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"Comparative Law System of Procurement of Goods and Services around Countries in Asia, Australia and Europe"



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THE APPLICATION OF BALANCE IDEA IN SETTLEMENT OF DOCTOR MALPRACTICE CASE THROUGH PENAL MEDIATION

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ABSTRACT

The current criminal acts of malpractice in the criminal justice system in Indonesia in its enforcement ignores the rights of victims of the crime in the criminal case handling process and the effect to be borne by the victims of the crime because of the legal protection for the victims of the crime does not receive adequate recognition. Based on this understanding the author made two formulations of the problem. First, how is the fulfillment of the rights of victims of doctor malpractice in the criminal justice system in Indonesia? Second, how is the implementation of balance idea in settling disputes of doctor malpractice through penal mediation? This research used normative juridical method. It can be concluded that first, the criminal justice system in Indonesia ignores the rights of victims of doctor malpractice and prioritize more on how to penalize the perpetrators of the malpractice. Second, the principle of balance idea in crime can be applied in resolving malpractice criminal cases through penal mediation where a doctor can be released from criminal penalties, subject to treat and recover the victims. Through the penal mediation the victims' protection and fulfillment of their rights are preferred and the responsibilities to treat the victims are burdened the doctors.

Keywords: Malpractice, penal mediation.

A. Introduction

The criminal justice system implies that criminal law instruments are less able to oversee the material criminal law enforcement.¹ There are very few chapters under the Criminal Code Procedure that discuss about the victim. This can be seen from the multiplicity of terms used in appointing a victim.² Victims of crime which are basically the most suffered in a criminal act did not receive as much protection as provided by the law to the perpetrators or offenders of the crime. As a result, when an offender has been sentenced criminal sanctions by the court, the conditions of the victims as such are ignored altogether.³

Under the positive criminal law currently in force, the protection of victims is more in the form of abstract protection or indirect protection. This due to offenses under positive criminal law is not seen as an act of attacking / violating the legal interests of a person (victim), personally and concretely, but it is only seen as a violation of norms / rule of law in

¹ Sidik Sunaryo, *Kapita Selekta Sistem Peradilan Pidana*, Malang: UMM Pres, 2005, page. 2.

² Other terms referred to victim contained in Article 80-81 of Criminal Code Procedure: interested party. Article 98-99: injured party. Article 108: Complainant or rapporteur.

³ Dikdik M. Arief Mansur and Elisatris Gultom, *Urgensi Perlindungan Korban Kejahatan Antara Norma dan Realita*, Jakarta: PT. RajaGrafindo Persada, 2006, page 24.

abstracto. As a result, the protection of the victims is neither direct nor *in concreto*, but only *in abstracto*.⁴

In this paper the author focuses on the victims of medical malpractice and efforts to comply with their rights in the criminal system in Indonesia. The Health Act did not include the notion of malpractice, however, it is set in the Criminal Provisions of Chapter XX in Article 190, which read:

- (1) Heads of care facilities and / or health professionals who practice or work at health care facilities who intentionally do not provide first aid to patients in an emergency situation as referred to in Article 32 section (2) or Article 85 section (2) shall be punished with imprisonment of up to 2 (two) years and a maximum fine of Rp. 200,000,000 (two hundred million rupiah).
- (2) If the act referred to in section (1) results in disability or death, the head of the health care facilities and / or the health professionals shall be punished by imprisonment of up to ten (10) years and a maximum fine of one billion rupiah.

Article 63 of Law No. 36 of 2009 clearly set the healing efforts of the disease and efforts for the health recovery as a benchmark for malpractice actions under the criminal provisions mentioned in Article 190 above. From the articles mention previously, the criminal settlement focuses more on the offenders while victims are ignored and their rights are not being fulfilled.

B. Formulation of Problem

1. How is the fulfillment of the rights of victims of doctor malpractice in the criminal justice system in Indonesia?
2. How is the implementation of the idea of balance in settling disputes of doctor malpractice through penal mediation?

C. Discussion

Malpractice is composed of two syllables e.g. mal and practice. Mal is derived from the Greek word, which means bad. Practice or the practice of acts means running in theory or performing work (profession). So, malpractice means running a poor; improper quality of work. Medical malpractice can be defined as negligence or failure of a doctor or medical

⁴ Barda Nawawi Arief, *Beberapa Aspek Kebijakan Penegakan dan Pengembangan Hukum Pidana*, Bandung: PT. Citra Aditya Bakti, 2005, page 84.

personnel to use the level of skills and knowledge that is commonly used in treating patients or those injured by the standard in the same environment.⁵

In a narrow sense, it is also known as a criminal malpractice. An act is said a criminal malpractice if it meets the following criteria⁶:

1. The existence of an element of negligence
2. The existence of a certain act form
3. The existence of serious injury or death to other people
4. The existence of a causal relationship between the form of the act with the death of someone else's.

Sampai sekarang, hukum kedokteran di Indonesia belum dapat dirumuskan secara mandiri sehingga batasan – batasan mengenai malpraktik belum bisa dirumuskan, sehingga isi pengertian dan batasan – batasan malpraktik kedokteran belum seragam bergantung pada sisi mana orang memandangnya. UU No 29 tahun 2004 tentang Praktik Kedokteran juga tidak memuat tentang ketentuan malpraktik kedokteran. Pasal 66 ayat (1) mengandung kalimat yang mengarah pada kesalahan praktik dokter yaitu :

Until now, medical law in Indonesia can not be formulated independently so that the limits on malpractice has not been formulated, hence the contents of the understanding and limits of medical malpractice is not uniform depending on which side one looks at.⁷ Law No. 29 of 2004 regarding Medical Practice also does not contain provisions on medical malpractice. Article 66 section (1) contains a sentence that leads to errors in medical practice, namely:

“every person who knows or whose interests have been harmed by the actions of doctors or dentists in conducting medical practice can complain in writing to the chairman of the Indonesian Medical Disciplinary Honorary Council”

Hukum pidana digunakan apabila timbul akibat berupa kematian atau cacatnya seseorang. Hukum pidana berperan sebagai hukum sanksi (*sanctierecht*). Apabila terjadi suatu kematian atau cacat setelah suatu perawatan oleh dokter atau tenaga medis lainnya, untuk membuktikan sejauh mana terjadi kesalahan maka harus dibuktikan melalui hukum

⁵ Hanafiah, M.Yusuf and Amri Amir, *Etika Kedokteran Dan Hukum Kesehatan*, Kedokteran EGC, Jakarta, 1999, page 96.

⁶ Adami Chazawi, *Kejahatan Terhadap Tubuh dan Nyawa*, PT Raja Grafindo Persada, Jakarta, 2000, page 125

⁷ Crisdiono M. Achadiat, *Dinamika Etika dan Hukum Kedokteran dalam tantangan Zaman*. Penerbit Buku Kedokteran, Jakarta, 2004, page 21.

pidana. Pelaksanaan pelayanan kesehatan kepada masyarakat menggunakan norma hukum kesehatan, sedangkan terhadap penyimpangannya digunakan hukum pidana dalam bidang kesehatan.

The criminal law is used when the result arouse is in the form of death or disability of a person. The criminal law serves as a legal sanction (*sanctierecht*). In the event of a death or disability after treatment by a physician or other medical personnel, to prove the extent to which an error occurred, it must be proven through the criminal law. Implementation of health care services to the community using the health legal norms, while for the deviation the criminal law in the field of health is applied.

The compensation is mentioned in Article 55 section (1) of the Health Law, which read: "Everyone is entitled to a compensation as a result of errors or negligence done by health professionals." It also explained that granting the right to compensation is an attempt to provide protection for every person on a result that arises, both physically and nonphysically, for the errors or the negligence of the health personnel.

In essence, the doctor-patient relationship is based on trust from the patient to the doctor, according to Guwandi, the trust relationship between doctors and patients are as follows⁸:

- a. Patients believe that doctors have the medical knowledge that can be used for healing effort for them.
- b. Patients believe that doctors are capable and skilled in the application of their knowledge in order to try to cure them.
- c. Patients believe that doctors will act in careful and thorough manner, both in diagnosis and in determining therapy.
- d. Patients believe that doctors will perform the work based on medical professional standards set by the profession association.

Such great trust from patients certainly brings quite serious consequences that should be carefully considered by a doctor and should not be tainted by less accountability deeds.⁹

The renewal of criminal law by replacing the old Criminal Code with the new Criminal Code is intended to ensure that the criminal law in force is in accordance with the system of values held by the Indonesian nation. In this regard, the reform of the criminal law was done be revisited and re-establishment of criminal law in accordance with the central values of socio-political, socio-philosophical and socio-cultural values of Indonesian

⁸ Guwandi, *Misdiagnosis atau malpraktek ?* , Jurnal Perhimpunan Rumah Sakit Seluruh Indonesia , 2003.

⁹ Ibid.

community. In accordance with the character of the Indonesian nation that puts the interests of the individual and the social in balance, therefore, the monodualism balance underlying the arrangement of the crime act, liability, crime and punishment.

The enforcement of malpractice case has put more emphasis on the punishment of the perpetrators and the rights of the victims of malpractice have been ignored. The compensations procedures are very cumbersome and time consuming, meanwhile the victims need immediate treatment.

The attention of the international community concerning the rights of victims in obtaining justice is expressed in a declaration called the Declaration of Basic Principles of Justice for Victim of Crime and Abuse of Power, 1985. The issuance of the declaration did not escape the influence of the victim movement internationally, especially from European countries. The international victim movement has arouse the awareness of the international community and the international institution, the United Nations, issued a resolution on victims of crime and victims of abuse of power. The publication of the declaration means that member states have a moral obligation to include the contents of the declaration into their national law, which means the issue of victims which was originally in the form of demands on political, moral and social internationally, has now shifted to the lawsuit (criminal).¹⁰

In modern criminal law, the attention to victims of crime not only accentuated the process of criminalization, but also closely related to sentencing guidelines, the concept of criminal responsibility and effort to include compensation as criminal sanctions. Analysis of the victims of crime is increasingly important to determine the most appropriate criminal politics in the framework of crime prevention.¹¹

Dalam penanganan perkara pidana, kepentingan korban sudah saatnya untuk diberikan perhatian khusus, selain sebagai saksi yang mengetahui terjadinya suatu kejahatan juga karena kedudukan korban sebagai subjek hukum yang memiliki kedudukan sederajat di depan hukum (equality before the law).

In the handling of criminal cases, it is now the time to give special attention to the victims; both victims as the witnesses who knew the occurrence of a crime as well as the

¹⁰ Mudzakkir, *Viktimologi (Studi Kasus di Indonesia)*, *Penataran Hukum Pidana dan Kriminologi*, Surabaya, 14-15 Maret 2005, page 18.

¹¹ Muladi, *Prinsip-prinsip Dasar Hukum Pidana Lingkungan dalam kaitannya dengan UU No 23 Tahun 1997*, *Jurnal Hukum Pidana dan Kriminologi*, Volume I/Nomor 1/1998, Aspehupiki dan Citra Aditya Bakti, Bandung, 1998, page 6.

position of the victims as the legal subject which have equal standing before the law (equality before the law).¹²

If the concept of crime is considered as a conflict between the offender and the state, the question is who is the victim of a crime then? An action said as a crime (breaking the law) because of the victim, it can not be regarded as a crime if it does not cause harm to the victim.¹³ Implementation of criminal justice puts the state function as the dominant in the form of rationalization of the distribution of revenge against the offenders.¹⁴

In the current development of criminal law there are a lot of researches that offer the concept of penal mediation in the resolution of the case. Penal mediation is an alternative solution for criminal cases outside the penal track. If the resolution of a criminal case is obtained through the penal track there is usually sentences by the judges against the perpetrator. It is, philosophically, sometimes does not satisfy all parties, therefore it is necessary to reconsider the settlement of the criminal case through ADR (Alternative Dispute Resolution) with the intention to resolve the conflict between the perpetrator and the victim.¹⁵

Nampaknya mediasi penal ini juga bisa diterapkan dalam perkara malpraktik. Hal ini dinilai lebih memberikan keadilan dan pemenuhan hak-hak korban karena dalam media penal ditawarkan konsep pelaku malpraktik diharuskan memberikan pelayanan pemulihan kesehatan kepada korban sampai pulih kembali. Segala pembiayaan dan beban lainnya di tanggung oleh pelaku. Adapun pelaku dalam hal ini dapat dibebaskan dari pasal-pasal pidana tentang malpraktik.

It seems that this penal mediation could also be applied in cases of malpractice. It is considered to give more justice and the fulfillment of the rights of the victim since the penal mediation offers the concept that malpractice actors are required to provide medical recovery services to victims to recover. All financing and other expenses paid by the offender. The perpetrator in this case can be exempted from criminal provisions of malpractice. This penal mediation certainly has the condition that is the offender can be freed from criminal penalties by providing compensation to the victims or providing care to victims recovery. However, penal mediation does not apply if the victim had died.

¹² Dikdik M. Arief Mansur and Elisatris Gultom, *Urgensi Perlindungan Korban Kejahatan Antara Norma dan Realita*, Jakarta: PT. RajaGrafindo Persada, 2006, page 31.

¹³ Mudzakkir, *Posisi Hukum Korban Kejahatan dalam Sistem Peradilan Pidana*, Disertation, Jakarta: Universitas Indonesia, 2001, page 183.

¹⁴ Ibid.

¹⁵ Sahuri Lasmadi, *Mediasi Penal Dalam Sistem Peradilan Pidana Indonesia*, <http://online-journal.unja.ac.id/index.php/jimih/article/viewFile/530/484> accessed on 4 December 2016.

C. Conclusion

The criminal justice system that relies on retaliation was not able to function optimally to control crime. The ideal goal formulated by retributive justice do not seem contribute significant impact in its function as a control against crime.

The idea of balance in malpractice cases through penal mediation provides an opportunity for victims to be rehabilitated and given compensation by the offender provided that the victim had not died. In contrast, the offender can also be exempted from punishment since in cases of malpractice negligence is more often the reason of the doctor malpractice.

DAFTAR PUSTAKA

- Adami Chazawi, 2000, *Kejahatan Terhadap Tubuh dan Nyawa* , PT Raja Grafindo Persada, Jakarta.
- Barda Nawawi Arief, 2005, *Beberapa Aspek Kebijakan Penegakan dan Pengembangan Hukum Pidana*, Bandung: PT. Citra Aditya Bakti.
- Crisdiono M. Achadiat, 2004, *Dinamika Etika dan Hukum Kedokteran dalam tantangan Zaman*. Penerbit Buku Kedokteran, Jakarta.
- Dikdik M. Arief Mansur dan Elisatris Gultom, 2006, *Urgensi Perlindungan Korban Kejahatan Antara Norma dan Realita*, Jakarta: PT. RajaGrafindo Persada.
- Guwandi, 2003, *Misdiagnosis atau malpraktek ?* , Jurnal Perhimpunan Rumah Sakit Seluruh Indonesia.
- Hanafiah, M.Yusuf dan Amri Amir, 1999, *Etika Kedokteran Dan Hukum Kesehatan*, Kedokteran EGC, Jakarta.
- Mudzakkir, 2005, *Viktimologi (Studi Kasus di Indonesia)*, *Penataran Hukum Pidana dan Kriminologi*, Surabaya, 14-15 Maret.
- Mudzakkir, 2001, *Posisi Hukum Korban Kejahatan dalam Sistem Peradilan Pidana*, Disertasi, Jakarta: Universitas Indonesia.
- Muladi, 1998, Prinsip-prinsip Dasar Hukum Pidana Lingkungan dalam kaitannya dengan UU No 23 Tahun 1997, *Jurnal Hukum Pidana dan Kriminologi*, Volume I/Nomor 1/1998, Asphepiki dan Citra Aditya Bakti, Bandung.
- Sidik Sunaryo, 2005, *Kapita Selekta Sistem Peradilan Pidana*, Malang: UMM Pres.
- Sofyan Dahlan, 1999, *Hukum Kesehatan Rambu – Rambu Bagi Profesi Dokter*, Badan Penerbit Undip, Semarang.