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Criminal Legal Politics Regarding Alleged Medical Malpractice As an Effort to Ensure Legal Certainty in Health Services in Indonesia

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Abstract: Criminal sanctions are the last resort (*last resort*), from a series of stages of enforcing a legal rule. This last resort is the ultimate measure if enforcement mechanisms in other areas of law are ineffective. However, in the development of criminal law in Indonesia, criminal sanctions have shifted in certain cases, no longer serving as the *ultimum remedium* but as the *primum remedium* (primary remedy). The provisions of criminal sanctions as *first remedy* in health services can be seen from the resolution of medical disputes that have an extraordinary and large impact on society, and no longer consider other sanctions, because it may be felt that it is appropriate to immediately use or impose criminal sanctions, which is not the last remedy, considering that there are still many cases of medical disputes that are detrimental to society, and this is the core of criminal law politics.

Keywords: Criminal, Sanctions, Malpractice, Health

INTRODUCTION

The state is the central actor that holds primary responsibility for implementing policies based on international law or international agreements where the right to health is protected.¹ The right to health is emphasized in the General Comment of the Committee on Economic, Social and Cultural Rights which states that: *Health is a fundamental human right indispensable for the exercise of other human rights* (Health is a fundamental human right that is indispensable for the implementation of other human rights).²

The right to health is not only interpreted as the right of every person to be healthy or to be free from disease. However, the right to health is the right to obtain and enjoy the highest standard of health that is naturally attainable for every person, that every human being is born free and equal. The phrase "the highest attainable standard of health" is interpreted to mean that the level of health that can be enjoyed by every person must be the highest possible health condition and supported by maximum resources, and every person has the right to obtain and

¹John Tobin. *The Right to Health in International Law*, Oxford University Press New York. Volume 4. Nomor

²OHCHR, 2000, *CESCR General Comment No. 14: The Right to the Highest Attainable Standard Of Health (Art. 12)*, Adopted at the Twenty-Second Session of The Committee On Economic, Social, and Cultural Rights, On 11 August 2000 (Contained in Document E/C.12/2000/4), 2000, No. 14, 2000, hlm. 1

enjoy the services, facilities, and conditions necessary to prevent, restore, and mitigate poor health.³and this is the core of the provision of health services.

Essentially, healthcare (medical) services are essential and must be maintained and improved in accordance with applicable service standards, ensuring that the public can experience the services provided. Service itself is essentially an effort to assist others in providing everything they need and to provide satisfaction in accordance with the desires and expectations of consumers. Three components are involved in a service process: service is largely determined by the quality of the service provided, who provides the service, and consumers who assess a service based on their expectations.⁴

The provision of health services in recent developments increasingly shows that hospitals are...*in fact* has shifted from a social institution to a business entity. Hospital health services have evolved from imperialist services, developed on a missionary basis, and finally, in the 20th century, developed with business values.⁵ Hospitals that previously never thought about profit and loss because they were solely established for social and humanitarian purposes (non-profit), have changed into an economic activity. If hospitals are established and managed by private bodies, hospital activities have become a business entity that seeks profit (*profit making*).⁶This benefit should not be the main thing that a hospital should put forward, considering that in providing health services, the essence of the profession is a life calling that dedicates oneself to humanity based on education that must be carried out with sincerity of work, humility, and scientific and social integrity as well as full responsibility.⁷And this professional essence is what distinguishes health workers from other professions. According to Wirjowidjojo, at the 4th PERHUKI National Congress in Surabaya, he provided the following specific characteristics of the profession:⁸

1. As a system mastery of expertise;
2. Undergoing long-term special education;
3. Full-time job;
4. Representation of dedication and service to the community;
5. Has a monopoly on its expertise;
6. Upholding collegiality;and
7. Self-regulating and controlling through ethics and morals

Based on the characteristics above, the primary foundation for doctors and dentists to perform medical procedures on others is the knowledge, technology, and competencies they possess, acquired through education and training. This knowledge must be continuously maintained and improved in line with advances in science and technology. Doctors and dentists, with their scientific tools, possess unique characteristics. This uniqueness is evident in the justification provided by law, namely the permission to perform medical procedures on the human body in an effort to maintain and improve health. In practicing their profession, they will always be in contact with people who are seeking help. It is appropriate that in carrying

³Article 1 of the Universal Declaration of Human Rights, in the Standard Norms and Regulations on the Right to Health, was ratified through the Decision of the Plenary Session No. 04/PS/00.04/IV/2021 dated April 5, 2021 in Decision Number 16 and stipulated in the Regulation of the National Human Rights Commission of the Republic of Indonesia No. 1 of 2021 dated April 20, 2021, p. 7

⁴Titik Triwulan Tutik, *Legal Protection for Patients*, Jakarta, Prestasi Pustaka Publisher, 2010, p. 12.

⁵Kartono Muhammad, *Hospitals Between Commercialization and Ethics*, Jakarta, PT. Gramedia Widiasarana, 1995, pp. 2-3.

⁶Eka Julianta Wahjoepramono, 2015.*Legal Consequences in the Medical Profession*, Bandung, Work of Putra Darwati, p. 25.

⁷Hendrojono Soewono, 2020,*Protection of Patient Rights in Therapeutic Transactions, A Legal Review After the Enactment of Law Number 29 of 2004 concerning Medical Practice*, Surabaya : Srikandi, p. 16

⁸Basuki Wirjowidjojo, 1996,*Ethical and Legal Issues in Medical Practice Errors*, Paper of the IV PERHUKI National Congress, Surabaya, 26-27 July 1996.

out professional duties, they must always respect the rights of patients based on noble values, nobility, and dignity for the benefit of patients. The rights here are those that society grants power, freedom, and status. Meanwhile, the obligation is for doctors to provide services to the community, prevent abuse, maintain the quality of the profession, and regulate the quality of its members. This aims to avoid errors or negligence in carrying out professional obligations carried out by doctors or hospitals as the party providing health services to patients as recipients of health services.⁹ Errors or negligence in carrying out professional obligations are currently better known as medical malpractice.

A milestone in malpractice cases in Indonesia, namely: The case of Dr. Setyaningrum, a general practitioner at the Wedarijaksa District Health Center, Pati Regency, Central Java, occurred in early 1979 where her patient experienced anaphylactic shock after being injected with the antibiotic Streptomycin. Although shock treatment was carried out by injecting Adrenaline, Cortison, and Delladryl, the patient's life could not be saved. The patient's husband, a soldier, reported the incident to the police. In the subsequent process, Dr. Setyaningrum was sentenced to three months in prison with a 10-month probation period by the Pati District Court. Furthermore, in the appeal process in 1982, the Semarang High Court upheld the Pati District Court's decision. However, in the cassation process, the Supreme Court overturned the Pati District Court's decision and the Semarang High Court's decision on June 27, 1984.¹⁰

However, after examining Dr. Setyaningrum, the Supreme Court acquitted her, citing no negligence or omission, even though the patient had died. Based on these factors, thoughtful consideration and action are necessary in addressing the consequences of life-threatening medical procedures, as they can be considered malpractice and may also represent a risk of the procedure.¹¹ Since that event, the world of law (*Themis*) with the medical world (*Aesculapius*) in a new institution in Indonesia, becoming a new branch of the legal discipline, namely Medical Law (*Medical Law*), then became medical law, and finally the scope of discussion was expanded to become Health Law (*Health Law atau Health Law*). The "Pati" case has awakened society from its long "deep sleep" to learn about victims' rights in the medical and health worlds.¹²

Based on the above description, it can be concluded that: medical malpractice often occurs, carried out by medical personnel, health workers, and hospitals, which results in the loss of patient independence. Patients require more serious treatment to overcome their health problems, and at the same time seek the right treatment pattern as a form of seeking legal certainty, as well as the best interests of the patient. However, the process of handling in finding a solution to resolve medical malpractice is certainly a long and never-ending debate, whether it will be resolved through administrative law, civil law, and/or criminal law. This resolution, which previously placed criminal law as a last resort (*last resort*), a comprehensive and in-depth study must be carried out with the ultimate aim of placing criminal law as the main effort (*first remedy*) in the perspective of criminal law politics which is based on the approach put forward by the Father of Moral Philosophy and Ethics, namely: K. Bertens, who divides 2 (two) values, namely: *Pro Choice* is considered as the Right to a Choice, whereas *Pro Life* considered as the Right to Life and the Right to Defend Life. The explanation above prompted the author to write this article entitled: Criminal Legal Politics Regarding Alleged Medical Malpractice As An Effort To Ensure Legal Certainty In Health Services In Indonesia.

⁹ *Ibid.*

¹⁰ Jawa Pos, 2018, *On Medical Law Awareness Day, 3 Cases of Criminalization of Doctors were Reported*, 2018, accessed from <https://www.jawapos.com/kesehatan/30/06/2018/hari-kesadaran-hukum-kedokteran-ada-3-catatan-kriminalisasi-dokter/>, on April 23, 2024 at 15.00 WIB.

¹¹ *Ibid.*

¹² Appreciation, 2018, *Introduction to Health Law*, IAIN Palopo Campus Publishing Institute, pp. 13-14

RESEARCH METHODS

The research specification is descriptive analytical, with a normative legal approach supported by empirical legal methods. The types of data used are secondary and primary data. Secondary data was obtained from document studies, while primary data was obtained through interviews. The data obtained were then analyzed qualitatively.

RESULT AND RESEARCH

In foreign literature, the term "criminal law policy" is often known by various terms, including "penal policy", "criminal law policy" or "strafrechts politiek". To find out more about the meaning of criminal law policy or politics, you can see the meaning of legal politics and criminal politics. Meanwhile, the meaning of legal politics according to Sudarto is as follows: 1. Efforts to realize good regulations according to the circumstances and situations at a certain time; 2. Policy from the state through authorized bodies to establish the desired regulations, which are expected to be used to express what is contained in society and to achieve what is aspired to.¹³ Sudarto further explained that implementing criminal law policy means holding elections to achieve the best criminal legislation, in the sense of fulfilling the requirements of justice and efficiency. Furthermore, implementing criminal law policy means efforts to create criminal legislation that is appropriate to the circumstances and situation at a given time and for the future.¹⁴

Barda Nawawi Arief further explained that every effort and policy to create sound criminal law regulations is essentially inseparable from the goal of combating crime. Therefore, criminal law policy or politics is also part of criminal politics. In other words, viewed from a criminal politics perspective, criminal law politics is synonymous with the concept of "crime prevention policies with criminal law." Efforts to combat crime through the creation of criminal laws are essentially an integral part of community protection efforts. (*social defense*) and efforts to achieve community welfare (*social welfare*). Therefore, it is natural that criminal law policy or politics is also an integral part of social policy or politics (*social policy*). Social policy (*social policy*) can be interpreted as all rational efforts to achieve social welfare and at the same time include social protection. So, in the definition of "social policy", it also includes "social welfare policy" and "social defense policy". Criminal law policy can also be seen as part of criminal politics,¹⁵ and this is also the core in resolving medical malpractice cases.

The term "medical malpractice" is not found in other laws and regulations in Indonesia. Although the term "malpractice" is not found in other laws and regulations in Indonesia, it is widely used by Indonesian society. Although the term "malpractice" is not an official term, it is intentionally used in this article, and the term "malpraktik" is used as a translation of the term *malpractice* in English. Some reasons for using the term malpractice include filling the need for terminology in Indonesian law, where the terminology in question does not yet exist. As stated above, Indonesian law does not yet have a term for legal actions in the health sector carried out by medical personnel, health workers, and health care facilities that result in harm to patients. These losses can be financial or non-financial, namely: physical or psychological injury, or even death.¹⁶

Literally, malpractice means medical practice that is wrong, inappropriate, or in violation of the law or code of ethics. Medical malpractice is usually committed by medical personnel. The Health Law defines medical personnel as any person who dedicates themselves to the

¹³Barda Nawawi Arief, 2002, *Anthology of Criminal Law Policy*, Second Printing, Revised Edition, Bandung: Publisher PT Citra Aditya Bakti, pp. 24-25

¹⁴Edi Ribut Harwanto, 2019, *Criminal Law Politics*, Sai Wawai Publishing, p. 23

¹⁵*Ibid.*

¹⁶Sutan Remi Sjahdeni, 2022, *Health Malpractice Law and Medical Personnel Malpractice*, In the Criminal Law Health Course Material, in the Master of Law Program, Military Law College (STHM), Jakarta, p. 5

health sector and possesses professional attitudes, knowledge, and skills through professional education in medicine or dentistry that require the authority to carry out health efforts. Medical personnel consist of doctors (including specialists and subspecialists) and dentists. Therefore, the definition of medical malpractice is a form of failure by a doctor to carry out medical treatment in accordance with applicable standard operating procedures ("SOP"). This can be caused by a lack of competence or skill on the part of the doctor, or due to negligence in providing health services to patients, which is the main cause of injury to the patient.¹⁷

The elements of negligence must be fulfilled by 4 (four) elements known as 4-D, namely:¹⁸

- 1) *Duty To Use Due Care*: There is no negligence without an obligation to treat. This element is certainly impossible, because the obligation to treat is a professional obligation that must be fulfilled, derived from the Law, and must be carried out wholeheartedly by medical personnel, health workers, and hospitals. This is regulated in Article 274 letter a of Law No. 17 of 2023 concerning Health, which states that: medical personnel in carrying out their practice are obliged to provide health services in accordance with professional standards, professional service standards, operational procedure standards, and professional ethics as well as the patient's health needs.
- 2) *Dereliction (Breach of Duty)*: If there is an obligation (*duty*), then the doctor/nurse of the hospital must act in accordance with the applicable professional standards. If there is a deviation from these standards, then he/she can be blamed. The obligations that must be carried out by medical personnel, health workers and hospitals have not only violated professional standards, but also service standards and standard operating procedures (SOP), where the obligation to treat begins from the patient's arrival at the ER, receiving medical treatment, nursing care patterns that do not comply with the three standards, namely: Professional Standards, Service Standards, and Standard Operating Procedures (SOP), all of which have an impact resulting in patient death.
- 3) *Damage (Injury): Damage (Injury)* A health service that results in death. Death can be triggered during the treatment process by many factors related to actions that do not comply with the three standards: Service Standards, Professional Standards, and Standard Operating Procedures (SOPs).
- 4) *Direct Causation (Proximate Cause)*: There must be a reasonable causal relationship between the defendant's (doctor's) attitude and the damage suffered by the patient as a result. Death, due to the following actions: neglecting obligations, doing something that should not be done by medical personnel, because of the oath of office or the oath of medical personnel; ignoring something that should be done by medical personnel; and violating the provisions of the law. Furthermore, although it has been explained in the previous section, it can be concluded that the cause of death is due to doctors, specialist doctors, DPJP (medical personnel), health personnel, and hospitals working not in accordance with the three standards, working carelessly, and not paying attention to cleanliness around the inpatient room, and inpatient rooms that are not separated from other patients. From the explanation above, it can be concluded that; alleged medical malpractice committed by medical personnel, health personnel, and hospitals that results in death to patients must meet the elements to be said to be medical malpractice, so that medical personnel, health personnel can be subject to legal sanctions.

The implementation of Medical Malpractice Sanctions in the Health Law can be imposed on medical personnel. Medical personnel who commit malpractice can be subject to sanctions,

¹⁷Florentina Dewi Pramesuari. 2000, *Analysis of Indonesian State Policy in Medical Dispute Resolution*. Journal of Law and Human Rights Wara Sains,

¹⁸J. Guwandi, 2010, "About Lawsuits: Medical Malpractice", (Publishing House of the Faculty of Medicine, University of Indonesia, Jakarta, pp. 19-23J

including; disciplinary enforcement through professional organizations, legal sanctions include: civil, administrative, and criminal sanctions. Based on Section Eleven Enforcement of Discipline of Medical Personnel and Health Personnel and Settlement of Disputes Paragraph I Enforcement of Discipline of Medical Personnel and Health Personnel. Article 304 states that: (1) In order to support the professionalism of Medical Personnel and Health Personnel, it is necessary to implement enforcement of professional discipline. (2) In order to enforce professional discipline as referred to in paragraph (1), the Minister forms a council that carries out duties in the field of professional discipline. (3) The council as referred to in paragraph (2) determines whether or not there is a violation of professional discipline committed by Medical Personnel and Health Personnel. (4) The council as referred to in paragraph (2) can be permanent or ad hoc. (5) Further provisions regarding the duties and functions of the council as referred to in paragraph (2) are regulated by Government Regulations.

Section Eleven Enforcement of Discipline of Medical Personnel and Health Personnel and Settlement of Disputes Paragraph I Enforcement of Discipline of Medical Personnel and Health Personnel. Article 306 states that: (1) Violations of discipline of Medical Personnel or Health Personnel as referred to in Article 304 paragraph (3) are subject to disciplinary sanctions in the form of: a. written warning; b. obligation to attend education or training at an education provider in the Health sector or the nearest teaching hospital that has the competence to conduct such training; c. temporary deactivation of STR; and/or d. recommendation to revoke SIP; (2) The results of the examination as referred to in paragraph (1) are binding on Medical Personnel and Health Personnel. (3) Medical Personnel or Health Personnel who have carried out disciplinary sanctions as referred to in paragraph (1) which are imposed and there is suspicion of a criminal act, law enforcement officers prioritize dispute resolution with restorative justice mechanisms in accordance with the provisions of laws and regulations.

Furthermore, in Section Eleven of the Enforcement of Discipline of Medical Personnel and Health Personnel and Settlement of Disputes Paragraph I Enforcement of Discipline of Medical Personnel and Health Personnel. Article 308 states that: (1) Medical Personnel or Health Personnel who are suspected of committing unlawful acts in the implementation of Health Services that can be subject to criminal sanctions, must first request a recommendation from the panel. Role in handling malpractice, coaching and Supervision can be carried out: Professional organizations are responsible for fostering and supervising the implementation of professional standards, service standards, and standard operating procedures (SOP) by their members; Ethics and Discipline Settlement: In accordance with the latest law (Health Law), professional organizations together with the Professional Discipline Council have a mechanism to assess alleged violations of professional discipline before entering the realm of criminal law, and Expert Examination. Professional organizations are often asked to provide expert witnesses in determining whether a medical action meets standards or constitutes negligence (malpractice). If malpractice occurs, the responsibility of the professional organization includes: Code of Ethics Hearing: Conducting an ethics hearing if a member violates the medical code of ethics; Disciplinary Sanction Recommendations: Providing recommendations to the Professional Disciplinary Council regarding disciplinary sanctions, ranging from the obligation to take re-education to recommendations for revocation of Registration Certificates (STR) or Practice Permits (SIP) to authorized agencies. Revocation of STRs and SIPs can also be considered as administrative sanctions given to medical personnel, health workers, and hospitals.

Furthermore, legal sanctions can also take the form of civil, administrative, and criminal sanctions. The civil legal liability of Law No. 17 of 2023 concerning Health strengthens the hospital's liability for losses suffered by patients due to the negligence of medical personnel (*vicarious liability*), as well as the Limitation of Liability, where there is no Civil Legal Responsibility: personally by the medical personnel (doctors/nurses) concerned, or the

hospital. Civil liability (compensation) or criminal (prison/fines) is generally borne by the place where they work (*Vicarious Liability*), and not as the Main Determinant: Professional organizations provide professional considerations, Hospitals are responsible for errors made by their medical staff based on the employment relationship. (*vicarious liability*). Compensation: The family can claim material compensation (treatment costs) and immaterial compensation (emotional/moral losses) based on Article 1365 of the Civil Code concerning Unlawful Acts (PMH).

Meanwhile, Administrative Legal Accountability can be in the form of: Internal and External Audits, Where a hospital can form an internal investigative audit team, which is supervised by the Central and Representative Ombudsman of the Republic of Indonesia. Disciplinary Sanctions If proven to have violated standard operating procedures (SOP), the relevant medical personnel can be subject to sanctions by the Professional Disciplinary Council (MDP) ranging from warnings to revocation of practice permits. From the description above, it is very clear that criminal legal accountability is always the last remedy (criminal as *ultimum remedium*). Then, if there is a criminal element, then criminal sanctions can be imposed based on Article 440 of the Health Law which states as follows: 1. Every Medical Personnel or Health Personnel who commits negligence resulting in serious injury to a Patient shall be punished with a maximum imprisonment of 3 (three) years or a maximum fine of Rp250,000,000.00 (two hundred and fifty million rupiah); 2. If negligence as referred to in paragraph (1) results in death, every Medical Personnel or Health Personnel shall be punished with a maximum prison sentence of 5 (five) years or a maximum fine of IDR 500,000,000.00 (five hundred million rupiah).

The explanation of these two articles can be concluded that: for a criminal act to exist there must be elements, according to Moeljatno: 1. Action (Human); 2. Which fulfills the formulation in the law (is a formal requirement); 3. Is unlawful (is a formal requirement) In positive law, the unlawful nature (*unlawfulness*) and error (*debt*) is not an absolute characteristic to be said to be a crime, in imposing a sentence it is not enough to have a crime alone but there must be a person who can be punished. This means that someone who commits a crime can be punished, but there is also the view that those who commit a crime cannot be punished at all if they do not meet the requirements and must still be accompanied by the requirements of criminal responsibility that must be present on the person who committed the crime.

In Article 440 Paragraph (1) of the Health Law, subjective and objective elements must be fulfilled. The subjective elements in this article that can be held criminally responsible are: every medical or health worker. While the objective elements in this article are: those who commit negligence that results in serious injury to the patient. Meanwhile, in Article 440 Paragraph (2) of the Health Law, subjective and objective elements must be fulfilled. The subjective elements in this article are: those who commit negligence, and the objective elements are: those who result in serious injury to the patient are subject to a maximum prison sentence of 3 (three) years or a maximum fine of IDR 250,000,000.00 (two hundred and fifty million rupiah). The negligence referred to in Article 440 Paragraph (2) of Law No. 17 of 2023 concerning Health refers to the negligence of medical or health workers that results in the death of the patient.

This negligence is a form of medical malpractice or gross negligence that violates professional standards, standard operating procedures, or medical ethics. The key points regarding this negligence are: Unintentional medical errors (*blame*), but occurs due to carelessness or lack of caution resulting in death; The form of action in this article is: carrying out actions that should not be carried out, not carrying out actions that should be carried out, or violating SOPs that result in the death of a patient. The sanctions in Article 440 paragraph (2) threaten medical/health personnel who are proven to be negligent in causing death with a

maximum prison sentence of five years and/or a fine of up to half a billion rupiah. This is emphasized as a form of financial accountability if malpractice causes the loss of someone's life.

Furthermore, legal sanctions can also be directed at hospitals. Article 193 of Law No. 17 of 2023 concerning Health states that hospitals are legally responsible for all losses incurred due to negligence by their healthcare personnel. Therefore, it can be concluded that hospital management is responsible for malpractice by medical personnel, with an emphasis on preventing and stopping criminal acts. *Vicarious Liability* (Vicarious Liability): The concept where the hospital bears responsibility for unlawful acts (gross negligence/culpa lata) committed by medical personnel/subordinates. Elements of Criminal Liability for a hospital to be held criminally liable, it must fulfill the following elements: Fault: There is gross or deliberate negligence (negligence). Fatal Consequences: There is actual harm or disability to the patient. Unlawful Act: The actions of medical personnel are contrary to professional or legal standards. Forms of Liability Hospitals can be sued and brought to court to be held accountable for the negligence of medical personnel that causes harm to patients. Basis of Hospital Liability (Doctrine): *May the Superior answer*. The hospital (supervisor) is responsible for the employee's actions. *Ostensible/Apparent Agency*: The hospital is held publicly liable for the doctor's actions. In short, the hospital cannot escape liability for the negligence of its medical staff and may be subject to criminal sanctions.

Legal liability of hospitals, based on Article 193 of Law No. 17 of 2023 concerning Health and the doctrine of Vicarious Liability, includes all patient losses caused by the negligence of health workers (doctors, nurses, other medical personnel) and hospital staff. Parties involved in hospital liability: a. Hospital Corporation: As a legal subject that is civilly responsible (compensation) for the negligence of medical personnel working under its auspices, both permanent employees and partners; b. Medical Personnel (Doctors): Responsible for the quality of medical services (duty of care), diagnosis, and medical actions; c. Health Personnel (Nurses, Midwives, etc.): Responsible for nursing care and delegated actions; d. Medical Records: Responsible for patient medical record documents; e. Hospital Management: The Director/leader is responsible for compliance with standard operating procedures (SOPs) and patient safety (emergency patients must be served regardless of cost).

Legally, hospitals are responsible for all losses suffered by patients due to the negligence of their staff. Criminal liability for hospitals in Indonesia is now recognized, particularly through Law No. 17 of 2023 concerning Health and the doctrine of *Vicarious Liability* (joint and several liability). Hospitals are legally responsible for losses/fatal negligence of medical personnel (Article 447), especially if it occurs due to weak supervision or corporate negligence in providing services. Key points of hospital criminal liability: a. Legal Basis: Law No. 17 of 2023 concerning Health (specifically Articles 440 and 447) regulates sanctions for medical personnel and corporate liability; b. In addition, hospitals as corporations can be sued if medical staff commit fatal errors (*can blame*) which results in the death or disability of the patient, based on the principle *May the Superior answer*.

Types of Criminal Acts: Fatal medical negligence by staff that is ignored by management. Neglecting emergency patients (e.g., in the emergency room) to die. Environmental crimes (e.g., careless disposal of medical waste). Sanctions: Hospitals can be subject to fines (as corporations), while leaders/managers can be subject to criminal sanctions if proven to have ordered or allowed criminal acts. This accountability is emphasized to ensure patients receive legal protection and health services that meet standards, as well as to force hospitals to monitor the competence of their staff.

In Article 438 of Law No. 17 of 2023 concerning Health, it states that: 1. Heads of Health Service Facilities, Medical Personnel, and/or Health Personnel who do not provide first aid to Patients in Emergency Conditions at Health Service Facilities as referred to in Article 174 and

Article 275 paragraph (1) shall be punished with imprisonment of a maximum of 2 (two) years or a maximum fine of IDR 200,000,000.00 (two hundred million rupiah); 2. In the event that the act as referred to in paragraph (1) results in disability or death, the head of the Health Service Facility shall be punished with imprisonment of a maximum of 10 (ten) years or a maximum fine of IDR 2,000,000,000.00 (two billion rupiah).

In Article 447 Paragraph (2) of Law No. 17 of 2023, it states that: In addition to imprisonment and fines against managers who have functional positions, give orders, hold control, and/or beneficial owners of corporations, the penalties that can be imposed on corporations are in the form of a maximum fine of: 1. Rp. 2,000,000,000.00 (two billion rupiah) in the case of a crime committed which is threatened with imprisonment of less than 7 (seven) years; 2. Rp. 5,000,000,000.00 (five billion rupiah) in the case of a crime committed which is threatened with imprisonment of a maximum of 7 (seven) years to a maximum of 15 (fifteen) years; or 3. Rp. 50,000,000,000.00 (fifty billion rupiah) in the case of a crime committed which is threatened with the death penalty, life imprisonment, or a maximum imprisonment of 20 (twenty) years.

Article 447 Paragraph (3) of Law No. 17 of 2023 states that: Corporations are subject to criminal liability for acts committed for and/or on behalf of the corporation if the act is included in the scope of its business as determined in the articles of association or other provisions applicable to the corporation concerned. Article 447 Paragraph (4) of Law No. 17 of 2023 states that: Criminal penalties are imposed on corporations if the criminal act: is committed in order to fulfill the corporation's aims and objectives; is accepted as corporate policy; and/or is used to unlawfully benefit the corporation.

From the description above, it can be concluded that: in malpractice that occurs, it should fulfill subjective and objective elements. Subjective elements include: Whoever is meant here is Medical Personnel, Health Workers, and hospitals. Meanwhile, the objective elements meant here are: actions that here can be said to be people who commit negligence that results in serious injury to patients. The negligence referred to includes: negligence committed by doctors, health workers, and hospitals is in the legal context referring to the unintentional or negligent act in carrying out an action that should be carried out carefully and according to applicable standards. Negligence can occur when someone, in this case a professional such as a doctor, fails to act with the level of caution or care expected of them in carrying out their professional duties or obligations.

Serious injuries in the new Criminal Code (Law No. 1 of 2023) are defined in Article 155, including injuries that result in danger of death, inability to carry out work, loss of five senses, permanent disability, or mental disorders for more than 4 weeks. The criminal threat for abuse that results in serious injuries is a maximum of 5-8 years imprisonment depending on the context. Definition of Serious Injuries (Article 155 of the New Criminal Code/Law No. 1/2023): Falling ill or receiving injuries that do not give hope of recovery at all, or that cause danger of death; Continuous inability to carry out official duties or search work; Loss of one of the five senses; Suffering from severe disability or paralysis; Suffering from impaired cognitive abilities for more than 4 weeks, as well as miscarriage or stillbirth of a woman's fetus.

Meanwhile, the definition of serious injury from a health law perspective, referring to Article 90 of the Criminal Code, is a permanent or life-threatening physical injury that includes an illness that is beyond recovery, danger of death, permanent disability, loss of five senses, or inability to work. This is the basis for a *visum et repertum* to determine the degree of injury in cases of abuse (Article 351/354 of the Criminal Code) or medical negligence. Criteria for Serious Injury (Article 90 of the Criminal Code) according to law, an injury is categorized as serious if it meets the following elements: a. Danger of Death: Illness or injury that has a high risk of causing death; b. Permanent Disability: Loss of one of the five senses, paralysis, or severe mental disorder. c. Permanent Incapacity: Inability to continuously carry out job duties

or work to earn a living; d. Intensive Care: Injuries that require intensive medical care, and are at risk of permanent disability.

Furthermore, from a health and medical law perspective, where health workers (doctors) are tasked with providing medical conclusions regarding the degree of injury (severe, moderate, or light) which is stated in *Seen and Found* for the benefit of justice; Medical Negligence is the gross negligence of a health worker that results in a patient suffering serious injury and can be subject to criminal penalties, referring to health workers. The determination of "serious injury" is based on the permanent or serious functional impact on the body of the victim, not just temporary pain. This condition needs to be reviewed in depth, if the provision of health efforts results in the death of the patient, we should think of criminal legal accountability as the "primary remedy" or better known in criminal law as "primum remedium".

Term *last resort* used by the Dutch Minister of Justice to answer a question from a member of parliament named Meckay in the context of discussing the draft Criminal Code (KUHP), which stated, among other things, that: "The principle is that those who may be punished are those who create "onregt" (unlawful acts). This is *condition without which no* Second, the condition that must be added is that the unlawful act, according to experience, cannot be suppressed by other means. Punishment must remain a last resort. Fundamentally, there are objections to every threat of punishment. Every rational person can understand this even without explanation. This does not mean that punishment should be abandoned, but people must make an assessment of the advantages and disadvantages of punishment, and must ensure that the medicine given is not worse than the disease.

It must also be acknowledged that not all legal scholars view criminal law as *last resort*. For example, L.H.C. Huleman in his acceptance speech as a professor in Rotterdam in 1965 and A. Mulder in his farewell speech in Leiden stated that criminal law, like other laws, aims to maintain the law, and therefore criminal law does not have an independent nature *last resort*. This requires prior consideration of the use of other sanctions before imposing harsh and severe criminal sanctions. If other legal functions are lacking, then criminal law can be used. In relation to the characteristics of criminal law in the context of *ultimum remedium*, the enforcement of criminal law with harsh and severe sanctions must still be attempted to minimize the suffering of the perpetrator as much as possible.

Implementation *last resort* In imposing criminal sanctions, judges can accommodate the interests of the perpetrator of the crime, every activity that refers to the application of the principle of imposing imprisonment as a last resort (*last resort*) is very supportive of the perpetrators of criminal acts, because before harsh criminal sanctions are imposed, the use of other sanctions such as administrative sanctions and civil sanctions is prioritized so that when the function of these legal sanctions is lacking, criminal sanctions are imposed. However, looking at the other side through Van Bemmelen's opinion, the application of this *ultimum remedium* must be interpreted as an effort (*middle*), is not a tool to redress injustice or to recover losses, but rather an effort to restore an unstable situation in society, which if nothing is done about the injustice, can cause people to become self-righteous.

As previously explained, criminal sanctions are the last resort (*ultimum remedium*) in a series of stages of legal enforcement. This last resort is the ultimate measure if enforcement mechanisms in other areas of law are ineffective. However, in the development of criminal law in Indonesia, the status of criminal sanctions has shifted in certain cases, no longer being *last resort* but rather as *first remedy* (the main drug). The provisions of criminal sanctions as *first remedy* In health services, it can be seen from the resolution of medical disputes that have a very extraordinary and large impact on society, and no longer consider other sanctions, because it may be felt that it is appropriate to immediately use or impose criminal sanctions, it is not a last resort, considering that there are still many cases of medical disputes that are detrimental

to society. This can be seen from the many resolutions of medical disputes that are only carried out through civil law and administrative law in the form of providing compensation, in the form of money or fines without any criminal imposition, so that criminal law feels it does not play its role as it should, when the doctor has caused harm to the patient in the form of physical disability or death of the patient, then based on these things, the role of criminal law is very necessary to regulate this, namely criminal sanctions as the main option in the process of resolving medical disputes. Criminal sanctions as the main option in resolving medical disputes must emphasize the responsibility of doctors and patients, or doctors with hospitals for patient safety incidents related to patient safety limits.

CONCLUSION

The shift in the concept of criminal legal responsibility which was previously a last resort (*last resort*), being the primary remedy (*primum remedium*) is an important point in criminal law politics. This is because the death of a patient should not be the role of the Professional Disciplinary Council (MDP), civil legal responsibility, administrative legal responsibility becomes the main one, considering that the death of a patient is very contrary to the objectives of criminal law, and the objectives of health services. The purpose of criminal law is to provide protection against crimes against the body and life of the patient, while the purpose of health law is: to reduce suffering, prolong life, and accompany patients until the end of their lives.

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