Johanes de Masenus Arus (Editor). *Hak Ekonomi, Sosial, Budaya Esai-Esai Pilihan*, Buku 2, Lembaga Studi dan Advikasi Masyarakat (ELSAM), 2001.
- Kusuma, RM. A.B. *Lahirnya Undang-Undang Dasar 1945*, Jakarta: Penerbit Fakultas Hukum Universitas Indonesia, 2004.
- Kusnardi, Moh. dan Bintan Saragih. *Susunan Pembagian Kekuasaan Menurut Sistem UUD 1945*, Cetakan Ketujuh. Jakarta: Gramedia, 1994.
- Kusumaatmadja, Mochtar. *Hubungan Antara Hukum Dengan Masyarakat: Landasan Pikiran, Pola dan Mekanisme Pelaksana Pembaruan Hukum*, Jakarta: BPHNLIPI, 1976.
- Komisi Penanggulangan AIDS. *Laporan Komisi Penanggulangan AIDS Nasional periode Januari-Juni Tahun 2011*, Jakarta: Komisi Penanggulangan AIDS Nasional, 2011
- -----, *Strategi Nasional Penanggualangan HIV/AIDS 2003-2007*. Jakarta: Kementerian Koordinator Bidang Kesejahteraan Rakyat Komisi Penanggulangan AIDS Nasioal, 2003.
- Kremalis, K.D. *The Right to Health Protection-From the Health Insurance Schemes of Social Security to the Uited Health Service System* (Athens, 1987).
- Laksanto, Stefanus Utomo. *Budaya Hukum Masyarakat Samin*, Bandung: PT Alumni, 2013.
- Leonard, Arthur A. *United States AIDS Law: Pragmatism dan Politics, Legal Responses to AIDS in Comparative Perspective*, (Stanislaw Fronkowski (ed), Kluwer Law Internastional: 1998).
- Magnis, Franz Suseno. *Hak Asasi Manusia Dalam Perspektif Budaya Indonesia*, Jakarta: Gramedia Pustaka Utama, 1997.
- Maluwa, Miriam. *HIV/AIDS and Human Rights: The Role of National Human Rights Institutions in the Asia Pacific* Melbourne: tanpa penerbit, 2001.
- Mertokusumo, Sudikno. *Mengenal Hukum: Suatu Pengantar*, Yogyakarta: Liberty, 2005.
- Mulya, T. Lubis. *In Search of Human Rights: Legal-Political Dilemmas of Indonesia"s New Order, 1966-1990*, Jakarta: Gramedia Pustaka Utama, 1993.
- Nygren-Krug, Helena. *25 Questions and Answers on Health and Human Rights*, (World Health Organization, 2002).

- Oscar, Silalahi Parulian. *Bagaimana menyikapi HIV dan AIDS*. Lentera, November 2006. (Denpasar. Sloka Institute, 2007).
- Oxford Advanced Learner's Dictionary, Sixth Edition, London: Oxford University Press, 2009.
- Piot, Peter. "*Human Rights dan HIV/AIDS*" *Speech to the United Nations Human Rights Commission, Joint United Nations Programme on HIV/AIDS*, (April 1996).
- Purwadarmita, W.J.S. *Kamus Umum Bahasa Indonesia*, Jakarta: Balai Pustaka, 2003.
- Pratomo, Eddy. *Hukum Perjanjian Internasional Pengertian, Status Hukum dan Ratifikasi*, Bandung: PT. Alumni, 2011.
- Rahardjo, Satjipto. *Hukum Dan Masyarakat*, Bandung: Angkasa, 1984.
- -----, *Hukum dalam Perspektif Sejarah dan Perubahan Sosial dalam Pembangunan Hukum dalam Perspektif Politik Hukum Nasional*, Jakarta: Rajawali Press, 1996.
- Rasjidi, Lili dan I.B Wyasa Putra. *Hukum Sebagai Suatu Sistem*, Bandung: CV. Mandar Maju, 2003.
- Republika, 01 Desember 2015 Richter, Dana. *Medical Professionals and Their Refusal to Treat HIV/AIDS Patient*, Washington University, Seattle: Law and Psychology Review, 1999.
- Rifai, Ahmad. *Penemuan Hukum oleh Hakim Dalam Persepektif Hukum Progresif*, Jakarta: Sinar Grafika, 2011.
- Salim, H. HS dan Erlies Septiana Nurbaini. *Penerapan Teori Hukum Pada Penelitian Tesis dan Disertasi*, Jakarta: Rajawali Pers, 2013.
- Soekanto, Soerjono & Sri Mamuji. *Penelitian Hukum Normatif, Suatu Tinjauan Singkat*, Jakarta: CV. Rajawali, 2001.
- Soeweno, Inten. *Kapita Selekta Kesejahteraan Sosial*. Jakarta: Bumi Aksara, 1988.
- Smith, Rhona K.M. et. Al., *Hukum Hak Asasi Manusia*, Cetakan Pertama.
- Yogyakarta: Pusat Studi Hak Asasi Manusia Universitas Islam Indonesia, 2008.
- Stephen, F. Wignall MD, *Health and Human Rights: HIV/AIDS (Family Health Internasional, Aksi STOP AIDS)*, Semiloka Kesehatan dan Hak Asasi Manusia, Uplift International, IDI dan University of Washington School Of Law, Jakarta, Maret 2003
- Suharso dan Anna Retnoningsih. *Kamus Besar Bahasa Indonesia*, Semarang: Penerbit Widya Karya, 2009.
- Sundari, Siti Rangkuti. *Hukum Lingkungan dan Kebijakan Lingkungan Nasional*, Surabaya: Airlangga University Press, 2000.
- Syahlan, J.H. et al. *AIDS dan Penanggulangannya*, Cetakan ketiga, Jakarta: Pusat Pendidikan Tenaga Kesehatan, Departemen Kesehatan RI dan The Ford Foundation, 1999.
- Syamsudin, M. *Konstruksi Baru Budaya Hukum Hakim Berbasis Hukum Progresif*, Jakarta:-, 2012.
- Wahjono, Padmo. *Indonesia Negara Berdasarkan Atas Hukum*, Jakarta: Ghalia Indonesia, 1986.
- Warassih, Esmi Pujirahayu, *Budaya Hukum Pancasila*, Yogyakarta: Tahafamedia, 2014.
- Wignyosoebroto, Soetandyo. *Hukum (Paradigma Metode dan Dinamika Masalahnya)*, Jakarta: Elsam Huma, 2002.
- Yusuf, Noldy Rey. *Betapa Mahalnya Obat Infeksi Oportunistik*. Lentera.Denpasar: Sloka Institute, 2007.

LEGAL ANALYSIS ABOUT LOSS AUTHORITY IN THE NO. 38/2014 ABOUT NURSING

Agus Sutarman

Student of Legal Studies Doctor Program, Universitas Borobudur

agus_sutarman53@yahoo.com

Abstract

Law No. 38 of 2014 concerning Nursing (hereinafter referred to as the Nursing Law), provides legal protection for nurses in Indonesia and regulates the limits of authority in nursing practices aimed at improving the nurse's scientific quality and nursing practice. Nurses are authorized to perform limited medical action services based on delegation or mandate from a doctor. Every medical action must fulfill the requirements stipulated in the Minister of Health Regulation as the implementation of the Nursing Law and based on nurses' competence in medical intervention. The purpose of this study is to analyze the procedure for delegating the authority of medical action from doctors as medical personnel to nurses. As is usual, both doctors and nurses are reluctant to comply with procedures for delegating mild clinical assignments and most of them do not realize that the procedure is a diagnostic procedure that nurses should not do. Practically licensed doctors and nurses often carry out the abundance of medical action tasks and today are increasingly being encountered, such as examples of abundant injecting assignments, wound dressing, removing stitches and immunization. There are no clear limits on the types of actions that can be performed by nurses in medical action, on the contrary abundant tasks in these medical actions often lead to undesirable events that are even fatal, nurses need additional training before carrying out the abundant task. It is very dangerous if the abundant task is carried out by someone who is not trained. Delegation of medical action should pay attention to patient safety and comfort. This study uses a normative juridical method that is legal clinical research (prescriptive normative) with a literature study and case study approach, secondary data collected from primary legal materials such as law invite and decision cases number 1165 / Pid.B / 2010 / PN.SDA, 1166 / Pid.B / 2010 / PN.SDA and 1167 / Pid.B / 2010 / PN.SDA as well as interviews with legal advisors who handle cases of delegation of authority medical action from doctors to nurses. The results of this study indicate the limited regulation of medical procedure procedures based on delegation or mandate from doctors. Policy makers in health services should make provisions and implementation guidelines based on legislation that regulates the procedure of delegation of authority along with its limitations.

Keywords: Authority, delegation, procedure, medical action, case decision.

A. INTRODUCTION

Health efforts are a series of activities carried out in an integrated, integrated and sustainable manner to maintain and improve the health status of the community in the form of disease prevention, health improvement, disease treatment and health recovery by the government and by the community. Health services, which are a form of health efforts, are categorized as individual health services and public health services. Then the health service includes activities with a promotive, preventive, curative, rehabilitative and palliative approach.

The authority to administer health services lies with Health Workers. Health personnel in question must have the authority to provide health services in accordance with their expertise and has permission from the government. In carrying out their professional duties, a Health Worker needs to hold on to authority. Health workers who can take medical action are Medical Personnel. Medical personnel are

part of the Health Workforce consisting of doctors, dentists, specialist doctors, and specialist dentists. Doctor's authority as one of the main components of health service providers to the community according to Article 35 of Act No. 29 of 2004 is one of which is to take medical / medical actions. The limited number of doctors raises the need for support from supporting staff in carrying out their duties. In 2014, the ratio of general practitioners was 16 , 18 per 100,000 population, lower than the predetermined target, namely forty general practitioners per 100,000 population. Not one province in Indonesia has fulfilled target set. Provinces with the highest ratio of general practitioners to 100,000 population are in North Sulawesi, North Kalimantan and Aceh Provinces. While the lowest ratio of general practitioners per 100,000 population is found in the provinces of West Java, East Java and Lampung.

Nursing staff is a Health Worker who contributes to the improvement of health status but his duties and authority are only limited to providing nursing care and does not have the authority to take medical action on his own initiative, except when he has received an abundance of written assignments from the doctor, and or in an emergency.

Minister of Health Regulation Number 2052 / Menkes / Per / C / 2011 concerning Permit for Practice and Implementation of Medical Practices in Article 23 paragraph (1) states that "doctors or dentists can provide delegation of medical or dental actions to nurses, midwives, or certain other Health Workers in writing in carrying out medical or dental actions. " Article 73 paragraph (3) of Law Number 29 Year 2004 concerning Medical Practice provides an opportunity especially for nurses to take medical action if they comply with statutory provisions.

Nurses are the most numerous Health Workers in Indonesia, which are 281,111 people. But unfortunately, nurses do not seem to really understand the aspects of health law, especially those concerning legal rules governing nursing practice, including the authority of nurses. This condition can be seen from the results of Hariyati (1999) research at Bhakti Yudha Depok Hospital, stating that 64 , 29 % of nurses surveyed had a low level of knowledge about the legal aspects of nurse practice.

The author is interested in writing about this topic because the delegation of the authority of medical action by doctors to nurses is considered a general action and both doctors and nurses do not know the legal responsibility for the devolved action.

B. RESEARCH METHODS

The research method used is descriptive research which is a comprehensive study of analysis of secondary data. This research was analyzed based on books, journals and laws and regulations. Theories regarding medical personnel, nursing staff and delegation of authority are compiled to be then compared with Decision 1167 / Pid.B / 2010 / PN. Regional. The results of the study are then presented in full, clear, detailed and systematic about the discussion of the problem.

C. PROBLEM FORMULATION

Based on the background of the problems described earlier, the authors formulated several problems as follows:

- a. How does a positive law regulate the delegation of authority of medical personnel to nurses as health workers ?
- b. How is the legal responsibility of a medical action delegated but not lege artis or giving the wrong result?

D. DISCUSSION

1. Position Case

Case with Decision Number: 1167 / Pid.B / 2010 / PN. Regional Court charged Setyo Mujiono, a man born in Lamongan on June 18, 1984 (26 years), an Indonesian national and residing in

Tenggiring Village RT.01-RW. 01 Kec. Sambeng, Kab. Lamongan. Setyo Mujiono is a Muslim and works as an employee at the Krian Husada General Hospital and has the last diplomat 3 education (D.3) and hereinafter referred to as the Defendant. The defendant was accompanied by a legal advisor who was an Advocate from "Law Firm & Legal Consultant BAMBANG SOETJIPTO, SH., M.Hum., & ASSOCIATES".

The defendant was a nurse at the Krian Husada Hospital and worked based on the Nurse Work Permit No. 552.42 / 632 / Prw / 404.3.2 / 2008 dated July 10, 2008. The defendant was caught in a Criminal case because his negligence or negligence in carrying out a job or search caused another person to die. On April 29, 2010 on Wednesday at around 7:00 p.m., the defendant arrived a patient named Dava Chayanata Oktaviano who was subsequently referred to as a victim due to diarrhea and bloating. Victims directly handled by dr. Wida Parama Astiti as a doctor. The next day, at the request of the parents of the victims who were worried because their children were still complaining of stomach pain, Dr. Wida took medical action to the victim by ordering the Defendant to inject 12.5 ml Kcl because of Dr. Wida is handling another patient on the 1st floor while the Defendant is on the 2nd floor (where the victim was treated). The defendant then asked an apprentice student named Dewi Ayu Yulmasari to inject Kcl with the victim.

As a result of the defendant's negligence resulted in the death of the cowboy who was 3 (three) years old. Visum Et Repertum Jenasah No. Kf: 10.341 dated April 29 explained that there is an imbalance of electrolyte levels in the body which means that there has been sudden (acute) tissue damage and found an increase in potassium levels which are very high up to 8 times the normal which implies the heart is working harder so it is not strong and stop causing death to the victim. In this case, the information obtained from witnesses and experts, the evidence of the letter and the information at the trial are as follows:

- a. The defendant was a nurse at the Krian Husada General Hospital since 2007 with a nurse academy education;
- b. A 3-year-old boy named Dava Chayanata Oktaviano was hospitalized at Krian Husada General Hospital because of diarrhea and flatulence;
- c. The doctor has given the drug to the victim in the form of syrup by drinking it but the patient refuses;
- d. The victim's family requested to give the drug in the form of an injection to eliminate the bloated stomach of the victim to the defendant. The defendant conveyed the matter to Dr. Wida and Dr. Wida still recommends giving medicine by mouth and eucalyptus oil;
- e. The victim's family (the victim's grandmother) still insisted on giving the medicine by injection.
- f. Finally, Dr. Wida told the defendant to inject 12.5 Cc of KCL to the victim. However, because the size of the syringe is only 10 Cc, the defendant enters the Kcl in the spuit 10 Cc and the deficiency of 2.5 Cc will be proposed.
- g. The defendant entered the Kcl into the Spuit and ordered Dewi to inject the victim and monitor the Dewi from a distance of approximately 3 meters.
- h. After the injection, the patient experiences convulsions and his body turns blue. dr. Wida then did a pacemaker but 20 minutes later the patient was no longer helped and was declared dead.
- i. It is known that the defendant did not for the first time order the apprentice student to inject drugs to the victim on the grounds of being a coaching practice and always succeeding well;
- j. The defendant knew that as a form of peace made by the hospital, the hospital has given the money to the parents of Rp.150.000.000 patients, 00(one hundred and fifty million rupiah) and have achieved peace between the two sides.

In the judgment of the Panel of Judges that the defendant had violated Article 359 of the Criminal Code in conjunction with Article 361 of the Criminal Code whose elements included, among others, the witness Dr. Wida confirmed that he ordered the defendant to inject Kcl but the defendant on his own initiative administered an apprentice student to inject victims. Dr. H. Agus Moch Algozi, Spd (K) DEM, SH explained that potassium chloride can be used to eliminate flatulence. But if it is done by injection or through a vein bolus that can stop the heart's performance. Dr. Agus also said that the actions taken by doctors were right and nurses were allowed to delegate the injections to student interns. Dr. Agus also explained that even if he was not injected by an apprentice child, the reaction given by KCL would be the same as death.

So look from experts in the above description, the judges found the accused is already executing on doctors' orders, and the death of the child patients were not for the injection, but because capacity is only 10 cc syringe is still under doctor's instructions that should be 12, 5 Cc so as dr. Wida has the authority to order the defendant and the defendant to only carry out the order, so there is no lawlessness in his actions. So from these considerations the judges found the accused guilty but innocent actions that can not be convicted. So that the Panel of Judges adjudicated that the accused Setyo Mujiono in this case was proven to have committed an indictment but was not found a criminal offense.

E. CONCLUSION

Based on the problem problems and the discussion it can be concluded that:

- A. Article 32, Law number 17 of 2014 concerning Nursing, has made arrangements for the delegation of authority of medical personnel to nurses as health workers in the researcher's record that the arrangement is unclear, incomplete and opens the gap for multiple interpretations.
- B. The legal responsibility of a medical action delegated to nurses can be divided into responsibility for delegating deligative authority and responsibility as a mandate. Deligative responsibility is divided into two parts, which are accounted for by doctors as medical personnel who have medical authority and responsibility by nurses as owners of nurse competencies. In the case of the implementation of medical actions by the nurse not lege artist, the nurses who are related bear the responsibility. If the overall results of this effort are not in line with expectations, it is necessary to conduct a medical audit and analysis of work responsibilities to find out whether the violation was carried out by medical personnel or carried out by nurses in carrying out the medical action.¹

REFERENCES

- Indonesia, Health Law , Law No. 36 of 2009, LN. No. 144 of 2014. TLN No. 5063, Ps. 1 number 11
- Willa Chandrawila Supriadi, *Medical Law*, (Bandung: Mandar Maju, 2001), p. 52.
- Danny Wiradharma, *Medical Law*, (Jakarta: Bina Rupa Aksara, 1996), p. 129-130.
- Diwa Agus Sudrajat, *Legal Aspects of Nursing Practice*, <http://stikesayani.ac.id/publikasi/e-journal/filesx/2009/200908/200908-002.pdf>, accessed on October 10, 2016.

¹ Indonesia, *Health Law* , Law No. 36 of 2009, LN. No. 144 of 2014. TLN No. 5063, Ps. 1 number 11.

LEGAL PERSPECTIVE OF AGREEMENT BETWEEN DOCTORS AND PATIENTS IN ORTHOPEDIC SURGERY

A.J. Didi Surachman

Student of Legal Studies Doctor Program, Universitas Borobudur
ajdidys@gmail.com

Abstract

The relationship between the doctor and the patient raises the legal aspect of the emergence of a therapeutic transaction to carry out a medical action (informed consent.) And this informed consent is the beginning of the birth of a therapeutic agreement between the doctor and the patient. invitation (statue approach) Based on the data found, a number of conclusions can be summarized as follows:

Form of Agreement between Doctors and Patients in Orthopedic Surgery in Legislation in Indonesia: resulting from the relationship between doctors and patients in orthopedic surgery through a therapeutic agreement, which is implicitly regulated in Article 61 of Law No. 36 of 2014 concerning Health Workers which begins with informed consent, which is regulated in the Minister of Health Regulation No. 585 of 1989. Approval of medical action in orthopedic surgery is a high-risk medical treatment. High-risk medical actions require explicit forms of consent or forms of written consent. Informed consent is the starting point for the birth of a therapeutic agreement. An Orthopedic and Traumatology Specialist is required to explain in a language that is understood by the patient if he is going to undergo treatment or surgery, pre, durante, and postoperative risk factors, prognosis and notify the patient of the possibility of consulting a relevant Specialist to minimize risk.

Doctor's Responsibility in order not to cause acts against the law: a doctor must think carefully, carefully, carefully in acting in order to anticipate the risks that might occur. This is so that if there is a risk that harms the patient, the doctor is not blamed. Materially, a medical action in its nature does not conflict with the law if it fulfills the requirements: it has medical indications to achieve a concrete goal, carried out according to applicable rules in medical science / lege artis, must have received approval from the patient.

The role of Informed Consent as a Legal Protection in Therapeutic Transactions Between Physicians and Patients: the importance of informed consent according to Law Number 36 of 2009 concerning Health, informed consent obtained in a good way will actually increase the patient's trust in the doctor and strengthen the relationship between doctor with patient. If then the estimate misses the patient, it will not just sue the doctor, because the patient is aware that not all of the consequences of the action can be previously suspected. written statements are needed if evidence is needed in the future, the medical practice law and PERMENKES regarding the approval of medical actions state that all types of operative and high-risk actions must obtain written approval and be signed by those entitled to receive approval.

Keywords: Legal, Agreement, Doctor, Patient, Bedan Orthopedic Perspective.

A. INTRODUCTION

Since the beginning of the history of human civilization, it is known that the relationship of trust between human beings is the healer and sufferer. In this modern age the relationship is referred to as a therapeutic transaction between doctors and sufferers, which is carried out in a trusting (confidential) mutual relationship. The profession of doctors and other medical personnel is a profession that is highly

valued in the view of society. Because of this profession, a lot depends on life expectancy and / or recovery from patients who are also suffering from illness.

Health is something that is very important for one's life. The high degree of a person's health is one indication of the high quality of one's life. This right to health is a right that can be enjoyed by everyone. International conventions such as The Universal Declaration of Human Rights 1948 and The International Covenant on Civil and Political Rights 1966.

Other provisions are also listed in Health Law No. 36 of 2009 which states that "everyone has the same rights in obtaining optimal health status". Thus, everyone is guaranteed to get their rights to health.

The health of a person is not only reviewed in terms of physical health. A person's health is realistic, namely physical and spiritual health. Health is also one of the determinants of a person's level of well-being. Article 28 H paragraph (1) of the 1945 Constitution: "Every person has the right to a life of inner and outer prosperity, resides and has a good and healthy environment and has the right to proper health."

In countries with a level of progress that meets the standards with advanced criteria, medical services still face a dilemma that is detrimental to patients and society. Likewise in Indonesia especially as a developing country there arises a dilemma that is not much different from that faced by developed countries but is not as severe as experienced by developed countries, this is due to different backgrounds in terms of social, cultural, cultural and health service systems.

The relationship between a doctor and a patient in making a health effort is a reciprocal relationship. This relationship in the past has been described as a paternalistic relationship.

In the International Covenant on Civil and Political Right Convention provides a basis for human rights that underlies the relationship between doctors and patients, but the document only contains the basic principles, while the realization for each country still depends on the norms or rules that apply in the country concerned . In its implementation it will certainly be different in each country, as the legal system adopted in the west is more oriented towards individual rights, while in Indonesia it is oriented to the principle of kinship in accordance with the basic state of Pancasila.

Along with the dynamics of society, there is a shift in the relationship between doctors and patients. The relationship between doctors and patients shifts to more egalitarian relationships, namely horizontal contractual nature, namely therapeutic transactions. Therapeutic transactions can be understood as a legal relationship between doctors and patients in professional medical services based on competencies that are in accordance with certain skills and skills in the medical field.

The emergence of a relationship between the doctor and the patient because the patient is looking for help to cure the disease, in this case to the doctor or hospital. This has the effect that the relationship of giving this assistance has a characteristic, because in general the relationship between doctors and patients is not equal, there are gaps between the two in various aspects.

Initially the legal relationship between doctors and patients was vertical or paternalistic, where doctors were considered the most superior (father know best), but along with the times including the increase in education and public awareness, the latter form of legal relations shifted towards form a more democratic legal relationship, namely a horizontal contractual legal relationship, namely a legal relationship that is equal between the patient and his doctor. Everything is communicated between the two parties. This agreement is commonly called an informed consent or medical action agreement.

Every medical action that contains a high risk must be with a written agreement signed by the person entitled to give consent. In addition, the doctor is responsible for implementing the provisions regarding the approval of medical measures.

According to Fred Amein in a therapeutic transaction called *inspanningsverbintenis*, the agreement between the doctor and the patient, wherein the doctor will be empowered, try, make every effort to cure the patient.

So what was promised was "a maximum effort, effort, effort" to achieve a result. Another case if the promised is a "work" or achievement, called *resultaatvervaltenis*, where doctors can promise and guarantee the quality of an item / service. for example a dentist who makes dentures for his patients.

Juridically, the emergence of a relationship between doctors and patients based on two things, namely the agreement (*ius contractual*) or what is called a therapeutic transaction, this relationship is personal between doctors and patients because it is based on trust; and law (*zaakwarming*).

It is said *zaakwarming* or voluntary representation, if the patient is in an unconscious condition so that the doctor is not possible to provide information, then the doctor can act or make medical efforts without the patient's permission as an act based on voluntary representation or according to Article 1354 of the Civil Code.

Transaction means an agreement or agreement, namely a reciprocal relationship between two parties that agree on one thing. Therapeutic is a translation of therapeutic meaning in the field of medicine. This term is not the same as therapy or therapy which means treatment. Approval that occurs between doctors and patients is not only in the field of medicine, but more broadly covers the fields of diagnostics, preventive, rehabilitative, and promotive so that this agreement is called therapeutic agreement or therapeutic transaction. Therapeutic transactions are agreements between doctors and patients in the form of legal relationships that give birth to rights and obligations for both parties.

In the law of engagement as stipulated in the Book of Law on Civil Law (Civil Code), there are two types of agreements:

1. *Inspaning verbinten*, namely an effort agreement means that both parties promise maximum effort to realize what is promised.
2. *Resultaatvervaltenis*, namely Transactions of parties that promise to give a *resultaat* that is a tangible result in accordance with what was promised.

The agreement between the doctor and the patient is different from the agreement in general, which is located in the object of the agreement, which is not the result of being the main goal of an agreement (*resultaatverbinten*), but in the effort to cure the patient (*inspaning verbinten*). From here we can see that in a medical treatment done by a doctor, the doctor cannot guarantee or promise 100% of the patient's recovery, but try to do the best and the patient is expected to understand this.

The definition of a therapeutic agreement is not specifically mentioned in the Civil Code, but with the provisions in Article 1319 of the Civil Code, the therapeutic agreement entered as a form of agreement that follows the provisions in Book II of the Civil Code. Article 1319 of the Civil Code reads:

"All agreements, whether those with a special name, or those that are not well known by a certain name, are subject to general rules, which are contained in this chapter and the previous chapters."

Agreement or therapeutic transactions give birth to rights and obligations for both parties. In contrast to agreements made by the community, therapeutic agreements have specific characteristics or characteristics that are different from the agreement in general, the specificity of which lies in or concerning the object agreed upon.

The object of this agreement is in the form of an effort or therapy to cure patients. So an agreement or therapeutic transaction, is a transaction to determine or attempt to find the most appropriate therapy for patients performed by doctors. So according to the law, the object of agreement in a therapeutic transaction is not the recovery of the patient, but rather seeking the right effort to cure the patient.

Due to the emergence of a right and obligation of each party, namely the patient has the rights and obligations as well as the reverse with the doctor then, if in this agreement one party is negligent with its obligations, the party can be said to have defaulted. In accordance with article 1320 of the Civil Code, one of the conditions of the agreement is a cause that is not prohibited. Therefore, the contents of this therapeutic agreement must not be agreed to commit against the law.

In the therapeutic agreement, it was explained that with the arrival of the patient to the hospital where the doctor worked in order to check his health or seek treatment, an agreement was considered. Patients or families of patients have the right to get an explanation or information about what the doctor will do, so the doctor is obliged to convey information related to medical actions that will be performed or after being done. Information relating to the patient's disease must be clear, such as diagnostic procedures, actions or therapies, therapeutic alternatives and financing as well as the risks that may arise from the process.

In every medical action that contains high risk, it must get the consent of the patient / family of the patient. Approval of the action is known as the Approval of Medical Action or in the medical world often referred to as (Informed Consent).

In the agreement made by these doctors and patients, this agreement is included in an agreement that is a standard contract. Patients in their position as weak parties only sign a letter of agreement previously made by the doctor / health worker. Everything is left to the doctor, while doctors only make maximum efforts and do not confirm the results.

The agreement between the two parties to this agreement is not like the agreement stipulated in Article 1320. It is agreed that if there is an embodiment of the will of two or more parties in the agreement on what they want. Agree means agreeing to each other's will without coercion, error and fraud.

Every patient has the right to know the medical action that will be done on him. The patient's right to know the type of medical action that will be performed by a doctor or medical personnel is usually conveyed in writing through the Informed Consent sheet. Informed Consent serves as written evidence of medical actions performed on patients. The benefits of Informed Consent are enormous, both for patients, doctors and hospital institutions if there is a problem in the future can be used as evidence.

The relationship between doctors and patients does not always run smoothly and smoothly. Sometimes the relationship between them experiences a crisis in the form of patient dissatisfaction with healing efforts which leads to demands for malpractice. The problem is, people who do not understand the ins and outs of medicine tend to see more care from the results. In fact, given the results of treatment that cannot be predicted with certainty, a doctor in practice only guarantees the best possible process (*inspanningsverbinten*), and has absolutely no promising results (*resultaatsverbinten*).

This kind of misunderstanding often leads to malpractice claims. When the debate between medical risk and alleged malpractice against a failure of practice has entered the area of legal dispute with all its arguments, this is of course a very troubling thing for doctors.

Overcoming legal disputes requires skills outside the medical field. On the other hand, patients are also faced with ignorance of the concept of medical risk. This is related to the lack of information he got during the process of healing efforts from doctors. The patient's right to information is not optimally obtained from the doctor who treats it. The patient does not get an adequate explanation of the treatment process carried out and the risks that arise in connection with the treatment. Another problem, in everyday reality, is not easy to distinguish medical risks from medical malpractice.

Informed consent is an agreement / agreement of the patient for medical efforts that will be carried out by the doctor against him, after the patient gets information from the doctor about medical efforts that can be done to help him, accompanied by information about all risks that may occur.

The agreement in this agreement is manifested in the form of informed consent, namely the patient's right to permit the conduct of a medical action. Juridically, informed consent is a one-sided will, namely from the patient's side. So, because the consent letter is not a pure agreement, the doctor does not have to sign it. In addition, the patient can cancel the agreement at any time before the medical action is taken.

Orthopedic surgery is a collection of types of surgery that aim to overcome diseases that occur in the body's motion system. Orthopedic surgery can overcome various diseases or injuries that arise in the

bones, joints, tendons, ligaments, muscles, and nerves of the muscles. Through orthopedic surgery, patients with disease in these organs can move back, and work and move normally. Patients suffering from motion system diseases, generally will undergo non-surgical treatment first. If non-surgical treatment does not effectively cure the disease, the doctor will recommend patients to undergo a surgical procedure. Non-medical treatment for orthopedic patients is generally in the form of medication and physiotherapy.

This orthopedic surgery is one type of surgery that must have informed consent. Because orthopedic surgery is a high-risk medical treatment.

Case examples of patients present with complaints of pain in the left knee after performing Volley Ball exercise when jumping and spraining. The patient was referred by the company doctor to the hospital and then hospitalized for more than 1 week. After X-rays the results were good, there were no fractures in the bone, but the specialist at the hospital referred patients to the hospital for magnetic resonance imaging and the results of Suspect Intrasubstance Tear Meniscus Lear, Anterior Cruciate Ligament tear and Medial Collateral Ligament tear, hemarthrose. The bone surgeon finally performed surgery on the patient, then X-rays were repeated but the patient was surprised at the X-ray results where there were 2 pen screws on his left leg and of course he refused surgery.

This is the root of a dispute until it reaches the court, where according to the patient the doctor does not explain this, but of course the doctor has explained and delivered it to the patient with proven informed consent signed by the patient. The case continues to spread into many postoperative problems such as persistent pain, patients cannot bend their legs freely, cannot work even worship, cannot walk properly, and so on.

The dispute has been tried with family consultation but has not produced results so that patients make demands to the district court with demands for material losses in the form of costs incurred from the hospital, as well as immaterial losses in the form of torture, stress, 10 months of pain, joint damage left foot, disability / abnormal left foot for life / forever, loss of hope and future because it cannot work / earn a living for a lifetime / forever. But from each patient's demands, the doctor can prove the patient's accusation is not correct with various types of evidence, one of which is the medical record form and informed consent.

In the case of a dispute between a private hospital in Bandung and patients treated by a surgeon. The case began when Dwi Meilesmana exercised volleyball on the night of May 31, 2011. Suddenly Dwi's left knee dislocated and immediately rushed to the nearest hospital and hospitalized. X-rays showed that Dwi's left leg bone was declared good, there was no fracture. On June 8, 2011, Dwi was referred to a larger hospital that had MRI. After MRI was performed, intra-lateral lateral tear maniscus, ACL tear accompanied by MCL tear hemarthrose. The outer appearance is no longer swollen. However, according to the doctor who examined, surgery on Dwi's knee had to be done if he did not want to experience paralysis. Dwi believes in the diagnosis of the doctor with the guarantee of complete recovery after 3 months after the ACL reconstruction. Then the operation was carried out on July 1, 2011 for 3 hours. Dwi was totally sedated and so woke up experiencing tremendous pain. Even according to one of the nurses, Dwi was given a kind of morphine to eliminate the pain. On July 6, 2011 Dwi's foot was X-rayed again and how shocked Dwi was because there were already two very large pen screws installed and the doctor said the pen would be installed for life. Even though Dwi was never told that a pen would be installed. As a result of this operation, Dwi also experienced prolonged pain. Because the pain did not heal, Dwi then consulted various doctors to get a second opinion. On October 17, 2011 he did an MRI at a well-known hospital in South Jakarta. As a result, a vertical ACL graft was discovered because screw installation and implants planted far from medical standards. The hospital then recommended a repeat operation. For the findings, Dwi visited the first hospital to install a pen without his permission. Strangely, the hospital actually provided referrals for operations at other hospitals and offered to help

with the cost of re-operation. Finding this service, Dwi chose to do a repeat operation in South Jakarta in July 2012. But because it was wrong from the start, as a result Dwi experienced a disability for life.

The case above is one example of the importance of a written agreement. Based on the description of the background above, the authors are interested in discussing in a thesis entitled: **LEGAL PERSPECTIVE OF AGREEMENT BETWEEN DOCTORS AND PATIENTS IN ORTOPEDI SURGERY.**

LEGAL PROTECTION ON RIGHTS FOR CHILDREN'S WORKERS

Amin Ibrizatun

Student of Legal Studies Doctor Program, Universitas Borobudur
ibrizi.3.88@gmail.com

Abstract

Indonesia as a law state upholds human rights including human rights to children. Children are the mandate as well as the gift of God the Almighty, which we must always guard because in him inherent dignity, dignity, and rights as a whole person. Protection of children's rights is a guaranteed human right in article 28B paragraph (2) of the 1945 Constitution of the Republic of Indonesia. Children need to have the widest opportunity to grow and develop optimally, both physically, mentally and socially. Likewise the rights of child laborers are classified as vulnerable to exploitation. This study has 2 (two) formulation of the problem, namely: 1) how is the regulation of the rights for child workers in legislation ?; 2) what forms of employment for children are allowed and which are not allowed for the enforcement of child protection? The research method that will be used in writing this research is juridical-normative, with the data studied in the form of library material or secondary data consisting of primary legal material, namely the 1945 Constitution of the Republic of Indonesia, Law Number 39 Year 1999 concerning Human Rights, Law Number 13 Year 2003 concerning Manpower, Decree of the Minister of Manpower Number Kep. 115 / Men / VII / 2004 concerning Protection for Children Who Work to Develop Talents and Interests, and Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection, secondary legal materials, namely legal science books, legal journals, and scientific research, as well as tertiary legal materials which include the Large Indonesian Language Dictionary (KBBI), legal dictionaries, encyclopedias, and others.

Keywords: Human Rights, Child Labor, Exploitation, Legal Protection.

A. INTRODUCTION

Right of Life is a right that is owned by every human being as a Human Rights which is a gift of God Almighty. With the right of life that is owned by every human being gives them the right to be able to fulfill their daily needs which are also human rights. Therefore Human Rights are universal, where there are humans there, there are Human Rights that must be respected and upheld.¹ The right of life in the Constitution of the Republic of Indonesia, namely the 1945 Constitution of the Republic of Indonesia (abbreviated as the 1945 Constitution of the Republic of Indonesia) is contained in Article 28A, which reads: "Everyone has the right to live and has the right to live and live.

The law state according to Abdul Aziz the judge is a country based on law and justice for his citizens. What it means is that all the authority and actions of the equipment of the state or the ruler, based solely on law or in other words governed by law so as to reflect justice for the association of its citizens.² Indonesia as a law state upholds human rights including human rights to children. Children are the mandate as well as the gift of God the Almighty, which we must always guard because in him inherent dignity, dignity, and rights as a whole person.³ Children as God Almighty are considered as the most

¹ Gunawan Setiadi, 1993, *Hak-Hak Asasi Manusia Berdasarkan Ideology Pancasila*, Kanisius, Yogyakarta, page. 75.

² Abdul Aziz Hakim, 2011, *Negara Hukum dan Demokrasi Di Indonesia*, Penerbit Pustaka Pelajar, Yogyakarta, page. 8.

³ Muladi, 2009, *Hak Asasi Manusia Hakekat, Konsep dan Implikasinya dalam Perspektif Hukum dan Masyarakat*, Refika Aditama, Bandung, page. 232.

valuable assets compared to other assets, which are always guarded and protected on the grounds that in children the inherent dignity, dignity, and rights as human beings must be upheld.⁴ According to Satjipto Raharjo, legal protection is an effort to organize various interests in the community so that there is no collision between interests and can enjoy all the rights given by law.⁵

Child protection is an effort aimed at preventing, rehabilitating and empowering children who experience wrong treatment, exploitation and neglect in order to ensure the survival and growth of children naturally, both physically and mentally socially.⁶

Protection of children's rights is a human right guaranteed in Article 28B paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which states that: "Every child has the right to survival, growth and development and has the right to protection from violence and discrimination." the widest opportunity to grow and develop optimally, both physically, mentally and socially. The Law specifically regulating Child Protection is contained in Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection, where the obligation to provide protection for children is contained in Article 59 paragraph (1) of the law, stating that: "The Government, Regional Government and other State Institutions are obliged and responsible to provide special protection to children." Special protection as referred to in the article is further explained in Article 59 paragraph (2), which reads: " some special protection for children referred to in paragraph (1) is given to children in emergency situations, children who are faced with the law, children from minority groups and isolated, also children who are exploited economically and / or sexually."

With the regulation of child protection, it is expected that children will be free from exploitation, including in the case of children who have worked or referred to as child labor, where the phenomenon of child labor occurs in Indonesia which is caused by several factors, such as economic and social factors. Urbanization and deterioration of the slums of the most invidious cities in the developing world, where a growing number of children are heading down the road, joining the search for family life and for themselves.⁷ But child labor classified as vulnerable to exploitation even though it is clear that Child Labor must still get their rights as a child. For this reason, the discussion in this study will focus on regulating the rights of child laborers in legislation, as well as forms of employment for children that are permitted and not allowed for the enforcement of child protection.

B. RESEARCH METHOD

The research method that will be used in writing this research is juridical-normative, with the data studied in the form of library material or secondary data consisting of primary legal material, namely the 1945 Constitution of the Republic of Indonesia, Law Number 39 Year 1999 concerning Human Rights, Law Number 13 Year 2003 concerning Manpower, Decree of the Minister of Manpower Number Kep. 115 / Men / VII / 2004 concerning Protection for Children Who Work to Develop Talents and Interests, and Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection, secondary legal materials, namely legal science books, legal journals, and scientific research, as well as tertiary legal materials which include the Large Indonesian Language Dictionary (KBBI), legal dictionaries, encyclopedias, and others.

C. PROBLEM FORMULATION

The formulation of the problems that can be discussed in this study are as follows:

1. What is the regulation regarding the rights for child laborers in legislation?

⁴ Sumiadi, Laila M. Rasyid dan Romi Asmara, "*Restorative Justice* Hakim Terhadap Anak Yang Berkonflik Dengan Hukum Di Pengadilan Negeri Lhokseumawe", *Jurnal Mimbar Hukum*, Vol. 29, No.1, Februari 2017, 43-53, page. 44.

⁵ Satjipto Raharjo, 2000, *Ilmu Hukum*, PT. Citra Aditya Bakti, Bandung, page. 53-54.

⁶ Zulkhair Sholeh Soeaidy, 2000, *Dasar Hukum Perlindungan Anak*, PT Prenhallindo, Jakarta, page. 4.

⁷ Peter Davies, 1994, *Hak-Hak Asasi Manusia*, Yayasan Obor, Jakarta, page. 69.

2. What are the forms of employment for children that are permitted and which are not allowed for the enforcement of child protection?

D. DISCUSSION

1. Regulations concerning Rights for Child Labor in Legislation

Before discussing further issues related to the rights of child laborers, it is necessary to discuss in advance the definition of workers and children. The term worker / laborer according to Article 1 point 3 of Act Number 13 Year 2003 concerning Manpower is: "every person who works by receiving wages or other forms of remuneration" while labor based on Article 1 point 2 of Act Number 13 Year 2003 concerning Employment is: "every person who is able to do work to produce goods and / or services both to meet their own needs and for the community. According to Erna Susanti, there are at least 3 (three) elements, first, work, second, wages, and third, commandments.⁸

Then regarding the definition of children, based on Article 1 point 26 Law Number 13 Year 2003 concerning Labor which states that the definition of a child is every person under the age of 18 (eighteen) years, as well as the understanding of Children in Article 1 point 1 Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection states that the definition of a child is someone who is not 18 (eighteen) years old, including a child who is still in the womb. So based on this understanding, it can be concluded that those who can be classified as Child Labor are workers under the age of 18 (eighteen) years.

Workers whose age is still classified as vulnerable children to get exploitation treatment, starting in terms of wages, working hours, education and others. According to Surayin in the General Indonesian Dictionary Book, Exploitation is exploitation, utilization, utilization for self-profit, exploitation, and extortion (people power).⁹ Whereas exploitation according to Article 1 number 7 Law Number 21 Year 2007 concerning Crime of Trafficking in Persons, states that: "exploitation is an act with or without victim's consent which includes but is not limited to prostitution, forced labor or service, slavery or practices similar to slavery , oppression, extortion, physical, sexual, reproductive organs, or illegally transferring or transplanting body organs and / or tissues or utilizing someone's energy or abilities by other parties to benefit both materially and immaterial. "In order for legal protection for child labor it can be implemented, for this reason, it is necessary to recognize the Entrepreneurs as well as the parents and children concerned that Child Labor has rights that must be fulfilled and must not be violated.

Child labor is not primarily a matter of whether or not a child is prohibited from working but rather of a weak child's place in the job. Child labor is underprotected, both by formal law and by the condition in which children work. That's precisely where child labor is going to be. Concentration on introducing protective measures will enable children to grow and develop normally.¹⁰

The rights possessed by Child Labor are guaranteed in Law Number 13 Year 2003 concerning Manpower, which in this law regulates matters relating to child labor starting from the age allowed for work, who is classified as a child, wages and protection for child labor, with the following explanation:

a. Child Labor Rights for Worthy Wages

As stipulated in Article 90 paragraph (1) of Law Number 13 Year 2003 concerning Manpower, which essentially stipulates that the wages agreed between employers and workers must not be lower than the stipulations for wages stipulated by legislation, and based on Article 91 paragraph (2) Law Number 13 Year 2003 concerning Manpower, that if employers

⁸ Erna Susanti, "Kebijaksanaan Pembinaan Hubungan Industrial dalam Melindungi Pekerja untuk Menuju Terciptanya Kepastian Hukum Menurut UU No. 13 Tahun 2003 Tentang Ketenagakerjaan", *Jurnal Risalah Hukum*, Vol. 4, No. 2, Desember 2008, page. 110 -119.

⁹ Surayin, 2007, *Kamus Umum Bahasa Indonesia*, cetakan ke-IV, CV.Yrama Widiya, Bandung, page. 129.

¹⁰ Dwiyantri Hanandini, *Tindak Kekerasan Di Lingkungan Pekerja Anak Sektor Informal Kota Padang*, *Jurnal Sosiologi SIGAI*, Vol. 6, No. 9, Februari 2005, page. 94-95.

promise to pay wages that are lower than the minimum wage, then the agreement is null and void. With this arrangement, it is the same as Child Labor, that Child Labor must get a minimum wage in accordance with the applicable laws and regulations, so that employers are prohibited from paying lower than the minimum wage stipulated by the local government.

b. Child Labor Rights to Get Appropriate Work Time

Working time allowed by legislation for working hours of Child Labor is regulated in Article 69 paragraph (2) points c and d of Law Number 13 Year 2003 concerning Labor, namely work hours may not be more than 3 hours, carried out during the day, and does not interfere with school time. If employers violate these provisions, they can be subject to criminal sanctions as stipulated in Article 185 of Act Number 13 Year 2003 concerning Manpower.

c. Child Labor Rights in Obtaining Education

As Child Labor, children remain inseparable from their rights to obtain education, where education for children is a very crucial thing that must be fulfilled for all Entrepreneurs. According to Article 9 Law Number 35 Year 2014 concerning Amendments to Law Number 23 Year 2002 concerning Child Protection, it has been explained that every child has the right to obtain education and teaching in the context of his personal development and the level of his intelligence in accordance with his interests and talents. children are also entitled to protection in education units from sexual crimes and violence committed by educators, education personnel, fellow students, and / or other parties. Then based on Article 70 paragraph (1) Law Number 13 Year 2003 concerning Employment, which reads: "Children can do work in the workplace which is part of an education or training curriculum that is authorized by an authorized official."

d. Child Labor Rights for Occupational Safety and Health

Child labor has a high level of occupational safety and health because there is a prohibition on employers to employ children in certain jobs. Based on Article 74 Law Number 13 Year 2003 concerning Manpower, it has been clearly stated that anyone is prohibited from employing and involving children in the worst jobs that could endanger the health, safety or morals of children.

e. Child Labor Rights to Get Enough Rest and Leave

Regarding adequate rest and leave time, the regulation has been given in the law, where in Article 79 paragraph (1) Law Number 13 Year 2003 concerning Manpower, it has been explained that the Entrepreneur is obliged to give workers time off and leave. The break and leave referred to in Article 79 paragraph (2) Law Number 13 Year 2003 concerning Labor consists of breaks between working hours, weekly rest 1 (one) day, annual leave, and long breaks of at least 2 (two) month. This provision is also mandatory for child laborers.

2. Allowed and Unacceptable Forms of Child Labor for Enforcement of Child Protection

Child protection is a formal and material legal regulation that aims to carry out fostering or defense and protection of rights to criminal acts and illegal acts arising from and or for the benefit of the child.¹¹ Whereas according to Soerjono Soekanto, law enforcement is an infiltration between what is in the rules of a number of regulations to create, nurture and maintain peace in association with life.¹²

When reviewing the provisions of Law Number 13 Year 2003 concerning Labor, it can be seen that in principle children cannot work under Article 68 of Law Number 13 Year 2003 concerning Labor which states that: "employers are prohibited from employing children", Philosophically the ban on the child's employment was meant simply to provide a guarantee of legal protection against

¹¹ Maulana Hasan Wadong, 2000, *Pengantar Advokasi dan Hukum Perlindungan Anak*, PT Gramedia Widayana Indonesia, Jakarta, page. 5.

¹² H. Soetandyo Wignjosebroto, 2010, *Dasar-Dasar Sosiologi Hukum*, Pustaka Pelajar, Yogyakarta, page. 373.

the child in order to develop his prestige and dignity in order to prepare for his future.¹³ But children can work and excluded from these rules with certain conditions and interests based on Article 69 paragraph (1) Law Number 13 Year 2003 concerning Labor, which states that children are allowed to work for light work, namely for children aged between 13 (thirteen) years up to 15 (fifteen) years as long as it does not disturb the development and physical, mental and social health.

Based on the article above, it can be seen that one of the jobs for children allowed is light work. Even so, the employer who employs him must fulfill all requirements which are further regulated in Article 69 paragraph (2) of Law Number 13 Year 2003 concerning Manpower, which states that: "Entrepreneurs who employ children in light work must meet the following requirements: a). written permission from parents or guardians; b). employment agreement between the entrepreneur and the parent or guardian; c). maximum working time of 3 (three) hours; d). carried out during the day and does not interfere with school time; e). occupational Health and Safety; f). the existence of a clear working relationship; and g). receive wages in accordance with applicable provisions ". The provisions referred to in paragraph (2) letters a, b, f, and g are excluded for children who work in their family business.

In addition to light work, that work that is permissible for children is work in the workplace which is part of the education or training curriculum authorized by authorized officials (Article 70 paragraph (1) Law Number 13 Year 2003 concerning Labor), which is based on Article 70 paragraph (2) and (3) Law Number 13 Year 2003 concerning Manpower, that the child is at least 14 (fourteen) years old with certain conditions, such as: a) given clear instructions on how to carry out the work and guidance and supervision in carrying out work; and b) given occupational safety and health protection.

In addition, based on Article 70 paragraph (1) Law Number 13 Year 2003 concerning Employment, it is stated that children can do work to develop their talents and interests with certain conditions, where the conditions are regulated in Article 71 paragraph (2) Law Number 13 Year 2003 concerning Manpower, namely: a) under the direct supervision of a parent or guardian; b) working time no later than 3 (three) hours a day; and c) conditions and work environment do not interfere with physical, mental, social, and school time development.

Jobs to develop children's talents and interests are basically opportunities given to children to channel their talents and interests. Further arrangements related to this matter are regulated in the Decree of the Minister of Manpower Number Kep.115 / Men / VII / 2004 concerning Protection for Children Who Perform Work to Develop Talents and Interests, which in the Ministerial Decree explained that work to develop talent and interests must meet the following criteria:

- a. The work can be done by children from an early age
- b. The work is of interest to children
- c. The work is based on the child's ability
- d. The work adds creativity and fits the world of children

In addition to jobs that are permissible for child labor, there are provisions that also regulate and prohibit certain jobs for child labor, where those jobs are categorized as the worst work for children because if the work is done by a child it will have an influence very bad for child development both physically, mentally, socially and intellectually. The worst forms of child labor are regulated in Article 74 paragraph (2) Law Number 13 Year 2003 concerning Labor, which includes:

- a. All work in the form of slavery or the like.
- b. All work that utilizes, provides, or offers children for prostitution, the production of pornography, pornographic shows or gambling.
- c. All work that utilizes, provides or involves children for the production and trade of liquor, narcotics, psychotropic substances and other addictive substances and or
- d. All jobs that endanger a child's health, safety or morals.

¹³ Netty Endrawati, *Faktor Penyebab Anak Bekerja Dan Upaya Pencegahannya*, Jurnal Ilmiah Hukum-Refeksi Hukum, April 2011, page. 22.

E. CONCLUSION

The conclusion of this research is about the rights that must be fulfilled by employers to child labor so as to protect children from exploitation guaranteed in Law Number 13 Year 2003 concerning Manpower, which includes the right of Child Labor to decent wages, the right of Child Labor to obtain work time according to the rights of Child Labor in obtaining education, the right of Child Labor to occupational safety and health, and the right of Child Labor to adequate rest and leave, in addition there are rules that allow and prohibit children from performing certain jobs as stipulated in the Law. Law Number 13 Year 2003 concerning Manpower and Decree of the Minister of Manpower Number Kep. 115 / Men / VII / 2004 concerning Protection for Children Doing Work to Develop Talents and Interests, where such regulations must be fulfilled by Entrepreneurs to provide protection to Child Labor.

REFERENCES

A. Book

- Abdul Aziz Hakim, 2011, *Negara Hukum dan Demokrasi Di Indonesia*, Penerbit Pustaka Pelajar, Yogyakarta.
- Gunawan Setiadirja, 1993, *Hak-Hak Asasi Manusia Berdasarkan Ideology Pancasila*, Kanisius, Yogyakarta.
- H. Soetandyo Wignjosoebroto, 2010, *Dasar-Dasar Sosiologi Hukum*, Pustaka Pelajar, Yogyakarta.
- Maulana Hasan Wadong, 2000, *Pengantar Advokasi dan Hukum Perlindungan Anak*, PT Gramedia Wiasarana Indonesia, Jakarta.
- Muladi, 2009, *Hak Asasi Manusia Hakekat, Konsep dan Implikasinya dalam Perspektif Hukum dan Masyarakat*, Refika Aditama, Bandung.
- Peter Davies, 1994, *Hak-Hak Asasi Manusia*, Yayasan Obor, Jakarta.
- Satjipto Raharjo, 2000, *Ilmu Hukum*, PT. Citra Aditya Bakti, Bandung.
- Sumiadi, Laila M. Rasyid dan Romi Asmara, "Restorative Justice Hakim Terhadap Anak Yang Berkonflik Dengan Hukum Di Pengadilan Negeri Lhokseumawe", *Jurnal Mimbar Hukum*, Vol. 29, No.1, Februari 2017, 43-53.
- Surayin, 2007, *Kamus Umum Bahasa Indonesia*, cetakan ke-IV, CV.Yrama Widiya, Bandung.
- Zulkhair Sholeh Soeaidy, 2000, *Dasar Hukum Perlindungan Anak*, PT Prenhallindo, Jakarta.

B. Journal

- Dwiyanti Hanandini, *Tindak Kekerasan Di Lingkungan Pekerja Anak Sektor Informal Kota Padang*, *Jurnal Sosiologi SIGAI*, Vol. 6, No. 9, Februari 2005.
- Erna Susanti, "Kebijaksanaan Pembinaan Hubungan Industrial dalam Melindungi Pekerja untuk Menuju Terciptanya Kepastian Hukum Menurut UU No. 13 Tahun 2003 Tentang Ketenagakerjaan", *Jurnal Risalah Hukum*, Vol. 4, No. 2, Desember 2008.
- Netty Endrawati, *Faktor Penyebab Anak Bekerja Dan Upaya Pencegahannya*, *Jurnal Ilmiah Hukum-Refeksi Hukum*, April 2011.

C. Legislation

- Indonesia, The Constitution of the Republic of Indonesia Year 1945
- _____, Law Number 39 Year 1999 concerning Human Rights
- _____, Law Number 13 Year 2003 concerning Manpower.
- _____, Decree of the Minister of Manpower Number Kep. 115 / Men / VII / 2004 oncerning Protection for Children Doing Work to Develop Talents and Interests.
- _____, Law Number 35 Year 2014 concerning Amendment to Law Number 23 of 2002 concerning Child Protection.

IMPLEMENTATION OF STATE RESPONSIBILITIES FOR PATIENTS OF DISORDERS OF SKIZOFRENIA SOULS ON FULFILLMENT OF RIGHTS ASSOCIATED IN FAMILY DISEASE PATIENTS BY FAMILY BASED ON ACT NUMBER 18 OF 2014 REGARDING MENTAL HEALTH AND ACT NUMBER 36 OF 2009 REGARDING HEALTH

Andjar Bhawono

Student of Legal Studies Doctor Program, Universitas Borobudur
andjarbhawono@yahoo.com

Abstract

Psychological and physical violence experienced by mental disorders patients diagnosed with schizophrenia from their families, occurs because the family's understanding of the treatment of mental disorders patients diagnosed with schizophrenia is still very low. Therefore, the state has the responsibility to fulfill the rights of mental disorders diagnosed with schizophrenia.

This study is normative with secondary data as a data source. Data is examined by means of document studies. Data is analyzed qualitatively. The results of the analysis are presented descriptively.

The results of the study show that the implementation of state responsibility for people with schizophrenic mental disorders on the fulfillment of human rights due to the infestation of patients with schizophrenic mental disorders by families based on Act Number 18 of 2014 regarding Mental Health and Act Number 36 of 2009 regarding Health is that health for people with schizophrenic mental disorders, such as public hospitals, health centers have not been well organized and realized, limited human resources that conduct or implement policies in accordance with the law, so that when family members who experience schizophrenia are only treated at home with how to stick, without being taken to a Psychiatric Hospital. This is due to access to locations that are far from the place of residence and also the limited costs that prevent them from being treated or treated. Apart from that, related to the financing of people with schizophrenic mental disorders, BPJS does not cover psychosocial therapy treatments provided by psychologists given outside Psychiatric Hospital. The available human resources are not mental health professionals, but only village midwives and self-care practices, so that families find it difficult not to attach to existing limitations.

Keywords: Responsibility, Schizophrenia, Human Rights.

A. INTRODUCTION

The role of the family in handling mental disorders is very important, namely caring for patients, providing support, ensuring continuity of family assistance, reporting symptoms or changes in abnormal behavior on each shift, ensuring medication is taken, reporting patient refusal to treatment, meeting the basic needs of patients, building communication with the hospital.¹

Family action in handling family members who suffer from mental disorders is to give love and more attention to sufferers. This is because the importance of family in mental care is:²

1. The family is the scope that most relates to patients;
2. The family (considered) knows the condition of the patient best;

¹ <http://www.poltekkes-malang.ac.id> downloaded date Juli 20th 2017.

² Puji Lestari, "Kecenderungan Atau Sikap Keluarga Penderita Gangguan Jiwa Terhadap Tindakan Pasung - Studi Kasus Di RSJ Amino Gondho Hutomo Semarang", *Journal Keperawatan Jiwa*. Volume 2, No. 1, Mei 2014, p. 19.

3. Mental disorders that arise in patients may be caused by a way of care that is less suitable for patients;
4. Patients who experience mental disorders will later return to society; especially in the family environment;
5. The family is the main care giver in achieving fulfillment of basic needs and optimizing peace of mind for patients;
6. Mental disorders may require therapy for quite a long time, so that family understanding and collaboration are very important in medicine.

Problems arise when families who should have a very large role in the recovery of the souls of patients with mental disorders, instead turn to intimidation, violence and up to the infestation of patients with mental disorders which will inhibit treatment in people with mental disorders due to practical use limit movement. This happens to people with mental disorders that occur a lot in Indonesia.

The Coordinator of the Monitoring and Investigation Sub-Commission of the National Human Rights Commission, Siane Indriani, said there were two obstacles that caused mentally ill people to live in the market, firstly from the village head, social service, and health services, second to his family. The coordination of the parties has not run optimally, so the healing programs run by the government are slow. From the family side, they do not understand that mental illness can be treated medically.³

As a result of lack of understanding in dealing with family members who experience mental disorders, the family action that is common in Indonesia is by way of installation which aims to make the sufferer not endanger other people and bring shame to the family. Surge clearly exacerbates schizophrenia. The negative impact, which is the longer the symptoms are not handled properly which is only dampened by inclusion, then the brain damage that occurs is getting worse.

This worsens the mental condition of people with mental disorders because they cannot convey their emotions and feel isolated, which makes them even more depressed. Based on this, the losers are those with mental disorders whose rights are seized by their families who should be the first party in the healing process of patients with mental disorders.⁴

Mental disorders patients diagnosed with schizophrenia still experience psychological and physical violence from their families which certainly violates the rights of mental disorders patients diagnosed with schizophrenia as stipulated in Article 42 of Act Number 39 of 1999 regarding Human Rights that every citizen with a mental disability has the right obtain care, education, training, and special assistance at the expense of the state, with the aim of ensuring a decent life in accordance with the dignity of its humanity.⁵ Therefore, the state has the responsibility to fulfill the rights of mental disorders patients diagnosed with schizophrenia.

At present the government has built a Psychiatric Hospital in each province and also a Community Health Center that can handle the examination of symptoms of mental disorders patients who are diagnosed with schizophrenia. However, when the patient has been declared stable, because of the handling of families who pay less attention to psychiatric schizophrenia patients who are declared stable, making recurrence that often appears in schizophrenic patients.

³ <https://m.tempo.co/read/news/2016/06/06/058777240/orang-gila-dipasung-komnas-ham-keluarga-malu>, downloaded date August 2nd 2017.

⁴ *Ibid.*

⁵ Joko Sulistyanto, *Hak Asasi Manusia di Negara Pancasila: Suatu Tinjauan Yuridis Normatif Tentang Sejarah Hak Asasi Manusia Dalam Hubungannya dengan Undang-Undang Dasar 1945*, Jakarta: Pascasarjana Fakultas Hukum Universitas Indonesia, 2007, p. 14.

This is not the focus of the government which only acts to treat without making preventive measures. Though further prevention is needed to reduce the rate of recurrence of schizophrenia. Prevention can be done with family support as a direct care effort so that families can better understand the problems faced by mental disorders patients.

B. RESEARCH PROBLEM

Based on the above background, the problem in this study is how the implementation of State responsibility for people with schizophrenic mental disorders towards the fulfillment of human rights due to family psychiatric schizophrenia sufferers based on Act Number 18 of 2014 regarding Mental Health and the Act Number 36 of 2009 regarding Health?

C. RESEARCH METHODS

This research is basically a normative juridical study, because the target of this research is law or normative methods in the form of legal principles and legal systems.⁶ This research is descriptive because it describes the laws and regulations that apply and is associated with legal theories in the practice of implementation related to the problems to be studied. The data obtained will be analyzed in qualitative analysis.

D. RESEARCH DISCUSSION

Implementation of State Responsibilities For Patients of Disorders of Skizofrenia Souls On Fulfillment of Rights Associated In Family Disease Patients By Family Based On Act Number 18 of 2014 Regarding Mental Health And Act Number 36 of 2009 Regarding Health

Article 1 number 1 of Act Number 36 of 2009 regarding Health states that health is a healthy condition, both physically, mentally, spiritually and socially that enables everyone to live productively socially and economically. Health as one of the elements of general welfare must be realized in accordance with the ideals of the Indonesian nation as referred to in the Opening of the 1945 Constitution through sustainable national development based on Pancasila and the 1945 Constitution.⁷ Health development is directed at enhancing health status which is of great significance for the development and fostering of Indonesian human resources and as a capital for the implementation of national development which is essentially the full development of Indonesian people and the development of all Indonesian people. One of the health developments in Indonesia is the provision of health services for people with mental disorders.

People with mental disorders, no matter how heavy, can recover as long as they get the treatment and psychosocial support they need. They can recover and return to life in society productively, both economically and socially. Most of them can be free from having to take medication. It's just that, like body health, mental health must still be maintained and improved. Without maintenance, both one's physical and mental health can return to illness. People with high blood pressure, asthma or diabetes, will be able to fall back sick if they eat carelessly or don't want to take medication. If not maintained, people with mental disorders who have recovered, can also fall back sick.

Based on this, the state has an obligation to deal with its citizens who suffer from mental disorders. The responsibility of the state in terms of fulfilling the rights of its citizens who suffer from mental disorders, is regulated in various laws and regulations, i.e:

⁶ Soerjono Soekanto dan Sri Mamuji, *Penelitian Hukum Normatif-Suatu Tinjauan Singkat*, Jakarta: Rajawali Press 2007, p. 10.

⁷ J. Guwandi, *Hukum Medis*, Jakarta: Fakultas Kedokteran Universitas Indonesia, 2005, p. 25.

1. Article 28H paragraph (1) of the 1945 Constitution of the Republic of Indonesia has affirmed that everyone has the right to obtain health services.
2. Act Number 18 of 2014 regarding Mental Health is intended to guarantee that everyone can achieve a good quality of life, and provide integrated, comprehensive and sustainable health services through promotive, preventive, curative and rehabilitative efforts.
3. Article 147 of Act Number 36 of 2009 regarding Health is related to the responsibility of the state in providing health services for people with mental disorders.
4. Article 42 of Act Number 39 of 1999 regarding Human Rights that every citizen with a mental disability has the right to receive care, education, training, and special assistance at the expense of the state, with the aim of ensuring a decent life in accordance with the dignity of his humanity.
5. Law Number 25 of 2009 concerning Public Services, where the state is obliged to serve every citizen and population to fulfill their basic rights and needs in the framework of public services which are mandated by the 1945 Constitution of the Republic of Indonesia.

Based on these provisions, according to the author it can be interpreted that there is a state obligation to provide and provide health facilities, such as health centers and hospitals, including experts and medicines that are very necessary in supporting the implementation of adequate health efforts. The birth of the right to obtain good and healthy health services can certainly be derived from the existence of healthy rights themselves, as stated in Act Number 18 of 2014 regarding Mental Health, so that health services are the right of every person guaranteed in the State Constitution The Republic of Indonesia in 1945 which must be realized with the highest efforts to improve the public health status.

Especially for sufferers of psychiatric disorders, then besides being regulated in Article 28H paragraph (1) of the 1945 Constitution of the Republic of Indonesia and Act Number 18 of 2014 regarding Mental Health, it is also regulated in Law Number 18 of 2014 concerning Health The soul in terms of the state's obligation to provide good and healthy health services, and protect its rights as stipulated in Article 42 of Act Number 39 of 1999 concerning Human Rights and Law Number 25 of 2009 concerning Public Services.

In practice, there are still families who torture both physically and psychologically against family members who suffer from mental disorders. The community who as a large group is not capable of not knowing that his actions to install family members is a wrong action which actually worsens the health condition of those with mental disorders.

Apart from that, the inclusion of people with mental disorders in Indonesia has been banned based on Law Number 23 of 1966 concerning Mental Health, stating that patients with displaced mental disorders receive care and treatment at a place of care. The Act was followed up with a Letter from the Minister of Home Affairs Number PEM.29 / 6/15, dated November 11, 1977 addressed to the Governor of the Head of Regional Levels throughout Indonesia, asking the public not to infuse people with mental disorders and raise public awareness to submit care sufferers at the Psychiatric Hospital.

Consolidation of family members suffering from mental disorders also contradicts the declaration of the Minister of Health of the Republic of Indonesia on October 10, 2010, namely Towards a Free Indonesia. The reason for violating the law owned by the State of Indonesia, because mental disorders can be solved and people with mental disorders have the right to receive humane treatment and treatment services, so, Indonesia Free Pasung has the meaning of an effort to make Indonesia free nationally from the existence of pasung and neglect of people with mental disorders .

Based on this, it has become the responsibility of the state in terms of providing legal protection for people with mental disorders to obtain their rights as mandated in various laws and regulations.

Implementation of state responsibility for people with schizophrenic mental disorders on the fulfillment of human rights due to inclusion in patients with schizophrenic mental disorders by families based on Law Number 18 Year 2014 concerning Mental Health and Act Number 36 of 2009 regarding Health is:

1. Provision of Health Facilities

Helping recovery of mental disorders requires patience and mental maturity. Allowing a family to try on its own to help recover one of his sick family members is not right. They need the support of psychologists, friends, neighbors or volunteers.

Based on the research data that the author obtained, it is known that in Kuningan Regency, it was found that there were 2,232 mental disorders patients. Of the 29 cases, it consisted of 14 pasang brackets and 15 chain pairs and beams.⁸ Based on these data, in addition to health facilities such as the Psychiatric Hospital and also the Puskesmas that specifically deal with mental disorders patients, clinical psychologist staff who aim not only to treat patients with mental disorders, but also provide understanding to family members related to treatment that can be done for family members suffering from mental disorders. However, based on research data, the number of clinical psychologists in Kuningan Regency is still very small. There are almost no clinical psychologists who stand by at the Puskesmas, so the services for mental disorders patients in the Puskesmas are not optimal.

According to the author, health services for people with mental disorders can be handled by the Puskesmas and also the General Hospital at the city and district level. However, as the research data obtained by the author, because of the unpreparedness of doctors at the Puskesmas and the General Hospital at the city and regency level to provide mental health services, causing almost all patients with mental disorders to be referred to the Psychiatric Hospital.

2. Provision of Medical Costs

Based on the mandate in Article 42 of Act Number 39 of 1999 regarding Human Rights and Article 149 paragraph (4) of Act Number 36 of 2009 regarding Health, the government, regional government, and the community must carry out treatment and care in health care facilities for people with mental disorders who are displaced, vandalized, threaten the safety of themselves and / or others, and / or interfere with public order and / or security, including the financing of medical treatment and care for people with mental disorders for the poor.

3. Equal Opportunities in Education and Training

Article 42 of Act Number 39 of 1999 regarding Human Rights, every citizen who is mentally handicapped has the right to receive care, education, training, and special assistance at the expense of the state, with the aim of ensuring a decent life in accordance with the dignity of humanity, increasing self-confidence, and the ability to participate in community, national and state life.⁹ This provision is strengthened in Article 148 paragraph (1) of Act Number 36 of 2009 regarding Health which states that people with mental disorders have the same rights as citizens.

Education and training for people with mental disorders is very important. This is because to prevent recurrence and also to guarantee the future of mental disorders patients, it is appropriate for the government to provide education and training for mental disorders patients. Education and training can be given during treatment and more intensified when the patient's condition is stable.

4. Community Information

⁸ <https://www.radarcirebon.com/pasien-gangguan-jiwa-di-kuningan-sebanyak-2-232-orang-19-dipasung> .html., downloaded date 11 Juni 2019.

⁹ Ramlond Naning, *Cita dan Citra Hak Asasi Manusia di Indonesia*, Jakarta: Lembaga Kriminologi Universitas Indonesia Program Penunjang Bantuan Hukum Indonesia, 2003, p. 7.

In Article 147 paragraph (1) of Act Number 36 of 2009 regarding Health states that in addition to the government, the community is also responsible for efforts to cure people with mental health problems. Based on this, the community can help mental disorders patients who have stable mental conditions.

In mental disorders patients who do outpatients, the community has a role in healing these patients. The role is in the form of rehabilitation that aims to optimize the ability or effort to help achieve optimal quality of life for people with mental disorders.

Rehabilitation will help the healing process and return to self-confidence in people with mental disorders. In addition, the participation of the community who are close to the family is needed because the community can help the rehabilitation process by accepting and encouraging people to carry out social activities according to their circumstances.

Families and communities have the strength and responsibility to help the recovery process of mental disorders. Families who have expertise can contribute their expertise, families that have the time and energy can contribute their time and energy. Communities can support by creating jobs, providing social roles, and other psychosocial support.

The author argues, it is necessary to establish a family-friendly association for former mental health sufferers. This is caused by the existence of a family-friendly association, it will be very helpful for the former sufferer of health and also for his family. The formation of the association can be done by the Health Office. With the existence of these associations, it can be used to disseminate information to the community. This is because former mental health sufferers can share stories with the community regarding their past experiences and how to act properly for their family members who experience mental health problems.

Based on this, the fulfillment of the rights of people with schizophrenic mental disorders due to the inclusion of the family is not only the responsibility of the state, but also the responsibility of the community. The community has a big responsibility when finding cases of attachment to people with mental disorders around their homes by reporting to the Community Health Center, General Hospital, or Psychiatric Hospital to get health services as soon as possible, so that human rights sufferers of schizophrenic mental disorder get treatment, care in health care facilities, and education and training can be guaranteed.

The author argues, thus it can be concluded that Law No. 18 of 2014 concerning Mental Health and Law No. 36 of 2009 concerning Health has guaranteed the fulfillment of human rights for schizophrenic mental disorders patients. However, until now in its implementation, there are still shortcomings for the government in terms of fulfilling the human rights of mental disorders patients, thus causing imperfect legal protection.

Based on this, the author argues, there needs to be a legal culture that must be directed at building awareness in fulfilling the human rights of people with schizophrenic mental disorders due to family involvement. Efforts to realize legal protection¹⁰ in fulfilling the human rights of people with schizophrenic mental disorders due to the attachment by the family must touch 3 (three) indicators, i.e:

1. Guarantee of Legislation in Handling Schizophrenic Mental disorders patients

According to the author, Act Number 18 of 2014 regarding Mental Health and Act Number 36 of 2009 regarding Health has been good in terms of fulfilling the rights of patients with schizophrenic mental disorders. However, in terms of the medical costs of schizophrenic mental

¹⁰ Legal protection is the protection of dignity and recognition, as well as recognition of human rights owned by legal subjects based on legal provisions of arbitrariness. See: Philipus M. Hadjon, *Perlindungan Hukum Bagi Rakyat di Indonesia*, Surabaya: PT. Bina Ilmu, 1987, p. 30.

disorders patients, BPJS is not covered, specifically related to the psychosocial treatment provided by psychologists given outside Psychiatric Hospitals.

The author argues, it is necessary to revise or issue special regulations for patients with mental schizophrenia in order to be able to use BPJS to carry out psychosocial treatment provided by psychologists given outside Psychiatric Hospitals. This needs to be done so that mental disorders patients get maximum service, both when handled in a hospital or health center, and services beyond hospital health measures.

2. Adequate Facilities and Infrastructures

As the author stated above, that at present, the family of schizophrenic mental disorders patients is always treated at the Psychiatric Hospital. Of course if all out of schizophrenic mental disorders patients go to the Psychiatric Hospital, then there will be over capacity resulting in disruption of health services for patients with mental schizophrenia.

According to the author, the government can maximize other health care facilities, such as health centers and public hospitals to be able to accept psychiatric patients with schizophrenia, especially those who are on outpatient care. The services provided by Puskesmas and Public Hospitals are the availability of stand-by clinical psychologists to serve schizophrenic mental disorders patients.

3. Law Awareness and Compliance with Community Behavior

Family and society are parties that greatly influence the recovery of patients with schizophrenia. Family actions that ignore, abandon, isolate, make fun of, or even poke up are wrong actions that actually make the psychiatric patient with psychiatric disorders worse.

Based on this, it has become the government's duty to provide counseling to the community in terms of good and right handling of patients with schizophrenic mental disorders. Public Relations can be conducted by Public Relations at the Health Office in collaboration with NGOs, community leaders, even with patients who have recovered to provide education to the community in terms of prohibition of inclusion and also information on the basic rights of schizophrenic mental disorders patients.

E. CONCLUSION

The implementation of state responsibility for people with schizophrenic mental disorders towards the fulfillment of human rights due to the infestation of patients with schizophrenic mental disorders by families based on Act Number 18 of 2014 regarding Mental Health and Act Number 36 of 2009 regarding Health is that health facilities for people with disabilities the soul of schizophrenia, such as the General Hospital, the Puskesmas has not been well organized and realized, the limitation of Human Resources that conducts or implements policies in accordance with the law, so that when a family member has mental illness schizophrenia is only treated at home by folding taken to a Psychiatric Hospital. This is due to access to locations that are far from the place of residence and also the limited costs that prevent them from being treated or treated. Apart from that, related to the financing of people with schizophrenic mental disorders, BPJS does not cover psychosocial therapy treatments provided by psychologists given outside Psychiatric Hospitals. The available human resources are not mental health professionals, but only village midwives and self-care practices, so that families find it difficult not to attach to existing limitations.

REFERENCES

A. Books:

- Desriza Ratman, *Aspek Hukum Informed Consent dan Rekam Medis Dalam Transaksi Terapeutik*, Bandung: Keni Media, 2013.
- Djamaludin, *Psikologi Islami Solusi Atas Problem-Problem Psikologi*, Yogyakarta: Pustaka Pelajar, 2004.
- J. Guwandi, *Hukum Medis*, Jakarta: Fakultas Kedokteran Universitas Indonesia, 2005.
- Joko Sulistyanto, *Hak Asasi Manusia di Negara Pancasila: Suatu Tinjauan Yuridis Normatif Tentang Sejarah Hak Asasi Manusia Dalam Hubungannya dengan Undang-Undang Dasar 1945*, Jakarta: Pascasarjana Fakultas Hukum Universitas Indonesia, 2007.
- Mohammad Fauzy, *Pelaksanaan Hak Asasi Manusia dan Asas Negara*, Bandung: Mandar Madju, 2005.
- Philipus M. Hadjon, *Perlindungan Hukum Bagi Rakyat di Indonesia*, Surabaya: PT. Bina Ilmu, 1987.
- Ramlond Naning, *Cita dan Citra Hak Asasi Manusia di Indonesia*, Jakarta: Lembaga Kriminologi Universitas Indonesia Program Penunjang Bantuan Hukum Indonesia, 2003.
- Soerjono Soekanto dan Sri Mamuji, *Penelitian Hukum Normatif-Suatu Tinjauan Singkat*, Jakarta: Rajawali Press, 2007.

B. Journal:

- Puji Lestari, “Kecenderungan Atau Sikap Keluarga Penderita Gangguan Jiwa Terhadap Tindakan Pasung (Studi Kasus Di RSJ Amino Gondho Hutomo Semarang)”, *Journal Keperawatan Jiwa*. Volume 2, No. 1, Mei 2014.

C. Internet:

- <https://m.tempo.co/read/news/2016/06/06/058777240/orang-gila-dipasung-komnas-ham-keluarga-malu>., downloaded date Agustus 2nd 2017.
- <https://www.radarcirebon.com/pasien-gangguan-jiwa-di-kuningan-sebanyak-2-232-orang-19-dipasung.html>., downloaded date June 11 2019.

D. Legislation:

- 1945 Constitution of the Republic of Indonesia.
- Act Number 29 of 2004 regarding Medical Practice.
- Act Number 18 of 2014 regarding Mental Health.
- Act Number 36 of 2009 regarding Health.

LEGAL PROTECTION AGAINST DOCTORS FOR LAWSUITS FILED BY PATIENTS FOR MALPRACTICE

Andreas Andri Lensoen

Student of Legal Studies Doctor Program, Universitas Borobudur
dr_andreas_andri@yahoo.com

Abstract

Recognition and protection of human rights for Indonesian citizens are vital to the law state as one characteristic of the existence of the law state itself. A fundamental human right of any citizen is the human rights of health care based on Article 28H Paragraph (1) of the Republic of Indonesia's Constitution Year 1945. Health services are punctuated by health-care workers where one grouping from the health-care is the medical staff, one is the doctor. Doctors of his profession have rights and are protected, but, in fact, there is often a lawsuit against a doctor committed to a doctor's alleged malpractice when there is an unexpected risk of a patient or a family, which is not necessarily a doctor's fault in which any act of health care performed by a doctor is always associated with society as a doctor's malpractice. It certainly goes against the doctor's basic rights. This journal has 2 (two) formulation of the problem, namely: 1) What are the rights possessed by the Doctor for his profession in providing medical services ?; 2) What is the legal protection of doctors who are demanded by the Patient for the medical services that he does?. The research method used in this journal is juridical-normative legal research, with secondary data as the data studied, covering primary legal materials, namely the Republic of Indonesia's Constitution Year 1945 and Law Number 39 Year 1999 concerning Human Rights, Law Number 29 Year 2004 concerning Medical Practices, Law Number 36 Year 2009 concerning Health, Law Number 36 Year 2014 concerning Health Workers, as well as other statutory regulations, secondary legal materials covering legal theory books, scientific journals and other materials, and tertiary legal materials which include legal dictionaries, language dictionaries, and other materials.

Keywords: Protection of law, human rights, health care, Doctors.

A. INTRODUCTION

Indonesia as a law state based on Article 1 Paragraph (3) of the Republic of Indonesia's constitution Year 1945 have a responsibility for the welfare of its citizens without exception. According to AV. Dicey, the 3 (three) elements that must exist in every legal state (referred to as "the rule of law"), 1) the supremacy of the rule of law (supremasi of the law) is the absence of arbitrary power in the sense that a person must be punished only when breaking the law; 2) this same standing before the law (equality before the law); 3) legislation and judicial decisions ensure human rights.

Recognition and Protection of Human Rights (HAM) for Indonesian citizens is very important for the rule of law, one of which is the State of Indonesia as one of the characteristics of the existence of the rule of law itself. Human rights are defined as rights inherent in human dignity as creatures of God where the rights are carried by humans since he was born on earth so that these rights are natural (natural) rather than human or state gifts.¹ Human rights in Indonesia besides being regulated in the constitution are also regulated in several laws and regulations, one of which is in Law Number 39 Year 1999 concerning Human Rights, which provides the following definition of Human Rights: "Human Rights is a set of rights inherent in the dignity and human dignity of God Almighty and is a gift that must be respected,

¹ Mahfud MD, 2001, *Dasar dan Struktur Ketatanegaraan Indonesia*, Rineka Cipta, Jakarta, page. 127.

upheld and protected by the state, law and government, and every person for the honor and protection of human dignity."

A fundamental human right of every citizen is a fundamental human right in the field of health care. Based on Article 28H Paragraph (1) of the Republic of Indonesia's Constitution Year 1945 stated: "everyone has the right to birth and inner life, to take up residence, to a good and healthy environment and to a right to health care. "In rendering health care cannot be done by any man because health care is the fundamental right of every human, to be governed about the limitation of authority in administering medical services. Based on Article 23 Paragraph (1) of Law Number 36 Year 2009 concerning Health states: "health-care workers have the authority to perform health services."

The definition of Health Workers is based on Article 1 Point 1 of Law Number 36 Year 2014 concerning Health Workers, which states as follows: "Health Workers are those who devote themselves to the health sector and possess knowledge and / or skills through education in the field of health which for certain types requires authority to carry out health efforts. "Regarding the Health Workers, each grouping can be determined based on Article 11 Paragraph (1) of Law Number 36 Year 2014 concerning Health Workers, which states as follows:" Health Workers are grouped into: a) medical personnel; b) clinical psychology staff; c) nursing staff; d) midwifery personnel; e) pharmacy personnel; f) public health personnel; g) environmental health personnel; h) nutrition workers; i) physical firepower; j) medical technical personnel; k) biomedical engineering personnel; l) traditional health personnel; and m) other health workers."

Based on Article 11 paragraph (2) of Law Number 36 Year 2014 concerning Health Workers, which states that: "Types of Health Workers included in the group of medical personnel as referred to in paragraph (1) letter a consist of doctors, dentists, specialists , and specialist dentists. "The focus in this journal is about discussing one of the Health Workers in the group of medical personnel, namely Doctors in providing health services to the community. Doctors based on Article 1 Point 2 of Law Number 29 Year 2004 concerning Medical Practice, state that: "Doctors and dentists are doctors, specialists, dentists, and specialist dentists who have graduated from medical or dental education both inside and outside country recognized by the Government of the Republic of Indonesia in accordance with the laws and regulations."

Patients as parties who receive health services provided by doctors are guaranteed to obtain legal protection as guaranteed in several statutory regulations, which includes Law Number 29 Year 2004 concerning Medical Practices, Law Number 36 Year 2009 concerning Health, Law Number 36 Year 2014 concerning Health Workers, as well as other laws and regulations, as well as Doctors where doctors have their rights and are protected by both the Laws and Regulations and the Professional Code of Ethics, but in reality, there are often demands the law against the Doctor submitted by the Patient for alleged malpractice if there is an unexpected risk Patient or Family Patient in the health service to the Patient, such as the deterioration of the patient's condition or the worst case of the patient dies, the risk is always associated with malpractice If not by doctors, it is not necessarily entirely due to the doctor's fault in providing health services, so that if every medical service action carried out by the doctor is always associated with the community as a doctor's concerned malpractice, this is certainly contrary to the Human Rights for Doctors where Doctors also He has the right to get legal protection for the health service actions he has taken, so that in this study he will discuss the rights possessed by the doctor for his profession in providing medical services, as well as legal protection for doctors who are required by the Patient for medical services he performs.

B. RESEARCH METHOD

The research method used in this journal is juridical-normative legal research, with secondary data as the data studied, covering primary legal materials, namely the Republic of Indonesia's constitution

Year 1945 and Law Number 39 Year 1999 concerning Human Rights, Law Number 29 Year 2004 concerning Medical Practices, Law Number 36 Year 2009 concerning Health, Law Number 36 Year 2014 concerning Health Workers, as well as other statutory regulations, secondary legal materials covering legal theory books, scientific journals and other materials, and tertiary legal materials which include legal dictionaries, language dictionaries, and other materials.

C. PROBLEM FORMULATION

The formulation of the problems to be discussed in this journal are as follows:

1. What are the rights that the doctor has for his profession in providing medical services?
2. What is the legal protection of doctors who are required by the Patient for medical services that he does?

D. DISCUSSION

1. Rights that doctors have for their profession in providing medical care

Doctors as health service providers for their profession have rights and are protected by both the Laws and Regulations of the Medical Professional Code of Ethics, these rights can be reviewed in several articles in several Legislation Regulations, one of which is based on Article 50 of the Law Number 29 Year 2004 concerning Medical Practice, which states that: "Doctors or dentists in carrying out medical practices have the right: a) obtain legal protection as long as carrying out their duties in accordance with professional standards and standard operating procedures; b) provide medical services according to professional standards and standard operating procedures; c) obtain complete and honest information from patients or their families; and d) receive compensation for services. "

Based on the article above, it can be seen that the Doctor in carrying out his profession is to provide health services to the Patient to get legal protection provided that the doctor concerned in carrying out his duties is in accordance with professional standards and standard operating procedures. What is meant by professional standards and standard operating procedures can be found in the Explanation of Article 50 of Law Number 29 Year 2004 concerning Medical Practice, which states that: "What is meant by" professional standards "is the limit of knowledge, skill and professional attitude. minimum that must be mastered by an individual to be able to carry out his professional activities to the community independently made by professional organizations. What is meant by "standard operating procedures" is a set of instructions / steps that are standardized to complete a certain routine work process. Standard operating procedures provide the right and best steps based on joint consensus to carry out various activities and service functions made by health service facilities based on professional standards."

According to Eka Julianta, that in the legal relationship between doctors and patients (theuperatic transactions) what happens is called medical services and medical actions and there is a need for transparency and accountability, so that they are far from unilateral acts of abuse. In the medical profession, actions without principles will have an impact on deviant medical practices, which later became known as malpractice. Therefore, in the legislation governing health, it is necessary to determine standard operating procedures as guidelines for health services in Indonesia.²

In addition, other rights possessed by the Doctor are contained in Article 27 paragraph (1) of Law Number 36 Year 2009 concerning Health, which states that: "Health workers are entitled to receive legal compensation and protection in carrying out their duties in accordance with their profession."

² Eka Julianta Wahjoepramono, 2012, *Konsekuensi Hukum dalam Profesi Medik*, Karya Darwati, Bandung, page. 81.

Patients also have the right to health services they receive where in Article 58 paragraph (1) of Law Number 36 Year 2009 concerning Health, which states that: "Everyone has the right to claim compensation for someone, health personnel, and / or health providers who cause harm due to errors or negligence in the health service received. "So from that it can be concluded that the patient can sue the doctor if the harm he suffered due to health services he received was caused by a doctor's mistake or negligence, so this article in addition provides protection to patients also gives rights and legal protection to doctors where doctors cannot be prosecuted for health services they do if there are no elements of errors or negligence by doctors in them.

2. Legal protection against a doctor who is required by a patient for his medical services

Based on previous discussions, it can be seen that the doctor gets legal protection in accordance with the rights he has as stated in Article 50 of Law Number 29 Year 2004 concerning Medical Practice, one of the contents of the article is the right of the Doctor to obtain legal protection as long as carrying out tasks in accordance with professional standards and standard operating procedures. This article explains that if a doctor or dentist has carried out medical services or medical practice in accordance with professional standards and standard operating procedures, then the doctor or dentist cannot be prosecuted, either administratively, civilly, or criminal.

After all, before the Doctor gives his action to the Patient, it should have followed the rules stated in Article 45 paragraph (1) to paragraph (5) of Law Number 29 Year 2004 concerning Medical Practice, where the articles regulate the need for prior approval First of all, for patients to take medical action, the article states that:

- (1) Every medical or dental action that will be performed by a doctor or dentist for a patient must be approved.
- (2) The approval referred to in paragraph (1) is given after the patient has received a complete explanation.
- (3) The explanation as referred to in paragraph (2) shall at least include:
 - a. diagnosis and procedures for medical treatment;
 - b. the purpose of medical action taken;
 - c. other alternative actions and risks;
 - d. risks and complications that may occur; and
 - e. prognosis of the actions taken.
- (4) The approval referred to in paragraph (2) may be given both in writing and orally.
- (5) Every action, medical or dentistry containing high risk must be given with a written agreement signed by the person entitled to give consent.

In carrying out his profession, Informed Consent is an obligation that must be fulfilled by a doctor. Informed Consent consists of two words, namely "informed" which implies explanation or information (information), and the word "consent" which means approval or giving permission. Thus the Informed Consent contains an understanding of an agreement given by the patient or his family after getting information about the medical action that will be performed on him and all the risks.³

In addition to the Informed Consent, doctors are also obliged to make a "Medical Record" in every health service activity for their patients. Medical record settings are contained in Article 46 paragraph (1) of the Law concerning Medical Practice. Medical record is a file that contains notes and documents about the patient's identity, examination, treatment, actions and services provided to

³ Syahrul Machmud, 2012, *Penegakan Hukum dan Perlindungan Hukum Bagi Dokter Yang Diduga Melakukan Medikal Malpraktek*, KDP, Bandung, page. 85.

the patient. Medical records are made with various benefits, namely for the treatment of patients, improving the quality of services, education and research, financing, health statistics and proof of legal, disciplinary and ethical issues.⁴

Claims are usually submitted by the patient to the doctor for the alleged occurrence of medical service malpractice, but both in Law Number 36 Year 2009 concerning Health and Law Number 29 Year 2004 concerning Medical Practice do not recognize the term malpractice or misdiagnosis but recognize the term negligence based on Article 29 Law Number 36 Year 2009 concerning Health, which states that: "In the event that health workers are suspected of carrying out negligence in carrying out their profession, such negligence must be resolved first through mediation." In the relation of therapeutic (professional conduct), medical disputes in Indonesia are triggered by an adverse event and an opinion that every generalized adverse event is malpractice.⁵ In the event of a medical accident, it is necessary to reflect on the words of a judge who hears such a case, namely "We do require that a doctor must act cautiously on every action taken. But we cannot simply label it as an act of negligence against something that is actually an accident."⁶

Based on the things mentioned above, the author can say that if the health services provided by the Doctor to the Patients have met and adhered to professional standards and standard operating procedures, it should be for the actions of the Doctor to obtain protection based on the Legislation, also based on Article 45 Law Number 29 Year 2004 concerning Medical Practices, it can be seen that before medical action is taken on Patients, Doctors must have provided an explanation regarding the matters referred to in paragraph (3) of the law as the obligations of the Doctor, one of which is risk and complications that may occur to the patient, and after being informed of these matters, the patient or family of the patient must give his / her consent to take medical action against him, therefore the patient should be aware of the risks that might occur to him for medical action. Therefore, if a patient has a risk that is not desired by both the patient and the patient's family, it should be categorized as a medical risk outside of the wishes of the doctor concerned so that the doctor cannot be blamed for the risk because the risk occurs even though Doctors have met and adhered to professional standards and standard operating procedures, also Patients and families. Patients already know the risks that may occur, so that it cannot be categorized as a malpractice carried out by a Doctor.

E. CONCLUSION

Based on the discussion stated above, the conclusions that can be given are about the rights possessed by the Doctor in providing services to the Patients regulated in several Articles on several Legislation Regulations, one of which is Article 50 of Law Number 29 Year 2004 concerning Medical Practice and Article 27 paragraph (1) of Law Number 36 Year 2009 concerning Health, while concerning legal protection for Doctors for health services he provided, if the health services provided by the Doctor to Patients meet and comply with standards profession and standard operating procedures, as well as before medical service. Patients already know about the risks and complications that may occur for medical services, and have given approval for the conduct of medical action, then it should be for the actions of the doctor to get protection and risks that occur the patient cannot be called a doctor's malpractice.

⁴ *Ibid.*, page. 219.

⁵ Breen, J, K *et.al*, 2010, *Good Medical Practice Professionalism, Ethics And Law*, Cambridge University Press, New york, page. 49.

⁶ Mohamad Rizky Pontoh, *Penegakan Hukum Pidana Terhadap Resiko Medik Dan Malpraktek Dalam Pelaksanaan Tugas Dokter*, Jurnal *Lex Crimen*, Vol. II, No. 7, November 2013, page. 79.

REFERENCES

A. Book

- Breen, J, K *et.al*, 2010, *Good Medical Practice Professionalism, Ethics And Law*, Cambridge University Press, New york.
- Eka Julianta Wahjoepramono, 2012, *Konsekuensi Hukum dalam Profesi Medik*, Karya Darwati, Bandung.
- Mahfud MD, 2001, *Dasar dan Struktur Ketatanegaraan Indonesia*, Rineka Cipta, Jakarta.
- Syahrul Machmud, 2012, *Penegakan Hukum dan Perlindungan Hukum Bagi Dokter Yang Diduga Melakukan Medikal Malpraktek*, KDP, Bandung.

B. Journal

- Mohamad Rizky Pontoh, *Penegakan Hukum Pidana Terhadap Resiko Medik Dan Malpraktek Dalam Pelaksanaan Tugas Dokter*, Jurnal *Lex Crimen*, Vol. II, No. 7, November 2013.

C. Legislation

- Indonesia, The Constitution of the Republic of Indonesia Year 1945.
- _____, Law Number 39 Year 1999 concerning Human Rights.
- _____, Law Number 29 Year 2004 concerning Medical Practice.
- _____, Law Number 36 Year 2009 concerning Health.
- _____, Law Number 36 Year 2014 concerning Health Workers.

LEGAL ASPECT OF INFORMED CONSENT IN TERAPEUTIC TRANSACTIONS

Asrofi S Surachman

Student of Legal Studies Doctor Program, Universitas Borobudur
asrofisurachman4@gmail.com

Abstract

A doctor will feel safe and comfortable in providing treatment, action and service to the patient if it has provided an explanation to the patient / family about the illness suffered by a patient, treatment / action to be taken and possible outcomes of treatment, risks and possible complications of the action will be done. The explanation will be continued with the signatory to the agreement / rejection of the treatment / action to be taken. Approval of this action is called informed consent in therapeutic transactions.

Of the many laws, government regulations and accreditation standards both national and international hospitals state that consent information in therapeutic transactions is very necessary and must be carried out before treatment / action in therapeutic transactions. Informed Consent can be written or unwritten, but when it comes to actions that have a high risk, both morbidity and mortality, then Informed Consent should be written. Meanwhile, the Patient Doctor's relationship in Health Law is known as a Therapeutic Transaction (TT) as a civil agreement, Therapeutic Transaction is subject to the regulations concerning treaty law in book III of the Civil Code (KUH Perdata). Doctor Patient Agreement seen from its contents is an agreement of effort and not an agreement of results. This is more evident in the existence of an agreement on the Therapeutic Transaction that gives birth to responsibility to the parties. The doctor's responsibility in Therapeutic Transactions can generally be divided into 3, namely responsibility for losses caused by (1) Acts against the Law (Article 1365 of the Civil Code), (2) Negligence or inadvertence (Article 1366 of the Civil Code), (3) Responsibility superior to subordinates (Article 1367 Civil Code). Therefore, even though there is an agreement on the approval of a medical / surgical procedure, a problem will arise when the patient or husband / wife or parent of the patient feels there is an irregularity during the procedure or after surgery, for example, the patient is unconscious. Then the patient asks him who then gets an unsatisfactory answer. This is where 'disputes' begin to emerge. So, informed consent seen from the legal aspect is not an agreement between two parties, but rather towards unilateral agreement on services offered by other parties (patients) from a person or group of medical service providers, namely doctors.

Keywords: Legal Aspect, Informed Consent, Therapeutic Transaction.

A. INTRODUCTION

A doctor will feel safe doing the action / treatment to the patient, if it has provided an explanation to the patient about the diagnosis of the disease, the actions to be taken, the risks and complications that may occur if an action / treatment is carried out to the patient. The explanation was continued with the signing of the agreement on action / treatment to be carried out. But it turns out that there are still many patients / families who demand from the doctor or the hospital / health care provider, if there is any unsuccessful treatment / action given to the patient.

This happens because there is suspicion from the patient / family that there is negligence or error from the doctor or service provider (hospital) so that there is a failure in action / treatment. Therefore, informed consent is not a guarantee that the patient / family does not complain or demand if there is a

failure in treatment or action against the patient. Informed Consent is only a unilateral agreement that the patient / family agrees to do treatment / action, therefore it does not rule out the possibility that the patient / family does not sue the hospital or doctor if there is a failure in treatment / action.

B. RESEARCH METHODE

The research method that will be used in writing research is juridical normative, with the data studied in the form of library material or secondary data consisting of primary legal material, namely Law No. 36 of 2009, Law No. 29 In 2004, concerning Medical Practice, Regulation of the Minister of Health No. 290 of 2008, concerning Approval of Medical Measures and other regulations / policies relating to informed consent.

C. PROBLEM FORMULATION

The formulation of the problems that can be discussed in this study are as follows :

1. What is the regulation regarding the informed consent ?
2. What is the legal aspect of informed consent in therapeutical transaction?

D. DISCUSSION

1. Informed Conccent

Informed Consent contains an understanding of an agreement given by the patient or his family after getting information about the medical action that will be performed on him and all the risks.

The principle of informed consent is rooted in human dignity where the patient's autonomy and personal integrity must be protected. Human integrity demands that everyone act according to what he knows and based on his free choice. Such choices are personally sourced from within, not from coercion or pressure from other parties.

In everyday practice we often hear from people related to health services, especially in hospitals, having been given a piece of paper from the official to be signed, said the official for approval of actions, whether operated on, in Sectio Caesaria, chemotherapy, plastic surgery or action other medical. Before signing the agreement the action is preceded by the delivery of information by the competent officer to the patient or the husband / wife or parent of the patient about the actions to be taken and the possibility of complications if they occur. Such a procedure is standard, but problems sometimes arise when patients or husbands / wives or parents of patients feel there is an irregularity during the action or after surgery, for example, the patient is unconscious (coma). Then the patient asks him who then gets an unsatisfactory answer. This is where 'disputes' begin to emerge.

In principle, informed consent is the right and obligation of each competent individual to improve his spiritual life and physical well-being through his free consent, or by refusing to approve certain medical actions based on sufficient knowledge of benefits, losses and associated risks. For individuals who are incompetent, these rights and obligations must be interpreted by the guarantor of the individual (patient) who is legitimate according to his knowledge or rational desire. So that it can minimize the occurrence of medical dis Informed Consent is a process of communication between doctors and patients about the agreement on medical action that will be performed by doctors on patients, which is then followed by the signing of the Informed Consent form in writing. This is based on the right of a patient to everything that happens to his body and the main task of the doctor in healing patients. The purpose of providing complete information about the disease as well as medical actions to be carried out is so that the patient can determine his own decision according to his own choice. On the other hand, this information must be given correctly to patients, because

the main obligations of a doctor who is carrying out a profession are very moral, as well as the norms that apply in society.

Informed Consent is a process of communication between doctors and patients about the agreement on medical action that will be performed by doctors on patients, which is then followed by the signing of the Informed Consent form in writing. This is based on the right of a patient to everything that happens to his body and the main task of the doctor in healing patients. The purpose of providing complete information about the disease as well as medical actions to be carried out is so that the patient can determine his own decision according to his own choice. On the other hand, this information must be given correctly to patients, because the main obligations of a doctor who is carrying out a profession are very moral, as well as the norms that apply in society.

According to Loebby Loqman, informed consent has not resolved the problems that occur in practice. In other words, even though in practice there is always an explanation of information to the patient about what will be done by a doctor, and also asked for patient approval for what will be done by a doctor, there is still a dispute when an unexpected event occurs.

Submission of information for medical treatment is commonly known as the 'informed consent'. The implementation of informed consent does not only follow the rules (fixed procedure) but actually has legal responsibility. Old Health Act (UUK No. 23 of 1992), Informed consent is not specifically listed. We can only see and mention a little that in an emergency where medical action is needed then it can only be done with the consent of the pregnant mother concerned or her husband or family (article 15 paragraph 2 letter c). The latest Health Law (UUK No. 36 of 2009), informed consent (using the term not informed consent) has been more frequently mentioned. For example in article 8 which reads, "Every person has the right to obtain information about his health data including actions and treatment that have been and will be received from health workers". Furthermore article 56 paragraph 1 concerning Patient Protection reads: "Every person has the right to accept or reject part or all of the assistance measures that will be given to him after receiving and understanding the information regarding the action in full".

Provisions regarding informed consent are stipulated in article 45 of Law No. 29 of 2004 concerning Medical Practice which states as follows:

1. Every medical or dental action that will be performed by a doctor or dentist on a patient must be approved.
2. The approval referred to in paragraph (1) is given after the patient has received a complete explanation.
3. Explanation as referred to in paragraph (2) includes at least:
 - a. Medical diagnosis and procedure;
 - b. The purpose of medical actions taken;
 - c. Alternative other actions and risks;
 - d. Risks and complications that may occur; and
 - e. Prognosis of actions taken.
4. The approval referred to in paragraph (2) may be given both in writing and orally.
5. Every high-risk medical or dental action must be given with a written agreement signed by the person entitled to give consent.
6. Provisions regarding the procedure for approval of medical or dental actions as referred to in paragraph (1), paragraph (2), paragraph (3), paragraph (4), and paragraph (5) shall be regulated by a Ministerial Regulation.

In carrying out medical actions on patients, as part of an informed consent, the doctor must explain several things, namely:

- a) Outline of the ins and outs of the disease suffered and procedures for treatment / treatment to be given / applied;
 - b) Risks faced such as complications that are expected to arise;
 - c) Prospects / prognosis of success or failure;
 - d) Alternative methods of treatment / treatment;
 - e) Matters that can occur if the patient refuses to give consent; and,
- The treatment / treatment procedure to be carried out is an experiment or deviates from the habit, if it is to be done.

The rights to obtain information are the most important rights of patients even in special actions, an informed consent is required. The patient has the right to ask about things about the plan of medical action to be received if the information provided is felt to be unclear, the patient has the right to ask for an opinion or explanation from another doctor to clarify or compare information about the planned medical action, the patient has the right to reject the plan medical action, the patient has the right to request confidentiality for the disease he suffered.

All information above must be received by the patient before the medical action plan is implemented. The provision of this information should be objective, impartial and without pressure. After receiving all the information, the patient should be given time to think and consider his decision.

The relationship between informed consent and medical action to be performed by a doctor can be said that informed consent is the main component that supports the existence of such medical action. As a juridical basis, informed consent is regulated in the regulation of the Minister of Health No. 290 / MENKES / PER / III / 2008 concerning approval of medical actions to be performed on patients must be approved. The intended consent was given in writing or verbally after the necessary explanation was given about the need for medical action to be taken.

The term informed consent according to KKI is an agreement on medical or dental actions which means patient approval or legitimate representation of the plan for medical or dental action submitted by a doctor or dentist, after receiving sufficient information to be able to make an agreement. Approval of medical or dental actions is a unilateral statement from the patient and not an agreement between the patient and the doctor or dentist, so that it can be withdrawn at any time. Approval of the action of medicine or dentistry is a process as well as the result of an effective communication between the patient and the doctor or dentist, and not just the signing of the consent form. Approval of medical action is a patient's unilateral statement or legitimate representation in the form of approval of a plan of medical or dental action submitted by a doctor or dentist, after receiving sufficient information to be able to make an agreement or rejection.

An agreement is considered valid if:

- 1) Patients have been given an explanation / information
- 2) Patients or legitimately representing them are competent to make decisions / approvals
- 3) Approval must be given voluntarily

2. Therapeutical Transaction

Therapeutical Transaction is an agreement made in the context of therapy. In this case therapy is not only about health, but also involves all aspects of health including promotions, preferences, treatment and rehabilitation. Doctor Patient Relations in Health Law is known as Therapeutical Transactions (TT) as a civil agreement, Therapeutic Transactions are subject to regulations regarding treaty law in book III of the Civil Code (KUH Perdata). Doctor Patient Agreement seen from its contents is an agreement of effort and not an agreement of results. This is more evident in the existence of an agreement on the Therapeutic Transaction that gives birth to responsibility to the

parties. The doctor's responsibility in Therapeutical Transactions can generally be divided into 3, namely responsibility for losses caused by (1) Acts against the Law (Article 1365 of the Civil Code), (2) Negligence or inadvertence (Article 1366 of the Civil Code), (3) Responsibility superior to subordinates (Article 1367 Civil Code), and regulated also in Law No. 36 of 2009 concerning Health, article 56 paragraph 1, 2, 3, and article 57 paragraph 1, 2, and article 58 paragraph 1, 2, 3 which essentially regulates in the responsibility of the doctor is also obliged to follow the Indonesian Medical Ethics Code, Professional Standards, and Standard Operating Procedures and the provisions of Administrative Law (registration certificate and practice permit) in carrying out his work as a doctor.

So, in general, consent information in therapeutic transactions is as follows:

- a. In general, touching, or making an intervention physically to someone, without any "approval" thereof, is considered as persecution.
- b. Therefore, obtaining "consent" is a must in a medical / research act, other than a routine physical examination of patients who come to see a doctor.
- c. In the case of routine and general physical examinations and medical investigations, written consent is not required, because patients who come to the doctor's office for treatment, are an implicit consent of the patient
- d. Without written consent that explains the need for an action to be referred to a specialist doctor, the patient / family in the future can sue.
- e. Likewise for someone who experiences an emergency / unconsciousness, for example due to an accident

In this situation, medical action can be taken by the doctor immediately, to save the life of the patient, without having to ask for written consent. Based on Article 56 paragraph 1 of Law No. 36 of 2009 concerning Health "Every person has the right to accept or reject part or all of the assistance measures that will be given to him after receiving and understanding the information regarding the action in full."

Permenkes R.I Number: 290 / MENKES / PER / III / 2008 states that the approval of medical action is an agreement given by the nearest patient or family after obtaining a complete explanation of the action of medicine or dentistry to be performed on the patient. The term Informed Consent was first implied in Law Number 23 of 1992 concerning health, namely in Article 53 paragraph (2) which states that: "Health workers in carrying out their duties are obliged to meet professional standards and respect the rights of patients. In explaining patient rights, the explanation of the article provides examples of patient rights including the right to information and the right to give consent' "

Approval from patients before doctors and dentists to perform medical services or medical actions on their patients is a necessity or obligation. This is reflected in the provisions of Article 45 paragraph (1 and 2) of the Medical Practice Act which states the following:

1. Every medical or dental action that will be performed by a doctor or dentist for a patient must be approved.
2. The approval referred to in paragraph (1) is given after the patient has received a complete explanation.

Approval of medical action can be given orally and can also be given in writing. It's just that the UUPK requires written approval for high-risk cases that must be signed by the person entitled to give consent. It's just that who is meant by the rightful person has yet to have a provision because there is no Government Regulation that regulates it. The practice that has occurred so far that signed the medical action agreement if the patient is unable to do so is the parent, husband or wife, family or anyone who takes the patient.

As for the substance of the agreement is the action of medicine or health services to be carried out by doctors as a form of health services. A new informed consent is given to patients if they fulfill a minimum of elements:

1. Information disclosure.
2. Patient competency in giving consent.
3. Volunteering

If after the information is given, the patient refuses to carry out a medical / medical treatment, then the doctor should also obtain the documentation, and ask for the patient's signature on a patient rejection form, stating that all risks have been explained.

E. CONCLUSION

Informed consent is seen from the legal aspect as an agreement between two parties, the agreement is more towards unilateral approval of services offered by other parties. The operational definition is a unilateral agreement from the person who is entitled (ie patient, family or guardian) whose permission or approval for the doctor to take medical action representing the person entitled to get sufficient information about the therapeutic action to be taken. Patients / people who can apply for approval and like to ask questions about the court disagree with local ethics and customs, agreeing there is nothing wrong with the medical training provided. Therefore, what is very important in therapeutic transactions is good communication between doctors, nurses and hospital staff for patients and farms. Guidance can also be done because of the teaching disability given to patients, even though there is no failure in medical treatment

REFERENCES

A. Book

- Alexandra Indriyanti Dewi, 2008, Health Ethics and Law, Yogyakarta.
- Kerbala Husein, 1993. Ethical Aspects and Juridical Informed consent, Jakarta: Sinar Harapan Library
- Komalawati, Veronica, 2002. Role of Informed Consent in Therapeutic Transactions, Bandung: Citra Aditya Bakti
- Indonesian Medical Council, Medical Action Approval Manual, 2002. Jakarta: Indonesian Medical Council
- Loqman Loebby, 2000. Review of Criminal Law Against Power Relations
- Health with Consumers / Patients, Legal Consultation Relating to
- Health Services in Hospitals, Surabaya
- Machmud, Syahrul, 2012. Law Enforcement and Legal Legal Protection
- Alleged Doctors Doing Medical Malpractice, Karya Putra Darwati, Bandung.

B.Legislation

- Minister of Health, Regulation No. 290 of 2008, concerning Approval of Medical Measures. In 2008. Jakarta
- Indonesian Government, Law No. 36 of 2009, About Health. Republic of Indonesia State Institution of 2009 No. 144 State Secretariat. Jakarta.
- Government of Indonesia, Law No. 29 of 2004 concerning Medical Practices. Republic of Indonesia State Institution of 2004 No. 116 State Secretariat. Jakarta.

THE LEGAL REVIEW OF EUTHANASIA IN THE PERSPECTIVE OF HUMAN RIGHTS PARTICULARLY THE RIGHT TO LIFE

Arief WidyaTaufiq

Student of Legal Studies Doctor Program, Universitas Borobudur
taufiqsadid@yahoo.co.id

Abstract

The commitment of the legal state is to uphold and provide protection of law against human rights for each citizen. The right to life is one of those rights that cannot be reduced in any circumstance or are referred to as non-derogable rights. Euthanasia is etymologically derived from the Greek language of the eu which means normal or good, and thanatos which means death. On the basis of his said euthanasia means a good death or an easy death without suffering. Euthanasia's decision was made to eliminate disease and suffering of the patient rather than to avoid the spread of diseases that would spread to many. There are some reasons that euthanasia's actions violate the basic right of human life, and thus today there is still debate as to whether euthanasia's actions are some form of human rights infringement, particularly the violation of human rights, since euthanasia is a way to end human life. This study has 2 (two) formulation of the problem, namely the first: "How does Positive Law in Indonesia regulate the provisions of Euthanasia ?; and the second: "how is the Legality of euthanasia based on Positive Law in Indonesia?" The research method used in this study is juridical-normative legal research, with the data being examined in the form of secondary data that includes primary legal material, secondary legal materials, and tertiary legal. Primary legal materials, namely the Criminal Code, the Constitution of the Republic Indonesia Year 1945, and Law Number 39 Year 1999 concerning Human Rights, secondary legal materials, namely scientific research, legal journals, and legal books, then finally, tertiary legal materials, namely legal dictionaries, language dictionaries (English and Indonesian), and other legal materials needed to support this research.

Keywords: Right to Life, Human Rights, Euthanasia, Crimes.

A. INTRODUCTION

The commitment of the legal state is to uphold and provide legal protection for each citizen. The law state according to Abdul Aziz is a country based on law and justice for his citizens. What it means is that all the authority and actions of the equipment of the state or the ruler, based solely on law or in other words governed by law so as to reflect justice for the association of its citizens.¹ In accordance with the mandate of the Constitution of the Republic of Indonesia, namely the Constitution of the Republic Indonesia Year 1945, especially in Article 28I Paragraph (4), which reads: "Protection, promotion, enforcement and fulfillment of human rights are the responsibility of the state, especially the government." The concept of Indonesia as a rule of law as contained in the Constitution of the Republic of Indonesia has provided a firm guarantee of the importance of protecting human rights. Human rights recognition in Indonesia has been implemented in Pancasila as the state's philosophy and as the fundamental foundation of national and national life.²

¹ Abdul Aziz Hakim, 2011, *Negara Hukum dan Demokrasi Di Indonesia*, Penerbit Pustaka Pelajar, Yogyakarta, page. 8.

² Syukri Akub dan Baharudin Baharu, 2012, *Wawasan Due Process of Law dalam Sistem Peradilan Pidana*, Rangkang Education, Yogyakarta, page. 45.

Human rights are a set of rights that are inherent in human dignity and values as creatures of God Almighty and are His gifts that must be respected, upheld and protected by the state, law and government, and every person for the honor and protection of human dignity (Article 1 Point 1 of Law Number 39 Year 1999 concerning Human Rights). The Republic of Indonesia recognizes and upholds human rights and basic human freedoms as rights that are inherently inherent in and inseparable from humans, which must be protected, respected and upheld for the sake of warning human dignity, prosperity, happiness and intelligence and justice (Article 2 of Law Number 39 Year 1999 concerning Human Rights).

Regulations concerning Human Rights are contained in the Constitution of the Republic of Indonesia, one of which is the right to live as a basic right for every individual human being guaranteed in Article 28A of the Constitution of the Republic Indonesia Year 1945, which reads: "Everyone has the right to live and entitled to maintain life and life." The right to life is one of the rights that cannot be reduced under any circumstances or referred to as non derogable rights. Therefore, until now there is still a debate about whether the act of euthanasia is a form of violation of human rights, specifically a violation of the right to life, considering euthanasia is a way to end human life.

Euthanasia in etymology comes from Greek, namely *eu* which means normal or good, and *thanatos* which means dead. Based on the fragment he said euthanasia means good or easy death without suffering. The language of the word euthanasia was later known in the world of medicine and law, because in its development, the term was widely used in legal terms, especially in criminal law concerning murder offenses.³ According to Soehardjo, the notion of euthanasia is the death or lethal death of someone who is seriously ill who cannot be cured.⁴ The presence of euthanasia as a human right in the form of the right to die is considered a logical consequence of the right to life. Because everyone has the right to live, everyone has the right to choose a death that is considered pleasing to him. It is this fun death that later gave rise to the term Euthanasia.⁵

The decision to do euthanasia is done to eliminate the disease and suffering of patients, in addition to avoiding the spread of diseases that will spread to many people. In addition, euthanasia was carried out on the grounds that the hope for medical recovery and no more, so the cost of treatment was wasted. Some serious diseases such as cancer and leukemia are some of the diseases that are difficult to treat, so it is potentially a reason for euthanasia.⁶ If we judge euthanasia from aspects of human rights. The act of euthanasia is an act of violating human rights. There are several reasons that the act of euthanasia violates the basic rights of human life, violates the declaration issued by the United Nations, Article 28A of the Constitution of the Republic Indonesia Year 1945, the Law and the most important is to override the authority of the Almighty God.⁷ Based on this, this study will discuss the provisions of Indonesian positive law governing euthanasia, as well as a study of the legality of the actions of euthanasia in terms of positive law in Indonesia.

³ Waluyadi, 2005, *Ilmu Kedokteran Kehakiman*, cet ke-2, Djambatan, Jakarta, page. 135.

⁴ Soehardjo, 1992, *Politik Hukum dan Pelaksanaannya dalam Negara republik Indonesia*, Fakultas Hukum Undip, Semarang, page. 4.

⁵ Nur Hayati, *Euthanasia Dalam Perspektif Hak Asasi Manusia Dan Kaitannya Dengan Hukum Pidana*, Jurnal *Lex Jurnalica*, Vol. 1, No. 2, April 2004, page. 93.

⁶ M. Yusuf Hanafilah dan Amri Amir, 1999, *Etika Kedokteran dan Hukum Kesehatan*, EGC, Jakarta, page. 107.

⁷ Tjandra Sridjaja Pradjonggo, *Suntik Mati (Euthanasia) Ditinjau Dari Aspek Hukum Pidana Dan Hak Asasi Manusia Di Indonesia*, Jurnal Ilmiah Pendidikan Pancasila dan Kewarganegaraan, Th. 1, No. 1, Juni 2016, page. 62.

B. RESEARCH METHOD

The research method used in this study is juridical-normative legal research, with the data being examined in the form of secondary data that includes primary legal material, secondary legal materials, and tertiary legal . Primary legal materials, namely the Criminal Code, the 1945 Constitution of the Republic of Indonesia, and Law No. 39 of 1999 concerning Human Rights, secondary legal materials, namely scientific research, legal journals, and legal books, then finally, tertiary legal materials, namely legal dictionaries, language dictionaries (English and Indonesian), and other legal materials needed to support this research.

C. PROBLEM FORMULATION

Based on the explanation in the introduction section above, the formulation of the problem to be discussed is as follows:

1. How does Positive Law in Indonesia regulate the provisions of Euthanasia?
2. How is the Legality of euthanasia based on Positive Law in Indonesia?

D. DISCUSSION

1. Regulations For Euthanasia In Indonesia's Positive Law

Euthanasia in Indonesia is no longer a new thing, but until now it is still a debate. In medical dictionaries it is stated that euthanasia intentionally ends a person's life by means of death or eliminating life calmly and easily to complete suffering. This understanding holds that euthanasia is a preventive measure for suffering that is more severe than someone experiencing an accident or contracting an illness. Euthanasia is done considering there is no other way that can help a person to escape extraordinary suffering.⁸

The progress of science and technology has an impact on ethical / moral, religious, legal, social, cultural and other aspects. Doctors in dealing with patients asking for euthanasia are faced with a dilemma, in terms of whether they have the legal right to end a patient's life on the basis of the patient's own request or family, but without making the doctor himself face a legal consequence. Euthanasia internationally has also received its own attention. Countries in the European Continent such as the Netherlands have legalized the practice of euthanasia, then Belgium, America and Australia have also begun to recognize euthanasia. Of course all of this is through various and several procedures, rules and requirements.⁹

Related to euthanasia according to Dr. R. Soeprono, that euthanasia can be divided into 4 (four) forms, namely:¹⁰

- a. Voluntary euthanasia. Patients request, give permission or consent to stop or eliminate life-prolonging treatments.
- b. Euthanasia forced (Involuturv eulfzunusu) Allowing the patient to die without the patient's prior knowledge by stopping or eliminating life-prolonging treatments.
- c. Voluntary Mercy Killing (Mercy Killing Voluntary) With the patient's knowledge and consent, action is taken to cause death.
- d. Mercy Killing was forced (Involutari A1ercv Killing) Actions deliberately taken without the patient's knowledge to speed up death.

⁸ Gunawandi, 2007, *Hukum Medik (medical Law)*, Fakultas Ilmu Kedokteran Universitas Indonesia, Jakarta, page. 246.

⁹ Pingkan K. Paulus, *Kajian Euthanasia Menurut HAM (Studi Banding Hukum Nasional Belanda)*, Jurnal Vol. XXI, No. 3, April-Juni 2013, page. 118.

¹⁰ Prakoso. D. dan D. A. Nirwanto, 1984, *Euthanasia Hak Asasi Manusia dan Hukum Pidana*, Ghalia Indonesia, page. 54.

Referring to the problem of death, when viewed from the aspect of the way it occurs, the world of science distinguishes it into three types of deaths, namely: Orthothanasia, namely death that occurs due to a natural process, Dysthanasia, which is an unnatural death and Euthanasia, namely death that happens with help or not with the help of a doctor.¹¹

Juridically, euthanasia is not explicitly regulated in positive law in Indonesia, which is included in the Health Law (Law Number 36 Year 2009 concerning Health) and the Medical Practice Act (Law Number 29 Year 2004 concerning Medical Practice), so that there are no clear limits that govern the euthanasia action. But in the Criminal Code there are several articles which are often associated with the problem of euthanasia, one of which is Article 344 of the Criminal Code. The Article 344 of the Criminal Code reads as follows: "Whoever takes the life of another person at the request of the person who is clearly stated with sincerity, is punished with a maximum imprisonment of 12 years."

Based on the type of euthanasia, for active and passive euthanasia without request, there are several related articles regarding euthanasia as the legal basis for the regulation of euthanasia, as follows:

- a. Article 340 of the Criminal Code: "Anyone who intentionally and planned to eliminate the soul of another person is punished, because murder is planned (moord), with the death sentence or prison for the rest of his life or temporary prison for twenty years.
- b. Article 359 of the Criminal Code: "Whosoever, because of his wrongdoing, causes the death of a person, sentenced to prison for a period of five years or confinement for the whole year.
- c. Article 345 of the Indonesian Criminal Code: "Anyone who intentionally incites others to commit suicide, helps him in doing so, or gives the effort to commit suicide, is sentenced to imprisonment for four years in prison."

2. Euthanasia's Legality Based On Positive Laws In Indonesia

Man's awareness of human rights comes from his sense of self-worth and self-dignity. Therefore, human rights have existed from the time it was born in the world, and thus HAM is not new.¹² From various kinds of debates about euthanasia, starting from the point of view of human rights, religion and practice in several countries, it would be good for Indonesia to prohibit the act of euthanasia, by pouring it into a more strict legal provision, it is only done to respect human dignity and respect for the right to human life that cannot be reduced under any circumstances. No matter how severe the illness suffered by a patient, it does not mean that there is no hope of recovery at all, especially when there is a rapid development in the world of medicine and medicine, so there should be no reason to eliminate human life under any pretext in Indonesia.¹³

Barda Nawawi Arief is of the opinion that the basis for acting is related to the problem of the source of law or the basis of legality to declare an act as a crime or not.¹⁴ The basis of the legality of the act of euthanasia in Indonesia is not clearly regulated in positive law but related to the regulation of euthanasia can refer to several articles in the Criminal Code, one of which as discussed earlier, namely in Article 344 of the Criminal Code, which reads as follows: "Who eliminating the

¹¹ Djoko Prakoso dan Djaman Andhi Nirwanto, 1994, *Euthanasia Hak Asasi Manusia dan Hukum Pidana*. Ghalia Indonesia, Jakarta, page. 8.

¹² Ramdlon Naning, 1988, *Cita dan Citra Hak-HAM di Indonesia*, Lembaga Kriminologi Program Penunjang Bantuan Hukum Universitas Indonesia, Jakarta, page. 8.

¹³ Endang Suparta, *Prospektif Pengaturan Euthanasia Di Indonesia Ditinjau Dari Perspektif Hak Asasi Manusia*, Jurnal Ilmiah Penegakan Hukum, 5 (2) Desember 2018, page. 83.

¹⁴ Barda Nawawi Arief, 2009, *Perkembangan Sistem Pemidanaan di Indonesia*, Badan Penerbit Universitas Diponegoro, Semarang, page. 49.

lives of others at the request of the person himself who is clearly stated with sincerity, is punished with a maximum imprisonment of 12 years."

Based on the article, it can be concluded that the murder even at the request of the victim is still subject to criminal sanctions for the perpetrator. In addition, if euthanasia is carried out, it will violate human rights. Judging from the aspect of human rights, that the right to life is a fundamental right that belongs to every human being. The consequence of this right of life is an obligation for every human being to uphold the glory of human life. In Article 3 of the Declaration of Human Rights it is stated that everyone has the right to a person's life, independence and safety.

The right to life is guaranteed in Law Number 39 Year 1999 concerning Human Rights, specifically in Article 9 Paragraph (1) of Law Number 39 Year 1999 concerning Human Rights, which reads: "Every person has the right to live, maintain life and improve his standard of living." Guarantees for the right to life are emphasized in the Elucidation of Article 9 Paragraph (1) of Law Number 39 Year 1999 concerning Human Rights, which reads: "Every person has the right to life, to maintain life, and to improve his standard of living. The right to life is even attached to unborn or dead people. In the case or situation that is very extraordinary that is in the interests of the life of his mother in the case of abortion or based on a court decision in a death sentence, then the act of abortion or capital punishment in terms of and or conditions, can still be permitted. Only in these two things is the right to life can be limited. "

Based on the article, it can be seen that a person's right to life can be limited by the reason for the occurrence of a very extraordinary thing or situation, which only consists of 2 (two) reasons, namely in the interest of his mother's life in an abortion or based on a court decision in a death sentence. Apart from these two things, all forms of termination of one's life constitute a form of criminal offense and are not legalized. Thus on this basis, in the context of positive law in Indonesia euthanasia is still considered a prohibited act, so it is not possible to conduct euthanasia even if there is a prohibition on "terminating one's life" even at the request of the person himself. The act is still considered a criminal act, namely as an act threatened with criminality for those who violate the prohibition in accordance with applicable regulations, namely the Criminal Code.

E. CONCLUSION

The conclusion of the above discussion is related to legal regulation and the legality of euthanasia is that juridically euthanasia is not explicitly regulated in positive law in Indonesia, so there are no clear limits governing euthanasia, but in the Criminal Code there are the article is often associated with the problem of euthanasia, one of which is Article 344 of the Criminal Code, as well as other articles such as Article 340 of the Criminal Code, Article 359 of the Criminal Code, Article 345 of the Criminal Code, etc. in Indonesia euthanasia is still considered an act that is prohibited, because a person's right to life can only be limited by reason of an extraordinary thing or situation, which consists of only 2 (two) reasons, namely in the interest of his mother's life in an abortion in death penalty cases, so besides karen secondly, all forms of termination of one's life constitute a form of criminal offense and are not legalized, including euthanasia. Therefore euthanasia is not legalized in Indonesia so that the perpetrators can be subject to the threat of punishment.

REFERENCES

A. Book

- Abdul Aziz Hakim, 2011, *Negara Hukum dan Demokrasi Di Indonesia*, Penerbit Pustaka Pelajar, Yogyakarta.

- Barda Nawawi Arief, 2009, *Perkembangan Sistem Pemidanaan di Indonesia*, Badan Penerbit Universitas Diponegoro, Semarang.
- Djoko Prakoso dan Djaman Andhi Nirwanto, 1994, *Euthanasia Hak Asasi Manusia dan Hukum Pidana*. Ghalia Indonesia, Jakarta.
- Gunawandi, 2007, *Hukum Medik (medical Law)*, Fakultas Ilmu Kedokteran Universitas Indonesia, Jakarta.
- M. Yusuf Hanafilah dan Amri Amir, 1999, *Etika Kedokteran dan Hukum Kesehatan*, EGC, Jakarta.
- Prakoso. D. dan D. A. Nirwanto, 1984, *Euthanasia Hak Asasi Manusia dan Hukum Pidana*, Ghalia Indonesia.
- Ramdlon Naning, 1988, *Cita dan Citra Hak-HAM di Indonesia*, Lembaga Kriminologi Program Penunjang Bantuan Hukum Universitas Indonesia, Jakarta.
- Soehardjo, 1992, *Politik Hukum dan Pelaksanaannya dalam Negara republik Indonesia*, Fakultas Hukum Undip, Semarang.
- Syukri Akub dan Baharudin Baharu, 2012, *Wawasan Due Process of Law dalam Sistem Peradilan Pidana*, Rangkang Education, Yogyakarta.
- Waluyadi, 2005, *Ilmu Kedokteran Kehakiman*, cet ke-2, Djambatan, Jakarta.

B. Journal

- Endang Suparta, *Prospektif Pengaturan Euthanasia Di Indonesia Ditinjau Dari Perspektif Hak Asasi Manusia*, Jurnal Ilmiah Penegakan Hukum, 5 (2) Desember 2018.
- Nur Hayati, *Euthanasia Dalam Perspektif Hak Asasi Manusia Dan Kaitannya Dengan Hukum Pidana*, Jurnal Lex Jurnalica, Vol. 1, No. 2, April 2004.
- Pingkan K. Paulus, *Kajian Euthanasia Menurut HAM (Studi Banding Hukum Nasional Belanda)*, Jurnal Vol. XXI, No. 3, April-Juni 2013.
- Tjandra Sridjaja Pradjonggo, *Suntik Mati (Euthanasia) Ditinjau Dari Aspek Hukum Pidana Dan Hak Asasi Manusia Di Indonesia*, Jurnal Ilmiah Pendidikan Pancasila dan Kewarganegaraan, Th. 1, No. 1, Juni 2016.

C. Legislation

- Criminal Code
- Indonesia, The Constitution of the Republic of Indonesia Year 1945.
- _____, Law Number 39 Year 1999 concerning Human Rights.

LEGAL PROTECTION OF DOCTOR PROFESSION AGAINST THE ADVERSE EVENT IN THE HOSPITAL

Bambang Dwi HS

Student of Legal Studies Doctor Program, Universitas Borobudur

badwiehs@gmail.com

Abstract

Unexpected events both in the form of misdiagnosis and errors in treatment processes and other errors can occur during the process of providing health services. There are 4 types of incidents that can occur at the hospital: Sentinel events, Unexpected events (Adverse event), Near injury / Near Miss and Potential Injury Conditions.

Patient safety is a system that makes patient care safer. One of the main benefits of the system is to reduce the incidence of medical disputes.

Most medical disputes in Indonesia are triggered by **unexpected events** (adverse events) and unfortunately it has become public opinion that each adverse events is malpractice.

The reciprocal relationship in medical services is almost certainly based on a sense of mutual need, mutual trust, sympathy and empathy between doctors and patients. Medical dispute resolution in the event of a conflict between doctors as providers of medical services with patients as recipients often uses legal channels.

In the case of a medical dispute that is based on adverse events, we must wisely determine our attitude. Adverse events is an incident that is equally unexpected by doctors and patients. Adverse events is an accidental and unwanted incident.

Keywords: Malpractice, Incidence injury, Adverse event

I. PRELIMINARY

The hospital as a public health service is expected to provide complete and holistic health services, starting from emergency care, outpatient installation services, providing inpatient services, as well as supporting installations that are of high quality and affordable by the community. The hospital has the task of prioritizing healing and recovery efforts for its patients (Med Law No. 44 of 2009).

Aside from being a lot of production institution and multi discipline institution, the hospital is a very complex organization because it is capital intensive, fully technology, system intensive, and quality-intensive and risky, allowing for unexpected events / inside the hospital that conducted by medical personnel including doctors.

Doctor's profession is a very noble profession. In his service, a doctor must prioritize the interests of others and society in addition to his personal interests. In order to carry out its role as a doctor / medical personnel, professional doctors, pharmacists, midwives and nurses require professional competence in order to carry out their duties and responsibilities properly and correctly. Professional competence as outlined in Clinical privileges is an absolute requirement that must be possessed so that medical personnel in carrying out their duties are truly measurable and as far as possible avoid various unexpected events.

Unexpected events both in the form of misdiagnosis and errors in treatment processes and other errors can occur during the process of providing health services at the hospital. Some of these errors exist potentially causing injury to patients and some not. **The author is sure and certain that there is no doctor intends to harm his patient. A doctor is just a human being who tries to help patients to seek**

healing with the blessing of Allah SWT. However, security of action is the most fundamental thing in providing health services. Patient safety is a top priority that must be carried out by the hospital, so that the patient's service can be guaranteed safety and in order to maintain the quality of security and service image in the hospital.

II. PROBLEM BACKGROUND

Republic of Indonesia Law No. 44 of 2009 concerning Hospital explains that hospitals are required to implement patient safety standards and are implemented through incident reporting, analyzing and implementing problem solving in order to reduce the number of unexpected events. Patient safety is a system that makes patient care safer. The system consists of risk assessment, identification and management of patient risk, reporting and analysis of incidents, the ability to learn from incidents and follow-up, and implementation of solutions to minimize the occurrence of risks and prevent injuries caused by mistakes due to taking action or not taking action should have been taken. One of the main benefits of the system is to reduce the incidence of medical disputes.

Most medical disputes in Indonesia are triggered by unexpected events (Adverse events) and unfortunately it has become public opinion that each Adverse events is malpractice. In the period 2006-2015, there were 317 suspected cases of malpractice reported to the Indonesian Medical Council. in which 114 cases involved general practitioners, followed by 76 cases of surgeons, 56 cases of obgyn doctors (obstetricians) and 27 cases of pediatricians.

III. DISCUSSION

A. Types of incidents that can occur at the hospital:

1. Sentinel events: A negligence that results in death or serious injury, permanent loss of function that is not related to the natural course of the underlying disease or condition. Example:
 - a) Suicide events in patients during treatment.
 - b) The crime of befalling the patient (murder, rape) during the treatment period.
 - c) Death, paralysis, coma or other major permanent loss due to medication errors.
 - d) Operation events on the wrong side.
 - e) The occurrence of a wrong operating procedure.
 - f) Surgical events in the wrong patient.
 - g) etc
2. Unexpected events (Adverse event): An incident that results in injury to the patient.
 - a) The incidence of transfusion reactions.
 - b) Incidence due to drug side effects
 - c) Errors in drug administration
 - d) etc
3. Near injury / Near Miss): occurrence of incidents that are exposed to patients.
 - a) The patient is not visited by doctor.
 - b) Doctor visit patient at rest hour.
 - c) The patient is visited by a doctor not a specialist.
 - d) Patients were injected with non-disposable syringes.
 - e) The patient runs out of medication.
 - f) The patient is not taken action due to the damaged tool.
 - g) Patients are congested, no O2 is available.
 - h) etc

4. Potential Injury Conditions (Reportable Circulation): A condition / situation that has the potential to cause injury, but no incident has occurred. Example:
 - a) ICUs are very busy but the number of medical personnel is always lacking.
 - b) The placement of the standby defibrillator on the emergency room was damaged and could not be used.

The incidence of patient safety is any unintentional event and condition that results in or has the potential to result in preventable injuries to the patient (Ministry of Health, 2017).

The incident reporting system is designed to obtain information about patient safety. Reporting incidents of good patient safety can support efforts in identifying risks in incidents that have the potential to cause patient safety threats (Gunawan et al., 2015).

B. Rules of Patient Safety Law.

Legal disputes often occur due to the loss / failure of the treatment process suffered by the patient. Therefore the government is responsible for issuing policies regarding patient safety. The responsibility of patient safety law is regulated in Article 58 of Law No. 36 of 2009 concerning Health:

1. Everyone has the right to claim compensation for a person, health worker, and / or health provider that causes harm due to errors or negligence in the health services he receives.
2. The claim for compensation as referred to in paragraph (1) does not apply to health workers who take action to save lives or prevent a person's disability in an emergency.

Hospital legal responsibility related to patient safety is regulated in:

1. Article 46 of Law No. 44 of 2009 concerning Hospitals: Hospitals are legally responsible for all losses incurred due to negligence committed by health personnel in hospitals.
2. Article 45 of Law No. 44 of 2009 concerning Hospitals:
 - a) The hospital is not legally responsible if the patient and / or his family refuses or stops treatment which can result in the death of the patient after a comprehensive medical explanation.
 - b) Hospitals cannot be prosecuted in carrying out tasks in order to save human lives.

C. Legal aspects of health services.

In the framework of providing medical / health services, a doctor / medical staff / health facility (Hospital etc.) of course still must obey and follow the rules / provisions for the application of existing medical and nursing science. Compliance with SOPs / rules of practice medical / nursing management both in order to establish a diagnosis, procedures for taking actions and other activities related to treatment services.

The reciprocal relationship in medical services is almost certainly based on a sense of mutual need, mutual trust, sympathy and empathy between doctors / medical personnel and patients. Because it is packaged in the form of health services, of course, the service providers and patients are the recipients of services that eventually develop towards a transactional service. This is where the beginning of the problem of medical services arises, where patients hope doctors / medical personnel can provide the best service for him but on the other hand doctors in addition to having the ability also have limits of ability. Things that happen beyond the limits of the ability of a medical person are often the ones that cause unexpected events that result in medical disputes.

Medical dispute resolution in the event of a conflict between doctors / medical personnel as providers of medical services with patients as recipients of service services often uses legal channels. This will certainly not benefit all parties (both the giver and the recipient of the service).

D. Medical Disputes, Malpractice and Crime.

As a human being, of course, a doctor / medical person will also not escape from criminal acts either in daily life or while carrying out his professional activities. In day-to-day life, he could carry out illegal acts such as cheating, stealing, drug cases, persecuting, raping, etc. In carrying out his profession, doctors / medical personnel can also be subject to criminal sanctions (**Medico-professional crime** / crime by using their medical knowledge and skills) for example when intentionally carrying out an act of abortion outside medical indications (malpractice).

Malpractice is often associated with the practice of medicine. Malpractice is a term used by certain professional groups (can be doctors, law, accountants and so on) to describe deviations, failures, errors and inability to do professional practice. In general, only those professional groups understand and are aware of Malpractice. Outside the profession, it is difficult to understand Malpractice and wrong interpretations often occur.

In the case of a medical dispute that is based on an Unexpected Event (Adverse events), of course we must wisely determine our attitude. Adverse events is an incident that is equally unexpected by doctors and patients. Adverse events is an accidental incident. Adverse events is an unexpected event / plan. So, in the event of a Adverse events we should focus on immediately analyzing / analyzing the event whether it is in accordance with the established service procedure (SOP) or not.

Adverse events which is managed appropriately is expected to be able to improve the safety culture in all aspects of service activities besides of course it can be used as material for monitoring and evaluating all existing SOPs. The occurrence of Adverse events does not have to be responded to as extraordinary so that it is overreacted.

The definition of Malpractice according to WMA in 1992 and the difference with misfortune (untoward result) is:

1. **Malpractice:** "Medical malpractice involves the physician's failure to conform to the standard of care for the patient's condition, or lack of skill, or negligence in providing care to the patient, which is the cause of injury to the patient. "
2. **Untoward Result:** "An injury occurred in the course of medical treatment which could not be foreseen and was not the result of lack of skill or knowledge on the part of treating a physician is untoward results, for which the physician should not bear any liability ".

So Malpractice can occur because of: Ignorance, Negligence, lack of skill, lack of fidelity in the performance of professional duties (unfaithful, dishonest towards professional assignments), intentional wrong doing (intentionally wrong) and illegal or ethical practice (not in accordance with medical ethics).

E. Doctor Profession Legal Protection.

Legal protection is one of the functions of law, namely the concept in which law is expected to provide justice, order, certainty, benefit and peace. The state must be able to guarantee / provide legal protection for its citizens (doctors, medical teams or patients) in accordance with the values of Pancasila. Legal protection should start from the interest in respecting all individuals so that their rights and obligations are not violated.

The protection of doctors' professional law is actually regulated in the **Republic of Indonesia Law No. 44 of 2009 concerning Hospital** Article 50: "Doctors or dentists in carrying out medical practices have the right to obtain legal protection as long as carrying out their duties in accordance with professional standards and standard operating procedures." However, in addition to laws that provide legal protection for the medical profession, there are also several other laws which actually contain criminal threats to the health profession. In a

number of articles in the Criminal Code and also in the Hospital Law and Medical Practice Law, several articles have been found that are criminal in threat. Even some things that are administrative in nature (about RC, PHF, signpost practice etc.) are also criminal threats.

Some Legal articles that contain criminal threats to the health profession:

1. Criminal Code:

- a) **Article 359** of the Criminal Code reads "Whosoever, because of his negligence, causes the death of another person, is threatened with a maximum imprisonment of five years or a maximum of one year imprisonment".
- b) **Article 360** of the Criminal Code: because negligence causes serious injury:
 - 1) Paragraph (1) Whosoever due to his negligence causes other people to be seriously injured, is threatened with imprisonment for a maximum of five years or a maximum of one year imprisonment.
 - 2) Paragraph (2) Anyone due to his negligence causes other people to be injured in such a way as to cause illness or obstruction in carrying out work, position or livelihood for a certain period of time, threatened with imprisonment for a maximum of nine months or a maximum fine of three hundred rupiah.

2. Law No. 29 of 2004 concerning Medical Practice:

- a. **Article 1 paragraph (1):** "The practice of medicine is a series of activities carried out by doctors or dentists on patients in carrying out health efforts". This definition does not describe "treatment services" in the broad perspective referred to in the Health Act (ie may use medical science or use other responsible methods). This definition is also different from the definition in several other countries where it states that anyone who does work that contains the essence of treatment can be categorized as practicing medicine (medical practice) even though he is not a doctor or dentist.
- b. **Article 29 paragraph (3) and Article 35:** doctor's license is a Registration Certificate (RC). While PHF is a permit for health facilities (health facilities and infrastructure). So, PHF, which should have been used as a document for working at home, is a document to work in a hospital which in fact already has a hospital operating permit.
- c. **Article 50:** Doctors or dentists in carrying out medical practices have the right:
 - 1). Obtain legal protection as long as carrying out duties in accordance with professional standards and standard operating procedures.
 - 2). Providing medical services according to professional standards and standard operating procedures;

Article 50 paragraph (2), Doctors' rights are also the Obligations of doctors.
Doctors or dentists in carrying out medical practices have the right to obtain legal protection cannot be prosecuted as long as carrying out their duties in accordance with professional standards and standard operating procedures;
- d. **Article 75 paragraph (1):** Every doctor or dentist who intentionally conducts medical practice without having a registration letter as referred to in Article 29 paragraph (1) is punished with a maximum of 3 (three) years imprisonment or a maximum fine of Rp. 100,000. 000.00 (one hundred million rupiah).
- e. **Article 76,** Every doctor or dentist who intentionally conducts medical practice without having a practice permit as referred to in Article 36 is punished with a maximum imprisonment of 3 (three) years or a maximum fine of Rp. 100,000,000.00 (one hundred million rupiah).

It is necessary to have special laws for health services in Indonesia which can ignore Article 359 and Article 360 of the Criminal Code.

On the other hand, **Law No. 29 of 2004** concerning Medical Practices made by the legislature means that the material in it is too technical. Laws that are too technical will cause the law to be rigid and vulnerable to non-principle changes so that the consequences will not last long. The ratification of Law No. 29 of 2004 concerning Medical Practice, apparently did not solve the problem. Medical practices (also about health facilities including hospitals) should be regulated in Government Regulations as mandated by the Health Law. With the enactment of Law No. 29 of 2004 concerning Medical Practices (as well as the Hospital Law), what has been successfully incorporated into the Health Law (al. UU Health Workforce, Mental Health Act, Pharmacy Law, Occupational Health Act, Outbreak Law etc.) is broken down - broken back as before.

Satjipto Rahardjo (professor of Undip legal sociology), said that we cannot just give up the next trip of a law (including Law No. 29 of 2004 concerning Medical Practices) only to the law, let alone laws that are run normatively-dogmatically. There are many laws in our place where the legal rules are sometimes inappropriate.

As a sovereign country that has 74 years of independence, the rules and regulations in Indonesia are good. But facts in society (if associated with Indonesian social and cultural norms) ethical norms, norms of discipline and implementing legal norms cannot be separated. This causes the understanding of each person is different.

In other countries (Malaysia and Singapore), criminal acts against doctors are only applied for intentional tort due to the professional relationship between doctors and patients. However, patients can still sue the doctor to pay compensation in order to restore the right to negligence that the doctor has done.

Doctor's negligence on incidence Adverse events must be ensured that in this case there was no intentional element. If the element of intentions is obtained, the threat is criminal.

If this Adverse events does not have an intentional element, then this is only negligence which can be grouped into:

1. Violations of Law, namely:
 - a. Violating ethical norms, discipline norms and legal norms (legal ethics);
 - b. From the moral side, it is wrong (morally wrong or delectant);
 - c. Subject to ethical sanctions, discipline and legal sanctions
2. Violations of Medical Discipline, namely:
 - a. Morally, it is not wrong;
 - b. In terms of the law against the law (wet delecten or legally wrong);
 - c. Subject to adminiRCative sanctions.
3. Ethical violations, namely:
 - a. Only violates ethical norms, and does not violate disciplinary and legal norms;
 - b. Subject to ethical sanctions.

IV. CONCLUSION

Unexpected events can either occur during the process of providing health services at the Hospital. Some of these errors have the potential to cause injury to patients and some that do not. Patient safety is a top priority that must be carried out by the hospital, so that the patient's service can be guaranteed safety and in order to maintain the quality of security and service image in the hospital.

Adverse events is an unintentional, unexpected event / plan. Adverse events that is managed properly (used as material for monitoring and evaluation), is expected to increase the culture of safety in the hospital.

Law No. 29 of 2004 concerning Medical Practice Article 50 and Law No. 36 of 2014 concerning Health Workers article 57 and Law No. 29 of 2004 concerning Medical Practice, have not fully provided protection for doctors. Investigators in practice remain guided by the Criminal Procedure Code on the process of handling suspected cases of malpractice.

Ethical aspects, medical aspects and juridical aspects are always considered aspects in every clinical case faced by a doctor in making clinical decisions.

Completion of Law No. 29 of 2004 concerning Medical Practice is expected to be carried out by the Government and the Parliament to provide rules / guide lines for procedures for resolving medical disputes ranging from investigations, investigations, prosecutions if necessary until the decision. The legal process that is now carried out is very tiring, requires a long time, not a small amount of money.

REFERENCES

A. Book.

- Abdul Aziz Hakim, 2011, *Negara Hukum dan Demokrasi di Indonesia*, Penerbit Pustaka Pelajar, Jogjakarta
- Hadjon P. M., *Legal Protection for the People in Indonesia*, Bina Ilmu, Surabaya, 1987.
- Jonsen, A, R, Siegler, M, Winslade, W, J, *Cliniical Ethics, A Practical Approach to Ethical Decision in Clinical Medicines*, McGraw-Hill Medikal Publishing Division, New York, 2006.
- Satjipto Rahardjo, 2000, *Ilmu Hukum*, PT Citra Aditya Bakti, Bandung

B. Jurnal

- <http://www.rstarakanjakarta.com/kars/indikator-kejadian-tidak-diharapan/>
- http://www.pdpersi.co.id/kanalpersi/website_ikprs/content/pedoman_pelaporan.pdf
- [http://eprints.dinus.ac.id/14476/1/\[Materi\]_Respati_Wulandari%2C_M._Kes_-_Pasient_Safety.pdf](http://eprints.dinus.ac.id/14476/1/[Materi]_Respati_Wulandari%2C_M._Kes_-_Pasient_Safety.pdf)
- <http://lib.ui.ac.id/file?file=digital/20282767-T%20Yully%20Harta%20Mustikawati.pdf>
- <http://wordpress.com/2012/10/21/bisnis-dan-etika>
- <https://www.merdeka.com/peristiwa/5-kasus-malpraktik-dalam-dunia-kedokteran.html>
- <https://jurnal.ugm.ac.id/jmh/article/view/16053>
- https://www.researchgate.net/publication/42354558_Aspek_Yuridis_About_Activation_Doctor_With_Do_Malpractice_Medical

C. The Law

- Law No. 29 of 2004 concerning Medical Practice.
- Republic of Indonesia Law No. 44 of 2009 concerning Hospitals
- Law No. 36 of 2014 concerning Health Workers

HARMONIZATION OF LAWS ON TAX DISPUTE SETTLEMENT WITH THE JUSTICE POWER SYSTEM IN INDONESIA

Bambang Sriwijatno

Student of Legal Studies Doctor Program, Universitas Borobudur

bsriwijatno@gmail.com

Abstract

The Tax Court as a court specifically enforces judicial authority in examining and deciding tax disputes still applies a dualism system of guidance. Organizational, administrative and financial guidance by the Ministry of Finance and technically the judiciary is carried out by the Supreme Court. While the independence and freedom of Judges of Tax Court in deciding tax disputes must uphold justice, and must not submit to and be bound to any party. That by the increase in the number of taxpayers and understanding of their rights and obligations in implementing tax laws and regulations, it is inevitable that tax disputes will arise which require a fair settlement with fast, inexpensive and simple procedures and processes. For this reason, a Tax Court is required in line with the judicial power system and is able to create justice and legal certainty in resolving tax disputes. From the results of the study it was found that there were differences in the application of the Tax Court Law with the Judicial Power Law where there was a dualism of guidance by the Enforcers of the Law and Executors of Judicial Power in a Judicial Power System, thereby reducing public trust in obtaining justice through the Tax Court. Therefore it requires the Tax Court Law to be harmonized.

Keywords: Tax Dispute Settlement and Harmonization of the Law.

A. INTRODUCTION

The national development that is continuous, sustainable and equally distributed throughout the country requires adequate funds, especially from taxation sources.

The Indonesian taxation system is based on Law No. 6 of 1983 concerning General Provisions and Procedures for Taxation as lastly amended by Law No. 16 of 2009 has given trust fully to taxpayers to calculate, assess, pay, and report their own taxes (*self-assessment*).¹

The monitoring function carried out through research and inspection activities by tax officials often triggers disputes between taxpayers and the Directorate General of Taxes.²

Article 1 of Law Number 14 of 2002 concerning Tax Court defines tax dispute as a disputes arising in the field of taxation between taxpayers or tax bearers with authorized officials as a result of the issuance of decisions that can be appealed or filed against the Tax Court based on taxation laws. Furthermore, Article 2 states that the Tax Court is a judicial body that carries out judicial powers for Taxpayers who seek justice against tax disputes.³

Article 1 number I of Law Number 48 of 2009 concerning Judicial Power states as follows:⁴

¹ Republic of Indonesia, General Provisions and Procedures for Taxation, Law Number 6 Year 1983 jo Number 16 of 2009.

² Subagio Effendi, Tax Dispute and International Arbitration, <https://www.beritasatu.com/investor/540076>, downloaded 16 June 2019 at 11:00

³ Republic of Indonesia, Law on Tax Court, Law Number 14 of 2002.

⁴ Republic of Indonesia, Law on Judicial Power, Law Number 48 of 2009

"The power of the judiciary is an independent power of the state to hold a judiciary in order to uphold the law and justice based on Pancasila, for the implementation of the Rule of Law of the Republic of Indonesia."

The article states that the judicial authority in the Unitary State of the Republic of Indonesia is one of the State's powers in law enforcement and justice that is free from interference from other parties.

The function of the state must be able to protect and create justice in society, in economic, social, cultural justices including legal justice. In terms of legal justice, one of them is the regulation/provision in the field of taxation. Based on Article 23A of the 1945 Constitution, it is stated that taxes and other levies are compelling in nature for the State budget are regulated by the law.⁵ This provision implies that in order to maintain legal certainty and justice for all taxpayers, all tax collection must be preceded by the laws which regulate it.

Tax disputes often occur due to differences in perceptions and calculations between taxpayers and tax officers, especially regarding the amount of tax to be paid, this is due to among others: (a) There are changes in provisions that are not known to taxpayers. (b) The recording and bookkeeping system carried out by taxpayers are different from what tax officials do. (c) There are differences in interpretation of a regulation between taxpayers and tax officers. (d) There are arbitrary treatments of tax officers that harm the taxpayers.

Based on these conditions, the taxpayers try hard to claim so their rights can be treated fairly. On the other hand, tax officers maintain the reason that what they have done was correct. Then if it cannot be settled at the first level at the Directorate General of Taxes (for the Central Tax), or at the Directorate General of Customs and Excise (for Customs and Excise), or at the Regional Government (for Regional Taxes), then this tax dispute is submitted to the Tax Court to be resolved which is called an appeal effort. Resolution of previous tax dispute at the first level, known as an Objection effort, was a quasi trial because it was still within internal environment of the Tax Collector or Tax Authorities.

Article 5 Paragraph (1) of Law Number 14 of 2002 concerning the Tax Court states that justice technical guidance for the Tax Court is conducted by the Supreme Court, and in Paragraph (2) it is stated that organizational, administrative and financial guidance for the Tax Court is carried out by the Department of Finance (now Ministry of Finance).⁶

Institution of the Tax Court is again in the spotlight of practitioners who joining in the Indonesian Association of Lawyers and Tax Advocates. The spotlight is aimed at the independence of Tax Court as regulated in Article 5 of Law Number 14 of 2002 concerning the Tax Court which in this association's assessment is deemed inappropriate.⁷

According to the Association there are three issues, namely:

1. Institution of the Tax Court which is still under the Ministry of Finance but is under the supervision of the Supreme Court
2. Tax Court judges who come from employees of the Directorate General of Taxes and the Directorate General of Customs and Excise (government's internal)
3. Capability of most of judges who are not from a law degree background.

Other highlights against the Tax Court among them regarding the decisions issued by the court which lack of legal arguments containing justice, and also the disparity of decisions between judges which raises a legal uncertainty.⁸

⁵ Republic of Indonesia, State Constitution of the Republic of Indonesia, 1945

⁶ Republic of Indonesia, Law concerning Tax Court, Op.Cit

⁷ ---, Independence of the Tax Courts Highlighted, *Bisnis Indonesia Daily*, published on 31 January 2019

⁸ Richard Burton, Highlighting the Decision of the Tax Court, Article, *Bisnis Indonesia Daily*, published on 12

In connection with the issue concerning the variables of harmonization of law and tax dispute resolution in order to fulfill a sense of justice and legal certainty, this study is entitled: Harmonization of Law on Tax Dispute Settlement in the Judicial Power System in Indonesia.

B. RESEARCH METHOD

The research method uses library research to obtain secondary data. The research is based on the normative juridical approach, through the study of documents over the primary legal materials such as legislation and secondary legal materials such as journals, legal articles, internet pages related to the object of the research. Data that already collected are presented descriptively to be analyzed qualitatively. Furthermore, the said data is subject to analysis to test and find the alternative solutions to the problem regarding the application of the Tax Court Law that is in harmony with the Judicial Power System.

C. PROBLEM FORMULATION

From the description of the background of the problem above, the main problem of this research is how the harmonization of the law on tax dispute resolution with the judicial power system in order to create justice and legal certainty?

D. DISCUSSION

A. Judicial Power System

This study uses the Justice Theory based on Pancasila, the theory of the rule of law, and the theory of independent judicial power. The use of these theories as an analytical tool for discussion of the harmonization of law on judicial power in order to create justice and legal certainty.

We can find the term justice in the Pancasila in the second principle which reads "Just and civilized Humanity" and the fifth principle which reads "Social justice for all Indonesian people".⁹

The term social justice is mentioned in the fourth paragraph of the Preamble of the 1945 Constitution. Thus, social justice has been laid down as one of the basic foundations of the State's goals and ideals as well as the fundamental philosophy of the state embodied in the second and fifth principles of Pancasila.

This research too uses the State of Law Theory because in the 1945 Constitution it is stated that the State of Indonesia is a State of Law, as stated in article 1 paragraph (3) of the 1945 Constitution.

The intended legal state is a country that prioritizes the rule of law to uphold truth and justice and no power which is not accounted for. Similarly, the legal regulations only exist if the legal regulations reflect justice for its citizens.

With regard to power, the doctrine that drives the birth of the idea of a state of law is the doctrine put forward by John Locke and Montesquieu. According to John Locke in his book *Two Treatises on Civil Government* dividing the powers of the State into (1) Power to make laws (2) Power to enforce laws, (3) Federative power. Executive power according to Locke including the power to carry out or maintain laws, including prosecution. Federative power is

February 2019

⁹ Republic of Indonesia, State Constitution of the Republic of Indonesia, 1945 Constitution, Preamble.

power that includes all powers which do not include executive and legislative powers, namely those which include relations with foreign countries.¹⁰

Having the influence and thought of John Locke, Montesquie in his book entitled *L'Espirit des Lois*, giving rise to a new theory in the form of a concept of separation of state powers into three elements, namely: (1) *La puissance legislative*, the power to make the law, (2) *La puissance de executive*, the power to enforce the law, (3) *La puissance de juger*, executor of justice power.¹¹

The three powers according to Montesquie are separate from each other, both regarding the functions and the organs that perform them.¹² The aim is to guarantee the freedom of citizens and prevent arbitrary actions by the authorities, and prevent the concentration of state power in one hand or one body, so that each agencies can control each other (check and balances).

The 1945 Constitution uses the term "judicial power" as an equivalent of judicative power. The existence of independent and free judicial power is a characteristic of a democratic state of law. Therefore the power of the judiciary and the state of law is a unity, meaning that judicial power is the main aspect of the rule of law. If this aspect does not exist in a country, then the country is not a state of law.¹³

At the level of Applied Theory uses the independent Theory of Judicial Power. Settlement of legal dispute by an independent judicial authority is the basis of proper legal functioning. With an independent judicial authority, everyone will get a guarantee that the government will act in accordance with applicable law. The existence of this trust can be realized by an independent judiciary and is free to decide the cases. The linkage of independent judicial power with the administration of government can give raise to a function of the judicial power control over the administration of government. This control function is the duty of the judicial authority to assess the legal validity (*rechtmatigheid*) of actions or acts of government administration.¹⁴

The independent judicial power also aims to guarantee impartiality, fairness, honesty and neutrality. If the freedom and neutrality are not possessed by judicial authorities, surely the justice will not be realized, especially if there is a dispute between the authorities and the people.

According to Mahfud MD, the power of the judiciary and the judicial power are the power to examine and prosecute and hand down decisions on cases handed over to them to enforce law and justice based on legislation. The body that holds this power must be able to work well in its duties so as to produce objective and impartial decisions by always upholding law and justice, therefore this body must be free from the influence of other powers or the influence of governmental power.¹⁵

B. Independency of Tax Court Judges

The Tax Court Judges in examining and deciding the tax disputes are required to hand down a fair verdict as stated in the ruling that which says "For the Sake of justice Based on the

¹⁰ Moh. Kusnardi and Harmaily Ibrahim. Introduction to Indonesian Constitutional Law, Jakarta, HTN- FHUI Study Center, 1988, p. 140-141.

¹¹ E. Utrecht, Introduction to Indonesian State Administrative Law, Ichtiar Baru, Jakarta, 1990, p. 23.

¹² Ismail Sunny, Division of State Powers, Aksara Baru, Jakarta, 1978, p.33

¹³ Abdullah Zaini, Introduction to Constitutional Law, Pustaka Sinar Harapan, Jakarta, 1991, p. 78

¹⁴ Bagir Manan, Judicial Organization in Indonesia, the Paper is presented at the Faculty of Law, Airlangga University, 12 February 1998, p. 3.

¹⁵ Moh. Mahfud MD., Fundamental and Structure of Indonesian State Administration, PT. Rineka Cipta, Jakarta, 1993, p. 117.

One and Only God " (Article 54 of Law Number 14 of 2002) so that any event of tax dispute must be first constricted is not merely an assumption or an allegation.

At least there are four theories determine the truth of events as presented by Kattsoff. First, the theory of coherence is the interconnected state, one statement with another statement or existing experience. Second, correspondence theory is a true statement if it is in accordance with the facts. Third, the empirical theory of truth is based on human sensory experiences. Statements that are predictive or hypothetical if the prediction of the meaning of the statement is fulfilled then that is the truth. Fourth, the pragmatic theory that truth is a useful idea or can be implemented in a situation.¹⁶

There are tax disputes that are not easily resolved because the law does not yet exist and this can occur due to the development of the business world is faster than the development of tax law norms.

Based on Article 2 of the Tax Court Law, it is stated that the Tax Court is a judicial body that enforces judicial authority for taxpayers who seek justice against the tax disputes.¹⁷

Judge's profession is a profession in the field of law which functionally is the main actor in the administration of judicial power, and judges are required to have a special expertise and also understanding in depth their scope of duties and obligations, for which tax court judges are required to have competency in mastering legal skills and taxation science.

In the code of ethics of judge, a judge must uphold and demonstrate independence, both individually and institutionally, by doing, among other things, carrying out the functions of the court independently based on the judge's assessment of facts and in accordance with their understanding and awareness of the law, free from any outside influence, persuasion, pressure, threats or direct or indirect interference from any party or by any reason.¹⁸

The important attitude that must be shown by the judges of the tax court is the impartiality against one of the parties, especially the tax authorities or tax collectors. This attitude is very important for the Tax Court's judges, considering the Tax Court's judges come from employees in the Ministry of Finance, so that there would be allegations and suspicions from the disputing parties, especially from taxpayers that the decision to be taken would be unfair.

E. CONCLUSION

An independent trial essentially aims to obtain the fairest decision through the considerations and authority of an independent judges without influence or interference from other parties. To guarantee the independence and freedom of Tax Court Judges in examining and deciding the tax disputes, it is necessary to revise Article 5 of Law Number 14 of 2002 concerning the Tax Court, which relates to the dualism of guidance over the Tax Court in order to realize the Tax Court as an independent judicial body in under the guidance of the Supreme Court, either organizational, administrative and financial guidance as well as technical guidance of the judiciary as the administrator of the highest judicial power in Indonesia.

REFERENCES

A. Books

- Abdullah Zaini, Introduction to Constitutional Law, Pustaka Sinar Harapan, Jakarta, 1991

¹⁶ Richard Burton, Op.Cit.

¹⁷ Republic of Indonesia, Law on Tax Court, Op.Cit.

¹⁸ Joint Decree of the Chair of the Supreme Court of the Republic of Indonesia and Chair of the Judicial Commission of the Republic of Indonesia concerning the Judge's Code of Ethics Number: 047/KMA/SKB/IV/2009 and 02/SKB/P.K.Y /IV/2009 on 5 March 2009.

- Bagir Manan, Judicial Organizations in Indonesia, Paper presented at the Faculty of Law, Airlangga University, on 12 February 1998
- Ismail Sunny, Division of State Powers, Aksara Baru, Jakarta, 1978
- Moh. Kusnardi and Harmaily Ibrahim. Introduction to Indonesian Constitutional Law, Jakarta, HTN-FHUI Study Center, 1988
- Moh. Mahfud MD., Foundation and Structure of Indonesia State Administration, PT. Rineka Cipta, Jakarta, 1993
- Richard Burton, Highlighting the Tax Court's Decision, Article, Bisnis Indonesia Daily, published on 12 February 2019
- Subagio Effendi. Tax Disputes and International Arbitration, <https://www.beritasatu.com/investor/540076>, downloaded on 16 June 2019 at 11:00
- Utrecht, E., Introduction to Indonesian State Administration Law, Ichtiar Baru, Jakarta, 1990
- -----, Independence of the Tax Court is Highlighted, Bisnis Indonesia Daily, published on 31 January 2019

B. Legislation

- Republic of Indonesia, State Constitution of the Republic of Indonesia, 1945 Constitution
- Republic of Indonesia, State Constitution of the Republic of Indonesia, 1945 Constitution, Preamble,
- Republic of Indonesia, Law on Judicial Power, Law Number 48 of 2009
- Republic of Indonesia, General Provisions and Procedures for Taxation, Law Number 6 of 1983 in conjunction with Number 16 of 2009.
- Republic of Indonesia, Law on Tax Court, Law Number 14 of 2002
- Republic of Indonesia, Joint Decree of the Chief of the Supreme Court of Republic of Indonesia and Chair of Judicial Commission of Republic of Indonesia concerning the Code of Ethics of Judges, Joint Decree Number: 047/ KMA/SKB/IV/2009 and Number: 02/SKB/P.K.Y/IV/2009.

CHALLENGES FACING SOEs AND SOE SUBSIDIARIES TOWARD LAW ENFORCEMENT AND HUMAN RIGHTS PROTECTION (Post Constitutional Court Decision Number 01/PHPU-PRES/XVII/2019)

Binsar Jon Vic S

Student of Legal Studies Doctor Program, Universitas Borobudur
bjonvic@bukitasam.co.id

Abstract

Law Enforcement and Human Rights Protection are strategic and or universal issues that applies to countries and nations in the world including Indonesia and in particular become a challenge and dilemma for SOEs and or SOE's Subsidiaries. This becomes the main discussion in connection with the Constitutional Court Decision Number 01/PHPU-PRES/XVII/2019 which implicitly states that SOE Subsidiaries are not SOEs, so that the Laws governing State Finance applied to SOEs and SOE Subsidiaries become a problem in every corporate action, those problem first is, how do SOEs/SOE Subsidiary anticipate in the event of potential corporate criminal acts and secondly how do the laws and regulations governing the business of SOE and or SOE Subsidiaries Post the Constitutional Court Decision Number 01/PHPU-PRES/XVII/2019, this research method is carried out by normative juridical law while still using reference to 1945 Constitution of Republic of Indonesia, the laws governing SOE and or SOE subsidiaries and after the decision of the Constitutional Court Number 01/ PHPU-PRES/XVII/2019. This study is expected to provide legal inspiration for law enforcement agencies and institutions that deal directly with State-Owned Enterprises or State-Owned Enterprises' Subsidiaries, so that State-Owned Enterprises/State-Owned Enterprise' subsidiaries are expected to increase profits and become development agents for the welfare of the people.

Keywords: Law Enforcement, Human Rights, SOEs and SOE Subsidiaries, Decision of Constitutional Court Number 01/PHPU-PRES/XVII/2019.

A. INTRODUCTION

The dynamics and issues in implementing law enforcement and human rights protection provide inspiration to be studied in Indonesia, including for SOEs and SOE subsidiaries. This is indicated by the increasing demands of stakeholders and the communities (both individually and collectively) toward the implementation of law enforcement and human rights protection.

The United Nations Convention on civil and political rights was enacted in 1966, which stated that human rights were very fundamental, in their implementation it is absolutely necessary so that humans could develop according to their talents, ideals and friends. This also applies universally meaning that there are inherently owned by humans without differences based on nation, race, religion or gender.¹

Objectively, the principle of human rights protection between countries is the same. But the implementation is not so. This means that at one time there is an equality of will towards what should be protected and regulated, but at other times there are differences in perceptions and interpretations of law enforcement and human rights protection one to another.

The Indonesian state since its independence as of 17 August 1945 has a commitment on issues concerning human rights. This can be seen in the Preamble of the 1945 Constitution which contains statements and recognitions that uphold the dignity, self-esteem and values of humanity that are very noble and very basic, such as the right to freedom and so on.

¹ Barda Nawawi Arief, Tinjauan Aspek Hukum HAM, Seminar Hukum tentang HAM, 1993.

Given that the governance system of the Republic of Indonesia is based on the law as explicitly stated in the 1945 Constitution, then the law is the highest rule that must be adhered to and implemented by all parties without exception.

The complexity of the issues on law enforcement and protection of human rights when viewed from various angles of study, requiring various parties to always correct each other, because after all in the law enforcement there are various factors that influence. Meanwhile the purpose of law enforcement is to create peace in the society. A law enforcement is said to be functional if the goal has been achieved. So that when viewed as a whole, the law enforcement is a system.

Satjipto Rahardjo argues that if we speak about law enforcement as being a field that has a special attractiveness. The issue of human rights without referring to humans/corporations that carry out the law enforcement is a strategic conversation.

B. RESEARCH METHOD

The method used of this research is normative juridical legal research, with the data being examined namely secondary data that include primary legal materials such as the 1945 Constitution of the Republic of Indonesia, Law No. 39 of 1999 concerning Human Rights, Law on State Owned Enterprises No. 19 of 2003, Law on Limited Liability Company No. 40 of 2007 and Post Decision of the Constitutional Court Number 01/PHPU-PRES/XVII/2019, secondary legal materials such as books, philosophy and theory of law, legal journals, scientific research, the websites, and other legal materials and the latest are tertiary legal materials such as legal dictionaries, encyclopedias, and so forth.

C. PROBLEMS FORMULATION

Based on the description above, the problem can be formulated as follows:

1. How do State-Owned Enterprises/SOE subsidiaries anticipate the threat of corporate criminal acts related to law enforcement and human rights protection?
2. How do law enforcement officers and relevant institutions anticipate post Decision of the Constitutional Court Number 01/PHPU-PRES/ XVI 12019 towards SOEs/SOE subsidiaries?

D. DISCUSSION

1. Regulation of Law Enforcement and Human Rights in the Legal System in Indonesia

Law enforcement and Protection of Human Rights in Indonesia have universal and socio-cultural dimensions, so that Law Enforcement and Human Rights in its realization must be related to the stability of the Indonesian State itself and the heterogeneous unity of the Indonesian nation. And to what extent the Indonesian state's positive legal system contains human rights statements, among others can be seen in:

- 1.1. Preamble of the 1945 Constitution. The statements contained in the preamble of 1945 Constitution contain many declarations and recognition that uphold the dignity, self-esteem and human values that are very noble and very basic. And the statements in the preamble of the 1945 Constitution which contain the mind and spirit are not much different from the statements that are in the Universal Declaration of Human Right (UDHR). For example, a statement stating "That in fact Independence is the right of all nations and therefore the occupation in the world must be abolished because it is not in accordance with humanity and justice", identical to first paragraph of the UDHR Preamble which states:²
"Whereas recognition of the inherent dignity and of equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".
- 1.2. The body of the 1945 Constitution includes the provisions of Article 27 (1) of the 1945 Constitution, that all citizens are equal before the law and government with no exceptions,

² Burn Weston dalam Todung Mulya Lubis, HAM Dalam Hidup, Obor Indonesia, Jakarta, 1993.

almost the same as Article 6 of UDHR (recognition as a person before the law), Pasal 7 (equal protection of the law), Article 21 Paragraph 3 (equal access to public service in one's country), Article 1 (equal in dignity and rights), Article 2 (entitled to all rights and freedoms without distinction).

Guarantee for human rights in the development of the legal system in Indonesia has increasingly shown its confirmation since the enactment of Law Number 39 Tahun 1999 concerning Human Rights on 23 September 1999. Human rights in this Law are juxtaposed with basic human freedoms and are regulated in Chapter III with the following systematics: first part regulates family rights and continues to govern, third part regulates self-development rights, fourth part regulates rights to justice, fifth part regulates rights to personal freedom, sixth section regulates rights to security, seventh part regulates rights, welfare eighth rights to participate in government, the ninth part regulates women's rights, the tenth part regulates children's rights.

Those rights of independence are as follows:

1. To know the basics or reasons for arrest, detention or imposition of a sentence against him and obtain rehabilitation or compensation if the arrest, detention or imposition of a sentence is not based on applicable law;
2. To get treatment and rights in accordance with applicable regulations during the period of arrest, detention or conviction over him.

Furthermore, another very fundamental aspect of humanity from the point of view of criminal law is that a person must be considered innocent before a court decision with permanent legal force and someone cannot be convicted (including being subject to an action) without any mistake. The first is referred to as "presumption of innocence" and the second is with the principle of culpability (*nulla poena sine culpa* or no punishment without guilt/fault).

2. Challenges facing SOE /SOE Subsidiaries Managements in Law Enforcement and Human Rights Protection

In realizing law enforcement and protection of human rights in accordance with the ideals and objectives namely protecting human dignity, then it requires the support of law enforcers who have high quality and dedication. Conceptually, what is called law enforcement is a process for realizing legal wishes into reality. The existence of the law's desire is because law enforcement does not merely mean implementing legislation. Because there is a possibility that law enforcers who carry out the law do not reflect law enforcement but instead disturb peace and order in the community.³

Soerjono Soekanto argues the elements of the role are:

1. The ideal role and the role that should be (expected role);
2. Perceived role and actual role

3. Legal Obligations of SOE/SOE Subsidiaries Management in the Application of Law Enforcement and Human Rights Protection

Law Enforcement and the protection of human rights are always related to interferences with human rights. Forms of human rights violations can be found in the provisions of Criminal Law. SOE/SOE Subsidiaries Managements (board of commissioners and board of directors) have the authority and role to prevent the potential for corporate actions that have an impact on

³ Putusan MK RI Nomor 01/PHPU-PRES/XVII/2019, Jakarta, 2019.hal.hal.1938.

corporate criminal acts in the form of observing applicable laws and regulations and including to pay attention to consideration and opinion in Post Decision of the Constitutional Court Number 01/PHPU-PRES / XVII/2019 in particular which states in principle legally that SOE subsidiaries are not SOEs so that SOE subsidiaries fully comply with Law No. 40 of 2007 concerning Limited Liability Companies.⁴

E. CONCLUSION

Based on the above description, what can be concluded is that aSOEs/ SOE subsidiaries have a central role in supporting law enforcement and protection of human rights both internal and external matters of the corporation. Post Constitutional Court's Decision Number 01/PHPU-PRES/ XVII/2019 becomes a legal source that can inspire Law Enforcement Officials and related institutions/agencies to make appropriate adjustments to laws and regulations governing SOEs and or SOE subsidiaries.

REFERENCES

A. Paper/Seminar

- Bahrullah Akbar, Paper Law Enforcement for Corporate Crimes in SOEs (In the State Financial Perspective), Indonesian Training Institute and Consulting Services (INTRINSICS), Bali, 21-22 March 2019.
- M. Fadil Imran, Paper Law Enforcement for Corporate Crimes in SOE (In the State Financial Perspective), Indonesian Training Institute and Consulting Services (INTRINSICS), Bali, 21-22 March 2019.
- Barda Nawawi Arief, Paper Overview of Human Rights Aspects, Human Rights National Seminar, 1993.
- Burn Weston and Todung Mulya Lubis, Human Rights in Community Life, Yayasan Obor Indonesia, Jakarta, 1993,
- Satjipto Rahardjo, Law, Community & Development Publisher, Alumni, Bandung, 1980.
- Soerjono Soekanto, Factors Affecting Law Enforcement, Jakarta, 1996.

B. Legislation

- 1945 Constitution of the Republic of Indonesia;
- Law Number 8 of 1981 concerning Criminal Law Procedure Code;
- Law Number 39 of 1999 concerning Human Rights;
- Law Number 40 Known 2007 concerning Limited Liability Companies;
- Law Number 19 of 2003 concerning State-Owned Enterprises;
- Decision of the Constitutional Court Number 01/PHPU-PRES/XVII/2019;
- Supreme Court Regulation Number 13 of 2016 concerning Procedures in Handling of Criminal Cases by Corporations;
- Government Regulation Number 72 of 2016 concerning Amendment to Government Regulation Number 44 of 2005 concerning Procedures in Participation and Administration of State Capital in SOEs.

C. Internet

- Hukumonline.com, accessed (May to July 2019)
- Detiknews.com, accessed (May to July 2019)

⁴ Putusan MK opcit,Jakarta,2019.hal.1950.

**ANALYSIS OF CRIMINAL LAW ENFORCEMENT
"INTENTIONALLY PRODUCING OR DISTRIBUTE COSMETIC
PHARMACEUTICAL SUPPLIES WITHOUT PRODUCTION PERMIT
AND DISTRIBUTION LICENCE"
ACCORDING TO LAW NUMBER 36 OF 2009 ON HEALTH**

Budiman Gunawan¹, Bambang Dwi Hasto²

Student of Legal Studies Doctor Program, Universitas Borobudur

¹budiman1411@gmail.com, ²badwiehs@gmail.com

Abstract

Cosmetics is one of the needs of the community. Even today people consider that cosmetics are not only secondary needs, but have become primary needs. Cosmetics circulated in Indonesia must have marketing licenses in the form of notifications issued by the National Agency of Drug and Food Control (NADFC). This notification is needed, because the notification indicates that the cosmetics meet the requirements of safety, usefulness and quality. Unfortunately there are still many cosmetics - without production permits and distribution licence - that do not have notifications.

The juridical approach used is the legislative approach, concepts and case decisions, while the analysis used prescriptive reasoning. The Indonesian government has enforced the law against criminal acts of cosmetics circulation without marketing authorization and production permits - but not maximally - based on Law Number 36 of 2009 concerning Health. The government provides legal protection to consumers by requiring businesses to register their cosmetic products to obtain notifications before they are circulated in Indonesia. Other protection provided to consumers of cosmetic users is the presence of inspection carried out by NADFC and related agencies to eradicate cosmetics without notification on the market, and NADFC will release a public warning regarding cosmetics that are not safe for consumption by consumers. If consumers are harmed due to cosmetics circulation without notification, they can file legal remedies.

Keywords: Law Enforcement, Legal Protection, Crime, Cosmetic Circulation, Distribution Licence, Production Permit, Consumer, Cosmetics, Notification.

1. INTRODUCTION

Efforts to improve the highest degree of health initially in the form of efforts to cure disease, then gradually developed towards the integration of health efforts for the entire community by involving the community at large which includes comprehensive, promotive, preventive, curative, and rehabilitative efforts and continuous. This development was contained in the National Health System (NHS) in 1982 which was subsequently mentioned in the 1983 Board Guidelines of State Policy (BGSP) and 1988 BGSP as the order to implement health development. For this reason, it is time for us to see health issues as a major factor and valuable investment whose implementation is based on a new paradigm commonly known as a healthy paradigm, namely the health paradigm that prioritizes promotive and preventive efforts without neglecting curative and rehabilitative. Therefore, it is necessary to establish a general health policy that can be implemented by all parties and at the same time be able to answer the challenges of the globalization era and with the increasingly complex health problems in a new Health Law (Law No. 36 of 2009) to replace the Law Number 23 of 1992 concerning Health. Thus, health development is part of national development that aims to increase awareness, willingness

and ability to live healthy for everyone in order to realize the highest degree of public health, as an investment for the development of productive human resources socially and economically. Health development as mandated by Law Number 36 of 2009 concerning Health and Presidential Regulation Number 72 of 2012 concerning the National Health System (hereinafter abbreviated as NHS) must be guided by NHS. NHS is a form and method of administering health development that combines the various efforts of the Indonesian people in one step, in order to ensure the achievement of health development goals within the framework of realizing people's welfare, as referred to in the 1945 Constitution of the Republic of Indonesia.

NHS as a way of administering health development is a collection of elements or subsystems that have their respective functions, thus ensuring the achievement of the objectives of the system that is greatly influenced by performance from the existing Subsystem, one of the NHS Subsystems is Pharmaceutical Preparations, Medical Devices and Food. Based on Article 1 paragraph 4 and 5 of Law Number 36 of 2009 concerning Health, Pharmaceutical Preparations are drugs, medicinal ingredients, traditional medicines, and cosmetics. According to the Regulation of the Head of the Indonesian Food and Drug Administration, Cosmetics are materials or preparations intended to be used on the outside of the human body (epidermis, hair, nails, outer lips and genital organs), or teeth and mucous membranes of the mouth, especially to clean, smell, change appearance, and / or correct body odor or protect or maintain the body in good condition. Health is a human right and an element of human welfare that must be realized in accordance with the ideals of the Indonesian people. Basic rights in the field of health, namely the right to health care (the right to healthcare) and the right to self-determination (the right on selfdetermination or called TROS). In Indonesia these basic rights were adopted in Article 28-H paragraph (1) of the 1945 Constitution of the Republic of Indonesia, which reads as follows: "Every person has the right to live in physical and spiritual prosperity, to live in and obtain an environment that good and healthy and entitled to health services. "Indonesia as a developing country can not be separated from various problems of violations and various kinds of crimes that can threaten people's welfare and order. One of them is crime in the health sector. Health science is one of the fastest growing fields of science today. Similarly, the development of criminal acts in the health sector. Health services are very specific, the relationship that occurs between patients and health workers in addition to a relationship that is partnership is a relationship of trust and actions taken regarding human life.

Juridically, criminal acts in the health sector are regulated in the Law of the Republic of Indonesia Number 36 of 2009 concerning Health. In the law various types of criminal acts in the health sector have been explained, including not giving first aid to patients, without permission to establish traditional health service practices, selling organs / body tissues, plastic / reconstructive surgery to change someone's shape, abortion, buying and selling of blood, criminal acts of pharmacy and / or medical devices, and so on.

Health problems are a very serious concern in every country, both developed and developing countries. Because health is one of the most important factors in the progress of a country. Every country has an obligation to provide and provide health services along with legal rules that guarantee the protection of their citizens related to health. Empirically, at this time there are many criminal acts in the health sector, one of which is rampant today is crime in the pharmaceutical field. For this reason, it is necessary to improve the quality of health services, inseparable from the understanding of rights and obligations, namely understanding the aspects of health law specifically, to avoid legal snares in carrying out health duties. Community needs for health protection are non-negotiable, because they directly involve primary community needs. It is the government's obligation to enforce existing laws and regulations to overcome various increasingly complex problems in the health sector. Cases that often occur in the community today that are related to Pharmaceutical Preparations are very diverse, such as those that occur in Jakarta, Aceh (Tapaktuan), Ambon (Masohi), Kudus, Medan, Sleman (Yogyakarta),

among others there are cases of circulation / sale of cosmetics without distribution permit, which is categorized as a criminal offense "intentionally circulating Pharmaceutical Preparations (cosmetics) without marketing authorization". There are also cases of manufacture / production, namely by counterfeiting well-known cosmetics, but mixing hazardous materials and labeling the famous brand, which includes criminal acts "intentionally producing Pharmaceutical Preparations (cosmetics) without having a production permit". This often happens so that it is very detrimental to the community as consumers. From these cases the conviction of the perpetrators is sometimes still felt that it is not appropriate to see the impact caused by the perpetrators' actions. It is often proven or not proven by the defendant in the trial because of the lack of proper Article indicted by the Public Prosecutor so that the conduct of the perpetrator fulfills or does not fulfill the elements of the indictment, or the lack of evidence that can convince the Panel of Judges, free criminal or under the demands of the Public Prosecutor (lighter than the indictment), and / or even not need to undergo a sentence of imprisonment (only criminal trial). Even in some cases, even though the Panel of Judges has stated the perpetrator (Defendant) has legally and convincingly proven to have committed a crime that was indicted against him, but still the decision was still mild. Based on this description, the author will examine a number of examples of cases of law enforcement against crimes or criminal acts in the health sector, especially those relating to criminal acts "by deliberately producing or distributing cosmetic Pharmaceutical Preparations without production permits and distribution licence".

2. RESEARCH METHODS

The research method describes the method of conducting research, starting from formulating the approach used to how to analyze the results of the study. In order for the analysis of the object of research to be carried out in accordance with the correct procedure so that the final conclusions obtained approach the objective truth and can be scientifically accounted for. The right research method is also needed to provide direction in learning and understanding the object under study, so that it can facilitate the writer. In connection with this, to be systematic and directed to produce arguments, theories or new concepts that are in accordance with existing developments, in this case the research method is used as follows.

3. PROBLEM APPROACH

In legal research, there are several approaches that can be used to obtain information from various aspects of the issue being tried to find answers. The approaches used in legal research are statute approach, case approach, historical approach, comparative approach, and conceptual approach. To discuss the problem using the Law Approach and the Conceptual Approach.

- a. Statute approach, this approach is carried out by examining all laws and regulations relating to legal issues being addressed. The results of the study are an argument for solving legal issues faced by the author.
- b. Conceptual approach, this approach goes from the legislative approach and the doctrines that develop in law. Researchers need to refer to legal principles. Can be found in scholarly views or legal doctrines.

4. LITERATURE REVIEW

Legal materials are a means to solve legal issues and at the same time provide prescriptions about what should be needed, research sources are needed. Sources of research can be divided into two research sources in the form of primary legal materials and secondary legal materials.

1. **Material of Primary Law.** Primary legal material is legal material that is authoritative, meaning having authority. Primary legal materials consist of legislation, official records or minutes in making laws and judges' decisions.

The primary legal materials used in making this Dissertation are as follows :

- a) Law of the Republic of Indonesia Number 8 of 1981 concerning Criminal Procedure Law (State Gazette of the Republic of Indonesia of 1982 Number 76, Supplement to the State Gazette of the Republic of Indonesia Number 3209);
- b) Law of the Republic of Indonesia Number 36 of 2009 concerning Health (State Gazette of the Republic of Indonesia of 2009 Number 144, Supplement to the State Gazette of the Republic of Indonesia Number 5063);
- c) Government Regulation of the Republic of Indonesia Number 72 of 1998 concerning Safeguarding of Pharmaceutical Preparations and Medical Devices (State Gazette of the Republic of Indonesia of 1988 Number 138);
- d) Republic of Indonesia Government Regulation Number 51 of 2009 concerning Pharmaceutical Work (State Gazette of the Republic of Indonesia of 2009 Number 124);
- e. Regulation of the Minister of Health of the Republic of Indonesia Number 445 of 1998 concerning Materials, Dyes, Substrates, Preservatives, and Sunscreen on Cosmetics.
- f. Decision of North Jakarta District Court Number: 1774 / Pid.B / 2010 / PN.Jkt.Ut., Date: 30 May 2011, and Read Out on 13 June 2011, with Defendant: WINALDI CHANDRA ALIAS AWI;
- e) g. Decision of Tapaktuan District Court Number: 79 / Pid.B / 2013 / PN.Ttn., Date: 10 January 2014 and Read Date: 15 January 2014, with Defendant: JUNE MUHAMMAD, SE Bin MUHAMMAD;
- f) h. Decision of Tapaktuan District Court Number: 62 / Pid.B / 2014 / PN.Ttn., October 10, 2014, and Read Date: October 15, 2014, with Defendants: YULIZAR Bin JAFRI and SYUKRI Bin JAFRI;
- i. The decision of the Masohi District Court Number: 130 / Pid.Sus / 2014 / PN.Msh., Date: 27 November 2014, and Read Date: 9 December 2014, with Defendant: USMAN;
- g) j. Decision of the Holy District Court Number: 57 / Pid.Sus / 2015 / PN.Kds., June 8, 2015, and Read Date: June 10, 2015, with the Defendant: ABDUR ROHMAN Bin NURHADI;
- k. Decision of Medan High Court Number: 739 / Pid.Sus / 2014 / PT-MDN, Date: January 15, 2015, and Read Date: January 20, 2015, with Defendant: CIEN IN Alias AFEN;
- l. The decision of the Jambi District Court Number: 478 / Pid.Sus / 2015 / PN.Jmb., Date: 10 November 2015, and Read Date: 10 November 2015, with the Defendant: LIANA Binti DAUD MONG;
- h) m. Decision of the Yogyakarta High Court Number: 82 / Pid.Sus / 2018 / PT. YKK. Date: January 15, 2018, and Read Date: January 31, 2018, with the Defendant: SITI NURLAELA Binti HARTO PRAYITNO;

2. **Secondary Legal Materials.** Secondary legal material in the form of all publications about the law which are not official documents. Legal publications include textbooks, legal dictionaries, legal journals, and comments on court decisions.

Secondary legal sources used in writing this dissertation are literature books, legal writings, and legal journals that are relevant to the issues discussed.

3. **Analysis of Legal Materials.** This process is a process carried out to find answers to the main problems. The analysis used by researchers by :

1. Identifying legal facts and eliminating irrelevant matters to establish legal issues to be resolved;
2. Collection of legal materials and if deemed to have relevance also non-legal materials;
3. Review legal issues submitted based on the materials collected;
4. Draw conclusions in the form of arguments that answer legal issues;
5. Give prescriptions based on arguments that have been built in conclusions.

In accordance with these steps the author has identified legal materials that have been collected, namely in the form of judicial decisions and related regulations such as the Criminal Procedure Code (KUHP), Law Number 36 of 2009 concerning Health, then compiled systematically using prescription methods, ie each analysis will be returned to legal norms because the test equipment is a legal norm based on the logic of deduction (from the general to the specific). Then map the legal issues to be discussed, then collect relevant materials. These legal materials are then used to examine and analyze the legal issues discussed. After doing the analysis and analysis will conclude the results. Using the research method described above is expected to find answers to problems so that the results can be justified scientifically.

5. RESULTS & DISCUSSION

Government actions in controlling the production and distribution of cosmetics that are safe, quality, and useful in order to guarantee the quality of cosmetics and protection for the public include: the establishment of legislation, licensing and law enforcement. Permits in carrying out activities and / or businesses in the cosmetics sector have a very important position, because cosmetics as Pharmaceutical Preparations from the pharmaceutical industry consumed by the public can have a very important impact on the quality of one's health. In the cosmetics field, someone has the right to make an effort to fulfill their needs, but on the other hand, everyone has the right to obtain the right to health. The government as a regulator has the duty to balance the rights of everyone as an effort to fulfill human rights. Government efforts to fulfill everyone's rights and balance the implementation of rights are carried out by establishing legislation, law enforcement, and licensing. Licensing in the field of cosmetics serves as an effort to conduct selection and control of the activities of making / producing and distributing safe cosmetic products with the intention of providing quality assurance for traded cosmetics products to meet safety standards, benefits and quality. On the other hand, this permit provides legal certainty for entrepreneurs in conducting their business. In accordance with the licensing laws and regulations in the cosmetic business starting from manufacturing to distribution, licensing in the cosmetics field includes: Business Licenses, Production Permits, Circular Licenses, Import Recommendations, and Trading Business Permits (SIUP). Based on the legality of licensing in the field of cosmetics, there are different legal bases, functions and permits. With the many permits and differences in the agencies that give licenses, the consequences of violations of permits are caused by ignorance of employers and / or the community, resulting in a higher economic burden.

6. CONCLUSION

- a. In the manufacture and distribution of cosmetics, licensing is a preventive instrument carried out by the Government (Central) and Regional Governments to select and control cosmetic production in order to meet the requirements of security, benefits and quality. The types of licenses relating to the manufacture and distribution of cosmetics include: Business licenses (Production Industry, Import Industry, Trading Business), Production Permits, Circular Licenses (Notifications) and Import Agreements issued by each agency that has duties and functions in its field, both in the central government and in the local government.

- b. In controlling the circulation of cosmetics containing hazardous substances and harming public health, licensing as a preventive instrument must be followed by law enforcement administration and enforcement of criminal law. Enforcement of administrative law includes the supervision and application of administrative sanctions, in which administrative law enforcement in the field of cosmetics is carried out by cosmetic withdrawal by BPOM, while the application of criminal law is carried out by reporting criminal acts and the distribution of cosmetics without production permits and marketing permits and containing hazardous material to the police which is then followed up with a judicial process.
- c. Cosmetic products that do not have marketing licenses are illegal products where the producers are not recorded in the Indonesian Food and Drug Administration as a result of pre-market supervision such as production flow processes, raw materials used, hygiene and sanitation during production cannot be monitored. Pre-market supervision plays an important role in detecting early at the point of crisis of the production process flow, in addition if there are complaints from the public who use cosmetics without having marketing permits such as experiencing negative side effects or cosmetic toxic effects including allergies, poisoning or death of the authorities unable to follow up on this because the cosmetics manufacturer is unknown.
- d. From a number of instances of cases, enforcement of criminal law for criminal acts of cosmetics circulation without production permits and marketing permits associated with Law No. 36 of 2009 concerning Health, is still not maximally sanctioned. The decision of the District Court Judges is generally too light because the Panel of Judges does not pay attention to the burdensome conditions which according to the Public Prosecutor have not been considered in the verdict, namely the Defendant's actions which disturb the public and are contrary to government programs in the eradication of illegal cosmetics, thus not reflecting a sense of justice. Although in the end the decision of the High Court Judge and the Supreme Court's decision is more severe than the decision of the District Court Judge, but it feels still lighter than the sanctions mentioned in Article 196 and Article 197 of Law Number 36 of 2009 concerning Health.

REFERENCES

- Language Agency of Ministry of Education and Culture, 2016. Large Indonesian Language Dictionary Edition V. Language Development and Development Agency, Ministry of Education and Culture of the Republic of Indonesia, Jakarta.
- Hamzah, Andi, 1986. Dictionary of Law. Gahlia Indonesia, Jakarta.
- Mamudji, Sri, et al., 2008. Law Thesaurus. National Law Development Agency, Ministry of Law and Human Rights Republic of Indonesia, Jakarta.
- Pakpahan, Normin S., et al., 1997. Dictionary of Elliptical Economic Law, First Edition. Ellipse Economic Law Improvement Procurement Project, Jakarta.
- Pudjiwati, Endang. 2015. Regulation of Cosmetics and Cosmetic Medicine. RI POM Agency,
 - o Central POM in Semarang.
- Puspa, Yan Permana. 1977. Legal Dictionary Complete Edition. Various Sciences, Semarang.
- Daughter, Vera Jasini. 2005. Dictionary of Law & Glossary of Regional Autonomy, Third Edition. Friedrich Naumann Stiftung, Jakarta.
- Sigar, Edi and Ernawati. 1996. Buku Pintar Perempuan. Library of Delapratasa, Jakarta.
- Tatanusa Editorial Team. 2010. Dictionary of the Terms of Regulation in the Field of Internal Affairs. Tatanusa, Jakarta.
- Wiradharma, Danny. 2010. Guidance on Medical Law Lecture. Sagung Seto, Jakarta.

- Maisusri, Syafrina. 2016. "Law Enforcement Against the Crime of Circulating Imported Medicines that Do Not Have Circular Licenses by Investigators of Civil Servants in the Center for Drug and Food Control in Pekanbaru", JOM Faculty of Law, Volume III, Number 2, October 2016, Pekanbaru.
- Pudjiastuti, Lilik. 2016. "Licensing as a Legal Protection Instrument in Circulating Cosmetics that is Safe for Public Health", Licensing in the Citizen Friendly Era, ISBN: 978-602-361-070-9, Faculty of Law, Airlangga University, Surabaya.
- Rusmini, Andin. 2016. "Crime of Pharmaceutical Drug Distribution and Abuse Without Circular Permit According to Law Number 36 of 2009 concerning Health", Al'Adl, Volume VIII, Number 3, September - December 2016, College of Law of Sultan Adam, Banjarmasin.
- Decree of the Head of the Republic of Indonesia Drug and Food Control Agency Number 02011 / SK / KBPOM of 2001 concerning the Organization and Work Procedure of the Drug and Food Supervisory Agency as amended by Decree of the Head of the Republic of Indonesia Drug and Food Supervisory Agency Number HK.00.05.21.4231 of 2004 .
- Decree of the Head of the Republic of Indonesia Drug and Food Supervisory Agency Number HK.00.05.4.3870 of 2003 concerning Guidelines on How to Make Good Cosmetics.
- Decree of the Head of the Republic of Indonesia Drug and Food Supervisory Agency Number HK.03.1.23.08.11.07517 of 2011 concerning Technical Requirements for Cosmetic Materials.
- Decree of the Minister of Health of the Republic of Indonesia Number 1027 / Menkes / SK / IX / 2004 Year 2004 concerning Pharmaceutical Service Standards at the Pharmacy.
- Decree of the Minister of Health of the Republic of Indonesia Number 386 / Menkes / SK / IV / 1994 of 1994 concerning Guidelines for Advertising of Free Drugs, Traditional Medicines, Medical Devices, Cosmetics, Household Health Supplies, and Food-Beverages.
- Presidential Decree of the Republic of Indonesia Number 103 of 2001 concerning Position, Task, Function, Authority, Organizational Structure and Work Procedure of Non-Department Government Institutions as amended several times, the latest by Presidential Regulation Number 64 of 2005.
- Presidential Decree of the Republic of Indonesia Number 110 of 2001 concerning Organizational Units and Tasks of Echelon I Non Departmental Government Institutions as amended several times, the latest by Presidential Regulation Number 52 of 2005
- Regulation of the Head of the Food and Drug Supervisory Agency of the Republic of Indonesia Number HK.03.1.23.12.11.10052 of 2011 concerning Supervision of Cosmetic Production and Circulation (Official Gazette of the Republic of Indonesia of 2011 Number 942).
- Regulation of the Head of the Republic of Indonesia Drug and Food Control Agency Number HK.03.42.06.10.4556 of 2010 concerning Operational Guidelines Guidelines for Making Good Cosmetics.
- Regulation of the Head of the Republic of Indonesia Drug and Food Control Agency Number HK.03.1.23.12.10.11983 of 2010 concerning Criteria and Procedures for Submission of Cosmetic Notification, as amended by Regulation of the Head of the Republic of Indonesia Drug and Food Supervisory Agency Number 34 of 2013.
- Regulation of the Head of the Food and Drug Supervisory Agency of the Republic of Indonesia Number HK.03.1.23.12.10.12123 of 2010 concerning Product Information Document Guidelines.
- Regulation of the Head of the Republic of Indonesia Drug and Food Control Agency Number HK.03.1.23.12.10.12459 of 2010 concerning Cosmetic Technical Requirements.

- Regulation of the Head of the Food and Drug Supervisory Agency of the Republic of Indonesia Number HK.03.1.23.04.11.03724 of 2011 concerning Monitoring of Importation of Cosmetics.
- Regulation of the Head of the Republic of Indonesia Drug and Food Control Agency Number HK.03.1.23.07.11.6662 of 2011 concerning Requirements for Microbial and Heavy Metal Contaminants in Cosmetics.
- Regulation of the Head of the Republic of Indonesia Drug and Food Supervisory Agency Number HK.03.1.23.08.11.07517 of 2011 concerning Technical Requirements for Cosmetic Materials.
- Regulation of the Head of the Food and Drug Supervisory Agency of the Republic of Indonesia Number HK.03.1.23.12.11.10689 of 2011 concerning the Forms and Types of Certain Cosmetic Preparations that can be Produced by the Cosmetic Industry that Has a Production Permit for Group B.
- Regulation of the Head of the Republic of Indonesia Drug and Food Supervisory Agency Number 19 Year 2015 concerning Cosmetic Technical Requirements.
- Regulation of the Minister of Health of the Republic of Indonesia Number 1175 / Menkes / Per / VI / 2010 of 2010 concerning Permit for Cosmetic Production.
- Regulation of the Minister of Health of the Republic of Indonesia Number 1176/Menkes/Per/VIII/2010 of 2010 concerning Cosmetic Notification.
- Regulation of the Minister of Health of the Republic of Indonesia Number 1799/Menkes/Per / XII /2010 of 2010 concerning the Pharmaceutical Industry.
- Government Regulation of the Republic of Indonesia Number 72 of 1998 concerning Safeguarding of Pharmaceutical Preparations and Medical Devices (State Gazette of the Republic of Indonesia of 1998 Number 138, Supplement to the State Gazette of the Republic of Indonesia Number 3781).
- Law of the Republic of Indonesia Number 36 of 2009 concerning Health (State Gazette of the Republic of Indonesia of 2009 Number 144, Supplement to the State Gazette of the Republic of Indonesia Number 5063).
- Law of the Republic of Indonesia Number 8 of 1999 concerning Consumer Protection (State Gazette of the Republic of Indonesia of 1999 Number 42, Supplement to the State Gazette of the Republic of Indonesia Number 3821).

LEGAL ANALISYS OF DETERMINATION OF THE COURT IN CHILDREN GENDER BASED ON CHILD PROTECTION LAW (CASE STUDY)

Dana Nur Prihadi

Student of Legal Studies Doctor Program, Universitas Borobudur
dananurprihadi@gmail.com

Abstract

This research was conducted to understand that the sex determination of children is very important to give, especially for children who have unclear sex. The presence of the state through the power of judges by using legal considerations that favor children is very necessary to be able to provide protection for children in matters of identity and sex with legal certainty. Determination of the court on the sex of the child will be the basis of other agencies, namely the Population Office to be able to make sex changes in the child's birth certificate.

This study uses a normative juridical research method because the processing and analysis based on the data studied consists of primary legal materials, secondary legal materials, and tertiary legal materials. And this research is a case study in the determination of the District Court regarding the request for changes in the sex of the child.

The results of the study can be concluded that there is a need for public knowledge and concern about children's rights regarding sex status which is part of a human's identity. Good cooperation between legal practitioners, the Population, Medical, and Religious Service will be able to provide a sense of calm for the condition of children because they have obtained gender status in accordance with legal certainty.

Keywords: Determination of Courts, Gender, Child.

A. INTRODUCTION

The gender is unclear or there are two images of external sex that are equally clear in one individual or more accurately known in the medical world with the term Disorder of Sex Development (DSD) is a congenital disorder that occurs due to the development of genitals at the chromosome level , gonad or anatomy. Unclear sex is characterized by the presence of an external genital organ which is not clearly male or female, or an image of both sexes in one child..

Issues about human rights cannot be released from countries with the concept of the rule of law. Fulfillment of the implementation of protection and enforcement of human rights is one of the main focuses of a country that embeds itself as a legal state that has an obligation to uphold human rights as one of the conditions for the rule of law itself, either through the constitution or the Basic Law and regulations others are a reference for the running of a country. sex and can be well received by the family and the environment, so that children can grow and develop according to their potential.

Children are among the vulnerable groups of human rights violations, abuse, bullying, violence, exploitation and discrimination in addition to women's groups, people with disabilities and minority groups. So that this study needs to analyze the legal aspects involving the interests of children with legislation that includes children's rights, namely the Child Protection Act.

Law Number 35 of 2014 concerning Amendment to Law No. 23 of 2002 concerning Child Protection has the aim of ensuring the fulfillment of children's rights in order to live, grow, develop and participate optimally according to human dignity and dignity, and obtain protection from violence and

discrimination for the sake of the realization of a quality, noble and prosperous Indonesian child. The principle used in the Child Protection Act is non-discrimination, the best interest for children, the right to life, survival and development and appreciation of children's opinions.

Determination of the Court regarding sex change was first carried out by the Central Jakarta District Court in 1973 in the case of adults who had carried out sex change operations abroad. Certainly different from the Determination of the District Court regarding sex changes in cases in children that the author will examine, namely specifically for children who have genitals is not clear whether male or female or even there are both.

Problems will arise if the sex determination of a child with a multiple sex is different between the beginning and has been listed in the birth certificate with the actual gender medically. At present there are no legal regulations regarding procedures for changing sexes in children. Law Number 24 of 2013 concerning Population Administration, does not regulate in detail this. However, with Law Number 48 of 2009 concerning Judicial Power in Article 10 paragraph (1) it is stated that the Court is prohibited from refusing to examine, hear, and decide cases filed on the grounds that the law does not exist, but is obliged to examine and try, even though there are no rules that govern it but there are no legal processes that cannot be resolved..

Legislation concerning children has received attention from the government for quite a long time, since the ratification of the Convention on the Rights of the Child with Presidential Decree No. 36 of 1990 which became the starting point for recognition of children's rights and our government has an obligation to fulfill the provisions in the Convention on Rights child. We hope that the implementation of what has been mandated by the Law can increase and Indonesian children can live in a safe, healthy and conducive environment in accordance with the child's soul. There has been no legal aspect research on the establishment of a court on child sex change based on the Child Protection Act in Indonesia.

B. RESEARCH METHOD

This research is library research because it is done through data collection in the form of library material from books, review of case documents and court decisions related to this research.

C. PROBLEM FORMULATION

The formulation of problems that can be discussed in this study are:

1. How judges consider judicial decisions to change the sex of the child?
2. How the judge has applied the contents of the Child Protection Act in a court decision on the change of gender in the child?

D. DISCUSSION

Primary legal materials derived from legal materials that have juridical binding powers in the form of legislation in the fields of health, human rights, child protection, population administration and medicine. Secondary legal material in the form of publications on law which are not official documents, including textbooks, legal journals and comments on court decisions, scientific works, papers relating to the problems under study. Tertiary legal materials such as legal and internet media dictionaries are used to provide instructions, explanations and appropriate understanding of primary and secondary legal materials.

Determination of the sex of the child by a doctor or midwife who helps the birth of a baby is a very important and crucial thing in people's lives. Clear form of genitals in newborns, of course, will make it easier for doctors / midwives and families to ascertain gender and giving baby names that are appropriate for the sex.

If it turns out that there is no clear form of genitals whether male or female, it will create doubts both on the part of the doctor / midwife and the baby's family. So that the sex of the baby is determined by guessing either by the doctor / midwife or his own family or an agreement between the two parties.

Giving the name of a baby certainly follows his gender and will be recorded in his birth certificate. In the birth certificate includes the data of a child in the form of name, gender, date and place of birth and the name of the parent.

In this study will be discussed and reviewed the determination of the District Court regarding changes in sex in children born with unclear sex forms that have been decided in Indonesia.

The author will conduct a study of a District Court Decision that has been published in the Directory of Decisions of the Supreme Court of the Republic of Indonesia through the website putusan.mahkamahagung.go.id. Determination of the Mungkid District Court, which was decided in 2015.

The consequences of the law will be to follow the changes in sex that is the change of population data. This can be found in Article 77 of Law No.23 of 2006 on Population Administration, saying that "No one can change, replace, add to its identity without the Court's permission".

In accordance with the contents of article 77 of Act No.23 of 2006 concerning Population Administration, then a person who wishes or has performed a medical action in the form of surgery or non-surgery on his genitals that is unclear whether the male or female are of different sex from earlier and has been written in residences (for example: birth certificates), must file alteration of his / her identity identity data to court through an application for change of the legal status of a person from a sexable person to a person of male sex or otherwise.

Article 10 paragraph (1) of Law Number 48 of 2009 on Judicial Power states that "The Court is prohibited from refusing to examine, adjudicate, and decide on a matter filed under the pretext that the law is absent or not clear, but it is obligatory to examine and adhere to it". The court through judges obtaining the mandate of Article 10 paragraph (1) of Law Number 48 Year 2009 regarding Judicial Power is a representation of the Court as the last pillar to find justice for society and for the sake of lawful grounds, mandatory to answer the law's legal needs by finding its law if there is no legal arrangement on the matters it handles, as long as it does not contravene existing law, decency and morality, so the determination of gender changes is an answer and a legal discovery because there is no rule set about that, so there is no legal vacuum. In the law's discovery, judges explore the legal values of living in the community including medical findings that are considered judges in the determination of gender determination of a person who has sexually explicit or multiple.

Judges or litigants require the information and opinion of a person who has the competence and experience in the matters he deals with because the subject matter is beyond the reach of a judge's experience and experience, as in the case of setting a gender change. Judges require expert opinion and evidence of physical examination or laboratory or radiology or psychology as one of the tools to consider avoiding wrong judges in final conclusion.

The Court's determination of a change from the previous sex to a child will be able to provide psychological calm in the child, legal certainty and orderly administration of population. This will certainly give happiness to families and children who are born with genital or indirect genitals to get the same growth and growth opportunities as other children.

Legal Analysis of the Establishment of the Mungkid District Court Number: 52 / Pdt.P / 2015 / PN Mkd.

Case

Starting from the birth of Carissa Azzahra in December 2013 at Budi Rahayu Hospital, Magelang from a married couple Bowo Saputro and Desi Setya Rini. The process of birth by cesarean section is said to be female sex and birth certificate with female sex has been made.

Legal certainty regarding the sex of Carissa Azzahra was submitted by her father to submit a request for sex change in the child's birth certificate on behalf of Carissa Azzahra on June 4, 2015 at the Mungkid District Court.

Determination of gender status in the District Court is an concrete case where there are no regulations governing it so that it does not include the legal basis on which to determine it. The judge reconstructs the facts and disclosed in the trial strengthened by evidence from, 2 witnesses and 2 expert witnesses with evidence from the Sardjito Hospital in Yogyakarta which is an authentic deed.

Witness: statement from expert pediatrician and genetic consultant at Sardjito Hospital, Yogyakarta. The expert justifies having examined the applicant's child named CarissaAzzahra who was sent by a previous doctor because of an ambiguous genitalia. The results of the expert examination are without the testis, the penis is sticky down and does not appear outward, the urinary hole is at the base of the penis, not at the tip of the penis.

The chromosome examination results are XY karyotype 46, the conclusion: male genotype. An ultrasound was performed to look for the testes, no ovaries were found, no uterus was found and no female genitals were found. There are no secondary genitals, unknown causes of sex are not clear. The main basis for determining sex that applies in Indonesia and internationally is the examination of chromosomes, while other supporting factors are hormone testing. The action to clarify the sex of the applicant's child did not have a psychological impact on the child because he was still small.

Considering, that Article 3 paragraph (2) of Law Number 39 of 1999 concerning Human Rights stipulates that every person has the right to recognize guarantees of protection and fair legal treatment and obtain legal certainty and equal treatment before the law. Furthermore Article 17 of Law Number 39 of 1999 concerning Human Rights regulates that every person without discrimination has the right to obtain justice by submitting requests, complaints and claims, both in criminal, civil and administrative cases and being tried through a free and non-judicial process. taking sides, in accordance with the procedural law which guarantees an objective examination by an honest and fair judge to obtain a fair and correct decision.

Considering, that with regard to recording important events, Explanation of Article 56 paragraph (1) of Law Number 23 Year 2006 concerning Population Administration as amended by Act Number 24 of 2013 concerning Amendment to Law Number 23 Year 2006 concerning Population Administration and Article 97 paragraph (2) and paragraph (3) of the Presidential Regulation Number 25 of 2008 concerning Requirements and Procedures for Population Registration and Civil Registration, stipulates that what is meant by "other important events" is events determined by the District Court to be recorded in the implementing agency including changes in sex..

Considering, that based on the testimony of expert Dr. Suryono Yudha Patria, Ph.D, Sp.A. the occurrence of sex that is not clear (ambiguous genetalia) does not know the cause, but it is possible because of the occurrence of hormonal changes or inflammation when the child is still in the womb. Until now, the main basis for determining sex that applies in Indonesia and internationally is the examination of chromosomes, while other supporting factors are hormone testing. Because the results of the applicant's chromosome examination are 46XY, it is not possible that the child will experience a change in sex to become a woman. The act of clarifying the sex of the Petitioner's child did not have a psychological impact on the child because he was still small; Considering, that based on the description of the medical considerations above, it is evident that the Petitioner's child named Carissa Azzahra had an ambiguous genetalia and after medical examination it was concluded that the Petitioner's child was male sex and medical action was taken by the doctor The Petitioners' sex organs are intended to improve the genitals of the Petitioner's child so that they are in the proper place and can function properly. The act of perfecting the Petitioner's genitals did not have a psychological impact on the child because he was still small.

Considering whereas based on the evidence of the Petitioner's religion is Islam and pursuant to Article 42 paragraph (2) of Law No. 23 of 2002 on Child Protection as amended by Act No. 35 of 2014 on the Amendment to Law No. 23 of 2002 about the Protection of Children is set that before the child can determine his choice, the religion embraced by the child follows the religion of his parents, then in considering the religious view of the change in gender in this case the Court uses consideration in the view of Islam.

Considering, that the Indonesian Ulama Council (MUI) in its fatwa concerning Amendments and Improvements to Gender Number 03 / Munas-VIII / MUI / 2010 dated July 27, 2010, decides / stipulates: Replacement of Gender:

Considering whereas in the above-mentioned medical considerations, the physician's medical action against the sexually transmitted organs of the Petitioner is intended to refine the applicant's genitals to be in the proper place and to function as it may be, due to the ambiguous gender genetalia). Thus, when it is related to the MUI fatwa mentioned above, the change in gender status of the child of the Petitioner who was the first woman to be male is the perfection of the genitals and this is allowed in the teachings of Islam.

The condition that encourages you to apply for a change in name and gender is that your child at the age of 2 months has a small lump like a male genitals even though at birth looks like female genitals. After medical examination and surgery on the applicant's genitals, it was stated that Carissa Azzahra was a man and the doctor suggested a change in name and gender before further surgery was carried out on the applicant's child.

Judge's consideration besides covering information witnesses who know the child since birth and the medical information from the expert, who appeals the judge also uses the consideration of Article 56 paragraph (1) of Law No.23 of 2006 concerning Population Administration as amended by Law No.24 2013 on the change of Law No. 23 of 2003 on the administration of Population Administration and Article 97 paragraph (2) and (3) of the Regulation of the President of the Republic of Indonesia No. 25 of 2008 on the Terms and Procedures of Registry of Submissions submitted by the District Court to be recorded on the implementing agency.

The judge uses the consideration of the Fatwa of the Indonesian Ulema Council (MUI) on Amendment and Improvement of Gender number 03 / Munas-VIII / MUI / 2010 dated July 27, 2010 and is declared permissible for actions to improve genitals, but is haram if the operation aims at sex change.

Consideration of the Judge uses also Article 3 Paragraph (2) of Law No.39 of 1999 on Human Rights which regulates the right of everyone to the recognition of guarantees of protection and fair treatment of law and obtain legal certainty.

Judgment consideration by using Article 42 section (2) of Law No. 23 of 2002 on Protection as amended by Law No. 35 of 2014 on Amendment to Law No. 23 year2002 on Child Protection is very interesting because it uses the view of the Islamic Religion about the change in gender in this case, as cited by the child concerned.

Application for determination of sex status is a case in concreto that does not yet have a clear legal basis, but is not an excuse for the court to reject this application, because based on Article 10 Paragraph (1) of Law No. 48 of 2009 concerning judicial power states that: Courts are prohibited from refusing to examine, hear, decide a case that is filed under the pretext that the law does not exist or is unclear, but it is obligatory to examine and try it.The judge is considered to know all the laws so that the court may not reject a case even if there is no law, the court will carry out reconstruction on the basis of the principle of curia novit jus, control of considerations in terms of reason, justice and social policy. Decisions in the determination of a case in the form of an authoritarian decision, so that it can be applied later with a deductive logic process in cases or cases that have the same scope.

In carrying out legal reconstruction, a judge certainly needs another party in the form of an expert statement because the judge is certainly not able to master various scientific fields, one of which is the medical problem.

In Article 5 of Act Number 23 of 2002, it is said that every child has the right to a name as self-identity and citizenship status.

It can be seen how important children are to get their name and gender as early as possible. Social and legal issues in cases of children with unclear or multiple genitals. There are many factors that cause "mistakes in determining sex", for example, lack of knowledge or inaccurate examination of labor assistants to identify the type of genitals of a baby or indeed it is difficult to determine their sex because the shape is not firm and can resemble a man or woman. It is here that consultation is needed with more competent medical personnel with blood tests, ultrasonography and chromosome analysis.

Hard and smart work is needed from all parties, including the community, the central government, local government, related institutions, judicial institutions, religion, medicine, education, non-governmental organizations and mass media to raise awareness of human rights, especially children's rights.

Children's rights have been considered by the government with the issuance of the Child Protection Act. It is our duty together to work together and coordinate with each other to strive to place children as whole human beings and have human rights as well as adults.

Actually we still have a big homework, that is, if the gender certainty of a child has unclear genitals. When is the right time to do the reconstruction or repair of a child's genitals, how many hospitals have a special team to handle DSD cases, how much the family costs or how much the State will pay when using National Health Insurance through BPJS. These problems are not only faced by developing countries, but also face challenges, especially in the fields of ethics and law.

Further research is needed with more Court decisions and of course with more legislation, so that more complex and comprehensive aspects can be analyzed. With the hope that the results of this study can be a starting point and as a basis for further research.

E. CONCLUSION

Based on the discussion of the results of the research on the Verdict of the District Courts in Indonesia, the authors draw the following conclusions:

1. Requests for sex change can be determined through a District Court Decision and the Judge can take a decision not too long (less than 2 months) even though it includes an concrete case that does not have a clear legal basis.
2. Legal considerations that are widely used in determining sex change in children are letter of evidence, witnesses, experts and Law Number 24 of 2013 concerning Amendments to Law Number 23 Year 2006 concerning Population Administration.
3. Law Number 35 Year 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection has not been used maximally as a legal consideration in the establishment of courts regarding changes in sex in children.
4. Court decisions regarding sex change in children have provided legal certainty and guarantees the rights of children to a name as self-identity in children born with unclear genitals.

REFERENCES

- Dellyana, Shant 1998, *Konsep penegakan hukum*, Liberty, Yogyakarta.
- Marzuki, PM, 2005, *Penelitian hukum*, Kencana, Jakarta.

- Lawrence Meir Friedman, 2009, *Sistem hukum: perspektif ilmu social*, diterjemahkan oleh M Khozim, Nusa Media, Bandung,.
- Hutson etc, 2012, *Disorders of sex development*, Springer, Berlin.
- Mertokusumo, S, 2014, *Penemuan hukum*, Cahaya Atma Pustaka, Yogyakarta.
- Soerjono Soekanto, 2014, *Faktor-faktor yang mempengaruhi penegakan hukum*, Rajawali Press, Jakarta.
- Batubara dkk, 2017, *Buku ajar endokrinologi anak*, Balai Penerbit Ikatan Dokter Anak Indonesia, Jakarta.
- Undang- Undang Dasar Negara Tahun 1945.
- Keputusan Menteri Kesehatan Republik Indonesia Nomor 191/MENKES/SK/III/1989 tentang Penunjukkan Rumah Sakit dan Tim Ahli Sebagai Tempat dan Pelaksanaan Operasi Penyesuaian Kelamin
- Undang-Undang Nomor 39 Tahun 1999 tentang Hak Asasi Manusia.
- Undang-Undang Nomor 23 tahun 2002 tentang Perlindungan Anak.
- Undang-Undang Nomor 23 Tahun 2006 tentang Administrasi Kependudukan.
- Undang -Undang Nomor 36 tahun 2009 tentang Kesehatan.
- Undang-Undang Nomor 24 Tahun 2013 tentang Perubahan atas Undang-Undang Nomor 23 Tahun 2006 tentang Administrasi Kependudukan. Undang-Undang Nomor 35 Tahun 2014 tentang Perubahan atas Undang-Undang Nomor 23 tahun 2002 tentang Perlindungan Anak.
- Fatwa MUI Nomor 03/Munas/VIII/2010.
- Purwanti, A 2016, 'Disorder o f sex development: Problema yang dihadapi di Indonesia', *Med Hosp* vol.4, no.1.
- Klarisa, Sampurna, B 2017, 'Kepastian hukum perubahan jenis kelamin di Indonesia'. *Proceeding Annual Meeting*.
- Risdalina, 2016, 'Kedudukan hukum terhadap status perubahan jenis kelamin dalam perspektif hak asasi manusia dan administrasi kependudukan'. *Jurnal Ilmiah Advokasi.*; vol. 4:no. 02.
- Handayani, I 2013, 'Ugensi perlindungan anak di Indonesia (kajian perspektif hukum)', *Bestuur* ed. 02.
- Sonata, D, 'Metode penelitian hukum normative dan empiris: karakteristik khas dari metode meneliti hukum'.
- Widhiatmoko, B Suyanto, E 2013, 'Legalitas perubahan jenis kelamin pada penderita ambiguous genitalia di Indonesia', *Jurnal Kedokteran Forensik Indonesia* vol.15, no.1.
- Hoesin, I 2003, 'Perlindungan terhadap kelompok rentan dalam perspektif Hak Asasi Manusia', Bali.
- Rajagukguk E, *Hakim Indonesia mengesahkan penggantian dan penyempurnaan jenis kelamin*, diakses 12 Maret 2018 pukul 21.45 WIB, diakses dari pascasarjana.uai.ac.id/wp-content/upload/2017/07/01.
- Rika Dwi Setiawati, *Hukum dan Ham*, Diakses tanggal 24 November 2018 Pukul 20.00 WIB. <https://rikadwisetiawati.wordpress.com/matkul-hukum/hukum-dan-ham>.

GUIDANCE OF WORK SKILLS FOR CONVICTED PERSON AS A RIGHT FULFILMENT DURING PUNISHMENT PERIOD IN CORRECTIONAL INSTITUTION

Danial Rasyid

Student of Legal Studies Doctor Program, Universitas Borobudur
nialrasyid@gmail.com

Abstract

Socialization system that applied now by conceptual and historical is very different with imprisonment system. Principle that embraced by socialization system put the prisoner not only as the object but as coaching and seen as a whole human being and faced not with revenge background but with coaching and rehabiliton so that could return being a whole human being and integrate with society, as stated in pasal 2 Undang undang number : 12 in year 1995 about socialization which is socialization system held in order to forming prisoners to be a whole human being, realize their mistakes, want to improve themselves and won't repeat their mistakes so they could be actively play a role in development and could live as a good citizen and be responsible. Socialization system was born because a brilliant idea from dr. Sahardjo at Dinas Direktorat Jenderal Pemasyarakatan at Lembang Bandung, April until May 1964, that : "besides from make the prisoners suffering because od their loss independence moving, guide the prisoners to the right way, educate them so they could be useful indonesian people". In socializaion system, the government with the society have a responsibility to coaching prisoners so the prisoners could go back to the middle of society and be useful for the nation and the country. Training and trade skills activities is one of the elements that were very effective to form the character of a law offender. Basically, the pattern of socialization system in Undang Undang number 12 year 1995 about socialization have a lot adoptions from Standart Minimum Rules For The Treatment of Prisoners (SMR). One of the socialization concepts, where coaching and guiding prisoners leads to life integrity in society.

Problems of crime prevention and treatment of a convicted person has got attention since 18th century. Idea about criminal prevention presented by **Cesare Beccaria (1738 – 1794)** with his outlook, are :

1. Crime must be regarded as harmful for society and the only rationale measurement for crime is the magnitude of the amount of loss the people are suffering for.
2. Prevention of crime is more important than punishment of crime. In fact, punishment of crime can be sustained as long that thing can helping prevent crime.
3. In criminal proceedings, confidential allegations and manner of persecution must be deleted. So there must be a swift justice, the person who have been charged must got right and facilites to bring up evidences in the interest of their defense.
4. The purpose of criminal convictions is to prevent someone doing crime and it's not about revenge from society.
5. Aspect of prison affair attenuation must be more noticed, and clarification is needed and separation based on age, gender and how big the crime that has been done.

The penitentiary has an important role in develop and build a prisoner's identity through coaching program in special skills so the prisoners could apply their skills when they back to the middle of society. With this coaching, could really help and profitable for the prisoner and could utilize their work results.

Like vision and mision of Mr. President Joko Widodo which is taking care of the nation's economy weakness, poorness problem and social inequality, at this moment, development of socialization/prison

world's level grow not only in Europe. Some Asian country has been started apply how to full prisoner's right could implications increase welfare and pressed crime number.

Penitentiary has succeeded manufacturing goods and service which could be enjoyed by society but not maximum because of this factors :

- a. Resources
- b. training camp and production still not enough because they placed the training camp and prisoner's place of activity in one place. Storage of staple and tools didn't have particular place.
- c. There's no specific place for marketing
- d. Some of the work tools still traditional

Keywords: Prisoners, Socialization System

1. Institutional

There's still weakness in function of work areas such as work areas prison class is located in one place with prison guidance section.

In step with the spirit of socialization order changes and the birth of an industrial penitentiary in some district, such as Pohuwato Penitentiary which located in Kabupaten Pohuwato Gorontalo has been succeeded doing some export to some country. Pohuwato penitentiary doing work activities in the field of chicken and duck farming which directly give positive results for the people where they got decent salary to fulfill their life and for the success of another programs like security which proved by the minimum of security distraction, etc.

A. INTRODUCTION

Recent applicable correctional system in a conceptual and historical manner is greatly different with prison system. The correctional system treats any law violators by always providing directions and limits concerning procedures to treat correctional institution inmates (convicted person, protégé, and Clients of the correctional) accordance to the Pancasila and Constitutional of the 1945 which always upholds principles of Human Rights as well as are based on spirit of Guidance. The principles of correctional system lays convicted person not only as an object, but also as a subject of guidance as well as a human in a whole and it is not faced by retribution background but by guidance and counseling (rehabilitative / social reintegration) so that they can go back as a whole human and integrate with the community, as seen in article 2 Law number 12 of 1995 concerning Correctional stating that the Correctional System is applied in order to form any Correctional Institution Inmates to be a whole human who are aware of its mistakes, willing for self-improvement and no longer repeat any crimes so that it can actively participate in development process and can live as a good and responsible citizen.

The correctional system is born from a brilliant idea by a person called as dr.Sahardjo at conference of Directorate General of Correctional Office in Lembang Bandung, April to May 1964, stating that: "not only give pain for convicted person by loss of freedom to move, it is necessary to guide them to repent, teach to be a useful Indonesian citizen."

This Sahardjo formulation in an outline manner shows that the aim of prisoner is "Correctional".

In its application, the correctional system emphasizes on guidance program in order to improve quality of faith to the God the Almighty, Intellectual, Attitude and behavior, professionalism, spiritual and physical health.

Guidance for convicted person includes personal guidance and independent guidance.

The personal guidance is directed to mental and character building for the convicted person so that they can be a whole human with faith to God and responsibility for themselves, their families and community. And, the independent guidance is applied in order that convicted person has adequate skills

so after being free, it is expected that they can compete with other person and / or can live independently so that they can be useful for themselves, Families, Community, Nation and Country. The Independent Guidance is realized in the forms of Guidance activities of Work Skills and Work Production Training.

B. RESEARCH METHOD

1. Data and Sources of Data

Using writing methods with Primary data that is directly to the implementing source of work activity / Workshop Supervisors and secondary data in the form of documents and books.

2. Collection Techniques

Library Research, in the form of secondary data obtained from books and documents related to writing.

- Field Research by Observation to Prison and Detention Technical Implementation Units

3. Data Analysis

Data that has been obtained is analyzed qualitatively, according to what was obtained in the respondent's field.

C. PROBLEMS FORMULATION

In the correctional system, the government with the community has responsibilities of the Guidance for the convicted person so that they can in the future go back to the community by being a useful person for the Country and Nation. The Guidance activities Work Skills and Work Production Training is conducted operationally by the activity division called as *Workshop* (Bengker) pursuant to the Circular of Minister of Justice of the Republic of Indonesia Number : M.01- PK. 03 of 1989 concerning Governance of Management and Administration of Workshop Activity, then it was confirmed by guidance of implementation of Director General of Correction Number: E – 04.PK.03.01 of 1990 concerning Circular of Minister of Justice on May 31, 1989.

Term of Workshop has already been exist since the period of kingdom, particularly in Ancient Asian countries, which it aimed to provide punishment for any convicted persons and enable the countries to obtain benefits by employing the convicted. In Indonesia, development of Workshop has been started since the period of forced labor (1872 – 1905) until recent reformation era. Function of the correctional institutions as a place of guidance for convicted person particularly related to work activities by the time can be increasingly improved. This can be seen from some activities conducted by the Party of Director General of Correction by organizing Exhibitions of art products by the entire convicted person, one of which is routinely conducted as an Exhibition of Convicted Craft in Industry Building annually by cooperating with stakeholders engaging in the same fields. However, this Workshop activity yet fully creates the desired purposes due to some obstacles found out in the fields, among others are:

1. Minimum talents by the convicted person in the field of Workshop
2. Provision of Work Skills for convicted person in the Correctional Institution is still aimed to spend any leisure time, this is proven by less interest and motivation by convicted person to join the work skill activity.
3. There are still limited Facility and Infrastructure as well as minimum training costs so that implementation of work training and production can yet be optimal.

2. Theoretical Theories

Basically, the pattern of the Correctional system adopted in the Law No. 12 of 1995 concerning Corrections has adopted a lot of the Minimum Standard Rules for the Treaty of Prisoners (SMR). One of the Correctional concepts states that guidance and counseling for prisoners or protégé lead to the integrity of life in the community. In the Consideration of the Law Number 12 of 1995 concerning Corrections, it

is clearly stated that the re-acceptance of the community and the involvement of prisoners in the development is the end and implementation of the correctional.

The applicable guidance process in the correctional system prioritizes the principle of recognition and treatment that is more human compared to the prison system which prioritizes revenge / deterrence.

The problem of crime prevention and treatment of a convicted person has received attention since the 18th century. The idea of prevention of crime was put forward by **Cesare Beccaria (1738 - 1794)** by his views including:

1. Crime must be considered to be detrimental to society and the only rational measure of crime is the amount of losses suffered by the community.
2. Prevention of Crime is more important than criminal prosecution of Punishment of Crime. Indeed, criminal prosecution against crimes can be maintained as long as it can help to prevent the occurrence of crime.
3. In the Criminal Procedure Code, the accusations are confidential and the method of persecution must be immediately abolished. Therefore, there must be a fast trial, the accused must obtain the rights and facilities to present evidence in the interest of his defense.
4. The purpose of criminal prosecution is to prevent someone from committing a crime and not as a revenge for the community.
5. The aspect of imprisonment management must be paid more attention to, and it is necessary for classification and separation based on age, sex and severity of the committed crimes.
6. Philosophically, Correctional is a system of punishment that has far moved to abandon the philosophy of Retributive (Retaliation), Deterrence and re-socialization. In other words, Criminal Procedure is not intended to make suffering as a form of retaliation, it is not intended to make deterrence, also not assuming the convicted person as someone who lacks of socialization by improving the program of job training education.

D. DISCUSSION

Contextually, the purpose of punishment and the purpose of the criminal justice system illustrates the paradigm that criminal sanction institutions depicted in the types of criminal are not just served as a tyrannical and destructive tool to punish and make criminal institutions, in line with the theory of Utilitarians which considers that criminality is actually prospective and forward-oriented, by emphasizing on prevention with the final aim of social welfare, by this perspective, correctional institutions with orientation to increase workshop activities are the appropriate option as institutions as a manifestation of imprisonment with a new paradigm.

The correctional Institution plays an important role in improvement and building a self-image as a convicted person through guidance program, in this case special Skills to be applied after the person goes back in the community. In this Workshop and job training, it can be formed and developed the abilities possessed by prisoners appropriately and practically. During the guidance period, it is necessary for job provision in order to obtain work skills to maintain survival in a reasonable manner. The Guidance taken in this procedure can greatly assist and benefit the prisoners and can directly utilize from results of their work.

“Job provision to prison inmates who intend to make them become human beings who can make a living if they are freed by giving technical training to appropriate convicts” (RA Koesnoen).

Based on the above opinion, it is seen the importance of job provision for prisoners. It is also seen the procedure of guidance implementation. The convicted person must work so that they are not left unemployed who do not provide any benefits to themselves and others. This job provision is intended so that the convicted person from time to time will increase their expertise, thereby it will influence on production in the correctional institution that indirectly influence on the level of productivity.

In line with the Vision and Mission of the President Joko Widodo, one of which is to overcome the problem of weaknesses in the joint of economy of the nation, the problem of poverty and social inequality, currently the development of world Corrections / Prison is increasing not only in several European countries, in several Asian countries have implemented fulfillment of rights of the Convicted person so that the can have an impact on increasing welfare levels while reducing crime rates. The correctional institution has adopted form of guidance in some countries as known by Industrial Prison and the views of the President gave birth to the inspiration of prisoners to develop Industrial Prisons in several Technical Implementation Units throughout Indonesia. There are some Correctional Institutions that have succeeded in producing goods and services from prisoners' work activities, among others are:

- Binjai Correctional Institution (Prison)
Producing concrete blocks with the amount of PNBK deposited reaching 24,000,000 per year.
- Sukamiskin Correctional Institution (Prison)
The main activity is in the field of printing with a production capacity of 20,000 pcs.
- Karawang Correctional Institution (Prison).
Producing rice with a capacity of 2 tons per harvest
- Semarang Correctional Institution (Prison)
Engaging in the field of shoe production as a result of cooperation with CV. Sinar Sentosa and has produced 1,000 pairs of shoes.
- Madiun Correctional Institution (Prison)
Producing products in the form of furniture by 11,424 pieces and by 4,200 paving blocks as the work activities that are carried out independently.
- Porong Correctional Institution (Prison)
Producing 1,200 sets of furniture, 931 sets of back chair, 7,325 kg of natural stone and opening laundry services that have served 1,214 people.
- Watampone Correctional Institution (Prison)
Producing 20,000 red stones
- Selong Correctional Institution (Prison)
Producing paving Block with ability to produce 4,909 pieces and produce 7,9005 bricks.

In the implementation of work activities and training are in the Organization and governance with cooperation with other fields and this can be seen in the structure below:

Explanation of the duties and requirements of each part is regulated in the Decree of the Minister of Justice of the Republic of Indonesia Number: M.01.PR.07.03 of 1985 concerning Organizations and Work Procedures of Correctional Institutions as amended by Decree of the Minister of Justice and Human Rights Number: M.01.02 of 2011. Production and or industrial activities in Correctional Institutions which have been under the field of Work Development, the field of work activities have the task of providing work guidance, preparing work advice and managing work results. To carry out these tasks, the field of work activities has the following tasks:

- Providing vocational training guidance for inmates.
- Preparing work facilities.
- Managing work outcomes

Even so, the Correctional Institution has succeeded in producing goods and or services that can be enjoyed by broader community but this has not been considered maximally, the factors that influence on yet maximum production activities within the Correctional Institution include Supporting Resources namely training instructors and management and institutions :

1. Supporting Resources

- Training and production sites are still very limited, which the training site tends to be united with the activities of prisoners.

- The place for storing raw materials and equipment as well as production results have no special place.
- There is no special place for marketing.
- Supporting facilities and equipment / Tools of work activities are still traditional.

2. Institutional

There are still some weakness and disadvantages in formulation of tasks and functions of the work activity division and section of work activity in particularly the work activity has only been in Prison class I, meanwhile Prison Class II has its work activity place united with section of Guidance of Protégé Convicted Person and work Activity.

Forms of guidance:

1. Legal assistance / legal counseling
2. Spiritual counseling
3. Physical counseling
4. Talent guidance
5. Library
6. Work skill guidance

The officers of correctional institutions must be aware that they are not only a servant of the state, but also as an educator and servant of humanity meaning that actually they must be able to provide useful things for their inmates such as provision of work skills. The officers always face social norms so that it is necessary for scarification and great attention on development of attitude of the prisoners, try to assist prisoner or inmates of correctional institutions so that an inmate can be aware of his failure in self-adjustment to social norms and aware of guidance needs clearly, particularly guidance of work skill and other skills so that inmates of correctional institutions or prisoners can improve themselves.

3. CONCLUSION

in the correctional institutions, the implementation of guidance is by the correctional system, so that it can be acknowledged that the correctional is a process of guidance for convicted person as known by "Therapeutics Process" so that clearly it can guide the prisoners by the intension and purpose to heal one person who is temporary lost from his life due to any weakness that he possesses.

In order to overcome this weakness, it can take some approaches, among others by making arrangement in the form of Prisoner Catur Dharma including:

1. We as prisoners promise to be an ethical human with principles of Pancasila and an active and productive development human.
2. We as prisoners are aware of and regret fully of our action violating laws which we have done and we promise to not repeat the action.
3. We as prisoners promise to protect manners and orders, conduct good actions and be a role model for the correctional institutions.

In line with the spirit of changes on the correctional governance and the existence of Industrial correctional institutions in a number of regions presented in the Decree of the Minister of Justice and Human Rights, among other the Pohuwanto correctional institution in Pohuwanto Regency Gorontalo engaging in the industrial field of Coco Fiber, so far, it has been succeeded in exports to some countries. In addition, Pohuwato correctional institution conducts work activities in the field of chicken and duck farming which directly create positive results to the inmates which they have received good wages / salaries to fulfill their lives inside and their families and possibly, after they leave later, they can apply their skills and it can be developed properly and professionally.

REFERENCES

- Blue Print of Convicted Person Work Activity, Quoted from sites http://www.academia.edu/15351257/CETAK_BIRU-KEGIATAN-KERJA-NARAPIDA
- Sahardjo. PohonBeringinPengayoman. Bandung: 1963.27 pages
- Cesare Beccaria (1738 - 1794) <https://www.Utilitarianism.com/earia.html> Eassy on Crime and Punishments
- Compilation of Regulation Concerning Corrections. Directorate General of Correctional, Ministry of Justice and Human Rights, RI, 2015
- Donny Michael. Prisoner Guidance in the fields of skills based on human rights
- Academic manuscript, Regulation of Ministry of Justice and Human Rights concerning Management and Utilization of Industrial Activities in Correctional Institutions, Directorate General of Correctional, RI
- <http://kumparan.com/rusdedi/prestasi-pasti-lapas-pohuwanto>

THE RIGHT TO EDUCATION AS HUMAN RIGHTS FOR CHILDREN

Darryrahman Diyan Baskoro

Student of Legal Studies Doctoral Program, Universitas Borobudur
daryrahman@gmail.com

Hadi Purnomo, Sientje Kurniawati

Student of Legal Studies Doctoral Program, Universitas Jayabaya

Abstract

The state is obliged to guarantee the welfare of each of its citizens in accordance with the objectives of the Indonesian State as set out in the Preamble of the Constitution of 1945, paragraph IV. For the sake of the welfare of every Indonesian citizen, it is necessary to have legal protection and fulfillment of human rights, one of which is the right to education based on Article 28C paragraph (1) of the 1945 Constitution. The right to education is given to all Indonesian citizens without except for the neglected child which has been guaranteed by the State in fulfilling its rights under Article 34 paragraph (1) of the 1945 Constitution. This study will discuss regulations related to the right of education for children, as well as legal protection that can be given to abandoned children for his right to education. The research method used in writing scientific papers is juridical-normative legal research, with library materials covering primary legal materials, namely the 1945 Constitution, Law Number 39 of 1999 concerning Human Rights, Law Number 20 In 2003 concerning the National Education System, Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection, and Republic of Indonesia Government Regulation Number 47 Year 2008 concerning Compulsory Education, secondary legal materials covering scientific research, legal books , internet, as well as other legal materials, as well as tertiary legal materials which include language dictionaries, and encyclopedias.

Keywords: Human Rights, Neglected Children, Education, Legal Protection.

A. INTRODUCTION

The Indonesian state has a very starting goal as set out in the Preamble of the 1945 Constitution. Paragraph IV is *"to advance public welfare, educate the life of the nation, and participate in carrying out world order based on freedom, eternal peace and social justice."* it confirms that the state is obliged to guarantee the welfare of each of its citizens.

For the sake of the welfare of every Indonesian citizen, it is necessary to have legal protection and fulfillment of the human rights possessed by every citizen guaranteed in the Indonesian Constitution, namely in Article 28A up to Article 28J of the 1945 Constitution. the basic rights that must be fulfilled are in Article 28C paragraph (1) of the 1945 Constitution, namely *"Every person has the right to develop themselves through meeting their basic needs, having the right to education and benefiting from science and technology, art and culture, in order to improve quality of life and for the welfare of mankind."* Based on the article it can be seen that education is the right of every citizen where the welfare rights must be fulfilled. The state has a big responsibility to respect, fulfill, protect human rights for the education of all citizens.¹

The responsibility of the State for the fulfillment of human rights is one of the rights to obtain education given to all Indonesian citizens without exception, including for neglected children. Also emphasized in the 1945 Constitution of the Republic of Indonesia article 34 paragraph (1) affirms that

¹ Yosep Adi Prasetyo, 2012, *Hak Ekosob Dan Kewajiban Negara*, Komisi Nasional Hak Asasi Manusia, page. 5.

"poor and neglected children are maintained by the State". This means that the government has the authority and responsibility for the maintenance of neglected children, including street children. Neglected children as citizens alike have the right to education, where such rights are the responsibility of the State in fulfilling them, for which appropriate regulations are needed as protection for neglected children, one of which is Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection.

With the enactment of Law Number 23 Year 2002 concerning Child Protection, it is the implementation of the ratification of the international convention on the Rights of the Child, namely the ratification of the Convention on the Rights of the Child through Presidential Decree Number 36 of 1990 concerning Ratification of the Convention on The Rights of the Child), substantively the law regulates a number of issues, including the problem of children facing the law, children from minority groups, children from victims of economic and sexual exploitation, trafficked children, children victims of riots, children who become refugees and children in situations of armed conflict, child protection is carried out based on non-discrimination principles, the best interests of the child, respect for children's opinions, the right to live, grow and develop. For this reason, this study will discuss regulations concerning the right of education for children, as well as legal protection that can be given to neglected children for their right to education.

B. RESEARCH METHOD

The research method used in writing scientific papers is juridical-normative legal research, with library materials covering primary legal materials, namely the 1945 Constitution, Law Number 39 of 1999 concerning Human Rights, Law Number 20 In 2003 concerning the National Education System, Law Number 35 Year 2014 concerning Amendments to Law Number 23 Year 2002 concerning Child Protection, and Republic of Indonesia Government Regulation Number 47 Year 2008 concerning Compulsory Education secondary legal materials covering scientific research, legal books, internet, as well as other legal materials, as well as tertiary legal materials which include language dictionaries, and encyclopedias.

C. PROBLEM FORMULATION

The formulation of the problems that can be discussed in this study are as follows:

1. How are the regulations related to the rights to education for children?
2. What legal protection can be given to neglected children for the fulfillment of educational rights?

D. DISCUSSION

1. Regulations Regarding the Rights to Get Education for Children

Definition of Children according to article 1 point 2 of Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection, namely: *"a child is someone who is not 18 (eighteen) years old, including a child who is still in the womb. "The definition of a child according to the Convention on the Rights of the Child (1989), namely" children are every human under the age of 18, except based on what applies to the child. It is determined that adulthood is reached earlier. "* Law Number 39 of 1999 concerning Human Rights, namely *"children are every human being under the age of 18 (eighteen) years old and unmarried, including children who are still in the womb if this is in their interest."*

Someone who can be categorized as an abandoned child is regulated in Article 1 point 6 of Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection, namely: *"Neglected children are children who are not properly met, physically, mentally, spiritually and socially."* One of the neglected children is street children, who are children

who skip or use most of their time to do daily activities on the streets, including in markets, shops and other crowded centers.²

Based on Article 34 paragraph (1) of the 1945 Constitution, it is stated that the poor and neglected children are maintained by the State. This article is the basis that the fulfillment of human rights towards the poor and neglected children is the responsibility of the State. One of the basic rights that must be fulfilled by the state towards neglected children is the basic right of education. The definition of education is based on Article 1 point 1 of Law Number 20 Year 2003 concerning the National Education System, namely *"conscious and planned efforts to create a learning atmosphere and learning process so that students actively develop their potential to have religious spiritual strength, self-control, personality intelligence, noble character, and skills needed by him, the Community, the Nation, and the State."*

The basic rights of neglected children are in principle the same as human rights in general, as stated in Law Number 39 Year 1999 concerning Human Rights, and Presidential Decree Number 36 Year 1990 concerning Ratification of the Convention On The Rights Of The Child (Convention on the Rights of the Child), where neglected children must get their rights normally as children, namely civil rights and independence, family environment and maintenance choices, basic health and welfare, education, recreation and culture, and protection special.

Legislation that guarantees children the right to education can be described as follows:

- a. Article 12 of Law Number 39 of 1999 concerning Human Rights, namely: *"every person has the right to protection for his personal development, to obtain education, educate himself and improve the quality of his life so that he becomes a man of faith, piety, responsibility, morality, happy and prosperous in accordance with human rights."*
- b. Article 13 of Law Number 39 of 1999 concerning Human Rights, namely *"every person has the right to develop and benefit from science and technology, art and culture in accordance with human dignity for the welfare of his people, nation and humanity."*
- c. Article 60 paragraph (1) Law Number 39 of 1999 concerning Human Rights, namely *"every child has the right to obtain education and teaching in the context of his personal development in accordance with his interests, talents and level of intelligence."*
- d. Article 1 number 12 of Law Number 35 Year 014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection, namely *"children's rights are part of human rights that must be guaranteed, protected, and fulfilled by parents, families, communities, government and state."*
- e. Article 9 paragraph (1) of Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection, namely *"every child has the right to receive education and teaching in the context of his personal development and the level of intelligence according to his interests and talents."*
- f. Article 9 paragraph (2) of Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection, namely *"in addition to the rights of the child as referred to in paragraph 1, specifically for children with disabilities also the right to obtain extraordinary education, while for children who have excellence, they are also entitled to special education."*
- g. Article 10 of Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection, namely *"every child has the right to express and hear his opinion, receive, seek and provide information in accordance with the level of intelligence and age for his development in accordance with the values value of decency and propriety."*

² <https://www.kemsos.go.id/content/anak-andangan>, accessed on June 8, 2019 at 16:30 WIB.

- h. Article 48 of Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection, namely *"The government is obliged to provide a minimum basic education of 9 years for all children."*
- i. Article 49 of Law Number 35 o Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection, namely *"States, governments, families and parents must provide opportunities to the widest possible extent for children to obtain education."*
- j. Article 50 of Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection, namely *"education as referred to in article 48 is directed at: a) Development of attitudes and abilities of children's personality, talents, mental and physical abilities to achieve their optimal potential; b) Development of respect for human rights and fundamental freedoms; c) Development of respect for parents, cultural identity, language and its own values, national values where children live, where children come from, and different civilizations of their own civilization; d) Preparation of children for responsible life; and e) Development of respect and love for the environment."*
- k. Article 52 of Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection, namely *"children who have an advantage are given the opportunity and accessibility to obtain education."*
- l. Article 53 paragraph (1) of Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection, namely *"The government is responsible for providing free education and / or free assistance or special services for children from families able, neglected children, and children who live in remote areas."*
- m. Article 53 Paragraph (2) of Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection, namely *"the government's responsibility as referred to in paragraph 1 includes also encouraging the public to play an active role."*
- n. Article 54 of Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection, namely *"children in the school environment must be protected from acts of violence committed by teachers, school managers or friends in the school concerned, or other educational institutions. "*

2. Legal Protection That Can Be Given To Neglected Children For The Fulfillment Of Educational Rights

Regarding legal protection against the fulfillment of the education rights of neglected children is an obligation and responsibility of both the government and other state institutions as stated in Article 59 of Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection, namely *"Government and other state institutions are obliged and responsible for providing special protection to children in emergency situations, children facing the law, children from minority groups and isolated, economically and / or sexually exploited children, trafficked children, children who are victims of narcotics abuse , alcohol, psychotropic, and other addictive substances (drugs), children abducted, sold and trafficked, children victims of physical and / or mental violence, children with disabilities, and children victims of mistreatment and neglect."*

In order to provide protection for the right to education of children, legislation requires children to receive education as stipulated in Article 34 paragraph (2) of Law Number 20 Year 2003 concerning the National Education System, namely: *"The government and regional government guarantee the implementation of compulsory study at a minimum at the basic education level without charging fees."* Reinforced in Article 3 paragraph (2) of the Republic of Indonesia Government Regulation Number 47 Year 2008 concerning Compulsory Education,

namely: *"Implementation of compulsory education on the formal pathway is carried out at a minimum of elementary education. MI, SMP, MTs, and other forms are equal."* Based on the two articles, it can be seen that by requiring children to receive education it is actually one form of legal protection against them, which should be directly proportional to its implementation.

Although education in the formal pathway has been mandatory, the approach that can be taken to neglected children cannot immediately impose formal compulsory education, there needs to be coordination and cooperation between the Social Service and the Education Office and the community to determine the right type of education services for children. abandoned child. The types of education services referred to in Article 1 point 10 of Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection, namely *"education units are education service groups that provide education in formal, non-formal and informal ways at every level and type of education."* Formal education is a structured and tiered educational path consisting of basic education, secondary education and higher education (Article 1 point 10 of Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 about Child Protection) Non-formal education is a pathway for education outside formal education that can be implemented in a structured and tiered manner (Article 1 point 11 of Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection), and Informal Education is the path of family and environmental education. (Article 1 point 12 of Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection). Then, after getting the results of coordination from the Social Service, Education Office, and the community regarding the determination of the right type of education services for each of the Neglected Children, the education services must be immediately implemented.

E. CONCLUSION

The conclusion of the above discussion can be conveyed regarding the right of the child to receive education, that the right to education is one of the basic rights that must be fulfilled for every citizen, including for neglected children based on Article 34 paragraph (1), guaranteeing the right of education to children are regulated in laws and regulations, namely in Law Number 39 of 1999 concerning Human Rights and Law Number 35 of 2014 concerning Amendment to Law Number 23 of 2002 concerning Child Protection, then related to legal protection that can be granted For neglected children for the sake of fulfilling their rights to get an education, one of them is by providing rules related to compulsory education (regulated in Law Number 20 of 2003 concerning the National Education System and Government Regulation of the Republic of Indonesia Number 47 of 2008 concerning Compulsory Education). and cooperation between the Social Service and education authorities and the community to be able to determine the right type of education service for Neglected Children, which consists of formal, non-formal, and informal channels.

REFERENCES

A. Book

- Yosep Adi Prasetyo, 2012, *Hak Ekosob Dan Kewajiban Negara*, Komisi Nasional Hak Asasi Manusia.

B. Legislation

- *Indonesia, the 1945 Constitution of the Republic of Indonesia.*
- _____, *Law Number 39 of 1999 concerning Human Rights.*

- _____, *1945 Constitution, Law Number 39 of 1999 concerning Human Rights.*
- _____, *Law Number 20 Year 2003 concerning National Education System, Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection.*
- _____, *Republic of Indonesia Government Regulation Number 47 Law 2008 concerning Compulsory Education.*

C. Internet

- <https://www.kemsos.go.id/content/anak-andangan>, accessed on June 8, 2019 at 16:30 WIB.

LEGAL ISSUE OF MEDICAL HOME VISITE THROUGH ONLINE APPLICATION SYSTEMS BASED ON POSITIVE LAWS IN INDONESIA

Defri Aryu Dinata

Faculty Of Law, Borobudur University
ro.inmemory@gmail.com

Abstract

Industry 4.0 era greatly affects all sectors, one of which is the health sector. Which a new type of health service has come in, namely an online application-based health service. One of the service is health personnel visitation services (home visit) to the patient's home by online. The legality of visitation by health workers services through online application systems still debatable. Based on UU No. 29 year 2004 chapter 36 article 1 states that doctors must have a registration letter, have a place of practice and have recommendations from professional organizations. The permit is given to practice health care facilities and is limited to three permits for three practice sites in health service facilities. In relation to online application-based health care products, doctors are invited to participate in non-permanent health service activities in the form of a call according to the patient's needs. In practice, there is no clear legal entity that regulates the implementation of the online application-based health service practice facility that explains whether the product is included in public health facilities or not. According to Peraturan Menteri Kesehatan No. 028/MENKES/PER/I/2011 concerning Clinics chapter 1 article 1, health care provider based on online is still unclear to categorized as clinic or not. So i concluded that there is the potential for misuse of services that can harm various parties and to avoid this, policies and regulations must be made in such a way.

Keywords: Health care application online, medical practice, home visite

1. INTRODUCTION

At this time, Indonesia has been entering industrial era 4.0. The industrial era 4.0 was marked by the presence of the internet that was able to present artificial intelligence, computational connections, data analysis and internet of things (IoT). Industry 4.0 era greatly affects all sectors, one of which is the health sector. The characteristic of millennial society who need direct access to health services are answered by the presence of various online applications that offer health consulting services, doctor visitation to patients' homes (home visit), home care, therapy and drug purchases online.

Before the 4.0 industrial revolution, there were two types of ways people access health services, namely traditional medical services and modern health services. Traditional health services are treatments that refer to medical experiences and skills from generation to generation empirically that can be accounted for and applied in accordance with the prevailing norms in the community. While modern health services are based on western public health sciences that are based on empirical studies, research and technology development. The conditions for the occurrence of modern health services are the presence of patients (recipients of health services), doctors/nurses/midwives (health care providers) and health service facilities/facilities. The standard for determining diagnosis and therapy for modern health services must through several phases, namely history taking (questioning and answering between patients and health care providers), physical examination, blood tests, radiographs and other examinations.

In the 4.0 industrial revolution, a new type of health service came in, namely an online application-based health service. A distinctive feature of this type of health service is the occurrence of consultation (questioning and answering between patients with health care providers) through cyberspace

intermediaries. In addition, health personnel visitation services (home visit) to the patient's home can also be done with an online application system. The visitation system by health personnel is carried out to the level of diagnosis and treatment. There are two types of health workers in this service, namely (1) freelance medical personnel, namely doctors/nurses/midwives/physiotherapists who are under the management of online application owner companies, (2) collaborative medical personnel, namely cooperation between online application companies and health care facilities.

Unfortunately the development of health care online application services which is growing rapidly is not accompanied by the presence of law to regulate it. Legal instrument are very necessary for health workers both doctors and paramedics in this services. Likewise, legal instrument for patients who use online-based health services applications to obtain minimum service standards and patient safety. If there are no legal instruments governing this, it is feared that there will be many legal disputes that are detrimental to both health workers and patients in the future. These legal instruments can be law of state (UU), regulations of the minister of health (Permenkes), medical council regulations, doctors society (IDI) regulations, regulation of medical profession associations, medical ethics and regional regulations (Perda) which are expected to be issued quickly and not overlapping.

2. RESEARCH METHOD

The research method used in this paper is library research. The data are gathered from library materials which includes textbooks, both published and unpublished academic document such as journal, conference proceedings, dissertations dan theses. Other sources of information are gathered from internet search.

3. PROBLEM

How the legality of visitation by health workers services through online application systems based on positive laws in Indonesia?

4. DISCUSSION

Everyone desires to be healthy and being healthy is one of the needs to be achieved by humans to the highest degree. The definition of health is a healthy state, both physically, mentally, spiritually and socially, which enables everyone to live productively socially and economically. For that, literally, people will seek access to safe, comfortable and affordable health services. In addition, each person has the right and responsibility to determine the type of health care for themselves. Health care is any effort that is held alone or jointly in an organization to improve and maintain health, prevent and cure diseases and restore health, individuals, families, groups or communities. According to Undang-undang kesehatan chapter 52 article 1, health services were divided into two, namely:^[1]

1. Individual health services with the aim of curing diseases and restoring individual and family health; consists of hospitals, clinics and independent practices.
2. Public health services that aim to maintain and improve health that refer to promotive and preventive actions are carried out at public health centers such as health centers.

Based on the Undang- Undang Republik Indonesia No. 36 year 2009 concerning health, health is a human right and one of the elements of welfare that must be realized in accordance with the ideals of the Indonesian people as intended in Pancasila and the 1945 Constitution of the Republic of Indonesia. Activities in an effort to maintain and enhance the highest degree of public health, carried out based on non-discriminatory, participatory and sustainable principles in the framework of establishing Indonesia's human resources, as well as increasing the nation's resilience and competitiveness for national

development.^[1] Indonesia's global competitiveness index rises to ranked 45th out of 140 countries in 2018.^[2] This is inseparable from the role of manufacturing in the country that utilizes the latest digital technology and research activities to create innovation. This digital technology has also developed a lot in the health sector, especially in individual health services. According to Undang-Undang Republik Indonesia No. 36 year 2009, health technology is all forms of tools and/or methods intended to help establish diagnosis, prevention and management of human health problems. Health technology has assisted in carrying out health efforts which are activities and/or a series of activities carried out in an integrated and sustainable manner to maintain and improve public health in the form of disease prevention, health improvement, disease treatment, and health recovery by the government and/or community.^[1]

Health development is an effort to fulfill people's rights to obtain health services. It requires quality human resources with equitable distribution, the realization of affordable and quality health services, the realization of clean and healthy living behavior in all settings, the realization of public health care guarantees. Health facilities are needed to realize affordable and quality health services. Health facilities are places that are used to organize health efforts which include medical centers, health centers, hospitals, medical practices, midwives practice, pharmacies, laboratories and others. Health facilities must be in accordance with quality health service standards both physically, management, service and human resources. Health facilities in the implementation require permission as a regulator or controller by the government of activities carried out by the community in accordance with UU No. 36 year 2009 chapter 23.^[1] According to Peraturan Menteri Dalam Negeri No. 24 year 2006 concerning Guidelines for the Implementation of One-Stop Integrated Services Chapter 1 article 8, permits are documents in the form of legality evidence issued by regional governments stating that a person or legal entity is authorized to carry out certain activities, regulated by regional regulations and others. Permission is issued through several stages, namely:^[3]

1. Application
2. Research requirements and participation
3. Decision making
4. Submission of permission

The progress of technology and information has taken many parts in the implementation of health facilities. This is done in addition to advancing the country's competitiveness, as well as to meet the needs of the public health aspects. The form of technology and informatics involvement in its implementation is with the development of online application-based health care products. Applications can be interpreted as a program in the form of software that runs on a particular system that is useful to help various activities carried out by humans.^[4] Online is a term when we are connected to the internet or cyberspace.^[5] Many people tend to spend time with digital media with 60% of online searches are done through cellphones. The average internet usage of the population of Indonesia is 3.5 hours per day. The development of today's technology has changed people's lifestyles in reading, seeking entertainment and doing daily activities such as shopping and taking notes. Technological developments in the health sector are also motivated by the ease of meeting public health needs. Meeting the needs of the community through online applications aims to facilitate the public in obtaining health services by medical personnel. The online application combines health services that include doctors, patients, clinics and pharmacies. The example of the service developed was doctor visitation to the patient's home to do health services. Doctors as partners can register themselves and undergo practices as they do in hospitals and clinics.

Medical practice is a series of activities carried out by doctors and dentists on patients in carrying out health efforts. A doctor in practice is regulated in Undang-Undang No. 29 year 2004 concerning

medical practice. The practice permit that must be owned by a doctor is written evidence by the government to carry out medical practice after fulfilling the requirements. To get a practice permit, Undang-Undang No. 29 year 2004 chapter 36 article 1 states that doctors must have a registration letter, have a place of practice and have recommendations from professional organizations. The permit is given to practice health care facilities and is limited to three permits for three practice sites in health service facilities.^[6] In relation to online application-based health care products, doctors are invited to participate in non-permanent health service activities in the form of a call according to the patient's needs. In practice, there is no clear legal entity that regulates the implementation of the online application-based health service practice facility that explains whether the product is included in public health facilities or not.

Online application-based health care products can work with a clinic that might be considered a place of practice in the running of the program. However, as we know, Peraturan Menteri Kesehatan No. 028/MENKES/PER/I/2011 concerning Clinics chapter 1 article 1 states that clinics are health care facilities that provide individual health services that provide basic and / or specialist medical services, held by more than one type of health worker and led by a medical personnel. Furthermore, in article 2 it is stated that the medical personnel in question are doctors, specialists, dentists or specialist dentists. If an online application product is a product under a clinic or is a program of a clinic, it must be led by a medical person.^[7] Clinical efforts to make applications by working with other parties in developing services are the right of the clinic but keep in mind that the service area is regulated by the district/city government based on the ratio of population. Thus, the application can only be used by residents in the area covered by the clinic. If the online application health care products are not under the clinic, but a company that is a clinical partner, without a clear legal entity, it cannot be said to be a public health service facility where doctors can make a practice permit as referred to in UU No. 29 year 2004 chapter 38.^[6]

Application manufacturers may have legal entities related to the company, but for the launch and use, there are no clear legal provisions. In services offered by online health applications, consultation / question and answer for patients with health care providers occurs through cyberspace intermediaries and there may be a health visitation service (home visit) to the patient's place. Consultation can be in the form of checks and/or treatments with the aim of preventive, curative, rehabilitative or promotive. However, consultations conducted online, cannot make the diagnosis appropriately because the examination cannot be carried out. This increases the likelihood of misdiagnosis and, of course, inappropriate handling of patients. The home visit is a service where a health worker comes to the patient's home to do an examination and treatment. Home visits are carried out with a family approach to serve patients holistically. Usually this is done because the patient's health condition is not possible to come to the doctor's office. However, some problems are often found in practice such as limited actions can be taken and equipment used to treat patients, calls that are not needed so that they can harm health workers by wasting time and energy and excessive dependence on patients and families. Safety for patients and health workers is still questionable. If a doctor comes to visit a patient and things that are related to a violation of the law occur, there are no provisions that govern this matter. In this case the safety of doctors in conducting health services is questionable. Moreover, if the call exceeds the coverage area or fake call. Vice versa, if patients do not get services according to their rights and there is a possibility of violations of law by certain people, the security of the application implementation is still unclear.

Patient protection is something that must be considered by the government. This must be done based on the law to prevent things that are not in accordance with the procedure, the safety of the products used and the workforce in accordance with the competencies given that in online applications, there is cooperation between clinics, health workers and pharmacies. The procedures, tools and products used must have official permission. Health care facilities/clinics must also have permits in accordance with

Peraturan Menteri Kesehatan Republik Indonesia No. 6 year 2013 concerning criteria for remote health services, very remote and health care facilities that were not in demand, Peraturan Menteri Kesehatan No. 9 year 2014 concerning clinics and Peraturan Menteri Kesehatan No. 512 year 2007, Peraturan Menteri Kesehatan Republik Indonesia No. 93 year 2014 concerning the implementation of integrated one-stop services in the health sector at the investment coordinating body. Patients also have the right to receive compensation if the services obtained are not appropriate. Broadly speaking, patients have the right to receive medical services that meet their needs, receive services without discrimination, guarantee security, safety and comfort, and medical information about their conditions.^{[3], [8], [9]}

Many efforts related to law have been carried out to protect the public and doctors as a whole. The progress of science and technology is considered to develop very quickly and is not balanced with the development of the law. The Indonesian Medical Council is a body that bridges the implementation of medical practices that are still inadequate. The Indonesian Medical Council has a regulator function to increase the implementation of medical practice. One of its functions is registration of all doctors who carry out medical practices, validate professional standards of doctors and conduct coaching with other relevant institutions on the implementation of medical practice. The registration letter is then submitted to the Ikatan Dokter Indonesia's office for recommendations for practice. This recommendation is a condition for making practical license recommendation letter. This permit is needed for doctors to practice based on practices that have been registered before. If the doctor performs a service or practice without having a practice permit, sanctions can be given by the local government or the health office with a recommendation to revoke the practice permit.^[9] Online applications have not been registered as a health facility so far. The placement of practice licenses on these facilities is also certainly not possible, unless the application is under a clinic. However, there is no clear legislation that regulates this.

Legal protection is needed in providing health services. According to Kamus Besar Bahasa Indonesia (KBBI) dictionary, protection is a place of refuge, an act of protection.^[4] Legal protection is a protective action from certain parties using legal instruments in ways such as the following:^[10]

1. Making rules
2. Enforce regulations
 - a. Administrative law
 - b. Criminal law
 - c. Civil law

The need for regulations governing the practice of doctors relating to the online application of health services is needed to facilitate, legalize and clarify health services obtained by the community. This must also be done to legalize the practice of doctors who have collaborated with the online application, which is not yet clear. Here means the government has a role to form a law regarding the implementation of these services in accordance with Undang-Undang No. 36 year 2009 chapter 14 article 1 where the government is responsible for planning, regulating, organizing, fostering and overseeing the implementation of equitable and affordable health efforts by the community. In article 2 it is stated that the responsibility is devoted to public service.^[11] Public services themselves according to Undang-undang Republik Indonesia no. 25 year 2009 concerning public service article 1, constitute a form of service or activity in accordance with the laws and regulations to fulfill internal needs. forms of services, goods, and/or administrative services for every citizen and population by public service providers.^[11] The government is also responsible for the availability of all forms of quality, safe, efficient and affordable health efforts. In Undang- undang kesehatan chapter 54, health services are regulated under the government which supervises the implementation of health services. Legal instruments are needed to ensure standards, protect patients and create legal protection to improve, direct and provide basic health services.

5. CONCLUSION

Thus, a legal instrument and a clear legal basis are needed for each health service and legal reform that should continue to keep abreast of developments with current technological and information advancements. Online applications are technological advances that can be appreciated for their development and use in everyday life but without legal arrangements, there is the potential for misuse of services that can harm various parties and to avoid this, policies and regulations must be made in such a way.

REFERENCES

- Indonesia. Undang-Undang Republik Indonesia No. 36 tahun 2009 tentang Kesehatan.
- The Global Competitiveness Report 2017–2018. World Economic Forum. (2017).
- Kementerian Dalam Negeri Republik Indonesia. Peraturan Menteri Dalam Negeri No. 24 tahun 2006 tentang Pedoman Penyelenggaraan Pelayanan Terpadu Satu Pintu. Jakarta.
- Kementerian Pendidikan dan Kebudayaan Republik Indonesia. Kamus Besar Bahasa Indonesia. Badan pengembangan dan Pembinaan Bahasa. Jakarta. (2016).
- Cambridge Dictionary Cambridge: Cambridge University Press.
- Indonesia. Undang-Undang No. 29 tahun 2004 tentang Praktik Kedokteran.
- Kementerian Kesehatan Republik Indonesia. Peraturan Menteri Kesehatan No. 028/MENKES/PER/I/2011 tentang Klinik.
- Kementerian Kesehatan Republik Indonesia. Peraturan Menteri Kesehatan No. 9 tahun 2014 tentang klinik.
- Kementerian Kesehatan Republik Indonesia. Peraturan Menteri Kesehatan Republik Indonesia No. 052/menkes/per/x/2011 tentang Izin Praktik dan Pelaksanaan Praktik Kedokteran.
- Sasongko W: Ketentuan-Ketentuan Pokok Hukum Pelindungan Konsumen. UNILA. pp. 30 (2007).
- Indonesia. Undang-Undang Republik Indonesia No. 25 tahun 2009 tentang Pelayanan Publik.

**PROTECTION OF POOR PATIENT BY LAW,
IN THE IMPLEMENTATION OF MEDICAL ACTION
IN HOSPITALS REVIEWED FROM LAW NUMBER 44 OF 2009
CONCERNING HOSPITAL AND LAW NUMBER 29 OF 2004
CONCERNING MEDICAL PRACTICE**

Didin Syaefudin

Student of Legal Studies Doctoral Program, Universitas Borobudur
didinsyaefudin@yahoo.com

Abstract

Health care is an effort that is organized alone or together in an organization to improve and maintain health, prevent disease, treat diseases and restore health to individuals, groups or the community. Hospitals are a means of health efforts that carry out health services and part of the health care system, so hospitals are required to provide quality medical services for the community. Patients as recipients of medical services have the right to obtain services that are appropriate to medical needs, but there are still patients who do not receive appropriate services due to limited costs. Based on this, how do legal responsibilities in protecting patients have limited costs in obtaining appropriate medical action. The study was conducted using a normative juridical approach. Techniques for collecting data through primary and secondary legal materials, as well as research in the field, which are obtained through interviews. The specification of this study is descriptive & analytical, then the data analysis is done in a qualitative juridical manner. Based on the results of the study, it is known that harmonization between doctors and hospitals is very necessary for the well-being of patients, besides the patient's knowledge about the extent to which the law protects the rights of patients is expected to increase because the law actually protects patients from various legal aspects, clearly what is the rights and obligations of patients, doctors and hospitals

Keywords: Health Care, Patients, Legal Protection

A. INTRODUCTION

The aspirations of the Indonesian people as stated in the opening of the 1945 Constitution, as well as being the national goal of the Indonesian nation, are to protect the entire Indonesian nation and all of Indonesia's bloodshed and advance public welfare, educate the nation's life and participate in carrying out world order based on independence, eternal peace and social justice. In order to realize the ideals of the nation in accordance with the 1945 Constitution, the government continues to carry out national development in various fields, including the Health sector.

The government is obliged to provide and improve both services and health services for the community, to realize the development of the health sector in Indonesia. Meeting the needs of health services and health services was not an impossible thing for the poor. The underlying reason is that healthcare is a human right and one of the elements of welfare that must be realized in accordance with the ideals of the Indonesian people as referred to in the nation's ideology and the opening of the 1945 Constitution of the Republic of Indonesia, so that every activity and effort to improve healthcare is carried out based on non-discriminatory, participatory, protection and sustainable principles which are very important for the formation of Indonesian human resources to increase national resilience and competitiveness, and national development.

One of the health care facilities in question is a hospital. With the rapid development of medical science and technology, there are many things that hospitals can do to help a patient. In addition to the main purpose of helping patients, the hospital also has other objectives as follows:

As an organization that brings together organized medical personnel with permanent medical facilities that aim to provide medical services, continuous nursing care, diagnosis and treatment of patient diseases;

As a place for sick people to receive medical services and places to organize clinical education for medical students, nurses and various other health professionals.

As a center for organizing public health services, education and medical research.

The Medical Law Assessment Team of the National Legal Development Agency (BPHN), health law is a legal provision that regulates rights and obligations, both from health workers in carrying out health efforts and from individuals and communities who accept these efforts in all aspects, namely promotive, preventive aspects, curative, rehabilitative in addition to the organizational aspects and facilities that must be considered: Medical, international, customary, and autonomous guidelines in the health sector, knowledge and medical literature are also sources of health law.

Health Development also has a goal as contained in Article 3 of Law Number 36 of 2009 concerning Health, namely increasing awareness, willingness and ability to live healthy for everyone in order to realize the highest degree of health, as an investment for the development of human resources productive socially and economically.

The enactment of Law No. 36 of 2009 concerning Health, hereinafter referred to as the Health Law. In this law it is not regulated regarding health services but regarding health efforts in Article 1 paragraph (11) which explains that health efforts are every activity and / or series of activities carried out in an integrated, integrated and sustainable manner to maintain and improve community health status in forms of disease prevention, health promotion, treatment of diseases, and health management by the government and / or the community

Law No. 36 of 2009 concerning Health Article 17 explains that the Government is responsible for the availability of access to information, education and health service facilities to improve and maintain the highest degree of health.

The relationship between doctors and patients is a relationship that has a special nature, where doctors as health services and patients who receive health services, because basically the relationship between doctors and patients is a relationship based on beliefs and beliefs where patients believe and believe that the doctor will make maximum efforts in healing patients.

Therapeutic Transaction is an activity in the practice of doctors in the form of providing health services individually or called medical services based on expertise and skills, as well as accuracy. Medical services themselves are a central part of health efforts involving health resources as supporters of their implementation, which must be carried out in accordance with their functions and responsibilities.

The approval of the medical procedure is usually carried out in writing and can be a legal document or evidence. As stipulated in the Regulation of the Minister of Health of the Republic of Indonesia Number 290 / MENKES / PER / III / 2008 concerning Approval of Doctor Actions Article 7 paragraph (3), at least including "

- a. Medical diagnosis and procedure
- b. The purpose of medical action is carried out
- c. Alternative other actions and risks
- d. Possible risks and compilation; and
- e. Prognosis of actions taken

Estimated financing

Understanding serious informed consent is really needed, and must be in accordance with the level of education and condition of the patient. Regulation of the Minister of Health of the Republic of Indonesia Number 290 in 2008 Article 3 states that medical actions that have a high risk must be with written approval and signed by those entitled to give consent. So written agreement is a must for implementing high-risk medical actions. What should not be forgotten is that in providing information may not be deceptive (Fraud), suppress (Force) or create fear (Fear) because the three things will make the agreement given to be a legal flaw.

Patients can refuse to give consent after being given information through informed consent, the rejection is known as informed refusal. This can be justified based on a person's basic right to determine what he wants to do with him. For informed refusal, the patient must understand all the consequences that will occur to him that might arise due to the rejection and of course his doctor cannot be blamed for the rejection. For the rejection, the patient is signed on the Rejection Sheet for Medical Actions.

Informed consent has been done both orally and in writing, but several hospitals in the Standard Operating Procedure state that before patients get medical treatment there are several things that must be implemented, one of which is in the case of hospital administration that must be completed before medical action is carried out.

Every country is certain that the government has a health insurance program that is intended for its citizens, especially citizens who cannot afford it, in Indonesia there is already a Health Social Security Organizing Agency, which in Presidential Regulation Number 12 of 2013 concerning Health Insurance explained that the Social Security Organizing Agency hereinafter abbreviated as BPJS kesehatan is a legal entity formed to organize a Health Insurance program.

The Indonesian population according to official 2010 census data amounted to 237,641,326 people, still far from all having Health Insurance cards, even DKI Jakarta's poor residents do not all have Healthy Jakarta Cards, this is not uncommon to make the administration process in the Hospital not work fluently in incapacitated patients.

Law Number 44 of 2009 concerning Hospital Article 13 paragraph (3) explains that every health worker working in a hospital must work in accordance with professional standards, hospital service standards, applicable standard operating home procedures, professional ethics, respect for rights patient and prioritizing patient safety. Not only on the Article, patient safety is also referred to in other origins including Article 3 which states that one of the objectives of organizing a hospital is to provide protection for patient safety.

Article 3 of Law Number 29 of 2004 concerning Medical Practice also explains that medical practice arrangements aim to provide protection to patients, maintain and improve the quality of medical services provided by doctors and dentists and provide legal certainty to the public, doctors and dentists.

B. PROBLEM FORMULATION

The formulation of the problem that can be discussed in this study are as follows :

1. What factors have resulted in the non-implementation of medical action in hospital health services based on Law Number 44 of 2009 concerning Hospitals?
2. How is the fulfillment of the rights of patients unable to obtain certain medical actions at the Hospital in terms of Law No. 36 of 2009 concerning health?

C. THEORY

1. Basic Legal Relations between Doctors and Patients in Health Services at Hospitals.

At first the mind of the doctor-patient relationship was based on Paternalism, the relationship between the patient's doctor based on trust (fiduciary relationship). People who are sick will give 100%

of their treatment to their doctor's opinion, because as a doctor he knows better and will choose what is best for his patients. In the past the patient just gave up and entrusted his treatment to his doctor and will accept the consequences of whatever happened. If even the death (of the patient) is today, it is considered to have been the will of the Almighty God, that first time has changed drastically as a result of humans. Human rights are now the main subject in the first relation what is to be done to patients. The risk must be, what are the consequences, if not done, are there other alternatives and so on. This is what is called Informed Consent.

Once upon a time in ancient Greek and Roman times the doctors were concerned by patients based on general therapeutic goals. The background is based on a belief that a patient will recover faster if he himself also participates in his treatment (J.Brent). In modern times the concept of informed consent derives a legal basis, because the courts are increasingly strong in recognizing one's human rights to decide what to do with themselves.

If someone voluntarily, without being assigned, represents someone else's business, with or without the person's knowledge, then he secretly binds himself to continue and complete the matter, so that the person he represents his interests can work on that matter himself. He must burden himself with everything that belongs to that business. He also has to carry out all the obligations he must assume if he accepts the power expressly stated (Article 1354 of the Civil Code)

Agreements both real and silent between doctors and patients often lead to professional relationships, so the obligation that must be fulfilled by a doctor to the patient is sometimes seen as an obligation based on a service contract, although most doctor and patient relationships contain mutual agreement between the parties, so that it is generally assumed to arise from a contract that is at least secretly made, but not always so.

There is a relationship between the doctor and the patient based on an obligation to provide medical assistance that is charged by the community to the doctor through the Tort principle, and not as an event that arises from a contract that exists between the parties. Therefore, the obligation of physicians should be seen as something that is based largely on a medical professional relationship, which is a combination that can arise in several contexts and which can lead to rights and obligations regardless of the agreements made by the parties (King, 1977; 8 -9).

Patient Rights and Obligations

Patient rights arising from therapeutic transactions are regulated in Article 52 of Law Number 29 of 2004 concerning Medical Practice, including:

- a. Get a complete explanation of medical actions as referred to in Article 45 paragraph (3).
- b. Ask for opinions from other doctors
- c. Get services that are suitable for medical needs
- d. Refuse medical action
- e. Get the contents of medical records

Doctor's Rights and Obligations

The doctor or/and dentist in Article 50 of Law Number 29 of 2004 concerning Medical Practice in carrying out medical practice has the right to:

- a. Obtain legal protection as long as carrying out duties in accordance with professional standards and standard operating procedures
- b. Providing medical services according to professional standards and operational standards
- c. Obtain complete and honest information from patients or their families
- d. Get rewards from services.

2. Medical Actions are based on Law Number 29 of 2004

Healthcare according to Lavelly and Loomba is an effort that is held alone or together in an organization to improve and maintain health, prevent disease, treat diseases and restore health aimed at individuals, groups, or communities.

Law Number 36 of 2009 concerning Health Article 1 paragraph (12-16), health services are explained:

- a. Promotive health services are activities and / or a series of health service activities that prioritize health promotion activities.
- b. Preventive health services are prevention activities against a health / disease problem.
- c. Curative health services are activities and / or a series of medical activities aimed at healing diseases, reducing suffering due to illness, controlling disease, or controlling disability so that the quality of patients can be maintained as optimal as possible.
- d. Rehabilitative health services are activities and / or a series of activities to return sufferers to the community so that they can function as members of the community that are useful for themselves and the community as much as possible according to their abilities.
- e. Traditional health services are treatments and / or treatments by means and drugs that refer to experiences and skills from generation to generation empirically that can be accounted for and applied in accordance with the prevailing norms in the community.

Health care is basically a relationship between a patient or his family and a doctor as a health worker in a hospital. Health service activities or treatment for an increasingly advanced society turned out to grow legal needs in various health matters. Law number 29 of 2004 concerning Medical Practice and Law Number 36 of 2009 concerning Health are part of the government's efforts to realize a better health service for the community, but not all of them are regulated in the law.

The task of the hospital is to provide personal health services in full. In carrying out health care efforts, hospitals have various rights and obligations. The regulation regarding hospitals in Indonesia is contained in Law Number 44 of 2009 concerning Hospitals. Among them:

- a. To determine the number, type, and qualifications of human resources in accordance with the classification of the Hospital;
- b. To receive compensation for services and determine remuneration, incentives, and awards in accordance with the provisions of legislation;
- b. To cooperate with other parties in order to develop services;
- c. To receive assistance from other parties in accordance with the provisions of legislation;
- d. To sue the party that caused the loss
- e. To obtain legal protection in implementing health services;
- f. To promote health services in hospitals in accordance with statutory provisions; and
- g. To get tax incentives for public hospitals and hospitals that are designated as teaching hospitals

Matters that are the obligations of the hospital are regulated in Law Number 44 of 2009 concerning Hospital Article 29 paragraph (1), namely:

- a. To provide correct information about hospital services to the community;
- b. To provide safe, quality, antidiscriminative and effective health services by prioritizing patient interests in accordance with Hospital service standards;
- c. To provide emergency services to patients in accordance with their service capabilities;
- d. To take an active role in providing health services to disasters, according to their service capabilities;
- e. To provide facilities and services for poor or poor people
- f. To carry out social functions, among others, by providing facilities for poor / poor patients, emergency services without advances, free ambulances, services for victims of disasters and extraordinary events, or social services for humanitarian missions;

- b. To create, implement, and maintain quality standards for health services in hospitals as a reference in serving patients;
- c. To organize medical records;
- d. To provide adequate public facilities and infrastructure, including facilities for worship, parking, waiting rooms, facilities for disabled people, breastfeeding women, children, the elderly;
- e. To implement the referral system;
- f. To refuse patient's wishes that are contrary to professional standards and ethics and legislation;
- g. To provide true, clear and honest information about the rights and obligations of patients;
- h. To respect and protect patient rights;
- i. To carry out hospital ethics;
- j. To have an accident prevention and disaster management system;
- k. To carry out government and health sector programs both regionally and nationally;
- l. To make a list of medical personnel who practice medicine or dentistry and other health workers;
- m. To develop and implement Hospital internal regulations;
- n. To protect and provide legal assistance for all Hospital officers in carrying out their duties; and
- o. To enforce the entire hospital environment as a non-smoking area

D. DISCUSSION

A. Factors That Can Cause Cancellations in Implementation of Medical Measures in Hospital Health Services are based on Law Number 44 of 2009 concerning Houses for the Hospital.

Hospital as a means of organizing health efforts, which organizes health services and is used for education of health personnel and research, besides that it is part of the health care system, the Hospital is required to provide quality medical services for the community. The organization of medical service functions is largely determined by the internal and external aspects of the hospital itself.

The internal factors of the hospital are closely related to the development of a hospital management system that regulates the roles and functions of each type of health worker in the hospital, because the core of quality public services is the harmonization of the roles and functions of the professionals involved in the hospital. in providing health services. This was also confirmed by the opinion of Azrul Anwar where it was explained that a hospital is an organization through organized professional medical personnel and medical facilities that permanently carry out medical services, continuous nursing care diagnosis and treatment of diseases suffered by patients.

B. Fulfillment of the Rights of Patients In Poverty to Obtain Certain Medical Measures at Hospitals in terms of Law No. 36 of 2009 concerning Health.

Furthermore, if the patient feels that his rights have been violated, the legal remedies available to the patient are:

- a. In accordance with the patient's rights contained in Article 32 letter (q) of Law Number 44 of 2009 concerning hospitals, that the patient has the right to sue and or sue the Hospital if the hospital is suspected of providing services that do not comply with standards either civil or criminal.
- b. In accordance with the rights of patients who are present in Article 32 letter (r) of Law Number 44 of 2009 patients have the right to complain about hospital services that are not in accordance with the standards of service through print and electronic media in accordance with the provisions of legislation.
- c. In accordance with Article 58 paragraph (1) of Law No. 36 of 2009, that every person has the right to claim compensation for a person, health worker, and / or health provider that causes losses due to errors or omissions in the health services he receives.
- d. In accordance with Article 45 of Act Number 8 of 1999 concerning Consumer Protection, that any harmed consumer can sue a business actor through an institution tasked with resolving disputes between consumers and business actors or through courts in the general court environment.

- e. In accordance with Article 66 of Law Number 29 of 2004 concerning Medical Practice, that anyone who knows or has an interest impaired by the actions of a doctor or dentist in carrying out medical practice can report in writing to the Chairperson of the Indonesian Council of Ethics Discipline.
- f. Report to the police or other investigators. This is because in every law mentioned above, there are provisions for criminal sanctions for violating the rights of patients.

E. CONCLUSION

1. Factors that lead to non-implementation of medical actions in health services, among others, the availability of unsustainable health services between the provision of medical devices and existing human resources, then the second health services that are not affordable in terms of costs and location of facilities and infrastructure health, then the third patient does not have health insurance but the patient's condition has decreased while the procedure for obtaining long health insurance. This is not in accordance with what is stipulated in Article 29 letter (f) of Law Number 44 of 2009 concerning Hospitals, and Article 4 of Law Number 44 of 2009 concerning Hospitals.
2. The Hospital is responsible for providing safe, quality, anti-discriminatory and effective health services, in accordance with those stated in Article 29 paragraph (1) of Law Number 44 of 2009 concerning Hospitals. Doctors also have obligations to patients in accordance with article 51 of Law Number 29 of 2004 concerning Medical Practice

F. SUGGESTIONS

1. The hospital in refusing the patient explains in advance what makes the hospital reject the patient, and before refusing it should the hospital do the best possible examination and as much as the hospital can, and see the condition of the patient first whether in a serious condition or not .
2. The government must reach out to all people in data collection of capable and incapable patients in order to create equitable health insurance, and in law No. 29 of 2004 concerning Medical Practice should be added Article concerning the right of doctors to act outside hospital regulations when patients are in an emergency .

REFERENCES

A. Books

- A. Mashyur Effendi, *perkembangan Dimensi HAM dan Proses Dinamika penyusunan Hukum HAM*, Bogor, Ghalia Indonesia, 2005.
- Anny Isfandyarie, *Tanggung Jawab Hukum dan Sanksi Bagi Dokter*, Jakarta, Prestasi Pustaka, 2006.
- Azrul Anwar, *Pengantar Administrasi Kesehatan*, Tangerang, Binarupa Aksara, 2010.
- Danny Wiradharma, *Penuntun Kuliah Hukum Kedokteran*, jakarta, Bina Rupa Aksara, 1996.
- Deddy Rasyid, *Perbuatan Malpraktik Dokter Dalam Perespektif Hukum Pidana di Indonesia*, Tesis UI, 2000.
- Djodjodibroto Darmanto, *Kiat Mengelola Rumah Sakit*, Jakarta, Hipokrates, 1997.
- Dra. Sri Siswati, S.H., Apt., M.Kes., *Etika Dan Hukum Kesehatan Dalam Perspektif Undang-Undang Kesehatan*, jakarta, Raja Grafindo Persada, 2013
- Endang Kusuma Astuti, *Transaksi terapeutik Dalam Upaya Pelayanan Medis Di Rumah Sakit*, Bandung, PT. Citra Aditya bakti, 2009.
- Endang Wahyatu Yustina, *Mengenai Hukum Rumah Sakit*, Bandung. Keni Media, 2012.
- Guwandi, *Hukum Medic (Medical Law)*, jakarta, Balai Penerbit Fakultas Kedokteran Universitas Indonesia, 2013.

- Hermie. H. Koeswadji, *Beberapa Permasalahan Hukum dan Medik*, Bandung, Citra aditya bakti, 1992.
- Indra bastian Suryono, *Penyelesaian Sengketa Kesehatan*, Jakarta, Salemba Medika, 2011.
- Kaelan, M.S, *Pendidikan Pancasila*, Yogyakarta, Paradigma, 2004.
- Konsil Kedokteran Indonesia, *Kemitraan dalam Hubungan Dokter-Pasien*, Jakarta, KKI, 2006.
- Magula dalam Sofwan Dahlan, *Hukum Kedokteran (Rambu-Rambu bagi Profesi Dokter)*, Semarang, BP Undip, 2000.
- Mochtar Kusumaatmadja, *Pengantar Ilmu Hukum*, Bandung, Penerbit Alumni, 2009.
- R.Abdoel Djamali dan Lindawati Tedjapermana, *Tanggung Jawab Hukum Seorang Dokter Dalam Mengangani Pasien*.
- Ronny Hanitijio Soemitro, *Metodologi Penelitian dan Jurimeteri*, Jakarta, Galian Indonesia, 1998.
- Safitri Hariyanti, *Sengketa Medik Alternatif Penyelesaian Perselisihan Antara Dokter dengan Pasien*, Jakarta, Diadit Media, 2011.
- Soekidjo Notoatmodjo, *Etika dan Hukum Kesehatan*, PT Rineka Cipta, 2010.
- Soerjono Soekanto, *Hak dan Kewajiban Pasien*, Jakarta, Ind-Hill-Co, 1989.
- Soerjono Soekanto dan Sri Mamuji, *Penelitian Hukum Normatif (Suatu Tinjauan Singkat*, Jakarta, Rajawali Pers, 2001.
- Soerjono Soekanto dan Herkutanto, *Pengantar Hukum Kesehatan*, Bandungm Citra Aditya Bakti, 2001.
- Sofwan Dahlan, *Hukum Kesehatan*, Semarang, Badan Penerbit Universitas Diponegoro, 2003.
- Sri Siswanti, *Etika dan Hukum kesehatan dalam Perspektif Undang-Undang Kesehatan*, Jakarta, Raja Grafindo Persada, 2013.
- Syahrul Machmud, *Penegakan Hukum dan Perlindungan Hukum Bagi Dokter yang Diduga Melakukan Medikal Malpraktik*, Bandung, Mandar Maju.
- Veronica Komalawati, *Peranan Informed Consent dalam Transaksi Terapeutik*, Bandung, PT Citra Aditya Bakti , 2002.
- Y.A. Triana Ohoiwutun, *Bunga Rampai Hukum Kedokteran*, Bandung, Bayu Media Publishing, 2008.

B. Legislation

- Pembukaan Undang-Undang Dasar Negara Kesatuan Republik Indonesia 1945.
- Undang-Undang Republik Indonesia Nomor 29 Tahun 2004 tentang Praktik Kedokteran.
- Peraturan Menteri Kesehatan Nomor 290 Tahun 2008 tentang Persetujuan Tindakan Medis.
- Undang-Undang Republik Indonesia Nomor 36 Tahun 2009 Tentang Kesehatan.
- Undang Undang Republik Indonesia Nomor 44 Tahun 2009 Tentang Rumah Sakit
- Peraturan Menteri Kesehatan Republik Indonesia Nomor 512 tentang Izin dan pelaksanaan Praktik kedokteran.

C. Other Sources

- Pemerintah Optimis Regulasi BPJS Kesehatan Rampung, dikutip dari <http://www.hukumonline.com/berita/baca/lt51e50e1047373/pemerintah-optimis-regulasi-bpjs-kesehatan-rampung> diakses tanggal 12 Mei 2015, pukul 11:22 WIB.
- Departemen Kesehatan Republik Indonesia. 2009. "Sistem Kesehatan Nasional" dikutip dari http://pppl.depkes.go.id/_asset/_regulasi/KEPMENKES_374-2009_TTG_SKN-2009.pdf diakses tanggal 12 mei 2015, pukul 13:15 WIB.
- Prinsip Tanggung Jawab, Dikutip dari <http://vanbanjarechts.wordpress.com/2013/01/01/prinsip-tanggung-jawab> , diakses pada tanggal 27 Mei 2015 pukul 12:43 WIB.

LAW ENFORCEMENT FOR PILOT WITH NARCOTICS ABUSE IN AVIATION

Dominiques Reggy Marfilan

Student of Legal Studies Doctor Program, Universitas Borobudur

dreggy88@gmail.com

Abstract

Pilots in aviation world have an important role for ensuring flight safety. A case of narcotics abuse by a pilot is considerably shocking aviation world. Narcotics abuse by pilots certainly something that can not be tolerated, because pilots are responsibility for the safety of passengers. Analysis were conducted using normative juridical approach and results show legal arrangements on narcotics abuse in the Indonesian aviation world have been well organized. Law enforcement for pilot with narcotics abuse depends on level of abuse. Good cooperation is needed between the governments, airlines company, pilots and other stake holder to prevent narcotics abuse in pilot community.

Keywords: Narcotics Abuse, Pilot, Aviation.

A. INTRODUCTION

Aviation industries in Indonesia is growing very rapidly, this is because Indonesia is an archipelago. But lately aviation world has been shocked by the occurrence of narcotic abuse by the flight crew. An airline pilot was arrested for consuming drugs. Previously, a pilot and a co-pilot had been arrested with the same case, namely being caught partying shabu-shabu. The pilot was charged with possession and use of methamphetamine and ecstasy. This is certainly not tolerable, because the task of the flight crew, especially pilots, is not a light matter, they bring safety from tens or even hundreds of passengers above a certain height by plane. A pilot with his responsibility to drive an airplane traveling hundreds of kilometers of course requires physical and prime conditions, but if this is not fulfilled because of negligence and even threatening the safety of passengers because taking drugs, of course this is very dangerous. More serious efforts are needed to prevent this from happening again in the future.

By law, if an airplane accident occurs, then the party who has the right to request compensation is the passenger, sender or recipient of the goods as well as third party users of flight services. While the party responsible for compensation (civil liability) is the airline. However, this is certainly different if it is associated with criminal responsibility for airplane pilots. This is also related to the factor of human negligence or human error that can cause aircraft accidents. Airplane pilots can cause airplane accidents when airplane pilots in a state of sudden inability and large fatigue occur due to flight schedule factors and monthly flight loads that exceed the capability limit. By looking at this situation, many pilots use drugs as energy boosting drugs.

Drugs or often referred to as narcotics according to Law Number 35 Year 2009 concerning Narcotics (hereinafter referred to as Narcotics Law), are substances or drugs derived from plants or not plants, both synthetic and semisynthetic, which can cause a decrease or change in consciousness loss of taste, reduce to eliminate pain, and can cause dependence, which is distinguished into groups as attached to this narcotics law. Referring to Law Number 1 Year 2009 concerning Aviation (hereinafter referred to as the Aviation Law), as well as the medical test requirements issued by the Ministry of Transportation, a pilot must meet health requirements by issuing a medical certificate to obtain his flight license, and then the medical certificate will extended by evaluating medical tests every 6 months. These medical tests include physical test, eyes, heart, teeth, radiology, ears, nose and throat, and other test, including drug test. The pilot's job is in dire need of cognitive abilities and high concentration that originates in a healthy and prime physical condition. This condition will not be achieved if a pilot takes other ways to obtain it,

for example by consuming prohibited substances such as narcotics. In addition to this, it will be contrary to the existing law, it will also endanger flight safety, because the effects produced from narcotics will not last for a long time and even result in a very drastic decrease in awareness of normal human conditions. Pilots as pillars of safety in aviation world should not be caught in the problem of narcotics abuse.

B. RESEARCH METHOD

The research method used in this study is normative legal research, namely research carried out by examining existing legal materials by conducting research on certain legal problems and then examined by using the Statute Approach which means that the law is conceptualized as what written in legislation or law conceptualized as a rule or norm. This study uses primary legal materials and secondary legal materials that have been systematically compiled with descriptive analysis techniques.

C. PROBLEM FORMULATION

Based on the explanation above, the formulation of the problem can be taken as follows:

1. How is the legal arrangements regarding narcotics abuse in the aviation world according to Law Number 1 Year 2009 Concerning Aviation?
2. How is law enforcement for pilot with narcotics abuse in aviation?

D. DISCUSSION

1. Legal Arrangements Regarding Narcotics Abuse in The Aviation World According to Law Number 1 Year 2009 Concerning Aviation

Legal arrangements regarding narcotics abuse in the aviation world are related to several regulations. The Aviation Law Article 53 states that everyone is prohibited from flying or operating an airplane that could endanger the safety of an airplane, passengers, goods and / or residents or disturb security and public order or harm other people's property. Furthermore, Article 54 states that anyone who is on an airplane during a flight is prohibited from carrying out acts that could endanger flight safety and security. The consequences of this violation are stated to be subject to sanctions, namely in the form of freezing until the revocation of the medical certificate and flight license.

Health supervision for flight crew, especially pilots, is carried out routinely by the Directorate General of Air Transportation of the Ministry of Transportation of the Republic of Indonesia. As stipulated in the Minister of Transportation Regulation of the Republic of Indonesia Number PM 69 Year 2017 concerning Civil Aviation Safety Regulations Part 67 (Civil Aviation Safety Regulation Part 67) concerning Health Standards and Aviation Personnel Certification (hereinafter referred to as PKPS PM), that medical tests for pilots are carried out periodically every 6 months. The stages for obtaining health certification for flight personnel include medical tests:

1. Eyes;
2. Ear, nose, throat and balance;
3. Mental;
4. Neurological;
5. Cardiovascular;
6. General medical conditions.

In the points the mental health test is divided into:

1. There is no medical history or clinical diagnosis of the following:
 - 1.1. Personality disorders that are quite severe that have manifested repeatedly with real action.
 - 1.2. Psychosis, what is meant by psychosis in this case is a mental disorder where:

- 1.2.1. Individuals have shown delusions, hallucinations, strange or irregular behavior, or other symptoms of this condition; or
 - 1.2.2. Individuals are considered likely to show delusions, hallucinations, strange or irregular behavior, or other symptoms of this condition.
 - 1.3. Bipolar disorder: maniacs and / or types of depression
 - 1.4. Dependence of substance / substance, unless there is satisfactory clinical evidence regarding the cure of this dependence, including not using the substance for not less than 2 years before the medical examination, which is referred to in the substance below:
 - 1.4.1. Subtansi includes: Alcohol, sedatives, and other hypnotics, anxiolytics, opioids, central nervous system stimulants such as cocaine, amphetamines and acting sympathomimetics similar, hallucinogens, phencyclidine or acting arylcyclohectylamines, cannabis, inhalants, and drugs and psychoactive substances , and
 - 1.4.2. Dependence of substance is a condition where a person depends on a substance or substance, other than tobacco or ordinary drinks containing xanthine (for example: caffeine) as evidenced by:
 - 1) Increased tolerance;
 - 2) Manifestation of withdrawal symptoms;
 - 3) Damage to use controls;
 - 4) Use continues despite damage to physical health or damage to social, personal or job functions
2. There was no substance abuse within 2 years before the last medical examination which was defined as follows:
 - 2.1. Use of substance in situations where the use of said substance is physically harmful, if there has been use of substances that are physically harmful;
 - 2.2. There is a positive drug test result, this test is based on an anti-drug program or the Directorate General of Civil Aviation's internal program; or
 - 2.3. The use of a substance, based on case history and qualitative medical assessment in relation to the related substance, is stated by the authorities:
 - a) Make the person unable to safely carry out his duties or use special rights in accordance with the pilot's certificate that he owns or wants to have; or
 - b) It is suspected that within the maximum period of validity of the certificate desired or possessed, it can make the person unable to carry out his duties or privileges according to the certificate safely.
3. There are no other personality disorders, neuroses or other mental conditions, based on case histories and qualifications of medical judgment in relation to the conditions, which the authorities stated:
 - 3.1. Make the person unable to safely carry out his duties or use special rights in accordance with the pilot's certificate that he owns or wants to have; or
 - 3.2. It is suspected that within 2 years after the discovery of the case it can make the person unable to carry out his duties or privileges in accordance with the certificate safely.

The Ministry of Transportation through the Republic of Indonesia Minister of Transportation Regulation Number PM Number 17 Year 2012 concerning Standard Operating Procedures for the Prevention and Eradication of the Misuse and Illicit Circulation of Narcotics (P4GN) and Psychotropic in the Transportation Sector (hereinafter referred to as PM P4GN) states that P4GN activities and Psychotropic in the transportation sector as referred to in Article 2 is carried out through activities:

- a. Socialization;
- b. Advocacy;
- c. Routine Operation;
- d. Special Operations; and
- e. Contingency Operations.

This is done in order to guarantee transportation safety, in this case aviation world.

2. Law Enforcement For Pilot With Narcotics Abuse in Aviation

In carrying out his duties as a pilot with a tight flight schedule can cause the pilot to force work to the extent of his ability. Not infrequently there are pilots who are sick but cannot take several drugs because they contain the effects of drowsiness and choose to consume drugs to maintain health. Taking illegal drugs such as narcotics will create dependency, the negative content of drugs has a psychological effect and the physical users. If a pilot uses narcotics while driving an airplane can cause an accident that endangers the passenger. For aircraft accidents, pilots can be liable with criminal sanctions in accordance with those stipulated in the Criminal Code and the Aviation Law. Article 438 of the Aviation Law states that the pilot is in danger or other aircraft and does not notify the air traffic control agency and because the action results in the loss of other people's property sentenced to a maximum of 8 (eight) years imprisonment, if because of this death of another person sentenced to a maximum of 10 (ten) years imprisonment.

For pilots that had been caught using narcotics while on duty, they will be charged according to the applicable law in Indonesia. Administrative sanctions that apply according to the Aviation Law in the form of freezing until the revocation of medical certificates and flying licenses. Based on the Narcotics Law it is known that the perpetrators of drug offenses are threatened with high and severe criminal penalties by allowing the defendant to be sentenced to the maximum, namely capital punishment in addition to imprisonment and criminal penalties. In view of the narcotics criminal acts including the types of special crimes, the criminal threat against them can be imposed cumulatively by imposing 2 (two) types of basic crimes at once, such as imprisonment and criminal penalties or capital punishment and criminal penalties.

Regulations regarding narcotics crimes in the Narcotics Law include the following:

Article 111 states that:

- (1) Any person without rights or against the law plant, maintain, possess, store, control, or provide Narcotics Group I in the form of plants, shall be punished with imprisonment for a minimum of 4 (four) years and no later than 12 (twelve) years and criminal fine of at least Rp. 800,000,000.00 (eight hundred million rupiahs) and at most Rp. 8,000,000,000.00 (eight billion rupiahs).
- (2) In the case of the act of planting, maintaining, possessing, storing, controlling, or providing Narcotics Group I in the form of plants as referred to in Paragraph (1) the weight exceeds 1 (one) kilogram or more than 5 (five) trees, the offender is punished with imprisonment for life or imprisonment for a minimum of 5 (five) years and a maximum of 20 (twenty) years and a maximum criminal penalty as referred to in paragraph (1) plus 1/3 (one third).

Article 112 states that:

- (1) Any person who has no right or against the law owns, saves, controls or provides Narcotics Group I not a plant, shall be punished with imprisonment for a minimum of 4 (four) years and a maximum of 12 (twelve) years and a minimum fine Rp.800,000,000.00 (eight hundred million rupiahs) and at most Rp. 8,000,000,000.00 (eight billion rupiahs).
- (2) In the event that the act of possessing, storing, controlling, or providing Narcotics Group I is not a plant as referred to in paragraph (1) the weight exceeds 5 (five) grams, the

offender is sentenced to life imprisonment or imprisonment for a minimum of 5 (five) year and no later than 20 (twenty) years and the maximum fine sentence as referred to in paragraph (1) shall be added to 1/3 (one third).

Article 113 states that:

- (1) Any person without rights or against the law of producing, importing, exporting, or distributing Narcotics Group I, shall be punished with imprisonment for a minimum of 5 (five) years and a maximum of 15 (fifteen) years and a fine of at least Rp. 1,000,000,000.00 (one billion rupiah) and at most Rp. 10,000,000,000.00 (ten billion rupiahs).
- (2) In the case of the act of producing, importing, exporting or distributing Narcotics Group I as referred to in paragraph (1) in the form of plants exceeding 1 (one) kilogram or exceeding 5 (five) tree trunks or in the form of non-plants exceeding 5 (five) grams, the offender is punished with capital punishment, life imprisonment, or imprisonment for a minimum of 5 (five) years and a maximum of 20 (twenty) years and a maximum criminal fine as referred to in paragraph (1) plus 1/3 (one third).

Article 114 states that:

- (1) Any person without rights or against the law offers to sell, sell, buy, receive, mediate in buying and selling, exchange or surrender Narcotics Group I, shall be sentenced to life imprisonment or imprisonment for a minimum of 5 (five) year and a maximum of 20 (twenty) years and a fine of at least Rp. 1,000,000,000.00 (one billion rupiah) and at most Rp. 10,000,000,000.00 (ten billion rupiahs).
- (2) In the case of an act offering for sale, selling, buying, becoming an intermediary in buying and selling, exchanging, surrendering, or receiving Narcotics Group I as referred to in paragraph (1) in the form of plants exceeding 1 (one) kilogram or exceeding 5 (five) grams, the offender is punished with capital punishment, life imprisonment, or imprisonment for a minimum of 6 (six) years and a maximum of 20 (twenty) years and a maximum fine penalty as referred to in paragraph (1) plus 1/3 (one third).

Furthermore, in the criminal provisions of Article 127 the Narcotics Law states that:

- (1) Every Abuser:
 - a. Narcotics Group I for one self shall be punished with imprisonment for a maximum of 4 (four) years;
 - b. Narcotics Group II is for it self punishable by imprisonment for a maximum of 2 (two) years; and
 - c. Narcotics Group II is for it self punishable by imprisonment for a maximum of 1 (one) year.
- (2) In deciding the case as referred to in paragraph (1), the judge must pay attention to the provisions referred to in Article 54, Article 55 and Article 103.
- (3) In the event that the abuser referred to in paragraph (1) can be proven or proven to be a victim of Narcotics abuse, the Abuser must undergo medical rehabilitation and social rehabilitation.

In the case of rehabilitation of narcotics user pilots, after it has been proven that the pilot is a victim of narcotics abuse, rehabilitation of the pilot can be carried out for 2 years, then after completing rehabilitation and the pilot is declared free of narcotics influence, medical testing will be carried out again to the pilot.

E. CONCLUSION

Based on the existing discussion, it can be concluded that:

1. Legal arrangements regarding narcotics abuse in the aviation world have been well arranged starting from Law Number 1 Concerning Aviation to its derivatives. The role of the government is needed in this case as the main stake holder of aviation safety through the enforcement of the Aviation Law, and the role of the airlines themselves to better monitor their pilots. Synergic cooperation is needed between the government, airlines, the National Narcotics Agency and the pilot itself.
2. Law enforcement for pilots with narcotics abuse in Aviation can be subject to the Aviation Law, as well as related laws such as the Narcotics Law and the Criminal Code. For pilots who have proven to be only victims of narcotics abuse, rehabilitation can be carried out for 2 years.

REFERENCES

Books:

- K. Martono. Hukum Penerbangan: Berdasarkan UURI No.1 Tahun 2009. CV. Mandar Maju, Bandung. 2009.
- Soerjono, Soekanto. Penelitian Hukum Normatif: Suatu Tinjauan Singkat. CV. Rajawali, Jakarta. 1985.
- Sedarmayanti & Syarifudin Hidayat, Metodologi Penelitian, Mandar Maju Bandung. 2002.
- Profil dan Rencana Strategis Balai Kesehatan Penerbangan 2010 – 2014. Direktorat Jenderal Perhubungan Udara Kementerian Perhubungan Republik Indonesia, Jakarta. 2009.

Legislations:

- Constitution of The Republic of Indonesia Year 1945.
- Law Number 1 Year 2009 Concerning Aviation.
- Law Number 35 Year 2009 Concerning Narcotics.
- The Criminal Code.
- Republic of Indonesia Minister of Transportation Regulation Number PM Number 17 Year 2012 concerning Standard Operating Procedures for Prevention and Eradication of Narcotics (P4GN) and Psychotropic Abuse and Illicit Circulation in the Transportation Sector (hereinafter referred to as PM P4GN).
- Minister of Transportation Regulation of the Republic of Indonesia Number PM 69 Year 2017 concerning Civil Aviation Safety Regulations Part 67 (Civil Aviation Safety Regulation Part 67) Regarding Health Standards and Aviation Personnel Certification.

Journal and Internet:

- Susanti. Jurnal Penelitian Perhubungan Udara Warta Ardhia. Vol. 38 No.2, Juni 2012.
- Cok Istri Ida Andriani, I Wayan Parsa. Tanggungjawab Maskapai Penerbangan Apabila Terjadi Kecelakaan Akibat Pilot Memakai Obat Terlarang. Hukum Bisnis Fakultas Hukum Udayana, downloaded on June 30, 2019.
- Anton Sudanto. Penerapan Hukum Pidana Narkotika di Indonesia. Fakultas Hukum Universitas 17 Agustus 1945 Jakarta, ADIL Jurnal Hukum, downloaded on June 30, 2019.
- Parasian Simanungkalit. Model Pemidanaan Yang Ideal Bagi Korban Pengguna Narkoba di Indonesia. Pimpinan Nasional Gepenta, downloaded on June 30, 2019.

INFORMED CONSENT IMPLEMENTATION IN TERAPEUTIC AGREEMENT AS A LEGAL PROTECTION EFFORTS FOR DOCTORS

Dwi Heri Susatya

Student of Legal Studies Doctor Program, Universitas Borobudur

dwiherisusatya@gmail.com

Abstract

Every treatment, test or procedure that will be performed by a doctor or dentist on a patient must be approved. The agreement is called informed consent, which is the agreement given by the patient and / or his family on the basis of information and explanation of the medical procedures to be performed on the patient. Therapeutic agreements carried out using informed consent involve medical personnel (doctors) and patients. In implementing the therapeutic agreement, both parties must be responsible and carry out their respective obligations. But on the one hand, both parties are also given rights by law, so that both parties also get legal protection. This study is normative with secondary data as a data source. Data is examined by means of document studies. Data is analyzed qualitatively. The results of the analysis are presented descriptively. The results showed that the implementation of informed consent in a therapeutic agreement as an effort to protect the law for doctors was to prevent legal disputes between doctors and patients. Therefore, the doctor is obliged to provide information or explanations in the form of diagnosis and medical procedures, the purpose of medical procedures taken, other alternative procedures and risks, risks and complications that may occur and the prognosis of procedures as stipulated in Article 45 paragraph (3) Act Number 29 of 2004 regarding the Medical Practices. However, if a dispute occurs, the legal settlement can be carried out through mediation aimed at creating a win-win solution and in the event of malpractice, then the form of settlement is through a District Court that can be settled either civilly or criminal.

Keywords: Informed Consent, Therapeutic Agreements, Legal Protection.

A. INTRODUCTION

Hospitals in organizing health service activities require adequate health personnel as one of the requirements for their resources. In Article 12 of Act Number 44 of 2009 it is stated that: (1) Requirements for human resources as referred to in Article 7 paragraph (1), namely Hospitals must have permanent personnel which include medical and medical support personnel, nursing personnel, pharmaceutical personnel, hospital management staff, and non-health workers. (2) The number and type of human resources as referred to in paragraph (1) must be in accordance with the type and classification of the Hospital. (3) Hospitals must have data on personnel who carry out practices or work in the organization of hospitals. (4) Hospitals can employ temporary staff and consultants in accordance with their needs and abilities in accordance with the provisions of the laws and regulations. Medical personnel include doctors and dentists as well as specialist doctors and specialist dentists.

Health services carried out by doctors after the issuance of Act Number 29 of 2004 regarding the Medical Practice encourages everyone who works in the health sector to follow the rules stated in it. Act Number 29 of 2004 regarding the Medical Practice, Act Number 36 of 2009 regarding the Health and Act Number 44 of 2009 regarding the Hospitals become a reference in legal protection for health workers, especially doctors and dentists in carrying out health services to patients in particular and the general public.

Health¹ service demands The prime health care demands are in accordance with the Medical Practice Act, where the rights and obligations of the actors in the health sector are certainly not free from the binding legal rules. Actually in the implementation of health efforts depends on the availability of health resources in the form of energy, facilities and infrastructure in an adequate amount and quality. Health services as part of the main activities of the hospital place doctors and nurses as health workers who are the closest to the patient in handling the disease. There are several relationships in the health care effort, namely the relationship between the hospital and the doctor; nurse with patient; relationship between doctor and nurse and patient; and the relationship between nurses and patients.

In carrying out their duties, doctors, nurses and other health workers are protected by law. Article 27 of Act Number 36 of 2009 regarding the Health states that (1) Health workers are entitled to receive compensation and legal protection in carrying out their duties in accordance with their profession. (2) Health workers in carrying out their duties are obliged to develop and improve their knowledge and skills. (3) Provisions regarding the rights and obligations of health workers as referred to in paragraph (1) and paragraph (2) are regulated in Government Regulations. Accountability in health services involves two parties, namely the hospital as a place for organizing health service activities and health workers.

Provisions regarding the accountability of hospitals are regulated in Act Number 44 of 2009 regarding the Hospitals. Article 46 of Act Number 44 of 2009 regarding the Hospitals states "The Hospital is legally responsible for all losses incurred due to negligence committed by health workers in the Hospital". The provisions of Article 46 can be interpreted that the hospital is responsible for negligence caused by health service actions carried out by health workers working at the hospital.

The accountability of health workers for every action taken in the framework of health services is contained in the provisions of Article 60 of Act Number 36 of 2014 regarding the Health Workers, namely:

- a. devote themselves in accordance with the scientific field they have;
- b. increase competency;
- c. behave and behave in accordance with professional ethics;
- d. prioritize the interests of the community rather than personal or group interests; and
- e. perform service quality control and cost control in carrying out health efforts.

This provision shows that health workers have responsibilities that are not the responsibility of the hospital where the health worker works in order to provide health services.

Hospitals and doctors can be responsible as long as the actions or actions of health services performed by health personnel outside the medical staff are in accordance with the delegation of actions as stipulated in Article 65 paragraph (3) letters a to d are:

- a. devolved actions include the abilities and skills that have been possessed by the recipient of the delegation;
- b. the implementation of devolved actions remains under the supervision of the delegator;
- c. the defermenter remains responsible for actions delegated as long as the implementation of the action in accordance with the delegation is given; and
- d. delegated actions do not include decision making as the basis for implementing actions.

Patients also get legal protection in obtaining health services. Legal protection for patients is regulated in Article 56 of Act Number 36 of 2009 regarding the Health, namely.

- (1) Everyone has the right to accept or reject part or all of the assistance measures that will be given to him after receiving and understanding the information on such measures in full;

¹ Dumilah, *Kebijakan Kesehatan Prinsip dan Praktik*, Jakarta: Raja Grafindo Persada, 2015, p. 6. Health is an important thing that is entitled to be obtained by each individual and is an obligation for the state to guarantee that every citizen wants and is able to live healthily and utilize health services. In addition, health is one part of the Human Development Index, which is an indicator in determining the level of people's welfare.

- (2) The right to accept or reject as referred to in paragraph (1) does not apply to:
 - a. sufferers of diseases whose disease can be quickly transmitted to the wider community;
 - b. the condition of someone who is unconscious; or
 - c. severe mental disorder.
- (3) Provisions regarding the right to receive or reject as referred to in paragraph (1) are regulated in accordance with the provisions of the legislation.

Article 58 contains provisions:

- (1) Every person has the right to claim compensation for a person, health worker, and / or health provider that causes harm due to errors or negligence in the health service received.
- (2) Claims for compensation as referred to in paragraph (1) do not apply to health workers who take action to save lives or prevent someone's disability in an emergency.
- (3) Provisions regarding the procedure for filing claims as referred to in paragraph (1) are regulated in accordance with the provisions of the legislation.

Related to the actions of doctors when conducting health services, it has been regulated in Article 45 of Act Number 29 of 2004 regarding the Medical Practice, namely:

- (1) Every treatment, test or procedure that will be performed by a doctor or dentist for a patient must be approved.
- (2) Approval as referred to in paragraph (1) is given after the patient has received a complete explanation.
- (3) The explanation as referred to in paragraph (2) shall at least include:
 - a. diagnosis and procedures for medical treatment;
 - b. the purpose of medical procedures taken;
 - c. Alternative other actions and risks;
 - d. risks and complications that may occur; and
 - e. prognosis of the actions taken.
- (4) The approval referred to in paragraph (2) can be given both in writing and orally.
- (5) Every treatment, test or procedure containing high risk must be given with a written agreement signed by the person entitled to give consent.
- (6) Provisions regarding the procedure for approval of medical or dental actions as referred to in paragraph (1), paragraph (2), paragraph (3), paragraph (4), and paragraph (5) are regulated by a Ministerial Regulation.

Based on these provisions, it can be seen that Every treatment, test or procedure that will be performed by a doctor or dentist must be approved by the patient. The agreement is called informed consent, which is the agreement given by the patient and / or his family on the basis of information and explanation of the medical procedures to be performed on the patient.²

The legal basis for the implementation of informed consent is in Article 45 paragraph (3) of Act Number 29 of 2004 regarding the Medical Practice which contains information or explanations in the form of diagnosis and procedures for medical procedures, objectives of medical procedures taken, alternative procedures and risks, risks and possible complications and prognosis for the actions taken.

A doctor may not impose his will on a patient, even if it is in accordance with his knowledge and in the interest of the patient himself. The doctor must respect any choice of the patient, because the difference between doctors and violations of general crimes is informed consent.³ If there has been an informed consent, then the rights and obligations that arise between the doctor and the patient arise. This

² Sri Siswati, *Etika dan Hukum Kesehatan*, Jakarta: Raja Grafindo Persada, 2013, p. 98.

³ Desrizza Ratman, *Aspek Hukum Informed Consent dan Rekam Medis Dalam Transaksi*
Bandung: Keni Media, 2013, p. 39.

is where a legal relationship arises between doctors and patients that occurs because of medical factors which subsequently give birth to an agreement known as the therapeutic agreement.

Therapeutic agreement is an agreement of care, because one party (patient) wants to be cured and the other party (the doctor) wants to treat the patient and try to cure the patient. The agreement was born based on an agreement between the two parties without oversight, coercion or fraud, and applies as a law to the parties and must be carried out in good faith.⁴

Therapeutic agreements carried out using informed consent involve medical personnel (doctors) and patients. In implementing the therapeutic agreement, both parties must be responsible and carry out their respective obligations. But on the one hand, both parties are also given rights by law, so that both parties also get legal protection.

B. RESEARCH METHOD

1. Types of Research

This research is basically a normative juridical study, because the target of this research is law or normative methods in the form of legal principles and legal systems.⁵ Normative research in this study is a study that describes or describes in detail, systematic, comprehensive and in-depth about the rationale for implementing informed consent in a therapeutic agreement as a legal protection effort for doctors.

2. Nature of Research

This research is descriptive because it describes the laws and regulations that apply and is associated with legal theories in the practice of implementation related to the problems to be studied.

3. Data Analysis

The data obtained will be analyzed in qualitative analysis.

C. PROBLEM FORMULATION

Based on the background above, the problem in this study is how the implementation of informed consent in a therapeutic agreement is a legal protection effort for doctors?

D. DISCUSSION

Informed Consent Implementation In Therapeutic Agreement As A Legal Protection Efforts For Doctors

Based on Article 50 letter a of Act Number 29 of 2004 regarding the Medical Practice, doctors who have carried out their duties in accordance with professional standards and standard operating procedures must obtain legal protection. One form of professional standard and standard of operational procedures in medicine is the carrying out of informed consent in a therapeutic agreement.

The obligation to carry out informed consent has been strictly regulated in Article 45 paragraph (3) of Act Number 29 of 2004 regarding the Medical Practices which states:

- (1) Every treatment, test or procedure that will be performed by a doctor or dentist for a patient must be approved.

⁴ Y.A. Triana Ohoiwutun, *Bunga Rampai Hukum Kedokteran*, Malang: Bayumedia, 2007, p. 8.

⁵ Soerjono Soekanto dan Sri Mamuji, *Penelitian Hukum Normatif-Suatu Tinjauan Singkat*, Jakarta: Rajawali Press, 2007, p. 10.

- (2) Approval as referred to in paragraph (1) is given after the patient has received a complete explanation.
- (3) The explanation as referred to in paragraph (2) shall at least include:
 - a. diagnosis and procedures for medical treatment;
 - b. the purpose of medical procedures taken;
 - c. Alternative other actions and risks;
 - d. risks and complications that may occur; and
 - e. prognosis of the actions taken.
- (4.) The approval referred to in paragraph (2) can be given both in writing and orally.
- (5) Every treatment, test or procedure containing high risk must be given with a written agreement signed by the person entitled to give consent.
- (6) Provisions regarding the procedure for approval of medical or dental actions as referred to in paragraph (1), paragraph (2), paragraph (3), paragraph (4), and paragraph (5) are regulated by a Ministerial Regulation.

Based on these provisions, then if the doctor has carried out the task in accordance with professional standards and standard operating procedures, the doctor must obtain legal protection. Every hospital that provides health services has implemented standard operating procedures for its doctors. One of the standard operating procedures is to carry out the mandate of Article 45 paragraph (3) of Act Number 29 of 2004 regarding the Medical Practices on the obligation of doctors to carry out informed consent.

The procedure for carrying out informed consent is:

1. The Doctor in Charge of Services provides an explanation to patients and / or their families about the planned actions to be taken, including:
 - a. Diagnosis and procedure for medical treatment.
 - b. The purpose of medical procedures is carried out.
 - c. Benefits and risks of the procedure for action to be taken and complications that will occur.
 - d. Alternative other actions and risks,
 - e. Prognosis of actions taken.

Ask the patient whether he understands and understands the explanation of the actions to be taken.

Patients / families agree, patients / families are asked to sign the medical procedures approval form and on the medical procedures information giving form.

1. The doctor signs the form as evidence that has provided an explanation.
2. The patient signs the form as a witness.
3. For patients who have no family and are unable to make a statement, the witness can sign the informed consent form.

The purpose of the procedure in carrying out informed consent is to provide protection for both the doctor and the patient. This is in accordance with the purpose of carrying out informed consent, namely:

1. Patients understand and agree with the medical / dental actions that will be carried out.
2. Providing protection to patients for medical procedures to be performed.
3. Providing legal protection to doctors about the possibility of negative events.

The author argues, with the mandate of Article 45 paragraph (3) of Act Number 29 of 2004 regarding the Medical Practices on the obligation of doctors to carry out informed consent, all doctors in the Hospital have the right to legal protection as mandated in Article 50 letter a of the Act Number 29 of 2004 regarding the Medical Practice.

Based on the legal protection stated by Philipus M. Hadjon, the implementation of informed consent in a therapeutic agreement as an effort to protect the law for doctors is divided into 2 (two), namely:

1. Preventive Legal Protection
2. In this preventive legal protection, it aims to prevent disputes. According to the author, informed consent in a therapeutic agreement is one form of preventive legal protection. This is because the main purpose of the informed consent in the therapeutic agreement is so that the patient understands and agrees with the medical / dental actions that will be carried out.

Based on this, it can be stated that with patients understanding and agreeing with the medical / dental actions to be performed, the patient understands the benefits and risks to be received, and automatically, doctors are exempt from legal responsibility, both administrative and civil or criminal.

In implementing informed consent in a therapeutic agreement, there are many forms that aim for each medical procedures, the patient understands the medical procedures. An informed consent form in the therapeutic agreement at the Hospital such as:

- a. Approval of Blood Transfusion Measures.
- b. Approval of Hysterectomy Surgery.
- c. Approval of General Anesthesia Measures.
- d. Approval of Actions of Spinal/Epidural Anesthesia.

At the hospital, there is also a form about the approval of the refusal of medical procedures and also a form for another opinion statement and a return form at the patient's request. The purpose of making a form in each medical procedures is for both parties, namely doctors and patients to get legal protection, especially preventive legal protection aimed at preventing future disputes.

Another preventive legal protection is that if there is a miss communication between the patient and the doctor, then the hospital management provides an alternative solution, namely through mediation as stipulated in Article 29 of Act Number 36 of 2009 regarding the Health stating that in the event that health personnel are suspected of negligence in carrying out their profession, such negligence must be resolved first through mediation.

Mediation is a problem-solving negotiation process where impartial and neutral outside parties work with the disputing parties to help them obtain agreement satisfactorily. Unlike judges or arbitrators, mediators do not have the authority to decide disputes between parties. But in this case the parties empower the mediator to help them solve problems between them. The assumption is that third parties will be able to change the strength and social dynamics of the relationship of conflict by influencing the beliefs and personal behavior of the parties by providing knowledge or information or by using a more effective negotiation process, and thus helping participants to resolve disputed issues.⁶

Apart from mediation and negotiation, the form of legal protection for doctors on informed consent in a therapeutic agreement at the Hospital is through the Disciplinary Session at the Indonesian Medical Disciplinary Board. Based on Article 55 of Act Number 29 of 2004 regarding the Medical Practices, the Indonesian Medical Disciplinary Board was formed with the aim of upholding the discipline of doctors and dentists in the implementation of medical practice.

If anyone who knows or has an interest in being harmed by the actions of a doctor or dentist in carrying out medical practice can report in writing to the Chairperson of the Indonesian Medical

⁶ Gary Goodpaster, *Negosiasi dan Mediasi: Sebuah Pedoman Negosiasi dan Penyelesaian Sengketa Melalui Negosiasi*, Jakarta: ELIPS Project, 1993, p. 201.

Disciplinary Board.⁷ Complaints must at least contain the identity of the complainant, the name and address of the doctor or dentist's practice and the time the action was taken and the reason for the complaint.⁸

The Indonesian Medical Disciplinary Board will examine and make decisions on complaints relating to the discipline of doctors and dentists. If the ethics violation is found, the Indonesian Medical Disciplinary Board continues complaints to professional organizations. Disciplinary sanctions as referred to in paragraph (2) can be in the form of:

- a. giving written warnings;
- b. recommendation for revocation of registration certificate or practice permit; and / or
- c. obligation to attend education or training in medical or dental education institutions.

Repressive Legal Protection

Repressive legal protection is a legal protection that aims to resolve disputes through the court. Based on the data that the author obtained, it is known that until now, doctors in hospitals have never had a dispute to the court. However, if there is an alleged malpractice dispute involving a doctor at the hospital, then under the provisions of the applicable law, the doctor must be accountable, both criminal and civil.

Based on Article 79 letter c of Act Number 29 of 2004 regarding the Medical Practice states that doctors can be sentenced to imprisonment for a maximum of 1 (one) year or a maximum fine of Rp 50,000,000 (fifty million rupiah), every doctor or doctor teeth that intentionally do not fulfill the obligations as referred to in Article 51 letter a, letter b, letter c, letter d, or letter e.

In Article 51 of Act Number 29 of 2004 regarding the Medical Practice states:

Doctors or dentists in carrying out medical practices have obligations:

- a. provide medical services in accordance with professional standards and standard operating procedures and medical needs of patients;
- b. refer patients to doctors or other dentists who have better skills or abilities, if they are unable to carry out an examination or treatment;
- c. keep everything she knows about patients, even after the patient dies;
- d. conduct emergency assistance on the basis of humanity, except if he believes someone else is on duty and able to do so; and
- e. increase knowledge and keep abreast of medical or dental science.

E. CONCLUSION

The implementation of informed consent in a therapeutic agreement as an effort to protect the law for doctors is to prevent legal disputes between doctors and patients. Therefore, the doctor is obliged to provide information or explanations in the form of diagnosis and procedures for medical procedures, the purpose of medical procedures taken, other alternative procedures and risks, risks and complications that may occur and the prognosis of actions as stipulated in Article 45 paragraph (3) Act Number 29 of 2004 regarding the Medical Practices. However, if a dispute occurs, the legal settlement can be carried out through mediation aimed at creating a win-win solution and in the event of malpractice, then the form of settlement is through a District Court that can be settled either civilly or criminal.

REFERENCES

⁷ Article 66 paragraph (1) Act of the Republic of Indonesia Number 29 of 2004 regarding the Medical Practice.

⁸ Article 66 paragraph (2) Act of the Republic of Indonesia Number 29 of 2004 regarding the Medical Practice.

Books:

- Desriza Ratman, *Aspek Hukum Informed Consent dan Rekam Medis Dalam Transaksi Terapeutik*, Bandung: Kemi Media, 2013.
- Dumilah, *Kebijakan Kesehatan Prinsip dan Praktik*, Jakarta: Raja Grafindo Persada, 2015.
- Gary Goodpaster, *Negosiasi dan Mediasi: Sebuah Pedoman Negosiasi dan Penyelesaian Sengketa Melalui Negosiasi*, Jakarta: ELIPS Project, 1993.
- Koeswadi, *Hukum dan Masalah Medik*, Surabaya: Airlangga University Press, 1984.
- Soerjono Soekanto dan Sri Mamuji, *Penelitian Hukum Normatif-Suatu Tinjauan Singkat*, Jakarta: Rajawali Press, 2007.
- Sri Siswati, *Etika dan Hukum Kesehatan*, Jakarta: Raja Grafindo Persada, 2013.
- Y.A. Triana Ohoiwutun, *Bunga Rampai Hukum Kedokteran*, Malang: Bayumedia, 2007.

Legislation:

- The 1945 Constitution of the Republic of Indonesia.
- Civil Code.
- Act of the Republic of Indonesia Number 29 of 2004 regarding the Medical Practice.
- Act of the Republic of Indonesia Number 36 of 2009 regarding the Health.
- Act of the Republic of Indonesia Number 44 of 2009 regarding the Hospitals.

HUMAN RIGHTS AND LAW NO. 29 YEAR 2004 AS LEGAL PROTECTION DOCTOR ON THE CASE OF EMERGENCY

Edi Prasetyo

Student of Legal Studies Doctor Program, Universitas Borobudur

dr_eprasetyo@yahoo.com

Abstract

This paper discusses the certainty of legal protection for doctors who treat patients with emergency cases are reviewed from human rights and medical Practice in Law No. 29 year 2004. Informed consent is absolutely given and is requested for approval before medical action is conducted by the physician to the patient as stipulated in article 45 Law No. 29 year 2004 on medical practice. The issue raised in this paper about whether there is an exception Informed consent is not given at the beginning of the treatment of emergency patients in accordance with Indonesian legislation and to know the obligations of Informed consent for emergency patient handlers and the legal aspects incurred when they were not conducted. This paper uses the normative method due to conflict of norms, Informed consent as an absolute condition that is difficult to apply for emergency patient handling. Informed consent can be excluded for the handling of emergency patients as stipulated in the Law of Health Ministry A which is an explanation of article 45 and article 52 letter a Law No. 29 year 2004 on medical practice but hierarchically Law of Healt Ministry should not contradict the regulation of the law above which is medical practice law, so that it is necessary to do the reconstruction so that there is a legal certainty for doctors in the handling of emergency cases. In addition, doctors also have legal protection rights reviewed from the perspective of human rights because if all procedures and administrations are in accordance with the standards but still can be charged because it is still not complete explanation and details in the article of medical practice Law No. 29 year 2004.

Keywords: Informed consent, emergency handling, Law of medical practice, Law of Health Ministry, human rights.

A. INTRODUCTION

Health care in Indonesia is currently experiencing a shifting pattern in relation between doctors and patients, once as if the doctor has great power in regulating and determining medical action without requiring the approval of the patient or family so that only one way communication is created in the health service but it is not valid today, the advancement of health technology along with the disclosure of health information that can be accessed by the public to cause the community have critical thinking on the health services that they will receive, in addition to the existing medical practice law makes the patient's right increasingly clear but unfortunately the rights of health workers, especially the legal protection against Medical negligence with the administration or medical action in the law still there is a gap in both civil and criminal claims due to the unexplained procedures and interpretation of the contents of the legislation in detail in several chapters in the practice Law Medicine.

Medical practice has always been the target of criticism from various communities. Humanistic, doctors as ordinary people are certainly not separated from neglect and omission. The negligence that occurred at the time of his profession duties is what can lead to the term malpractice of medicine. The doctor as a professional is obliged to implement the ethical norms, discipline norms and legal norms. So all the actions of doctors can be accountable both from the principle aspect, standards and rules of the doctor profession. Every case of the clinic facing a doctor is an aspect of ethics, medical aspects and

juridical aspects that cannot be separated. While in society there are also people who are in good faith, who deliberately attract doctors to have a lawyer. Medical negligence in practice is sometimes obscured by what is called a medical risk. So it is not uncommon to be a doctor who has worked very professionally that is in accordance with the medical profession standards, standards of health services, as well as Standart Operating Procedure (SOP) is still charged with the alleged malpractice Moreover, it turns out that negligence is caused by the patient's dishonesty in giving the information or the patient is not aware in certain cases so that it can not receive information (Informed Consent) for the action to be performed.

Cases of suspected malpractice reported to the Indonesian Medical Council in the period of 2006-2015 317 cases, 114 of them are general practitioner, followed by surgeon 76 case, doctor right (obstetrician) 56 case and pediatrician 27 Case. In the IDI region of Central Java during 2011-2014 as many as 6 cases. The Proposi is based on the doctrine of negligence, i.e. *res ipsa loquitur* or "The thing speaks for itself". This doctrine is only valid and appropriate only for the Civil Law field with the concept of unproving the occurrence of negligence or misconduct regarding the act against the law (*Onrechtmatige daad*) between the patient as plaintiff over the offence Of the doctor as defendant. The therapeutic relationship (professional conduct), the medical dispute in Indonesia generally arises by adverse events and becomes the opinion that any adverse event generalized is malpractice, it is influenced by internal factors and external patients.

B. RESEARCH METHOD

The analytical descriptive methodology is used to explain the description of the legal reconstruction of doctors ' care in anticipating the completion of medical disputes arising. Through empirical approaches and the use of Paradigm constructivism, the authors are expected to describe various primary and secondary data processed and analyzed in order to reconstruct legal protection for the physician's profession.

C. PROBLEMS FORMULATION

1. How does human rights and medical practice ACT No. 29 year 2004 Article 45 and article 52 A can provide legal protection to doctors who handle patients with emergency and or unconscious cases?
2. Why is it necessary to reconstruct the law of Medical Practice law No. 29 year 2004 in article 45 and article 52 letter A?

Outline theory

This article aims at analyzing the application of legal protection and the weaknesses of legal protection of the doctor's profession from the viewpoint of human rights and medical Parktek law. Human rights is a set of rights inherent to the Hahikat and human existence as a creature of God Almighty and is His grace that must be respected, held high and protected by the State, law and government and each person in order to Respect and protection of human dignity, including the right to be healthy. Health is the most important thing that must be cared for, because without health everything becomes meaningless, so it is reasonable if everyone has the right to be healthy in his life. Healthy is not only seen from the physical, but also from his mental and social. Besides this paper analyzes the possibility of the legal reconstruction of the doctor's profession in the settlement of medical disputes between doctors and patients who may arise from his/her informed consent to the handling of emergency patients Established in the medical Practice ACT No. 29 of 2004 and Permenkes No. 290/Menkes/Per/III/2008 as derivatives based on the value of justice and on human rights policy.

D. DISCUSSION

The medical profession or doctor profession is a noble profession, who in his devotion is concerned with the interests of others and the people (altruistic). Therefore, it is recommended that the sublime profession be entrusted only to those who are polite, honorable, and have a paternalistic soul. The profession itself, is a work characterized by having Knowledge, Cleverness, Devotion; and Purity (Physic and mind). Knowledge is the most important characteristic of this knowledge-based profession that will guide healthcare professionals (such as: Doctors, dentists, nurses, and midwives) to a specific level of competence and norms so that they are able to Properly perform their duties and devotion.

Professions require competence ("the condition of being capable" or "the capacity to perform task and role") so that the profession can carry out their roles, duties, and responsibilities properly. In relation to the profession in the field of practice, the absolute competence required because the profession in this field is not a natural right (natural right) that can be practiced by anyone. The right to do the coronation practice is more privileged (privilege) given only to someone because of its competence. In order to ensure that professionals are more compliant with the values and norms of ethics, the traditions that Pythagoras have pioneered should be preserved by obliging each physician's graduate to say an oath or appointment while wanting to The profession of the coronation practice.

The oath of profession (such as the Oath of doctor, oath of nurse, or oath of midwives) is essentially a promise to the community (social contract) spoken in the name of God Almighty, so that the consequences must be implemented to maintain good relations With the community (Habblum the fateful reflection) and the relationship with the creator (Habblum minal Allah). Legal protection of the physician's profession in the settlement of medical disputes according to please Ke 4 and 5 Pancasila; And according to article 28 G and article 28 H CONSTITUTION of the Republic of Indonesia 1945 is the description of human rights. Every citizen has the same position in the legal eye, that the law does not favoring one of the parties who in this case is the doctor and or the patient. It is in accordance with article 27 of paragraph 1 of the Constitution 1945 which reads "All citizens in conjunction with the law and government and obliged to uphold the law and the Government with no exceptions." The article implies that all citizens are entitled to legal protection of themselves, their personal, soul, honour, and possessions.

When there is a result of the practice done by the doctor, and it is detrimental to the patient, then the patient will conduct a lawsuit and lawsuits that are the right of the patient. And when the right of the patient is used, the doctor will put all the time and attention, even the credibility and the good name, to follow the legal process. Although in any activity the doctor has the protection of law that is governed by article 50 of the medical practice ACT, doctors or dentists in carrying out medical practice have the right: obtaining legal protection through the carrying out of duties Standards and standard operational procedures. It is a problem if one side of the doctor has run the profession properly and properly, and on the other hand, the result of the practice leads to victims of the patient.

In LAW practice medicine No 29 years 2004 article 45 paragraph (1) any medical or dental action that will be performed by a physician or dentist to the patient must be approved. Article 52 Letter A patient, in receiving service to the practice of medicine, has the right: a. Obtain a complete explanation of the medical action as intended in article 45 paragraph (3);.. The approval of medical action is the consent given by the patient or his family on the basis of explanations about the medical action that will be performed on the patient. Another term often used is the approval of the medical action (Informed Consent). Informed Consent is consent, whereas Informed is informed, so Informed Consent means approval on the basis of information. Before conducting medical action a physician is obliged to provide explanation to the patient and/or his/her family about the diagnosis and procedure of procedures, medical action conducted, alternative actions and risks, risk and Possible complications and prognosis of the action. The word must and the right of the patient in the article shall contain the meaning of the

obligation of the doctor or dentist in every action must be approved and the patient gives an answer to approve.

In the explanation of article 4 Permenkes No 290/MenKes/Per/III/2008 on medical approval, it is said in an emergency situation to save the patient's life and or prevent defects is not required. But this makes it a dilemma for medical personnel, especially doctors, when referring to the above two rules because health is a human right. Everyone has the right to a sufficient level of living for the health and well-being and his family as mentioned in article 25 of the United Nations General Declaration of Human Rights. The State recognizes everyone's right to acquire the highest standards that can be achieved for physical and mental health. In the hierarchy of medical practice law has a higher position of the ministerial regulation so that if there is a regulation of ministers contrary to the law on it then the regulation is not applicable means the legal protection against A physician who is about to help people in the case of emergency and or unknowingly constrained in the Uncomplete approval file of medical action that must be filled and signed by the patient and or the patient's family or his/her owner who understands The medical action that will be given to him because it is weak and will cause legal consequences if the mandate of the medical practice law is not on the run. Then what if it is reviewed in terms of human rights, for doctors who have given the best for the health efforts of patients who are overweight and threatened when not done medical assistance due to the constraints Informed Consent.

Essentially the legal relationship between doctors and patients rests on the two fundamental human rights bases secured in documents and international conventions. These two types of rights are the right to self determination and the right to information (the right to information). Both of these basic rights depart from the right to health care, which is an individual human rights.

The international document that guarantees both rights is The Universal Declaration of Human Right in 1948, and The United Nations International Covenant on Civil Political Right in 1966. In addition, legal protection for physicians suspected of conducting medical negligence is contained in article 1 of Law No. 39 year 1999 of human Rights.

Essentially the legal relationship between doctors and patients rests on the two fundamental human rights bases secured in documents and international conventions. These two types of rights are the right to self determination and the right to information (the right to information). Both of these basic rights depart from the right to health care, which is an individual human rights. The international document that guarantees both rights is The Universal Declaration of Human Right in 1948, and The United Nations International Covenant on Civil Political Right in 1966.

In addition, legal protection for physicians suspected of conducting medical negligence is contained in article 1 of Law No. 39 year 1999 of human Rights.

Legal protection of the doctor's profession in the settlement of medical disputes in the Sila-Sila Pancasila can be seen in the description of the details of the Pancasila consisting of 45 grains as stipulated in the Tap MPR No. I/MPR/2003.

The description of legal protection is contained in the description of grains of Pancasila please 4th and 5th, and article 28G and 28H CONSTITUTION of the Republic of Indonesia 1945 can be explained as follows:

- A. Please the fourth: The Circumcision led by wisdom in the consultative/representative. The details consist of:
1. As citizens and citizens, every Indonesian human being has the same position, rights, and obligations.
 2. Should not impose wills on others
 3. Prioritize deliberations in making decisions for mutual interest.
 4. Deliberation to reach consensus is overcome by the spirit of family.
 5. Respect and uphold every decision achieved as a result of deliberation.
 6. In good faith and a sense of responsibility to accept and carry out the results of deliberation decisions.

7. In the deliberation, the mutual interest in the interests of personal and group interests.
 8. Deliberation is done with common sense and according to a noble conscience.
 9. The decisions taken must be morally accountable to the Almighty God, uphold the dignity of the people, the values of righteousness and justice, prioritizing unity and unity in the common interest.
 10. Provide confidence to the trusted representatives to perform the consultative conduct.
- B. Sila Fifth: Social justice for all Indonesian people. consist of:
1. Develop sublime deeds, reflecting the attitudes and atmosphere of the family and the woe.
 2. Develop a fair attitude towards others.
 3. Maintain a balance between rights and obligations.
 4. Respect the rights of others.
 5. Like to give help to others in order to stand alone.
 6. Do not use proprietary rights to businesses that are blackmail against others.
 7. Not using proprietary rights for extravagance and extravagant lifestyles.
 8. Not using proprietary rights to conflict with or harm the public interest.
 9. Likes to work hard.
 10. Likes to appreciate the work of others who are beneficial for mutual progress and well-being.
 11. Like to do activities in order to realize the progress of equitable and social justice.
- C. Article 28G subsection (1) CONSTITUTION of the Republic of Indonesia year 1945: Everyone is entitled to the protection of personal, family, honor, dignity, and property under his control, and entitled to the security and protection of the threat of fear. To do or not to do something of a human right.
- D. Article 28H subsection (1) CONSTITUTION of the Republic of Indonesia year 1945: Everyone has the right to live prosperous life and spirit, reside, and get a good and healthy living environment and the right to get health care.

In the criminal provisions in Indonesia, a physician is given the reason for the criminal removal because there are two basic mistakes, namely the reason for the correct, namely the reason that abolished the nature of the act against the proper and correct deeds and reasons PEMAAF16, which is the reason for which he has forgiven the nature of his deeds, even though the act is against the law. But in this case, the Doctor who runs his profession in accordance with the corridor of the law, will be detached from the lawsuits by reason of the correct. Besides, another thing that must be fulfilled by the doctor when carrying out his profession, is the necessity of Informed Consent.

From the description and analysis above the author drafted a reconstruction of the legal protection of a physician's profession in the settlement of medical disputes between doctors and patients based on the value of justice and human rights. In the law, the criminal to the doctor is only applied to the action of intentional tort due to the professional relationship between the doctor and the patient. Nevertheless, the patient can still sue the doctor to pay damages for the recovery of the right to the negligence that the doctor has done.

But the health LAW No. 36 yrs 2009 Article 58 said that:

- (1) Everyone has the right to claim damages against a person, health worker, and/or health organizer who raises a loss due to an error or omission in the healthcare service he receives.
- (2) The claim for indemnification as intended in paragraph (1) does not apply to healthcare personnel who perform life saving measures or the prevention of a person's disability in an emergency.

With the above article, the doctor can not be done lawsuits both criminal and civil when handling emergency cases. But currently there is still a legal gap in article 45 and article 52 letter a Law No 29 year 2004 about the practice of medicine that if not done the reconstruction of the law then doctors can still be carried out lawsuits in emergency cases. So it is necessary to reconstruction the law so that there is legal certainty for doctors who have been procedurally working and follow the rules. Because the doctor who has exercised his medical practice by fulfilling all of the above conditions, if there is an unwanted occurrence experienced by the patient, it will be detached from the lawsuits with the reason of the criminal eraser, which interpreted as a special circumstance (which must be expressed, but not necessarily evidenced by the defendant) that if fulfilled cause-although against all the written elements of the Delic formula has been fulfilled-can not be dropped criminal. The reason for criminal erasers is known both in the criminal CODE, doctrine and jurisprudence.

In criminal law science the reasons for criminal erasers are differentiated in:

- 1) reason for general criminal erasers, namely the reason of the criminal erasers and mentioned in section 44, 48 – 51 of the PENAL code;
- 2) The reason for special criminal erasers is the reason for criminal erasers that apply only to certain criminal acts. For example chapters 122, 221 paragraphs (2), 261, 310, and 367 subsection (1) of the CRIMINAL code. In addition, doctors are not able to blame if the doctor fails or does not succeed in the treatment of his patients when, the patient is not cooperative because it does not explain truthfully about the history of diseases that have been suffered and drugs Who have been consumed during illness, or are not adhering to the instructions and insrtuksi of doctors or rejecting the treatment that has been disepakati¹⁷.

Through theories in grand theory, middle theory and applied theory, 2 legal reconstruction is possible:

- a) reconstruction of value: According to the Stufenbau theory is a theory of the legal system by Hans Kelsen stating that the legal system is a stair system with a level rule where the lowest legal norm should be holding onto the legal norm The higher legal norms (such as the Constitution) should be held on the most fundamental legal norm (grundnorm). According to Kelsen the most basic legal norm (grundnorm) Form is not concrete (abstract). An example of the most basic abstract legal norm is Pancasila. Hans Kelsen's theory of much attention is the hierarchy of legal norms and the validity chains that make up the legal pyramid (Stufen Theorie). One of the figures who developed the theory was Hans Kelsen's disciple Hans Nawiasky. Nawiasky theory is called by Theorie von Stufenaufbau der Rechtsordnung.
The structure of norms according to the theory, among others, the fundamental norms of the State (Staats fundamental norm), the basic rules of the country (Staats Grundgesetz), the formal statute (Formell Gesetz), the implementation rules and autonomous regulations (Verordnung en autonome Satzung). Staats fundamental norm is the norm that is the basis for the establishment of a constitution or the Basic Law (Staats Verfassung) of a country. The legal position of an Staats fundamental norm is as a condition for a constitution. Staats fundamental norm exists in advance of a country's constitution. According to Nawiasky, the highest norm by Kelsen referred to as the basic norm in a country should not be referred to as the Grundnorm Staats but rather the fundamental of the foundation norm, or the fundamental norm of the country. Grundnorm is essentially unchangeable, while the highest norm is altered for example by way of a coup or revolution.
- b) reconstruction of law. Reconstruction of several articles of Law No. 29-year 2004 on medical Practice: Articles 45 and 52 A,

From the description above the reconstruction of legal protection of doctors profession in medical disputes between doctors and patients based on value of justice is like in table 1.

TABLE 1. Reconstruction ACT No 29 yrs 2004

No	Before Reconstruction	Disadvantages	Suggestion
1	Article 45 (1) Any medical or dental action that a physician or dentist will take to a patient must be approved. (2) The approval as intended in paragraph (1) is given after the patient has a complete explanation. (3) The explanation as intended in paragraph (2) shall at least include: A. Diagnosis and procedure of medical action; B. Purposes of medical measures undertaken; C. Alternative other actions and risks; D. Risks and complications that may occur; Dan E. Prognosis of the action taken. (4) The agreement referred to in paragraph (2) may be given either in writing or orally. (5) Any medical or dental action that contains a high risk must be provided with a written consent signed by the right to give consent. (6) Provisions on procedures for the approval of medical or dental action as intended in paragraph (1), paragraph (2), paragraph (3), paragraph (4), and paragraph (5) shall be governed by Ministerial regulation.	In people who are unconscious and emergency and require immediate action then it is difficult to implement although there is regulation of the Minister of Health No. 290 but hierarchical regulation of the minister is not Boleh contrary to the LAW above	(1) Any medical or dental action that a physician or dentist will take to a patient must be approved. (2) Informed consent does not apply to emergency cases and/or unconscious patients without the damping family or forgiveness. (3) Inforemed Consent can be given/depreciable after emergency action is completed and attached to the medical resume
2	Article 52 Letter A (a) The patient, in receiving service to the practice of medicine, has the right: a. Obtain a complete explanation of the medical action as referred to in article 45 paragraph (3);	<i>informed consent rights</i>	Article 52 Letter a Except in unconscious and or emergency patients inforemed consent is given when the patient has been consciously or the family has attended

E. CONCLUSION

The therapeutic relationship between doctors and patients is a legal relationship (agreement) instead of ethics. Because the relationship between the doctor and the patient is contained in the legislation. Legal protection for doctors who are in charge of handling emergency cases and or unconscious patients is indispensable as this is the right of a physician. Doctors also have human rights as a human being to get the same treatment in the field of law, health and a decent life. In the completion of the medical dispute between the physician and the patient arising as contained in article 45 and article 52 of law No. 29 year 2004 on medical Practice the procedures or procedures are still using the criminal CODE as a feature, this Because the medical practice law is still many legal gaps that have not given details in detail about the intent of each sentence of law in each article and there is still a regulation of the minister as a guideline or the description of the article in the Law Practice of medical poses a conflict of legal norms, so that the doctor's position as a medical worker intends to help still unprotected from medical disputes.

Therefore, the existing study requires the legal reconstruction of the chapters in the medical practice ACT for the enhancement and certainty of reference in law enforcement. During the reconstruction process has not been made or happened, it is necessary to be required by the temporary legal basis of permenkes in the revision or added article that does not contradict the higher level of law. The government and the DPR are expected to make improvements to the law No. 29 year 2004 on medical practice.

REFERENCES

- M. Jusuf Hanafiah & Amri Amir, 2009, Etika Kedokteran Dan Hukum Kesehatan, Cetakan Pertama, Penerbit BukuKedokteranEGC,Jakarta.
- Peter Mahmud Marzuki, 2010, Penelitian Hukum, Cetakan VI, Kencana Prenada Media Group, Jakarta.
- Ohoiwutun, Y.A Triana, 2009, Bunga Rampai Hukum Kedokteran, Cetakan kedua, Bayumedia Publishing.
- Syahrul, Machmud, 2012, Penegakan Hukum dan Perlindungan Hukum Bagi Dokter yang Diduga Melakukan Medikal Malpraktek, CV.Karya PutraAbadi, Bandung.
- Hadjon P. M., Perlindungan Hukum Bagi Rakyat di Indonesia, Bina Ilmu, Surabaya, 1987
- Hans Kelsen “Teori hukum murni-dasar-dasar ilmu hukum normative” terjemahan The fure of teory : Barkely University of California press :1978 : Nusa Media, Bandung, 2010

PERATURAN PERUNDANG - UNDANGAN:

- Kitab Undang-Undang Hukum Pidana RepublikIndonesia
- Undang-Undang Nomor 29 Tahun 2004 Tentang Praktik Kedokteran,
- Lembaran Negara Republik Indonesia Tahun 2004 Nomor 116.
- Undang-Undang Nomor 36 Tahun 2009 Tentang Kesehatan,
- Lembaran Negara Republik IndonesiaTahun 2009 Nomor 144.
- Peraturan Menteri Kesehatan Republik Indonesia Nomor 290/Menkes/Per/III/2008 Tentang PersetujuanTindakan Kedokteran.

LEGAL POSITION OF DOCTORS ON INFORMED CONSENT IN THERAPEUTIC AGREEMENTS

Errawan Ramawitana Wiradisuria

Student of Legal Studies Doctor Program, Universitas Borobudur

errawan.w@gmail.com

Abstract

A doctor may not impose his will on a patient, even if it is in accordance with his knowledge and in the interest of the patient himself. The doctor must respect any choice of the patient, because the difference between doctors and violations of general crimes is informed consent. If there has been an informed consent, then the rights and obligations that arise between the doctor and the patient arise. This is where a legal relationship arises between doctors and patients that occurs because of medical factors which subsequently give birth to an agreement known as the therapeutic agreement. This study is normative with secondary data as a data source. Data is examined by means of document studies. Data is analyzed qualitatively. The results of the analysis are presented descriptively.

The results showed that the legal position of the doctor on informed consent in a therapeutic agreement is situational, ie the doctor will be equal to the patient, when the patient is in a conscious state to know the information provided by the doctor, related to medical procedures to be performed by the doctor, so can provide medical consent (informed consent) in the form of express consent (stated), therefore, in this provision it must fulfill all the legal elements of the agreement stipulated in Article 1320 of the Civil Code. However, there are times when the position of the doctor is higher than the patient, which is generally stated as implied consent (considered given). This condition can be given during an emergency, so that based on the provisions in Article 51 letter d of Act Number 29 of 2004 regarding the Medical Practice and also Article 4 of the Minister of Health Regulation Number 290 / MENKES / PER / III / 2008 regarding the Approval of Medical Measures, then in an emergency there is no need for informed consent.

Keywords: Doctor, Informed Consent, Therapeutic Agreement.

A. INTRODUCTION

Informed consent is an agreement given by the patient and / or his family on the basis of information and explanation of the medical procedures to be performed on the patient.¹ The legal basis for the implementation of informed consent is in Article 45 paragraph (3) of Act Number 29 of 2004 regarding the Medical Practice which contains information or explanations in the form of diagnosis and procedures or medical procedures, objectives of medical procedures taken, alternative procedures and risks, risks and possible complications and prognosis for the actions taken. A doctor may not impose his will on a patient, even if it is in accordance with his knowledge and in the interest of the patient himself. The doctor must respect any choice of the patient, because the difference between doctors and violations of general crimes is informed consent.² If there has been an informed consent, then the rights and obligations that arise between the doctor and the patient arise. This is where a legal relationship arises between doctors and patients that occurs because of medical factors which subsequently give birth to an agreement known as the therapeutic agreement.

¹ Sri Siswati, *Etika dan Hukum Kesehatan*, Jakarta: Raja Grafindo Persada, 2013, p. 98.

² Desrizza Ratman, *Aspek Hukum Informed Consent dan Rekam Medis Dalam Transaksi Terapeutik*, Bandung: Keni Media, 2013, p. 39.

Therapeutic agreement is an agreement of care, because one part (patient) wants to be cured and the other part (the doctor) wants to treat the patient and try to cure the patient. The agreement was born based on an agreement between the two parties without any oversight, coercion or fraud, and applies as a law to the parties and must be carried out in good faith.³ Therapeutic agreements carried out using informed consent involve medical personnel (doctors) and patients. In implementing the therapeutic agreement, both parties must be responsible and carry out their respective obligations. But on the one hand, both parties are also given rights by law, so that both parties also get legal protection.

Problems arise when the patient's condition is in a state of emergency and unconsciousness and the family cannot be contacted, while the patient must immediately get help for patient safety without having to obtain prior consent, so that informed consent is not carried out in the therapeutic agreement. Even though informed consent in a therapeutic agreement is an obligation for doctors in accordance with the mandate of Act Number 29 of 2004 regarding the Medical Practice.

B. RESEARCH METHODS

1. Types of Research

This research is basically a normative juridical study, because the target of this research is law or normative methods in the form of legal principles and legal systems.⁴ Normative research in this study is a study that describes or describes in detail, systematic, comprehensive and in-depth about the rationale for the legal position of doctors on informed consent in a therapeutic agreement.

2. Nature of Research

This research is descriptive because it describes the laws and regulations that apply and is associated with legal theories in the practice of implementation related to the problems to be studied.

3. Data Analysis

The data obtained will be analyzed in qualitative analysis.

C. PROBLEM FORMULATION

Referring to the background described above, the main problem to be discussed is 3 how the legal position of the doctor on informed consent in the therapeutic agreement?

D. DISCUSSION

Legal Position of Doctors on Informed Consent in Therapeutic Agreements

Hospitals⁵ as one of the health service institutions is The presence of a government hospital in Indonesia must be associated with the Ethical Politics of Ethische Politiek, namely the colonial political direction championed explained in Act Number 44 of 2009 regarding the Hospitals, in Article 1 paragraph (1) says:

“Hospital is a health care institution that organizes individual health services in a comprehensive manner that provides inpatient, outpatient, and emergency services”.

Based on this, it can be interpreted that the Hospital is a health service institution that functions to provide and administer healing and recovery efforts for patients and patient safety.

³ Y.A. Triana Ohoiwutun, *Bunga Rampai Hukum Kedokteran*, Malang: Bayumedia, 2007, p. 8.

⁴ Soerjono Soekanto dan Sri Mamuji, *Penelitian Hukum Normatif-Suatu Tinjauan Singkat*, Jakarta: Rajawali Press, 2007, p. 10.

⁵ Samsi Jacobalis, *Kumpulan Tulisan terpilih Tentang Rumah Sakit Indonesia dalam Dinamika Sejarah, Transformasi, Globalisasi dan Krisis Nasional*, Jakarta: Yayasan Penerbitan IDI, 2008, p. 10.

Health services provided by the Hospital to patients can also be seen as services provided between businesses (hospitals) with patients (consumers).⁶ In considering Act Number 44 of 2009 regarding by Cornelis Theodor van Deventer and friends. Van Deventer is a jurist who worked in Java from 1881 to 1897.

The Hospitals states that health services are the right of every person guaranteed in the 1945 Constitution of the Republic of Indonesia which must be realized with efforts to increase the highest degree of public health. Hospital is a health service institution for the community with its own characteristics that are influenced by the development of health science, technological advances, and socio-economic life of the people who must be able to improve quality and affordable services for the community in order to realize the highest degree of health.

In order to improve the quality and coverage of hospital services and the regulation of the rights and obligations of the community in obtaining health services, it is necessary to regulate the hospital by law. Arrangements regarding hospitals are not sufficient to be used as a legal basis in organizing hospitals as health service institutions for the community. Based on these considerations and to provide legal certainty for the community and the Hospital, it is necessary to form a Act on Hospitals. Hospitals in organizing health service activities require adequate health personnel as one of the requirements for their resources. In Article 12 of Act Number 44 of 2009 it is stated that: (1) Requirements for human resources as referred to in Article 7 paragraph (1), namely Hospitals must have permanent personnel including medical and medical support personnel, nursing personnel, pharmacy personnel, hospital management staff, and non-health workers. (2) The number and type of human resources as referred to in paragraph (1) must be in accordance with the type and classification of the Hospital. (3) Hospitals must have data on personnel who carry out practices or work in the organization of hospitals. (4) Hospitals can employ temporary staff and consultants in accordance with their needs and abilities in accordance with the provisions of the laws and regulations. Medical personnel include doctors and dentists as well as specialist doctors and specialist dentists.

Health services carried out by doctors after the issuance of Act Number 29 of 2004 regarding the Medical Practice encourages everyone who works in the health sector to follow the rules stated in it. Act Number 29 of 2009 regarding the Medical Practices, Act Number 36 of 2009 regarding the Health and Act Number 44 of 2009 regarding the Hospitals become a reference in legal protection for health workers, especially doctors and dentists in carrying out health services to patients in particular and the general public.

Article 3 of Act Number 29 of 2004 regarding the Medical Practice regulates the purpose of medical practice so that its implementation is protected by applicable law. In addition, the law aims to provide legal certainty to the public, doctors and dentists. Doctors and dentists are legally protected in providing health efforts based on the provisions of Article 23 of Act Number 36 of 2009 regarding the Health, (1) that health personnel are authorized to carry out health efforts, (2) the authority to administer health services as referred to in paragraph (1) carried out in accordance with the field of expertise possessed, (3) In the implementation of health services, health workers must have permission from the government.

Health efforts⁷ are every activity and or series of activities carried out in an integrated, integrated and continuous manner to maintain and improve the degree of public health in the form of disease prevention, health improvement, disease treatment and health recovery by the government and or the community. Health efforts are carried out by health workers, while health services consist of five

⁶ Indra Bastian, *Penyelesaian Sengketa Kesehatan*, Jakarta: Salemba Medika, 2011, p. 5.

⁷ Dumilah, *Kebijakan Kesehatan Prinsip dan Praktik*, Jakarta: Raja Grafindo Persada, 2015, p. 6. Health is an important thing that is entitled to be obtained by each individual and is an obligation for the state to guarantee that every citizen wants and is able to live healthily and utilize health services. In addition, health is one part of the Human Development Index, which is an indicator in determining the level of people's welfare.

types of services namely promotive health services, preventive health services, curative health services, rehabilitative health services and traditional health services.

The prime health care demands in accordance with Act Number 29 of 2004 regarding the Medical Practice where the rights and obligations of the actors in the health sector are certainly not free from the binding legal rules. Actually in the implementation of health efforts depends on the availability of health resources in the form of energy, facilities and infrastructure in an adequate amount and quality. Health services as part of the main activities of the hospital place doctors and nurses as health workers who are the closest to the patient in handling the disease. There are several relationships in the health care effort, namely the relationship between the hospital and the doctor; nurse with patient; relationship between doctor and nurse and patient; and the relationship between nurses and patients.

Based on Article 1 number 2 of Act Number 29 of 2004 regarding the Medical Practice states doctors and dentists are doctors, specialists, dentists, and specialist dentists who have graduated from medical or dental education both inside and outside the country recognized by the government Republic of Indonesia in accordance with laws and regulations. The doctor's profession is a noble and noble profession, besides that there are 6 (six) basic qualities, namely divine nature, purity of intentions, nobility, humility, sincerity of work, scientific integrity, and social. Therefore, it is natural that the presence of doctors is expected to provide good health services.

Medical practice is a series of activities carried out by doctors and dentists on patients in carrying out health efforts.⁸ Doctors in carrying out their duties, namely seeking one's health as explained in Article 1 number 1 of Act Number 29 of 2004 regarding the Medical Practice, certainly has its own rules which are used as guidelines in their duties. One of the guidelines is about informed consent.

Informed consent is an agreement given by the patient and / or his family on the basis of information and explanation Article 1 number 1 of Act Number 29 of 2004 regarding the Medical Practice.

Of the medical procedures to be taken against the patient.⁹ The legal basis for the implementation of informed consent is in Article 45 paragraph (3) of Act Number 29 of 2004 regarding the Medical Practice which contains information or explanations in the form of diagnosis and procedures for medical procedures, objectives of medical procedures taken, alternative procedures and risks, risks and possible complications and prognosis for the actions taken.

A doctor may not impose his will on a patient, even if it is in accordance with his knowledge and in the interest of the patient himself. The doctor must respect any choice of the patient, because the difference between doctors and violations of general crimes is informed consent.¹⁰

This Medical procedures Agreement is related to the doctor's obligation to provide information to patients and the obligation to take medical procedures in accordance with medical professional standards. A new informed consent is legitimately given by the patient if it meets at least 3 (three) elements as follows:

1. Sufficient information disclosure provided by doctors;
2. Patient competency in giving consent;
3. Volunteering (without coercion or pressure) in giving consent.

In health law there are two forms of informed consent, is:

1. Implied Consent Generally implied consent is given under normal circumstances, meaning that the doctor obtains the approval of the medical procedures from the signal given or performed by the patient. Likewise with emergency cases, while doctors require immediate action while the

⁸

.....

⁹ Sri Siswati, *Etika dan Hukum Kesehatan*, Jakarta: Raja Grafindo Persada, 2013, p. 98.

¹⁰ Desrizza Ratman, *Aspek Hukum Informed Consent dan Rekam Medis Dalam Transaksi Terapeutik*, Bandung: Keni Media, 2013, p. 39.

patient is unable to give consent and his family is not available, then with such conditions, the doctor can take the best medical procedures according to the doctor.

2. This is in accordance with the principle of father knows the best, which means that the doctor has a role like the parents of his patients.¹¹ The patient fully trusts the doctor to take medical procedures against him. This kind of relationship is active-passive and has a vertical pattern that makes the position of doctors and patients unequal and makes patients have to accept all decisions and actions of doctors by not contributing anything to the medical services they receive. Therefore, there is no interaction of any communication regarding the medical procedures that will be carried out.¹²
2. Expressed Consent Informed consent in the form of express consent (stated), can be stated orally or in writing. In medical procedures that are invasive and contain risks, the doctor should get approval in writing, or that is generally known in the hospital as an operating license. Based on this, then in an emergency situation informed consent is still the most important thing even though the priority is recognized at the bottom. The main priority is to save the lives of patients, although informed consent is important, but should not be a barrier or obstacle to the implementation of emergency care. This is in accordance with Article 4 of the Minister of Health Regulation Number 290 / MENKES / PER / III / 2008 regarding the Medical procedures Agreements that no emergency consent is required in an emergency situation.

Based on this, the position of doctors with patients in informed consent becomes unequal. This is due to therapeutic transactions born on the orders of the law, namely Article 51 letter d of Act Number 29 of 2004 regarding the Medical Practices which states that doctors in carrying out medical practices have the obligation to carry out emergency assistance on the basis of humanity, except if there are certain people others on duty and able to do it.

However, in the case of an informed consent in the form of expressed consent, the position of the doctor on the informed consent is equivalent to that of the patient. Therefore, on an informed consent in the form of an express consent (stated) it must fulfill all the legal elements of the agreement stipulated in Article 1320 of the Civil Code.

The author argues, the obligation of doctors to carry out informed consent is nothing but in order to provide legal protection for doctors and patients for medical procedures that they do. If the doctor has performed a medical procedures in accordance with the Standard Operating Procedure, the doctor has the right to receive protection as stipulated in Article 50 letter a of Act Number 29 of 2004 regarding the Medical Practices which states that doctors carry out medical practices have the right to obtain legal protection throughout the course in accordance with professional standards and standard operating procedures.

Generally, informed consent has been prepared from the hospital in the form of a completed form or commonly referred to as a standard agreement, and if there are articles or sections that are not approved by the patient, then it cannot immediately revise. According to the author, there is a weakness in the existence of informed consent in the form of a standard agreement.

The weakness is the failure to fulfill the principle of freedom of contract, which is one of the important principles in an agreement. The principle of freedom of contract relates to the contents of the agreement which, if made in the standard form, the patient only has the choice, namely take it or leave it.

According to the author, the main legal basis of informed consent is Article 1320 of the Civil Code, namely the agreement of both parties, the ability to carry out legal actions, the existence of objects, and the existence of legal causes. According to the author, informed consent is an agreement

¹¹ Hermin Hadiati Koeswadji, *Hukum Kedokteran*, Bandung: Citra Aditya Bakti, 1998, p. 36.

¹² Pradhipta Priyo Prasetyo, "Perlindungan Hukum Bagi Dokter Terhadap *Informed Consent* Dalam Perjanjian Terapeutik (Studi Kasus Putusan Peninjauan Kembali Mahkamah Agung Nomor 79 PK/PID/2013)", *Tesis*, Yogyakarta, Pascasarjana Universitas Gadjah Mada, 2014, p. 34.

if it is based on Article 1320 of the Civil Code, one of which is that the agreement is considered valid if it meets the principle of freedom of contract, one of which is free to determine the contents of the agreement. the agreement is only determined by the hospital, so the agreement formed in informed consent does not reach perfection.

In Article 1338 of the Civil Code which states that all agreements made legally apply as laws for those who make them. The provisions in Article 1320 and 1338 of the Civil Code contain principles and principles of freedom to make contracts or agreements. In civil law, basically every person is given the freedom to make agreements both in terms of form and content, as long as they do not violate statutory provisions, decency, propriety in society (Article 1337 Civil Code). After the agreement arises and binds the parties, the next concern is about the implementation of the agreement itself.

According to Munir Fuady, the validity of an informed consent given by a patient must fulfill 3 (three) conditions, that is:¹³

1. Sufficient information disclosure provided by doctors;
2. Patient competency in giving consent, ie if they fulfill the requirements as capable people (old enough, no mental illness);
3. Volunteering (without coercion or pressure) in giving consent.

According to the author, in general, patients or families of patients are people whose medical knowledge is not as good as that of a doctor and a state of urgency at that time which requires the patient or family of patients to sign the agreement for medical treatment. Therefore, doctors must provide information as clearly as possible to patients as mandated in Article 45 paragraph (3) of Act Number 29 of 2004 regarding the Medical Practice.

This is caused the informed consent only imposes an obligation on the doctor to provide information about matters relating to everything related to taking medical procedures. However, this information is given verbally, so that in the event of a legal dispute in the future, patients and families of patients cannot make it as evidence in court.

E. CONCLUSION

The legal position of the doctor on informed consent in a therapeutic agreement is situational, that is, the doctor will be equal to the patient, when the patient is in a conscious state to know the information provided by the doctor, related to medical procedures to be performed by the doctor, so the patient can provide medical approval (informed consent) in the form of express consent (stated), therefore, in this provision it must fulfill all the legal elements of the agreement stipulated in Article 1320 of the Civil Code. However, there are times when the position of the doctor is higher than the patient, which is generally stated as implied consent (considered given). This condition can be given during an emergency, so that based on the provisions in Article 51 letter d of Act Number 29 of 2004 regarding the Medical Practice and also Article 4 of the Minister of Health Regulation Number 290/MENKES/PER/III/2008 regarding the Approval of Medical Measures, then in an emergency there is no need for informed consent.

REFERENCES

A. Books:

- Bastian, Indra, *Penyelesaian Sengketa Kesehatan*, Jakarta: Salemba Medika, 2011.
- Dumilah, *Kebijakan Kesehatan Prinsip dan Praktik*, Jakarta: Raja Grafindo Persada, 2015.

¹³ Munir Fuady, *Sumpah Hipocrates: Aspek Hukum Malpraktek Dokter*, Bandung: PT. Citra Aditya Bakti, 2005, p. 48.

- Fuady, Munir, *Sumpah Hipocrates: Aspek Hukum Malpraktek Dokter*, Bandung: PT. Citra Aditya Bakti, 2005.
- Goodpaster, Gary, *Negosiasi dan Mediasi: Sebuah Pedoman Negosiasi dan Penyelesaian Sengketa Melalui Negosiasi*, Jakarta: ELIPS Project, 1993.
- Hanafiah, Jusuf, *Etika Kedokteran dan Hukum Kesehatan*, Jakarta: EGC, 2008.
- Jacobalis, Samsi, *Kumpulan Tulisan terpilih Tentang Rumah Sakit Indonesia dalam Dinamika Sejarah, Transformasi, Globalisasi dan Krisis Nasional*, Jakarta: Yayasan Penerbitan IDI, 2008.
- Koeswadi, Hermin Hadiati, *Hukum Kedokteran*, Bandung: Citra Aditya Bakti, 1998.
- Ohoiwutun, Y.A. Triana, *Bunga Rampai Hukum Kedokteran*, Malang: Bayumedia, 2007.
- Ratman, Desriza, *Aspek Hukum Informed Consent dan Rekam Medis Dalam Transaksi Terapeutik*, Bandung: Keni Media, 2013.
- Siswati, Sri, *Etika dan Hukum Kesehatan*, Jakarta: Raja Grafindo Persada, 2013.
- Soekanto Soerjono, dan Sri Mamuji, *Penelitian Hukum Normatif-Suatu Tinjauan Singkat*, Jakarta: Rajawali Press, 2007.

B. Thesis:

- Prasetyo, Pradhipta Priyo “Perlindungan Hukum Bagi Dokter Terhadap Informed Consent Dalam Perjanjian Terapeutik (Studi Kasus Putusan Peninjauan Kembali Mahkamah Agung Nomor 79 PK/PID/2013)”, *Tesis*, Yogyakarta, Pascasarjana Universitas Gadjah Mada, 2014.

C. Legislation:

- The 1945 Constitution of the Republic of Indonesia.
- Civil Code.
- Act of the Republic of Indonesia Number 29 of 2004 regarding the Medical Practice.
- Act of the Republic of Indonesia Number 36 of 2009 regarding the Health.
- Act of the Republic of Indonesia Number 44 of 2009 regarding the Hospitals
- Republic of Indonesia Supreme Court Regulation Number 01 of 2008 regarding the Procedure for Mediation in Courts.
- Minister of Health Regulation Number 290/MENKES/PER/III/2008 regarding the Approval of Medical Measures.
- Decree of the Directorate General of Medical Services No. HK.00.06.3.5.1866 of 1999 regarding the Guidelines for Approval of Medical Measures.

LEGAL LIABILITY OF NURSING FOR DELEGATION OF CLINICAL PRIVILEGE IN HEALTH SERVICES

Hanrizal Satria

Student of Legal Studies Doctor Program, Universitas Borobudur
s3a.meddocs@yahoo.com

Abstract

In the profession of nursing staff there are known actions that are independent and delegate actions. Independent actions are the main competencies of the nursing professional profession obtained through education and training. This independent action is an inherent authority and is the full responsibility of the nursing staff. The authority of the nursing staff to take medical action is a delegation or mandate that requires certain clinical authorities and needs to be credited. Thus, a delegate medical action is the responsibility of the medical personnel who receive the delegation. However, mandate medical actions are the responsibility of medical personnel who provide mandates. The problem in this study is how legal liability for nurses for delegating clinical privileges to health services? This study is a normative study that uses secondary data and analyzed qualitatively, the results of which are presented descriptively. The results of the study state that legal liability for nurses for delegating clinical privileges to health services can be in the form of administrative, civil or criminal liability as well as the level of negligence or errors committed by nurses. Therefore, in an effort to prevent errors in delegating clinical privileges, the enforcement of professional discipline and professional ethics development needs to be carried out in a planned, directed and highly motivated manner so that the nursing and midwifery services provided truly guarantee patients will be safe and get satisfaction.

Keywords: Legal Liability, Clinical Privilege, Nurse.

A. INTRODUCTION

The Unitary State of the Republic of Indonesia was formed based on its Constitution namely the 1945 Constitution on August 18, 1945, a day after the Proclamation of Independence. In the 1945 Constitution, the purpose of the State was stated. The purpose of the country is in the Opening of the 1945 Constitution which after four amendments, the last was given the full name of the 1945 Constitution of the Republic of Indonesia in 2002, the purpose of the state did not change. The aim of the country is the main interest rather than the order of a country. The organizing a country starts from the formation of law as a rule that regulates order in the life of the nation and state.

The Indonesian state aims are to protect the entire nation of Indonesia and all of Indonesia's bloodshed, promote public welfare, educate the life of the nation and participate in carrying out world order based on freedom, eternal peace, and social justice. The purpose of this country is then elaborated in the contents or body of the 1945 Constitution of the Republic of Indonesia. The implementation is in the form of various laws and regulations as immovable law in the form of a law that moves to become a Rule of Law (the government based on the law). According to Mokhamad Najih,¹ one form of the implementation of the concept of the rule of law is the constitutional protection of human rights with legal guarantees for the demands of its enforcement through a fair process.

The Rule of Law concept is a concept that states that the government is run based on legal authority. The Law places individuals as parties that must be protected. Violation of individual rights is a violation

¹ Mokhamad Najih, *Politik Hukum Pidana*, Malang: Transpublishing, 2008, page. 9.

of the law. Furthermore, violations of these individual rights can only be done when permitted and based on legal regulations. This is also called the legality principle of the rule of law. Every state action must be based on law. The laws and regulations which have been held earlier are the limits of the state's acting power. So the state forming a law is precisely to limit the power of the state through its government so that it is not arbitrary. The 1945 Constitution of the Republic of Indonesia which contains legal principles and legal regulations must be obeyed, and also by the government or its bodies.

Munir Fuady stated the concept of the state Rule of Law was a concept of the state that was considered the most ideal at this time, even though the concept was carried out with different perceptions. The term "rule of law" in Indonesian is often also translated as "*supremasi hukum*" (supremacy of law) or "the government based on the law."²

According to Franz Magnis Suseno, the rule of law based on the belief is the state power must be good and fair law. So there are two elements in the understanding of the rule of law: first, the relationship between the governing and the governed is not based on power, but based on an objective norm which also binds the governing party. And second, the objective norms, the law, fulfill the requirements not only formally, but can be maintained in the face of legal ideas. Law is the basis of all state actions; and the law must be good and fair. Good because it is following what is expected by the community and law, and fair because the basic purpose of all laws is justice. In terms of political morale there are four main reasons for demanding that the state be held and carry out its duties under the law: (1) legal certainty, (2) demands for equal treatment, (3) democratic legitimacy, and (4) demands of reason.³

The confession of a country as a rule of law (government by law) is very important, because a state and political power is not unlimited (not absolute). It is necessary to limit the authority and power of the state and politics, to avoid arising from arbitrariness from the authorities. In this state of law, restrictions on state and political power must be carried out, which cannot be violated by anyone. Therefore, in a state of law, the law plays a very important role, and is above state and political power. Therefore, the term "government under the law" appears. Then the concept which in the Common Law states is called the system "government based on law, not based on (human will)" (government by law, not by men) or a system of government based on the rule of law, not a rule of men.

Meanwhile, in Continental European countries, the concept of "rule of law" (*rechtstaat*) is known as opposed to "the power state" (*machstaat*). This *Rechtsstaat* is a Dutch language term which has a parallel understanding of the meaning of rule of law in countries which are Anglo Saxon systems. In Indonesian, it is often referred to as "the rule of law".

Indonesia as a legal state emphasizes the existence of government activities carried out by the provisions of Article 1 chapter (2) of the 1945 Constitution of the Republic of Indonesia (as amended), sovereignty is in the hands of the people and carried out according to the Constitution. Furthermore, according to the provisions of Article 1 chapter (3) of the 1945 Constitution of the Republic of Indonesia, the Indonesian state is a legal state which means that the system of administering the government of the Republic of Indonesia must be based on the principle of popular sovereignty and the principle of the rule of law. Based on these principles, all forms of decisions and actions of government administrators must be based on popular sovereignty and law, and not based on power inherent in the position of the apparatus of the government. One form of governance is the implementation of health services.

Health services carried out by doctors after the issuance of Law Number 29 of 2004 concerning Medical Practice encourages everyone who works in the health sector to follow the rules stated therein. The Law Number 29 of 2004 concerning Medical Practices, Law Number 36 of 2009 concerning Health and Law Number 44 of 2009 concerning Hospitals is a reference in legal protection for health workers,

² Munir Fuady, *Teori Negara Hukum Modern*, Jakarta: Refika Aditama, 2009, page. 1.

³ Franz Magnis Suseno, *Etika Politik*, Jakarta: Gramedia Pustaka Utama, 2001, page. 294.

especially doctors and dentists in carrying out health care services in patients in particular and the general public.

Health developments are every activity and or the activities carried out in an integrated and continuous manner to maintain and improve the degree of public health in the form of disease prevention, health improvement, disease treatment and health recovery by the government and or the community. Health developments are carried out by health workers. While health services consist of five types of services namely promotive health services, preventive health services, curative health services, rehabilitative health services and traditional health services.⁴

Doctors and dentists are legally protected in providing health efforts based on the provisions of Article 23 of Law Number 36 of 2009 concerning Health states that health workers are authorized to carry out health developments. The authority to carry out health services is carried out by the field of expertise they have. In administering health services, health workers must have permission from the government.

In the development of health services carried out by nurses, where in the medical profession there is a name *Kodeki* (Indonesian Medical Ethics Code), then before Law Number 29 of 2004 concerning Medical Practices was formed a Code of Ethics for Professional Nursing was established, which was published in the Deliberation Decision National IV Indonesian National Nurses Association No. 09 / National Conference IV / PPNI / 1989. The issuance of the Nursing Professional Ethics code is in response to the legal position of nurses in health services.

The nurses duty as health workers is to carry out or conduct health activities by their respective fields of expertise, related to their respective expertise, it is important that what is called a diploma from educational institutions and competencies which have been ratified by professional associations. Both of these are conditions which can be used by nurses in carrying out their duties and obligations to carry out the health service profession.⁵

In the profession of nursing staff, there are known actions which are independent and delegate actions. Independent actions are the main competencies of the nursing professional profession obtained through education and training. This independent action is an inherent authority and is the full responsibility of the nursing staff. The authority of the nursing staff to take medical action is a delegation or mandate which requires certain clinical authorities and needs to be credited. Thus, a delegate medical action is the responsibility of the medical personnel who receive the delegation. However, mandate medical actions are the responsibility of medical personnel who provide a mandates.

B. RESEARCH METHOD

1. Research Type

This research is a normative juridical research. This research gives an understanding of norm problems experienced by dogmatic law in its activities to describe legal norms, formulate legal norms (form legislation), and enforce legal norms (judicial practice). Normative research in this study is a study which describes or describes in detail, systematic, comprehensive and in-depth about the legal responsibility of nurses for delegating clinical privileges to health services.

2. Research Design

This research design is descriptive because it describes the laws and regulations that apply and is associated with legal theories in the practice of implementation relating to the problems to be examined.

⁴ Titik Triwulan Tutik, *Perlindungan Hukum Bagi Pasien*, Jakarta: Prestasi Pustaka, 2010, page 6

⁵ Wila Chandrawila, *Hukum Kedokteran*, Bandung: Mandar Maju, 2001, page. 26.

3. Data Analysis

The data obtained will be analyzed in qualitative analysis.

C. PROBLEM FORMULATION

Based on the background of study above, the problem in this study is “How is the legal responsibility of nurses for delegating clinical privileges to health services?”.

D. DISCUSSION

Legal Liability of Nursing for Delegation of Clinical Privilege in Health Services

As previously known, the authority of nursing staff to take medical actions is a delegation or mandate which requires certain clinical privileges and needs to be credited.

The credential process ensures nursing staff is competent in providing nursing and midwifery services to patients by professional standards. The credential process includes the stages of review, verification, and evaluation of documents relating to the performance of nursing staff.⁶

Based on the results of the credential process, the Nursing Committee recommends to the head/director of the Hospital to determine the Clinical Assignment that will be given to the nursing staff in the form of a Clinical Assignment letter. Clinical assignments are in the form of Clinical Privileges (Clinical privileges) given by the head/director of the Hospital to nursing staff to carry out nursing care or midwifery care within the Hospital for a certain period.

The purpose of the credential process is:

1. To give clarity to the Clinical Authority (Clinical Privilege) for each;
2. To protect patient safety by ensuring that nursing staff who provide nursing and midwifery care have clear competencies and Clinical Privileges;
3. The recognition and appreciation of nursing staff at all levels of service.⁷

The Provisions about the delegation of clinical privileges are stipulated in Article 32 of Law Number 38 of 2014 concerning Nursing which states:

- (1) The implementation of tasks based on the delegation of authority as referred to in Article 29 chapter (1) letter e can only be given in written by medical personnel to the Nurse to carry out medical actions and evaluate their implementation.
- (2) The Delegation of authority as referred to in chapter (1) may be delegated or mandated.
- (3) The Delegation of authority delegatively to do medical action given by medical personnel to the Nurse accompanied by a delegation of responsibility.
- (4) The Delegation of delegated authority as referred to in chapter (3) can only be given to professional nurses or trained vocational nurses who have the necessary competencies.
- (5) The Mandate delegation of authority is given by medical personnel to the Nurse to carry out medical actions under supervision.
- (6) The responsibility for medical action in the delegation of mandate authority as referred to in chapter (5) is at the time of delegation of authority.
- (7) In carrying out tasks based on the delegation of authority as referred to in chapter (1), the nurse is authorized:
 - a. To take medical action by its competence for delegating the delegated authority of medical personnel;
 - b. To take medical action under the supervision of delegation of mandate authority; and
 - c. To provide health services by Government programsh.

⁶ Attachment Regulations Health Minister Number 49, 2013 about Nursing Hospital Committee, page. 15.

⁷ *Ibid.*, page. 16.

The legal aspects of the delegation of doctor authority to nurses can be viewed from civil aspects because of work relations, so that losses arising from these relationships can be prosecuted and from the criminal aspect if the relationship causes death and or injury based on Article 359 jo 361 jo Article 55 chapter (1) KUHP (The Criminal Code).

Nurse rights are regulated in Article 36 of Law Number 38 of 2014 which is concerning Nursing, nurses in carrying out Nursing Practices have the right:

1. Obtaining legal protection as long as carrying out duties by service standards, professional standards, operational procedure standards, and provisions of the Legislation;
2. Obtaining correct, clear and honest information from Clients and/or their families;
3. Receiving compensation for services provided by Nursing Services;
4. Refusing the wishes of the Client or other parties that are contrary to the code of ethics, service standards, professional standards, standard operating procedures, or the provisions of Legislation; and
5. Obtaining work facilities according to standards.

The nurses obligation is regulated in Article 37 which is about nurses in carrying out Nursing Practices obliged:

1. Completing the facilities and infrastructure of Nursing Services by the standards of Nursing Services and the provisions of the Legislation;
2. Providing Nursing Services by the code of ethics, standards of Nursing Services, professional standards, standard operating procedures, and provisions of Legislation;

Referring Clients who cannot be handled by Nurses or other health personnel who are more appropriate by the scope and level of competence;

1. Documenting Nursing Care by standards;
2. Providing complete, honest, correct, clear, and easy to understand information regarding nursing actions to clients and/or their families by the limits of their authority;
3. To Carry out the devolution of authority from other health personnel by the competency of the Nurse; and
4. To Carry out special assignments determined by the Government.

From the article above, the provisions which is relating to nurses' accountability in health services are contained in Article 65 of Law Number 36 of 2014 concerning Health Workers and Article 29 to Article 35 of Law Number 38 of 2014 concerning Nursing. The legal liability of nurses can be viewed from the legal proceedings themselves.

If the legal liability of nurses reviewed based on State Administrative Law, the legal liability will be based on his/her issue of authority. If the legal responsibility is based on civil law, the related element is the presence or absence of an act against the law or default and if the source is in criminal law, the element is the presence or absence of an error which should not be carried out based on written or unwritten law.

Based on these conditions the author will describe it one by one. The nurse's responsibility will depend on his/her form of authority. In the violation of the authority of attribution which is the independent function of the nurse, then if there is an error in the nursing care, the nurse concerned will bear the burden of his responsibility. A Case in point if a nurse makes a mistake when bathing a baby patient which causes an invoice.

Meanwhile, if the interdependent function is violated, the nurse will shoulder the burden of responsibility together with the team leader and hospital who gave the assignment. A case in case of a nurse's mistake in calculating the amount of round cotton in the operating room after surgery which results in the loss of cotton in the patient's stomach not detected by the doctor. To delegate authority as a dependent function, the errors which occur are not directly the responsibility of the nurse.

It must be examined first whether the error was due to an unclear doctor's order or because the nurse did not heed the order properly. Because a delegation carried out by doctors to nurses has several requirements, as stated by Wintari Hariningsih in the Implementation of Nurse Performance at the Hospital as follows:

1. In the implementation based on the doctor's decision; this means the delegation must be definitive.
2. It can take certain medical actions if they have been trained; in this case, a trained nurse because he has undergone training by applicable legislation and not all nurses can be given this abundance of authority.
3. The delegation must be written with clear instructions for implementation and instructions for complications; *disi* (disc) applies how there is an obligation for a delegate (in this case the doctor) to provide clear information and the nurse has the right to ask.
4. There must be guidance and supervision in the implementation; here nurses and doctors become partners, not subordinates. The doctor guides and oversees the delegated actions.
5. The nurse has the right to refuse if he feels unable.⁸

Legal liability in the civil field will be based on acts against the law or default. But the two limits of violation of the law will still not be separated from the implementation of the nurse's function. The nurse's actions can be said to be against the law if the fulfillment of the elements contained in Article 1365 KUHAP (The Civil Code) which is the existence of real losses suffered as a direct result of these actions while accountability in the category of default if fulfilled the elements of default in Article 1234 KUHAP (The Civil Code).⁹

Nurses' accountability when viewed from the provisions in the Civil Code can be categorized into 4 (four) principles as follows:

1. The direct accountability based on Article 1365 BW and Article 1366 BW Based on the provisions of the article, a nurse who makes a mistake in running an independent function that results in a loss to the patient, he/she is obliged to assume his/her direct responsibility.
2. The accountability with the principle of *respondeat superior* or "lets the master" answer or specifically in the operating room with the principle of "the captain of a ship" through Article 1367 BW. In this case, accountability will arise if the error occurs in carrying out the interdependent function of the nurse. As part of the team and people who work under the doctor's/hospital's orders, the nurse will be jointly accountable for the harm that befalls the patient.¹⁰
3. The accountability under the principle of *zaakwarneming* based on Article 1354 BW. In this case, the concept of accountability occurs instantly for a nurse who is in a certain condition must carry out emergency assistance where no other person is competent for it. Legal protection in nurses' *zaakwarneming* actions as stated in Article 20 of the Minister of Health Regulation concerning Nurse Registration. Nurses will be asked for legal responsibility if they do not do what should be done in Article 20.
4. Accountability due to default lawsuit based on Article 1234 BW. In the default of nurse will be held accountable if the elements of default are met:
 - a. Not doing his obligations at all; in this context, if a nurse does not do all the tasks by their functions, both independent, interdependent and dependent functions.
 - b. Doing obligations but late; in this case if the duty according to the function is carried out late which results in a loss to the patient. A case in point is a nurse who does not routinely

⁸ Ta'adi, *Hukum Kesehatan Sanksi dan Motivasi Bagi Perawat*, Buku Kedokteran Jakarta: EGC, 2013, page. 71.

⁹ Arrie Budhiartie, "Pertanggungjawaban Hukum Perawat Dalam Penyelenggaraan Pelayanan Kesehatan di Rumah Sakit", *Jurnal Penelitian Universitas Jambi Seri Humaniora*, Volume 11, Nomor 2, page. 45-51.

¹⁰ Veronica Komalawati, *Peranan Informed Consent Dalam Transaksi Tereapeutik Persetujuan Dalam Hubungan Dokter dan Pasien; Suatu Tinjauan Yuridis*, Bandung: PT.Citra Aditya Bhakti, 2002, page. 22.

dispose of a patient's urine bag with a catheter every day. But it is 2 days to wait until full. This action resulted in the patient having a bacterial urinary tract infection transferred from urine which was not removed.

- c. Working on obligations but not as they should; a job that is done carelessly. For example, a nurse shrinks the flow of patient infusion at night just because he doesn't want to be interrupted by rest.
- d. Doing things that shouldn't be done. In this case, if a nurse does a medical action that does not get a delegation from a doctor, such as injecting a patient without an order, do an infusion even though he has not been trained. If the nurse is proven to fulfill the element of default, the responsibility will be borne directly by the nurse concerned.

Meanwhile, from the criminal legal responsibility aspect, a new nurse can be held accountable if there are elements as follows:¹¹

1. An illegal act. In this case, if the nurse carries out health services outside the authority stated in Article 15 of the Minister of Health.
2. Be able to be responsible. In this case, a nurse who understands the consequences and risks of each action and in terms of ability has received training and education for that. This means that a nurse realizes that his actions can harm the patient.
3. The existence of errors (schuld) in the form of intentional (dolus) or because of negligence (culpa). Errors here depend on intentions (intentionally) or just because of negligence. If the action is carried out because of intention and there is an element of deliberation, the nurse concerned can be charged as a criminal offender. For example, a nurse who consciously and intentionally gives a lethal injection to a patient who is already terminal (called active euthanasia).
4. There is no justification or forgiving reason. In this case, there are no forgiving reasons such as the absence of rules which allow him to take any action, or there is no justification for reasons such as the risks inherent in the actions taken. For instance, the risk of developing odor (swelling) after the needle has been removed or the presence of discomfort for patients who undergo a catheter.

In the administrative accountability, it has been regulated in Article 58 of Law Number 38 of 2014 concerning Nursing which stipulates that everyone violates the provisions of Article 18 chapter (1), Article 21, Article 24 chapter (1), and Article 27 chapter (1) subject to administrative sanctions in the form of:

1. Oral reprimand;
2. Written warning;
3. Administrative fines; and/or
4. Revocation of permission.

As the statement above, each nursing staff must have a high professional discipline in providing nursing and midwifery care and implementing professional ethics in practice. The professionalism of nursing staff can be improved by fostering and enforcing professional discipline and strengthening ethical values in professional life.¹²

The Ethical values are very necessary for nursing staff as a foundation in providing human-centered, patient services. The principle of "caring" is the core of the service provided by nursing staff. Violation of service standards, professional disciplines of nursing and midwifery almost always starts from violations of moral-ethical values that will ultimately harm patients and society.

The Several factors which influence violations or the emergence of ethical problems include the high workload of nursing staff, the obscurity of clinical privileges, facing critical-critical patients

¹¹ Setiawan, *Etika Kebidanan dan Hukum Kesehatan*, Jakarta: TIM, 2010, page. 51.

¹² Attachment Regulations Health Minister Number 49, 2013 about Nursing Hospital Committee, page. 20.

with low competence and services that have begun to be business-oriented. Ethical practice skills are only abilities learned at the time of study/education, not yet an important thing to learn and implement in practice.

Moreover, the enforcement of professional discipline and professional ethics development needs to be carried out in a planned, directed and highly motivated manner so that the nursing and midwifery services provided truly guarantee patients will be safe and get satisfaction.

E. CONCLUSION

The Legal liability of nurses for delegating clinical privileges to health services can be in the form of administrative, civil or criminal liability as well as the level of negligence or mistakes made by nurses. Therefore, to prevent errors in delegating clinical privileges, the enforcement of professional discipline and professional ethics development needs to be carried out in a planned, directed and highly motivated manner so that the nursing and midwifery services provided truly guarantee patients will be safe and get satisfaction.

REFERENCES

Books:

- Franz Magnis Suseno, *Etika Politik*, Jakarta: Gramedia Pustaka Utama, 2001.
- I Made Pasek Diantha, *Metodologi Penelitian Hukum Normatif Dalam Justifikasi Teori Hukum*, Jakarta: Prenada Media Group, 2016.
- Mokhamad Najih, *Politik Hukum Pidana*, Malang: Transpublishing, 2008.
- Munir Fuady, *Teori Negara Hukum Modern*, Jakarta: Refika Aditama, 2009.
- Setiawan, *Etika Kebidanan dan Hukum Kesehatan*, Jakarta: TIM, 2010.
- Ta'adi, *Hukum Kesehatan Sanksi dan Motivasi Bagi Perawat, Buku Kedokteran* Jakarta: EGC, 2013.
- Titik Triwulan Tutik, *Perlindungan Hukum Bagi Pasien*, Jakarta: Prestasi Pustaka, 2010.
- Veronica Komalawati, *Peranan Informed Consent Dalam Transaksi Terepeutik Persetujuan Dalam Hubungan Dokter dan Pasien; Suatu Tinjauan Yuridis*, Bandung: PT.Citra Aditya Bhakti, 2002.
- Wila Chandrawila, *Hukum Kedokteran*, Bandung: Mandar Maju, 2001.

Journal:

- Arrie Budhiartie, "Pertanggungjawaban Hukum Perawat Dalam Penyelenggaraan Pelayanan Kesehatan di Rumah Sakit", *Jurnal Penelitian Universitas Jambi Seri Humaniora*, Volume 11, Nomor 2.

Legislation:

- *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*
- *Kitab Undang-Undang Hukum Pidana*
- *Kitab Undang-undang Hukum Perdata*
- *Undang-Undang Nomor 29 Tahun 2004 Tentang Praktek Kedokteran, (Lembaran Negara Republik Indonesia Tahun 2004 Nomor 116, Tambahan Lembaran Negara Republik Indonesia Nomor 4431).*
- *Undang-Undang Nomor 38 Tahun 2014 Tentang Keperawatan (Lembaran Negara Republik Indonesia Tahun 2014 Nomor 307, Tambahan Lembaran Negara Republik Indonesia Nomor 5612).*

LAW ENFORCEMENT AND ENFORCEMENT OF HUMAN RIGHTS TO THE PROBLEM OF HUMAN RIGHTS VIOLATIONS IN THE LIFE OF THE COMMUNITY, NATION AND STATE

Hendrik Marthen Rumsayor

Student of Legal Studies Doctor Program, Universitas Borobudur
hendrikmarthen7rumsayor@gmail.com

Abstract

Enforcement of human rights is one measure or part of the responsibility of the state, especially the government as referred to in Article 8 of the Law of the Republic of Indonesia Number 39 of 1999 concerning Human Rights. Law enforcement and enforcement of human rights are the goals of all law enforcement officials with the obligation to uphold human rights, given the direct source of human rights is human dignity (noble position) and aims to form a life that is dignified to humans, which is part of the law. laws and policies of countries throughout the world, have been modified into international law and recognized by international courts, given that human rights are basic rights that naturally attach to every human being in people's lives, including not only individual rights, but also society, nation and state in full contained in the 1945 Constitution of the Republic of Indonesia and in accordance with the principles contained in the Universal Declaration of Human Rights, 1948 and other international conventions based on **“All human beings all born free and equal and dignity and rights. They are and the with weat reason and concience and should act toward one another a spirit of brotherhood)”**.

Keywords: Law enforcement, law enforcement officers, human rights enforcement, factors that influence law enforcement, challenges to uphold human rights, community life, nation and state, dignity, independence, equality, humanity and brotherhood.

A. INTRODUCTION

Dynamics in the life of society, nation and state based on Pancasila and the 1945 Constitution of the Republic of Indonesia as a Constitution. The coi on is all provisions and rules regarding the constitution or the Constitution of a country.

The 1945 Constitution of the Republic of Indonesia Article 1 paragraph (3) states: The State of Indonesia is a State of Law.

Law is a collection of regulations that must be obeyed by all people in a community with the threat of having to compensate or get a criminal offense, if it violates or ignores those regulations, so that an association can be achieved in an orderly and fair society.

The implementation of the life of the nation and state is inseparable from the constitution or the Constitution, wherein the implementation of community life, nation and state in Indonesia is based on the 1945 Constitution of the Republic of Indonesia, bearing in mind that the aforementioned Constitution is source, basis and foundation for the establishment of a lower or lower Law or Regulation.

The 1945 Constitution or State Constitution of the Republic of Indonesia as a basic law is:

1. Tools for realizing social justice, public welfare;
2. Tools for creating a democratic and independent society;
3. Tools for realizing society and government based on law;
4. Tools for protecting human rights.

If we look at the State Constitution of the Republic of Indonesia which contains the whole ideas, thoughts, souls and spirit of the text of the 1945 Constitution of the Republic of Indonesia, from opening, torso to its explanation and the development of our understanding of the fundamental things in life nation

and state, the understanding of the rule of law that we have turns out to contain broad and profound meaning that contains the principles of orderly and upholding the law and awareness to uphold the law.

These principles, when applied in earnest, cover not only the legality of state / government actions with the existence of a free court but also include respect and protection of human rights.

Therefore, every law enforcement and enforcement of human rights must be interpreted not only to realize legal certainty and justice and benefit, but also include the achievement of the objectives of human rights protection and the promotion, enforcement and fulfillment of human rights in the life and life of the people in the entire territory of the Unitary Republic of Indonesia based on the Pancasila and the Constitution of the Republic of Indonesia, which is the official constitution of the state.

B. RESEARCH METHODS

Research methods used in scope problem formulation is normative research methods (literatur study) it is conducted by library research by collecting, studying and analyzing some relevant secondary and tertiary legal Indonesia (decrees of constitutional, act / law, regulations, scientific books, newspaper, paper seminar result, related sources scientific, legislation, etc.).

C. PROBLEM FORMULATION

1. How is law enforcement in Indonesia?
2. What are the factors that influence law enforcement?
3. How to uphold human rights in Indonesia?
4. What are the challenges of upholding human rights?

D. DISCUSSION

1. Law enforcement in Indonesia

a. Definition of law enforcement

In English, the term enforcement is known as enforcement and is interpreted as the act of putting something such as a law into effect, the execution of law (Henry Cambell Black, M.A., 1979 : 474).

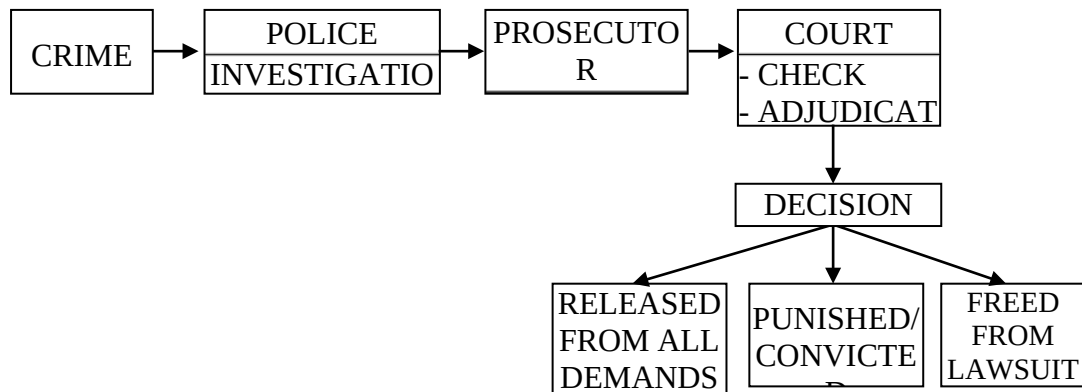
According to the former Attorney General of the Republic of Indonesia, Hari Suharto, S.H. in the paper presented in arranging the material of the Republic of Indonesia National Police Law on 10 to 11 December 1984 at the Jakarta Police Science College (STIK PTIK), stated that "Law enforcement is a series of activities in the framework of efforts to implement legal provisions that applicable both in the form of prosecution and prevention, covering all technical and administrative activities carried out by law enforcement officers, so as to create a safe, peaceful and orderly atmosphere in order to strengthen legal certainty in the community (R. Abdussalam, 1985: 21).\

b. The term law enforcement

In the Big Indonesian Dictionary, Enforcement is the one who establishes / enforces. Law enforcers are those who enforce the law (Anton M. Moelyono et. al., 1980 : 912). In a narrow sense it only means the police and prosecutors. In Indonesia this term is expanded, so that it includes judges and lawyers. (Mardjono Reksodiputro, 1994 : 91).

In english it is known as the law enforcement officer, meaning it is *those whose duty it is to preserve the peace* (Henry Cambell Black, M.A., 1979 : 797). So law enforcers are officers who carry out or carry out the law, namely the Police, Prosecutors, Judges, Lawyers including Correctional Institutions.

- c. The process of solving first-degree criminal cases in the Indonesian criminal justice system chart as follows :



- d. Criminal law is part of the entire law that applies in a country that holds the basics and rules for :

- Determine which actions may be carried out, which are prohibited accompanied by threats or sanctions in the form of certain crimes for those who violate them.
- Determine when and in what cases to those who have violated the prohibitions can be subject to or punished as threatened.
- Determine how the imposition of criminal acts can be carried out if someone is suspected of violating the prohibition (Muljatno, 1985 : 1).

2. Factors that influence law enforcement

Based on the above explanations, a tentative conclusion can be drawn, that the main problem of law enforcement actually lies in these factors which have a neutral meaning, so that the positive or negative impact lies in the contents of these factors, as follows:

- a. The legal factor itself, which in this paper will be limited to the act only;
- b. Factors in law enforcement, namely those who form or implement the law;
- c. Factors of facilities or facilities that support law enforcement;
- d. Community factors, namely the environment in which the law applies or applies;
- e. Cultural factors, namely as a result of the work of creativity and taste based on human intention in life (Sukanto, Surjono, 1993 : 5).

Whereas according to Malinowsky, there are 4 factors of effective law enforcement, namely:

- a. The law is good and right;
- b. Enforcement discipline;
- c. Facilities are adequate;
- d. High community legal awareness.

3. Enforcement of human rights in Indonesia

a. Definition of human rights

Until now there has not been a standard definition / definition of human rights. Nevertheless, there are various opinions expressed by legal experts and experts on human rights and international legal provisions as well as Indonesian legal provisions regarding human rights, as follows:

- 1) Definition of human rights according to experts :

- **John Locke** : Human rights are birthright rights, which are inherently inherent in every human being and cannot be contested.

- **Ralph Cranshaw** : Human rights are rights inherent in our existence as human beings. These rights enable us to develop ourselves and fulfill our needs as human beings. These rights also protect life, physical and psychological needs.
 - **Joel Feinberg** : Human rights are general moral rights concerning fundamentally important matters. These rights are owned by every human being equally, unconditionally and cannot be contested.
 - **Prof. Koentjoro Poerbo Pranoto** : Human rights are fundamental rights. That is, the rights that humans have according to their nature are inseparable from their nature, so they are sacred.
- 2) According the Universal Declaration of Human Rights, 1948, The United Nations (UN) is written: *"Everyone is entitled to all rights of freedom,.... without discrimination on any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"*.
 - 3) Based on the Law of the Republic of Indonesia No. 39 of 1999 concerning human rights is a set of rights attached to the nature and existence of human beings as creatures of God almighty and is a gift that must be respected, upheld and protected by the state, law, government and everyone for the honor and protection of dignity and human dignity.
 - 4) According to the International Committee of the Red Cross (Geneva, 1998): Human Rights (HAM) is a legal right that everyone has as a human being. This right can be violated, but it cannot be abolished.

b. The nature of human rights

The nature of human rights is a basic right possessed by humans because of their dignity as humans and not given by society or the state. Therefore, human rights cannot be eliminated or declared invalid by the state;

The views on the types of human rights are very diverse. This difference is influenced by the background or condition of the country of origin of philosophers and human rights experts as well as the times.

c. Human Rights Violations

According to the Law of the Republic of Indonesia No. 39 of 1999 concerning Human Rights Article 1 point 6 states: Human rights violations are every act of a person or group of people including state apparatus either intentionally or unintentionally or negligence which illegally reduces, obstructs or restricts and or revokes someone's human rights or a group of people guaranteed by this law and do not get or fear that they will not get a correct and fair legal settlement based on the applicable legal mechanism.

d. Basic Human Rights Principles

- Article 2 states: "The Republic of Indonesia recognizes and upholds human rights and basic human freedoms as rights that are inherently inherent in and inseparable from human beings that must be protected, respected and upheld for the sake of increasing human dignity, welfare, happiness and intelligence and justice".
- Article 8 states: "Protection, promotion, enforcement and fulfillment of human rights are primarily the responsibility of the government.

e. The formulation of Human Rights included in the Amendment of the 1945 Constitution of the Republic of Indonesia covers several aspects, namely :

- Human rights is related to life and life
- Human rights related to family
- Human rights relating to education, science and technology

- Human rights related to work
- Human rights relating to freedom of religion and belief in trust, freedom of attitude, opinion and association
- Human rights related to information and communication
- Human rights are related to security and protection from treatment that undermines human dignity
- Human rights related to social welfare
- Human rights related to equality and justice
- Human rights are obliged to respect the rights of people and other parties.

4. The process of upholding human rights in Indonesia

The National Action Plan for Human Rights (RANHAM) of 1998-2003 was launched by the President of the third Republic of Indonesia B.J. Habibie dated June 25, 1998. With this declaration, RANHAM is officially the basis of reference for all communities, nations and governments / countries in order to provide protection, promotion, enforcement and fulfillment of human rights.

Making RANHAM itself was planned several years before this action program was launched by President B.J. Habibie. At that time, in 1991 there had been a change in Indonesian diplomacy in the field of Human Rights (HAM). At that time, Indonesia began to pursue human rights policies that were more likely to be proactive in replacing defensive policies. This policy was then sustained by the establishment of a permanent Human Rights Committee consisting of officials from relevant departments, with the task of helping the government find a way to resolve human rights problems and in the face of international human rights allegations.

Proactive policies in the field of human rights are a follow-up to the Vienna Declaration. The 1993 Human Rights Action Program, inaugurated the establishment of the National Human Rights Commission (KOMNAS HAM R.I.) on 7 December 1993. The Vienna Declaration also inspired Indonesia to make plans for action in the field of human rights. To realize this, PANTAP HAM together with KOMNAS HAM began a program of making a national action plan at the beginning of 1994. Various workshops and seminars were held to get input for making this action plan.

There are 4 (four) pillars of RANHAM, namely the ratification of 8 important international human rights instruments in the field of human rights between 1998-2003; dissemination and education of human rights; the implementation of Human Rights (HAM) which are determined as priorities, especially human rights that cannot be reduced; and the implementation of the provisions of international human rights conventions that have been ratified by the Indonesian government / state. RANHAM, then stipulated by Presidential Decree No. 129 of 1998 and to implement it the RANHAM National Committee (PANNAS-HAM) was formed.

Ratification of international instruments in the field of human rights is a legal procedure that binds Indonesian law. The consequence of this ratification is that the government must implement the provisions of the instrument.

In addition, the government also needs to take steps such as the dissemination of human rights instruments, harmonize the law in Indonesia.

Dissemination and education of human rights in Indonesia is a process of forming values, attitudes and habits within students when interacting with the environment.

In order to strive to internalize the values of human rights in everyday life, dissemination and human rights education programs are delivered, among others, at the tertiary level and other education and training institutions, school pathways, out-of-school track education, pathway education family and mass media.

Thus, as one of the benchmarks in the life of society, nation and state, respect for human rights really requires a long process, considering human rights that are full of value.

The following are some of the following processes of enforcement of Human Rights (HAM):

a. Enforcement of human rights in Indonesia through ratification, namely the ratification of 8 (eight) international instruments in the field of human rights in the order of priority :

1) 1998/1999

- *Convention on economic social and cultural rights*
- *Convention against torture and other cruel, in human or degrading treatment of punishment*
- *International convention on the elimination of all forms of racial discrimination.*

2) 1999/2000

- *Convention on the prevention and punishment of the crime of genocide*
- *Slavery convention of 1926*

3) 2000/2001

- *Convention on the protection of the rights of all rights workers and members of their families.*

4) 2001/2002

- *Convention for the suppression of the traffic in persons and on the exploitation of the prostitution of others.*

5) 2002/2003

- *Convention on civil and political rights.*

b. Enforcement of Indonesian human rights through justice:

1) Position and authority of the human rights court

2) The stages of investigation, investigation, arrest and detention under the Law of the Republic of Indonesia No. 26 of 2000 concerning the Human Rights Court.

c. Examination in court

1) Inspection program

2) Prosecution

3) Criminal provisions

d. Protection of victims of human rights violations

Victims and witnesses in gross violations of human rights must obtain physical and mental protection from threats, harassment, terror, and violence from any party. This protection must be carried out by law enforcement officials and local security forces for free.

If the victims and witnesses do not provide protection by law enforcement officers and the local security apparatus, it is feared that victims and witnesses will be mentally and mentally threatened, because they are always haunted by the events they have experienced. For victims of severe human rights violations or to their heirs compensation, restitution and rehabilitation can be given.

Compensation is a reward given by the state, because the perpetrator is unable to provide compensation which is entirely his responsibility.

Restitution is compensation provided to victims or their families by perpetrators or third parties. Restitution can be in the form of:

- a. Return of property;
- b. Payment of compensation;
- c. Reimbursement of costs for certain actions.

What is meant by rehabilitation is recovery in its original position, such as honor, good name, position or other rights.

If the enforcement of human rights by the government is the main responsibility, the enforcement of human rights according to the author is divided into 2 (two) parts, is :

First : Enforcement of human rights against human rights violations in general, which includes the rights of Indonesian citizens as follows :

- Right to live;
- Right of family and continuing descent;
- Right to develop themselves;
- Right to obtain justice;
- Right to personal freedom;
- Right to security;
- Right to welfare;
- Rights to participate in government;
- Rights for women;
- Rights for children.

Second : Enforcement of human rights against several examples of police actions (police actions) as law enforcement officers who violate human rights, namely in the form of :

- Arrest and detention that is not in accordance with the law;
- Torture, inhuman treatment and degrading human dignity;
- Corruption and accepting bribes;
- Protect crime;
- Take inhumane actions against people who are arrested and detained;
- Conduct body punishment;
- Treating inhumane pioneers who report human rights violations;
- Unauthorized search and seizure procedures;
- Use of excessive force;
- Eliminate the lives of other people without going through a legal process;
- Execution of 3 (three) people or more out of law, arbitrary or not through the proper process (mass murder);
- Death caused by the use of excessive force;
- Murder;
- Mutilation;
- Insult to one's dignity;
- Acts of hostage taking;
- Mass punishment;
- Death penalty without proper judicial process;
- Cruel and degrading treatment;
- Covering crime and corruption.

5. The challenge of upholding human rights in Indonesia

In efforts to uphold human rights there are many obstacles, including:

- 1) The level of people's courage is still low. Communities are often still indifferent when human rights violations occur, for fear of reporting. Therefore enforcement of human rights is difficult to do.
- 2) The lack of firmness of law enforcement agencies in giving verdicts against human rights violators.
- 3) Lack of public knowledge about human rights violations in the form and form.

6. The existence of the Law of the Republic of Indonesia No. 39 of 1999 concerning Human Rights

Before talking further about this law, we need to know in advance what are the underlying and underlying issues of the Republic of Indonesia Law Number 39 of 1999 concerning Human Rights for the people, nation and Unitary State of the Republic of Indonesia (NKRI).

In the opinion of the author, the main thing of course is the background of human rights goals which read: "The aim of the implementation of human rights is to defend the rights of citizens from arbitrary actions by state officials, and encourage the growth and development of multi-dimensional human persons, as well as the main values of human rights that are inherent in every human being in the life of society, namely: Freedom, equality, humanity, justice and brotherhood that must receive protection, protection and service from the state / government, as mandated in the Constitution of the Republic of Indonesia Year 1945 as the Constitution of the Republic of Indonesia.

For more details, the Constitution of Republic of Indonesia in 1945 Article 28 paragraph (4) states: "Protection, promotion, enforcement and fulfillment of human rights are the responsibility of the state, especially the government". Paragraph (5) states: "To uphold and protect human rights in accordance with the principles of a democratic legal state, the implementation of human rights is guaranteed, regulated and set forth in legislation".

7. Content material

Overall, that Law of the Republic of Indonesia No. 39 of 1999 concerning Human Rights, consisting of XI CHAPTER, 106 Articles and 7 Points:

- 1) CHAPTER I: GENERAL PROVISIONS
- 2) CHAPTER II : BASIC ASAS
- 3) CHAPTER III : HUMAN RIGHTS AND FUNDAMENTAL FREEDOM
- 4) CHAPTER IV : HUMAN BASIC OBLIGATIONS
- 5) CHAPTER V : OBLIGATIONS AND RESPONSIBILITIES OF THE GOVERNMENT
- 6) CHAPTER VI : LIMITATIONS AND PROHIBITIONS
- 7) CHAPTER VII : COMMISSION OF NATIONAL HUMAN RIGHTS
- 8) CHAPTER VIII : COMMUNITY PARTICIPATION
- 9) CHAPTER IX : HUMAN RIGHTS COURT
- 10) CHAPTER X : TRANSITIONAL PROVISIONS
- 11) CHAPTER XI : CLOSING PROVISIONS.

8. Criminal Acts in the Law on Human Rights are regulated in particular in Chapter IX concerning the Human Rights Court specifically implemented in the Law of the Republic of Indonesia No. 26 of 2000 concerning the Human Rights Court in Article 7 states: "Severe Human Rights Violations include :

- a. Genocida crime
- b. Crime againts of humanity

E. CONCLUSION

Such is the author's brief description of law enforcement and enforcement of human rights on the issue of human rights violations in the life of the community, nation and state that have been regulated in the provisions of Indonesian law concerning human rights, in relation to human rights in the Indonesian criminal justice process based on Pancasila, the basis of the philosophy of the Unitary State of the

Republic of Indonesia contained in the 1945 Constitution of the Republic of Indonesia as referred to in the Act R.I. No. 12 of 2011 concerning the Establishment of legislation, so that an association can be achieved in a society that is peaceful, orderly and fair.

REFERENCES

A. Books

- H.R. Abdussalam, Law Enforcement in the field by the National Police, Jakarta, Police Law Office, 1997
- H.R. Abdussalam, Human Rights in the Judicial Process, Jakarta, Publisher : PTIK, 2010
- R. Soesilo, Principles of Criminal Law General Regulations and Special Delictions, Bandung, Printing by PT. Karya Nusantara, 1984
- Moeljatno, Criminal Law Principles, Jakarta, Publisher: Bumi Aksara, 1985
- Ruslan Renggong, Special Crime Law for Understanding Deliquette outside the Criminal Code, Jakarta, Publisher: Prenadamedia Group, 2016
- Moh. Hatta, Criminal Law and Economic Activities, Yogyakarta: Calpulis, 2016
- Elsi Kartikasari and Advendi Simangunsong, Law in Economics, Jakarta: Printing by PT. Gramedia, 2008
- Masyhur Effendi, Dimensions of the Dynamics of Human Rights in National and International Law, Jakarta: Ghalia Indonesia, 1993
- Saafroedin Bahar, Human Rights Analysis of KOMNAS HAM and ranks of HANKAM / ABRI, Jakarta: Pustaka Sinar Harapan, 1996
- Hestu Cipto Handoyo, Constitutional Law, Citizenship and Human Rights, Yogyakarta: Universitas Adma Jaya Yogyakarta, 2003.
- Lemdiklat POLRI, Handbook on Human Rights for POLRI Members, Jakarta: May 2006.

B. Legislations

- Principal instruments of Human Rights for Law Enforcement Apparatus, collaboration of UNHCR, Ministry of Justice and Human Rights and National Police in the field of Policing Skills Training, Human Rights and Refugee Law.
- Law of the Republic of Indonesia Number 39 of 1999 concerning Human Rights, State Gazette of the Republic of Indonesia Number 165, Supplement to the State Gazette of the Republic of Indonesia of 1999 Number 3886.
- Law of the Republic of Indonesia Number 12 of 2011 concerning Establishment of Legislation, State Gazette of the Republic of Indonesia Number 82 of 2011, Supplement to the State Gazette of the Republic of Indonesia Number 5234.
- Law of the Republic of Indonesia Number 26 of 2000 concerning Human Rights Court, State Gazette of the Republic of Indonesia of 2000 Number 2018, Supplement to the State Gazette of the Republic of Indonesia Number 4026.
- Law of the Republic of Indonesia Number 40 of 2008 concerning Elimination of RAS and ETHNIS Discrimination, State Gazette of the Republic of Indonesia of 2008 Number 406, Supplement to the State Gazette of the Republic of Indonesia Number 4919.
- Government Regulation of the Republic of Indonesia Number 56 of 2010 concerning Procedures for supervision of efforts to eliminate discrimination in RAS and ETNIS, State Gazette of the Republic of Indonesia Year 2012 Number 6, Supplement to the State Gazette of the Republic of Indonesia Number 4171.

C. Dissertation, Thesis, Thesis, Papers, Journals, Dissertation Making Guidelines, Thesis, Thesis, Magazines and Newspapers

- Guidebook for Writing Dissertation Doctoral Program in Law Science Year of Lecture 2010-2012 up to. 2013-2014, which was published by the Postgraduate Program in the Doctoral Program in Law, Borobudur University, Jakarta, 2011.

RESOLUTION OF THE BOGOR CITY REGULATION DISPUTE THROUGH A NON-LITIGATION MECHANISM AND ITS IMPACT ON REGIONAL AUTONOMY

Hery Chariansyah

Student of Legal Studies Doctor Program, Universitas Borobudur
herychariansyah@gmail.com

Abstract

As an addictive product, cigarettes contain around 7000 chemicals, 70 of which are carcinogenic, which can lead to various diseases including cancer, heart disease, impotence, blood disease, emphysema, chronic bronchitis, and pregnancy disorders therefore it is undeniable that cigarettes as an addictive product threaten health rights which are human rights that must be fulfilled. Fulfillment of the right to health is the responsibility of the state, especially the government, including the regional government so that everyone can enjoy the highest degree of health. That the prohibition of outdoor cigarette advertising and the prohibition of displaying cigarette products in the Bogor City region carried out by the Bogor City Government is a further authority of the Bogor City Government to regulate outdoor advertising and cigarette displays in Bogor City in accordance with the interests and needs of Regional Development based on Article 34 PP 109 of 2009 concerning Materials Containing Addictive Substances in the Form of Tobacco Products and also in accordance with the principles of regional autonomy and regional authority. On the basis of Constitution and for the sake of justice and legal certainty, cancellations or changes to Bogor city policies that prohibit outdoor cigarette advertisements and the prohibition of displays in places of sale must be carried out as the regulation is made through the Regional Representative Council with Regency / City Government or through the judicial institution. Dispute Settlement Norms requested by GAPRINDO and APRINDO through the Non-litigation Path carried out by the Ministry of Law and Human Rights whose results essentially request cancellation of the regulation on the Ban on Cigarette Display as stipulated in Article 16 of Bogor City Regional Regulation Number 12 of 2009 concerning Non-Smoking Areas and prohibition of outdoor advertising in the city of Bogor as stipulated in Article 2 of the Bogor Mayor's Regulation Number 3 of 2014 concerning the Prohibition of the Implementation of Cigarette Billboards in Bogor City, it is against the Constitution and the spirit of regional autonomy.

Keywords: Local Regulation Dispute, Non-Litigation Mechanism, Regional Outonomy

A. INTRODUCTION

The Constitution of the Republic of Indonesia Number 12 of 2011 concerning the Establishment of Legislation Regulations in Article 7 stipulates that the types and hierarchies of Legislation Regulations in Indonesia consist of: a. The 1945 Constitution of the Republic of Indonesia; b. Decree of the People's Consultative Assembly; c. Government Substitution Constitution / Regulations; d. Government regulations; e. Presidential decree; f. Provincial Regulation; and g. Regency / City Regulation. Where the legal force of the Legislation is in accordance with its hierarchy.

In the case of the establishment of a Regency / City Regional Regulation, as stipulated in Constitution Number 12 of 2011 in Articles 55 through Article 63 that the establishment of a Regency / City Regional Regulation through several stages including proposals that can be made by the Regent / Mayor or Council District / City Regional Representatives, making academic studies and/or manuscripts,

discussing between the Regional Government and the Regency / City District Representatives, and Attestation.

In 2009 Bogor City Government passed the Bogor City Regional Regulation Number 12 of 2009 concerning Non-Smoking Areas and then proceeded to issue Bogor Mayor Regulation Number 3 of 2014 concerning the Prohibition of the Implementation of Cigarette Billboards in Bogor City.

And in August 2018, the Association of Indonesian White Cigarette Producers (GAPRINDO) and the Indonesian Retail Entrepreneurs Association (APRINDO) filed an objection to the Bogor City Regional Regulation Number 12 of 2009 concerning Non-Smoking Areas and then proceeded to issue Bogor Mayor Regulation Number 3 of 2014 concerning Prohibition The implementation of Cigarette Advertisements in Bogor City, which are considered to be contrary to the higher Constitutions and regulations, one of which and / or referred to is Government Regulation Number 109 of 2012 concerning Safeguards of Materials that Contain Addictive Substances in the Form of Tobacco Products for Health, as derivative Constitution Number 36 of 2009 concerning Health. To the Ministry of Law and Human Rights.

The objection to the regional legal product to the Ministry of Law and Human Rights of the Republic of Indonesia uses the mechanism of dispute resolution legislation through non-litigation channels as regulated in the Ministry of Law and Human Rights Regulation No. 32 of 2017 concerning Dispute Settlement of Legislation Through the Non-Litigation Path.

Based on Invitation Letter Number PPE.7.PP.06.03-167 on September 6th 2018 issued by the Ministry of Law and Human Rights of the Republic of Indonesia with regard to Invitation to Provide Information to Parties in the Petitioner's case to settle the Dispute Norm on Legislation through the Non-Pathway Litigation at the Ministry of Law and Human Rights (KEMENKUMHAM) of the Republic of Indonesia submitted by the Association of Indonesian White Cigarette Producers (GAPRINDO) and the Indonesian Retail Entrepreneurs Association (APRINDO), held a meeting facilitated by the Ministry of Law and Human Rights of the Republic of Indonesia and produce an agreement in principle that the Bogor City Government must abolish and/or change the regulations concerning the prohibition of outdoor cigarette advertisements and the prohibition of cigarette product displays at the point of sale.

As a new channel and/or mechanism in the process of correction and/or change of legislation, the use of mechanisms for resolving disputes over legislation through non-litigation channels against the Bogor City Regional Regulation and the Bogor Mayor Regulation needs to be seen the impact or legal implications of development regional autonomy and legal reform. Because regional regulations are part of the development of Constitution in regions that are adjusted to regional interests and are part of the principle of implementing regional autonomy.

B. RESEARCH METHOD

This research was conducted using a normative juridical. Library data is used as the main data, such as primary legal material in the form of norms or basic rules and regulations. In addition, it also uses secondary legal materials such as the results of research and the opinions of academics and legal experts.

C. PROBLEM FORMULATION

As the concerned from the description on the Background above there are several things that can be used as problems that need to be discussed, are:

1. How is the subject matter that has become a dispute over legislation through non-litigation channels?
2. How is the authority of the Bogor City government in the regulation that is the object of dispute or the object of the dispute requesting legislation through non-litigation channels?

3. How is the impact of the dispute resolution of legislation through non-litigation channels against the Bogor City Regional Regulation and the Bogor Mayor's Regulation on the principles and implementation of regional autonomy?

D. DISCUSSION

1. The Principal Case That Becomes the Object of Disputing of Legislation Regulations Submitted Through the Non-Litigation Path

Based on the objection Constitutions and regulations proposed by the Association of Indonesian White Cigarette Producers (GAPRINDO) and the Indonesian Retail Employers Association (APRINDO), the Ministry of Law and Human Rights (KEMENKUMHAM) of the Republic of Indonesia sent Invitation Letter Number PPE.7.PP.06.03- 167 dated on September 6th 2018 to the Bogor City Government and the Party filing the objection. From the invitation, it is known that the object of objection to the Association of Indonesian White Cigarette Producers (GAPRINDO) and the Indonesian Retail Entrepreneurs Association (APRINDO) is about the regulation of prohibiting cigarette advertisements outside the space and prohibiting the Display of Cigarette Products at the Selling Place as regulated in:

1. Article 16 of Bogor City Regional Regulation Number 12 of 2009 Concerning Non-Smoking Areas which reads:
"People and/or institutions and/or agencies that sell cigarettes in the Non-Smoking Area are prohibited from clearly showing the types and products of cigarettes but can be indicated by the writing" cigarette is available here ".
2. Article 2 of the Bogor Mayor Regulation Number 3 of 2014 concerning Prohibition of the Implementation of Cigarette Billboards in the City of Bogor which reads:
 - (1) The Regional Government sets a ban on cigarette advertisements.
 - (2) The prohibition on cigarette advertisements as referred to in section (1) is a prohibition on cigarette advertisements in all regions
 - (3) The prohibition on cigarette advertisements as referred to in section (1) includes:
 - a. board/billboard, Videotron, Megatron, and the like;
 - b. fabric cloth;
 - c. attached film or sticker;
 - d. leaflets;
 - e. playground including on the vehicle;
 - f. airplay;
 - g. floating game;
 - h. sound recording;
 - i. film/slide show;
 - j. play show.
 - (4) Excluding prohibited advertisements as referred to in section (1) are:
 - a. holding advertisement through the internet, television, radio, daily news, weekly news, monthly news, and the like;
 - b. label/product brand that is attached to the traded goods which function to distinguish from other similar products.
 - (5) OPD which has the authority to issue an Advertising License (IPR) is prohibited from issuing cigarette IPR.

By the Association of Indonesian White Cigarette Producers (GAPRINDO) and the Indonesian Retail Entrepreneurs Association (APRINDO), the regulation of prohibiting cigarette advertisements outside the space and prohibition of Display of Cigarette Products at the Selling Place conducted by

the Bogor City Government is deemed to have no legal basis because it is not regulated and mandated by Regulation Government Number 109 of 2012 concerning Safeguards of Materials Containing Addictive Substances in the Form of Tobacco Products for Health, as a derivative of Constitution Number 36 of 2009 concerning Health. So that it is considered contrary to the higher legislation.

2. The Urgency of Prohibiting Outdoor Cigarette Advertising and Prohibition and Display of Cigarette Products at the Selling Place

The worst result of cigarette consumption is death. Cigarettes are products that are addictive as stipulated in Constitution No. 36 of 2009 concerning Health in Article 113 section (2) which states that:

"Addictive substances as referred to in section (1) include tobacco, products containing tobacco, solids, liquids, and gases which are addictive which use can cause harm to himself and/or the surrounding community."

Legal certainty about cigarettes as an addictive product is also found in the Decision of the Constitutional Court in case Number 19 / PUU-VIII / 2010, in the opinion section of the Court (3.15.10) which states:

"Even if the phrase" addictive substances "in Article 113 of the Act is removed, this will not change the fact that tobacco actually contains addictive substances.

As an addictive product, cigarettes contain around 7000 chemicals, 70 of which are carcinogenic. ¹hat can cause various diseases including cancer, heart disease, impotence, blood disease, emphysema, chronic bronchitis, and pregnancy disorders.² Smoking is also the leading cause of death for 7 of the 8 biggest causes of death in the world.³ Global data says that smoking is the leading cause of death for 7 of the 8 biggest causes of death in the world ⁴ And ironically, more than 80% of cigarette-related deaths occur in developing countries. (MPOWER, "Tobacco Consumption Control Efforts", page 1).

As a product that can cause illness and death for its use, the cigarette industry requires a marketing strategy that can make people (consumers) interested in starting to use it. Theoretically and empirically, advertising and promotion of cigarettes is a marketing strategy for the Cigarette Industry to introduce and market cigarette products aimed at adding consumers, is a novice smoker. Massive cigarette advertisements display cigarette advertising and promotion materials that associate smoking with cool, slender, confident, loyal friends, and so on. This is part of a systematic series of cigarette industry marketing strategies that aim to entice children to become beginner smokers. Because according to Dr. Widyastuti Soerojo, advertising and promotion of cigarettes are indeed directed to attract young people, namely children and adolescents not parents or grandparents.⁵

PT. HM. In its annual report, Sampoerna acknowledged that "The Tobacco Industry in Indonesia has almost absolute freedom to advertise their products in any form and through almost all lines of communication."⁶ Even the cigarette box is an advertising medium for the cigarette industry. Thus the prohibition of cigarette display is in line and one breath in an effort to ban cigarette advertisements.

1
2
3
4
5
6

Article 59 of Constitution Number 23 of 2022 concerning Child Protection, expressly states that the Government and other state institutions are obliged and responsible to provide special protection including among children who are victims of abuse of narcotics, alcohol, psychotropic and other addictive substances (drugs).

Based on the development of the Child Protection Constitution, special protection measures for children must be carried out quickly by the Government and other State Institutions. Therefore, children who are victims of abuse of addictive substances must be given special protection which also applies to smoke as an addictive product. So that the Government and other State Institutions must make a quick and effective effort, including through efforts to prevent children from becoming victims of smoking as an addictive product.

According to the Health Constitution, health is a prosperous condition of the body, soul, and social which enables everyone to be economically productive ⁷ Therefore health is the basis of recognizing humanity. Without health, a person becomes not equal to conditionally. and without health one cannot fully enjoy life as a human being.⁸

Article 28 I section (4) of the 1945 Constitution states that:

"The protection, promotion, enforcement, and fulfillment of human rights are the responsibility of the state, especially the government."

This government obligation is also confirmed in Article 8 of Act Number 39 of 1999 concerning Human Rights which reads:

"The protection, promotion, enforcement, and fulfillment of human rights are primarily the responsibility of the Government."

The same thing is also stated in Article 19 of Constitution Number 36 of 2009 concerning Health which explicitly states:

"The government is responsible for the availability of all forms of quality, safe, efficient and affordable health efforts."

Thus, the right to health is a human right that must be fulfilled. Fulfillment of the right to health is the responsibility of the state, especially the government, including the regional government so that everyone in Indonesia can enjoy the highest degree of health.

The Authority of Bogor City Government in Regulating the Ban on Outdoor Cigarette Advertising and Prohibition and Display of Cigarette Products at Sales Sites which Become the Object of Disputes in Legislation through Non-Litigation Pathways.

Government Regulation Number 109 of 2012 concerning Safeguards of Materials Containing Addictive Substances in the Form of Tobacco Products for Health in Article 34 stipulates that:

"Further provisions regarding the Admission of Tobacco Products in outdoor media are regulated by the Regional Government".

This arrangement provides legal authority to the Regional Government to further regulate the implementation of cigarette advertisements in their respective regions.

The prohibition of cigarette advertising and the prohibition of displaying cigarette products in the Bogor City area is a further arrangement carried out by the City of Bogor in accordance with the interests of its regional development.

In addition, Constitution Number 32 of 2004 concerning Regional Government in Article 1 number (5) and number (6) also stipulates that:

7

8

- (1) Regional autonomy is the right, authority and obligation of the autonomous region to regulate and manage government affairs and the interests of the local community in accordance with the Constitutions and regulations.
- (2) An autonomous region hereinafter referred to as a region, is a legal community unit that has regional boundaries which are authorized to regulate and manage government affairs and the interests of the local community according to their own initiatives based on the aspirations of the people in the Unitary State of the Republic of Indonesia.

Based on the rules above, it is known that the prohibition of outdoor cigarette advertising and the prohibition of displaying cigarette products in the Bogor City region carried out by the Bogor City Government is a further authority of the Bogor City Government to regulate outdoor advertising and cigarette displays in Bogor City in accordance with their interests and Regional Development needs based on the mandate of Article 34 PP 109 of 2009 concerning Materials Containing Addictive Substances in the Form of Tobacco Products and also in accordance with the principles of regional autonomy and regional authority.

Thus, this can be referred to as Strengthening Norms carried out by the Bogor City government in accordance with the interests and needs of Regional Development and also as a step to strengthen the implementation and / or achievement of regulatory objectives in Government Regulation Number 109 of 2012 concerning Safeguards of Materials that Contain Addictive Substances Tobacco Products for Health, as stated in Article 2 section (2) letter b of the Government Regulation, which reads:

"Protect productive age population, children, adolescents, and pregnant women from environmental encouragement and the influence of advertising and promotion for the initiation of use and dependence on ingredients containing addictive substances in the form of tobacco products".

Impacts of Dispute Settlement on Legislation through Non-Litigation Paths to Bogor City Regional Regulations and Bogor Mayor Regulations Against Principles and Implementation of Regional Autonomy.

Bogor City Regional Regulation Number 12 of 2009 Concerning Non-Smoking Areas and Bogor Mayor Regulation Number 3 of 2014 concerning Prohibition on the Implementation of Cigarette Billboards in Bogor City is an initiative and aspiration of the Bogor City Government because the formation of the regulation has gone through the stages of discussion between the Bogor City Government, Bogor City the Regional Representative Council (DPRD) and Bogor City Community.

Regarding the mechanism for formal and material discussion and correction of regional regulations regulated in Constitution 32 of 2004 concerning Regional Government in Article 145 which basically reads: "Regional Regulations are submitted to the Government no later than 7 (seven) days after they are stipulated. And if the Regional Regulation is deemed by the Government to be in conflict with the public interest and/or higher legislation can be canceled by the Government. And the decision to cancel the Regional Regulation is stipulated by a Presidential Regulation no later than 60 (sixty) days after the said Regional Regulation was received. If the province/regency/ city cannot accept the decision to cancel the Government Regulations with reasons that can be justified by legislation, the regional head can file an objection to the Supreme Court. "This article expressly states that the Regional Regulations that have been ratified and enforced have passed the revision process by the Government Center.

Constitution Number 14 of 1970 on the Principles of the Judicial Mistranslation Article 26 section (1) stipulates that: "The Supreme Court is authorized to declare invalid all Constitutions and regulations from a lower level than the grounds of Constitution contrary to the rules higher Constitutions ". Although Constitution Number 14 of 1970 on the Principles of Judicial Mankind

has been amended to Act Number 48 of 2009 on Judicial Power, the Supreme Court's powers in conducting the Examining of Legislation under the Constitution remain and are still the same as its original regulation.

On the basis of the Constitution and for the sake of justice and legal certainty, the cancellation or amendment must be made as the regulation is made through the discussion between the Regional Representative Council and the District / City Government or through the judiciary.

Accordingly, the Settlement of Norms Dispute filed by GAPRINDO and APRINDO through Nonlitigation Line conducted by the Ministry of Law and Human Rights. whose result essentially requested the cancellation of the arrangement of the Display of the Smoking Display as set forth in Article 16 of the Regulation of the City of Bogor Number 12 of 2009 on Non-Smoking Area and prohibited advertisement outside of the space in the city of Bogor as regulated in Article 2 of Regulation of Mayor of Bogor Number 3 of 2014 About Prohibition of Implementing Cigarette Advertising in Bogor City is contrary to Constitution and spirit of development of regional autonomy.

Therefore, the cancellation attempt through the Non-Aligned Path has to be interpreted as a form of repressive oversight by the Central Government to the Regional Government which will inevitably lead to a wider implication on the development, development, and implementation of regional autonomy. Among them can cause the Local Government to almost have the opportunity to create new creativity and breakthroughs in development policies tailored to real conditions, characteristics, and local specifics. So there is no opportunity or opportunity for the people to make arrangements for their own home affairs, through their initiatives and aspirations, and the tendency is not given independence in organizing and building their region.⁹Which ultimately can obscure the meaning and purpose of regional autonomy itself.

E. CONCLUSION

Based on the data and descriptions above, it can be concluded that health rights are human rights that must be fulfilled. Fulfillment of the right to health is the responsibility of the state, especially the government so that everyone in Indonesia can enjoy the highest degree of health.

The prohibition of cigarette advertising and the prohibition of displaying cigarette products in the Bogor City area is a further arrangement carried out by the City of Bogor in accordance with the interests of its regional development. Thus, this is Strengthening Norms carried out by the Bogor City government in accordance with the interests and needs of regional development and also as a step to strengthen the implementation and / or achievement of regulatory objectives in PP 109 of 2009 concerning Materials Containing Addictive Substances in the Form of Tobacco Products, as listed in Article 2 section (2) letter b of the Aquino Government Regulation, and in accordance with the spirit of regional autonomy and regional authority as referred to in Article 1 number (5) and number (6) of Constitution Number 32 of 2004 concerning Regional Government.

Whereas the Settlement of the Norms Dispute requested by GAPRINDO and APRINDO through the Non-litigation Path carried out by the Ministry of Law and Human Rights. whose results principally require the cancellation of the regulation on the Prohibition of Cigarette Display as stipulated in Article 16 of Bogor City Regional Regulation Number 12 of 2009 concerning Non-Smoking Areas and the prohibition of outside advertising space in the Bogor City area as stipulated in Article 2 of the Bogor Mayor Regulation Number 3 of 2014 concerning Prohibition of the Implementation of Cigarette

⁹ [Lukman Fadlun, Cancellation of Local Regulations And Its Implications Against Initiatives And Community Aspirations, Program Dissertation Doctor of Law Science Faculty of Law Universitas Brawijaya, (Malang: 2012), p. 442-443.

Billboards in Bogor City is contrary to the Constitution and also contrary to the mechanism of reviewing Constitutions and Regulations regulated by the Constitution.

REFERENCES

- Lukman Fadlun, Pembatalan Peraturan Daerah Dan Implikasinya Terhadap Prakarsa Dan Aspirasi Masyarakat, disertasi Program Doktor Ilmu Hukum Fakultas Hukum Universitas, Brawijaya, Malang: 2012
- TCSC-IAKMI, Fakta Tembakau: Permasalahannya di Indonesia Tahun 2009, Jakarta, TCSC-IAKMI, 2010
- U.S. Department of Health and Human Services, How Tobacco Smoke Causes Disease: The Biology and Behavioral Basis for Smoking-Attributable Disease: A Report of the Surgeon General, Atlanta, GA: U.S., 2010
- WIdyastuti Soerojo, Pemerintah Tutup Mata Pada Anak Korban Rokok, Majalah GATRA, Edisi 4 Juni 2008
- World Health Organization, Report on The Global Tobacco Epidemic, "M-Power Package", Brazil, 2008
- <http://referensi.elsam.or.id/2015/04/kesehatan-sebagai-hak-asasi-manusia/>
- Ridwan HR, Hukum Administrasi Negara, Jakarta, Raja Grafindo Persada, 2006
- World Health Organization (WHO), Framework Convention on Tobacco Control, Geneva, 2003, Available from: http://www.who.int/fctc/text_download/en/
- Undang-Undang Dasar Negara Republik Indonesia Tahun 1945
- Undang-Undang Republik Indonesia Nomor 35 Tahun 2014 tentang Perubahan Atas Undang-Undang Nomor 23 Tahun 2002 tentang Perlindungan Anak
- Undang-Undang Republik Indonesia Nomor 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-Undangan
- Undang-Undang Republik Indonesia Nomor 36 Tahun 2009 tentang Kesehatan
- Undang-undang Nomor 48 Tahun 2009 tentang Kekuasaan Kehakiman
- Undang-Undang Republik Indonesia Nomor 32 Tahun 2004 tentang Pemerintah Daerah
- Undang-Undang Republik Indonesia Nomor 39 Tahun 1999 tentang Hak Asasi Manusia
- Peraturan Pemerintah Republik Indonesia Nomor 109 Tahun 2012 tentang Pengamanan Bahan Yang Mengandung Zat Adiktif Berupa Produk Tembakau Bagi Kesehatan

LEGAL PROTECTION FOR DIGITAL APPLICATION USERS BASED ON THE LAW OF THE REPUBLIC OF INDONESIA NUMBER 19 YEAR 2016 AND THE LAW OF THE REPUBLIC OF INDONESIA NUMBER 8 YEAR 1999

I Putu Gde Sosiantara

Student of Legal Studies Doctor Program, Universitas Borobudur
sosiantara99@yahoo.com

Abstract

As the development of technology of information, computer and telecommunication are increasingly advanced, especially with the presence of internet technology, it changes the people's perspective and ways of working in all fields includes in the way of services transaction by on line which is trending in the society because it is considered to be easier and more practical. However, along with the convenience offered, this on line service transaction often utilized by individuals who seek for profit in a not good way which often caused fraud occur when the on line transaction is carried on. This fraud often damage the consumer and on line service application provider. Therefore, in line with the various convenience obtained from on line transactions, legal protection has become an important foothold for the digital application producer and user to avoid all form of crime. The legal protection for the user of digital application should start from when user download the application on the internet until they receive the goods or services desired appropriate with the advertisement made by the digital application producers. Numbers of crime actions occur against the producer and user of digital application make the government as the regulator must prepare a legal protection which can protect the digital application producer and user from crime. Government regulation of Republic Indonesia which is currently available and used to protect the producer and user of digital content application among others Law of the Republic Indonesia Number 19 of 2016 concerning amendements to the Law of the Republic Indonesia Number 11 of 2018 concerning Information and Electronic Transaction, Law of the Republic of Indonesia Number 8 of 1999 concerning Consumer Protection are not adequate in encountering the development of Information, Computer and Telecommunication technology which has developed rapidly. This journal has 2 (two) formulations of problem. First; How the law accomodates the users of service digital application, especially in terms of the infectious disease transmission in which the users are infected by the disease when they are using the service of digital application.

Second; How to clearly accomodate, the responsibility of the digital content application owner to the users when the users get an accident / badluck caused by the officers or drivers who run that digital content application. The method used in this research is a normative legal reasearch, in which the data used are in the form of library material or secondary data which includes the primary legal material, namely The Law of Republic of Indonesia Number 19 of 2016 concerning the amendements to the Law of Republic of Indonesia Number 11 of 2018 concerning the Information and Electronic Transaction and the Law of Republic of Indonesia Number 8 of 1999 concerning the Consumer Protection, the secondary legal material which covers the reference book related to the legal protection for the users of digital application, and the tertiary legal material in the forms of articles, dictionaries and other materials related to the research of this journal. More specific and detail regulation from the government as the regulator is needed to complete the various existing laws and government regulations which are used to protect the users of digital content application from the crimes. The regulation should not inhibit the growth of new digital application entrepreneurs, however more on supporting the development and growth of those new entrepreneurs and give the security and convenience to the users of digital application from crimes.

Keywords: Law, Consumer, Digital Application

A. INTRODUCTION

The development of information and computer technology causes the development of digital economic activities in Indonesia. E-commerce transaction, the supporting system of sales of goods and services, financial activities and other activities which use internet are increasingly visible and followed by the development of business model in several fields.

“The development of information technology can improve the people’s performance and allow various activities to be carried out quickly, precisely and accurately, therefore ultimately it can increase productivity”.¹

“The development of information technology shows the appearances various activities which are based on this technology namely e-government, e-commerce, education, e-medicine, e-laboratory, etc which all is based on electronic”.²

Along with the rapid development of e-commerce business and the significant growth of new digital application entrepreneurs, to prevent various problems of crime which has and will be occurred such as fraud, vandalism and crime from the hacker; government as the regulator needs to prepare more specific and detail regulation to complete the existing laws and government regulation which are used to protect the users of digital application maximally. Government as the regulator has issued various laws and government regulations to provide protection for the consumers of goods or services through digital on line which among others is stated in the Laws of Republic of Indonesia Number 19 of 2016 concerning the amendements to the Laws of Republic of Indonesia Number 11 of 2008 concerning the Information and the Electronic Transaction and the Laws of Republic of Indonesia Number 8 of 1999 concerning the Consumer Protection.

However, as the rapid development of the information, telecommunication and electronic technology currently, government must complete the existing laws and government regulations to provide the maximum protection for the digital application consumers.

B. RESEARCH METHOD

Research is a tool which is used to strengthen, grow and develop knowledge. The research method which is used in this research is the normative legal research, in which the data used are in the form of library material or secondary data which includes the primary legal material, namely The Law of Republic of Indonesia Number 19 of 2016 concerning the amendements to the Law of Republic of Indonesia Number 11 of 2018 concerning the Information and Electronic Transaction and the Law of Republic of Indonesia Number 8 of 1999 concerning the Consumer Protection, the secondary legal material which covers the reference book related to the legal protection for the users of digital application, and the tertiary legal material in the forms of articles, dictionaries and other materials related to the research of this journal. This research is descriptive, namely the research which is intended to provide data as accurately as possible with humans, circumstances and other tendencies and only explains the state of the object of the problems without intending to draw conclusions which are generally accepted.

C. PROBLEM FORMULATION

According to the introduction which has been described above, the problem formulations in this journal are:

1. How to regulate the rights of digital application consumers in the Law of Republic of Indonesia Number 19 of 2016 concerning the amendements to the Law of Republic of Indonesia Number 11 of 2018 concerning the Information and Electronic Transaction and the Law of Republic of Indonesia Number 8 of 1999 concerning the Consumer Protection, especially about the

¹ Ahmad M. Ramli H, 2006, *Cyber Law dan Haki dalam Sistem Hukum Indonesia*, Penerbit Amrico, Bandung, hlm. 1.

² Wardiana. 2002, *Aspek-Aspek Pemanfaatan ITE*, hlm.1.

accommodation of the existing regulation to provide protection for the user of service digital application, especially in terms of the infectious disease transmission in which the users are infected by the disease when they are using the service of digital application, for instance the on-line transportation service by car.

2. How does the government reformulates the consumer protection on the digital application transactions including: clearly accommodated the responsibility of the owner of the digital content application to the users when the disaster happened caused by the officers or drivers who run the digital content application.

D. DISCUSSION

1. The Law of The Republic of Indonesia Number 8 of 1999 concerning the Consumer Protection

Government as the regulator has issued various laws and government regulations to provide protection for the consumers of goods or services through digital on line which among others is stated in The Law of The Republic of Indonesia Number 8 of 1999 concerning the Consumer Protection.

Article 4 of the Law of Consumer Protection states that the consumers rights are:

- a. The right of comfort, security and safety in consuming the goods or services;
- b. The right to choose the goods and/ services and obtain those goods and/ services in accordance with the exchange rate, condition and the guarantees promised;
- c. The right of the correct, clear and honest information regarding to the condition and guarantee of the goods and/ services;
- d. The right to be listened his opinions and complaints regarding to the goods and/ services used;
- e. The right to obtain advocacy, protection, and efforts to resolve consumer protection disputes properly;
- f. The right to get guidance and consumer education;
- g. The right to be treated and served correctly, honestly and not discriminatory;
- h. The right to have compensation if the goods and/ services received are not suitable with the agreement or not as they should be;
- i. The rights stipulated in the provisions of other laws and regulations.
- j. On the other hand, the obligation of the business actors (in this case is the online seller), based on the Article 7 of the Law of Consumer Protection are: Have good intentions in carrying out their business activities;
- k. Provide the true, clear and honest information about the conditions and guarantees of goods and/ services and provide the explanation of use, repair and maintenance;
- l. Treating or serving consumers correctly and honestly and not discriminatory;
- m. Guarantee the quality of goods and/ services produced and/ traded based on the provisions of the applicable quality standards of goods and/ services;
- n. Give an opportunity to the consumers to test, and/ try certain goods and/ services and provide guarantees and for the goods produced and/ traded;
- o. Give compensations for losses due to the use and utilization of traded goods and/ services;
- p. Give compensation and/ replacement if the goods and/ services received or utilized are not suitable with the agreement.

More assertively, Article 8 paragraph (1) letter f of the Law of Consumer Protection prohibits the business actors from trading goods or services which are not in accordance with the promises stated in labels, etiquette, information, advertisements or sales promotions for the goods and/ services.

Based on the article, the incompatibility of specifications of goods received by consumers with the goods listed in the advertisement or photo of the goods offered is a form of violation or prohibited for business actors in trading goods.

The consumer, based on the article 4 letter h of the Law of Consumer Protection, has the right to have compensation if the goods and/ services received are not suitable with the agreement or not as they should be. Meanwhile, the business actor himself, according to the article 7 letter g of The Law of Consumer Protection, is obliged to provide compensations and/ reimbursement if the goods and/ services received or utilized are not in accordance to the agreement.

In case of the business actor violates the prohibition on trading the goods and/ service which are inappropriate with the agreement stated in the label, etiquette, information, advertisement or sales promotion of the goods and or services, he can be convicted under the Article 62 paragraph (1) of the Law of Consumer Protection which states:

The business actor who violates the provision referred to in the Article 8, Article 9, Article 10, Article 13 paragraph (2), Article 15, Article 17 paragraph (1) letter a, letter b, letter c, letter e, paragraph (2) and Article 18 shall be convicted a maximum imprisonment of 5 (five) years or a maximum fine of Rp. 2 billion.

2. Consumer Protection according to the Law of Information and Electronic Transaction and Government Regulation of the Electronic Transaction System Operator (PP PSTE).

Sale and purchase transactions, even if carried out by on line, according to the Law of Information and Electronic Transaction and Government Regulation of the Electronic Transaction System Operator remain recognized as the accountable electronic transactions. The agreement in buying goods online by clicking on an agreement of transactions is a form of acceptance that expresses approval in the agreement on an electronic transaction. The acceptance actions is usually preceded by a statement of approval on the terms and conditions of online trading which can be said as one of the Electronic Contract.

Electronic contracts according to Article 47 paragraph (2) of the Government Regulation of the Electronic Transaction System Operator are considered legitimate if:

- a. There is agreement between the parties;
- b. Performed by competent legal subjects or authorized to represent in accordance with the provisions of the legislation;
- c. There are certain things;
- d. The object of the transaction must not conflict with the legislations, decency and public order.

The Electronic Contract itself must at least contain the followings:

- a. The identity of the parties;
- b. Objects and specifications;
- c. Electronic Transaction Requirements;
- d. Prices and costs;
- e. Procedure in case of cancellation by the parties;
- f. Provisions that give rights to the aggrieved party to be able to return the goods and or request product replacement if there are hidden defects;
- g. Legal choice of the Electronic Transaction settlement

Thus, in the case of electronic transactions, you can use the instrument of the Law of Information and Electronic Transaction and Government Regulation of the Electronic Transaction System Operator as the legal basis for resolving your problems.

In relation to the consumer protection, Article 49 paragraph (1) of the Government Regulation of the Electronic Transaction System Operator confirms that the Business Actors who offer products through the Electronic System must provide complete and correct information related to the contract terms, producers and products offered.

Furthermore, it is reaffirmed that business actors must provide clear information about the contract or advertisement offers. If the goods you have receive are not appropriate as promised, the Article 49 paragraph (3) of the Government Regulation of the Electronic Transaction System Operator specifically regulates about this matter, namely the Business Actor must provide a time limit to the consumer to return the goods if they are not in accordance with the agreement or there are hidden defects.

Besides of the two conditions above, if item received does not match the photo on the advertisement of the online store (as a form of bidding), you can also sue the Business Actor (in this case is the seller) on the pretext of default of the sale and purchase transaction which has been done with the seller.

According to Prof. R. Subekti, S.H. in his book on "Law of the Agreement",³ default is negligence or omission which can be occurred in the form of 4 types of conditions, namely:

- a. do not do as what has been agreed to do the thing that has been promised but not as promised
- b. do the thing that has been promised but late
- c. do something that according to the agreement is not allowed to be done

If one of those 4 types of conditions occurs, then you can civilly sue the online seller on the pretext of default (for example, the item you received is not in accordance with the specifications of the item contained in the display home page / web site).

3. Criminal Fraud in Online Trading Transactions

Should be remembered that the online sale and purchase transaction is principally the same with the factual sale and purchase in general. The law on consumer protection related to online sale and purchase transactions as we explained earlier is not different from the applicable law in factual sale and purchase transactions. The only difference is the use of internet facilities or other telecommunications facilities. As the consequence is that in an online sale and purchase transaction it is difficult to carry out an execution or actual action if a dispute or fraud occurs.

The cyber behavior in electronic transactions allows every person, both seller and buyer, to disguise or falsify their identity in every transaction or sale and purchase agreement.

In the case of a business actor or seller apparently using a false identity or committing deception in the online sale and purchase transaction, he may also be convicted under Article 378 of the Criminal Code ("KUHP") concerning fraud and Article 28 paragraph (1) of the Law of Information and Electronic Transaction concerning in spreading false and misleading news that results in consumer losses in Electronic Transactions.

The complete statement of Article 378 of the Criminal Code is as follows:

Anyone with an intention to benefit themselves or others against the law, by using a false name or false dignity, by deception, or a series of lies, lead other people to give something to him, or to give credit or write off accounts receivable, is threatened because of fraud with a maximum imprisonment of four years.

³ Prof . R. Subekti, S.H., Hukum Perjanjian, :
<https://anilifitya.wordpress.com/2013/09/21/hukum-perjanjian-prof-subekti/>

The complete statement of Article 28 paragraph (1) of the Law of Information and Electronic Transaction is as follows:

Everyone who intentionally and without rights spreads false and misleading news that results in consumer losses in Electronic Transactions.

Regarding violations of Article 28 paragraph (1) of this Law of Information and Electronic Transaction is threatened with criminality as regulated in the Article 45A paragraph (1) of the Law 19/2016, namely:

“Everyone who intentionally and without rights spreads false and misleading news that results in consumer losses in Electronic Transactions as referred to in Article 28 paragraph (1) shall be punished with imprisonment of a maximum of 6 (six) years and / or a maximum fine of Rp1,000,000. 000.00 (one billion rupiah)”.

Note about Online Transactions

Based on the observations and experiences, the main principles of online transactions in Indonesia still prioritize the aspects of "trust" among the seller and buyer. The security principle of online transaction infrastructure, such as the guarantee of the truth of the identity of the seller or buyer, security guarantee of payment, security guarantees and reliability of electronic commerce websites; have not been a major concern for sellers and buyers, especially in small to medium-scale transactions with nominal value transactions are not too much (for example, sale and purchase transactions through social networks, online communities, online stores, or blogs).

One of the indication is the number of complaints reports about fraud through the internet and other telecommunications media received by the police and investigators of the Ministry of Communication and Information.

Based on these conditions, it is better for us to be more selective in conducting online transactions and prioritizing the security aspects of transaction and prudence as the main consideration in conducting online sale and purchase transactions.

Legal basis:

1. The Criminal Code;
2. The Law Number 8 of 1999 concerning Consumer Protection;
3. The Law Number 11 of 2008 concerning Electronic Information and Transactions as amended by Act Number 19 of 2016 concerning Amendments to the Law Number 11 of 2008 concerning Information and Electronic Transactions;
4. Government Regulation Number 82 of 2012 concerning System Implementation and Electronic Transactions.

From the discussion above, we do not see specific explanations for the consumer protection which specifically accommodating the protection of users of digital application service in existing legislation, especially in the case of disease transmission in which the users are infected by the disease when they are using the service of digital application, for instance the on-line transportation service by car.

Also, the existing regulations have not accomodated clearly yet the responsibility of the owner of digital content applications to the users when they are experiencing a disaster caused by officers / drivers who run the digital content application.

E. CONCLUSION

Based on in the discussion above, the conclusion that can be obtained in this study is that it is proposed to addition revision of articles or paragraphs in Law number 8 of 1999 which regulates the Consumer Protection for users of service of digital application, especially in the case of transmission of disease in which the users are infected by the disease when they are using the service of digital application, for instance the on-line transportation service by car, in which the provider of digital applications must routinely check the health of their employees who run the online service application, and do not allow them to run the online service application if they are infected by an infectious disease.

It is proposed to add the revision of articles or paragraphs in Law number 8 of 1999 concerning Consumer Protection regarding protection of users of digital application services, especially in terms of the responsibility of digital content application owners to the users when they are experiencing disaster caused by officers / driver who runs the digital content application.

References

1. Legislation

The Law of the Republic of Indonesia Number 19 of 2016 concerning the amendments to the Law of the Republic Indonesia Number 11 of 2008 concerning the Information and electronic:

- The Law of the Republic of Indonesia Number 8 of 1999 concerning the Consumer Protection
- Government Regulation Number 82 of 2012 concerning the System and electronic Transaction Operator
- The Criminal Code

2. Internet

- Teguh Arifiyadi, SH. MH., Perlindungan Hukum Bagi Konsumen Belanja Online:<https://www.hukumonline.com/klinik/detail/ulasan/lt50bf69280b1ee/perlindungan-konsumen-dala-e-commerce/> diakses pada tanggal 4 juli 2019 pukul 08:00 wib.
- Mega Lois Aprilia, Endang Prasetyawati, Perlindungan Hukum Terhadap Data Pribadi Konsumen Pengguna Gojek : [https://www.researchgate.net/publication/331659872 PERLINDUNGAN _HUKUM_TERHADAP_DATA PRIADI_ KONSUMEN_ PENGGUNA _GOJEK](https://www.researchgate.net/publication/331659872_PERLINDUNGAN_HUKUM_TERHADAP_DATA_PRIADI_KONSUMEN_PENGGUNA_GOJEK), diakses pada tanggal 3 Juli 2019 pkl 23:00 wib.
- Singgih Utomo, Perlindungan Hukum Bagi Konsumen Dalam jual Beli Online Melalui Facebook:
- https://www.academia.edu/22541695/Perlindungan_Hukum_Bagi_Konsumen_Indonesia_dalam_jual_beli_online_melalui_facebook, diakses tanggal 4 Juli 2019 pkl 09:00 wib.
- Prof. Subekti SH, Hukum Perjanjian : <https://anilifitya.wordpress.com/2013/09/21/hukum-perjanjian-prof-subekti/>, diakses tanggal 4 Juli 2019 pkl 09:30 wib.
- Ahmad M. Ramli H, 2006, Cyber Law dan Haki dalam Sistem Hukum Indonesia, Penerbit Amrico, Bandung, hlm. 1.
- Wardiana. 2002, Aspek-Aspek Pemanfaatan ITE, hlm.1.

THE ROLE OF MEDICAL RECORDS IN ENFORCING DIAGNOSIS TO SUPPRESS MALPRACTICES IN HOSPITALS

Jajang Edi Priyatno

Student of Legal Studies Doctor Program, Universitas Borobudur

jajangep@gmail.com

Abstract

The medical record in the explanation of 46 Section (1) subsection of the Medical Practice Law is a file that contains notes and documents about the patient's identity, examination, treatment, actions and other services that have been given to the patient. Medical Records can be used as evidence in showing a malpractice case performed by a doctor in a hospital. In reality, medical records are still considered in the proof abstract. In this research discussed medical records as proof of malpractice cases according to medical studies and criminal law. Information on medical records can be used as proof of malpractice cases from a legal perspective. The purpose of this study was to determine the role of the medical history in a legal perspective, Law No. 8 of 1981 concerning KUHAP, Regulation of the Minister of Health No. 629 / MENKES / PER / III / 2008 calm Medical Record and Law No. 36 of 2009 concerning Health, Constitution No. 29 of 2004 concerning Medical Practice and Constitution No. 44 of 2009 concerning hospitals. The results of the study in the form of medical records as proof of malpractice cases are seen in terms of medical and criminal law aspects. The standard type of medical services is a reject measure resulting in malpractice. The medical field medical records are one of the written proofs that contain the process of services provided by doctors. Medical records can show and result in malpractice seen from the medicolegal aspect. The criminal history of medical records can be used as evidence of a malpractice case if it is associated with the Criminal Procedure Code, medical records, including evidence. In a legal perspective, no one has mentioned the medical record rules as proof of malpractice cases. In conclusion, medical records, as evidence, are considered essential for patients to prove malpractice cases in medicine. Therefore, it is recommended that there be a special law that mentions malpractice and medical records as evidence to have legal force in proving malpractice.

Keywords: Medical Record, Legal Perspective, Malpractice, Legal Force

A. INTRODUCTION

The State of the Republic of Indonesia is a constitutional law Pancasila and the 1945 Constitution as the basis of the constitution The state, the State upholds human rights and guarantees equal rights and position in law and government as well must uphold the law and government without being there the exception. Health is a human right and an element health which must be realized in accordance with the ideals of the nation Indonesia as referred to in the Pancasila and opening The constitution of the Republic of Indonesia in 1945. Each people have the right to obtain information about their health data including actions and treatments that have been or will be received from health workers. Every time our lives are ruled by law interfere in human affairs before he is born and still mixes it after he dies. The function of law is to safeguard human rights. Law must protect human personal rights. The role of law is to create a good rule of society so that human rights are guaranteed. In principle, the law requires a structured relationship between doctors and patients. The law covers the relationship of interaction between doctors and patients since the birth of the legal relationship. The patient expresses his complaint and the doctor undertakes to examine and provide therapy ^[1].

The first thing to learn is that to create legal protection for patients, the parties must understand the rights and obligations inherent in themselves, including health care providers, so that they are responsible for the profession given to the recipient of service providers. The hospital guarantees legal protection for health personnel doctors so as not to cause medical errors in handling patients, as well as patients get protection from hospital responsibilities and health personnel doctors^[2]. One indicator to measure the quality of health services is the availability of complete and accurate medical records. . Without the completeness and accuracy of medical records, the impression is that health services do not take place properly and it is difficult to imagine the actual facts that occur because medical records are a collection of all activities of health implementers written and described for their activities on patients^[3]. According to Hayt refer to as a compilation of facts relating to the history of the development of patient health, illness and treatment received. A documentary complication that can be used in various ways by doctors, patients, health institutions where patients are treated, the wider community and for the development of medical science. Making a medical record aims to support orderly administration in order to improve health services in hospitals. In health services, the relationship between doctors and patients is a contractual relationship so that this relationship tends to be the starting point if there is a dispute/conflict in terms of health services. The handling of the problem of health services provided by doctors and hospitals must be carried out with approaches in the medical and juridical fields regulated by the medical law and the health law. Medical records are a necessity that must be present and made in the hospital (Article 3 of the Decree of the Minister of Health No.034 / BIRHUP / 1972 concerning Hospital Planning and Maintenance) and must be made by doctors according to Law No. 29 of 2004 concerning Medical Practice. The emergence of cases and claims from the patient is a sign that public legal awareness is increasing. The more aware the public of the rule of law, the more they know their rights and obligations and the broader the voices that demand that the law play its role in the health sector. This also causes the community (patients) no longer wish to take for granted the methods of treatment carried out by medical parties.

Patients want to know how medical action is taken so that later they will not suffer losses due to errors and negligence of the medical side. The patient's claim to hold the doctor and the hospital accountable is based on Article 1239 and 1365 KUHPer [4]. In medical / health services, especially those conducted by doctors both in hospitals and private practice, the role of recording medical records (RM) is very important and very attached to the service activities. Thus there is a part that the medical record is the third person when the doctor receives the patient. This can be understood because such records will be useful for recording the patient's condition, the results of the examination and treatment measures given at that time. Records or records are very handy to remind doctors about the condition, results of the examination, and treatment and treatment. However, it is now increasingly understood that the role of medical records is not confined to the assumptions stated above, but far wider. Therefore, today's health workers must understand well the matters relating to medical records.

In the last eight years, the Indonesian Medical Disciplinary Board has received 193 complaints of alleged malpractice. Of that number, 34 doctors were given written witnesses, 6 doctors were required to take part in education again, the hardest, 27 doctors had their registration letters revoked which automatically made them practice permits invalid. Article 66 paragraphs 1 of Law Number 29 of 2004 concerning Medical Practice clearly states that community members who feel disadvantaged by the practice of a doctor or dentist can report to the Indonesian Medical Disciplinary Board. The law that regulates health and hospital matters is not patient because it places a burden on proof of the victim. In this case, the patient must prove the occurrence of malpractice. Another problem is the gap between knowledge and information between the victim and the doctor. If this is aligned with the usual evidentiary laws regulated in civil and criminal terms, it certainly will not find. Even the patient has a tendency to lose, because all the evidence is held by the doctor. The existence of medical records is very

necessary in every health service facility, both in terms of the implementation of health service practices and the legal aspects. Legal regulations concerning the implementation of health services cover aspects of criminal law, civil law, and administrative law.

From the legal aspect, medical records can be used as evidence in medical cases, in accordance with Article 184 paragraph (1) of the Criminal Procedure Code that there are five types of evidence, namely, witness statements, expert information, letters, instructions, and statements of the five types of evidence can be considered sufficient to reveal the truth of a conventional crime^[4]. From this expression it is clear that medical records must always be in a state of being ready to use especially in the face of judicial demands. The law recommends that medical records be strong evidence in the court, so the medical record must be filled in correctly and completely so that it can provide an overview of what has been done to the patient.

B. RESEARCH METHOD

In the law enforcement system in Indonesia, the system of authority / authority to enforce criminal law is implemented in 4 (four) subsystems in the criminal justice process, namely the power of investigation, prosecution power, power of judicial judgment / decision making, and the power of executing or executing decisions. In the Indonesian criminal law enforcement system, it is also necessary to look in in abstracto (law making and law reform) because the enforcement of criminal law in abstracto is a formulation or process of making legislation through the legislative process. The process of formulation or in abstract is a strategic initial stage of the law enforcement process in Concreto which is essentially a process of criminal imposition or a criminal prosecution process in accordance with (four) law enforcement systems in Indonesia, in accordance with medical malpractice cases should be reviewed with in abstracto the laws relating to medical practice and in concreto the process of criminal prosecution must be seen from 4 (four).

The rights of patients in the information about medical records based on the Republic of Indonesia PERMENKES No. 629 / MENKES / PER / III / 2008 concerning Medical Record Article 12 said that the medical record file belongs to the health service facility and the contents of the medical record belong to the patient. The form of the summary medical record can be given, recorded or copied by the patient or the person who is given the authority or written consent of the patient or the family of the patient who is entitled to it. But whether or not the patient knows the contents of the medical record depend on the patient's ability to hear information about the disease described by the doctor who treated him.

The presentation of the contents of the medical record should be made by the doctor who treats the patient with the patient's written permission. The head of the health service facility can explain the contents of the medical record without the patient's permission based on the laws and regulations. Because the patient is the owner of "the contents of the medical record", the health facility can submit with no more hesitation, which can be in the form of photocopies of medical records or in the form of a letter containing a resume of the course of illness and treatment during the health facility. Original medical records can only be withdrawn from health facilities on court orders. Whereas to third parties, after obtaining patient approval, the information submitted must meet the principle of "get to know", which is minimal but sufficient, relevant and accurate.

C. PROBLEM FORMULATION

In the law enforcement system in Indonesia, the system of authority / authority to enforce criminal law is implemented in 4 (four) subsystems in the criminal justice process, namely the power of investigation, prosecution power, power of judicial judgment / decision making, and the power of executing or executing decisions. In the Indonesian criminal law enforcement system also needs to be seen in abstracto (law making and law reform) because the enforcement of criminal law in abstracto is a

formulation or process of making legislation - According to Hermien Hadiati Koeswadji, conceptually mentioning 4 (four) essential elements / components to be categorized as law, namely 1. The existence of normative elements, 2. The existence of elements of regularity (regularity) 3. The existence of elements of court (court) 4.

There is just an enforcement element^[5]. Lawrence M. Friedman suggests that the effectiveness and success of law enforcement depend on three elements of the legal system, namely legal structure, legal substance and legal culture. The legal structure concerning law enforcement officials, legal substance including legislation and legal culture is the living law that is adopted in a society. Legal structure based on Law No. 8 of 1981 includes; starting from the Police, Prosecutors' Office, Courts and Criminal Executing Bodies (Lapas). The authority of law enforcement agencies is guaranteed by law. So that in carrying out their duties and responsibilities regardless of the influence of government power and other influences. There is an adage that states "fiat justitia et pereat mundus" even though the world is collapsing the law must be enforced. The law cannot walk or erect if no law enforcement officer is credible, competent and independent. How good a law is if, it is not supported by good law enforcement officers then justice is only wishful thinking.

The weak mentality of law enforcement officers has resulted in law enforcement not working properly. Many factors that influence the weak mentality of law enforcement officers include weak understanding of religion, economics, non-transparent recruitment processes and so on. So that it can be confirmed that law enforcement factors play an important role in the functioning of the law. If the regulations are good, but the quality of law enforcement is low, there will be problems. Likewise, if the regulations are bad while the quality of law enforcement is good, the possibility of problems arises is still open.^[6]

In Article 53 of the Health Law, patients are entitled to medical secrets. The things that must be kept secret according to government regulations regarding the obligation to keep medical secrets include everything that is known while doing medical work. Everything is a fact that is obtained from the interpretation examination to make a diagnosis and carry out treatment based on these provisions, then all data in the medical record is confidential^[7].

The positive law that applies to medical records in the Medical Practice Act as a Special and the latest Law, promulgated on October 6, 2004. Medical Records are contained in Article 47 paragraphs (1) to (3). Article 46 paragraphs (1) and its explanation: Every doctor or dentist in carrying out medical practice must make a medical record. In the explanation of Article 46 paragraph (1) it is stated that what is meant by "Medical record" is a file containing notes and documents about the patient's identity, examination, treatment, actions and other services that have been given to the patient. In the event of an error in recording, it may not be removed or eliminated in any way. Changes to records or errors in medical records can be made by deletion and affixed initial the relevant officer^[8].

The patient's medical record must be filled in all medical actions instructed by the doctor and also on all observations on the patient while being treated. In general, it can be realized that the information contained in confidential medical records is confidential. The patient certainly expects that the doctor writes that is confidential to himself not read by other people. The obligation of doctors and health groups to protect this secret is reflected in the Doctor's Oath pronouncement, Indonesian Medical Ethics code and legislation^[9].

In the Medical Practice Act No. 29 of 2004 Article 46, paragraph: 1. Every doctor or dentist who practices medicine must make a medical record. Paragraph (2) The medical record as referred to in paragraph (1) must be completed immediately after the patient has finished receiving health services. Paragraph (3) Every record of the medical record must be affixed with the name, time and signature of the officer providing the service or action.

Article 79 of the Medical Practice Law :

1. Every doctor or dentist who intentionally does not make a medical record can be sentenced to a maximum of 1 (one) year imprisonment or a maximum fine of IDR 50,000,000 (fifty million rupiahs).
2. Doctors and dentists who do not make medical records are subjected to civil sanctions. 3. Disciplinary and ethical sanctions are given based on both the law and the code of professional ethics: Medical Practice Law, KKI Regulation, Indonesian Medical Ethics Code (KODEKI) and Indonesian Dental Ethics Code (KODEKGI).

If there is an offence related to the medical record, then based on the law above it can be seen that the negligence of doctors and dentists who intentionally did not make medical records in health services will be threats both criminal and fine or civil. With the obedience of the rules, it is expected that doctors and dentists carry out the legal rules governing Medical Records. Being a good medical record will improve service to patients and provide convenience for doctors and dentists in carrying out their services. Sanctions against doctors and dentists if they deliberately do not commit medical records.

Among all the benefits of Medical Records, the most important is the legal aspect of Medical Records. In the case of medical malpractice, nursing and pharmacy, Medical Record is one of the principal written proofs. Based on the information in the Medical Record, legal officers and the Judges can determine whether or not there has been a malpractice action, how the malpractice occurred and determine who is actually guilty in the case.

D. DISCUSSION

Article 184 of the Law invite cumulatively, but also must go hand in hand with the judge's conviction. In cases where the doctor or home illness is one of the parties (case doctor's mistake or negligence or homesick in carrying out the profession), wrong one obstacle faced in the process proof is the statement of the expert regulated in article 186 of the Criminal Procedure Code. Expert information intended here can also have been given at the time examination by the investigator or prosecutor general information in one form report and made by remembering swear when he received the position / job ^[10]. If this is not the case given at the time of inspection by the public investigator / prosecutor, then the time of examination at the hearing is requested to provide information and be recorded in the minutes of the examination.

Such information is given after him take an oath or promise as before the court regarding the truth his statement as an expert witness. Oath or promise given as an expert witness must be distinguished from vows / promises spoken at the time accept the position / job (oath position). Expert information intended by article 186 of the Criminal Procedure Code if it is associated with relationships between doctor or hospital and patient can be poured in fine form written or unwritten. Information experts whose written form can be in the form of Criminal Procedure Code (KUHAP, Law) Number 8 of 1981) stated : Valid evidence according to the law is regulated in Article 184 consists of, (1) witness statements ; (2) statement of expert; (3) letter; (4) instructions; and (5) the defendant's statement. Indonesia adheres to the principle negative evidence in criminal law, which means that someone is not enough to be declared as proven committing a crime based on style t-valid evidence according to law - Medical Record (RM) in formal terms is a set of notes regarding things related to history the course of the disease and patient treatment / care. While in terms of material, content medical records include patient identity, records of the disease, results of the laboratory examination, x-rays, and ultrasound examination. Legal function of medical records is because medical records can function as evidence if there are opinions demands from patients and on the other hand as legal protection for doctors. Medical records which are records of the

conduct of certain medical actions implicitly also contain a Medical Action Agreement, because certain medical actions will not be carried out if there is no agreement with the patient. If the medical record that has a multifunction is associated with an article 184 of the Criminal Procedure Code, then the medical record besides functioning as a documentary evidence also functions as evidence of expert testimony that is poured and is the contents of the medical record. The problem is that the contents of the medical record belong to the patient and the doctor is required to maintain confidentiality. The summary of the medical record can be given, recorded, or copied by the patient or person who is authorized or with written consent of the patient or the family of the patient who is eligible for it. In no circumstances.

The interest of the court, the summary of the medical record is given. Presentation of the contents of medical records can do to ensure that medical records are needed as evidence in the law enforcement process. Information about identity, diagnosis, disease history, examine history and history of treatment can be opened in terms of, among others, to fulfill the request of law enforcement officials in the context of law enforcement on court orders^[11]. An explanation of the contents of the medical record should be made by a doctor or hospital that treats patients with written permission from patients or based on legislation.

While the head of the health service facility can explain the contents of the medical record in writing or directly to the applicant without the patient's permission based on legislation. In such cases, fulfilling the request of law enforcement officials in the context of law enforcement on court orders, the doctor, who is responsible for patient care or the head of the hospital, can provide photocopies of medical records in addition to conclusions (which is his opinion). The opinion of legal experts is because the medical record serves as a proof of evidence and evidence of expert evidence. This does mean that the judge can use the medical record as evidence in a court hearing, but this is not binding in nature, and still depends on the judge's judgment. Therefore, the principle of Indonesian criminal law implements the principle of negative proof. This means that the medical record can be used as a basis to prove whether there is a mistake / negligence of the doctor / hospital in carrying out the profession, and in other aspects the medical record can be used as a basis for defense / legal protection for the doctor / hospital against the claim / claim intended to her.

The use of medical records as evidence in court proceedings is thus only possible if the parties, namely doctors or hospitals to patients and public prosecutors submit medical records as evidence to find material truth / true truth, and clarify whether there are errors or omissions of doctors or hospital in carrying out its profession.

Thus the medical record is an evidence that the doctor or hospital has sought as much as possible through the stages of the health service effort process to one of the most appropriate treatment options in the form of certain medical actions. For patients, medical records are evidence that can be used as a basis for certain medical actions performed by doctors or hospitals against them according to professional standards.

E. CONCLUSION

Medical records are evidence that the doctor or hospital has made every effort to go through the stages of the health service effort process to one of the most appropriate treatment options in the form of certain medical actions. For patients, medical records are evidence that can be used as a basis for certain medical actions performed by doctors or hospitals against them according to professional standards. Therefore, the more complete the medical record the stronger its function as evidence that provides legal protection for doctors or hospitals. Medical records have a dual function as evidence, namely: as evidence of expert testimony, and as proof of a letter. Medical records are a force for doctors or hospitals to prove that maximum efforts have been made to cure patients according to the standards of the medical profession.

REFERENCES

- P. Studi *et al.*, “Penyelesaian sengketa akibat pemakaian produk teknologi kesehatan pada layanan kesehatan dalam perspektif perlindungan konsumen,” 2016, pp. 556–565.
- N. Luh, G. Yogi, M. Emy, and A. Citra, “Perlindungan Hukum Bagi Pasien Selaku Konsumen Jasa Pelayanan Kesehatan yang Mengalami Malpraktek,” 2015.
- Y. Amin, *Etika Profesi dan Hukum Kesehatan*. Kementerian Kesehatan Republik Indonesia, 2017.
- L. Niken. Rosari, “Perlindungan Hukum Terhadap Pasien Sebagai Konsumen Jasa di Bidang Pelayanan Medis Berdasarkan Kitab Undang-Undang Hukum Perdata,” Universitas Sebelas Maret Surakarta, 2010.
- R. Nuha, “Analisa Hukum Kontrak Terapeutik Terhadap Tindakan Medik Dalam Hubungan Pasien dengan Dokter di Rumah Sakit,” *Lex Soc.*, vol. IV, no. 3, pp. 33–40, 2016. K. Hermawanto, “Teori Sistem Hukum Lawrence M. Friedman,” Surabaya, 2017.
- Ns. Ta’adi, *Hukum Kesehatan : Pengantar Menuju Perawat Profesional*. EGC, 2010.
- R. I. Ginting, “Tanggung Jawab Dokter dalam Pelayanan Medis di Rumah Sakit,” Universitas Lampung, 2018.
- H. Yunanto, “Pertanggungjawaban Dokter dalam Transaksi Terapeutik,” *J. Law Reform*, vol. 6, no. 1, pp. 109–123, 2011.
- L. Hestirani, “Peranan Hak Atas Informasi dalam Transaksi Terapeutik Antara Dokter Spesialis dan Pasien di Rumah Sakit (Studi Kasus: Rumah Sakit Kanker Dharmas),” Universitas Indonesia, 2010.
- F. Eleanora, “Analisis Yuridis Rekam Medis Sebagai Alat Bukti Surat,” *Forum Ilmiah*, Jakarta, Sep-2013.

LAW ENFORCEMENT FOR DOMESTIC VIOLENCE IN INDONESIA

Julia Bea Kurniawaty

Student of Legal Studies Doctor Program, Universitas Borobudur
julia_bea@yahoo.com

Abstract

This paper examines how Indonesia's law system face two different dimensions of law enforcement for domestic violence, which are cultural and sociological dimension. The writer chose to review sociological aspect because law enforcement in genuine, is a work to implement law in society which necessarily establish an interaction between law as a normative regulation with elements in society. Laws about domestic violence, which applied in 2003 act no. 20, hasn't effectively enforced to protect the victims of domestic violence.

Keywords: Law Enforcement, Domestic Violence, Sociological Aspect

A. BACKGROUND

In response of a long-standing problem in daily society life, domestic violence, Indonesia's government released a 2004 act number 23 about domestic violence obliteration (UU PDKRT). The government hoped this act would solve and the victims, which commonly are women and kid, could live safely. This is based on the act, which banned a physical and sexual violence within a household, including neglect. The individuals within the household is husband, wife, kids, and relatives within cognation, marriage, maternity, parental, guardianship, and those who lives in the house including maids. Unfortunately, this act hasn't yet fully worked as expected. Further prospect for this act is to be able to prevent any domestic violence cases, with penalties for the violators as written in the act.

The existence of this act creates many responses, from positive to negative ones. The positive response is to make domestic violence as a criminal action in which sustain the violator to be punished, and to prevent future crimes / victims in Indonesia's households. The negative response refers to the enforcement of this act, due to the assumptions that the law apparatus seems to not take the domestic violence seriously. This assumption came from many reported domestic violence cases that remains unsolved until today.

This research aims to study about law enforcement for domestic violence in Indonesia, and expected to feature reasons why some domestic violence victims can't be protected, as expected by many people. These reasons will discuss not only educational factor of the domestic violence victims, but also cultural factor which affect the law enforcement for domestic violence problems.

B. METHODS

In conducting research, the authors conducted a review of the laws relating to domestic violence in Indonesia, then the authors reviewed data on domestic violence originating from the National Commission on Violence Against Women. After that, the researcher will review the legal parties related to law enforcement in domestic violence.

After reviewing the two data, the author provides an argument based on several sources who can provide actual information regarding attitudes in response to the protection of victims of domestic violence. This argument will later be used as an analysis and criticism of the law enforcement of domestic violence in Indonesia.

C. DISCUSSION

1. Domestic Violence in Indonesia

To start the chapter, it is wise to look at the map of Indonesia's domestic violence. According to the 2004 act number 23, domestic violence defined as follows:

Any actions to an individual, especially women, which cause physical, sexual, psychological, and / or neglect suffer / misery, counted as a treat to an action of coercion / deprivation of an individual's freedom, and against the law of households.

From definition above, it is clear to understand the reason and the target of this act, which is for every household member, whether it is men or women. The use of "especially women" shows the idea behind this act is a reality where the victims of domestic violence mostly are women. Household, as referred to act of criminal procedure article 1 number 30 is a synonym to family, who has cognation to a certain point or a marriage status.

In reality, majority of Indonesia's families embrace a system of patriarchy, in which men is the leader and the householder and women as domestic household manager. After marriage process, then these privileges will automatically attached to the husband, such as keeping control of his wife, become the authority of any social, economy, or law, and to make decisions. In the other side, the wife will automatically play a role as a manager and be responsible of technical jobs from the decision made by the husband.

Household righteously should be a paradise for couples around the world, but sometimes it is also a place of violence and crime for the member of the household. This is a situation that no couples ever wanted, especially from what it is expected from social and law norms. As social institution, household is expected to create a harmonious and intense communication for each members, and place to implement social and religion values. As a law institution, household is expected to be a safe and comfortable place where they respect, protect, and love each other. This is written in 1974 act of marriage, but with further non-law adjustment clauses which not affect any law consequences once it is violated. This leads to a perspective that domestic violence is not a law violation, rather as natural incident in households and marriages, therefore the victims were not protected by the government and society. This also systematically creates a common sense that domestic violence is reasonable action. The victims were seen as if they are unlucky to marry the bad ones, and receiving the consequences.

Until today, Indonesia still don't have a national statistic of domestic violence. The current data from reported cases can't represent all the domestic violence in the country. Clearly it's because some of the victims are yet to aware of the law about this, and report the crime actions they received. But, domestic violence clues are able to be investigated through related institutions such as hospitals, health centers, police departments, social foundations, courts, etc. National Committee of Anti Women Violence or *Komnas Perempuan*, noted that the numbers of reported domestic violence cases has increased each year ever since domestic violence act passed. *Komnas Perempuan* noted that there are 4475 cases in 2014, 6499 cases in 2015, 5785 cases in 2016, and 5649 cases in 2017. In some of these case reports, there are canceled reports, due to oppression from the violators, suggestion of law apparatus, and the victims will after they said they have done a mediation.

2. Definition of Law Enforcement

The act of domestic violence expected to create a harmonious love to each other, a protection in society, especially in family circle. Roscoe Pound express this in a law as a tool of social engineering. From this perspective, an act of domestic violence is expected to be a tool to plan the future of loving and protective society.

Punishment for the violators is a work to create a deterrent effect for them, and to prevent future domestic violence crimes. Therefore, it can be said that this punishment somehow give a protection effects for the victims and the society. The society is assumed to be afraid to violate the rules due to punishment, and for those who already violated will have to go through the law mechanism which they created.

The protection which this act promised is an abstract notion and will be neglected if it's only existed in written sentence and spoken socialization. The future loving society as planned, will also live in a dream. Therefore, to live this notion and plan, a further work and alignment process are needed. This process is called the Law Enforcement. Munir Fuady formulate law enforcement as a work to explain law principles to a society's life, so the purpose of the law such as justice values, equalities, justified rules, protection rights, and peaceful society can be implemented.

In positivistic perspective, law enforcement is a logical practice. There is a logical mechanism which suppose a certainty. As an example, two people named Ratno and Ratman did a beating to their wives with the same tool and cause the same effect, a cut in the head. Then the two went to the same court with the same judge. Ratno and Ratman accused of violation to domestic violence act in article 44 which says "every individual who committed physical violence in household circles as intended in article 5 letter A, will be sentenced to jail for the longest of 5 years or fined at most of 15 million rupiahs." Referring to the article above, Ratno and Ratman should get the same punishment, 4 years in jail or 10 million rupiahs fine.

Unfortunately, the reality speaks differently. Sometimes laws have their own logic, which is a complex sociological logic that depends contextually in the place where individuals live. Law actualization is different than launching a designed and planned product.

Sociological perspective sees law enforcement as empiric process that have different way with mathematic principles that have a certainty as normative positivistic paradigm written above. Law enforcement involves humans and complex society, resulted a complex outcome and opens choices and various possibilities. Two people who did the same crime and courted with the same law articles, might get different punishment, depends on how the law enforcement in each place works. This phenomenon brings an eye of sociologists. Satjipto Rahardjo said that law enforcement isn't a casual case, not only it's a complex problem, but also how the law system synchronize with social, politic, and economy system of one society. He also thought that law enforcement essentially is a variable that have correlation and interdependence with other factors in process.

There are a few factors that affect law enforcement process, as told by Friedman, they are law substance, law culture, and law structural. These three components have to operate simultaneously in order to create effective law enforcement. If there's only one malformation in these components, it will affect the law enforcement's quality. Surjono Sukanto shared an opinion with Sutjipto and Friedman, as he said that there are 5 factors that determine law enforcement's effectiveness, they are principles of law, law facilities, law apparatus, law awareness, and law culture. To discuss law enforcement on domestic violence in Indonesia, the writer chose Surjono Sukanto's five components as analysis tool.

a) Principle of Law

Law principle which adjust domestic violence is the 2004 act number 23 about domestic violence obliteration. Surjono Sukanto said that law principle will become effective if it meets juridical, sociological, and philosophical terms. If a law principle fulfill these aspects, then law enforcement will be easy to be done. In domestic violence act, the juridical terms has been fulfilled. This can be proved from the creation process that synchronize the procedural of rules to make an act. Philosophically, principles in domestic violence act are definitions of philosophic values of Indonesia's ideology, Pancasila, and 1945 constitution.

Explicitly, the act's preamble mentioned that every citizen has the right for safety and freedom from any kind of violence, especially domestic violence, which is a violation of human rights and a crime / discrimination to humans dignity that needs to be obliterated. This preamble suit the second principle of Pancasila, a justified and civilized humanity. Besides, as a nation that claims to be religious, Indonesians also have identic philosophical values with domestic violence obliteration, they are Christian and Catholic's theology of affection, such as "shall you love them as you love yourself". In Islam, they have philosophy of "you are a clothes to them as they are to yours.", which refers to husband and wife. The interpretation of a clothes is their function to protect, beautify, sanify, and to cover things that people don't need to see. Sociologically, principles of domestic violence act is acceptable to few societies as a brilliant solution to solve conflicts in households legally.

For women right activists, this act is the answer for their anxiety about violence they could possibly experience, including their family member. In the past, domestic violence is considered as a personal problem and needs to be solved personally without law involvement. Now since domestic violence act passed, any kinds of domestic violence will involve a law process. Therefore the nation will normatively has no reason to ignore the case. The same thing affects the citizen as they have a law stands for domestic violence and can help others without being accused to involve other household problem. This group will actively utilize the act to help the victims with many service centers, such as complaint center, psychology and law counseling, law accompaniment, making safe house, health center, etc. On the other hand, a few people felt this act helps them, and instead giving negative response to the act. It is said that domestic violence act provokes many wives to file a divorce, jail the husband and cause a broken home.

This pro and contra to the domestic violence act affects the law enforcement for the cases. One of the effect is for the victims accept the beating and violence as life problems and have to be solved with patience. The patience attitude contextually means of keeping the problems for themselves, instead of report the case to the police or relatives, in hope that the violator willing to either introspect themselves or listen to an advice. In this situation, principle of domestic violence act can't give a proper and maximum protection to the victims.

b) Law Apparatus

Law apparatus are people or parties whose job is to enforce a law. This definition covers a wide scope, which are first grade to third grade officers, reporting duty, investigation, prosecution, and court. In their duty to enforce the law, apparatus has rules and guides for each degree. It assumed that if apparatus works well, then the law will be served, and so the opposite. But, if the apparatus let corruption happens everywhere instead of solve them legally, then it is ineffective law enforcement. Therefore, society will affected and thinks that corruption is a reasonable action, instead of thinking it is an illegal action and against the law, because there are no punishment given for the corruptor.

In domestic violence case, apparatus doesn't have a standard to investigate the case. Some apparatus serves the law for the victims and giving empathy by professionally doing procedures to court the violator, meanwhile some others only suggest the victims to do mediation and forgive the violator, because they think it's bad to jail someone within their own family. They claim that it is bad for social impact, especially if the violators take control of the family in finance.

Some apparatus even verbally harass the victims in the reporting, investigation, and court stage. This difference attitude to domestic violence shows unbalance understanding with the

philosophy of domestic violence. Therefore, there is unbalance law enforcement for domestic violence case. Apparatus who doesn't understand domestic violence as a crime will let free the violators of any punishment besides of what they did, which open chances for them to repeat their actions, maybe in even wider circles and more victims. Another indication that shows a misunderstanding of domestic violence as nothing serious is a low punishment given for the violator. Apparatus who delayed and even cancelled the case interpreted as a work to mediate the victims and the violators. This also shows that many of reported domestic violence cases are not processed to the formal law, instead they are guided for mediations and counseling. This is considered as a move to prevent a broken home, especially if the violators are in charge of financial. This also indicates that the police and apparatus consider another aspects rather than the act.

c) Law Facilities

Law facilities is every mediums which allowed successful law enforcement. In domestic violence case, law facilities includes every prevention and solving mediums to protect the victims of domestic violence.

As a commitment to the domestic violence act, the government provides a responsive and variative law facilities. There are even special facilities to solve domestic violence cases. Some of these facilities are, Women and Kids Protection Unit in every police station which solve women and kids violence, Integrated Service Center which provides free service for medic, psychological, law, and even social protection in every districts, awarding the region with less domestic violence numbers, etc. Besides, in few of government and private institution, hotlines are available, mails are also available to report a domestic violence case for the victims and spectators.

However, the numbers of facilities are far from equal. The facilities haven't met the population ratio and the region, which affects the awareness of domestic violence act, how the law works, and how to prevent domestic violence. Some people also didn't know how to ask for protection once they become a victim of a domestic violence.

Another problem from law system perspective, is a strong positivistic paradigm in solving domestic violence case. This is proven from case handling procedural that strongly attached from procedural law. As an example, the confrontation procedural between the victims and violators in a court. In a case of domestic violence where a relation power from the violator is stronger than the victim, the truth can't be revealed and instead, cornered the victim in the face of law. In other words, the judge can't make a breakthrough procedural to protect the victim without persecute him / her in a court. The paradigm of seeing domestic violence as a law problem, has not meet the changes of court system to protect the victims.

d) Law Awareness

Law awareness commonly known as citizen's willingness to obey the law, which means to prevent violation and doing legal things as written in humanity values of what the law expected. For years, it is noted that counseling to be aware of laws was reduced by the government to telling the people to know what is right and wrong. After Suharto's era falls, along with movements for better democracy, awareness counseling included not only people's responsibility, but also their rights.

Rights awareness said to be important because this can prevents discriminative actions from other people, including governments. Besides, the victims can file a lawsuit if they

received violence. There are few points of awareness in domestic violence which are as follows:

- 1) Aware of the law that bans any kind of violence to the member of the household.
- 2) Aware that every member of the household has right of freedom and protection from domestic violence by other households.
- 3) Aware of society's responsibility to protect each other from domestic violence as good as possible.

D. CONCLUSION

Law of Domestic violence, which applied in the 2003 act no. 20 hasn't yet effectively protect the victims of the crime. Many sociological factors which caused these ineffective law enforcements are lack of victim protection's paradigm in the law apparatus circles, uneven socialization about the law, unbalanced law enforcement facilities with current cases, lack of people's awareness about the law and frictions between the values which embraced the law and society values.

REFERENCES

A. Books

- Anwar, Yesmil dan Adang, 2008, *Pembaharuan Hukum Pidana Reformasi Hukum Pidana*, Grasindo, Jakarta.
- , 2008, *Pengantar Sosiologi Hukum*, Grasindo, Jakarta.
- Dwiati, Ira, 2007, *Perlindungan Hukum Korban Perkosaan dalam Peradilan Pidana*, Tesis, S2 Universitas Diponegoro, Semarang.
- Fathia, 2008, *Dinamika Kekerasan pada Istri (Sebuah studi Kualitatif pada Perempuan Korban KDRT yang Bertahan dalam Perkawinannya)*, Tesis, S2 Psikologi, Universitas Diponegoro, Semarang.
- Friedman, Lawrence W., 1990, *Teori dan Filsafat Hukum*, Rajawali Press, Jakarta.
- Fuady, Munir, 2003, *Aliran Hukum Kritis, Paradigma Ketidakberdayaan Hukum*, Citra Aditya Bakti, Bandung.
- Hatta, Mohammad, 2008, *Sistem Peradilan Pidana Terpadu*, Galang Press, Yogyakarta.
- Hermawati, Istiana, 2003, *Kekerasan terhadap Pekerja Rumah Tangga (PRT) Perempuan dan Pola Penanganannya (Studi Kasus terhadap PRT Perempuan Korban Tindak Kekerasan Domestik yang Ditangani oleh Rumpun Tjoet Njak Dien Yogyakarta)*, Tesis, S2 Universitas Indonesia, Jakarta.
- Ihromi, T.O., 2000, *Sosiologi Keluarga*, Yayasan Obor Indonesia, Jakarta.
- Irianto, Sulistyowati dan Cahyadi, Antonius, 2008, *Runtuhnya Sekat Perdata dan Pidana*, Yayasan Obor Indonesia, Jakarta.
- Lestari, Sakti Mustika, 2009, *Studi Deskriptif Tentang Kekerasan pada Pekerja Rumah Tangga di Malang*, Penelitian Universitas Muhammadiyah Malang, Malang.
- Lianawati, Ester, 2009, *Tiada Keadilan Tanpa Kepedulian KDRT, Perspektif Psikologi Feminis, Paradigm Indonesia*, Yogyakarta.
- Nurhayati, 2009, *Perlindungan dan Pemenuhan Hak bagi Pekerja Rumah Tangga (PRT)*, Tesis, S2 Ilmu Hukum Universitas Indonesia, Jakarta.
- Rahardjo, Satjipto, 2009, *Penegakan Hukum, Tinjauan Sosiologis*, Genta Publishing.
- Sadli, Saparinah dan Effendi, Johan, 2005, *Muslimah Reformis, Perempuan Pembaharu Keagamaan*, Mizan, Bandung.

- Sari, Puspita, 2008, *Tingkat Kesadaran Hukum Istri Korban KDRT*, Tesis, S2 Universitas Muhammadiyah Malang, Malang.
- Setyawan, Donny Eko, 2010, *Pertanggungjawaban Istri sebagai Pelaku Kekerasan Rumah Tangga, Studi Kasus Upaya Mediasi dan Pencabutan di Kepolisian Resor Surabaya Selatan*, UPN Veteran, Surabaya.
- Soekanto, Soerjono, 1983, *Faktor-Faktor yang Mempengaruhi Penegakan Hukum*, Raja Grafindo Persada, Jakarta.
- Utama, I Made Arya, 2007, *Hukum Lingkungan*, Pustaka Sutra, Bandung.
- Widanti, Agnes, 2005, *Hukum Berkeadilan Jender, Aksi Interaksi Kelompok Buruh Perempuan dalam Perubahan Sosial*, Kompas, Jakarta. Wignyo Subroto, Sutandyo, 2002, *Hukum Paradigma Metode dan Dinamika Masalahnya*, Elsam dan Huma, Surabaya.

B. Journal Article

- Yusrivadi, "Paradigma Positivistik dan Implikasinya Terhadap Penegakan Hukum di Indonesia", *Jurnal Hukum*, Vol. XIV, April, 2004.

C. Papers

- Kasim, Husain, H.M. Djafar Saidi dan Husen Alting, "*Legal Awareness of Tax Obligation and Retribution towards the Increase of the Regional Original Revenue of City of Tidore Archipelago*", Paper, Pascasarjana Universitas Hasanuddin, Makassar, 17 Februari 2011.
- Komisi Nasional Anti Kekerasan terhadap Perempuan, "*Catatan Tahunan Kerentanan Perempuan terhadap Kekerasan Ekonomi dan Kekerasan Seksual di Rumah*", Makalah, Institusi Pendidikan dan Negara, 2009.
- Komisi Nasional Penghapusan Kekerasan terhadap Perempuan, "*Women's Vulnerability to Economic & Sexual Violence*", Paper, Annual Notes on Violence against Women, Jakarta, 7 Maret, 2009.
- Tim Pelaksana Penelitian Kolektif, "*Kekerasan dalam Rumah Tangga*", Laporan, Penelitian Balitbang Sumatera Utara, 2009.
- Tim Unit Khusus Penanganan Kasus SPEKHAM, "*KDRT Selalu Ranking Satu*", Laporan, SPEK-HAM, Solo, Desember, 2010.

D. Internet Articles

- Amir, Endang T.S., "*Menjaga Kemuliaan Pasangan Hidup*", <http://www.hadits.net/islamia/renungan/>, diakses 15 Mei 2011.
- Fanani, Estu Rahmi, "*UU PKDRT: Terobosan Hukum, Antara Fakta dan Pelaksanaannya*", <http://www.djpp.depukumham.go.id/hukum-pidana/>, diakses 15 Agustus 2011.
- Fauziyah, Azmi, "*Penjajahan Lewat UU*", <https://jurnaltoddoppuli.wordpress.com/2011/01/20/penjajahan-lewat-uu-2/>, diakses 4 Januari 2012.
- Ira, "*Wawancara dengan Estoe Rakhmi Fanani (Direktur LBH Apik) tentang Penanganan KDRT Penting Membangun Perspektif Gender di Kalangan Penegak Hukum*", <http://www.komnasperempuan.or.id/2009/07/>, diakses 17 Agustus 2011.
- Jauzi, Abdul Hamim, "*Memutus Impunitas KDRT*", <http://ikahidiy.blogspot.com/p/arti-kel.html>, diakses 15 Agustus 2011.
- Kementerian Pemberdayaan Perempuan dan Anak, "*Page Pusat Pelayanan Terpadu Pemberdayaan Perempuan dan Anak*", <http://www.mennegpp.go.id>, diakses 10 Agustus 2011.

- Kusumaningtyas, “*Ketika Fraksi Balkon Tersenyum Lega*”, [http://www.rahima.or.id/index.php?option=com_content&view=article &id=392:info-edisi-12-ketika-fraksi-balkon-tersenyum-lega&catid=44:info&Itemid=323](http://www.rahima.or.id/index.php?option=com_content&view=article&id=392:info-edisi-12-ketika-fraksi-balkon-tersenyum-lega&catid=44:info&Itemid=323), diakses 15 Mei 2011.
- Muttaqien, Ikin Zaenal, “*Langkah-langkah Advokasi Legislatif LBH APIK bersama Jaringan dalam Menangani Isu KDRT*”, [http:// www.docstoc.com/docs/68853221/Langkah- langkah-Advokasi](http://www.docstoc.com/docs/68853221/Langkah-langkah-Advokasi), diakses 14 Mei 2011.
- Novirianti, Dewi, “*Akses Perempuan terhadap Keadilan, Mekanisme Hukum dan Keadilan, Peran Pendampingan Korban dan Rasa Keadilan*”, [http://www.komnasperempuan.or.id/keadilanperempuan/index.php?option=com_content&view= article& id= 82:akses- perempuan-terhadap-keadilan-mekanisme- hukum-dan-keadilan-peranan-pendamping- dan-rasa-keadilan-korban&catid=41:tu- lisan-lain](http://www.komnasperempuan.or.id/keadilanperempuan/index.php?option=com_content&view=article&id=82:akses-perempuan-terhadap-keadilan-mekanisme-hukum-dan-keadilan-peranan-pendamping-dan-rasa-keadilan-korban&catid=41:tu-lisan-lain), diakses 20 Mei 2011.
- Nurkhairani, “*Akses Layanan Korban KDRT Masih Terbatas*”, [http://www.lintasberita.com/ Nasional/Politik/](http://www.lintasberita.com/Nasional/Politik/), diakses 15 Agustus 2011. Timor Express, “*KDRT Terpopuler di Matim*”, [http://timorexpress.com/index.php/index. php?act=news&nid=34569](http://timorexpress.com/index.php/index.php?act=news&nid=34569), diakses 25 Mei 2011.
- Udin, “*Trofi Juara I Pencegahan KDRT Diserahkan*”, [http://tulungagung.go.id/index. php/ berita/858-trofi-juara-i-pencegahan- kdrt-diserahkan](http://tulungagung.go.id/index.php/berita/858-trofi-juara-i-pencegahan-kdrt-diserahkan), diakses 10 Agustus 2011. Youtube, “*Kaum Ibu HTI Tolak Liberalisasi Rumah Tangga*”, [http://www.youtube.com/watch?v= ygn5pZMqc18](http://www.youtube.com/watch?v=ygn5pZMqc18), diakses 12 Mei 2011.

E. Law Acts

- Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan. (Lembaran Negara Republik Indonesia Tahun 1974 Nomor 1. Tambahan Lembaran Negara Nomor 3019).
- Undang-Undang Nomor 23 Tahun 2003 tentang Penghapusan Kekerasan Dalam Rumah Tangga. (Lembaran Negara Republik Indonesia Tahun 2004 Nomor 95. Tambahan Lembaran Negara Republik Indonesia Nomor 4419).
- Peraturan Menteri Pemberdayaan Perempuan Nomor 1 Tahun 2010 tentang Standar Pelayanan Minimal Bagi Layanan Terpadu Perempuan dan Anak Korban Kekerasan.

LAW ENFORCEMENT IN TAX COURT IN COMPLETING TAX DISPUTES IN INDONESIA

KMS. Herman¹, Yudi Apriadi²

Student of Legal Studies Doctor Program, Universitas Borobudur

¹kemas_herman@yahoo.com, ²yapriadi@gmail.com

Abstract

Tax disputes are disputes arising in the field of taxation between Taxpayers or Tax Insurers with authorized officials as a result of the issuance of decisions that can be appealed or filed against the Tax Court based on tax legislation, including claims for billing based on tax collection laws by force letter. In other words, tax disputes occur because of the inequality of perceptions or differences of opinion between taxpayers and tax officers regarding the determination of the payable tax issued or the collection of actions carried out by the Directorate General of Taxes. Tax disputes generally begin with the issuance of tax assessment letters or the issuance of tax collection actions. The tax assessment letter is an underpayment tax assessment letter, an additional underpayment tax assessment letter, an overpayment tax assessment letter, a zero tax assessment. In addition, disputes can also arise due to the deduction or collection carried out by third parties based on the provisions of the law. Referring to the above understanding, the legal efforts to resolve disputes that can be carried out by Taxpayers are objections, appeals, claims and reconsiderations. Legal remedies for objection to tax provisions are submitted to the Directorate General of Taxes. Whereas an appeal and lawsuit was submitted to the Tax Court. Especially for legal remedies submitted to the Supreme Court.

Keywords : Tax, Tax Disputes, Law Enforcement in the Tax Court.

A. INTRODUCTION

When discussing the notion of taxes, many experts give limits on taxes, including the notion of tax as stated by Prof. Dr. PJA Adriani which has been translated by R. Santoso Brotodihardjo, SH in the book *"Pengantar Ilmu Hukum Pajak"* (1991: 2) *"Tax is a contribution to the state (which can be imposed) owed by those who are obliged to pay it according to regulations without obtaining an achievement return, which can be directly appointed, and the point is to (finance public expenses in relation to the duties of the State that administers the government)"*.¹

In the definition above, it focuses more on the budgetary function of the tax, while the tax still has other functions, namely the regulating function. When paying attention to its style, in limiting the definition of tax can be distinguished from various kinds, namely in terms of economics, legal aspects, sociological aspects, etc. This will also color the emphasis placed, for example in terms of income, in terms of purchasing power, but most more patterned in the economy.

Quotations of several tax definitions² stated by other experts are as follows:

1. Definition of tax according to Prof. Edwin R. A. Selogmen in the Essay in Taxation book published in America stated: *"Tax is compulsory contribution to expenses in the interest of interest, without reference to special benefits conferred"*. From the definition above, we can see that someone's contribution is addressed to the State without any benefits specifically aimed at someone. Indeed, this is the case, however, the tax is shown to be of benefit to the community;

¹ Kesit Bambang Prakosa, *Hukum Pajak*, Penerbit Ekonisia, Fakultas Ekonomi UII, Yogyakarta, 2006, hal.2

² Erly Suandy, *Hukum Pajak*, Penerbit Salemba Empat, Jakarta 2005. Hlm 9

2. Definition of tax according to Philip E. Taylor in the book *"The Economics of Public Finance"* giving tax limits as above only replaces without reference with with little reference;
3. Definition of taxes according to Mr. Dr. NJ. Feldmann in the book *De Over Heidsiniddelen Van Indonesia* (translation): *"Tax is an achievement that is unilaterally imposed by and owed to the employer (according to the norms set in general), without any counterparty, and is solely used to cover expenses - general expenses"*;
4. Definition of tax according to Prof. Dr. MJH. Smeets in the book *De Economische Betekenissen Belastingen* (translation): *"Tax is an achievement to the government that is owed through general norms and which can be imposed, without the existence of contradictions that can be shown in terms of the individual, intended to finance government expenditure"*;
5. Definition of taxes according to Dr. Soeparman Soemahamidjaja In his dissertation entitled *"Pajak Berdasarkan Azas Gotong Royong"*, he's stated *"taxes are compulsory contributions in the form of money or goods collected by the authorities based on legal norms, in order to cover the cost of producing goods and collective services in achieving public welfare"*. And the definition above does not appear to be the term *"mandatory contribution"*. The other side relating to counterparty emphasizes the realization of the counterparty that taxes are needed;
6. Prof. Dr. Rochmat Soemitro, SH in his book *"Dasar-dasar hukum Pajak"* (1990: 5) states: *"Taxes are contributions to the State treasury based on the law (which can be imposed) by not getting lead services (contravention), which can be directly shown and used to pay for public expenses"*.

While the definition of tax according to the researchers themselves is *"payments made to the State (both central and regional) that are compulsory and compelling based on applicable laws and regulations without reciprocity that can be directly felt, in order to fill the State treasury in financing various expenditures and expenditures State, solely for the benefit of the state and society in general"*.

From this understanding it can be concluded that the characteristics inherent in the definition of tax are 1) Taxes are levied according to the law and the rules for their implementation can be imposed; 2) In the payment of taxes it cannot be shown that there is an individual counterpart of the government; 3) Taxes are collected by the State, both the central government and the regional government; 4) Taxes are intended for government spending, which if and if there is a surplus, is used to finance public investment; 5) Tax can also have goals other than budgeters, namely regulating.

Tax Disputes are disputes that occur between taxpayers or taxpayers with the Government or Tax Collectors because of the issuance of Tax Assessment Letters,³ namely: Underpayment Tax Assessment Letter (*Surat Ketetapan Pajak Kurang Bayar*), Additional Underpayment Tax Assessment Letter (*Surat Ketetapan Pajak Kurang Bayar Tambahan*), Tax Assessment Letter More Pay (*Surat Ketetapan Pajak Lebih Bayar*), Zero Tax Assessment Letter (*Surat Ketetapan Pajak Nihil*), and collection or deductions made by third parties. Upon the issuance of these Decrees, if the taxpayer or taxpayer objected, he could make legal remedies, in the form of Objection, Appeal to the Tax Court to make extraordinary legal remedies to the Supreme Court of the Republic of Indonesia. That is what makes the author interested in writing about Law Enforcement in the Tax Court. In this paper, the author will conduct a study entitled **"LAW ENFORCEMENT IN TAX COURT IN COMPLETING TAX DISPUTES IN INDONESIA"**.

B. RESEARCH METHODS

The research in making this paper was conducted using normative juridical research which is also often referred to as doctrinal research⁴ with objects or research targets in the form of regulations, laws and other legal materials. The results of legal research are not to find new legal theories but to look for

³ Wirawan B. Ilyas dan Richard Burton, *Hukum Pajak*. Penerbit SALEMPA EMPAT. Jakarta, 2008, hal. 91

⁴ Soerjono Soekanto, *Pengantar Penelitian Hukum*, Penerbit Universitas Indonesia (UI-Press), 1984, hal. 12

alternative arguments, namely by examining the subject matter as mentioned above. In addition, this research will also complement other relevant aspects based on the scope and identification of the problems formulated.

C. FORMULATION OF THE PROBLEM

The problem statement in this study is about Law Enforcement in the Tax Court in Resolving Tax Disputes in Indonesia. The focus of the research is limited to the following research:

- 1) How Effective are Tax Law Enforcement in the Tax Court in Resolving Tax Disputes in Indonesia?
- 2) Is the Tax Court part of the system of State Administrative Courts in Indonesia?

D. DISCUSSION

1. Tax Disputes

Tax disputes According to the provisions of Article 1 number 5 of Act Number 14 of 2002 concerning the Tax Court (Tax Court Law), are disputes arising in the field of taxation between Taxpayers or Tax Insurers with authorized officials as a result of the issuance of decisions that can be appealed or sued to the Tax Court based on tax legislation, including a lawsuit for the execution of billing based on the tax collection law with a forced letter.⁵

2. Early Tax Disputes

The occurrence of a Tax or Customs Dispute begins with a perception or dissent inequality⁶:
1) Between Taxpayers and Director General of Taxes (apparatus of the Directorate General of Taxes) for the determination of tax payable for central taxes managed by the Directorate General of Taxes, or 2) Between Taxpayers and Regional Heads / Heads of Regional Revenue Services (Local Revenue Service Offices) (Provinces / Regencies / Cities) for the determination of tax payable for regional taxes, or 3) Between Person (individual or legal entity) / Taxpayer with Director General of Customs and Excise (apparatus of the Directorate General of Customs and Excise) for stipulating import duty, excise, and administrative sanctions, and Income Tax Article 22 - Import, Value Added Tax - Imports, and Sales Tax on Luxury Goods - Imports.

3. Disagreement of Dissenting Opinion and Disputes

Dissenting Opinion Institutions (different opinions) and concurring opinions (different reasons) from the judges who decided on a case seemed to be a new institution which is now starting to be applied frequently in the trial process. Dissenting opinion and concurring opinion is a new institution in order to provide a special credibility for judges who truly believe that they have different opinions or different reasons from the majority of judges who decide a case. Dissenting opinion means that there are opinions of judges who differ in opinion from the majority of judges who decide cases. While the concurring opinion means that there are judges who have different legal reasons with the majority of judges who decide the case, even though the judge in question approves the overall verdict.

In taxation matters, these dissenting opinions and concurring opinions are regulated in Article 79 of the Tax Court Law which confirms that basically the Tax Court's decision is taken based on deliberation led by the Chief Judge and if an agreement cannot be reached, the decision

⁵ Pasal 1 angka 5 Undang-undang Nomor 14 Tahun 2002 tentang Pengadilan Pajak

⁶ Atep Adya Barata: *Memahami Prosedur di Pengadilan Pajak* (Jakarta:?.LP3 AB-IBTA,2002) halaman 5

is taken by majority vote (paragraph 1).⁷ However, paragraph (2) confirms that if the Assembly takes the decision by means of an agreement that cannot be reached an agreement so that the decision is taken by the majority vote, the opinion of the Member Judge who disagrees with the decision is stated in the Tax Court, other Legislation decisions that explicitly regulate This dissenting opinion was also found in Article 45 paragraph (10) of Law Number 24 Year 2003 concerning the Constitutional Court.

4. Tax Disputes, Customs and Excise

In the field of taxes, customs and excise disputes occur and can be caused by various things, depending on the contents of the laws and regulations that are violated or the degree of differences in calculations regarding taxes, import duties, excise, on the application of goods classification between taxpayers and fiscal authorities.

We first step into the tax field. Taxes adhere to the principle of self-assessment as outlined in the Annual Announcement Letter, which starts from personal income tax. Body income value added tax, stamp duty, earth and building, fees for acquiring land and building rights, and notices or Import Duty, Excise and taxes in the Import Framework which are set forth in Customs Notification (notification of Import of goods, Goods Export Notification, Notification of Production of Excise Goods, Between notification by taxpayers and research activities or inspection of Customs Notification (Import Declaration of Goods, Goods Export Notification).

The next stage, is a problem arising from the provisions arising from the provisions stating that every person / citizen of Indonesia is a taxpayer, namely an individual or entity that has fulfilled a subjective and objective obligation.⁸ Therefore it has an obligation to register with the Office of the Directorate General of Taxes to be recorded as a taxpayer and at the same time obtain a Taxpayer Identification Number. The consequence of registering and obtaining a TIN is to have obligations that must be carried out continuously and continuously, namely making reports or notifications periodically. If this obligation is not carried out or negligent in fulfilling it, the Taxpayer in the trial, there is a statement from the Bandung Petitioner, that the dispute arises as a result of the absence of socialization from the taxation agency, especially regarding the existence of newly issued laws or regulations. In the absence of socialization activities, taxpayers have not or no socialization activities, taxpayers have not or cannot implement it, both in the notification and the methods of calculating the tax payable. But the reason for the lack of socialization cannot be a measure for the Judges to abort corrections. Comparable. It cannot be verified in court and in accordance with statutory provisions stating that if a new law has been registered in the Supplement to the State Gazette, it is considered that all citizens if a new law has been registered in the Supplement to the State Gazette, it is considered that all citizens or taxpayers have known, read, understood, and understood the existence of the new law, among others, concerning the following matters:

- 1) Who can issue a decision?
- 2) Decisions or decisions or notifications for corrections will be issued by the authorized official in the field of tax / customs / excise or local government, namely:
 - Director General of Taxes, Director General of Customs and Excise, or appointed official at the Central level.
 - Governors, regents, mayors, or designated officials at the regional level.
- 3) Who can submit a dispute?

⁷ Pasal 79 UU Pengadilan Pajak

⁸ Mardiasmo, *Perpajakan*, Edisi Revisi Tahun 2001, Penerbit Andi Yogyakarta 2001, hal. 97

Persons / Legal Entities that can submit dispute requests are Individual Taxpayers, National Legal Entities, Foreign Legal Entities, Permanent Business Entities, Trade Representatives, Taxable Entrepreneurs or persons conducting customs activities. In certain cases, this dispute can be submitted by a third party who obtains power from the Taxpayer to represent the person / legal entity in filing and resolving tax disputes. Power of attorney can be given to company employees or legal counsel according to applicable laws and regulations.

5. Dispute Resolution

Tax Disputes are disputes arising in the field of taxation between taxpayers or tax bearers with authorized officials as a result of the issuance of decisions that can be appealed or filed against the Tax Court based on tax laws and regulations, including claims for billing based on the tax collection law. by force letter.⁹

Tax Dispute Settlement is through legal efforts, namely:

1. Ordinary legal remedies
2. Objection Legal Efforts, submitted by Taxpayers to the Directorate General of Taxes
3. Comparative remedies and lawsuits submitted by taxpayers to the tax court.
4. Extraordinary remedies in the form of:

Request for review to the Supreme Court of the Republic of Indonesia. Remedies include each of the following:

- 1) Objections to income tax and value added tax;
- 2) Objection to Land and Building Taxes;
- 3) Objections to the Right to Acquisition of Rights / Land and Buildings;
- 4) Objections to Land Taxes; and 5) Objections to Value.

Objection Laws can be petitioned When the Taxpayer obtains a tax assessment letter and feels dissatisfied with the intended tax provisions, the Taxpayer can submit a legal effort with the name of the objection. In accordance with the provisions of Article 25 of the UU KUP, objection legal remedies are submitted to the Directorate General of Taxes, namely to the Tax Service Office / Land and Building Tax Service Office (KPP / KPPBB) where Taxpayers are registered.

Whereas for customs issues, with Law Number 10 of 1995 concerning Customs, it is stipulated that Taxpayers may submit legal remedies for objections to customs tariffs and / or values for calculating Import Duty to the Director General of Customs and Excise within 30 (thirty) days from the date of stipulation by submitting a guarantee in the amount of Import Duty to be paid, in accordance with Article 93 and also for the imposition of administrative sanctions as provided for in Article 94 paragraph (1) of the law.

Likewise with the types of local taxes, namely taxes levied by the regions based on tax regulations set by the region for the benefit of household financing of the regional government.¹⁰ What is regulated in Law Number 18 of 1997 concerning Regional Taxes and Regional Retributions as amended by Law Number 34 of 2000, and finally by Law Number 28 of 2009, that Taxpayers can submit objections only to the Regional Head or appointed official for a:¹¹ Regional Tax Assessment Letter; Underpayment Regional Tax Assessment Letter; Additional Local Tax Assessment Letter; Overpayment of Regional Tax Assessment; Zero Regional Tax

⁹ Kesit Bambang Prakosa, *Hukum Pajak*, Penerbit Ekonisia, Fakultas Ekonomi UII, Yogyakarta, 2006, hal. 65

¹⁰ Mardiasmo, *Perpajakan*, Edisi Revisi Tahun 2001, Penerbit Andi Yogyakarta 2001, hal. 93

¹¹ Gunawan Widjaja, Seri Hukum Bisnis, *Alternatif Penyelesaian Sengketa*, Divisi Buku Perguruan Tinggi PT RajaGrafindo Persada, Jakarta, 2001, hal. 17

Assessment Letter; Cutting or collection by third parties based on the provisions of tax laws and regulations.

A description of the objections will be based more on the provisions of the KUP Law because in principle the rule pattern stipulated in this provision is also used by other laws. Speaking about the legal objections of taxpayers, the legal efforts carried out are still within the same institution, namely the Directorate General of Taxes. Because institutions that resolve disputes between taxpayers and tax authorities are still carried out by the same institution, according to Prof. Rochmat Soemitro, such dispute resolution is referred to as an impure administrative court or judicial dole.

6. Taxpayers must pay attention to the objection decision

After the tax office conducts the inspection process, according to Article 26 paragraph (3) UU KUP, there are 4 (four) possible decisions that can be issued or issued by the Director General of Taxes. The four decisions are: Rejected; Partially accepted; Received entirely; or Add tax assessments.

Since the enactment of Law Number 27 of 2008 concerning changes in the law, the KUP of the legal aspects of legal remedies filed by taxpayers has undergone changes, especially regarding the tax debt arising in the tax assessment. In the previous provisions, taxpayers are still allowed to submit objections, without the need for prior payment. Only since January 1, 2008, in Article 25 paragraph (3a) Law No. 27 of 2008, it is required that there be a payment of a number approved by the Taxpayer listed in the final discussion on the results of the examination, before the objection letter is submitted.¹² Furthermore, the amount of tax that has not been paid at the time of filing an objection is classified as non tax payable (paragraph 8). As a legal consequence, if the Taxpayer's objection is rejected or granted only partially and the Taxpayer does not file an appeal, then the Taxpayer will be subject to administrative sanctions of 50% of the tax based on the objection decision minus the tax paid before filing an objection.

Then, what if the Taxpayer filed an appeal? If the Taxpayer submits an appeal, then an administrative sanction in the form of a fine of 50% is not imposed.¹³

7. Tax Court

Tax justice is the implementation of procedures for procedures, processes and systems of court activities in deciding cases of taxation and legal consequences.

8. Tax Court According to Law Number 14 of 2002

a. Legal basis

Article 2 of Law Number 14 of 2002 concerning Tax Court contains an understanding of the Tax Court, namely:

*"A Tax Court is a judicial body that carries out judicial powers for Taxpayers or Tax Insurers seeking justice against tax disputes."*¹⁴

In the sense above there are elements as follows: 1) The Tax Court is a special judicial body, in which this specificity is indicated by the field of authority to examine and decide, namely concerning tax disputes only; 2) Carrying out judicial power means that it is in line with other judicial bodies that have been determined, in accordance with existing laws and

¹² Pasal 25 ayat (3a) Undang-undang No. 27 tahun 2008

¹³ Wirawan B Ilyas dan Richard Burton : *Hukum Pajak* (Jakarta : penerbit SALEMBA EMPAT, 2008) Hlm, 98

¹⁴ Pasal 2 Undang-undang Nomor 14 Tahun 2002 tentang Pengadilan

regulations; 3) Courts that have specificity, in the fiscal field, because they have their own characteristics, characteristics and characteristics. Nevertheless the Tax Court is still within the scope of the Administrative Court.

Based on Article 24 of the 1945 Constitution, that which conducts judiciary to uphold the law and justice is carried out by Supreme Court and the judicial body under the Supreme Court, in the environment: a. General Justice; b. Religious Courts; c. Military Courts; d. State Administrative Court, and e. A Constitutional Court.

The Tax Court, is a special court and its formation based on Law Number 9 of 2004 concerning Amendment to Law Number 5 of 1986 concerning TUN Judgment Article 9A and its explanation and Law Number 14 of 1970 as amended by Law number 35 of 1999, amended again with Law No. 4 of 2004, and finally by Law No. 48 of 2009 concerning Justice of the Republic of Indonesia in conjunction with Law Number 14 of 1985 as it has been amended by Act No. 5 of 2004, and finally by Act Law number 3 of 2009 concerning the Second Amendment to Law Number 14 of 1985 concerning the Supreme Court.

With the enactment of Law Number 14 of 2002 concerning the Tax Court, Law Enforcement in the field of Taxation and the tax justice system in the process of resolving tax dispute issues can be done through the Tax Court.

b. Consideration

Judicial bodies whose functions are related to judicial authority are regulated by law, including special court cases such as the Tax Court within the scope of the State Administrative Court, with considerations as follows.

- (a) Law Number 4 of 2004 dated January 15, 2004 as a substitute for Law No. 14 of 1970 as it has been amended by Law Number 35 of 1999, in Article 1 stated:

"The power of the judiciary is the power of an independent state to hold a judiciary in order to uphold the law and justice based on Pancasila, for the implementation of the Law State of the Republic of Indonesia"

This article clearly states that the duties and functions of judicial authorities are those who carry out the task of upholding law and justice. In Law number 4 of 2004, it is the stipulation of judicial powers as implementers of Article 24 paragraph (3) of the 1945 Constitution as mentioned above. In Article 10 and Article 15 it is stated that special courts can only be formed in one court environment (from 4 judicial environments).¹⁵

- (b) Explanation of Article 15 paragraph (1) further confirms that Tax Justice can be formed as a special court in the state administrative court that is regulated by law.
- (c) Law Number 51 of 2009 concerning the Second Amendment to Law Number 5 of 1986 concerning State Administrative Courts, in Article 9A and its explanation, stated:
- "In the State Administrative Court, special tax courts are regulated by law".¹⁶
- (d) Law Number 14 of 2002 concerning the Tax Court in Article 2 and Article 5 is stipulated by the Tax Court as a judicial body that carries out the authority of the judiciary which is carried out by the Supreme Court. In Article 6, Article 27 and Article 28 of Law Number 14 of 2002, it is specifically regulated in the composition and procedure of the courts and secretariats of the tax court, in line with the provisions of Article 13 paragraph (3) of Law Number 4 of 2004.

¹⁵ Pasal 10, 15 Undang – undang nomor 4 tahun 2004

¹⁶ Undang-undang Nomor 5 Tahun 1986 tentang Peradilan Tata Usaha Negara, pada Pasal 9A dan penjelasannya

- (e) In Article 10 and Article 15 of Act Number 4 of 2004 concerning Judicial powers and Article 9A of Law Number 9 of 2004, the Tax Court formed under Law number 14 of 2002 is a special court in the judiciary state administration and as a judicial body under the Supreme Court, as referred to in Article 24 of the 1945 Constitution.
- (f) The Tax Court is an appeal court, which according to Law number 14 of 2002 article 1 paragraph (6) The definition of appeal intended by the law is:
"Legal remedies that can be carried out by Taxpayers or Tax Insurers against a decision that can be appealed based on applicable laws and regulations".

So the criteria for filing an appeal is the existence of a decision that can be appealed, in the sense that the decision fulfills the formal requirements and material for submitting bids. Decisions made by the executive basically stem from the existence of authority held in the tax field as regulated by law.¹⁷

Based on Article 31 of Law 14 of 2002, the Tax Court has the duty and authority to examine and decide on Tax Disputes. In the case of an appeal, the Tax Court only checks and decides the dispute over the objection decision, issued by the tax authorities (Director General of Taxes / Customs and Excise), if it cannot be accepted or not approved by the Taxpayer. A tax dispute that is the object of examination is a dispute raised by the appellant in the petition for objection regarding what should be taken into account, considered and decided in the objection decision.

For Claims filed by Taxpayers, because the Tax Court has the authority to examine and decide disputes over the implementation of tax collection or Correction Decisions or other Decisions as referred to in article 23 paragraph (2) regarding KUP and statutory regulations for taxation invitations that apply.

The Tax Court is the first and final court in examining and deciding on Tax Disputes. Therefore, the Tax Court's decision is final and has permanent legal force. this means that once the Tax Court Assembly decides on a tax dispute, in its decision the verdict can be immediately carried out by not requiring the decision of the competent authority, as stipulated in article 86 of Law Number 14 of 2002 This article states that the Tax Court decision must be carried out by an authorized official within 30 (thirty days from the date of receipt of the decision. Officials who have carried out the Tax Court's decision within the stipulated period are subject to sanctions in accordance with the applicable staffing provisions (stipulated in Article 88 paragraph (2) and paragraph (3). the implementation of sanctions imposed are the lightest to the toughest sanctions, as stipulated in Government Regulation Number 30 of 1980 concerning Discipline of Civil Servants.

If in the trial there are doubts about the law or statutory provisions that must be applied, the Tax Court can call or request data or information relating to tax disputes and third parties. This data or information as an addition to the data that exists, and for the Appellant can be a novum that will clarify the dispute being examined.¹⁸

c. Law Enforcement in the Tax Court in Resolving Tax Disputes in Indonesia.

Law Enforcement in the Tax Court In Resolving Tax Disputes in Indonesia within the last 5 (five) years, namely 2013 to 2018, can be seen from the Tax Dispute Settlement statistics in the Tax Court below:

Statistics

¹⁷ Rukiah Komariah dan Ali SH.MH, dan Ali Purwanto, M.SH., MM : *Pengadilan Pajak*, 2006) Hlm, 51

¹⁸ Rukiah Komariah SH., MH dan Ali Pruwatno M, SH.,MM : *Ibid* Hlm, 37.

Tax Dispute Settlement in the Tax Court
2013 - 2018

No.	Result of Decision	2013	2014	2015	2016	2017	2018	Total
1	Revocation	81	95	174	1.350	1.524	250	3.474
2	Not acceptable	1.013	859	1.187	1.782	701	1.053	6.595
3	Reject	1.929	2.454	2.294	2.900	2.600	1.997	14.174
4	Adding Taxes that Must Be Paid	2	1	13	8	1	9	34
5	Partially grant	1.003	1.440	1.217	1.353	1.373	1.389	7.775
6	Grant all of them	3.276	4.014	4.049	5.332	4.982	5.228	26.971
7	Void	73	37	94	128	50	37	419
	Total	7.377	8.900	9.028	12.853	11.231	9.963	59.352

E. CONCLUSION

Based on the description and analysis in the previous section, finally this research arrived at several conclusions regarding the findings of the problems studied, as follows:

1. Effective Tax Court in Tax Law Enforcement in the Tax Court in Resolving Tax Disputes in Indonesia, which can be seen from the number of cases filed and decisions made by the Tax Court as a gateway for justice seekers in the field of taxation, especially in 5 (five) the last year, namely the period 2013 to 2018;
2. The Tax Court is part of the system of State Administrative Courts in Indonesia. This is stated in the Act as follows:
 - a. Explanation of Article 15 paragraph (1) of Law Number 4 of 2004 as last amended by Law Number 48 of 2009 concerning Judicial Power, further explains that the Tax Court can be formed as a Special Court in the State Administrative Court which is regulated by Constitution.
 - b. Law No. 51 of 2009 as the second amendment to Law No. 5 of 1986 concerning State Administrative Courts Article 9A in its explanation includes "The State Administrative Courts can be specialized in the specialization of Tax Courts regulated by Law".

REFERENCES

A. Buku

- Adya Barata, Atep, *Memahami Prosedur Beracara di Pengadilan pajak* Saudana LP3AB-IBTA Jakarta 2002.
- Erly Suandy, *Hukum Pajak*, Penerbit Salemba Empat, Jakarta 2005.
- Gunawan Widjaja, Seri Hukum Bisnis, *Alternatif Penyelesaian Sengketa*, Divisi Buku Perguruan Tinggi PT RajaGrafindo Persada, Jakarta, 2001
- Kesit Bambang Prakosa, *Hukum Pajak*, Penerbit Ekonisia, Fakultas Ekonomi UII, Yogyakarta, 2006
- Komariah, Rokiah dan Purwito, Ali, *Pengadilan Pajak* badan Penerbit fakultas Hukum Universitas Indonesia, Jakarta 2006.
- Mardiasmo, *Perpajakan*, Edisi Revisi Tahun 2001, Penerbit Andi Yogyakarta 2001.
- Soekamto, Soerjono dan Sri mamudji, *Penelitian Hukum Normatif Suatu Tinjauan Singkat*, Rajawali Press, Jakarta 1985.
- Wirawan B. Ilyas dan Richard Burton, *Hukum Pajak*. Penerbit SALEMBA EMPAT. Jakarta, 2008.

B. Legislasi

- Undang-Undang Dasar 1945
- Undang-Undang kekuasaan Kehakiman
- Undang-Undang PTUN
- Mitra Wacana Media. *Undang-undang Pajak Dilengkapi dengan UU Pajak daerah dan Retribusi daerah PIKP 2007*. Jakarta 2007

ASPECT LAW INDEPENDENCE ORGANIZERS SOCIAL SECURITY AGENCY (BPJS) IN RELATION HEALTH SERVICES

Lukman Ma'Ruf

Student of Legal Studies Doctor Program, Universitas Borobudur
lukmann20@gmail.com

Abstract

Social Security Agency of Health is a public legal entity set up to manage the health of social security programs. Article 28 H paragraph (1) of the 1945 Constitution which states that "everyone has the right to live in the physical and spiritual well-being, to live, and to get a good and healthy environment and the right to receive health care.

BPJS self-reliance is the implementation of tasks, functions and authority BPJS by law to carry health insurance by relying on finding the maximum benefit for the interests of the participants. Facts on the ground which brings us to the big problem in the independence BPJS require serious thinking and handling, especially if associated with the implementation of the field in the chaos of the last 5 years Law No. 40/2004 on the National Social Security has been systematically arranged many things about Social Security.

Another big problem in front of the eyes are the regulatory issues, the struggle for authority in issuing regulations, the regulator who BPJS? This is a legal matter and the contacts that may arise at any time during the trip BPJS. Other legal issues including everything from conflict of authority, fraud in the implementation of Social Security, the problem of overlapping oversight and other issues related to Public Law Firm in BPJS.

Keywords: Social Security Agency, The Agency for Public Law, Independence

A. PRELIMINARY

1. Background

National health insurance program that is in operation can be by the Social Security Agency (BPJS) Health is the implementation of Article 28 and Article 34 Paragraph (2) of the Constitution of the Republic of Indonesia in 1945 were all implemented with consistent will be the bridge to reach the prosperity equitable society Indonesia adheres to the state social state of law is a dynamic or a welfare state (welfare state) that in order to achieve its objectives demanded consequences for the magnitude of the role of the state.

¹In the preamble-1945 clearly here among the country destinations

".... Indonesia form a state government that protects the entire Indonesian nation and the entire homeland of Indonesia and to promote the general welfare, educating the nation and participate in the establishment of world order based on freedom of lasting peace and social justice "

As in other developing countries where the problem in Indonesia is still high level of poverty that directly or indirectly is related to the health of citizens, which actually is a task for the state to do the priority of reducing poverty and all its derivatives. Move sure to cut out the circle of poverty derivatives is to provide social security to its nationals currently held by BPJS social security.

¹ Moh. Mahfud MD. Democracy and the Constitution in Indonesia (Yogyakarta; Rineka Copyright, 2003), p 130.

The social security system is a multi-disciplinary, economic, legal, social and science of government. Social security is a factor in the economic dimension of investment to the contributions that have not matured and consumption factors in the form of cash benefits², Then Social Security in the legal dimension is that of how far there is no implementation of social security under Law Social Security carried out as a follow up of 1945 and related to constitutional law and whether there is a violation or deviation from social security so that no party, especially participants who are disadvantaged for implementation The social security³ related to criminal law.

Implementation of social security necessary consequence of the strategic planning, implementation of consistent operational with sufficient funding available and continuously, because in fact the social security is a public welfare program permanent dimension of a lifetime. Funding social security systems should involve all stakeholders (stake-holders) including employers, labor and the government of the recipient. The key to success in the implementation of the social security system is efficient and effective supervision with the implementation of effective law enforcement, If there are limitations in funding and gaps in oversight, causing inconsistency in law enforcement will have an impact on the quality of these Social Security programs.

There is one task of the government is indispensable since the first until someday in the future, namely:

- 1) making public policy,
- 2) implementing public policy,
- 3) implementing public policy evaluation-monitoring included in the evaluation.

So the role of government in the future must build public policy excellence.⁴

2. Formulation of the problem

Noting the identification of problems in the background of the above problems, the formulation of the problem can be stated as follows:

- a. How BPJS independence as a Legal Entity of Public Health?
- b. How strength and power tie BPJS Regulation for stakeholders in the ranks BPJS?
- c. How and when the Ministry of Health can arrange BPJS?

3. Research purposes

General Objective This study aimed to know the hierarchy with clarification of the law on

- a. BPJS Independence of Public Health as a legal entity that is associated with the laws and regulations that exist.
- b. Strength and power tie BPJS Regulation for stakeholders in the ranks BPJS in various operations.
- c. Their Permenkes in its capacity as an organization tool BPJS.

Specific Objectives: To know a few things during these perceptions of different and often caused a stir in the field such as:

- a. Do BPJS as Public Law Firm is an independent state organ?
- b. Is BPJS Regulation bind strongly stakeholders?
- c. The position of the Minister of Health in operational settings BPJS?

B. LITERATURE REVIEW

² Sulastomo, National Social Security System Delivering Constitutional Commission (Jakarta: Kompas, 2011), p 5.

³ M.Nasser, Legal Studies Seminar on Health Insurance Services-BPJS, Papers Presented in National Seminar Lecture MHKI, on February 7 on May 15, 2015 Yogyakarta and Malang.

⁴ Munir Fuady, Comparative Legal Studies, (Bandung: PT Refika Aditama, 2010), pp 86-88.

With the enactment of Law No. 40 of 2004 on National Social Security System, the nation of Indonesia has had a Social Security system for all Indonesian people. To realize the goal of national social security system needs to be formed organizing body in the form of a public legal entity based on the principle of mutual cooperation, non-profit, transparency, prudence, accountability, portability, participation is mandatory, a trust fund, and the results of the management of the Social Security Fund be used entirely for program development and as much as possible for the benefit of participants.

As mandated by Law No. 40 of 2004 on National Social Security System shall be established a Social Security Administering bodies through Act No. 24 of 2011 of the Social Security Agency. With this Act established two (2) BPJS namely BPJS BPJS Health and Employment. BPJS began operation Health Insurance Program held on January 1, 2014 and the institutional transformation of PT Askes (Persero).

C. RESULTS AND DISCUSSION

1. Overview BPJS

BPJS health is a health insurance agency legal status, which runs a program based on Law No. 24 of 2011. Which by the formation BPJS then this is a form of social protection given by government to the people of Indonesia to ensure that they can meet all the basic needs of the people Indonesia better and more feasible. Where the basic principle that is in use by BPJS in organizing the national health insurance system is a system that is guided by the principles of humanity, with the benefits of social justice for all people Indonesia¹:

Conflict BPJS Authority

The majority of respondents stated that there are some potential conflict of authority that potentially occur in BPJS management. Conflicts of authority and or potential conflicts of interest that occur can occur between several parties, such as:

a. Between the Board of Directors and the Supervisory Board BPJS BPJS

In Article 20 of the Law states that BPJS BPJS organ composed of Board of Trustees and the Board of Directors. Board of Trustees is BPJS organ in charge of supervising the implementation of the arrangements BPJS by directors and advises the board of directors in the administration of the Social Security program⁵, In Article 22, paragraph (a) of this Act states that the Board of Trustees serves to supervise the execution of duties BPJS. Meanwhile Dewas BPJS duty to exercise supervision over BPJS management policies and performance of the Board of Directors.

b. Between Directors BPJS and DJSN as external supervisor who has special authority for BPJS

Board security National Social hereinafter abbreviated DJSN is a board which serves to assist the President in the formulation of public policies and synchronize implementation of the national social security system.⁶ BPJS external supervision conducted by DJSN and watchdog agencies⁷

BPJS BPJS required to separate assets and the assets of the Social Security Fund. Social Security Fund assets are not assets BPJS. BPJS shall store and administer the Social Security Fund to the custodian bank is state-owned enterprises

c. Between the Government represented by the Ministry of Health as BPJS as a regulator and operator.

The logical consequence of the operational form that occurred in the last five years in which the Ministry of Health issued to regulate the management has given rise to situations BPJS lessconductive and can lead to potential conflict or a conflict of authority between the Board of Directors BPJS obligations with the Ministry of Health, since both these authorities according to the legislation

⁵ BPJS Law No. 24/2011, Article 1 (12)

⁶ Law No.24 / 2011 on BPJS: Article 1 (13?)

⁷ UU no. 24/2011 article

equally responsible to the President. Regulation of the Minister of the legal basis, namely the implementation of the National Health Insurance Peraturan Menteri Kesehatan (Minister of Health) and the ministerial regulations Financial (PerMenKeu) Permenkes.

2. Discussion

Law on the Social Security Agency (BPJS) is an implementation of Law No. 40 of 2004 on National Social Security System (Navigation), after the Constitutional Court decision on the case Number 007 / PUU / III / 2005, in order to provide legal certainty for the establishment BPJS to implement the Social Security program in Indonesia. This Law is the implementation of Article 5 (1) and Article 52 of Law No. 40 of 2004 on National Social Security System (Navigation) which mandates the establishment of Social Security Agency (BPJS) and institutional transformation of PT Askes (Persero), PT Jamsostek (Persero), PT TASPEN (Persero) and PT Asabri (Persero) to Social Security Agency (BPJS). The transformation was followed by the transfer of participants, programs, assets and liabilities, employees,

With the formation of both the scope of membership BPJS social security program will be expanded gradually.

Principles of the National Social Security System (Navigation) is as follows:

- a) The principle of cooperativeness. This principle is embodied in the mechanism of mutual cooperation of the participants were able to participants who are less able in the form of mandatory participation for all citizens. Low-risk participants to help high-risk and healthy participants help the sick. Through the principle of cooperativeness, social security can foster social justice for all Indonesian people.
- b) The principle of non-profit. Management of trust funds is not intended for profit (profit) for the Social Security Agency (BPJS), but the main goal is the implementation of social security to meet the maximum interests of the participants. Trust funds, investment results and the budget surplus will be exploited in the interests of the participants.
- c) The principle of openness, prudence, accountability, efficiency and effectiveness. These management principles are applied and underlie all fund management activities derived from participants' contributions and investment results.
- d) The principle of portability. Social security is intended to provide continuous security, even though the participants change jobs or residence in the territory of the Republic of Indonesia.
- e) The principle of participation is mandatory. Compulsory membership meant that the whole people become participants so that they can be protected. Although membership is mandatory for all citizens, its application remains adjusted to the economic capacity of the people and Government as well as the feasibility of the implementation of the program. In the initial phase of workers in the formal sector, the informal sector at the same time, participation will be voluntary, so as to include farmers, fishermen, and those who work independently, so that in the end the National Social Security System can cover the entire population.
- f) The principle of trust funds. Funds collected from the participants' contributions to agencies entrusted organizers to be managed as well as possible in order to optimize the funds for the welfare of the participants.

Principle result the management of the National Social Security Fund in this Act is the result of the form of dividends from shareholders returned to the interests of participants of social security.

D. COVER

1. Conclusion

Determination of the legislation that BPJS as Public Law Firm is responsible to the President for the state administration will have at least three things:

- a. BPJS is independent of the State Agency for financial management that dihimpunnya from the public and received BPJS of government. Financial accountability is accountability to the state administrative system state institutions that are applicable to their respective functions
- b. BPJS as State institutions submit six-monthly reports and other incidental reports as required to the President. Good President as Head of State or Head of Government can straighten BPJS leadership policy direction.
- c. Regulation or decree binding BPJS led all components associated with the operational BPJS and an instrument set up the same position with the regulation, and the Police Regulation of Bank Indonesia regulations or other equivalent regulations also set the environment underneath.

As the Board of Public Law that is responsible to the President, BPJS is not subordinate to the Minister, there is also in charge of the Minister or not coordinated by any institution as well so as the State Agency has a policy authority that is independent and free round for the greatest interest of the benefits received by participants and functions the best services to the public. In other words BPJS Leaders can do anything on their own policies all of which allow participants to benefit optimally. However, this policy must be accountable to the President, who ketata nationality is accompanied by the possibility to receive improvements, changes and fundamental correction of the President.

The legal status BPJS is a government organ that is directly responsible to the President but may be subject and object of the law.

Researchers found the Public Legal Entity (BHP) is not perfect for their legal interactions and character traits contradictory or mutually supportive. In fact, in the field there are some things that are recorded as the application of laws that are contrary to law the charge itself. For example in making regulatory and operational decisions, BPJS not independent because they depend on government regulators. Almost all BPJS regulations made by the Ministry of Health. When the Board of Directors BPJS BPJS issued Regulation No. 02, 2015 Deemed Determination of Amount of capitation and capitation Development Commitment Fulfillment Services Based On First Level Health Facilities, MoH urged that these regulations be drawn and the results of Directors BPJS withdraw and revise the Agency Regulation into BPJS Regulation No. 3/2015. This Regulation Deemed Determination of Amount of capitation and capitation Development Commitment Pememuhan Based Services In health facilities of First Instance BPJS Directors based on the desire to increase participants' contributions. From interviews with respondents, the researchers observed that the operational point BPJS Directors of the load regulation is revised, it is correct and "on the right tract".

With the enactment of Law No. 40 of 2004 on National Social Security System, the nation of Indonesia has had a Social Security system for all Indonesian people. To realize the goal of national social security system has been set up organizing body in the form of a public legal entity based on the principle of mutual cooperation, non-profit, transparency, prudence, accountability, portability, participation is mandatory, a trust fund, and the results of the management of the Social Security Fund be used entirely for program development and for the magnitude of the interests of participants.

So the uncertainty of the form and legal responsibility BPJS eg BPJS uncertainty in the legal position shown in oversight mechanisms when the difference in the determination of the authority of the Board of Trustees BPJS (chosen by Parliament and set out by the President), while the Board of Directors selected and determined by the President

As a Public Law Entity that is responsible to the President has the authority independently to optimize the function of public service and has the nature and authority of the force. As a body or institution that was born through Act with a clear affirmation of the status and position of the independence BPJS the constitutional independence that can not be reduced by other institutions either for operational and managerial concerns the financial and public services.

Independence of BPJS shown in various articles on two of Law, ie the Law No.40 / 2004 and Law No.24 / 2011. In Article 11 BPJS referred to that in his duties BPJS have been authorized to collect payment of dues to the parties in arrears as well as providing administrative sanctions. BPJS also authorized to put the Social Security Fund for short-term investments and long-term by considering aspects of liquidity, solvency, prudence, security of funds and adequate results.

All things above shows us, that BPJS have a high independence in general support of the ideals for Social Security program's success. Even BPJS can make a deal with a major health facility about payment for healthcare, create or terminate employment contracts with healthcare facilities dapatmengenakan even administrative sanctions to health facilities that do not meet their obligations.

In addition BPJS also entitled to obtain the results of monitoring and evaluation of the implementation of the Social Security program DJSN every 6 months as written in Article 12 (2). This verse may be evidence of the recognition that BPJS be a very strong Board hopes to become an independent Board and can not be influenced by other agencies either under the President and the legislature as the House of Representatives.

The rights and authority of -kewenangan stipulated in the legislation that are above, once again showing that BPJS is a state institution that is independent and stand alone in the Social Security program to operationalize this. In the course of BPJS during 2014-2015 and 2016, world health insurance in Indonesia, many were surprised by the view that the implementation of the Health BPJS, BPJS position only as mere carriers which the Ministry of Health is seen as a regulator. On the field, the authors found several contradictions that result from this dichotomy view. Apart from the existing charge in the rules that are fixed, this research saw that there were problems in the field of law contradiction that needs to be clarified that this BPJS program can work well.

The logical consequence of the operational form that occurred in the last five years in which the Ministry of Health issued to adjust BPJS management has given rise to the unfavorable situation and cause the appearance of a potential conflict or a conflict of authority between the Board of Directors BPJS obligations with the Ministry of Health, given that the two officials, according to enactment laws are equally responsible to the President. Regulation of the Minister of the legal basis, namely the implementation of the National Health Insurance Peraturan Menteri Kesehatan (Minister of Health) and the ministerial regulations Financial (PerMenKeu)

In essence, according to the Law of Social Security Agency (BPJS) is a Public Legal Entity (BHP) which is independent, has the authority to regulate matters related to the benefit of national health insurance participants, responsible to the President and a written report every six months .With thus BPJS health is a state organ that is not in charge of or under the Minister of Health.

With status as Board of Public Law, established and disbanded with through legislation and is responsible jawabpada president, then president of the BPJS has the authority to issue regulations organizing body of social security (BPJS) which has a holding capacity strong on the whole range of stakeholders BPJS ,

In effect the regulation of health minister (Minister of Health) has a position that is parallel to BPJS rules, but the rules can be set BPJS health minister when the set is:

- a) The regulation of the ministry of health personnel
- b) Settings related matters and budgetary policies of the working unit (SATKER) hospitals under the Ministry of Health.
- c) The policy setting that is not operational policy of national health insurance (JKN) / Social Security Agency (BPJS) Health.

2. Suggestion

- a. The president gave clear guidance on health ministers and directors BPJS about the importance of coordination to avoid conflicts of authority and assert that power tie BPJS regulations equal to the power regulation of the Minister of Health.
- b. We need to make a revision of the rules that describe the formulation of a conflict / conflict of authority in the field, for example between the Minister and the Director BPJS, as described in several articles in Presidential Decree No. 12 of 2013 which has been revised three times.
- c. Done and harmonious coordination in advance of the current Minister of Health and the Director BPJS will issue a policy / regulation respectively

REFERENCES

Books, Internets and Laws:

- Moh. Mahfud MD. Democracy and the Constitution in Indonesia (Yogyakarta; Rineka Copyright, 2003), p 130.
- Munir Fuady, Theory of Modern Legal State (rechtstaat), (Bandung: Refika Aditama, 2009), pp 120-122.
- Sulastomo, National Social Security System Delivering Constitutional Commission (Jakarta: Kompas, 2011), p 5.
- M.Nasser, Legal Studies Seminar on Health Insurance Services-BPJS, Papers Presented in National Seminar Lecture MHKI, on February 7 on May 15, 2015 Yogyakarta and Malang.
- Munir Fuady, Comparative Legal Studies, (Bandung: PT Refika Aditama, 2010), pp 86-88.
- AndrePieter De Exter, Health Care Law-Making in Central And Eastern Europe (New York; Intersectia, 2007), p 57.
- Fachmi Idris, "Seminar on Legal Studies in Health Insurance Services-BPJS" Paper Presented at the National Seminar MHKI, on February 7, 2015 in Jakarta.
- Bagir Manan, Dawn Toward Autonomous Region, First edition, (Yogyakarta: Center for Legal Studies (PSH) FH UII: 200), p 153
- Muchsan, Surveillance Systems Deeds Against Government Officials and State Administrative In Indonesia, Molds I (Yogyakarta: Liberty: 1992), p 36
- Ni'matul Huda, Dissertation Controlled Products Regional Legal Relations between the Government and Local Government of the Republic of Indonesia, Doctoral Program (S-3) Legal Studies Graduate Program Faculty of Law, University of Indonesia Yogyakarta 2009, hlm78-80
- Ministry of National Education Indonesian Dictionary, Third Edition, (Jakarta, 2005), p 604
- Salim and Erlies Septiana Nurbani, Application of Legal Theory on thesis and dissertation research, Issue I, Molds I (Jakarta: Rajawali Press, 2013), pp 183-196
- Soerjono Soekanto & Sri Mamudji, Normative Legal Research Unit (Brief Overview), (Jakarta: Rajawali Press, 2001), p. 12
- Article 1 paragraph 1 of Law No. 24 of 2011 on Social Security penyelenggara body.
- Asih Eka Putri, 2014, Series Handbook 2: Understand BPJS (Social Security Agency of Health), iedrich-Ebert-Stiftung, hlm.7
- Susanti Adi Nugroho, 2008, the Consumer Dispute Resolution Process Seen From Obstacles And Procedural Law Implementation, Jakarta, Kencana Prenanda Media Group, p, 61
- Hermein Hardiati Koeswadji, 1984, Law and Medical Papers, Surabaya, Airlangga University Press, hlm.31
- <http://m.hukumonline.com/berita/baca/lt54cf4a639cccf/kepesertaan-wajib-bpjs-bukan-private-domain->, accessed on April 19, 2017, 20:00 pm.

- Ahmdi Miru, Sutarman Yodo, 2011, the Consumer Protection Law, Jakarta, Rajagarfindo Persada, p. 38
- [http:// www / Suharto / Pdf / Reinventing .Depsos.di](http://www/Suharto/Pdf/Reinventing.Depsos.di) visit on April 7, 2015 at 23:12 page 7
- Moh Mahfud MD, Primary and constitutional structure of Indonesia (Revised Edition) Renaka Cipta, Jakarta case 64
- Yudo siswo Husodo, Dreams of the Welfare State, an introduction., Cetkn I, July / 2006., Hal8 Burhanuddin, Consumer Protection Legal Thought and Halal Certification, Malang 2011 case 1-2
- <https://ferli1982.wordpress.com/2013/05/31/perlindungan-konsumen/> the visit on the 24th of August at 20.15
- Abdul Halim Barkatulah, opcit l 8
- Shidarta Ibid page 11
- Janus Sidabalok, Consumer protection laws in Indonesia, publisher Aditya Citra Bhakti, Bandung 2014, p 38
- <http://nitanurrachmawatiatmasari.blogspot.co.id/2011/02/perlindungankonsumen.di> visit on August 24 2016 at 23:26
- <http://blogingria.blogspot.co.id/2012/12/makalah-hukum-erlindungankonsumen.html>,dikunjungi on 15 september 2016, 23:43 pm
- <https://mardyantongara.wordpress.com/2013/04/16/perlindungan-konsumen>. The visit on August 24 2016 at 17:47
- <http://www.yabpekna.com/2015/04/perlindungan-konsumen.html>, in the visit on November 5, 2015. At 12:50
- <http://fh.unram.ac.id/wp-content/uploads/2014/07/PENYELESAIAN-SengketaKonsumen-Mediation-Through-the-On-Board-Dispute-Resolution-Consumer-BPSK>., In visits on November 5, 2015. At 15:00
- Janus Sidabalok, opcit, page 52
- <http://www.uaji.id/MIH1712>. In Kunjung On the date August 7, 2016 at 20:15
- Ahmed Miru., Principles, Law of Consumer Protection., Jakarta cetkn k-II, 2013, p. 183 21 Ahmad Miru, opcit case 184
- Abdul Halim Barkatulah., Law of Consumer Protection, theoretical studies and the development of thinking, April, 2008, p 49
- Diah Arielle: Setting BPJS as Public Law Firm, Dissertation, 2017
- BPJS Law No. 24/2011, Article 1 (12)
- M.Nasser: Potential Conflicts in BPJS operations; Seminar Paper MHKI, Jakarta, August 7th, 2014
- Law No.24 / 2011 on BPJS: chapter 1 verse 13
- UU no. 40 of 2004 The National Social Security System (Social Security Act)
- Law No. 24 of 2011 about Social Security Agency (BPJS):
- Regulation No. 101 of 2012Beneficiaries of the Health Insurance Contribution
- Government Regulation No. 82 Year 2013on Initial Capital for Social Security Agency of Health
- Constitutional Court judges, Chief Justice of the Supreme Court, Ministers, Deputy Ministers and Specific Officials
- Minister Regulation No. 59 of 2014on Standard Rates in Health Care Health Insurance Program Implementation
- Minister Regulation Number 36 Year 2015On the Prevention of Fraud (Fraud) In Health Insurance Program Implementation At the National Social Security System.

- PerMenKeu No. 205 of 2013on Procedures for Procurement, Disbursement, and Accountability daa Health Insurance Contribution Income Recipients of Government
- Beneficiaries Health Contribution
- PerMenKeu No. 211 of 2013regarding the Amount Percent Operational Fund for Health Social Security Agency in 2014
- Health BPJS Regulation No. 1 of 2014on the Implementation of Health Insurance
- Health BPJS Regulation No. 2 of 2014about the Quality Control Unit Services and Complaints Handling Participants
- Health BPJS Regulation No. 3 of 2014on Procedures and Mechanisms of Compliance Supervision and Inspection on the Implementation of Health Insurance Program
- BPJS Health Regulations No. 4 of 2014on Procedures for Registration and Payment of Individual Participant Social Security Agency of Health
- Health BPJS Regulation No. 1 of 2015About the Registration Procedure and Fee Payment Full Participant and Participant Wages Not Recipients Not Employed
- Kepmenkes No. 328 In 2013About the National Formulary set list of selected medicines are needed and should be available in health facilities
- KepmenkesNo. 455 In 2013About the Association of Health Care Facilities
- Menkes Circular Letter No. 31/2014On the Application of Standards Rates On Health Care Health Care Facilities First Level and Advanced Level Health Care Facilities in the Implementation JKN
- Menkes Circular Letter No. 32/2014On the Implementation of Health Care Health Care Facilities First Level and Advanced Level Health Care Facilities in the Implementation JKN
- Law No. 39 of 1999on Human Rights (HAM)
- UU no. 36 of 2009About health
- UU no. 44 Year 2009About Hospital
- UU no. 29 of 2004On the Practice of Medicine
- UU no. 32 of 2004On Local Government
- UU no. 17 of 2003State Finance
- UU no. 1 of 2004On the State Treasury
- UU no. 15 of 2004About Management and Financial Responsibility State.
- UU no. 33 of 2004About the Central and Regional Financial Balance.
- UU no. 30 of 1999About Arbitase and Alternative Dispute Resolution
- UU no. 8 1981About the Book of the Law of Criminal Procedure Law
- Kepmenkes No. HK.03.01 / 60 / I / 2010About the Strategic Plan of the Ministry of Health in 2010-2014 [H1]
- The Universal Declaration of Human Rights (HAM) - The United Nations 1948
- ILO Convention No. 102 1952 (C.102)
- ILO Convention No. 130 1969 (C.130)
- ILO Recommendation No. 202 Year 2012 (R.202)
- Resolution WHA 58 of 2005 on Sustainable Financing, Universal Health Coverage, and Social Health Insurance

SHIFT IN INDONESIA'S ISLAM INHERITANCE LAW WITH GIVING WAJIBAH WILL TO NON MUSLIM HEIR

Maman Suparman

Student of Legal Studies Doctor Program, Universitas Borobudur
msuparman85@yahoo.co.id

Abstract

The inheritance of different religions is one of the contemporary problems in Islamic legal thought. But the Compilation of Islam Law, The Fatwa of the Indonesian Ulema Council and other laws and regulations have not yet regulated inheritance for non-Muslim heirs. Starting from these problems, viewed from the side of justice, the right of non-Muslim heirs, they need to get a portion of the assets left by the deceased with arrangements or adjustments as material ideas in the formation of inheritance law and national wills, by giving rights to non-Muslim heirs through Wajibah wills. Wajibah Will, Justice, non-Muslim.

Keywords : Wajibah Will, Justice, Non-Muslim.

A. INTRODUCTION

Indonesian society is a complex and plural society, so that the existence of religious differences in a particular family can be said to be reasonable. This can be seen from the reality that shows the number of marriages between a male / female Muslim and a non-Muslim male / female. Furthermore, the children of their marriage have chosen non-Muslim non-Muslims so that there will be religious differences in a family. Seeing such facts, it is important to discuss the law for non-Muslims in the context of Islamic law, in relation to justice regardless of religion.

In a family if there are several people with different religions, which is there are Muslims and there are also non-Muslims, certain problems will arise, especially problems involving inheritance if one of his family members dies. This might happen, if in Muslim families there are family members who are non-Muslim, or in non-Muslim families there are Muslim families.

Islamic inheritance law applies to Indonesian people who are Muslim based on Staatsblad 1845 No 129 promulgated in the Netherlands with Staatsblad 1855 Number 2 and in Indonesia with Staatsblad Number 221 which has been amended, added and so on. That Islamic inheritance legal issues are very broad and complex, because it covers the scope of human life and society, from the problem of children who are still in the womb to death, so it is not possible to reveal the whole.

In the process of compiling the Compilation of Islamic Law (KHI), intellectuals or Muslim scholars have a role as researchers of the yellow books and participants in the Workshop on Development of Islamic Law through jurisprudence. The books studied are 38 books, with 160 details of the subject matter of material law in the field. family law (administration, inheritance, will, grant, endowment, and sodaqah). The research of the books intended was carried out by 10 State Islamic Institutes (IAIN) throughout Indonesia, and the study took 3 (three) months, starting March 7 to June 21, 1985.¹

Compilation of Islamic Law contained in Presidential Instruction No. 1 of 1994 and carried out by Decree of the Minister of Religion No. 154 of 1991 concerning the Implementation of Instruction of the President of the Republic of Indonesia Number 1 of 1991 dated June 10, 1991. Compilation was

¹ Wawan Kurniawan, *Reformation of Inheritance Law in Indonesian's Islamic Law Compilation*, (Bandung: Shari'ah and Law Faculty of Islamic State Sunan Gunung Jati University, 2012), page. 35

disseminated to the Chair of the High Court of Religion and Chairperson Circular Director of the Guidance of Islamic Courts on July 25, 1991 Number 3694 / EV / HK.003 / AZ / 91.

The Compilation of Islamic Law (KHI) is a summary of various legal opinions taken from various books written by Islamic jurisprudence scholars, which are commonly used as references in religious courts to be processed, developed and compiled in a collection.² This KHI can also be called as Indonesian Fiqh, which was compiled by uniting various fiqh schools and paying attention to the conditions of the needs of Indonesian Muslims.

The inheritance of different religions is one of the contemporary issues in contemporary Islamic legal thought. The problem of religious inheritance is sticking out when relations between Muslims and non-Muslims are again discussed by various groups.³ In fact, these problems have been the concern of Islamic thinkers since the beginning of its formation up to the contemporary era.⁴

Concerning inheritance of different religions, the Compilation of Islamic Law (KHI) does not explicitly state that religious differences are inheritance barriers. In Article 173 KHI states that inheritance barriers are murder or attempted murder, or severe torture to the heir and slander that the heir has committed a crime that is punishable by a sentence of five years or more. However, this is explicitly revealed in the provisions of Article 171 KHI which states that what is meant by heirs is a person who at the time of death has a blood relationship or marital relationship with an heir, is Muslim, and is not hindered because of the law to become an heir.⁵

According to the Fatwa of the Indonesian Ulema Council Number: 5 / MUNAS / VIK / MUI / 9/2005 Concerning the Inheritance of Different Religions, stipulates a Fatwa concerning the Differences of Different Religions, namely:

1. Islamic inheritance law does not give mutual inheritance rights between people of different religions (between Muslims and non-Muslims)
2. Giving assets between people of different religions can only be done in the form of grants.

So according to the Fatwa of the Indonesian Ulema Council in number 2, the provision of property between people of different religions can only be done by means of grants, wills or gifts, however, if the heir does not give his assets in the form of grants, wills or gifts, the Fatwa does not regulate against heirs of different religions to be given heir's inheritance, by means of the obligatory will.

Based on the above problems, actually the problem of inheritance between people of different religions can be accommodated with a will law of obligation, with the giving of a will for non-Muslim heirs, thus there has been a shift in Islamic inheritance law in practice, so the above issues become interesting and important to study more deeply, namely one aspect of Islamic inheritance law as part of the thinking in the formation of inheritance law and national will, by taking into account the culture or habits that live in the community. Therefore, this study specifically seeks to examine the shifting of Islamic inheritance law in Indonesia with a Testament Wajibah to Non Muslim Heirs.

B. RESEARCH METHOD

In order for this discussion to be accurate and directed from the data analysis process to solving the problem according to scientific criteria that can be scientifically accounted for, the researcher uses the following stages of the method:

1. Type of research

² Abdurrahman, *Compilation of Islamic Law In Indonesia*, 3rd print, (Jakarta, Academia Pressindo, 2001), page. 14

³ Muhammad Muhibbudin, quote Mun'im A Sunny in Indonesian's Islamic Inheritance Law Reform, *Ahkam Journal*, 3rd Volume, Number 2013, page. 188

⁴ Muhammad Muhibbudin, Indonesian's Islamic inheritance Legal Law, quoted from Abdul Aziz Al-Barrah, *Ibid*.

⁵ *Ibid*, page. 123

This research belongs to the category of normative legal research that seeks to examine inconrento law (legal reality), making the Supreme Court's decision as a case. Therefore, the emphasis of library research, namely research that makes literature as the main data source that aims to find, develop, and test a science. This literature study is used to identify and map concepts and provisions regarding the law of inheritance in Islamic law in relation to non-Muslim heirs. This research belongs to the category of normative legal research that seeks to examine inconrento law (legal reality), making the Supreme Court's decision as a case. Therefore, the emphasis of library research (library research), namely research that makes literature as the main data source that aims to find, develop, and test a science. This literature study is used to identify and map concepts and provisions regarding the law of inheritance in Islamic law in relation to non-Muslim heirs.

2. Data and Data Sources

Based on this study, the data analyzed are secondary data consisting of primary legal materials, secondary legal materials and tertiary legal materials, the legal materials are as follows:

- a. Primary legal material, is a binding legal material such as Qur'an , As-Sunah legislation relating to inheritance and wills law especially the wajiban will.
- b. Secondary legal materials, namely legal material that explains primary legal materials, namely legal material in the form of books, views of legal experts, results of research on inheritance law and will as well as Supreme Court Decision Number 368.K /AG /1995 and Decision of the Supreme Court Number 51.K /AG /1999.

C. PROBLEM FORMULATION

Based on the description above about the background of the problems, the dissertation study on the Shift of Islamic Inheritance Law in Indonesia With the Wajibah Will Award for Non-Muslim Heirs, the researcher tried to put forward the formulation of the problem as follows:

1. Why do non-Muslim heirs need to be given a will?
2. How do you give a Wajibah will for non-Muslim heirs in the Islamic inheritance system in Indonesia?

D. DISCUSSION

Islam is a religion of Rahmatan Lil'alam, a religion that is universal, comprehensive, and complete. On the other hand, Islam is very flexible which can accommodate the interests of its servants, in complex social life in the present, differences, especially in terms of perception are something that cannot be avoided. Efforts to build a positive perception of Islam in the eyes of the world will be difficult to realize when the Islamic paradigm does not prioritize the Islamic vision of Rahmatan Lil 'alam in building essential world peace. However, there are many misinterpretations regarding the concept of rahmatan lil 'alam itself.⁶

Islam does not prohibit his people from interacting with other religious communities, because the grace of Allah given through Islam is not given to his people if communication with them does not go well. Because of this the Jurists of various schools allowed a Muslim to give alms to the non-Muslims who were not harbi infidels. Likewise, vice versa, a Muslim is allowed to receive assistance and gifts

⁶ Lim Salaman, "Family Inheritance Practice with Religion Differences in Compound Society in Bengkulu Province in Islamic Law Perspective, *Dissertation*, Postgraduate Program of State Islamic University Raden Intan 1439H / 20128 M, page. 15

given by non-Muslims. Fukaha scholars also require a Muslim to provide his wife, parents and non-Muslim children.⁷

To explain the Shifting of Islamic Inheritance Law with the help of the Obligatory Testament for non-Muslim inheritance experts, the researcher has asked for two formulations of the problem. For me to answer the two problem formulations above, the researcher uses the research using some of theories as an analysis tools.

1. To carry out the formulation of the first problem, the concepts of wills and wajibah wills will be used as well as the theory of justice, including the theory of justice in Islamic law. While to explain the second problems will be analyzed with the State of Law and Jurisdiction theory that explains the nature of state law represent the principle of legality as not universal, where the state bases its power and authority fully-determined by basic law, and state sovereignty theory, which explains the state that makes positive law and Islamic law in Indonesia.

According to Islamic law, the enactment of predetermined inheritance law is something that is obligatory for every Muslim. In addition, the provisions determined by the sender, without the efforts of the person who will die (heir) or the will of the person who will receive (heir) and cannot be changed by the government, or referred to as the *ijbari* principle.⁸

It was agreed upon by the Ulama and the Fukaha, the religious differences between the testator and the heir were one of the obstacles to obtaining inheritance. Thus, Muslims cannot inherit from non-Muslims and vice versa. This provision is based on the hadith of the Prophet Muhammad. The first hadith, which means as follows: "From Usamah bin Zaid that the Prophet SAW said: *Muslims cannot inherit the property of infidels and even the unbelievers cannot inherit the property of Muslims (H.R Bukhari)*⁹.

Wajibah wills according to Suparman Usman is a will that its implementation do not influenced or depended by does the willingness or desire of the deceased. This applied testament is carried out, whether spoken or not spoken, both desired or not desired by the deceased.¹⁰ Thus the implementation of the Wajibah Wills does not require proof that the implementation of Wajibah Will need to be spoken, written, or desired, but its implementation is based on legal reasons that justify that the will must be carried out.¹¹

Basically giving a will is an act of faith, which is an action carried out at the instigation of his own disire under any circumstances. Thus, people are free to make a will or not depend on the person concerned.¹²

Jurisprudence argues for close relatives who do not inherit the will needs to make a will, this is based on the Word of Allah SWT in Surah Al-Baqarah verse 180, and those who support include Imam Ahmed bin Hambal, Ibn Hazm, Said Ibnu, Musayyab, Al Hasanul Bashri, etc.¹³

Because there are no contradictions about the verses that require a will, grant or gift, the scholars who hold this opinion still require a will in advance for a close relative who does not receive an inheritance. And if the close relative does not get a will, grant or gift then he should have inherited property through a mandatory will.

⁷ *Ibid*''

⁸ Amir Syarifudin, Islamic Inheritance Law, *Op.Cit.* page.7

⁹ Dian Mustika, Wajibah Wills to Non Moslem in Islamic Law Perspective; Analysis of the Indonesia Republik Supreme Court Ruling Number 51 K/AG/1999, *Inovatif Journal*, Vol. X,No. 2, July- Desember, 2011, page. 385

¹⁰ Suparman Usman and Yusuf Somawinata, Fiqih Inherit the Law Of Islamic Inheritance, *Op, Cit*, page.163

¹¹ *Ibid*

¹² Fatchur Rahman, Science of Will, *Op. Cit*, page. 62

¹³ Teuku Muhammad Hasbi Ash Shiddiqie, Introduction to Muqalah Fiqh, *Op. Cit.* Page.300

According to Fatur Rahman, the ruler or judge as the highest state apparatus has the authority to force or give a letter of Wajibah Will mandatory decision to certain people, also in certain circumstances caused by two things, namely:

- a. The loss of elements of effort for the giver of the will and the emergence of an element of obligation through legislation or a decree without depending on the willingness of the person who has the right and the consent of the recipient of the will.
- b. There are similarities with the provisions for the distribution of inheritance in the case of male acceptance 2 (two) times the share of women.¹⁴

The concept of a will in Indonesia is applied to adopted children and adoptive parents as outlined in Article 209 of the Compilation of Islamic Law, as follows:

- (1) *The inheritance of adopted children is divided based on Articles 176 to 193 above, whereas for adoptive parents who do not accept the wajibah will given a will as much as 1/3 of the inheritance of the adopted child.*
- (2) *An adopted child who does not receive a will is given a wajibah will as much as 1/3 of the inheritance of his adoptive parents.*

Based on the Compilation of Islamic Law adoptive parents or adopted children will not obtain inheritance rights, because he is not an heir, therapy adoptive parents are automatically considered to have left a will (Wajibah will) a maximum of 1/6 of the assets left for their adopted child, or on the contrary, if you adopt the adoptive parents before being forced to distribute inheritance to the heirs, then the will must be carried out first. Testamentary Obligations are testaments whose implementation does not depend on the willingness or will of the deceased, and this will is intended for heirs or relatives who do not obtain a portion of inheritance from the deceased person, due to an obstacle in the matter (Syara).¹⁵

This dictum is considered radical because even though its name is a will but in reality it means giving inheritance rights to adopted children or adoptive parents, even though in practice it is not easy for adopted children and adoptive parents to obtain the wajibah will because it will reduce the inheritance rights of the entitled heirs for the inheritance.

In terms of legal certainty that heirs of different religions with heirs are heirs who do not receive the inheritor's inheritance this side has already right, but in terms of justice according to the author it is not appropriate, therefore there should be a change in regulation in the Compilation of Islamic Law and Fatwa Assembly Indonesian Ulema concerning people who can accept a will, for example to a heir who is different from a religion with a Muslim heir, it is true that the heir is an heir who is not entitled to inheritance's wealth due to different religions, but the heir can receive a will , grants or prizes, but if they do not receive a will, grant or gift from the inheritor, they should receive a portion of the inheritance's wealth based on a wajibah will. This is as the decision of the Indonesian Supreme Court NO. 368 K / AG / 1995 July 16, 1998 and No.51K / AG / 1995 dated September 29, 1999.

In the decision Number No. 368.K / AG / 1995 dated July 16, 1998, it was stated that the non-Muslim heirs received a portion of the inheritance of Muslim heir based on the Wajibah Will of the Muslim heirs, in this decision the non-Muslim heirs were not declared as an entitled heir, while in decision No. 51.K / AG / 1999 dated September 29, 1999, non-Muslim heirs in this case were said to be entitled heirs, and received the inheritance of the Muslim heirs as well as Muslim heir based on wajiibah will.

From the two decisions of the Supreme Court that can be concluded that there has been renewal of Islamic inheritance law, before the non-Muslim heirs did not get a part of the inheritance of the Muslim

¹⁴ Fatchur Rachman, Science of Inheritance, *Op, Cit.* page.63

¹⁵ Abdul Aziz Dahlan, Islamic Law Encyclopedia, *Op.Cit.* page.30

heir, but after the verdict the non-Muslim heirs became part of the inheritance of the Muslim heir, and get recognition as an heir. Although the decision of the Supreme Court is only limited to non-binding guidelines for judges who decide similar cases, the issuance of both decisions is a very advanced breakthrough, in providing a sense of justice for non-Muslim heirs.

However, from the two decisions there are interesting things related to legal considerations, in case No.368.K / AG / 1995 dated July 16, 1998 and No. 51.K / AG / 1999 dated September 29, 1999. Both are based on *wajibah* wills, while in case No.51.K / AG / 1999 Non-Muslim heirs in addition to obtaining property based on a *wajibah* will also he is declared as a heir of the Muslim heir.

In the Compilation of Islamic Law, the percentage of inheritance that may be allocated for *wajibah* wills is a maximum of 1/3 (one third) of the inheritance's wealth. Also in Article 209 of the Compilation of Islamic Law, it is mentioned about the people who have the right to receive the *wajibah* will, namely adopted children and adoptive parents only, without mentioning the method of giving the *wajibah* will.

REFERENCES

- Wawan Kurniawan, *Reformation of Inheritance Law in Compilation of Islamic Law in Indonesia*, Bandung: Faculty of Sharia and Law of the Sunan State Islamic University of Gunung Jati 2012
- Abdurrahman, *Compilation of Islamic Law in Indonesia*, 3rd edition, Jakarta: Akademika Pressindo, 2001
- Abdul Azis Dahlah, *Encyclopedia of Islamic Law*, Jakarta: New Arrival Van Hoeve, 1999
- Amir Syarifuddin, *Law Inherits Islam*, Jakarta: Kencana, 2004
- Dian Mustika, *Wajibah Will of Non-Muslims in Islamic Law Perspective: Analysis of the Decision of the Supreme Court of the Republic of Indonesia Number 51 K / AG / 1999*, Journal of Innovation, Vol. X, No. 5, Juli-December, 2011
- Fatchur Rahman, *Ilmu Waris*, Bandung: PT. Alma Arif, 1981
- Fatwa of the Indonesian Ulema Council Number 14 of 2012 concerning the position of the Children of Adultery and the treatment of it on March 10, 2012 M / 18 Rabbi 'ul ul end 1443 H
- Lim Salaman, "The Practice of Family Inheritance in Diverse Religious Communities of Plural in Bengkulu Province in the Perspective of Islamic law, *Dissertation*, Postgraduate Program of State Islamic University Raden Intan, 1439H / 20128 M
- Muhammad Muhibbudin, Quoted Munim A Suny in renewing Islamic Inheritance Law in Indonesia, *Ahkam Journal*, Volume 3, Number 2013
- Suparman Usman and Yusuf somawinata, *Fiqh Mawaris Islamic Heritage Law*, Jakarta: First Mada Elephant 1070
- Teuku Muhammad Hasib Ash Shiddieqe, *Fiqh Mawaris*, Semarang: Library, 2001
- Wawan Kurniawan, *Reformation of Inheritance Law in The Compilation of Islamic Law in Indonesia*, Bandung: Faculty of Sharia and the Islamic University of Sunan Gunung Jati Islamic University, 2012

RIGHTS OF WOMEN WORKERS IN HUMAN RIGHTS PERSPECTIVE

Mariska

Student of Legal Studies Doctor Program, Universitas Borobudur
riska1404@gmail.com

Abstract

Indonesia as a legal state has several characteristics, namely the protection, promotion, enforcement and fulfillment of human rights by regulating Human Rights in Chapter XA of Human Rights starting from Article 28A to Article 28J of the 1945 Constitution of the Republic of Indonesia. Human Rights apply universally not limited to certain times and places, so that with the universal application of Human Rights in line with the recognition of the principle of equality for all citizens without exception which is constitutionally regulated in Article 27 paragraph (1) of the 1945 Constitution of the Republic of Indonesia. Therefore, every citizen has equal rights before the law and government regardless of religion, ethnicity, gender, position and class, as well as working women who have rights that must be fulfilled without discrimination due to obtaining jobs and livelihoods. eligible is the right of each war If the state is based on Article 27 paragraph (1) of the 1945 Constitution of the Republic of Indonesia, so this paper will focus on discussing the regulation and protection of human rights for women in Indonesian national law, as well as regulations relating to rights that must be fulfilled in hiring women. This research has 2 (two) formulations of the problem, first: how is the regulation and protection of human rights for women in Indonesian national law ?, and second: how are the regulations related to the rights that must be fulfilled in hiring women? The research method used is juridical-normative legal research with the data studied is in the form of library material or secondary data that includes primary legal materials, namely the 1945 Constitution of the Republic of Indonesia, Law No. 39 Year 1999 concerning Human Rights, and Law No. 13 Year 2003 concerning Manpower, secondary legal materials include legal science books, legal scientific journals, etc., as well as tertiary legal materials which include KBBI, encyclopedia, etc.

Keywords: Human Rights (HAM), Women's Worker Rights, Obligations of Entrepreneurs.

A. Introduction

Constitutionally, the State of Indonesia is a legal state based on Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. As a legal state it has several characteristics, namely protection, promotion, enforcement and fulfillment of human rights by regulating Human Rights in Chapter XA Human Rights starting from Article 28A to Article 28J of the 1945 Constitution of the Republic of Indonesia. By stipulating a separate Article on Human Rights, the aim is to ensure that the protection, promotion, enforcement and fulfillment of human rights are manifested, effective, binding and sustainable, which is guaranteed, regulated, and set forth in legislation (Article 28I Paragraph 5 of the 1945 Constitution of the Republic of Indonesia), one of which is Law No. 39 of 1999 concerning Human Rights (HAM).

Human rights apply universally not limited to certain times and places, so that with the application of universal human rights in line with the recognition of the principle of equality for all citizens without exception. This is constitutionally regulated in Article 27 paragraph (1) of the 1945 Constitution of the Republic of Indonesia which reads as follows: "All citizens are at the same time in law and government and are obliged to uphold the law and government without exception." This principle of equality eliminates discrimination, therefore every citizen has equal rights before the law and government regardless of religion, ethnicity, gender, position and class.

By upholding the principle of equality for every citizen, in law enforcement and human rights in Indonesia must be free from discrimination for a particular group, and this principle applies to every line of human life, including in the right of citizens to obtain employment. The right of Indonesian citizens to obtain decent jobs and livelihoods is regulated in Article 27 paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which reads "Every citizen has the right to work and livelihoods that are appropriate for humanity." the state has the right to decent work and livelihood including women who work.

Working women have rights that must be fulfilled without discrimination. This is related to Article 5 paragraph (3) of Law No. 39 Year 1999 concerning Human Rights, which reads "everyone who is among the vulnerable groups has the right to receive more treatment and protection with regard to their specificity." Vulnerable groups of people as intended in the article are elderly people, children, the poor, women pregnant and disabled (Explanation of Article 5 paragraph (3) of Law No. 39 Year 1999 concerning Human Rights). Whereas according to the Human Rights Reference stated that those belonging to vulnerable groups are: a. Refugees; b. International Displaced Persons (IDPs); c. National Minorities; d. Migrant Workers; e. Indigenous Peoples; f. Children; and Women.¹ so that not only pregnant women are included in vulnerable groups, but also women. Women who work must be free from discrimination by enforcing and fulfilling their rights so that the discussion in this journal will focus on regulating and protecting human rights for women in Indonesian national law, as well as regulating rights that must be fulfilled in hiring women.

B. Research Method

The research method used is juridical-normative legal research with the data studied is in the form of library material or secondary data that includes primary legal materials, namely the 1945 Constitution of the Republic of Indonesia, Law No. 39 of 1999 concerning Human Rights, and Law No. 13 of 2003 concerning Manpower, secondary legal materials include legal science books, legal scientific journals, etc., as well as tertiary legal materials which include KBBI, encyclopedia, and others.

C. Problem Formulation

The formulation of the problems that can be discussed in this study are as follows:

1. How is the regulation and protection of human rights for women in Indonesian national law?
2. How is the regulation related to the rights that must be fulfilled in hiring women?

D. Discussion

1. Regulation and Protection of Human Rights for Women in Indonesian National Law

Human rights in Indonesian National Law are regulated in several Laws and Regulations, one of which is in Law No. 39 Year 1999 concerning Human Rights, which states that Human Rights are a set of rights that are inherent in the nature and existence of humans as creatures of God Almighty and are His gifts that must be respected, upheld and protected by the rule of law, Government and everyone for the honor and protection of human dignity (Article 1 point 1 of Law No. 39 Year 1999 concerning Human Rights).

The provisions in Law No. 39 Year 1999 concerning Human Rights which affirms the principle of equality as stipulated in Article 27 paragraph (1) of the 1945 Constitution of the Republic of Indonesia NRI is in Article 3 paragraph (1) to (3) Law No. 39 Year 1999 concerning Human Rights, which reads as follows:

¹ Willem van Genugten J.M (ed), 1994, *Human Rights Reference*, Netherlands ministry of foreign Affairs, The Hague, page. 73.

- (1) Every human being is born free with equal and equal human dignity and values and is endowed with reason and conscience to live in a society, nation and state in the spirit of brotherhood.
- (2) Everyone has the right to recognition and guarantee of protection and fair legal treatment and to obtain legal certainty and equal treatment before the law.
- (3) Everyone has the right to the protection of human rights and basic human freedoms without discrimination.

The regulation of Human Rights, especially on Human Rights for Women, has been specifically regulated in the Ninth Section entitled Women's Rights starting from Article 45 to Article 51 of Law No. 39 Year 1999 concerning Human Rights, besides that there are also other Laws and Regulations such as Law No. 23 Year 2004 concerning the Elimination of Domestic Violence, Law No. 12 Year 2006 concerning Citizenship, Law No. 21 Year 2007 concerning Eradication of Criminal Acts on Trafficking in Persons, and Law No. 2 Year 2008 concerning Political Parties, Law No. 42 Year 2008 concerning General Elections, Presidential Instruction Number 9 Year 2000 concerning Gender Administration (PUG) and Presidential Decree No. 181 Year 1998 concerning the Establishment of the National Commission on Violence Against Women or Komnas Perempuan which was amended by Presidential Regulation Number 65 Year 2005.

2. Rights that must be fulfilled in employing women

Women in the workforce have the same opportunities guaranteed in law. Related to Human Rights for Women who work, it is regulated in Article 49 of Law No. 39 Year 1999 concerning Human Rights, which reads:

- (1) Women have the right to choose, be elected, appointed in work, position and profession in accordance with the requirements and legislation.
- (2) Women have the right to get special protection in carrying out their work or profession on matters that can threaten their safety and / or health with regard to their reproductive functions.
- (3) Special rights inherent in women due to their reproductive functions, guaranteed and protected by law.

In addition to the aforementioned rights, there are still many rights for female workers that should be realized by female workers themselves and filled with employers who employ them. These rights are detailed in the Law No. 13 Year 2003 concerning Labor as a positive law governing the ins and outs of employment. One article that guarantees equal opportunity for everyone (regardless of sex) to get a decent job is in Article 5 of Law No. 39 Year 1999 concerning Human Rights, which reads "Every worker has equal opportunity without discrimination to get a job", and Article 6 of Law No. 39 Year 1999 concerning Human Rights, which reads "Every worker / laborer has the right to receive equal treatment without discrimination from employers". This provision implies that every worker who does not see sex or other predicates has equal opportunities and rights to obtain work and equal treatment without discrimination from the company where they work.

The rule of law for female workers is different from that of men because the nature of men is different from that of women where the differences in the rule of law aim to protect female workers and cannot be seen as discrimination against male workers. The rights that women workers must obtain are regulated in several articles in Law No. 13 Year 2003 concerning Manpower, as follows:

a. Overtime Regulations

Regarding work outside of working hours, based on article 76 paragraph (1) and (2) Law No. 13 Year 2003 concerning Manpower, that female workers of less than 18 years of age and pregnant women (based on doctor's letters are not permitted because they are dangerous)

are prohibited from being employed between 23:00 and 07:00. But if female workers are employed at this hour, then under article 76 paragraph (3) and (4) Law No. 13 Year 2003 concerning Manpower, the Entrepreneur is obliged to provide nutritious food and drinks, maintain morality and security while at work, and is obliged to provide shuttle transportation for female workers / laborers who depart and return to work between 23:00 and 05:00.

b. Menstruation leave rights

For female workers given menstrual leave rights based on Article 81 paragraph (1) Law No. 13 Year 2003 concerning Manpower, which reads "Women workers who feel sick and notify employers, do not have to work on the first and second days of menstruation." But there are still many women who do not know about this.

c. The right to maternity leave and maternity leave

For female workers given the right to maternity leave and maternity leave where based on Article 82 paragraph (1) Law No. 13 Year 2003 concerning Labor, that female workers have the right to get a rest for 1.5 (one and a half) months before the time for childbirth and 1.5 (one and a half) months after giving birth according to the obstetrician or midwife's calculations. Women's workers leave rights for 1.5 months before giving birth 1.5 months after giving birth or if they are accumulated to 3 months.

d. Right to leave a miscarriage

For female workers, they are given the right to leave if the baby they are carrying has a miscarriage, which is based on Article 82 paragraph (2) of Law No. 13 Year 2003 concerning Manpower, workers who experience a miscarriage have a 1.5 month maternity leave right accompanied by a statement from the obstetrician.

e. Breastfeeding rights

Article 83 Law No. 13 Year 2003 concerning Labor states that breastfeeding workers are at least given time to breastfeed or pump breast milk during working hours.

f. Termination of employment with special reasons

Minister of Manpower Regulation No. Permen 03 / Men / 1989, regulates the prohibition of layoffs for female workers on the grounds of marriage, pregnancy or childbirth. This is also regulated in article 8 of ILO Convention No. 183/2000 that upon returning to work, companies are prohibited from discriminating against female workers who have just returned after maternity leave. They have the right to reclaim their position and get a salary equal to the salary received before maternity leave.²

g. Cost of delivery

Based on Law No. 3 Year 1992 concerning labor social security, companies that employ more than 10 workers or pay wages of at least Rp 1,000,000 / month must include their employees in the Social Security program. One of the social security programs is a health care guarantee that covers the examination and costs of childbirth.³

In addition, there is also supervision from the Ministry of Manpower which is regulated in articles 176 through article 181 of Law No. 13 Year 2003 concerning Manpower which states that in order to guarantee the implementation of labor regulations according to this law and other implementing arrangements, a system of labor inspection is carried out and in the explanation it is also stated that the labor oversight function is as follows:

² <https://blog.talenta.co/bahasa/inilah-hak-hak-pekerja-wanita-yang-penting-untuk-diketahui/>, accessed on 3 Juni 2019 time 16.30 WIB.

³ *Ibid.*

- a. Supervise the implementation of legal provisions regarding employment. The provisions referred to are legal provisions as mentioned above, namely regulations concerning legal protection for female workers who work at night. If in the practice of conducting a business, the supervisor finds that the concerned entrepreneur violates these laws and regulations, the supervisor can immediately take action in accordance with the applicable law, and the company that commits the violation may be subject to sanctions in accordance with the law. invitation.
- b. Providing technical handling and advice to employers and workers on matters that can guarantee the effectiveness of the implementation of labor regulations. The technical handling referred to is in the event that a violation of the provisions of the legislation is found, the supervisor first provides technical handling in advance, in the form of an explanation of what the employer should do. In addition to being notified about things that should be done by employers, the technical handling can also be in the form of temporary closure of employers who violate statutory provisions and stop violations.
- c. Report to authorities about fraud in the field of employment.
When interpreting the law as a set of rules governing the community, it is necessary to regulate sanctions if there is a violation of law for the sake of justice, including companies because if there is no sanction, then the law cannot be enforced, especially in the field of labor which is full of violations by Entrepreneur.

E. Conclusion

For the discussion previously stated, the conclusions that can be given related to human rights for women are specifically stipulated in the Ninth Section entitled Women's Rights starting from Article 45 to Article 51 of Law No. 39 Year 1999 concerning Human Rights, as well as in other Legislative Regulations, then related to the rights of Women Workers which must be fulfilled by Entrepreneurs regulated in Law No. 13 Year 2003 concerning Manpower, as well as other regulations covering Overtime Regulations, menstrual leave rights, maternity leave and maternity leave, the right to miscarriage leave, breastfeeding rights, termination of employment with special reasons, and costs of delivery.

References

A. Book

- Willem van Genugten J.M (ed), 1994, *Human Rights Reference*, Netherlands ministry of foreign Affairs, The Hague.

B. Legislation

- Indonesia, The Constitution of the Republic of Indonesia Year 1945
- _____, Law Number 39 Year 1999 concerning Human Rights
- _____, Law Number 13 Year 2003 concerning Manpower

C. Internet

- <https://blog.talenta.co/bahasa/inilah-hak-hak-pekerja-wanita-yang-penting-untuk-diketahui/>, accessed on 3 Juni 2019 time 16.30 WIB.

JURIDICAL REVIEW OF LEGAL PROTECTION ON WORKERS / WORKERS WHO WORK WITH OUTSOURCING SYSTEM

Mirza Alfaris¹, Erni Agustina

Student of Legal Studies Doctor Program, Universitas Borobudur

¹mirzapingme@gmail.com

Abstract

The right of every citizen to decent work and livelihood based on Article 27 paragraph (2) of the 1945 Constitution of the Republic of Indonesia is one of the human rights that must be upheld by all parties in the life of the nation and state. Law Number 13 Year 2003 concerning Labor aims at creating legal certainty between workers / employers and employers as well as providing legal protection for workers / laborers in working relationships with employers, including certainty and legal protection for workers / laborers with outsourcing systems. With this system, workers / laborers only have a legal relationship to the labor service provider company, while the employer company does not have a legal relationship, so in this journal we will examine further whether employing workers using outsourcing systems violates the provisions of the Law Law Number 13 Year 2003 concerning Labor and concerning legal protection that can be given to workers / laborers with an outsourcing system. This study has 2 (two) formulation of the problem, first: how is the regulation regarding workers / laborers with outsourcing systems ?; and second: what is the form of legal protection for workers / laborers with an outsourcing system? The research method used is juridical-normative legal research, with secondary data covering primary legal materials, namely the 1945 Constitution of the Republic of Indonesia, Law Number 13 Year 2003 concerning Labor, and Court decisions Constitution No. 27 / PUU-IX / 2011, secondary legal material which includes legal books on employment, and scientific research in the form of legal journals, and tertiary legal materials which include language dictionaries, encyclopedias, and others.

Keywords: Human Rights, Outsourcing, Legal Protection.

A. INTRODUCTION

Human rights are the fundamental human rights that exist and are the gift of the almighty god, and ham is also a natural right that cannot be deprived of any other human being. Ham is believed to have universal value that means not knowing the limits of time and space.¹ Article 27 paragraph (2) of the 1945 Constitution of the Republic of Indonesia mandates that "Every citizen has the right to decent work and livelihood for humanity." Where the right of every citizen to decent work and livelihood is one of the human rights Humans must be upheld by all parties in the life of the nation and state. In order for workers to get their rights, legal protection is an absolute thing and must be carried out maximally.

The purpose of legal protection for workers is to guarantee the basic rights of workers and ensure equality and treatment without discrimination on any basis to realize the welfare of workers and their families while taking into account the development of business progress and the interests of employers.² Therefore, Law Number 13 Year 2003 concerning Manpower was established which further regulates labor provisions. The objectives of labor development according to Article 4 of Law Number 13 Year 2003 concerning Labor, are as follows:

¹ Muladi, 2005, *Hak Asasi Manusia*, Refika Aditama, Bandung, page. 70.

² Joni Bambang, 2013, *Hukum Ketenagakerjaan*, Pustaka Setia Bandung, Bandung, page. 269.

1. Empower and utilize the workforce optimally and humanely;
2. Realizing equal employment opportunities and providing labor in accordance with the needs of regional national development;
3. Providing protection to workers in realizing prosperity;
4. Improve the welfare of workers and their families.

The presence of Law Number 13 Year 2003 concerning Manpower aims to create legal certainty between workers / employers and employers and provide legal protection to workers / laborers in work relations with employers. In this law specifically regulates several types of work agreements, namely those covering a Specific Time Work Agreement (PKWT), a Non-Specific Time Work Agreement (PKWTT) and including outsourcing.

One model that is currently commonly applied in the world is the outsourcing model. Understanding outsourcing according to Eugene Garaventa and Thomas Tellefsen "Outsourcing can be defined as the contracting out of functions, tasks, or services by an organization for the purpose of reducing its process burden, acquiring specialized technical expertise, or Achieving expense reduction."³ The entry of the problem of outsourcing in the Manpower Act is influenced by global economic conditions and technological advances that are so fast that the impact of business competition is so tight.⁴

In the Civil Code Article 1601 b stated that the contracting of work (outsourcing) is an agreement where the one party, the contractor binds himself to carry out a particular job for the other party, namely the party that buys it, by accepting a predetermined price. Based on these provisions, outsourcing can be divided into 2 (two) groups, as follows:

- a. Submission of a job by a company to another company to work in another company place (the emphasis is on material products)
- b. Provision of worker services by companies providing worker services that are employed by other companies in need (the point of interest is more for individuals whose services are needed).

Meanwhile, according to Chandra Suwondo, outsourcing is the delegation of operations and daily management of a business process to outside parties (outsourcing service provider companies).⁵ Through this delegation, management is no longer carried out by companies that use outsourcing services, but delegated to outsourcing services companies that have become contractors. Basically there are several objectives of implementing an outsourcing system, among others, to develop business partnerships, so that one company will not master an industrial activity. In the long term, these activities are expected to be able to reduce the concentration of industrial activities in urban areas to be more evenly distributed to the regions.⁶

In the outsourcing of labor or labor comes a vital role and position. Manpower is a perpetrator to achieve national development goals. In accordance with the roles and positions of the labor, it is necessary to build employment to improve the quality of the labor force and its share in construction and to increase the protection of its workforce and family in accordance with the dignity and dignity of humanity.⁷

The rise of entrepreneurs who use the services of outsiders, namely outsourcing companies as companies engaged in the supply of labor, is based on the many needs for labor where by using the services of an outsourcing company, the company offers labor to employers' companies, which makes companies that need labor work does not need to bother to find, select and train the workforce needed.

³ Eugene Garaventa, *Outsourcing: The Hidden Costs*, Review of Business Journal, Volume 22.

⁴ Adrian Sutedi, 2009, *Hukum Perburuhan*, Sinar Grafika, Jakarta, page. 219.

⁵ Sehat Damanik, 2006, *Outsourcing & Perjanjian Kerja*, DSS-Publishing, Jakarta, page. 2.

⁶ Komang Priambada, 2008, *Outsourcing Versus Serikat Pekerja*, Alih Daya Publishing, Jakarta, page. 110.

⁷ Sonhaji, *Beberapa Permasalahan Perlindungan Pekerja Outsourcing Berdasarkan Permenakertrans Nomor 19 Tahun 2012*, Jurnal Masalah - Masalah Hukum, Vol. 46, No. 2, April 2017, page. 191.

However, it needs to be studied further whether by employing workers using the outsourcing system violates the provisions of Law Number 13 Year 2003 concerning Labor and legal protection that can be given to workers / laborers with an outsourcing system.

B. RESEARCH METHOD

The research method used is juridical-normative legal research, with secondary data covering primary legal materials, namely the 1945 Constitution of the Republic of Indonesia, Law Number 13 Year 2003 concerning Labor, and the decision of the Constitutional Court No. 27 / PUU-IX / 2011, legal material secondary which includes legal books on employment, and scientific research in the form of legal journals, and tertiary legal materials which include language dictionaries, encyclopedias, and others.

C. PROBLEM FORMULATION

The formulation of the problems that can be discussed in this study are as follows:

1. What are the arrangements regarding workers / laborers with outsourcing systems?
2. What is the form of legal protection for workers / laborers with an outsourcing system?

D. DISCUSSION

1. Regulations concerning Workers / Laborers with Outsourcing Systems

Arrangements regarding outsourcing agreements for workers / laborers are regulated in several articles in Law Number 13 Year 2003 concerning Labor, namely in Articles 64-65. In the law, there is no explicit mention of the term from the outsourcing itself, but based on the provisions of article 64 Law Number 13 Year 2003 concerning Manpower, it is explained that: "The company can hand over part of the work to other companies through work contract agreements or provision of worker / labor services made in writing. "So that outsourcing can be equated as an agreement to contract work or provide services for workers / laborers. In other words, the Manpower Act has provided justification for the partial surrender of work to other companies or companies providing workers / laborers services through agreements to provide / provide workers' services.⁸

The outsourcing agreement must be made in writing with regard to several provisions in the contract law in general. In Article 65 paragraph (2) Law Number 13 Year 2003 concerning employment, it has limited what works can be left to other companies by outsourcing systems, where the work in question must meet the following requirements:

- a. Performed separately from the main activities.
- b. Done with direct orders.
- c. It is an overall corporate support activity;
- d. Does not inhibit the production process directly.

These requirements are cumulative conditions that must be met in their entirety, both by outsourcing companies and companies that need workers. If one of the conditions is not met, then the work provided with the outsourcing system cannot be left to another company. If it has already been implemented, it will have a detrimental effect on the employer, especially with regard to responsibility for workers / laborers.

An important point to consider in labor provisions is Article 65 paragraph (6) Law Number 13 Year 2003 concerning Manpower, which states that work relations in the implementation of work as referred to in paragraph (1) are regulated in written work agreements between other companies. and workers / laborers who are employed. This means that employment relations only occur between workers / laborers and outsourcing companies, whereas between workers and employers who use

⁸ Abdul Khakim, 2007, *Hukum Ketenagakerjaan Indonesia*, Citra Aditya Bakti, Bandung, page. 72.

outsourcing services do not have a working relationship, outsourcing companies have separate cooperation agreements with employers.

As for the form of worker / labor agreement with the outsourcing system, in Article 65 paragraph (7) Law Number 13 Year 2003 concerning Manpower determines that the employment relationship referred to in paragraph (6) can be based on an indefinite time labor agreement or time employment agreement certain if it meets the requirements referred to in Article 59 Law Number 13 Year 2003 concerning Manpower.

As for the provisions of Article 59 paragraph (1) Law Number 13 Year 2003 concerning Labor, it states that a work agreement for a certain period of time can only be made for certain jobs which according to the type and nature of the work will be completed in a certain time, namely:

- a. work that is once completed or temporary in nature;
- b. the estimated work completion is not too long and no later than 3 (three) years.
- c. Seasonal work; or
- d. Jobs related to new products, new activities or additional products that are still under trial or exploration.

There are also jobs that may not use outsourcing services as stipulated in Article 66 paragraph (1) Law Number 13 Year 2003 concerning Labor, which reads as follows: "Workers / laborers from companies providing services for workers / laborers may not be used by employer to carry out main activities or activities that are directly related to the production process, except for supporting service activities or activities that are not directly related to the production process.

2. Forms of Legal Protection for Workers / Laborers with Outsourcing Systems

According to Satjipto Raharjo, legal protection is to provide protection for the rights that are harmed by others and that protection is given to the community in order to enjoy all the rights granted by law.⁹ The law is directed entirely as a means to support development, whereas what is supposed to be development is only a means to enhance human dignity, so it is clear that by law we will create or make welfare for the people.¹⁰

Legal problems that often occur in the implementation of the outsourcing system for workers / laborers are about the welfare of the outsourced workers themselves where the implementation of outsourcing systems to workers puts the workers' position unprotected and can be broken off. after the contract expires. Labor recruitment and termination costs little more because PKWT and outsourcing employees are not granted severance rights, employment awards, and right replacement money.¹¹ The practice in outsourcing work agreements tends to be used by PKWT / contracts, making it easy for companies to lay off if the company doesn't need it anymore.¹² Lately, the implementation of outsourcing has been discussed a lot by the actors in the process of producing goods and services, and observers because outsourcing is mostly done to reduce labor costs with protection and the work conditions provided are far below what should be given so that it is very harmful workers / laborers.¹³

Although clearly the legal protection that can be given to outsourced workers / workers has been arranged in such a way as in article 64-65 Law Number 13 Year 2003 concerning Manpower as

⁹ Satjipto Rahardjo, 2006, *Ilmu Hukum*, PT Citra Aditya Bakti, Bandung, page. 35.

¹⁰ Faisal Santiago, 2012, *Pengantar Hukum Bisnis*, Mitra Wacana Media, Jakarta, page. 2.

¹¹ Mohamad Yusup, *Kajian Terhadap Pemberlakuan System Outsourcing Di Indonesia Pasca Diterbitkannya Peraturan Menteri Tenaga Kerja Dan Transmigrasi Republik Indonesia Nomor 19 Tahun 2012*, Jurnal KAPemda, Vol. 11, No. 6, September 2017, page. 121.

¹² I Nyoman Putu Budiarta, 2016, *Hukum Outsourcing*, Setara Press, Malang, page. 13-14.

¹³ Siti Kunarti, *Perjanjian Pemborongan Pekerjaan (Outsourcing) Dalam Hukum Ketenagakerjaan*, Jurnal Dinamika Hukum, Vol. 9, No. 1, Januari 2009, page. 68.

discussed earlier, but in fact there are still many violations that occur on these rules which result in the rights of outsourced workers / workers are not fulfilled, so that a judicial review of article 59, article 64, and article 65 of Law Number 13 Year 2003 concerning Labor was submitted by the Chairperson of the Alliance of Electricity Meter Readers (AP2ML), Didik Suprijadi, which has been decided through the decision of the Constitutional Court No. 27 / PUU-IX / 2011. The essence of the decision is that the phrase "... work agreement of a certain time" in Article 65 paragraph (7) and the phrase "... employment agreement for a certain time" in Article 66 paragraph (2) letter b of Law Number 13 Year 2003 concerning Labor in contravention of the Republic of Indonesia State Constitution The Indonesian Constitution in 1945 as long as in the employment agreement does not require the transfer of rights for workers / laborers whose work object persists, even though there is a change in the company that carries out part of the contract work from another company or worker / laborer service provider. On this basis, in its ruling, the Constitutional Court granted a part of the material test, which only granted article 65 paragraph (7) and article 66 paragraph (2) letter b which were considered constitutional.

To follow up on the decision of the Constitutional Court, a Circular of the Director General of Industrial Relations Development and Labor Social Security of the Ministry of Manpower and Transmigration Number: B.31/PHIJSK/I/2012 concerning the Implementation of the Constitutional Court Decision Number 27/PUU-IX/2011, where the Circular is related to legal considerations in the decision of the Constitutional Court Number 27/PUU-IX /2011, the working relationship between Outsourcing Companies and workers can be carried out / agreed through a Certain / Permanent Work Time Agreement ("PKWTT") or through a Certain Time / Contract Work Agreement ("PKWT").

Based on this, it can be seen that the legal protection provided is by requiring that work agreements between workers and companies carrying out outsourcing work not be in the form of a certain time work agreement (PKWT), but in the form of an indefinite time employment agreement (PKWTT). the matter of work relations between workers and outsourcing companies is carried out based on PKWT, then the work agreement must require the transfer of rights protection for workers whose work object still exists, even though there is a change of company that performs part of contract work from other companies or worker service companies.

E. CONCLUSION

The conclusion that can be conveyed based on the discussion above is that the arrangement regarding the outsourcing agreement on workers is regulated in Article 64-65 Law Number 13 Year 2003 concerning Labor as the legal basis for the implementation of an outsourcing system for workers / laborers who the requirements must be met by the outsourcing company and the employer company, while the legal protection that can be given to outsourced workers is in the Constitutional Court decision No. 27 / PUU-IX / 2011, which requires that the implementation of outsourcing is not in the form of PKWT, but in the form PKWTT, but if it is in the form of PKWT, then the work agreement must require the transfer of rights protection for workers whose work object still exists, even though there is a change of company that carries out part of the contract work from another company or worker service provider company.

REFERENCES

A. Book

- Abdul Khakim, 2007, *Hukum Ketenagakerjaan Indonesia*, Citra Aditya Bakti, Bandung.
- Adrian Sutedi, 2009, *Hukum Perburuhan*, Sinar Grafika, Jakarta.

- Eugene Garaventa, *Outsourcing: The Hidden Costs*, Review of Business Journal, Volume 22.
- Faisal Santiago, 2012, *Pengantar Hukum Bisnis*, Mitra Wacana Media, Jakarta.
- I Nyoman Putu Budiarta, 2016, *Hukum Outsourcing*, Setara Press, Malang.
- Joni Bambang, 2013, *Hukum Ketenagakerjaan*, Pustaka Setia Bandung, Bandung.
- Muladi, 2005, *Hak Asasi Manusia*, Refika Aditama, Bandung.
- Komang Priambada, 2008, *Outsourcing Versus Serikat Pekeja*, Alih Daya Publishing, Jakarta.
- Satjipto Rahardjo, 2006, *Ilmu Hukum*, PT Citra Aditya Bakti, Bandung.
- Sehat Damanik, 2006, *Outsourcing & Perjanjian Kerja*, DSS-Publising, Jakarta.

B. Journal

- Mohamad Yusup, *Kajian Terhadap Pemberlakuan System Outsourcing Di Indonesia Pasca Diterbitkannya Peraturan Menteri Tenaga Kerja Dan Transmigrasi Republik Indonesia Nomor 19 Tahun 2012*, Jurnal KAPemda, Vol. 11, No. 6, September 2017.
- Siti Kunarti, *Perjanjian Pemborongan Pekerjaan (Outsourcing) Dalam Hukum Ketenagakerjaan*, Jurnal Dinamika Hukum, Vol. 9, No. 1, Januari 2009.
- Sonhaji, *Beberapa Permasalahan Perlindungan Pekerja Outsourcing Berdasarkan Permenakertrans Nomor 19 Tahun 2012*, Jurnal Masalah - Masalah Hukum, Vol. 46, No. 2, April 2017.

C. Legislation

- Indonesia, The Constitution of the Republic of Indonesia Year 1945
- _____, Law Number 13 Year 2003 concerning Manpower.
- _____, Decision of the Constitutional Court No. 27 / PUU-IX / 2011.

JURIDICAL REVIEW OF DEAD PENALTY IN HUMAN RIGHTS PERSPECTIVE AND THEIR APPLICATION OF CRIMINAL ACTORS OF TERRORISM

Moch. Eko Setiyo Budi Utomo

Student of Legal Studies Doctor Program, Universitas Borobudur
wwjoko78@gmail.com

Zudan Arief F

Faculty of Law, Universitas Borobudur
cclsis@yahoo.com

Abstract

Indonesia is a legal state as explicitly stated in Article 1 paragraph (3) of the Constitution of the Republic of Indonesia Year 1945 where one of the important elements in the state of law is the protection of Human Rights (HAM). Human rights are interpreted as rights inherent in human dignity as God's creatures and those rights are brought by humans from birth to the face of the earth so that these rights are natural (natural) rather than human or state gifts. The right to life is guaranteed in Article 28A of the Constitution of the Republic of Indonesia Year 1945, as well as Article 9 paragraph (1), paragraph (2) and paragraph (3) of Law Number 39 Year 1999 concerning Human Rights. The Indonesian Constitution explicitly stipulates that the right to life is one of the rights that cannot be reduced under any circumstances (non derogable rights), so the study in this study is to discuss the life rights of criminal offenders based on the perspective of human rights in the application of capital punishment against them, as well as studies related to the right of life in the application of capital punishment to perpetrators of criminal acts of terrorism. This journal has 2 (two) problem formulations, first; how is the application of the death penalty in the perspective of human rights, especially the right to life based on the Indonesian State Constitution? Second; Is the Death Penalty against the perpetrators of criminal acts of terrorism contrary to the right of life as a fundamental human right? The research method used in this journal is juridical-normative legal research, where the data studied are library materials or secondary data which includes primary legal materials, namely the Constitution of the Republic of Indonesia Year 1945 and Law Number 39 Year 1999 concerning Rights Human Rights, secondary legal material which includes books, journals, scientific research, as well as other references relating to Human Rights, and tertiary legal materials which include dictionaries, articles, and other materials that are in accordance with the theme in writing this journal.

Keywords: Human Rights, non-derogable rights, terrorism, and death penalty.

A. INTRODUCTION

Indonesia is a legal state as stated explicitly in Article 1 paragraph (3) of the Constitution of the Republic of Indonesia Year 1945. According to Jimly Asshiddiqie, "Indonesia is idealized and aspired by the founding fathers as a legal state (Rechtsstaat / The Rule of Law)".¹ One important element in the rule of law is the protection of human rights (HAM). Recognition of human rights has been recognized by the founding fathers by including it in the Indonesian State Constitution. Human rights are interpreted as

¹ Jimly Asshiddiqie, 2009, *Menuju Negara Hukum Yang Demokratis*, PT Bhuana Ilmu Populer Kelompok Gramedia, Jakarta, page. 3.

rights inherent in human dignity as God's creatures and those rights are brought by humans from birth to the face of the earth so that these rights are natural (natural) rather than human or state gifts.²

In Indonesia the notion of Human Rights is stated in Article 1 point 1 of Law Number 39 Year 1999 concerning Human Rights, which reads as follows: "Human Rights are a set of rights that are inherent in the dignity and dignity of human beings as God and is His gift that must be respected, upheld and protected by the state, law and government, and every person for the honor and protection of human dignity."

One of the rights that will be discussed in this study and is the most fundamental right for each individual human being is the right to life. The right to life is guaranteed in Article 28A of the Constitution of the Republic of Indonesia Year 1945, which reads: "Every person has the right to live and has the right to defend his life and life." The legal basis that guarantees the right to life in Indonesia is also contained in Article 9 paragraph (1), paragraph (2) and paragraph (3) of Law Number 39 Year 1999 concerning Human Rights which reads: (1) Everyone has the right to live, maintain life and improve their standard of living; (2) Everyone has the right to live peacefully, safely, peacefully, happily, physically and spiritually; (3) Everyone has the right to a good and healthy environment."

The Constitution of the Republic of Indonesia Year 1945 explicitly stipulates that the right to life is a right that cannot be reduced under any circumstances (non derogable rights). But in reality for certain criminal cases, in the laws and regulations there is a provision of capital punishment for the perpetrators, so this study will examine whether the imposition of capital punishment limits the life rights of perpetrators of related crimes, or does not conflict with the principle of Human Rights as mandated in the Constitution of the Republic of Indonesia Year 1945, besides that, it will also be examined whether the application of capital punishment to perpetrators of terrorism violates the Indonesian Constitution or not.

B. RESEARCH METHOD

The research method used in this journal is juridical-normative legal research, where the data studied are library materials or secondary data which includes primary legal materials, namely the Constitution of the Republic of Indonesia Year 1945 and Law Number 39 Year 1999 concerning Rights Human Rights, secondary legal material which includes books, journals, scientific research, as well as other references relating to Human Rights, and tertiary legal materials which include dictionaries, articles, and other materials that are in accordance with the theme in writing this journal.

C. PROBLEM FORMULATION

The formulation of the problems that can be discussed in this study are as follows:

1. How is the Application of Penalty Dead in the perspective of Human Rights, especially the Right to Life based on the Indonesian State Constitution?
2. Does Death Penalty against terrorist offenders conflict with the right to life as a basic human right?

D. DISCUSSION

1. Application of Death Penalty in the perspective of Human Rights, especially the Right to Life based on the Indonesian State Constitution

Human Rights (HAM) are the basic rights possessed by every human being which in constitutional constitution becomes a basic right for every citizen. The rights in question can be categorized into 2 (two) categories of rights, namely derogable rights and non-derogable rights. Derogable rights are rights covered by civil and political rights that are not absolute which can be

² Mahfud MD, 2001, *Dasar dan Struktur Ketatanegaraan Indonesia*, Rineka Cipta, Jakarta, page. 127.

limited by the state in certain circumstances. These rights are: (i) the right to freedom of peaceful assembly; (ii) the right to freedom of association, including forming and becoming a member of a trade union; and (iii) the right to freedom of expression or expression, including the freedom to seek, receive and provide information and all kinds of ideas without regard to boundaries (either through oral or written), while non-derogable rights are rights covered by civil rights and absolute politics that cannot be restricted by the state in any circumstances, these rights are: (i) the right to life (rights to life); (ii) the right to be free from torture; (iii) rights free from slavery (rights to be free from slavery); (iv) the right to be free from detention because it fails to fulfill the agreement (debt); (v) retroactive rights free from punishment; (vi) rights as legal subjects; and (vii) the right to freedom of thought, belief and religion.³

Based on this, because one of the non-derogable rights that cannot be limited is the right to life, the question arises whether the death penalty for the perpetrators of a criminal act limits the basic rights of the perpetrators of the crime, namely the right to live as guaranteed in the Constitution The State of Indonesia, or the death penalty is in accordance with the Indonesian State Constitution. The death penalty is given to the perpetrators of crimes listed in several laws, namely Law Number 5 Year 1997 concerning Psychotropic, Law Number 22 Year 1997 concerning Narcotics, Law Number 26 Year 2000 concerning Human Rights Court, Law Number 20 Year 2001 concerning Amendment to Law Number 31 Year 1999 concerning Eradication of Corruption Crime, Law Number 23 concerning Child Protection and Law Number 15 Year 2003 concerning the stipulation of Government Regulation in Lieu of Law Number 1 Year 2002 concerning Eradication of Criminal Acts of Terrorism into Law, which is renewed by Law Number 5 Year 2018 concerning Amendments to Law Number 15 Year 2003 concerning the Establishment of Government Regulations in lieu of Law Number 1 Year 2002 concerning Eradication of Criminal Acts of Terrorism into Law.

Related to the capital punishment, when viewed from the Indonesian State Constitution, namely the Constitution of the Republic of Indonesia Year 1945, that the right to life has been guaranteed in Article 28A of the Constitution of the Republic of Indonesia Year 1945 which reads: "Everyone has the right to live and has the right to defend their lives and lives." Even though the right to life has been guaranteed in the Indonesian State Constitution, basically capital punishment does not conflict with the right to life as guaranteed by the Constitution because the Indonesian Constitution does not adhere to the principle of absolute human rights.⁴ In addition, this limitation is also clearly stated in Article 28 J paragraph (1) of the Constitution of the Republic of Indonesia Year 1945, which reads: "Every person must respect the human rights of others in orderly life in society, nation and state."

Furthermore, this restriction is included in the Elucidation of Article 9 paragraph (1) of Law Number 39 Year 1999 concerning Human Rights, which reads: "Every person has the right to life, to maintain life, and to improve his standard of living. The right to life is even attached to unborn or dead people. In a case or situation that is very extraordinary, namely for the sake of the life of his mother in the case of abortion or based on a court decision in a death sentence. Then the act of abortion or capital punishment in terms of and or conditions, can still be permitted. Only those two things are the right to life can be limited. "Likewise related to the limitation of rights obtained by citizens in citizenship also included in Article 70 of Law Number 39 Year 1999 concerning Human Rights, which reads" In exercising their

³ Ifdhal Kasim, 2001, *Hak Sipil dan Politik Esai-Esai Pilihan*, Elsam, Jakarta, page. xii-xiii.

⁴ <https://www.antaranews.com/berita/81939/mk-pidana-mati-tak-bertentangan-dengan-uud>, diakses pada tanggal 28 April 2019 pukul 16:30 Wib.

rights and freedoms "Every person must submit to the restrictions stipulated by the Law with the intention of guaranteeing recognition and fulfilling fair demands in accordance with moral, security and public order considerations in a democratic society." The article means that in exercising the rights and obligations of every citizen limited by laws and regulations that have boundary criteria based on moral, security and public order considerations. From the explanation of Article 9 paragraph (1) and Article 70 of Law Number 39 Year 1999 concerning Human Rights mentioned above, it can be seen that under certain conditions there is a case or situation that is very extraordinary, the life rights of the criminal offender are decided capital punishment can be limited to respect and uphold the rights of others.

2. Death Penalty Against Terrorism Criminal Actors

One crime that is threatened with death penalty will be discussed in this journal is a criminal act of terrorism. As for a crime that can be categorized as a criminal act of terrorism in general can be seen in Article 1 point 2 of Act Number 5 of 2018 concerning Amendments to Law Number 15 Year 2003 concerning the Establishment of Government Regulations in lieu of Law Number 1 Year 2002 Eradication of Terrorism Crimes into Law, which reads: "Terrorism is an act that uses violence or the threat of violence that creates an atmosphere of terror or widespread fear, which can cause mass casualties, and / or cause damage or destruction to vital objects strategic, environmental, public facilities, or international facilities with ideological, political or security disturbances."⁵

Based on the elements of criminal acts of terrorism in the article above, that terrorism is a crime which is a violation of human rights. Actions which constitute violations of Human Rights can be seen based on Article 1 paragraph (6) of Law Number 39 Year 1999 concerning Human Rights, which reads: "Human rights violations are every act of a person or group of people including state apparatus whether intentional or not intentional, or negligence that violates the law reduces, deters, limits and or revokes the human rights of a person or group of people guaranteed by this law, and does not obtain, or is feared not to obtain a fair and correct legal settlement, based on a mechanism applicable law."

Every human being in Indonesia has basic rights that must be fulfilled, one of which is the right to life guaranteed in Article 28A of the Constitution of the Republic of Indonesia Year 1945. Criminal acts of terrorism committed by a group of individuals result in mass human rights being taken away so that criminal acts of terrorism are categorized as "extraordinary crime" and are also categorized as "crimes against humanity" or "crime against humanity" because terrorism is an international crime that endangers world security and peace and is a serious violation of rights human rights, especially the right to life.⁶

The basis of the inclusion of terrorism into the category of extraordinary crime is because it is stated in international conventions on terrorism. Indonesia in dealing with terrorism crimes has been bound by international conventions related to terrorism which have been ratified into national law in Indonesia so that on this basis Indonesia has admitted that criminal acts of terrorism are considered as extraordinary extraordinary crimes against humanity so that their enforcement needs special treatment , effective and maximum.

⁵ Indonesia, Law concerning Amendments to Law Number 15 Year 2003 concerning Determination of Government Regulation in Lieu of Law Number 1 Year 2002 concerning Eradication of Criminal Acts of Terrorism into Law, Law Number 5 Year 2018, Article 1 point 2.

⁶ Government Information regarding the issuance of Perpu Number 1 Year 2002 concerning Eradication of Terrorism Crimes submitted by the Minister of Justice and Human Rights, Ministry of Justice and Human Rights, 2002, page. 8.

Based on the study of the author, that with the enactment of capital punishment in Law Number 5 Year 2018 concerning Amendments to Law Number 15 Year 2003 concerning the Determination of Government Regulation in Lieu of Law Number 1 Year 2002 concerning Eradication of Criminal Acts of Terrorism is one of the special treatment against the perpetrators of criminal acts of terrorism because capital punishment is the heaviest punishment, and by applying severe penalties, namely capital punishment for serious crimes such as terrorism, then this is in accordance with the regulations in terrorism-related conventions, Article 3 Universal Declaration of Human Rights, and Law Number 39 Year 1999 concerning Human Rights so that it does not violate any international agreements.

The death penalty does not violate the International Covenant on Civil and Political Rights (ICCPR), which in the ICCPR advocates the abolition of the death penalty, but in Article 6 paragraph (2) the ICCPR is an international legal basis in imposing the death penalty on participating countries of the Convention, specifically for the most serious crimes. The sound of Article 6 paragraph (2) of the ICCPR is as follows: "In countries which have not abolished the death penalty, the sentence of death may be imposed only for the most serious crimes in accordance with the law of the time of the commission of the crime and not contrary to the provisions of the present Covenant and Convention on Prevention and Punishment of the Crime of Genocide. This penalty can be carried out pursuant to a final judgment rendered by a competent court. "Therefore, based on the above, the death penalty for perpetrators of criminal acts of terrorism does not conflict and violate the life rights of the perpetrators concerned.

E. CONCLUSION

Based on the discussion stated above, the conclusion that can be given is that although the right to life is one of non-derogable rights that cannot be limited and guaranteed by the Indonesian State Constitution based on Article 28A of the Constitution of the Republic of Indonesia Year 1945, but the right to life There are also restrictions that exist in Article 28 J paragraph (1) of the Constitution of the Republic of Indonesia Year 1945, which reads: "Every person must respect the human rights of others in orderly life in society, nation and state." basically capital punishment does not conflict with the right to life as guaranteed by the Constitution because the Indonesian Constitution does not adhere to the principle of absolute human rights, as well as provisions in the Elucidation of Article 9 paragraph (1) and Article 70 of Law No. 39 of 1999 concerning Human Rights that under certain conditions, namely things or circumstances that occur g very extraordinary, the life rights of the criminal offender who has been decided by capital punishment can be limited to respecting and upholding the rights of others, as well as the application of capital punishment to perpetrators of terrorism, because terrorism is categorized as "extraordinary crime" or "Extraordinary crime" which endangers world security and peace and is a serious violation of human rights, especially the right to live for other people, therefore capital punishment can be imposed.

REFERENCES

A. Book

- Ifdhal Kasim, 2001, *Hak Sipil dan Politik Esai-Esai Pilihan*, Elsam, Jakarta.
- Jimly Asshiddiqie, 2009, *Menuju Negara Hukum Yang Demokratis*, PT Bhuana Ilmu Populer Kelompok Gramedia, Jakarta.
- Mahfud MD, 2001, *Dasar dan Struktur Ketatanegaraan Indonesia*, Rineka Cipta, Jakarta.

B. Legislation

- Indonesia, The Constitution of the Republic of Indonesia Year 1945
- _____, Law Number 39 Year 1999 concerning Human Rights
- _____, Law concerning Amendments to Law Number 15 Year 2003 concerning Determination of Government Regulation in Lieu of Law Number 1 Year 2002 concerning Eradication of Criminal Acts of Terrorism into Law, Law Number 5 Year 2018.
- International Covenant on Civil and Political Rights (ICCPR).
- *Universal Declaration of Human Rights*.

C. Internet

- <https://www.antaranews.com/berita/81939/mk-pidana-mati-tak-bertentangan-dengan-uud>, diakses pada tanggal 28 April 2019 pukul 16:30 WIB.

THE ROLE OF THE INDONESIAN MEDICAL DISCIPLINARY BOARD IN RESOLVING DISPUTES IN DOCTORS' DISCIPLINE AS AN EFFORT TO CREATE DOCTORS WHO ARE PROFESSIONAL AND HAVE INTEGRITY

Mohamad Birza Rizaldi

Student of Legal Studies Doctor Program, Universitas Borobudur
mbirzarizaldi@gmail.com

Abstract

Article 29 of the Health Law states that in the event that health workers are suspected of committing negligence in carrying out their profession, such negligence must be resolved first through mediation. In the explanation it was not clearly stated, to what agency the mediation would be resolved, but the Medical Practice Law mandated the establishment of a doctor disciplinary settlement institution which would later become known as the Indonesian Medical Disciplinary Board (MKDKI). The problem in this study is how is the role of the Indonesian Medical Disciplinary Board in resolving disputes in physician discipline in an effort to create doctors who are professional and have integrity? This study is a normative study that uses secondary data and analyzed qualitatively, the results of which are presented descriptively. The results showed that the role of the Honorary Board of Discipline in Indonesia in resolving disputes in physician discipline as an effort to create doctors who are professional and have integrity is to uphold the discipline of doctors through the reception of complaints of violations of discipline by doctors and dentists. For the complaint, the Kedokteran Indonesian Disciplinary Council will carry out a mechanism to determine whether or not there are errors made by doctors / dentists in the application of medical / dental disciplines and stipulate sanctions for doctors / dentists who are found guilty.

Keywords: Indonesian Medical Disciplinary Board, Doctor's Discipline, Dispute Resolution.

A. INTRODUCTION

A doctor who understands the field of medicine should not arbitrarily impose his will in examining or treating patient without information regarding his actions. Therefore, these autonomous rights develop into several patient rights that should be respected by a doctor, and if violated, the law is waiting to give penalties to said doctor. Several patient rights covered by the law are as follows:¹

1. The right to choose medical staff (if the patient chooses to visit the hospital)
2. The right to obtain information (informed consent)
3. The right to their own body, such as refusing to receive medical treatment, both partially and whole.
4. The right to die naturally (related to euthanasia).
5. The right to the content of medical record.
6. The right to obtain second opinions.
7. The right to obtain referral, if the associated doctor is unable to provide treatment.
8. The right to medical secrecy.

In medical therapeutic transaction, the patient's position is highly benefited by many rights that should be fulfilled by the doctor or hospital. This occurs because doctors have a domination in science to perform medical practice according the patient's condition, but not dominant in law. Therefore, the

patient received an advantage in law protection. Doctors are given penalty when they violated patient's rights, both in criminal law (professional secrecy in Article 322 of Criminal Code, euthanasia in Article 338, 340, 344, 345, and 359 of Criminal Code), civil law (informed consent of medical action/negligence –Law No. 36 of 2009 regarding health), and administrative (disciplinary action and revocation of practice permit – Law No. 29 of 2004 regarding medical practice).

When a patient received medication outcome or medical procedure contrary to their expectation and experienced adverse effects or unwanted effects from a form of medication or medical procedure (medical risk), they can easily state or even condemn that the doctor had performed what is known by “medical malpractice”. Moreover, when this statement has been published, especially through mass media, then the doctor is condemned guilty and become the target of public opinion.

In therapeutic transaction, it is stated that the doctor-patient relationship occurs because there is an object of agreement (according to Article 1234 of Civil Criminal Code), i.e. giving something, performing something or not performing/achieving something. When the agreed achievement does not fulfill one of the rights (especially the patient's rights), then a tort occurs in the medical field which is usually known as medical malpractice.²

Black's Law Dictionary stated that:

“Malpractice is any professional misconduct, unreasonable lack of skill. This term is usually applied to such conduct by doctors, lawyers, and accountants. Failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstance in the community y the average prudent reputable member of the profession with the result of injury, loss or damage to the recipient of those entitled to rely upon them. It is any professional misconduct, unreasonable lack of skill or fidelity in professional or judiciary duties, evil practice or illegal or immoral conduct.”³

According to above statement, a malpractice occurs when a doctor could not fulfill his professional standard,⁴ i.e. the limitation of his minimum ability (knowledge, skill, and professional attitude) that should be mastered by a doctor or dentist in order to perform their professional activity on the community privately which is made by the professional organization (Regulation of the Ministry of Health No. 512/2007 regarding Practice Permit and Medical Practice Implementation Article 1, Point 9).

In performing their profession, a doctor should have provisional knowledge learnt from their time in college according to their educational level and can be held responsible during implementation. Therefore, in order to give legality to the knowledge of a doctor or dentist, all graduates should undergo competency test to obtain certificate of competence as a professional standard.

The competency test as a professional standard assess the minimum ability regarding attitude, skills, and knowledge, known as the basic competence or the core, in which knowledge and skills should be increased to obtain additional or advanced competence. In order to assess whether a doctor has implemented his knowledge correctly and appropriately in his practice, an independent board that acts as a “judge” is needed when complaints or demands of patients on harmful medical practice.⁵

Article 54 paragraph 1 of The Law of Health No. 23 of 1992 stated that “disciplinary actions should be conducted on healthcare service provider who perform mistakes or negligence in conducting their profession”, and in paragraph 2 which stated that “the determination of mistake of negligence stated in paragraph 1 is measured by the Medical Disciplinary Board.”

The Medical Disciplinary Board is mandated to be set in the Presidential Decree. However, the decree has not yet been established until 2004, therefore the Law of Medical Practice No. 29 of 2004 form an autonomous, private and non-structural board known as the Indonesian Medical Council (KKI), in which its members are determined by the President by the proposal of the Ministry of Health.

KKI has several functions of regulation, ratification, and guidance of doctors and dentists who perform medical practices, in order to improve the quality of medical services, and has tasks as follows:

1. Register doctors and dentists
2. Legalize the education standard of doctor and dentist
3. Guide the implementation of medical practice performed together with related institutions according to each function.

In order to establish discipline in performing medical practice, KKI established an autonomous independent institution, which is Indonesian Medical Disciplinary Board (MKDKI) placed in the Capital of the country (Article 55 of Medical Practice Law No. 29 of 2004).

MKDKI may assess and make decisions related to doctor and dentist discipline according to complaint from patient/community (Article 67) and if ethical violations were found during assessment, then MKDKI will forward the complaint to professional organization, and the decision binds the corresponding doctor or dentist.

B. PROBLEM FORMULATION

According to the background described above, then the problem in this study is how is the role of Indonesian Medical Disciplinary Board in resolving disciplinary dispute in an effort to create doctors with professionalism and integrity?

C. RESEARCH METHOD

a. Research Design

This study is essentially a normative juridical study that gave an understanding in norm problems experienced by dogmatic legal science in its activity in describing the norm of law, formulation the norm of law (creating legislation), and establishing the norm of law (judicial practice).⁶ This normative study is a study that described in detail, systematically and thoroughly regarding the role of Indonesian Medical Disciplinary Board in resolving disciplinary disputes as an effort to create doctors with professionalism and integrity.

b. Research Nature

This study is a descriptive study because it describes the applicable laws and regulations related to the theory of law and in its implementation related to problems to be studied.

c. Data Analysis

The obtained data were analyzed qualitatively.

D. DISCUSSION

The role of Indonesian Medical Disciplinary Board (MKDKI) in resolving disciplinary dispute as an effort to create doctors with professionalism and integrity. Ethical malpractice is a conduct in medical practice that contradicts medical ethics stated in KODEKI (Indonesian Code of Medical Ethics). KODEKI is a set of ethical standards, principles, rules or norms applicable to the doctors.⁷

As already known, the doctor profession as a professional occupation which not only a profession because not all occupation is called profession. Profession is a moral community that has shared goals and values.⁸ They form a profession united by similar educational background and similar skills. The responsibility of a professional is toward his profession (internal) and to the community (external). Therefore, a profession has a unique characteristic that differentiate it from other occupations.

Leenen, a legal expert from the Netherlands, stated that the boundaries of medical profession standard elements should fulfill the elements below:

Act carefully (*zorgvuldig handelen*), related to negligence. When a doctor is not careful, then he is considered to be neglectful.

1. A doctor should work according to the medical standard (volgens de medische standaard), a practicing doctor should perform his task according to his knowledge or authority and competence. For example, a general practitioner should not perform cesarean section, even though he is capable to perform the procedure by his experience in helping an obstetrician.
2. Should have the average ability compared to equal medical categories (gemiddelde bewaamheid van gelijke medische categori). If a general practitioner is condemned of conducting a negligence, then the person who states it should also be a general practitioner, not a specialist.
3. If a doctor is condemned to perform a negligence, then the parameter is a similar condition and situation that occurs to the colleague who assess (gelijke omstandigheden). For example, if an inland health care physician is stated to perform negligence disadvantaging the patient, it should be compare to a general practitioner with similar situation and condition with the accused doctor and should not be compared to a doctor who practiced in a city community health center who might still have the chance to refer to the hospital.
4. Comparable and proportional facilities and efforts to the objective of the medical procedure, which means that if a community health center doctor with simple facilities and efforts performed a procedure that caused a negligence, then the one who accused should be a community health center doctor with similar facilities and efforts with the one accused and not to be compared with a general practitioner who practiced in large hospital.

The relationship between doctor and patient must be in a form of partnership. Doctors cannot be blamed if the patient is being dishonest when the medical record and informed consent have been fulfilled. The question is, what if the patient has made an informed consent and the doctor has fulfilled all the requirements as mentioned above (reasons for justifying the doctor's actions) but an unfavorable event still arises? Do we have to prove that the doctor has carried out his obligations in court? Or perhaps other place?

Article 29 of the Health Law states that in the event that health care providers are suspected of committing negligence in carrying out their profession, such negligence must be resolved first through mediation. In its explanation it was not clearly stated, to what institution should the mediation be carried out, but the Medical Practice Law mandated the establishment of an institution for the conduct of doctor's discipline which was later known as the Indonesian Medical Disciplinary Honorary Council / Majelis Kehormatan Disiplin kedokteran Indonesia (MKDKI). MKDKI is not a mediation institution, in the context of dispute resolution mediation, but MKDKI is a state institution which is authorized to:

1. Determine whether or not there is a mistake made by doctors / dentists in the practice of medical / dental disciplines; and
2. Establish sanctions for doctors / dentists who are found guilty.
3. Disciplinary violations here are interpreted as violations of rules and / or regulations in the practice of medical / dental disciplines. Doctors / dentists are considered to violate medical discipline if:
 1. Showing incompetence in practicing medicine
 2. Not carrying out assignments and professional responsibility (in this case not achieving standards in medical practice); and
 3. Having despicable behavior which affect the dignity and honor of his profession. Matters that include violations of medical / dental disciplines, are dishonesty in practice, practicing with physical and mental inability, making improper medical reports, providing "guaranteed cure" to patients, refusing to handle patients without reasonable reasons, providing medical treatment without patient/family's approval, doing sexual harassment,

abandoning the patient when needing immediate treatment, instructing or conducting additional unnecessary examinations / treatment, not working according to medical care standards, and so on.

In the Indonesian Medical Council/ Konsil Kedokteran Indonesia (KKI) Regulation Number 15 / KKI / Per / VIII / 2006 concerning the Organization and Work Procedure of MKDKI and MKDKI at the Provincial Level, it is stated that MKDKI's duties are:

1. Receive complaints, examine, and decide cases of disciplinary violations of doctors and dentists; and
2. Develop guidelines and procedures for handling violations of doctor or dentist disciplines.
3. Receive complaints of disciplinary violations by doctors and dentists;
4. Establish the type of complaint of violation as a violation of discipline or a violation of ethics or not both;
5. Checking complaints of disciplinary violations by doctors and dentists;
6. Decide whether there is a disciplinary violation by doctor / dentist and determine the sanctions for disciplinary violations of doctors and dentists;
7. Implement MKDKI decisions;
8. Arrange procedures for handling cases of disciplinary violations by doctors and dentists;
9. Compile the MKDKI and MKDKI-P guidebook;
10. Fostering, coordinating and supervising the implementation of the duties of MKDKI-P;
11. Make and give consideration to the proposed formation of MKDKI-P to the Indonesian Medical Council; and
12. Conduct promotion, counseling, and dissemination about MKDKI and MKDKI-P record and document complaints, examination processes, and MKDKI's decisions.

Based on this, if there is a suspicion that a doctor carries out negligence, then in accordance with its authorities, MKDKI can accept the complaint and examine it if: the doctor / dentist who was reported has been registered at the Indonesian Medical Council; The reported medical actions by doctor / dentist were done after October 6, 2004 (after the enactment of Law Number 29 in 2004 concerning Medical Practice); there is a professional doctor-patient relationship in the event; and There is a strong suspicion of violations of medical / dental disciplines.

If the four things have been fulfilled, then the complaint is submitted to the Disciplinary Examination Council/ Majelis Pemeriksa Disiplin (MPD) to be examined. The MPD examination is a closed examination in which the MPD asks for information from the complainant and the complained doctor individually. The MPD examination trial is conducted in a closed manner with the aim that the MKDKI MPD trial prioritizes on the principle of maintaining medical confidentiality and the enforcement of discipline by MKDKI is essentially done to foster and improve the performance of doctors and dentists. However, the hearing about MPD examination's decision was open.

If the doctor or dentist is proven to have committed a breach of discipline, then in accordance with the Medical Practice Law, disciplinary sanctions in the MKDKI decision can be in form of:

Written warnings;

1. Recommendation for revocation of STR or SIP; and / or
2. Obligation to attend education or training in medical or dental education institutions.

MKDKI's decision is final and binds the complained doctor / dentist, KKI, Ministry of Health, District / City's Health Service Office (Dinas Kesehatan Kabupaten/ Kota), and related institutions. The complained doctors / dentists can submit an objection to MKDKI's decision to the Chairperson of MKDKI within a period of no later than 30 days from the decision reading or acceptance by submitting a new evidence supporting the objection.

Historically and judging from the purpose of its formation, the large number of public complaints to MKDKI shows that the community has been pessimistic about the outcome of the settlement in court. Prolonged and costly processes cause the community to turn to MKDKI because it is an independent institution whose purpose is to examine the performance of doctors, whether they have fulfilled the specified discipline or not. It is different from the settlement through MKEK, where the majority of the party who resolves the problem comes from doctors themselves, so that the settlement's subjectivity is very dominantly influential.

In general, perhaps the verdict in the form of suspension does not have a significant impact on doctors, compared to the decision of the District Court that granted the patient's claim which could reach hundreds of millions of rupiah. However, the decision on the medical profession which is suspected of having an element of negligence or error, even only in the form of suspension, has a psychological impact on the doctor to regain the trust of the community or his patients.

Based on this, the settlement mechanism through MKDKI should be prioritized before the settlement through the mechanism of criminal prosecution by the police and the mechanism of civil claims in court. The reason is that the examination conducted by MPD MKDKI on the presence or absence of negligence / medical errors committed by doctors is primarily done with the statement of a doctor or dentist as witnesses who are experts in that particular field of medicine.

However, it is appropriate if MKDKI is not only looking for errors and doctor's practice by merely considering the norms of scientific discipline. The author agrees that in case of any undesirable events that arise as a result of a doctor's action, doctor should be responsible by proactively and directly explaining each action to the patients. Therefore, *opzet*, *culpa lata*, namely negligence in which the nature of error is huge and causes losses, can be seen. In addition to the violation of the law in medical discipline, which is settled by MKDKI, the nature of criminal errors is also inherent in the doctor's actions.

MKDKI and the authority of criminal institutions, should also look at other benchmarks in addition to two things, namely: *actus reus* (objective conditions) in the form of errors, either *opzet* (intentional) and / or *culpa* (negligence / negligence) and illegal acts (*wederrechtelijkheid*); and the existence of *mens rea* (subjective condition), that is, towards the perpetrators can be legally justified. Other parameters are:

1. The presence of normal *zorgvuldigheid* (precision) from a doctor;
2. A diagnosis (position, development and state of medical science) and therapy (the presence of psychological and combination of factors that arise unexpectedly) has been made.
3. Professional standards, in the form of:
 - a. Average ability; The same category and condition;
 - b. The fulfillment of the principle of proportionality and the principle of subsidiarity in the purpose of taking medical actions.

In other words, some of these requirements will always have a relevance with each other as Professional Competency and Geographic Competency of Experts, all in the general context of profession standards.

With the establishment of the MKDKI institution that has the authority to examine and resolve disputes between patients and doctors who are suspected of committing negligence or errors in medical practice, it is expected to be the primary and final form of dispute resolution. Because if this institution gives a verdict that a doctor has violated discipline and gives sanctions in the form of suspension, the patient or patient's attorney who are aware of this decision can bring this MKDKI decision to be disputed in the legal domain through civil or criminal lawsuits or even to the administrative court.

Although in the MKDKI's decision it was clearly stated that the results of the examination and the MKDKI's decision cannot be used as evidence in civil or criminal justice, the judge cannot reject the evidence submitted by the patient or patient's attorney.

If this happens, MKDKI is not an institution that is expected by doctors as mediators in disputes between doctors and their patients, but an institution that complicates disputes between doctors and their patients, and this will be the only reason for doctors to do defensive medicine (a medical approach that prioritizes the safety of health care providers from the threat of lawsuits). If this happens, once again, the losing party is not a doctor or medical profession organization, but the patients who visit doctors for their medical complaints.

E. CONCLUSION

The role of the Indonesian Medical Disciplinary Honorary Council in resolving doctor's disciplinary disputes as an effort to create doctors who are professional and have integrity is to uphold the discipline of doctors by receiving complaints of disciplinary violations by doctors and dentists. Regarding the complaint, the Indonesian Medical Disciplinary Honorary Council will conduct a mechanism to determine whether there are errors made by doctors / dentists in the practice of medical / dental disciplines and stipulate sanctions for doctors / dentists who are found guilty.

REFERENCE

Text Book :

- Desrizza Ratman, *Mediasi Non Litigasi Terhadap Sengketa Medik Dengan Konsep Win-Win Solution*, Jakarta: PT Elex Media Komputindo, 2012.
- Fred Ameln, *Kapita Selekta Hukum Kedokteran*, Jakarta: Grafikatama Jaya, 1991.
- Heni Puji Wahyuningsih, *Etika Profesi Kebidanan*, Yogyakarta: Fitramaya, 2008.
- I Made Pasek Diantha, *Metodologi Penelitian Hukum Normatif Dalam Justifikasi Teori Hukum*, Jakarta: Prenada Media Group, 2016.
- J. Guwandi, *Hukum Medik (Medical Law)*, Jakarta: Balai Penerbit FKUI, 2007.
- M Yusuf Hanafiah, dan Amri Amir, *Etika Kedokteran dan Hukum Kesehatan*, Jakarta: EGC, 1999.
- Rinanto Suryadhimirta, *Hukum Malpraktik Kedokteran*, Yogyakarta: Total Media, 2011.

Rule of Law:

- Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.
- Kitab Undang-Undang Hukum Perdata.
- Undang-Undang Nomor 29 Tahun 2004 Tentang Praktek Kedokteran, (Lembaran Negara Republik Indonesia Tahun 2004 Nomor 116, Tambahan Lembaran Negara Republik Indonesia Nomor 4431).
- Undang-Undang Nomor 36 Tahun 2009 tentang Kesehatan (Lembaran Negara Republik Indonesia Tahun 2009 Nomor 144, Tambahan Lembaran Negara Republik Indonesia Nomor 5063).
- Undang-Undang Nomor 44 Tahun 2009 tentang Rumah Sakit (Lembaran Negara Republik Indonesia Tahun 2009 Nomor 153, Tambahan Lembaran).

PROTECTION OF WOMEN'S HUMAN RIGHTS DUE TO REPUDIATION DIVORCE BY HUSBAND BASED ON DECISION OF RELIGIOUS COURT

Muhamad Wakhid

Student of Legal Studies Doctor Program, Universitas Borobudur
muhamad.wakhid@yahoo.co.id

Abstract

Protection of women's human rights due to repudiation divorce in religious courts has paid attention to the protection of human rights in accordance with the Law on Human Rights Number: 39 of 1999 article 51. The religious justice judge will not terminate divorce/pledge divorce if the applicant for divorce has not fulfilled his obligation to fulfill the rights of the respondent in this case the wife.

Keywords: Women's Human Rights, Divorce, Court, Protection, Verdict

A. INTRODUCTION

In Indonesia, issues concerning women have been under intense study by scientists, especially observers of women. In fact, various theories began to emerge so as to display the diversity of ideas, values, and perspectives whose directives are aimed at finding the right formation in determining equality between men and women. Some claim that equality between men and women is inseparable from the context of revelation so that it has a strong foundation according to a religious perspective, and from the other side some also claim from the traditional social structure perspective.

The state's commitment to provide special protection for women and children who are vulnerable to discrimination and human rights violation is regulated in the Ninth Section on Women's Rights, namely in article 45 to article 51 of Law No. 39 of 1999, where article 45 states that : Women's rights in the Human Rights Law are Human Rights.

To be able to better understand and operationalize women's rights in the family life, society, state, even between countries, our legal system should not discriminate against women. Political rights, marriage, employment, education, health and legal rights are regulated in Law No. 39 of 1999 (Human Rights Law), namely: articles 46 to 51.

Marriage is the necessity of life of all societies since the ancient, present and future times to the end of time. Therefore marriage is a problem that is always warm in the community and in the law. From marriage, there arises a husband and wife relationship and then the relationship between parents and their children. Therefore marriage has a very broad influence, both in family relationships in particular, as well as in public and state life in general.

The prevailing regulations before Law Number 1 of 1974 concerning marriage are enacted, were based on Article II and Article IV Transitional Regulations of the 1945 Constitution. These regulations were in effect before Law Number 1 of 1974 concerning marriage is enacted, based on Article II and Article IV of the Transitional Regulations of the 1945 Constitution.¹

In essence the ideal marriage is solemnized for ever, not for a certain period of time. The couple should ideally only be separated by death. However, not all married couples are able to maintain their marriage. Misunderstandings that lead to disputes and conflicts and end in divorce, both divorce at the

¹ Bakri A. Rahman dan Ahmad Sukardja, *Hukum Perkawinan menurut Islam Undang- Undang Perkawinan dan Hukum Perdata/BW*, Hidakarya Agung, Jakarta, Volume One, 1982, page: 2

request of the husband and the wife's claim through a court hearing. Thus shows, that family life does not always occur harmoniously.²

One main problems that is often faced in a husband and wife relationship is the lack of financial balance. Almost all people put this financial problem as a big problem. This economic problem can also occur in marital relations, namely the husband works and his wife as a housewife. In this connection, along with development of times, not infrequently a husband's income is not able to meet their household needs, so the wife looks for alternatives to work to help her husband in fulfilling family needs.

This may cause problems if the wife's income after work is greater than her husband's. This condition triggers conflict in the household. This happens with the husband's jealousy towards the wife in economic terms. In some cases, these conditions may lead to domestic violence.³ The consequences of this financial problem may also trigger infidelity, whether done by one partner or both partners, because there is no understanding in resolving the conflicts they face. So that it is not a few that their relationship end in divorce.

Based on the description of background of problem as mentioned above, several problems may be identified, namely **"How to Protect the Human Rights of Women due to Repudiation Divorce Based on the Decision of Religious Courts?"**

Theoretical framework

In accordance with the theme of this research, this study employ the law enforcement framework of Philippe Nonet and Philip Selsznik that the law enforcement is conditionally influenced by materials of legal rules and law enforcer, facilities, society and culture. Responsive legal theory and law enforcement will be used to see how the rationality and completeness of a law, a unity and coherence between the material laws and procedural laws will determine the implementation of the right of sustenance and the achieved objectives of law.⁴ Anderson states that changes in the law apply and occurs in Islamic family law in all Muslim countries, in an 'intra doctrinal reform' and 'extra doctrinal reform'.⁵ Meanwhile according to Ian Edge, the reform that occurs is a method of renewal that adopts the secular legislation model.⁶

The Universal Declaration of Human Rights was approved on December 10, 1948. The Universal Declaration of Human Rights (Resolution 217A / III) has been recognized as an international instrument which is the basis for implementation and principles of equality, integrity and dignity of all human without discrimination, whose essence is human rights. Human rights have an important meaning for dignity in family life, nation and state.

The Convention on The Political Rights of Women (UN 1952) which was ratified by the Republic of Indonesia with Law No.68 of 1958 concerning: Approval of the Convention on Women's Political Rights (Memory of Explanation in Supplement to State Gazette No. 1653), and approved by the House of Representatives at the 82nd open plenary on June 30, 1958, Monday P 336/1958. In article 2 of Law No. 68/1958 it reads: "The final sentence of Article VII and Article X is entirely the conception of women's political rights considered as not valid for Indonesia and reserved by Indonesia".

² Husin Anang Kabalmay "kebutuhan Ekonomi dan Kaitannya dengan Perceraian".Jurnal IAIN Ambon 2015.

³ <http://www.pemantauperadilan.com/detil.php?id=219&tipt=kolom> (accessed on Agusut 23, 2013).

⁴ M. Atho Mudzhar dan Khairuddin Nasution (Eds), *Hukum Keluarga di Dunia Islam Modern; studi perbandingan dan keberanjakan UU modern dari kitab- kitab fiqh* (Jakarta: Ciputat Press, 2003), page. 207-208.

⁵ Norman Anderson, *Law Reform in the Muslim World* (London: The Athlone Press, 1976), page. 34.

⁶ Ian Edge (Ed.), *Islamic Law and Legal Theory* (New York: New York University Press, 1996), page. 578-579.

Convention on the Elimination of Discrimination of All Forms of Discrimination Against Women (UN 1979) - CEDAW Convention. With the adoption of the CEDAW Convention, on July 24, 1984 with Law No.7 of 1984, Indonesia as a participating country is obliged to implement it in national legislation. In Law No.7 of 1984, Indonesia reserved article 29 paragraph 1 concerning: Settlement of Disputes concerning Interpretation or Application of the Convention. In one consideration of establishment of the CEDAW Convention that: paying attention to the Universal Declaration of Human Rights (UDHR), human rights asserts the principle of non-acceptance of discrimination and states that all humans are born free and equal in dignity and rights, and that everyone has the right for all rights and freedoms, without any differences, including differences based on sex.

Indonesian Islamic marriage law has stipulated the property rights of divorced wives in the form of iddah livelihoods, mut'ah and communal property, with some exceptions such as divorce of bain repudiation and fasakh, as stated in articles of compilation of Islamic law, namely article 81 paragraph (1), Article 136 paragraph 2 points a and b, Article 149 points b, Article 149 points a, Article 158 and Article 160. The rights of the defendant's divorced wife are adopted by compilation of Islamic law including rights agreed by jumhur fuqaha (Islamic Scholars), the whole of which is 1). Right of 'Iddah Livelihood, 2). Right of Mut'ah, 3). Right of Hadanah, 4). Right of Hadanah Wage.⁴ In Holy Qur'an, the law regarding the right to live a divorced wife is very clear and strong. The arguments referenced by the ulama are Holy Quran Sueah al-Nisa 34 and Surah al-Baqarah 233, with the argument that the wife whos is divorced with raj'i still has not broken her wife's status. Likewise, it is mentioned in Surah al-Talaq verse 1, 6, 7. The argument of mut'ah as a gift for a wife who has not been sexually intrercoursed is Surah al-Ahzab 49, and Surah al-Baqarah 231. Meanwhile, mut'ah talak [gift of divorce] is based on the Surah Al -Baqarah 236-237. Due to the power of his arguments, fiqh scholars agreed on this obligation even to the wife who have been iirevocably divorced [talak ba'in], with differences in several scholars. Therefore, the compilation of Indonesian Islamic law adopted the strongest opinion about the gift [mut'ah] of divorce. These verses are also supported by a number of hadiths that are clear about the obligation to provide this sustenance.

B. RESEARCH METHOD

Primary data in this study are collected through field research. The data are collected using observation techniques, interviews with informants who know the problems studied and documentation. In addition, secondary data is collected through library research.

C. DISCUSSION

Humans must be recognized according to their dignity so that human existence as the holder of rights and obligations can be executed. Especially according to Theo Huijbers, humans must be seen as God's creation so that they must be directed and guided towards their goals, namely their own development and the glory of God. With this overall view, natural law and human rights can only be understood.⁷ The preamble of the Universal Declaration of Human Rights (UDHR) expressly stated that the recognition of the dignity inherent and the equal rights which cannot be revoked from all human family members is the foundation for freedom, justice and peace in the world. For this reason, the neglect and humiliation of human rights result in vile actions that make human ireful, and the formation of world where humans will enjoy freedom of speech and belief, and freedom from fear and deprivation have been declared as the highest aspirations of humans in general. Among the civil and political rights are the right to life, the right to freedom from slavery and trade, the right to freedom and personal security, rights to be treated humanely in any situation, the right to freedom of movement, choosing a place to live, the right to

⁷ Theo Huijbers, *Filsafat Hukum Dalam Lintasan Sejarah* (Yogyakarta : Kanisius, 1988), page. 305

the same position before the law, the right to be recognized as a person before the law, the right not to interfere in their personal affairs, the right to freedom of thought, belief and religion, the right to freedom of expression, the right to associate and join trade unions, rights in marriage, the right to get the same opportunities in government and rights to get equal treatment in legal protection.⁸

Divorce is a word that should be avoided in the dictionary of a household. Divorce is the beginning of a disaster and misery, both for the couple and for the children. Divorce will only result in gaping injuries. Divorce is not a way out but a compulsion that does not add anything but emptiness.⁹ In article 38, the marriage law stipulates that marriage may end on its journey if it is caused by death; divorce or over a court decision.¹⁰

Generally all married couples want a marriage that aims to form a family which is eternally happy based on the the Only One God. But, to bring together two different persons who have a long and heavy process, during periods before they unite the principle there are problems that arise and cannot be resolved in a marriage, there may be a separation between the couple so-called divorce. The cause of divorce in the household is certainly very diverse, starting from economic problems, saturation, domestic violence to the presence of third person.¹¹

As regulated in article 41 of Law No. 1 of 1974 and Article 149 of Compilation of Islamic Law, the consequence of marriage termination may be divided into two types, namely:

1. As a result of talak [repudiation] divorce (divorce initiated by husband)
2. As a result of petition divorce (divorce initiated by wife)

When the marriage terminates because of talak [repudiation], then the ex-husband is obliged to :

- a. Provide his ex-wife with a decent amount of money and material [mut'ah].
- b. Provide his ex-wife with sustenance, dowry and kiswah during the pre-trial period unless the ex-wife has been sentenced with irrevocable divorce [bain] and is not pregnant.
- c. Pay off the dowry that has been owed in whole and half if the the ex-wife has not been sexually intercourse [qabla al dukhul].
- d. Provide expenses for children who have not reached the age of 21 years.

As mentioned in article 41 of the Marriage Law, there are three consequences of termination of marriage due to divorce against their children as follows:

1. Both the mother and father are still obliged to care for and educate their children, solely based on the interests of the children.
2. The father is responsible for all the taking care of and education costs of the children.
3. Courts may require ex-husbands to finance their livelihoods and determine obligations for their ex-wives.
4. For a husband or wife who is special because of divorce and divorce, they are entitled to communal property. Communal property are those acquired during the marriage on which the husband and the wife have the rights in the property with equal portion.

Besides that, the ex-husband also has another obligation is to provide gifts [mut'ah] to his ex-wife. This gift from the ex-husband to the ex-wife may take form of objects or money and others. The gift is provided to the ex-wife based on the conditions that:

⁸ Majda el Muhtaj, *Dimensi-dimensi HAM : Mengurai Hak Ekonomi, Sosial, dan Budaya* (Jakarta : PT RajaGrafindo Persada, 2008), page. 236.

⁹ <http://www.syariahonline.com/v2/component/content/article/70/2740.html>, accessed on July 12, 2013 at 15.05 WIB

¹⁰ Budi susilo , *Prosedur gugatan cerai* , Pustaka yustisia , Jakarta , 2007, page: 17

¹¹ http://www.melindahospital.com/modul/user/detail_artikel.php?id=2468_Hal-yang-Dapat-menjadi-Penyebab-Perceraian-Rumahtangga, accessed on July 13, 2013 at 07.00 WIB.

- a. No dowry has not been determined for the wife who has been sexually intercourse [Ba'da al dukhul].
- b. Divorce is initiated by the husband.¹²

If the husband has not given or implemented his obligations (money gift, sustenance, dowry, and *kiswah*, paying off the dowry to his wife) by entrusting them to the Religious Courts office, the panel of judges will not pronounce the statement of divorce so that the divorce process has not been granted by the panel of judges until the husband's obligations are fully performed. This panel of judges' decision serves as a protection against human rights as stated in Law No.39 of 1999 article 51. Meanwhile, the cost for children custody and education that are sustainable in nature up to the age of 21 years is not given directly and will not affect the pronouncement of the statement of divorce before the Panel of Judges. If the husband denies against the the right to children custody, the ex-wife may report it to the police, while the religious court cannot execute the case. The communal property are distributed in accordance with the agreement of both parties or in accordance with the decisions of the religious court.

D. CONCLUSION

Based on the foregoing, a conclusion can be drawn up that the rights of a wife divorced by a husband (repudiation divorce) in a religious court still get the rights as stated in the Human Rights Law.

REFERENCES

- Bakri A. Rahman dan Ahmad Sukardja, *Hukum Perkawinan menurut Islam Undang- Undang Perkawinan dan Hukum Perdata/BW*, Hidakarya Agung, Jakarta, Volume One, 1982, page : 2;
- Budi susilo , *Prosedur gugatan cerai* , Pustaka yustisia , Jakarta , 2007, page : 17;
- Husin Anang Kabalmay "Kebutuhan Ekonomi dan kaitannya dengan Perceraian"Jurnal IAINAmbon 2015;
- Ian Edge (Ed.), *Islamic Law and Legal Theory* (New York: New York University Press, 1996), page 578-579.
- M. Atho Mudzhar dan Khairuddin Nasution (Eds), *Hukum Keluarga di Dunia Islam Modern; studi perbandingan dan keberanjakan UU modern dari kitab- kitab fiqh* (Jakarta: Ciputat Press, 2003), page 207-208;
- Majda el Muhtaj, *Dimensi-dimensi HAM : Mengurai Hak Ekonomi, Sosial, dan Budaya* (Jakarta : PT RajaGrafindo Persada, 2008), h. 236.
- Norman Anderson, *Law Reform in the Muslim World* (London: The Athlone Press, 1976), page 34;
- Theo Huijbers, *Filsafat Hukum Dalam Lintasan Sejarah* (Yogyakarta : Kanisius, 1988), h. 305;

LIST OF INTERNET LINKS

- <http://www.pemantauperadilan.com/detil.php?id=219&tipe=kolom> (accessed on August 23, 2013);
- <http://www.syariahonline.com/v2/component/content/article/70/2740.html>, accessed on July, 12 2013 on 15.05 WIB;
- http://www.melindahospital.com/modul/user/detail_artikel.php?id=2468_Hal-yang-Dapat-Menjadi-Penyebab-Perceraian-Rumahtangga, accessed on July, 13 2013 on 07.00 WIB;
- <http://kevinevolution.wordpress.com/2011/11/01/perceraian-menurut-uu-no-1-tahun-1974/>, accessed on July 15, 2013 on 08.09 WIB.

¹² <http://kevinevolution.wordpress.com/2011/11/01/perceraian-menurut-uu-no-1-tahun-1974/>, accessed on July 15, 2013 at 08.09 WIB .

EVIDENCE IN THE CONCEPT OF PROTECTION HUMAN RIGHTS IN INDONESIA

Nasrun Umar

Student of Legal Studies Doctor Program, Universitas Borobudur
hajinasrunumar62@gmail.com

Abstract

This study discusses the enforcement of criminal law. Enforcement is intended in terms of punishment in relation to the protection of human rights. The main focus of research is whether the crimes contained in Indonesian criminal law are in accordance with the concept of human rights protection in Indonesia. Based on the results of the study it is illustrated that the determination of criminal sanctions in the context of punishment has been formulated in accordance with the concept of human rights protection. This can be seen from the philosophical foundation of the establishment of criminal sanctions.

Keywords: Punishment, Protection, Human Rights

A. INTRODUCTION

Humans as individuals will have meaning and can develop their lives if they are together with other humans. No human being can live without involving other people in meeting their needs and interests. As stated by A. H. Maslow quoted by Purnadi Purbacaraka, basic human needs include:¹

1. Food, Shelter, Clothing;
2. Safety of self and property;
3. Self-esteem;
4. Self-actualization; dan
5. Love.

Therefore humans in order to meet their different needs and interests are in a relationship with others. In carrying out this relationship norms are needed as a benchmark or guideline. Similarly, families, communities and nations also need families, communities and other nations to meet their needs and interests.

If these basic needs cannot be fulfilled, then people will feel worried, the heightened worry will result in people feeling dissatisfied with the existing pattern which turns out unable to fulfill their basic needs. At this time humans tend to take actions that violate the rights of others that are formulated in legal norms that have been determined by the state, which in society is more often referred to as crime.²

Based on the provisions contained in every material criminal law against perpetrators of crimes, must get a sentence that is in accordance with the stipulated provisions. In order to provide these penalties, enforcement of criminal law must be carried out. Conceptually, the core and meaning of law enforcement lies in the activities of harmonizing the relationships of values outlined in the principles that are solid and manifest and act as a summary of the final stages of value translation, to create, maintain and maintain the peace of life. Law enforcement as a process which is essentially a discretion concerning

¹ Purnadi Purbacaraka dan Soerjono Soekanto, *Legal Principles, (Sixth Prints)*, PT. Citra Aditya Bakti , Bandung, 1993, p. 5

² Ali Dahwir, *The Moral Platform for the Protection of the Rights of Victims of Crime in Indonesia (Criminalization Oriented to Victims of Crime)*, Journal of Solutions Volume VI, No. 3 September 2014, p. 203

decision making that is not strictly regulated by the rule of law, but has an element of personal judgment and essentially discretion is between law and morals.³

Firm, consistent and non-discriminatory law enforcement is very important for the realization of the pillars of justice and legal certainty and will bring benefits to the community by providing a deterrent effect, so as to prevent someone who wants to commit corruption. Another benefit is the growing public trust in law enforcement efforts and law enforcement apparatus, so that community support for law enforcement agencies will strengthen.⁴

Enforcement of criminal law is an effort made by law enforcement officials in accordance with the laws and regulations in carrying out their main duties and functions in the criminal justice system. This means that the whole activities of law enforcement officials towards the establishment of law, justice and protection of human dignity, order, peace and legal certainty in accordance with the 1945 Constitution.⁵

Criminalization is a part of criminal law enforcement. Criminalization of perpetrators of crimes should ideally be oriented to:

1. Prevent people from becoming victims of crime;
2. Can resolve crime cases that occur so that people are satisfied that justice has been upheld and the guilty have been convicted; and
3. As an instrument of prevention so that the perpetrators of criminal acts do not repeat their crimes.

Explanation of Law Number 39 of 1999 states that humans are endowed by God Almighty with reason and conscience that gives him the ability to distinguish between good and bad that will guide and direct attitudes and behaviors in living his life. With reason and conscience, humans have the freedom to decide their own behavior or actions. Besides that, to compensate for these freedoms, human beings have the ability to be responsible for all actions they take.

Article 73 of the Human Rights Law stipulates that the rights and freedoms stipulated in the Law can only be limited by and based on law, solely to guarantee recognition and respect for human rights and basic freedoms of others, morality, public order, and the interests of the nation. This means that restrictions on human rights in Indonesia can only be carried out under the law.

B. RESEARCH METHODS

This study uses normative legal research with secondary data in the form of primary legal materials, namely legislation, secondary legal materials in the form of books, scientific journals, articles and internet as well as tertiary legal materials in the form of legal dictionaries, Indonesian dictionaries and encyclopedias. The collected data was analyzed using qualitative analysis.

C. PROBLEM FORMULATION

Based on the description on the background above, there are indeed several issues regarding law enforcement in Indonesia. The main problem in this research is how to convict in the concept of protecting human rights in Indonesia according to the Human Rights Law.

D. DISCUSSION

D.1. Criminal Punishment

The field of criminal law is a specific field compared to other legal fields such as civil law and state administrative law. The specialty of criminal law lies in its distinctive sanctions.

³ Soerjono Soekanto, *Factors Affecting Law Enforcement*, PT. RajaGrafindo Persada, Jakarta, 1983, p. 5

⁴ Bambang Waluyo, *Tactical and Strategic Efforts to Eradicate Corruption in Indonesia*, Journal of Legal Sciences Association of Indonesian Law College Leaders, Volume IV, No. 1, 2017, p. 627-628

⁵ Heni Siswanto, *Reconstruction of the Criminal Law Enforcement System Facing Trafficking in Persons*, Pustaka Magister, Semarang, 2013, p.

Criminal sanctions are always special suffering imposed on violators.⁶ Continued, explained by J.H. Sutherland said that crime is a behavior that is prohibited by the state because it is harmful. State criminals react by imposing penalties as an effort to prevent and eradicate them.

According to Soedarto, what is meant by punishment is suffering that is deliberately imposed on people who commit acts that fulfill certain conditions. In modern criminal law, crime also includes what is called "disciplinary action" (*tuchtmaatregel, masznahme*), even in indigenous law, Ter Har use reaction terms.⁷

Criminalization can be interpreted as the stage of determining sanctions and also the stage of sanctions in criminal law. The word "criminal" is generally interpreted as law, while "punishment" is interpreted as punishment. The doctrine distinguishes material criminal law and formal criminal law. J.M. Van Bemmelen explained the two things as:

The material criminal law consists of criminal acts which are referred to in succession, general regulations that can be applied to the act, and criminal sanctions that are threatened against the act. Formal criminal law regulates the way in which criminal proceedings should be carried out and determine the order that must be considered on that occasion.⁸

Barda Nawawi Arief explained that, if the notion of punishment is broad as the process of granting or imposing a sentence by a judge, then it can be said that the criminal system covers all statutory provisions governing how criminal law is enforced or operationalized concretely, so that someone is sentenced. This means that all statutory rules regarding substantive criminal law, formal criminal law and criminal implementation law can be seen as a unified criminal system.⁹

Barda Nawawi Arief departs from the above definition stating that if the statutory regulations are limited to the substantive criminal law contained in the Criminal Code, it can be said that the entire provisions in the Criminal Code, both general rules and special rules regarding the formulation of criminal acts, are essentially one unit of the criminal system.

D.2. Human Rights in Indonesia

Humans, as creatures of God the Almighty who carry out the task of managing and maintaining the universe with full devotion and full responsibility for the welfare of mankind, by his creator are endowed with human rights to guarantee the existence of dignity and dignity and harmony of the environment. The Indonesian nation as a member of the United Nations has a moral and legal responsibility to uphold and implement the Universal Declaration of Human Rights stipulated by the United Nations, as well as various other international instruments concerning human rights that have been accepted by the Republic of Indonesia.

The obligation to respect these human rights is reflected in the Opening of the 1945 Constitution which animates the whole article in the trunk, especially with regard to the equal position of citizens in law and government, the right to decent work and livelihood, freedom of association and assembly, the right issue thoughts with oral and written, freedom to embrace religion and to worship according to their religion and beliefs, the right to obtain education and teaching.

⁶ M. Ali Zaidin, *Criminal Policy*, Sinar Grafika, Jakarta, 2016, p. 217

⁷ *Ibid*, p. 218

⁸ Leden Marpaung, *Principles of Criminal Law Practices*, Sinar Grafika, Jakarta, 2005,

⁹ Barda Nawawi Arief, *Criminal Crime Policy*, Citra Aditya Bakti, Bandung, 2002, p. 129

Because human rights are natural, they actually do not need juridical legitimacy to apply them in a national or international legal system. Even though there is no constitutional protection and guarantee for human rights, that right still exists in every human being. Because indeed that right is God's gift to humans who are born into the world. John Locke stated that human rights are rights granted directly by God the Creator as a natural right. Therefore, there is no power in the world that can revoke it. This right is very basic in human life and life and is a natural right that cannot be separated from and in human life.¹⁰

Marthen Kriale, argues that human rights are rights derived from God. Jack Donnaly said that human rights are derived from natural law, but the main source is from God. D.F. Scheltens, argues that human rights are rights obtained by every human being as a consequence he was born into a human. Therefore human rights must be distinguished from basic rights, where human rights come from words "*Mensen Rechten*", while the basic rights come from the word "*Grond Rechten*"¹¹

If human rights are rights obtained by every human being as a consequence he is destined to be born as a human being, then it is different from basic rights, as a right obtained by every human being as a consequence of becoming a citizen of a country. Referred to from the source, human rights originated from God, while basic rights, originated from the state or government. Human rights are universal, while basic rights are domestic. Its function is to guard basic rights (*legal rights*).

It can be interpreted that not all human rights possessed by humans cannot be withdrawn from humans themselves. This is based on or depends on where the source of human rights is obtained.

D.3. Criminalization in the Concept of Human Rights

Criminal law is the rule of law of a sovereign State, contains prohibited acts or deeds ordered, accompanied by criminal sanctions for those who violate or do not comply, when and in what cases the criminal sanctions are imposed and how the implementation of the criminal sanctions imposed by the State. The definition includes material criminal law and formal criminal law.¹²

The state as a legitimate power has the authority to limit its citizens within boundaries that do not violate the provisions of Human Rights. These restrictions are carried out by using laws and regulations through norms of criminal law and accompanied by threats of criminal sanctions for violators of these norms.

Criminal sanctions are one of the most effective means used to tackle crime, but crime is not the only means so that if necessary it is used in combination with other social efforts. Crime prevention efforts by using criminal law are the oldest, as old as human civilization itself, until now even criminal law is still used and "reliable" as a means of criminal politics. The essence of criminal law is related to something that is very wanted to be achieved, and which is very noble, that is to realize the welfare of society. This can be realized through the protection of individuals / guards and protection of the community. Such protection can be

¹⁰ Masyhur Effendi, *Dimensions and Dynamics of Human Rights in National and International Law*, Ghalia Indonesia, Jakarta, 1994, hlm. 3

¹¹ DF. Scheltens in Puteri Hikmawati, *Competency of the Human Rights Court and the Establishment of a Human Rights Court Ad Hoc*, Jurnal Kajian Vol 17 No. I Maret 2012, p. 7

¹² Eddy O.S Hiariej, *Principles of Criminal Law (Revised Edition)*, Cahaya Atma Pustaka, Yogyakarta, 2016, p. 16

carried out through prevention, namely by not using a criminal law system but outside criminal law (*extra legal system*).

Soedarto said that punishment is suffering that is deliberately imposed on people who commit acts that fulfill certain conditions. It means that the punishment given to someone is not automatically given, but has gone through several stages. Starting from the politics of criminal penalties to the selection of the types of penalties imposed on criminals. This is because the punishment is part of law enforcement efforts.

Criminalization as an action against a criminal, can be justified normally not primarily because the punishment contains positive consequences for the convicted person, the victim is also someone else in the community. Therefore this theory is also called the theory of consequentialism. Criminal charges are not for having done evil but so that the perpetrators of crimes will no longer do evil and others are afraid to commit similar crimes.

The statement above shows that punishment is not intended as an attempt at revenge but rather as an effort to foster a perpetrator of crime as well as a preventive effort towards the occurrence of similar crimes. Criminal or criminal granting can really be realized if you see several planning stages as:

1. Provision of criminal acts by law makers;
2. Provision of criminal acts by the authorized body; and
3. Provision of criminal acts by the authorized implementing agency.

Criminal sanctions threatened for criminals in Indonesian positive law consist of various types, as stipulated in Article 10 of the Criminal Code. Determination of criminal sanctions is certainly on the one hand in the framework of protecting human rights, although on the other hand it seems to be a violation of human rights itself.

In Article 10 of the Criminal Code, criminal sanctions are stipulated as:

1. Capital Punishment

Mors dicitur ultimum supplicium: Capital Punishment is heaviest punishment. Capital punishment intended for cruel crimes committed by the state as a representation of victims for perpetrators of bad morality.¹³ The imposition of capital punishment on criminals is permissible during the crime *extra ordinary crime*. Determination of the threat of capital punishment against certain criminal acts that are of a special nature may be carried out by the state, with a view to preventive measures in the prevention of criminal acts.

In relation to the source of human rights originating from God, in Islamic law the imposition of capital punishment is permissible, even with special conditions. The foundation of the application of capital punishment is very strong, which comes from Islamic law originating from the Word of Allah SWT in the Qur'an (Al-baqarah ayat 178, 179, dan 194) and Prophet's sunnah (Sunnah Rasulullah "Do not punish him with the law of God, whosoever exchanges his religion, should be killed (narrated by Ibn Abbas) to implement Islamic Criminal Law. The imposition of capital punishment in the concept of Islam does not violate human rights as long as the stages are fulfilled.

Abdul Al-Qadir in H. Harun Al-Rasyid said that in Islamic law what is meant by sanctions is retribution that is set to preserve the interests of the community because of violations of the provisions of syara'.¹⁴ As in Islamic law that is evil (*jarimah*) covers *jarimah hudud*, *qishash*

¹³ Karen S. Miller, *Wrongful Capital Convictions And The Legitimacy Of The Death Penalty*, LFB Scholarly Publishing LLC, New York, 2006, hlm. 63

¹⁴ H. Harun al-Rasyid, *Corruption Jurisprudence (Analysis of Money Politics in Indonesia in the Perspective of Maqashid al-Shari'ah)*, PrenadaMedia Group, Jakarta, 2016, p. 186-187

diyat and *ta'zir*. Furthermore, capital punishment can be categorized into *jarimah ta'zir* where this *jarimah ta'zir* the threat of the death penalty is intended for the perpetrator *jarimah* outside *qishas* and *hudud* which the authorities believed was very dangerous for the survival and benefit of the wider community.¹⁵

2. Imprisonment

Imprisonment is one of the criminal forms of deprivation of independence which may only be imposed by a judge through a court decision. According to Foucault, prison cannot be separated from the embodiment of state power, therefore its implementation begins with various symbolic ceremonies for the benefit of the wider community. A.Z. Abidin Farid and Andi Hamzah asserted that imprisonment is a criminal form in the form of losing independence.¹⁶

Imprisonment is deprivation of liberty while someone who has violated the norms of criminal law is threatened with a prison sentence. P.A.F. Lamintang stated that: the form of imprisonment is a crime in the form of limiting the freedom of movement of a convicted person, which is done by closing the person in a Penal Institution by requiring that person to obey all applicable regulations in the correctional institution that are associated with an action order for those who have violated these rules.¹⁷

3. Light Imprisonment

light imprisonment is indicated by criminal acts that qualify as violations. Even so, there are also some crimes that are threatened with imprisonment, if done because of a negligence and the threat of imprisonment against these crimes that are alternative with imprisonment. The nature of imprisonment is basically the same as imprisonment, both of which are types of criminal deprivation of independence. A confinement limits the freedom of movement of a convict by confining the person to prison.

In principle, light imprisonment is the same as Imprisonment, except that the length of time the implementation of the crime is distinguished, this is caused by the type of crime committed. If the crime is a crime, then the threat of punishment is Imprisonment and if the criminal act is a violation then the threat of punishment is the light imprisonment.

4. Fine

One reason for the existence of fine is because it does not agree with the body punishment in a short period of time. Fine is the oldest criminal form even older than the Imprisonment. Fine is a person's obligation to pay a certain amount of money because he has committed an act that can be punished.

According to P.A.F. Lamintang fine can be found in Book I and Book II of the Criminal Code which have been threatened both for crimes and for violations. This fine penalty is also threatened both by the sole principal punishment and alternatively by imprisonment only, or alternatively with the two principal penalties together.¹⁸

As stated by D.F. Scheltens said that human rights consisted of two sources, namely those originating from God and originating from the State. Even human rights originating from God

¹⁵ In the case of *qishas*, the threat of the death penalty is intended for the perpetrators of deliberate murder (premeditated murder), where the perpetrator of the murder must bear the legal reward commensurate with what he did. In the *hudud* problem, the threat of the death penalty is intended for adulterers *muhsan*, *hirabah*, *al-baqyu* and *riddah*. Topo Santoso, *Grounding Islamic Criminal Law*, Gema Insasi Press, Jakarta, 2003, p. 188

¹⁶ Tolib Setiady, *Principles of Indonesian Penitentiary Law*, Alfabeta, Bandung, 2010, p. 91

¹⁷ P.A.F Lamintang, *Indonesian Penitentiary Law*, Armico, Bandung, 1988, p. 69

¹⁸ P.A F Lamintang, *op cit*, hlm. 69

can still be revoked by the State, through Judges as the manifestation of God before the earth to human rights owners who commit crimes that are believed to be very dangerous for the survival and benefit of the wider community.

Furthermore, human rights originating from the State can certainly be revoked by the State, if human rights holders violate the rules set by the State. It can be said that the revocation of the rights of some citizens who have violated the provisions stipulated by the State is not a violation of human rights. On the contrary, if the owner of the human rights violates the norms of criminal law, there is no punishment then the State has violated the law.

E. CONCLUSION

Based on the description, it can be concluded that the penalties contained in Indonesian criminal law are in accordance with the concept of human rights protection. Determination of criminal types in Indonesian criminal law is based on the context of human rights protection. This denial of rights means denying human dignity.

REFERENCES

- Ali Dahwir, *The Moral Platform for the Protection of the Rights of Victims of Crime in Indonesia (Criminalization Oriented to Victims of Crime)*, Journal of Solutions Volume VI, No. 3 September 2014
- Bambang Waluyo, *Tactical and Strategic Efforts to Eradicate Corruption in Indonesia*, Journal of Legal Sciences Association of Indonesian Law College Leaders , Volume IV, No. 1, 2017
- Barda Nawawi Arief, *Criminal Crime Policy*, Citra Aditya Bakti, Bandung, 2002
- Eddy O.S Hiariej, *Principles of Criminal Law (Revised Edition)*, Cahaya Atma Pustaka, Yogyakarta, 2016
- H. Harun al-Rasyid, *Corruption Jurisprudence (Analysis of Money Politics in Indonesia in the Perspective of Maqashid al-Shari'ah)*, PrenadaMedia Group, Jakarta, 2016
- Heni Siswanto, *Reconstruction of the Criminal Law Enforcement System Facing Trafficking in Persons*, Pustaka Magister, Semarang, 2013
- Karen S. Miller, *Wrongful Capital Convictions And The Legitimacy Of The Death Penalty*, LFB Scholarly Publishing LLC, New York, 2006
- Leden Marpaung, *Principles of Criminal Law Practices*, Sinar Grafika, Jakarta, 2005 Leden Marpaung, *Principles of Criminal Law Practices*, Sinar Grafika, Jakarta, 2005
- M. Ali Zaidin, *Criminal Policy*, Sinar Grafika, Jakarta, 2016
- Masyhur Effendi, *Dimensions and Dynamics of Human Rights in National and International Law*, Ghalia Indonesia, Jakarta, 1994
- P.A.F Lamintang, *Indonesian Penitentiary Law*, Armico, Bandung, 1988
- Purnadi Purbacaraka dan Soerjono Soekanto, *Legal Principles, (Sixth Prints)*, PT. Citra Aditya Bakti , Bandung, 1993
- Puteri Hikmawati, *Competency of the Human Rights Court and the Establishment of a Human Rights Court Ad Hoc*, Jurnal Kajian Vol 17 No. I Maret 2012
- Soerjono Soekanto, *Factors Affecting Law Enforcement*, PT. RajaGrafindo Persada, Jakarta, 1983
- Tolib Setiady, *Principles of Indonesian Penitentiary Law*, Alfabeta, Bandung, 2010
- Topo Santoso, *Grounding Islamic Criminal Law*, Gema Insasi Press, Jakarta, 2003

LEGAL, ETHICAL, AND RELIGION ASPECTS OF ISLAM ABOUT ORGAN TRANSPLANTATIONS IN INDONESIA

Nirwan Arief, Tjatur Winarsanto

Student of Legal Studies Doctor Program, Universitas Borobudur

rafifnirwan2009@gmail.com

Abstract

Transplantation has been used as a healing method in the medical field that has helped many human lives. The survival rate of donor recipient patients is currently very high, so the demand for transplants is increasing worldwide, in Indonesia. Differences and debates in view of the law, ethics, culture and beliefs held by the community occur in addressing the implementation of this organ transplant. If the good progress of science and technology in the field of medicine does not followed by a good understanding of bioethics, there will be a lot of misuse which was aimed at helping patients shift to seek the maximum profit by exploiting human organs. How can bioethics be understood by all parties, whether doctors, donors or patients? Organ transplantation is carried out for humanitarian reasons, so there is no use of organs in the name of the benefits of a particular party. In the view of Islam, that the law of organ transplants can be done with the aim of avoiding death, to save one's life, this must be in accordance with the rules of Shari'a. Positive law in Indonesia allows the transplantation of organs for healing diseases and recovery of health can be done through organ transplants, drug implants and/or medical devices, plastic surgery and reconstruction, and the use of stem cells in accordance with the provisions stipulated in the law. In terms of medical ethics, transplants are allowed only in emergencies. A doctor must carry out his profession according to the highest measure, to protect human life and be sincere and use all his knowledge and skills.

Keywords: Transplantation, Positive Law, Medical Ethics And Islamic Religious Law.

A. INTRODUCTION

The use of transplants as a healing method has long been known in the medical field. Organ transplantation has become one of the most meaningful solutions in the world of modern medicine, many human lives are helped by this organ transplant. The survival rate of donor recipient patients is very high, so the demand for transplants is increasing all over the world, including in Indonesia Medical measures for organ transplantation are currently growing, have saved lives and improved the quality of life for recipients. One example is the act of kidney transplantation in patients with end-stage renal failure².

In general, organ transplants have become hopeful for patients with late-stage organ failure. Kidney transplantation has become the best management for end stage renal disease (ESRD) patients. The estimated number of ESRD patients is more than two million worldwide. Management for ESRD patients in developing countries is still limited to dialysis but the transplant program is already well-known so that lately attention to security in the implementation of transplants has increased. Charges of 20,000 USD - 30,000 USD are used by successful kidney transplant recipients. The cost of this treatment is 50% more efficient compared to dialysis programs in a year in developing countries that range from 10,000 USD - 20,000 USD. In addition, the quality of life of kidney transplant patients increases compared to the quality of life of hemodialysis patients.

Differences and debates on ideology, culture, and beliefs held by the community occurred during the transplantation³. Some of them are allowed to donate or give something if something to be donated is theirs, so if the problem is that this property is withdrawn in the context of human organs, the question

that arises then is whether someone has his own body so he can donate his organs? Or is this body entrusted by God Almighty that should not be used except with His permission? As a person cannot eliminate himself in destruction, he cannot donate his body if it brings harm to him.

To answer these problems, it needs to be regulated in a regulation concerning transplant law³. It needs to be explained who is authorized to carry out the procedure of organ transplantation, how is the procedure for the implementation of medical procedures for organ transplants. Because this problem involves many legal, moral, humanitarian ethics and various aspects. Therefore, there is a need for a more detailed study of these problems, both from the perspective of Islamic law, positive law in Indonesia, and medical ethics.

B. RESEARCH METHOD

Transferring organs from donors to recipients is not a simple problem⁴. Many factors must be considered, for example medical transplants, where organ or tissue donations require transplant therapy, including recipient preparation before transplantation, during surgery and after transplantation. Frequent rejection of transplants, ie organs or donor tissue is not received by the recipient's body⁵. This is a complex challenge and problem for the medical world. To overcome the rejection of recipients overcome with immunosuppressant drugs, drugs that inhibit the activity of the immune system. The use of this drug carries a high risk, because with the immune system inactive, the recipe becomes susceptible to infeki and the spread of malignant cells. Other side effects are causing hypertension, dyslipidemia, hyperglycemia, peptic ulcer, liver and kidney damage. This drug also usually interacts with other drugs and will affect the recipient's metabolic activity.

Transplants can be grouped according to the origin of organs and donor conditions⁶. According to the conditions of origin of organs, transplants are divided into autotransplantation, homotransplantation, heterotransplantation, autograft, allograft, isograft, xenotransplantation, split transplantation, and tomino transplantation. If viewed from donor conditions, transplants can be divided into transplants with live donors and transplants with dead donors or corpses⁷. Living donor transplantation is transferring a person's tissue or organs to another person or to another part of his own body without threatening health. This life donor is carried out on regenerative tissue or organs, such as the skin, blood and bone marrow, and the organs that are in pairs such as the kidneys. Organs can come from dead donors (cadaveric donors), donors have been declared to experience brain stem death, so the organs to be donated must continue to function properly and can be transplanted in the body of the recipient. At this time cadaveric donors can be from donors who have been declared cardiac-death. The type of organ that is usually donated is an organ that does not have the ability to regenerate for example the heart, cornea, kidneys and pancreas.

Based on historical records, the first successful organ transplant was a heart transplant carried out by a Chinese doctor, Pien Chi'ao, while skin transplants were first performed by Sushruta in the 2nd century BC, then in the 3rd century Damian and Cosman successfully transplanted gangrenous feet and corneal transplants were first successful in 1873⁸. Sometimes the organs of the deceased-donor, usually the liver, can be divided between two recipients, especially adults and a child so that split transplants are carried out which is not usually the desired choice due to transplant the overall organ is more successful.

Heart and lung transplants by Bruce Reitz (Stanford, USA) were carried out in 1981. Transplants of the lung lobes by Joel Cooper (Toronto, Canada) were carried out in 1983. Transplanted both lung lobes by Joel Cooper (Toronto, Canada) carried out in 1986. Transplants throughout the lungs by Joel Cooper (St. Louis, USA) were carried out in 1987. Kidney transplants from living donors with laparoscopic techniques by Lloyd Ratner and Louis Kavoussi (Baltimore, USA) were carried out in the year 1995. Pancreatic transplantation from living donors by David Sutherland (Minnesota, USA) and hand

transplants (France) was carried out in 1998. Transplants through the Tissue Engineered Bladder technique by Anthony Atala (Boston Children's Hospital, USA) were carried out in 1999.

The first successful transplant in Indonesia was carried out in 1977, initiated by Prof. Dr. R. P. Sidabutar, SpPD-KGH which is a kidney transplant which is the main choice of treatment for patients with chronic kidney disease at the end of stage⁹. Difficulties in finding donors make kidney failure sufferers have to look for kidneys to China. In recent years, many patients from Indonesia have gone to China for transplantation of organs such as the kidneys. Reportedly, in China, human organs are sold openly. Although not cheap, the availability of organ supplies makes them interested in undergoing a transplant¹⁰.

The purpose of transplantation is an attempt to release humans from abnormalities resulting from damage to the function of organs, tissues or cells is to cure a disease, such as blindness, damage to the heart, kidneys, etc., restoring an organ, tissue or cell that has been damaged or experienced abnormalities but there is absolutely no biological pain, for example cleft lip¹⁰. Organ transplantation is usually carried out at the terminal stage of an illness, where the existing organ can no longer bear the burden because its function is almost lost due to an illness.

C. PROBLEM FORMULATION

The ethical aspect of human organ transplantation is regulated in medical ethics, which is more directed at the rules of a professional organization, namely the medical ethics code, which regulates the patient-doctor-family relationship of patients¹¹. In organ transplants, doctors, donors and their families will be involved and prescribe with their families. There is a procedure that must be understood by everyone involved in organ transplants. In terms of medical ethics, this action must be carried out if there are indications, based on several articles in KODEKI, Article 2 which state that a doctor must always carry out his profession according to the highest measure. Kodeki Article 10 requires that every doctor must always remember and his obligation to protect human life¹². Kodeki Article 11 requires that each doctor must be sincere and use all his knowledge and skills for the benefit of the sufferer.

Some ways of thinking about ethical issues relating to transplantation are justifying that people who are still living give an organ to another person¹³. In this context, three reasons for justifying organ giving are the obligation to do good that requires that we help others, if the risks to ourselves are not much, the benefits obtained by the recipient in terms of age and quality of life, and the limited risks experienced by the donor. James Nelson mentions five principles that still apply as a way to evaluate a particular transplant such as transplantation is a last resort for patient health (clinical and not experimental), agreement with procedures must be free and based on information, protection against innocents, and proportionality of benefits the procedure is carried out, it must offset the risks and costs. This criterion not only pays attention to the quality of life, but also considers medical feasibility.

The number of organs to be donated is very small compared to those requiring organs¹⁴. Data from the transplant center states that every day people who need organ transplants increase by 106 people, organ transplants occur every day as many as 68 people and 17 people died, because waiting for organs to be transplanted. Thus the transplant center must make strict rules, by making the criteria for each person to have the same rights, to people in need, people who are trying, people who contribute, based on free-market exchanges, and consideration of the length of time to wait and age. The transplant center tried to increase the number of donated organs and more directed cadaveric donors, with several steps prepared, namely education, mandated choice police, giving incentives to families who gave organs from their deceased family members, prisoners sentenced to death, then being cadaveric donor, and presumed consent. Education is done by giving awareness to donate organs when they die, because many people need their organs, so they can help other people's souls. Also understanding the family to support donating their organs when they die. Mandated choice police is an effort made by the government to urge

its people to care for sick people who need organs, by facilitating registration of cadaveric donors. Presumed consent is the policy of a country, that when someone dies, the body belongs to the state, so that everyone can become a cadaveric donor with state permission.

To be able to decide and give approval to what will be done to the patient, the doctor must first provide sufficient information followed by giving consent by the relevant patient which is then called informed consent which is the relationship between doctors and patients based on trust, the existence of autonomy rights or determine fate for himself, and the agreement between the doctor and patient¹⁵. A new informed consent is legitimately given by the patient if it meets at least three elements of sufficient information disclosure provided by the doctor, patient competency in giving consent, and volunteerism that is without coercion or pressure in giving consent. The purpose of Informed consent according to J. Guwandi is to protect patients against all medical actions carried out without the knowledge of patients and provide legal protection to doctors against unexpected and negative consequences, for example against risk of treatment that cannot be avoided even though doctors have tried as much as possible and act very carefully and thoroughly¹⁶.

D. DISCUSSION

The legal rules for transplanted organs are explicitly contained in the Acts and Government Regulations in Lieu of Law^{17,18,19,20,21}. Transplantation is a matter that is related to an act that causes illness or injury or injury (to the donor and recipient) and also relates to the problem of the engagement or agreement, then the Articles in the Criminal Code can still be applied. The articles in the Criminal Code related to transplantation are Article 204, Article 205 and Article 206 and Article 1382 of the Criminal Code.

UU no. 23 of 1992 which has been replaced with Law No. 36 of 2009 concerning Health, hereinafter referred to as the Health Law, namely Article 64, which states that disease healing and health recovery can be done through transplantation of body organs and/or tissues, drug implants and/or medical devices, plastic surgery and reconstruction, and cell use stick out.

Indonesia only allows health workers who have the authority to carry out transplants on the basis of the agreement of donors and their heirs. New organ harvesting can be done if the donor has been informed of the risks of surgery and on the basis of correct understanding the donor and heirs or their family voluntarily express their agreement. This is stated in the Health Law Article 65 paragraph 1 which states that transplantation can be done by health workers who have the expertise and authority for that and carried out in certain health care facilities, while article 65 paragraph 2 states that the harvesting of organs and/or tissue from a donor must pay attention to the health of the donor concerned and receive donor and/or heir or family.

Article 66 of the Health Law states that cell transplants, both those originating from humans and from animals, can only be done if they have proven their safety and usefulness. Article 67 of the Health Law states that the collection and delivery of specimens or parts of organs can only be carried out by health workers who have the expertise and authority and carried out in certain health care facilities.

The law governing transplants and sanctions for violations is also contained in RI Law No. 23 of 1992 concerning health and advertising regulations that helped support the implementation of good organ transplantation was RI Law No. 23 of 1992 concerning Health Article 33 paragraph 1 which states that in healing diseases and restoring health, organ and / or tissue transplantation, blood transfusion, drug implants and / or medical devices and plastic surgery and reconstruction can be carried out, while Article 33 paragraph 2 states that organ transplantation and / or body tissues and blood transfusions as referred to in paragraph (1) are carried out only for humanitarian purposes and are prohibited for commercial purposes.

RI Law No. 23 of 1992 concerning health Article 34 paragraph 1 states that organ and / or tissue transplants can only be carried out by health workers who have the expertise and authority to do so in certain areas, while article 34 paragraph 2 explains that the harvesting of organs and / or tissues from a donor must pay attention to the health of the donor concerned and there is an agreement between the donor and the heir or his family, and article 34 paragraph 3 regulates the conditions and procedures for organ harvesting. RI Law No. 23 of 1992 concerning health Article 72 paragraph 3 states that acts with commercial purposes in the implementation of organ, body or body tissue transplants or blood transfusions as referred to in article 33 paragraph 2, are punished with a maximum of 15 years imprisonment and a maximum of 300 million penalties .

In addition to the Health Law, this regulation concerning transplantation of human organs is also regulated in Government Regulations. Government Regulation No. 18 of 1981 concerning the Surgery of Clinical Bodies and Anatomical Corpses Surgery and Tool Transplantation or Human Body Tissue, hereinafter referred to as PP 18/1981. The transplantation is carried out by doctors who work in hospitals appointed by the Minister of Health, this is stated in Article 11 PP 18/1981 paragraph 1 states that the transplantation of organs and or tissue of the human body should only be carried out by doctors who work in a hospital designated by The Minister of Health, while Article 11 of PP 18/1981 paragraph 2 states that the transplantation of instruments or tissues of the human body must not be carried out by doctors who treat or treat the donor concerned.

Organ regulated transplants of Islam through the foundation of the holy verses of the Qur'an, hadiths, and agreements of ulama²². The purpose of transplantation is nothing but as a treatment of disease because Islam itself commands humans to treat every disease, because allowing nesting diseases in the body can result in death, while allowing themselves to fall into death (without effort) is forbidden, as God's word in -Qur'an Surah An-Nisa (4) verse 29, "And do not kill yourselves, Allah is the Most Merciful to you. "If an organ transplant is taken from someone who is still in a healthy life, then the law is forbidden by reason as the word of Allah Surat al-Baqarah 195: destruction, and do good, for surely Allah likes those who do good. "

The verse explains that we should not be careless and careless in doing something, but must pay attention to the consequences, which allows it to be fatal to the donor. Although the act has good and noble humanitarian goals. For example, someone donates a kidney, or an eye to someone else who needs it, because of family relationships or because of friends, etc. In this case, the person who donates an eye or kidney to another person who is blind or does not have a kidney, he may risk at any time experiencing the malfunctioning of his eye or kidney, from which it can be understood that an element is valued bring danger and drop into destruction.

Furthermore, the problem of transplants taken from people who have died, then this is according to Islamic principles allow it based on the word of God in the Qur'an Surat Al-Kahf: 9-12 and based on the rules of fiqh including: "A thing that is sure not can be removed with a doubt / not sure: "The basis of legal retrieval is the continuation of a long condition until there is a definite indication of its change." Various congressional and fatwa results of international Islamic institutions (Islamic Jurisprudence Institutions from the Islamic World League (Makkah, January 1985 M.), the Saudi Arabian Ulema Council (SK. 99, 6/11/1402 H.) and the OIC conference (Malaysia, April 1969 AD) allow the practice of this type of transplantation provided that conditions are emergency and must not be traded.

If there are two people who need donor assistance, one Muslim and one non-Muslim, then that is what Muslims should take first. To be more clear see QS: At-Taubah: 71. Even a pious Muslim and a commitment to his religion are more important to be donated than a wicked person who neglects his obligations to God. Because with the virtuous and healthy life of a Muslim it means the donor has helped him to obey God and to benefit his fellow beings. This is different from the scribes who use the favors of God only to disobey Him and cause harm to others.

According to Zuhdi, there are some arguments considered as the basis of the ban on organ transplant organs when donors are in a state of life²³. For example, Q.S. al-Baqarah: 195 and hadith of the Prophet (peace and blessings of Allah be upon him), "It is not permissible for yourself to be self-inflicted and can not be self-sufficient. (Narrated by Ibnū Majah) is interpreted by ulema 'Usul as a ban to eliminate *ḍarar* by giving the same or greater *ḍarar* thereof. Therefore, it should not be donated outside the body organs, such as eyes, hands, and legs. Because of that it is rid of others' selfishness by raising a bigger self, for which he neglects the use of the organ for himself and makes the appearance worse. Similarly, the internal organs are in pairs but one of the pairs is not working or sick, then this organ is considered to be one organ. It is an example of what his affair affects one who has the right to the donor, such as the right of a wife, child, husband, or creditor (exhorting something to him).

There is hardly any discussion in the classical fiqh text that leaves a paper that discusses directly about the law of donating human organs for the purpose of transplantation²⁴. However, the law of treatment of human bodies is mentioned in the chapter on buying and selling. Likewise when discussing about treatment, the condition is forced, what can and should not be done when the situation is forced. The history of Abu Daud from Abu Darda ', "Verily Allah decreases disease and medicine, and makes for every disease the medicine, From that seek your treatment, but do not seek treatment with the forbidden!" (Abu Dawud No. 3372) says that treatment is indeed recommended, but not with the unclean.

Whereas seen from its legal rule to surviving donors, "Refusing damage takes precedence over achieving benefit" and "Danger should not be eliminated by other hazards." Confirms that in Islam it is not justified to overcome a danger by causing another danger. Whereas people who donate their organs in a state of healthy living in order to help and save others are considered efforts to eliminate the danger with the consequences of other hazards. Someone must prioritize guarding himself from destruction, rather than helping others by sacrificing themselves and having fatal consequences, eventually he is unable to carry out his duties and obligations, especially the duty of his duties in performing worship. Transplantation of a person must prioritize maintaining himself from destruction rather than helping others by sacrificing himself, finally he cannot carry out his duties and obligations, especially the duties of his duties in performing worship.

Discussing about Islamic Law, then can see the laws that apply in Arab countries as a reference because the Arab country has a population of 100% Muslims who can be ascertained to use Islamic law as the basis of their rules. Arab countries that have joined the Gulf Cooperation Council (GCC), namely Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates have formed the National Organ Transplant Committee or NOTC based on Ministerial Regulation Number 1045 of 2009 which members are doctors from various health sectors as well as Islamic and Sharia law experts to form related regulations regarding organ transplants. After conducting a review of the best practices carried out around the world and the rules that apply in the countries that are members of the GCC, a regulation is formed which broadly allows people who are mentally and physically healthy and over the age of 21 to become donors. The donated organ should not harm the donor. This rule also confirms to allow using dead donors. Dead people can inherit their kidneys, lungs, pancreas and heart to save others. For this reason, the donor must write the will in writing and be accompanied by two witnesses. This rule also allows donors to change their minds. This rule also allows multi-organ donations at different stages in meeting the shortcomings of international organ donations²⁵.

People who donate their organs when they are still healthy to others, they will face risks, one day they will experience irregularities, because it is impossible for God to create eyes or kidneys in pairs if there is no wisdom and benefit for a human being. So if the donor's kidney doesn't work anymore, then it's difficult to help again. So it is the same as eliminating disease from the recipient by making a new disease for the donor. Whereas the problem of kidney transplants, if sourced from both living and dead humans, is agreed upon by most Islamic law scholars about their ability when grafted to patients who

need it, because it is considered very necessary. National Symposium II on "organ transplants", an agreement was signed between NU, PP Muhammadiyah and MUI regarding the acquisition of organ transplants in an emergency with the aim of saving the lives of others. Other scholars such as Quraysh Shihab also allow. According to him, people who live are prioritized. In addition, K H. ĩ Alĩ Yafie, also reinforces that there are methods of ushul fiqh that can be used as reinforcement for the acquisition of transplants, namely "hurmatul hayyi a'dhamu min hurmatil mayyiti" (the honor of living people is greater than the dead²⁶).

Imam Ahmad narrated from 'Amar bin Hazm al-Ansharĩ, saying: "The Messenger of Allah had seen me lean on a grave." Then he said: "Do not hurt the occupants of the tomb." This hadith clearly shows that the dead have the honor of being live. Similarly, breaking the honor and persecution of the corpse is the same as breaking the honor and persecute the living.

While judging from the views of scholars on this matter, including Qardhawi, allowing live organ transplants. He argued that even though this body was entrusted by Allah, humans were given the authority to use and use it, as may donate property²⁷. In essence, property belongs to God, but humans are authorized to own and spend it. As the word of Allah Surat an-Nūr 33: And give to them a portion of the inheritance of Allah that has been given to you. The ability for a Muslim to accept non-Muslim body organs is based on the following two conditions: (1) the organs needed cannot be obtained from a Muslim's body and (2) the Muslim's life can float if the transplant is not done immediately. Whereas Qardawĩ, explained that donating blood to non-Muslims who are not hostile to Islam, including charity, just as it should not be given to apostates, according to him the donation to non-Muslims is permitted under these provisions, but if two people are the same - the same requires donation of one Muslim and the other non-Muslim, then Muslims must be prioritized. If the recipient is a Muslim then it is still permissible because the organs cannot be categorized as Muslim or non-Muslim, even according to him all the organs of the human body and living things are glorified and submissive to Allah without the exception of the infidel organs²⁸.

While Zallum, argues that syara 'allows someone to donate a portion of their organs when he or she is alive, the condition is voluntary or not forced by anyone. The donated organs are not vital organs, such as the heart and heart.²⁹ This is because the donation can lead to the death of the donor, even though Allah forbid to kill himself. While Mujtana, said that the law of organ transplants, as follows: (1) If the transplant is done with no intention syar'i, namely for treatment, then the law is haraam. Because there is an element of "taghoyyurul khilqoh" (change of creation) and it is feared that it reflects the attitude of not being willing to accept divine taqdir; (2) If there is a degree of syar'iiyyah, for example organ transplants with the aim of recovering the disease, which includes the hajj (primary) problem, then the law may be in the following conditions: (a) Taken from animals, other than humans. (b). Taken from itself, with no harmful provisions. (c). Taken from a dead human whose dignity is lower, then the equivalent; (3) If an organ transplants with the aim of avoiding death, to save one's life, then this is an element of dhoruriyat, such as a person suffering from heart or kidney disease who has reached a serious stage, so he can die at any time. Therefore transplants can be carried out on the basis of an emergency³⁰.

The number of ulama Fiqh which consists of some scholars of Maamahab Ĥanafĩ, Malikĩ, Syafĩ'ĩ and Ĥanbali, argues that utilizing human organs as a treatment is permitted in an emergency. Transplants can be carried out on the condition that the donor has inherited before he dies or from his heirs (if he has died). According to the deceased scholarship scholarship donors who have died, the reason is that transplantation is a type of treatment, while treatment is something that is ordered and ordered in Islam, there are two things that are important in this problem, namely cutting off parts of the body that are sacred and guarded and saving lives need for the body organs. But the biggest harm is the danger of saving human life.

Taking organs from a deceased person to save the lives of other people in a juridical and medical manner, the law is *mubah*, which is permissible in the Islamic view, provided that the patient is in a life-threatening emergency if the transplant is not carried out, while he has been treated optimally, but not successful. This is based on *qaidah fihiyyah*: "Emergency will allow forbidden."

Furthermore, in another *fihiyyah* law it is stated: "Danger must be removed." In addition, there must be a will from the donor to his heir to donate his organs if he dies, or there is permission from his heirs. This is in accordance with the fatwa of the Indonesian Ulema Council dated June 29, 1987, that in the absence of better options, taking heart valves of the deceased for the benefit of living people can be justified by Islamic law provided that there is permission from the family concerned^{31, 32}.

Some Islamic fatwa institutions are currently more dominant in view of supporting the permissibility of organ transplants such as the Islamic Fiqh Academy (institutions under the world Islamic league in Saudi Arabia), Indian Islamic fiqh academies, and Dārul Iftā' (Autonomous Institutions such as the MUI in Egypt. Al-Azhar University, of course, it must be remembered that the transplanting process must pass the prescribed conditions, likewise, the religious edicts of Islamic countries such as the Kingdom of Jordan must meet the requirements: 1). Must be with the consent of the parents of the corpse / guardian or the will of the corpse 2). Only if it feels really necessary and emergency. 3). If it is not an emergency and the need is not urgent or urgent, then it must provide appropriate compensation to the beneficiary beneficiaries (without transactions and sale and purchase contracts). Similarly, the state of Kuwait (according to the Decree of the Director General of Fatwa Dept. Endowments and Islamic Affairs no.97 year 1405 H.), Egypt. (Decree of the Permanent Committee on Fatwa al-Azhar no. 491), and al-Jazair (Decree of the Standing Committee Fatwa of the Algerian Islamic Higher Institution, 20/4/1972 (Risalah Islamiyah, 69). Furthermore, some argue that organ transplants of people who have death is forbidden, the term is based on the prohibition of hurting the corpse as hurting the living person, as the Prophet said: "Break the bones of the dead as well as the law by cutting off his bones while he is still alive". transplantation of deceased donors, namely: (a) the sanctity of the human body, every form of aggression against the human body is forbidden, among the well-known hadiths "Breaking a person's corpse is as sinful and violating it by breaking the bone of that person while he is alive" (b) The human body is a mandate: Life, self, and the human body are basically not human property but are a mandate from God That must be maintained, because of that humans do not have the right to donate it to others. (c) The human body must not be treated as a material object only; transplantation is done by cutting a person's body organs to be placed (grafted) on someone else's body, even though the human body is not a mere material object that can be cut and moved.

E. CONCLUSION

From the explanation above it can be concluded that transplantation is a series of medical actions to move organs and or tissues of the human body from other people's bodies or the body itself in order to treat tissue and / or organs that are not functioning properly or experiencing damage. Transplantation can be classified into several factors, such as from the point of view of the recipient or organ recipient and the organ contributor itself. When viewed from the recipient of the organ include autotransplantation, homotransplantation, heterotransplantation, autograft, allograft, isograft, xenograft and xenotransplantation, split transplantation and domino transplantation. Whereas seen from the contributing angle include transplants with living donors and dead donors (corpses). There are so many factors that cause someone to do an organ transplant. Among other things for healing from an illness (such as blindness, damage to the heart and kidneys), Restoring the function of an organ, tissue or cell that has been damaged or has an abnormality, but there is absolutely no biological pain (for example: cleft lip).

In Christianity, Catholicism, Hinduism and Buddhism transplants can be carried out on medical grounds and provided with sincere intentions and the purpose for good is to help someone's life without

endangering the donor's life. Whereas in Islam for organ transplants must be seen first from where the organs to be transplanted come from or seen from the source of the organ. In law, transplantation is not prohibited if in an emergency and there are medical reasons, it is not done in an illegal manner, carried out by professionals and carried out consciously. In terms of nursing ethics as long as it does not violate ethical principles such as autonomy (Autonomy), No harm (Nonmaleficence), Doing good (Beneficence), Justice (Honesty), Honesty (Veracity) and Keeping promises (Fidelity) organ transplants are allowed. In terms of society, during transplants carried out on medical grounds and getting approval from family members it is permissible. But on the other hand organ transplants in the community have not been fully understood so that it still raises some questions about transplants.

In the view of Islam, that the law of organ transplants can be done with the aim of avoiding death, to save one's life, this must be in accordance with the rules of Shari'a. Positive law in Indonesia allows the transplantation of organs for healing diseases and recovery of health can be done through organ transplants, drug implants and / or medical devices, plastic surgery and reconstruction, and the use of stem cells in accordance with the provisions stipulated in the law. In terms of medical ethics, transplants are allowed only in emergencies. A doctor must carry out his profession according to the highest measure, to protect human life and be sincere and use all his knowledge and skills. From the conclusions above, it can be suggested, namely: In principle, human organ transplants, both in the view of Islam, positive law and medical ethics, are permitted with reasons to save one's life from death. This must be in accordance with the rules of syar'i law, positive law and medical ethics.

REFERENCES

- Bradley J. A. Transplantation. Bailey and Love's Short Practice of Surgery. Arnold Publishers, London. 24th ed. 2004. P183-206.
- Petrini C. Preemptive Kidney transplantation: Ethical issues. Ann 1st Super Sanita 2009; 45: 173-7
- Chrisdiono, *Dinamika Etika dan Hukum Kedokteran dalam Tantangan Zaman*, (Jakarta: EGC, , 2012), hal. 12.
- Paul, B; Valapour,M; Bartels, D, Penny, S.B; Kahn, J (2004). Ethics of Organ Transplantation. University Minnesota, Bioethics center.
- Price SA and Wilson LM (eds 6, vol 1). 2002. *Pathophysiology : Clinical Concepts of Disease Processes*. The University of Tennessee Health Science Center, Tennessee. Hal. 99-100.
- International Summit (2008). The Declaration of Istanbul on Organ Trafficking and Transplant Tourism. The Council of American Society of Nephrology.
- Rothman,D.J; Rose, E; Atawa, T; Cohen, B; Daar, A; Dzemeshevich, S.L; Lee, C.J; Munro, R; Reyes, H; Rothman,S.M; Schoen, K.F; Hughes, N.S; Shapira, Z and Smit, H. (1997). The Bellagio Task Force Report on Transplantation, Bodily Integrity and the International Traffic in Organs. Transplantation Proceedings (29): 2739-2745.
- Linden PK. History of solid organ transplantation and organ donation. Crit Care Clin 2009;25(1):165-84,ix
- Rumah Sakit Cipto Mangunkusumo, 2011, Transplantasi Ginjal RSCM, diakses dari www.rscm.co.id Sabtu, 20 September 2017 pukul 15.33
- Trini Handayani, *Fungsionalisasi Hukum Pidana Terhadap Perdagangan Organ Tubuh Manusia*, Bandung: Mandar Maju, 2012, hlm. 72.
- Sapiudin Shidiq, op.cit, hlm. 121
- Soekidjo Notoatmodjo, *Etika dan Hukum Kesehatan*, Jakarta: Rineka Cipta, 2010.

- Moloney G, Walker I. Talking about transplants: social representations and the dialectical, dilemmatic nature of organ donation and transplantation. *Br J Soc Psychol* 2002;41(Pt 2):299-320.
- Ota K. Current status of organ transplants in Asian countries. *Transplantation Proceedings* 2004;36(9):2535-8
- M. Chrisdiono, *Dinamika Etika dan Hukum Kedokteran dalam Tantangan Zaman*, Jakarta: Penerbit Buku Kedokteran ECG, 2007, hlm. 74
- Guwandi, *Rahasia Medis*, Jakarta, Penerbit Fakultas Kedokteran UI, 2005, hlm. 32 Ibid, hal. 176.
- Undang-Undang No. 36 Tahun 2009 Tentang Kesehatan
- Peraturan Pemerintah No 18 tahun 1981 tentang Otopsi Anatomi, Otopsi Klinik dan Transplantasi Alat dan Jaringan Tubuh Manusia
- Peraturan Menteri Kesehatan No. 585 tahun 1989 tentang Persetujuan Tindakan Medis
- Peraturan Menteri Kesehatan Nomor 38 tahun 2016 Tentang Penyelenggaraan Transplantasi Organ
- Undang-Undang Nomor 36 Tahun 2009 Tentang Kesehatan
- Hasil Mukhtamar NU. Solusi Problematika Aktual Hukum Islam, Panitia Mukhtamar NU, 1995. 13 Yūsūf al-Qardawī, *Fatwa- Fatwa Kontemporer*, (Jakarta: Gema Insani Press, Jilid 2, 1995), hal. 757.
- Masjfuk Zuhdi, *Pencangkoan Organ Tubuh dalam Masaail Fiqhiyah*, Jakarta: Mas Agung, Cet IV, 1993.
- Al-Suyuthi, *Al-Asybah wa al-Nazhair*, Beirut-Lebanon: Dar-al-Fikr, 1415 H/1995 M. H. Mahjuddin, M.pd.I, *Masailul Fiqhiyah*, Jakarta: Kalam Mulia, cet.ke-7.
- Patricia Soetjipto, *Transplantasi Organ Tubuh Manusia (Naskah Akademik)*, Jakarta: Universitas Indonesia, 2010. hlm. 47
- Hasil Mukhtamar NU. Solusi Problematika Aktual Hukum Islam, Panitia Mukhtamar NU, 1995.
- Yūsūf al-Qardawī, *Fatwa- Fatwa Kontemporer*, (Jakarta: Gema Insani Press, Jilid 2, 1995), hal. 757.
- Al-Qardawī, *Fatwa-Fatwa Kontemporer ...* hal. 760.
- Qadim Zallum, *Beberapa Problem Kontemporer dalam Pandangan Hukum Islam*, judul asli *Hukmu asy Syar'i fī al- Istinsakh, Naqlul A'adlā, al-Ijhadi, Athfalul Anabib, Ajhizatul In'asy Ath Ṭibbiyah, al-Ḥayah wal Maut*, (Beirut: 1997), hal. 9.
- Saifuddin Muhtaba, *al-Masailul Fiqhiyah*, (Jombang: Rausyan Fikr, 2009), hal. 317
- Al-Suyuthī, *al-Asybah wa al-Nazhair*, (Beirut-Lebanon: Dār-al-Fikr, 1415 H/1995 M), hal. 61.
- Majelis Ulama Indonesia, *Himpunan Keputusan dan Fatwa Majelis Ulama Indonesia*, (Jakarta: Sekretariat MUI, 1415 H/1995 M), hal.

PROTECTION OF VICTIMS OF HUMAN RIGHTS VIOLATIONS

Nyimas Enny Fitriya Wardhany

Student of Legal Studies Doctor Program, Universitas Borobudur

Megawaty Barthos

Faculty of Law, Universitas Borobudur

megawatibarthos@borobudur.ac.id

Abstract

Human Rights are basic rights bestowed by God on human beings, are universal to be protected, respected, maintained, and should not be ignored, reduced or taken away by anyone. It is therefore the responsibility of the state as well as collateral for enforcement against violations of human rights principles. The UN as an international organization in its charter has been put respect and appreciation for human rights into the charter that.

The Universal Declaration of Human Rights was adopted unanimously by the General Assembly of the United Nations General Assembly on December 10, 1948. Human rights violations in North Korea should have been the responsibility of the state concerned, and also it is a shared responsibility of the international community. North Korea as one of the countries with the worst human rights records. North Koreans have been referred to as the “most brutalized people in the world” due to the severe restrictions placed on the top of their political and economic freedoms. The North Korean government has committed human rights violations in the form of crimes against humanity against the civilian population, so that the perpetrators cannot act arbitrarily in treating civilian population.

Keywords: Human Rights, North Korea, History

A. PRELIMINARY

The issue of human rights is increasingly widespread and more and more countries have ratified human rights treaties signed in 1996. However, the development of human rights issues has become a tool for western countries to pressure third world countries to be connected with foreign aid issues or military assistance.

International concern for human rights is a relatively new phenomenon. although we can refer to a number of international treaties or agreements affecting the issue of humanity before World War II after being included in the UN Charter in 1945 we can speak of systematic human rights protection in the international system.

The issue of human rights is increasingly widespread and more and more countries have ratified human rights treaties signed in 1996. However, the development of human rights issues has become a tool for western countries to pressure third world countries to be connected with foreign aid issues or military assistance.

An international mechanism for guaranteeing new human rights will carry out its role if the system of protection within the country itself is shaky or in extreme cases it does not even exist. thus the international mechanism functions to strengthen domestic protection of human rights and provide a substitute if the domestic system fails or turns out to be inadequate.

Human rights violations are any acts or actions of individuals or groups of people, including state apparatus whether intentional or unintentional or because of negligence that legally reduces, obstructs, limits and or revokes human rights of individuals or groups of people guaranteed by law and not obtained

or feared will not obtain a fair and correct legal settlement based on the applicable legal mechanism. Thus human rights violations are acts of violation of humanity either committed by individuals or by state institutions or other instances on the rights of other individuals without any basis or juridical reasons and rational reasons that are the basis.

Various serious crime cases have been tried by an international criminal court which fosters confidence that perpetrators of serious crimes no longer have impunity, and bring justice to victims.

North Korea as one of the countries that has the worst human rights record. North Koreans are often referred to as "the most brutally treated people in the world" because of strict restrictions placed on their political and economic freedom. the North Korean government, the dictator makes absolute rules, the Kim Jong II government has committed serious human rights crimes. the north Korea government treats all its citizens with an intensive and systematic ideological and political indoctrination. North Korean refugees have witnessed the existence of prison camps and have reported torture, rape, hunger, murder, medical trials, forced labor, and forced abortion of human fetuses.

B. PROBLEM

- a. what is the history of human rights development?
- b. How are human rights arrangements?
- c. What is the protection of victims of human rights in North Korea?

C. RESEARCH METHODS

This study uses a normative juridical approach. Normative approach is an approach that examines law as a rule that is deemed to be in accordance with normative juridical research or written legal research or doctrinal legal research that works to find the correct answers by verifying the truth sought from the legal prescriptions written in the law - invite. In short, normative juridical research discusses doctrines or principles in law

D. DISCUSSION

History and Development Of Human Rights

Magna Charta (1215) is often mistakenly considered the forerunner of British citizen freedom, this charter is actually only a compromise of division of power between King John and his nobles and only recently did the words in this charter actually appear in the Bill of Rights - provisions to protect individual rights or freedoms. but this development must also be seen in its context. Bill of Rights as described in the long title "An Act Declaring the Rights and Liberties of the Subject and Setting the Succession of the Crown"

Was the result of the parliamentary struggle against the rule of the kings of arbitrary statutes in the 17th century. It was ratified after King James II was forced to abdicate and William II and Mary II ascended to the throne following the "brilliant revolution" in 1688. It also prohibits tax collection and maintenance of permanent forces in peacetime by the king without parliamentary approval. In Marxist analysis, the brilliant revolution of 1688 and the Bill of Rights which institutionalized it were bourgeois revolutions; this revolution only confirmed the rise of nobility and merchants above the monarchy.

The leaders of the British colonies in North America who rebelled in the second half of the 18th century did not forget the experience of the British revolution and various philosophical and theoretical attempts to justify the revolution. In an effort to release the colonies from British rule following dissatisfaction with high taxes and the absence of representatives in the British parliament, the founders of the United States sought justification in social contracts and natural rights from Locke and French philosophers.

The Human Rights Declaration in Virginia was compiled by George Mason a month before the declaration of independence, listing specific freedoms which must be protected from state interference. These freedoms include, among other things, freedom of the press, freedom of worship, and provisions that guarantee that a person's freedom cannot be revoked except under local law or based on the consideration of their fellow citizens.

Even though the French Revolution and the struggle for independence of the United States have many features in common, there is one important difference. If the colonies which rebelled in America were merely trying to become an independent and sovereign nation, French revolutionaries aimed to destroy an absolute and old system of government and establish a new democratic order.

The theoretical solution to this problem, which was discovered by a Frenchman by following the American concept of people's legitimacy, was its own fate. the argument that is not responsive to the demands of its citizens can be changed by the statement of the will of the people.

The settlement that followed the French revolution also reflected the theory of social contracts and natural rights of the Locke and French philosophers, Montesquieu and J.J Rousseau. the declaration of human rights and citizens (1789) clearly shows that the government is something that cannot be as pleasant and desired as little as possible.

According to the declaration, true happiness must be sought in individual freedom which is the product of "sacred human rights irrevocable, and natural", so while declaring the protection of certain individual rights, the right to correct court protests (presumption innocent) freedom to hold opinions and adhere to religious beliefs, and freedom to express ideas and opinions, this declaration ushered in these rights with a clear philosophy of freedom. Article 2 of the Declaration states that "the target of every political association is the preservation of human rights that are natural and irrevocable. These rights are liberty, property, safety, and resistance to oppression.

This concept also requires the government to act in accordance with the laws and laws which are the basis of the government's actions that are not oppressive, arbitrary or discriminatory. of course we must not forget that this revolution which gave birth to noble ideals and principles also gave birth to a period of terror and guillotine.

Whatever the theoretical or doctrinal debate regarding the basics of the British, American, and French revolutions, what is clear is that each revolution in its own way has helped the development of liberal democratic forms where certain rights are considered the most important thing in protecting individuals against tendency towards authoritarianism inherent in the state. What is important about these protected rights is that these rights are individualistic and liberating. these rights are dominated by the words "free from" and not "entitled to"

In modern languages, these rights will be called civil and political rights, because these rights are mainly about individual relations with state organs. so great is the power of these revolutionary ideas, that only a few modern written constitutions do not claim to protect these individual rights.

Not only civil and political rights protected by modern constitutions and contemporary international law. Various kinds of economic, social, cultural and other rights also become the subject of various forms of protection. Karel Vasak has tried to classify human rights developments according to the slogan "freedom, equality, and brotherhood" from French revolutionaries.

Economic, social, cultural rights are sometimes regarded as a socialist inheritance, or as derivative rights that do not deserve to bear that name. But such rights were protected in the domestic constitution of the USSR, Mexico, and Germany at the beginning of the 20th century and have since been included in a number of other domestic constitutions, and are explicitly recognized by international law.

From historical accounts, it appears that the notion of human rights has shifted from merely concern for the protection of individuals in the face of state absolutism, to the creators of calculated social and economic conditions that will enable individuals to develop their potential to the maximum.

Human rights arrangements

1. Human Rights according to the universal declaration of human rights

The UN through independent organizations often still insists that the definition of human rights applies to all nations. Meanwhile, every nation is formed and formed from situations and past history that are different from other nations. If only coercion is deemed to violate human rights, then the implementation of the concept of human rights itself cannot be forced.

Human right is a problem that has become a hot topic in the world today. This arises because human rights problems concern human life, both as gods and social beings. Although it is rather difficult to track where and from when HAM emerged in the discussion, from some historical records we know that since several centuries BC, people have begun to discuss human rights issues.

From ancient Greece, the same respect for fellow citizens, the same freedom of speech and meeting in public, and equality before the law are common norms for citizens of classical Athens. the development of human rights later in the contemporary world began with Magna Charta (1215) and culminated in the success of the United Nations in issuing the Universal Declaration of Human rights. The formation of the UDHR itself in its history is inseparable from debates between different countries of interests. The principle of universalism of human rights was opposed by the principle of cultural relativism.

General declaration of human rights (UDHR), namely human rights as a general implementation standard for all nations and all countries, with that every person and everybody in the community always remembers this statement, will strive by means of teaching and with the ways of progressive actions nationally and internationally, guaranteeing general and effective recognition and implementation, both by nations of their own member countries and areas under their legal authority.

2. Human rights arrangements in the 1996 International Covenant on Civil and Political Rights (ICCPR) 1996

If the universal declaration is formulated as an order that must be obeyed by countries to protect certain rights, the ICCPR is structured to answer practical problems in the protection of human rights. Thus the covenant describes more specifically the rights that can be protected and states the use of certain rights in certain circumstances.

In addition, the rights listed in the ICCPR are not fully in accordance with the rights stated in the universal declaration. In the covenant there is a state obligation to allow individuals who are members of an ethnic, religious or linguistic minority "to enjoy their culture, declare and practice their religion or use their own language" in communities together with other members of that group (art. 27).

Other things included are the right to be free from prison sentences for failing to fulfill contractual obligations (article 11): the right of all people to be treated humanely by respecting their dignity as humans (article 10 (1)): and the right to special protection for children -children (article 24). What is not included in this covenant is asylum. the right to obtain a citizenship and the right to own wealth.

Limitation of rights must also be immediately notified in writing to other covenant participating countries through the UN secretary general, accompanied by reasons for this. certain rights are also subject to what Professor Rosalyn Higgins has called a "claw back" provision that allows for the limitation of rights to protect public safety, public order, public health, or general morals or the rights and fundamental freedoms of others.

It should be noted that this obligation is absolute and must be carried out immediately. It should also be noted that these rights must be given to all individuals who are under the jurisdiction of that country, regardless of their nationality. This does not only cover the country's territorial jurisdiction, but also the state's jurisdiction over the personalities of its citizens abroad.

3. Human rights arrangements in the international covenant of economic, social and cultural rights (ICESCR) 1996

Human rights in international economic law concern the international community after the human rights approach began to spread widely. This human rights approach finally awakened the international community to make an international convention on economic rights. The international covenant on human rights in the economic field was carried out in 1966 by producing the International Covenant on Economic, Social and Cultural Rights (ICESCR). The covenant is a derivation of the universal declaration of human rights in 1948

The ideological debate over the birth of conventions on economic, social and cultural rights (ICESCR) is quite interesting. Countries that have a liberal-capitalist ideological background do not support the birth of the ICESCR on the grounds that the state cannot intervene in economic activities. Whereas socialist countries support the birth of ICESCR on the grounds that the state has a responsibility to prosper its people.

The middle of the debate was the issuance of two conventions on the derivation of the universal declaration of human rights in 1948, namely the covenant of civil and political rights and the covenant of economic, social, cultural rights. The background of this ideological debate was acknowledged by Verloren Van Themaat. According to him that in the international economic order there are two different economic systems. First are countries that adhere to the principle of market liberalization known as capitalist countries. The second is socialist countries that adhere to the importance of state intervention in the economic field.

4. Regulation of human rights in the convention on the elimination of all forms of racial discrimination

The elimination of all forms of discrimination has been one of the main objectives of the UN since its inception. The Charter of the United Nations, the institutions created in accordance with the charter, and the international Bill of Rights, all make the equality of treatment of all humans the main theme. Therefore, it is not surprising that various UN agencies have devoted a considerable amount of energy to developing their instruments in order to combat the most widespread types of discrimination everywhere, namely racial discrimination and sexual discrimination.

The first treaty that specifically addresses racial discrimination is an international convention concerning the elimination of all forms of racial discrimination. Then it was approved by the general assembly in 1965 and entered into force in 1969. This Convention prohibits racial discrimination defined by article 1 (1) as follows:

any differentiation, exclusion, prohibition, or preference based on race, color, or ancestral, national or ethnic origin, which aims or has the effect of eliminating or reducing recognition, enjoyment, or implementation, above in the fields of political, economic, social life, culture, or other fields of public life.

The International Court of Justice maintains that this function can be relied upon to interpret the provisions of non-discrimination in the UN charter. It can also be argued, given that this definition has been well received by many countries, this definition also forms part of jus cogent. It is noteworthy that based on article 2 (2), affirmative action programs are not prohibited by the

convention, even though the time period is clearly limited to the achievement of the objectives of the programs.

Participating countries are required under article 2 (1) to "use all appropriate means" to eliminate racial discrimination within their territory, and ensure that all civil, political, economic and social rights are granted without discrimination. To oversee this convention, based on article 8, a racial discrimination elimination committee (CERD) was formed consisting of 18 independent experts selected by participating countries.

The main method of supervision is a periodic reporting system by participating countries that resembles the reporting system stipulated in international covenants, but the convention also allows an individual right to submit such written complaints.

As in the first facultative protocol of the ICCPR, complainants must first make a thorough attempt at all local remedy before their written complaints can be considered. Once the written complaint is permitted, CERD considers the complaint and can submit recommendations to the participating country and the individual concerned.

Although in article 22 of the convention permits ICJ jurisdiction to be carried out in cases of unresolved disputes among participating countries, the majority of participating countries submit conditions to this matter so that this important provision is practically meaningless.

One of the most important challenges to international human law in recent years has been the foothold of South Africa regarding institutionalized discrimination and racial segregation, known as "apartheid", although this policy continues to be the target of the curses of a number of UN organs dealing with human rights humans, but it was not until 1973 that the general assembly of the United Nations approved an international convention on eradicating and punishing crimes of apartheid. This Convention was valid in 1976.

The apartheid, stated in article 1 of the convention as a crime against humanity, and thus equated with genocide, is defined by referring to it as "the same policies and practices of racial discrimination and discrimination as practiced in South Africa.

5. Protection of civilians as victims of gross human rights violations according to the 1949 Geneva convention

Geneva conventions are conventions whose acceptance is the widest because the whole world is a party to the convention. The international conference in Geneva, which is the realization of Henry Dunant's ideas, has taken place several times and the peak of the birth of the Geneva Convention in 1949 concerning the protection of victims of war. This convention in more detail consists of four parts, namely:

1. The convention of being happy about the improvement of the condition of the wounded and sick in the armed forces on the ground battlefield.
2. Conventions for improving the condition of members of the armed forces in the sea who are injured, sick and shipwrecked.
3. Geneva conventions regarding the treatment of prisoners of war.
4. Geneva conventions concerning the protection of civilians at the time of war.

Protection of civilians is regulated in the Geneva Convention. According to this IV convention, the protection includes general protection, regulated in section II. While based on additional protocols, the protection is regulated in section IV concerning civilians.

Part IV of this protocol includes regulating general protection, assistance to civilians, and the treatment of people who are in the power of one of the disputing parties, including the protection of refugees who have no citizenship, children, women, and reporters

D. CONCLUSION

- a. Human rights in a universal sense that is considered valid for all nations. starting from the basic understanding, namely the rights given by the supreme god that everyone has the right to get his rights such as teaching, educating, marrying, etc. From the historical presentation it appears that the notion of human rights has shifted from merely concern for the protection of individuals in the face of state absolutism to the creation of calculated social and economic conditions that will enable individuals to develop their potential to the maximum
- b. Human rights violations are any acts or actions of individuals or groups of people including state apparatus, whether intentional or unintentional or due to negligence which legally reduces, deters, restricts or revokes the human rights of individuals or groups guaranteed by the Constitution and is not found or feared obtain a fair and correct legal settlement almost all countries that are above planet Earth are legally bound to cooperation in supporting the principles and objectives stated in their charter. This attachment includes the attachment to eliminating the war to promote human rights to maintain respect for justice and international law and use the world organization as a center to harmonize their steps to achieve that goal.
- c. Almost all countries that are above planet Earth are legally bound to cooperation in supporting the principles and objectives stated in their charter. This attachment includes the attachment to eliminating the war to promote human rights to maintain respect for justice and international law and use the world organization as a center to harmonize their steps to achieve that goal. To address human rights violations that took place in North Korea the United Nations Security Council unanimously passed a resolution to form the commission which would investigate human rights violations "systematically, extensively and severely" in North Korea. the resolution also condemned allegations of forced labor and torture camps for political prisoners in North Korea.

REFERENCES

Book.

- Brownie, Ian, Dokumen-Dokumen Pokok Mengenai Hak Asasi Manusia, Terj. Beriansyah, Jakarta: UI Press, 1993
- Casey, Steven. Selling the Korean War: Propaganda, Politics, and Public Opinion In the United states, 1950-1953. Oxford University Press US, 2008
- Cummings, Bruce. The Origins of The Korean War, Vol. 1 : Liberation And The Emergence Of Separate Regimes, 1945-1947, Princeton University Press
- Davidson, Scott. Hak Asasi Manusia, PT. Temprint, Jakarta, 1994
- Departemen Kehakiman RI., Konvensi Jenewa Tahun 1949: Geneva Convention of 1949, Direktorat Jenderal Hukum dan Perundang-undangan Departemen Kehakiman, Jakarta, 1999
- Gerung, Rocky.ed., Hak Asasi Manusia: Teori, Hukum, Kasus, Depok: Filsafat-UIP
- ICRC, Kenali ICRC, Jenewa, 2005
- Kusumaatmaja, Mochtar. Konvensi-konvensi Palang Merah 1949, Bina Cipta, Bandung, Cetakan Ke-4, 1989
- Samuel P. Huntington, Benturan Antar Peradaban dan Masa Depan Politik Dunia, Terj. Sadat Ismail, Yogyakarta: Qalam, 2003
- Szabo, Historical Foundation of Human Right and Subquent Developments, dalam Vasak , Vol. 1
- Legislation
- Deklarasi HAM PBB 1948

- Deklarasi Tentang Perlindungan dari Penyiksaan 1975
- DPRK'S Socialist Contitution (full text) The People's Korea.1998
- Konvensi Jenewa 1949
- Konvenan International Hak Ekonomi, Social, dan Budaya (ICESCR) 1966

Internet

- <http://en.bisnis.com/articles/kim-hye-sook-dari-gwalisso-nomber-18-kisah-tahanan-politik-korea-utara-bagian-2>
- <http://lembagapengkajianhukum.wordpress.com/2009/09/16/hak-asasi-manusia-ham-dalam-perspektif/>
- <http://maixelsh.wordpress.com/2011/02/21/hak-asasi-manusia-universal-declaration-of-human-right-1948/>
- <http://maylisa-a-p.blogspot.com/2012/04/ham-hak-asasi-ekonomi.html>
- <http://web.amnestyusa.org/our-work/countries/asia-and-the-pacific/north-korea>
- <http://everyculture.com/ja-ma/north-korea.html>
- <http://manadonews.com/berita/international/-komisi-pbb-akan-selidiki-pelanggaran-ham-di-korut.html>

THE RIGHT TO CITIZENSHIP FOR MIXED MARRIAGES IN THE PERSPECTIVE OF HUMAN RIGHTS

Prasetyo Edi

Student of Legal Studies Doctor Program, Universitas Borobudur
prasmedic@gmail.com

Abstract

Human rights are legitimately secured and upheld by every citizen. The state has responsibility for its citizens in providing enforcement and protection of law. As to who can become an Indonesian citizen is governed by Article 26 of Paragraph (1) Constitution of the Republic of Indonesia Year 1945: "the native indonesians and others who were passed by laws as citizens." The importance of citizenship of a person is due to individual citizenship status to determine the sustainability of legal jurisdiction of a country. If a person is born in Indonesia to both an Indonesian parent, the child will automatically become an Indonesian citizen, but the legal problem with child citizenship occurs in mixed marriages, a child born to a father and mother who is not an Indonesian citizen, or foreign citizen. The study has 2 (two) the formula of the problem, 1) how the setting regarding securing citizenship rights, and 2) how mixed marriage laws can affect child citizenship. The method of research in this study is the study of *yuridis-normatif* law, with data under study of a secondary data including primary legal stuff such as the Constitution of the Republic of Indonesia Year 1945, Law Number 39 Year 1999 concerning human rights, Law Number 1 Year 1974 concerning marriage, Law Number 23 Year 2002 concerning child protection, and Law Number 12 Year 2006 concerning the citizenship of the republic of Indonesia, Secondary legal materials such as the book legal theory, legal journals, scientific research, the Internet, and other legal materials, and finally the legal material have become a Indonesian dictionary, a legal dictionary, an encyclopedia, and so on.

Keywords: Human rights, citizenship rights, children, mixed marriages.

A. INTRODUCTION

Jurisdictions have been guaranteed and upheld for every citizen as clearly stated in several articles in the Constitution of the Republic of Indonesia Year 1945. Human rights (HAM) are basic human rights that exist and are the gift of God Almighty, besides that human rights are also natural rights which therefore cannot be revoked by other human beings. Human rights are believed to have universal values,¹ which means they do not know the boundaries of space and time. Indeed, human rights have existed since humans were born in this world, thus human rights are not a new thing.²

The state has responsibility for its citizens in providing law enforcement and protection in accordance with the mandate of Article 28I Paragraph (4) of the Constitution of the Republic of Indonesia Year 1945, which reads: "Protection, promotion, enforcement and fulfillment of human rights are the responsibility the state, especially the government." The existence of citizens is one of the fundamentals for the building of a country, so that the certainty and guarantee of law should be given to

¹ Muladi, 2005, *Hak Asasi Manusia*, Refika Aditama, Bandung, page. 70.

² Ramdlon Naning, 1988, *Cita dan Citra Hak-HAM di Indonesia*, Lembaga Kriminologi Program Penunjang Bantuan Hukum Universitas Indonesia, Jakarta, page. 8.

them by the state. A citizen must be guaranteed the protection and legal certainty of his rights, as well as obligations that become his responsibility as a citizen of a country.³

Every country has the right to determine who can be a citizen, in this case every country is sovereign, there are almost no restrictions.⁴ Regarding who can become an Indonesian citizen, it is regulated in Article 26 Paragraph (1) of the Constitution of the Republic of Indonesia Year 1945, which reads: "Those who are citizens are people of the original Indonesian nation and people of other nations authorized by law as a citizen."

A.W. Bradley and K.D. Ewing said that nationality and citizenship status connected someone with other people in international relations.⁵ The importance of determining one's citizenship is due to a person's citizenship status determines his submission to the legal jurisdiction of a country.⁶ Therefore citizens' rights to citizenship status are guaranteed in the Constitution of the Republic of Indonesia.

Having citizenship is the right of every citizen, also confirmed in Article 28D Paragraph (4) of the Constitution of the Republic of Indonesia Year 1945, which reads: "Everyone has the right to citizenship status." Because having citizenship is the right of every citizen, then from that it has been guaranteed by the Constitution of the Republic of Indonesia that every person has the right to choose his citizenship. The guarantee is based on Article 28E Paragraph (1) of the Constitution of the Republic of Indonesia Year 1945, which reads: "Everyone is free to embrace religion and worship according to his religion, choose education and teaching, choose employment, choose citizenship, choose a place to live in the country and leave it, and have the right to return."

If someone is born in Indonesia from a father and mother who are both Indonesian citizens, then automatically the child will be of the same nationality as his father and mother, namely Indonesian citizenship. This is regulated in Article 21 Paragraph (1) of Law Number 12 Year 2006 concerning Citizenship of the Republic of Indonesia, which reads: "Children who are not 18 (eighteen) years old or have not been married, reside in the territory of the Republic of Indonesia, from a father or mother who obtains Citizenship of the Republic of Indonesia by itself is a citizen of the Republic of Indonesia."

The legal problem that exists for child citizenship is if a child is born of a father and mother, one of whom is not an Indonesian citizen, or a foreign national. This is possible because mixed marriages are permitted and regulated in Indonesian Legislation Regulations. Regarding mixed marriages are regulated in Article 57 of Law Number 1 Year 1974 concerning Marriage, which reads: "Mixed marriages in this Law are marriage between two people who are subject to different laws in Indonesia, due to differences in citizenship. and one of the parties is an Indonesian citizen." According to K Wantjik Saleh (Indonesian Marriage Law) Marriage is an agreement held by two people, in this case the agreement between a man and a woman with material goals, namely forming a happy family (household) and eternal it must be based on the One Godhead, as the first principle in Pancasila.⁷ According to Wirjono Prodjodikoro, mixed marriages still have national and foreign elements. The national element is the regulation of parties who are Indonesian citizens, and foreign elements are the rules of a foreign authority.⁸ Children born to mixed marriages have the possibility that their mothers' fathers have different nationalities and are

³ May Lim Charity, *Urgensi Pengaturan Kewarganegaraan Ganda Bagi Diaspora Indonesia*, Jurnal Konstitusi Vol. 13, No. 4, Desember 2016, page. 813.

⁴ Koerniatmanto Soetoprawiro, 1990, *Hukum Kewarganegaraan dan Keimigrasian Indonesia*, PT. Gramedia Pustaka Utama, Jakarta, page. 1.

⁵ A.W. Bradley and K.D. Ewing, 2003, *Constitutional and Administrative Law*, 13th edition, Longman Pearson, Harlow, page. 425.

⁶ R.M. MacIver, 2006, *The Modern State*, Oxford University Press, London, page. 482.

⁷ Soedharyo Soimin, 2010, *Hukum Orang dan Keluarga*, Cet. 3, Sinar Grafika, Jakarta, page. 6.

⁸ Wirjono Prodjodikoro, dikutip oleh Achmad Ichsan, 1987, *Hukum Perkawinan Bagi yang Beragama Islam (Suatu Tinjauan dan Ulasan Secara Sosiologi Hukum)*, Cet. 1, Pradnya Paramita, Jakarta, page. 67.

subject to two different legal jurisdictions.⁹ Based on some of these things, in this journal we will discuss the regulation of guaranteeing citizenship rights as well as the mixed marriage law for a child's citizenship status.

B. RESEARCH METHOD

The research method in this study is juridical-normative legal research, with the data being examined namely secondary data which includes primary legal materials such as the 1945 Constitution of the Republic of Indonesia, Law Number 39 Year 1999 concerning Human Rights, Law Republic of Indonesia Number 1 Year 1974 concerning Marriage, Law Number 23 Year 2002 concerning Child Protection, and Law Number 12 Year 2006 concerning Republic of Indonesia Citizenship, secondary legal materials such as legal theory books, legal journals, scientific research, internet, and other legal materials, and finally tertiary legal materials such as Indonesian dictionaries, legal dictionaries, encyclopedias, and so on.

C. PROBLEM FORMULATION

Problem formulation as the focus of the discussion in this study is as follows:

1. What is the arrangement regarding the guarantee of citizenship rights?
2. What are the consequences of mixed marriages for child citizenship status?

D. DISCUSSION

1. Regulations Regarding Guaranteed Citizenship Rights

Article 1 point 2 of Law Number 12 Year 2006 concerning Citizenship of the Republic of Indonesia, which reads: "Citizenship is all matters relating to citizens." The right of every person to have citizenship other than stipulated in the Constitution of the Republic of Indonesia Year 1945, also regulated in several laws and regulations, namely in Article 53 Paragraph (2) of Law Number 39 Year 1999 concerning Human Rights, which reads: "Every child from his birth has the right to a name and citizenship status." Article 26 Paragraph (1) of Law Number 39 Year 1999 concerning Human Rights, which reads: "Every person has the right to own, obtain, replace or maintain his citizenship status." And Article 5 of Law Number 23 Year 2002 concerning Child Protection, which reads: "Every child has the right to a name as self-identity and citizenship status."

Regarding one's nationality, it is guaranteed that everyone has the right to choose their citizenship, as stipulated in Article 26 Paragraph (2) of Law Number 39 Year 1999 concerning Human Rights, which reads: "Everyone is free to choose his citizenship and without discrimination has the right to enjoy rights that originate from and are inherent in their citizenship and must carry out their obligations as citizens in accordance with the provisions of laws and regulations."

2. Mixed Marriage Legal Effects For Child Citizenship Status

When talking about the consequences of mixed marital law, it can be seen that one of the legal consequences is for the citizenship status of the Child, where the child can have dual citizenship or otherwise do not have citizenship. According to Law Number 12 Year 2006, Indonesia adheres to the principles of citizenship as follows:¹⁰

⁹ Rahmat Fauzi, *Dampak Perkawinan Campuran Terhadap Status Kewarganegaraan Anak Menurut Hukum Positif Indonesia*, Jurnal, Soumatera Law Review, Vol. 1, No. 1, 2018, page. 171.

¹⁰ Herlin Wijayati, 2010, *Hukum Kewarganegaraan dan Keimigrasian*, Bayumedia, Malang, page. 93.

The principle of *Ius sanguinis* (law of the blood) is the principle that determines one's nationality based on offspring.

- a. The principle of *Ius Soli* (law of the soil) is limited to the principle that determines the nationality of a person based on the place of birth, which is limited to children in accordance with the provisions stipulated in this law.
- b. The principle of single citizenship is the principle that determines a citizenship for everyone.
- c. The principle of limited dual citizenship is the principle that determines dual citizenship for children in accordance with the provisions stipulated in this law.

This regulation regarding citizenship is usually determined based on one of two principles, namely the principle of *ius soli* or the principle of *ius sanguinis*.¹¹ *Ius* means legal or proposition. *Soli* means derived from the word *solum* which means country or land. *Sanguinis* comes from the word *sanguis* which means blood.¹² What is meant by *ius soli* is the principle that bases itself on the legal understanding of the land of birth, while *ius sanguinis* bases itself on the principle of blood relations.¹³

This law basically does not adopt dual citizenship (*bipatride*) or citizenship (*apatride*). The dual citizenship granted to children in this Act is an exception. *Bipatride* is someone who has two nationalities. *Apatride* is someone who for various reasons does not have citizenship or citizenship.¹⁴

In the case of a person's citizenship status occurring if the citizenship principle above is strictly applied in a country, it will result in the person's citizenship status being as follows:¹⁵

- a. *Apatride*, that is, a person does not get citizenship because the person is born in a country that adheres to *ius sanguinis*.
- b. *Bipatride*, ie someone will get two nationalities, if the person is from an old person whose country adheres to *ius sanguinis*, while he is born in a country that adheres to *ius soli*.
- c. *Multipatride*, which is someone who has more than two nationalities, namely someone (resident) who lives on the border between two countries.

In practice there is a tendency that allows a person to have dual citizenship (*bipatride*) or vice versa, not having citizenship (*apatride*). This dual citizenship is due to the adoption of different principles between the two countries in determining their citizenship. One country uses the principle of *ius sanguinis* and the other uses the principle of *ius soli*. Even in its development in the future, new needs arise based on experience in various countries that these two principles must be changed to another principle or must be applied simultaneously to prevent the possibility of a double-citizenship or dual-citizenship (*bipatride*) or vice versa altogether status without citizenship (*apatride*). However, in practice, there are also countries that actually adhere to both because consideration is more beneficial to the interests of the country concerned. This system is commonly referred to as a mixed principle. The principle used is mixed so that it can cause *apatride* or *bipatride*. In such cases, what is usually tolerated is a *bipatride* state, namely dual-citizenship.¹⁶

If a child is born from a mixed marriage, that is, from a father or mother, one of whom is not an Indonesian citizen, then the child has the right to choose to obtain the citizenship of his father or mother, based on Article 29 Paragraph (1) of Law Number 23 Year 2002 concerning Child

¹¹ Moh. Kusnardi, 1980, *Pengantar Hukum Tata Negara Indonesia*, FHUI, Jakarta, page. 292.

¹² Winarno, 2008, *Pendidikan Kewarganegaraan*, Bumi Aksara, Jakarta, page. 50.

¹³ *Ibid.*, page. 293.

¹⁴ Dzulkikifli Umar dan Utsman Handoyo, 2010, *Kamus Hukum*, Quantum Media.

¹⁵ Syahril Syarbaini, 2012, *Pendidikan Pancasila, Implementasi Nilai-Nilai Karakter Bangsa di Perguruan Tinggi*, Ghalia Indonesia, Bogor, page. 262-263.

¹⁶ Rokilah, *Implikasi Kewarganegaraan Ganda Bagi Warga Negara Indonesia*, Jurnal Ajudikasi, Vol. 1, No. 2, Desember 2017, page. 54.

Protection. which reads: "If there is a mixed marriage between citizens of the Republic of Indonesia and foreign nationals, the child born from the marriage has the right to obtain citizenship from his father or mother in accordance with the provisions of the applicable legislation." Likewise in the case the child has dual citizenship wherein the child has the right to choose one of the citizenship of his father or mother, based on Article 6 paragraph (1) of Law Number 12 Year 2006 concerning the Citizenship of the Republic of Indonesia, which reads: "In the case of the Republic of Indonesia Citizenship status as referred to in Article 4 letter c, letter d, letter h, letter l, and Article 5 result in children having dual citizenship, after the age of 18 (eighteen) years or having married the child must declare to choose one of their nationalities." and Article 25 paragraph (4) of Law Number 12 Year 2006 concerning Citizenship The Republic of Indonesia, which reads: "In the case of the Republic of Indonesia Citizenship status for children as referred to in paragraph (1), paragraph (2), and paragraph (3) it results in children having dual citizenship, after 18 (eighteen) years of age or having married a child the said must declare one of his nationalities as referred to in Article 6. "

E. CONCLUSION

Based on the explanation of the discussion stated above, the conclusion that can be given to this research is that having citizenship is a right for every person guaranteed by the Constitution of the Republic of Indonesia Year 1945, and is regulated in several laws and regulations, namely Law Number 39 Year 1999 concerning Human Rights, Law Number 12 Year 2006 concerning Citizenship of the Republic of Indonesia, and Law Number 23 Year 2002 concerning Child Protection, and if children are born from mixed marriages, namely from wrong Father or Mother one is not an Indonesian citizen, so the child has the right to choose to obtain the citizenship of his father or mother at the age of 18 (eighteen) years.

REFERENCES

A. Book

- A.W. Bradley and K.D. Ewing, 2003, Constitutiona and Administrative Law, 13th edition, Longman Pearson, Harlow.
- Dzulkikifli Umar dan Utsman Handoyo, 2010, Kamus Hukum, Quantum Media.
- Herlin Wijayati, 2010, Hukum Kewarganegaraan dan Keimigrasian, Bayumedia, Malang.
- Koerniatmanto Soetoprawiro, 1990, Hukum Kewarganegaraan dan Keimigrasian Indonesia, PT. Gramedia Pustaka Utama, Jakarta.
- Muladi, 2005, Hak Asasi Manusia, Refika Aditama, Bandung.
- Moh. Kusnardi, 1980, Pengantar Hukum Tata Negara Indonesia, FHUI, Jakarta.
- Ramdlon Naning, 1988, Cita dan Citra Hak-HAM di Indonesia, Lembaga Kriminologi Program Penunjang Bantuan Hukum Universitas Indonesia, Jakarta.
- R.M. MacIver, 2006, The Modern State, Oxford University Press, London.
- Soedharyo Soimin, 2010, Hukum Orang dan Keluarga, Cet. 3, Sinar Grafika, Jakarta.
- Syahrial Syarbaini, 2012, Pendidikan Pancasila, Implementasi Nilai-Nilai Karakter Bangsa di Perguruan Tinggi, Ghalia Indonesia, Bogor.
- Winarno, 2008, Pendidikan Kewarganegaraan, Bumi Aksara, Jakarta.
- Wirjono Prodjodikoro, dikutip oleh Achmad Ichsan, 1987, Hukum Perkawinan Bagi yang Beragama Islam (Suatu Tinjauan dan Ulasan Secara Sosiologi Hukum), Cet. 1, Pradnya Paramita, Jakarta.

B. Journal

- May Lim Charity, Urgensi Pengaturan Kewarganegaraan Ganda Bagi Diaspora Indonesia, Jurnal Konstitusi Vol. 13, No. 4, Desember 2016.
- Rahmat Fauzi, Dampak Perkawinan Campuran Terhadap Status Kewarganegaraan Anak Menurut Hukum Positif Indonesia, Jurnal, Soumatera Law Review, Vol. 1, No. 1, 2018.
- Rokilah, Implikasi Kewarganegaraan Ganda Bagi Warga Negara Indonesia, Jurnal Ajudikasi, Vol. 1, No. 2, Desember 2017.

C. Legislation

- Indonesia, The Constitution of the Republic of Indonesia Year 1945.
- _____, Law Number 39 Year 1999 concerning Human Rights.
- _____, Law Number 1 Year 1974 concerning Marriage.
- _____, Law Number 23 Year 2002 concerning Child Protection.
- _____, Law Number 12 Year 2006 concerning Citizenship of the Republic of Indonesia.

IMPLEMENTATION OF TELE-RADIOLOGY IN CONTEXT OF THE IMPLEMENTATION OF GENERAL PRINCIPLES OF GOOD GOVERNANCE (AUPB) TO REALIZE JUSTICE IN ACCESS TO HEALTH SERVICES IN INDONESIA

Prijo Sidipratomo¹, M. Nasser, Antonius PS Wibowo

Student of Legal Studies Doctor Program, Universitas Borobudur

¹sidipratomo@yahoo.com,

Abstract

Radiology is one of the services that is greatly needed in establishing a patient diagnosis. However, currently the distribution of radiology specialists in Indonesia is not evenly distributed where 83% are in western Indonesia, the middle is 15% and east is only 2%. Recently, the author revealed that the implementation of teleradiology is needed in order to realize fair access to health services in Indonesia. Teleradiology provides benefits for patients and hospitals. Access to health services for patients in remote areas would be better with the application of teleradiology, patients in remote areas could enjoy the health services from radiology specialists so that the handling of patients is getting better. Teleradiology would develop cooperation between city and regional hospitals, hospitals in remote areas where a lack of radiology specialists will be helped by city hospitals that have more radiology specialists. However, teleradiology currently does not have a legal basis in its implementation. By using a normative juridical method with a qualitative approach, the author examines the perspective of State administrative law (Law No. 30 of 2014) in relation to teleradiology was then linked to the general principles of good governance (AUPB), the theory of distributive justice John Rawls and human rights theory to realize justice in access to health services in Indonesia. In order to created justice in accessing health services in Indonesia, the implementation of teleradiology requires legal certainty, namely by the regulation of the minister of health related to the implementation of teleradiology in Indonesia. In the perspective of Good Governance General Principles (AUPB), the establishment of clear regulations related to teleradiology will ensure the implementation of a principle of good service for the community, actions taken by officials or bodies fulfill the principle of motivation for the issuance of government actions and in line with the principle of justice.

Keywords: Teleradiology, Justice, General Principles of Good Governance, AUPB.

A. INTRODUCTION

Law exists to create orderliness in society so that people's rights are protected in every line of life, including in the health sector. In the context of health care efforts it is influenced by many factors. Among them are environmental, social, cultural, economic, social and physical environment that are dynamic and complex. Because of the extent of these factors, the government through the national health system seeks to implement a comprehensive, integrated, equitable and acceptable health system for all levels of society, in order to achieve optimal health levels.¹ Radiology services are one of the services that are needed in establishing patient diagnoses. It can almost be said to be the main need in the current

¹ Bahder Johan Nasution, *Hukum Kesehatan Pertanggung Jawaban Dokter*, (Jakarta: PT Rineke Cipta, 2005). Hlm. 2

era of medicine. The problem is that currently the distribution of radiology specialists is not evenly distributed where 83% are in western Indonesia, the middle is 15% and east is only 2%.²

Hospitals need many specialist doctors, especially in remote areas, but many doctors and specialist Indonesian graduates do not want to serve in remote areas, said the Minister of Health of the Republic of Indonesia (Menkes -RI) Prof. Dr. dr. Nila Djuwita F. Moeloek, SpM (K).³ Based on data compiled by the Indonesian Ministry of Health, approximately 937 hospitals of various types in Indonesia, still experiencing shortages of 2,484 specialists. The data can be calculated with details: 460 pediatricians, 388 Internal Medicine specialists, 546 Surgical specialists, 74 Anesthesiologists, 225 Radiology specialists, 125 Clinical Pathologists, 219 Medic surgeons, and 202 Anatomical Pathology specialists. In more detail the Minister of Health explained that the ratio of specialist doctors was 12.6 per 100,000 population (as of December 31, 2015) it had reached the target of the health personnel development plan for 2011-2025 which was 12.2 per 100,000 population. However, there is considerable disparity between provinces in Indonesia. The lowest ratio of specialist doctors is in Papua Province with a ratio of 3.0 per 100,000 population, while the highest ratio of specialist doctors is in DKI Jakarta province with a ratio of 52.2 per 100,000 population.

Prof. Ristaniah Sp.Rad said that public health services in West Java, and Indonesia in general, still lacked facilities and infrastructure and human resources, including services in the radiology field. Teleradiology can be one of the technologies that provide solutions to these problems. Teleradiology is a technology that is able to take an image in a location and then send it to another place for diagnostic or reference purposes. Teleradiology is part of the concept of the parent telemedicine which is the provision or delivery of cross-regional health services.⁴ Telehealth, also known as telemedicine, is a long-distance health service, through the use of communication and information technology that can provide health care solutions to remote areas where health facilities are inadequate.⁵ (Sri Ariyanti & Kautsarina, p.43).

In India, telemedisine is linked to connecting all small hospitals in the village (Majumdar, 2007). Telemedicine forms remote control units in a large hospital that has experts handled by a physician on duty. With a teleconference system, doctors or nurses in remote villages can conduct long-distance consultations with specialist doctors in all major hospitals in India. If it requires deep handling, then the patient is referred to a large and complete hospital. This system also increases the knowledge of doctors and nurses in remote villages with the transfer of knowledge formed. Meanwhile, telemedicine in Indonesia is still in the testing phase of the diagnostic phase, namely teleradiology, telecardiology, and video conference based on the Decree of the Minister of Health of the Republic of Indonesia Number HK.02.02 / MENKES / 409/2016 concerning Trial Hospital Video-Conference-Based Telemedicine Service Program and Teleradiology.

In the 1945 Constitution article 34 paragraph (3), it states that "the State is responsible for the provision of adequate health service facilities and public service facilities". In addition, through Law Number 36 of 2009 concerning Health, Article 4 states that "Everyone has the right to health".⁶ In the administration of government, as a reference for the use of authority for government officials in issuing

² Attachment to the Decree of the Minister of Health of the Republic of Indonesia Number HK.02.02 / MENKES / 409/2016 concerning Trial Hospital of Video-Conference Telemedicine Service Programs and Teleradiology

³ (<http://www.fk.ub.ac.id/menkes-mengatasi-pemerataan-dokter-spesialis-diperlukan-sinergisitas-dan-regulasi-antara-institusi-pendidikan-dan-pihak-kesehatan-untuk-kesejahteraan-pelayanan-masyarakat/>).

⁴ <http://www.unpad.ac.id/2014/01/teleradiologi-bisa-jadi-solusi-keterbatasan-sarana-dan-sdm-radiologi-di-indonesia/>

⁵ Sri Ariyanti & Kautsarina, p.43

⁶ Indonesia, Law on Health, Law No. 36 of 2009, LN No. 144 of 2009, TLN No. 5063, Article. 4.

decisions and / or actions must pay attention to the general principles of good governance as stipulated in Law No. 30 of 2014 concerning Government Administration.⁷

The importance of teleradiology services to overcome the problems of distribution of uneven specialist doctors, it is necessary to have legal arrangements related to teleradiology. This study aims to determine the potential benefits and advantages of implementing teleradiology in Indonesia as well as to determine the role of State administrative law (Law 30/2014) in relation to teleradiology to realize fair access to health services in Indonesia.

B. RESEARCH METHOD

The method used is normative juridical with a qualitative approach. The author examines the perspective of State administrative law (Law No. 30 of 2014) in relation to the theory of general principles of good governance (AUPB), distributive justice theory John Rawls and teleradiology human rights theory to realize justice in access to health services in Indonesia. In order to be more comprehensive, this study uses data related to the distribution of radiology specialists in Indonesia, the distribution of hospitals and the ratio of the population to the authors of the Indonesian Medical Association as well as the competency standards for radiology specialist education curriculum. Data sources used in this study is a secondary data source. Legal material in research consists of primary legal materials, secondary legal materials and tertiary legal materials. Secondary data sources include official documents, books, results of research in the form of reports and so on.⁸

C. PROBLEM FORMULATION

1. What are the potential benefits and benefits of implementing teleradiology in Indonesia?
2. What is the role of teleradiology in the framework of implementing Good Governance General Principles (AUPB) to realize justice in access to health services in Indonesia?

D. DISCUSSION

From the 2016 Indonesian Health Profile, (Jakarta: RI Ministry of Health, 2017), the distribution of doctors and population in 2016, we can know the ratio of the number of radiology specialists to every 100,000 residents. In West Papua Province for example, the ratio of radiology specialists is 0.67 per 100,000 population with a ratio of specialist doctors is 13.08 per 100,000 population. Even for 100,000 residents it does not meet the number of 1 radiology specialist in West Papua. The province of North Kalimantan has a ratio of radiology specialists of 0.75 per 100,000 population with a ratio of specialist doctors to 13.35 per 100,000 population. The Papua Province has a ratio of radiology specialists of 0.46 per 100,000 population with a ratio of specialist doctors to 9.13 per 100,000 population. DKI Jakarta Province has a ratio of radiology specialists of 2.43 per 100,000 population with a ratio of specialist doctors is 62.9 per 100,000 population. From the calculation of the sample ratio of radiology specialist doctors and the ratio of availability of all specialist doctors to, in 2016 there was still an inequality in the distribution of specialist doctors, including radiology specialists.

In the table of tables on the distribution of STR of specialist doctors registered at the Indonesian Medical Council until March 31, 2018 (including radiology specialists), specialist doctors are registered and spread throughout Indonesia. For West Papua, the radiology specialist actually decreases initially (in 2016) to 6 to 4. In the Papua province the radiology specialist who initially (in 2016) numbered 15 to 4. In the province of North Kalimantan it remains 5 (in 2016 and as of March 2018) . Whereas in DKI

⁷ Indonesia, Law Number 30 Year 2014 concerning Government Administration, Article (1) point 17..

⁸ Amiruddin dan H. Zainal Asikin, *Pengantar Metode Penelitian Hukum*, (Jakarta: PT Rajagrafindo Persada, 2006), hlm. 30.

Jakarta Province the number of radiology specialists increased from 2016 data as many as 250 doctors, in March 2018 it increased to 284. The trend in the range of 3T the number of specialist doctors was reduced because generally doctors for placement would flock to the urban areas, especially Java. On the other hand, the population is increasing, as written in the Central Java Tribune article that the rate of population growth in Indonesia has increased by around 1.49% per year.⁹

In the 1945 Constitution, 34 paragraph (3) states "the State is responsible for the provision of adequate health service facilities and public service facilities". In addition, through Law Number 36 of 2009 concerning Health, Article 4 states that "Everyone has the right to health".¹⁰ Justice in accessing health services is the human right of all people guaranteed by the State and contained in the 1945 Constitution. In Article 28 D that everyone has the right to recognition, guarantee, protection, and fair legal certainty and equal treatment before the law. Then everyone has the right to obtain protection and justice, including in access to health services. In Article 28 H of the 1945 Constitution, it is also stated that every person has the right to live as a born, and inner, reside, and get a good and healthy environment and has the right to receive health services. Article 28 I paragraph 5 states that to uphold and protect human rights in accordance with the principles of a democratic legal state, the implementation of human rights is guaranteed, regulated and set forth in legislation.

In the case of the inequality of radiology specialists, the author relates to distributional justice theory John Rawls. Regarding John Rawls's idea of justice theory, Amartya Sen analogues the story of Ann, Bob, and Carla about flutes, as follows:

- Ann (she is poor, but really wants to have a flute)
- Bob (his ability to play flutes is undoubted, very good)
- Carla (she's the flute maker, so she feels entitled)

Amartya Sen argues that there is no justice that absolutely applies 100% in all regions. According to him, all have a minus plus, so it depends on what theory we want to use in accordance with the goals and needs of a society. There are several theories related to justice, as follows:

- a. Utilitarian (Jeremi Bentham) theory of expediency

Based on this theory, if faced with the position of having to choose whom the flute is given, then Bob will choose. Because he is good at playing flutes, the flute will be beneficial for him to develop his talent. That justice in a utilitarian view is justice with benefits. Who benefits more then is fair for a community.

- b. Justice based on hard work, sacrifice and so on (Robert Nozic)

Based on this theory, if faced with the position of having to choose whom the flute is given, then Carla will choose (hard work, he makes the flute). Justice based on this theory would be fair if people who worked hard then he would get what he tried. The more hard work, the results that he must get more, and this is natural because he worked hard. As in this theory assume, tax obligation especially progressive tax is an injustice for those who have struggled to work hard and get more wages many. Because in the end they have to pay more taxes. This theory of justice strongly opposes the existence of taxes.

- c. Distributive Justice (John Rawls)

Based on this theory, if faced with the position of having to choose whom the flute was given, then it would choose Ann. That justice should be equitable and can be felt by the wider community.

⁹ <http://www.google.com/amp/jateng.tribunnews.com/amp/2017/08/02/data-terkini-jumlah-penduduk-indonesia-lebih-dari-262-juta-jiwa>, diakses Selasa 15 Januari 2019 Pukul 5.09 WIB

¹⁰ Opcit. Indonesia, *Undang-Undang Tentang Kesehatan*, UU No. 36 Tahun 2009, LN No. 144 Tahun 2009, TLN No. 5063, Ps. 4.

Associated with facts and conditions in Indonesia, namely: the distribution of radiological specialists who are uneven; there is a gap in the distribution of specialist doctors in Indonesia to the population in a region; the community has the right to access to the same health services; the government is responsible for access to the same health services for citizens in Indonesia; and the geographical factors of Indonesia's islands. Therefore, John Rawls's theory of distributive justice will be more appropriately used in accordance with the goals and needs of a society in Indonesia. To create justice for access to health services, especially in the field of radiology, teleradiology is the solution to the realization of justice in accessing health services in Indonesia. With teleradiology, patients in areas where there are no radiology specialists can still benefit from access to radiology services from a radiology specialist without having to come to the same place.

Based on the competency standards of the education curriculum of radiology specialists, that there are 5 forms of abnormalities in the human body, namely: Infection, due to accidents, cancer, aging and hormonal processes. In abnormalities due to infection and accidents require more urgent handling than the other three. Radiological treatment for infections and accidents can generally be carried out without contrast. Contrast is a material or media that is inserted into the patient's body to help with radiological examination so that the inserted media appears more clearly or the radiolucent on the body organs to be examined. Giving contrast can be done by direct injection by a doctor and performed by expertis, a radiology specialist. For contrast use that requires a radiology specialist, it cannot be done with teleradiology, but doctors and patients must face to face. The use of teleradiology can be done in cases that do not include contrast into the patient's body. Of course in the implementation must pay attention to patient safety. According to the radiology specialist education curriculum competency standards, this method is still safe because other health workers such as radiographers who play a role in radiology are also equipped with knowledge that is in accordance with their competencies.

Teleradiology refers to the use of computers and telecommunications networks to transmit diagnostic images obtained at one location to another for primary review and specialist interpretation and consultation. The benefits obtained for teleradiology include a more timely interpretation of radiological images, greater access to secondary consultations in addition to providing improved continuous medical education, the main goal of which is to significantly improve patient care.

In order for the implementation of teleradiology to be in accordance with existing laws and regulations, it must be taken in relation to the following matters:

- a. The right bandwidth so that the clarity of the image is good and appropriate
- b. The confidentiality of medicine, in accordance with the Regulation of the Minister of Health of the Republic of Indonesia concerning the Secret of Medicine, Permenkes No. 36 / MENKES / PER / III / 2012.
- c. Informed consent must be in accordance with the standards
- d. Medical records must be recorded in accordance with the standards
Medical records for specialist doctors based on the Republic of Indonesia's Minister of Health Regulation on Medical Records, Permenkes No. 269 / MENKES / PER / III / 2008 in article 2 paragraph (5) are adjusted as needed. According to the author's observations, in teleradiology the medical record should be carried out by both parties involved, namely from the radiographer and radiology specialist.
- e. Authority of the hospital, radiographer and radiology specialist
Hospitals must still be responsible for all actions taken in teleradiology in the specified hospital. Radiographers are responsible as far as existing SOPs have been adjusted for teleradiology activities. Radiology specialists are responsible for the results they read and advise on medical action to be taken.
- f. Medical practice permit from the relevant radiology specialist

The medical practice permit from a specialist is at the hospital where he works. The hospital will coordinate or cooperate with other hospitals for the teleradiology service.

The urgency of using teleradiology in hospitals is due to:¹¹

a. Patient Needs

- The existence of patient needs for speed and accuracy of diagnosis from the results of analysis of radiology specialists obtained from radiology examinations, speed of education and medical consultation
- The need for a professional second opinion when trying to provide a medical interpretation
- Geographic or distance constraints in providing radiology services
- The tendency of health service providers to provide / provide services or products that are effective and efficient.

b. Because of equipment

- expensive radiology tools
- The number of radiological devices is limited
- Number of hospital providers with limited radiology facilities
- Trends in changes in fusion imaging (a combination of various radiological modalities) and diagnostic fusion (cross-checking some medicinal diagnoses)

c. Radiology specialist

- The number of radiology specialists is small
- Radiology specialists work in several hospitals

The teleradiology base system consists of 3 (three) main components:¹² server; transmission network, and client.

At present the teleradiology implementation in Indonesia is still in the trial phase based on the Decree of the Minister of Health of the Republic of Indonesia Number HK.02.02 / MENKES / 409/2016 concerning the Trial Hospital of Video-Conference and Teleradiology Telemedicine Service Programs. There is no legal umbrella that clearly regulates the implementation of teleradiology in Indonesia. Therefore, the role of the government is needed to immediately form a related ministerial regulation governing the implementation of teleradiology in Indonesia so as to create legal certainty in its implementation.

The legal action that must be carried out by the government based on the above is the making of regulations governing the implementation of teleradiology in Indonesia. The connection with teleradiology is that the authorities are the Ministry of Health of the Republic of Indonesia who is tasked with developing national health in Indonesia. Legally, that authority exists because it has been mandated by the Constitution. Every state administration and government must have legitimacy, namely the authority given by law. Thus, the substance of the principle of legality is authority, namely the ability to carry out certain actions. That such authority is the attribution of the law. This is also in line with Law No. 30 of 2014 concerning Government Administration. Article 1 point 22 states that attribution is the granting of authority to the Agency and / or Government Officials by the 1945 Constitution of the Republic of Indonesia or the Act.

In Article 10 paragraph (1) of Law No. 30 of 2014 concerning Government Administration, it is stated that one of the principles of Good Governance Principles (AUPB) is legal certainty. In its explanation, what is meant by legal certainty is the principle in a legal state that prioritizes the basis of the provisions of legislation, propriety, fairness, and justice in every policy of governance. The principle of legal certainty gives rights to those concerned, in this case is the implementer of teleradiology,

¹¹ Ahmad Hariri, <http://www.google.com/amp/s/portalradiografi.wordpress.com/2015/08/05/his-ris-pacs-dan-teleradiologi/amp/>, accessed 15th of Januari 2019 , 11.32 a.m.

¹² *Ibid.*

especially specialist doctors and hospitals to know exactly what to do in relation to the implementation of teleradiology. Legal certainty in teleradiology is very important so that in its implementation it is in accordance with regulations and has a legal umbrella or is based on clear law. In addition, the establishment of regulations related to teleradiology will ensure the implementation of a principle of good service for the community. The principle of good service in its explanation is the principle that provides timely service, procedures and clear costs, in accordance with service standards, and provisions of legislation. With clear arrangements, the implementation of this principle in the AUPB will be achieved. The teleradiology implementation of justice in accessing health services is also in line with the principle of justice in the AUPB theory that every action taken by a State administrative body or official provides an aspect of justice. With the existence of compelling reasons to realize justice, it fulfills the principle in AUPB that the actions taken by officials or bodies fulfill the principle of motivation for the issuance of government actions in this matter is the establishment of rules relating to the implementation of teleradiology in Indonesia.

In terms of government actions, there are 2 forms, namely regulation (*regeling*) and decision (*beshikkingen*). Legislation, has a general and comprehensive character, is universal and has the power to correct and improve itself.¹³ In relation to the implementation of teleradiology, it will be more suitable if issued in the form of Minister of Health Regulation, because teleradiology includes the actions of doctors, hospitals, procedures in medical records and informed consent and information and communication technology used. Besides that, its universal applicability is expected to be carried out throughout Indonesia. Related to the ability to correct itself, teleradiology in its development will later follow the technology that is developing in its time so that it can be adjusted.

E. CONCLUSION

Teleradiology provides benefits and benefits for patients and hospitals. In this case, access to health services for patients in remote areas will be better with the application of teleradiology. Patients in remote areas can both enjoy health services from radiology specialists through teleradiology so that the handling of patients is getting better. Hospitals can also work together between hospitals in remote areas where a lack of radiology specialists will be helped by collaborating with city hospitals that have more radiology specialists. Legal certainty in teleradiology is very important so that in its implementation it is in accordance with the regulations and based on clear law. In addition, the establishment of regulations related to teleradiology will ensure the implementation of the principle of good service for the community, namely providing timely services, procedures and clear costs, in accordance with service standards, and statutory provisions. The teleradiology implementation of justice in accessing health services is also in line with the principle of justice in the AUPB theory that every action taken by a State administrative body or official provides an aspect of justice. With the existence of compelling reasons to realize justice, it fulfills the principle in AUPB that the actions taken by officials or bodies fulfill the principle of motivation for the issuance of government actions in this matter is the establishment of rules relating to the implementation of teleradiology in Indonesia.

REFERENCES

- Amiruddin dan H. Zainal Asikin, *Pengantar Metode Penelitian Hukum*, (Jakarta: PT Rajagrafindo Persada, 2006).
- Nasution, Bahder Johan. *Hukum Kesehatan Pertanggung Jawaban Dokter*, (Jakarta: PT Rineke Cipta, 2005).
- Rahardjo, Satjipto. *Ilmu Hukum* (Bandung: Alumni, 1996).

¹³ Satjipto Rahardjo, *Ilmu Hukum* (Bandung: Alumni, 1996), hlm. 83-84.

- Waluyo, Bambang. *Penelitian Hukum dalam Praktek*, (Jakarta: Sinar Grafika, 2002).
- Ariyanti, Sri & Kautsarina, Kajian Tekno-Ekonomi pada Telehealth di Indonesia, Buletin Pos dan telekomunikasi Vol. 15 No. 1 (2017) 43-54.
- Decree of the Minister of Health of the Republic of Indonesia Number HK.02.02 / MENKES / 409/2016 concerning Trial Hospital Video-Conference and Teleradiology-Based Telemedicine Service Program and its Attachments
- Ministry of Health of the Republic of Indonesia, Indonesia Health Profile 2016, (Jakarta: RI Ministry of Health, 2017).
- Indonesia, Law on Health, Law No. 36 of 2009, LN No. 144 of 2009, TLN No. 5063.
- Indonesia, Law on Government Administration, Number 30 of 2014, LN No. 5601.
- (<http://www.fk.ub.ac.id/menkes-mengatasi-pemerataan-dokter-spesialis-diperlukan-sinergisitas-dan-regulasi-antara-institusi-pendidikan-dan-pihak-kesehatan-untuk-kesejahteraan-pelayanan-masyarakat/>).
- <http://www.unpad.ac.id/2014/01/teleradiologi-bisa-jadi-solusi-keterbatasan-sarana-dan-sdm-radiologi-di-indonesia/>
- <http://www.google.com/amp/jateng.tribunnews.com/amp/2017/08/02/data-terkini-jumlah-penduduk-indonesia-lebih-dari-262-juta-jiwa>, accessed Tuesday 15th of January 2019 at 5.09 a.m.
- Ahmad Hariri, <http://www.google.com/amp/s/portalradiografi.wordpress.com/2015/08/05/his-ris-pacs-dan-teleradiologi/amp/>, accessed Tuesday 15th of January 2019 at 11.32 a.m.

THE REGULATION ABOUT CARDIOLOGIST PLACEMENT TO THE RIGHT HOSPITAL WOULD BRING POTENTIALLY VERTICAL LAW CONFLICTS

Prihati Pujowaskito

Student of Legal Studies Doctor Program, Universitas Borobudur
pujowaskito@yahoo.com

Abstract

The number of medical personel, especially doctors, has increased over time. Based on the Ministry of Health data recapitulation in 2010, there were 25333 general practitioners, 8403 specialist doctors and 8731 dentists. This number has increased in 2015 where general doctors almost doubled, namely 41025, specialists up to five times as many as 47894 and dentists 11686.¹ Even though the number of specialists has grown rapidly, the number of heart specialists or cardiologists is still not much and is needed. The need of cardiologists is accompanied by an the rate of heart disease that is rapidly increasing. In Indonesia, national prevalence of heart disease according to Indonesian Basic Health Surveillance (Riskesmas) 2007 is 7.2%. According to the Indonesian Ministry of Health, Indonesia currently only has around 500 cardiovascular specialist doctors. This number is still very far from the expected needs of 1 doctor to 250,000 residents. Heart disease has become a major problem in the health sector in the community and is the leading cause of death. Based on data from the World Health Organization, 23.6 million people are expected to die of heart and blood vessel disease.² However, in practice several problems have arisen in this regard. According to the head of Indonesian Medical Association (IDI) Surabaya, Health Services of Surabaya city did not issue medical liscense for specialists outside the four basics (internal medicine, surgery, children and the uterus), such as cardiologist, dermatologist and other specialists, they have to do their practices minimal in type B hospitals as it is said in the regulation of the Health Ministry Regulation number 56 year 2014.³ This has been a controversy because in the regulation chapter 37, it is said that medical services for type C hospitals consist of at least four basic specialists, which means cardiologists should be allowed to practice in hospitals not only type B but also type C under the guidance of Health Services of Surabaya city. This article will discuss more about this.

Keywords: Reactive regulation, negative impacts

A. INTRODUCTION

The number of medical professionals have grown from time to time. Based on The Health Minister data recapitulation in 2010, the number of doctors, specialists and dentists were 25333, 8403 and 8731 doctors consecutively. In 2015, the number of doctors duplicated to almost two times where there were 41025 doctors; specialists to almost five times to 47894 doctors and dentists 11686.¹ The ratio of specialists to the population of Indonesia is less than that of developed countries and other ASEAN countries. In 2017, the ratio of specialist doctors per 100,000 population is 13.6. Although the number of specialists has grown rapidly, the number of heart specialists is still not large and is needed in hospitals, especially accompanied by an increase in the rate of heart disease that is rapidly increasing. National prevalence of heart disease according to Riskesmas 2007 is 7.2%.

According to the Indonesian Ministry of Health, Indonesia currently only has around 500 cardiovascular specialist doctors. This number is still very far from the expected needs of 1: 250,000 residents. This is way different from neighboring countries such as Singapore and Laos. In Singapore, there are 160 cardiologists dealing with a population of only five million. The same thing is seen in Laos, where there are 60 cardiologists who handle six million people. This is very contrary to Indonesia where

it is reported that in the East Nusa Tenggara region, one cardiologist serves around eight million people.² Heart disease has become a major problem in health sector in the community and is the leading cause of death. Based on data from the World Health Organization, 23.6 million people are expected to die of cardiovascular diseases.³ According to the Ministry of Health, in 2016, the need for standard cardiovascular specialists is still lacking around 151 doctors.⁴ However, in its placement, there are still some problems that occur. Several reports related to the limitations in the practice of cardiologists were found, even though the number of heart specialists is still limited. According to the Ministry of Health, the number of cardiologists in Indonesia in 2011 only reached 493 doctors and a third worked in the Jakarta, Bogor, Depok, Tangerang and Bekasi regions. The population of Indonesia reaches 250 million, thus in order to fulfill this shortfall it should be practically spread evenly especially to regional hospitals outside the city, the suburb areas.²

Hospital is a health service institution that organizes individual health services in a comprehensive manner that provides inpatient, outpatient and emergency services. Hospitals according to the type of service are divided into general hospitals and special hospitals. Public hospitals in Minister of Health Regulation Number 56 of 2014 are classified into four, namely class A, class B, class C and class D. This is determined based on services, equipment, buildings, infrastructure and human resources. Every hospital of any class must have four basic specialists, namely surgeons, pediatricians, obstetricians and internal medicine specialists. Meanwhile, specialists outside the four bases are referred to as *other* specialists.⁵ In the practice of cardiologists, there are several problems related to policies regarding the issuance of licenses for practice in several regional hospitals, specialist welfare and health insurance services related to some heart diseases.

B. RESEARCH METHODE

This study try to describe the juridical and sociological aspect of cardiologist placement regulation to the right hospital by city health services. Base on juridical normative aproach, the study analyse theories, concepts, law principles, and regulations related to the issue. At the level of aplied study, we focus to this problem because this being as atention by many people and many doctors.

C. PROBLEM FORMULATION

This problem raises a problem for cardiologists who will extend their practice license at the hospital. This raises a problem with the distribution of specialist doctors as expected. By not achieving this equality, the impact that can be caused is an increase in cases or heart disease especially in suburb areas due to minimal intervention by specialists who have special expertise in dealing with the disease. This also can lead to conflict related to the rights and obligations of doctors and the rules and laws that apply. This article will review some government regulations that can lead to possible conflicts in the practice of cardiologists.

D. DISCUSSION

Southeast Asia has a population, a majority younger than 65 years, but has an early mortality rate due to high non-communicable diseases (especially cardiovascular disease). It is estimated that 38 million people worldwide experience heart failure with most published studies reporting a prevalence of between 1% and 2% of the adult population. According to the 2014 World Health Organization status report, the probability of premature death from non-communicable diseases in many Southeast Asian countries far exceeds the UK (12.0%), with more than double the risk in the Philippines (27.9%), Myanmar (24.3%) and Laos (24.2%). The risk of premature death due to non-communicable diseases is also high in Indonesia (23.1%), Malaysia (19.6%), Cambodia (17.7%), Vietnam (17.4%), Brunei (16.8%)

and Thailand (16.2%); but Singapore (10.2%) is the only exception with a risk comparable to that of the UK.⁶

Cardiovascular disease is a heart and blood vessel related disease. Every year, 17.9 million people die from cardiovascular disease with an estimated 31% of all deaths in the world. More than 75% of deaths from cardiovascular disease occur in developing countries with low to moderate incomes.⁷ According to a cohort study conducted at the Harapan Kita National Heart Center and five hospitals in Indonesia in 2006, the mortality rate from cardiovascular disease in hospitals is around 6-12% and the rate of return to hospital is 29%. The 2013 Riskesdas data shows that coronary heart disease is the most common heart disease in Indonesia.³

The need for heart specialists is still high considering that with a ratio of 1 doctor to 100,000 residents, and the number of heart doctors in Indonesia is only around 493 doctors. The Indonesian Cardiovascular Specialist Association (PERKI) is a professional organization that is the sole organization of Cardiovascular Specialists under the auspices of the Indonesian Doctors Association. In 2020, the addition of a cardiac and blood vessel specialist is targeted at 1,000 doctors by PERKI. These doctors will be spread in various regions in Indonesia. But in fact, currently there are only about 1,000 cardiac and blood specialist doctors whose distribution is not evenly distributed. There are still many District / City hospitals that do not have heart specialists.⁸

Heart disease services by cardiologists are not owned by all hospitals. The hospital is a health service institution that organizes individual health services in a comprehensive manner that provides inpatient, outpatient and emergency services. The aim of the hospital is to improve the health status of the Indonesian people. According to the type of service, hospitals are divided into two namely general hospitals and special hospitals. General hospitals are hospitals that provide health services in all fields and types of diseases while special hospitals are hospitals that provide primary services in one field or one particular type of disease based on scientific disciplines, age groups, organs, types of diseases or other specialties. Minister of Health Regulation Number 56 of 2014 regulates the classification of hospitals. In chapter 12, general hospitals are divided into four classifications, namely class A, class B, class C and class D. This is determined based on the type of service, human resources, equipment and buildings and infrastructure owned. Most heart cases in hospitals without a heart specialist are handled by an internal medicine doctor.

Cardiologists are allowed to work in hospitals, clinics and independent practices. But in fact, a number of problems were found in the field related to the distributing of doctors and treatment of heart disease that was not appropriate. For example, in East Java, several cases have been reported regarding the difficulty of cardiologists to obtain a practice permit, especially for those who will have their practice in types C and D hospitals. According to the Regulation of the Minister of Health of the Republic of Indonesia Number 512 / MENKES / PER / IV / 2007 concerning practice permits and the implementation of medical practices, practice permits are written evidence provided by the District / City Health Service to doctors and dentists who have met the requirements for practicing medicine. Medical practice in question is a series of activities carried out by doctors for patients in carrying out health efforts. Without a practice permit, the doctor cannot make health service efforts at his work. This was said to have happened because the Surabaya City Health Office questioned the classification of the hospital where type C and D hospitals did not need other specialists besides the four basic and supporting hospitals who were supposed to work in type A and B hospitals, and type C hospitals who wanted having other specialists outside the basic specialist must improve themselves to be a type B hospital.

According to Minister of Health Regulation No. 56 of 2014 concerning the classification of hospitals, type A hospitals are the main referral hospitals which consist of at least 18 general practitioners for basic medical services, 4 general dentists, 6 basic specialists, 3 supporting specialists, 3 *other* specialist doctors, two subspecialty doctors and one specialist dentist. According to chapter 15, basic

specialist medical services consist of internal medicine, child health and obstetrics and gynecology services; specialist support services include anesthesiology, radiology, clinical pathology, anatomical pathology and medical rehabilitation while *other* specialist services consist of opthalmologists, ear nose throat specialists, neurologists, cardiologists, dermatovenereologists, psychiatrist, pulmonologist, orthopedic surgeon, urologist, neurosurgeon, plastic surgeon and forensic medicine specialists. Type B hospitals have at least basic specialist services, supporting specialist services, eight out of 13 *other* specialist services and two out of four basic subspecialties. While for type C hospitals, medical personnel according to chapter 43, at least consist of:

- 9 general practitioners,
- 2 general dentists,
- 2 doctors for each basic specialist,
- 1 specialist for supporting services and
- 1 specialist dentist.

This means that for type A hospitals, surely they have the services of a cardiologists, in type B hospitals, if the cardiologists are included in 8 of the 13 other specialist services and in type C hospitals, the cardiologists can still do their practice because according to chapter 43, services there were need was 'at least' fulfilling the requirements of four basic and supporting specialist services.⁵ However, according to the Surabaya Health Office, the hospital classification that made the practice of the doctor a problem, the type of hospital must be upgraded if specialists are outside the four basics and the supporting specialists want to have a license to practice at a type C hospital. This can be a problem because other specialists who have their license in type C hospitals cannot extend their practice permits to perform services at the hospital because in practice medical personnel practice medical in hospitals must have a practice permit in accordance with the Law Number 44 of 2009 concerning hospitals.⁹

The limited service of heart specialists in the East Java region in particular can have an impact on the distribution of specialist doctors who are equally as expected. Most type A and B hospitals are located in cities and regencies which are quite advanced, while the distribution of cardiac specialists is expected to cover the entire population of Indonesia as expected by one doctor for a minimum of 100,000 residents. According to Ministry of Health data, the number of hospitals in Indonesia is 2773. As of April 2018, in East Java there were 10 type A hospitals, 55 type B hospitals, 176 type C hospitals and 131 type D hospitals.¹⁰ Of these available number, it can be seen that the number of type C hospitals are twice more than the types A and B hospitals. This shows that if a cardiologist is only allowed to practice in type A and B hospitals, then the coverage of type hospital type C, which is clearly found more, will not be achieved and equalization cannot be developed. The accumulation of cardiac specialists in urban areas and the reduction in services of cardiologists to remote areas can result in heart disease services being hampered and the incidence of heart disease continuing to rise in Indonesia. This is regulated in Law No. 36 of 2009 chapter 26 where it is said that the government regulates the placement of health workers for equitable health services and local governments can organize and utilize health workers in accordance with the needs of their regions. If a cardiologist is only allowed to do services and place a practice permit in type A and B hospitals, then this is contrary to these provisions, although this is indeed the authority of the regional government in placing health workers in accordance with regional needs.

According to the Regulation of the Minister of Health of the Republic of Indonesia Number 2052 / MENKES / PER / X / 2011 regarding practice permits and the implementation of medical practice chapter 2 article 3, the head of the district / city health office must provide a balance between the number of doctors and dentists health services. The number of doctors and specialists will certainly increase their needs in the regions because in urban areas, there have been many referral centers and medical education centers that have more complete specialist doctors. Community needs for specialist doctors also increase

due to the limited competence of general practitioners in diagnosing and providing therapy for patients with special heart disease.

If the distribution of heart specialist can not be achieved, the heart disease service will not be optimal even though there are still internal medicine specialists who in their education have the competence to handle heart diseases in general. However, the heart and blood vessel specialists are different from internal medicine doctors. Cardiovascular specialists have specific expertise in handling cases of the heart and blood vessels or also called cardiovascular. Cardiologists also have the competence to carry out heart-related investigations and conduct interventions related to handling heart cases experienced by patients. This can be seen in accordance with the Indonesian Medical Council Regulation Number 57 of 2019 concerning Education Standards for Cardiovascular and Specialist Doctors. Patient management is also done more holistically where the principles of four doctor services, namely promotion, preventive, curative, and rehabilitative realization will be optimal.¹¹ The limitation of specialists in proposing to work in type C hospitals can lead to conflict where the implementation of health law is not in accordance with applicable laws and regulations.

Nevertheless, the government in making and implementing policies may consider several things such as limited services that can be performed by cardiologists in type C hospitals that are inadequate. Most type C hospitals do not provide facilities for cardiac catheterization or other sophisticated diagnostic tools that can help a cardiologist to do his job optimally. For example, a radiology facility at a type C hospital is minimal x-ray. In carrying out diagnostics, cardiologists prefer to use ultrasonography or CT. The facility is not necessarily there and the implementation of a cardiologist in dealing with patient diseases may also be limited and trigger the next problem. Conflict over the desire of a hospital to meet the needs of certain specialist doctors can arise even though the hospital has not been able to improve its quality in other fields to improve its standards. Of course, each hospital also has a budget and development plan that has been arranged in such a way. Increasing the well-being of human resources related to equipment and health facilities may also have been considered by them, especially if the hospital has just been appointed as class C where it must require a considerable amount of time to improve its minimum quality to carry out maximum health care.

Heart services in type C hospitals are mostly carried out by internal medicine doctors and in this era of national health insurance, the difficulty of the community to get referrals from one health facility to the next health facility is found. This of course is one of the obstacles for people to get optimal heart disease services. As stated in health law number 36 of 2009, referrals from one health facility to another are carried out in stages. From puskesmas - type D hospitals - type C hospitals - type B hospitals to type A. However, many heart cases are handled by general practitioners in the puskesmas and hospitals. The doctor can refer the patient to the closest type C hospital that doesn't always have a specialist in heart disease. There, they will be served by internal medicine specialists if there are no specialists in heart disease. Of course the internal medicine doctor's service will be different from a heart specialist who has undergone specific education about the heart for four years. Some diagnoses and therapies may not be maximal. Even though the presence of a cardiologist in a type C hospital will also reduce the burden on medical specialists because of the excessive number of patients compared to their abilities. Patients will also benefit because they will get maximum service from experts with adequate diagnosis and therapy.

E. CONCLUSION

Given that the high rate of heart disease in Indonesia, it is expected that the government can follow up on the conflicts that occurred in East Java between cardiologists and health services because community services will certainly be blocked and limited. While if seen in other cities / regencies, many heart specialists place themselves in type C hospitals with limited facilities and services to continue to serve the community as much as possible with the minimum equipment. This certainly triggers a conflict

about the feeling of injustice between the differences in the administration of law in one region and another. While if seen, the regulation of the minister of health applies throughout Indonesia, not just one or two parts. From a legal point of view from the health minister's regulation that there is actually no prohibition for cardiologists to practice in class C hospitals because of the sentence in the regulation, it is mentioned that type C hospital may have 'at least' four basic specialists are not just limited only for the four basic specialists.

Decision making that is discussed and decided together with both parties will be better done to avoid potential conflicts that can occur due to misunderstandings due to lack of communication.

REFERENCES

- Katadata. Bagaimana Ketersediaan Dokter di Indonesia? Jakarta: Katadata.co.id; 2018. Available from: <https://databoks.katadata.co.id/datapublish/2018/03/15/bagaimana-ketersediaan-dokter-di-indonesia>.
- Kementerian Kesehatan Republik Indonesia. PERKI DUKUNG KEMKES ATASI PTM Jakarta: Kemenkes RI; 2011 [updated 2015; cited 2011 Mar 30]. Available from: <http://www.kemkes.go.id/development/site/jkn/index.php?cid=1451&id=perki-dukung-kemkes-atasi-ptm.html>.
- Kementerian Kesehatan Republik Indonesia. MENKES: AKSES MASYARAKAT TERHADAP PELAYANAN KESEHATAN JANTUNG MENINGKAT. Jakarta: Kemenkes RI; 2011.
- Sumantri U. Program Pemenuhan Tenaga Kesehatan. In: Kesehatan D, editor. Jakarta: Kemenkes RI; 2017.
- Peraturan Menteri Kesehatan No. 56 tahun 2014 tentang Klasifikasi dan Perizinan Rumah Sakit. Jakarta: Kemenkes RI; 2014.
- Lam CSP. Heart failure in Southeast Asia: facts and numbers. ESC heart failure. 2015;2(2):46-9.
- WHO. Cardiovascular disease Geneva: WHO; 2019 [cited 2019 June]. Available from: https://www.who.int/cardiovascular_diseases/en/.
- Perkonsil No. 57 tahun 2018 tentang Standar Pendidikan Dokter Spesialis Jantung dan Pembuluh Darah.
- Undang-undang nomor 44 tahun 2009 tentang rumah sakit. 2009.
- Trisnantoro L, Listiyani E. Jumlah RS di Indonesia Pertumbuhan RS Publik: Kemkes; 2018 [cited 2019]. Available from: <http://sirs.yankes.kemkes.go.id/rsonline/report/>
- Peraturan Konsil Kedokteran Indonesia Nomor 57 tahun 2019 tentang Standar Pendidikan Dokter Spesialis Jantung dan pembuluh Darah. 2018.

LEGAL REVIEW OF IMPLEMENTATION OF RATIFICATION OF WOMEN'S DISCRIMINATION (CEDAW) EVALUATION OF WOMEN'S EMPOWERMENT EFFORTS IN INDONESIA

Rachmanto HSA

Student of Legal Studies Doctor Program, Universitas Borobudur
iwan_rachmanto@yahoo.co.id

Abstract

The 1945 Constitution as the main instrument in legal norms and state policies has shown progress in respecting, protecting and fulfilling human rights, according to Article 27 of the 1945 Constitution "does not distinguish every citizen"

And as part of the international community, the government demonstrates its commitment to human rights efforts more specifically in Women's Empowerment by ratifying the Convention on the Elimination of Discrimination Against Women (CEDAW) and accepting the Beijing Declaration and Platform of Action (BDPoA) as a guideline for implementing state policy in the effort to empower Indonesian women .

This study examines from a legal standpoint the implementation of the CEDAW Ratification by the Indonesian government that whether the implementation of the CEDAW Ratification has been effective / appropriate and how the implementation of CEDAW's ratification of the law has been prepared in the policy relating to women's empowerment.

Implementation of policies, regulations and legislation with a gender perspective is good. The government protects the sustainability of women, in the fields of law, health, political participation, protection from violence and citizenship.

Keywords: CEDAW, BDPoA, Empowerment Of Women, Gender Equality

A. INTRODUCTION

The opening of the United Nations Charter stipulates that one of the main objectives of the Organization is to reaffirm "the belief in fundamental human rights, in human dignity and values, in equality of rights for men and women". Article 1 states that one of the objectives of the United Nations is to achieve international cooperation in promoting and promoting respect for human rights and fundamental freedoms for all people without differences, among other things, gender.

Based on the provisions of the Charter, the first international instrument that specifically refers to human rights and equal rights for men and women, all members of the United Nations are legally bound to realize fully human rights and fundamental freedoms. Human rights, including the goal of equality between women and men,

The International Human Rights Act strengthens and broadens this emphasis on women's human rights. The Universal Declaration of Human Rights states the right of everyone to equality before the law and to enjoy human rights and fundamental freedoms without any form and results to include sex among the reasons for such unauthorized differentiation.

As the implementation of the universal declaration of Human Rights the United Nations Human Rights Commission formed a sub-commission which became the forerunner of the Commission on the Status of Women (CSW), at the beginning of its formation, CSW provided recommendations relating to issues in the field of women's rights apply the principle that men and women must have equal rights, then they have produced a number of important declarations and conventions that protect and promote

women's human rights, this is the forerunner (Convention on the Elimination of Discrimination Against Women - CEDAW).¹

The substance of CEDAW is aimed at fighting for equality between women and men in all fields (gender equality). Fields that are focused on all life are reflected in articles that are regulated both in the civil, cultural, economic, political and social fields. The substance contained in the CEDAW Convention, must be adopted to be implemented in the national law of each participating country.

Discussing the notion of gender is basically not just the sex difference between men and women as a gift from God. Gender emphasizes the differences in roles and functions in society, which are understood and analyzed giving rise to discrimination,

Gender Equality is the main goal, namely achieving equality and empowering women. Women everywhere must have rights, opportunities, and can live peacefully without violence and discrimination. The following are some of the global goals or targets on gender equality:

1. End all forms of discrimination.
2. Eliminating all forms of violence against women in public and private spaces, including human trafficking and sexual exploitation and various other types of exploitation.
3. Eliminate all dangerous practices, such as child marriage, early and forced marriage, and female circumcision.
4. Ensure full and effective participation, and obtain equal opportunities for women to lead at the level of decision making in political, economic and community life.

Here the importance of the role of the government in implementing legal equality objectives within the new and specific legal framework with women as targets, which aims to end gender discrimination, by providing equal access to education, care, health, decent work and protection, is expected to promote prosperity for women and girls. As a mission to eliminate discrimination against women is gender equality and women's empowerment, these two things must be in line;

Understanding Women's Empowerment / Women's Empowerment: can be defined in many ways, however, when talking about women's empowerment, empowerment means accepting and allowing people (women) who are outside the decision-making process into it. "This puts a strong emphasis on participation in political structures and formal decision-making and, in the economic sphere, the ability to obtain income that enables participation in economic decision-making."²

Empowerment is an important strategy in increasing the role and opportunities of women in an effort to increase and actualize their potential so that they are more capable and independent. Empowerment can be done through fostering and improving women's skills.

Based on the above arguments, it raises the question, namely how do government efforts regulate for the realization of gender equality?

The more concentrated a country is on the issue of human rights and gender equality the implications will be for the betterment of women's empowerment in these countries. Likewise, if the government neglects the problem of gender inequality, it will adversely affect the overall empowerment of women in the fields of Education, Politics, Law, Culture, Social Affairs.

That however, laws and policies that uphold women's rights and open potential pathways because women's empowerment will change women's lives. Real change depends on other social and economic structures, such as access to welfare and other basic services, economic markets, socio-cultural norms and the quality of civil society. Follow-up policies and regulatory reforms help provide substance to the

¹ Sources : *Convention on the Elimination of All Forms of Discrimination against Women*, published the United Nations Department of Public Information)

² Mosedale, Sarah (2005-03-01). "Assessing women's empowerment: towards a conceptual framework". *Journal of International Development*. 17(2): 243–257. doi:10.1002/jid.1212. ISSN 1099-1328

law changing and increasing women's access to new economies and social rights and resources.³

Based on the description of the arguments above, it is imperative for the Indonesian Government now to initiate goodwill in implementing policies and giving birth to gender perspective legislation. Although good intentions have been shown by the government through the ratification of the Convention on the Elimination of Discrimination against Women (CEDAW) as a reference in formulating policies, the escalation of seriousness and consistency in implementing the above instruments still needs to be implemented,

B. RESEARCH METHOD

The research method that will be used in writing this research is juridical normative, with the data studied in the form of library material or secondary data consisting of primary legal material, namely is the 1945 Constitution of the Republic of Indonesia, and the Marriage Law No.1 of 1974 (UUP), secondary legal materials, namely legal science books, legal journals, and scientific research, as well as tertiary legal materials which include the Large Indonesian Language Dictionary (KBBI), legal dictionaries, encyclopedias, and others.

C. PROBLEM FORMULATION

The formulation of the problem that can be discussed in this study are as follow to convey the development of government efforts in empowering CEDAW's methods as a whole, as well as the challenges that must be faced by the government in implementing them, also will outline the relevance of policies and legislation to improve improvements in women's empowerment in Indonesia.

D. DISCUSSION

1. Implementation of CEDAW Ratification in Indonesian Legislation

The main instrument norm in determining legal norms, actions or government policies is the 1945 Constitution, in fact the 1945 Constitution has shown progress in respecting, protecting and fulfilling human rights, according to Article 27 of the 1945 Constitution "does not distinguish every citizen" Whereas the *Convention on the Elimination of Discrimination Against Women (CEDAW)*, is an international instrument which is one of the Human Rights Conventions, and as part of the international community The Indonesian government has taken a role by ratifying it in Law Number 7 of 1984. concerning Ratification of the Convention concerning the Elimination of All Forms of Discrimination Against Women;

Historically new women were recognized as legal subjects in 1974, namely through the Marriage Law No.1 of 1974 (UUP). Previously, the woman had to be represented by her voice and her husband's decision in matters relating to outside affairs including to take care of her wife's personal property (article 105 BW).

Women are seen as incompetent in carrying out legal actions and if they do legal actions they must be under the guardian of their husband (male). UUP has corrected this condition through the provisions of article 31 paragraph 1 which states that "*the rights and position of the wife are balanced with the rights and position of the husband in domestic life and the association of living together in the community*".⁴

Article 31 paragraph 2 of the Marriage Law confirms that "*Husband is the head of the family and wife of a housewife.*" Furthermore, "*The husband is obliged to protect his wife and provide all the necessities of living according to his ability.*" (Article 34 verses 1 and 2 of the article came to be known as *gender standardization*. Through this provision, the state has legitimized and ratified the division of sexual work between men and women in the family / household;

³ Development Progress, Working Paper 06, November 2014

⁴ Sources : Ratna Batara Munti, MSi (LBH-APIK – Jakarta)

The struggle of women to oppose discrimination gained momentum when the government ratified the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) through Law No.7 of 1984. In this Convention Discrimination is "every differentiation, exclusion, limitation made on the basis of type sex, which has an influence or purpose to reduce or eliminate the recognition, enjoyment or use of human rights and basic freedoms in the political, economic, social, cultural, civil or whatever else by women; and accept the *Beijing Declaration and Platform of Action (BDPoA)* as a guideline for implementing state policies in the effort to empower Indonesian women.

This ratification is a form of support and efforts of the state in encouraging the government to more actively improve the mechanism and effective implementation of the law in their respective countries, on the other hand it has consequences for the government to implement the convention content consistently and consistently, namely the government must guarantee the absence of discrimination towards women in the civil, political, economic, social and cultural fields. The point is the principle of non-discrimination must be the basis of the government in designing policies, programs and public services for women, this effort is carried out with supervision from international organizations on a regular basis for the implementation of CEDAW principles that must be carried out by the Indonesian government.

As a continuation of the ratification of CEDAW, the principles in the *Beijing Declaration and Platform for Action* have also been recognized by Indonesia since 1995. Although this declaration has no legal consequences and has no oversight mechanism as possessed by CEDAW, the manifesto has an important role because they both put the issue of women's rights as the essence of the struggle against equality. Until now, efforts to realize gender equality in Indonesia have tended to intersect with 3 (three) main problems, namely, problems in the fields of law, education and employment.

In the context of the field of legal protection for women, government policies reflecting the actualization of CEDAW and BDPoA began with the establishment of the National Commission on Violence Against Women (Komnas Perempuan) in July 1998. The vital and strategic policy in establishing Komnas Perempuan was a strong foundation to start eroding slowly the issue of empowering women. There were 29 new government policies to deal with empowerment of women, 11 at the national level, 15 at the regional level, and 3 at the ASEAN regional level, after the establishment of the National Commission on Women.⁵

Gradually, the presence of Komnas Perempuan actually changed the government's paradigm in positioning women as an important consideration in making policies.

To what extent has Indonesia determined further policies since ratifying the CEDAW convention? This can be proven by the birth of legislation which later became the basis for the Indonesian government in formulating gender equality, namely Law No. 39 of 1999 concerning Human Rights which specifically regulates women's human rights in Article 45.⁶

The escalation of the government's seriousness towards gender equality is increasingly seen with the presence of Presidential Instruction Number 9 of 2000 concerning Gender Administration, after the declaration of BDPoA and the establishment of the National Commission on Women. Such legal products instruct all ministries, state institutions and local governments to implement gender mainstreaming in each of their policies.⁷

On the basis of the policy as described above, in the past 14 years, the Indonesian government has

⁵ Saparinah Sadli, *Different but Equal: Thought about Women's Studies*, Jakarta: Kompas, 2010), p. 269.

⁶ Article 45 of Law No. 39 of 1999 concerning Human Rights states that: "Women's rights in this law are human rights". This legal method pioneered the birth of other legal methods that regulate more details about women's rights in political, household, education, employment and health matters

⁷ Ministry of National Development Planning, *Voluntary National Review: Eradicating Poverty and Promoting Prosperity in a Changing World*, (Jakarta: Ministry of National Development Planning, 2017), p. 44

issued a legal product that seeks to reposition the position of women in the public order as a form of commitment to gender equality including:

- Presidential Decree of the Republic of Indonesia No. 181/1998 concerning *the Establishment of the National Commission on Violence Against Women (National Women's Commission)* which was later upgraded to Presidential Regulation No.65 of 2005.
- Act No.39 / 1999 concerning Human Rights (Article 45 "*Women's Rights are Human Rights*").
- Indonesia signed the *CEDAW Optional Protocol* in 2000.
- *National Action Plan for the Elimination of Violence Against Women* in 2001.
- Presidential Decree of the Republic of Indonesia No. 88/2002 concerning the *National Action Plan for the Elimination of Trafficking in Women and Children*.
- Act No.12 / 2003 concerning General Elections (Article 655 (1) - 30% allocation.
- Act No. 36 of 2009 concerning *Health*
- (This law requires *reproductive health socialization and education for adolescent girls*)

Legislation and legal products as mentioned above are in fact a concrete reflection of the conditions contained in CEDAW and BDPoA. Such an argument is clearly proven by the conformity between the legal rules of the two international instruments with the aim of establishing the legislation above.

Below are some explanations regarding the implementation of the contents of CEDAW on the laws formed by the government above including the following:

- Act No. 12 of 2006 concerning Citizenship is a form of implementation of Article 9 paragraph (1) CEDAW stating that:
- *"The United States grant women equal rights to acquire, change, or retain their nationality. They shall ensure in particular that neither marriage to the aliens nor the change of nationality of the husband during the course of changing the nationality of the wife, rendered her stateless or force upon her nationality of the husband. "*
- Act No. 23 of 2004 concerning the Elimination of Domestic Violence and Law No. 21 of 2007 concerning Eradication of Criminal Acts of Trafficking in Persons is a form of actualization of point 124 letter (b) BDPoA which requires the government to:
- *"Refrain from engaging in violence against women and exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether they are perpetrated by the State or by private companies."*
- Act No. 2 of 2011 concerning Political Parties, Act No. 7 of 2017 concerning General Elections, and Law No. 6 of 2014 concerning Villages can be said as a form of manifestation that is in harmony with Article 7 letters (a) and (b) CEDAW which confirms that:
"State parties should take appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms, the right to: a). To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies; b). To participate in the the formulation of government policy and the implementation there are of and to hold public office and perform all public functions at all levels of government. "
- Furthermore, Act No. 36 of 2009 concerning Health which contains a legal basis for the government to carry out socialization and education of reproductive health for young women in fact, is very in line with points 106 letters (m) BDPoA which oblige every country to:
- *"Ensure that girls have continuing access to necessary health and nutrition information and services as they mature, to facilitate a healthy transition from childhood to adulthood."*
- Supreme Court Regulation No. 3 of 2017 concerning Guidelines for Judging Women's Cases Dealing with Law (Supreme Court Regulation No. 3 of 2017) actually, is an embodiment of

Article 2 paragraph (c) CEDAW which states that:

"To establish a legal basis for the protection of rights of women on an equal basis with competent national tribunals and other public institutions the effective protection of women against any act of discrimination."

Such CEDAW rules are certainly in line with the aim of protecting women from acts of discrimination in court, as also stated in Article 5 of Regulation No. 3 of 2017, namely: "In examining women facing the law, the judge may not:

- a. Demonstrate attitudes or issue statements that demean, blame and / or intimidate women against the law;
- b. Justify discrimination against women by using culture, customary rules, and other traditional practices and using expert interpretations that are gender biased;
- c. Questioning and / or considering the experience or background of the victim's sexuality as a basis for freeing the perpetrator or alleviating the punishment of the perpetrator;
- d. Issues statements or views that contain gender stereotypes. "

The embodiment of the guideline in handling women's cases before the law can actually also be said as a form of embodiment of the constitution (the 1945 Constitution) in dealing with

discrimination against women that has been happening in Indonesia. This is as stated in the constitutions of Article 28 D, 28 G, and 28 I which regulates the rights of all citizens to protect their personal self, family and honor, as well as the same position before the law.⁸

In order to protect the role of women in the scope of justice, as stipulated in Article 2 paragraph (c) CEDAW, the government is also planning a policy on the existence of an Integrated Criminal Justice System for Handling Cases of Violence Against Women (SPPT-PKKTP). This agenda is an integrated system that shows the process of linkages between agencies / authorities that handle cases of violence against women and access to easy and affordable services for women in each case of violence against women.

This agenda is an integrated system that shows the process of linkages between agencies / authorities that handle cases of violence against women and access to easy and affordable services for women in each case of violence against women.⁹

Although the policy and regulatory framework in Indonesia that is oriented towards meeting gender equality has been created, it is undeniable that efforts to maintain and commit to gender equality in the *Sustainable Development Goals* agenda still need to be improved, especially in terms of access to education and employment women in Indonesia. Until now, the focus of the Indonesian government on the policy framework and legislation with a gender perspective is still centered on protecting women from violence, equality of women in court, political participation and government, citizenship and health. The Indonesian government's point of view in realizing a policy that upholds gender equality needs to be expanded to include the fields of education and employment opportunities for women. Because, efforts to realize gender equality to aspects of education and employment opportunities for women can actually make a positive contribution to women's empowerment in real life.

Indonesia, as a country that is building a commitment to gender equality, needs to carefully create a gender-perspective policy and legislation framework that can also provide positive and constructive implications for the empowerment of Indonesian women for a more just and prosperous life.

II. Relevance of CEDAW Ratification on Women's Empowerment

⁸ Sources : Muhammad Ishar Helmi, "Special Court of Domestic Violence: Implementation of the Idea of the Integrated Criminal Justice System for Handling Cases of Violence Against Women, (SPPT- PKKTP)", *Jurnal Cita Hukum* Vol II No.2 (Desember-2014), p. 321

⁹ National Commission on Violence Against Women, Paper Policy: *Gender-based Integrated Criminal Justice System in Handling Cases of Violence Against Women*, (Jakarta: Komnas Perempuan, 2005), p. 51

Empowerment is a process that creates strength in individuals for their own lives, communities, and in their communities. People are empowered when they can access the opportunities available to them without restrictions and limitations such as in education, profession and lifestyle. Feeling entitled to make their own decisions creates a sense of empowerment. Empowerment includes measures to improve the status of women through education, raising awareness, literacy and training. Women's empowerment is all about equipping and enabling women to make decisions that determine life through various problems in society.¹⁰

The decision of the Indonesian Government to ratify CEDAW and make it the basis for making policy further strengthens and enhances women's empowerment.

Women increasingly gain access to justice in the fields of law, education, health and politics.

According to the Cedaw Working Group Indonesia (CWGI) record a network of civil society organizations in monitoring the implementation of CEDAW in Indonesia, despite the implementation of the Indonesian government it has not implemented CEDAW maximally, but with the establishment of the Ministry of Women's Empowerment, whose existence in the United Indonesia Cabinet was a continuation of the previous government at this time is to carry out its duties and functions in the field of women's empowerment especially in monitoring and evaluating how the implementation / implementation of the CEDAW Convention.

While the National Commission on Violence Against Women (Komnas Perempuan) uses the CEDAW framework in its work, contributes to its findings and provides regular reports to the CEDAW Committee on the implementation of this Convention in Indonesia,

The following is the National Women's Commission Note on the implementation of CEDAW in Indonesia:

1. Developing issues, both discrimination and violence are increasingly complex and massive compared to the state's response to handling them;
2. Violence is increasingly crossing boundaries (*trafficking, drug trafficking, migration*), but this Convention when it was made into law there was a miopism or a narrowing of the protection space that only protected the citizens of the country rather than protecting women across borders;
3. The increasing lack of socialization of CEDAW substance or the Republic of Indonesia Act No. 7 of 1984 to the state apparatus and the public as the principle of the constitutional rights of women as human beings and citizens;
4. Systemic and systematic escort is not optimal at the recommendation of the CEDAW committee;
5. The delay in the Republic of Indonesia report to the CEDAW Committee is the negligence of Indonesia's moral responsibility on the international human rights mechanism and the potential to be a precedent for other countries;
6. Regarding the issue of violence against women and to ensure the implementation of CEDAW's mandate by the Government in providing protection for victims, the National Women's Commission (Komnas Perempuan) and its partners open access and process it into important findings;
7. The January-June 2017 report received by the National Commission on Violence Against Women reached 646 cases, of which 90% (584) were cases of gender-based violence and as many as 10% (62 cases) were cases that were not gender based and only requested information about National Women's Commission (Komisi Nasional Perempuan) institutions. or about violence against women. Reporting is generally done because the victim encounters a stagnation in his case handling efforts and the victim does not get the appropriate response to restore it;
8. Cases of violence reported to National Women's Commission (Komisi Nasional Perempuan) were dominated by violence in personal relations which reached 74% (433 cases) out of a total of 584

¹⁰ Bayeh, Endalcachew (January 2016). "The role of empowering women and achieving gender equality to the sustainable development of Ethiopia". *Pacific Science Review B: Humanities and Social Sciences*. 2(1): 38. Retrieved 11 December 2018.

cases. Violence in the community reaches 17% (101 cases) and 9% (50 cases) is violence in the state domain;

9. Reporting on domestic violence cases is always the highest (74%) where violence against wives dominates by 298 (68%), 50 cases of Courtship Violence (11%) and cases of violence by ex-husbands as many as 29 cases (6%), while violence against girls 26 cases (6%). Complex cases of violence are violence that flanks violence in marital relations, namely violence in courtship and violence after divorce by ex-husband and family who are always separated from relations in the household. Even though the facts of domestic violence continue, even though there has been a divorce, where the perpetrators are ex-husbands, such as in cases of seizure of child custody, income, deduction or neglect of ex-wife's rights and other violence;
10. Complaints of violence in the community place rape as a form of sexual violence that dominates, with a percentage of 32% or as many as 33 cases, the next is 21% in workplace violence (22 cases), 8% in public places of violence (9 cases) and 7% cases of sexual abuse (8%). Knowledge of sexual violence remains in the type of rape and sexual abuse.
11. In response to various forms of violence, the National Women's Commission presented findings to Law Enforcement Officials, catalyzed issues of discrimination and violence that had not received state attention and legal protection, encouraged a comprehensive and affordable service and referral system up to the villages and the archipelago, as emphasized in the spirit of the Convention, strengthens and crosses synergies with strategic partners to strengthen analysis and strategic work on handling violence against women at the local, national, regional and international levels, making legal views or addressing public views based on Women's Human Rights and encourage legal and policy reforms to stop discrimination and violence against women¹¹

Developed countries that are the drivers of gender equality and raise international issues at the United Nations, and countries that enforce the elimination of civilization against women, citizens, especially women, have increased their status in the fields of education, politics, health and the economy. in short the empowerment of women is more advanced and increasing.

Whereas in countries that do not participate in the ratification of CEDAW, gender equality is still underdeveloped as well as the empowerment of women.

In simple terms, it can be said that the state abolished discrimination against women (by ratifying CEDAW), the lives of citizens especially women have a better life for gender equality and women's empowerment, both in terms of economy, health, education and politics than countries that do not ratify CEDAW.

Ratifying and implementing CEDAW will increase women's empowerment, because women are the main agents of change and when women and men are equal, the economy grows faster; fewer people remain in poverty, and overall people's welfare increases.

With a policy that includes the Elimination of discrimination of women, women in Indonesia obtain "privileges and are more empowered by several laws which specifically regulate women's empowerment, as in Act No. 7 of 2017 concerning General Elections and Act No. 2 of 2011 concerning Political Parties, where the law guarantees representation of women's voices.

E. CONCLUSION

The implementation of policies and legislation with a gender perspective in Indonesia is actually in the development stage towards better. Along with the ratification of CEDAW and the recognition of

¹¹ National Commission Women's Press Release 33-Year National Commission on Women Ratifies the CEDAW Convention in Indonesia: *"Implement CEDAW in the Fulfillment of Women's Rights for Victims of Violence"* Jakarta, July 24, 2017, Ms. Sumber Azriana, Chairperson of the National Commission on Violence Against Women

BDPoA, the Indonesian government has actually tried to implement gender equality points in government policy. Between 1998-2008, many laws and regulations relating to human rights came out. It can be said, these ten years are the most progressive period in the protection of human rights, especially women.¹²

Along with the change of cabinet in the government and regular evaluation, women's rights in terms of protection against violence, equality before law, health, political participation and citizenship. It can be said, the law that has been available is the right basis for realizing protection for women victims of gender based violence.¹³

But on the other hand, the Indonesian government still needs to promote the attention and focus of gender equality policies in the field of education problems and access to employment opportunities for women. The urgency of CEDAW and BDPoA empowerment on these two problem areas can actually be seen from the close relationship between the conditions of gender equality in the education sector and access to employment opportunities with economic improvement in a country. As described above, more and more policies that protect women in a country will have an impact on increasing women's empowerment in the country.

The Indonesian government has taken and maintained a fairly good step by issuing that protects the sustainability of women in the fields of law, health, political participation, protection from violence and citizenship. However, it is good and useful, if, the Indonesian Government extends such policy measures to cover the education sector and access to employment opportunities for women. So that by increasing women's empowerment, increasing public welfare.

What can be a barrier to the implementation of the CEDAW convention in Indonesia is that it is influenced by many interrelated factors, one of which is culture. The patriarchal culture that is still strong in Indonesia causes gender differentiation between women and men is still common.

REFERENCES

Legislation

- Constitution of the Republic of Indonesia in 1945;-
- Law on Human Right, Act Number 39 in 1999;-
- Indonesia. Law on the Elimination of Domestic Violence. Act Number 23 of 2004. State Gazette of the Republic of Indonesia No. 95 of 2004. Additional State Gazette No. 4419.
- Law on Citizenship. Act Number 12 of 2006. State Gazette of the Republic of Indonesia No. 63 of 2006. Additional State Gazette No. 4634.
- Law on Eradicating Crime in Trafficking in Persons. Act Number 21 of 2007. State Gazette of the Republic of Indonesia No. 58 of 2007. Additional State Gazette No. 4720.
- Health Law. Act Number 36 of 2009 State Gazette of the Republic of Indonesia No. 144 of 2009. Additional State Gazette No. 5063.
- Law on Political Parties. Act Number 2 Year 2011. State Gazette of the Republic of Indonesia No. 8 of 2011. Additional State Gazette No. 5189.
- Village Law. Act Number 6 of 2014. State Gazette of the Republic of Indonesia I No. 7 of 2014. Additional State Gazette No. 5495.
- Law on General Elections. Act Number 7 Year 2017. State Gazette of the Republic of Indonesia No. 182 of 2017. Additional State Gazette No. 6109.
- Supreme Court Regulation concerning Guidelines for Judging Women's Cases Dealing with Law. Supreme Court Regulation Number 3 of 2017.

¹² Dede Kania, "Women's Rights in Regulatory Regulations in Indonesia", Journal of the Constitution Vol. 12 (December 2015), p. 732

¹³ Nur Rochaety, "Upholding Human Rights through Legal Protection for Women Victims of Violence in Indonesia", Journal of Palastren Law Vol. 7 (June-2014), p. 22

National Documents

- Ratna Batara Munti, MSi (LBH-APIK – Jakarta)
- Saparinah Sadli, *Different but Equal: Thought about Women's Studies*, Jakarta: Kompas, 2010
- Ministry of National Development Planning, *Voluntary National Review: Eradicating Poverty and Promoting Prosperity in a Changing World*, (Jakarta: Ministry of National Development Planning, 2017)
- Muhammad Ishar Helmi, “Special Court of Domestic Violence: Implementation of the Idea of the Integrated Criminal Justice System for Handling Cases of Violence Against Women, (SPPT-PKKTP)”, *Jurnal Cita Hukum* Vol II No.2 (Desember-2014)
- National Commission on Violence Against Women, Paper Policy: Gender-based Integrated Criminal Justice System in Handling Cases of Violence Against Women, (Jakarta: Komnas Perempuan, 2005),
- National Commission Women's Press Release 33-Year National Commission on Women Ratifies the CEDAW Convention in Indonesia: "Implement CEDAW in the Fulfillment of Women's Rights for Victims of Violence" Jakarta, July 24, 2017, Ms. Sumber Azriana, Chairperson of the National Commission on Violence Against Women
- Dede Kania, "Women's Rights in Regulatory Regulations in Indonesia", *Journal of the Constitution* Vol. 12 (December 2015)
- Nur Rochaety, "Upholding Human Rights through Legal Protection for Women Victims of Violence in Indonesia", *Journal of Palastren Law* Vol. 7 (June-2014)

International Documents

- United Nations General Assembly, Universal Declaration of Human Rights. Paris: UN, 1948.
- Convention on the Elimination of All Forms of Discrimination against Women, published the United Nations Department of Public Information)
- Article 45 of Law No. 39 of 1999 concerning Human Rights states that: "*Women's rights in this law are human rights*".
- Mosedale, Sarah (2005-03-01). "Assessing women's empowerment: towards a conceptual framework". *Journal of International Development*. 17(2): 243–257. doi:10.1002/jid.1212. ISSN 1099-1328
- Development Progress, Working Paper 06, November 2014
- General Assembly of United Nations. Resolution adopted by the General Assembly on September 25, 2015 Number A / Res / 70/1 (Transforming Our World: The 2030 Agenda for Sustainable Development). Geneva: UN, 2015.
- Bayeh, Endalcachew (January 2016). "The role of empowering women and achieving gender equality to the sustainable development of Ethiopia". *Pacific Science Review B: Humanities and Social Sciences*. 2(1): 38. Retrieved 11 December 2018

HUMAN RIGHT PROTECTION FOR DOCTORS IN PERFORMING MEDICAL PRACTICES: REVIEW OF DOCTOR'S WORKLOAD AFTER THE ISSUANCE OF LAW NUMBER 40 YEAR 2004 REGARDING SOCIAL SECURITY SYSTEM

RM Arief Qomarullah

Student of Legal Studies Doctor Program, Universitas Borobudur
ariefqomarullah2017@gmail.com

Abstract

The human rights of doctors as humans in performing medical practices need to be protected. Law Number 40 Year 2004 implements the principle of mutual cooperation. The principle is realized in cooperation mechanism from fortunate participants for unfortunate participants in form of compulsory participation for all people; the low-risk participants help the high-risk participants; and the healthy participants help the sick. Through the principle of mutual cooperation, social security can develop social justice for all Indonesian people. Article 2 of Law Number 40 Year 2004 regarding Social Security System mentions that National Social Security System is organized based on the principle of humanity, benefits, and social justice for all Indonesian people. The great number of people using the service of BPJS Kesehatan makes long queue at hospitals that cooperate with BPJS that causes the quality of health care decrease among others in form of less time of consultation between doctors and patients, the increasing workload of doctors that causes exhaustion due to the great number of patients, patients waiting to be examined by doctors, and extremely low service fee for doctors compared to the number of patients taken care by the doctors.

Keywords: Human Right Protection, Medical Practises, Social Security System

A. INTRODUCTION

After the issuance of Law Number 40 Year 2004 regarding Social Security System (hereinafter referred to as Law No. 40 Year 2004), it directly gives significant effect on Medical Profession, not only related to task substance and function but also substantive aspect of human rights provided in the Constitution of the Republic of Indonesia. According to Law Number 29 Year 2004 regarding Medical Practice Article 2, one of the principles of organization of medical practices is humanity. It is in line with Article 28A verse (1) of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution) that governs that “everyone is entitled to live a prosperous life physically and mentally, reside, and obtain good and healthy environment, as well as obtain health care”.

Formation of new paradigm related to health field developed by the government through current programs for all Indonesian people in fact does not give any assurance of human rights guarantee to medical profession. There is a quite serious “utopia” on conceptual level that can be expressed, namely the duty and function of a doctor are “a) to provide protection for patients; b) to maintain and improve the quality of medical service given by doctors and dentists; and c) to give legal assurance to people, doctors, and dentists”,¹ but in fact in performing their duty and function, medical profession is frequently harmed. The loss is related to workload beyond reasonable limit and low service fee especially after the issuance of Law No. 40 Year 2004.

A member of House of People's Representatives of the Republic of Indonesia Commission IX who is in charge of health field, Siti Masrifah, quoted by CNN Indonesia Online, stated that “the capacity,

¹ See Law No. 29 Year 2004 regarding Medical Practices especially Article 3

facility, and infrastructure of health facility such as hospitals are not adequate yet. From the result of constituent reporting, the quality of health facility decreased because of BPJS Kesehatan. Doctors, for example, the problem was IDR 2,000. Doctors never talk about how much salary, allowance, and other facilities they receive as Civil Servant.² On the organizational level of IDI (Association of Indonesian Physicians) regarding the problem of BPJS funding, the Chairman of IDI, Ilham Oetama Marsis, confirmed that improvement of health security system had to be accompanied by improvement of national health system. The system improvement cannot be separated from improvement of human resources and health facilities.³

It has to be understood that medical profession in Indonesia faces medical code of conduct that requires each doctor to optimally perform his/her duty and function. Article 50 of Law No. 29 Year 2004 gives guarantee in form of: “a) to obtain legal protection as long as they perform the duties in accordance with professional standard and standard operational procedure; b) to provide medical service in accordance with professional standard and standard operational procedure; c) to obtain complete and honest information from patients or their families; d) to obtain service fee. The phrase “to obtain service fee” of course relates to the rights to be obtained, it is in line with Article 28C verse (1) of the 1945 Constitution that states that “everyone is entitled to develop himself/herself through fulfillment of his/her basic needs, to improve the quality of his/her life”. The critical logic that can be expressed is “how can doctors improve the quality of their life if their basic needs are not satisfied with the low service fee and unreasonable workload?”

B. PROBLEM FORMULATION

Based on the explanation above, it is relevant to be reviewed in form of a study entitled “Review of Doctor’s Workload and Service Fee after the Issuance of Law Number 40 Year 2004 regarding Social Security System”. The study was an effort to provide clarity and solution for the problem above. The study implemented normative legal approach by focusing on statutory regulations. Furthermore, to give into the understanding, it conducted limited interview with related parties as a form of response to empirical level. The focus of problem in the study was: a) What are the bases of legal settings of doctors related to the duty and function?; b) How is the implementation of workload and service fee guarantee in line with the concept of human right protection for doctors?

C. DISCUSSION

Medical profession in our country like it or not faces some problems of medical ethics that for colleagues in other countries are quite confusing. The ones decided the type of health care to be given are the patients and their families. In this case, health staff plays the role as a coach or resource person in the decision making.

Ethical values and moral attitude of our life have changed. What considered important some decades ago now have changed. The life at the time was probably easier than the life now.

Another problem is the conflict occurring because there is a difference of values between health staff and patient as the party who has to take decision.

House of People’s Representatives of the Republic of Indonesia and President of the Republic of Indonesia decided : Established : **Law regarding Medical Practices No. 29 Year 2004 Article 50 that contains the Rights and Obligations of Doctors and Dentists in performing Medical Practices who have the rights:**

² <https://www.cnnindonesia.com/nasional/20150809151241-20-70965/dokter-protes-jasa-bpjs-dibayar-lebih-murah-dari-parkir>, downloaded on 02/07/2019

³ <https://www.wartaekonomi.co.id/read201107/pemerintah-gandeng-idi-selesaikan-defisit-bpjs-kesehatan.html>

- a. To obtain legal protection as long as they perform the duties in accordance with professional standard and standard operational procedure;
- b. To provide medical service according to professional standard and standard operational procedure;
- c. To obtain complete and honest information from patients and their families;
- d. To obtain service fee.

Based on the explanation above, the writer tried to raise the issue in a journal entitled “Review of Doctor’s Workload after the Issuance of Law Number 40 Year 2004 regarding Social Security System.”

1. Identification of Problems

1. Doctors who have worked in accordance with the standard can still be sued that causes bad image on the presumption of innocence, especially because of error of diagnosis and negligence in performing medical action because of much workload because the number of patients coming for treatment is not balanced with the number of doctors available in health service;
2. Many allegations of malpractice due to medical practices are not solely the mistake of doctors but can also be caused by inadequate facilities.

2. Formulation of Problems

1. How does the legal protection for doctors who perform medical practices in Indonesia after the issuance of Law Number 40 Year 2004 regarding Social Security System work?
2. Do the doctors who have performed medical practices in accordance with professional standard and standard operational procedure get adequate legal protection?

Objectives

1. To know and understand about the legal protection for doctors in performing medical practices;
2. To know and understand medical ethics and service standard of doctors in performing medical practices.

Benefits

1. The writing has the following benefits:
2. General benefits
To add knowledge and information regarding legal protection for doctors who perform medical practices;
3. To add scientific and literature treasure especially in legal and medical field.

Concept of Human Right Protection

1. Substance I : Concept Human Rights, Karel Vasak’s theory, UN Charter
2. Three generations of human rights
3. Human Rights Day
Category of human rights into three generations was firstly expressed in 1979 by a Czech-French legal expert named Karel Vasak. He had been using the term at least since November 1977. [1]
4. First-Generation Rights
First-generation human rights basically relate to freedom and political life. In other words, the rights are civil and political rights. For example, right of living, equality before the law, freedom of opinion, right to obtain fair legal process, right of religious freedom, and right to vote in general election. The rights are pioneering by Declaration of Rights in the United States of America and Declaration of Human and Citizen Rights in France in the 18th century.
5. The rights were included in Article 13 to Article 21 of Universal Declaration of Human Rights in 1948 and then in International Covenant regarding Civil and Political Rights established in 1966.

6. Second-Generation Rights

Second-generation human rights are basically economic, social, and cultural rights, and the rights are called as “second generation” because the rights are said to occur in the 19th century as a response to poverty and exploitation triggered by Industrial Revolution. For example, right of health, right of food, and right of settlement. The rights are also included in Universal Declaration of Human Rights and protected by International Covenant regarding Economic, Social, and Cultural Rights.

7. Third-Generation Rights

Third-generation human rights are the rights that occurred in the second half of the 20th century and expressed in documents classified as “soft law” in international law such Declaration of Stockholm 1972 and Declaration of Rio 1992. For example, right of development and right of healthy environment.

8. African Charter on Human Rights and Citizen Rights are known because it secures such rights in Article 20, 21, 22, and 24.

9. Karel Vasak: “Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights”, UNESCO Courier 30:11, Paris: United Nations Educational, Scientific, and Cultural Organization, November 1977.

Universal Declaration of Human Rights

1. Eleanor Roosevelt with translation of Universal Declaration of Human Rights in Spanish Universal Declaration of Human Rights (abbreviated as UDHR) is a suggestive declaration adopted by General Assembly of the United Nations A/RES/217, 10 December 1948 in Palais de Chaillot, Paris). The declaration consists of 30 articles that outline the view of General Assembly of the United Nations regarding human rights guarantee for everyone. Eleanor Roosevelt, the first chairwoman of Commission on Human Rights (abbreviated as CHR) who prepared the declaration, stated that “This is not an agreement... [In the future] it probably will be international Magna Charta...” [1]

2. Human Rights Day

Since the proclamation of Universal Declaration of Human Rights, some countries have proclaimed similar declarations. For example, Bill of Rights in the United States of America, and Declaration of Human Rights and Citizen Rights in France.

3. Preparation

After the occurrence of various crimes against humanity committed by German Nazi after World War II, there was a general consensus in world community that UN Charter could not fully define the rights mentioned. A universal declaration explained that personal rights were needed. John Peters Humphrey was called by Secretariat General of the United Nations to work on a project and became the organizer of the universal declaration. Humphrey was also aided by Eleanor Roosevelt from the United States of America, Jacques Maritain from France, Charles Malik from Lebanon, and P.C. Chang from Republic of China, and others. The proclamation was ratified during General Meeting on 10 December 1948 with voting result of 48 affirmative, 0 negative, and 8 abstain (all were Soviet country block, South Africa, and Saudi Arabia). [2] Although an important role was played by John Humphrey, a Canadian, the Canadian government was initially abstain in the voting, but finally approved it in General Meeting (see: [2]).

Content of Universal Declaration of Human Rights

Universal Declaration of Human Rights among others contains that everyone has the right of:

1. Living;
2. Physical freedom and safety;

3. Recognition of personality;
4. Getting same recognition as the others according to the law to obtain legal assurance in criminal case, such as examined before the public, considered innocent unless there is valid proof;
5. Entering and leaving the area of a country;
6. Getting asylum;
7. Obtaining a nationality;
8. Getting the ownership right on an object;
9. Freedom to express mind and feelings;
10. Freedom to embrace a religion;
11. Expressing opinion;
12. Meeting and gathering;
13. Getting social security;
14. Getting a job;
15. Trading;
16. Obtaining education;
17. Participating in a cultural movement in the society;
18. Enjoying arts and participating in the scientific advancement.

Basic Principles of Human Rights

1. **Universality.** Human rights are universal. Everyone in the world is bound to human rights. Universality refers to certain ethical and moral values held together in every part of the world, and the government and communities have to recognize and uphold it. Nevertheless, universality of rights does not mean that the rights cannot be changed or have to be experienced in the same by everyone. Universality of human rights is included in the words of Article 1 of UDHR: “Every human was born free and equal in dignity and rights”.
2. **Inalienability.** Human rights cannot be taken away. It means that the rights owned by everyone cannot be revoked, handed over, or transferred.
3. **Indivisibility.** Human rights cannot be divided. It refers to equal interest of each of human rights, let it be civil, political, economic, social, or cultural. All of human rights have equal stats, and cannot be placed in hierarchal setting. The right of a person cannot be denied because another person decided that the rights is less important or not the main one. The principle of indivisibility is reaffirmed by Declaration of Vienna.
4. **Interdependency:** Human rights depend on each other.
5. **Equality.** The principle of equality refers on a view that all humans are blessed with the same human rights without any differences. Equality does not mean treating people the same way, but taking steps required to promote social justice for all.
6. **Non-discrimination.** Non-discrimination is a unity with the concept of equality. The principle of non-discrimination protects the view that anyone cannot be treated differently based on additional criteria and cannot be allowed. Discrimination based on race, skin tone, tribes, gender, age, language, disability, sexual orientation, religion, political or other opinions, social or geographic origins, ownership, birth or other status made by international standard of human rights violates human rights. View on participation and inclusion, similarly accountability and rule of law, is important when we talk about human rights.
7. **Participation and Inclusion.** Everyone has the right to participate in accessing information related to decision making process that affects their life and existence. Rights-based approach requires great participation from communities, civilians, minorities, women, youth, custom societies, and other groups.

8. Accountability and Rule of Law. The country and duty holders have to be able to answer about performance of human rights. In this case, they have obey legal norms and standard stated in international instrument of human rights. If they fail to obey, the right holders who become victims will be entitled to claim for appropriate compensation before a competent court or other judges in accordance with the rules and procedures provided by the law. Personals, media, civilians, and international communities play important role in making the government accountable for the obligations to uphold human rights.

Legal Setting of Medical Profession in Indonesia

Health is one of human rights and one of the elements of welfare that has to be realized in accordance with the ideals of Indonesians as referred to in Pancasila and the 1945 Constitution of the Republic of Indonesia.

Based on Law of the Republic of Indonesia Number 44 Year 2009 regarding Hospital, health service is the right of everyone secured in the 1945 Constitution of the Republic of Indonesia that has to be realized to improve the level of health of people as high as possible. Health is one of human rights and one of the elements of welfare that has to be realized in accordance with the ideals of Indonesians as referred to in Pancasila and the 1945 Constitution of the Republic of Indonesia. It is in accordance with Law of the Republic of Indonesia Number 36 Year 2009 regarding Health.

To give legal assurance and protection to health care receivers, doctors, and dentists, it requires a setting on performance of medical practices. The main obligation of a doctor to his/her patients is to work hard (*inspannen*) to maintain the health of patients or to cure their sickness. In carrying out his/her profession, a doctor is independent from interference of anyone including his/her patients. However, he/she has to use his/her medical knowledge and follow the development of medical science.

(Guwandi, Informed Consent, Balai Penerbit FKUI, Jakarta, 2004, page 5)

The pronunciation of oath of Indonesian doctors in accordance with Government Regulation No. 26 Year 1960 is based on Oath of Hippocrates and Declaration of Geneva by World Medical Association (WMA 1948). Hippocrates (460-377 SM) was a Greek doctor who was meritorious to improve medical science as an independent science, free from philosophy, therefore he is considered as the father of medical science.

Pronunciation of doctor's oath in accordance with Declaration of Geneva (1948) approved by General Assembly of WMA and then announced in Sydney (1968) reads as the following: "When I am accepted as a member of medical profession, I swear that: I will always prioritize the patients' health; I will conceal every secret I know even after the patients pass away."

Basic Principles of Ethics/Bioethics (Western Medical)

Basic principles of ethics/bioethics are the principles that facilitate ethical reasoning. The principles have to be specific. In the practice, a principle can be confused with other principles. But in some cases, because of different condition, a principle becomes more important and valid to be used by sacrificing the other principles. The condition is referred to as *prima facie*.

1. Respect for Person/Autonomy. Firstly, every individual (patient) has to be treated as a human who has autonomy right (the right to determine his/her own fate), and secondly, every human whose autonomy is reduced or eliminated needs to be protected.

Kant's view: autonomy of will = moral autonomy, namely: freedom to act, decide (choose) and determine by himself/herself with the best awareness for himself/herself determined by himself/herself without obstacles, coercion, or intervention of external parties (heteronomy), an inner motivation based on the principle of rationality or self-legislation of humans.

J. Stuart Mill's view: autonomy of action/thought = individual autonomy, namely the ability to think and act (realize a decision and the ability to implement it), right of self-determination from personal side of view.

2. Beneficence. In addition to giving respect to human dignity, doctors also have to make efforts so that the health of patients taken care by them can be maintained (patient welfare). The definition of "doing good" is being friendly or helpful, more than only fulfilling the obligations.

Actions of beneficence

- General beneficence:
 - a) Protecting and maintaining other rights;
 - b) Preventing the occurrence of loss to the others;
 - c) Eliminating the conditions causing loss to the others.
- Specific beneficence:
 - a) Helping disabled people;
 - b) Saving people from danger.

Prioritizing the interest of patients, viewing patients/families/something not only as long as they benefit doctors/hospital/other parties Non-maleficence. Medical practices have to choose medication with the lowest risk and the greatest benefit. An old statement: first, do no harm, still applies and has to be followed.

The complementary side of beneficence from patients' point of view, such as:

- a. Must not do evil or harm the patients;
 - b. Minimize adverse effect.
3. Justice. Difference of social status, economic level, political view, religion and belief, nationality, marital status, and gender must not and cannot change the attitude of doctors to the patients. There is no other consideration than the patient's health that becomes the main attention of doctors.

Elements of malpractice are:

- 1) The doctor has a duty to the patient;
- 2) The doctor fails to fulfill his/her duty to the patient;
- 3) As a result of the doctor's failure to fulfill his/her duty, the patient suffers from a damage;
- 4) The doctor's failure to fulfill his/her duty is the direct cause of the damage that occurs.

In sum, it can be said that medical malpractice consists of "four Ds" namely:

1. Duty: The doctor's duty to the patient;
2. Dereliction: The doctor's failure to fulfill his/her duty to the patient;
3. Damage: As a result of the doctor's failure to fulfill his/her duty, the patient suffers from a damage;
4. Direct: The doctor's failure to fulfill his/her duty is the direct cause of the damage that occurs.

The relationship between a doctor and his/her patient juridically can be included as a contract. A contract is the meeting of minds of two persons regarding a matter (Solis). The first party binds himself/herself to provide the service. A patient comes to ask the doctor to be given treatment while the doctor accepts to provide it.

End of Doctor-Patient Relationship

Determination of when doctor-patient relationship ends is important because all of the rights and obligations imposed to the doctor will also end. Unless that the nature of treatment determines otherwise, the end of the relationship causes the occurrence of the patient's obligation to pay for the medication service given.

Similarly in a therapeutic contract between a doctor and a patient, each party has respective rights and obligations. KODEKI currently only contains doctor's obligations and does not contain doctor's rights, patient's rights and obligations either.

Therefore, the matters need to be reviewed, which relate to doctor-patient relationship, so as not to always cause conflicts that make both parties worry.

Framework of Concept

Definition: Medical profession standard: is a criterion regarding the ability in knowledge, skills, and professional attitude of minimum specialist expertise that has to be mastered by a doctor.

Patient

Everyone who consults his/her health problems to obtain health service needed either directly or indirectly to doctors or dentists.

Doctor and Dentist

Doctor and dentist as referred to in Law Number 29 Year 2004 regarding Medical Practices are doctors, medical specialists, dentists, and specialist dentist who graduated from medical or dentistry education, either inside or outside the country recognized by Indonesian government in accordance with statutory regulations.

Doctor-Patient Communication

The relationship ongoing between doctor/dentist with his/her patient during examination/medication/treatment process that happens in individual practice room, polyclinic, hospital, and public health center to help solve the patient's health problem.

Effective Doctor-Patient Communication

Development of doctor-patient relationship that takes place effectively and efficiently with main objective to deliver information or to give explanation required to establish cooperation between doctor and patient. Communication done verbally and non-verbally produces understanding of the patient about his/her health condition, opportunity, and obstacles, so as to find alternatives to solve the problem together with the doctor.

Anamnesis

The process of patient's sickness history exploration by doctor. Anamnesis is a part of doctor-patient communication.

Communication Method/Technique

Knowledge and skills regarding communication that follows the steps of communication, namely giving attention, opening dialogue, finding solution or alternatives of problem solving, and concluding the result.

Association of Medical Education Institution

An institution formed by the deans of medical faculties that functions to give considerations to empower and secure the quality of medical education organized by medical faculties.

Competence consists of main competence, supporting competence, other special competences, and competences that depend on the main competence (Decision of Minister of National Education 045/U/2002).

Elements of competence consist of:

- a. Personality foundation;
- b. Mastery of knowledge and skills;
- c. Ability to work;
- d. Attitude and behavior in working according to the level of expertise based on the knowledge and skills mastered;
- e. Understanding of social life principles in accordance with choice of expertise in working.

Medical education is the education organized to produce doctors who have competence to provide primary health service and is the basic medical education as university education.

Basic medical education consists of 2 stages, namely medical degree and doctor profession. University education is an education under Directorate General of Higher Education, National Department of Education.

Medical profession is a medical profession done based on knowledge and competence obtained through tiered education, and code of conduct that is community-service in accordance with Law No. 29 Year 2004 regarding Medical Practices.

Competence standard is the qualification including attitude, knowledge, and skills (Government Regulation 19/2005). National standard of education is minimum criteria of education system throughout the Republic of Indonesia. National standard of education is minimum reference consisting of content standard, process, graduate competence, education staff, facility and infrastructure, management, funding, and education assessment that has to be improved in planned manner and periodically. National standard of education is used as reference of development of curriculum, education staff, facility and infrastructure, management, and funding (Government Regulation 19/2005).

Education Standard of Doctor Profession is minimum standard to be fulfilled by medical education institution in organizing medical education.

Competence certificate is a certificate of recognition of a doctor's ability to perform medical practices throughout Indonesia after passing competence test (Law of the Republic of Indonesia No. 29 Year 2004 regarding Medical Practices).

According to Article 3 of Law of the Republic of Indonesia No. 29 Year 2004 regarding Medical Practices, setting of medical practices aims:

1. To provide protection for patients;
2. To maintain and improve the quality of medical service given by doctors;
3. To give legal assurance to people, doctors.

According to Article 26 of Law of the Republic of Indonesia No. 29 Year 2004 regarding Medical Practices:

1. Education standard of doctor profession is ratified by Indonesian Medical Council.
2. Education standard of medical profession:
 - a. For doctor profession education, it is prepared by association of medical education institution;
 - b. For medical specialist education, it is prepared by medical collegium.
3. Association of medical education institution in preparing education standard coordinates with professional organizations, collegiums, association of educational hospitals, National Department of Education, and Department of Health.
4. Medical collegium in preparing education standard of profession coordinates with professional organizations, association of medical/dentistry education institutions, association of educational hospitals, National Department of Education, and Department of Health.

In explanation of Article 7 verse (2) of Law of the Republic of Indonesia No. 29 Year 2004 regarding Medical Practices, it is mentioned that general standard of doctor and dentist profession is the

standard in accordance with statutory regulations related to national education system. National education system is overall education components that relate to each other in integrated manner to achieve the goals of national education.

Therefore, if each education component related to medical education has the same standard, it is guaranteed that the doctors produced will have the same quality.

In accordance with Law of the Republic of Indonesia No. 29 Year 2004 regarding Medical Practices Article 27, medical education and training to give competence to doctors are done in accordance with education standard of doctor profession, so Education Standard of Doctor Profession needs to be prepared.

3. Definition of Education Standard of Doctor Profession

Medical education standard in Indonesia is the equalizer of medical education quality made and agreed together by the stakeholders of medical education. Medical education standard is also a device to secure the achievement of education goals in accordance with the competence. Education standard can also be used by Education Institutions for self-assessment and as a basis of education process quality improvement program planning sustainably. The components of medical education standard include content, process, graduate competence, education staff, facility and infrastructure, management, funding, and evaluation of education process. The standard of each component of education has to be continuously improved in planned manner and periodically following the development of medical science and technology, development of medical education and technology, and public health needs and demands.

Medical service standard has 4 (four) important goals that are also the functions of the standard, namely:

1. Protecting people from practices that are not in accordance with professional standard;
2. Protecting medical profession from unreasonable public demands;
3. As a guidance in monitoring doctor's practice as well as coaching and improvement of medical service quality;
4. As a guidance to provide effective and efficient health service.

(Mughtaruddin, Yulherina Et All, Standar Pelayanan Medik, 3rd Edition, Administrator of Association of Indonesian Physicians, Jakarta, 1998).

Legal Scheme of Setting of Workload and Service Fee in Indonesia

Protecting people from practices that are not in accordance with professional standard. It is in accordance with KODEKI (Indonesian Medical Code of Conduct) Article 2 that contains: a doctor has to always perform his/her profession according to the highest measurement.

(Sachrowardi Qomariyah, Diktat Etik Dan Hukum Kedokteran Prakoas, Medical Faculty of Yarsi University, Jakarta 2009)

Low service fee is also a problem in the country. Doctors obtain low fee because their workload increases with longer working hours and have to serve many patients every day as a result of the issuance of Law Number 40 Year 2004 regarding Social Security System who mostly experience injustice. The doctors work very hard but the fee obtained is very low compared to the number of patients coming for treatment. In Article 23 verse (3) of Universal Declaration of Human Rights of UN, everyone who performs a job is entitled to fair and good wage that secures his/her life with his/her family, comparable to human dignity, and added by other social aids. Therefore, it is inappropriate that doctor's fee is below average. The doctors are also humans, they also have needs to be satisfied.

Implementation of Human Rights Guarantee on Appropriate Workload and Service Fee for Medical Profession

Regulation regarding employment is provided specifically in Law No. 13 Year 2003 Article 77 to Article 85. Where, Article 77 verse (1) of Law No. 13/2003 requires each entrepreneur to implement the provision of working hours. The provision of working hours governs 2 systems, namely:

- 7 working hours in 1 day or 40 working hours in 1 week for 6 working days in 1 week; or
- 8 working hours in 1 day or 40 working hours in 1 week for 5 working days in 1 week.

In the two systems of working hours, it provides the limitation of working hours namely 40 (forty) hours in 1 (one) week. If it is more than the provision of working hours, it will be calculated as overtime so the workers or labors are entitled to overtime pay.

D. CLOSING

Protection for doctors in performing their duties has to be provided by the government because doctor profession is a profession that plays important role in improving the health of Indonesians.

Doctors who are in charge of providing health service for people need to get protected in performing the function and duty. The protection has to be provided carefully in statutory regulations and has to be implemented by the country.

Protection for doctors given by the country is a type of state protection not only for doctors but also the people who trust their health examination to doctors.

Law Number 40 Year 2004 regarding Social Security System needs to add articles that specify doctor's workload in giving service to patients in a day so doctor's workload is not too heavy that doctors can get protection for human rights so as to improve the health service for patients.

Because according to Article 3 of Law of the Republic of Indonesia No. 29 Year 2004 regarding Medical Practice, medical practice setting aims:

1. To provide protection for patients;
2. To maintain and improve the quality of medical service given by doctors.

E. CONCLUSION

With protection for doctors in performing medical practices, doctors in working will not exceed their workload and can maintain and improve the quality of medical service, because if doctor's workload increases, it will cause exhaustion to doctors that finally can result in negligence that can be medical malpractice.

REFERENCES

- Flowers, N. (2000). *The Human Rights Education Handbook: Effective Practices For Learning, Action, and Change*. Minneapolis, MN: University of Minnesota.
- Karel Vasak, "Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights", *UNESCO Courier* 30:11, Paris: United Nations Educational, Scientific, and Cultural Organization, November 1977.
- Mertus, J. et al. (1999). *Local Action/Global Change: Learning About the Human Rights of Women*
- Undang - Undang No. 29 Tahun 2004 : UU Tentang Praktik Kedokteran
- Undang Undang Nomor 40 tahun 2004 tentang Sistem Jaminan Sosial.
- Ravindran, D. J. (1998). *Human Rights Praxis: A Resource Book for Study, Action and Reflection*.

LEGAL ASPECTS OF MEDICAL DISPUTES BETWEEN DOCTORS AND PATIENTS IN HEALTH SERVICES

Roedi Djatmiko

Student of Legal Studies Doctor Program, Universitas Borobudur
roedidjatkiko19@gmail.com

Abstract

Initially the relationship between doctors and patients was called a therapeutic transaction. Therapeutic transaction can occur because of the agreement and Act. The Relationship between the two subjects has the rights and obligations regulated in the law, one of which is Law number 36 of 2009 concerning health. But with development technology and science are increasingly fast now causing bad influences for the views and ways of thinking of the community, especially in the field of medical services.

That matter evidenced by the rise of lawsuits for alleged cases of malpractice by patients to the doctor. Suspected cases of malpractice are often over-reported by mass media even viral on social media. Doctors are considered irresponsible and not careful in carrying out their profession. Though not necessarily the news conveying things that are truly true, it only misleads the people actually need better medical help.

This discussion will show about how legal protection for doctors and patients as well procedure for resolving medical disputes by the Medical Disciplinary Board Indonesia (MKDKI) in an effort to provide legal protection against doctors and patient.

Keywords: Legal Aspects, Doctors, Patients, Medical Disputes, Health Services

A. INTRODUCTION

1. Background

Doctors are one of the health workers who carry out medical services to patients in hospitals. In relation to legal responsibility, in principle the doctor is ethically responsible, discipline and law for the implementation of medical services carried out in the hospital. There are two types of legal relationships between patients and doctors in health services, namely relationships because of the occurrence of therapeutic contracts and relationships because of their existence regulations. In the first relationship, it begins with an agreement (not written) so that the second parties will be assumed to be accommodated when the agreement is reached.

Agreements reached include approval of medical action or even rejection of a medical action plan. Relationships because regulations usually appear because the obligations imposed on the doctor because of his profession without need patient approval is requested.

In addition, the legal relationship between doctors and hospitals in medical services is based on Law No. 44 year of 2009 concerning Hospitals, where hospitals can employ doctors as medical personnel while remaining as employees or temporary medical personnel or consultants who can also be referred to as partner. Furthermore, the doctor's responsibility in medical services at the hospital is that the doctor is responsible according to the violation, where if the doctor commits an ethical violation, he will be tried and sanctioned at the Medical Ethics Honorary Council (MKEK). But if the doctor commits a violation discipline will then be tried and sanctioned at the Indonesian Medical Disciplinary Board (MKDKI). Doctors who have practiced medicine in accordance with the standards in fact, still being prosecuted legally. For this reason doctors are required to carry out their duties and authority in medical services. However, not forever medical services provided by doctors in hospitals can provide results as desired by all party. There are times when these medical services occur errors/ omissions by doctors that cause harm to patients both immaterial and material such as trauma, disability, paralysis or even death. Medical malpractice actions by doctors may indeed occur, either because of intentional or due to negligence.

However, as ordinary human beings who are full of shortcomings, doctors cannot escape the possibility of making mistakes and because they are traits human nature.

The relationship between health services is based on trust. Patients believe in the doctor's ability to make every effort to cure the illness. Patients also believe that the doctor will make every effort possible to cure his illness and reduce his suffering. The amount of trust that is built in it is public view that often results in disappointment when hope does not materialize, and this is the way to make a conflict or dispute.

2. Problem Formulation

1. Legal aspects of Doctors and Patients in service disputes health.
2. Medical dispute resolution in health services outside the Court that guarantees justice between doctors and patients.

3. Research Methods

The author in conducting this discussion is to use normative legal research methods. Data collection is done by literature study. The data used are secondary data consisting of primary legal materials, secondary legal materials, and tertiary legal materials.

B. DISCUSSION

1. Definition

a. Law

The law has a broad understanding. Every corner in this life must be related to what is called law. Law is a system made by humans to limit human behavior so that it can be controlled. Law is also a tool can be used to uphold and seek justice. Therefore every society has the right to obtain a defense before the law so that the law can be interpreted as a provision or written and unwritten regulations that regulate people's lives and provide sanctions for those who violate them.

For a more complete explanation of what is meant the law refer to our description below which also includes legal notions according to experts, legal objectives, and kinds of laws. Law is a rule in the form of norms and sanctions that are made with the aim of regulating human behavior, maintaining order, justice, preventing the occurrence of chaos. Law has the duty to guarantee that there is legal certainty in society. Therefore every community has the right to obtain a defense before the law. Law can be interpreted as a written regulation or provision/provision or not written to regulate people's lives and provide sanctions for people who violate the law.

b. Doctors

According to the Big Indonesian Language Dictionary (KBBI), doctors are graduates of medical education who are experts in terms of diseases and their treatment. Article 1 number (11) Law No. 29 of 2004 about Medical Practice explains the definition of a doctor is a work carried out based on a scientific, competencies obtained through tiered education and a code of ethics that is serving the community. Doctors are people who are dedicated to the health sector and have the knowledge and skills through education in the medical field requires authority to make health efforts.¹ A doctor must understand the legal provisions that apply in the implementation of his profession, including the understanding of rights and obligations in carrying out the profession as a doctor. The main legal obligations of a doctor are based on Article 51 of Law Number 29 of 2004 concerning Medical Practice becomes 4 things consisting of:

1. Obligation to diagnose disease.
2. The obligation to treat diseases.

¹ Veronika komalawati, Peranan Informed Consent Dalam Transaksi Traumatik , (Bandung: Cipta Aditya Bakti,2002), hlm 17.

3. The obligation to provide sufficient information to patients inside language understood by patients, whether requested or not.
4. Obligation to get patient approval for action the medical will be done by a doctor after the doctor provides sufficient information and is understood by the patient.

c. Patient

Understanding Patients in Article 1 of Law No. 29 of 2004 concerning Medical Practices explaining the definition of patients is everyone who carries out a consultation on his health problems for obtain health services that are needed both directly and indirectly to the doctor or dentist.

Patient Rights: The rights of patients as stipulated in Article 52 of Law No.29 of 2004 concerning Medical Practice, are:

- 1) Get a complete explanation of medical actions;
- 2) Asking for the opinion of another doctor or dentist;
- 3) Get services according to medical needs;
- 4) Refusing medical actions; and
- 5) Obtain the contents of medical records.

Patient Obligations :

Obligations of patients regulated in Article 53 of Law No 29 of 2004 concerning this Medical Practice are:

- 1) Provide complete and honest information about health problems.
- 2) Comply with doctor's advice and instructions or dental pacer.
- 3) Comply with the applicable provisions in health care facilities and
- 4) Providing compensation for services received.

d. Approval of medical action (informed consent) doctor and patient

Informed consent is an agreement regarding the conduct of medical action by a doctor on his patient. This agreement can be in oral or written form. In essence, informed consent is a process of communication between the doctor and the patient regarding the agreement of medical action that the doctor will make to the patient. The signing of the written informed consent form is only an affirmation of what was previously agreed. The purpose of the complete explanation is so that the patient determines the decision itself is in accordance with his own choice (informed decision). Therefore, patients also have the right to refuse recommended medical treatment.

The patient also has the right to ask for another doctor's opinion (second opinion), and the doctor who treats him. Approval of medical consent (informed consent) in health services is a matter that must be done by doctors to patients in terms of legal aspects.

For this reason, it should be noted in its implementation approval of the medical action. So to note the obstacles and solutions to overcome in the implementation of service health to patients, so that there is legal protection for both doctors and patients.

e. Dispute

Disputes are a situation where there is a party who feels aggrieved by another party, then the party convey this dissatisfaction to the second party. If the situation shows differences of opinion, what happens is called the dispute. In the context of law, especially contract law, what is meant by dispute is a dispute that occurs between the parties because of a violation of the agreement set forth in a contract, both partially and whole. In other words, there have been defaults by parties or one of the parties (Nurnaningsih Amriani, 2012: 12). According to Nurnaningsih Amriani (2012: 13), what is meant by dispute is a dispute that occurs between parties in the agreement due to a default made by one of the parties to the agreement. The same thing was conveyed by Takdir Rahmadi (2011: 1) which means that conflict or dispute is a situation and condition in which people experience factual disputes and disputes that exist only in their perceptions.

Thus, what is meant by dispute is a disputes that occur between two or more parties that maintain each other's perceptions, where such disputes can occur because of an act of default from the parties or one of the parties to the agreement.

Medical Disputes are disputes that occur between patients or families of patients with health workers or between patients with a hospital / health facility.

Usually the one disputed is the result or end result of health services by not paying attention or ignoring the process. Even though in the health law it is recognized that energy health or implementing health services when providing services are only responsible for the process or effort undertaken (Inspanning Verbintennis) and does not guarantee/guarantee the final results (Verbintennis Resultalte).

f. Health services

Health services are servants whose main purpose is to treat (curative) disease and restore (rehabilitative) health, and the main target is individuals. Another term for medical services is medical services, therefore medical services cover all efforts and activities in the form of prevention (preventive), treatment (curative), improvement (promotive), and rehabilitation (rehabilitative) of health, which is based on the relationship of medical services.

2. Legal Aspects for Doctors and Patients in Health Services

The legal bases that regulate as much as possible make an effort legal protection against doctors in carrying out the medical profession and several things that must be done by doctors to avoid lawsuits and the reasons for the elimination of penalties against doctors suspected of medical malpractice are as follows:

a. Legal Basis That Provides Legal Protection Against Doctors in Running Medical Professionals

Legal provisions that protect doctors in the event of a suspected malpractice are in Article 50 of the Medical Practice Law:

Doctors or dentists in carrying out medical practices has the right :

- 1) obtain legal protection as long as carrying out duties in accordance with professional standards and standard operating procedures.
- 2) provide medical services according to professional standards and standards operational procedures;
- 3) obtain complete and honest information from patients or his family; and
- 4). receive compensation for services.

In Article 24 Paragraph (1) of the Law of the Republic of Indonesia Number 36 of 2009 concerning Health:

- (1) Health workers as referred to in Article 23 must fulfill the provisions of the code of ethics, professional standards, rights of users of health services, service standards, and standard operating procedures.

Article 27 Paragraph (1) Law of the Republic of Indonesia Number 36 of 2009 About Health:

- (1) Health workers have the right to receive legal rewards and protection in carrying out their duties in accordance with their profession.

Article 29 of the Republic of Indonesia Law Number 36 of 2009 concerning Health:

In the event that a health worker is suspected of committing negligence in carrying out his profession, such negligence must be resolved first through mediation.

In Article 24 Paragraph (1) Government Regulation of the Republic of Indonesia Number 32 of 1996.

Article 24

- (1) Legal protection is given to health workers who perform their duties in accordance with professional standards health workers.

b. Some of the Things that the Doctor Must Do to Avoid Lawsuits

- 1) Informed Consent

Informed Consent is an obligation that must be fulfilled by a doctor. Informed consent is an agreement regarding medical action by doctors to his patients. This agreement can be in oral form or written. In essence, informed consent is a process of communication between doctors and patients regarding agreement on medical actions that the doctor will make to the patient.

The signing of the written informed consent form is only an affirmation of what was previously agreed. The purpose of the complete explanation is so that the patient determines the decision itself is in accordance with his own choice (informed decision).^[1]

Therefore, patients also have the right to refuse recommended medical treatment. The patient also has the right to ask for another doctor's opinion (second opinion), and the doctor who treats him. Therefore Informed Consent contains an understanding of an agreement given by the patient or his family after obtaining information on medical actions to be performed on him and all the risks.

2) Medical record

Doctors are also obliged to make "Medical Records" in every health service activity for their patients. The medical record arrangement is contained in Article 46 paragraph (1) of the Republic Act Indonesia Number 29 of 2004 concerning Medical Practice:

(1) Every doctor or dentist in carrying out medical practice must make a medical record.

Medical records are files that contain notes and documents about the patient's identity, examination, treatment, actions and services provided to patients. Medical records are made with various benefits, namely for the treatment of patients, improving the quality of services, education and research, financing, health statistics and proof of legal, disciplinary and ethical issues.

c. Reasons for the Abolition of Punishment for Doctors Who Perform Medical Malpractice

Risk of Treatment

1) The inherent or inherent risk

In every medical action performed by a doctor, both diagnostic and therapeutic will always contain risks inherent in the action itself (risk of treatment).² If the doctor takes this medical action carefully, the patient's permission and based on the Medical Professional Standards, but it turns out the risk still occurs, then the doctor cannot be blamed. A doctor cannot be blamed for a negative result that might arise from an action unpredictable medical.³ For example: a shock anaphylactic in administration of anesthetics or other drugs, an injection that causes excessive reactions from the patient's own body, and others.⁴ It cannot be blamed by doctors because the relationship between doctors and patients is an therapeutic contract, a business agreement (inspannings verbintenis)..

2). Risk of an allergic reaction

Allergic risk is an overreaction of a person's body due to an allergy that arises suddenly and which cannot be predicted in advance. Therefore if such an allergic reaction arises so that the patient experiences shock anaphylactic, the doctor cannot be blamed.⁵

3). Risk of complications that arise in the patient's body

In the case of sudden complications arising in the patient's body that cannot be known or previously suspected, they cannot be blamed on the doctor.⁶ It often happens that the patient's prognosis appears to be good, but suddenly the patient's condition deteriorates and dies, without knowing the cause. For example: after undergoing an operation and being treated for several days in the room,

² J. Guwandi, *Hukum Medik (Medical Law)*, Fakultas Kedokteran UI, Jakarta, 2004, hlm. 20

³ Chrisdiono. M. Achadiat, *Dinamika Etika dan Hukum Kedokteran Dalam Tantangan Zaman*, EGC, Jakarta, 2007, hlm. 69.

⁴ J. Guwandi, *Op-cit*, hlm.105.

⁵ J. Guwandi, *Op-Cit*, hlm. 106.

⁶ Pujiyono, *Kumpulan Tulisan Hukum Pidana*, Mandar Maju, Bandung, 2007, hlm. 95.

pulmonary embolism suddenly arises and the patient dies. In a Caesarean section, an amniotic embolism suddenly presents which is fatal.⁷

Medical Accidents

In the event of a medical accident, it is necessary to reflect on the words of a judge who has tried such a case, namely "We indeed require that a doctor must act cautiously on every action taken. But we cannot simply label it as an act of neglecting something that is actually an accident."⁸

In Medical Law (medical law), a doctor or surgeon does not always have to succeed in every action, and does not always have to be responsible for every event that might occur in the delivery of therapy, except when not acting properly in applying knowledge and his intelligence is on par with his fellow peers.⁹ If an accident occurs, the doctor cannot be justified.

Errors in Clinical Assessment

According to this doctrine, a medical profession caretaker who has followed the standards of the medical profession in general, cannot be held accountable for his negligence, if the decision taken is apparently wrong.¹⁰ A doctor is a human who cannot be separated from the possibility of making mistakes, therefore it can be understood if there is a mistake in clinical judgment.

Lord Denning stated about the error of clinical judgment, namely :

"If a doctor is always considered responsible if something happens or if he does not succeed in healing, then this will ultimately harm the community itself. In a professional, an error of judgment is not negligence. Maybe the consideration is wrong, but even he or another doctor might not always be right."¹¹

Volenti Non Vit Iniura / Assumption of Risk (Known Risks)

According to this doctrine, doctors cannot be held accountable for the risks that arise from an action, if the doctor has fully explained the great risk to the patient or the patient's family really knows it and is willing to accept it.¹² This doctrine is based on the view that if someone already knows the existence of a risk and voluntarily willing to take the risk, if then the risk really happens then he can no longer sue. Real examples of this doctrine are: -in the field of sports that have high risks such as boxing, soccer, martial arts. -in the medical world, can occur for example for kidney transplants from living donors, with a high risk found in the recipient and donor of the kidney. If the risk really happens, based on this doctrine, of course, it is impossible to delegate responsibility to the doctor who treats it.¹³ This doctrine can also be applied to protect hospitals and their doctors against patients or their families who are popularly said to be 'forced home'. Willing to go home on his own accord, even though his doctor has not allowed it. This doctrine can be applied by asking for an autograph that he will bear all risks that may arise. That he had been given complete information by his doctor, so that the hospital and his doctor could not be blamed later.

Contributory Negligence (participating in patients in negligence)

In general, this doctrine is used to describe behavior (behavior) that is not fair on the part of the patient, resulting in injury to the patient himself.¹⁴ The term contributory negligence is used by not looking at whether the doctor has negligence or not. This attitude of action, intentionally or unintentionally can be the basis for the elimination of punishment on the part of the doctor. A patient

⁷ J. Guwandi, Loc-Cit, hlm. 107.

⁸ Chrisdiono. M. Achadiat, Op-Cit, hlm. 69.

⁹ Pujiyono, Op-Cit, hlm. 95 - 96.

¹⁰ Ibid, hlm. 96.

¹¹ J. Guwandi, Op-Cit, hlm. 108.

¹² Pujiyono, Loc-Cit, hlm. 96.

¹³ Chrisdiono. M. Achadiat, Op-Cit, hlm. 70.

¹⁴ J. Guwandi, Op-Cit, hlm. 108.

who is mature and mentally healthy will naturally naturally obey his doctor's advice in order to heal quickly. This can be expected from a patient who is normal and acts naturally. But sometimes because of the patient's own mistakes, whether intentional or not, there is an attitude of the patient who does not obey the doctor's advice, so that the situation worsens. For example: disobeying a doctor's order, going home forcibly, refusing to take medication, not returning to continue therapy.¹⁵ In this case, the patient who filed a lawsuit against the hospital or his doctor could be sued. Doctors can submit back evidence that there is a contributory negligence on the part of the patient himself.

3. Medical dispute resolution in health services outside the Court that guarantees justice between doctors and patients.

Philosophically dispute resolution is an attempt to restore the relationship of the parties to the dispute in its original state, with the return of the relationship so that they can establish relations both socially and legal relations with each other.

While the term dispute originates from an English translation of dispute or geding in Dutch. Dean G Pruitt states that a dispute is a perception of perceived divergence of interest or a belief that the aspirations of the disputing parties are not achieved simultaneously (simultaneously) (Dean G Pruitt and Jeffrey Z Rubin, 2004: 9-10).

In health services followed by legal relations between doctors and patients are often characterized by neglect of the rights of patients resulting in conflicts or disputes.

The triggers for disputes are misunderstandings, differences in interpretations, unclear arrangements, dissatisfaction, offense, suspicion, improper, fraudulent or dishonest acts, arbitrariness or injustice and the occurrence of unexpected circumstances. If it is related to the relationship between doctors and patients, medical disputes originate from a feeling of dissatisfaction from one of the parties because there is another party who does not fulfill the achievement as agreed, or there is a default. Where this default in a medical dispute is usually carried out by the doctor. Matters that cause breach in medical disputes include: (i) Not doing what according to the mandatory agreement. (ii) Do what according to the agreement must be done but it is too late to fulfill it or not on time. (iii) Do what according to a mandatory agreement is not perfect. (iv) Doing what according to the agreement should not be done (Eddi Junaedi, 2011; 8).

Medical dispute resolution with mediation on the basic principle will be stated by Fathillah Syukur: (i) the principle of voluntary principle, where mediation is a method that bases itself on the voluntary parties to seek solutions for mutual interests without coercion, threats or pressure from any party, (ii) the principle of self-determination, which is related to the principle of volunteerism, (iii) the confidentiality principle, which is a confidential mediation process where all information can only be known by parties and mediators (iv) the good faith principle, namely the willingness of the parties to take the mediation process should not buy time or take advantage of their own interests, (v) the principle of determining the ground rules principle, with the help of mediators, parties must make an agreement and comply with the rules of the game before starting the pr oses mediation in order to be able to walk constructively and achieve the desired results, (vi) separate meeting principles / procedures (principle private meetings), mediators and parties can and have the right to hold separate meetings with one party when facing certain situations, such as negotiations experiencing deadlock, relieving high emotions, and other related causes (Fatahillah A. Syukur, 2012; 10-11).

It is stated in Article 29 of the Health Law, that in the event that health workers are suspected of carrying out negligence in carrying out their profession, such negligence must be resolved first through mediation. In its explanation, it was not clearly stated to the agency whether the mediation would be resolved, but the Medical Practice Law mandated the establishment of an institution for the completion of medical disciplines which was later known as the Indonesian Medical Discipline Honorary Council (MKDKI). MKDKI is not a mediating institution, in the context of dispute resolution mediation, but MKDKI is a state institution authorized to determine whether or not a mistake is made by doctors or

¹⁵ Pujiyono, Op-Cit, hlm. 96.

dentists in the application of medical or dental disciplines and to impose sanctions for doctors or dentists who are found guilty.

The Supreme Court through its Circular Letter (SEMA) in 1982 gave direction to the Judges, that the handling of cases of doctors or other health workers who allegedly committed negligence or errors in carrying out actions or medical services so that they were not immediately processed through legal channels, but were asked for an opinion from the Medical Ethics Honorary Council (MKEK). At present MKEK has been replaced by the Indonesian Medical Disciplinary Board (MKDKI), an independent institution under the Indonesian Medical Council (KKI).¹⁶ The procedure for handling cases by MKDKI has been regulated in Indonesian Medical Council Regulation Number 2 of 2011 concerning Procedures for Handling Cases of Alleged Violations of Discipline of Doctors and Dentists. Case handling of alleged violations is carried out after the complaint is made. The requirements for the complaint are contained in Article 3 of Perconsil Number 2 of 2011. After the complaint is registered with MKDKI / MKDKI-P, the complainant can provide supporting data for the complaint in the form of evidence and a statement about the truth of the complaint. After that, clarification will be made by special officers from MKDKI / MKDKI-P. Then enter the handling of cases in the form of "Initial Examination". This initial inspection phase is discussed in Articles 13-18 of the Regulation.

Council Number 2 of 2011. At this examination stage MKDKI checks whether the complaint was received, not received or rejected. If a complaint is received, the Chair of MKDKI forms the MPD, namely the Disciplinary Examination Council. Members of this MPD are from MKDKI. MPD can decide that the complaint cannot be accepted, rejected or terminated. MPD then conducted an investigation. Investigation is carried out to gather information and evidence related to the incident being reported. After the investigation, a disciplinary hearing was conducted. If the doctor or dentist's disciplinary hearing is complete, the MPD will determine the decision against the trial.

The decision can be in the form of:

- a. Declared not doing violation of the discipline of a doctor or dentist
- b. Provision of disciplinary sanctions, in the form of:
 1. Written warning
 2. Obligation to attend education or training, which can be done in the form of:
 - a) Formal reeducation in accredited medical or dental education institutions
 - b) Non-formal education carried out under the supervision of a particular doctor or dentist at accredited medical or dental education institutions, health service facilities and networks, or other designated health care facilities, at least 2 (two) months and no more than 1 (one) year.
 3. Recommendations for STR or SIP revocation that are:
 - a) For a maximum of 1 (one) year
 - b) Permanent or forever
 - c) Restrictions on certain medical care actions in an area of medicine or dentistry in the implementation of medical practice.

If proven to have committed a violation of discipline, then after the decision of the doctor or dentist who is complained, it can submit an objection to the decision of MKDKI to the Chairperson of MKDKI no later than 30 days after the decision was read or received by submitting new evidence supporting the objection.¹⁷

In terms of guaranteeing the neutrality of MKDKI, Article 59 paragraph (1) of the Medical Practice Law states that MKDKI consists of 3 (three) doctors and 3 (three) dentists from their respective

¹⁶ Syahrul Machmud, *Penegakan Hukum dan Perlindungan Hukum Bagi Dokter Yang Diduga Melakukan Medikal Malpraktek*, Karya Putra Darwati, Bandung, hlm. 326-327.

¹⁷ Eka Julianta Wahjoepramono, *Konsekuensi Hukum Dalam Profesi Medik*, Karya Putra Darwati, Bandung, 2012, hal. 317.

organizations, a doctor and a dentist representing Hospital association and 3 (three) law graduates²⁰.¹⁸ So that it is no longer worrying that the doctors will defend their colleagues.

C. CONCLUSION

When a doctor has carried out duties in accordance with professional standards, service standards and standard operating procedures are entitled to legal protection. But all of them will not have meaning in their defense if there is no good medical record. A good medical record is a medical record that contains all the information needed, both obtained from the patient, doctor's thoughts, doctor's examination and actions, communication between medical / health personnel, informed consent, etc., as well as other information that can be evidence later on it was arranged in chronological order. This is used to prove that the entire process of handling and medical actions carried out by doctors and other health personnel is in accordance with professional standards and standard operating procedures or means that medical negligence does not occur.

Where all of them can be used as evidence that can free the doctor from all lawsuits in the event of alleged malpractice. There are a number of things that are reasons for eliminating penalties so as to free doctors from lawsuits, namely: Risk of treatment, medical accidents, distribution of negligence, Respectable minority rules & error of (in) judgment and Volenti non fit iniuria or assumption of risk. MKDKI has the authority to examine and make decisions regarding complaints relating to the discipline of doctors and dentists. MKDKI can determine whether there are errors made by doctors and dentists in the application of medical and dental disciplines. This institution is an autonomous institution from the Indonesian Medical Council which in carrying out its duties is independent.

D. SUGGESTIONS

The ideal dispute resolution between doctors and patients is the settlement that involves the parties directly so as to allow open dialogue, thus a joint decision is most likely to be achieved. Besides that, because the parties' meetings are closed, they will provide a feeling of comfort, security to the parties involved so that fears of the opening of secrets and good names that are needed by doctors and health care facilities can be avoided. Then if it is necessary to prove the existence of malpractice, it can be through MKDKI as an institution authorized to resolve violations of doctor's discipline.

In carrying out the relationship between doctors and patients, the implementation of the relationship between the two so that they are always regulated by certain rules so that harmony occurs in the implementation. As is known, unregulated relations will cause disharmony and confusion. A doctor is obliged to take medical action in accordance with professional standards, service standards and standard operating procedures. For the community and law enforcement officials, they should better understand the differences in medical malpractice and medical risk. For the government, it should make legal regulations specifically regulating medical malpractice clearly, so that the existence of systematic legislation can provide protection and legal certainty for doctors and patients.

To parties who feel aggrieved over medical actions must better understand the position of the dispute that will be reported, if it wants to resolve a medical dispute it is better to give to the competent authorities the same agreed upon by the parties, and preferably in the solution through mediation, because initially the relationship between doctors and patients is a relationship that trusts each other, then completing their worries prioritizes improving relations between the two parties.

REFERENCES

- Veronika komalawati, Peranan Informed Consent Dalam Transaksi Trapautik , (Bandung: Cipta Aditya Bakti,2002), hlm 17.
- Achadiat. Chrisdiono. M., Dinamika Etika dan Hukum Kedokteran Dalam Tantangan Zaman, EGC, Jakarta, 2007.
- Guwandi. J., Hukum Medik (Medical Law), FK-UI, Jakarta, 2004.

¹⁸ Ari Yunanto, Hukum Pidana Malpraktik Medik, ANDI, Yogyakarta, 2010, hal. 85.

- Pujiyono., Kumpulan Tulisan Hukum Pidana, Mandar Maju, Bandung, 2007.
- Machmud, Syahrul., Penegakan Hukum dan Perlindungan Hukum Bagi Dokter Yang Diduga Melakukan Medikal Malpraktek, Karya Putra Darwati, Bandung, 2012.
- Wahjoepramono, Eka Julianta J., Konsekuensi Hukum Dalam Dalam Profesi Medik, Karya Putra Darwati, Bandung, 2012.
- Yunanto, Ari., Hukum Pidana Malpraktik Medik Tinjauan Dan Perspektif Medikolegal, ANDI, Yogyakarta, 2010.
- Kamus Besar Bahasa Indonesia., Edisi Ketiga, Balai Pustaka, Jakarta, 2002.

Laws:

- Perkonsil Kedokteran Indonesia No.2nd Year 2011 concerning Procedures for Handling Cases of Alleged Violations of Physician Discipline and Dentists.
- Indonesian Medicine Perception Number 4th of 2011 concerning Professional Discipline of Doctors and Dentists.
- Indonesian Medicine Perconsil No.15th/ KKI/PER/VIII/ 2006 concerning Organization and Work Procedure of MKDKI and MKDKI-P.
- Government Regulation Number 32nd of 1996 concerning Health Workers.
- Law Number 23rd of 1992 concerning Health
- Law Number 29th of 2004 concerning Medical Practice.
- Law Number 36th of 2009 concerning Health.

CRIMINAL RESPONSIBILITY OF MONEY COUNTERFEITERS AND COUNTERFEIT MONEY DEALERS AND THE CAUSES

Rusdin¹, Nuno Guilhermino Pacheco Magno², Bernhard L. Malau³

Student of Legal Studies Doctor Program, Universitas Borobudur

¹rusdin_ismail@yahoo.com,, ² nunomagno@yahoo.com, ³bernhardmalau78@gmail.com

Abstract

The history of human civilization money has played an important role for human life both as a means of payment or a legitimate means of exchange within a country, as well as a symbol of a state as a unifying tool, or also it can serve as a tool for economic control or occupation by one country to another. Money as a means for driving economic growth has obtained a position to impose the will of a country to another country, or from an agency to reinforce its influence, or to influence the exercise of authority over certain individuals. The role of money that is important as stated above, has developed the human desire to have money or to obtain money in a way that is against the law. Among them are crimes in the form of counterfeiting money, and circulating fake money which is an instant way to get money. This action is an act that cannot be justified by law, considering that counterfeiting money is a criminal offense that is subject to punishment for perpetrators whether as regulated in Law No.7 of 2011 concerning Currency or in the Criminal Code Article 245 regulates about whoever intentionally issues state currency or notes or banknotes that are forged or counterfeited by themselves or which at the time of receipt are known to be counterfeit or counterfeited. The purpose of this study is to determine the criminal responsibility of counterfeit money dealers in terms of criminal law and the factors that may cause a person to commit a crime of counterfeiting money. The research method used in this writing is a normative research method. From the results of the study it can be concluded that counterfeiting of currencies by the criminal offender is an object of crime in article 245, namely there are 3 (three) types of money: currency, notes and banknotes carried out by criminal offenders should be committed intentionally, there must be awareness or knowledge that the money intentionally circulated, intentionally stored and intentionally imported into Indonesia, are fake. Factors that cause a person to commit a crime of counterfeiting money is to seek personal gain due to economic factors, lack of employment, but there is also a criminal act of counterfeiting money used as a political purpose, namely to weaken the economy of political opponents. Compared to the methods carried out abroad, then in Indonesia the method or technique of falsifying money still be categorized to be simple or conventional. But sooner or later many of them will be imitated by money counterfeiters in Indonesia.

Keywords: Criminal Responsibility, Money Counterfeiting, Counterfeit Money Dealers.

A. INTRODUCTION

The criminal acts of counterfeiting money and the circulation of counterfeit money carried out by perpetrators of crime continue to experience a very advanced development in the globalization era, because it has a very broad dimension and influence for counterfeiters including forgery involving the perpetrators, the modus operandi and motivation or desire they want to achieve. Considering money as a legal means of payment in a country, so that it will have a negative impact on the economy of a country. In human life, money has a very important value and role as a means of payment or legal exchange in a country.¹ Money also indicates an object that has its own prestige value which then becomes a standard

¹ Soekanto, Soerjono. *Introduction to Legal Research*. Jakarta: UI-Press, 1986.

measure of value in economic life. Money carries a big influence on human life since the barter system changes with a legal means of exchange, which serves as a means of exchange, a store of value, a unit of calculation, a delayed measure of payment (calculating the amount of loan payments).²

Along with the increasing needs, such as basic needs, education, health and lifestyle so that money becomes the main source for everyone to meet their needs. Quoting from his book John Eatwell, Murray Mullgate and Peter Newman entitled "the new palgwave: a dictionary of economics" that: "*Money is a social relation. Like the meaning of a word, or the proper form of a ritual, it exists as a part of a system of behavior shared by a group of people*".³ He explains how money has a power that is able to regulate and force people to worship the existence of money.

But in line with its function and existence, it turns out that money is also the main source of crime in a country. Some people can justify any means for their actions to get money. Because money has a huge influence on human life.⁴

So serious is the power of money towards social life in our community that Damarjari Sufajar analogizes money as a golden bullet which in Javanese philosophy can kill powerful Javanese people. "Javanese people are powerful, who can kill them only gold bullets, nowadays gold bullets are money", he said. The shifting of the function of money is like a sacred myth that may even has become a new economic theory in society. Such paradigm has been poisoned by the hegemony of the money. With such thought, it does not rule out the possibility that crime is increasingly prevalent because money carries a potential to commit crimes.

In addition to some of the crimes mentioned above, forgery and circulation of counterfeit money are also crimes that often occur in the community. The desire to get a lot of money in order to meet their needs is supported by existing knowledge so that the perpetrators launch their actions.

Money as a legitimate payment instrument and has an important function has been misinterpreted by certain individuals. Along with the development of science and technology, there are many smart people, but this intelligence is not followed by good ethics and morals so that many people use technology for an act that violates the law.⁵

The rise of various types of crimes is an evidence that the level of morality and character of the people have begun to diminish. In other words the original money printed by the state is counterfeited and then distributed and used as a legal payment instrument to replace the authentic money issued by the state or the bank.⁶ Basically, the legal instruments governing aspects of currencies and crimes against currencies consist of 2 (two) laws namely Law Number 23 of 1999 concerning Indonesian Central Bank. As amended by Law Number 3 of 2004 and the Criminal Law.

The definition of a criminal act of counterfeiting money is an unlawful act, where the original banknotes are forged or counterfeited through a way combining two expertise's in the field of photography and expertise in printing. This method usually produces types of fake banknotes that are of very good quality and the counterfeiting is e not easily recognized by common people.

In ancient times, according to history in several countries in the continent of Europe, the makers of counterfeit money were threatened with the death penalty, and in practice the death penalty was actually carried out. The act of counterfeiting this money is a criminal act by changing the number that indicates the value of money into higher or lower number. One of the conditions for the crime of counterfeiting

² Weatherford, Jack. *History of Money*, Adapted by Noor Cholis. Bentang Pustaka, Bandung: 2005.

³ John Eatwell, Murray Mullgate and Peter Newman titled "the new palgwave: a dictionary of economics.

⁴ Suseno, Solikin. *Money, Definition, Creation, and Its Role in Economy*, Bank Indonesia, Jakarta: 2005.

⁵ Fuady, Munir. *Acts Against the Law*, Bandung: Citra Aditya Bakti, 2002.

⁶ *Bulletin Banking Law and Central Banking.*, Volume 4 No. 3, April 2005.

money is that the result of this act is a metal goods or a writing paper resemble coins or genuine banknotes in such a way.⁷

Counterfeiting of money is in the form of an attack on legal interests against the trust in money as a legitimate payment instrument.⁸ As a means of payment, the trust in money must be guaranteed. This act is conducted in conjunction with protecting the legal interests of the community against money as a means of payment.

In the criminal law system, the crime against bank notes is a form of serious crime. At least there are 2 (two) reasons that support that statement, namely:

1. Maximum punishment threat against this crime on average is severe. There are 7 forms (formulations) of crimes of currency and notes in Chapter X of book II of the Criminal Code, and two of them to face a maximum sentence of 15 years imprisonment (Article 246 and Article 245), two with a maximum imprisonment of 12 years (Article 246 and Article 247), one with a maximum imprisonment of 6 years (Article 250). The rest is threatened with a maximum sentence of 1 year (Article 250 bis) and a maximum of 4 months 2 weeks imprisonment (Article 249).
2. For crimes concerning currency and notes universality principle is applicable, meaning that Indonesian Criminal Law applies to every person who commits this crime outside the territory of Indonesia anywhere (Article 4 paragraph 2 of the Criminal Code). Committing crimes which are determined by law to apply universality principles not only relating to the protection of the legal interests of Indonesian community and the legal interests of the Republic of Indonesia, but also for the legal benefit of international community.⁹

B. RESEARCH METHOD

The research method in this study is normative juridical legal research, with the data being examined namely secondary data that cover the legal materials such as the 1945 Constitution of the Republic of Indonesia, Law Number 23 of 1999 concerning Indonesian Central Bank as amended by Law Number 3 of 2004, Article 35 and Article 37 of Law No.7 of 2011 concerning currency. The Secondary legal materials such as legal theories, legal journals, scientific research, the websites and other legal materials, and finally tertiary legal materials such as Indonesian Language Dictionary, Law Dictionary, Encyclopedia, and so on.

C. PROBLEM FORMULATION

Problem statement as the focus of the discussion material in this study are as follows:

1. How is the application and legal provisions governing the forgery?
2. How is the criminal responsibility according to the law against the perpetrators of criminal acts of counterfeiting money?

D. DISCUSSION

1. Application and legal provisions governing forgery.

The crime of counterfeiting money is a serious crime because in addition it aims to enrich itself economically it also has an impact on decreasing the state's economic stability.¹⁰

Counterfeiting crime is also increasingly sophisticated along with technological

⁷ Soemitro, Ronny Hanitijo. *Legal Research Method and Jurimetry*. Jakarta: Ghalia Indonesia, 1990.

⁸ Adami Chazawi, *Crimes of Forgery*, 2nd Issue, (Jakarta: PT. Radja Grafindo Persada, 2002, p. 21.

⁹ Lamintang. *Fundamentals of Indonesian Criminal Law*, Bandung: Citra Aditya, 1997.

¹⁰ Sugandi, R. *Criminal law and its Explanation*. Surabaya: Usaha Nasional, 1980

developments. Responsibility for the crime of counterfeiting the Indonesian Rupiah is not only the duty and responsibility of Bank Indonesia and the responsibility of the National Police, but it is also the responsibility of the community to jointly fight the crime or criminal act.

Basically, the legal instruments that regulate the aspects of currency and crime against currency consist of 2 (two) laws, namely Law Number 23 of 1999 concerning Indonesia Central Bank as amended by Law Number 3 of 2004 and the Criminal Code.¹¹

The arrangements of the currency in the positive law that currently in effect briefly are:

1. Arrangement in the Law of Indonesian Central Bank namely in Articles 2, 3, 19 through 23 and Articles 65 and 66 ;
2. Criminal Law in Chapter X regarding forgery of currencies and notes in Article 244 through Article 252 regulating crime offense against currencies and criminal threats.

In the criminal law system, the crime against bank notes is a form of serious crime. At least there are 2 (two) reasons that support that statement, namely:

- a. Maximum punishment threat against this crime on average is severe. There are 7 forms (formulations) of crimes of currency and notes in Chapter X of book II of the Criminal Code, and two of them to face a maximum sentence of 15 years imprisonment (Article 246 and Article 245), two with a maximum imprisonment of 12 years (Article 246 and Article 247), one with a maximum imprisonment of 6 years (Article 250). The rest is threatened with a maximum sentence of 1 year (Article 250 bis) and a maximum of 4 months 2 weeks imprisonment (Article 249).¹²
- b. For crimes over currency and notes universality principle is applicable, meaning that Indonesian Criminal Law applies to every person who commits this crime outside the territory of Indonesia anywhere (Article 4 paragraph 2 of the Criminal Code). Committing crimes which are determined by law to apply universality principles not only relating to the protection of the legal interests of Indonesian community and the legal interests of the Republic of Indonesia, but also for the legal benefit of international community.

2. Criminal responsibility according to law against money counterfeiting criminal perpetrators

A crime or *strafbaar feit* is an act that contains elements of "act or action that can be criminalized and elements of criminal responsibility against the perpetrators. So that in requirements of criminal penalties against a person, it can be briefly stated that there will be no criminal punishment against a person without the things that can clearly be considered as fulfilling the two elements. In connection with the principle of criminal law, namely not being convicted if there is no mistake, then the definition of a criminal offense is separate from what is meant by the responsibility over a criminal act.¹³

Whereas ROESLAN SALEH and MOELJANTO among others argue, "Criminal Actions and Responsibility in criminal matters are not merely a matter of *Strafbaar feit*, but criminal act and criminal responsibility are two basic definitions in the criminal law.

Criminal liability in Dutch languages is referred to as "*toerekeningsvatbaarheid*", "criminal responsibility". The criminal responsibility in question is to determine whether a criminal perpetrator is held responsible for a crime that has occurred or not. Criminal responsibility leads to conviction of the perpetrator, if he has committed a crime and according to the elements

¹¹ Sianturi, SR. *Principles of Criminal Law in Indonesia and Its Implementation*. 3rd Issue. Jakarta: Stora Grafika, 2002.

¹² Marpaung, L. *Principle-Theory-Practice of Criminal Law*, Jakarta: Sinar Grafika, 2005.

¹³ Moeljatno. *Criminal Act and Responsibility in Criminal Law*: Bina Aksara, 1983.

specified in the law.¹⁴ No one can be convicted unless he can be blamed for committing a crime.¹⁵

In holding someone accountable in criminal law, the possibility must be opened for the counterfeiter to explain why the perpetrators of the crime did so. If the legal system does not open such an opportunity, it can be said that there would be no due process in taking responsibility for the perpetrator of the crime. In turn, this will be faced with the principles of justice.¹⁶

The theory of separation between criminal acts and criminal responsibility has several consequences. This first affects the definition of crime itself. Mistake as a determining factor for the existence of criminal responsibility must therefore be excluded from the definition of a criminal act. The definition of a criminal offense contains only the characteristics of an act that is prohibited and threatened with punishment.

A criminal offense can be punished for fulfilling the elements in the offense formulation. If convicted, it must be evident that the action taken is illegal (*wederrechtelijk*) in nature and there is a mistake (*schuld*) that covers it is accused and held accountable. In other words whether the criminal offenders will be convicted or released. If he is convicted, it must be evident that the action committed is of illegal in nature and that the criminal offenders can be held responsible.¹⁷ The capability to be held responsible shows the mistakes of the perpetrator in intentional or inadvertent form. Meaning that the act is despicable and criminal offenders are aware of the act committed.

E. CONCLUSION

Based on the explanation of the discussion that has been described above, then the conclusions that we can offer to this writing are that criminal responsibility is to determine whether a criminal perpetrator can take responsibility for a crime he committed. Criminal responsibility must lead to conviction of the perpetrator, if he has committed a crime and according to the elements specified in the law. No one can be convicted unless he can be accused for committing a crime.

Responsibility for the crime money forgery and counterfeit money dealers is not only the responsibility of Indonesia Central Bank and the responsibility of the National Police, but it is also the responsibility of the community to jointly fight the crime or criminal acts of counterfeiting money and dealers of counterfeit money.

REFERENCES

A. Books

- *Bulletin Banking Law and Central Banking.*, Volume 4 No. 3, April 2005.
- Chazawi, Adami. *Crimes on Forgery*. Jakarta: PT. Radja Grafindo Persada, 2002
- Fuady, Munir. *Acts Against Law*, Bandung: Citra Aditya Bakti, 2002.
- Huda, Chairul. "From 'No Crimes without Mistakes' Towards Criminal Responsibility Without Mistakes", First Edition. 1st Issue Jakarta: Kencana, 2006.
- Kartanegara, Satochid. *Criminal Law Part One*, Jakarta: Balai Lektur Mahasiswa, 1998.
- Lamintang. *Fundamentals of Indonesian Criminal Law*, Bandung: Citra Aditya, 1997.

¹⁴ Utrecht. *Criminal Law*. Volume I. Surabaya: Pustaka Tinta Mas, 1999.

¹⁵ Huda, Chairul. "From 'No Punishment without Mistake' Towards Criminal Responsibility Without Mistake", First Edition, 1st Issue. Jakarta: Kencana, 2006.

¹⁶ Kartanegara, Satochid. *Criminal Law Part One*, Jakarta: Balai Lektur Mahasiswa, 1998.

¹⁷ Prodjodikoro, Wiryono. *Certain Criminal Acts in Indonesia*. Bandung: PT. Refika Aditama, 2003

- Moeljatno. *Criminal Acts and Responsibility in Criminal Law*. Jakarta: Bina Aksara, 1983.
- Marpaung, L. *Principle-Theory-Practices of Criminal Law*, Jakarta: Sinar Grafika, 2005.
- Prodjodikoro, Wiryono. *Certain Criminal Acts in Indonesia*. Bandung: PT. Refika Aditama, 2003
- Sianturi, SR. *Principles of Criminal Law in Indonesia and Its Implementation*. 3rd . Jakarta: Storia Grafika, 2002.
- Soekanto, Soerjono. *Introduction to Legal Research*. Jakarta: UI-Press, 1986.
- Soemitro, Ronny Hanitijo. *Legal Research Method and Jurimetry*. Jakarta: Ghalia Indonesia, 1990.
- Sugandi, R. *Criminal Law and Its Explanation*. Surabaya: Usaha Nasional, 1980
- Suseno, Solikin. *Money, Understanding, Creation, and Its Role in Economy*, Bank Indonesia, Jakarta: 2005.
- Utrecht. *Criminal Law*. Jilid I. Surabaya: Pustaka Tinta Mas, 1999.
- Weatherford, Jack. *History of Money*, Adapted by Noor Cholis. Bentang Pustaka, Bandung: 2005.

B. Laws and Other Regulations

- *Criminal Code (Wetboek Van Strafrecht)*. Translated by Moeljatno, 21st Prin, Jakarta: Bumi Aksara, 2001.
- *Criminal Code Procedure*. Translated by Moeljatno, Jakarta: Bumi Aksara, 2000.
- Law Number 23 of 1999 regarding Indonesia Central Bank as amended by Law Number 3 of 2004 .
- Law Number 7 of 2011 regarding Currency.
- Law Number 2 of 2002 regarding Indonesia National Police.
- Government Regulation Number 27 of 1983 regarding Implementation Guidelines of Criminal Procedure Code.
- Regulation of Indonesian Central Bank No. 6/14PBI/2004 regarding Issuance, Distribution, Revocation Withdrawal and Destruction of Indonesian Rupiah.

HUMAN RIGHTS AND LAW ENFORCEMENT IN INDONESIA

Rusdiyanto

Student of Legal Studies Doctor Program, Universitas Borobudur
ih_center@yahoo.co.id

Abstract

The 1945 Constitution explicitly states that Indonesia is a State based on law (*Rechtstaat*) and not a State merely based on power (*Machstaat*). This must be interpreted that constitutionally the State requires the existence of guarantees and legal protection for the rights and obligations of citizens, as well as the implementation of state government power based on legal provisions. Regulations regarding Human Rights have existed since the adoption of Pancasila as the basis of the Indonesian state, both concerning the relationship between human beings and God and the relationship among human beings. This is contained in the values of the precepts contained in the Pancasila. In the Constitution of 1945 (which has been amended), the issue concerning Human Rights is specifically included in CHAPTER XA articles 28A to 28J which is the result of the second amendment of 2000. To enforce the law on Human Rights, in 1999 the Law No. 39 of 1999 concerning Human Rights was ratified. And on November 23, 2000, Law No. 26 of 2000 concerning the Human Rights Court was passed. On the other hand, Indonesia established a Human Rights Commission.

Keywords: Human Rights, Law Enforcement.

A. INTRODUCTION

The 1945 Constitution explicitly states that Indonesia is a State based on law (*Rechtstaat*) and not a State merely based on mere power (*Machstaat*). This must be interpreted that constitutionally the State requires the existence of guarantees and legal protection for the rights and obligations of citizens, as well as the implementation of state government power based on legal provisions.

This means that all activities that take place in Indonesia are based on law. Activities that rely on power and arbitrage are not permitted in Indonesia. Moh. Mahfud MD stated that the rule of law in the *rechtstaat* concept is rooted in the *civil law* legal system which focuses on administration and prioritizes *wetmatigheid* and *rechtmatigheid*. On the other hand, *the rule of law* is rooted in the *common law* legal system which focuses on the judicial aspects and prioritizes the principle of *equality before the law*¹.

Friderich Julius Stahl proposed four elements of *rechtstaat*, namely: 1) Protection of Human Rights; 2) Separation or division of power to secure those rights; 3) Government based on regulations; 4) Administrative court in dispute.² Likewise, Scheltema stated that the elements of *Rechtsstaat* is Law Certainty, Equality, and Democracy.³ That the government must serve the public interest of its citizens, not the other way around. Moreover, Philipus M. Hadjon proposed the characteristics of *Rechtsstaat* as follows:

- a. There is the constitution that contains written regulations about the relationship between the ruler and the people.
- b. There is distribution of power in the state.

¹ Janedjri M. Gaffar, *Democracy and Elections in Indonesia*, (Jakarta: Constitution Press, 2013), p. 56.

² *Ibid.*, Janedjri M. Gaffar, p. 55.

³ Janedjri M. Gaffar, *Democracy and Elections in Indonesia*, (Jakarta: Constitution Press, 2013., p. 70.

- c. The people's rights for freedom are acknowledged and protected.⁴

In this matter, Sri Soemantri also proposed the four most important elements for a constitutional state, namely:

- a. The government in performing its duties and obligations must be based on law or statutory regulations.
- b. Human rights (of citizens) are secured.
- c. There is distribution of power in the state.

Human Rights (HAM) are absolute rights, i.e. the rights that give authority to an individual to do an act, which rights may be withheld by anyone. On the other hand, everyone must respect those rights. As such, Human Rights are the rights that are absolutely inherent in an individual.⁵

The Human Rights that are inherent in a human being have various basic rights, covering the followings:

- a. *The personal rights*, covering the freedom to express opinions, follow a religion, move, and so on.
- b. *The property rights*, i.e. the rights to have something, buy and sell as well as exploit it.
- c. The rights to receive equal treatment in law and government, i.e. *the rights of legal equality*.
- d. *The political rights*, i.e. the rights to participate in the government, suffrage (electing and being elected in the election), the rights to establish a political party, and so on.
- e. *The social and cultural rights*, e.g. the rights to choose education, develop culture, and so on.

The Human Rights to receive equal treatment in the court system and protection or the "*the procedural rights*", e.g. regulations in the matters of arrest, search, adjudication, and so on.⁶

B. Research Method

The research method uses library research to obtain secondary data. The research is based on the normative juridical approach, through the study of documents over the primary legal materials such as legislation and secondary legal materials such as journals, legal articles, internet pages related to the object of the research. Data that already collected are presented descriptively to be analyzed qualitatively.

C. PROBLEMS FORMULATION

What are the contents of Human Rights in the Indonesian Constitution.

- How is law enforcement in Human Rights.

D. DISCUSSION

1. Human Rights in the Constitution

Regulations regarding Human Rights have existed since the adoption of Pancasila as the basis of the Indonesian state, both concerning the relationship between human beings and God and the relationship among human beings. This is contained in the values of the precepts contained in the Pancasila.

⁴ Philipus M. Hadjon, *Legal Protection for Indonesian People's Right*, (Surabaya: PT. Bina Ilmu, 1987), p. 76.

⁵ Kansil CST, *"Introduction to Indonesian Legal Data Law"*, Jakarta, Balai Pustaka, 1986.

⁶ Dardji Darmodihardjo dan Santiaji, *Pancasila*, (National Business, 1981), pp. 80-81.¹⁸ See the Preamble of the Constitution of 1945: "An then, in order to establish the National Government of Indonesia that protects the whole Indonesian nation and the whole country of Indonesia and to promote public welfare, to sharpen the intelligent life of the nation, and participate in realizing the orderliness of the world based on freedom, eternal peace and social justice..."

According to Sri Soemantri, in general the matters of a constitution would cover three fundamental elements, namely: 1) There is guarantee of Human Rights and its citizens; 2) The fundamental state system is established; 3) There is distribution and limitation of fundamental state duties.⁷

According to A.A.H. Struycken, the Constitution (*grondwet*) as a written constitution is a formal document that contains: 1) Outcome of the national political struggle in the past; 2) The highest levels of the national development of the state; 3) The vision of the national figures that shall be realized, both now and in the future; 4) A wish, by which the development of the national life of the state will be led⁸.

The Constitution of 1945 according to A.A.H. Struycken has contained the views, wishes and the development of the state life by the national figures, who long for the establishment of a constitutional state that protects Human Rights.

In the Constitution of 1945 (which has been amended), the issue of Human Rights is specifically set out in CHAPTER XA articles 28A up to 28J which was the outcome of the second amendment in 2000.⁹

Article 28 A states that everyone has the right to live and maintain their life and living. Article 28 D Paragraph 1: Everyone has the right for acknowledgement, guarantee, protection, and legal certainty that are fair and equal before the law.

Moreover, Article 28 G paragraphs 1 and 2:

- (1) Everyone has the right to personal self, family, honor, dignity and property under his control, and has the right to security and protection from the threat of fear of doing or not doing something that is a human right.
- (2) Every person has the right to be free from torture or treatment which undermines human dignity and has the right to obtain political asylum from other countries.

Moreover, Article 28 I Paragraphs 1, 2 and 3:

- (1) The right to life, the right not to be tortured, the right to freedom of thought and conscience, religious rights, the right to be recognized as a person before the law, and the right not to be prosecuted on a retroactive basis are human rights which cannot be reduced under any circumstances.
- (2) Everyone has the right to be free from discriminatory treatment on any basis and has the right to receive protection against discriminatory treatment.
- (3) In order to uphold and protect human rights in accordance with the principles of a democratic legal state, the implementation of human rights is guaranteed, regulated and set forth in legislation.

Moreover, Article 28 J Paragraph 1: Everyone shall respect the human rights of others in the public, national, and state life.

2. Law Enforcement in Human Rights

To carry out the mandate of the people through the Decree of the People's Consultative Assembly, the Government stipulated Law No. 39 of 1999 concerning Human Rights which was ratified on September 23, 1999 that regulates several important matters concerning the Human Rights Court.

⁷. C. Anwar, *Theory and Constitutional Law*, (Malang: In-Trans Publishing, 2011), p. 61.

⁸. Dahlan Thaib., et. al., *Theory and Constitutional Law*, (Jakarta: PT Rajagrafindo Persada), p. 15

⁹ Indonesia, *the 1945 Constitution and its Amendments*, (Jakarta: Penabur Ilmu, 2003).

Law Number 39 of 1999 concerning Human Rights¹⁰ defines Human Rights as "... A set of rights inherent in the nature and existence of human beings as the creatures of God Almighty and is His gift that must be respected, upheld and protected by the state, law, Government , and everyone for the sake of honor and protection of human dignity.

In Law No. 39 of 1999 concerning Human Rights, regulations on Human Rights are determined by referring to the United Nations Declaration of Human Rights, the United Nations Convention on the elimination of all forms of discrimination against women, the United Nations convention on children's rights and various other international instruments governing Human Rights. The matters of this Law must certainly be adjusted to the public need for the law and the development of national law based on Pancasila and the Constitution of 1945.

Firstly, the definition of violation of human rights is described as every act of a person or group of people including state apparatus either intentionally or unintentionally or negligence which illegally reduces, deters, limits and/or revokes the human rights of a person or group of people guaranteed by this law, and do not get or worry about not getting a fair and correct legal settlement, based on the applicable legal mechanism (article 1 paragraph 6).

Secondly, the right to life, the right not to be forced, the right of personal freedom, mind and conscience, religious rights, the right not to be enslaved, the right to be recognized as a person and not prosecuted on a retroactive basis can be excluded in the case of serious violation on human rights classified as crimes against humanity.

Thirdly, in Article 7 it is stated that every person has the right to use all national legal efforts and international forums for any violations of human rights guaranteed by the law of the Republic of Indonesia concerning Human Rights to become a national law.

Fourthly, in Article 104 it is regulated about the Human Rights court as follows: To adjudicate violations of Human Rights which are serious, a court is established as referred to in paragraph (1) by Law within a maximum period of 4 years before a Human Rights court established as referred to in paragraph (2) is adjudicated by the competent court.

Subsequently, Article 104 paragraph (1) of Law No. 39 of 1999 on Human Rights states that it is the Human Rights court that is authorized to adjudicate serious violations of Human Rights. On October 8, 1999 a Government Regulation in Lieu of Law (Perpu) No. 1 of 1999 was drafted on the Human Rights court with the duty to settle the cases of serious Human Rights violations. But it was deemed inadequate and not be approved by the Parliament of the Republic of Indonesia to be Law and therefore it was revoked.

On November 23, 2000, Law No. 26 of 2000 concerning the Human Rights Court in lieu of Perpu No. 1 of 1999 was enacted. The Human Rights Court has the task to resolve serious human rights violations, in this case is the crime of genocide, namely the destruction or demolition of all or part of a national group, race, ethnic group, religious group by committing an act of killing group members. It results in severe physical and mental suffering for group members. It creates living conditions that aim to cause the group to be destroyed. It is imposing actions aimed at birth in the group. It forcibly transfers children from certain groups to other groups.

The Human Rights Court in Indonesia has now entered a new phase with the completed Mandate of the Act No. 39 of 1999 concerning Human Rights which affirms the government as the state administrator and the House of Representatives as a legislative body to make legislation relating to the trial of perpetrators of violations of human rights violations in Indonesia.

¹⁰ *State Gazette of the Republic of Indonesia* Number 165 of 1999, *Supplement to the State Gazette of the Republic of Indonesia* Number 3886.

The Human Rights Court is regulated in Law no. 26 of 2000 concerning Human Rights courts. Its existence legally "answers" that Indonesia wants and is able to seriously prosecute serious human rights violators, as mandated by the Declaration of Manuasia Rights and various international instruments as well as the International Criminal Justice. There is a special feature of the Indonesian Human Rights Court that adheres to the principle of "retroactivity", namely prosecuting severe human rights violations, which were carried out before Law 26 of 2000, which was made possible by the proposal of the House of Representatives and a presidential decree. This retroactive Human Rights Court is called the Ad Hoc Human Rights Court.

On the other side, Indonesia established a National Human Rights Commission. The National Human Rights Commission is an independent body whose position is at the same level as other state institutions with the functions to review, study, counsel, monitor, and mediate Human Rights. The National Human Rights Commission has objectives as follows:

- a. Developing conducive condition to the implementation of Human Rights in accordance with Pancasila and the Constitution 1945 and the Charter of the United Nations Charter as well as the Universal Declaration of Human Rights; and
- b. Increasing protection and enforcement of Human Rights for personal development of the Indonesian people wholly with the ability to participate in various facets of life.

To achieve its objectives, the National Human Rights Commission carries out the function of assessment, research, counseling, monitoring, and mediation on Human Rights. The National Human Rights Commission consists of community leaders who are professionally dedicated and of high integrity, live up to the ideals of a state of law and a welfare state with a core of justice, respect for Human Rights and basic human obligations. The National Human Rights Commission is domiciled in the capital of the Republic of Indonesia.

The National Human Rights Commission is based on Pancasila, meaning that the legal grounds of the National Human Rights Commission are based on Pancasila. The National Human Rights Commission in enforcing the Human Rights abides by the value system found in the territory of Indonesia in line with the philosophy of the Indonesian nation, i.e. Pancasila.

E. CONCLUSION

The Indonesian Constitution, i.e. the Constitution 1945 contains regulations on the protection of Human Rights for citizen. Human Rights are not only based on the rights to associate, gather and express opinions but wider and more specific by containing all regulations of DUHAM 1948.

In order to regulate Human Rights in greater detail, then in 1999 the Law No. 39 of 1999 on Human Rights and one year later the Law No. 26 of 2000 on the Court of Human Rights were passed.

On the other side, Indonesia established a National Human Rights Commission with the purposes of: developing conducive condition to the implementation of Human Rights in accordance with Pancasila and the Constitution 1945 and the Charter of the United Nations Charter as well as the Universal Declaration of Human Rights; and increasing protection and enforcement of Human Rights for personal development of the Indonesian people wholly with the ability to participate in various facets of life.

REFERENCES

- Janedjri M. Gaffar, *Democracy and Elections in Indonesia*, (Jakarta: Constitution Press, 2013).
- Philipus M. Hadjon, *Legal Protection for Indonesian People's Rights*, (Surabaya : Bina Ilmu PT, 1987) p.76
- Kansil CST, *"Introduction to Indonesian Legal Data Law"*, Jakarta, Balai Pustaka, 1986.

- Dardji, Darmodihardjo and Santiaji, *Pancasila*, (National Business, 1981).
- C. Anwar, *Theory and Constitutional Law*, (Malang: In-Trans Publishing, 2011), p. 61.
- Dahlan Thaib., Et. al., *Theory and Constitutional Law*, (Jakarta: PT Rajagrafindo Persada), p. 15
- Indonesia, *the 1945 Constitution and its Amendments*, (Jakarta: Penabur Ilmu, 2003).
- *Republic of Indonesia State Gazette* of 1999 Number 165, *Additional State Gazette of the Republic of Indonesia* Number 3886.
- Dirdjosisworo, Soedjono, *Human Rights Court*, Bandung: Citra Aditya Bakti, 2002

HUMANISM APPROACH AS NON-PENAL WORK TO DIMINISH CRIMES AND THUGS

Santyo Widayatmo

Student of Legal Studies Doctor Program, Universitas Borobudur
santyow13@gmail.com

Abstract

The findings and analysis of this article, summarize that crimes and thugs are social phenomenon occurs in any place and in any social layer. The problem concerns to the fact that nobody wanted to be a thug, yet life crisis forced them to commit crimes and become thugs. This happens in any society classes, from the lower, to the middle, and even upper class. In lower class case, economy and financial pressure impulse person(s) to do crimes, while in middle and upper class, greedy habits cause the crimes. In the other side, it is important to acknowledge that these phenomena rooted from hypocrisy in which society sees norm and social status provokes lower class society to commit crimes and streets crimes as a social revenge and rebel. Meanwhile, the middle and upper class society justify harm ways to gain more wealth which leads them to subconsciously wear it as a pride once they successfully achieve their goals.

Keywords: Humanism approach, thugs, crimes.

A. INTRODUCTION

Every social community dreams of a civilized society, which defined as justice, prosperous, and law observant. In Indonesia, this common term well known as a justice and prosperous society. In the reality, what truly happened is a vice versa, uncivilized people, social gap, high crime rates, abuse, etc. Sociology terms named this situation as an *Anomie* which defined a disorganized and distorted situation.

Although Indonesia has various norms made by the societies, yet these norms seemed to be overpowered by the deviations occurred in the society. It is proven by the high rates of *street crimes*, *blue collar crimes*, and *white collar crime*.

Then why this situation occurred? There was once a wise word says: ***“Society without crime is impossible”***. A society without any crime, is an abnormal society, while a normal society will have deviations and crimes, quoted from Emile Durkheim.

Thinking further about what Emile Durkheim stated, society was forced to accept the social reality of being the opposite from what a civil society dreamed of a justice, prosperous, and law observant. The contradictive between this idealism and reality shows that Durkheim’s opinion wasn’t an exaggeration.

Social reality shows a grow of crime rates in many types and in many society classes, from the lower class, to the middle class, to the upper class society. Besides, the idealism shows an utopian and hyperbolic society without seeing the reality.

Crimes and deviations, which are violation acts of social, law, and religion norms, precisely becomes an equilibrium in a normative society. This pictures a society as if it’s weighing a scale on one side, and crimes weighing the the other side, resulting a balance. Thuggery and gangster are assumed as the rebel of prejudice rules and norms and has developed from a social response of economy pressure to a paradigm.

A concrete solution is required to diminish crime grows in a society, along with various perspectives and acts, as long as it solved the specific problems. In order to discuss effective acts to reduce crime rates and thugs, in society classes, a deeper study of crimes and thugs in each society classes is required.

a. Crimes and Thugs in Lower Class Society

Crimes in Lower Class Society commonly divided into two category, *blue collar crime* and *street crime*, which involved physics rather than psychic, although in special occasions, they are

developed into *organized crime*, which is a characteristic of a *white collar crime*, the types of middle and upper class society crimes.

These *blue collar* and *street crimes* are committed as a response to economy pressure, or well known as kind of a rebel due to discrimination shown by the middle and upper class society, to show the lower class society's existence by committing violence and street crimes.

According to *Lower Class Culture* theory, as disclosed by Walter B Miller, there are a few factors which impulse someone to commit crimes and thugs, they are:

1. *Trouble* which cause a small physics crimes to show an existence.
2. *Toughness* or bravery attitude. This is a clear motivation to do violations.
3. *Excitement*, defined as a feeling of satisfied after getting recognition from a society as a result of what someone's did.
4. *Autonomy*, an attitude of independency to show an individual freedom from norms and laws.
5. *Fate*, a belief that motivates someone that someone's existence is the way of living.

From the factors above, it is clear that crimes in lower class society such as thefts, stains, and other *street crimes* as a manifestation of disappointment to their marginalized existence and discriminations, and to pay these things, they commit actions to push back the economy pressure and as an act of *self-actualization*.

In this situation, doing talks and giving advices are not strong enough to bring them back in track. Many parties will have to act solving this social problem. Unfortunately, what usually happened was the opposite, people misunderstood their actions and cornered them even more with discrimination. This only leads to provokes for more serious crimes. For example, public figures who commonly talks about morality, violations, and solving poverties, acts the opposite ways and somehow making a social gap, a few of them even become hypocrite by showing arrogance and insincerity. They talked about morality, but at the same time their acts counted as *sophisticated crime* for the lower class society, along with their powers and tricks.

In scale of criminology, crimes in lower class society wasn't rooted from human habits, as once pictured by Thomas Hobbes if human is a 'wolf' to others (*Homo Homini Lupus*). These crimes were impulse from social and economy pressure, rather than greedy habits as shown in *white collar crimes*.

These stigma on thugs gets stick with every crimes and violations as if it's the nature habit to the lower class society. In fact, thugs has grown from a 'free-man' lifestyle of the lower class to the mindset of middle and upper class society.

b. Crimes and Thugs in Middle and Upper Class Society

The middle and upper class society who have economy stability, have other crimes factor, which rooted from human's greedy habit. They exploit their intelligence, power, and advantages to do psychic crimes instead of physic, well known as *white collar crime*, though in some case *blue collar crime* still occurs.

White collar crime often immune to law because they can trick behind the formality, and sometimes took advantages of law for some purposes, which is why this type of crime also called *sophisticated crime*. This type of crimes involved corruption, manipulation, *mark-up*, etc.

At least one case shows characteristic of middle and upper class society crimes is *corporate crime*, which is one of *white collar crime*. According to Prof. J.E. Sahetapy, *corporate crime* have characteristics as follows:

- a. Suspects do their actions silently, even law enforcement officers who supervise the corporate, find it hard to smell the crime.
- b. Even if law enforcement officers notice and reveal the crime, it still hard to be adjudicated.
- c. Once the suspects gets adjudicated, there's a small chance they get sentenced.

It is important to remember that there is a possibility of allying between the law officials and the corporate, sometimes involving academicians, experts, and public.

Thugs and crimes by the middle and upper class society is not a mindset to commit things for a living, but rather to achieve goals by justifying harm ways as pictured in Machiavelli's paradigm.

Crimes like corruption, manipulation, value inflation in projects, gratification, extortion by the officials using business excuses or to smoothen procedural process.

c. **Humanism Approach as Non-Penal Work to Diminish Crimes and Thugs**

According to Barda Nawawi, non-penal work to solve crimes is more of a crime prevention. The aim of non-penal work is to take care of the crime factors. These factors centered on social problems which created motivation for someone to commit crimes. Humanism can be defined as an approach aiming for humanity values as perspective in solving problems.

In solving crime factors for any social classes, non-penal work with humanity approach is needed.

1. **To solve lower society class crimes, works and approaches needed are as follows:**

- a. **Ontological** approach helps suspects of a crime to learn why they are doing wrong, instead of just getting blamed and punished. Common motive of *blue collar crime* is economy and financial pressure, therefore, to solve this problem, a deeper understanding is needed to create a practical solution on how to strengthen their economy stability.
- b. A **sociological** approach helps to understand lower class social problem and their living mindset, which both cause crimes and violations, comprehensively. One of many solutions is to deliver a clear message with understandable language to create practical solution, instead of giving a utopic and idealistic advices. This utopic and idealistic advices will only create an image of not understanding the problem and somehow cliché. For example, soothing a crowd of people to be patient or lenient in a middle of chaotic life, while these people live goes on, means that the speaker doesn't understand specific problem and solution. Besides, it is not easy to judge someone's morality based on things they did, this will lead to misunderstanding and provokes lower class society to commit crimes as social revenge to the insult because of the misunderstanding. It is best to keep down-to-earth and not showing arrogance, this will prevent hypocrisy of judging someone's morality too much and doing something immorality.
- c. **Holistic** approach by getting in touch with someone's feeling. It is important to remember that nobody wants to commit a crime, so acknowledging life hospitality is easier without ignoring to living the life with positive attitude because of harmonious support and understanding from middle and upper class society, for the lower class.

2. **To solve middle society class crimes, non-penal harmonize works will be needed, which are as follows:**

- a. An **ontological** approach, understanding *white collar crimes* happened due to greedy habits and 'hunger for more' rather than economy pressure. Therefore, the solution is to give guidance and enlightenment for their anxiety about rich and wealth. Mostly, the middle and upper class society commit crimes by crimes due to their anxiety and subconscious fear if one day their wickedness gets revealed and exposed, as they are unprepared to face the worst possibility. These *white collar crimes* also exist to show toughness and invincible to the law. On the other hand, hypocrisy on understanding social economy status leads to violations of law by justifying harm ways to accommodate middle and upper class society.
- b. Doing **sociological** approach by analyzing ambivalences in each of society classes. Hypocrisy of talking about morality and norms but doing things that are completely the opposite. Even though this shows a superiority and arrogance, but it still have same substance of violations. The key attitude is consistency of middle and upper class. Then, the solution is to give a freedom for middle and upper class to achieve their *self-actualization*, but at the same time become a model and showing care to the lower class.

- c. **Holistic** approach of touch someone's feeling because the essence of human is seeking for happiness, but instead trapped in pseudo of fun and greed. This cause people to do whatever it takes to achieve goals that are illusion of 'fun' instead of 'happiness'. The solution for this approach is to look at the bright side of every positive intents, even just a small detail. It is also important to remember that even the worst person still have a positive heart. This little positive heart leads to one positive goal or maybe even first step. This explanations is related to ontological approach as written above.

B. CONCLUSION

From all the analysis written in previous chapters, it can be summarized that crimes and thugs are social phenomenon occurs in any place and in any social layer. The problem concerns to the fact that nobody wanted to be a thug, yet life crisis forced them to commit crimes and become thugs. This happens in any society classes, from the lower, to the middle, and even upper class. In lower class case, economy and financial pressure impulse person(s) to do crimes, while in middle and upper class, greedy habits cause the crimes. In the other side, it is important to acknowledge that these phenomenons rooted from hypocrisy in which society sees norm and social status provokes lower class society to commit crimes and streets crimes as a social revenge and rebel. Meanwhile, the middle and upper class society justify harm ways to gain more wealth which leads them to subconsciously wear it as a pride once they successfully achieve their goals.

Therefore, it is the best for the society to start understanding each other aside from their crimes, instead of judging someone's morality. This is one implementation of humanism approach to diminish crime rates and thugs with ontological, sociological, and holistic approaches.

REFERENCES

- Ahmadi, H. Abu, Drs., *Ilmu Sosial Dasar*, Jakarta: Rineka Cipta, 1997
- Arif, Barda Nawawi, *Upaya Non-Penal dalam Kebijakan Penanggulangan Kejahatan*, Semarang: Bahan Seminar Kriminologi VI
- Cooter, Robert, and, Men, Thomas, *Law and Economics*, Addison Wesley Educational Publishers, Inc., 1997
- Dentler, Robert A, Erikson, Kai T, *The Functions of Deviance in Groups*,_____
- Durkheim, Emile, *The Normal and The Pathological*,_____
- Kusnadi, Moh.,SH, R.,Saragih, Bintan, R., Prof.,Dr.,SH., *Ilmu Negara*, Jakarta: Gaya Media Pratama, 1993
- Miller, Walter B, *Lower Class Culture as a Generating Milieu of gang Delinquency*,__
- Nitibaskara, Tb.Ronny Rahman, Prof., Dr., *Gunakan Hukum Tegakkan Gukum*, Jakarta: Penerbit Buku Kompas, 2007
- Nitibaskara, Tb.Ronny Rahman, Prof., Dr., *Ketika Kejahatan Berdaulat*, Jakarta: Peradaban 2001, 2007
- Progress Publisher, Union of Soviet Socialist Republics (USSR), *Science and Morality*, Moscow: Progress Publisher, 1975
- Prodjodikoro, Wirjono, Prof., Dr., SH., *Azas-azas Hukum Pidana di Indonesia*, Bandung: PT Eresco, 1986
- Sahetapy, JE., Prof., Dr., SH., MA,M *Kejahatan Korporasi*, Jakarta: PT Refika Aditama, 2002
- Saleh Ismail, SH, *Hukum dan Ekonomi*, Jakarta: PT Gramedia Pustaka Utama, 1990
- Simanjuntak, Maruli CC, *Preman-Preman Jakarta*, Jakarta: Pensil 324, 2007
- Soehino, SH., *Ilmu Negara*, Yogyakarta: Liberty, 1986
- Soekanto, Soerjono, *Sosiologi Suatu Pengantar*, Jakarta: CV Rajawali, 1986

HUMAN RIGHTS ON VICTIMS OF NARCOTICS ABUSE BASED ON LAW NUMBER 35 YEAR 2009 ON NARCOTICS

Sukarman

Student of Legal Studies Doctor Program, Universitas Borobudur
cvrahayu540@gmail.com

Abstract

Protection and enforcement of human rights for citizens is one of the important characteristics that must exist in every legal state, including the State of Indonesia as a rule of law based on Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia because human rights are rights that must be fulfilled for every human being without exception, including for Narcotics addicts. Narcotics addicts are categorized as perpetrators of Narcotics crimes so that they are subject to criminal sanctions, but basically, they also have human rights that must be fulfilled and must be protected by the State because these rights are inherent in their nature and dignity as human beings, especially if the Abuse is The narcotics turned out to be a victim of narcotics abuse. This journal has 2 (two) formulation of the problem, namely how are the criminal provisions against victims of narcotics abusers and how is the legal protection of victims of narcotics abusers. The research method used in this journal is juridical-normative legal research, where the data studied are library materials or secondary data which includes primary legal materials, namely the 1945 Constitution of the Republic of Indonesia, Law Number 39 Year 1999 concerning Rights Human Rights, Law Number 35 Year 2009 concerning Narcotics, and Law Number 13 Year 2006 concerning Protection of Witnesses and Victims, secondary legal materials, namely legal books, journals, the internet, and other data, and tertiary legal material, namely Kamus Besar Bahasa Indonesia (KBBI) Online.

Keywords: Narcotics, Medical and Social Rehabilitation, Narcotics Abuse Victims, Human Rights.

A. INTRODUCTION

Protection of Human Rights for citizens is one of the important characteristics that must exist in every state of law, including the State of Indonesia which explicitly states that the State of Indonesia as a Law State based on Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. The definition of Human Rights is listed in Article 1 point 1 of Law Number 39 Year 1999 concerning Human Rights, which reads as follows: "Human Rights are a set of rights that are inherent in human dignity and values as creatures of God Almighty and are a gift He who must be respected, upheld and protected by the state, law and government, and everyone for the honor and protection of human dignity."

In general, in every country that adheres to the rule of law there are three basic principles, namely the rule of law (supremacy of law), equality before the law, and law enforcement in a way that is not against the law (due process of law).¹ According to Soerjono Soekanto, law enforcement is an activity to harmonize the relationship of values that are described in solid rules and actions as a series of final stages of translation. to create, maintain and maintain the peace of life.²

Enforcement and legal protection especially in the realm of human rights are the two important elements in the rule of law because human rights are rights that must be fulfilled for every human being without exception, including for narcotics addicts. Narcotics is a substance or drug that is very useful and

¹ Akhmad Ali, 2008, *Menguak Realitas Hukum, Rampai Kolom dan Artikel Pilihan dalam Bidang Hukum*, Kencana Prenada Media Group, Jakarta, page. 12.

² Soerjono Soekanto, 1983, *Faktor-faktor Yang Mempengaruhi Penegakan Hukum*, UI Press, Jakarta, page. 35.

needed for the treatment of certain diseases. However, if it is misused or used not in accordance with the standard of treatment, it can have a very detrimental effect on individuals or the community, especially the younger generation. This will be more detrimental if accompanied by abuse and illicit trafficking of Narcotics which can lead to greater danger to life and national cultural values which will ultimately be able to weaken national security.

According to Darda Syahrizal, Narcotics is a drug that works selectively in the central nervous system (CNS) and has a 'main effect' on changing consciousness or making a decrease in consciousness, loss of taste, and reducing pain relief, used for analgesics, antipasmotics and premedication of anesthesia.³ Narcotics crime is an international crime (International Crime) and organized crime (Organize Crime), and has an extensive network. This international crime proves the increasing quantity and quality of crime towards transnational crime organizations, crossing national borders and demonstrating regional and international cooperation.⁴

The statutory provisions governing the problem of narcotics have been compiled and implemented through the Narcotics Law. However, crimes related to narcotics cannot be relieved. In many recent cases, many narcotics dealers and dealers have been caught and heavily sanctioned, but this does not seem to have a deterrent effect for other actors, there is even a tendency to expand their operational areas.⁵ In terms of age, narcotics is not only enjoyed by adolescents, but also middle-aged and old age groups. The spread of narcotics is no longer limited to big cities, but has entered small towns and spread to sub-districts and even villages.⁶

Based on Article 1 point 13 of Law Number 35 Year 2009 concerning Narcotics, Narcotics Addicts are people who use or abuse Narcotics and are in a state of dependence on Narcotics, both physically and psychologically. Although in Law Number 35 Year 2009 concerning Narcotics, Narcotics Addicts, namely Narcotics Abusers are categorized as perpetrators of Narcotics crimes so that they are subject to criminal sanctions, but basically, they also have human rights that must be fulfilled because these rights are inherent from the nature and dignity as a human being, and must be protected by the State especially if the Abuse of Narcotics turns out to be a Victim of Narcotics abuse. So that in this Journal we will discuss criminal provisions against victims of narcotics abuse and legal protection for victims of narcotics abuse.

B. RESEARCH METHOD

The research method used in this journal is juridical-normative legal research, where the data studied are library materials or secondary data which includes primary legal materials, namely the 1945 Constitution of the Republic of Indonesia, Law Number 39 Year 1999 concerning Rights Human Rights, Law Number 35 Year 2009 concerning Narcotics, and Law Number 13 Year 2006 concerning Protection of Witnesses and Victims, secondary legal materials, namely legal books, journals, the internet, and other data, and tertiary legal material, namely Kamus Besar Bahasa Indonesia (KBBI) Online.

C. PROBLEM FORMULATION

In this study, the formulation of the problem to be discussed is as follows:

1. What are the criminal provisions against Victims of Narcotics abuse?
2. What is the legal protection for victims of narcotics abuse?

D. DISCUSSION

1. Criminal Provisions Against Narcotics Abuse Victims

³ Darda Syahrizal, 2013, *Undang-Undang Narkotika dan Aplikasinya*, Penerbit Laskar Aksara, Jakarta, hal. 1-2.

⁴ Siswanto Sunarso, 2004, *Penegakan Hukum Psikotropika Dalam Kajian Sosiologis Hukum*, PT RajaGrafindo Persada, Jakarta, page. 2.

⁵ O.C. Kaligis & Associates, 2012, *Narkotika dan Peradilannya di Indonesia, Reformasi Hukum Pidana Melalui Perundangan dan Peradilan*, Alumni, Bandung, page. 260.

⁶ Hari Sasangka, 2011, *Narkotika dan Psikotropika Dalam Hukum Pidana*, Mandar Maju, Bandung, page. 9.

Etymologically narcotics comes from English, namely narcose or narcosis which means to sleep. Narcotics comes from narcotic words, which means something that can relieve pain and can cause stupor, anesthetics and anesthesia.⁷ Related to Narcotics, based on Article 1 point 1 of Law Number 35 Year 2009 concerning Narcotics, reads: "Narcotics are substances or drugs derived from plants or non-plants, both synthetic and semisynthetic, which can cause a decrease or change in consciousness, loss of taste, reduce to eliminate pain, and can cause dependence, which is differentiated into groups as attached in this Act. "

Basically Narcotics use is permitted but only for certain purposes, as stipulated in Article 7 of Law Number 35 Year 2009 concerning Narcotics, which reads: "Narcotics can only be used for the benefit of health services and / or the development of science and technology." Therefore, narcotics used other than for the purpose of health services and / or the development of science and technology are prohibited.

There are a lot of terms in referring to parties related to narcotics, starting from narcotics dealers, and narcotics users, each of whom has a mention according to their respective roles as follows:⁸

- a) Narcotics dealer
- b) The party producing Narcotics is against the law (Article 1 point 3 jo Article 113);
 - 1) Persons Importing Narcotics in a Legal Contravention (Article 1 point 4 jo Article 113);
 - 2) The party exporting Narcotics is against the law (Article 1 point 5 jo Article 113);
 - 3) The party carrying out transportation or Narcotics Transito is unlawful (Article 1 number 9, 12 jo Article 115);
 - 4) Parties conducting the Illegal Circulation of Narcotics and Narcotics Presidents (Article 1 number 6 jo 111, 112, 129).
- a. Narcotics Users
 - 1) Narcotics addicts (Article 1 number 13 jo Article 54 jo Article 127);
 - 2) Narcotics Users (Article 1 number 15 jo Article 54 jo Article 127).

When viewed from the Large Indonesian Language Dictionary, that the Distributor is a person who circulates, and circulates the meaning of carrying (conveying) letters and so on from one person to another,⁹ while the user is the person who uses, and uses means to use (tools, tools); take advantage of it; do something.¹⁰ In Law Number 35 Year 2009 concerning Narcotics the perpetrators are categorized into two groups, namely as "dealers" and as "users". Law Number 35 Year 2009 concerning Narcotics explicitly does not explain the notion of "narcotics dealers", however, implicitly and narrowly that dealers can be said to be people who carry out narcotics distribution and surrender activities, but broadly, the understanding of narcotics dealers includes dimensions sell, buyers to circulate, and include storing, mastering providing activities to export and import narcotics.¹¹

The understanding of Narcotics addicts based on Article 1 point 13 of Law Number 35 Year 2009 concerning Narcotics is a person who uses or misuses Narcotics and is in a state of dependence on Narcotics, both physically and psychologically, while what is meant by a Misuse based on Article 1 item 15 Law Number 35 Year 2009 concerning Narcotics is a person who uses Narcotics without rights or against the law.

The focus of the discussion in this study is related to the criminal provisions against victims of narcotics abusers where the criminal provisions stipulated in Article 127 of Law Number 35 Year

⁷ Jhon M. Elhols dan Hasan Sadili, 1996, *Kamus Inggris Indonesia*, PT. Gramedia, Jakarta, page. 390.

⁸ <https://www.hukumonline.com/berita/baca/lt5a799bc2a041a/jenis-golongan-dan-penerapan-pasal-yang-dikenakan-pada-uu-narkotika-oleh--eric-manurung/>, accessed on June 17 at 7:00 p.m.

⁹ <https://kbbi.web.id/edar>, accessed on June 17 at 7:30 p.m.

¹⁰ <https://kbbi.web.id/guna>, accessed on June 17 at 7:30 p.m.

¹¹ A.A. Istri Mas Candra Dewi, *Perlindungan Hukum Terhadap Korban Penyalahgunaan Narkotika Dengan Berlakunya Undang Undang No 35 Tahun 2009 Tentang Narkotika*, Jurnal Program Studi Magister Hukum Program Magister Program Pascasarjana Universitas Udayana, Bali, 2012.

2009 concerning Narcotics are those who use Narcotics without rights or against the law, which read:

Every Misuse To:

Narcotics Group I for oneself shall be punished with imprisonment for a maximum of 4 (four) years;

- a. Narcotics Group II is for itself punishable by imprisonment for a maximum of 2 (two) years; and
- b. Narcotics Group III for oneself is punished with imprisonment for a maximum of 1 (one) year.

(1) In deciding the case as referred to in paragraph (1), the judge must pay attention to the provisions referred to in Article 54, Article 55, and Article 103.

(2) In the event that the Misuse as referred to in paragraph (1) can be proven or proven to be a victim of Narcotics abuse, the Abuse is obliged to undergo medical rehabilitation and social rehabilitation.

The meaning of victims in the scope of victimization has a broad meaning, because it is not only limited to individuals who actually suffer losses, but also groups, private corporations and government.¹² The concept of abuse stems from the existence of a person's rights or authority guaranteed by law. Narcotics abuse is a form of irregularities, actions or actions of people who are not entitled, not authorized to use or distribute narcotics.¹³

Based on the article above, it can be seen that the criminal sanction in the form of imprisonment based on the narcotics group consumed is a Narcotics Misuse because a Narcotics Abuser is a person who uses Narcotics without rights or is against the law therefore he is guilty of a crime . Unlike the case with Narcotics abuse victims based on the Explanation of Article 54 of Law Number 35 Year 2009 concerning Narcotics, which reads: "The meaning of" victims of Narcotics abuse "is someone who accidentally uses Narcotics because he was persuaded, deceived, deceived, forced, and / or threatened with using Narcotics." so that the action is not included as a criminal offense.

Although based on Article 103 paragraph (1) of Law Number 35 Year 2009 concerning Narcotics that a Judge can decide whether a Narcotics addict is proven guilty of a Narcotics (Misuse of Narcotics) crime or not proven guilty of Narcotics crime (Victims of Narcotics abuse) , but both Narcotics Abusers and Narcotics Abuse victims are equally obliged to undergo medical rehabilitation and social rehabilitation, with differences, namely for Victims of Narcotics abuse not subject to criminal sanctions, it is only compulsory to undergo medical rehabilitation and social rehabilitation, while for Misuse of Narcotics besides being subject to criminal sanctions, they are also obliged to undergo medical rehabilitation and social rehabilitation, where the period of undergoing treatment and / or care for Narcotics Addicts, namely rehabilitation is considered as a period of serving sentence (Article 103 paragraph (2) Law Number 35 Year 2009 concerning Narcotics).

Drug addicts must be rehabilitated. In this case, what is meant by addicts based on Circular of the Supreme Court (SEMA) Number 4 Year 2010 concerning Abuse Placement, Victims of Abuse and Narcotics Addictions in Social Rehabilitation and Medical Rehabilitation Institutions are people who use or abuse narcotics in a state of dependence both physically and psychic, about the placement of abusers, victims of abusers and drug addicts are placed in medical and social rehabilitation institutions. This means placing narcotics abusers as victims of narcotics crimes.¹⁴

¹² Didik, 1997, *Urgensi Perlindungan Korban Kejahatan Antara Norma dan Realita*, Rineka Cipta, Jakarta, page. 3.

¹³ Chartika Junike Kiaking, *Penyalahgunaan Narkotika Menurut Hukum Pidana Dan Undang-Undang Nomor 35 Tahun 2009 Tentang Narkotika*, Jurnal Lex Crimen, Vol. VI, No. 1, Januari-Februari 2017, page. 106.

¹⁴ Wenda Hartanto, *Penegakan Hukum Terhadap Kejahatan Narkotika dan Obat-Obat Terlarang dalam Era Perdagangan Bebas Internasional yang Berdampak pada Keamanan dan Kedaulatan Negara (The Law Enforcement Against Narcotic and Drug Crimes Impacting on Security and State Sovereignty in The Era of International Free Trade)*, Jurnal Legislasi Indonesia, Vol. 14, No. 01, Maret 2017, page. 2-3.

2. Legal Protection Against Narcotics Abuse Victims

Talking about criminal law means that it cannot be separated from the main problems in the criminal law itself. Criminal law if viewed in depth there are three main problems, namely: (1) Prohibited acts; (2) The person (corporation) who does the prohibited act; (3) Crimes that are threatened and imposed on people (corporations) who violate the prohibition.¹⁵ According to Law Number 13 Year 2006 concerning the Protection of Witnesses and Victims in Article 1 paragraph (2) the victim is someone who experiences physical, mental, and / or economic losses caused by a criminal act.

The form of legal protection that can be given to victims of Narcotics abuse is regulated in Article 54 of Law Number 35 Year 2009 concerning Narcotics, which states that Narcotics Addicts and victims of Narcotics abuse must undergo medical rehabilitation and social rehabilitation. This article actually confirms that in this case the victims of Narcotics abuse must carry out their own medical recovery and health, and the recovery of their good name for the users to return to the community, especially after undergoing the rehabilitation process in the rehabilitation center.

The definition of Medical Rehabilitation based on Article 1 point 16 of Law Number 35 Year 2009 concerning Narcotics is an integrated process of medical treatment activities to free addicts from Narcotics dependence, while Social Rehabilitation based on Article 1 point 17 of Law Number 35 Year 2009 concerning Narcotics is an integrated process of recovery activities, both physical, mental and social, so that former Narcotics addicts can return to carrying out social functions in people's lives. In the rehabilitation process, victims of narcotics abuse are not objects but subjects. He is a subject because the success of the rehabilitation process is very much determined by him. The presence of other roles is more to sustain and guide him through the stages of rehabilitation.¹⁶

This breakthrough in decriminalization taken by the government by including mandatory rehabilitation of Narcotics Addictions has prompted the Indonesian government to create other facilities that are expected to function and provide solutions such as using non-reasoning facilities which are often referred to as prevention without using crime (prevention without punishment).¹⁷

The form of legal protection for both Narcotics Abusers and Victims of Narcotics abuse is to conduct medical and social rehabilitation by placing drug addicts as victims and sick people who must get help to recover physically and psychologically from Narcotics dependence in order to be able to lead normal lives and be able to work for himself, his community, and his nation in the future.

E. CONCLUSION

Based on the discussion stated above, the conclusions that can be given to the existing problems that regarding the criminal provisions against victims of Narcotics abuse are regulated under Article 127 paragraph (3) of Law Number 35 Year 2009 concerning Narcotics, where if a Misuse of Narcotics can be proven or proven to be a victim of Narcotics abuse, so he is not guilty of Narcotics crime so that he was not sentenced to prison in the form of prison but he is a Victim of Narcotics abuse must undergo medical rehabilitation and social rehabilitation, then regarding legal protection for Victims of Narcotics abuse, that both Narcotics Abusers and Victims of Narcotics abusers are both obliged to undergo rehabilitation, both medical and social rehabilitation, the ultimate goal is as a means to recover physically and psychologically from Narcotics dependence in order to be able to lead a normal life and be able to work for himself, his community, and his nation in the future.

¹⁵ Sudaryono dan Natangsa Surbakti, 2005, *Hukum Pidana*, Fakultas Hukum Universitas Muhammadiyah Surakarta, Surakarta, page. 5.

¹⁶ Visimedia, 2006, *Rehabilitasi bagi korban narkoba*, Pranita offset, Tangerang, page. 12.

¹⁷ Muladi, 1995, *Kapita Selekta Sistem Peradilan Pidana*, Undip, Semarang, page. 4.

REFERENCES

A. Book

- Akhmad Ali, 2008, *Menguak Realitas Hukum, Rampai Kolom dan Artikel Pilihan dalam Bidang Hukum*, Kencana Prenada Media Group, Jakarta.
- Darda Syahrizal, 2013, *Undang-Undang Narkotika dan Aplikasinya*, Penerbit Laskar Aksara, Jakarta.
- Didik, 1997, *Urgensi Perlindungan Korban Kejahatan Antara Norma dan Realita*, Rineka Cipta, Jakarta.
- Hari Sasangka, 2011, *Narkotika dan Psikotropika Dalam Hukum Pidana*, Mandar Maju, Bandung.
- Jhon M. Elhols dan Hasan Sadili, 1996, *Kamus Inggris Indonesia*, PT. Gramedia, Jakarta.
- Muladi, 1995, *Kapita Selekta Sistem Peradilan Pidana*, Undip, Semarang.
- O.C. Kaligis & Associates, 2012, *Narkoba dan Peradilannya di Indonesia, Reformasi Hukum Pidana Melalui Perundangan dan Peradilan*, Alumni, Bandung.
- Siswanto Sunarso, 2004, *Penegakan Hukum Psikotropika Dalam Kajian Sosiologis Hukum*, PT RajaGrafindo Persada, Jakarta.
- Sudaryono dan Natangsa Surbakti, 2005, *Hukum Pidana*, Fakultas Hukum Universitas Muhammadiyah Surakarta, Surakarta.
- Visimedia, 2006, *Rehabilitasi bagi korban narkoba*, Pranita offset, Tangerang.

B. Journal

- A.A. Istri Mas Candra Dewi, *Perlindungan Hukum Terhadap Korban Penyalahgunaan Narkotika Dengan Berlakunya Undang Undang No 35 Tahun 2009 Tentang Narkotika*, Jurnal Program Studi Magister Hukum Program Magister Program Pascasarjana Universitas Udayana, Bali, 2012.
- Chartika Junike Kiaking, *Penyalahgunaan Narkotika Menurut Hukum Pidana Dan Undang-Undang Nomor 35 Tahun 2009 Tentang Narkotika*, Jurnal Lex Crimen, Vol. VI, No. 1, Januari-Februari 2017.
- Wenda Hartanto, *Penegakan Hukum Terhadap Kejahatan Narkotika dan Obat-Obat Terlarang dalam Era Perdagangan Bebas Internasional yang Berdampak pada Keamanan dan Kedaulatan Negara (The Law Enforcement Against Narcotic and Drug Crimes Impacting on Security and State Sovereignty in The Era of International Free Trade)*, Jurnal Legislasi Indonesia, Vol. 14, No. 01, Maret 2017.

C. Legislation

- Indonesia, the 1945 Constitution of the Republic of Indonesia.
- _____, Law Number 39 Year 1999 concerning Human Rights.
- _____, Law Number 35 Year 2009 concerning Narcotics
- _____, Law Number 13 Year 2006 concerning the Protection of Witnesses and Victims

D. Internet

- <https://www.hukumonline.com/berita/baca/lt5a799bc2a041a/jenis-golongan-dan-penerapan-pasal-yang-dikenakan-pada-uu-narkotika-oleh-eric-manurung/>, accessed on June 17 at 7:00 p.m.
- <https://kbbi.web.id/edar>, accessed on June 17 at 7:30 p.m.
- <https://kbbi.web.id/guna>, accessed on June 17 at 7:30 p.m.

ARBITRATION THROUGH CONSUMER DISPUTE RESOLUTION BOARD (BPSK) AS AN OPTION FOR RESOLVING MEDICAL DISPUTES IN POSITIVE LAW IN INDONESIA

Sukirman

Student of Legal Studies Doctor Program, Universitas Borobudur
drsukirman04@gmail.com

Abstract

The aims of this write is to see how the pattern of arbitration is seen as effective in resolving medical disputes in the review of Law No. 30 of 1999 concerning Arbitration and Alternative Resolutions of off-court disputes. The write methodology used is the normative legal study methodology with a document study approach / literature study, by examining references related to the writing object. Based on the results of the study, in the event of a medical dispute between patients as health service consumers who feel disadvantaged by doctors / dentists and / or hospitals as health care provider, if the mediation to reach reconciliation do not meet an agreement, then the parties can choose the arbitration path through the Consumer Dispute Settlement Agency as an alternative settlement outside the court. Arbitration guarantees the confidentiality of the parties involved to the dispute. The process is simpler and more flexible, effective in relation to time and costs, the decision is final and binding on the parties so that it must be carried out voluntarily based on good ethics

Keywords: Medical dispute cases, Alternative Dispute Resolutio, BPSK, Arbitration

1. INTRODUCTION

The disharmony between doctors and patients can cause medical disputes, which will create opposition between doctor and/or the hospital in one side and patient/family in the other side. What is usually disputed was the result or the final result of the health service by not paying attention or ignoring the process. In fact, in medical law, it is admitted that medical staff or health services staff will only be held responsible for the process or the efforts undergone during the treatment (*InspanningVerbintennis*) and will not be held responsible or guarantee the final result of it (*ResultalteVerbintennis*). According to the law, the object of the treatment in this therapeutic transaction was not on the patient's recovery, but more on searching for the appropriate ways to cure the patients (Bader Johan Nasution, 2005: 11).

In some circumstances where patients feel like they don't get satisfying medical service, or consider that a mistake has happened during the medical treatment, in this case that the patient felt disadvantaged, generally they tend to sue or file complaints to the responsible institutions that can solve the problem. The claim addressed to the doctor was basically a law process asking for the doctor's responsibility upon what one has done, either the ones done accidentally or intentionally. The doctor's responsibility becomes the main object of claim of the medical indifference, and the doctor will be held responsible by either providing compensation or sentenced by other punishment in accordance to the judge's decision (Anny Isfandyarie, 2006: 4).

The settlement of this dispute through litigation or through the common process in court, has typical characteristics; high cost, long duration, high psychologic burden, and formality along with its complexity of the litigation process (Eddi Junaedi, 2011 : 17). On the doctor's side or on the medical staff's side, solving the medical dispute through court / litigation means risking what they have achieved with hard work, and might cause them losing their reputation. Even though it has not been found guilty or even when the final decision found them innocent, the reputation of the doctor or the medical staff has been judged badly because it has been openly published in mass media that they are accused in doing mistakes which will also give them bad stigma in society. This might cause the decreasing trust from the society to the doctor or the medical staff. Meanwhile, the effort to solve the

medical dispute has never brought satisfaction to the patient because the judge's decision is considered to be unable to provide justice for the patient. This happens due to the difficulty from both the patient and the Public Prosecutor to prove doctor's mistake.

In the case of medical dispute, if litigation as the way to solve medical dispute considered unfavorable for all parties, then a better solution will be done through Alternative Dispute Resolution (APS). Solving the dispute through APS can be done by doing discussion, negotiation, or mediation (Affandi, 2009). However, if there is a miscommunication in solving the dispute through negotiation and mediation, usually caused by the dissatisfaction by the patient towards the explanation of medical service or if the doctor feel like the claim given is inappropriate, which make the resolution results into nothing in solving the dispute, then the resolution can be done through alternative dispute resolution; arbitration. The juridical foundation for this alternative dispute resolution through arbitration has been regulated in accordance with the Law No. 30 of 1999 bout Arbitration and Alternative Resolution Dispute.

Even though Arbitration as one of the means to solve medical dispute is still less popular and is still less likely be used by people compared to the other means, but if all disputed parties are capable to willingly undergo the process with good intention, Arbitration has several advantages, such as guarantee the confidentiality of all parties in dispute, has a simpler and more flexible process, more effective in terms of cost and time, and the amendment to the decision is final and binding (Gunawan Wijaya dan Ahmad Yani, 2003: 38-39). With that being said, the results will be advantageous for all parties in dispute.

The cases of medical dispute need more attention and good resolution because as the number of medical disputes increase, the more complex and expensive the medical service will be. It can cause the decreasing amount of trust given by the society to the medical service. Other impact cause by this case is that all parties will keep their distance and will break the good relation between doctor and patients. This might also result into a decline in the medical service quality.

Based on the explanation above, this study tries to review arbitration to be considered as one of the effective options to solve medical dispute in terms of positive law in Indonesia.

2. THE STUDY

In this study, the writer will discuss about "Arbitration through Consumer Dispute Resolution Board (BPSK) as an option for resolving medical disputes in positive law in Indonesia" with the research questions as follow:

- a. How can the relationship between doctor and patient cause medical dispute?
- b. What are the rights of patients as consumer of health services if harmed?
- c. What will be the alternative dispute resolution?
- d. How is the use of arbitration as an alternative to solve medical dispute?
- e. How is the role of BPSK in resolving the medical dispute as what is regulated in the Law No. 8 of 1999 about Consumer Protection?
- f. What are the procedures in Arbitration to solve medical dispute?

3. RESEARCH METHODOLOGY

This study uses normative legal research method. Normative legal research is literature law research. This will only employ literature materials as the research data, hence the data collection is done by tracking various available literature materials in several libraries and/or e-libraries though internet. There are two approach methods used in this study, those are Statute Approach and Conceptual Approach. Statute Approach is done by examining various laws and regulations related with medical dispute and its resolution, consumer dispute resolution in BPSK, consumer protection, and arbitration procedure. As for Conceptual Approach, it is used by moving on to the developing views and doctrines in law, especially in the field of constitutional and medical law. The collected research materials will hence be analyzed using qualitative descriptive analysis method.

4. DISCUSSION

4.1. Patient's rights if aggrieved in health service

If the patient feels disadvantaged in receiving health service, their rights are protected and regulated in law and regulations in Indonesia. Article 66 section 1 in Medical Practice Law says: everyone who knows or if their matter is aggrieved by the action of doctor or dentist can report their complaint written to the Chairman of the Honorary Assembly of the Indonesian Medical Discipline (MKDKI). The law and regulations give space for patient to fight for their right if they feel like they are aggrieved by doctor and/or dentist or by the hospital. In Law No.36 of 2009 about Health, Article 58 section 1 stated that everyone has the right to claim for compensation towards a health staff and/or medical provider that cause any harm due to their mistake or negligence in the medical service received. Then, in article 58 section 2 stated that claims for compensation as what is meant in section 1 is not applicable for medical staff who takes action to save someone's life or prevent someone's disability in case of emergency. In relation to the services given by the hospital, the patient's rights itself has been written in Article 32 letters (f) and (g) of Indonesian Republic Law No.44 of 2009 concerning Hospital: (f) to file a complaint about the quality of medical service received (q) to sue the hospital if the hospital is suspected of providing services which are not in accordance with the standard either in civil law or criminal law.

With the enactment of Indonesian Republic Law No.8 of 1999 concerning Consumer Protection, a patient has the right that is also regulated in the same way as health care consumer (Yusuf Shofie, 2002: 103). The law and regulations related to granting the rights of the patients if they are harmed while receiving the medical service that is not in accordance with their rights, can be seen in Article 4 letters (d), (e), (h) which state: (d) the right for their opinions and complaints (about the goods and/or the service used) to be heard, (e) the right to get advocacy, protection, and effort to have proper consumer protection upon the dispute resolution, (h) the right to get compensation, if the goods and/or the service they get is not what is promised or not as what is supposed to be. Those Articles are related because patient is consumer of the health care service given by doctor and/or dentist and by hospital.

4.2. The relationship between doctor and patient which creates medical dispute

Generally, when patient feels dissatisfied or feels harmed in receiving the health service, it will create a conflict. A conflict is a situation where two or more parties are faced with different interest. Conflict develop or change into dispute if one of the parties states his/her dissatisfaction or concern, either directly state this to the related party or to other party. A conflict can change or develop to be a dispute, which means unresolved conflict will change into dispute (Safitri Hariyani, 2005: 44). Mentioned further that medical dispute is a condition where there is a clash in medical practice. The Constitution No. 29 of 2004 concerning medical practice implicitly stated that medical dispute that happen because patient's interest is harmed by doctor' or dentist' action who perform the medical practice. Therefore, medical dispute is a dispute that happens between the user of medical service and medical service actors, in this case between patient with doctor and/or dentist and with hospital. Usually, what is disputed is the result or final result of medical service which does not pay attention or ignore certain process. In fact, it is recognized in medical law that medical staff or the medical service actor is only responsible for the process or the effort done (*InspanningVerbintennis*) during the service and does not guarantee the final result of the service (*ResultalteVerbintennis*).

4.3. Medical dispute resolution

There are two options to offer for the parties in dispute who want to solve their disputes by criminal law, which are though litigation or non-litigation process. Choosing litigation process means that handling the case is done through a process in court. While choosing non- litigation is solving the legal problem outside the court process. Litigation process has prominent features which are a high cost, a long process, high psychologist burden, and the formality and complexity of the litigation process. For the doctor or the health service facilities, solving the medical dispute through court /

litigation process means risking the reputation they have achieved with hard work and can cause losing it which will decrease the society's trust towards doctors or medical service facilities. Meanwhile, in the patient's side, the effort to solve medical dispute through court often times dissatisfy them with the result they got, because the judge's verdict is considered to not fulfilling justice for the patient, this is caused by the difficulty from the patient or the public prosecutor to prove the doctor's mistake (Eddi Junaedi, 2011 : 17-18).

In the case of medical dispute, if litigation as the way to solve medical dispute considered unfavorable for all parties, then a better solution will be done through Alternative Dispute Resolution (APS), because it is considered to be more advantageous for both parties. The dispute resolution through APS is considered to be ideal for all parties in dispute due to the fact that the resolution involve all parties directly in an open dialogue, hence a joint decision is more likely to be achieved (Affandi, 2009: 59). Besides that, the meeting of all parties is private, hence it will give the sense of comfort and security to all parties involved, so that the concern about the leaking secret and the reputation that is highly needed by either the doctor or the medical service facilities can be avoided. Solving the dispute through APS can be done by discussion, namely by means of dialogue assisted by other party, in this case usually by professional organization or by the hospital. Other wait of solving the dispute through APS is by negotiation, namely where all parties agree to solve the medical dispute through negotiations, where the process doesn't involve a third party as the mediator. Meanwhile, doing APS through mediation needs a third party as the mediator or authorities.

However, when there is a misunderstanding along the process of negotiation and mediation which cause no resolution in solving the medical dispute, usually because the patient and/or the family dissatisfied with the explanation given by the medical service staff, or if the doctor/dentist and/or hospital feels like the patient and/or the family's claim is inappropriate, then the medical dispute resolution can be done though an alternative medical dispute resolution, arbitration. Juridical basis for resolving disputes through arbitration has been regulated in accordance with the Constitution No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution.

4.4. Arbitration as a medical dispute resolution option

As stated in Article 1 paragraph 1 in the Constitution No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, Arbitration is a civil dispute resolution outside the court that is based on the arbitration agreement made in writing by the parties in dispute. In Black Law Dictionary, explained as follow (Brian Gardner, 2009) "*Arbitration is the reference of a dispute to an impartial (third) person chosen by the parties to the dispute who agree in advance to abide by arbitrator's award issue after hearing at which both parties have and opportunity to be heard. An arrangement for taking and abiding by the judgement of selected persons in some dispute matter, instead of carrying it to establish tribunal of justice, an is intended to avoid the formalities, the delay, the expense and taxation of ordinary litigation*". Arbitration according to the International Law Commission is *procedure for the settlement of disputes between states by binding award on the basis of law and as a result of an undertaking voluntarily accepted* (Huala Adolf, 2006: 39). Based on those definitions, arbitration contains elements: a private dispute resolution or outside the court, on the basis of written agreement from all parties, to anticipate dispute that might happen or that has already happened, by involving third party (arbiter) who has the authority to make decision, and the nature of the decision is final and binding.

Arbitration is a dispute resolution outside the court which is based on the written agreement from all parties in dispute. Arbitration is a dispute resolution through private adjudication, in which the nature of its decision is final and binding (Munir Fuady, 2000). In the provision of Article 3 from The Constitutions No. 30 of 1999, it is stated that The District Court does not have the right to judge the dispute of all parties bound in arbitration agreement. As for the object of arbitration examination is checking the civil disputes, but not all civil disputes can be solved through arbitration, only for the disputes regarding rights that are legally controlled by parties in dispute on the basis of their agreement, as what is stated in Article 5 paragraph (1) of The Constitution No.30 of 1999 that

“disputes that can be solved through arbitration are trading disputes and disputes concerning rights which according to the law and constitution are fully controlled by the parties in dispute,” on the basis of their own agreement. Article 5 paragraph (2) stated that “disputes which cannot be solved through arbitration are disputes which according to the law and constitutions cannot be held peace.

Principally, the dispute resolution which will be done through arbitration have to fulfill the requirement that both parties in dispute agree to solve it through arbitration and this agreement is attached to the arbitration clause. Therefore, only the disputes which attach arbitration clause that can be solved through arbitration (Gatot Soemartono, 2006). With the existence of the clause, it will nullify the rights of all parties to submit the dispute resolution to the district court and the district court is obliged to refuse/ not intervene in resolving disputes that have been determined through arbitration, except the one as specified in The Constitution No.30 of 1999. There are two types of arbitration clause so that a civil dispute can be solved through arbitration process, those are:

- a. With the clause in the main agreement (the agreement can be made before a dispute arises), that contains the settlement of a dispute that may arise from the agreement, will be solved through arbitration (Article 1 Paragraph 1,3 of Arbitration Constitution), or what is commonly known as “*pactumdecompromittendo*”.
- b. With a separate agreement, other than main agreement. The agreement is made specifically if after the dispute arises in carrying out the main agreement (agreed by all parties when they are going to resolve the dispute through arbitration). This kind of agreement is known as “*akta van compromise*” (Article 2 in Arbitration Law).

After the enactment of the Constitution No. 30 of 1999 about alternative dispute resolution and arbitration, therefore in general the legal procedure for arbitration is not the same with the procedure in District Court. Regarding the applicable procedure before the tribunal arbitration regulated in Chapter IV of Law No.30 of 1999 concerning the alternative dispute resolution and arbitration, starting from articles 27-58. In general, the following is “*that in principle all examinations of disputes by arbiter or tribunal arbitration are conducted in a closed manner, in Indonesian language except with the consent of arbiter or tribunal arbitration to choose another language to use.*”

Different with the civil court in District Court level, the arbitration process is preceded by the submission of an arbitration application accompanied by an arbitrary appointment request to be selected by the applicant to handle the dispute in arbitration to the evidence that will be submitted by the applicant to support his application (statement of claim). What is interesting in arbitration, before the trial begins, the parties already know the position and attitude of each party as stated in the arbitration application and the answer to the arbitration request. In fact, the parties have also submitted a list of evidence to support their arguments. So that, at the arbitration hearing, the parties get the freedom to express their arguments verbally and can also include additional evidence. Arbitration is expected to be able to fulfill the sense of justice of the parties and realize the ease of dispute resolution which enters competency disputes that are allowed to be resolved by arbitration and alternative dispute resolution (Bambang Sutyoso, 2008).

The Arbitrator's decision or Arbitral Tribunal can be executed through the District Court, as stipulated in Article 67 paragraph (1) of the Arbitration Law, as the principle applies in civil procedural law, only a judgment that can be enforced by the court (*Condemnatoir*), both through the mechanism of Confiscation Execution, Seizure Auction, Confiscation of Discharges and other seizures. In Constitution No. 30 of 1999, the execution or execution of an arbitral decision is divided into 2 parts:

- a. First part about the execution of the National Arbitration Decision (Article 59 up to Article 64).
- b. The second part is about the recognition and enforcement of international arbitral awards stipulated in Articles 65 to 69.

But for both decisions both National and International, a universal provisions apply, that the arbitral decision is final and binding on the parties. It cannot be compared or appealed, as stipulated in Article 60 of the Arbitration Law. But the arbitrator's decision only has executorial power after obtaining a permit or order to be executed (*executoir*) from the court.

Before the dispute resolution process uses the way arbitration begins, the Assembly or Arbitrator must first seek peace between the two parties who are in dispute. This is also stated in article 1 of the BANI Arbitration Procedure Regulation which reads, "*... the peaceful settlement of disputes through arbitration in BANI is based on the goodwill of the parties based on cooperative and non-confrontational procedures*". This statement is also made clear in Article 20 of the Arbitration Law concerning the Effort to Seek Peace Settlement which states that the Assembly or Arbitrator is obliged to pursue a peaceful way for both parties, either on their own business or with the assistance of a third party. If this peace agreement is agreed upon, then the Assembly or Arbitrator prepares a memorandum containing both parties' peace agreement in writing. This Memorandum has legal force and binds both parties. However, if peace through the mediation path is unsuccessful and there is no agreement for peace between the parties, then the inspection procedure and the new arbitration trial can be carried out properly.

4.5. The role of BPSK in resolving medical dispute

Dispute resolution through non-litigation channels is generally carried out in civil cases because it is more private, in accordance with Article 45 Paragraph (2), namely through an institution tasked with resolving disputes between consumers and business actors. With the enactment of Law Number 8 of 1999 concerning Consumer Protection, to ensure the realization of the implementation of consumer protection, in the event of a dispute or dispute between consumers, the Consumer Dispute Settlement Agency (BPSK) was formed. BPSK was formed by the government in each district, which functions to handle and resolve disputes between consumers and business actors outside the court.

BPSK as an agency or institution currently has the duty and authority to resolve consumer disputes that have several ways of resolving or often referred to as the method of dispute resolution which include conciliation or mediation or arbitration (article 34 paragraph 4 jo article 26 to article 36 SK Memperindag Number 350 / MPP / Kep / 12/2001). In brief / outline as follows (Janus Sidabalok, 2014: 178):

- a. Through the conciliation method, the consumer dispute resolution process concerning the form and amount of compensation is left to the parties, the results of consumer and business actors deliberations are issued in the form of BPSK decisions, that the assembly only attempts to reconcile the parties in dispute, the assembly only acts as conciliator (passive).
- b. Through the mediation method that is in resolving consumer disputes outside the court through this method basically the same as the way of conciliation, only the difference between the two means is that the active assembly provides advice, guidance, advice and other efforts in resolving disputes, but the results of the decision all submitted to the parties.
- c. Through the arbitration method, namely in resolving consumer disputes outside the court through this method, the implementation is different from the way of mediation and conciliation. The Assembly acted actively to reconcile the parties in dispute.

The results of consumer dispute resolution remain in the hands of the parties. The choice of dispute resolution method by means of mediation or conciliation or arbitration is fully left to the parties to the dispute to obtain a decision or agreement to determine both the form and amount of compensation that must be received by the consumer, with an agreement that will be written in a written agreement signed by both parties the disputing party, as evidence for the making of the minutes by the BPSK clerk (Suherdi Sukandi, 2004). BPSK is obliged to settle consumer disputes submitted to him within 21 (twenty one) days from the date the claim is received by BPSK, when requested to determine the execution at the district court at the place of the consumer who is at a disadvantage. While the decisions of the BPSK assembly are final and binding. What is meant by the verdict of the assembly is final is that in BPSK there are no appeals and cassation. Regarding the execution of the decision in the event that the business actor accepts the BPSK decision, then one is obliged to carry out the decision within 7 (seven) working days as of receiving the BPSK decision (article 56 paragraph 1 UUPK jo article 41 paragraph 4 SK Memperindag No. 350 / MPP / Kep / 12/2001). If the business actor does not use an objection effort, then the BPSK decision becomes a permanent legal force. The

ruling was not carried out, moreover after filing fiat execution based on article 57 UUPK was a criminal act in the field of consumer protection.

4.6. Arbitration Medical Dispute Settlement Procedure at the Consumer Dispute Settlement Agency (BPSK)

In the process of proceedings by means of arbitration, the parties fully submitted to the BPSK Assembly to decide and resolve the medical dispute that occurred. The selection process of the BPSK Assembly by arbitration is carried out by means of (Article 32 of the Decree of the Minister of Industry and Trade Number 350 / MPP / Kep / 12/2001): first the parties choose an arbitrator from the BPSK Assembly member, second is the arbitrator chosen by the parties then choose the third arbitrator from BPSK members from the Government elements as Chair of the BPSK Assembly.

The principle of procedures for resolving medical disputes by arbitration is carried out through 2 (two) trials, namely the first trial and the second trial (Bambang Sutiyoso, 2006: 179- 182). At the first trial, namely:

- a. Obligations of the BPSK assembly provide guidance on legal remedies for both parties (article 33 paragraph 1 of the Decree of the Minister of Industry and Trade Number 350 / MPP / Kep / 12/2001)
- b. Obligation of the BPSK assembly to reconcile the two parties (Article 34 of of the Decree of the Minister of Industry and Trade Number 350 / MPP / Kep / 12/2001). In the event that peace is achieved, the results of the peace agreement must be made by the BPSK assembly (article 35 paragraph 3 of the Decree of the Minister of Industry and Trade Number 350 / MPP / Kep / 12/2001)
- c. Revocation of consumer lawsuit is done before the business actor gives an answer, poured in a statement accompanied by the obligation of the BPSK panel to announce the revocation of the claim in the trial (article 35 paragraph 1 and 2 of of the Decree of the Minister of Industry and Trade No. 350 / MPP / Kep / 12/2001)
- d. The authority of the BPSK assembly to provide equal opportunities for the pihak (principle of audi et alteram partem) article 34 paragraph 2 of the of the Decree of the Minister of Industry and Trade Number 350 / MPP / Kep / 12/2001), namely:
 1. Equal opportunity to study files relating to the trial and make closure as needed (article 33 paragraph 2 SK Memerindag Number 350 / MPP / Kep / 12/2001)
 2. Reading the contents of the consumer lawsuit and the respondent's answer letter, if peace is not achieved (article 34 paragraph 1 of the Decree of Minister of Industry and Trade Number 350 / MPP / Kep / 12/2001).

While at the second trial, namely:

- a. The obligation of the BPSK assembly to provide the last opportunity until the second hearing is accompanied by the obligation to bring the necessary evidence, if one of the parties is not present at the first hearing (article 36 paragraph 2 of the Decree of Minister of Industry and Trade Number 350 / MPP / Kep / 12/2001)
- b. The second trial was held no later than 5 (five) working days after the first trial (article 36 paragraph 2 Decree of Minister of Industry and Trade Number 350 / Mp / Kep / 12/2001)
- c. The obligation of the BPSK secretariat to notify the second trial with a summons to the parties (article 36 paragraph 3 Decree of Minister of Industry and Trade Number 350 / MPP / Kep / 12/2001)
- d. Granting consumer lawsuit, if the business actor does not come at the second trial (*verstek*), otherwise the lawsuit is aborted, if the customer does not come (article 36 paragraph 3 Decree of Minister of Industry and Trade Number 350 / MPP / Kep / 12/2001)

5. CONCLUSION

- a. In order to ensure the realization of the implementation of consumer protection, in this case if there is a dispute between consumers and business actors, according to the mandate of Law Number 8 of 1999 concerning Consumer Protection, a Consumer Dispute Settlement Agency (BPSK) is formed to resolve disputes between consumers and business actors outside the court.
- b. If the peace efforts by mediation fail in resolving medical disputes, the parties can choose the arbitration path through BPSK as an alternative settlement of disputes outside the court. The parties to the dispute are guaranteed confidentiality, have a simpler and more flexible process, effective time and costs, final and binding decision for all parties.

Suggestion:

- a. Given the many advantages of the arbitration proceedings, even though arbitration as an alternative to resolving medical disputes is not yet widely known in the community, but in medical disputes in its settlement it allows peace, if in the case of peace through mediation the parties do not find an agreement the parties can choose the arbitration pathway as an alternative to resolving medical disputes outside the general courtline.
- b. To get the results expected by the parties, good will and the compliance of the parties to the dispute over the results of the settlement that has been achieved through the arbitration mechanism, is needed, as mandated by Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution.

REFERENCES

- Afandi,D.,2009, *Mediasi :Alternatif Penyelesaian Sengketa Medis*, Majalah Kedokteran Indonesia, volume : 59, No. 5, Mei 2009
- Bryan A. Garner, 2009, *Black's Law Dictionary*, Editor in Chief Ninth Edition, st. Paul. MN : West Publishing. Co.
- Breen, J, K et.al, *Good Medical Practice Professionalism, Ethics And Law*, Cambridge University Press, New york, 2010
- Gunawan,W. dan Ahmad,Y., 2003, *Hukum arbitrase*, PT Raja Grafindo Persada, Jakarta,11-14.
- Isfandyarie,A., 2005, *Malpraktik dan Resiko Medik dalam kajian hukum pidana*, Fokus Media
- Junaidi, E., 2011, *Mediasi Dalam Penyelesaian Sengketa Medik*, Raja Grafindo Persada, Jakarta, 2011
- Shofie,Y.,2002, *Penyelesaian Sengketa Konsumen Menurut Undang-Undang Perlindungan Konsumen (UUPK), Teori dan Praktek Penegakan Hukum*, Citra Aditya Bakti, Bandung, Hlm.39
- Sidabalok, J. 2014. *Hukum Perlindungan Konsumen di Indonesia*, PT Citra Aditya Sakti Bandung
- Soemartono, G.,2006, *Arbitrase dan Mediasi Indonesia*, Gramedia, 2006
- Sutiyoso,B., 2008, *Hukum Arbitrase dan Alternatif Penyelesaian Sengketa*, 2008, Gama Media, Yogyakarta
- Undang-Undang Negara Republik Indonesia Nomor 8 Tahun 1999 tentang Perlindungan Konsumen.
- Undang-Undang Negara Republik Indonesia Nomor 30 Tahun 1999 tentang Arbitrase dan Alternatif Penyelesaian Sengketa
- Undang-Undang Negara Republik Indonesia Nomor 29 Tahun 2004 tentang Praktek Kedokteran
- Undang-Undang Negara Republik Indonesia Nomor 36 Tahun 2009 tentang Kesehatan
- Keputusan (SK) Memperindag No.350/MPP/Kep/12/2001 tentang Pelaksanaan Tugas dan Wewenang BPSK. Tanggal 10 Desember 2000

LEGAL AND HUMAN RIGHTS REVIEW OF RAPE ABORTIONS TO THE RIGHT OF LIFE FOR THE CHILD

Sultan Finekri Arifin Abidin

Student of Legal Studies Doctor Program, Universitas Borobudur

finekri@yahoo.co.id

Abstract

Human Rights are a set of basic rights that have existed since humans were born as gifts from God Almighty, and it is the duty of the state to protect and uphold Human Rights for its citizens. One of the basic human rights that cannot be reduced in any situation (non derogable rights) is the right of life that is owned by all humans, including infants who are still in the womb. But the rampant abortion carried out in Indonesia is not a new thing. There are several reasons that women use in aborting an abortion, one of the reasons being an emergency is that the woman in question is a victim of rape and the pregnancy that occurs is unwanted. Pregnancies experienced by victims are very contrary to women's reproductive rights. The pregnancy will have a negative impact which is experiencing suffering physically, mentally and socially. But on the one hand the child in the womb also has the right to life which should not be reduced even under any circumstances. Therefore, this study will discuss the regulation of abortion in positive law in Indonesia and regarding the legalization of abortion for mothers of rape victims to the right to live their children in their womb. This study has 2 (two) formulation of the problem, first; What is the regulation regarding abortion in Indonesian positive law? and second; What is the regulation regarding the legalization of abortion for women who are victims of rape?. In this study, the research method that the author uses is juridical-normative legal research, where the data studied are library materials consisting of primary legal material, secondary legal material, and tertiary legal material. Primary legal material, namely the Constitution of the Republic of Indonesia Year 1945, Law Number 39 Year 1999 concerning Human Rights, Law Number 23 Year 2002 concerning Child Protection, Law Number 36 Year 2009 concerning Health, and the Criminal Code, secondary legal materials, namely legal journals, and legal books, and tertiary legal materials, namely legal dictionaries and language dictionaries, and other legal materials.

Keywords: Abortion, Protection of Law, Human Rights, and The Right to Life.

A. INTRODUCTION

Human Rights are a set of basic rights that have existed since humans were born as gifts from God Almighty. Human rights must always be fulfilled so that it is actually the duty of the state to protect and uphold human rights for its citizens. This is the mandate of Article 28I paragraph (4) of the Constitution of the Republic of Indonesia Year 1945, which reads: "Protection, promotion, enforcement and fulfillment of human rights are the responsibility of the state, especially the government." Human rights universally interpreted as "those who are not living as human beings" by the people of the world."¹ According to Mahfud MD that human rights are defined as rights inherent in human dignity as God's creatures and those rights under humans since birth to the face of the earth so that the right is natural (natural) is not a human or state gift.²

¹ Muladi, 1997, *HakAsasiManusia, Politik Dan Sistem Peradilan Pidana*, Badan Penerbit Universitas Diponegoro, Semarang, page.1.

² Mahfud MD, 2001, *DasardanStrukturKetanegaraan Indonesia*, RienekeCipta, Jakarta, page. 127

One of the fundamental human rights that cannot be reduced under any circumstances (non derogable rights) is the right to life. The right to life is guaranteed in Article 28A of the Constitution of the Republic of Indonesia Year 1945, which reads: "Everyone has the right to live and has the right to defend his life and life." The right to life is owned by all humans, including infants who are still in the womb. Babies even though they are still in the womb also have the right to live, as well as the mother who contains the child. But the rampant abortion carried out in Indonesia is not a new thing.

According to the Law Dictionary "Abortion" is the termination or abortion of pregnancy or abortion of a child in the womb by using unlawful means, while "Abortion" is the death of a child who is in the womb because of premature birth without any intentional element in the process.³ In terms of abortion is abortion, the release of conception or premature fertilization. In the English Indonesian Abortion dictionary translated by abortion.⁴

The reason for carrying out an abortion if described, there are several reasons that are used by women in aborting both legal and illegal abortion caused by not wanting to continue the pregnancy until delivery. These reasons are like health reasons, social reasons, economic reasons and reasons for an emergency (force).⁵ One reason for the emergency is that the woman concerned is a rape victim.

Rape criminal acts can be classified into forms of violence with violence, because this crime is usually accompanied by violence / threats of violence. According to Soerjono Soekanto cited by Mulyana W. Kusuma, the cause of violent crime is the orientation of objects which gives rise to the desire to get material easily, there is no channeling of will and there is a kind of mental pressure on someone, courage to take risks, and lack of guilt and the lack of good example.⁶

The impact that is most detrimental to rape victims is the occurrence of unwanted pregnancies. Pregnancy experienced by victims is very contrary to reproductive rights. The pregnancy will have a negative impact which is experiencing suffering physically, mentally and socially. Victims experience psychological trauma and feel worthless in the eyes of society. This can encourage victims to carry out illegal abortions that can endanger the lives of the victims themselves, namely through methods other than medical, by non-medical personnel who are incompetent and at the age of the womb who do not meet medical requirements.⁷ Abortion is because the child in the womb is a child from rape to prevent the mother from carrying the child mentally traumatized, but on the one hand the child in the womb also has the right to live which should not be reduced even under any circumstances. Therefore, this study will discuss the regulation of abortion in positive law in Indonesia and regarding the legalization of abortion for mothers of rape victims to the right to live their children in their womb.

B. RESEARCH METHOD

In this study, the research method that the author uses is juridical-normative legal research, where the data studied are library materials consisting of primary legal material, secondary legal material, and tertiary legal material. Primary legal material, namely the Constitution of the Republic of Indonesia Year 1945, Law Number 39 Year 1999 concerning Human Rights, Law Number 23 Year 2002 concerning Child Protection, Law Number 36 Year 2009 concerning Health, and the Criminal Code, secondary legal

³ M. Marwan, 2009, *Kamus Hukum Dictionary of Law Complete Edition*, Reality Publisher, Surabaya, page. 10.

⁴ Echols dan Hasan Shaddily, 1992, *Kamus Inggris Indonesia*, Gramedia, Jakarta, page. 2.

⁵ Yuke Novia Langie, *Tinjauan Yuridis Atas Aborsi Di Indonesia (Studi Kasus di Kota Manado)*, Jurnal Lex et Societatis, Vol. II, No. 2, Februari 2014, page. 56.

⁶ Mulyana W. Kusuma, 1982, *Analisa Kriminologi Tentang Kejahatan-Kejahatan Kekerasan*, Ghalia Indonesia, Jakarta, page. 41.

⁷ Wiwik Afifah, *Perlindungan Hukum Bagi Perempuan Korban Perkosaan Yang Melakukan Aborsi*, DIH, Jurnal Ilmu Hukum, Vol. 9, No. 18, Februari 2013, page. 95.

materials, namely legal journals, and legal books, and tertiary legal materials, namely legal dictionaries and language dictionaries, and other legal materials.

C. PROBLEM FORMULATION

The formulation of the problems that can be discussed in this study are as follows:

1. What is the regulation regarding abortion in Indonesian positive law?
2. What is the regulation regarding the legalization of abortion for mothers of rape victims to the right to live in their womb?

D. DISCUSSION

1. Regulations Regarding Abortion in Indonesian Positive Law

The definition of abortion or *Abortus Provocatus* is the termination or expenditure of pregnancy from the womb prematurely.⁸ In other words, "expenditure" is meant that the intentional discharge of the fetus by human intervention, either through mechanical means, drugs or other means. The popular term abortion is abortion. What is meant by an act of abortion is to carry out an act that is somehow the form and method of the content of a woman which results in the birth of a baby or fetus from the woman's womb before the time is born according to nature. The act of forcing the birth of a baby or fetus is not yet time is often called *abortus provocatus* or sometimes abbreviated as abortion.⁹

Artificial abortion or abortion or also called pregnancy termination which has two kinds, namely, is illegal (*abortus provocatus criminalis*), and is legal (*abortus provocatus therapeuticus*).¹⁰ Criminal provocatus abortion is a miscarriage in the form of the release of an embryo or fetus solely not because it occurs spontaneously / naturally, but because it is intentional or occurs because of human intervention (provocation) without medical indications. The explanation is that there are medical abortion actions, if there are medical indications that show signs that the pregnancy must be aborted in order to save the life of the mother. If without medical indications it is often referred to as the term *criminalis abortus provocatus*.¹¹

The type of abortion that is not permitted and prohibited by legislation is Abortion of criminalist provocatus. The regulation on intentional abortion (*abortus provocatus*) is classified as a crime against life. According to the provisions listed in Article 346, 347 and 348 of the Criminal Code, criminalist abortion includes the following actions:¹²

1. Abortion (*afdrijving van de vrucht*).
2. Killing the womb (*de dood van vruchtveroorzaken*).

The problem of abortion is essentially not related to the values and religious norms that develop in Indonesian society. Related to positive criminal law in Indonesia, the regulation of the problem of abortion is found in Articles 346, 347, 348, and 349 of the Criminal Code, which can be described as follows:

- a. Article 346 of the Criminal Code: "A woman who intentionally aborts or kills her womb or orders other people to do so is threatened with a maximum imprisonment of four years".
- b. Article 347 of the Criminal Code:

⁸ Kusmaryanto, SCJ., 2002, *Kontroversi Aborsi*, PT Gramedia Widiasarana Indonesia, Jakarta, page. 203.

⁹ Adami Chazawi, 2004, *Kejahatan Terhadap Tubuh dan Nyawa*, PT Raja Grafindo Persada, Jakarta, page. 113.

¹⁰ Cucu Solihah dan Trini Handayani, *Kajian Terhadap Tindakan Atas Jiwa dan Bukan Jiwa (Aborsi) Menurut Hukum Pidana Islam dan Hukum Kesehatan*, Jurnal Hukum FH UNSUR Cianjur, Vol.V, No. 04, Juni-Desember 2009, page. 11.

¹¹ Natalia Eunike Melisa, *Tindak Pidana Aborsi Berdasarkan Undang-Undang Nomor 36 Tahun 2009 Tentang Kesehatan*, Jurnal Lex Crimen, Vol. VIII, No. 1, Januari 2018, page. 72.

¹² Musa Perdana Kusuma, 1981, *Bab-bab Tentang Kedokteran Forensik*, Ghalia Indonesia, Jakarta, page. 192.

- (1) Anyone who deliberately aborts or turns off the womb of a woman without her consent is threatened with imprisonment for a maximum of twelve years.
 - (2) If the act results in the death of the woman, it is threatened with a maximum of fifteen years imprisonment.
- c. Article 348 of the Criminal Code:
- (1) Anyone who intentionally uses or turns off the womb of a woman with her consent, is threatened with imprisonment for a maximum of five years and six months.
 - (2) If the act results in the death of the woman, it is threatened with a maximum imprisonment of seven years.
- d. Article 349 of the Indonesian Criminal Code: "If a doctor, midwife or pharmacist assists in committing a crime under Article 346, or helps to commit one of the crimes in Article 347 and 348, a third of the penalty can be revoked and the right to carry out a livelihood in which crime is committed ".

2. Regulations Regarding Legalization of Abortion for Mothers of Victims of Rape Against the Right to Life of Children in their Contents

Based on Article 346, 347, 348 and 349 of the Criminal Code as discussed in the previous section, it can be seen that the regulation in the Criminal Code does not allow abortion at all, including abortion carried out by women victims of rape. Because it has been formulated so, in the case of abortion carried out by rape victims, there are at least two people who are subject to criminal sanctions in accordance with the provisions contained in the Criminal Code, namely the woman herself who is pregnant because of rape and who intentionally helps the woman abort.

The formulation of rape crime is in Book II of Chapter XIV of the Criminal Code concerning crimes against decency, especially Article 285. The complete formulation of Article 285 of the Criminal Code is as follows: "Whoever is violent or threatens to force a woman to have intercourse with her outside marriage committing rape with a maximum imprisonment of twelve years."Raping is a violation of human rights because women have guarantees of reproductive rights. The guarantee is stated in Article 49 paragraph (3) of Law Number 39 Year 1999 concerning Human Rights, which reads: "Special rights inherent in women due to their reproductive functions, guaranteed and protected by law." And based on Article 72 letter c Law Number 36 Year 2009 concerning Health, which reads: "Every person has the right to determine for themselves when and how often to reproduce healthfully medically and not against religious norms."

On this basis, pregnancy that is not desired or due to rape is a violation of Human Rights because the victims of rape lose their reproductive rights and lose their reproductive health physically, mentally and socially, whereas every woman should have the right to determine her reproductive life freely, including has the right to determine his own pregnancy, so that in this case there is a need for legal protection against rape victims.

According to SatjiptoRaharjo, legal protection is to provide protection for the rights that are harmed by others and that protection is given to the community in order to enjoy all the rights granted by law.¹³ Legal protection is a guarantee or certainty that someone will get what has become the rights and obligations concerned with security. The existence of law in society is a means of creating peace and order in society, so that the relationship between one community and another can be maintained. Law is nothing but protection of human interests in the form of norms or rules.¹⁴

¹³ SatjiptoRahardjo, 2006, *IlmuHukum*, PT Citra AdityaBakti, Bandung, page. 35.

¹⁴ SudiknoMertokusumo, 2003, *MengenalHukumSuatuPengantar*, Liberti, Yogyakarta, page. 39.

But children in the womb of women have the right to live. The right to life is a human right that cannot be limited. This right is stated in the Indonesian State Constitution, namely in Article 28 (a) of the Constitution of the Republic of Indonesia Year 1945, which reads: "Every person has the right to live and has the right to defend his life and life". With the right to live, the state will safeguard and protect the rights of life of every citizen, so that the state through state law enforcement tools will act if there is a known disappearance of human life rights, and based on the provisions of Article 34 of the Constitution of the Republic of Indonesia Year 1945, that the state has an obligation to protect the dignity of the child, and according to Article 1 paragraph (1) of Law Number 23 Year 2002 concerning Child Protection, the Child is a person who is not eighteen years old including a child who is still in the womb.¹⁵

The act of abortion is actually a conflict between the right to life owned by the child in the womb and the woman's right to reproduction. The Criminal Code does not legalize abortion because the child in the womb has the right to live, but there is a need for legal protection for women victims of rape, so that when reviewing several articles in Law Number 36 Year 2009 concerning Health, it can be seen that there are exceptions to prohibition on having an abortion. The article can be described as follows:

a) Article 75 of Law Number 36 Year 2009 concerning Health:

(1) Everyone is prohibited from having an abortion.

(2) The prohibition as referred to in paragraph (1) can be excluded based on:

- a. indications of medical emergencies detected early in pregnancy, both those that threaten the life of the mother and / or fetus, those who suffer from severe genetic disease and / or congenital defects, or those that cannot be repaired making it difficult for the baby to live outside the womb; or
- b. pregnancy due to rape which can cause psychological trauma to rape victims.

b) Article 76 of Law Number 36 Year 2009 concerning Health: Abortion as referred to in Article 75 can only be done:

- a. before pregnancy is 6 (six) weeks counted from the first day of the last menstruation, except in the case of medical emergencies;
- b. by health workers who have the skills and authority that have certificates set by the minister;
- c. with the consent of the pregnant mother concerned;
- d. with the husband's permission, except the rape victim; and
- e. health service providers that meet the conditions set by the Minister.

Based on the article above, it can be seen that although basically based on the Criminal Code and Law Number 36 Year 2009 concerning Health, abortion is prohibited to be carried out, but in order to guarantee legal protection for women victims of rape, based on Law Number 36 Year 2009 Regarding Health, the prohibition in carrying out abortion can be excluded, but the exception in question must fulfill the conditions as stipulated in Article 75 paragraph (2) and Article 76 of Law Number 36 Year 2009 concerning Health. If these conditions cannot be fulfilled, the acts of abortion carried out include illegal actions and those who do so will get criminal sanctions.

E. CONCLUSION

The conclusion that can be given by the author on the discussion of this study is Article 346, 347, 348, and 349 of the Criminal Code is articles that prohibit the act of abortion, as well as Article 75

¹⁵ Trini Handayani, *Perlindungan Dan Penegakan Hukum Terhadap Kasus Kekerasan Seksual Pada Anak*, Jurnal Hukum Mimbar Justitia, Vol. 2, No. 2, 2017, page. 829.

paragraph (1) of Law Number 36 Year 2009 concerning Health. An abortion is an accidental abortion (*abortus provocatus*) because the action is included in a crime against life. But in order to protect the legal interests of women who are victims of rape whose pregnancies are not desirable, the prohibition in carrying out abortion can be excluded by the conditions as stipulated in Article 75 paragraph (2) and Article 76 of Law Number 36 Year 2009 concerning Health. All these conditions must be met, because if they are not fulfilled, then the abortion that is carried out includes illegal actions and the parties who do it will get criminal sanctions.

REFERENCES

A. Book

- Adami Chazawi, 2004, *Kejahatan Terhadap Tubuh dan Nyawa*, PT Raja Grafindo Persada, Jakarta.
- Echols dan Hasan Shaddily, 1992, *Kamus Inggris Indonesia*, Gramedia, Jakarta.
- Kusmaryanto, SCJ., 2002, *Kontroversi Aborsi*, PT Gramedia Widiasarana Indonesia, Jakarta.
- Mahfud MD, 2001, *Dasar dan Struktur Ketatanegaraan Indonesia*, Rineke Cipta, Jakarta.
- Muladi, 1997, *Hak Asasi Manusia, Politik Dan Sistem Peradilan Pidana*, Badan Penerbit Universitas Diponegoro, Semarang.
- Mulyana W. Kusuma, 1982, *Analisa Kriminologi Tentang kejahatan-Kejahatan Kekerasan*, Ghalia Indonesia, Jakarta.
- Musa Perdana Kusuma, 1981, *Bab-bab Tentang Kedokteran Forensik*, Ghalia Indonesia, Jakarta.
- M. Marwan, 2009, *Kamus Hukum Dictionary of Law Complete Edition*, Reality Publisher, Surabaya.
- Satjipto Rahardjo, 2006, *Ilmu Hukum*, PT Citra Aditya Bakti, Bandung.
- Sudikno Mertokusumo, 2003, *Mengenal Hukum Suatu Pengantar*, Liberty, Yogyakarta.

B. Journal

- Cucu Solihah dan Trini Handayani, *Kajian Terhadap Tindakan Atas Jiwa dan Bukan Jiwa (Aborsi) Menurut Hukum Pidana Islam dan Hukum Kesehatan*, Jurnal Hukum FH UNSUR Cianjur, Vol. V, No. 04, Juni-Desember 2009.
- Natalia Eunike Melisa, *Tindak Pidana Aborsi Berdasarkan Undang-Undang Nomor 36 Tahun 2009 Tentang Kesehatan*, Jurnal Lex Crimen, Vol. VIII, No. 1, Januari 2018.
- Trini Handayani, *Perlindungan Dan Penegakan Hukum Terhadap Kasus Kekerasan Seksual Pada Anak*, Jurnal Hukum Mimbar Justitia, Vol. 2, No. 2, 2017.
- Wiwik Afifah, *Perlindungan Hukum Bagi Perempuan Korban Perkosaan Yang Melakukan Aborsi*, DIH, Jurnal Ilmu Hukum, Vol. 9, No. 18, Februari 2013.
- Yuke Novia Langie, *Tinjauan Yuridis Atas Aborsi Di Indonesia (Studi Kasus di Kota Manado)*, Jurnal Lex et Societatis, Vol. II, No. 2, Februari 2014.

C. Legislation

- Indonesia, The Constitution of the Republic of Indonesia Year 1945
- _____, Law Number 39 Year 1999 concerning Human Rights
- _____, Law Number 23 of 2002 concerning Child Protection.
- _____, Law Number 36 of 2009 concerning Health.
- Criminal Code.

The Enforcement of Criminal Law over Corporate Crime Conducted by State-Owned Corporations Manager

Tb Boy B. Ariffin

Student of Legal Studies Doctor Program, Universitas Borobudur
tbbariffin@bukitasam.co.id

Abstract

The role of corporations dominate everyday life, let alone the increasing privatization. Nowadays, a country did not provide needs, but corporate, especially state-owned corporation, that is State-owned Enterprises are expected to increase the state wealth and the welfare of Indonesian people. Using the mechanism of Economical Structure and politics can encourage the growth of massive corporation power. Based on its background, it could raises legal issues, namely, how the application of the current criminal law enforcement in the face of criminal acts of corporations who perform criminal acts as well as how a formulation of criminal law policy in the face of corporate criminal acts in the future. The research method used in this study is *Yuridis Formil* using secondary data. The data collection is done by collecting and analyzing study materials as well as related documents. Furthermore, collected data is analyze cumulatively normative to interpret and reconstruct the statement contained in the criminal acts of the Corporation. If we pay attention and delve onto the Corporate Law, namely Company Law, State-owned Enterprise Law, would be found an inconsistency between punishment determination to the accused corporation and the lack of uniformity in deciding of when exactly a corporation can be said to be accountable and sentenced for criminal act, also the formulation of criminal type that can be charge against the accused corporation. With the released rules of The Supreme Court Number 13 year 2016, about the ordinance the matter a criminal offence by The Supreme Court of Corporate. Handling the matter with Corporate Law as the subject, currently become a hot topic to be discussed. The difference of perspective in each of prosecutor of the offence against the Corporate Law becomes an issue, because the prosecutor only cling to Criminal Code Procedures, where the crime is addressed only to the accused person/manager of the stated organization. The released rules of The Supreme Court can be a way to address the corporation with the crime, because this rules are released as the guide for prosecutor to charge against the corporation that do the crime as well as filling the gap in law for handing such corporate crime. Corporate Legal in House Counsel, become instrumental in mapping the business activity to be always comply with the Act of Law related to the company's core businesses. From that point on, the understanding of corporate law is needed in order to avoid such legal issues for State-owned Enterprise business activity, and help to realizing the Good Corporate Governance in State-owned Enterprise.

Keywords: Enforcement of Law, Corporate Law, Good Corporate Governance, State-owned Enterprise.

A. INTRODUCTION

State-owned Enterprises are already known in business field since decades ago in Indonesia. In the beginning, State-owned Enterprises is a place where Ministerial of Indonesia doing business to simplify the logistic matters, and to gain profit for the corporations itself.

If we look through history, a few centuries ago to be exact, the birth of Industrial Revolution has pushed the growth of corporation as the legal entities and economic entities. If we remember, VOC that founded by the Dutch on 1602 can be seen as the pioneer of corporation (business) that stand below the

Dutch Government, to doing business in spices and produced goods in Indonesia, which is fully funded by the Dutch Government, with capital and share permanent.¹

State-owned Enterprises give a lot of contribution in economic growth of a country in a form of tax and foreign exchange, so the impact of corporation seems very positive.²

State-owned Enterprise can increase the state wealth and absorb many worker. Large scale State-owned Enterprise is not only gain so much profit, but also have a social and political power in a way that every activity of stated corporation, can affect the life of every people from their birth into their death. A large scale and strategic State-owned Enterprises can control the work-life and safety of every people, either directly or indirectly, such as PERTAMINA, PLN, MIGAS, BULOG, FARMASI, PERKEBUNAN, PERTAMBANGAN, JASA KEUANGAN, PROPERTY, etc.

Nowadays, there are a few State-owned Enterprise has become a Multinational Corporations, and give political influence towards Indonesian Government, and Foreign Government where the corporation operates.³

Loss because of the corporate crime often hard to be estimated because the effect of those crimes as multiplied, while the punishment in a form of jail time and fines that has to be paid does not really show their level of crime. If we take an illustration from FBI, the losses because of thief and robbery in United States of America are 3 Billion Dollars a year in average. While the losses because of corporate crime ranged from 200 – 500 Billion Dollars. American Corruption Eradication Commission has punished 87 from 609 cases that brought to justice court. Therefore, the average confinement sentence for 64 months for nonviolent criminals who first committed a crime.⁴

Corporate crime that used to form is a white-collar crime, usually done by company or legal entities who operates in business field with an act that contradict with an active criminal law. Based on experience of many developed countries, the act of corporate crime could be identified as the offense of monopoly act, computer-based fraud, payment of tax and customs, the offense of price regulations, mass-produce of dangerous/hazardous products for health, corruption, bribery, administration offense, labor offense, and environmental poisoning.⁵

The topic of Corporate Crime is important to be discussed, especially with the recent renewal of the Criminal Code that is already on the hands of President. The role of corporation dominate everyday life, let alone the increasing privatization, the country did not provide, corporation does. There are no dividing in the enforcement of the Corporate Law in the State-owned Enterprises, whether as the organizer of government, or as an investor. State investment towards State-owned Enterprises have not gotten the equal treatment as private investment towards Limited Liability Company. This sort of matters is crucial, especially related to the losses of the state. This kind of problem is often fright the Management of State-owned Enterprises in decision-making process with the reason of one simple mistake or miscalculation can brought them to justice because of the corruption crime.

Efforts to prosecute an accountable corporation is always been a priority, but it always face various obstruction, such as law immunity for some people/person. In order to stop the weakness of legal system, a comprehensive rules of accountability that includes all sort of crime for State-owned Enterprises need to be made.⁶

¹ Clinard and Yeager on LS. Susanto, *Corporate Crime*, BP UNDIP, Semarang, 1995, pg 15.

² Setiyono, *Corporate Crime (Victimology Analysis and Corporate Liability In Criminal law of Indonesia)*, Bayumedia Publishing, Malang, 2005. pg. 1.

³ Clinard and Yeager on Sutan Remi Sjahdeini, *Op. Cit.*, pg 3.

⁴ *Corporate Crime and Constitutional Rights*, <http://pithoyoadhi.wordpress.com>, 15 November 2010.

⁵ Gobert dan Punch, *Rethinking The Corporate Crime*, <http://maswig.blogspot.com>, 21 November 2010.

⁶ Abdul Hakim Garuda Nusantara, *Corporate Crime in Draft Legislation of Criminal Code*, Forum Notes Group Discussion, Bandung, 2005. Pg 3.

Another Acts follows the stated Act, such as Act number 7/drt. 1955 on Economic Crime, Act number 5 of the year 1984 on Industry, Act number 6 of the year 1984 on Post, Act number 9 of the year 1985 on Fisheries, as amended by Act number 31 of the year 2004, Act number 7 of the year 1992 concerning Banking, as amended by Act number 10 of the year 1998, Act number 8 of the year 1995 about Stocks Market, Act number 10 of the year 1995 concerning Customs, Act number 5 of the year 1997 concerning Psychotropic Substances, Act number 22 of the year 1997 on Psychotropic Substances, as amended by Act number 35 of the year 2009, Act number 23 of the year 1997 about Environmental Management, as amended by Protection and Management of Environment, Act number 5 of the year 1999 on Prohibition of Monopolies and Unhealthy Business Competition, Act number 8 of the year 1999 concerning Consumer Protection, Act number 31 of the year 1999 about Eradication of Criminal Acts of Corruption, as amended by Act number 20 of the year 2001, Act number 8 of the year 2010 concerning Prevention and Eradication of the Money Laundering Crime. Special Acts outside of Criminal Code (KUHP) that regulates about the accountability of its actions that causes losses (Corporate Crime).⁷

The rules and regulations in the stated Acts before is formulated in any means possible to ensnare the accountable corporate that offended the law, but the crime regulation in those stated Acts imposed only on a practical level, not at the policy level. The problem shows when the crime is placed as an *Ultimum Remedium* on practical level, that could be easily discriminated in the court of justice even if the prosecuted is proved violate the legislation, the criminal offense against corporation could be ignored if the court ruling out that another field of law functioned better than the criminal offense.⁸ Corporations as a non-state actor has an impunity such is law immunity for any form of crime, so even if the corporation is proved for the criminal offense, it would not face any maximum prosecution.⁹

Whatever crime committed, the victim is always the one who suffered losses the most affected by the crime. The victim counts is always increasing in a way of the crime growth. Similarly, the crimes committed by the Corporation that raises corporate crime victims will suffer losses. The losses that suffered by the victim of corporate crime is harder than any conventional crime to be detected. According to Clinard and Yeager, in an ordinary crime, the victim knows that the related suspect was a victim from its kind of crimes before.¹⁰

The victim of corporate crime, both direct and indirect, need to be given special attention from all the involved parties in the law enforcement, especially those involved corporations. This is because the corporate crime is harder to be detected therefore will face many kinds of obstruction in the future. In addition according to Arief Amrullah, the result that brought by conventional crime, i.e. death or injury as a result of a production flaw, then the determination of prices by the Corporation. And many victims due to corporate crime.¹¹

The lack of decisive action provided by law enforcement agencies against various corporate crimes is alarming because the impact that corporate crime does is huge. Therefore, the means that committed by the Criminal Code renewal team nowadays that give the decisive actions not only for person (naturalijk person) but also for the legal entities (recht person) is deserved an enthusiastic response. Through the Criminal Code renewal, the chance to widening the kind of crimes that can be committed by corporations is open, confirming what kind of crimes that a corporate can be accountable for by the Criminal Offense,

⁷ Barda Nawawi Arief, *Capita Selecta of Criminal Law*, Citra Aditya Bakti, Bandung, 2003, pg.223-226.

⁸ Human Rights Commission, *The Institute studies and Advocacy Community (ELSAM)*, PAHAM Universitas Padjajaran, KAHAM Universitas Diponegoro, PUSHAM Universitas Surabaya, *Corporate Crime in Draft Legislation*, ELSAM, Bandung, 6 December 2005. Pg.21

⁹ A.H. Semendawai, *Corporate Criminal Liability in Draft Legislation of Criminal Code*, Position Paper Advocate Draft Legislation KUEP Seri #6, ELSAM, Jakarta, 2005., pg 3.

¹⁰ Clinard and Yeager on Sutan Remi Sjahdeini, *Op. Cit*, pg 4.

¹¹ Arief Amrullah, *Corporate Crime (The Hunt For Mega-Profit and The Attack on Democracy)*, Bayumedia Publishing, Malang 2006, pg. 129.

also to choose the correct kind of criminal offense that can give justice for the victims and deterrent effect for the other corporations.¹² Based on the above description, there shows some kind of problem related to the corporate crime, therefore the writer would try to analyze it in a form of research titled “The Enforcement of Criminal Law over Corporate Crime conducted by State-owned Corporations Manager”.

Based on the above description, here are the problem formulation for this research: how the policy formulation of the current criminal law to deal with criminal acts of the Corporation? How the implementation of the current criminal law against the corporations that offended the criminal law? In addition, how the policy formulation of criminal law for the future corporate criminal law violators?

B. RESEARCH METHOD

This research is using the juridical normative which is literate¹³, by inventories and examine or analyzing secondary data in a form of materials.

Primary law and secondary law materials by understand that law as a regulatory device or positive principles in a legislation that regulate the human life. In addition to that is the uses of comparative approach that used as a comparison to choose the path of the future policy.

1. Research Specification

This research specification is a descriptive analysis research, which is a research that draw and analyzing the current law, and included in library research that would be presented descriptively.

This descriptive analysis-writing intended to delineate, describe, discuss, and outlines with precise and clear though about corporate crime. A descriptive research that is intended to provide a very thorough data on humans, circumstances or other symptoms with a view mainly to reaffirm hypotheses in order to assist in the strengthening the old theories or in drawing up new theories.¹⁴ Then do the interpretation as well as the analysis of the data collected in order to find answers to problems that are examined.

2. Source of Law Material

This research is included in the normative law research; therefore, the data used in this research is secondary data. The secondary data that being examined in this research are:

a. The primary material law is consisted of legislation in a form of Acts or Law. This Material is needed to obtain the base of Law to answer the problems being researched. The primary law material being used are:

1. Criminal Code (KUHP);
2. Act number 19 of the year 2005 concerning State-owned Enterprises;
3. Act number 40 of the year 2007 concerning Incorporated Company;
4. Act number 17 of the year 2003 concerning State Finance;
5. Act number 20 of the year 2001 about the changes to the Act No. 31 of the year 1999 about the Eradication of Criminal Acts of Corruption;
6. Act number 8 of the year 2010 about Prevention and Eradication of Criminal Acts of Money Laundering;

b. Secondary Law Material

Secondary law material is the material that gives an explanation about the primary law material. Not binding, but can be used as a support for primary law material. The secondary law material is consisted of books, articles from a journal or newspaper, magazines, internet media, and the result of another research, the works from legal circles about criminal act of corporations,

¹² A.H. Semendawai, *Op. Cit.*, pg. 4-5.

¹³ Sri Mamudji, et al., *Research Method and Legal Writing*, (Jakarta: Publishing Agency of Law Faculty University of Indonesia, 2005, pg. 32.

¹⁴ Soerjono Soekanto, *Introduction of Legal Research, Cet.1*, (Jakarta: Universitas Indonesia Press, 1984),, pg 52.

especially for State-owned Enterprises Manager. This secondary book material is needed to obtain theoretical and base concept for the examined problem.

c. Tertiary Law Material

Tertiary law material gives a deeper explanation about the primary and secondary law material, such as:

1. Indonesian Encyclopedic;
2. Legal Dictionary;
3. English – Indonesian Dictionary;
4. Indonesian Language Dictionary.

3. Data Collecting Method

According to the secondary data as the data source for this research, then the data collecting procedure is committed by using literate study and document study by collect and analyze both the literate material and also related document. Secondary data, either related to the primary, secondary, or tertiary law material are all obtained by literate study and document study.

4. Data Analyzing Method

Data analyzing in this research is committed by qualitative, which is a research method that resulting in analyzes descriptive data that is everything that written or spoken by respondents and their behavior is examined and studied as a whole.

The term analyzes means, as an explanation and interpretation by logic, systematic; logic systematic shows a deductive-inductive way of thinking and follows the rules of writing a scientific research report. After analysis of the research has been done, the result will be presented descriptively, in other words by telling and describing as it is according to the researched problem.¹⁵ From the aforementioned result, the conclusion can be taken as an answer to the problem raised by this research.

5. Data Validation

Validation in this research is using a triangulation method, this kind of method is used when 2 (two) assumptions are available, which is first, in the approaching level, triangulation technique is used due to the desire to do research using the two methods at once, namely quantitative and qualitative research method. This can be happening due to each method has its own strength and weaknesses, and have a different suggestion and opinion in looking and responding to a problem. One problem could have been looked different by one method and the other. Therefore, it would be very useful if both different method used together in response to a problem so that was expected to be able to produce a more complete and perfect result. The second assumption is underlying the uses of triangulation technique that is on analyzes data collection. Researcher can push on either qualitative method and quantitative method, or even both of them. If researcher choose to push through qualitative method, quantitative method can be used as a facilitator in helping the research activity, and *vice versa* by using quantitative method.

D. DISCUSSION

1. Current Criminal Act Formulation Policy against Criminal Act of Corporation in State-owned Enterprises

In the first part of this writing have been expressed that the current Criminal Code (KUHP) does not treat corporation as a subject of criminal act, however legal growth outside of Criminal Code in a form of Act of Special Crime has been embraced the corporation as a subject of criminal act.

¹⁵ H.B. Sutopo, *Qualitative Research Method Ch. II*, UNS Press, Surakarta, 1988, pg.37

The growth also affecting the growth of accountability of criminal act of corporation in a way of corporate criminal in State-owned Enterprises. The rules and regulations who adhere to corporations as a subject of criminal law that is included on Act number 7/Drt. of the year 1955 concerning Economic Crime, Act number 5 of the year 1984 on Industry, Act number 6 of the year 1984 on Post, Act number 9 of the year 1985 on Fisheries, as amended by Act number 31 of the year 2004, Act number 7 of the year 1992 concerning Banking, as amended by Act number 10 of the year 1998, Act number 8 of the year 1995 about Stocks Market, Act number 10 of the year 1995 concerning Customs, Act number 5 of the year 1997 concerning Psychotropic Substances, Act number 22 of the year 1997 on Psychotropic Substances, as amended by Act number 35 of the year 2009, Act number 23 of the year 1997 about Environmental Management, as amended by Protection and Management of Environment, Act number 5 of the year 1999 on Prohibition of Monopolies and Unhealthy Business Competition, Act number 8 of the year 1999 concerning Consumer Protection, Act number 31 of the year 1999 about Eradication of Criminal Acts of Corruption, as amended by Act number 20 of the year 2001, Act number 8 of the year 2010 concerning Prevention and Eradication of the Money Laundering Crime. Special Acts outside of Criminal Code (KUHP) that regulates about the accountability of its actions that causes losses (Corporate Crime).¹⁶

This of course bring consequences that can be charged for criminal responsibility of corporations against corporate crime. From the rules and regulations that treat corporation as a subject of criminal law, writer focusing this research on Act number 23 of the year 1997 concerning on Environmental Management as amended by Act number 32 of the year 2009 concerning Protection and Management of Environment, Act number 8 of the year 1999 concerning Consumer Protection, Act number 31 of the year 1999 in connection with Act number 20 of the year 2001 concerning Eradication of Criminal Acts of Corruption and Act number 8 of the year 2010 concerning Prevention and Eradication of the Money Laundering Crime.

a. Act number 23 of the year 1997 concerning Environmental Management as amended by Act number 32 of the year 2009 concerning Protection and Environmental Management

Formulation of the Corporation as the subject of a criminal offence is contained in section 116 reads:

- (1) If the crime against the environment is committed by, for, or by the name of corporation, the charge for a crime is pointed towards:
 - a. Corporation; and/or
 - b. Person in charge of doing the crime or person who led the activity of the crimes.
- (2) If the crime against environment as mentioned in article (1) is committed by person, based on work relation or another relation that act in corporate work circles, criminal punishment would be charged towards the person in command or leader in the stated crime without concerning the crime is committed either as individual or together.

On the above regulation is clearly said that corporate is called business entity, it is either legal entities or non-legal entities, incorporated company, union, foundation, or other organization.

b. Act number 8 of the year 1999 concerning Consumer Protection

Act of Consumer Protection is mainly a form of protection for consumer of goods and services that produced by corporation, the potential victim from a crime committed by corporation. The perpetrator of this criminal offense is often called by the phrase “trader”, as mentioned on section (1) sub-section 3 reads:

¹⁶ Barda Nawawi Arief, *Capita Selecta Criminal Law*, Bandung, Citra Aditya Bakti, 2003, pg. 223-226

“Trader is a person or corporation, either in a form of legal entities or non-legal entities that founded and operates or do business activity in the area of Republic of Indonesia, either as individual or together through a contract to do business activity in an economic field”.

In article 61 further determined that: “the charge of crimes can be pointed towards trader and/or its manager”. From the aforementioned regulation is stated that corporation is a subject of criminal act in the Act of Consumer Protection. This legislation provides guidelines for consumers and businessmen in order to create a relationship that goes well and mutual benefit between the businessmen with the Corporation. Therefore, in chapter III be organized regarding the rights and obligations of the consumer (article 4 and 5) and trader (article 6 and 7), which is the complete formulation is as follows:

Article 4

Consumer rights are:

- a. The rights to comfort, security, and safety in consuming the goods and/or services;
- b. The rights to choose goods and/or services also get the goods and/or services according with their promised price and condition;
- c. The rights for correct, clear and honest information about the condition and warranty of the goods and/or services;
- d. The rights to be heard on their suggestion and complaint over the goods and/or services.
- e. The rights to get an advocate, protection and solution of a conflict or consumer protection;
- f. The rights to get consumer education and coaching;
- g. The rights to be treated or served properly and honestly and not discriminatory;
- h. The rights to get compensation, compensation and / or reimbursement, if the goods and / or services received are not in accordance with the agreement or not as appropriate;
- j. The rights that regulated in other statutory provisions;

Article 5

The obligation of consumers is:

- a. To read or follow the instructions for information and procedures for the use or use of goods and/or services, for security and safety;
- b. in good faith in paying for goods and/or services;
- c. paying according to the agreed exchange rate ;
- d. Following the efforts to properly settle the law on consumer protection disputes.

Article 6

The rights of trader is:

- a. The right to receive payments in accordance with the agreement on the conditions and exchange rates of traded goods and/or services;
- b. The right to legal protection from the actions of consumers who have bad intentions;
- c. The right to defend themselves properly in the settlement of consumer dispute law;
- d. The right to good reputation rehabilitation if legally proven that consumer losses are not caused by goods and/or services traded;
- e. The rights stipulated in the provisions of other legislation.

Article 7

The obligation of trader is:

- a. Good intention in conducting their business activities;
- b. Providing true, clear and honest information about the conditions and guarantees of goods and/or services and providing explanations for use, repair and maintenance;
- c. or serving consumers correctly and honestly and not discriminatory;

- d. Guarantee the quality of goods and/or services produced and or traded based on the provisions of the quality standards of applicable goods and/or services;
- e. Provide opportunities for consumers to test, and/or try certain goods and/or services. In addition, provide guarantees and/or guarantees for goods made and/or traded;
- f. Provide compensation, compensation and/or reimbursement for losses due to the use, use and utilization of traded goods and/or services.
- g. Provide compensation, compensation and/or reimbursement if the goods and/or services received or utilized are not in accordance with the agreement.

c. Act number 31 of the year 1999 in connection with Act number 20 of the year 2001 concerning Eradication of Crime of Corruption

In the preamble of the Act a criminal offence of corruption has been revealed that the criminal offence of corruption is very detrimental to the finances of the State or the economy of the country and hindering national development, as well as inhibiting the growth and survival of national development that demands high efficiency so that must be eradicated in order to realize a just and prosperous society based on Pancasila and the 1945 Constitution of the Republic of Indonesia. Therefore, the eradication of criminal acts of corruption continue to experience renewal so that it can be applied effectively in the prevention and eradication of criminal acts of corruption.

In Act No. 31 of the year 1999 Jo. Law No. 20 Year 2001 which replaced Act No. 31 of the year 1999 about the eradication of criminal acts of Corruption there is a new provision that was previously not set in previous legislation, among other things:

Subject criminal acts in the form of corporations as provided for in article 20 paragraph (1).

- (1) existence of the burden of proof was reversed, the defendant has the right to prove that he is not doing criminal acts of corruption, as provided for in article 37 that reads:
- (2) The defendant has the right to prove that he is not doing criminal acts of corruption.
- (3) In the rights of the defendant can prove that he is not doing criminal acts of corruption, then the authentication used by the Court as a basis for stating that the claim is not proven.
- (4) the threat of criminal sanctions heavier form of life imprisonment and/or a maximum fine of Rp 1 billion (one billion dollars), as provided for in article 12, which reads: "are convicted with imprisonment for life or imprisonment of most short period of 4 (four) years old and most 20 (twenty) years and criminal fines of at least RP 200 million rupiah (two hundred million rupiah) and at most RP 1,000,000,000 (one billion dollars)"
- (5) Gratuities as criminal acts, as provided for in article 12B subsection (1) which reads: "any gratuity to civil servants or the organizers of the country considered taking bribes, when"

Understanding the Corporation contained in article | the numbers | which reads: "the Corporation is a group of people and organized wealth or good is a legal entity or not legal entities". Formulation of the Corporation as the subject of a criminal offence is governed expressly by article 20 paragraph (1), where it is determined that "in terms of criminal acts of corruption committed by or on behalf of a corporation, the claim and the overthrow of the criminal can be made against Corporation and/or its administrator ". The clear provisions of the Corporation may be prosecuted and sentenced for criminal in proven criminal acts of corruption.

Legislation the eradication of criminal acts of Corruption have been expressly specify the criminal offence can be said to be a criminal act committed by the Corporation. This is regulated in article 20 paragraph (2), which reads:

"The criminal acts of corruption committed by the Corporation when the crime was committed by people either on the basis of the working relationship or other relationship, act in the corporate environment alone as well as together".

The Corporation can incur criminal liability if the individual committing the criminal corruption of the working relationship or other relationship other than a working relationship with the Corporation. Regarding the criminal can be dropped to the Corporation itself is a form of criminal fines as provided for in article 20 paragraph (7), which reads: "the criminal subject matter that can be dropped to the Corporation only criminal with a fine, provided the maximum criminal 1/3 plus (one per three) ".

In addition, the Corporation may also be subject to additional criminal as provided for in article 18 that includes:

- 1) deprivation of the tangible chattels or intangible or immovable goods used and retrieved from the criminal acts of corruption, including companies belonging to convict corruption crime nowhere do, as does the price of the goods replacing such goods;
- 2) the substitute payment) amount of running mates with property obtained from the criminal acts of corruption;
- 3) closure of the business or part of the company in writing within one (1) year;
- 4) Repeal all or some specific rights or removal of a portion of certain profits, which have been or may be provided by the Government to the convicted person.

e. Law No. 8 Year 2010 on prevention and eradication of the crime of money laundering

Formulation of the Corporation as the subject of a criminal offence is contained in article 6 paragraph (1), which reads: "in terms of the crime of money laundering as referred to in article 3, article 4 and article 5, performed by the criminal Corporation, dropped against corporations and/ or Corporate Controller Personnel. "These provisions demonstrate that the Act a criminal offence of money laundering has been determining the Corporation as the subject of a criminal offence and can result in criminal sanctions.

This legislation also has to determine when a criminal act can be said to be a criminal act committed by the Corporation. This provision is set out in article 6 paragraph (2), where it is determined that:

"The criminal was dropped against the corporations if the criminal offence of money laundering:

1. conducted or ordered by the Governing Corporate Personnel;
2. carried out in the framework of the fulfillment of the goals and purpose of the Corporation;
3. conducted in accordance with the duties and functions of the offender or the giver of orders;
- or
4. Is done with the intention of providing benefits to the Corporation. "

Thus, the new Corporation can incur criminal liability if the criminal offence of money laundering committed Trustees is entering within the scope of his business, in accordance with the articles of the Corporation.

The criminal subject matter that could be meted out to the corporations that make money laundering provided for in article 7 of the Act a criminal offence of money laundering, which is the complete formulation is as follows:

- (1) The principal criminal against criminal Corporation is a maximum fine of Rp. 100,000,000,000.00 (one hundred billion rupiah). In addition to criminal fines referred to in subsection (1), the Corporation may also dropped an additional form of criminal:
 - a. announcement of the decision of the judge;
 - b. freezing some or all of the business activities of the Corporation;
 - c. revocation of business license;
 - d. the dissolution of the Corporation and/or banning of the Corporation;

- e. deprivation of Corporate assets for the State, and/or
- f. Corporate takeover by the State.

In the revised Act is criminal, criminal fines in the form of principal has been set regarding alternative criminal in criminal fines are not implemented by the governing corporate personnel. This is contained in article 8, which States that: "in terms of property is not sufficient to convict the criminal pay a fine as stipulated in article 3, article 4 and article 5, criminal fines for criminal confinement is replaced with the longest | (one) year 4 (four months)."

Being an alternative to the criminal when a criminal fine of not executed by the Corporation then against the Corporation according to the provisions of article 9 may be subject to:

- (1) In the event that the Corporation was not able to pay criminal fines referred to in article 7 paragraph (1), criminal fine is replaced with the deprivation of Property belonging to the Corporation or the Corporation's Governing Personnel whose value is equal to the verdict of the criminal fine being dropped.
- (2) In the event of the sale of Property belonging to the Corporation which was taken as mentioned in paragraph | insufficient substitute confinement, criminal fines meted out against the Governing Corporate Personnel taking into account the fines have been paid.

2. Application/Implementation Of Criminal Law Enforcement During This Against The Corporations Who Do The Crime

The principle of no criminal without any errors need not be too stiff enacted corporate responsibility in considering aspects of victimology corporate crime is so widespread. The application of criminal liability to the Corporation rigorously can be a factor that will add kriminogen rampant corporate crime.

Subjective in terms of criminal liability will include the ability of responsible, deliberate forgetfulness/and there is no reason for forgiving. If this is used, then it will remain: first, in criminal liability must be accepted the concept of offender functional (functional *daderschap*). Characteristic of the perpetrator of this functional i.e. physical deeds of one (which actually do) generate functional deeds against another. Thus the ability of responsible people who do for and on behalf of corporate transitioned into the ability of the responsible corporation as the subject of a criminal offence. Against this concept, Muladi concretely recommend to see if deeds according to the purpose of the Statute and the company or by the company's policy, and the most important is when such action is in accordance with the scope of the work of the company. In other words, when the Act was forbidden will be charged on the company, then the deed must be done in the framework of implementing the tasks and/or attainment of the goals of the company.

Second, the issue of willful and forgetfulness of corporations can be included on a company or political activities that manifest from a single company. It can also be explained by looking at the deliberate action or forgetfulness of the Corporate Executive Board in the politics of the company, or be in the real activity of a particular company. So willful or forgetfulness of the Corporation should be detected through psychological atmosphere prevailing on the Corporation or on the Executive Board, acting on behalf of the Corporation.

Third, the problem of the reason for forgiving corporations remain in force by adopting the reasons forgiving for the natural person. This is as a consequence of mistakes administrators acting for and on behalf of the Corporation is attributed to be the fault of corporations, so the vanishing because of the forgiving sysop misconduct be removed also the Corporation's mistakes. Meanwhile in article 50 of the PENAL CODE BILL (year 2004) mentioned that the reason for forgiving the perpetrators of criminal acts, acting for and on behalf of the Corporation

which was charged to the Corporation will negate liability the criminal for the culprit. For corporations, the forgiving reasons also apply all it submitted in advance by the Corporation. More sound Article 50 of the PENAL CODE BILL is as follows: the reason the justification or excuse forgiving may be submitted by the manufacturer of that Act to and/or on behalf of the Corporation, may be filed by corporations all those reasons directly connected with the Act addressed to the Corporation.

The legislative policy of the vital and strategic position in placing a sanction for certain crimes. The legislative policy in relation to the placement of a particular sanction was not done in a rational, then it will lead to chaos in the practice of law enforcement, especially at the stage of application and the execution stage because the policy does not oriented to the goals to be achieved. Therefore, the placement of a certain sanctions that are intended for a particular crime must show the nature, purpose and function of the sanctions so that it will support the legislative policy objectives to be achieved. This is where the importance of an understanding of the system will be penalized in criminal law because only the crimes that occurred in the community will be able to be solved.¹⁷

Barda Nawawi Arief stated that the CRIMINAL CODE in force currently attended two criminal threat formulation system namely single formulation of the system and the system of the alternative formulation. The system of a single formulation of the imprisonment that is formulated as the only type of criminal sanctions for the matter in question, being an alternative formulation system is imprisonment which are formulated in the alternative with the kind of criminal sanctions other types of sequence based on the heaviest sanctions to lightest.¹⁸

3. Policy Formulation of criminal law in the face of Corporate criminal acts In the future

Arrangements regarding the criminal liability of corporations currently are out of the book of the law of criminal law (the CRIMINAL CODE). This is due to not adhered to principles of Corporation as the subject of a criminal offence in the criminal code in force now, because the subject is a criminal offence under the CRIMINAL CODE now is merely human or individual people. Arrangements of this kind more juridical consequences be brought only those individuals can be charged for criminal responsibility and sentenced criminal, while the Corporation does.

Along with the development of society, both feel strongly the need to put the Corporation as the subject of a criminal offence in order to be saddled with criminal liability when committing crimes, so that the Corporation in the exercise of his business without doing actions that violate the provisions of the law and detrimental to the general public. Therefore, the settings of the Corporation as the following criminal acts subject to criminal accountability placed on the outside of the CRIMINAL CODE in order to accommodate such arrangements, and of course with a fixed reference to the CRIMINAL CODE as general guidelines.

Some laws and regulations outside the CRIMINAL CODE has determined the Corporation as the subject of a criminal offence, so that the criminal prosecution and the overthrow can be made to the Corporation. The rules and regulations who adhere to corporations as a subject of criminal law that is included on Act number 7/Drt. of the year 1955 concerning Economic Crime, Act number 5 of the year 1984 on Industry, Act number 6 of the year 1984 on Post, Act number 9 of the year 1985 on Fisheries, as amended by Act number 31 of the year 2004, Act number 7 of the year 1992 concerning Banking, as amended by Act number 10 of the year 1998, Act number

¹⁷ *Ibid.*, pg. 233.

¹⁸ Barda Nawawi Arief, *The legislative policy in Tackling Crime with imprisonment*, 3rd prints, Semarang, Publisher Agency of Diponegoro University, 2000. Pg .151.

8 of the year 1995 about Stocks Market, Act number 10 of the year 1995 concerning Customs, Act number 5 of the year 1997 concerning Psychotropic Substances, Act number 22 of the year 1997 on Psychotropic Substances, as amended by Act number 35 of the year 2009, Act number 23 of the year 1997 about Environmental Management, as amended by Protection and Management of Environment, Act number 5 of the year 1999 on Prohibition of Monopolies and Unhealthy Business Competition, Act number 8 of the year 1999 concerning Consumer Protection, Act number 31 of the year 1999 about Eradication of Criminal Acts of Corruption, as amended by Act number 20 of the year 2001, Act number 8 of the year 2010 concerning Prevention and Eradication of the Money Laundering Crime.

The above legislation have determined the Corporation as the subject of a criminal offence. However, if the formulation of the provisions in it have legal basis for the imposition of criminal liability to corporations, especially corporate responsibility towards the victims of corporate crime. The formulation of corporate criminal liability is of course not enough just by mentioning the subject Corporation as a crime but must also determine the rules regarding criminal system, so it required a reorientation efforts and reformulating the criminal liability against corporate crime victims in the future.

Re-orientation and reformulating the criminal liability against corporate crime victims, among others, include provisions on:

1. the provisions on when a criminal act can be said to be a criminal act committed by the Corporation;
2. who can be prosecuted and sentenced for crimes perpetrated criminal Corporation;
3. types of sanctions that correspond to the crime subject of corporate-oriented form of awarding damages to the victim.

Formulations regarding these provisions must be set explicitly to minimize the possibility of corporations escape from responsibility for crimes that he did. Impossible to provide fulfillment of the damages suffered by the victim by the Corporation, if the Corporation is unable to be ensnared, prosecuted, and sentenced the criminal based on the existing legislation.

E. CONCLUSION

From the explanation that had been featured in previous chapters then can be obtained summary concerning the following:

1. Policy formulation of the current criminal law in enforcing the criminal acts of the Corporation are not set in the current PENAL CODE. The CRIMINAL CODE do not subscribes to or recognize corporations as the subject of the crime, but legal developments outside the CRIMINAL CODE in the form of law the special criminal act has reciprocity Corporation as the subject of a criminal offence. Of the four regulations are examined by the authors, namely Act No. 23-year 1997 on environmental management as amended by law Number 32 Year 2009 on the protection and management of Environment, law number 8 of year 1999 on the protection of consumers, a 31-year law 1999 Jo, Act No. 20 of 2001 year of the eradication of criminal acts of corruption and law No. 8 Year 2010 on prevention and The eradication of money laundering a criminal offence, then it can be inferred the arrangements regarding sanctions a criminal offence of the Corporation contained in the fourth Act is inconsistent.
2. The application of the enforcement of the criminal acts of the Corporation during the time that is most often the judge dropped criminal fines, however legislative policy concerning criminal sanctions fines as long as it is less able to support the implementation of criminal fines it effectively Since in laws-invitations outside the CRIMINAL CODE there is an inconsistency regarding the amount of the fines will be charged.

3. Policy formulation of criminal law in the face of corporate criminal acts in the future expected more uniform and consistent in terms of the determination of when a criminal offence is a criminal offence committed corporations, who can prosecuted and convicted to criminal in corporate crime, as well as what types of sanctions that apply to corporations that committed a crime, as well as in the framework of prevention and tackling corporate crime itself.

Suggestion

1. Do the reorientation and reformulating the policy formulation in the existing legislation, be it of the CRIMINAL CODE and the concept of the CRIMINAL CODE as general guidelines, as well as specific legislation outside CRIMINAL CODE, relating to liability criminal the Corporation. Reorient and reformulating include provisions on when a corporation can be said to be performing a criminal act, the provisions regarding who may be prosecuted and sentenced for crimes perpetrated criminal corporations, as well as the provisions regarding the types of crime that can be dropped to the Corporation.
2. Must be set explicitly in the regulations that define corporations as the subject of a criminal offence on when a corporation can be said to be performing a criminal act. Similarly to the provisions regarding who may be prosecuted and sentenced for crimes perpetrated criminal corporations must be set firmly, so that the Corporation could not swerve for crimes that he did with shelter behind the Corporate Executive Board.
3. The types of sanctions can be meted out to the Corporation in relation to liability criminal corporations against corporate crime victims must be set firmly and consistently. In addition, other types of criminal sanctions should be tailored to the capacities of Corporation as the subject of a criminal offence is not a person. And the most important is the given sanctions, not only oriented on the judgment against corporate entities, but also should pay attention to the fulfillment and the restoration of the rights of the victim in the form of the payment of damages for crimes which performed by the Corporation. In order for these criminal provisions can be applied against the Corporation that committed a crime.

REFERENCES

- A.H. Semendawai, *Corporate Criminal Liability in Draft Legislation of Criminal Code*, Position Paper Advocate Draft Legislation KUEP Seri #6, ELSAM, Jakarta, 2005.
- Abdul Hakim Garuda Nusantara, *Corporate Crime in Draft Legislation of Criminal Code*, Forum Notes Group Discussion, Bandung, 2005.
- Arief Amrullah, *Corporate Crime (The Hunt for Mega-Profits and The Attack on Democracy)*, Bayumedia Publishing, Malang 2006
- Barda Nawawi Arief, *Capita Selecta of Criminal Law*, Bandung, Citra Aditya Bakti, 2003.
- Barda Nawawi Arief, *Capita Selecta of Criminal Law*, Citra Aditya Bakti, Bandung, 2003.
- Barda Nwawi Arief, *The legislative policy in Tackling Crime with imprisonment*, 3rd prints, Semarang, Publisher Agency of Diponegoro University, 2000.
- Clinard and Yeager on LS. Susanto, *Corporate Crime*, BP UNDIP, Semarang, 1995.
- Gobert dan Punch, *Rethinking The Corporate Crime*, <http://maswig.blogspot.com>, 21 November 2010. H.B. Sutopo, *Methodology Qualitative Research Part II*, UNS Press, Surakarta, 1988
- *Corporate Crime and Constitutional Rights*, <http://pithoyoadhi.wordpress.com>, 15 November 2010.

- *Human Rights Commission, The Institute studies and Advocacy Community (ELSAM), PAHAM Universitas Padjajaran, KAHAM Universitas Diponegoro, PUSHAM Universitas Surabaya, Corporate Crime in Draft Legislation, ELSAM, Bandung, 6 December 2005.*
- *Setiyono, Corporate Crime (Victimology Analysis and Corporate Liability In Criminal law of Indonesia), Bayumedia Publishing, Malang, 2005.*
- *Soerjono Soekanto, Introduction of Legal Research, Cet.1, (Jakarta: Universitas Indonesia Press, 1984),*
- *Sri Mamudji, et al., Research Method and Legal Writing, (Jakarta: Publishing Agency of Law Faculty University of Indonesia, 2005*

Legal Aspects of Sponsorship in Health Workers in Preventing Gratification

Tjatur Winarsanto¹, Nirwan Arief²

Student of Legal Studies Doctor Program, Universitas Borobudur

¹tjaturwin@yahoo.com , ²rafifnirwan2009@gmail.com

Abstract

Sponsorship for a doctor is still needed to develop and improve his knowledge and skills every year. The high cost required to implement the Continuing Professional Education Development Program (CPD) is one of the reasons that pharmaceutical companies can enter and offer solutions in the form of sponsorships. While until now the issue of the issue of gratification in the medical world is still rife with the existence of this sponsorship. In practice, this sponsorship activity is often the donor and recipient of sponsorship forget to look at the ethical corridor by not heeding the limits that must be considered for various reasons. Currently there are government regulations and company code of ethics (IPMG) that regulate this sponsorship problem to prevent bribery gratuities. It is expected that the law review and ethics of sponsorship will be able to remind or provide understanding to health workers in their daily practice.

Keywords: Sponsorship, gratuity, CPD, IPMG

A. INTRODUCTION

A health worker, especially a doctor to develop and improve his knowledge or skills, needs continuous education or training that is in line with the development of medical science. This routine education and training needs to be done because the development of medical science is very fast developing and changing according to the evidence base that exists and can be a symposium.

In participating in the symposium activities, there are still many doctors who need sponsorships from companies / pharmaceutical industries, medical devices, laboratory equipment. Although sponsorship for health workers, especially doctors, has been regulated by Minister of Health Regulation No. 58 of 2016, the risk of gratification is still large. So that issued a Circular of the Minister of Health Number 02.02 / Menkes / 66/2016 which regulates sponsorship reporting mechanisms to reduce the risk of gratuity.

The rise of corruption cases in Indonesia has made Indonesia the 13th most corrupt country in the Asia Pacific according to a survey conducted by Transparency International, a global anti-corruption movement organization. And in everyday practice the term corruption is so close to two other criminal acts, namely bribery and gratuity.

According to Permenkes RI no 58 of 2016, sponsorship is defined as providing support in all forms of assistance and / or activities in order to increase knowledge carried out organized or sponsored by pharmaceutical companies / industries, medical devices, medical laboratory equipment and / or other insured companies / industries answer transparently and accountably. Whereas what is meant by gratuity according to Law No. 31 of 1999 Juncto No. 20 of 2001 is giving in the broadest sense, which includes the provision of money, goods, discounts, commissions, interest-free loans, tourism trips, free medical treatment and other facilities. The gratuities are received both domestically and abroad and are carried out using electronic means and without electronic means. While the International Pharmaceutical Manufacturers Group (IPMG) is a non-profit, non-governmental organization consisting of 25 multinational pharmaceutical companies, research-based engaged in Indonesia, upholding its

commitment to providing safe, high-quality and nutritious medicines, and providing sufficient information regarding the value and potential risks of their product to health care provider.

B. RESEARCH METHOD

The research method that will be used in writing this research is juridical normative, with the data studied in the form of library material or secondary data consisting of primary legal material, namely the 1945 constitution of the republic of indonesia, Law No. 31 of 1999 Juncto No. 20 of 2001, Minister of Health Regulation No. 58 of 2016, Circular of the Minister of Health Number 02.02 / Menkes / 66/2016 which regulates sponsorship reporting mechanisms to reduce the risk of gratuity. While the International Pharmaceutical Manufactures Group (IPMG) is a non-profit, non-governmental organization consisting of 25 multinational pharmaceutical companies, research-based engaged in Indonesia, upholding its commitment to providing safe, high-quality and nutritious medicines, and providing sufficient information regarding the value and potential risks of their product to health care provider.

C. PROBLEM FORMULATION

The formulation of the problem that can be discussed in this journal are as follows :

1. Why sponsorship is needed by health workers
2. Is sponsorship at risk for gratification in the implementation of the CPD
3. How is sponsorship not at risk of gratification that is bribery in the implementation of the CPD

D. DISCUSSION

1. Sponsorship Problems Doctor's Professional Development Program

As a doctor, it requires sufficient time and money in his education. After completing his education, a doctor in carrying out his duties as a health care worker is obliged to develop and improve his knowledge and skills in accordance with the Health Law No. 36 of 2009. So doctors are professions in which a dedication is needed to continue to pursue medical science. Especially now that medical science is developing very fast and can change rapidly in accordance with research in the health sector.

In carrying out its duties as a doctor to serve patients in one health service institution or independently, must have a Registration Certificate (STR) as regulated in the Health Act No. 36 of 2014 which is one of the requirements to be able to perform health services in the form of Permit Practice (SIP). STR is valid for 5 years and must be re-registered with one of the requirements that must meet the adequacy in service activities, education, training, and / or other scientific activities in accordance with the scientific field. In re-registration, a Professional Credit Unit (SKP) is needed by participating in the scientific symposium in accordance with its scientific field, where a doctor is required to collect 250 SKP in 5 years so that in about 1 year approximately 50 SKP. From 250 SKP, only 20-30% is needed in the field of professional development, so that one year requires 10 to 15 SKP.

For this reason, the Continuing Professional Development Program (CPD) is a matter that must be followed by doctors in Indonesia in accordance with their specialized scientific fields. The CPD is in the form of a seminar / medical symposium or workshop in accordance with its scientific field. This is a problem, given the cost of registration and accommodation and transportation of a medical symposium is not small. Moreover, the location of the symposium was held in the city of big cities, while the location of doctors working in remote areas was sometimes very expensive for transportation.

Because of the considerable costs needed to attend the symposium, so many doctors will try to find sponsorships from companies / pharmaceutical industries that they know. So as to create opportunities for pharmaceutical companies / industries, medical devices, laboratory equipment or others to provide sponsorships to doctors through financing the costs of registration, accommodation, transportation, and even holding a free medical symposium. The problem is that pharmaceutical

companies / industries that provide sponsorships will introduce their products in such a way that the sponsored doctors can use their products. So that puts the doctor in the position of ethical dilemma, given the concerns related to the boundary between sponsorship and gratification which is considered still gray.

Until now, if doctors do not know or use products from a particular company, the pharmaceutical company / industry will not want to give sponsorship to the doctor. Or the doctor has been sponsored by a particular pharmaceutical company / industry for symposium activities, and after that the doctor does not use the product, the pharmaceutical company / industry will not want to provide sponsorships anymore. Even though a doctor needs to get STR again, having to take part in the medical symposium can be at least 3 times a year. Moreover, a doctor who works in an unreachable area with a pharmaceutical company / industry in Indonesia will be less likely to have the opportunity to take part in such scientific activities because there is no sponsorship used for that. Or indeed the pharmaceutical company / industry is less interested in giving sponsorships.

2. Review of Legal Sponsorship

To prevent the occurrence of gratification in sponsorship activities for health workers, including doctors, it was formed Health Minister Regulation No. 58 of 2016 concerning sponsorship for health workers. Chronology of the birth of Minister of Health Regulation No. 58 of 2016, began the Minister of Health audience with the head of the Corruption Eradication Commission (KPK) related to sponsorship from pharmaceutical companies. And then there is a joint statement to prevent gratification in the medical profession. So that the Minister of Health Regulation No. 58 of 2016 appears with the aim of the sponsorship to support the improvement of knowledge and / or skills and professional development.

To prevent sponsorship from being one of the gratuities, it must fulfill the following 7 principles:

- a. Does not affect independence in providing health services
- b. Not in the form of money or money equivalent
- c. Not given directly to individuals
- d. According to the field of expertise
- e. Provided openly
- f. Managed accountably and transparently

A doctor can receive in the form of money if the person concerned is the speaker and / or moderator as an honorarium at the scientific event.

The provision of sponsorship by pharmaceutical companies / industries is expected to be given openly and with no interest, so as not to affect independence such as prescription writing or recommendations on the use of products or goods or related sponsorship products from these companies. The problem is finding a pharmaceutical company that really doesn't expect the product to be used or prescribed, it's very difficult. So that this kind of sponsorship that is very worried will become a gratification. And a doctor will also have the tendency to prescribe products from pharmaceutical companies that provide sponsorship.

Providing sponsorships to health workers, including doctors, can be given to health workers with the status as employees of the State Civil Apparatus (ASN), Non ASN employees / private employees or individual practices. For institutions, professional organizations, health care facilities organizations as organizers, sponsorships can be used for organizing:

- a. Scientific seminars and / or meetings
- b. Education and / or training

It is not regulated about who has the right to initiate the implementation of the above activities. Thus, both recipients and sponsors can propose plans for the implementation of these activities. The amount of sponsorship received by health workers as participants, resource persons or moderators in accordance with the provisions of the legislation or unit cost that applies to sponsors associations / companies.

The sponsorship reporting mechanism is regulated by a circular letter (SE) Minister of Health No HK / 02.02 / MENKES / 66 / 2017. This SE regulates recipients and sponsors to prevent gratification. Recipients and sponsors must report to the KPK and be sent to the ministry of health. Health workers who receive sponsorship through institutions must report their sponsorship to institutions. Health workers who carry out private practices when receiving sponsorship must report directly to the KPK through an existing application. Furthermore, the institution will report the sponsorship to the KPK. The sponsorship report is no later than 30 working days. While the sponsors must report to the KPK in the form of recapitulation of the provision of sponsorships for a period of 1 month running the slowest on the 10th, the following month. Administrative sanctions can be imposed on health workers who do not comply / report on sponsorship received. But the threat of sanctions has not yet been regulated for institutions that are administrators or not as organizers, health service facility organizations and / or professional organizations.

Before there was Minister of Health Regulation No. 58 of 2016, related to sponsorship in the P2KB framework, on June 11, 2007, a memorandum of understanding was signed between the Indonesian Medical Association's Executive Board and the Central Pharmaceutical Company Management regarding the "Joint Agreement on Ethics for Drug Promotion" as follows:

- a. doctor in doing his medical work may not be influenced by something that results in the loss of freedom and professional independence. The relation with drug promotion is that doctors are prohibited from directing patients to buy certain drugs because doctors who are in charge have received sponsorship from certain pharmaceutical companies.
- b. Any support given by a pharmaceutical company to a doctor for attending scientific meetings should not be required / associated with the obligation to promote or prescribe a product.
- c. Pharmaceutical companies may provide sponsorship to a doctor individually in the context of continuing medical education, namely only for registration fees, accommodation and transportation to and from the place of continuous medical education.
- d. Pharmaceutical companies are prohibited from giving honorariums and or pocket money to a doctor to attend continuing medical education, unless the doctor is a speaker or moderator.
- e. In the case of giving donations to the medical profession, pharmaceutical companies may not offer gifts / awards, incentives, donations, financial in other similar forms, which are associated with prescription writing or recommendations for the use of certain company drugs / products.

In fact, in KODEKI in 2012 it was regulated that doctors could receive assistance from the sponsor for the purposes of the medical symposium registration, transportation and accommodation money in the implementation period and H-1 and H + 1 individual activities without bringing family members. Noteworthy is that the sponsorship may not be in the form of cash. The legalization agreement for doctor sponsorship to prevent gratification is still a lot of criticism, because there are still many who think that the sponsorship is causing drug prices to be more expensive. Even though the price of drugs is expensive because the raw materials are indeed expensive, especially the raw materials 90% are still from outside Indonesia.

3. Review of Legal Gratification

Gratification to a doctor is still very much associated with sponsorship given by certain pharmaceutical companies to sponsor the CPD activities required for a doctor. Indeed, according to Perkonsil No. 4 of 2011, gratification is a violation of the discipline of medical personnel.

According to Law No. 31 of 1999 concerning corruption (Tipikor) article 13, it is stated that every person who gives gifts or promises to civil servants in view of the power or authority inherent in his position or position, or by the gift giver or promise is considered inherent in his position or the

position, will be sentenced to imprisonment for a maximum of 3 (three) years and / or a fine of at most Rp. 150,000,000.00. This regulation was then updated through Law No. 20 of 2001 concerning changes to the Corruption Law. In the Law, in the explanation of article 12B it is written that what is meant by gratification is giving in a broad sense, which includes the provision of money, goods, discounts, commissions, interest-free loans, lodging facilities, tourism trips, free medical treatment and other facilities. And sponsorship can be included in the criteria referred to in Law no. 20 of 2001.

In the Regulation of the Minister of Health of the Republic of Indonesia no. 14 of 2014 concerning the control of gratification within the Ministry of Health, gratification is categorized into two, namely gratuities that are considered bribery and gratuities that are not considered bribery. Gratuities that are considered bribery in the health sector are:

- a. Transactional marketing fees or rewards related to marketing a product.
- b. Cash back received by agencies used for personal gain.
- c. Gratification related to the procurement of goods and public auction or other processes, and
- d. Sponsorship related to the marketing or research of a product.

Whereas gratuities that are not considered bribes are:

- a. Gratuities that are not considered bribery related to service, namely grants received officially by the ministry of health as an official representative of the agency in an official activity, in recognition of the participation or contribution in the activity.
- b. Gratuities that are not considered bribes that are not related to service.

Which includes gratuities that are not considered bribery related to service obtained from but not limited to:

- a. Other parties in the form of souvenirs in official service activities such as meetings, seminars, workshops, conferences, training, or other similar activities
- b. Other parties in the form of compensation received related to official activities, such as honorarium, transportation, accommodation and financing as stipulated in the applicable standard of fees at the giver's institution, insofar as there is no conflict of interest and does not violate the applicable provisions in the receiving agency.
- c. Sponsorship given to agencies related to institutional development, certain celebrations that are used transparently and accountably.

Whereas those that include gratuities that are not considered bribery are not related to service obtained from but not limited to:

- a. Other people who have family relations insofar as they do not have a conflict of interest with the recipient of the gratuity.
- b. Other people related to weddings and others, there is no highest value limit as long as there is no conflict of interest and reported to the KPK and after verification and clarification it is stated that it is not considered a bribe.
- c. Giving from agencies or work units originating from joint donations of health ministry officials other than ceremonies as referred to in letter b reported to the KPK and after verification and clarification is deemed not considered a bribe.
- d. Superiors to subordinates of the ministry of health as long as they do not use the State budget.
- e. Other people, including fellow ministry officials / institutions related to the celebration event regarding their position or position, such as welcome separation and others, which are reported to the KPK and after verification and clarification are deemed not considered bribery.
- f. Other people include fellow officials of the ministry of health, which are related to disasters or disasters experienced by recipients of gratuities or their families insofar as they do not have a conflict of interest with the recipient of the gratuity.

- g. Other people in the form of prizes, lottery results, discounts / rebates, vouchers, point rewards, or generally accepted souvenirs.
- h. Someone else is a general dish or dish.
- i. Academic and non-academic achievements followed by using their own expenses such as championships, competitions or competitions.
- j. Profit or interest from general accumulation of funds, investments or private ownership, and
- k. Compensation or income for professions carried out during working hours and obtain written permission from direct supervisor and / or other authorized parties.

In conducting patient referrals, laboratories and / or technology to doctors or other supporting facilities, or prescribing / administering drugs, a doctor is only justified to work for the benefit of patients. Therefore doctors are not justified in asking for or receiving compensation for services or making agreements with other parties outside the conditions of professional ethics (kick back or fee splitting) which can affect the independence of the doctor concerned. Therefore, to avoid sponsorship received by doctors is not a gratification that is not considered a bribe, then the procedures for reporting and determining the gratification are needed according to the rules.

4. Code of Ethics from International Pharmaceutical Manufacturers Group (IPMG)

All members of IPMG are fully committed to supporting the medical community scientifically and by complying with relevant laws and regulations, especially the code of ethics in marketing practices. In an effort to always create equal opportunities in the Indonesian pharmaceutical industry and ensure a uniform interpretation of the code, the Marketing Practices sub committee revised several articles and points in the IPMG code of ethics issued in June 2015. This code of conduct guarantees harmony with the decree that only released by the Ministry of Finance regarding sponsorship support.

Ethical promotion of medicine is very important for the pharmaceutical industry's mission in helping patients find, develop and market new drugs. Ethical promotion helps ensure that the health profession has access to the information the patient needs to get the medication needed and the medication prescribed and used with the aim of providing maximum health benefits to the patient. IPMG and its members have agreed to increase educational and promotional efforts that benefit patients and promotion and cooperation programs that improve the quality of medical practice. IPMG also tries to maintain the freedom of the health profession in making decisions to write medicines for their patients. For the interaction of IPMG members with the health profession, a code of ethics concerning the Marketing of Pharmaceutical Products in Indonesia began on May 1, 2017. So this code of conduct regulates pharmaceutical companies / industries in providing sponsorship to a doctor or health institution or health organization so as not to violate the rules as gratification. So the purpose of this code of ethics is to set high standards that must be adhered to by pharmaceutical companies / industries in implementing ethical pharmaceutical product promotion activities to health professions and establish self-disciplinary processes to ensure that member interactions with the healthcare profession are appropriate and are considered to serve interests the public as well as possible in improving public health degrees and rational drug use.

The product information provided must be based on the latest evaluation data with supported scientific evidence that is legal, accurate, clear and presented in a way that is not misleading. All information about product safety, as well as counter-indications, warnings and side effects must be in accordance with those approved by the Authoritative Authority. Information, claims / narratives, promotions, supporting data and audio, other graphic or visual presentations may not be directly or indirectly misleading by removing certain parts or deviating from evidence of evidence or expert opinion.

IPMG members are not permitted to deliberately copy marketing / promotional / advertising material from other companies so that they can be misleading or confusing.

Relationship between IPMG Members and Health Professionals and Health Organizations is intended to benefit patients and to improve the quality of medical practice. Interaction must be focused on providing information to the Health Professional, providing scientific information and education, and supporting medical and educational research. It is prohibited to give or offer a Transfer of Value to a Health Professional in return for prescribing, recommending, buying, supplying or managing a product or a commitment to continue to do so. In accordance with the applicable legislation, the sponsorship of the Health Professional must be reported by the IPMG Member to the relevant institutions in this case the KPK.

The aim of all scientific events and promotions for Health Professional Professionals organized or sponsored by IPMG Members must be aimed at providing balanced scientific information or education and / or informing the Health Professional about the product. To organize or sponsor an event, IPMG Members must meet the following criteria:

- a. The agenda of the event must have a valid scientific content; and
- b. The event is held in a location and place / hotel that is appropriate and conducive for scientific or educational purposes, as well as the purpose of organizing the event.

IPMG members may not organize or sponsor an event for Health Professionals held outside Indonesia, unless it is deemed reasonable and justified from a logistical or security perspective. International scientific congresses and symposiums attended by participants from many countries are justified and permitted if 50% of the total number of invited Health Professionals come from outside Indonesia so that from a logistical or security standpoint it is reasonable to hold such events abroad. Sponsor support for Health Professionals in attending events is limited to payment of transportation, accommodation (including breakfast) and / or registration fees, which are paid directly, reimbursement of any fees related to the event to the Health Professional is strictly prohibited.

Health Professional Qualifications as speaker / moderator must be based on speaker medical or scientific expertise, professional credentials, academic and clinical expertise, publications, professional community affiliation and the ability to produce quality meetings. The amount of honorarium for speakers / moderators from Indonesia for a meeting should not exceed Rp. 6,000,000 net per presentation, both for events organized by IPMG Members and those held by third parties. The honorarium is limited to a maximum of Rp. 12,000,000 - net per day per speaker if the speaker gives several presentations as well as the same IPMG Members. Payment of honorarium for speakers should not be made in advance. As an exception, upfront payments can be made if the meeting is held by a third party, where the speaker's honorarium is included in the overall fee requested by the event's Organizing Committee.

Sponsor support for Health Organizations can be provided in the form, but not limited to sponsorship packages, congresses / symposiums / workshops and exhibition stands. Exhibition booths, counters and the like are only additional purposes and should not reduce the scientific objectives of the event. The exhibition is made solely so that Health Professionals can obtain scientific information related to the topic of the event. Simple snacks and drinks can be provided. Reasonable institutional costs are allowed to pay institutional fees for the use of the Institution's room if it is equipped with official documents from the Institution. In the use of government-owned hospitals, the institution must comply with regulations / legislation regarding the management of state assets. Institutional fees may not exceed the total speaker honorarium paid at the same meeting. However, in some cases institutional costs can exceed the speaker's total honorarium only if there is an official rate authorized by the Institution and signed by the person / party authorized. Pharmaceutical companies are not permitted to offer gifts / awards, incentives, donations, finances, and the like to Health Professionals associated with prescribing

or recommending drug use / products of a company. So this IPMG code of ethics is very necessary for sponsors to avoid gratuities that are bribery, so that IPMG members must always comply.

E. CONCLUSION

Doctors as one of the health workers are obliged to develop and improve their knowledge and skills in accordance with the Health Law No. 36 of 2009. For this reason, CPD must be followed by a doctor as a requirement to obtain the next STR.

The provision of sponsorship by pharmaceutical companies / industries for scientific activities is expected to be given openly and with no interest so as not to affect independence such as prescription writing or product usage recommendations related to the company's sponsorship products.

To prevent the occurrence of gratuities that intersect with bribery, a doctor must comply with applicable regulations in Indonesia. And sponsors must also adhere to the code of ethics determined by IPMG to prevent gratification which has been a problem issue that is still rife in giving sponsorships to a doctor.

References

- Adami Chazawi, Hukum Pidana Korupsi di Indonesia. 2018.
- Frans Santosa dkk, Sponsorship Pendidikan Kedokteran : Batasan yang sering Diabaikan, Jurnal Etika Kedokteran Indonesia vol 2 no 1. 2018. p 13.
- Undang-Undang Republik Indonesia nomor 11 tahun 1980 tentang tindak pidana suap. 1980.
- Peraturan Menteri Kesehatan nomor 58 tahun 2016 tentang sponsorship bagi tenaga kesehatan. 2016.
- Ikatan Dokter Indonesia. Pedoman pelaksanaan program pengembangan pendidikan keprofesian berkelanjutan (P2KB). Edisi ke-3. 2017. p.11.
- Ikatan Dokter Indonesia. Panduan verifikasi kegiatan P2KB dokter tahun 2017. 2017. p.13.
- Undang-Undang Republik Indonesia nomor 31 tahun 1999 tentang pemberantasan tindak pidana korupsi. 1999.
- Undang-Undang Republik Indonesia nomor 20 tahun 2001 tentang perubahan atas undang-undang nomor 31 tahun 1999 tentang pemberantasan tindak pidana korupsi. 2001.
- Peraturan Menteri Kesehatan Republik Indonesia nomor 14 tahun 2014 tentang pengendalian gratifikasi di lingkungan Kementerian Kesehatan. 2014.
- Majelis Kehormatan Etik Kedokteran Indonesia. Kode etik kedokteran tahun 2012. Jakarta: Ikatan Dokter Indonesia; 2012.
- Prawiroharjo P, Meilia PDI. Dokter beriklan: Sebuah tinjauan menurut Kode Etik Kedokteran Indonesia (KODEKI) tahun 2012. Jurnal Etika Kedokteran Indonesia. 2017;1(1);13. doi: 10.26880/jeki.v1i1.4
- Transparency International. Corruption perceptions index 2016 Diunduh dari: https://www.transparency.org/news/feature/corruption_perceptions_index_2016
- Kode Etik International Pharmaceutical Manufacturers Group ; 2017
- Peraturan Konsil Kedokteran Indonesia no 4 tahun 2011, Disiplin Profesional Dokter dan Dokter Gigi ; 2011
- Undang Undang no 29 tahun 2004, Praktek Kedokteran; 2004.
- Undang Undang n0 44 tahun 2009, tentang Rumah Sakit ; 2009.

LEGAL PROTECTION AGAINST A CHILD WHO DEALS WITH LAW IN THE HUMAN RIGHTS PERSPECTIVE

Wijoyo Hadi Mursito

Student of Legal Studies Doctor Program, Universitas Borobudur

drhadispb@yahoo.co.id

Abstract

Indonesia as a legal state certainly creates a consequence, one of which is that the Indonesian state must provide guarantees for the protection and enforcement of human rights for every citizen. Human rights protection is given to all Indonesian citizens without exception to children. In this study, we will discuss the rights of children who are faced with the law in the process of resolving criminal cases of children dealing with the law, for children with legal conflicts, children who are victims of criminal acts, and children who are witnesses of criminal acts, where the handling must be different from the process of resolving criminal cases in general in order to provide protection for them, i.e. with a diversion approach in restorative justice regulated in Law Number 11 Year 2012 concerning the Child Criminal Justice System. This study has 2 (two) formulation of the problem, namely: a) How are the Rights of Children Faced with Law in the criminal proceedings ?; b) What Are the Forms of Legal Protection Against Children Who Are Faced with Law in the Diversion Process Based on Law Number 11 of 2012 concerning the Child Criminal Justice System? The research method used by the researcher in this study is juridical-normative legal research, with the data being examined namely secondary data that includes primary legal material, secondary legal material, and tertiary legal material. Primary legal material, namely the Constitution of the Republic of Indonesia Year 1945, Law Number 39 Year 1999 concerning Human Rights, Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection, and Law Number 11 Year 2012 concerning the Criminal Justice System of Children, secondary legal materials, namely textbooks, prior research (legal journals), and tertiary legal materials, namely language dictionaries, encyclopedias, etc.

Keywords: Legal Protection, Children Dealing with Law, Human Rights, Diversion.

A. INTRODUCTION

It has been stated explicitly that Indonesia is a legal state as stipulated in Article 1 paragraph (3) of the Constitution of the Republic of Indonesia Year 1945, which reads: "The State of Indonesia is a legal state." Indonesia as a law state certainly produces a consequence, wrong the other is that the Indonesian state must provide guarantees for the protection and enforcement of human rights for every citizen. The definition of human rights is based on Article 1 point 1 of Law Number 39 Year 1999 concerning Human Rights, which reads: "Human Rights are a set of rights that are inherent in human dignity and values as creatures of God Almighty and are His gifts that must be respected, upheld and protected by the state, law and government, and every person for honor and protection of human dignity." According to Satjipto Raharjo, legal protection is an effort to organize various interests in the community so that there is no collision between interests and can enjoy all the rights granted by law.¹

Human rights protection is given to all Indonesian citizens without exception to children. Children are the nation's next generation and successors of development, namely the generation prepared as the subject of the implementation of sustainable development and the holder of the future control of a

¹ Satjipto Raharjo, 2000, *Ilmu Hukum*, PT. Citra Aditya Bakti, Bandung, page. 53-54.

country, including Indonesia.² Protection of Child Rights is included in Article 28B Paragraph (2) of the Constitution of the Republic of Indonesia Year 1945, which reads: "Every child has the right to survival, growth and development and has the right to protection from violence and discrimination." In Research this will discuss the rights of children who face the law.

Judging from the juridical aspects of children's understanding in the eyes of Indonesian positive law (*ius constitutum / ius operatum*) it is commonly interpreted as a person under age, people who are under age / inferiority or often also called as a child under the supervision of a guardian (*minderjarig ondervoordij*).³ Children face the law both as child offenders, witness children and child victims often suffer physically and suffer psychologically suffering which takes a long time to recover.

Protection of children dealing with the law has been regulated in positive law in Indonesia, as stated in Presidential Decree Number 36 Year 1990 concerning the Ratification of the Convention on The Rights of the Child on the 25 August 1990, which was ratification of the United Nations Convention on the Rights of the Child; Law No. 4 of 1979 concerning Child Welfare, Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection, and Law Number 11 Year 2012 concerning Child Criminal Justice System.

Every child has dignity that deserves to be upheld and every child who is born must get his rights without the child asking. This is in accordance with the provisions of the Convention on the Rights of the Child ratified by the Indonesian government through Presidential Decree Number 36 Year 1990 which states the general principles of child protection, namely non-discrimination, the best interests of children, survival and growth, and respect for children's participation.⁴ The recognition and legal protection of fundamental rights and freedom of children is intended to fulfill various interests related to the welfare and future of the child.⁵

The state has an obligation to protect its citizens from birth to death. Because of this, then in every judicial process law enforcers must and must prioritize the interests of the child in which the rights of the child are present.⁶ Settlement of children is indeed very special. This is because the nature of the child is seen from the age of the child does not have maturity both physically and mentally so that the child has not been able to distinguish between good and right things and tends to do things spontaneously without thinking.⁷

Therefore, in the process of resolving criminal cases of children facing the law, for children in conflict with the law, children who are victims of criminal acts, and children who are witnesses of criminal acts must be different from the process of resolving criminal cases in general. Protection of children facing the law cannot be equated with the protection given to adults in general in the criminal proceedings, so there needs to be a certain approach in solving child criminal problems, namely with a diversion approach.

The approach of diversion in restorative justice regulated in Law Number 11 Year 2012 concerning the Child Criminal Justice System is an unknown new breakthrough in the conventional Criminal Justice

² Nashriana, 2011, *Perlindungan Hukum Pidana Bagi Anak Di Indonesia*, Raja Grafindo Persada, Jakarta, page.1.

³ Nandang Sambas, 2013, *Peradilan Pidana Anak di Indonesia dan Instrumen International Perlindungan Anak serta Penerapannya*, Graha Ilmu, Yogyakarta, page. 4.

⁴ Rika Saraswaty, 2009, *Hukum Perlindungan Anak Di Indonesia*, Citra Aditya Bakti, Bandung, page.1.

⁵ Meily dkk., *Perlindungan Hukum Terhadap Hak Anak Pelaku Tindak Pidana Pemerkosaan Dalam Sistem Peradilan Pidana*, e Jurnal Katalogis, Vol. 5, No. 2, Februari 2017, page. 63-64.

⁶ Dony Pribadi, *Perlindungan Terhadap Anak Berhadapan Dengan Hukum*, Jurnal Hukum Volkgeist, Vol. 3, No. 1, Desember 2018, page. 19.

⁷ Laras Astuti, *Perlindungan Hukum Terhadap Anak Yang Berhadapan Dengan Hukum Dalam Kecelakaan Lalu Lintas*, Justitia Jurnal Hukum, Vol. 1, No.1, April 2017, page. 148.

System.⁸ The purpose of the implementation of diversion for children includes: a. To avoid children from detention; b. To avoid labeling children as criminals; c. To prevent repetitions of crimes committed by children, so that children are responsible for their actions; d. To carry out interventions needed for victims and children without having to go through a formal process, and keep children away from the negative influences and implications of the judicial process.⁹ The focus of this study will be on the rights of children facing the law in criminal proceedings as well as forms of legal protection for children facing the law in the diversion process based on Law Number 11 Year 2012 concerning the Child Criminal Justice System.

B. RESEARCH METHOD

The research method used by the researcher in this study is juridical-normative legal research, with the data being examined namely secondary data that includes primary legal material, secondary legal material, and tertiary legal material. Primary legal material, namely the Constitution of the Republic of Indonesia Year 1945, Law Number 39 Year 1999 concerning Human Rights, Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection, and Law Number 11 Year 2012 concerning the Criminal Justice System of Children, secondary legal materials, namely textbooks, prior research (legal journals), and tertiary legal materials, namely language dictionaries, encyclopedias, etc.

C. PROBLEM FORMULATION

The formulation of the problems that can be discussed in this study are as follows:

1. How are the rights of children facing the law in the criminal proceedings?
2. What Are the Forms of Legal Protection Against Children Who Are Faced with Law in the Process of Diversion Based on Law Number 11 Year 2012 concerning the Child Criminal Justice System?

D. DISCUSSION

1. The Rights of A Child to Contend With The Law in The Criminal Proceedings

In the definition and limitations of the child contained in Article 1 of Law Number 35 Year 2014 concerning Child Protection having 2 (two) important issues being the element of the definition of the child, namely: "First person who is not 18 (eighteen) years old. Thus, every person who has exceeded the age limit of 18 (eighteen) years, including those who are mentally incompetent, are qualified as non-children, namely adults. In this case it is not questioned whether the status is married or not. Both children are still in the womb. So, Law Number 35 Year 2014 extends the understanding of children which does not only provide protection to children who have been born but are expanded, which includes children in the womb."¹⁰

In accordance with the subject matter in this journal, namely Children In Confront with the Law, that children who are faced with the law consist of several categories. Based on Article 1 point 2 of Law Number 11 Year 2012 concerning the Child Criminal Justice System, which reads: "Children who are in conflict with the Law are children in conflict with the law, children who are victims of

⁸ Azwad Rachmat Hambali, Penerapan Diversi Terhadap Anak yang Berhadapan Dengan Hukum Dalam Sistem Peradilan Pidana (*Diversions For Children In Conflict With The Laws In The Criminal Justice System*), Jurnal Ilmiah Kebijakan Hukum, Vol. 13, No. 1, Maret 2019, page. 20.

⁹ Setya Wahyudi, 2011, *Implementasi Ide Diversi dalam Pembaruan Sistem Peradilan Anak Di Indonesia*, Genta Publishing, Yogyakarta, page. 67.

¹⁰ Komisi Nasional Perlindungan Anak, 2004, *Mengenal Lebih Dekat UU No. 23 Tahun 2002 Tentang Perlindungan Anak*, Komnas Perlindungan Anak, Jakarta, page. 72.

criminal acts, and children who are witnesses of criminal acts." The definition of a Child Conflicting with the Law can be seen in Article 1 point 3 of Law Number 11 Year 2012 concerning the Child Criminal Justice System, which reads: "Children Conflicting with Law, hereinafter referred to as Children, are children who are 12 (twelve) years old, but not yet 18 (eighteen) years old who is suspected of committing a criminal act. "The definition of a Child Who Becomes a Criminal Victim can be seen in Article 1 point 4 of Law Number 11 Year 2012 concerning the Child Criminal Justice System, which reads: "Children who Becoming a Criminal Victim, hereinafter referred to as a Victim Child, is a child who is not 18 (eighteen) years old who experiences physical, mental, and n / or economic losses caused by criminal acts. "While the definition of a Child Who Witnesses Criminal Acts can be seen in Article 1 point 5 of Law Number 11 Year 2012 concerning the Child Criminal Justice System, which reads: "Children Who Become Witnesses of Criminal Acts hereinafter referred to as the Witness Child is a child not yet 18 (eighteen) years old who can provide information for the purposes of investigation, prosecution, and examination in a court session regarding a criminal case that has been heard, seen and / or experienced by himself. "

Child protection can be divided into 2 (two) parts, namely: (1) juridical child protection, which includes protection in the field of public law and in the field of civil law; (2) child protection that is non-juridical in nature includes protection in the fields of social, health, education.¹¹

Children's rights in criminal proceedings are guaranteed in laws specifically regulating human rights, namely in Article 66 of Law Number 39 Year 1999 concerning Human Rights, which reads:

- (1) Every child has the right not to be subjected to mistreatment, torture or inhuman punishment.
- (2) Death sentences or life sentences cannot be imposed for perpetrators of child crimes.
- (3) Every child has the right not to be deprived of his liberty against the law.
- (4) Arrest, detention or imprisonment of a child may only be carried out in accordance with applicable law and can only be carried out as a last resort.
- (5) Every child deprived of his liberty has the right to receive humane treatment and by observing personal development needs in accordance with his age and must be separated from adults, except for his benefit.
- (6) Every child deprived of liberty has the right to obtain legal assistance or other assistance effectively in every step of the applicable legal effort.
- (7) Every child deprived of his liberty has the right to defend himself and obtain justice in the presence of an objective and impartial Juvenile Court in a session that is closed to the public.

Based on the aforementioned articles, it can be seen that the sound of Article 66 paragraph (4) of Law Number 39 Year 1999 concerning Human Rights states that arrest, detention, or criminal imprisonment of children may only be carried out in accordance with applicable law and can only be implemented as a last resort, therefore a diversion system is needed as a system that transfers the settlement of Child cases from criminal justice processes to processes outside criminal justice.

2. A Legal Protection Against Children Who Are Dealing With The Law In The Process According To Law Number 11 Year 2012 concerning the Child Criminal Justice System

According to Abdul Hakim Nusantara, who stated that the issue of legal protection for children is an approach to protecting Indonesian children. The problem is not only can be approached

¹¹ Maidin Gultom, *Perlindungan Hukum Terhadap Anak Dalam Sistem Peradilan Pidana Anak di Indonesia*, Refika Aditama, Bandung, 2010, page. 34.

juridically, but needs a broad approach, namely economic, social, and cultural.¹² In principle, in the Indonesian Criminal Law, the purpose of granting criminal sanctions must function to foster (make lawbreakers repent and not function in retaliation).¹³

When the juvenile justice process of child rights must get protection from every level, the protection is given as a form of respect for children's rights. Protection of children in conflict with this law underwent a fundamental change, namely strict regulation regarding restorative justice and diversion. This arrangement is intended to avoid and distance children from the judicial process, so as to avoid stigmatizing the children in conflict with the law.¹⁴ According to Levine the concept of diversion began with the establishment of juvenile justice in the 19th century which aimed to exclude children from adult justice so that children were no longer treated as adults.¹⁵

Protection of children facing the law in this case the child victims of criminal acts undergoing fundamental changes in the settlement of retaliation is no longer considered an effective way of resolving child irregularities but is more focused on restoring the situation in overcoming the problem of child victims of criminal acts. Settlement of child cases can not only be resolved through a judicial process but can be resolved outside the court process (diversion) the diversion process is carried out through deliberation involving parents / guardians, parents / guardians and community and professional workers based on a restorative justice approach.¹⁶

Diversion is a basic idea to eliminate the negative impact of the criminal justice system which always produces a negative stigma which then labels children according to the actions that occur to them.¹⁷ The diversion system emphasizes coaching where punished children do not lose their future related to their rights, both growing and developing and the right to education.¹⁸

The most basic substance in Law Number 11 Year 2012 concerning the Child Criminal Justice System is the explicit arrangement of Restorative Justice and Diversion which is intended to avoid and distance children from the judicial process so that they can avoid stigmatization of children who are faced with the law and are expected to return to the social environment fairly.

The definition of diversion is based on Article 1 point 7 of Law Number 11 Year 2012 concerning the Child Criminal Justice System, which reads: "Diversion is the transfer of settlement of Child cases from criminal justice processes to processes outside of criminal justice." criminal justice process becomes a process outside criminal justice having a purpose. These objectives are as described in Article 6 of Law Number 11 Year 2012 concerning the Child Criminal Justice System, which reads: "Diversion aims: a. achieve peace between victims and children; b. resolve child cases outside the court process; c. avoid the child from deprivation of liberty; d. encourage people to participate; and e. instill a sense of responsibility to the child. "

In its development, protection of children facing the law can not only be resolved through a judicial process but can also be resolved outside the criminal justice process or known as diversion, where the settlement involves the perpetrators, victims, families of the perpetrators / victims, and

¹² Abdul Hakim Garuda Nusantara dalam bukunya Maidin Gultom, 2008, *Perlindungan Hukum Terhadap Anak Dalam Sistem Peradilan Pidana Anak Di Indonesia*, Refika Aditama, Bandung, page. 35.

¹³ Petrus Irwan Panjaitan dan Pandapotan Simorangkir, 1995, *Lembaga Pemasyarakatan Dalam Persepektif Sistem Peradilan Pidana*, Pustaka Sinar Harapan, Jakarta, page. 9.

¹⁴ Dony Pribadi, *op.cit.*, page. 22.

¹⁵ Marlina, 2010, *Pengantar Konsep Diversi dan Restorative Justice dalam Hukum Pidana*, USU Press, Medan, page. 61.

¹⁶ Dheny Wahyudhi, *Perlindungan Terhadap Anak yang Berhadapan dengan Hukum Melalui Pendekatan Restorative Justice*, Jurnal Ilmu Hukum, Vol. 6, No. 1, Februari 2015, page. 154.

¹⁷ Setya Wahyudi, *op.cit.*, page. 14.

¹⁸ Anna Esther Pangalila, *Sistem Diversi Terhadap Anak Sebagai Pelaku Tindak Pidana Dalam Sistem Peradilan Dikaitkan Dengan Perlindungan Hak Asasi Manusia*, Lex Et Societatis, Vol. VI, No. 4, Juni 2018, page. 96.

other parties related to jointly seek a fair solution by emphasizing recovery back to its original state, and not revenge known as the justice restorative justice approach. (Article 1 paragraph (6) Law Number 11 Year 2012 concerning the Juvenile Justice System). In the law the juvenile justice system emphasizes the obligation for law enforcement officials to seek diversion first by prioritizing special restorative justice for children whose criminal threat is under 7 (seven) years in resolving child cases. Settlement outside the judicial process is expected to be able to provide a sense of justice to children who are faced with the law and by prioritizing the best interests of the child.

Regarding the diversion process can be studied in Article 7 and Article 8 of Law Number 11 Year 2012 concerning the Child Criminal Justice System, which reads:

- a. Article 7 of Law Number 11 Year 2012 concerning the Child Criminal Justice System:
 - (1) At the level of investigation, prosecution and examination of cases, Children in a district court must seek Diversion.
 - (2) Diversion as referred to in paragraph (1) is carried out in the event of a criminal offense committed: a. threatened with imprisonment under 7 (seven) years; and b. not a repetition of a crime.
- b. Article 8 of Law Number 11 Year 2012 concerning the Child Criminal Justice System:
 - (1) The Diversion process is carried out through deliberations involving children and parents / parents, victims and / or parents / guardians, community advisers and professional social workers based on the Restorative Justice approach.
 - (2) In the event that it is needed, deliberation as referred to in paragraph (1) may involve Social Welfare Personnel, and / or the community.
 - (3) The Diversion Process must pay attention to: a. the interests of victims; b. child welfare and responsibility; c. avoidance of negative stigma; d. avenging aversion; e. community harmony; and f. propriety, decency, and public order.

E. CONCLUSION

Based on the discussion above, the conclusion that can be given by the author is that children facing the law consist of children in conflict with the law, children who are victims of criminal acts, and children who are witnesses of criminal acts, where the rights of the child are in litigation criminal law is guaranteed in Article 66 of Law Number 39 Year 1999 concerning Human Rights, one of which states that arrest, detention, or criminal imprisonment of children may only be carried out in accordance with applicable law and can only be implemented as a last resort, therefore a system is required diversion as a system that diverts the settlement of Child cases from criminal justice processes to processes outside criminal justice, where the mechanism of this diversion process is carried out through deliberations involving children and parents / guardians, victims and / or parents / guardians, community advisers and workers Social Professional based on Justice Restora's approach tif, which aims to achieve peace between victims and children, resolve child cases outside the judicial process, prevent children from depriving them of liberty, encourage the community to participate, and instill a sense of responsibility to the child.

REFERENCES

A. Book

- Abdul Hakim Garuda Nusantara dalam bukunya Maidin Gultom, 2008, *Perlindungan Hukum Terhadap Anak Dalam Sistem Peradilan Pidana Anak Di Indonesia*, Refika Aditama, Bandung.
- Komisi Nasional Perlindungan Anak, 2004, *Mengenal Lebih Dekat UU No. 23 Tahun 2002 Tentang Perlindungan Anak*, Komnas Perlindungan Anak, Jakarta.

- Maidin Gultom, *Perlindungan Hukum Terhadap Anak Dalam Sistem Peradilan Pidana Anak di Indonesia*, Refika Aditama, Bandung, 2010.
- Marlina, 2010, *Pengantar Konsep Diversi dan Restorative Justice dalam Hukum Pidana*, USU Press, Medan.
- Nashriana, 2011, *Perlindungan Hukum Pidana Bagi Anak Di Indonesia*, Raja Grafindo Persada, Jakarta.
- Nandang Sambas, 2013, *Peradilan Pidana Anak di Indonesia dan Instrumen International Perlindungan Anak serta Penerapannya*, Graha Ilmu, Yogyakarta.
- Petrus Irwan Panjaitan dan Pandapotan Simorangkir, 1995, *Lembaga Pemasyarakatan Dalam Persepektif Sistem Peradilan Pidana*, Pustaka Sinar Harapan, Jakarta.
- Rika Saraswaty, 2009, *Hukum Perlindungan Anak Di Indonesia*, Citra Aditya Bakti, Bandung.
- Satjipto Raharjo, 2000, *Ilmu Hukum*, PT. Citra Aditya Bakti, Bandung.
- Setya Wahyudi, 2011, *Implementasi Ide Diversi dalam Pembaharuan Sistem Peradilan Pidana Anak di Indonesia*, Genta Publishing, Yogyakarta.

B. Journal

- Anna Esther Pangalila, *Sistem Diversi Terhadap Anak Sebagai Pelaku Tindak Pidana Dalam Sistem Peradilan Dikaitkan Dengan Perlindungan Hak Asasi Manusia*, Lex Et Societatis, Vol. VI, No. 4, Juni 2018.
- Azwad Rachmat Hambali, *Penerapan Diversi Terhadap Anak yang Berhadapan Dengan Hukum Dalam Sistem Peradilan Pidana (Diversions For Children In Conflict With The Laws In The Criminal Justice System)*, Jurnal Ilmiah Kebijakan Hukum, Vol. 13, No. 1, Maret 2019.
- Dheny Wahyudhi, *Perlindungan Terhadap Anak yang Berhadapan dengan Hukum Melalui Pendekatan Restorative Justice*, Jurnal Ilmu Hukum, Vol. 6, No. 1, Februari 2015.
- Dony Pribadi, *Perlindungan Terhadap Anak Berhadapan Dengan Hukum*, Jurnal Hukum Volkgeist, Vol. 3, No. 1, Desember 2018.
- Laras Astuti, *Perlindungan Hukum Terhadap Anak Yang Berhadapan Dengan Hukum Dalam Kecelakaan Lalu Lintas*, Justitia Jurnal Hukum, Vol. 1, No.1, April 2017.
- Meily dkk., *Perlindungan Hukum Terhadap Hak Anak Pelaku Tindak Pidana Pemerkosaan Dalam Sistem Peradilan Pidana*, e Jurnal Katalogis, Vol. 5, No. 2, Februari 2017.

C. Legislation

- Indonesia, The Constitution of the Republic of Indonesia Year 1945
- _____, Law Number 39 Year 1999 concerning Human Rights
- _____, Law Number 35 Year 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection.
- _____, Law Number 11 Year 2012 concerning the Criminal Justice System of Children.

HUMAN RIGHTS TO STREET CHILDREN IN INDONESIA

Willy Muljono

Student of Legal Studies Doctor Program, Universitas Borobudur
willymuljono@gmail.com.

Abstract

The problem of street children in Indonesia is not a new thing. Long-time state through the government seeks the handling of street children in Indonesia. The growing number of street children, including the female street children The harsh street life made the street girls get harsh treatment and sexual abuse such as sexual harassment, fornication and rape. The tendency for female street child victims of sexual crime is to be a commercial sex worker.

Indonesia has the proper care to give full attention to child protection because in the mandate of the Constitution 1945 (*UUD 1945*). Democracy in Indonesia is sourced to Pancasila and the Constitution 1945 (*UUD 1945*), democracy is not a destination, but as a means or tools to achieve the goal, namely a fair and prosperous society. To achieve it is necessary participation from the whole community, so that each individual action in achieving that goal must be an accountable action. Legal protection for street children especially for street children from the threat of sexual crimes seen from the legislation that set it up is quite a lot and complete enough. In response to legislation relating to the protection of children in Indonesia.

Keywords: Human rights, Street children in Indonesia.

A. INTRODUCTION

The problem of street children in Indonesia is not a new thing. Long-time state through the government seeks the handling of street children in Indonesia. At the moment the number of street children is increasing. The number of street children reaches 39,861 people with approximately 48% of them children who are new to the street. Datasurvey results in 12 major cities in Indonesia. Nationally it is estimated that there are 60,000 to 75,000 street children. The social ministry also noted that 60% of drop-off street children, 80% were still in contact with his family, and 18% of women.

The growing number of street children, including the female street children The harsh street life made the street girls get harsh treatment and sexual abuse such as sexual harassment, fornication and rape. The tendency for female street child victims of sexual crime is to be a commercial sex worker.

Indonesia should pay full attention to the protection of children because in the mandate of the Constitution 1945 (*UUD 1945*) article 28b paragraph 2, each child has the right to survival, grow, and develop, and entitled to the protection of Violence and discrimination. While section 34 (1) reads, the poor and the child is maintained by the state. Protection of the child's existence is explicitly confirmed in 15 articles governing the rights of children and chapters 52 – 66 LAW No. 39/1999 of HUMAN rights.

Points of concern

In Writing This That Be Staple Problems Is As Following :

1. How is human rights protection for street children from the threat of sexual crimes?
2. How does the program and the government's performance provide protection for street children especially for female street children from the threat of sexual crimes?

Purpose and Objectives

1. Knowing the laws governing and protecting the rights of children, especially for street children.
2. Knowing the program and government performance in providing protection for street children especially for street children from the threat of sexual crimes.

In this regard, the writing is directed to explain :

1. Legislation governing and protecting the rights of children
2. The Program and the Government's participation in providing protection for street children from the threat of sexual crimes.

B. RESEARCH METHOD

The theory to be used in this writing is the theory of natural law, this theory argues that the laws of nature are universal and timeless. According to Friedman, "The history of the Law of Nature is the history of mankind in his quest to find what is called Absolute Justice in addition to the history of the failure of mankind in seeking of justice.

Utilitarianism is a political theory in liberalism developed by Jeremy Bentham and John Stuart Mill in the 19th century, the main principle in utilityism is to maximize the greatest wisdom for as many as may be human. In politics This means maximizing the general welfare, if it is necessary to sacrifice individual freedoms. According to John Rawls. Utilitarianism has failed to give place to the general belief that every individual should be appreciated and must not be infringed on its rights for greater importance, including for the sake of the public (eg: utilitarianism Prohibit slavery not because it is unfair, but wealthy because it is inefficient).

The opinions contained in Prisma No. 12 year 1979 in accordance with the theory of natural Law submitted by John Locke, "The Law of Nature is the rules on human behavior .Human rights, which consist of rights of life, rights of independence, .Thus John Locke is regarded As the foundational of human rights fundamentals due to its natural legal theory. John Locke argues that in the natural state of man is a resourceful creature, and Homo sapiens.

The theory of John Locke knows the law of nature in line with the nature, which has been full of order and peace has always been ravaged by humans, with a variety of forms of murder, bloodshed, scrambling life. Pollute the environment and so forth.

John Locke and J.J. Rousseau are natural law figures and experts who have a great influence on as a simulative rights. The two figures also inspire the revolution of major nations to include in its Constitution on human rights.

Human rights are regarded as the right owned and attached to every human being since he was born, even in the development of this right is considered to exist since humans are still in the womb of his mother this right is fundamental or fundamental. According to Miriam Bidiardjo: "Birthright is a human right that has been acquired and brought about since his birth or his presence in a community life"

In relation to this writing that will describe the protection of human rights against street children from the threat of sexual violence, the theory of natural law is the theory used in memory of its universal and lasting validity.

C. PROBLEM FORMULATION

The historical origins of human rights conceptions can be traced back to the Greek and Roman times, having a close association with the pre-modern doctrine of natural law of Greek Stoicism (Greek stoticism), yes it was a philosophy school established by Zeno di Citium, among other things, argues that the power of work that must therefore be assessed based on the natural Law of Human Rights (HAM) has always been preceded by the social crisis. This crisis is connected with the active community in controlling the path of the government wheel, it can be seen by the crisis of social and humanitarian. Then the agreement was made that could protect human rights such as the 1215 Charter of Magna Charta in England that limited the reign of the king and could not be released from arbitrariness King at the time, a touch of flow Nationalism has shifted the king's absolutism paradigm to the sovereignty of the people who have long been restrained by the King. Universal Declaration of Human Rights (UDHR) in 1948

approved by the United Nations that guarantees the protection of basic human rights. The history of Magna Charta's document, "is regarded as the first document as a milestone in the protection of human rights, which was triggered by the nobles. With the correlation between the human rights crisis and the emergence of an official document of human rights, it has been exhibited that there is a will in order to have a guarantee of the law, so that violations and human rights crisis is not TeruLang, as well as the demands of the moral and legal norms that protect mankind.

The emergence of the official documents of human rights, which is to present a paradigmatic surge of human rights from the social condition or the previous norm can be better and wider. This led to the impact of other countries that eventually participated in the state of human rights assurance in its constituent formulation this century. "

Generation This Means Rights Human Human With Term That More Is Negative Or More Like Attendance Than Intervention Government In Search Dignity Human-" Although In Some In terms Also Requires Action Positive Government, Like Rights Top Security Private, Judicial That Fair Dan Open and others. But Value Central Remain, That Freedom Is A Shield That Protect Individual Alone Dan In and associations With others, From Misappropriation Dan Abuse Authority Political."

Generation Second Means Term Rights Human Human An Positive That Requires Intervention Country With Goal To to fish Participation That Evenly In Production Dan Distribution The values That Conceived." While So, Rights Choose Job With Non, Rights To Form Dan Join With Serikat Labor Dan Rights Participation An Non In Life Culture From Community, Not An Inherent Requires Action Government That Positive To Enjoy it. But Some Because Relatively Late Coming Influence Socialism-Communists In Field Normative Problems International, Then Internationalization Rights Human Human Generation Second This Rather Late With mHis ranking Power World Third In Level Global Really Is "Revolution Hope That Increased".

Genergy Third In Include I.e Rights Top Determination Fate Own In Field Political, Economic, Social. Dan Culture. Rights Top Development Economic Dan Social, Rights To Participate Dan Utilizing 'Heritage Together People Human' (Resources Earth Dan Spaces Space, Information Dan Progress Scientific, Technical Dan Other, And Tradition, Location Dan Monuments Culture).

Three Rights Other Is Rights Top Peace, Rights Top Environment That Healthy Dan Balanced Dan The rights Top Help Disaster Natural That Is Humanity.

The development of thinking in the formulation of human rights concepts has entered the fourth generation phase. According to Jimly Asshiddiqie, it is considered as a form of horizontal relationship pattern between community groups, between the people or the community, and even among one community group in a country with the community Other. "

Democracy in Indonesia is sourced to Pancasila and the Constitution 1945(*UUD 1945*), democracy is not a destination, but as a means or tools to achieve the goal, namely a fair and prosperous society. To achieve it is necessary participation from the whole community, so that each individual action in achieving that goal must be an accountable action. It is obvious that the soul of Pancasila has underlying the struggle for the liberation of Rights, this movement was born in reaction to the independent Indonesian colonialism and mencita-citakan by nationality, "a very important right for Indonesia's subsequent lives. The soul and the nature of Pancasila underlie the human rights that belong to the people, as well as know the obligation to be carried out and this is the meaning of the human humanity and the ideals of fair and civilized humanity. A fair and civilized humanity is a formulation of the nature of human nobility, with a just and civilized humanity that every citizen has the same equal and equal position on the law, has the same obligations and rights, Every citizen is assured of his rights and freedom relating to the relationship with God, people per person, people with country, community, and also regarding the independence that deserves to be in accordance with human rights. " Then the amendment said that the state of Indonesia will never be democracy if it is still under the Constitution 1945 (*UUD*

1945), since the Constitution 1945 (*UUD 1945*) contains a number of weaknesses that become the doorway to the appearance Authoritarian governance-"since the colonial times there have been ups and downs and rising in the development of political configurations in Indonesia from the political configuration of the kedemocratic authoritarian and vice versa."

Child rights are grouped into 4 (four) categories of child rights:

1. The right to life, namely the rights of children to sustain life and the right to obtain the most health and care standards,
2. The Right To Grow Flower, That Include All Rights To Get Education and To Get Standard Life That Worth For Development FisIk, Mental Spritual, Moral and Social Children,
3. The Right for protection, which includes protection from discrimination, acts of violence and alienation for children who have no family and for refugee children
4. The Right to participate, includes the rights to express opinion in all matters affecting the child.

D. DISCUSSION

Street children and the problem

Understanding and characteristics of Street children Actually, the term street children were first introduced in South America, precisely in Brazil, under the name of *Men Inas dethe section* to refer to groups of children who live on the streets and do not have ropes with tied The United Nations is a child who spends most of his time on the streets for work, play or other activities. Street children live on the streets for being cast or thrown out of a family that cannot afford to Bear the burden of poverty and destruction of his family. Generally street children work as a sharer, scavenger, Polish, child prostitute and garbage scavenger. Not infrequently they face the risk of trafficaccidents, extortion, fights, and other violence. Street children are more easily infected with unhealthy habits of street culture, especially free sex and abuse of illegal drugs. More concern, the environment will encourage street children to be sexual objects such as sodomy or child prostitution.

The threat of sexual violence against female Street children

Harassment and sexual violence often experienced female street children in various forms, such as being chopped, diraba-raba, and raped. Girls, especially those living on the streets, when sleeping often experience harassment or sexual violence from children or members of the street community.

Legal Protection of Street children from the threat of sexual crimes

Nation Indonesian Already Like a Give Attention Against Protection Children Because Order Law Basic 1945(*UUD 1945*) Article 28b Verse (2) States That "Every Children Reserves Top Continuity Life, Grow Flower, And Reserves Top Protection dAri Violence Dan Discrimination". Hand, Protection Cp Existence Children Confirmed An Explicit In 15 Article That Set The rights Children Appropriate Article 52 To With Article 66 Law Number 39 Years 1999 About Rights Human Human sEffectively Sequential Related With Protection Against Children In Indonesia Is As Following :

1. Article 28B paragraph (2) and article 34 of the State constitution 1945(*UUD 1945*),
2. Act No. 4 year 1979 on Child Welfare (Government Gazette year 1979 number 32, addition to Government Gazette number 3143),
3. Law number 7 of 1984 concerning The elimination of all Forms of Discrimination against Women (Convention on The Elimination oF All forms of Discrimination Againts Women) (Government Gazette year 1984 Number 29, addition to Government Gazette number 3277),
4. Law No. 3 year 1997 on children's Court (Government Gazette year 1997 number 3, addition to Government Gazette number 3277),
5. The law Number 4 Years 1997 About Disabled Defects (Sheet Country Years 1997

Number 9 Additional Sheet Country Number 3670),

Law number 20 of 1999 about ILO Convention Endorsement number 138 Concerning Minimum age for Admission TO Employment (ILO Convention knows the minimum age to be allowed to work).

The government's Program and performance in terms of providing protection to street children often got the obstacles in the field. There are several problems related to the government program Dialas, which is among others related to: House Layover.

The stopover House is an attraction that is prepared as an intermediary between the street children and the parties who will help them. The Stopover House is an informal process that gives the street children a resocialization atmosphere of the prevailing values and norms in local communities. A stopover house is an early stage for a child to get the next service, therefore it is important to create a comfortable, orderly and enjoyable atmosphere for the street children.

The general purpose of home layover is to help street children overcome problems and find alternatives for fulfilling their life needs.

The particular objectives are:

- a. To reshape the attitudes and behaviors of children in accordance with the prevailing values and norms in the community.
- b. We provide a variety of alternative services to fulfill the needs of children and prepare their future to be a productive citizen.
- c. There are several functions in the House, including the following
- d. Social worker meeting place with street children,
- e. Where to study the needs of children and the problems faced in finding solutions to the resolution,
- f. Among the children with parents and families,
- g. Child protection from narcotics and illegal drug abuse,
- h. Information Center about street children,
- i. Entrance pathway Social services,
- j. Place of recognition of value and social norms in street children.

E. CONCLUSION

Problems Know Children Street Indeed Not Things New For Nation Indonesian. Life That So Hard Especially In Area Urban Dan Inability In Face Competition In World Business, Disharmony In Family, Lack of Education That Obtained, Life Sex Non Ink The Alangan Teen, Abuse Drugs Forbidden, Marriage In Age Young, Divorce, To With Change Temperature Political That Cause Policies That Burden Community Medium Down, And The practices Corruption, Collusion Dan Nepotism Is Causes From More The mushrooming Life Children Street In Dishes.

Legal protection for street children especially for street children from the threat of sexual crimes seen from the legislation that set it up is quite a lot and complete enough. In accordance with the laws and regulations relating to the protection of children in Indonesia are as follows:

Article 33B paragraph (2) and article 34 of the Constitution of the Republic of Indonesia Year 1945 (UUD 1945), Act no. 4 year 1979 concerning the welfare of children (Government Gazette year 1979 number 32, addition to State Gazette number 3143), Elimination of any discrimination against women (Convention on The Elimination of All Forms of Discrimination Against Women) (Government Gazette year 1984 number 29, supplementary to State Gazette number 3277); The ineffectiveness cause of the legislation in providing protection against street children from victims of sexual crimes can be described as follows:

KPAI (Commission Protection Children Indonesia) That Formed By Law Number 23 Years 2002 Turns out Yet Favoring On Children Street. Children Street That Be Victims Crime Sexual Often Not Protected by KPAI Because Their Not Report To Party Authorities. For Children Street Hai This Done solely By Safety Their In Street. The Enforcement Law Yet Have Understanding The Regulations Legislation That Used In Give Protection For a Nak. Things This Cause Efforts Enforcement huKum Experience Difficulty Dan Of UnpaSTiAn Law. Socialization Regulations Legislation About

Children Yet Optimal. Still Many That Yet Know Know Protection Against The rights Children Even To Their That Including Family That Capable, Let alone For Their Family That Less Capable. Neglect Children Isn't Is A Crime For Their Because Ignorance Their Will Sanctions That Can Charged To Their Enough Weight. Cases Rape, Obscenity Dan Violence Sexual Other For Children Street Happen Result Sanctions That Have Not Have Effect Deterrent For Culprit Because Ignorance Their.

Performance Shuttle Agencies Government In Handle Children Street Less Coordinated With Good. Things This Look From Programs that Done By c Not Involves *Kementrian Education Dan Culture* Though Second Agencies This Have the Programs that Associated With Children Street. Besides It There are Difference Opinion Among Second Agencies Government This Know Model Coaching Against Children Street. *Ministry Social* Consider That Home Stopover Less Effective Dan Wasting Funds Were, While Did *Kementrian Education and Culture* Home Stopover Is Wrong One Center Information Dan Education For Children Street That Very Useful. Like Extension Sex, Use Tool Contraceptives To On Danger Disease Infectious Sexual Like HIV AIDS For This Yet Known By Children Street.

REFERENCES

- Bagong Suyanto, "*Permasalahan-permasalahan Strategis dalam Program Pemberdayaan Ekonomi Kerakyatan*", (Surabaya: Makalah untuk Rapat Kerja Daerah Program Keluarga Berencana Nasional Tahun 2002)
- <https://www.kompasiana.com/novi/54ff0e3ba3331174d50fba8/anak-jalanan-dan-hak-asasi-manusia?page=all>
- <https://www.kompasiana.com/jemiesimatupang/5500510a813311255efa781e/anak-jalanan-pendidikan-dan-hak-asasi-manusia>
- Property yang dimaksud adalah meliputi nyawa, kehidupan, kemerdekaan dan kehormatan dan harta benda Satwa Arinanto, *Negara Hukum dan Demokrasi* (Jakarta, FH-UI, 2005)
- <http://jhp.ui.ac.id/index.php/home/article/download/1668/1487>
- <http://www.alekkurniawan.com/2011/06/anak-jalanan-dan-hak-asasi-manusia.html>
- Lili Rasjidi dan Ira Rasjidi, *Dakar-Dasar Filia/af dan Teori Hukurn*, (Bandung: Penerbit Citra Aditya Bakti, 2001) dalam Novi Chandra, Op.cir., E. Soernaryono, *Erika Hokum: Relevansi Hokum Kodrar Thomas Aquinas*, (Yogyakarta: 2002)
- Sarya Arinanto, *Hak asasi Monusio Di Indonesia*, (Jakarta :Pusal Studi Hukum Tata Negara Fakultas Hukum Universitas Indonesia, 2005)
- http://digilib.uin-suka.ac.id/22610/1/09340072_BAB-I_IV-atau-V_DAFTAR-PUSTAKA.pdf
- Weston dalam Claude dan Weston; *Roscoe Pound Inrroducfion to the Philosophy of Law* (New Haven: Yale University Press)
- *Mustafa Faldui, Hak Asasi dan Keamanan Manusia*; Analisis Hukum Putusan Mahkamah Konstitusi alas Pengujian Anti-terorismeMm PcrspekrifHuman Security, (Jakeutar Tesis Program Pasta Sarjana UI, 2004)
- Petor Davies, *Hak-Hak Asasi Manusia, sebuah bunga rampai*, (Jakarta: Yayasan Obor Indonesia)
- <http://ejurnal.stainparepare.ac.id/index.php/diktum/article/download/438/334/>
- <http://www.mitrakukum.org/wp-content/uploads/2012/09/modul-pelatihan-ABH4.pdf>

APPLICATION OF LEGAL SANCTIONS ON REFERENCE OF MANDATORY IMMUNIZATION BASED ON LAW IN CHILDREN'S PROTECTION

Yenny Purnama

Student of Legal Studies Doctor Program, Universitas Borobudur
purnasejati@gmail.com

Abstract

The value of immunization is divided into three categories, namely individually, socially and profitably in supporting the national health system. Individually, if the child has been immunized, 80% -95% will avoid malignant infectious diseases. The right to obtain immunization is protected by Law No. 36 of 2009 concerning Health to prevent disease. The right of immunization for children is contained in: Article 130, which contains the government must provide complete immunization to every baby and child and Article 132 paragraph three states that every child has the right to receive basic immunization in accordance with applicable provisions to prevent the occurrence of diseases that can be avoided through immunization. Children are priceless treasures both seen from the social, cultural, economic, political, legal, and sustainability perspectives of a generation of families, tribes and nations. Therefore, children need to be protected from things that interfere with their growth and development. Child protection is all efforts aimed at preventing, rehabilitating and deceiving children who experience acts of mistreatment, exploitation, and neglect in order to ensure the survival and growth of children in a reasonable manner both physically, mentally and socially. Factors that influence children's growth and development are immunization. An abandoned child is a child who is not fulfilled naturally, physically, mentally, spiritually, or socially. If it is not immunized, it can be categorized as neglect of the child. This is because children are not fulfilled physically and mentally because they can get sick due to diseases that can be prevented by immunization. Some countries in the world apply strict sanctions to citizens who refuse compulsory immunization, including Prison (Pakistan), Prohibited schools (Italy), Fines (German), and Cut allowances (Australia). In Indonesia the refusal of immunization can be categorized as neglecting children, so that sanctions can be subject to criminal acts according to Law No. 23 of 2002 concerning Child Protection article 77 and Law No. 35 of 2014 concerning child protection in article 76 letters a and b and Article 77 letter b.

Keywords: Immunization, Child Protection, Child Abandonment, Legal Sanctions.

A. INTRODUCTION

Immunization is an attempt to actively induce or increase one's immunity against an illness, so that if one day is exposed to the disease it will not get sick or just experience mild illness. Immunization is a program organized by the government to eradicate or suppress immunization-preventable diseases. Children who have been given immunization can be protected from a variety of dangerous diseases included in suppress immunization-preventable diseases, namely TB, Diphtheria, Tetanus, Hepatitis B, Pertussis, Measles, Polio, meningitis, and pneumonia. With immunization, children are expected to be prevented from the above diseases.¹ Impact if not immunized, can cause Extraordinary Events and can even cause outbreaks, if the Extraordinary Events treatment is unsuccessful.

The Extraordinary Events of Diphtheria in 2017, as mentioned by the Indonesian Pediatrician Association (IDAI), occurred in 28 provinces and 142 districts / cities, so that the highest incidence in the

¹ Kementerian Kesehatan RI. Profil Kesehatan Indonesia Tahun 2015. Jakarta: Kementerian Kesehatan RI. 2016

world can be concluded. As prevention, IDI and IDAI appealed to the public to Immunization through ORI (Outbreak Response Immunization), this is the only way to reduce the number of fatalities continues to increase. The death toll of diphtheria outbreaks in Indonesia reached 38 children who died and 600 children were hospitalized.² Extraordinary events Diphtheria is an event that is very detrimental to the community, nation, and country of Indonesia. This outbreak cannot be separated from the low immunization coverage rate. The low number of immunization coverage is due to one of them is the refusal of diphtheria immunization. As happened in Jakarta, refusal of Diphtheria immunization by several schools when the ORI program took place.³

Rejection of immunization is largely due to fear of side effects in the form of heat obtained after immunization. Controversy over rejection and acceptance of vaccines is one of the causes of diphtheria outbreaks. The widespread anthrax movement in the world made diseases that were no longer appearing. Therefore some countries try to fight it by applying strict rules to anyone who prevents children from getting vaccinated. For example, in the country of Uganda, if parents who have children under five do not carry out a complete vaccination, they will face a six-month prison sentence.⁴ What about in Indonesia? Until now there has been no strict application of the law, such as in several countries that have occurred outbreaks. The application of legal sanctions for violators is an important part of achieving a government program. Immunization programs are included in public policy. As the notion of public policy is a decision made by the government or government agency to overcome certain problems, to carry out certain activities or to achieve certain goals relating to the interests and benefits of the people.⁵

In Minister of Health Regulation number 12 of 2017 concerning the implementation of immunization, Immunization Program is an immunization that is mandatory for someone as part of the community in order to protect the concerned and the surrounding community from diseases that can be prevented by immunization. With this immunization program, it is expected that the community can be free from infectious diseases that can be prevented by immunization.⁶

Prevention of infectious diseases, according to Permenkes number 82 of 2014 concerning the prevention of infectious diseases, types of infectious diseases as referred to in paragraph (2) letters a to p (a. Diphtheria; b. Pertussis; c. Tetanus; d. Polio; e. Measles; Typhoid; cholera: Rubella, Yellow Fever, Influenza, Meningitis, Tuberculosis, Hepatitis, Pneumococcal disease, Rotavirus disease, disease due to Human Papiloma Virus (HPV)) is a direct contagious disease that can be prevented by immunization.

In accordance with article 11 in Permenkes number 82 of 2014 concerning the prevention of infectious diseases, efforts to prevent, control and eradicate the Prevention of Communicable Diseases are carried out through activities: a. health promotion; b. health surveillance; c. controlling risk factors; d. case discovery; e. handling cases; f. giving immunity (immunization) g. mass drug prevention; and h. other activities determined by the Minister of Health. Giving immunity (immunization) is one of the activities in the prevention of infectious diseases.⁷

Immunization is one of the health services, namely preventive basic health services that aim to reduce infant mortality. The right to immunization is protected by Law No. 36 of 2009 concerning Health to prevent disease. The right of immunization for children is stated in: Article 130 which contains the government must provide complete immunization to every baby and child and Article 132 paragraph three states that every child has the right to receive basic immunization in accordance with the applicable

² <https://news.detik.com.12/2017>

³ <https://Kompas.com-12/2017>

⁴ <https://www.bbc.com.10/2017>

⁵ Syarif Budiman. Analisis Hubungan Antara Hukum Dan Kebijakan Publik: Studi Pembentukan Uu No. 14

⁶ Peraturan Menteri Kesehatan Republik Indonesia Nomor 12 Tahun 2017 Tentang Penyelenggaraan Imunisasi.

⁷ Peraturan Menteri Kesehatan Republik Indonesia Nomor 82 Tahun 2014 Tentang Penanggulangan Penyakit Menular

provisions to prevent the occurrence of diseases that can be avoided through immunization.⁸ Law of the Republic of Indonesia number 23 of 2002 concerning child protection, concerning: Rights and obligations of child article 8 which reads, "Every child has the right to receive health services and social security in accordance with physical, mental, spiritual and social needs."⁹

Physical, mental, spiritual and social needs of children must be fulfilled so that children can grow optimally according to their genetic potential. Optimal growth and development can be carried out optimally if the child is protected from things that interfere with the process. The disruption of child development can be categorized as neglecting children (neglected children are children who are not met their needs naturally, both physically, mentally, spiritually and socially).¹⁰

Based on the research there is a significant relationship between basic immunization and the growth and development of infants.¹¹

In terms of the application of the law to the refusal of diphtheria immunization, there are several articles from the Law that can be used, namely Law No. 23 of 2002 concerning Child Protection article 77: "Anyone who intentionally acts: a. discrimination against children which results in children experiencing losses, both material and moral, thus hampering their social functions; or b. neglect of children which results in children experiencing pain or suffering, both physical, mental, and social, c. convicted with a maximum imprisonment of 5 (five) years and / or a fine of a maximum of Rp. 100,000,000.00 (one hundred million rupiah).¹²

What is stated in Law No. 35 of 2014 Amendments to Law Number 23 Year 2002 concerning Child Protection: Article 76B "Everyone is prohibited from placing, allowing, involving, ordering to involve the child in situations of mistreatment and neglect. And Article 77B Any person who violates the provisions as referred to in Article 76B, shall be punished with imprisonment for a maximum of 5 (five) years and / or a fine of a maximum of Rp. 100,000,000.00 (one hundred million rupiah).¹³ According to health law experts Dr. M. Nasser SpKK, D.Law, the article above can be used for the application of the law against immunization rejection.¹⁴

B. RESEARCH METHODS

The research method in this journal uses normative legal research, namely legal research conducted by means of, examining library material or mere secondary data. Normative legal research is legal research that places law as the norm system. The norm system in question is regarding principles, norms, rules of law and regulations, court decisions, agreements and doctrines.

The theoretical framework is the ability of a researcher to apply his thinking patterns, in this case we use legal theory:

C. PROBLEM FORMULATION

Based on the background above, the author makes the formulation of the problem as follows:

1. Why do legal sanctions for refusing mandatory immunization under the Child Protection Act need to be implemented?

⁸ Undang Undang nomor 36 tahun 2009 tentang Kesehatan

⁹ Undang-Undang Republik Indonesia nomor 23 tahun 2002 tentang perlindungan anak

¹⁰ Undang-Undang No. 35 Tahun 2014 Pasal 1 ayat 6 tentang pembaruan perlindungan anak

¹¹ Melisa Citra K, Sefti R, Yolanda B. Hubungan Pemberian Imunisasi Dasar Dengan Tumbuh Kembang Pada Bayi (0 – 1 Tahun) Di Puskesmas Kembang Kencana Kecamatan Tombulu Kabupaten Minahasa. Ejournal Keperawatan (E-Kp) Volume 4 Nomor 1, Februari 2016)

¹² Undang-Undang Republik Indonesia nomor 23 tahun 2002 tentang perlindungan anak

¹³ Undang-Undang No. 35 Tahun 2014 tentang pembaruan perlindungan anak

¹⁴ dr. M. Nasser SpKK, D.Law. Pendapat Pakar Hukum Kesehatan. Wawancara 31-12-2018

2. How do you apply for mandatory immunization refusal sanctions under the Child Protection Act?
3. What is meant by the application of legal sanctions for rejection of mandatory immunization under the Child Protection Act?

To find out and explain why, how and what the application of legal sanctions against the refusal of compulsory immunization under the Child Protection Act. The hope is to form an understanding for law enforcers on the importance of implementing legal sanctions against the refusal of mandatory immunization under the Child Protection Act.

1. Authority theory

The term authority theory comes from English language translation, namely the authority of theory, a term used in the Dutch language, namely, *theorie van het gezag*, whereas in German it is *theorie der autorität*. The following is presented the concept of H.D Stout authority theory quoted by Ridwan HB. Authority is "The whole rules relating to the acquisition and use of government authority of legal subjects by the public in relation to public law relations"¹⁵

In general, authority is defined as power. Power is:

"The ability of people or groups to control other people or other groups based on authority, authority, charisma, or physical strength." ¹⁶

2. Protection Theory

The term legal protection theory comes from the English language, namely, legal protection theory, while in the Dutch language it is called *theorie van de wettelijke bescherming*, and in German is called *theorie der rechtliche schutz*. Gematically protection is: shelter or things (deeds) to protect.

Protecting is causing or causing protection. The meaning of taking refuge includes: (1) placing himself so as not to be seen, (2) hiding or (3) asking for help. The definition of protection includes: (1) closing so that it is not visible or visible, (2) maintaining, caring for, or maintaining, (3) saving or providing help.¹⁷

Maria Theresia Geme means that legal protection is:

"Relating to the actions of the state to do something with (enforcing state law exclusively) with he aim of guaranteeing the certainty of the rights of a person or group of people".¹⁸

There are 3 things that can be analyzed from Sudigno Mertokusumo's view. The three things include legal functions, legal objectives, and duties.

The function of law is to protect human interests. The main objective of the law is to create an orderly, orderly and balanced society order.¹⁹

D. DISCUSSION

Child Protection

Children are actually priceless treasures both seen from the perspective of social, cultural, economic, political, legal, and sustainability perspectives of a generation of families, tribes and nations. Seen from the social as a respect for the dignity of the family depends on the attitudes and behavior of the child for achievement, and the culture of the child is wealth and wealth that must be safeguarded as well as a symbol of a family's fertility, from politics the child is the successor of the tribe, nation, and economy. the child has a strategic position and position before the law, not only as

¹⁵ Ridwan HR, hukum administrasi negara, (Jakarta : Raja Grafindo Persada, 2008) hlm. 110

¹⁶ Departemen Pendidikan kebudayaan, kamus besar Bahasa Indonesia, (Jakarta : Balai Pustaka, 1889), hlm.468

¹⁷ Departemen Pendidikan kebudayaan, 1889, Op. Cit., hlm.526

¹⁸ Maria Theresia Geme "Perlindungan Hukum Terhadap Masyarakat Hukum Adat Dalam Pengelolaan Cagar Alam Watu Ata Kabupaten Ngada, Provinsi Nusa Tenggara Timur", Disertasi Program Doktor, Ilmu Hukum, Fakultas Hukum, Universitas Brawijaya Malang, 2012, hlm. 99

¹⁹ Sudigno Mertokusumo, Mengenal Hukum Suatu Pengantar, (Jogjakarta : Liberti, 1999), hlm. 71

the successor and heir of the family but as part of the legal subject with all the fulfillment of the needs for children who are guaranteed by law.²⁰

John Lock suggests that children are individuals who are still clean and sensitive to stimuli that come from their environment. Children are also not the same as adults, children have a tendency to deviate from law and order caused by limited knowledge and understanding of the reality of life, children are easier to learn with examples received from rules that are compelling.²¹

Therefore, every child's rights must be upheld for the sake of achieving the goal of the birth of a healthy young generation for the survival of the nation's life. Children are human beings who are the bearers of rights, namely everything that has rights and obligations called legal subjects. Understanding of children is regulated in Article 1 number 1 of Law 35 of 2014 concerning Child Protection which reads as follows: "Child is a person who is not 18 (eighteen) years old, including children who are still in the womb" Each statutory regulation set separately about the criteria for children. Child criteria affect the legal position of children as legal subjects. In Indonesian law there is pluralism regarding the age limit, this is what causes each legislation to regulate separately regarding the criteria regarding children.²²

Child protection is all efforts aimed at preventing, rehabilitating, and empower children who experience acts of mistreatment, exploitation and neglect in order to ensure the survival and growth of children in a reasonable manner both physically, mentally and socially.²³

In relation to the issue of legal protection, the 1945 Constitution clearly states that the State provides protection to the poor and neglected children. The problem of poverty is increasingly becoming a disease that continues to emerge in this country. The crime that befell children in this country is the main factor due to poverty, where this poverty factor has a major contribution in the act of neglecting children carried out by biological parents. In principle, child protection is based on Law No. 35 of 2014 carried out based on Pancasila and the 1945 Constitution. The principle of protection is regulated based on the best interest of the child, where this principle stipulates that in all actions that involve children carried out by the government, society, legislative bodies and judiciary, the interests of the child must be the main consideration.²⁴

Child Abandonment

Displaced children are children who because their parents neglect their obligations so that the needs of children are not met naturally, both spiritually, physically and socially. The understanding of neglected children is stated in Law No. 35 of 2014 Article 1 paragraph 6 that: "abandoned children are children whose needs are not met naturally, physically, mentally, spiritually, or socially".

Although there is a set of laws and regulations that protect children's rights, but the quality of the problems and year after year develops the complexity of hazards for the growth and development of physical, mental, moral, social and intellectual children. The type of neglect that is increasingly prevalent is found as parents do not provide enough food, clothing, shelter and affection for a child, as well as children left behind by their parents.²⁵

The case of neglect committed by the biological parents of this child if viewed from the legal side is an act that is included in a criminal act, because clearly the victim's parents abandoned the child, and this is an act categorized as an act of crime. Law No. 23 of 2002 concerning Child Protection

²⁰ Emeliana Krisnawati. *Aspek Hukum Perlindungan Anak*, (CV. Utama, Bandung, 2005), hlm. 5

²¹ Irma S. Soemitro, *Aspek Hukum perlindungan Anak*. (Bumi Aksara. Jakarta, 1990). hlm. 19

²² Darwan Prints, *Hukum Anak Indonesia*, (Bandung. PT. Citra Aditya Bakti, 2002), hlm 2

²³ Sholeh Soeady dan Zulkahir. *Dasar Hukum Perlindungan Anak*. (Jakarta Novindo Mandiri, 2001), hlm. 4

²⁴ Emeliana Krisnawati. *Aspek Hukum Perlindungan Anak*, (CV. Utama, Bandung, 2005), hlm. 5

²⁵ Emeliana Krisnawati. *Aspek Hukum Perlindungan Anak*, (CV. Utama, Bandung, 2005), hlm. 2

article 77: "Anyone who intentionally acts: a. discrimination against children which results in children experiencing losses, both material and moral, thus hampering their social functions; or b. neglect of children which results in children experiencing pain or suffering, both physical, mental, and social, c. convicted with a maximum imprisonment of 5 (five) years and / or a fine of a maximum of Rp. 100,000,000.00 (one hundred million rupiah).²⁶

The legislation governing child protection, namely Law No. 35 of 2014 and also the Criminal Code, is explained about the threat of imprisonment and fines. In Law No. 35 of 2014 concerning the protection of children in article 76 letters a and b and Article 77 letter b concerning criminal provisions that mention that: a. treat children in a discriminatory manner which results in children experiencing losses, both material and moral, thus hampering their social functions. b. Everyone is prohibited from placing, letting, involving, ordering to involve the child in situations of mistreatment and neglect. Article 77 letter b; c. Anyone who violates the provisions as referred to in Article 76B, is subject to criminal punishment. A maximum of 5 (five) years in prison and / or a maximum fine of Rp. 100,000,000.00 (one hundred million rupiah).²⁷

Immunization and child development

The benefits of immunization are not only felt by the government by decreasing morbidity and mortality due to diseases that can be prevented by immunization, but also felt by:

a. For children

Prevent suffering caused by illness, and possible disability or death.

b. For family

Eliminate anxiety and psychology of treatment if the child is sick. Encourage family formation when parents are sure to have a comfortable childhood. This encourages planned family preparation to be healthy and of good quality.

c. For the country

Improving the health level creates a strong and resourceful nation to continue the country's development.²⁸

Vaccine values are divided into three categories, namely individually, socially and profitably in supporting the national health system. Individually, if the child has been vaccinated, 80% -95% will avoid malignant infectious diseases. The more babies / children who get vaccinated (judged from immunization coverage), the more visible the decline in morbidity (morbidity) and death (mortality) In terms of supporting the national health system, immunization programs are very effective and efficient if given in broad coverage nationally. Increasing the economic growth of a country will certainly be better if the people are healthier so that the budget for curative / treatment can be transferred to other programs in need. Investment in health for welfare and improving the quality of children in the future.²⁹

In addition to healthy nutrition and clean sanitation, immunization can also be a supporting factor for child development. Therefore, parents should not miss to take their children to health facilities. "The factors that influence child growth are immunization. Coupled with exclusive breastfeeding, balanced nutrition, clean water supply, healthy sanitation and optimal care," said Chairperson of the management of the Indonesian pediatrician center (PP IDAI) Immunization Task Force, Prof. Dr. Cissy B Kartasmita SpA (K) MSc, when found at IDAI Building, Salemba, Central Jakarta, Wednesday, April 26, 2017.³⁰

²⁶ Undang-Undang Republik Indonesia nomor 23 tahun 2002 tentang perlindungan anak

²⁷ Undang-Undang No. 35 Tahun 2014 tentang pembaruan perlindungan anak

²⁸ Proverawati, A dan Andhini C.S.D. 2010. Imunisasi dan Vaksinasi. Yogyakarta: Nuha Offset.

²⁹ Ranuh I.G.N. G., Suyitno H., Hadinegoro S.R.S., Kartasmita C.B., Ismoedijanto., Soedjatmiko., 2011. Pedoman Imunisasi di Indonesia. Jakarta: Badan Penerbit Ikatan Dokter Anak Indonesia

³⁰ <https://lifestyle.okezone.com> 26/4/2017

Sanctions for refusing immunization in several countries

Several countries in the world apply strict sanctions to citizens who refuse compulsory immunization according to the provisions and regulations in the country. Given the importance of immunization in combating and suppressing diseases that can be prevented by immunization (P3DI). The state governments involved in implementing strict regulations to combat anti-vaccines are:

1. Prison. Pakistan is one of the three countries in the world, where polio is endemic. Over the years, the Pakistani government has tried to eradicate polio but continues to get many obstacles, ranging from parental refusal, resistance from local militants and attacks on the polio vaccination team. For this reason, the local authorities acted decisively by arresting parents who deliberately kept their children away from the vaccine. "There is no forgiveness, we have decided to face a case of rejection with an iron hand. Anyone who refuses (vaccination) will be sent to jail," said Deputy Commissioner of Peshawar City Government, Riaz Khan Mehsud.
2. School is prohibited. In Italy in 2015 there were around 250 recorded cases of measles. In 2016 the number increased to 840 cases and now throughout 2017 the epidemic has reached 2,395 cases. In response, the Italian Prime Minister Paolo Gentiloni recently made a decisive decision by applying the new rules for children to be vaccinated. Vaccination is a requirement for children who want to participate in Early Childhood Education (PAUD). When children will enter elementary school and still not vaccinated, their parents can be fined.
3. Fines. Not long after Italy announced it was immediately acting decisively to enforce the mandatory vaccination regulations, neighboring Germany also took similar steps. German Health Minister Hermann Grohe said that with the new regulation, parents who fail to include their children in the mandatory vaccination program will be fined up to Rp. 37 million. In addition, the child can also be expelled from his school specifically at the level of Early Childhood Education (PAUD).
4. Cut allowances. In 2015, in Australia, it was estimated that more than 39,000 children under the age of 7 did not get a vaccine because their parents adhered to anti-vaccines. Responding to this, the local government made a rule to cut allowances to around Rp 1.5 billion. In Australia there are indeed government benefits for every child born. Well if parents do not vaccinate children, the benefits will be revoked.³¹

Indonesia should be able to apply strict legal sanctions, such as the example of the country mentioned above, given the importance of immunization against child growth in fulfilling legal subjects that need to be protected, in order to grow according to their genetic potential. And as a legal subject with all the fulfillment of the needs for children to get legal guarantees in accordance with applicable laws.

E. CONCLUSION

Children are priceless treasures both seen from the social, cultural, economic, political, legal, and sustainability perspectives of a generation of family, ethnicity and nation. Children are individuals who are still clean and sensitive to stimuli that come from their environment. Children are human beings who are the bearers of rights, namely everything that has rights and obligations called legal subjects. So, children need to be protected against things that interfere with their growth and development. Child protection is all efforts aimed at preventing, rehabilitating and deceiving children who experience acts of mistreatment, exploitation, and neglect in order to ensure the survival and growth of children in a reasonable manner both physically, mentally and socially.

³¹ <https://health.detik.com/6/2017>

Factors that influence children's growth and development are immunization. An abandoned child is a child who is not fulfilled naturally, physically, mentally, spiritually, or socially. The benefits of immunization are a decrease in morbidity and mortality due to diseases that can be prevented by immunization. If it is not immunized, it can be categorized as neglect of the child. This is because children are not fulfilled physically and mentally because they can get sick due to diseases that can be prevented by immunization. This is in accordance with the Child Protection Act No. 23 of 2002 and Law No. 35 of 2014. So, immunization refusal can be threatened according to the Act above.

Neglect of children (one of whom refuses immunization) can be subject to sanctions for criminal acts in accordance with Law No. 23 of 2002 concerning Child Protection article 77 and Law No. 35 of 2014 concerning child protection in article 76 letters a and b and Article 77 letter b. Some countries in the world apply strict sanctions to citizens who refuse compulsory immunization according to the provisions and regulations in the country, including Prison (Pakistan), Prohibited schools (Italy), Fines (Germany), and Cut allowances (Australia).

REFERENCES

- Darwan Prints, *Hukum Anak Indonesia*, Bandung. PT. Citra Aditya Bakti, 2002, hlm 2
- Departemen Pendidikan kebudayaan, kamus besar Bahasa Indonesia, (Jakarta : Balai Pustaka, 1889), hlm.468
- Emeliana Krisnawati. *Aspek Hukum Perlindungan Anak*, CV. Utama, Bandung, 2005.
- Irma S. Soemitro, *Aspek Hukum perlindungan Anak*. Bumi Aksara. Jakarta, 1990.
- Kementerian Kesehatan RI. Profil Kesehatan Indonesia Tahun 2015. Jakarta: Kementerian Kesehatan RI. 2016
- Maria Theresia Geme “Perlindungan Hukum Terhadap Masyarakat Hukum Adat Dalam Pengelolaan Cagar Alam Watu Ata Kabupaten Ngada, Provinsi Nusa Tenggara Timur”, Disertasi Program Doktor, Ilmu Hukum, Fakultas Hukum, Universitas Brawijaya Malang, 2012.
- Mukti Fajar ND dan Yulianto Achmad, *Dualisme penelitian hukum Normatif dan Hukum Empiris*, (Yogyakarta : Pustaka Pelajar, 2010).
- Proverawati, A dan Andhini C.S.D. 2010. *Imunisasi dan Vaksinasi*. Yogyakarta: Nuha Offset.
- Ranuh I.G.N. G., Suyitno H., Hadinegoro S.R.S., Kartasasmita C.B., Ismoedijanto., Soedjatmiko., 2011. *Pedoman Imunisasi di Indonesia*. Jakarta: Badan Penerbit Ikatan Dokter Anak Indonesia
- Ridwan HR, *hukum administrasi negara*, (Jakarta : Raja Grafindo Persada, 2008) .hlm. 110
- Soerjono Soekanto dan Sri Mamuji, *Penelitian Hukum Normatif, suatu tinjauan singkat*. (Jakarta: Raja Grafindo Persada, 2010).
- Sholeh Soeady dan Zulkahir. *Dasar Hukum Perlindungan Anak*. Jakarta Novindo Mandiri, 2001.
- Sudigno Mertokusumo, *Mengenal Hukum Suatu Pengantar*, (Jogjakarta : Liberti, 1999).
- Undang-Undang Republik Indonesia nomor 23 tahun 2002 tentang perlindungan anak
- Undang Undang nomor 36 tahun 2009 tentang Kesehatan
- Undang-Undang No. 35 Tahun 2014 tentang pembaruan perlindungan anak
- Melisa Citra K, Sefti R, Yolanda B. Hubungan Pemberian Imunisasi Dasar Dengan Tumbuh Kembang Pada Bayi (0 – 1 Tahun) Di Puskesmas Kembang Kecamatan Tombulu Kabupaten Minahasa . *Ejournal Keperawatan (E-Kp)* Volume 4 Nomor 1, Februari 2016
- <https://lifestyle.okezone.com> 4/2017
- <https://health.detik.com> 6/2017
- <https://news.detik.com>.12/2017
- <https://Kompas.com> 12/2017
- dr. M. Nasser SpKK, D.Law. Pendapat Pakar Hukum Kesehatan. Wawancara 31-12-2018

THE APPLICATION OF LAW, GOING TO THE LAW ENFORCEMENT (AN ANALIZYNG OF THE RIIL SCIENTIFIC)

Yuhano

Student of Legal Studies Doctor Program, Universitas Borobudur
yuhano@indo.net.id

Abstract

The concept of the rule of law, the influence of the flow of socialism is getting stronger due to the existing concept of the rule of law that raises imbalances in the distribution of sources of prosperity. As a result the poverty gap has sharpened. this fact raises new awareness of the need to be involved in the role of the State in resolving the problems that occur. affirmation of the nation's philosophy towards the concept of the welfare state is also explicitly stated in legal politics as stated in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia which states "Indonesia is a state of law.the principle of state law which gave rise to the concept of the welfare state (welfare staats / state welfare law) was required to expand its responsibilities to cover the socio-economic problems faced by the people, the personal role to control the livelihood of the people was eliminated. it was this development that provided legislation for interventionist countries in the twentieth century. Even the State needs and must intervene in various socio-economic problems.

This journal has 2 (two) formulation problems, first; how is the role of the state in order to arrange the legal politics of the economy in building national economic conditions based on the concept of the welfare state? second, how is legal protection for health service business actors, namely Hospital for illegal acts by patients as consumers by using deconstruction interpretations? The research method used in this study is normative research law, with data used in the form of library materials or secondary data which includes primary legal materials, namely Law No. 36 of 2014 concerning Health Workers. secondary legal material including reference books relating to legal protection for persons with disabilities, as well as tertiary legal materials in the form of articles, dictionaries and other materials available in accordance with the writing of this journal.

Keywords: Legal protection, health service business actors, acts against the law of the welfare state concept

A. INTRODUCTION

In this moment there is the progress and change of the social life complexity such as the change of the social system. The efective communication is needed so much to make the social life harmonisly among the social participant who have the modern style life. The modern style life is the social model is moved for the conflict where need the law to regulate and controlling the conflict. So it is able to make the efective communication in the society. Really, the role or the function of the law want to make the efective communication in the society. And it is impossible if the social life does not need the legal service. Especially for the modern social where the conflict is happent intensively. And this situation is happent continously as way as the development period. So the law and the social life are two components that needed between the law as the normal idealis that analized from how far received the norm by society applying in the riil social life.

Actually the social life needs the balancing to achieve the ideas through the efective communication. So the law is needed by the social life as a tool to serve the relation among the social participants. So it can get the positive law. In the change of the social life, it will creat the legal change

serving the social interest. According to Satjipto Rahardjo about the law, it (the law) is very connected with the national development. The relation among them (law and national development) it can become the international issue¹.

In the 1972 there was the meeting of lawyers attending for the law and development to compose the result of agreement about kinds of researchs for the law and the development. And then, Satjipto Rahardjo said that there are many kinds of relation between the law and the development as the process to change the social. The law, it is also as a tool to change the social life. Accordance with that statement above, actually the people begin to analyze about the role or the function of law in the society but just talking about the consistant norm, logic and closed. It tries to analyze the law in the social actions and the law as the process to achieve the goals.

The application of law into the law enforcement can not be separated from the riil law in the society, because the law enforcement is made from the law as the instrument of the norm rule received by society efectively. The positive law or the law enforcement is not the application of law normatively without attending the riil situation and the background of the social reality.

In the legal development to achieve the law enforcement it is not limited by the normative rule but in the achievement of the law enforcement it should understand the social reality include its factors. We know that the effort of the criminal elimination policy (in Indonesian) is form of the legal development. It is used to make the social welfare and the social defence.

According to Muladi, the problem of the Indonesian criminal law will find the problem of the criminal elimination in the society. And it is called as the criminal policy.² G. Peter Hoefnagels said that criminal policy as a science of policy is part of a larger policy : the law enforcement policy, the legislative policy and enforcement policy is in turn part of the social policy.³

Law enforcement achieve the ideas of the legal development it is mentioned that Indonesian is the legal state and not as illegal state. It means that all activities must be regulated by the law. This research tries to find answers how does the application of law make the role or the function of law as a social servicer in the law enforcement⁴.

B. RESEARCH METHOD

The research method used in this study is normative research law, with the data used in the form of library materials or secondary data which includes primary legal materials, namely Law Number 36 of 2014 concerning Health Workers. Secondary legal materials include reference books relating to legal protection for persons with disabilities, as well as tertiary legal materials in the form of articles, dictionaries and other literature available in accordance with the writing of this journal.

C. PROBLEM FORMULATION

In this writing the author discusses the problem as follows :

1. How is the role of the state in order to arrange the legal politics of the economy in building national economic conditions based on the concept of the welfare state?
2. How is legal protection for health service business actors, namely Hospital for illegal acts by patients as consumers by using deconstruction interpretations?

D. DISCUSSION

1. The Application Of Law As A Norm Concretization In The Society

¹ Faisol Azhari, 2003, *The Police Descretion In The Law Enforcement*, Undip Press, Semarang, p.58

² Muladi, 1985, *Capita Selecta of the Criminal Justice System*, Undip, Semarang, p.vii

³ G. Peter Hoefnagels, 1969, *The Otherside Of Criminology*, p.57

⁴ Lawrence M Friedman, 1969, *Law And Behavioral Science*, the bobbs, Herril, Indianapolis, p. 76-77

Actually the law is the ideal rules about the norm must be done. When the law is applied in the society that is the process of concretization but it is still abstract. In the dogmatical law the law must attend the application of law. It means we have to understand about its factors. And the main factor is the human. According to Satjipto Rahardjo, In the social relationship there are social models and the maker of law is the reflection of the social models.⁵ Chambliss and Seidmann differed two social models they are the value consensus and the social conflict. For the value consensus, it is like no conflict in the society because they have a agreement or consensus or value recognized by them. In the second model, the character of the social conflict is change and the conflict. There are many impression in the society. Schuyt, there are two possibilities to solve the conflict they are conflict resolving and conflict strengthening⁶

2. The Application Of Law Into The Law Enforcement

First, we have to understand what the application of law and the law enforcement are. The law enforcement (in the small meaning) is the performing the rule to the society. But the duty of the law enforcement is not just performing it normatively such as The criminal law is not the policy to eliminate the crime normatively. According to Barda Nawawi Arief, The policy of the criminal elimination is part of the social defence. The main goal of the criminal policy is the social defence to achieve social welfare. The criminal policy is part of the social policy to reach the social welfare.⁷

Based on the UN (United Nations Organization) congress for the criminal eradication and the criminal elimination it attend the context of the development policy as the social global. The criminal elimination can be done through the policy approach (the criminal policy and the social policy and the criminal elimination). When the criminal policy is a part of the social policy, so that the rule can not be done limitatively or all rules normatively.

Talking about the legal achievement to the social welfare and the social defence the application of law is not the legal performing normatively. But it has to attend aspect of phenomena in the social reality and law is not made to be theory rational logically. But it is made to be done being effective communication among the social participants.

Therefore it is better called as the law is not the goal but the law is a tool to achieve the goal. Paul Scholten said that really the law has stopped to be the law when it has never been done. But when talking about the application of law, the law can be done in the social reality and it is the reflection of the rule or not.

Based on that statement that is depend on by how far to achieve the goal of the law enforcement or when the goal of the law enforcement will be achieved and the law is not done normatively. Here is, it is called as the application of law in the law enforcement. Roscoe Pound deferred them as the law in the books and the law in action. According to Edwin M Schur the law in action regulate the real social behaviour and the goals of the rule is same as the effect of the rule in the social reality⁸.

Exactly, we will find many rules and the effort of the law enforcement through the punishment. And the rules are different one for one. Because each rule has the background, histories and the way to make it. According to Soetandyo Wignjosoebroto, In the society the process of the social life will give the certain case for the effort of the order enforcement.⁹

⁵ Satjipto Rahardjo, 1980, *Law and Society*, Angkasa, Bandung, p.40

⁶ Ronny Hanitijo Soemitro, 1985, *Study Of Law And Society*, Alumni, Bandung, p.31

⁷ Barda Nawawi Arief, 2001, *The problem of the law enforcement and the policy of the criminal elimination*, Citra Aditya, Bandung, p.20

⁸ Alviner Shlomo, 1980, *Law And Social Control* (Ideas And Ideologies), Edward Arnold Publisher, London, p.89

⁹ Soetandyo wignjosoebroto, 2002, *The law: Paradigm, Method And The Problematically*, Huma, Jakarta, p.260

In the national law development the national law is made, built and developed to create the Indonesian social life system. The law is made to be the social engineering. The legal development finds a tool to develop the society based on the national law regulate the behaviour seriously. But the application of law has to regulate it flexibility.

E. CONCLUSION

The law as a rule it consists of the ideal necessity it can be valued from how far it can be received by society as a norm system in the social reality. Really the law is a tool used to change the social life. It means to re-analyze about the function of law in the society.. So the law is not as the constant norm, logic and closed but an analyze about the law to be one with the social actions, as a process etc. The application of law into the law enforcement can not be separated from the function of the law in the social reality. Because the law enforcement is made as a norm received by society effectively. So in the implementation of law the law is not done normatively and actually the implementation of law is a law enforcement. In the legal development to achieve the law enforcement it is not limited the legal perform normatively but it must be understood as a tool to change the social life system. Finally law is not a goal but it is a tool to achieve the goal.

REFERENCES

- Alviner Shlomo, 1980, *Law And Social Control* (Ideas And Ideologies), Edward Arnold Publisher, London.
- Barda Nawawi Arief, 2001, *The problem of the law enforcement and the policy of the criminal elimination*, Citra Aditya, Bandung.
- Faisol Azhari, 2003, *The Police Discretion In The Law Enforcement*, Undip Press, Semarang.
- G. Peter Hoefnagels, 1969, *The Otherside Of Criminology*.
- Lawrence M Friedman, 1969, *Law And Behavioral Science*, the bobbs, Herril, Indianapolis.
- Muladi, 1985, *Capita Selecta of the Criminal Justice System*, Undip, Semarang.
- Ronny Hanitijo Soemitro, 1985, *Study Of Law And Society*, Alumni, Bandung.
- Satjipto Rahardjo, 1980, *Law and Society*, Angkasa, Bandung.
- Soetandyo wignjosoebroto, 2002, *The law: Paradigm, Method And The Problematically*, Huma, Jakarta.

LEGAL PROTECTION ON FULFILLMENT OF HUMAN RIGHTS FOR PERSONS WITH DISABILITIES REVIEWED FROM LAW NUMBER 8 YEAR 2016 CONCERNING DISABILITIES

Zama Kurniati Martina Wulansari

Student of Legal Studies Doctor Program, Universitas Borobudur
zamakurniati81@yahoo.co.id

Evita Isretno Israhadi

Faculty of Law, Universitas Borobudur
evitaisretno@borobudur.ac.id

Abstract

The country of Indonesia is a country that highly upholds human rights where it is in line with the concept of a legal state (*rechtstaat*) adopted in the Republican constitution. As a rule of law, the State of Indonesia has the principle that human rights for every citizen must be protected without exception for citizens with disabilities, because one of the human rights safeguards mandated in the constitution is Article 28D paragraph (1) of the Constitution of the Republic of Indonesia Year 1945. wherein the article contains the Principles of Equality Before The Law, that "every person has the right to recognition, guarantee, protection, and fair legal certainty and equal treatment before the law". But in fact at the level of reality to date people with disabilities remain the most vulnerable groups to be marginalized in society. On this basis, in this study, the focus will be on the community paradigm in Law Number 4 Year 1997 concerning Disabled Persons and the paradigm shift that the legislators want to realize with the enactment of Law Number 8 Year 2016 concerning Disabled Persons for the sake of protection. and fulfillment of the rights of persons with disabilities. This journal has 2 (two) problem formulations, first; How is the regulation of the rights of persons with disabilities in Law Number 8 Year 2016 concerning Persons with Disabilities when compared to Law Number 4 Year 1997 concerning Persons with Disabilities in fulfilling the basic rights of persons with disabilities? Second; How do you reformulate the community paradigm towards respecting the rights of persons with disabilities? The research method used in this study is normative legal research, with the data used in the form of library materials or secondary data that includes primary legal materials, namely Law Number 4 Year 1997 concerning Disabled Persons and Law Number 8 Year 2016 concerning Persons with Disabilities, secondary legal material which includes reference books relating to legal protection for persons with disabilities, as well as tertiary legal materials in the form of articles, dictionaries, and other materials that are in accordance with the writing of this journal.

Keywords: Disabled Persons, Reformulation Paradigm, Fulfillment of Rights

A. INTRODUCTION

The country of Indonesia is a country that highly upholds human rights where it is in line with the concept of a legal state (*rechtstaat*) adopted in the constitution of the Republic of Indonesia as stipulated in Article 1 paragraph (3) of the Constitution of the Republic of Indonesia Year 1945, which reads: "The State of Indonesia is a rule of law". As a rule of law, the State of Indonesia has the principle that human rights for every citizen must be protected without exception. One of the safeguards of human rights mandated in the constitution is in Article 28D paragraph (1) of the Constitution of the Republic of Indonesia Year 1945, in which the article contains the Principles of Equality Before The Law, that

"everyone has the right to recognition, guarantee, protection and legal certainty that fair and equal treatment before the law ", with the principle attached to the article requiring that all Indonesian citizens are no exception to citizens with disabilities along with their legal position and their rights must be upheld in the law.

The term "differently abled people" is a condition that is the power of God Almighty that occurs outside of the human will concerned, which can occur due to acquired disabilities, the cause can be due to traffic accidents, war / armed conflict or due to chronic diseases and congenital defects, the causes of which are among others due to abnormal organ formation (organogenesis) during pregnancy, due to viral attacks, malnutrition, uncontrolled use of drugs or due to illness sexually transmitted. Such conditions should not be a limitation for persons with disabilities to obtain their most essential rights as human beings, namely the basic rights in Article 28A of the Constitution of the Republic of Indonesia Year 1945 that "Every person has the right to live and has the right to live and live". The right to life is the most basic human right for all human beings and is a non-derogable rights under any circumstances in accordance with article 28I paragraph (1) of the Constitution of the Republic of Indonesia Year 1945.

Human rights are always inherent in every human being, including Disabled Persons as fundamental rights that are inherently human and universal, and need to be protected, respected and maintained, so that it is the responsibility of the State and the role of the community to respect the rights of people with disabilities. But in fact at the level of reality to date people with disabilities remain the most vulnerable group to be marginalized in society because in Law Number 4 Year 1997 concerning Disabled Persons, who should be able to provide more operational guarantees in the fulfillment of the rights of persons with disabilities. disability in Indonesia, but the paradigm still looks at a person's physical and mental condition which is included in the object of policy that only focuses on welfare, health, and compensation programs, which makes persons with disabilities an integral part of society in general, which then injures the principle of equality before the law. With the promulgation of Law Number 8 Year 2016 concerning Persons with Disabilities bringing a new paradigm for persons with disabilities, the discussion in this study will focus on studying the paradigm that is to be developed for persons with disabilities in the new rules contained in Law Number 8 Year 2016 concerning People with Disabilities.

B. RESEARCH METHOD

Research is a tool used to strengthen, foster and develop science.¹ The research method used in this study is normative legal research, with the data used in the form of library materials or secondary data that includes primary legal materials, namely Law Number 4 Year 1997 concerning Disabled Persons and Law Number 8 Year 2016 concerning Persons with Disabilities , secondary legal material which includes reference books relating to legal protection for persons with disabilities, as well as tertiary legal materials in the form of articles, dictionaries, and other materials that are in accordance with the writing of this journal. This research is descriptive in nature, namely research that is intended to provide data as accurately as possible with humans, circumstances or other symptoms, and only explain the state of the object of the problem without intending to draw conclusions that are generally accepted.²

C. PROBLEM FORMULATION

Based on the introduction described above, the formulation of the problem in writing this journal is:

1. How is the regulation of the rights of persons with disabilities in Law Number 8 Year 2016 concerning Persons with Disabilities compared to Law Number 4 Year 1997 concerning Persons with Disabilities in fulfilling the basic rights of persons with disabilities?

¹ Soerjono Soekanto, 1986, *Pengantar Penelitian Hukum*, UI Press, Jakarta, page. 3.

² Soerjono Soekanto, 1986, *op.cit.*, page. 10.

2. How do you reformulate the community paradigm towards respecting the rights of persons with disabilities?

D. DISCUSSION

1. Regulation Of The Rights Of Persons With Disabilities In Law Number 8 Year 2016 Concerning Persons With Disabilities Compared To Law Number 4 Year 1997 Concerning Persons With Disabilities In Fulfilling The Basic Rights Of Persons With Disabilities

Disability is an Indonesian word derived from the absorption of English words disability which means disability or disability. Disabled Persons based on Article 1 point 1 of Act Number 8 of 2016 concerning Persons with Disabilities, namely: "Every person who experiences physical, intellectual, mental, and / or sensory limitations for a long period of time in interacting with the environment can experience obstacles and difficulties to participate fully and effectively with other citizens based on equal rights."

Disabled people have the same rights as other human beings, these rights are clearly stated both in the Constitution of the Republic of Year 1945 and other laws and regulations, one of them is Law Number 8 Year 2016 concerning Persons with Disabilities. Rights of Persons with Disabilities as stated in Article 5 paragraph (1) of Law Number 8 Year 2016 concerning Persons with Disabilities, which reads: "Persons with disabilities have the right: a) life; b) free from stigma; c) privacy; d) justice and legal protection; e) education; f) employment, entrepreneurship, and cooperatives; g) health; h) politics; i) religion; j) sports; k) culture and tourism; l) social welfare; m) accessibility; n) public services; o) protection from disasters; p) habilitation and rehabilitation; q) concessions; r) data collection; s) live independently and be involved in the community; t) express, communicate, and obtain information; u) move places and citizenship; and v) free from acts of discrimination, neglect, torture and exploitation. "Based on the rights of persons with disabilities it is clear that the law aims to realize equality of rights and opportunities for persons with disabilities towards a life that is prosperous, independent and without discrimination.

Unlike the rights of persons with disabilities as stipulated in Law Number 4 Year 1997 concerning Disabled Persons Article 6 which reads: "Every person with a disability has the right to: 1) education in all units, paths, types and levels of education; 2) decent work and livelihood according to the type and degree of disability, education, and ability; 3) the same treatment to play a role in development and enjoy the results; 4) accessibility in the framework of independence; 5) rehabilitation, social assistance, and maintenance of social welfare levels; and 6) the same rights to develop their talents, abilities, and social life, especially for children with disabilities in the family and community environment. "

There is one general right of people with disabilities which is only included in Law Number 8 Year 2016 concerning Persons with Disabilities, namely the right to be free from stigma. Based on Article 7 of Act Number 8 of 2016 concerning Persons with Disabilities, that: "The right to be free from stigma for persons with disabilities includes the right to be free from harassment, humiliation and negative labeling related to the conditions of disability." This article reflects the commitment of the Indonesian State to minimize discrimination against persons with disabilities.

One of the objectives of the enactment of Law Number 8 Year 2016 concerning Disabled Persons is positively seen that this law shifts the terminology of persons with disabilities who previously in Law Number 4 Year 1997 concerning Persons with Disabilities, persons with disabilities are referred to as persons with disabilities, while after promulgation Law Number 8

Year 2016 concerning Disabled Persons, the terminology changed to people with disabilities. Then it was reaffirmed in Article 148 of Act Number 8 Year 2016 concerning Persons with Disabilities, which reads: "the term Disabled Persons used in legislation that existed before this Act was in force, must be read and interpreted as Disabled, as long as does not conflict with this Law. "So that the provision reflects respect and appreciation for the existence of Persons with Disabilities.

When referring to Law Number 4 Year 1997 concerning Persons with Disabilities, there is a difference in views on Disabled Persons and less effective effect on its application because the material content in Law Number 4 Year 1997 concerning Persons with Disabilities is more compassionate (charity based) and the fulfillment of the rights of persons with disabilities is still considered a social problem whose policy of fulfilling new rights is social security, social rehabilitation, social assistance, and increased social welfare. Disabled people should get the same opportunity in an effort to develop themselves through independence as a dignified human being.

2. Reformulation of the Community Paradigm Against Respect for the Rights of Persons with Disabilities

Disabled Persons should have the same opportunity to develop themselves through self-reliance as a dignified human being, and fulfillment of the rights of persons with disabilities as a state obligation as also stated in Law Number 39 Year 1999 concerning Human Rights. Disabled Persons are among the vulnerable groups experiencing a lot of discrimination which results in the fulfillment of the rights of persons with disabilities. Of course, the rights of Disabled Persons must be expressly guaranteed in the Indonesian state constitution, namely in Article 28H of the Constitution of the Republic of Indonesia Year 1945 paragraph (2) which states that, "every person has the right to receive special treatment and benefits to achieve the same opportunities and benefits in achieving equality and justice. "The meaning of" convenience "and" special treatment "is not understood in terms of discriminatory treatment, but to obtain affirmative action in the context of protecting constitutional rights. The two concepts must be understood and infused in the formation of legislation and policies as the implementation of the provisions in the Constitution of the Republic of Indonesia Year 1945.

Special treatment and facilities referred to are seen as an effort to maximize the respect, promotion, protection and fulfillment of universal human rights, and are rights that must be owned by persons with disabilities, one of which is accessibility rights in Article 1 point 8 of Act Number 8 of 2016 About Disabled Persons, it reads: "the facilities provided for Persons with Disabilities to realize the Equal Opportunity." Further explained these rights in Article 18 letters a and b, which read: "Accessibility Rights for Persons with Disabilities include rights: a) get accessibility to use public facility; and b) obtaining decent accommodation as a form of accessibility for individuals."

Based on the things mentioned above, the solution that can be given in this problem is by changing the paradigm of the community towards persons with disabilities by equating the concept of thought as contained in Law Number 19 Year 2011 concerning Endorsement of the Convention on the Rights of Persons with Disabilities and the Law Number 8 Year 2016 concerning Disabled Persons who place equal opportunities for persons with disabilities in their efforts to develop themselves through independence as human beings who are dignified in the perspective of human rights and carry out reforms from all fronts by expanding the construction of physical accessibility facilities in the form of the availability of adequate facilities and infrastructure in various fields of life both in the fields of transportation, health, education, and

other public facilities and non-physical accessibility in the form of creating opportunities education, the opportunity to get decent jobs, the opportunity to live in prosperity, the creation of security and other opportunities in the field of life. Thus, the fulfillment of the rights of persons with disabilities must be upheld based on the principle of equality before the law so that there will be no more discrimination against persons with disabilities in various aspects of life.

E. CONCLUSION

Based on the discussion above, the conclusions that can be obtained in this study are Disabled Persons have similar rights to other human beings as clearly stated in the Constitution of Indonesia, namely the Constitution of the Republic of Indonesia Year 1945 and other laws, namely Law Number 8 Year 2016 Regarding Persons with Disabilities, for this reason, so that the public can view the equal rights of persons with disabilities, it is necessary to change the community paradigm towards persons with disabilities by equating the concept of thought as contained in Law Number 19 Year 2011 concerning Convention Endorsement on the Rights of Persons with Disabilities (The Convention on the Rights of Persons with Disabilities) as well as Law Number 8 Year 2016 concerning Persons with Disabilities who place equal opportunities for persons with disabilities in their efforts to develop themselves through independence as human beings who are dignified in the perspective of human rights, and shifting the paradigm in Law Number 4 of 1997 concerning Persons with Disabilities who view the rights of persons with disabilities as charity based and the fulfillment of the rights of persons with disabilities is still considered a social problem.

REFERENCES

A. Legislation

- Constitution of the Republic of Indonesia Year 1945.
- Law Number 4 Year 1997 concerning Disabled Persons.
- Law Number 39 Year 1999 concerning Human Rights.
- Law Number 19 Year 2011 concerning Convention Endorsement on the Rights of Persons with Disabilities (The Convention on the Rights of Persons with Disabilities).
- Law Number 8 Year 2016 concerning Disabled Persons.

B. Internet

- Rahayu Repindowaty Harahap, S.H., LL.M./Bustanuddin, S.H., LL.M., Perlindungan Hukum Terhadap Penyandang Disabilitas Menurut Convention on The Rights of Persons with Disabilities (CRPD) : <http://online-journal.unja.ac.id/index.php/jimih/article/download/2191/1530> diakses pada tanggal 27 April 2019 pukul 12.30 WIB.
- Erna Ratnaningsih, Pergeseran Paradigma Tentang Penyandang Disabilitas Dalam UU No. 8 Tahun 2016 : <http://business-law.binus.ac.id/2016/04/29/pergeseran-paradigma-tentang-penyandang-disabilitas-dalam-uu-no-8-tahun-2016/> diakses pada tanggal 27 April 2019 pukul 12.40 WIB.
- Pusat Studi Hukum Dan Kebijakan Indonesia, Kerangka Hukum Disabilitas di Indonesia : Menuju Indonesia Ramah Disabilitas : <http://www.pshk.or.id/wp-content/uploads/2016/01/Kerangka-Hukum-Disabilitas-di-Indonesia.pdf> diakses pada tanggal 27 April 2019 pukul 13.00 WIB.
- Karel Tuhehay, Difabel dan Aksesibilitas : <http://www.karinakas.org/i/index.php/muka/36-berita/58-difabel-dan-aksesibilitas> diakses pada tanggal 27 April 2019 pukul 13.20 WIB.

MORAL PHILOSOPHY IN LEGAL RENEWAL BASED ON JUSTICE AND LEGAL CERTAINTY IN INDONESIA

Abd. Kadir

Student of Legal Studies Doctor Program, Universitas Borobudur

Abstract

The law is not an institution that is absolute and final, but rather as an institution of morality, conscience and is therefore highly determined by its ability to serve humans. Legal thinking needs to return to its basic philosophy of law for humans. With this philosophy, humanity becomes the determinant and legal orientation point. So the phrase "law for humans" also means "law for justice". This means, that humanity and justice are above the law. The point is the emphasis on fair law enforcement. The problem is how the concept of moral philosophy in legal reform based on justice and legal certainty in Indonesia. The methodology for discussing problems is through a normative legal research approach which studies are carried out with a descriptive analysis method. Based on the study of the theory of justice and legal certainty, the relationship between law and morals has a close relationship and becomes the basis for progressive legal reform for the interests in regulating the life of the nation and state.

Keywords: Legal Reform, Moral and Justice Based

A. INTRODUCTION

The formulation of the Pancasila found in the fourth paragraph of the Preamble of the 1945 Constitution is the source of all sources of law in Indonesia which are products of the legal philosophy of the Indonesian state, inspired by many tribes, Ethnicity, then background, and ideological differences in pluralistic societies. For this reason, a legal philosophy emerged to unite Indonesian people in one nation, one unit, one language, and family principles, even though the follow-up of laws created often mixed, especially from Islamic law, customary law, and western law (civil law / especially in the Netherlands), Islamic law is often used as the basis for legal philosophy as a reference given that the majority of Indonesia's population is Muslims.

So with a legal philosophy developed through the basic ideas of Pancasila, it will be able to accommodate various interests, various tribes, and unify ideological differences in a very diverse society, thus Indonesian society will remain in the corridor of one country, one nation, unity, one language, who uphold the noble values of Pancasila.

Speculatively and critically the philosophy of law seeks to examine ideas about existing laws, see coherence, Correspondence and legal functions created, Indonesia indeed adheres to the popular sovereignty of Pancasila, the relation of legal philosophy to the formation of law in Indonesia is that the philosophy of law plays a role in the change of law towards more democratic, more directed towards the needs of the essential community.

Changes on the basis of renewal based on the principle of benefit and the principle of justice, making the renewal of law through the philosophy of law in Indonesia exist in its legal theory. This is in accordance with the sound of the key sentence in the Explanation of the 1945 Constitution which states; The Constitution creates the main points contained in the opening in its articles, then the change in law in Indonesia is based on the ideas of the articles in the following Body with the Explanation of the 1945 Constitution (as its legal theory).

Philosophically, the function of national law is essentially for protection. Then the change or development of Indonesian law must go through a legal moral philosophy process in which it is able to direct and accommodate legal needs in accordance with the levels of development progress in all

fields and is able to meet the needs of a broader society that tends to be plural, where the laws are rules for the game of life. Law was created to regulate the moral behavior of community members in order to remain in the moral corridor of socio-cultural values that grow and develop in society.

According to Satjipto Rahardjo, legal thinking needs to go back to its basic philosophy of law for humans. With this philosophy, humans become determinants and points of legal orientation. Law is in charge of serving humans, not vice versa. Therefore, the law is not an institution that is free from human interests. Progressive law departs from the basic assumption that law is for humans, not vice versa. Law is not as an absolute and final institution, but as an institution of morality, conscience and because it is very determined by its ability to serve humans. Law is an institution that aims to deliver people to a life that is just, prosperous and makes people happy.

Humanity and justice are the goals of everything in our legal life then the phrase "law for humans" also means "the law for justice". This means that humanity and justice are above the law. The point is the emphasis on fair law enforcement which in Indonesia is the creation of community welfare or what is often referred to as "a just and prosperous society".

Therefore, the government that carries out the duty of the state in making laws must really pay attention to 2 (two) things that have been explained above, namely the law should make the people prosperous and happy and the law created must be in favor of the community and that is called "law for humans".

B. THE PROBLEMS

The issue of the title of this paper is how the concept of moral philosophy in legal reform based on justice and legal certainty in Indonesia.

C. RESEARCH METHODOLOGY

The methodology of discussing this problem is through a normative legal research approach whose study is carried out by descriptive analysis method.

D. DISCUSSION

1. Theoretical Framework a. Justice Theory

Justice is a result of decision making that contains truth, is impartial, can be accounted for and treats every human being in the same position before the law. The realization of justice can be carried out within the scope of life of the community, the state is shown through attitudes and actions that are not biased and give something to others who are their rights. Justice can also be interpreted as an action based on norms, both religious norms and legal norms. According to L.J. van Apeldorn;

That justice treats the same thing and treats that is not equal in proportion to inequality. The principle of justice does not make the essential equality in the distribution of necessities of life. The desire for equality in the form of treatment must open eyes to the inequality of reality.

According to W.J.S Poerwadarminta in the Big Dictionary of the Indonesian language giving fair understanding with impartiality. If there is recognition and treatment that is balanced between rights and obligations, by itself if we recognize the "right of life", then we must defend the right to live by working hard and the hard work we do does not cause harm to others, because people others also have the same rights (the right to live) as well as the rights that we have.

According to Aristotle, justice here is to give to everyone what is their part or right (*ius suum cuique tribuere*). According to him that; Justice is divided into 2 namely corrective justice, justice based on transactions, whether voluntary or not, and focusing on correcting something wrong. And distributive justice, justice that requires distribution or appreciation, which focuses on distribution, honorarium, wealth and other goods that are equally obtained in society. Corrective justice is tasked with rebuilding the established or established equality. Whereas distributive justice emphasizes the study of the balance between the part received by someone as outlined in the form of a decision and the finding is a source of

law. Fair distribution is a distribution that is in accordance with its good value, namely its value to society. The discovery of the law itself is interpreted as a process of legal formation by judges or other legal officers who are given the task of implementing the law against concrete legal events. Furthermore, it can be said that the discovery of law is the process of concretization or individualization of legal regulations (das sollen) which are general in nature by remembering certain concrete events (das sein). In building his argument, Aristotle emphasized the need to distinguish between verdicts that base justice on the nature of cases and those based on common and prevalent human nature, with verdicts based on certain views of certain legal communities.

This distinction should not be confused with the distinction between positive law stipulated in law and customary law. Because based on Aristotle's distinction, the last two judgments can be a source of consideration that only refers to a particular community, while other similar decisions, even if they are realized in the form of legislation, are still natural laws if they can be obtained from the general human nature.

Theories of Natural Law since Socrates to Francois Geny, still maintain justice as a legal crown. Natural Law Theory prioritizes "the search for justice". Objective guidelines come from groundnorm (basic norms). Groundnorm resembles a presupposition of the order to be manifested in living together (in this case the State). Groundnorm is a logical- transcendentals requirement for the enactment of all legal systems and all positive legal arrangements must be guided hierarchically on groundnorm.

John Rawl's social justice in his book a theory of justice explains; Social theory as the difference principle and the principle of fair equality of opportunity. The core of the difference principle, is that social and economic differences must be regulated in order to provide the greatest benefits for those who are most disadvantaged. The term socio-economic differences in the principle of difference leads to inequality in one's prospects to get the basic elements of welfare, income and authority. According to Rawls, the situation of inequality must be given rules in such a way that it is most beneficial for the weaker groups of society. This will happen if two conditions are met. **First**, the situation of inequality guarantees the minimum maximum for the weakest group of people. This means that the community situation must be such that the highest profit can be generated for small groups of people. **Second**, inequality is bound to positions that are open to everyone. That is to say that all people are given equal opportunities in life. Based on this guideline, all differences between people based on race, skin, religion and other differences that are primordial, must be rejected.

So the Rawls Justice Theory can be summarized as follows:

1. Maximizing independence. This limitation on independence is only for the sake of independence itself.
2. Equality for all people, both equality in social life and equality in the form of utilization of natural wealth (social goods). Restrictions in this case can only be allowed if there is a possibility of greater profits.
3. Equality of opportunity for honesty, and the elimination of inequalities based on kelaahiran and wealth.

John Rawls emphasizes that the upholding of a democratic dimension of justice must pay attention to two principles of justice, namely; **First**, Giving equal rights and opportunities to the broadest basic freedoms of the same freedom for everyone. **Second**, it is able to rearrange the socioeconomic disparities that occur so that it can provide reciprocal benefits for everyone, both those from disadvantaged groups and those who are less fortunate.

Justice can only be understood if it is positioned as a condition that the law wants to be realized. Efforts to bring justice into law are dynamic processes that take a lot of time. This effort is often also dominated by strengths that fight in the general framework of political order to actualize it. Thus,

justice has a normative and constitutive nature for the law. Justice is a legal moral basis and a benchmark for a positive legal system. To justice the positive law stems from. While constitutive, because justice must be an absolute element of law as law. Without justice, a rule does not deserve to be a law. If, in law enforcement, it tends to be based on the value of legal certainty or from the point of its regulations, then as a value it has shifted the value of justice and usability. This is because, in legal certainty the most important is the regulation it self in accordance with what was formulated. Likewise when the value of usability is preferred, then the value of usability will shift the value of legal certainty and the value of justice because what is important for the value of usability is the fact whether the law is useful for the community. Likewise, when it is considered only the value of justice, it will shift the value of legal certainty and usability. So, in law enforcement there must be a balance between the three values.

2. Theory of Legal Certainty

According to Kelsen, law is a norm system. Norms are statements that emphasize the "supposed" aspect or *das sollen*, by including some rules about what to do. Norms are products and deliberative human actions. The law which contains general rules becomes a guideline for individuals behaving in a society, both in relationships with fellow individuals and in their relationships with the community. These rules become a limitation for the community in overloading or taking action against individuals. The existence of these rules and the implementation of these rules lead to legal certainty.

According to Gustav Radbruch, the law must contain 3 (three) values of identity, as follows:

The principle of legal certainty (*rechtmatigheid*). This principle reviews from a juridical angle. The principle of legal justice (*gerechtigheit*). This principle reviews from a philosophical point of view, where justice is the equal rights for everyone in front of the court. The principle of legal benefit (*zweckmatigheid* or *doelmatigheid* or utility. A near realistic legal objective is legal certainty and the benefit of the law. Positivism places more emphasis on legal certainty, while Functionalists prioritize the benefits of the law, and if it can be stated that "*summum ius, summa injuria, summa lex, summa crux*" which means that harsh laws can hurt, unless justice can help them, thus although justice is not the only legal objective, the most substantive legal objective is justice.

The teachings of legal certainty are derived from the Juridical-Dogmatic teachings which are based on positivistic schools of thought in the world of law, which tend to see law as autonomous, independent, because for adherents of this thought, law is nothing but a collection of rules. For adherents of this school, the purpose of law is nothing more than just guaranteeing the realization of legal certainty. Legal certainty is realized by law by its nature which only makes a general rule of law. The general nature of the legal rules proves that the law does not aim to realize justice or benefit, but solely for certainty. Fair law enforcement should be full of ethics and morals. Law enforcement should be able to provide benefits or utility for the community. But besides that, the community also expects law enforcement to achieve justice. Nevertheless, sometimes what is considered useful is not necessarily fair, and vice versa, what is felt as just, is not necessarily useful for the community. However, it should be noted that in upholding the law it would be better to prioritize the value of justice.

This is in accordance with progressive law enforcement according to Satjipto Rahardjo that law enforcement is an effort to realize ideas and concepts into reality. Law enforcement is a process for realizing legal wishes into reality. Legal desires are the thoughts of the legislature formulated in legal regulations. Therefore, the main purpose of law enforcement is to guarantee the existence of justice without neglecting the aspects of legal benefit and certainty for the community. Justice, benefit and legal certainty are the pillars of law enforcement. All three are needed to arrive at an adequate understanding and implementation of the law. Legal certainty is not merely a matter of law, but rather a matter of human behavior. Legal certainty has become a big problem since the law was written. Before that, for thousands of years, when we talked about law, we talked more about justice.

3. Legal and Moral Relationships

Moral comes from the Latin language *mos* (plural: *mores*) which also means habit, custom and comes from the Dutch language *moural*, which means morality, character. According to W.J.S. Poerwadarminta, moral means "teaching about both bad deeds and behavior." In moral Islam it is known as "morality", derived from the word "*khuluqun*", meaning manners, temperament, behavior, character.

Raghib Al-Isfahani, a classical Muslim philosopher interpret morals as human efforts to give birth to virtuous and good deeds. The reason, the word *akhlak* is a plural of *khuluq* which comes from the word *khalafa*. According to him, this is aimed at God's creation which is charged with power which can be perfected by human effort.

In a society that is still simple, moral or moral norms are sufficient to create order and direct the direction of community behavior, and uphold welfare in society. Decency gives rules to someone to become a perfect human being. The results of orders and prohibitions arising from moral norms rely on one's personal freedom. His conscience will state which actions are evil and will determine whether he will do something.

However, in societies that have developed the traditional rules no longer sufficient. This is motivated by moral *persandaran* is because personal freedom. To organize everything required, among others, is not based on personal freedom, but also curbed personal freedoms in the form of coercion, threats and sanctions. A rule that is called with the law. If the decency that is loaded is the recommended form of praise and criticism, then the legal norms and prohibitions contained *adalahperintah* reinforced by threats, coercion or sanctions for those who ignore. Although *coraknya* different, but the forms were praised and criticized in decency, so in essence the legal standards entrenched in decency.

A discussion of the relationship between the moral law is one of the important topics in the study of the philosophy of law. In the study of Western law, between law and morality does have a close connection, but the law is not the same as morality. Legally binding on everyone as a citizen, but morality is only bind people as individuals. It says in the theory of separation between law and morality that the law is one thing and morality is another matter, or in other words: "law and morality are not always the other side of the same coin". This does not mean that the judge or prosecutor only gives attention to the law and not pay attention to morality. Actually, a good law comes from good morality, and morality are well bore good law anyway.

4. Moral Basis for Legal Purposes

In much of the literature suggested that the purpose of the law or legal ideals none other than justice. Gustav Radbruch, of which states that no law other than the ideal of justice.²³ Furthermore, he stated "*Est autem ius a iustitia, a matre sua sicut ergo prius quam fuit ius iustitia*", which is translated: "But the law is derived from justice as born of his mother's womb, therefore justice existed before the law." According to Ulpianus, *Constans et Iustitia est perpetua voluntas ius suum cuique tribuendi*, translated freely, justice is a constant desire and fixed to give to people what the rights. The essence of justice rooted in human morality embodied in the sense of love and togetherness.

According to Thomas Aquinas, human through will power and thought he had to break away from the controls. Intellectual power of man can be ranking the meaning of what human beings. Wealth, pleasure, power, and knowledge is the object of desire that can be possessed by humans. But it can not produce the deepest human happiness. The things that do not have the character of universal goodness sought by humans. Aquinas believe that the universal goodness can not be found in the creation, but on God the Creator.

According to Thomas Aquinas, the law is primarily concerned with the obligations laid down by reason. Laws covering power, and power is what gives a liability. But behind this rule stands reason. Laws are created to maintain the existential function of the social life of human action or other human group seeking to undermine the existence of it. Hence the moral in this case is something that is operational. Hazarin book *Pancasila Democracy* stated that without the moral law is injustice. Moral

without law is anarchy and utopia that lead to per- bestiality. The only legal embraced by decency and rooted in morality to establish decency. Further, Dr. Muslehuiddin explained that law without justice and morality is not legal and can not last long. The legal system that does not have substantial roots in justice and morality will eventually bounce.

E. CLOSING

In the context of the legal moral philosophy approach in legal reform based on Justice and Legal Certainty in Indonesia, moral and legal relations have a correlation that is essential for the creation of ideal legal products. This means that, moral philosophy can be used as a foundation in creating law in the life of nation and state. This was proven by the founding fathers of the nation who later made Pancasila a State philosophy as well as a source of all sources of legal order in Indonesia.

In general, differences and relations between law and morals can be explained as follows:

1. Law requires morality. Quid sine moribus leges? (What does the law mean without morality?). Legal quality is also measured by its moral quality. Conversely, morals also need law. So that "more manifest more definitely in concrete behavior". Respect for other people's rights, for example, is a moral principle. This principle is reinforced in the law that protects property rights.
2. The law is more codified and thus more definite and objective than unwritten morality.
3. The law governs outer actions (legality), while morals are more concerned with the human attitude.
4. Morality is "the minimum content of the law". Law and morality differ only from the formal side, but there is no fundamental difference in terms of substance. Both legal norms and moral norms, both are equally regulating human behavior.
5. Sanctions relating to the law differ from sanctions relating to morality. Laws for the most part can be forced, violators will be punished. But ethical norms cannot be forced, because coercion only touches the outside, whereas ethical actions actually originate from within. The only sanction in the area of morality is only an uneasy heart.

The purpose of law regulates human life in state life, while moral regulates human life as a human. Justice and legal certainty can be used as an essential foundation for the development of law in Indonesia. The moral justice and legal certainty can provide a philosophical foundation in the development of law that is able to implement the visionary legal objective of justice.

DEATH PENALTY EVALUATED FROM HUMAN RIGHTS PRESPECTIVE

Zulfikar¹

Lecturer of Law Faculty University Esa Unggul, Jakarta-Indonesia
zulfikar.judge@esaunggul.ac.id

Abstract

Criminal imprisonment is the most important part of the criminal justice process. The application of death penalty by the state through a court decision means that the state takes the right to live of a convicted person which is a human right that cannot be reduced under any circumstances (non derogable rights). Therefore the application must pay attention to the human rights of the convicted person. This study aims to determine the nature of human rights in the implementation of the death penalty in Indonesia. The research method to complete this thesis includes "library research", the main method that the authors use in collecting data is documentation. While the primary data are in the form of sources of Indonesian Criminal Law in the form of the Criminal Code (Kitab Undang-Undang Hukum Pidana/KUHP) and in particular some documentation on human rights and legislation outside the Criminal Code (KUHP) applicable in Indonesia. Secondary data are material or references obtained from books, articles, journals and from the internet that are relevant to this problem. The results obtained by the author in conducting this research are: Execution of death penalty invites many pros and cons.

Keywords: Punishment, Death Penalty, Human Rights

INTRODUCTION

Since the death penalty was enforced in Indonesia, there have been 134 death row inmates, but until now only 22 death row inmates have been executed, so there are still 112 more waiting to be executed. Of the 22 death row inmates who have been executed, there are six convicted narcotics cases. In terms of criminal convictions, judges have great freedom because of the Law Number 48 of 2009 concerning Judicial Power. According to Article 1 point 1 of the Law Number 48 Year 2009 the power of the judiciary is the power of an independent state to administer justice in order to enforce law and justice based on the Pancasila and the 1945 Constitution of the Republic of Indonesia, for the sake of the implementation of the Republic of Indonesia.

Criminal death comes from two syllables, criminal and death. Criminal comes from the word straf (Dutch), often referred to as punishment. The term criminal is more appropriate than the term sentence because the law is commonly a translation of recht. It can be said that the term criminal in the narrow sense is related to criminal law. Criminal is defined as a suffering that is deliberately inflicted / given by the state to a person or several people as a result of the law (sanctions) for him for his actions that have violated the prohibition of criminal law. In particular, this prohibition in criminal law is called a criminal act (strafbaar feit).

Death penalty at Indonesia is regulated in article 10 of the Penal Code in conjunction with article 11. Death penalty is one of the main crimes that is still maintained by the Indonesian Criminal Law. Article 10 which contains two types of punishment, namely the main sentence and additional punishment. The basic sentences consist of: Death, imprisonment, imprisonment and fines. Additional sentences consist of: Revocation of certain rights, confiscation of certain goods and announcement of the judge's decision.

Article 11 of the Criminal Code which reads: "Death penalty is carried out by the executioner in the place of a hanger by strapping a rope tied to the gallows on the neck of the convicted person then dropping the board where the convicted person stands." While the procedures for carrying out the death penalty are regulated in Law No. 2 / PnPs / 1964 which is still valid today.

Death penalty can be said to be one of the oldest criminal offenses, in addition to criminal damages (fines) and physical crimes (flogged, limbs cut off, and stamped burnt). This form of Death penalty has been known throughout the world although since the beginning of the 20th century many countries abolished it. There are also countries that do not abolish the death penalty, but have never implemented it, for example the abolition of the death penalty by de facto in Belgium. There are also countries that try

¹ Student of Doctoral Program Faculty of Law University of Borobudur, Jakarta

to limit the application of death penalty by introducing a death sentence that is postponed, such as China. In general, developed countries, such as the Netherlands, Germany, Italy, Portugal, Austria, Switzerland, and developing countries, such as Indonesia, Malaysia, Singapore, Thailand, the Philippines, Pakistan, China, and Vietnam, still maintain it. (Yon, 2012)

The beginning of the existence of the death penalty in Indonesia is legally historically regulated in the Criminal Code, which is mostly from the Netherlands, namely WvS (*Wetboek van Strafrecht*). Although originating from the Netherlands, in its development and application in the Netherlands and Indonesia is very different. In the Netherlands, the death penalty has been abolished, even since 1870, except in a state of war. (Satochid, 1980). Meanwhile, Indonesia still recognizes and maintains the existence of the death penalty in several laws.

Pancasila is the philosophy or ideology of the Indonesian people. Pancasila contains fundamental values and is a basic characteristic of the Indonesian nation. In law, Pancasila is the source of all sources of law. Therefore, every legal product must adjust to Pancasila. In the Pancasila state, an understanding of human rights is seen as important according to what is stated in the second precepts, namely "just and civilized humanity" by placing human beings by their nature and dignity. The Indonesian state recognizes and upholds human rights and basic human freedoms as rights that are inherently inherent and cannot be separated from humans that must be protected, respected and upheld in order to improve human dignity, welfare, happiness, intelligence and justice.

INDONESIA AND HUMAN RIGHTS PROTECTION

Then confirmed again in a separate chapter that discusses human rights, namely in Chapter XA on Human Rights. Chapter XA contains 10 Articles concerning human rights. In Article 28I paragraph (4) of the 1945 Constitution the second amendment explains: The right to life, the right not to be tortured, the right to freedom of thought and conscience, the right to religion, the right not to be enslaved, the right to be recognized as a person before the law is retroactive is a human right that cannot be reduced under any circumstances.

Article 28A and Article 28I of the 1945 Constitution the second amendment is a human rights regulation relating to the issue that the author raises. Both Articles have the same purpose, but the difference is Article 28A of the 1945 Constitution. The second amendment only regulates the right to life of a person without information about the binding force of the article but Article 28I of the 1945 Constitution confirms human rights with the statement "cannot be reduced under any circumstances ". Either in normal circumstances (not in a state of dispute, not in a state of war, or not in an emergency) or in an abnormal state (in a state of armed dispute, in a state of war, or in an emergency) the right to life cannot be reduced by the State, Government and society. The right to life is non derogable human right, meaning that the right to life of a person cannot be accompanied under any circumstances, in an emergency or there is a reason regulated in a statutory regulation, for example committing a crime that is threatened with Death penalty.

However, the human rights provisions contained in the 1945 Constitution do not appear to be in line with the facts, because the death penalty is still enforced in Indonesia even though the Netherlands itself is not enforcing it. Thus there seems to be a conflict between human rights provisions and the implementation of the death penalty in Indonesia. Therefore, the authors are interested in making research with the title of Death Penalty Viewed From the Prespective of Human Rights The problem that I want to discuss is how is the nature of human rights in the implementation of the death penalty in Indonesia

The research conducted is normative legal research, by examining library materials which are secondary data. In this case normative legal research is research conducted or focused on positive legal norms in the form of laws and regulations. Data collection is carried out by means of literature study, namely by collecting and studying data obtained from library materials and understanding books, literature, journals, and legislation relating to research problems. The data analysis method used is a process in arranging data sequences, organizing them in patterns, categories and unitary basic descriptions. Data obtained through the study of documents will be analyzed qualitatively then presented descriptively, namely by describing, explaining and describing the judges' considerations in making decisions.

RESULTS AND DISCUSSION

Although the right to life is protected by a constitution that is imbued with human values in Pancasila, to date the Indonesian legal system still applies the death penalty in its criminal system. According to the opinion of the writer is contradictory to the concept of humanity in the values of Pancasila. If examined more deeply in accordance with the provisions of human rights documents, there are several articles in human rights documents that do not prohibit the implementation of the death penalty because it is contrary to the right to life of a person. The application of the death penalty is classified as a cruel and inhuman form of punishment, in addition to that the execution violates Article 3 of the Universal Declaration of Human Rights. (Abdul, 2010)

The right to life and protection is contained in the UDHR (Universal Declaration of Human Rights) Article 3 of the Universal Declaration of Human Rights, which reads:

"Every person has the right to a person's life, independence and safety." This guarantee is also reinforced by Article 6 paragraph 1 and Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and at the same time strengthened by the Optional Protocol . Second (Second Optional Protocol) of the International Covenant on Civil and Political Rights in 1989 concerning the Elimination of the Death Penalty.

Article 6 of the International Covenant on Civil and Political Rights (International Covenant on Civil and Political Rights (ICCPR)) states that the right to life must be protected by law and these rights must not be treated arbitrarily. Article 6 of the International Covenant on Civil and Political Rights, and the American Convention on Human Rights (American Convention on Human Rights) which contains provisions concerning the right to life, the article contains provisions relating to the right to life and the death penalty.

The provisions of the ICCPR relating to non-derogable rights are very relevant to be used as a reference in interpreting the phrase "Human rights that cannot be reduced under any circumstances" contained in Article 28I Paragraph (1) of the 1945 Constitution. Therefore, the implementation of the death penalty in Indonesia has violated the articles in the human rights instruments that the author pointed out above, where people sentenced to death have been deprived of their lives, independence, and personal safety. However, the execution of death penalty is a punishment that violates the right to live for humans as God's creatures. This can be seen by a lot of convicts who have been sentenced to death, including corruptors in China, Saddam Hussein in Iraq, or others.

But as is the case in Rwanda and Yugoslavia, perpetrators of human rights violations were only rewarded with a maximum sentence of life imprisonment, because the death sentence in modern times began to be abandoned by countries in the world, although there are still some countries that still apply it as in Indonesia. The International Covenant on Civil and Political Rights (ICCPR) aims to strengthen the basic human rights in the civil and political fields listed in the Universal Declaration of Human Rights so that they become binding conditions the law and its elaboration include other related subjects. Indonesia also adheres to the theory of monism, in order to realize world order. The theory of monism is based on the idea that national law and international law are a unified legal system. So, if a country has ratified and become a party to an international agreement to protect human rights, then that international agreement will automatically become its national law. (Mochtar, 2003)

Thus, the right to life includes rights that cannot be reduced under any circumstances (non derogable rights) even in emergencies that endanger the life of the nation. Global facts state that more than 170 countries in the world have committed to abolition.

This fact is followed by a number of countries in the Asia Pacific region, Africa and Latin America such as Madagascar, Mongolia, Fiji, Nauru, the Democratic Republic of Congo and Suriname to change their legal policy affiliation by being involved as a state of abolition of the death penalty. A positive trend is also present in the United States when 19 (nineteen) states have decided to move away from the practice of executions and it is certain this trend will continue. However, in the midst of progressive trends, the practice of death penalty is still often used as an instant solution for many state policy makers to face the complexities and changes in the character of global security politics. (Manfred, 2005)

The abolition of the death penalty in the Netherlands is not followed by Indonesia because of several considerations, as stated by Satochid Kartanegara, namely:

1. Indonesia consists of various ethnic groups. In the colonial period, with the population consisting of various tribes, it is very easy to cause various conflicts between tribes. To avoid conflicts and their consequences, the death penalty is considered necessary to maintain.

2. Indonesia consisted of a large number of islands and at that time the colonial government apparatus was imperfect, in addition to the inter-island transportation facilities which were also imperfect.
3. Apart from reasons related to geographical circumstances, some experts argue that the colonial region needs absolute power to maintain public order, so that it can be accounted for.

There are two regulations governing the death penalty, namely Article 11 of the Criminal Code which regulates the death penalty by hanging the guilty person and one regulation enacted by the Japanese government, which requires the death penalty to be carried out with gunfire.

DEATH PENALTY IN THE CONTEXT OF LAW IN INDONESIA

Once the size of the community's expectations of law enforcement in this reform era, it becomes a dilemma on one side that people want law certainty to be upheld consistently and consistently, but on the other hand there are also those that prioritize justice rather than legal certainty because they think something that is fair and good is above legal certainty (*aequum et bonum est lex legum*). Basically the law functions to protect human interests both individual and collective. The large number of people and the diversity of their interests is not impossible to cause a shift between one another. Therefore it is necessary to protect these interests for a better life. Protection can be done by establishing a rule or rule accompanied by sanctions that are binding and coercive.

The rule of law must be seriously believed to protect human interests that will apply in society as a guide on how humans should act both as individuals and groups. The community must realize that this is worth doing. Awareness from the community will be appropriate or inappropriate carried out in this community gives authority to the rule of law so that the law is obeyed. Without that authority the law will not be obeyed.

The death penalties listed in article 10 of the Criminal Code consist of principal and additional crimes. Death punishment, imprisonment, confinement, and fines are included in the main crime. Whereas additional crimes consist of revocation of certain rights, confiscation of certain items, and announcement of a judge's decision. Acts or criminal acts that are threatened with the death penalty in the Criminal Code, among others (Yon, 2012):

- 1.) Plots by killing the head of state. Article 104 mentions treason with the intention of killing the president or vice president or with the intention of depriving them of their independence or rendering them incapable of governing, threatened with death penalty or life imprisonment or imprisonment for a specified period of time, a maximum of twenty years.
- 2.) Inviting / inciting other countries to attack Indonesia (Article 111 paragraph 2).
- 3.) Protect or help the enemy who fights against Indonesia (Article 124 paragraph 3).
- 4.) Kill the head of a friendly state (Article 140 paragraph 3).
- 5.) Homicide is planned in advance (Article 140 paragraph 3 and Article 340).
- 6.) Burglary by violence by two or more friends at night by damaging the house which results in severe injury or death (Article 365 paragraph 4).
- 7.) Piracy at sea, by the sea, by the beach, at the river so that someone dies (Article 444).
- 8.) Encourage workers' revolt or riots against state defense companies in time of war (Article 124 bis).
- 9.) During the war committed fraud in the supply of goods needed by the army (Article 124 bis).
- 10.) Extortion with violence (Article 386 paragraph 2).

The basic considerations are (BPHN, 2004):

- a.) The act of treason is deemed to have occurred (completed or perfect) while the criminal threat is still in a commutable 1/3 condition, but in article 104 the Criminal Code actually becomes a death penalty.
- b.) Agreement on criminal sanctions in article 104 is a death penalty, whereas agreement is an act that is still very far from the beginning of the implementation, but the penalty is the same as if it has entered the initial stage of implementation.
- c.) Providing or facilitating the construction of criminal law is also included in the issue of *deelneming* in the assistance section. Penalties for this role are commuted 1/3, whereas the criminal acts stipulated in article 104 of the criminal are the same as those of the perpetrators.
- d.) Finally, the president certainly deserves more treatment than ordinary people. Therefore, article 104 and other articles in the Criminal Code can be legal instruments oriented to the interests of those who are holding power (the government), not the public interest. That is, the crime seems more intended to get rid of political opponents of the ruling party in an effort to maintain power. Did not rule out the possibility of law enforcement becoming an obstacle in a country's democratic life.

DEATH PENALTY IN LEGISLATION OUTSIDE THE CRIMINAL CODE

In addition to the Criminal Code, there are still criminal acts that are threatened with death, namely legislation outside the Criminal Code. These laws and regulations include:

1. Emergency Law No. 12 of 1951 concerning firearms enacted on September 4, 1951 article 1 paragraph 1. It reads: "Whoever, without the right to enter into Indonesia, makes, receives, tries to obtain, surrenders or tries to surrender, control, carry, have supplies to him or own in his possession, storing, transporting, hiding, using or removing from Indonesia a firearm, ammunition or explosives, sentenced to death or life imprisonment or a maximum prison sentence of twenty years".
2. Presidential Decree No. 5 of 1959 concerning the Authority of the Attorney General / Attorney General of the Armed Forces and about aggravating the threat of punishment for criminal acts that endanger the implementation of food and clothing equipment in article 2. This Presidential Decree was promulgated on 27 July 1959 in State Gazette 1959 No. 80
3. Government Regulation in Lieu of Law No. 21 of 1959 concerning aggravating the threat of punishment for economic crimes. Promulgated on November 16, 1959 in Statute Book No. 1959 130.
4. Law No. 4 of 1976 concerning Amendments and Additions to several articles in the Criminal Code related to the expansion of the enactment of the provisions of criminal legislation, aviation crime, and crimes against aviation facilities / infrastructure. Promulgated on April 27, 1976 in Statute Book No. 1976 26.
5. Presidential Decree No. 2 of 1964 concerning Procedures for the Implementation of Death Penalty handed down by the courts in the general court and military environment.
6. Law No. 5 of 1997 concerning Psychotropics. Criminal threats in psychotropic crimes are regulated in Chapter XIV concerning criminal provisions, articles 59 to 72 of Law No. 5 of 1997. Crimes that can be handed down to a defendant, based on general provisions of the Criminal Code are one main criminal and one additional criminal. In article 59 paragraph (1) of Law No. 5 of 1997 these provisions were distorted because two basic crimes could be handed down at once. Criminal imprisonment of a defendant can be in the form of imprisonment and fines. The length of imprisonment is also regulated in the Criminal Code, which is life or temporary. In provisional penalties, the minimum length of imprisonment is 1 day and a maximum of 15 years. While in Law No. 5 of 1997, also stipulates the minimum and maximum length of temporary penalties that can be imposed by a judge. Likewise, the minimum criminal fine.

Regardless of the problems, all the laws that have been made by and for the Indonesian people represented by the government and the Parliament and applied to the Indonesian people themselves show that legal awareness or feelings of justice still require the existence of the death penalty. There is no reason for those who are sentenced to die to say that death penalty is no longer appropriate in the current era of democracy. The existence of the death penalty in the Penal Code of national products can be accounted for when viewed from the perspective of the compiler and the stipulator.

VIEWS ON THE IMPLEMENTATION OF THE DEATH PENALTY AND ITS REASONS

This type of criminal terminates one's life in a hierarchical and substantive way. Article 10 of the Criminal Code puts the death penalty at the top which implicitly indicates that the death penalty is the heaviest of the many basic crimes in the world, and the criminal law system in Indonesia is no exception. The death penalty can be carried out if all the efforts of the defendant's appeal, legal counsel, or heir have been completed, and usually end with the issuance of a pardon. Each country has a different basis for the application of death penalty. In Middle Eastern and North African countries, for example, persistence in defending the death penalty is the result of clear words in Islam, in contrast to liberal parliamentary Western democracies where law is based on a mandate given to elected representatives. Public opinion is often the deciding factor of a decision whether a country will retain, abolish, or reinstate death penalty. Penal policy measures (criminal law policy) without public support will damage people's trust in the law, trigger acts of personal retaliation, and are considered anti-democratic. (Muladi, 2006)

In principle, punishment in Indonesia is not a revenge, but a preventive effort by suppressing the effect of the row (base) of the development of crime itself. While substantively, the death penalty has been regulated in KUHP article 10, but its implementation still refers to the Presidential Decree of the Republic of Indonesia No. 2 of 1964 concerning Procedures for the Implementation of Death Penalty handed down by the courts in the general court and military environment.

Death punishment is one of the oldest criminal types in the world. The holy books say that death penalty can be classified as retribution (*lex salionis*). There's also an adagium that stated "eyes are paid for eyes and teeth are paid for teeth" that is well known. The Torah, the Gospel, and the Qur'an are also familiar with death penalty. In fact, Balinese Hindus recognize the crime of banishment to the sea, such as the disposal of people who have intercourse with animals. (Yon, 2012)

In addition, for the same reason, imprisonment in the Criminal Code is more severe than the penalties in the Dutch WvS which entered into force on September 17, 1870. The death sentence is indeed still controversial, otherwise some people still consider that the death penalty is still needed for reasons of fulfilling a sense of justice and preventing similar crimes, while groups who are contrary to the statement, make humanity as the basis of their arguments. (Yon, 2012)

CONCLUSION

Based on historical records, the death penalty has been in effect for centuries. In fact, death penalty is applied in customary criminal sanctions. Criminal death in Indonesia legally, applies since the enactment of Law no. 1 of 1946 concerning Criminal Law Regulations. Until now the Criminal Code still lists the death penalty as one of the main criminal punishment types in addition to imprisonment, confinement, and fines. The pros and cons of the implementation of death penalty in Indonesia has been going on for a long time. The ups and downs are in tune with the legal developments in the land. But surely a person cannot act arbitrarily or freely in the name of human rights because everyone's actions are limited by laws. If someone has violated or disturbed the human rights of another person, then it is obligatory to take responsibility for his actions to achieve just demands in accordance with moral considerations, security, and public order in a democratic society. Every independent and sovereign country has its own limits on human rights and freedom. One of which needs to be applied to the death penalty is drug crimes. Where Narcotics Crimes is one of the extraordinary crimes. Because the effects of losses resulting from this act is very large, which threatens everyone, both children, young people and parents can even damage a generation and the future of a country.

REFERENCES

- Abdul Jalil Salam. (2010). *Polemik Hukuman Mati di Indonesia*. Jakarta : Badan Litbang dan Diklat KEMENAG RI.
- Ahmad Kosasih. (2003). *HAM dalam Perspektif Islam*, Jakarta : Salemba Diniyah.
- Badan Pembinaan Hukum Nasional. (2004). *Laporan Tim Pakar Hukum Pidana* (Jakarta: BPHN Departemen Hukum dan HAM RI.
- <http://aredcakep.blogspot.com/2013/01/sistem-pemidanaan-dalam-ketentuan-umum.html> diakses pada tanggal 25 oktober 2018.
- Manfred Nowak. (2005). *U.N Covenant on Civil and Political Rights CCPR Commentary, 2nd revised edition*, N.P Engel : Publisher.
- Mochtar Kusumaatmadja. (2003). *Pengantar Hukum Internasional; Pengertian, Batasan, dan Istilah Hukum Internasional*, Bandung : Alumni.
- Muladi. (2006). *Pengkajian Asas-asas Hukum Pidana di Indonesia* . Jakarta: Kementerian Hukum dan HAM RI.
- No Name . tersedia di 1 <http://donxsaturniev.blogspot.com/2010/08/pengertian-pidana.html>.
- Satochid Kartanegara. *Hukum Pidana. Kumpulan Kuliah Bagian Dua*. Jakarta: Balai Lektur Mahasiswa, tanpa tahun.
- Satriyo Mukantardjo. (2004). *Naskah Akademis Peraturan Perundang-undangan Tentang RPP Pelaksanaan Hukuman Mati di Indonesia* (Jakarta: BPHN Departemen Hukum dan HAM.
- Yon Artiono Arba'i. (2012). *Aku Menolak Hukuman Mati, Telaah Atas Penerapan Pidana Mati* (Jakarta: Kepustakaan Populer Gramedia.

THE DEVELOPMENT OF LEGAL SYSTEM POLICIES IN INDONESIA OF POST-REFORM

Koesnan Abdul Halim

Student of Legal Studies Doctor Program, Universitas Borobudur

Zudan Arief F

Faculty of Law, Universitas Borobudur
ccsis@yahoo.com

Abstract

The development of the national legal system is an effort to reform to date always done by improving, replacing or perfecting the articles in the 1945 Constitution, which are no longer relevant to the development of the times by replacing new laws originating from the cultural values of the Indonesian people in accordance with developments Indonesia today. Correspondingly, legal politics play an important role for the authorities or the government to develop the desired national law in Indonesia. The problem is, how the development of legal system policy in Indonesia after reformation which is oriented towards national law reform. In the national legal system there is a consideration that there should be no legal vacuum. On that basis, efforts to develop national law in Indonesia are absolutely necessary, as well as to try to refine Pancasila and the implementation of the 1945 Constitution by rearranging the sources of orderly law and ordinances.

Keywords: Legal System Development

A. INTRODUCTION

Since Indonesia's independence until reformation, the Indonesian people did not yet have a legal system that was purely sourced from the Indonesian sociocultural values themselves but made use of the laws and regulations inherited from the Dutch colonial government. Thus legal development is needed which is oriented towards renewing national law.

Nevertheless efforts to reform up to now have always been done by repairing, replacing or perfecting the articles in the 1945 Constitution which many parties consider there are articles that are no longer relevant to the development of the times by replacing new laws originating from Indonesian cultural values according with the current development of Indonesia. In line with that, legal politics plays a very important role for the authorities or the government to develop the desired national law in Indonesia. In the context of legal development including the national legal system.

According to Zudan: The development of a national legal system is a discourse that has never been completed. The discourse revolves around a number of issues such as is it true that Indonesian national law has a certain system, is it true that the national legal system has been established, whether the choice of the national legal system is carried out consciously, will be based on the paradigm of whether Indonesia's national legal system is to be built.

The role of legal politics towards the development of national law in Indonesia cannot be separated from the historical context. That is, throughout the history of the Republic of Indonesia there have been political changes alternately (based on the period of the political system) between democratic politics and authoritarian politics. In line with these political changes, the character of the legal product has also changed. The occurrence of this change is because law is a political product, so the character of the legal product changes if the politics that give birth to it change.

During the 1998 reform period, for example, there were changes in various laws, such as the law on political parties, elections and the composition and position of the MPR, DPR, and DPRD and others. In

addition, changes have also been made to higher legislation, namely the abolition of the Decree of the People's Consultative Assembly (Tap MPR) and amendments to the 1945 Constitution.

In reforms, each country has legal politics whose role is as a basic policy for state administrators to determine the direction, form and content of the law to be formed. According to Padmo Wahjono that legal politics is the policy of state administrators about what is used as a criterion to punish something which includes the establishment, implementation, and enforcement of law.

B. THE PROBLEMS

The problem raised in this paper is how to develop a legal system policy in post-reform Indonesia that is oriented towards renewing national law.

C. RESEARCH METHODOLOGY

The study methodology and discussion of the problems of this paper are through a normative legal research approach which focuses on theoretical studies and literature studies. The nature of the discussion is descriptive analysis.

D. DISCUSSION

1. Politics (Policy) Laws

Moh. Mahfud MD said that legal politics is an official legal policy or line (law) that will be applied both with new law and with the replacement of old law, in order to achievement the country destinations.

"Political law is a series of concepts, principles, basic policies and statements of the will of state authorities that contain the politics of law formation, politics of law and political implementation and law enforcement, concerning the function of institutions and guidance of law enforcers to determine the direction, form and content of the law. established, applicable laws in the region and regarding the direction of the development of the law that was built and to achieve the objectives of the country.

Laws in force in Indonesia are laws or regulations that are based on the Indonesian scientific and constitutional foundation, namely Pancasila and the 1945 Constitution or laws that are built on creativity based on the taste and engineering of the nation itself. In connection with that, Indonesian law is actually nothing but a law originating from national cultural values that have long existed and developed now.

2. Implementation of Indonesian State Administration

Politically, the legal system for administering Indonesian constitution develops based on a constitutional political system that influences the development of national law. Indonesia is in the position of the state that composes its legal politics systematically and programmed, both for reasons of colonies becoming independent and the ideological reasons for rechtsidea mandates, namely the legal ideals contained in the constitution and the opening of the 1945 Constitution. perfecting colonial inheritance laws with new laws.

In the early days of independence, through the 1945 Constitution, amid the debate over the replacement of colonial law, various demands and debates about what law appeared were colored in the development of modern Indonesian national law. Some people see that the colonial western law needs to be maintained by only renewing it with new developments in society. On the other hand the pioneer groups of customary law want to be enacted and the adoption of customary law into Indonesian national law and other groups suggest that Shari'at Islam needs to be introduced as Indonesian national law. The flow of legal political development and its role in the development of law in Indonesia since independence until post-reform.

After the Proclamation of Independence, Indonesia was faced with two choices in determining the national legal system, namely the colonial legal system with all its ins and outs and the people's legal system with all its diversity. Initially national leaders tried to establish Indonesian law by trying to break

away from the ideas of colonial law. But in reality it ended in the recognition that the realization process was not as simple as its strategic models in doctrine.

Besides that, in the national legal system there is consideration that there should not be a legal vacuum, Article 1 of the Transitional Rules of the 1945 Constitution states that "all laws and regulations that are still valid as long as they have not been held are according to this Constitution".

This provision gave constitutional legitimacy to the legislation of colonial inheritance to remain valid. However, this phenomenon certainly should not apply because the vision and mission contained in the colonial legacy laws and regulations are contrary to the religious traditions of the community. On that basis, efforts to develop national law in Indonesia are absolutely necessary.

The desire to establish a legal system that is more characterized by Indonesia with all its attributes of authenticity is indeed hope (*das sollen*). Because inheriting a number of rules and legal institutions from the colonial period actually means maintaining ways of thinking and the foundation of action that comes from individualism. This is of course not in line with the minds of the Indonesian people based on collectivistic understanding.

That is, the new rule of law must substantially really meet the needs of the community. Furthermore, the rights or obligations that are to be created are also in accordance with our goal of achieving a just society in prosperity and prosperity in justice.

The era of reform, is the climax of the demands of the Indonesian people in realizing the goals of the state and the ideals of the law, namely a just and prosperous society. The realization of the principle of equality before the law is a reflection of the conclusiveness of Pancasila as the source of all legal order that must be realized. Efforts to develop law in Indonesia up to now have always been done by repairing, replacing or perfecting the articles in the 1945 Constitution, such as in the New Order era which sought to purify Pancasila and the implementation of the 1945 Constitution by rearranging the legal order and regulations. legislation.

But in practice during the 32 years of the New Order era in power, the state has not succeeded in establishing a constitutional arrangement that can be used as a reference for efforts to strengthen legislation in the future. So in addressing the issue of the development of national law, it seems necessary for an effort to restructure legal institutions, supported by the quality of human resources and cultural and legal awareness of the community that continues to increase, along with the renewal of harmoniously structured legal material, and continuously updated in accordance with demands for the development of community needs that have become the demands of the reform era society. In line with that, legal politics plays a very important role for the authorities or the government to develop the desired national law in Indonesia.

3. Shifting Paradigm in the History of the Development of the Indonesian

Legal System The principle of state responsibility in a philosophical foundation is inseparable from the absolute sovereignty possessed by each entity called the state. Sovereignty which has a basic word of sovereignty, is a form of supreme power by a particular country. Sovereignty is a very important thing in determining the existence of a country both in the continuity of relations with other countries and in regulating citizens in the territory of the country concerned. Although in reality sovereignty itself is in a very theoretical realm.

In the development of the principle of state responsibility in internal implementation, the core assesses the extent to which a state entity makes a failure to provide a function of peace and welfare that is appropriate for its citizens. This is deemed necessary to be able to provide a comprehensive picture of the form or form of state responsibility. The application of the principle of state responsibility in implementation externally, namely assessing the state's responsibility for the conduct of a country which results in injury to other countries.

Such a thing eventually makes a country collaborate on various legal theories in making law a part of the foundation of life in a nation and state, including for the State of Indonesia which makes Pancasila a source of all sources of legal order.

The principle of state responsibility in addition to having an external function, also has an internal function, namely towards citizens of the country concerned. Significant differences from the form of state accountability to citizens are the object of the application of this principle, which involves the relationship between the state or the government that carries out state functions with citizens of the country concerned.

In some other parts of the world, the state has a responsibility to be able to provide political freedom, security, health, education, opportunities for economic activities, good service, law and other fundamental things.

When the state is unable to provide this, the state will be declared as failing to run a regime. One of the important things in discussing the principle of state responsibility in implementing internally is defining the failure of the state to which citizens and in what circumstances.

Theoretically, various doctrines of state failure developed very rapidly in the third world countries which were strongly influenced by geopolitical factors at that time.

Factors that played a significant role in the development of the doctrine of state failure included the end of World War II, which was accompanied by the collapse of several superpower countries, which made many people have high hopes for their country. In addition, the doctrine of state failure is also a new paradigm in modern development by placing the state not only as an authoritarian entity.

In the development of modern civilization development, the development of a national legal system is a discourse that continues to evolve accompanied by compromising the diversity of legal science theories and never finished. In Indonesia, the discourse revolves around the paradigm of Indonesian national law that is related to and has a particular system. Thus, the development of the legal system in Indonesia in real history has been built on the period since before Indonesia became independent until the current era. That fact is a manifestation of the national legal system formed as an option, as a paradigm foundation for the Indonesian national legal system that was built.

4. Construction of the Post-Reformation Era Legal System.

The development of the Indonesian Legal System since independence Indonesia was characterized by laws with a social control paradigm. Legislation with this social control paradigm is a characteristic of a developing country.

At the beginning of the establishment of the Indonesian state, the founding fathers of the state believed that they would be able to lift Indonesian law from the substance of customary law, so that Indonesia's national law really came from Indonesia's own land. Apparently the praxis is different.

These efforts are difficult to realize because the customary law system is not explicitly formulated, whereas Dutch law has long existed and manifested itself in very explicit written regulations. This is of course a colonial heritage that cannot be replaced in a short time.

It is impossible to establish a national law from a new configuration altogether or build a legal order from scratch. Sociologically this would not have been possible. However, the whole flow of the legal system in Indonesia has been organized and follows the principles outlined by the colonialists before they are overthrown. Therefore, it can be understood that the law that developed at the beginning of the establishment of this republic still contains a paradigm of social control and a liberal paradigms.

The social control paradigm which was later in law was constructed as a legal function for the means of manipulating society, obtaining a large portion.

This is based on the notion that Roscoe Pound said about the need to function "law as a tool of social engineering".

Mochtar Kusumaatmadja argues that the use of law as a means to manipulate society according to the scenario of government policy is very necessary for developing countries like Indonesia.

Currently the construction of national law can be implemented more progressive since the post-reform era in 1998. In enumerative, can be specified from the legal aspects of the establishment, implementation, and enforcement of the law, the substance of the legal aspects, procedural aspects, institutions, and the mentality of officers, as well as human resources and the provision of facilities and infrastructure. Before the era of the Reformation, the community also questioned the extent to which the government has carried out the mandate of the 1945 Constitution which confirms that our country is a country based on law, not power alone. This issue is related to the strengthening of the aspirations of the people who want change, openness, progress, justice and democratization.

Another problem that surfaced namely the existence of positive law is outdated and outmoded. In principle, the weakness of the legal substance coped with law enforcement noble integrity, but in reality there are fragile legal apparatus to enforce the law.

Law enforcement is often seen as a source of disease in the development of law. That is, cases of collusion in court, would destroy the authority of the law, and in the long run will hamper the development process of the law being implemented.

The decline of authority of the law occur because people no longer trust the law as norms that organize social life. Tempers situation "anomie" in which the people lost the values that must be followed.

Development of national law in the New Order was felt so urgent with the first reason, developments lately kebringasan shows the emergence of mass culture, lawlessness at all levels of society so that the impression of his slump authority of the law. Second, the law is the guarantee that is inherent in national development because the law was able to adhere in all aspects of ipoleksosbud-defense. Third, as the norms and values, the law will give signs in the governance of the public association so that the law will be the primary mirror of civilized life. Fourth, related to the free trade era in 2020, the law will become an increasingly important part as a manifestation of the nation's identity in a global atmosphere that tends to be liberal.

Within the framework of the development of law in terms of legal reform, there are at least three fundamental things that should be of concern, namely:

If we study the history of the world, especially the history of Indonesia, is essentially the history of the Western world bangsa-bangsa domination over Eastern nations in various fields such as politics, economics, law and democracy.

In a more specific case is the Dutch dominance over Indonesia. It turned out to have very long. Remaining until now, learning on college campuses (Fak. Law), which emphasizes the concepts of the rule of law, democracy, equality before the law, freedom of speech, all of which turned out to be based on the Liberal Paradigm.

As an independent counterweight we can think about when history took place opposite, not the West's dominance over the East but domination over the Eastern European nations.

Maybe it would have appeared oriental concepts that would be a "pattern" in the world. Will develop concepts of deliberation, do not look for case / litigants in court (in accordance with the concept of Java ngalah iku duwur wekasane), the concept of Rule of Morality and others. This writer suggested that we are not fixated on "pattern-pattern" West seems to have raw but not necessarily in accordance with the legal system of Pancasila. This is where the importance of introducing PANCASILA appear as a new paradigm.

An important step is indispensable in building a national law is to free the mind from the shackles of normative and dogmatic. We must think free. The legal system of Europe / West (especially the Netherlands) is not only an ideal legal system. We need to look to other legal systems are more in line with the values of the East, such as Japan, Korea, or Thailand.

Build law to conform with the legal system of Pancasila (Pancasila paradigm) need a critical attitude, independent thinking, and open because the current structure is a lot of values that are not easily

accommodated in the system of Pancasila. Reality in Indonesia today is the miss-inkronisasi between the values of the norms. Between values and norms that exist are not in harmony.

The values he wanted to appear are Indonesian cultural values, but the norms that emerge are European norms which notabeneanya is liberal capitalist.

Examples of strengthening conglomerate, monopoly, workers who are paid below the minimum wage, and others. These are all--gambaran picture yet of synchronization between the desired values with the norms that emerge. If this is not realized, then our nation will become a nation with "split personality", where there is a discrepancy between the values of the desired structure and norms.

The development of law in the post-reform period was marked by a remarkable spirit to perform realignment of the legal aspects of the institutions and agencies associated with the euphoria of democratization after the fall of President Suharto.

In this period looks once the urge to avoid the things that the "smell" of the New Order. New Order as a social order and the legal system have been unsuccessful in achieving democratic governance, clean, transparent, and accountable.

A fundamental change in this period was the pemikiran who dare to dismantle the constitution through the four amendments, namely in 1999, 2000, 2001, and 2002. The 1945 Amendment has been done to bring major changes in the whole constitutional structure of the Republic of Indonesia to enter new state life that is different from the previous period.

General Session in 1999 all the factions in the Assembly to make a deal, namely:

1. Do not change the opening of the 1945 Constitution;
2. Maintain the Unitary State of the Republic of Indonesia;
3. Retain the presidential system (in the sense that while refining really meet the general characteristics of the presidential system);
4. Move things that exist in the Company normative 1945 into the articles of the 1945 C constitution; and
5. To resorts to an addendum to amend the 1945 Constitution 22

In the 1945 Amendment and the National Legal Development, on the basis that:

1. The first changes to the 1945 Constitution began in 1999 with the direction of change limiting
2. presidential powers and strengthen the position of the house of Representatives (DPR) as a legislative body;
3. The second change to the 1945 Constitution made in 2000 with the direction of change in problem regions of the country and the division of local government, enhance the first change in terms of strengthening the position of the House of Representatives and detailed provisions on Human Rights;
4. The third amendment to the 1945 Constitution made in 2000 with the direction of change in the principles of the foundation state, state institutions, and the relationship between state institutions and the regulations of the General Election;
5. The fourth amendment to the 1945 Constitution made in 2000 with the direction of the change in the provision of state institutions and relations between state institutions, the abolition of the Supreme Advisory Council (DPA), the provision of education and culture, economy, and social welfare, and the transitional rules and additional rules. 1945 changes have brought great changes which then must be followed by the implementation of the changes. Implementation of the 1945 amendment can only work well if done systematically to reorganize the (consolidated) legal norms into practice through the implementation of national and state life.

With the amendment of the 1945 Constitution, since 2002 all institutions and agencies of law in Indonesia must adapt. Birth of new laws and regulations and the institutions of the new state is "natural child" of the constitutional changes. For example, the enactment of Law No. 32 of 2004 on Regional

Government which is a replacement of Law Number 22 Year 1999 is an elaboration of the spirit of decentralization contained in Articles 18, 18 A, 18 B, and 18 C of the 1945 Constitution Implementation of decentralization and direct presidential elections is one of the most tangible results of the 1945 amendment.

After the 1945 amendments, the Supreme Advisory Council (DPA) was dissolved and also formed several new state institution. The birth of the state agencies and commissions is the implementation of the 1945 changes, for example:

1. The Constitutional Court;
2. Anti-Corruption Commission;
3. Judicial Commission;
4. Prosecutorial Commission; and
5. Police Commission.

National Legislation Program is a program planning instrument formation of legislation drafted in a planned, integrated and systematic. Legislation is expected to be built through the national legal system better and more terpadu.²⁶ While manuscript material changes in laws continue to evolve the desired progression will accompany the people of Indonesia, as well as a part of political policy or national law.

Development of national law in a global era felt so urgent with the first reason, that the phenomenon of globalization into Indonesia can not be allowed to grow without regulation. Second, the law is the guarantee that is inherent in national development because the law as stated by Parson (1977; 2021) was able to adhere in all aspects of the ipoleksosbudhankam. Laws should appear as the integrating mechanism that can unify the various interests that the internal interests of the nation, between national interests and international and intersectoral national life. Third, as a norm, the law will give signs in the governance of the public association so that the law will be the primary mirror of civilized life. Fourth, associated with AFTA in 2003 and the era of free trade in 2020,

E. CLOSING

Related Development post-reform law reform is not a process that is "instant", meaning not a one-shot process. The main thing in building a law is determining the "soul / paradigm" and liberate the mind from the shackles and dogmas normative. Urgency national law in fostering noticed elements of political, sociological, philosophical, juridical, and practical adaptive.

Mestimulir legislation becomes irrelevant political development priorities post-reform law in Indonesia. Law politics is defined as the basic policy of state officials in the field of law that will, is and has been in force, which is derived from the values prevailing in the community for the purpose of creating the desired state. Thus, it is clear that the politics of law established in order to realize the ideals and objectives of the Republic of Indonesia. Legal political will, is and has been imposed in the jurisdiction of the Republic of Indonesia is very important, because it will be as a basic guideline in the process of determining the values, implementation, establishment and development of law in Indonesia. That is, both normative and practical-functional,

During the formation process of law to be a record for the law is an important shaper heed the voice of the majority society who do not have access to influence public opinion, do not have access to influence political policy. Here a rules of elected representatives through democratic mechanisms within the structure nor the political infrastructure to safeguard the interests of the majority of the people, and fully understand the norms, principles, interests and needs of the people that those values into positive law.

The political role of the law against the construction of national law in Indonesia can not be removed from the context of history. As is known, after Indonesia's independence until after the reform of the Indonesian nation has sought to reorganize the national legal system in accordance with the development of the Indonesian nation today.

BUSINESS LAW IN THE FREE MARKET ERA

Airindari Nancis Koesnan

Student of Legal Studies Doctor Program, Universitas Borobudur

Faisal Santiago

Faculty of Law, Universitas Borobudur

faisalsantiago@borobudur.ac.id

Abstract

Since the reform era, Indonesian people have not refused to be part of the association of the international community's business behavior. Free markets have become synonymous with globalization, visionaries embodying cross-border business behavior that prioritizes meeting the needs of the world community through modern economic behavior. As one part of the international community, the Unitary State of the Republic of Indonesia increases its progressivity through empowerment based on the ability of products that have a sale value for the international community. One of the efforts to improve balance as a strategic policy, Indonesia, since 1998 has continued to make legal reforms by reforming out-of-date regulations to be up to date. Economic legal regulations basically balance and create the ease of bureaucratic flows of imports and exports in order to be able to prosper and improve people's welfare. Thus the regulation of economic law rests on the meaning of the functions and objectives of the law that are fair. That is, the concept of a free market role model in the era of globalization in Indonesia is its vision of an orderly legal order for business people.

Keywords: Business Law, Free Market

A. INTRODUCTION

New challenges at the global level are emerging, such as the GATT (General Agreement on Trade and Tariffs), APEC (Asia Pacific Economic Cooperation), AFTA (Asean Free Trade Agreement) and NAFTA (North American Free Trade Agreement).

The era of free trade will shrink the role of government in regulating economic activity. The private sector will become increasingly prominent, where large companies with strong capital will monopolize the activities of the world economy.

Supposing we are now sitting on the edge of an iceberg that admires its beauty, without knowing the consequences. In other parts of the world, Japanese and South Korean farmers who were actually more prepared to face the free market, apparently reacted violently when their government opened a rice import faucet. Likewise in India, a number of farmer organizations are determined to oppose the development of genetic engineering and intellectual property right on agricultural products.

What about Indonesian farmers? If we go to the field, our farmers will never worry about a free market, because they don't know much about globalization and the free market. This is "reasonable", because the previous government signed an Agreement on Agriculture (AoA) in the World Trade Organization (WTO) without dialogue and sought the approval of the peasants.

The market is often imagined as an independent territory. In addition, the term "free market" is also known to refer to markets that are not controlled by the state. The United States government and businessmen always favor the free market in their rhetoric. The International Monetary Fund (IMF) and the World Bank, the two most influential international institutions on the Indonesian economy now, may be proud because all the countries they lent money have succeeded in freeing the market from state control. The term "free market" really attracts capitals from all corners of the world in this new century.

If socialist movements in the 9th and 20th centuries struggled to free the proletariat, the civil rights movement struggled to free the oppressed people (like blacks in the United States), and national liberation movements struggled to "liberating the colonized nations", the capitalists aggressively echo the slogan "free the market".

While Amnesty International builds a global movement for the release of political prisoners, the IMF and the World Bank call themselves a global movement for the liberation of employers from state control. Capitalists always speak in the language of freedom, and they believe that the market is an essential element for the achievement of human freedom.

Entering the era of reform, the vision and orientation of the law began to be affected by the frenzy of globalization and economic liberalization throughout the world. A series of agreements or negotiations, bilateral, multilateral, and plurilateral, arose, which had the effect of integrating global economic regulation. No doubt, legal reform became a priority program pursued by the government at that time. This construction is in line with the opinion of Erman Rajagukguk who said that economic globalization will bring legal globalization. In other words, if the economy becomes integrated, law harmonization will follow.

In the atmosphere of liberalization, the existence of the law seems to be devoted to the liberal economic paradigm. The law has also been transformed as a market instrument towards the accumulation of capital and profits.

This permissive reality has not only touched the technical level, but has touched the level of the constitution as a manifestation of the political law of the government. Representation of acceptance of Adam Smith's pioneering paradigm can be found in article 33 paragraph (4) through the inclusion of the principle of efficiency, and article 128 paragraph (4) of the 1945 Constitution concerning the recognition and guarantee of individual property rights from arbitrary expropriation by anyone.

This quite revolutionary change was then followed at the level of the law, which the government had issued as an active role in the liberalization process, for example; Law No.8 of 1999 concerning Consumer Protection, Law No.30 of 2000 concerning Trade Secrets, Law No.25 of 2007 concerning Investment, Law No. 40 of 2007 concerning Limited Liability Companies and other laws which have the capacity to frame business behavior.

Business law regulations, in the construction of legal and economic relations in the liberalization era, must continue to run in the corridor of economic democracy. It is inevitable if the law will be a key factor in harmonizing the interests of the state, business people and society. In addition, he must also be able to provide a compromise solution in the midst of a shift in the socialist economic system towards liberalism, while still referring to the values contained in the nation's fundamental consensus.

B. PROBLEMS

Based on the brief description above, the problem is How Business Law in the Free Market Era is able to play its function of facilitating fair behavior for business people.

C. RESEARCH METHODOLOGY

In order to facilitate the study of these problems, the study discussion is carried out through the normative research approach. Furthermore, the nature of the description of the study is done by descriptive analysis.

D. DISCUSSION

1. Business Conduct in the Free Market Era

One of the characteristics of business behavior in a secure free market era, the interests of business actors will certainly rely on the existence of a law that is able to provide a conducive climate for business, promote the principle of efficiency, and provide precise and accurate predictions for any impact of economic transactions. For this reason, the law must provide maximum protection space, both

preventive and repressive, which can be realized through the prohibition of unfair business competition practices, protection of intellectual property rights, certainty in the implementation of capital investment, and the provision of alternative business dispute resolution in the behavior of economic activities.

According to Sri Edi Swasono that; Economics is a moral science, and Indonesia's economic morale is as much as the prosperity of the people, so the interests of the state in line with the concept of welfare state are to guarantee and ensure that the concept can run properly, evenly and sustainably. Through legal intermediaries, these goals can be elaborated through upholding the principles of good governance, protection of labor interests, environmental stewardship, and alignments with micro, small and medium businesses.

The market serves a variety of purposes which are fragmented and cannot even be reconciled with one another. Thus while the economic building in the sense that is actually the result of human design, the free market is not the result of human design even though it may be caused by human action.

In this sense, even if there is an ultimate goal to be known, that goal is none other than the preservation of the order or "legal norms" that govern the free market and all that is different in it. Even if there is a single goal, this free market goal is not a direct target of every economic actor. All actors do not even know about this goal because the ultimate goal of the free market is not in the minds of every individual, but in the minds of nature.

In every free trade, it is not necessary for the actors to agree on the goals to be achieved absolutely. In an organization, especially members, will agree to help each other to achieve goals. The form developed in the free trade system, they try to contribute to the needs of other parties, even without realizing or knowing it, so that the difficulties experienced by business partners do not develop making it more uncontrollable. In an economy as an organization, goals are achieved through the planned policies of managers, in a free market economy the goals are realized by the free order itself. Visionistically, the free market functions to maintain an order that will provide an opportunity for everyone to achieve their own goals. A free market is a cosmic order that allows each individual to pursue his interests and thus finally realize the goals of the free market itself, namely life change the community. The more free a market, the more goods and services available, the more choices for traders and buyers.

Instead the free market functions under natural law, specifically the principle of not harming other parties. With the application of the principle of justice as a rule of the game, there will be spontaneous mutual benefits for each actor. In such an arrangement not only does each participant get a greater opportunity to pursue their interests, but a free market economic order will also improve the condition of everyone.

The main task in the wisdom of a market economy, is to create a framework that allows each individual to freely decide for himself what he wants to do. In such a system, this decision will ultimately contribute as much as possible to the realization of a better, fairer and more prosperous organization, whether consciously or not.

In a free market, economic actors are free to carry out their business activities without having the intention to do charitable things in the interests of others. Thus it can be said, that they do not care about the interests of others in the sense that in accordance with the principles of commutative justice still get the main attention.

2. Business Ethics

One thing that must be considered by economic actors is that they must not violate the rights and interests of others, and only then can a harmonious and fair social order be achieved.

Concern not to violate the rights and interests of others is precisely a moral control for all mechanisms of free trade. This development paradigm can produce, renew, and strengthen the community's economy.

Although this concern is not the real motive of the process of economic exchange, it has become a moral control that functions behind this whole process. This control functions in such a way that no rights are violated by the other actor's free activities.

In the end this moral control allows an economic exchange to be a fair exchange. This honest and open exchange has great potential to excite market participants to make some honest exchanges emphasizing serious changes to what they are doing.

In the ethical dimension of doing business, it means that every business person is required to prioritize the principle of not cheating, competing in a healthy manner, or not justify a lie. Cheating behavior and deceiving the public call "betrayal" the rights of markets, consumers, and business partners.

The ethics-based principle is beneficial for the continuity of exchange or trade. The business climate will be maintained when market participants trust each other for the goods or services exchanged. None of them felt cheated and sacrificed, so the market could run normally and profitably.

3. The Role of Law

With free market conditions involving fighters-fighters or business people-large and high-capitalized businessmen, the existence of the law will be able to support the operation of the moral dimension (ethics). Law has the power to bind and force, while morals only require awareness. With this character, law can be expected to be able to fill the lack of moral dimension, especially in filling the lack of moral dimension. The fate of apple, rice, orange, etc. farmers is an example that actually demands the existence and enactment of laws that protect it from business practices that threaten to harm and even kill it.

The law is a mirror that reflects the interests of the community. Because the interests of the people always change, operationally, the law is also demanded to always change themselves. When viewed sociologically, the rule of law has transformed itself into responsive law, meaning that it is the most advanced in the phase of legal development. Laws evolve and become repressive law into out onomous law and then in the form of responsive law.

The social dynamics that demand to be adapted legally are also a logical consequence of the reality of the demands for change in society. Market players or business people as pillars of social change are active actors who must be answered legally. The liveliness of business people will potentially create opposite conditions in a competitive climate of mutual disadvantage if not legally regulated. The intervention of the state in the juridical field does not indicate that the state is the ruler of the global market, but the state is obliged to make the market climate healthy so that it can survive and be healthy.

Any proposed legislation or new trade rules that come from this order (employers who live on profit) must always be listened to with extreme vigilance, and must never be enforced before being examined carefully and deeply, not only with the most careful attention, but also with suspicion. The proposal came from people whose interests were never fully the same as the public interest, which in general had an interest in deceiving and even oppressing the public.

New trade rules, known as juridical products in the formulated transactions show that business law will protect the market or the atmosphere of public capital rotation from fraudulent practices, fraud, and oppression (such as slavery and treating others as a victim).

For example, it is generally believed that during the depression the world market under capitalism was anarchic. The market moves following the wild cycle of explosions and slumps of trade. When so many people depend on the market to survive (sell their labor for wages and buy daily necessities at their wages) this type of uncontrolled fluctuation causes mass social suffering. The planned economy in the Socialist Republic of the Soviet Union then appeared as a completely rational and practical choice for many smart people because of the chaotic performance of capitalism at the time.

The case shows that the presence of binding rules or norms is important to overcome the tendency of human traits (business people). The nature of business people who are obsessed with making huge profits with small capital can encourage capital owners only thinking and acting that target to collect

economic benefits, while the matter of how to be excluded or considered with the benefits achieved, not on the question of right-wrong, inappropriate, or violate the law or not. This is where then state intervention by presenting (providing) a legal benchmark is important.

The intervention carried out by the state or government has benefits for small capital owners and consumers, because if not, the community of large capital owners, both individually and through their conglomerates, can create "market laws" in accordance with their free will. This is of course dangerous, not only because it will threaten and endanger the rights of consumers, but also has the opportunity to create an unhealthy market. Uncontrolled freedom will push big capital market participants to become wolves who are rude to do inhumane and unfair ways.

The history of the birth of the Law of the Republic of Indonesia Number 8 Year 1999 Concerning Consumer Protection, it can be seen that market problems are not easy. The state or government is indeed obliged to protect the public such as consumers from possible illegal actions or crimes committed by producers / entrepreneurs or capital owners who carry out business activities.

There are a number of political-economic considerations for the birth of consumer protection as follows:

1) that national development aims to create a just and prosperous society that is equally material and spiritual in the era of economic democracy based on the Pancasila and the 1945 Constitution; 2) that the development of the national economy in the era of globalization must be able to support the growth of the business world so that it can produce a variety of goods and / or services that investigate the technological content that can improve the welfare of many people and at the same time obtain certainty for goods and / or services obtained from trade without causing consumer loss; 3) that the increasingly opening of the national market as a result of the process of economic globalization must continue to guarantee the improvement of the welfare of the people as well as the certainty of the quality, quantity and security of the goods and / or services they obtain in the market; 4) that in order to increase the dignity of consumers, it is necessary to increase awareness, knowledge, care, ability and independence of consumers to protect themselves and foster attitudes of responsible business actors; 5) that the legal provisions protecting the interests of consumers in Indonesia are inadequate; 6) that based on the foregoing considerations a set of laws and regulations is needed to realize the balance of the protection of the interests of consumers and businesses so as to create a healthy economy.

The judicial consideration actually shows that the position of consumers in the midst of market life becomes dangerous in the hands of greedy capital owners or entrepreneurs. In the midst of unfair business competition, consumers can be disadvantaged through products or services that are not quality, in addition to endangering health and safety.

The physical or non-physical hazards do not occur no, it must involve the state in free market competition. Large capital owner or businesses from global countries cannot be allowed to simply enter Indonesia without binding legal rules. As business people who are present as "guests" in other countries, other countries' legal products and other applicable norms must be followed.

The character of global capitalism that places business people or strong capital owners as strategic forces that determine and color the construction of free markets must be directed juridically, which in every business activity does not merely demand and enjoy rights such as profits and security guarantees, but also understands and has commitment to carry out obligations, both related to the establishment and glory of the market and the interests of the community (public, consumers). The presence of business people in the free market era is not to free all kinds of ambitions, but to create a market construction that can prosper.

E. CLOSING

The scope of business activities is no exception in the face of globalization in essence determined by the community, business people, by the norms and values that apply in that society, especially ethical and legal norms and values. Law and Business are not activities that are fenced off or fortified solidly in

the middle of society, where everyone who wants to enter into it must first abandon the rules and values that apply in that society. Every person who enters into it carries the attributes of legal ethics, moral ethics and humanity inherent in themselves and society. If not, the business will be a kind of strange wild animal, which will destroy the entire social order. This is where the role of law determines and controls social change, the culprit is humans.

Successful business behavior is largely measured by the values and norms prevailing in the community, including the laws that govern it. This means that if you want to succeed, business is not only determined by pure business tips, but also by living the values and social norms and legal norms that apply.

REFERENCES

- Arimbi HP dan Emmy Hafild, *Membumikan Mandat Pasal 33 UD 45*, Jakarta: Walhi, 1999
- Bachri Aminuddin, *Falsafah Perekonomian Nasional*, Yogyakarta; Jakal Press, 2016
- Bambang Sugianto, *Tantangan Di Era Bisnis Global*, Jakarta; Pamator Press, 2017
- Cipto Herlambang, *Etika Bisnis di Era Pasar Bebas (Kajian Filsafat Etika)*, Jakarta: Binaraksa, 2014
- Edi Swasono, *Membangunan Ekonomi Kerakyatan*, Yogyakarta, Jakal Nasional, 2009
- Faridarta Suratman, *Pembangunan Ekonomi Berbasis Demokrasi Pancasila*, Jakarta; Intermedia, 2017
- Goesniadhie, Kusnu. *Harmonisasi Hukum dalam Perspektif Perundang-undangan*. Surabaya: JP-Books, 2006
- Halimurti Irawan, *Etika Bisnis Modern*, Jakarta; Pena Media, 2009
- Haliyudin, *Etika Bisnis Membangun Citra Bisnis, Sebagai Profesi luhur*, Yogyakarta: Kanisius, 2013
- John Roosa, *"Pasar"*, Jakarta: Media Kerjabudaya, 2005
- Munir Fuady, *Hukum Bisnis Antara Teori dan Praktek*, Bandung : Citra Adtya Bakti, 2014
- Sutarji Subrata, *Sistem Ekonomi Dan Hukum Bisnis*, Bandung; Ganesha, 2017
- Widodo Dwi Putro, *Beban Petani di Era Global*, Jakarta: Kompas, 2002
- Undang-Undang Republik Indonesia Nomor 8 Tahun 1999 Tentang Perlindungan Konsumen, Penjelasan Undang-undang Perlindungan Konsumen

ISBN 9786021752050

