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Legal Culture And Fundamental Right Webinar International

Subject:

LEGAL BASIS of DIGITAL SOCIETY

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OPENING SPEECH
CHAIRMAN OF LAW SCIENCE
DOCTOR PROGRAM BOROBUDUR UNIVERSITY

Changes in society are so fast, the Reform and development of Law in Indonesia, not as fast as changes in other segments, so that there has not been any development of Law towards a just and prosperous society. We are aware that legal development is interpreted as a change, so that the change itself brings renewal of the attitude of its perpetrators, we still see a lot of harm to the ideals of the law.

Legal reform basically has to be done not only by a State's monopoly, but legal reform is an answer to the need because of cultural changes and fundamental changes that have been mutually agreed upon. With this webinar expected input from law doctoral students and other webinar participants, recorded in the form of proceedings.

On this occasion, Borobudur University through the Doctor of Law Program took the opportunity to share knowledge through the International Webinar activity, where scientific collaboration occurred between 2 (two) countries, namely South Korea and Indonesia in conducting legal reforms.

The theme "Legal Basis of Digital Society" is expected to be able to give an idea of how legal problems currently based on digital data can make the law in solving problems can be quickly and cheaply resolved properly.

The birth of the presenters' thoughts in continuing this, received appreciation as a reflective that contributes to all parties, especially applicable science in the current digital era. Last but not least, we would like to thank those who helped organize the International Webinar, such as: Faculty of Law, Hankuk University, South Korea (HUS), Center for International Area Law Studies from the HUFS Lawa Research Institute, Korea Comparative Laughter Association & the Korea Vietnam Association - Indonesia Studies Law & Culture (KAVIN & CS), the Committee and all students of the Law Doctoral Program at Borobudur University.

Jakarta, 22 Juli 2020

EDITORIAL

We give our thanks to God Almighty, for His grace and guidance, for the implementation of the International Webinar which is the result of collaboration between the Law Doctoral Program at Borobudur University and the Law School of Hankuk University, South Korea (HUS), the Center for International Area Law Studies of HUFS Law Research Institute, Korean Comparative Law Association & Korean Association Vietnamese - Indonesian Law & Culture Studies (KAVIN & CS), on this occasion took the topic: "Legal Basis of Digital Society), which was held on March 21, 2020 online.

On behalf of the International Seminar organizers, we thank the participation of fellow students of the Law Doctoral Program at the University of Borobudur as presenters and participants, as well as to Hankuk University and KAVIN & CS, South Korea, so that Webiar International is going well.

We are aware of the limitations so let us express our deepest apologies, with the hope that the theme of this scientific activity will achieve its objectives in order to succeed the Legal Reform in Indonesia.

Thank You,
Jakarta, 22 Juli 2020

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

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DISCLAIMER OF INSURANCE CLAIM AGAINST LIABILITY (AN ANALYSIS OF THE RENEWAL OF THE COMMERCIAL LAW)

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ABSTRACT

In dispute settlement through Badan Mediasi Asuransi Indonesia (BMAI) consists of 2 (two) ways namely Mediation and Adjudication. Mediation is an alternative solution to non-court settlement disputes where the form of settlement of disputes is the parties make a voluntary agreement and determine the course of mediation where the expected dispute resolution agreement is a win-win solution meaning agreed settlement can be accepted as a solution to the settlement of the dispute encountered. whereas adjudication is an advanced level if the parties can not accept the decision of mediation which in this stage will be decided by the mediator appointed by the Indonesian Insurance Mediation Board (BMAI). Legal liability to third parties in connection with damages or losses caused by the insured, the efforts made by the Insurer provide compensation to the insured settled by way of negotiation or negotiation.

Keyword: Insurance, Legal Responsibility, BMAI And Compensation

A. INTRODUCTION

After Indonesia declared itself an Independent State, on August 17, 1945, there were efforts to reform the law based on political, sociological and practical reasons. Political reasons were based on the idea that an independent state must have its own national laws for the sake of pride national. Sociological reasons require the existence of laws that reflect the cultural values of a nation. While the practical reason is based on the fact, that usually a former colony inherited the law from a country that colonized it with its original language which then many did not understand by the younger generation of the new country the independence. The effort to reform the laws of the Dutch colonial product is inseparable from the foundation as well as the national goals to be achieved as formulated in the Preamble to the Constitution of the Republic of Indonesia 1945, especially paragraph four, namely:

> "Then, in order to form an Indonesian Government that protects all Indonesian people and all Indonesian blood and to promote public welfare, educate the nation's life, and participate in carrying out world order based on independence, eternal peace and social justice, Indonesian Independence was drafted. in the Constitution of the Republic of Indonesia, which is formed in the composition of the Republic of Indonesia which is sovereignty of the people based on the Almighty God, humanity that is just and civilized, Indonesian Unity and Popularism led by wisdom in Consultation/ Representative, and with realizing a social justice for all Indonesian people ".

The Book of Commercial Law (Wetboek van Koophandel) and the Civil Code (Burgerlijke Wetboek) are still being drafted to be amended and adjusted based on the rules, ideas, values that live in society as an Act of Nation.

The location of commercial law within the scope of civil law is in the binding law which is part of the property law other than the material law. The commercial law is included in the binding law section and not in material law because commercial law regulates human actions in commercial affairs, so that the commercial law regulates the rights and obligations between the parties concerned.[1]

B. PROBLEM STATEMENT

1. What is the basis for rejecting a motor vehicle insurance claim?
2. What is the procedure for resolving civil disputes regarding motor vehicle insurance claims?
3. What is the legal responsibility of the insured in an insurance claim?

C. LITERATURE REVIEW

[1]Pipin Syarifin & Dedah Jubaedah, *Hukum Dagang di Indonesia,* Bandung: Pustaka Setia: 2012, hlm. 20.

In insurance we know the law regarding the number of large numbers (law of large number).[2] which means that the insured risk must be in large quantities. With this reality humans need certainty, namely by transferring uncertainty (risk) to others who are willing to accept it. The party that transfers the risk is called the Insured and the party who is willing to accept the risk or the guarantor from the Insured is called the Insurer so that it can be said that in economic terms Insurance is a way to transfer the risk of someone called the Insured to another person called the Insurer.

According to Article 246 of the Commercial Law (KUHD), what is meant by insurance / coverage is: "Agreement with which an insurer binds himself to an insured by obtaining a premium, to provide compensation to him for a loss, damage or loss, profit expected that may be suffered because of an event that is not certain ". The term insurance or coverage is a translation from the Dutch language, namely from the word "verzekering". In Indonesia, scholars have no uniformity in using the term "coverage". In the description of this thesis there will be no difference in terms of insurance or coverage.

The principles of insurance agreements are regulated in the Commercial Code, almost all of the principles that apply to general compensation insurance. These principles generally provide security for interests related to ownership and material matters. The general principles of insurance adopted and mastered the game and implementation of insurance agreements are the principle of indemnity (Article 246 KUHD), the principle of insurable interests (Article 250 and Article 268 KUHD), the principle of perfect honesty (Article 1320-1329 Civil Code) and subrogation principle for the guarantor (Article 284 KUHD).

The purpose of insurance is to ease the burden of risk faced by the insured by obtaining compensation from the insurer in such a way that:

a. The insured avoids bankruptcy so he is still able to stand up as before suffering losses.
b. Return the insured to his original position as before suffering a loss.

   This insurance clause is intended to determine the limits of liability of the insurer in payment of compensation if at any time events occur that result in losses. As for what is meant by these clauses, among others, include:

   c. Primier risqué clause
   d. All risk clause
   e. Total loss only clause
   f. The all seen clause
   g. Renunciation clause
   h. Free Particular Average clause
   i. Callus riot, strike and civil commotion.[3]

The insurance policy is the main legal document that is legally made to meet the requirements stipulated in Article 1320 of the Civil Code and Article 251 of the Indonesian Criminal Code. The policy is not a contract or insurance agreement, but rather as evidence of a contract or agreement. This is stated in Article 258 KUHD paragraph (1) and (2) which states:

a. To prove the termination of the agreement, written proof is required, however other proofs may be used as well, when there is already a beginning of proof by writing.
b. However, special provisions and conditions may be permitted, if a dispute arises, within the period between the closure of the agreement and the submission of the policy, it is proven by all evidence, but with the understanding that all matters are subject to some type of coverage under the provisions of the law. the invalidation threats, the explicit mention in the policy, must be proven in writing.

D. RESEARCH METHODS

This research is a normative legal research that has a different method from other studies. The subject of the study is the law which is conceptualized as a norm or rule that applies in society and serves as a reference for everyone's behavior, so that normative legal research focuses on an inventory of positive laws, principles and legal doctrines, legal findings in the rejection of motor vehicle insurance claims.

E. ANALYSIS AND DISCUSSION

1. Basic Rejection of Motor Vehicle Insurance Claims

The legal basis for the insurance agreement is regulated in Article 1774 of the Civil Code which reads as follows:

"A profit agreement is an act whose results, concerning its profit and loss, both for all parties, as well as for a number of parties, depend on an uncertain event. Such is the

[2]Salim Abbas , *Asuransi dan Manajemen Resiko*, Jakarta : Raja Grafindo Persada, 2000. hlm. 10

[3]Zian Farodis, *Buku Pintar Asuransi*. Jogjakarta : Laksana. 2014. hlm.18-20

agreement on coverage, interest rates on life; gambling and betting. The first agreement regulated in the Commercial Law Code. "

According to the Article above, insurance agreements are classified as chancy agreements. The classification of an insurance agreement as a chance agreement does not match the true nature of the insurance agreement, which is as follows:

a. Subject of insurance agreement
   The main problem promised is the promise of the guarantor to provide compensation and the payment of the premium from the insured.
b. The birth of an insurance agreement
   Starting from the agreement on the bargaining between the guarantor and the insured and the date of coverage begins.[4]

2. In legal science, the definition of compensation can be divided into several categories, namely:

a. Nominal compensation, i.e. compensation in the form of giving a sum of money, even though the actual loss cannot be calculated in cash, even there may be no material loss at all.
b. punitive damages, i.e. a compensation in a large amount that exceeds the actual amount of the loss, the compensation is intended as a punishment for the perpetrator.
c. Actual damages (actual damages) ie losses that are actually suffered actually and can be easily calculated up to the value of the rupiah.
d. Remedy meddling, which is a variation of various tactics in which the creditor tries to increase his rights if the debtor defaults and reduces or eliminates his obligations if sued by another party in the contract.[5]

F. CONCLUSION

Motor vehicle insurance is one of the various types of loss insurance. In general, the purpose of motor vehicle insurance is to take over the risks that may be borne by the owner of the motor vehicle concerned for the financial losses suffered by motor vehicles for various uncertain reasons.

In dispute resolution through the Indonesian Insurance Mediation Board (BMAI) consists of 2 (two) ways, namely Mediation and Adjudication.

Legal liability to third parties related to damage or loss caused by the insured, the efforts made by the Insurer provide compensation to the Insured party which is settled by negotiation or negotiation.

G. REFERENCES

Abdulkadir Muhammad, *Hukum dan Penelitian Hukum*, Bandung : Citra Aditya Bakti, 2004

Huala Adolf, *Hukum Ekonomi Internasional: Suatu Pengantar*, Jakarta : Rajawali Pers, 2002

Mulyadi Nitisusastro, *Asuransi dan Usaha Perasuransian di Indonesia*. Bandung: Alfabeta, 2013

"Pertumbuhan Volume Kendaraan Bermotor", tersedia di *http://www.antaranews.com/*. Diunduh tanggal 10 Maret 2018

Peter Mahmud Marzuki, *Penelitian Hukum*, Jakarta: Kencana Prenada Media Group, 2005

Pipin Syarifin & Dedah Jubaedah, *Hukum Dagang di Indonesia*, Bandung: Pustaka Setia: 2012

Purwosutjipto. *Pengertian Hukum Dagang Indonesia (Hukum pertanggungan)*. Jakarta : Djambatan, 1983

Rido, R. Ali. *Aspek-aspek Hukum Asuransi Udara, Asuransi Jiwa, Dan Perkembangan perseroan Terbatas*. Bandung: Remadja Karya, 1986

Ronny Hanitijo Soemitro, *Metode Penelitian Hukum dan Jurimetri*, Jakarta : Ghalia Indonesia, 1990

Salim Abbas, *Asuransi dan Manajemen Resiko*, Jakarta : Raja Grafindo Persada, 2000

Salim. HS, *Hukum Kontrak: Teori dan Teknik Penyusunan Kontrak*, Jakarta: Sinar Grafika, 2004

Sigma, *Jurus Pintar Asuransi; Agar Anda tenang, Aman dan Nyaman*. Yogyakarta: G-Media, 2011

Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif; Suatu Tinjauan Singkat*, Jakarta: RajaGrafindo Persada, 2009

Sri Redjeki Hartanto. *Asuransi dan Hukum Asuransi di Indonesia*. Semarang : IKIP Semarang PRESS, 1985

[4]Sri Redjeki Hartanto., *op.cit* hlm 15.
[5]Salim.HS, *Hukum Kontrak: Teori dan Teknik Penyusunan Kontrak*, Jakarta: Sinar Grafika, 2004, hlm. 32.

_____, *Hukum Asuransi dan Perusahaan Asuransi*, Jakarta : Sinar Grafika, 1995

Subekti, R, *Pokok-pokok Hukum Perdata*, Jakarta: Intermasa, 2003

Sudarwan Danim, *Menjadi Peneliti Kualitatif Rancangan Metodologi, Presentasi, dan Publikasi Hasil Penelitian untuk Mahasiswa dan Penelitian Pemula Bidang Ilmu Sosial, Pendidikan, dan Humaniora*, Bandung: Remaja Rosdakarya, 2002

Moleong, Lexy. J, *Metodologi Penelitian Kualitatif*, Bandung: Remaja Rosdakarya, 2000

Wirjono Prodjodikoro, *Hukum Asuransi di Indonesia*, Jakarta : Intermasa, 1996

Zian Farodis, *Buku Pintar Asuransi*. Jogjakarta, aksana. 2014

THE PATIENT'S RIGHT TO THE MEDICAL RECORD OF A THERAPEUTIC AGREEMENT IN A HUMAN RIGHTS PERSPECTIVE

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ABSTRACT

Health is a healthy condition, physically, mentally, spiritually and socially that enables everyone to live productively socially and economically. Health is a basic human right guaranteed in the Constitution of the Republic of Indonesia Year 1945, which with this basic right creates an obligation for anyone who organizes Health Services to fulfill that right. Health services are carried out by Health Workers which include medical workers, pharmacy workers, nursing staff, public and environmental health workers, nutrition workers, physical ignorance staff, medical technical personnel, and other health workers, one of which is a Doctor, where the legal relationship between the Doctor and the Doctor Patients are bound by an agreement called a therapeutic agreement that gives birth to the rights and obligations of both parties as the basis of the doctor in providing health services to the patient, and requires the doctor to make a document in the form of a medical record containing facts relating to the patient's health, so that in the journal This focus will be analyzing the patient's right to a medical record as well as the doctor's obligation to the patient's medical record based on human rights. This research has 2 (two) problem formulations: 1) how is the patient's right to a medical record based on human rights?; and 2) what is the doctor's obligation for the patient's medical record based on human rights?. The writing of this journal was conducted using the juridical-normative legal research method, with the support of data in the form of secondary data covering legal materials, as follows: 1) primary legal material, namely the Constitution of the Republic of Indonesia Year 1945, Law No. 36 of 2009 concerning Health, Law No. 29 of 2004 concerning Medical Practices, and Regulation of the Minister of Health of the Republic of Indonesia Number 269 / MENKES / PER / III / 2008 concerning Medical Records; 2) secondary legal materials, namely literature in the form of books, scientific research, journals, etc. related to health law; and 3) tertiary legal materials which include encyclopedias, dictionaries, and so on.

Keywords: Medical Records, Patient’s Right, Health Service Provider Obligations.

A. INTRODUCTION

Health is a basic human right guaranteed in the Constitution of the Republic of Indonesia Year 1945, which with this basic right creates an obligation for anyone who organizes Health Services to fulfill that right. The definition of health based on Article 4 of Law No. 36 of 2009 concerning Health, which states: "Health is a healthy state, both physically, mentally, spiritually and socially that allows everyone to live productively socially and economically." The right to health for every citizen is implied in Constitution of the Republic of Indonesia Year 1945, especially in Article 28H which states: "every person has the right to live in physical and spiritual prosperity, to live and to have a good and healthy environment and to have health services". These rights are also guaranteed linearly in Law No. 36 of 2009 concerning Health in particular Article 4, which states: "Everyone has the right to health".

Regarding health services, based on Article 1 point 11 of Law No. 36 of 2009 concerning Health, which states: "Health efforts are any activities 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 promotion, treatment of diseases, and health recovery by government and / or community. "Health services are carried out by Health Workers based on Law No. 36 of 2009 concerning Health. The Health Workers based on Article 1 point 6 of Law no. 36 of 2009 concerning Health, which states: "Health workers are all people who devote themselves in the field of health and have knowledge and / or skills through education in health which for certain types require authority to conduct health efforts." The grouping of Health Workers is regulated in Elucidation of Article 21 paragraph (1) of Law No. 36 of 2009 concerning Health, which states: "Health workers can be grouped according to their expertise and qualifications, including among others medical professionals, pharmacy workers, nursing staff, community and environmental health workers, nutrition workers, physical ignorance personnel, medical technical personnel, and personnel other health." One of the Health Workers is a Doctor.

Legal Relationships between Doctors and Patients in the health services provided by Doctors contained in the Therapeutic Agreement. A therapeutic transaction is an agreement between a doctor and a patient, in the form of a legal relationship that gives birth to rights and obligations for both parties. The object of this agreement is an

effort or therapy to cure the patient.[1] The definition of Therapeutic Agreements is a contracts made between patients with health workers and / or doctors or dentists, where health workers and / or doctors or dentists try to make the maximum effort to cure patients according to the agreement made between the two and the patient is obliged to pay the costs of healing.[2] Where the provision of health services to patients requires doctors to make documents in the form of medical records. Medical records are facts relating to the patient's state of past and present medical history and treatment written by the health profession providing services to these patients.[3] Based on this fact, the medical record which contains the fact record relating to the patient's health should absolutely belong to the patient himself, but with the existence of several related laws and regulations regarding the medical record, it is stated that the ownership of the patient's medical record is not entirely owned by the patient itself because there is other related parties are also entitled to have a medical record, so in this journal the focus will be on analyzing the patient's right to a medical record and the obligations of the health service provider for the patient's medical record based on human rights.

B. PROBLEM STATEMENT

Formulation of the problem in this study:

1. What is the patient's right to a medical record based on Human Rights?
2. What is the doctor's obligation to a patient's medical record based on human rights?

C. LITERATURE REVIEW

Medical records

According to Bambang Poernomo (2000), a medical record is a record that reflects all information concerning a patient that will be used as a basis for determining further actions in an effort to provide medical services and other medical actions provided to a patient. Or according to medical technics, medical records are written and recorded information about identity, history, laboratory physical determination, diagnosis of all services and medical treatment of money given to patients as well as inpatient, outpatient, and emergency services.[4]

The legal basis for organizing medical records, namely:

a) Government Regulation Number 10 of 1960 concerning Obligation to Save Medical Secrets.
b) Government Regulation No. 034 / BIRHUB / 1992 concerning Hospital Planning and Maintenance which, among others, states that in order to support the implementation of a good master plan, each hospital is required to have and maintain up-to-date statistics, and foster medical records based on established conditions.
c) Minister of Health Regulation No. 134 of 1978 concerning the Organizational Structure and Work Procedures of Public Hospitals where among others it is stated that one of the sub-chapters is medical records.
d) Minister of Health Regulation No. 290 / MENKES / PER / III / 2008 concerning Medical Records.

Medical records have many uses which are divided into seven aspects. The following seven aspects are:[5]

1) In terms of administrative aspects
   The contents of the medical record concerns actions based on authority and responsibility as medical personnel and nurses in achieving health service goals.
2) In terms of medical aspects
   Medical records are used as a basis for planning treatment / care that must be given to patients, because these medical records contain a history of the patient's disease.
3) In terms of legal aspects
   Medical records relating to the existence of legal certainty guarantees on the basis of justice, in the context of efforts to enforce the law and the provision of evidence to prove justice.
4) In terms of financial aspects
   The contents of the medical record can be used as material to determine the cost of service payments. Without evidence of action / service records, then the payment cannot be accounted for.
5) In terms of research aspects
   The medical record file has research value, because it contains data / information that can be used as an aspect of research.
6) From the educational aspect
   The medical record file has educational value, because it contains data / information about the chronology of medical services provided to patients.
7) From the aspect of documentation
   The contents of the medical record is a source of memory that must be documented and used as material for accountability and health facilities reports.

[1] Bahder Johan Nasution, 2005, *Hukum kesehatan Pertanggungjawaban Dokter*, Rineka Cipta, Jakarta, page. 11.
[2] H.S, Salim, 2004, *Hukum Kontrak Teori dan Teknik Penyusunan Kontrak*, Sinar Grafika, Jakarta, page. 46.
[3] H.S, Salim, 2004, *Hukum Kontrak Teori dan Teknik Penyusunan Kontrak*, Sinar Grafika, Jakarta, page. 46.
[4] Hendrik, 2014, *Etika & Hukum Kesehatan*, Penerbit Buku Kedokteran EGC, Jakarta, page. 82.
[5] Nusye KI Jayanti, 2009, *Penyelesaian Hukum Dalam Malpraktek Kedokteran*, Pustaka Yustisia, Yogyakarta, page. 85.

D. RESEARCH METHOD

The writing of this journal was conducted using the juridical-normative legal research method, with the support of data in the form of secondary data covering legal materials, as follows: 1) primary legal material, namely the Constitution of the Republic of Indonesia Year 1945, Law No. 36 of 2009 concerning Health, Law No. 29 of 2004 concerning Medical Practices, and Regulation of the Minister of Health of the Republic of Indonesia Number 269 / MENKES / PER / III / 2008 concerning Medical Records; 2) secondary legal materials, namely literature in the form of books, scientific research, journals, etc. related to health law; and 3) tertiary legal materials which include encyclopedias, dictionaries, and so on.

E. ANALYSIS AND DISCUSSION

1. Patient's Right to Medical Record Based on Human Rights

According to Satijipto Raharjo, legal protection is to provide protection for human rights that have been harmed by others and that protection is given to the public so that they can enjoy all the rights granted by law.[6] Rights have been imprinted since humans were born and are attached to anyone. Among them are the rights of independence, the right of creatures and human dignity, the right of love of others, the right of the beauty of openness and spaciousness, the right to be free from fear, the right of life, the right of spiritual, the right of conscience, the right to peace, the right to give, the right to receive, the right to to protect and protect the river and so on.[7] The rights to be discussed in this journal relate to the patient's right to medical records.

Medical records are evidence both for patients and for health workers in front of a court hearing, because it contains about who, when, how, the medical action took place. Thus a medical record guarantees legal certainty on the basis of justice in the context of upholding the law and providing evidence to uphold justice.[8] In the Laws and Regulations specifically in the Republic of Indonesia Minister of Health Regulation No. 269 / MENKES / PER / III / 2008 concerning Medical Records, medical records are files that contain records and documents about identity, examination, treatment, actions, and other services that have been provided to patients.

Matters that must be included in the Medical Record include: (1) patient's identity, (2) history of illness, (3) physical examination report, (4) diagnostic and therapeutic instructions signed by an authorized doctor, (5) observational records or observation, (6) reports of actions and findings, (7) history of patients leaving health care facilities, and (8) incidents that have strayed.[9] Medical records are made for orderly administration in hospitals which is one of the determining factors in the context of efforts to improve health services.[10]

Ownership of medical records often creates its own dilemma where on one side the medical record can belong to the patient, or to the health care provider. But based on Article 52 of Law No. 29 of 2004 concerning Medical Practices, states: "Patients, in receiving services in medical practice, have the right: a) to obtain a full explanation of the medical measures referred to in Article 45 paragraph (3); b) ask for the opinion of another doctor or dentist; c) get services according to medical needs; d) refuse medical treatment; and e) obtain the contents of the medical record. Legislation specifically regulating medical records is contained in Minister of Health Regulation No. 269 / MENKES / PER / III / 2008 concerning Medical Records where the ownership rights of patient medical records are regulated based on Article 12 paragraph (1) to paragraph (4) Minister of Health Regulation No. 269 / MENKES / PER / III / 2008 concerning Medical Records. In Article 12 paragraph (1) which states: "Medical record file belonging to a health service facility", and in Article 12 paragraph (2) which states: "The contents of the medical record are the property of the patient", while the contents of the medical record are in the form of a medical record summary (Article 12 paragraph (3)), where Article 12 paragraph (4) states that those entitled to obtain a summary of medical records are: a) Patients; b) The patient's family; c) The person authorized by the patient or the patient's family; and d) People who have written consent from the patient or the patient's family. Based on the aforementioned explanations, it can be seen that the medical record is still the right of the patient but is not absolutely the patient's possession where the patient is only entitled to have the contents of the medical record in the form of a summary, while the physical file of the medical record belongs to the health care facility.

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[6] Satijipto Mansur Fagih, 1999, *Panduan Pendidikan Polik Rakyat*, Insist, Yogyakarta, page. 17.
Rahardjo, 2000, *Ilmu Hukum*, PT. Citra Aditya Bakti, Bandung, page. 54.

[7] Mansur Fagih, 1999, *Panduan Pendidikan Polik Rakyat*, Insist, Yogyakarta, page. 17.

[8] Indar, 2010, *Etika dan Hukum Kesehatan*, Lembaga Penerbitan Unhas, Makassar, page. 267.

[9] Triana Ohoiwatun, 2007, *Bunga Rampai Hukum Kedokteran, Tinjauan Berbagai Peraturan Perundangan dan UU Praktek Kedokteran*, Bayumedia Publishing, Malang, page. 26.

[10] Ery Rustiyanto, *Op.Cit.*, page. 7.

2. Doctor's Obligation to A Patient's Medical Records Based on Human Rights

The Legal Relationship between Doctor and Patient that creates rights and obligations that must be fulfilled by both Doctor and Patient initially occurs and is bound in an agreement called Therapeutic. Therapeutic transactions are activities in the implementation of medical practice in the form of individual health services or referred to as medical services based on their expertise and skills, and accuracy.[11] Therapeutic contract is an agreement so that in the therapeutic contract also applies binding law which is regulated in book III BW. Thus, for the validity of the therapeutic contract, the conditions contained in Article 1320 BW must be fulfilled.[12] These conditions are agreed, capable, certain things and halal reasons.

Guwandi in his book entitled "Doctors, Patients and the Law" said that, the relationship between doctors and patients is part of the civil jurisdiction which gives the parties freedom to make agreements.[13] However, one thing must be kept in mind that the therapeutic engagement is not contractually "free", because the content of the therapeutic nature of the engagement is subject to positive legal / normative provisions. Forms of achievement and counter-achievement in a therapeutic engagement have been determined in such a way as in normative, ethical and medical standards. A therapeutic agreement can be said to be effective from the time a doctor declares his ability or willingness to be stated orally (implied statement) or implied statement through actions that conclude his willingness such as by accepting registration, giving the patient's serial number, recording medical records and so on.[14]

Regarding making medical records is an obligation of doctors who have been bound by a therapeutic agreement with the patient. The obligations are clearly stated in Article 46 and Article 47 of Law No. 29 of 2004 concerning Medical Practices, which can be described as follows:

Article 46

(1) Every doctor or dentist in carrying out medical practice must make a medical record.
(2) The medical record referred to in paragraph (1) must be completed immediately after the patient has finished receiving health services.
(3) Every medical record must be given the name, time, and signature of the officer providing the service or action.

Article 47

(1) The medical record documents as referred to in Article 46 are the property of doctors, dentists, or health service facilities, while the contents of medical records are the property of patients.
(2) The medical record referred to in paragraph (1) must be kept and kept confidential by the doctor or dentist and the head of the health service facility.
(3) Provisions regarding medical records as referred to in paragraph (1) and paragraph (2) shall be regulated by a Ministerial Regulation.

With the obligation of the Doctor in making medical records also raises the obligation for Doctors to keep the contents of the patient's medical records confidential. According to Fred Ameln, medical secrets are: a) everything delivered by the patient (consciously or unconsciously) to the doctor, and b) everything that is known by the doctor when treating and treating patients.[15] The medical secret or medical secret is also recorded in the medical record, which gives rise to the patient's right to confidentiality.

The patient's right to confidentiality is part of the moral principle of autonomy. One part of one's autonomy is to determine who is allowed to know about himself. Medical consultation can occur with the disclosure of information to a doctor, namely with the aim of treating the patient and not for other reasons. This information is the property of the patient who revealed the information and should not be given to a third person without specific consent.[16]

This obligation is also clearly regulated in Article 51 of Law No. 29 of 2004 concerning Medical Practices, which states: "Doctors or dentists in carrying out medical practices have an obligation: a) to provide medical services in

[11] Veronica Komalawati, 2002, *Peranan Informed Consent Dalam Transaksi Terapeutik (Persetujuan Dalam Hubungan Dokter dan Pasien)*, PT. Citra Aditya Bakti, Bandung, page. 56.
[12] Veronica Komalawati, 1999, *Hukum dan Etika Dalam Praktik Dokter*, Pustaka Sinar Harapan, Bandung, page. 92.
[13] J. Guwandi, 2006, *Dugaan Malpraktek Medik & draft RPP : " Perjanjian Terapeutik antara Dokter dan Pasien*, Fakultas Kedokteran Universitas Indonesia, Jakarta, page. 1.
[14] Bayu Wijanarko dan Mudiana Permata Sari, 2014, *Tinjauan Yurudis Sahnya Perjanjian Teraupeutik dan Perlindungan Hukum Bagi Pasien,* Jurnal Hukum, Program Studi Ilmu Hukum Fakultas Hukum Universitas Sebelas Maret, page. 3.
[15] Hendrik, *Op.Cit.*, page. 11.
[16] Idries, Abdul Mun'im dan Agung Legowo Tjiptomartono, 2008, *Penerapan Ilmu Kedokteran Forensik dalam Proses Penyidikan*, Sagung Seto, Jakarta, page. 252.

accordance with professional standards and standard operating procedures and patient medical needs; b) refer the patient to another doctor or dentist who has better expertise or ability, if unable to conduct an examination or treatment; c) keep everything he knows about the patient, even after the patient's death; d) conduct emergency relief on the basis of humanity, except if he believes that someone else is on duty and is able to do it; and e) increase knowledge and follow developments in medicine or dentistry."

However, there are exceptions for doctors to disclose medical secrets, it is regulated in Article 48 paragraph (2) of Law no. 29 of 2004 concerning Medical Practice, which states: "medical secrets can be disclosed only for the benefit of the patient's health, fulfill the request of law enforcement officials in the context of law enforcement, patient's own request, or based on statutory provisions." And Article 10 paragraph (2) Regulation of the Minister of Health of the Republic of Indonesia Number 269 / MENKES / PER / III / 2008 concerning Medical Records, which states: "Information about identity, diagnosis, history of disease, history of examination, and history of treatment can be disclosed in terms of:

a. for the benefit of the patient's health;
b. fulfill the request of law enforcement officials in the context of law enforcement according to a court order;
c. the request and / or the patient's own consent;
d. institutional / institutional request based on statutory provisions; and
e. for the purposes of research, education and medical audits, as long as they do not mention the patient's identity. "

Based on the two articles, that only with these reasons can medical secrets be opened, and besides the reasons stated above, doctors are not allowed to disclose medical secrets, so that doctors are obliged to keep these medical secrets.

F. CONCLUSION

Based on the discussion above, conclusions can be drawn on the issue of the patient's right to a medical record that the patient in receiving health services is entitled to obtain the contents of a medical record where the contents of the medical record are given to the patient in the form of a summary of the medical record, and the patient's right to a medical record is not The patient's absolute possession is entirely due to the patient's right to the medical record only in the form of the contents of the medical record, whereas the medical record file belongs to the health service facility. Then, the conclusion regarding the doctor's obligation to the patient's medical record that the doctor is obliged to make a patient's medical record where the legal relationship between the patient and the doctor is bound in a therapeutic agreement, so that in addition to the doctor's obligation to make a medical record also creates an obligation for the doctor to keep the contents of the medical record which can be called a medical secret, but the Doctor's obligation can be dropped if there are reasons as stipulated in Article 48 paragraph (2) of Law no. 29 of 2004 concerning Medical Practices and Article 10 paragraph (2) Regulation of the Minister of Health of the Republic of Indonesia Number 269 / MENKES / PER / III / 2008 concerning Medical Records.

G. REFERENCES

Book

Bahder Johan Nasution, 2005, *Hukum kesehatan Pertanggungjawaban Dokter*, Rineka Cipta, Jakarta

Ery Rustiyanto, 2012, *Etika Profesi Perekam Medis dan Informasi Kesehatan*, Graha Ilmu, Yogyakarta.

Hendrik, 2014, *Etika & Hukum Kesehatan,* Penerbit Buku Kedokteran EGC, Jakarta.

H.S, Salim, 2004, *Hukum Kontrak Teori dan Teknik Penyusunan Kontrak*, Sinar Grafika, Jakarta.

Idries, Abdul Mun'im dan Agung Legowo Tjiptomartono, 2008, *Penerapan Ilmu Kedokteran Forensik dalam Proses Penyidikan*, Sagung Seto, Jakarta.

Indar, 2010, *Etika dan Hukum Kesehatan,* Lembaga Penerbitan Unhas, Makassar.

Mansur Fagih, 1999, *Panduan Pendidikan Polik Rakyat*, Insist, Yogyakarta.

Nusye KI Jayanti, 2009, *Penyelesaian Hukum Dalam Malpraktek Kedokteran,* Pustaka Yustisia, Yogyakarta.

Satijipto Rahardjo, 2000, *Ilmu Hukum,* PT. Citra Aditya Bakti, Bandung.

Triana Ohoiwatun, 2007, *Bunga Rampai Hukum Kedokteran, Tinjauan Berbagai Peraturan Perundangan dan UU Praktek Kedokteran*, Bayumedia Publishing, Malang.

Veronica Komalawati, 2002, *Peranan Informed Consent Dalam Transaksi Terapeutik (Persetujuan Dalam Hubungan Dokter dan Pasien)*, PT. Citra Aditya Bakti, Bandung.

Veronica Komalawati, 1999, *Hukum dan Etika Dalam Praktik Dokter*, Pustaka Sinar Harapan, Bandung.

Journal and Legal Scientific Research

Bayu Wijanarko dan Mudiana Permata Sari, 2014, *Tinjauan Yurudis Sahnya Perjanjian Teraupeutik dan Perlindungan Hukum Bagi Pasien,* Jurnal Hukum, Program Studi Ilmu Hukum Fakultas Hukum Universitas Sebelas Maret.

J. Guwandi, 2006, *Dugaan Malpraktek Medik & draft RPP : " Perjanjian Terapeutik antara Dokter dan Pasien*, Fakultas Kedokteran Universitas Indonesia, Jakarta.

Legislation

Indonesia, Constitution of the Republic of Indonesia Year 1945.
_____, UU No. 29 Tahun 2004 Tentang Praktik Kedokteran.
_____, UU No. 36 Tahun 2009 Tentang Kesehatan.
_____, Peraturan Menteri Kesehatan No. 290/MENKES/PER/III/2008 Tentang Persetujuan Tindakan Kedokteran.

THE DOCTOR'S OBLIGATION RELATED TO ITS PROFESSION IN HUMAN RIGHTS PERSPECTIVE

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ABSTRACT

Indonesia as a state based on welfare state guarantees the community's need for health as one of the of the human rights guaranteed in the Constitution of the Republic of Indonesia. Health services intended for the community are provided by Health Personnel as an authorized party based on Law Number 36 of 2009 concerning Health. Doctors as one of the Health Workers have the duty to provide health services to patients based on their profession. The doctor's profession in its development in Indonesia is regulated in Law No. 29 of 2004 concerning Medical Practice in which the medical profession is a work carried out based on a scientific basis, competence, obtained through tiered education, and a code of ethics that is serving the community. Thus it is seen that the presence of the medical profession aims to provide improvements and health protection for the community, especially patients in the scope of health services. Therefore, the Doctor as his profession has obligations that must be fulfilled, especially for patients so that the doctor's obligations will be discussed in this legal research. This study has 2 (two) problem formulations, namely first: What are the arrangements regarding Doctor Professional Education ?; and second: What are the obligations of the doctor's profession to the patient ?. The legal research method used in this study is juridical-normative legal research, in which the data used are secondary data with legal materials covering primary legal material, namely the Constitution of the Republic of Indonesia Year 1945, Law Number 29 of 2004 concerning Medical Practice , Law Number 36 of 2009 Concerning Health, Law Number 20 of 2013 Concerning Medical Education, Law Number 36 of 2014 Concerning Health Workers, Minister of Health Regulation No. 290 / MENKES / PER / III / 2008 concerning the Approval of Medical Action, secondary legal materials, in the form of legal text books, legal journals, legal scientific research, etc., tertiary legal materials, in the form of scientific reference dictionaries, language dictionaries , and others.

Keywords: Doctor Profession, Doctor Obligations, Health Services.

A. INTRODUCTION

Indonesia as a state based on welfare states guarantees people's needs for health as one of the human rights guaranteed in Article 28H of the Constitution of the Republic of Indonesia Year 1945, which states that "every person has the right to live in prosperity physically and mentally , live and have a good and healthy living environment and have the right to receive health services. " In this article as a manifestation of the existence of a country formed to protect the interests of the community, especially in the aspect of health fulfillment and improvement. For this reason, human rights, especially the rights of the people to obtain health services, are the responsibility of the State, one of which is that the state provides health facilities based on Article 34 paragraph (3) of the Constitution of the Republic of Indonesia Year 1945, which states that: decent general. "

Health services intended for the public are provided by Health Personnel as an authorized party based on Article 23 paragraph (1) of Law Number 36 of 2009 concerning Health, which states as follows: "Health workers are authorized to provide health services." Health Workers based on Article 1 point 1 of Law Number 36 of 2014 concerning Health Workers, which states as follows: "Health Workers are every person who devotes himself in the health field and has knowledge and / or skills through education in the health sector which is for types some require authority to make health efforts. "

Health Workers are grouped based on Article 11 paragraph (1) of Law Number 36 of 2014 concerning Health Workers, which states as follows: "Health Workers are grouped into: a) medical personnel; b) clinical psychology workforce; c) nursing staff; d) midwifery; e) pharmaceutical personnel; f) community health workers; g) environmental health workers; h) nutrition workers; i) physical ignition power; j) medical technical personnel; k) biomedical engineering personnel; l) traditional health workers; and m) other health workers. "Based on Article 11 paragraph (2) of Law Number 36 of 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 comprise top

doctors, dentists, specialist doctors and specialist dentists. "

Doctors as one of the Health Workers have the duty to provide health services to patients based on their profession. Doctors based on Article 1 point 2 of Law Number 29 of 2004 Concerning Medical Practice, states that: "Doctors and dentists are doctors, specialist doctors, dentists, and dentists who have graduated from medical or dentistry education both inside and outside a country which is recognized by the Government of the Republic of Indonesia in accordance with statutory regulations. "The doctor's profession in its development in Indonesia is regulated in Law Number 29 of 2004 Concerning Medical Practices where the medical profession is a work carried out based on scientific knowledge, competence, obtained through tiered education, and a code of ethics that is serving the community. Thus it is seen that the presence of the medical profession aims to provide improvements and health protection for the community, especially patients in the scope of health services. Therefore, the Doctor as his profession has obligations that must be fulfilled, especially for patients so that the doctor's obligations will be discussed in this legal research.

B. PROBLEM STATEMENT

This research has the following Problem Formulation:

1. What are the arrangements regarding Education of Doctor Profession?
2. What is the obligations of Doctor Profession towards patients?

C. LITERATURE REVIEW

Doctor's profession

A job can be categorized as a profession, while the characteristics of the profession, namely: a) It is a high-level occupation of skilled experts in applying knowledge systematically; b) Have competence exclusively for certain knowledge and skills; c) Based on intensive education and certain disciplines; d) Has the responsibility to develop his knowledge and skills and maintain honor; e) Having own ethics as a guide for assessing work; f) Tend to ignore the control of society or individuals; and g) The implementation is influenced by the community, certain interest groups and other professional organizations, especially in terms of recognition of their independence.[1] Based on Government Regulation of the Republic of Indonesia Number 32 of 1996 concerning Health Workers, what is meant by medical personnel includes doctors and dentists. Medical personnel are those whose profession is in the medical field, namely doctors, physicians (psychiatrists) and dentists (dentists).[2] Doctors in their profession are obliged to organize health services. The definition of health services according to Prof. Dr. Soekidjo Notoatmojo is a sub-system of health services whose main purpose is preventive (preventive) and promotive (health-enhancing) services targeting the community.[3]

D. RESEARCH METHOD

The legal research method used in this study is juridical-normative legal research, in which the data used are secondary data with legal materials covering primary legal material, namely the Constitution of the Republic of Indonesia Year 1945, Law Number 29 of 2004 concerning Medical Practice , Law Number 36 of 2009 Concerning Health, Law Number 20 of 2013 Concerning Medical Education, Law Number 36 of 2014 Concerning Health Workers, Minister of Health Regulation No. 290 / MENKES / PER / III / 2008 concerning the Approval of Medical Action, secondary legal materials, in the form of legal text books, legal journals, legal scientific research, etc., tertiary legal materials, in the form of scientific reference dictionaries, language dictionaries , and others.

E. ANALYSIS AND DISCUSSION

1. Education of Doctor Profession

The profession requires the competence ("the condition of being capable" or "the capacity to perform the task and role") so that professional stakeholders can carry out their roles, tasks and responsibilities properly and correctly.[4] Doctor profession is a profession that

[1] Veronica Komalawati, 1999, *Hukum dan Etika Dalam Praktik Dokter*, Pustaka Sinar Harapan, Bandung, page. 19.
[2] Azrul Azwar, 1996, *Kriteria Malpraktik dalam Profesi Kesehatan* , Makalah kogres Nasional IV PERHUKI, Surabaya, page. 7.
[3] Sahetapy, J.E. 2002, *Kejahatan Korporasi*, Cetakan Kedua, PT. Refina Aditama, Bandung, page. 21.
[4] Setyo Trisnadi, *Perlindungan Hukum Profesi Dokter Dalam Penyelesaian Sengketa Medis, Jurnal*

is accompanied by high morality to provide help to anyone who needs it. Professionals always carry out moral and intellectual commands and together they want to show the community the good thing for him.[5]

Based on Article 1 point 2 of Law Number 29 of 2004 Concerning Medical Practices which states that "Doctors are doctors, specialist doctors, dentists, and dentists who have graduated from medical or dentistry education both at home and abroad which are recognized by the Government Republic of Indonesia in accordance with statutory regulations ". The doctor is a graduate of the medical school. Doctors have the authority to carry out medical actions in all fields of medical science to a certain extent.[6] A doctor is someone who has an average ability to treat and treat patients.[7] Doctors have obligations and rights in providing health services to the community. Doctor's obligations and rights are regulated in the Law Number 29 of 2004 concerning Medical Practice.[8] Doctors have the responsibility to carry out medical practice.

Medical Practice based on Article 1 point 1 of Law Number 29 of 2004 concerning Medical Practice, which states that: "Medical practice is a series of activities carried out by doctors towards patients in carrying out health efforts". Where the doctor can carry out health efforts requires an agreement called a therapeutic agreement. The parties involved in a therapeutic transaction / agreement are the doctor and the patient. A therapeutic agreement is a contract made between a patient and a health worker and / or doctor or dentist, in which the health worker and / or doctor or dentist tries to make the maximum effort to cure the patient in accordance with the agreement made between the two and the patient is obliged pay for the healing costs.[9] For this reason, because a doctor is bound by a therapeutic agreement, the doctor should be a competent party in carrying out medical measures. However, in order for a person to be a doctor, qualified education is required as stipulated in the legislation regarding health as one of the requirements for doctors to carry out medical practice.

Education for doctors is specifically regulated in Article 1 point 1 of Law Number 20 of 2013 concerning Medical Education, which states: "Medical Education is a conscious and planned effort in formal education consisting of academic education and professional education at the higher education level. the study program is accredited to produce graduates who have competence in the field of medicine or dentistry. "As for further information on medical education, it is regulated in several articles, namely Article 7 paragraph (2) of Law Number 20 of 2013 concerning Medical Education, which states that : "Medical Education as referred to in paragraph (1) consists of: a. Academic Education; and b. Professional Education. "Academic Education consists of: a. Bachelor of Medicine programs and Bachelor of Dentistry programs; b. master's program; and c. doctoral program (Article 7 paragraph (2) of Law Number 20 of 2013 concerning Medical Education), while Professional Education consists of: a. doctor professional program and dentist profession; and b. primary service doctor program, specialist-subspecialist doctor, and specialist-subspecialist dentist (Article 7 paragraph (5) of Law Number 20 of 2013 concerning Medical Education).

In addition, doctors need to make an effort to obtain a license to practice in practicing medicine in Indonesia as stipulated in Article 37 of Law Number 29 of 2004 concerning Medical Practices which states that: a) The practice permit referred to in Article 36 is issued by an official health authority in the district / city where the practice of medicine or dentistry is carried out; b) Doctor or dentist practice permit as referred to in paragraph (1) is only given to at most 3 (three) places; c) A practice permit is only valid for 1 (one) place of practice.

Pembaharuan Hukum, Volume IV No. 1 Januari - April 2017, page. 30.

[5] Benyamin Lumenta, 1989, *Pasien, Citra, Peran dan Perilaku*, Kanisius, page. 81.

[6] Muhammad Mulyohadi Ali, dkk, 2006, *Kemitraan Dalam Hubungan Dokter-Pasien*, Konsil Kedokteran Indonesia, Jakarta, page. 35.

[7] Meivy Isnoviana Suhandi, *Akibat hukum Pemberian Surat Keterangan Sakit Terhadap Pasien*, Jurnal Hukum Kesehatan, vol. 10, No.1, 2005, page. 16.

[8] Bhekti Suryani, *Panduan Yuridis Penyelenggaraan Praktik Kedokteran*, Niaga Swadaya, Jakarta, page. 123.

[9] H.S, Salim, 2004, *Hukum Kontrak Teori dan Teknik Penyusunan Kontrak*, Sinar Grafika, Jakarta, page. 46.

2. The Obligations of Doctor Profession Towards Patients

A doctor is a person who has the proper authority and permission to conduct health services, specifically examining and treating diseases and is carried out according to health service laws.[10] Doctors and hospitals must fulfill their obligations to provide health services according to service standards, professional standards and standard operating procedures for patients both requested and unsolicited, because in principle from the therapeutic transaction, the health provider and the health receiver are both subject. a law that has equal rights and obligations in accordance with the principle of equality before the law and is stated in Article 1320 of the Civil Code regarding the legal requirements of an agreement.[11]

Doctors as health service providers in their profession have rights and are protected by both the Laws and the Medical Professional Ethics Code, these rights can be reviewed in several articles in several Laws and Regulations, one of which is based on Article 50 of Law Number 29 of 2004 concerning Medical Practice, which states that: "Doctors or dentists in carrying out medical practices have the right: a) to obtain legal protection as long as carrying out their duties in accordance with professional standards and operational procedure standards; b) provide medical services according to professional standards and operational procedure standards; c) obtain complete and honest information from patients or their families; and d) receive service fees. "

According to Permenkes No. 290 / MENKES / PER / III / 2008 concerning Approval of Medical Measures stipulates that, medical action is a medical action in the form of preventive, diagnostic, therapeutic, or rehabilitative performed by a doctor to a patient. One of the obligations of the doctor to the patient for medical action that should not be missed is regarding the patient's approval of the medical action that will be given to him. As for Article 45 Paragraph (1) of Law Number 29 of 2004 Concerning Medical Practice, which states that: "Every medical or dental action that will be performed by a doctor or dentist on a patient must obtain approval." The approval is given after the patient get a complete explanation (Article 45 paragraph (2) of Law Number 29 of 2004 concerning Medical Practices). The explanation referred to at least includes: a) diagnosis and procedure of medical treatment; b) the purpose of the medical treatment; c. other alternative actions and risks; d. risks and complications that might occur; and e. prognosis for actions taken (Article 45 paragraph (3) of Law Number 29 of 2004 concerning Medical Practices).

In addition, the obligations of doctors in Article 51 of Law Number 29 of 2004 concerning Medical Practice have also been outlined, which states that: "Doctors or dentists in carrying out medical practices have obligations:

a. provide medical services in accordance with professional standards and standard operating procedures and patient medical needs;
b. refer patients to a doctor or other dentist who has better expertise or ability, if unable to conduct an examination or treatment;
c. keep everything he knows about the patient, even after the patient's death;
d. conduct emergency relief on the basis of humanity, except if he believes that someone else is on duty and is able to do it; and
e. add knowledge and follow the development of medical science or dentistry.

There are several doctor obligations which are regulated in several articles in the Medical Practice Law, all of which if compiled, the doctor's obligation is to attend continuing medical education and training organized by professional organizations and other institutions accredited by professional organizations in the context of absorbing scientific developments. medical knowledge and technology, having a Registration Certificate (STR) and a Practice License (SIP), providing medical services in accordance with professional standards and standard operating procedures and patient's medical needs, referring patients to doctors or other dentists who have more expertise or ability well, if he is unable to carry out an examination or treatment, keep everything he knows about

[10] Black's *Law Dictionary*, 1979, St. Paul Minn: West Publishing, Co. Fifth Edition, page. 1033.
[11] Desriza Ratman, 2014, *Aspek Hukum Penyelenggaraan Prakek Kedokteran dan Malpraktik Medik*, Keni Media, Bandung, page. 2-3.

the patient, even after the patient's death, perform emergency relief on the basis of humanity, unless he is sure there are others on duty and able do it, and carry out quality control and cost control.[12]

In addition, the obligations of doctors to patients can also be described as stipulated in the Indonesian Medical Code of Ethics and the Guidelines for the Implementation of the Indonesian Medical Code of Ethics, which are collected in several articles, the obligations are as follows: a) Every doctor must be sincere and use all his knowledge and skills for the benefit of the patient. In this case he is unable to carry out an examination or treatment, then with the patient's consent, he must refer the patient to a doctor who has expertise in the disease (Article 10); b) Every doctor must provide an opportunity for the patient to always be able to deal with his family and counselors in worship and or in other matters (Article 11); c) Every doctor must keep everything he knows about a patient, even after the patient's death (Article 12); d) Every doctor is obliged to carry out emergency relief as a humanitarian task, except if he believes that someone else is willing and able to give it (Article 13).[13]

F. CONCLUSION

The conclusion of this study based on the discussion that has been stated previously, can be elaborated as follows: regarding Medical Professional Education specifically regulated in several laws and regulations regarding health, namely in Law Number 20 of 2013 concerning Medical Education where Medical Education consists of Academic Education (Bachelor of Medicine programs and Bachelor of Dentistry programs, master programs, and doctoral programs), and Professional Education (professional programs of doctors and dentist professions, and primary service doctor programs, specialist doctors-subspecialists, and specialist dentists-subspecialists) In addition, in order for a doctor to be able to practice medicine, a Practice License based on Law Number 29 of 2004 concerning Medical Practices is required, then regarding the professional obligations of doctors to patients is also regulated in several laws and regulations concerning health, some of which are in Article 45 paragraph (1) of Law Number 29 of 2004 concerning Medical Practices, Article 51 of Law Number 29 of 2004 concerning Medical Practices, as well as to the Indonesian Medical Ethics Code and Guidelines for the Implementation of the Indonesian Medical Ethics Code.

[12] Yussy A. Mannas, *Hubungan Hukum Dokter dan Pasien Serta Tanggung Jawab Dokter Dalam Penyelenggaraan Pelayanan Kesehatan*, Jurnal Cita Hukum (Indonesian Law Journal). Vol. 6 No. 1 (2018), page. 173-174.

[13] Kode Etik Kedokteran Indonesia dan Pedoman Pelaksanaan Kode Etik Kedokteran Indonesia, Majelis Kehormatan Etik Kedokteran Indonesia (MKEK), Ikatan Dokter Indonesia.

G. REFERENCES

Book

Benyamin Lumenta, 1989, *Pasien, Citra, Peran dan Perilaku,* Kanisius.

Black's *Law Dictionary*, 1979, St. Paul Minn: West Publishing, Co. Fifth Edition.

Bhekti Suryani, *Panduan Yuridis Penyelenggaraan Praktik Kedokteran,* Niaga Swadaya, Jakarta.

Desriza Ratman, 2014, *Aspek Hukum Penyelenggaraan Prakek Kedokteran dan Malpraktik Medik,* Keni Media, Bandung.

H.S, Salim, 2004, *Hukum Kontrak Teori dan Teknik Penyusunan Kontrak,* Sinar Grafika, Jakarta.

Muhammad Mulyohadi Ali, dkk, 2006, *Kemitraan Dalam Hubungan Dokter-Pasien*, Konsil Kedokteran Indonesia, Jakarta.

Sahetapy, J.E. 2002, *Kejahatan Korporasi*, Cetakan Kedua, PT. Refina Aditama, Bandung.

Veronica Komalawati, 1999, *Hukum dan Etika Dalam Praktik Dokter,* Pustaka Sinar Harapan, Bandung.

Journal and Legal Scientific Research

Azrul Azwar, 1996, *Kriteria Malpraktik dalam Profesi Kesehatan ,* Makalah kogres Nasional IV PERHUKI, Surabaya.

Kode Etik Kedokteran Indonesia dan Pedoman Pelaksanaan Kode Etik Kedokteran Indonesia, Majelis Kehormatan Etik Kedokteran Indonesia (MKEK), Ikatan Dokter Indonesia.

Meivy Isnoviana Suhandi, *Akibat hukum Pemberian Surat Keterangan Sakit Terhadap Pasien*, Jurnal Hukum Kesehatan, vol. 10, No.1, 2005.

Setyo Trisnadi, *Perlindungan Hukum Profesi Dokter Dalam Penyelesaian Sengketa Medis, Jurnal Pembaharuan Hukum,* Volume IV No. 1 Januari - April 2017.

Yussy A. Mannas, *Hubungan Hukum Dokter dan Pasien Serta Tanggung Jawab Dokter Dalam Penyelenggaraan Pelayanan Kesehatan,* Jurnal Cita Hukum (Indonesian Law Journal). Vol. 6 No. 1 (2018).

Legislation

Indonesia, Constitution of the Republic of Indonesia Year 1945.

_____, Law Number 29 Year 2004 concerning Medical Practices.

_____, Law Number 36 Year 2009 concerning Health.

_____, Law Number 20 Year 2013 concerning Medical Education.

_____, Law Number 36 of 2014 concerning Health Workers.

_____, Minister of Health Regulation No. 290 / MENKES / PER / III / 2008 Concerning approval of medical measures.

HOSPITAL RESPONSIBILITIES FOR HEALTH SERVICES TO PATIENTS

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ABSTRACT

Health is a human right and one of the elements of well-being that must be realized in accordance with the ideals of the Indonesian nation as referred to in the Pancasila and the Preamble of the Constitution of the Republic of Indonesia Year 1945. For this reason, it is necessary to guarantee the acquisition of health services for every Indonesian citizen. The party providing health services is the Doctor, while the party receiving the health services is the Patient. The doctor who organizes health care is under the auspices of a hospital called. Hospital is one of the institutions that conduct health services where in providing health services to patients, of course, between the patient and the hospital is bound by a legal relationship that gives birth to the rights and obligations of both parties who bind themselves. Therefore this study will discuss the rights and obligations of one party, the Hospital. In addition, the legal relationship between the Hospital and the Patients raises a responsibility, one of which is the Hospital's responsibility to the Patient, so this research will also discuss the Hospital's responsibility for health services to the Patient. This study has 2 (two) problem formulations, namely first, how are the rights and obligations of the hospital?, and second, how is the responsibility of the hospital for health care for patients? This research was conducted by *juridical-normative* legal research methods with secondary data covering primary, secondary and tertiary legal materials. Primary legal materials, namely the Constitution of the Republic of Indonesia Year 1945, Law Number 36 of 2009 concerning Health, Law Number 44 of 2009 concerning Hospitals, and Kepmenkes 129 / Menkes / SK / II / 2008 concerning Hospital Minimum Service Standards, secondary legal material, namely books and medical law research journals, and tertiary legal material, namely Kamus Besar Bahasa Indonesia (KBBI).

Keywords: Hospital, Patients, Health Services, Responsibilities

A. INTRODUCTION

Health is a human right and one of the elements of well-being that must be realized in accordance with the ideals of the Indonesian people as referred to in the Pancasila and the Preamble of the 1945 Constitution of the Republic of Indonesia.[1] For this reason, the right of health for every Indonesian citizen are guarantees in the Constitution of the Republic of Indonesia Year 1945, especially in Article 28H paragraph (1) which states: *"every person has the right to live in physical and spiritual prosperity, to live and to have a good and healthy living environment and the right to obtain health services"*.

According to Levey and Loomba, health services are efforts that are carried out alone or jointly in an organization to maintain and improve health, prevent, and cure diseases and restore health to individuals, families, groups, or communities.[2] According to Freddy Tengker, which can be classified as health services include medical examinations, diagnosis, therapy, anesthesia, prescribing medicines, treatment and care in hospitals, improving patients, control, post-treatment services, providing medical information, providing information, vertical cooperation of health service providers and so on.[3] So that health services provided to patients can be maximized, there needs to be a regulation regarding the health law itself in a number of related legislation.

Leenen explained that health law covers all general provisions that are directly related to health care and the application of civil law, criminal law, and administrative law in this connection as well as international guidelines, customary law and jurisprudence relating to health care, autonomous law, science, and literature, being a source of health law.[4] Regarding health is regulated in Law Number 36 of 2009 concerning Health. The law on health has several functions, including as a tool to improve the effectiveness and effectiveness of the implementation of health development which includes health efforts and resources, to reach increasingly complex developments that will occur in the future, and provide certainty and legal protection for health service providers and recipients.[5]

The party providing health services is the Doctor, while the party receiving the health services is the Patient. The doctor organizes health efforts based on Article 1 point 11 of Law Number 36 Year 2009 concerning Health, which states: *"Health efforts are every activity and / or series of activities carried out*

[1] Indonesia, Law on Health, Law No. 36 of 2009, General Section.
[2] Veronica Komalawati, 1999, *Peranan Informed Consent Dalam Transaksi Terapeutik (Persetujuan Dalam Hubungan Dokter Dan Pasien)*, PT. Citra Aditya Bakti, Bandung, page. 78.
[3] Freddy Tengker, 2007, *Hak Pasien*, CV. Mandar Maju, Bandung, page. 56.
[4] Hendrik, 2013, *Etika dan Hukum Kesehatan*, Penerbit Buku Kedokteran EGC, Jakarta, page. 24.
[5] Alexandra indriyanti, 2008, *Etika dan Hukum Kesehatan*, cet.1, Pustaka Book Publisher, Yogyakarta, page. 172.

in an integrated, integrated and sustainable manner to maintain and improve the health status of the community in forms of disease prevention, health promotion, treatment of diseases, and health recovery by the government and / or the community."

The doctor who organizes health services is under the auspices of an institution called hospital. According to the Dictionary named Kamus Besar Bahasa Indonesia (KBBI), what is meant by a hospital is a home where people care for the sick, provide and provide health services covering a variety of health problems.[6] The definition of a hospital based on Article 1 paragraph (1) of Law Number 44 Year 2009 concerning Hospitals, which states: *"Hospital is a health service institution that provides complete individual health services that provide inpatient, outpatient and outpatient services. emergency. "*

In the organization of hospitals based on Pancasila and based on human values, ethics and professionalism, benefits, justice, equal rights and anti-discrimination, equity, protection and patient safety, and have social functions.[7] The purpose of organizing the hospital is inseparable from the provision that the community has the right to health. Meanwhile the government has the responsibility to realize the highest health status, including providing health facilities as needed, one of which is the provision of hospitals.[8]

In providing health services to patients, of course, between patients and hospitals is bound by a legal relationship. Legal relations are relationships between legal subjects according to legal provisions which can be in the form of a bond of rights and obligations.[9] In legal relations, the rights and obligations of one party are dealing with the rights and obligations of another party. As for any such legal relationship, the rights and obligations of both parties are binding. Therefore this study will discuss the rights and obligations of one party, the Hospital. In addition, the legal relationship between the Hospital and the Patients raises a responsibility, one of which is the Hospital's responsibility to the Patient, so this research will also discuss the Hospital's responsibility for health services to the Patient.

B. PROBLEM STATEMENT

The problems that could be addressed in this study as follows:

1. What are the hospital's rights and obligations?
2. What is the hospital's responsibility for health services to patients?

C. LITERATURE REVIEW

Theory of Liability

According to Wahyu Sasongko, legal responsibility is the obligation to bear an effect according to applicable legal provisions and here there are norms or legal regulations governing liability. When there are acts that violate the legal norms, then the perpetrators can be held accountable according to the legal norms that are violated.[10] As for any legal subject who can be liable for civil liability in the case that the Hospital commits an unlawful act that causes the patient to suffer a loss, it can be based on the following types of liability:[11]

a. Personal liability
   Personal liability is a responsibility that is inherent in a person's individual meaning that those who do it are responsible.
b. Strict Liability
   Strict Liability is a responsibility that is often referred to as liability without fault, considering that a person must be held responsible even if he does not make any mistakes, whether intentional, tactlessness, or negligence, where this responsibility applies product sold or article of commerce, for which producers must pay compensation for the occurrence of disasters due to products produced, has given a warning of the possibility of these risks.
c. Vicarious Liability
   Vicarious Liability is a responsibility arising from mistakes made by subordinates. This Vicarious Liability doctrine is in line with article 1367 of the Civil Code which reads: *"A person is not responsible for losses caused by his own actions, but also for losses caused by the actions of those who are his dependents, or due to goods under his control"*.
d. Liability responders
   Is a joint responsibility.
e. Corporate Liability
   It is the responsibility of the government, in this case health is the responsibility of the minister of health.
f. *Rep Ipso liquitor liability*
   This responsibility is almost the same as strict liability but the responsibility caused by the act exceeds the authority or in other words the act of presumptuousness.

D. RESEARCH METHODS

This research was conducted by *juridical-normative* legal research methods with secondary data covering primary, secondary and tertiary legal

[6] Depdikbud, 1995, *Kamus Besar Bahasa Indonesia*, edisi kedua, Balai Pustaka, Jakarta, page. 851.
[7] Indonesia, Law on Hospitals, Law No. 44 of 2009, Article 2.
[8] Endang Wahyati Yustina, 2012, *Mengenal Hukum Rumah Sakit*, Keni Media, Bandung, page. 15.
[9] Wahyu Sasongko, 2010, *Dasar-Dasar Ilmu Hukum*, Universitas Lampung, Bandar Lampung, page. 50.
[10] Wahyu Sasongko, 2007, *Ketentuan-Ketentuan Pokok Hukum Perlindungan Konsumen*, Universitas Lampung, Bandar Lampung, page. 96.
[11] Nusye KI Jayanti, 2002, *Penyelesaian Hukum Dalam Malpraktik Kedokteran*, Pustaka Yustisia, Yogyakarta, page. 22.

materials. Primary legal materials, namely the Constitution of the Republic of Indonesia Year 1945, Law Number 36 of 2009 concerning Health, Law Number 44 of 2009 concerning Hospitals, and Kepmenkes 129 / Menkes / SK / II / 2008 concerning Hospital Minimum Service Standards, secondary legal material, namely books and medical law research journals, and tertiary legal material, namely Kamus Besar Bahasa Indonesia (KBBI).

E. ANALYSIS AND DISCUSSION

1. The Hospital's Rights and Obligations

Legal relations in health services in hospitals can be established between hospitals and patients, hospitals with health workers under their responsibility and hospitals with third parties that have a relationship with patients. Basically the rights and obligations of patients, doctors and hospitals must be carried out in a balanced manner. In the sense that the rights and obligations apply reciprocally, where the rights of one party become the obligations of the other party, and vice versa. If one party does not carry out its obligations, then it cannot claim the rights which are the balance of the reciprocal obligations to the other party.[12]

Health services provided to patients also have standards established through Kepmenkes 129 / Menkes / SK / II / 2008 concerning Hospital Minimum Service Standards. The decision contains the operational definition of the type of health services to be provided to patients. Types of hospital services that must be provided by the hospital at a minimum include: *"a) Emergency services; b) Outpatient services; c) Inpatient services; d) Surgical services; e) Childbirth and perinatology services; f) Intensive service; g) Radiology services; h) Clinical pathology laboratory services; i) Medical rehabilitation services; j) Pharmaceutical services; k) Nutrition services; l) Blood transfusion services; m) Poor family services; n) Medical record services; h) Waste management; i) Management administrative services; j) Ambulance / hearse services; k) corpse scouring services; l) Laundry service; m) Services for maintaining hospital facilities; and n) Prevention of Infection Control."*[13]

For that reason, Hospitals in relation to Patients have the rights and obligations as regulated in the Statutory Regulations, especially for the regulation of hospital rights based on Article 30 paragraph (1) of Law Number 44 Year 2009 Concerning Hospitals, which states: *"Every Hospitals have the right: a) determine the number, type, and qualifications of human resources in accordance with the Hospital's classification; b) receive service fees and determine remuneration, incentives and rewards in accordance with statutory provisions; c) cooperate with other parties in order to develop services; d) receive assistance from other parties in accordance with statutory provisions; e) suing the party resulting in losses; f) get legal protection in carrying out health services; g) promote existing health services in hospitals in accordance with statutory provisions; and h) get tax incentives for public hospitals and hospitals that are designated as teaching hospitals. "*

Whereas regarding the obligations of the Hospital is regulated in Article 29 paragraph (1) of Law Number 44 Year 2009 Regarding Hospitals, which states: *"Every Hospital has the obligation to: a) provide correct information about Hospital services to the public; b) provide safe, quality, anti-discrimination and effective health services by prioritizing patient interests in accordance with Hospital service standards; c) provide emergency services to patients in accordance with their service capabilities; d) plays an active role in providing health services in disasters, according to their service capabilities; e) provide facilities and services for the poor or poor; f) carrying out social functions, among others, by providing facilities for poor patients, emergency services without down payment, free ambulances, disaster victims and extraordinary events, or social services for humanitarian missions; g) create, implement, and maintain quality standards of health services in hospitals as a reference in serving patients; h) organize medical records; i) provide adequate public facilities and infrastructure including religious facilities, parking, waiting rooms, facilities for the disabled, breastfeeding women, children, elderly; j) implement a referral system; k) rejecting the wishes of patients who are contrary to professional and ethical standards and regulations; l) provide true, clear and honest information about the patient's rights and obligations; m) respect and protect the rights of patients; n) implement Hospital ethics; o) has an accident prevention and disaster management system; p) implement government programs in the health sector both regionally and nationally; q) make a list of medical personnel who practice medicine or dentistry and other health workers; r) compile and implement internal hospital regulations (hospital by laws); s) protect and provide legal assistance for all Hospital staff in carrying out their duties; and t) treat the entire hospital environment as a non-smoking area."*

2. The Hospital's Responsibility For Health Services to Patients

The purpose of organizing a hospital based on Article 3 of Law Number 44 of 2009 concerning Hospitals, namely: *"a) Facilitating public access to health services; b) Provide protection for patient safety, the community hospital environment and human resources in the hospital; c) Improve quality and maintain hospital service standards; and Provide*

[12] Endang Wahyati Yustina, *Op.Cit.*, page. 75-76.
[13] Kepmenkes 129 / Menkes / SK / II / 2008 concerning Hospital Minimum Service Standards, Chapter III.

legal certainty to patients, the community, hospital human resources, and hospitals."

Hospitals as legal entities that provide health services to the community will always be monitored by the Government's performance and the internal regulatory body of the Hospital concerned. Supervision is intended to minimize the existence of patient rights that are not fulfilled to get health services. The supervision is carried out by a special supervisory institution of the Hospital. This is regulated in Article 57 through Article 61 of Law Number 44 Year 2009 concerning Hospitals. Regulations regarding the Indonesian Hospital Supervisory Board are further regulated by Government Regulation. Regulations regarding the Hospital Supervisory Board are regulated in Government Regulation Number 49 of 2013 concerning the Hospital Supervisory Agency. The definition of the Hospital Supervisory Board is in Article 1 Number 2 of Government Regulation Number 49 of 2013 concerning the Hospital Supervisory Board. The Indonesian Hospital Supervisory Board, hereinafter referred to as the SRB, is a non-structural unit in the ministry that carries out government affairs in the field of health which carries out external hospital training and non-technical nature involving community elements.

In the legal sense, responsibility means "being bound". Every human being from the moment he is born until he dies has the rights and obligations and is called the subject of law. Likewise, the Hospital, as a reasonable legal subject when conducting health services, is bound and must be responsible for everything that results from the implementation of its legal position as the bearer of rights and obligations.[14] There is a legal relationship between the Hospital and Patients that gives rise to rights and obligations for each party. Hospitals where professional activities include medical personnel and other health personnel carrying out health service duties, in the legal relationship between the Hospital and patients as members of the community is a social subsystem, the Hospital is located as an organ that has the independence to carry out legal relations in full responsible. In this case the Hospital is not a "*persoon*" consisting of humans (*as a natuurlijk persoon*), but the Hospital is given a legal position as a "*persoon*" and therefore is a *recht persoon*. The law has made the Hospital as a legal subject (*recht persoon*) and because of that the Hospital is burdened with rights and obligations according to law.[15] Based on this explanation, the Hospital as a recht persoon can be responsible.

Within the scope of civil law, matters or actions of the Hospital that may give rise to civil liability include:

a. Defaults regulated in Article 1239 of the Civil Code.
b. The act violates the law based on Article 1365 of the Civil Code, "that every act that violates the law, which brings harm to others, obliges the person who by mistake issued the loss to compensate for the loss."
c. Neglecting obligations based on Article 1367 Paragraph (3) of the Civil Code that, *"a person is not only responsible for the loss caused by his own actions, but also for losses caused by the actions of those who are his dependents and against whom they exercise the authority of parents or guardians."*

As the discussion in the formulation of the previous problem regarding the rights and obligations of the Hospital, that if the Hospital does not carry out its obligations set out in the law, then the Hospital may be subject to sanctions. The sanctions referred to in accordance with Article 29 paragraph (2) of Law Number 44 Year 2009 concerning Hospitals, which states: *"Violations of the obligations referred to in paragraph (1) are subject to administrative sanctions in the form of: a) reprimands; b) written warning; or c) fines and revocation of hospital licenses."*

Regarding the Legal Liability of a Hospital if it violates the provisions of the Statutory Regulations based on the type of Hospital Management concerned. Based on Article 20 of Law Number 44 Year 2009 concerning Hospitals, which explains that based on its management, hospitals are divided into 2 (two), namely private hospitals and public hospitals. Public hospitals are managed by the government, regional governments and non-profit legal entities, while private hospitals are managed by legal entities in the form of limited liability companies or state-owned companies that are for profit. Based on the different management, the legal liability is also different. Legal responsibility in public hospitals will be related to the relevant agency orders (can be related to the Ministry of Health), while legal responsibility for private hospitals in the form of private Limited Liability Companies rests with the Board of Directors of the Limited Liability Company.

F. CONCLUSION

Based on the discussion previously stated, the following conclusions can be drawn from this study, as follows:

1. Regarding the rights and obligations of the Hospital where the legal relationship that gives rise to rights and obligations occurs between the Hospital and the Patient where those rights and obligations are mutually valid. Hospital rights are regulated in Article 30 paragraph (1) of Law

[14] Anny Isfandyarie, 2006, *Tanggung Jawab Hukum Dan Sanksi Bagi Dokter*, Prestasi Pustaka, Jakarta, page. 2.
[15] Hermein Hadiati Koeswadji, 2002, *Hukum Untuk Perumahsakitan*, Citra Aditya Bakti, Bandung, page. 89.

Number 44 of 2009 concerning Hospitals, while hospital obligations are regulated in Article 29 paragraph (1) of Law Number 44 of 2009 concerning Hospitals.

2. Regarding the responsibility of the hospital for health services to patients that due to the legal relationship between the hospital and the patient in a reciprocal way, one party must be responsible if it does not carry out the obligation. The hospital as a recht person can therefore be held responsible. The responsibility of the Hospital if it does not carry out its obligations can be in the form of civil liability, namely Default (Article 1239 of the Civil Code), illegal acts (Article 1365 of the Civil Code), and Negligence of obligations (Article 1367 Paragraph (3) of the Civil Code), administrative sanctions as referred to in Article 29 paragraph (2) of Law Number 44 Year 2009 Concerning Hospitals, where the responsibility is based on the type of Hospital Management concerned.

G. REFERENCES

Book

Alexandra indriyanti, 2008, *Etika dan Hukum Kesehatan*, cet.1, Pustaka Book Publisher, Yogyakarta.

Anny Isfandyarie, 2006, *Tanggung Jawab Hukum Dan Sanksi Bagi Dokter*, Prestasi Pustaka, Jakarta.

Depdikbud, 1995, *Kamus Besar Bahasa Indonesia*, edisi kedua, Balai Pustaka, Jakarta.

Endang Wahyati Yustina, 2012, *Mengenal Hukum Rumah Sakit*, Keni Media, Bandung.

Freddy Tengker, 2007, *Hak Pasien*, CV. Mandar Maju, Bandung.

Hendrik, 2013, *Etika dan Hukum Kesehatan*, Penerbit Buku Kedokteran EGC, Jakarta.

Hermein Hadiati Koeswadji, 2002, *Hukum Untuk Perumahsakitan*, Citra Aditya Bakti, Bandung.

Nusye KI Jayanti, 2002, *Penyelesaian Hukum Dalam Malpraktik Kedokteran*, Pustaka Yustisia, Yogyakarta.

Veronica Komalawati, 1999, *Peranan Informed Consent Dalam Transaksi Terapeutik (Persetujuan Dalam Hubungan Dokter Dan Pasien)*, PT. Citra Aditya Bakti, Bandung.

Wahyu Sasongko, 2007, *Ketentuan-Ketentuan Pokok Hukum Perlindungan Konsumen*, Universitas Lampung, Bandar Lampung.

Wahyu Sasongko, 2010, *Dasar-Dasar Ilmu Hukum*, Universitas Lampung, Bandar Lampung.

Legislation

Indonesia, The constitution of The Republic of Indonesia Year 1945.

_____, Law Number 36 of 2009 concerning Health.

_____, Law Number 44 of 2009 concerning Hospitals.

_____, Kepmenkes 129 / Menkes / SK / II / 2008 concerning Hospital Minimum Service Standards.

DUE PROCESS OF LAW AS A HUMAN RIGHTS PROTECTION AGENCY IN INDONESIA

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ABSTRACT

Every citizen undergoing a legal process must be protected by their human rights. The application of due process of law in the criminal justice system is a basic right that must be fulfilled and must not be violated. In law, the criminal justice process is regulated from investigation, prosecution, to trial. The implementation of the principle of due process of law is a set of procedures that require the law to have a standard of practice applicable to countries that uphold the law. Efforts to implement basic human rights into law are to ensure the highest values of justice and humanity in accordance with the dignity of free people. Although in the legal process law enforcement officials have been given special rights or privileges to carry out their functions by law to summon, examine, arrest, detain, and confiscate something from the defendant, they themselves must comply to the legal process. The idea of renewing the Indonesian Criminal Procedure Code (KUHP) cannot be separated from the contribution of human rights. This contribution was explicitly mentioned in the Draft of the Criminal Code (KUHAP). The problem raised in this paper is the contribution of the concept of human rights to the renewal of the Criminal Code (KUHAP), both concerning the protection of the rights of suspects or defendants and victims of criminal acts. The results of the studies conducted show that although the Criminal Code (KUHAP) has set the protection of the rights of suspects or defendants, it is still not optimal. To realize this concept, when dealing with criminal acts in the legal process no one should put himself above the law: everyone must uphold the rule of law and the law must be applied to anyone based on the principle of equal and fair treatment.

Keywords: Criminal Justice System, Human Rights, due process of law

A. INTRODUCTION

Human rights cannot be separated from state power, state functions, implementation, and limitation of state power. Historically, the nature of human rights has revolved around the relationship between the individual human being and the so-called political community. New human rights emerge as human beings begin to pay attention and fight for freedom from danger as a result of the power of the state.

The Republic of Indonesia has enshrined Human Rights in the UUD 1945 (Constitution of 1945). In the UUD 1945, the assertion of human rights is clearly mandated in the Opening and is elaborated in its Body, namely in Article 27, Article 28, Article 29, Article 30, Article 31, Article 33 and Article 34.[1] One of the Human Rights listed in Article 27 paragraph (1) of the Constitution of 1945 states that: *"Every citizen is equal in law and government and must uphold the law and rule without exception."* The protection of the suspect through the Basis of Equal Opportunity in Law was also set forth in the *Universal Declaration of Human Rights* 1945 of Article 10 stating that: *"Every person has the right, in the fullest sense, to be heard publicly and fairly by an independent and impartial court, in the determination of his rights and obligations and in any criminal suit brought against him."*

The *Due Process of Law* cannot be separated from the history of Human Rights. In England it was known as the birth of Magna Charta (1215), followed by the Bill of Rights (1689), the Declaration of Des Droit De L'Home et du Citoyen (1789), the Declaration of Independence (1876) and the Declaration of Human Rights (1948).[2] In order for human rights protection to be effectively and universally practiced, the principles of Human Rights protection must be formally set forth in the provisions of applicable law.

The implementation of the due process of law is a set of procedures that require the law to have a

[1] Antonio Cassese, *Hak-hak Asasi Manusia di Dunia Yang Berubah*, Translation by A.Rahman Zainuddin, (Jakarta: Yayasan Obor Indonesia, 1994), p. 294.

[2] Rahmat Efendy Al Amin Siregar,2015,*"Due Process of Law Dalam Sistem Peradilan Pidana di Indonesia Kaitannya dengan Perlindungan HAMP"*, FITRAH Scientific Journal, Volume I, p. 37.

standard of practice applicable to countries that uphold the law.[3] Due process of law emphasizes the procedure and protection of human rights in the process of law.

The Republic of Indonesia is a constitutional state based on the Pancasila (the philosophical basis of the Indonesian state) and the UUD 1945 (1945 Constitution), which upholds human rights and guarantees all citizens' rights to equality in law and government, and the state is obliged to uphold the law with no exception. According to Mien Rukmini, a state of law must fulfill several elements, namely:

1. The government, in carrying out its duties and obligations, must be based on laws or regulations;
2. The existence of guarantees for human rights (citizens);
3. The existence of division of power within the state; and
4. The existence of the supervision of judicial bodies[4]

In connection with this statement, specifically regarding the existence of guarantees for Human Rights (point 2), it can be inferred that in every constitution there is always found a guarantee for Human Rights (citizens). This is also contained in the UUD 1945 through several Articles which regulate human rights. One of them is Article 27 paragraph (1) concerning the Principle of Equality in Law. Article 27 paragraph (1) is implemented in the criminal justice process as the Principle of Presumption of Innocence regulated in Article 8 of Law No. 14 of 1970 in conjunction with Article 8 of Law No.4 of 2004 concerning Judicial Power, namely:

> *"Everyone who is suspected, arrested, detained, prosecuted at trial must be presumed innocent before his mistake is stated in the decision of a judge who has obtained permanent legal force".*

The principle of "presumption of innocence" is found in the general explanation of point 3 letter c. With the inclusion of the principle of presumption of innocence in the Criminal Procedure Code (KUHAP), it can be understood that the legislators have established it as a legal principle that underlies the Criminal Procedure Code and law enforcement.[5] In this regard, the writer needs to emphasize that the object of this research is the protection of human rights in the criminal justice system.

B. PROBLEM STATEMENT

Based on the description above, the author discover issues to be discussed, namely:

1. How is the regulation and application of due process of law as a form of Protection of Human Rights in the Criminal Justice System in Indonesia?
2. What is the form of human rights protection in relation to the rights of a victim of injustice in the criminal justice system?
3. How is the idea/renewal of criminal procedure law as a form of human rights protection in the criminal justice system that applies the due process of law?

C. LITERATURE REVIEW

1) Definition of Due Process of law

Due Process of Law is a legal process that is right or fair, which is the principle of Criminal Procedure in Indonesia.[6] The right to obtain a fair and proper legal process is a principle in criminal law which implies that each suspect has the right to be investigated based on applicable procedural law.

2) Understanding of the Criminal Justice System

The criminal justice system starts from the process of arrest, detention, prosecution, and examination before the court, and ends with the implementation of crime in a penal institution.[7]

3) Definition of Human Rights

Human Rights are a set of rights inherent in the nature and existence of humans as God's creatures and are His gifts that must be respected, upheld and protected by the state, law, government, and everyone for the honor and protection of human dignity;[8]

D. RESEARCH METHODS

[3] Mardjono Reksodiputro, *Hak Asasi Manusia Dalam Sistem Peradilan Pidana*, Jakarta: Pusat Pelayanan Keadilan dan Pengabdian Hukum, 1994, p 27.

[4] Mien Rukmini, *Perlindungan Ham Melalui APTB dan APKDH Pada Sistem Peradilan di Indonesia*, Bandung, Alumni, 2003, p.1.

[5] Yahya Harahap, *Pembahasan, permasalahan dan penerapan KUHAP Penyidikan dan Penuntutan*, (Jakarta: Sinar Grafika, 2009), p.40.

[6] Dzulkifli Umar and Usman Handoyo, *Kamus Hukum*, (Jakarta: Quantum Media Press, 2010), p.105.

[7] Yesmil Anwar and Adang, *Sistem Peradilan Pidana; Konsep, Komponen, dan Pelaksanaannya dalam Penegakan Hukum di Indonesia*, Widya Padjajaran, Bandung, 2009, p 33.

[8] Law Number 39 of 1999 concerning Human Rights

The research method used in this study is Normative Juridical. A normative juridical approach is legal research conducted by examining library materials or secondary data as a basis for research by conducting a search of regulations and literature relating to the problem under study.[9] The method of approach used in this paper is the statutory approach because what is examined is various legal rules which are the focus as well as the central theme of a research and conceptual approach that examines the views of legal doctrines that develop within the science of law.[10] Therefore, the focus of research is focused on library research which means that it will study secondary data more as a normative juridical approach because the problem being studied revolves around the relevance of regulations to one another and their application in society.

A. ANALYSIS AND DISCUSSION

I. Regulations and Implementation of Due Process of Law in Law Enforcement of Indonesian Criminal Procedures as a manifestation of Human Rights Protection.

The regulation and application of due process of law in criminal procedure in Indonesia is contained in the Criminal Procedure Code (KUHAP) because the due process of law is the objective of the Criminal Procedure Code itself. It is not only the Criminal Procedure Code that supports the creation of a fair trial process but can also be found in several laws and regulations that support the creation of a fair trial process and protect human rights, as stipulated in the **Human Rights Act No 39 of 1999 Article 18** which reads as follows:

"Everyone arrested, detained, prosecuted, because they are suspected of committing criminal offenses has the right to be presumed innocent, until proven legally guilty in a court hearing and given all the legal guarantees needed to defend him, in accordance with the provisions of the legislation".[11]

As stated in the criminal justice process, the principle of presumption of innocence has been contained in article 8 of Act No. 14 of 1970 concerning the Basic Provisions of Judicial Power in conjunction with Law No.35 of 1999 in conjunction with Law No. 4 of 2004 Concerning Judicial Power in which Article 18 clearly states that:

"Everyone suspected, arrested, detained, prosecuted at trial must be presumed innocent before his mistake is stated in the decision of a judge who has obtained a permanent law".

When compared, the second formulation is narrower than the formulation in Article 8 of Law No. 14 of 1970. Regarding the contents of the two articles, from the word everyone onwards ... it can be understood that the application of the presumption of innocence should apply without discrimination, meaning that there are no exceptions and there are no differences in accordance with the principle of equality in law based on Article 27 paragraph (1) of the UUD 1945.[12]

In practice, the notion of the principle of presumption of innocence is often interpreted ambiguously. Some parties interpret that a person cannot be named a suspect, cannot be arrested, detained and so on, because it is against the presumption of innocence. The goal is only to protect someone from the process of inspection by law enforcement, namely the police and prosecutors.

Based on the principle of presumption of innocence and the principle of equality in law, the purpose of this principle must be fulfilled, because it is clear that every suspect must obtain his rights without exception. As a person who has not been found guilty, he should get his rights to immediately get an examination in the investigation stage, the right to get a court hearing immediately and get the fairest decision, as well as the right to be informed of what is alleged to him, the right to prepare his defense, the right to get legal assistance, the right to get visits from family and other rights in accordance with the objectives of the Criminal Procedure Code contained in Law No.8 of 1981.

Legally the granting of protection of basic rights to every individual in accordance with equality in the law has been implied in Article 27 paragraph (1) of the UUD 1945. The phenomenon shows that in practice the rights of suspects and defendants are often ignored, because the article in the Criminal Procedure Code (Law No.8 of 1981) has not been able to accommodate the protection of human rights of suspects or defendants. This means that there are

[9] Soerjono Soekanto & Sri Mamudji, *Penelitian Hukum Normatif (Suatu Tinjauan Singkat)*, Rajawali Pers, Jakarta, 2001, p. 13-14.

[10] Johny Ibrahim, *Teori & Metodologi Penelitian Hukum Normative*, Cet III, Bayu media Publishing, Malang, 2007, p. 300.

[11] Undang-undang No.39 tahun 1999 *tentang Hak Asasi Manusia*, (Jakarta: Sinar Grafika, 2000, Article 18.

[12] Mien Rukmini, *Perlindungan HAM…*,p.7.

still many articles in the Criminal Procedure Code that are barren and ineffective in achieving the goal of upholding human rights in accordance with the objectives of the rule of law, especially implementing the principles of basic criminal law, including the principle of presumption of innocence and the principle of equality in law.

Human rights cannot be separated from state power, state functions, implementation and limitation of state power. Historically, the nature of human rights has revolved around the relationship between individual humans and the political society called the state. New human rights grow and emerge when people begin to pay attention and fight for freedom from danger as a result of state power. Disputes then arise between two powers, namely human power and state power.

The Republic of Indonesia has included human rights arrangements in the UUD 1945 (1945 Constitution). In the UUD 1945, the assertion of human rights is clearly mandated in the Opening and elaborated in the Body, namely in Article 27, Article 28, Article 29, Article 30, Article 31, Article 33 and Article 34.[13] One of the Human Rights listed in Article 27 paragraph (1) of the UUD 1945 states that: *"Every citizen has the same position in law and government and must uphold the law and government with no exception"*. The protection of the suspect through the Basis of Equal Opportunity in Law was also set forth in the *Universal Declaration of Human Rights* 1945 of Article 10 stating that: *"Everyone has the right, in equality to be fully heard in public and fairly by an independent and impartial court, in terms of establishing his rights and obligations and in any criminal charges directed against him"*

Both national and international law clearly stipulate the protection of human rights of suspects through the principle of equality in law and also the principle of presumption of innocence. Thus, the concept of equality in law according to the UUD 1945 is the link between rights and obligations which must function according to their respective positions.

Equality before the law means that every citizen must be treated fairly by the government. On the other hand, citizens must also comply with applicable laws and regulations. Although citizens are free to claim their rights, freedom is not like the freedom of Western Democracy. When compared with Western philosophy which states that humans are born free and have equal rights and so on, there are distinctive differences.

II. Protection of Human Rights in Relation to the Rights of a Victim of Injustice in the Criminal Justice System

Protection of Human Rights in relation to the right of a victim from an unfair trial has been regulated, among others, in the Criminal Procedure Code (KUHAP) No. 8 of 1981 where it is said that if there are victims of injustice from the court then a pretrial can be submitted for compensation and rehabilitation of good name both in accordance with Articles 95-101 of the Criminal Procedure Code. One Article says that;

"The suspect, defendant or convicted person has the right to claim compensation for being arrested, prosecuted, tried, or subjected to other actions without reasons based on the law or because of errors regarding the person or applied law".

The definition of a suspect according to Law No. 8 of 1981 concerning Criminal Procedure Code is a person who, because of his actions or circumstances, based on preliminary evidence should be suspected as a criminal offender. Whereas the suspect and defendant constitute a designation or status for the perpetrators of criminal acts according to the level and stage of the examination, stated by Article 1 point 14 of the Criminal Procedure Code. Furthermore, Article 1 point 15 of the Criminal Procedure Code states that the defendant is a suspect who has been prosecuted, examined and tried in court.[14]

From this understanding, it can be understood that the suspect is the designation of a person suspected of being a criminal in the investigation stage. The defendant is in the stage of prosecution or examination in court. If later there is a conviction that has obtained permanent legal force (a verdict in kracht van gewijsde), it is then called a convict. Convicted means a person convicted based on a court decision that obtains permanent legal force. Convicts undergo criminal conviction by eliminating their independence in a penal institution (Vide Article 1 point 6 and 7 of Law Number 12 of 1995). In the Indonesian legislation, the rights and treatment according to the law and human rights have been regulated clearly for the defendants.

[13] Antonio Cassese, *Hak-hak Asasi Manusia di Dunia Yang Berubah*, Translation by A.Rahman Zainuddin, (Jakarta: Yayasan Obor Indonesia, 1994), p. 294.

[14] Bambang Waluyo, *Komentar terhadap Kitab Undang-Undang Hukum Acara Pidana*, (Semarang: Aneka Ilmu. 1989), p.11.

In general, the limits regarding pretrial are regulated in Article 77 through Article 88 of the Criminal Procedure Code, while other articles are still related to pretrial but regulated in a separate article, namely regarding claims for compensation and rehabilitation as stipulated in Articles 95 and 97 of the Criminal Procedure Code.

Specific authority over pretrial is regulated in Articles 77 to 88 of the Criminal Procedure Code to examine whether or not a forced attempt (arrest and detention) is valid and to examine whether or not to stop the investigation or stop the prosecution, if it relates to Articles 95 and 97 of the Criminal Procedure Code concerning the meaning that pretrial authority is added authority to inspect and decide on compensation and rehabilitation. Compensation in this case is not solely due to the mistake of forced effort, investigation or prosecution, but it can also be due to the illegal entry of the house, search and seizure in accordance with the explanation of Article 95 paragraph (1) of the Criminal Procedure Code. In the decision of the RI Minister of Law No. M.01.PW.07.03 year 1982, pretrial can also be carried out for a confiscation offense that does not include evidence, or someone who is subject to other actions without grounds based on the Law, because of a person's mistake or applicable law.[15]

Compensation is provided for in Chapter XII, Part One of the Criminal Procedure Code. Article 1 point 22 states that "Compensation is the right of a person to obtain fulfillment of his claim in the form of compensation of a sum of money for being arrested, detained, or tried without reason based on the law or because of errors regarding the person or the law applied in the manner stipulated by the Act. Moving on from the sound of the article above, it can be clearly seen that compensation is a means of fulfillment to compensate for the loss of freedom due to forced efforts that are not based on law. It is very appropriate if the state is responsible for paying compensation, because the act of forced action is certainly carried out by law enforcement officials who are part of the state.

Specifically, the case of pretrial conducted by investigators on the cessation of prosecution or by the public prosecutor against cessation of investigations must be understood not to interfere with the authority of each institutional authority but rather be understood as a control mechanism of criminal procedural law enforcement.[16] Community participation either through NGOs or individually is also absolutely necessary in overseeing law enforcement. In Article 80 of the Criminal Procedure Code, the understanding of third parties who have an interest in submitting a pretrial concerning the termination of an investigation or prosecution is often interpreted to be limited to reporting witnesses or witnesses who are victims of criminal acts. In the future, this understanding needs to be broadened by involving the wider community represented by NGOs or community organizations. NGOs or community organizations are given space as parties to submit pretrial.[17]

As an institution that aims to oversee law enforcement, if the aim of stopping prosecutions is in the form of correcting or overseeing the possibility of error, the involvement of the wider community represented by NGOs or social organizations should be in received in the pretrial submission process because in this era, many NGOs are monitoring violations of Human Rights.

Submission of pretrial is carried out in the District Court by making a request to the Chairperson of the District Court to be registered in a special register on pretrial. From the request, in accordance with Article 78 paragraph (2), the Chairperson of the District Court will appoint a single judge to examine the pretrial case with the assistance of a court clerk. For the determination of the trial day, Article 82 (1) letter c requires that a hearing be held three days after it has been recorded in the register and within seven days the case must be decided whereas the summons of the parties shall be carried out concurrently with the determination of the hearing day by the appointed judge. The procedure and form of decisions in pretrial are not regulated in specific provisions in the Criminal Procedure Code.

III. Renewal of Criminal Law in the Context of Implementing Due Process of Law in the Criminal Justice System in Indonesia.

Human rights thinking also contributes to the idea of renewing the Criminal Procedure Code (KUHAP). In the consideration of the Draft of the Criminal Procedure Code, it is stated that "reform of criminal procedural law is also intended to provide greater legal certainty, law enforcement, legal order, public justice, and protection of law and human rights

[15] *Ibid*, p.10.

[16] *Ibid*., p.11.

[17] Yahya Harahap, *Pembahasan Permasalahan…*,p.96.

for suspects, defendants, witnesses, and victims, for the sake of the implementation of the state law."[18] From the consideration, it can be seen that one of the values to be built in the renewal of the Criminal Procedure Code is human rights. The entry of human rights ideas into the reform of the Criminal Procedure Code cannot be separated from the influence of international conventions on human rights that have been ratified by Indonesia. This has been stated explicitly in the consideration of the Draft of the Criminal Procedure Code, which is "since several international conventions that are directly related to the criminal procedure law have been ratified, the criminal procedure law needs to be adjusted to the convention's material."

The idea of protecting the rights of suspects or defendants is a contribution of human rights ideas contained in The International Bill of Human Rights, especially the UDHR and ICCPR. The UDHR has made significant contributions to the national constitutions and laws of member countries, including Indonesia, whereas the renewal of the Criminal Procedure Code is more influenced by the ICCPR which has been ratified by Indonesia by Law Number: 12 of 2005. The ICCPR has contributed a lot to the renewal of the Criminal Procedure Code, mainly related to the protection of the rights of suspects or defendants. The basic principle that serves as the umbrella of protection for suspects or defendants is the principle of "presumption of innocence." The principle of presumption of innocence is a principle that requires that everyone involved in a criminal case must be deemed not guilty before a court ruling declares that error. This principle must be obeyed by law enforcers in the process of investigation, prosecution and examination in court.

Every person questioned has the right to get legal assistance from the investigation process to the decision of the court which has permanent legal force. The government provides legal assistance to those who cannot afford it. For certain circumstances, the suspect or defendant is entitled to get other assistance related to the protection of their rights during the judicial process, for example to get spiritual and psychological guidance if needed. In order to provide more guarantees to the rights of suspects or defendants in every court process, the Draft of the Criminal Procedure Code still retains some of the above principles and is renewed by replacing the pretrial into a Commissioner Judge. Judge Commissioner will replace the role of Chair of the District Court (PN) or Pretrial Judge. However, obstacles do arise in the development of the pretrial and the aims and objectives of the application of pretrial are not achieved properly and correctly. This resulted in the rights of the suspect to obtain legal protection not properly fulfilled. Another striking obstacle is the back and forth of criminal cases between the POLRI (Indonesia National Police) investigators and prosecutors so that the right of suspects to obtain legal certainty is neglected, often even the back and forth of criminal cases is motivated by personal, group, or political interests. Some weaknesses in the pretrial gave rise to the idea of replacing it with Judge Commissioner. In Article 111 paragraph (1) of the Draft of the Criminal Procedure Code, the Judge Commissioner is given a much broader authority than the Pretrial, namely to determine or decide on:

1. The legality of arrest, detention, search, seizure, or wiretapping;
2. Cancellation or suspension of detention;
3. That the statements made by the suspect or defendant violate the right not to incriminate themselves;
4. Evidence or statements obtained illegally cannot be used as evidence;
5. Compensation and/or rehabilitation for someone who was illegally arrested or detained or compensation for any property that was illegally confiscated;
6. The suspect or defendant has the right to or is required to be accompanied by a lawyer;
7. That the Investigation or Prosecution has been carried out for an illegal purpose;
8. Termination of Investigation or termination of Prosecution that is not based on the principle of opportunity;
9. Whether or not a case is worthy of being prosecuted in court;
10. Violations of any other suspect's rights that occur during the Investigation stage

The existence of Judge Commissioner with the authority as mentioned above shows more guarantees of protection of the rights of suspects and defendants compared to the pretrial. Human rights violations against suspects or defendants in criminal acts can occur at the level of norms (the law), but it

[18] Muladi, *Hak Asasi Manusia; Hakekat, Konsep dan Implikasinya dalam Perspektif Hukum dan Masyarakat*, Bandung, PT. Refika Aditama, 2007, p.30.

will appear more clearly in the level of enforcement in the form of examination in all stages of the criminal justice system. In this stage, law enforcement officers have the potential to use their power in the form of physical and psychological threats to the perpetrators of criminal acts ranging from summons, determination as a suspect or defendant, protracted examination, illegal detention, even to case manipulation.

Case manipulation is a very cruel human rights violation in the law enforcement process because it deliberately creates someone as a criminal. Borrowing Richard Quinney's term, case manipulation means law enforcement has built a series (process) of crime construction in the judicial process. The presence of the Judge Commissioner indicates that the model of the proceedings in the Draft of the Criminal Procedure Code is more inclined to the Due Process of Law. As characteristic of the Due Process of Law model, the presence of Judge Commissioner emphasizes the protection of the rights of suspects and defendants in the judicial process. In general, the Due Process of Law emphasizes the role of law and procedural rules that must be obeyed in every legal process. The main principles of the Due Process of Law include: protection of suspects or defendants, equality of the parties, and the presumption of innocence.[19]

F. CONCLUSION

From the description stated earlier, conclusions can be drawn, namely:

- Regulations and application of due process of law as a form of protection of human rights in the enforcement of criminal procedural law in Indonesia can be found in the Criminal Procedure Code (KUHAP) because the due process of law is the application of the Criminal Procedure Code itself. Besides the Criminal Procedure Code, there are also several laws and regulations that supports the creation of a fair trial process that can protect human rights including the Human Rights Act No. 39 of 1999. In the criminal justice process, the principle of presumption of innocence has been contained in Article 8 of Act No. 14 of 1970 concerning the Basic Provisions of Judicial Power jo. Law No. 4 of 2004 concerning Judicial Power.
- Protection of Human Rights in relation to the rights of a victim from an unfair trial has been regulated among others in the Criminal Procedure Code No.8 1981, which states that if there are victims of an unfair trial, a pretrial can be submitted to obtain compensation and rehabilitation of good name in accordance with Article 95-101 of the Criminal Procedure Code. This is a logical consequence of the principles of the Criminal Procedure Code in which if a citizen is given the same rights and is treated equally before the law, then law enforcement must treat said citizen with the presumption of innocence, and in the event of abuse, the victim of abuse must obtain compensation and rehabilitation. There needs to be supervision from legal aid institutions to oversee the operation of the existing justice system. It is necessary to increase respect for human rights so that national self-esteem can get better and more positive attention from the international community as a country that upholds human rights.
- It is undeniable that the idea of renewing the Criminal Procedure Code is inseparable from the contribution of human rights thinking. This contribution has been explicitly included in the consideration of the draft Criminal Procedure Code. From the results of the study conducted, it was concluded that although the Criminal Procedure Code has provided protection for the rights of suspects or defendants, its implementation is still not optimal. Therefore, in the Draft of the Criminal Procedure Code there is a new institution called Judge Commissioner to replace the function of the pretrial institution whose authority is much broader to better guarantee the fulfillment of the rights of suspects or defendants at each stage of the judicial process.

The suggestions that the author can convey in connection with the problems in this paper are:

- That every law enforcement officer should be able to implement and uphold the due process of law to ensure the certainty of human rights law. The application of this principle will certainly have an impact on the process of law enforcement that is fair and aspired by the community.
- That the government and the House of Representatives would be able to immediately reform the criminal procedure law to guarantee

[19] Setiawan, Arif, *"Pembaharuan Pra Peradilan (Studi tentang Pemaknaan Hukum oleh Polisi dalam Penyidikan,"* Summary of Dissertation, Doctor of Law Program, Diponegoro University, Semarang, 2010, p.31.

and protect human rights in implementing the criminal justice system and the realization of a just due process of law.

REFERENCES

Literature :

Antonio Cassese, *Hak-hak Asasi Manusia di Dunia yang Berubah*, Translation by A. Rahman Zainuddin, Yayasan Obor Indonesia, Jakarta, 1994.

Bambang Waluyo, *Komentar terhadap Kitab Undang-undang Hukum Acara Pidana*, Aneka Ilmu. Semarang, 1989.

Dzulkifli Umar and Usman Handoyo, *Kamus Hukum*, Quantum Media Press, Jakarta, 2010.

Hiariej, Eddy O.S, "Asas Legalitas Dalam Hukum Acara Pidana," Paper, Seminar on Problems and Prospects of the Criminal Procedure Bill on the National Working Group Team organized by the Faculty of Law, Gadjah Mada University, Yogyakarta, Thursday, March 18, 2010

Mien Rukmini, *Perlindungan HAM Melalui APTB dan APKDH Pada Sistem Peradilan di Indonesia*, Alumni, Bandung.

Mardjono Reksodiputro, *Hak Asasi Manusia Dalam Sistem Peradilan Pidana*, Jakarta: Pusat Pelayanan Keadilan dan Pengabdian Hukum, 1994.

Muladi, *Hak Asasi Manusia; Hakekat, Konsep dan Implikasinya dalam Perspektif Hukum dan Masyarakat*, Bandung, PT. Refika Aditama, 2007.

Setiawan, Arif, 2010, "Pembaharuan Pra Peradilan (Studi tentang Pemaknaan Hukum oleh Polisi dalam Penyidikan," Summary of Dissertation, Doctor of Law Program, Diponegoro University, Semarang.

Yahya Harahap, Pembahasan, Permasalahan dan Penerapan KUHAP Penyidikan dan Penuntutan, Sinar Grafika, Jakarta.

Journal :

Rahmat Efendy Al Amin Siregar,2015,*"Due Process of Law Dalam Sistem Peradilan Pidana di Indonesia Kaitannya dengan Perlindungan HAMP"*, FITRAH Scientific Journal, Volume I.

Laws and regulations:

The 1945 Constitution with amendments to the fourth Amendment, 2010

Republic of Indonesia Law No.14 of 1970 concerning Basic Provisions for Judicial Power.

Republic of Indonesia Law No.4 of 2004 concerning Judicial Power.

Republic of Indonesia Law No.8 of 1981 concerning Criminal Procedure

Republic of Indonesia Law No.39 of 1999 concerning Human Rights

STATUS OF WOMEN IN ISLAMIC LAW IN THE PROVINCE OF NANGGROE ACEH DARUSSALAM

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ABSTRACT

In the midst of prolong conflict and the delay of reconciliation, Indonesian government provides a special autonomy to the Aceh people to implement Islamic laws (sharia') in the sociopolitical realms. Yet, for Aceh women the implementation of sharia' creates discriminative regulations such as enforcement to wear jilbab and curfew for them. Many recent political policies are totally disregard Aceh women as part of the Aceh society. Various local regulations (qanun) that proposed by local government are not gender-sensitive and put forward violence in doing conflict resolution. Local autonomy brings the oppression of women's roles in the society. Historically, Aceh women have significant roles in shaping cultural identity of Aceh society. In the past, the interpretation of sharia' recognized and supported women's leadership in the society. Hence, a new approach to put back women's public roles in order to participate in reconciliation process of the Aceh society is needed.

Keywords*:* Aceh special autonomy; Islamic laws; women's role; gender inequality**.**

A. INTRODUCTION

After the fall of the New Order marked by the fall of President Soeharto, the Indonesian people entered the Reformation era in which the Indonesian people were given freedom of democracy.

The protracted conflict in Aceh is very detrimental to the Indonesian people, to resolve this conflict a Law Number 44 of 1999 was issued.

Based on Law (Law) No. 44 of 1999 concerning the Implementation of the Privileges of the Special Province of Aceh, the province of Aceh adopted Islamic law in social life which was declared on 1 Muharam 1423 H to coincide with 15 March 2002. The scope of the specialties stipulated in the law The law covers 4 (four) fields, namely the field of Islamic law, the area of customs, education and the role of the ulama in the governance structure. Then, the implementation of Islamic law in Aceh was strengthened again with Law Number 18 of 2001 and Law Number 11 of 2006 concerning the Government of Aceh.

The application of Islamic Sharia in Aceh has now been 18 years since it was first legalized in 2002. The time span is relatively long and the implementation of Islamic Sharia in Aceh should be carried out effectively. But in reality the application of Islamic law in Aceh to date there are still shortcomings and violations so that there is speculation about the assessment of diverse communities. The community's evaluation of Islamic Sharia in Aceh in general is pro-Sharia and some are contra. The application of Islamic law in the province of Aceh must necessarily involve the entire community, both men and women, both of which have a strategic function towards the application of Islamic law. Women in particular are very instrumental in the successful implementation of Islamic law in Aceh in various ways. Women become sharia figures for children at home and in the government bureaucracy in Aceh.

The involvement of women in sharing sectors in Aceh has been historically tested. Munawiyah refers to A. Hasjmy's explanation that in Aceh from the Islamic kingdom of Perlak, the kingdom of Samudara / Pase to the kingdom of Aceh Darussalam, the community was fostered based on Islamic teachings, which originated from al- The Qur'an, Sunnah, ijmak and kias, do not place men and women in discriminatory positions. This is as the role during the Aceh kingdom which is regulated in the Meukuta Alam Adat of the Kingdom of Aceh Darussalam.2The position of women in the kingdom of Aceh Darussalam is not discriminated and treated according to the provisions of the Qur'an and Sunnah.

At the time of the kingdom in Aceh, the Qur'an and Sunnah were used as the source of the law. In the Book of SAFINATUL HUKKAM (Ark of Judges) written by Aceh Ulema Sheikh Jalaluddin Tursani written in 1721 AD, it is clearly stated that men and women have the same rights and obligations in the kingdom. Women may be kings or sultans as long as they meet the required conditions.3 Therefore, history

has also recorded that Acehnese women have privileged roles and roles. The persistence of Acehnese women in leading is no doubt, women are involved in government and wars against the invaders.

However, it is sad if we look at the turning point of how the history of the fate and treatment of women in Aceh during the conflict, the figure of Aceh women who had been respected became a legal object and an object of exploitation. Customary law and actual Islamic law, many government regulations are still discriminatory against women.

Post-conflict and peace measures, women are again not a concern of the government. Just see when the government apparatus and the Aceh DPRD were given the discretion to establish their own regional regulations (qanun), the polemic qanun jinayat which incidentally became a debate in discrimination against women continued. Unlike when the kingdom of Aceh under the leadership of Admiral Malahayati. One of the populist policies is that parents are obliged to give their daughters a home when they are going to get married. This was done so that her husband did not treat her arbitrarily.

Then, what is the role of women today? How does the government, especially the Aceh government, position and prioritize the welfare of women in their policies?

In some cases, the government does treat women specifically, such as maternity leave for civil servants, and the 30% party obligation must be filled with women's representation, however, for what if 30% is escapism with the aim of merely fulfilling seats and prerequisites to advance into the realm of politics, which in the end again women are only used as tools and supplements. This actually weakens women even more, when those who are 'fortunate' and elected to the legislative seat are unable to devote themselves and prove their achievements and struggle to elevate the dignity of the people they lead, especially in promoting the role of women. It is said that those chosen are 'entrusted' and not based on their quality and ability, especially in changing and determining regional policies. Perhaps this also dimmed the role of women in the Aceh administration, very few women came to the surface, who were able to prove their achievements and raise the dignity of their people.

B. PROBLEMS STATEMENT

This research is to answer to answer a number of problems, namely how to increase the role of women in the province of Aceh after the enactment of Islamic Sharia.

C. LITERATURE REVIEW

Islam is a religion sent down by Allah. Through Muhammad, as guidance and guidance for life for all mankind until the end of time. The main points of Islamic teachings are contained in the Qur'an, which is partly explained by the Hadith (Sunnah) of the Prophet, so that the Qur'an and Sunnah become the main propositions of Islamic teachings.

In regard to women, all Islamic scholars agree that the Qur'an as stated in its many verses clearly elevates the degree of women from a lowly and despicable position in the custom of Arabic ignorance to a higher and more respectable level.

The Qur'an recognizes that there are natural differences between men and women, such as pregnancy and breastfeeding; but this difference according to the Qur'an does not make women inferior to men.

In matters that are not natural, say in the field of culture or gender the Qur'an tends to assume that men and women are equal except in some cases that are clearly stated by the Qur'an, such as permission for polygamy for men men and inheritance rights are not the same between boys and girls, which will be further explained later.

Based on this situation, there are differences of opinion among the ulama, some of them consider that Islam elevates the degree of women from a lowly and despicable position in the custom of ignorance to a higher and more respectable position, but not to the level of men. While some others, especially contemporary scholars, claim that Islam elevates the degree of women in such a way that outside the issue of nature and beyond the exclusions made by the Qur'an, the position of women is equal to men.

The Role of Men and Women in the Koran

When Islam talks about relations between men and women, then Islam acts egalitarian without any inequality and high and low elements. Islam has offered the concept of gender by placing women and men in partnership relationships whose existence is recognized equally with their respective rights and obligations. This is clearly seen in the expression of the following verse The partnership of men and women is the concept of relationships that put men

men and women as relations that can positively influence each other. Alignment can mean the equal status of men and women in society that is reflected in an attitude of mutual respect, respect, filling, and helping. Islam is a religion that values women very much. This is proven by the verses in the Koran that explain the important role of women in life. The Koran expressly views men and women alike in its existence. So that the existence of women is a balancing force for men. But what happens in society, especially in Islamic societies, is that oppression and restraint of women still occur. This is due to patriarchal culture and gender bias in the interpretation of the Koran, which is mostly male-dominated. Recognized or not, so far the tendency of society to place men in the public world and women in the domestic world occurs in every human civilization. This practice has given rise to prolonged social disparity between the sexes. Women are considered responsible in household activities (domestic sphere), while men are considered most responsible in the public sphere.

From these differences it can be drawn meaning that women and men have complementary roles. In this different role does not mean that women must replace the role of men or vice versa, because each has different proportions according to their nature. For example, it is possible for women to conceive their offspring because women have a uterus that is not owned by men. Likewise, in terms of caring for and sustaining the baby as a child, women are blessed with the ability to breastfeed and feelings of love and endurance are more compared to men. Basically the spirit of the relationship between men and women in Islam is fair (equal). Therefore subordination to women is a belief that develops in a society that is incompatible or contrary to the spirit of justice taught by Islam. According to Nasaruddin Umar, Islam does recognize the differences (distincion) between men and women, but not discrimination. The difference is based on the physical-biological condition of women who are destined to be different from men, but the difference is not intended to glorify one and demean the other.

Women in Indigenous Peoples

The development process led to double marginalization of indigenous women. First, ignition by governments that do not recognize the rights of indigenous peoples to land and natural resources by marginalizing the role of indigenous women in their communities.

Second, indigenous women are not given access to decision making at all levels, even though the decision will later affect women. Often the decision making for indigenous women does not involve them. In the second JKMA Aceh congress on April 22-26 in Blang Mee settlement, women began to be actively involved, both in discussion forums and in the structure of the JKMA Aceh body. In fact, in some gatherings, women dominate questions over men. In order to elevate the status of women, the JKMA Aceh structure has now included three adat councils from women's representatives, namely Munawiyah Umar, Ainal Mardhiah, and Zahara. This is evidence that JKMA Aceh respects women's rights to be equaled with men.

D. RESEARCH METHOD

The research method used in this paper is a legal research method. Research in the context of this writing is normative, which is based on logical and coherent thinking by examining the applicable laws and regulations and their relation to the issues discussed. Normative research methods or literature law research methods are methods or methods used in legal research conducted by examining existing library materials.

E. ANALYSIS AND DISCUSSION

Some people's understanding of gender is in line with Islamic teachings. But there are things that are not derived from the teachings of Islam which are detrimental to women, by some people considered as part of Islam and therefore need to be straightened out.

Some women's rights in gender equality efforts, such as property rights, the right to education, politics and employment opportunities tend to be recognized and protected. But some other rights, such as the compliance limit to the husband, reproductive rights, double burden in domestic duties, the right to be the guardian of the assets of young children still have to be socialized to get recognition and protection.

Modernization and development of society now, especially in terms of domestic duties, according to the authors tend to encourage the wife to carry a double burden. Today's society (opinion formed, government policies, stories and news on television) tends to argue that domestic work is the wife's duty because of marriage, not because of agreement or adat.

In the effort to mainstream gender in policy making especially by the government (gender as an

analytical tool), there is an impression that what is prioritized (championed) is to encourage women to enter public activities just like men. While work and activities in the household (domestic) tend to be ignored or not considered, not a part of the struggle for gender equality. For this reason, according to the writer, it must be kept in mind that most of the men and women who are taken into account (which are objects) in relation to the analysis of gender equality are those who have become husbands and wives and have even become fathers and mothers. Because of this, efforts to encourage women (wife and mother) to enter and take part in the public sphere must be balanced with the distribution of time and attention to the family, so that children do not become displaced and work in the family (especially the task of saving marriages, maintaining harmony in the home stairs or family, making it a comfortable place for all members) is not considered as work whose value is lower than work in public space.

It should also be remembered that often a husband or wife succumbs not to not knowing the existence of mainstreaming gender (rights and obligations), but to do it consciously and voluntarily because of rational considerations such as wanting to serve or please her partner, wanting to save the family, because of family economic considerations, psychological considerations of their partners, etcetera; although it must be admitted, there are even many (men and women) who do it forcefully, are willing to give up in order to maintain integrity and save the household. In this situation it is often the weakest who will succumb or be defeated. But it may also be the opposite, it is the most mature who must yield and hold back.

Husbands or wives who are too aware of their rights, so that they do not want to sacrifice, who are too selfish so they do not consider the future of their children, are easier to divorce than a husband or wife who thinks and considers the future of their children. Some husbands or wives remain patient, are willing to suffer and continue to try to improve the turmoil and difficulties in the household (they remain optimistic and want to think long) is because they consider the future of their children. Therefore, prevention of domestic violence and fostering awareness about the rights and obligations of the parties in the household must be balanced with an explanation of sacrifice, compassion and family goals which include raising and making children a good generation in the future.

Gender and campaigns about domestic violence or for other reasons. If the cause is the gender equality campaign and the elimination of domestic violence, then we must dare to say there is something wrong in the campaign, because in our opinion the aim of the campaign is not to increase divorce rates (either directly or indirectly) but instead to save the household and make the parties especially children are happier and more prosperous.

In connection with the "Islamic Concept of Gender-based Development" the author tends to argue that women are given the same opportunities as the opportunities given to men to take part in the public sphere. But there must be no attempt to "force" or at least "encourage" women to take part in the public sphere, while leaving responsibilities in the family field (especially towards children, such as the right to breastfeed children), because the presumption of public space is more valuable and more valuable from domestic or household space.

A serious and genuine struggle to create gender equality should not lead to the assumption that domestic activities in the family are "number two" activities, not career activities, especially if they are considered as activities that must be avoided because they demean women. The conscious choice of women to become "housewives" in full is a choice that must be respected, must be considered as well as the choice to be involved in public space.

F. CLOSING

The position of women in Aceh society after the enactment of Islamic law, occupies a place that should be in accordance with the teachings of Islam, customary law that runs for generations and positive law in force in the Republic of Indonesia, but in daily practice there are still found some deficiencies due to interpretation about the teachings of Islam that have not been good.

G. REFERENCES

Sulaiman, *Studi Syariat Islam di Aceh* (Banda Aceh: Madani Publisher, 2018), h. 37.

Munawiyah, “Kedudukan Perempuan dalam Budaya Aceh,” dalam Jurnal Ar-Raniry Media Kajian Keislaman, Vol. 1, No. 87, 2011, h. 124.

Emi Suhaimi (1993). Wanita Aceh Dalam Pemerintahan Dan Peperangan disarikan dari buku Wanita Indonesia sebagai Negarawan dan Panglima Perang karangan A. Hasjmy.

Perempuan dalam pemerintahan kerajaan Aceh: Putri Lindung Bulan;Puteri Pahang; Ratu Nihrasiyah

Rawangsa Khadiyu; Ratu Safiatuddin; Ratu Naqiatuddin; Ratu Zakiatuddin; Ratu Kamalat Syah) Wanita aceh dalam peperangan :Laksamana Malahayati; Teungku Fakinah; CutNyakDhien; Cut Meutia; Pocut Meurah Intan; Pocut Baren; Teungku Fakinah).

Ernita Dewi, Kesetaraan Gender Dalam Islam: Sudut Pandang Al-Quran Dan Hadis, dalam Jurnal Substantia, Vol. 16, Nomor 2, (2014), 272.

Ibid., 273.

Ernita Dewi, Pemikiran Amina Wadud Tentang Rekonstruksi Penafsiran Berbasis Metode Hermeneutika, dalam Jurnal Substantia Vol. 15, Nomor 2, (2013), 149.

Nasaruddin Umar, Kodrat Perempuan dalam Islam, (Jakarta: Lembaga Kajian Agama dan Gender, 1999), 23.

LEGAL PROTECTION OF DOCTORS IN OPENING MEDICAL RECORDS OF HIV PATIENTS

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ABSTRACT

This paper aims 1) to describe, identify and analyze the authority of doctors in opening medical records of HIV / AIDS patients, and 2) to analyze and solve problems of legal protection for doctors in opening medical records for HIV / AIDS patients. Based on literature and observational data show that: First, the authority of doctors in opening medical records of HIV / AIDS patients is regulated in Permenkes RI number 269 / MENKES / PER / III / 2008 and number 36 of 2012 concerning Medical Secrets that is only for the benefit of patient health, fulfilling Requests for law enforcement officials in the context of law enforcement based on court orders that must be requested in writing from the head of the service facility health. The request and / or consent of the patient himself, the request of the institution / institution based on statutory provisions, as well as a condition that threatens the safety of others. Secondly, legal protection in opening medical records for HIV / AIDS patients is provided by the government in a preventive manner aimed at preventing disputes, which lead to prudent actions in the presence of various provisions stipulated in the medical, health practice laws and regulations of the minister of health. . Repressive legal protection if there is a violation in the practice of medical services aimed at handling a particular dispute that is also regulated in the Criminal Code and legislation to ensure doctors and patients get their rights and obligations in accordance with the provisions of the applicable laws and regulations.

Keywords: Legal Protection, HIV / AIDS

A. INTRODUCTION

Doctors in practice in the field can be constrained by the provisions stipulated in the applicable legislation regarding the obligation to maintain patient confidentiality which includes maintaining the confidentiality of the contents of the patient's medical record. Article 8 of the Medical Code of Ethics states: Disclosing HIV / AIDS patient secrets means breaking the oath of office and having to keep medical secrets Moral code for health workers is privacy (meaning respecting the patient's privacy rights), convidentiality (meaning the obligation to keep health information as confidential), fidelity (meaning loyalty) and veracity (means upholding the truth and honesty) .[1]

Revealing the secrets of HIV / AIDS patients can have a negative impact on patients, such as being stigmatized by the social environment as an immoral person, experiencing isolation or social isolation, eliminating the patient's opportunity to earn a living and meaningful life that is contrary to his human rights. However, if doctors keep confidential HIV / AIDS patients, it means sacrificing the health of others, which is also the right of every person. [2]

Accordingly, according to Minister of Health Instruction No. 72 / MenKes / Inst / 1988 regarding Obligation to Report Patients with AIDS Symptoms, the actions taken by health workers and health service facilities when meeting someone with AIDS symptoms are only reporting to Dirjen P2MPLP only, by taking into account the confidentiality of patients, while the environment is not notified when there are patients with HIV / AIDS on human rights grounds.

According to Satijipto Raharjo, legal protection is to provide protection for human rights that have been harmed by others and that protection is given to the public so that they can enjoy all the rights granted by law.[3,4,5]

[1] Samsi Jaco[1]balis, 2005, *Pengantar Tentang Perkembangan Ilmu Kedokteran, Etika Medis, dan Bioetika,* CV Sagung Seto bekerjasama dengan Universitas Tarumanegara, Jakarta

[2] M. Taufik. 2011. "Perspektif Yuridis Tanggung Jawab Dokter Terhadap Rahasia Medis Pasien HIV/AIDS (Studi di Rumah Sakit Umum Daerah Banyumas)" *Jurnal Dinamika Hukum* Vol. 11 No. 3 September 2011

[3] Margarita M. Maramis, 2007, *Konseling dan Tes Sukarela Untuk Penderita HIV & AIDS*, dalam Nasronudin & Margarita M. Maramis (editor), *Konseling, Dukungan, Perawatan & Pengobatan ODHA*, Airlangga University Press, Surabaya.

[4] M. Taufik. 2011. Loc. Cit

[5] Satijipto Raharjo, 2000. Ilmu Hukum.Bandung: PT. Citra Aditya Bakti, hlm. 53

According to Philipus M. Hadjon Preventive legal protection aims to prevent disputes, which direct actions to be cautious, while repressive protection aims to handle a particular dispute.[6]

Related to this, the opening of medical records by doctors in HIV / AIDS patients must get legal protection, because it can be an important effort in overcoming HIV / AIDS, especially related to HIV / AIDS transmission in families and in the community.

B. DOCTOR'S AUTHORITY IN OPENING PATIENTS MEDICAL RECORD OF HIV / AIDS

Authority is an understanding derived from the law of government organizations, which can be explained as a whole of the rules relating to the acquisition and use of governmental authority by the subject of public law in public law relations.[7]

Ridwan HR quoted the opinion of H.D. Van Wijk / Willem Konijnenbelt, explained theoretically that authority derived from legislation can be obtained through three ways, namely:[8] Attributes: toekenning van een bestuursbevoegheid door een wetgver aan een bestuurusorgaan (attribution is the granting of governmental authority by legislators to government organs); Delegatie: overdracht vaan een behogheid van het een bestuursorgaan aan een ander (delegation is the delegation of governmental authority from one governmental organ to another governmental organ); and Mandaat: een bestuursorgaan laat zijn bevogheid namens hem uitoefenen door een ander (mandates occur when a government agency allows its authority to be carried out by another organ on its behalf).

Legal responsibility is a necessity for someone to carry out what is required of him. S.J. Fochema Andrea uses the term verantwoordelijk which means responsibility with the following limitations: aansprakelijk, verplicht tot het afleggen van verantwoording entot het dragen van event, toerekenbare schade (desgevorderrd), ini rechte of in bestuursverband (liability is the obligation to assume responsibility and to incur losses (if prosecuted or if prosecuted) both in connection with law and in administration). [9,10]

According to Daldiyono, profession is a field or type of work that requires special education. Not all types of work can be called a profession because a profession has specific characteristics, namely: [11] there are certain fields of science that are clear and decisively studied, for example the medical profession that carries out medical science, there is history and can be known by its predecessor, the existence of an independent professional association and has the right to regulate its members, and to serve in the interests of those served (altruism) provided for in the code of ethics.[12,13,14]

Every medical service activity must have a complete and accurate medical record for each patient and every doctor and dentist must fill out the medical record correctly, completely and on time.[15]

Revealing the secrets of HIV / AIDS patients means breaking the oath of office and having to keep medical secrets. The moral code for health workers is privacy (means respecting the patient's privacy rights), convidentiality (means the obligation to keep health information as confidential), fidelity (meaning loyalty) and veracity (means upholding truth and honesty). [16]

Revealing the secrets of HIV / AIDS patients can also have a negative impact on patients, such as being stigmatized by the social environment as an immoral person, experiencing isolation or social isolation, eliminating the patient's opportunity to earn a living and meaningful life that is contrary to his human rights. However, if doctors keep confidential HIV / AIDS patients, it means sacrificing the health of others, which is also the right of every person. [17,18]

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[6] Maria Alfons, 2010. Implementasi Perlindungan Indikasi Geografis atas Produk-Produk Masyarakat Lokal dalam Prespektif Hak Kekayaan Intelektual. Malang: Universitas Brawijaya. hlm. 18

[7] Ridwan, HR, 2002, Hukum Administrasi Negara, UII Press, Yogyakarta, hlm. 65.

[8] Ibid, hlm 75

[9] Az.Nasution. 2011. Hukum Perlindungan Konsumen Suatu Pengantar. Jakarta: Diadit Media. hlm. 48-49

[10] Christine S.T. Kansil, 1997, Pokok-Pokok Etika Profesi Hukum, Jakarta: Pradnya Paramita, hlm 3.

[11] Daldiyono, 2007, Pasien Pintar dan Dokter Bijak, Jakarta: Buana Ilmu Popular, hlm 175.

[12] Christine S.T. Kansil, 1991, *Pengantar Hukum Kesehatan Indonesia*, Jakarta: Rineka Cipta, hlm 2

[13] *Ibid.* hlm 2-3

[14] Willa Candrawila. 2004, *Hukum Kedokteran* Mandar Maju: Bandung, hlm.20

[15] Nusye K.I Jayanti, 2009.*Penyelesaian Hukum Dalam Malperaktek Kedokteran*, Yogyakarta, Pustaka Yustisia, hlm. 85

[16] Samsi Jacobalis, *Loc. Cit*.

[17] M. Taufik. 2011. Loc. Cit.

[18] Ninik Maryati, 1998, Malpraktik Kedokteran dari Segi Hukum Pidana dan Perdata,. Jakarta, Bina Aksara, hlm. 5.

HIV patient secrets will only be disclosed if the patient's consent uses informed consent. HIV doctors and counselors may not divulge the secrets of an HIV patient's Medical Record to his wife or husband, close family or other community members. [19,20,21]

If an HIV sufferer wants to reveal the secret about HIV disease there are 2 ways: [22] delivered by HIV sufferers themselves or delivered by counselors with the permission of HIV patients. If sufferers object to opening medical record data, HIV counselors may not open medical records of these HIV patients, except for court or scientific purposes, but do not mention HIV identity. [23,24,25]

Data on medical records of HIV patients are only reported to the head of the field of service without mentioning the patient's identity, which is reported only the number of HIV sufferers every 3 months. Opening of the secrets of medicine in the Republic of Indonesia Health Minister Regulation No. 269 / MENKES / PER / III / 2008 CHAPTER IV in Article 10 paragraph (2) explains that information about identity, diagnosis, disease history, examination history, and treatment history can be opened in terms of: for the benefit of the patient's health, Fulfilling the request of law enforcement officials in the context of law enforcement on court orders, the request and or consent of the patient himself, the request of the institution / institution based on the provisions of the legislation, and for the purposes of research, education and medical audits insofar as the patient's identity is not mentioned.[26,27]

Furthermore, paragraph (3) Permenkes number 269 of 2008 states that the request for medical records for the purpose referred to in paragraph (2) must be made in writing to the leader of the health service facility. Minister of Health Regulation No. 36 of 2012 concerning Medical Secrets covers patient identity, patient health includes history taking, physical examination, supporting examination, diagnosis, treatment and medical treatment.

The obligation to keep medical secrets is regulated in Minister of Health Regulation No. 36 of 2012 concerning Medical Secrets also regulates the opening of medical records listed in Article 5 as follows: fulfill the request of law enforcement officials in the context of law enforcement, the request of the patient himself or based on statutory provisions;

Minister of Health Regulation No. 36 of 2012 concerning Medical Secrets provides further explanation of the provisions stipulated in Article 5 as follows: The disclosure of medical secrets for the benefit of patient health as referred to in Article 5 includes: The interests of health care, treatment, healing and care patient and administration requirements, payment of insurance or health financing guarantees; The disclosure of medical secrets as referred to in paragraph (1) letter a is carried out with the consent of the patient; The disclosure of medical secrets as referred to in paragraph (1) letter b shall be carried out with the consent of the patient in both written and electronic information systems; Consent from patients as required & in paragraph (3) is stated to have been given at the time of patient registration in a health care facility; In the event that the patient is incapable of giving consent as referred to in paragraph (2), consent can be given by the next of kin or his escort.

Arrangement for opening medical records related to the request of law enforcement officials for the benefit of the court is regulated in Article 7 Permenkes number 36 of 2012 as follows: Opening of medical secrets to fulfill a request for law enforcement officials in the context of law enforcement as referred to in Article 5 can be carried out in the process of investigation, investigation, prosecution and court hearing; The disclosure of medical secrets as referred to in paragraph (1) can be through the provision of data and information in the form of visum et repertum, expert statements, witness statements and or medical summaries.

Arrangements for opening medical records based on statutory provisions are regulated in Article 9 Permenkes number 36 of 2012 as follows: Disclosure of medical secrets based on statutory provisions as referred to in Article 5 is carried out without the patient's consent in the context of ethical or disciplinary and public interest interests. ; Opening of medical secrets in the context of ethical or disciplinary enforcement as referred to in paragraph (1) shall be given at the written request of the Professional Ethics Honorary Board or the Indonesian Medical Disciplinary Honorary Council; Opening of medical secrets in the context of public interest as

[19] Triwulan Tutik, T. 2010. Perlindungan Hukum Bagi Pasien Jakarta,..Prestasi Pustaka. hlm.49
[20] Informasi dari Dokter Penanggung Jawab Poli HIV
[21] Informasi dari Konselor HIV AIDS.
[22] Ibid.
[23] Informasi dari Dokter Penanggung Jawab Poli HIV.
[24] Ibid.
[25] Ibid.
[26] Informasi dari Direktur RSUD Majenang.
[27] Ibid

referred to in paragraph (1) is carried out without disclosing the patient's identity; Public interests referred to in paragraph (1) include: medical audits, threats of Extraordinary Events / outbreaks of infectious diseases, health research for the benefit of the country, education or use of information that will be useful in the future, and threats to the safety of others individually or Public.

The confidentiality of opening medical records of HIV / AIDS patients, of course, must be linked to efforts to tackle HIV / AIDS so as to prevent the chain of transmission of HIV / AIDS. Therefore, it is only natural that if the husband is infected with HIV / AIDS, the wife needs to be informed so that she can continue to live households while maintaining the risk of HIV / AID transmission in the family.

The opening of medical records by the person in charge of patient services is regulated in Article 10 Permenkes number 36 of 2012 as follows: the opening or disclosure of medical secrets is carried out by the person in charge of patient services; In case the patient is handled / cared for by the team, the team leader is authorized to reveal medical secrets; In the event that the team leader as referred to in paragraph (2) is absent, the disclosure of medical secrets can be carried out by one of the designated team members; and In the event that there is no person in charge of patient services, the leader of the health service facility can disclose medical secrets. The person in charge of patient services or the head of a health care facility may refuse to disclose medical secrets if the request is contrary to the provisions of the law. The medical record is no longer a medical confidentiality if a patient makes a claim against a health worker and has been informed through the mass media.

This is regulated in Article 13 Permenkes number 36 of 2012 as follows: Patients or close relatives of patients who have died who are demanding health workers and / or; health care facilities and inform them through mass media, have released their medical medical confidentiality to the public; (1) Information through mass media as referred to in paragraph (1) authorizes health workers and / or health service facilities to open or disclose the relevant medical secrets as the right of reply. [28,29]

C. LEGAL PROTECTION OF DOCTORS IN OPENING MEDICAL RECORD IN HIV / AIDS PATIENTS

The provisions stipulated in the Republic of Indonesia Ministerial Regulation No. 269 / MENKES / PER / III / 2008 CHAPTER IV in Article 10 paragraph (2) and Article 4 through Article 14 of the Minister of Health Regulation No. 36 of 2012 concerning Medical Secrets becomes clear signs for doctors in opening medical records, especially records HIV / AIDS patient medical.

Doctors will be protected legally in opening medical records of HIV / AIDS patients if the opening of medical records is carried out in accordance with the authority stipulated in Article 9 of the Minister of Health Regulation No. 36 of 2012 concerning Medical Secrets as follows: Opening of medical secrets based on the provisions of the legislation as referred to in Article 5 is carried out without the consent of the patient in the context of ethical or disciplinary enforcement interests and the public interest; Opening of medical secrets in the context of ethical or disciplinary enforcement as referred to in paragraph (1) shall be given at the written request of the Professional Ethics Honorary Board or the Indonesian Medical Disciplinary Honorary Council; Opening of medical secrets in the context of public interest as referred to in paragraph (1) is carried out without disclosing the patient's identity; Public interests referred to in paragraph (1) include: medical audits, threats of Extraordinary Events / outbreaks of infectious diseases, health research for the benefit of the country, education or use of information that will be useful in the future, and threats to the safety of others individually or Public. The provisions stipulated in Article 9 of the Minister of Health Regulation No. 36 of 2012 concerning Medical Secrets provide legal protection for doctors in opening medical records of HIV / AIDS patients. Opening medical records of HIV / AIDS patients by doctors as long as they meet the criteria set out in the regulation, the doctor will be protected legally.

[28] Hendrik, 2012. Etika dan Hukum Kesehatan, Jakarta : Penerbit Buku Kedokteran, hlm. 24-25.
[29] Budi Sampurna, Praktik Kedokteran Yang Baik Mencegah Malpraktik Kedokteran, Majalah Farmacia, Edisi: Maret 2006, hlm. 74

LEGAL PERSPECTIVE AGREEMENT BETWEEN DOCTORS AND PATIENTS IN ORTOPEDIC SURGERY

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ABSTRACT

The relationship between doctor and patient gives rise to 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 patient. invitation (aproach statue).

Based on the data found, some conclusions can be summarized as follows: 1. Form of Agreement Between Doctors and Patients in Orthopedic Surgery in Indonesian Laws: arising from the existence of a doctor and patient relationship 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 Minister of Health Regulation No. 585 of 1989. Approval of medical actions in orthopedic surgery is a high-risk medical procedure. High-risk medical treatment requires explicit consent or written consent. Informed consent is the starting point for the birth of a therapeutic agreement. An Orthopedic and Traumatology Specialist must explain in a language understood by the patient when he is going to perform treatment or surgery, pre, durante, and post-operative risk factors, prognosis and notify the patient for possible consultation with the relevant Specialist to minimize the risk. 2. The Doctor's Responsibility So As Not to Cause Acts Against the Law: a doctor must think carefully, thoroughly, carefully in acting in order to anticipate risks that might occur. This is so that if there is a risk that harms the patient then the doctor is not to blame. Materially, a medical action is not contrary to the law if it meets the requirements: has a medical indication to achieve a concrete goal, carried out according to the rules that apply in medical science / lege artist, must have received approval from the patient. 3. The Role of Informed Consent as a Legal Protection in Therapeutic Transactions between Doctors and Patients: the importance of informed consent according to Law Number 36 Year 2009 on Health, informed consent obtained in a good manner will actually increase patient confidence in doctors and strengthen the relationship between doctor with patient. If then the estimate was missed the patient will not simply sue the doctor, because the patient is aware that not all of the effects of the action can be predicted beforehand. Written statements are needed if future evidence is needed, the Medical Practices Act and the Ministry of Health regarding the approval of medical measures 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 Perspective, Agreement, Doctor, Patient, Orthopedic Difference

Since the beginning of the history of human civilization, there has been a known relationship of trust between two people namely the healer and the sufferer. In modern times this relationship is referred to as a therapeutic transaction between doctors and sufferers, which is carried out in an atmosphere of mutual trust. The profession of doctors and other medical personnel is a very respectable profession in the view of the community. Because of this profession a lot of life expectancy and / or healing from patients and their families who are suffering from illness.

Health is a very important thing for one's life. The high level of one's health is one indication of the high quality of one's life. The right to health is a right that everyone can enjoy. International conventions such as The Universal Declaration of Human Rights 1948 and the International Covenant on Civil and Political Rights 1966 regulate this right.

Other provisions are also contained in the Health Act No. 36 of 2009 which states that "everyone has the same right to obtain an optimal level of health". Thus everyone is guaranteed legal protection to get their right to health.

Health owned by a person is not only in terms of physical health alone. A person's health is comprehensive, namely physical and spiritual health. Health is also one of the determinants of a person's level of welfare. This can be seen in Article 28 H paragraph (1) of the 1945 Constitution: "Every person has the right to live in physical and spiritual

prosperity, to live and to have a good and healthy environment and to have health services".

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

The relationship between a doctor and a patient in making a health effort is a reciprocal relationship. This relationship can be described some time ago as a relationship that is paternalistic.

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 basic principles, while the realization for each country still depends on the norms or rules that apply in the country concerned . In its application it will certainly be different in each country, as the legal system adopted in the west is more oriented towards individual rights, whereas in Indonesia it is oriented to the principle of kinship in accordance with the foundation of the Pancasila state.

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

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

Nitially the legal relationship between doctors and patients is a vertical relationship or paternalistic relationship, where doctors are considered the most superior (father know best), but along with the times including increasing education and public legal awareness, then later this form of legal relations shifted towards the form a more democratic legal relationship that is legal relations.contractual horizontal, which is an equal legal relationship between a patient and his doctor. Everything is communicated between the two parties. This agreement is commonly referred to as informed consent or approval of medical treatment.

Any medical action that carries a high risk must be written approval signed by the person who has the right to give consent. In addition, the doctor is responsible for implementing the provisions regarding approval of medical measures.

According to Fred Amein in a therapeutic transaction called inspanningsverbintenis that is an agreement between a doctor and a patient, where the doctor will make an effort, try, endeavor as much as possible to cure the patient.

So what was promised was "a maximum effort, effort, endeavor" to achieve an outcome. Another case if what is promised is a "work" or achievement, called a resultaatververbintenis, where doctors can promise and guarantee the quality of an item / service. for example dentists who make dentures for their patients.

Juridically, the emergence of a relationship between a doctor and a patient is based on two things, namely an agreement (ius contractual) or what is called a therapeutic transaction, this relationship is personal between the doctor and his patient because it is based on trust; and laws (zaakwarneming).

It is said zaakwarneming or voluntary representation, if the patient is in an unconscious condition so that the doctor may not 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 the provisions of Article 1354 of the Civil Code.

Transaction means agreement or agreement, which is a reciprocal relationship between two parties that agree on one thing. Therapeutic is a translation of therapeutic which means in the field of medicine. This term is not the same as therapy or therapy which means treatment. Agreement between the doctor and the patient is not only in the field of medicine but more broadly covers the fields of diagnostic, preventive, rehabilitative, and promotive so this agreement is called a therapeutic agreement or therapeutic transaction. A therapeutic transaction is an agreement between a doctor and a patient in the form of a legal relationship that gives birth to rights and obligations for both parties.

In the engagement law as regulated in the Civil Code Unang (Civil Code), there are 2 kinds of agreements known:

1. Inspiring verbintenis, namely an effort agreement means that both parties promise to make the maximum effort to realize what is promised.
2. Resultaatverbintenis, namely Transaction of the party that promised to give a resultaat that is a real 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 on the object of the agreement, which is not the result which becomes the main goal of the agreement (resultaatverbintenis), but on efforts to cure the patient (inspecting verbintenis.). From this we can see that in a treatment effort by a doctor, the doctor cannot guarantee or promise 100% of the patient's recovery, but endeavor to do the best and the patient is expected to understand this.

The definition of this 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 contained in Book II of the Civil Code. Article 1319 of the Civil Code reads:

"All agreements, whether they have a specific name, or are unfamiliar with a particular name, are subject to the general rules, contained in this chapter and the previous chapters."

A therapeutic agreement or transaction breeds rights and obligations for both parties.

Unlike the agreement made by society, therapeutic agreements have characteristics that are different from the agreement in general, the specificity lies in or about the object promised.

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

As a result of the emergence of a right and obligation of each of the parties, namely the patient has the rights and obligations and vice versa with the doctor, if in this agreement one of the parties negligent with the obligations, that party can be said to have defaulted. In accordance with article 1320 of the Civil Code that one of the conditions of the agreement is a cause that is not prohibited. Therefore, the contents of this therapeutic agreement may not be agreed to carry out acts against the law.

In the therapeutic agreement explained that with the arrival of the patient to the hospital where the doctor works with the aim of checking his health or treatment, it was considered an agreement. The patient or the patient's family has the right to get an explanation or information about what the doctor will do, so the doctor must submit information related to the medical action to be performed or after it is done. Information relating to the patient's illness must be clear such as diagnostic procedures, actions or therapies, alternative therapies and financing and risks that may arise from the process.

In every medical treatment that contains high risk, it must obtain approval from the patient / patient's family. Approval of the action is known as the Approval of Medical Action or in medicine is often referred to as (Informed Consent).

In the agreement made by the doctor and this patient, this agreement is included in the agreement which is a standard contract (standard contract). Patients in their position as weak parties only sign the consent letter that was previously made by the doctor / health worker. Everything is left to the doctor, while the doctor only makes maximum effort and does not confirm the results.

The agreement between the two parties to this agreement is not like the agreement stipulated in Article 1320. It is said to agree if there is an embodiment of the wishes of two or more parties in the agreement regarding what they want. Agreeing means agreeing to each other's will without coercion, error, and deception.

Every patient has the right to know the medical actions that will be performed on him. The patient's right to know what type of medical action will be taken by the doctor or medical personnel is usually conveyed in writing through the Informed Consent form. Informed Consent serves as written evidence of medical actions committed on patients. The benefits of Informed Consent are enormous both for patients, doctors and hospital institutions if there is a problem in the future it 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 that lead to malpractice demands. The problem is, people who do not understand the ins and outs of medicine tend to

look more at treatment than the results. In fact, given the results of treatments that can not be predicted with certainty, a doctor in practice only guarantees the best possible process (inspanningsverbintenis), and absolutely does not promise results (resultaatververbintenis).

This kind of misunderstanding often leads to malpractice suits. When the debate between medical risks and the alleged malpractice against a failure of practice has entered the realm of legal dispute with all its arguments, this is of course a matter of great concern to the doctors.

Overcoming legal disputes requires abilities outside the field of medicine. 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 right to information is not obtained optimally from the doctor who treated him. Patients did not get adequate explanation about the treatment process undertaken 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 / approval of the patient for medical efforts to 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 any risks that may occur.

The agreement in this agreement was manifested in the form of informed consent, namely the patient's right to authorize a medical action. In juridical manner, informed consent is a one-sided will, namely from the patient. So, because the consent letter is not a pure agreement, the doctor does not have to sign it. In addition, the patient can cancel his consent statement at any time before the medical treatment.

Orthopedic surgery is a collection of types of surgery that aims 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 nerve muscles. Through orthopedic surgery, patients suffering from diseases of the body's organs can move back, and work and move normally. Patients suffering from motion system diseases will generally undergo non-surgical treatment first. If non-surgical treatment does not effectively cure the disease, the doctor will recommend the patient to undergo a surgical procedure. Non-surgical treatment for orthopedic patients is generally in the form of medication and physiotherapy.

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

Examples of cases of patients present with complaints of pain in the left knee after Volley Ball exercise when jumping and sprains. The patient was referred by the company doctor to the hospital and then was hospitalized for more than 1 week. After X-rays, the results were good, there was no fracture, but the specialist doctor at the hospital referred the patient to the hospital for magnetic resonance imaging and the results were seen in the Lateral Meniscus Intrasubstance Tear Suspect, Anterior Cruciate Ligament tear accompanied by Medial Collateral Ligament tear, hemarthrose. The orthopedic surgeon finally operated on the patient, then had a re-x-ray taken but the patient was surprised at the results of the X-ray there were 2 pen screws on his left leg and of course he would refuse 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 conveyed it to the patient, as evidenced by the patient's signed informed consent. The case continues to spread into many postoperative problems such as continuous pain, the patient cannot bend his legs freely, cannot work or even worship, cannot walk properly, and so on.

The dispute has been tried by way of family deliberation but it did not produce results so that the patient made a claim to the district court with material loss claims in the form of costs incurred from the hospital, as well as immaterial losses in the form of feeling tortured, stressed, enduring pain for 10 months, joint damage left foot, deformed / abnormal left foot for life / forever, loss of hope and future because it cannot work / earn a living with a maximum of a lifetime / forever. But from each patient's demands, the doctor can prove the patient's accusation is not true with various kinds 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 a patient handled by a surgeon, the case began when Dwi Meilesmana exercised volleyball on the night of May 31, 2011. Suddenly Dwi's left knee was dislocated and immediately rushed to the nearest hospital and hospitalized. X-rays showed 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 an MRI. After MRI was performed, it was stated 'suspect intrasubstance lateral tear maniscus, ACL tear accompanied by MCL tear hemarthrose. The external appearance is no longer swollen. But according to the doctor who examined, Dwi had to do surgery on Knee's knee if he didn't want to experience paralysis. Dwi believes that the doctor's diagnosis is guaranteed complete recovery after 3 months after the ACL reconstruction. Then surgery was carried out on July 1, 2011 for 3 hours. Dwi was totally drugged and when he woke up he experienced extreme pain. In fact, according to one of the nurses, Dwi was given a kind of morphine to eliminate the pain. On July 6, 2011 Dwi's leg was X-rayed again and how shocked Dwi was because he had installed 2 very large pen screws 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 go away, Dwi then consulted various doctors to get a second opinion. On October 17, 2011 he conducted an MRI at a well-known hospital in South Jakarta. As a result, a vertical ACL graft was found because the installation of screws and implants implanted was far from medical standards. The hospital then recommended a repeat operation. Upon these findings, Dwi went to the first hospital again to install a pen without his permission. Strangely, the hospital instead provided a referral for surgery in another hospital and offered to help with the cost of re-surgery. Finding the service, Dwi chose to re-operate in South Jakarta in July 2012. But because it was wrong from the beginning, as a result Dwi suffered a lifetime disability.

The above case is an example of the importance of a written agreement. Based on the description above, the writer is interested in discussing in a thesis entitled: **LEGAL PERSPECTIVE OF THE AGREEMENT BETWEEN DOCTORS AND PATIENTS IN ORTOPEDIC SURGERY.**

REFERENCES

Diana Devlin, Execution of Therapeutic Agreement in Approval of Medical Action on the Condition of Patients in Poor Conditions at Telogorejo Hospital Semarang, (Semarang: Diponegoro University Postgraduate Program, 2008), p. 16.

Moh Hatta, Health Law and Medical Disputes Issue 1, (Yogyakarta: Liberty, 2013). p.73.

Rio Christian, Health Legal Aspects in Medical Efforts to Organ Transplantation, (Yogyakarta: Atma Jaya University Yogyakarta, 2003), p. 7

Moh.. Hatta, Op.cit. p. 74-75.

Veronica Komalawati, Law and Ethics in Medical Practices, (Bandung: Pustaka Sinar Harapan, 2002), p.1

Ari Yunanto, Medical Malpractice Criminal Law Review and Medical Perspective, (Yogyakarta: CV Andi Offset, 2009), p. 14

Yunanto, Doctor's Responsibility in Therapeutic Transactions, (Semarang: Diponegoro University Postgraduate Program, 2009). p. 9

Agus Budianto. Health Service Aspects in Patient Protection Perspectives, (Bandung: Karya Putra Darwati, 2010), p. 67

Fred Ameln. Capita Selekta Law of Medicine. (Jakarta: Grafika Tama Jaya.1991), him. 34

Hermien Hadiati Koeswadji. Law Number 23 of 1992 concerning Health, Principles and Implementation Problems. (Bandung: PTCitra Aditya Bakti Publisher. 1999), him 61.

Agus Budianto, Loc.cit, p. 88

M.Jusuf Hanafiah, and Amri Amir, Medical Ethics and Health Law Edition 4, EGC, Jakarta, 2013.hlm.43.

Bahder Johan Nasution, Health Law: Doctor's liability, (Jakarta: PT Rineka Jaya, 2005), p. 11

Ibid. p. 13

Ibid. p. 11

Ibid, p. 89

Ibid

Veronika Komalawati, Role of Informed Consent in Therapeutic Transactions. (Bandung: Citra Aditya Bakti, 2002), p.86

Danny Wiradharma & Dionisia Sri Hartati, Guide to medical law courses (Jakarta: Sagung Seto, 2014), p. 44

https://news.detik.com/berita/2938804/pasang-pen-tanpa-permini-pasien-rs-di-bandung-digugat-rp-7-billion?9922022=

DOCTOR'S LIABILITY FOR MEDICAL NEGLIGENCE

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ABSTRACT

Regulations on Human Rights (HAM) for Indonesian citizens are very important for the rule of law where human rights regulations provide recognition and protection of basic human rights as one of the characteristics of the existence of the rule of law itself, including one of them is the State of Indonesia. One of the human rights that must be fulfilled for every Indonesian citizen is a health right where the right is stated in Article 28H of the 1945 Constitution of the Republic of Indonesia as the Constitution of the Republic of Indonesia. Health service providers are provided by Health Workers, where one of the Health Workers is a Doctor. But the doctor as a health service provider is not immune to mistakes, if there is a failure of the doctor in providing health services due to negligence and negligence resulting in harm to the patient, then the doctor should be obliged to take responsibility for these actions, so in writing this legal journal will discuss regarding the elaboration of the elements of medical negligence carried out by the Doctor, as well as the liability of the Doctor for medical negligence. This legal journal has 2 (two) formulations of the problem, namely: 1) How are the elements of medical negligence committed by the Doctor?; 2) What is the Doctor's liability for medical negligence?. The research method in this research is juridical-normative legal research, with the support of secondary data. The legal materials used include: 1) Primary legal material: International Covenant on Economic, Social and Cultural Rights, Criminal Code, Civil Code, the Constitution of the Republic of Indonesia Year 1945, Law Number 36 of 2009 concerning Health, Law Number 29 of 2004 concerning Medical Practice, and Minister of Health Regulation No. 290 / MENKES / PER / III / 2008 concerning the Approval of Medical Measures.; 2) Secondary legal materials: health law books and health law journals; 3) Tertiary legal material: Legal Dictionary, Large Indonesian Dictionary (In bahasa: Kamus Besar Bahasa Indonesia (KBBI)), and Black's Law Dictionary.

Keywords: Medical Negligence, Doctor's Liability, Human Rights.

A. INTRODUCTION

Regulations on Human Rights (HAM) for Indonesian citizens are very important for the rule of law where human rights regulations provide recognition and protection of basic human rights as one of the characteristics of the existence of the rule of law itself, including one of them is the State of Indonesia. Human rights are defined as rights inherent in human dignity as God's creatures in which those rights are brought by humans since they were born into the face of the earth so that these rights are natural (natural) not constituting human or state gifts.[1] In International Law, various human rights instruments have been developed, including the International Covenant on Economic, Social and Cultural Rights established in 1966, which in Article 12 paragraph (1) of the Covenant it was stated *that "everyone has the right to enjoy the highest standards that can be achieved for physical and mental health".*[2] According to Muladi, the category of third generation human rights was given to collective rights on the basis of solidarity between human beings based on a sense of brotherhood and solidarity that was needed. These human rights include, among others, *"the right to development; right to peace; and the right to a healthy and balanced environment."*[3]

One of the human rights that must be fulfilled for every citizen, especially Indonesian citizens, is the right to health where that right is stated in Article 28H of the Constitution of the Republic of Indonesia Year 1945, which states that *"every person has the right to live in prosperity and mentality, residence, and get a good and healthy living environment and are entitled to health services."* There is a special discipline of law regarding public health rights. The disciplines of law referred to are the Health Law and

[1] Mahfud MD, 2001, *Dasar dan Struktur Ketatanegaraan Indonesia*, Rineka Cipta, Jakarta, page. 127.

[2] The International Covenant on Economic, Social and Cultural Rights has been ratified by Law Number 12 of 2005.

[3] Muladi, 2004, *Sumbang Saran Perubahan UUD 1945*, Yayasan Habibie Center, page. 63.

Medical Law.[4] Health law, including the *"lex specialis"* law, specifically protects the duties of the health profession *(provider)* in the human health service program towards the goal of the *"health for all"* declaration and special protection of *"receiver"* patients for health services.[5] By itself this health law regulates the rights and obligations of each service provider and service recipient, either as individuals (patients) or community groups.[6]

Providers of health services are provided by Health Workers pursuant to Article 23 paragraph (1) of Law Number 36 of 2009 concerning Health, which states *that "Health workers are authorized to administer health services."* While recipients of health services are Patients. One of the Health Workers is a Doctor as a health service provider. Doctors based on Article 1 point 2 of Law Number 29 of 2004 Concerning Medical Practice, which states that *"Doctors and dentists are doctors, specialist doctors, dentists, and specialist dentists who have graduated from medical or dental education both inside and outside a country that is recognized by the Government of the Republic of Indonesia in accordance with statutory regulations."* A doctor is a person who has the proper authority and permission to conduct health services, specifically examining and treating diseases and is carried out according to health service laws.[7]

But the doctor as a health service provider is not free from mistakes, where health services provided by doctors are always faced with 2 (two) possibilities, namely success and failure. Unsuccessfulness can be caused by 2 (two) things, first is caused by overmacht (forceful condition), and second is caused by doctors doing medical actions that are not in accordance with medical profession standards or can be said to be due to negligence. If the cause of the failure of the doctor in providing health services to patients due to negligence and negligence resulting in harm to patients, then it is appropriate for the doctor to be responsible for these actions, so that in writing this legal journal will discuss the translation of the elements of medical negligence carried out by Doctor, as well as Doctor's liability for medical negligence.

B. PROBLEM STATEMENT

This research has the following Problem Formulation:

1. How are the elements of medical negligence committed by the Doctor?
2. What is the Doctor's liability for medical negligence?

C. LITERATURE REVIEW

Review of Theories About Doctors

Doctor's definition in terms of Article 1 point 2 of Law Number 29 of 2004 concerning Medical Practice, which states that *"Doctors are doctors, specialists, dentists, and dentists who have graduated from medical or dentistry education both at home and abroad. recognized by the Government of the Republic of Indonesia in accordance with statutory regulations."* Doctors in their profession are obliged to organize health services. The definition of health services according to Prof. Dr. Soekidjo Notoatmojo is a sub-system of health services whose main purpose is preventive and promotive (health-enhancing) services targeting the community.[8] Medical Practice based on Article 1 point 1 of Law Number 29 of 2004 concerning Medical Practice, which states that: *"Medical practice is a series of activities carried out by doctors towards patients in carrying out health efforts"*. According to Minister of Health Regulation No. 290 / MENKES / PER / III / 2008 concerning the Approval of Medical Measures states that *"medical treatment is a medical action in the form of preventive, diagnostic, therapeutic, or rehabilitative performed by doctors against patients."*

D. RESEARCH METHOD

The research method in this research is juridical-normative legal research, with the support of secondary data. The legal materials used include: 1) Primary legal material: International Covenant on Economic, Social and Cultural Rights, Criminal Code, Civil Code, the Constitution of the Republic of Indonesia Year 1945, Law Number 36 of 2009 concerning Health, Law Number 29 of 2004 concerning Medical Practice, and Minister of Health

[4] Pusat Penelitian dan Pengembangan Sistem Hukum Nasional Kementerian Hukum dan HAM RI, 2011, Laporan Akhir Penyusunan Kompedium Hukum Kesehatan, Kemenkumham RI, Jakarta, page. 34.

[5] Cecep Triwibowo, 2014, *Etika dan Hukum Kesehatan*, NuhaMedika, Yogyakarta, page. 16.

[6] Soekidjo Notoatmodjo, 2010, *Etika dan Hukum Kesehatan*, Rineka Cipta, Jakarta, page. 44.

[7] Black's *Law Dictionary*, 1979, St. Paul Minn: West Publishing, Co. Fifth Edition, page. 1033.

[8] Sahetapy, J.E., 2002, *Kejahatan Korporasi*, Cetakan Kedua, PT. Refina Aditama, Bandung, page. 21

Regulation No. 290 / MENKES / PER / III / 2008 concerning the Approval of Medical Measures.; 2) Secondary legal materials: health law books and health law journals; 3) Tertiary legal material: Legal Dictionary, Large Indonesian Dictionary (In bahasa: Kamus Besar Bahasa Indonesia (KBBI)), and Black's Law Dictionary.

E. ANALYSIS AND DISCUSSION

1. The Elements of Medical Negligence Committed by The Doctor

According to Eka Julianta, that in the legal relationship between doctors and patients (teuperatic transactions) what is called medical services and medical action and transparency and accountability are needed, so that far from unilateral acts of unilateralism. In the medical profession, acts without principles will have an impact on the practice of deviant medicine, 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.[9] Poor health services will adversely affect the interests of the people who need medical services.[10]

The doctor's profession in carrying out his duties has done wrong actions that cause pain, injury, physical disability, bodily damage and even death, or so-called malpractice causes a patient to feel disadvantaged, so malpractice victims submit requests for material and immaterial compensation.[11]

Humanistically, doctors as ordinary people certainly cannot be separated from neglect.[12] Negligence that occurs when performing professional duties is what can lead to medical malpractice.[13] Medical malpractice is the wrong action / negligence of a doctor in carrying out his professional obligations by not being careful and not following the professional standards, medical service standards, operational standard procedures that cause patients to experience disabilities, injuries and even death.[14] Failure to provide professional services and do so at a reasonable level of skill and intelligence by the average colleague of his profession in the community, resulting in injury, loss, or loss to the recipient of services that trust them, including wrongful professional attitudes, lacking improper skills, violating professional or legal obligations, very bad practices, illegal, or immorality.[15]

Malpractice can occur in carrying out all kinds of professions, including the medical profession.[16] Malpractice / Malpractice comes from the word "mal" which means bad, while the word practice means an action / practice, it can literally be interpreted as a "bad" medical action performed by a doctor in relation to a patient.[17] There are a number of different definitions for providing malpractice. In the Large Indonesian Dictionary (In bahasa: Kamus Besar Bahasa Indonesia (KBBI)), malpractice is defined as the practice of health workers in this case doctors or nurses who are done wrong or incorrectly, violating laws or codes of ethics. Literally "mala" has the meaning "wrong" or "bad" while "practice" has the meaning "implementation" or "action", so malpractice means "wrong or bad implementation or action".[18]

According to Munir Fuady, malpractice is the negligence of a doctor to use the level of skills and knowledge commonly used in treating patients or injured people according to size in the same environment. What is meant by neglect here is the attitude of carelessness, which is not doing what someone with a cautious attitude does it properly, but instead doing what someone with a cautious attitude would not do in the situation. Negligence is also interpreted by carrying out medical actions below the standard of medical services (professional standards and operational procedure standards).[19]

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[9] Eka Julianta Wahjoepramono, 2012, *Konsekuensi Hukum dalam Profesi Medik*, Karya Darwati, Bandung, page. 81.

[10] Cahyo Agi Wibowo, dkk., *Penolakan Pelayanan Medis Oleh Rumah Sakit Terhadap Pasien Yang Membutuhkan Perawatan Darurat*, Justitia Jurnal HukumVolume 1 No.1 April 2017, page. 81.

[11] Alexandra Indriayanti Dewi, 2008, *Etika Hukum Kesehatan*, Pustaka Publisher, Yogyakarta, page. 267.

[12] M. Iqbal Mochtar, 2009, *Dokter Juga Manusia*, Gramedia Pustaka Utama, Jakarta, page. 224.

[13] Nusye KI. Jayanti, 2009, *Penyelesaian Hukum dalam Malpraktek Kedokteran*, Pustaka Yustisia, Yogyakarta, page. 5.

[14] Syahrul Machmud, 2012, *Penegakan Hukum dan Perlindungan Hukum Bagi Dokter Yang Diduga Melakukan Medikal Malpraktek*, KDP, Bandung, page. 18.

[15] Ari Yunanto dan Helmi, 2010, *Hukum Pidana Malpraktik Medik*, Penerbit Andi, Yogyakarta, page. 27.

[16] Sartika Damopolii, *Tanggung Jawab Pidana Para Medis Terhadap Tindakan Malpraktek Menurut Undang-Undang Nomor 36 Tahun 2009 Tentang Kesehatan*, Jurnal *Lex Crimen*, Vol. VI, No. 6, Agustus 2017, page. 55.

[17] John Healy, 1991, *Medical Negligence Common Law Perspective*, Sweet & Maxwell, London, page. 39.

[18] Mohammad Fadli Dg. Patompo, *Kebijakan Formulasi Hukum Pidana Dalam Penanggulangan Malpraktek Keperawatan*, e Jurnal Katalogis, Volume 6 Nomor 4 April 2018, page. 51.

[19] Munir Fuady, 2005, *Sumpah Hippocrates dan Aspek Malpraktik Dokter*, Citra Aditya Bakti, Bandung, page. 4.

Negligence is one of the most common elements of medical malpractice. Malpractice itself has a literal meaning, failure to do the job. This failure can be caused by a variety of factors:[20]

a. The element of neglect.
   Negligence is the attitude of carelessness, doing its job inadvertently or improperly. But it can also be interpreted by giving actions below the standard of medical services.
b. The element of error acts.
   Errors in this action occur because of the lack of carefulness of doctors in observing patients so that things happen that are not desired together.
c. There is an element of violation of professional or legal rules.
   Violations of the rules of this profession occur when a doctor or health worker acts outside the limits of his authority.
d. Deliberate actions to do harm.
   Deliberate actions occur when a doctor or other health worker does things that are not supposed to be done just for reasons of profit.

An unexpected result in medical practice can actually be caused by several possibilities, namely:[21]

a. The results of an illness or complications of the disease that have nothing to do with medical action by a doctor.
b. The results of an unavoidable risk, namely:
   1) Risk that cannot be known in advance. Such risks are possible in medicine because the nature of empirical science and the nature of the human body are very varied and vulnerable to external influences.
   2) Risks which, although previously known, are considered acceptable, and have been informed to the patient and approved by the patient to be carried out, namely:
      a) The risks of a degree of probability and severity are quite small, can be anticipated, calculated, or controlled, for example side effects from drugs, bleeding, and infections in surgery and others;
      b) Risks that have a high degree of probability and severity in certain circumstances, that is if the risky medical action must be taken because it is the only way to be taken, especially in emergencies.

[20] Alexandra Indriyanti Dewi, *Op.Cit.*, page. 266.
[21] Ari Yunanto dan Helmi, *Op.Cit.*, page. 56.

2. The Doctor's Liability for Medical Negligence

The importance of legal aspects in health services aims to provide maximum health services in order to fulfill the basic rights of every human being. Health law covers the legal components of the health sector that intersect with each other, namely medical / dental law, nursing law, clinical pharmacy law, hospital law, public health law, environmental health law and so on.[22]

Patients also have the right to the health services they receive in Article 58 paragraph (1) of Law Number 36 of 2009 concerning Health, which states 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 negligence in the health services they receive."* The compensation referred to is a form of doctor's responsibility for medical services that causes harm to patients.

In the legal dictionary, responsibility is a necessity for a person to carry out what is required of him/her.[23] Legal responsibility as a result of further implementation of the role, both roles are rights and obligations or power. In general, legal responsibility is defined as an obligation to do something or behave in a certain way and not deviate from existing regulations."[24] Liability must have a basis, that is, a matter that causes legal rights for one person to sue another person as well as things that give birth to legal obligations someone else to give responsibility.[25]

The doctor's responsibility for malpractice actions that harm the patient can be divided into 2 (two) aspects, namely in the criminal and civil aspects. Prof. Moeljatno, SH, who argues that the definition of a criminal act which according to his term is a criminal act is an act that is prohibited by a law which prohibits accompanied by threats (sanctions) in the form of certain crimes, for anyone who violates the prohibition.[26] The concept of negligence in the Criminal Code is explained in Article 359 and Article 360 of the Criminal Code, which states that:

[22] Amri Amir dan M. Yusuf Hanafiah, 2008, *Etika Kedokteran dan Hukum Kesehatan*, edisi 4, Penerbit Buku Kedokteran EGC, page. 5.
[23] Andi Hamzah, 2005, *Kamus Hukum*, Ghalia Indonesia, page. 77.
[24] Khairunnisa, 2008, *Kedudukan, Peran dan Tanggung Jawab Hukum Direksi*, Pasca Sarjana, Medan, page. 4.
[25] Titik Triwulan dan Shinta Febrian, 2010, *Perlindungan Hukum bagi Pasien*, Prestasi Pustaka, Jakarta, page. 48.
[26] Moeljatno, 1987, *Asas-asas Hukum Pidana*, Bina Aksara, Jakarta, page. 54.

a. Article 359 of the Criminal Code: *"Anyone who fails to cause the death of another person is liable to a maximum imprisonment of five years or a maximum sentence of one year."*

b. Article 360 paragraph (1) of the Criminal Code: *"Whoever, because of his negligence, causes another person to be seriously injured, is liable to a maximum imprisonment of five years or a maximum sentence of one year."*

c. Article 360 paragraph (2) of the Criminal Code: *"Anyone who neglects to cause injury to others in such a way as to cause illness or obstruction of carrying out occupation or search for a certain period of time, is threatened with imprisonment for a maximum of nine months or a maximum sentence of six months or a fine the highest is three hundred rupiah."*

While the liability of doctors in the civil aspect, that responsibility in civil law can be requested based on the liability for losses due to acts against the law *(onrechtsmatigedaad)* or liability for losses due to default.[27]

Based on the law, the relationship between health workers refers to the Civil Code in Article 1365 of the Civil Code, Article 1366 of the Civil Code, and Article 1367 of the Civil Code. Article 1365 of the Civil Code regulates illegal acts which state that "Any violation of the law that brings harm to others means that the perpetrator causing the loss is obliged to demand compensation for the loss". Patients can sue a doctor because the doctor has committed an unlawful act. To determine a doctor to be responsible and make compensation, there must be a close relationship between mistakes and the harm caused. There are conditions that must be fulfilled to claim the loss of acts against the law in Article 1365 of the Civil Code, among others, as follows: 1) The existence of an act *(daad)* which includes qualifications of acts against the law; 2) There are errors *(dolus and / or culpa);* 3) There is a loss *(schade).*[28]

Losses arising from acts against the law can be either material or immaterial damages or it can be a combination of both. Unlike the case with compensation in a default case that only requires compensation in the form of material. The form of compensation known in civil law, namely:[29]

a. General compensation, i.e. that applies to all cases including acts against the law. The general compensation provisions by the Civil Code are regulated in Article 1243 - Article 1252 of the Civil Code which can be in the form of compensation and interest costs.
b. Special compensation, i.e. compensation that only arises from certain engagements.

F. CONCLUSION

Based on the discussion above, conclusions can be submitted, as follows:

1) Regarding the elements of medical negligence carried out by doctors, that humanistically, doctors as ordinary people certainly cannot be separated from negligence and negligence where the negligence that occurs when performing professional duties is what can lead to medical malpractice. Medical malpractice is the wrong action / negligence of a doctor in carrying out his professional obligations by not being careful and not following professional standards, medical service standards, operational standard procedures so as to cause patients to experience disabilities, injuries and even death to patients, where negligence can be caused by various kinds of factors, namely the element of negligence, the element of wrongdoing, and the element of violation of professional or legal rules, and the existence of intentional actions to do a detrimental.

2) Regarding the liability of doctors for medical negligence, that the liability of doctors for malpractice actions that harm the patient can be divided into 2 (two) aspects, namely in criminal aspects and civil aspects. In the Criminal Aspect, negligence is regulated and given sanctions in the Criminal Code, namely Article 359 of the Criminal Code, Article 360 paragraph (1) of the Criminal Code, and Article 360 paragraph (2) of the Criminal Code. In the Civil Aspect, liability in civil law can be requested based on liability for losses due to acts against the law *(onrechtsmatigedaad)* or liability for damages due to default, where for acts against the law regulated in the Civil Code, namely Article 1365 of the Civil

[27] Anny Isfandyarie, 2006, *Tanggung Jawab Hukum dan Sanksi bagi Dokter*, Prestasi Pustaka, Jakarta, page. 6.

[28] Widodo Tresno Novianto, *Penafsiran Hukum dalam Menentukan Unsur-Unsur Kelalaian Malpraktek Medik (Medical Malpractice)*, Jurnal Yustisia. Vol. 4 No. 2 Mei – Agustus 2015, page. 490.

[29] Munir Fuady, *Op.Cit.*, page. 134.

Code, Article 1366 of the Civil Code, and Article 1367 of the Civil Code , where the doctor's liability for losses arising from acts against the law can be either material or immaterial compensation or it can be a combination of both.

G. REFERENCES

Book

Alexandra Indriayanti Dewi, 2008, *Etika Hukum Kesehatan*, Pustaka Publisher, Yogyakarta.

Amri Amir dan M. Yusuf Hanafiah, 2008, *Etika Kedokteran dan Hukum Kesehatan*, edisi 4, Penerbit Buku Kedokteran EGC.

Andi Hamzah, 2005, *Kamus Hukum*, Ghalia Indonesia.

Anny Isfandyarie, 2006, *Tanggung Jawab Hukum dan Sanksi bagi Dokter*, Prestasi Pustaka, Jakarta.

Ari Yunanto dan Helmi, 2010, *Hukum Pidana Malpraktik Medik*, Penerbit Andi, Yogyakarta.

Black's *Law Dictionary*, 1979, St. Paul Minn: West Publishing, Co. Fifth Edition.

Cecep Triwibowo, 2014, *Etika dan Hukum Kesehatan*, NuhaMedika, Yogyakarta.

Eka Julianta Wahjoepramono, 2012, *Konsekuensi Hukum dalam Profesi Medik*, Karya Darwati, Bandung.

John Healy, 1991, *Medical Negligence Common Law Perspective*, Sweet & Maxwell, London.

Mahfud MD, 2001, *Dasar dan Struktur Ketatanegaraan Indonesia*, Rineka Cipta, Jakarta.

Moeljatno, 1987, *Asas-asas Hukum Pidana*, Bina Aksara, Jakarta.

Muladi, 2004, *Sumbang Saran Perubahan UUD 1945*, Yayasan Habibie Center.

Munir Fuady, 2005, *Sumpah Hippocrates dan Aspek Malpraktik Dokter*, Citra Aditya Bakti, Bandung.

M. Iqbal Mochtar, 2009, *Dokter Juga Manusia*, Gramedia Pustaka Utama, Jakarta.

Nusye KI. Jayanti, 2009, *Penyelesaian Hukum dalam Malpraktek Kedokteran*, Pustaka Yustisia, Yogyakarta.

Sahetapy, J.E., 2002, *Kejahatan Korporasi*, Cetakan Kedua, PT. Refina Aditama, Bandung.

Soekidjo Notoatmodjo, 2010, *Etika dan Hukum Kesehatan*, RinekaCipta, Jakarta.

Syahrul Machmud, 2012, *Penegakan Hukum dan Perlindungan Hukum Bagi Dokter Yang Diduga Melakukan Medikal Malpraktek*, KDP, Bandung.

Titik Triwulan dan Shinta Febrian, 2010, *Perlindungan Hukum bagi Pasien*, Prestasi Pustaka, Jakarta.

Journal and Legal Scientific Research

Cahyo Agi Wibowo, dkk., *Penolakan Pelayanan Medis Oleh Rumah Sakit Terhadap Pasien Yang Membutuhkan Perawatan Darurat*, Justitia Jurnal HukumVolume 1 No.1 April 2017.

Khairunnisa, 2008, *Kedudukan, Peran dan Tanggung Jawab Hukum Direksi*, Pasca Sarjana, Medan.

Mohammad Fadli Dg. Patompo, *Kebijakan Formulasi Hukum Pidana Dalam Penanggulangan Malpraktek Keperawatan*, e Jurnal Katalogis, Volume 6 Nomor 4 April 2018.

Pusat Penelitian dan Pengembangan Sistem Hukum Nasional Kementerian Hukum dan HAM RI, 2011, Laporan Akhir Penyusunan Kompedium Hukum Kesehatan, Kemenkumham RI, Jakarta.

Sartika Damopolii, *Tanggung Jawab Pidana Para Medis Terhadap Tindakan Malpraktek Menurut Undang-Undang Nomor 36 Tahun 2009 Tentang Kesehatan*, Jurnal *Lex Crimen*, Vol. VI, No. 6, Agustus 2017.

Widodo Tresno Novianto, *Penafsiran Hukum dalam Menentukan Unsur-Unsur Kelalaian Malpraktek Medik (Medical Malpractice)*, Jurnal Yustisia. Vol. 4 No. 2 Mei – Agustus 2015, hal. 490.

Legislation

International Covenant on Economic, Social and Cultural Rights.

Criminal Code.

Civil Code.

Indonesia, the Constitution of the Republic of Indonesia Year 1945.

_____, Law Number 36 of 2009 concerning Health.

_____, Law Number 29 of 2004 concerning Medical Practice.

_____, Minister of Health Regulation No. 290 / MENKES / PER / III / 2008 concerning the Approval of Medical Measures.

LEGAL CERTAINTY AGAINST ARTICLE 19 PARAGRAPH (3) LAW NUMBER 8 OF 1999 CONCERNING CONSUMER PROTECTION IN PROVIDING FAKE VACCINES AS AN EFFORT TO LEGAL PROTECTION OF CONSUMERS

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ABSTRACT

Fake vaccines circulating in Indonesia, packed in such a way that it is very difficult for ordinary people to know except through laboratory tests or information from health workers. The problem arises that there is no explanation of Article 19 Paragraph (3) of Law Number 8 of 1999 concerning Consumer Protection, thus causing legal uncertainty on the fate of toddlers and parents who are proven to be given fake vaccines for their rights to obtain compensation. The problem of this research is How is the legal certainty to Article 19 paragraph (3) of Law Number 8 of 1999 concerning Consumer Protection in case of giving fake vaccine? This research is normative law research, using approach of law. The data used in this study is secondary data and analyzed through qualitative descriptive analysis. The result of this research is legal certainty to Article 19 paragraph (3) of Law Number 8 of 1999 concerning Consumer Protection in case of giving fake vaccine not fulfilled, because there is no explanation of Article 19 paragraph (3) of Law Number 8 of 1999 concerning Consumer Protection, causing legal uncertainty in the provision of compensation to consumers of fake vaccine victims, so that when there is a difference, will cause interpretation for various parties..

Keywords: Fake Vaccine, Legal Protection, Consumer.

A. INTRODUCTION

The availability of vaccines is one of the government's commitments in implementing health services for the community.[1] Letter a Consideration of Law Number 36 of 2009 concerning Health, states:

> "Health is a human right and is one of the elements of welfare that must be realized in accordance with the ideals of the Indonesian people as referred to in the Pancasila and the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution)."
>
> Clause d Consideration of Law Number 36 of 2009 concerning Health, also states:
>
> "Every development effort must be based on health insight in the sense that national development must pay attention to public health and is the responsibility of all parties, both government and society".[2]

The efforts that have been made by the government certainly aim to maintain public health. This effort, in fact, was hampered by the circulation of fake vaccines. The circulation of fake vaccines has consequences for legal issues and serious public health problems. Fake vaccines certainly violate the provisions in the field of intellectual property rights, because the licensee, in this case the drug manufacturer will be violated, this also harms the community as the recipient of the vaccine because besides buying goods that are not useful, health conditions can experience interference due to consuming fake vaccine.

Fake vaccines circulating in Indonesia are packaged in such a way that it is very difficult for ordinary people to know except through laboratory tests or information from health workers. The government should be able to make various efforts to ensure the quality of vaccines through the prevention and supervision of the circulation of fake vaccines. People who are victims of the use of fake vaccines, generally there are still many who do not know their rights as consumers. The community still considers that vaccines given by health workers are generally safe and suitable for consumption. As is well known, fake producers of vaccines take advantage of the weaknesses of vaccine production and distribution in Indonesia, where there has been a scarcity of vaccines in Indonesia, so that manufacturers of fake vaccines can easily distribute their products to several hospitals in Indonesia.[3] This happened in the case of a fake vaccine carried out by a married couple in Bekasi.

In this case, a married couple, Hidayat Taufiqurahman and Rita Agustina produced fake vaccines in Kemang Pratama Regency, Rawalumbu District, Bekasi City. Police seized fake vaccine-making equipment and raw materials that will be used

[1] Sri Siswati, *Etika dan Hukum Kesehatan*, Jakarta: Raja Grafindo Persada, 2013, p. 17.
[2] Law Number 36 of 2009 concerning Health.
[3] https://m.tempo.co/read/news/2016/07/18/083788473/idi-pemerintah-tidak-peduli-vaksin-langka-sejak-2011, accessed on January 13, 2020.

as vaccines and thousands of bottles of vaccine packaging. According to the Director of Economic and Special Crimes of the Criminal Investigation Police Brigadier General Agung Setya said the Counterfeit Vaccine Handling Task Force has identified there are 197 toddlers suspected of being victims of fake vaccines.[4] According to Member of the House of Representatives Commission IX Karolin Margret Natasa said, the practice of producing and distributing fake vaccines has been going on since 2003.[5]

For this case, it is necessary to make legal protection efforts to the fate of toddlers and their parents who are proven to have been given fake vaccines, bearing in mind the toddlers and their parents are victims. This is in accordance with Article 1 number 1 of Law Number 8 of 1999 concerning Consumer Protection, which confirms "all efforts that guarantee legal certainty to provide protection to consumers". The legal certainty to provide protection to consumers, among others, is to increase the dignity of consumers and open access to information about goods and / or services for them, and foster an honest and responsible business actor's attitude.[6]

The problem arises is that based on Article 19 paragraph (3) of Law Number 8 of 1999 concerning Consumer Protection, which confirms that the compensation is carried out within 7 (seven) days after the transaction date. In the Elucidation of Law No. 8 of 1999 concerning Consumer Protection, there is no specific explanation regarding the article, causing legal uncertainty towards the fate of children under five and their parents who are proven to have been given fake vaccines for their rights to obtain compensation. That is because the victims of the fake vaccine have been years since using fake vaccines. The author considers that there is a vague meaning in the article, as in this case where consumers know after a few months or years later that they have become victims of fake vaccines, whether they can still get compensation from business actors considering the transaction has passed 7 (seven) day.

B. PROBLEM STATEMENT

Based on the background above, the problem in this study is how is legal certainty with respect to Article 19 paragraph (3) of Law Number 8 of 1999 concerning Consumer Protection in the case of providing fake vaccines?

C. LITERATURE RIVIEW

Vaccines are biological products made from germs, the component of germs that have been attenuated or killed which are useful for stimulating the emergence of specific active immunity against certain diseases.[7] All vaccines are vulnerable biological products that require special treatment. After a time, the vaccine will lose its potential, which is the ability to provide protection against a diseaset.[8] Vaccines can be classified as follows:

1. Classification based on antigen origin

Based on the origin of the antigen, the vaccine can be divided into:

a. Live vaccines are attenuated
   Live vaccines are made from viruses or wild bacteria that cause disease. Wild viruses or bacteria are attenuated in the laboratory, usually by repeated propagation. This vaccine is unstable and easily damaged when exposed to heat and light, therefore this class of vaccines must be managed and stored properly and carefully.
   Attenuated live vaccines derived from live viruses include measles, mumps, rubella, polio, rotavirus and yellow fever vaccines, while live vaccines originating from bacteria, namely BCG vaccine and oral typhoid fever.
b. The vaccine died inactivated
   Inactivated vaccine is produced by bacterial or viral breeding in the culture medium, then is made active by the addition of chemicals (usually formalin).[9] The inactivated vaccine currently available comes from:
   1) All inactivated viral cells, for example influenza, polio, rabies and hepatitis A.
   2) All inactivated bacteria, for example pertussis, typhoid, and cholera.
   3) Toxoid, for example diphtheria and tetanus.
   4) Pure polysaccharides, for example pneumococci and meningococci.
   5) Combined polysaccharides.
c. Recombinant (genetic engineering)
   Vaccine antigens can also be produced by genetic engineering. This product is often referred to as a recombinant vaccine, for example vaccines from genetic engineering that are currently available, namely the hepatitis B vaccine and typhoid vaccine.

2. Classification based on sensitivity to temperature.

The class of this vaccine, is:

a. Vaccines that are sensitive to cold temperatures below 0 C, namely freeze sensitive or freeze sensitive vaccines. Vaccines that are classified in this type are hepatitis B (in the vial or prefil injection

[4] http://www.antaranews.com/berita/572774/polisi-ada-197-balita-terpapar-vaksin-palsu., accessed on January 13, 2020.
[5] http://nasional.kompas.com/read/2016/06/30/11550991/-pemerintah.diminta.bergerak.cepat.hentikan.peredaran.vaksin.palsu., accessed on January 13, 2020.
[6] Adrian Sutedi, *Tanggung Jawab Produk Dalam Hukum Perlindungan Konsumen,* Bogor: Ghalia Indonesia, 2008, p. 8.
[7] William E Paul, *Fundamental Immunology, 5 Th Ed*, Philadelphia: Lipincott William dan Wilkins Company, 2003, p. 1328.
[8] *Ibid*.
[9] *Ibid*.

device packaging, DPT, DVT HB, DT, and TT.

b. Vaccines that are sensitive to excess heat (> 34 C), i.e. heat sensitive or heat sensitive vaccines, such as BCG, polio, and measles.[10]

D. RESEARCH METHOD

1. Types of Research

This research is basically a normative juridical study, because the target of this study is the normative law or method in the form of legal principles and the legal system.[11] Normative research in this study is research that describes or describes in detail, systematic, comprehensive and in-depth about the rationale for legal certainty with respect to Article 19 paragraph (3) of Law Number 8 of 1999 concerning Consumer Protection in the case of providing fake vaccines

2. Nature of Research

This research is descriptive because it illustrates the applicable laws and regulations and is associated with legal theories in the practice of its implementation relating to the problem to be examined.

3. Data Analysis

The data obtained will be analyzed by qualitative analysis.

E. ANALYSIS AND DISCUSSION

Arrangements for compensating consumers are regulated in Article 19 paragraph (3) of Law Number 8 of 1999 concerning Consumer Protection. In theory, after consumers feel disadvantaged against the goods / services of business actors, consumers can ask for compensation within 7 (seven) days after the transaction date. In its implementation, the victims of the fake vaccine only learned after years of using the fake vaccine.

Based on this, according to the Author, if based on Article 19 paragraph (3) of Law Number 8 of 1999 concerning Consumer Protection, it will cause legal uncertainty for the rights of consumers of fake vaccines, due to a grace period of 7 (seven) days after the transaction date has passed. According to the author, in the absence of explanation of Article 19 paragraph (3) of Law Number 8 of 1999 concerning Consumer Protection, there is legal uncertainty in providing compensation to consumers who are victims of fake vaccines, so that when a difference occurs, it will lead to interpretations for various parties. By using the definition of legal certainty from Satjipto Rahardjo[12] that legal certainty is certainty from the legislation and the existence of public compliance with the law, the implication is:

1. With Respect To Statutory Regulations

In Article 19 paragraph (3) of Law Number 8 of 1999 concerning Consumer Protection states "compensation is carried out within a period of 7 (seven) days after the date of the transaction." According to the author, normatively, the regulation is good and very clear in the provision of compensation to consumers for goods / services of business actors. However, in its implementation, there are still obstacles which in the end is the uncertainty of the law and regulations. This happened in the case of fake vaccines carried out by husband and wife in Bekasi, which in fact the victims of the fake vaccines only found out after years of using fake vaccines.

Based on this, it is evident that Article 19 paragraph (3) of Law Number 8 of 1999 concerning Consumer Protection does not have legal certainty for victims of fake vaccines who only find out after years of using fake vaccines, whereas according to Article 19 paragraph (3) of Law Number 8 of 1999 concerning Consumer Protection, compensation is implemented within 7 (seven) days after the transaction date. It needs to be understood that speaking of legal certainty must also speak of justice. Why is that? Legal certainty is indeed not justice so justice is also not legal certainty. But legal certainty must accommodate justice. Because justice can be realized, one of which is through legal certainty.

2. Against the Parties Themselves

Hospitals as business operators and medical personnel have a legal obligation to carry out the mandate in Act Number 36 of 2009 concerning Health, Act Number 44 of 2009 concerning Hospitals, and Act Number 8 of 1999 concerning Consumer Protection, because according to The author, both hospitals and medical personnel are obliged to obey and comply with the provisions set by the government as an effort to create legal certainty.

Given the fact that several hospitals and medical personnel in Bekasi produce and distribute fake vaccines, it has legal consequences for the parties, namely both the legal consequences of civil law relating to losses to consumers, as well as criminal legal consequences relating to counterfeiting of products, and cases can be submitted to the court, so according to the author will be very detrimental to both parties, because it will lose in terms of time, energy, thoughts, and also in terms of material.

3. Negative Legal Implications in the Case of Fake Vaccines

The implication comes from the community that the people can no longer trust the laws and regulations made by the government. That is because

[10] World Health Organization, *Ensuring Quality of Vaccines at Country Level a Guidelines for Health Staff*, WHO, 2002, p. 7.
[11] Soerjono Soekanto dan Sri Mamuji, *Penelitian Hukum Normatif-Suatu Tinjauan Singkat*, Jakarta: Rajawali Press, 2007, p. 10.
[12] Satjipto Rahardjo, *Hukum Progresif, Sebuah Sintesa Hukum Indonesia*, Yogyakarta: Genta Publishing, 2009, p. 19.

the legal products produced by the government cannot accommodate the rights of the community, especially victims of fake vaccines who only find out after years of using fake vaccines.

The author believes, thus it can be concluded that the provisions governing the granting of compensation to consumers in Article 19 paragraph (3) of Law Number 8 of 1999 concerning Consumer Protection does not cause legal certainty to be achieved. Precisely at this time the law does not provide legal certainty in granting compensation to consumers because of the imperfect provisions of the article in implementing regulations.

Furthermore, according to the Author, the Pancasila Law State is a country whose values in the law have the spirit of Pancasila. A law that is a law, as long as it is formed by the Parliament and the President by taking into account the provisions of Law Number 12 of 2011 concerning the Formation of Legislation, is considered to have contained Pancasila. Pancasila is contained in the Preamble to the 1945 Constitution which is the mode of vivendi (noble agreement) of the Indonesian people to live together in the bonding of a pluralistic nation.

It can also be called a sign of birth (deed) because as a mode of vivendi it contains statements of independence (proclamation) as well as self-identity and stepping steps to achieve the ideals of the nation and the goals of the state. If the Preamble is amended, the existing Indonesia will not be the one issued on August 17, 1945, but another Indonesia.

From a legal standpoint, the Opening of the 1945 Constitution which contained Pancasila became the basis of the state philosophy which gave birth to a legal ideal (rechtside) and the basis of its own legal system in accordance with the spirit of the Indonesian people themselves. Pancasila as the basis of the state becomes the source of all sources of law that provide legal guidance and overcome all statutory regulations including the Basic Law. In such a position, the Preamble of the 1945 Constitution and the Pancasila which it contained became staatsfundamentalnorms or the principles of fundamental rules and could not be changed by the law, unless changes were made to the Indonesian identity of the original born in 1945.

Thus giving compensation to consumers reflects the non-Pancasila-minded law, because if it is Pancasila-minded, then the implementation of Article 19 paragraph (3) of Law Number 8 of 1999 concerning Consumer Protection has reflected or even brought about legal certainty. According to the author, so that the implementation of Article 19 paragraph (3) of Law Number 8 of 1999 concerning Consumer Protection can be achieved, it is necessary to revise Article 19 paragraph (3) of Law Number 8 of 1999 concerning Consumer Protection by containing an explanation of Article 19 paragraph (3) of Law Number 8 of 1999 concerning Consumer Protection, in order to be in accordance with the principles of making laws contained in Article 5 letter f of Law Number 12 of 2011 concerning Formation of Regulations of Legislation especially the principle of clarity of the formulation, whereby each statutory regulation must meet the technical requirements for the drafting of statutory regulations, systematic, choice of words or terms, as well as clear and easily understood legal language so as not to cause various interpretations in its implementation so that legal certainty in providing compensation to consumers can be achieved.

F. Conclusion

Legal certainty regarding Article 19 paragraph (3) of Law Number 8 of 1999 concerning Consumer Protection in the case of providing fake vaccines is not fulfilled, because there is no explanation of Article 19 paragraph (3) of Law Number 8 of 1999 concerning Consumer Protection, giving rise to legal uncertainty in providing compensation to consumers of fake vaccine victims, so that when a difference occurs, it will lead to interpretations for various parties. This has implications for various things, namely the laws and regulations, in this case Article 19 paragraph (3) of Law Number 8 of 1999 concerning Consumer Protection does not have legal certainty for victims of the fake vaccine who only found out after many years since using fake vaccines. In addition, the parties themselves, in this case, are hospitals and medical personnel in Bekasi that produce and distribute fake vaccines, which results in both civil and civil law. Negative implications also come from the community that the community can no longer trust the laws and regulations made by the government. That is because the legal products produced by the government cannot accommodate the rights of the community, especially victims of fake vaccines who only find out after years of using fake vaccines.

REFERENCES

Books

Paul, William E. *Fundamental Immunology, 5 Th Ed*, Philadelphia: Lipincott William dan Wilkins Company, 2003.

Rahardjo, Satjipto, *Hukum Progresif, Sebuah Sintesa Hukum Indonesia*, Yogyakarta: Genta Publishing, 2009.

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.

Sutedi, Adrian, *Tanggung Jawab Produk Dalam Hukum Perlindungan Konsumen*, Bogor: Ghalia Indonesia, 2008.

World Health Organization, *Ensuring Quality of Vaccines at Country Level a Guidelines for Health Staff*, WHO, 2002.

Internet:

https://m.tempo.co/read/news/2016/07/18/083788473/idi-pemerintah-tidak-peduli-vaksin-langka-sejak-2011, accessed on January 13, 2020.

http://www.antaranews.com/berita/572774/polisi-ada-197-balita-terpapar-vaksin-palsu., accessed on January 13, 2020.

http://nasional.kompas.com/read/2016/06/30/11550991/pemerintah.diminta.bergerak.cepat.hentikan.peredaran.vaksin.palsu., accessed on January 13, 2020.

Legislation

Indonesia, The 1945 Constitution of the Republic of Indonesia.

Indonesia, Law Number 36 of 2009 concerning Health.

Indonesia, Law Number 8 of 1999 concerning Consumer Protection.

HUMAN RIGHTS PROTECTION AGAINST PATIENTS IN HEALTH SERVICES

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ABSTRACT

Welfare is a human right that must be obtained by every human being as guaranteed in Article 28 H paragraph (1) of The constitution of The Republic of Indonesia Year 1945, One of them is health services as one of the most fundamental and absolute aspects of human rights. Health services can only be provided by certain parties that work in the field of health, One isa doctor who, in any medical treatment that a doctor does to a patient, must first get approval, either verbally or written to the patient and / or the patient's family and thereby create a legal relationship binding to the term the therapeutic agreement. But often there are many problems where the patient is often a party who is in a weak position and does not have a bargaining position that is beneficial to him. Therefore there is a need for legal protection for patients so that human rights in receiving health services can be fulfilled. This research has 2 (two) problem formulations, first: what are the rights that should be obtained by patients in health services; and second: what forms of legal protection and legal efforts that a patient can do if his rights in health services are violated. The research method in writing this journal is juridical-normative legal research, with secondary data covering primary legal materials, namely The constitution of The Republic of Indonesia Year 1945, the Civil Code, Law No. 8 Year 1999 concerning Consumer Protection, Law No. 29 Year 2004 concerning Medical Practice, Law No. 44 Year 2009 concerning Hospitals, Law No. 36 Year 2009 concerning Health, Law No. 36 Year 2014 concerning Health Workers, and Minister of Health Regulation No. 290/MENKES/PER/III/2008 Regarding the Approval of Medical Measures, secondary legal materials namely legal literature that related to health law, such as health law books, legal journals and thesis / legal scientific research that discusses health law, and tertiary legal materials which including the Big Indonesian Dictionary (KBBI), and others.

Keywords: Human Rights, Health Services, Patients, Legal Protection.

A. INTRODUCTION

Welfare is a human right that must be obtained by every human being.[1] The concept of welfare can be formulated as an equivalent meaning from the concept of human dignity which can be seen from 4 (four) indicators, namely: (1) security, (2) welfare, (3) freedom, and (4)) identity (Identity). Welfare or prosperity can have four meanings (Big Indonesian Dictionary), which are safe and prosperous; congratulations (despite all kinds of disturbances).[2]

Because welfare is a human right, the state should guarantee the welfare of each of its citizens as mandated by Article 28I paragraph (4) of The constitution of The Republic of Indonesia Year 1945, that: *"Protection, promotion, enforcement and fulfillment human rights are the responsibility of the state, especially the government."* Guarantees for the welfare of every citizen are listed in Article 28 H paragraph (1) of The constitution of The Republic of Indonesia Year 1945, that: *"every person has the right to live in peace and prosperity, to live and to have a living environment good and healthy and are entitled to receive health services"*. Health is a component of welfare as one of the important aspects of Human Rights as stated in Article 25 paragraph (1) of the United Nations Declaration of Human Rights (UN) dated November 10, 1948, that: *"Everyone has the right to an adequate standard of living for the health and well-being of himself and his family "*.

In the Indonesian laws and regulations listed in Article 4 of Law No. 36 Year 2009 concerning Health, that: *"Everyone has the right to health"*, so based on that article that the community has the right to health services as the most basic and absolute human rights. Health services can only be provided by certain parties, bearing in mind that health services are the basic right of every human being, so that it is regulated regarding restrictions on the authorities in

[1] Nasikun, 1993, *Sistem Sosial Indonesia*, PT. Raja Grafindo Persada, Jakarta, page. 27.
[2] https://kbbi.web.id/sejahtera, accessed on 3 November 2019 at 18:30 WIB.

carrying out health services based on Article 23 paragraph (1) of Law No. 36 Year 2009 concerning Health, that: *"Health workers are authorized to organize health services."* The referred health workers consist of doctors, dentists, pharmacists, midwives, nurses, and others as parties who work in the health sector.

Implementation of medical measures based on Article 1 point 3 of Minister of Health Regulation No. 290/MENKES/PER/III/2008 Regarding the Approval of Medical Measures referred to as medical measures, can be in the form of preventive, diagnostic, therapeutic or rehabilitative measures taken by doctors against patients where the medical action must be approved in advance, both verbally or in writing. Therefore, the legal relationship that arises between health workers, especially doctors with patients and/or patients' families in health services, one of which is that in the approval of medical actions, a legal relationship has been established which is binding as a therapeutic agreement based on the existence of an agreement, namely an agreement where doctors try their best to cure patients.[3] So that the existence of the legal relationship raises the existence of legal protection in which patients here are seated as consumers with the right to get services in the form of health services from health workers.

But in reality in the therapeutic agreement between the doctor and the patient and / or the patient's family often causes many problems that usually occur because one party does not carry out its role as expected by the other party, especially for patients where the therapeutic agreement does not work well, one of them is because the party health services providers are often unable to establish good communication and patients are often the ones who are in a weak position and do not have a favorable bargaining position for themselves.[4] Therefore it is important to analyze the patient's rights, forms of legal protection, and legal remedies that can be done by the patient so that human rights, namely health services to patients can be fulfilled to the maximum.

B. PROBLEM STATEMENT

Problem formulation in this study:

1. What are the rights that should be obtained by patients in health services?
2. What forms of legal protection and legal efforts that a patient can do if his rights in health services are violated?

C. LITERATURE REVIEW

Legal Protection

Legal protection consists of two words, namely protection and law, where protection is a series of activities to guarantee and protect someone, while the law is a whole of the regulations that must be obeyed by everyone and those who break them are subject to sanctions.[5] According to Setiono, legal protection is an act or an effort to protect the community from arbitrary acts by the authorities that are not in accordance with the rule of law, to realize order and order to enable humans to enjoy their dignity as human beings.[6] There are 2 (two) forms of legal protection, firstly preventive legal protection means that the people are given the opportunity to express their opinions before the government's decision gets a definitive form that aims to prevent disputes. Second, repressive legal protection aimed at resolving disputes.[7]

D. RESEARCH METHODS

The research method in writing this journal is juridical-normative legal research, with secondary data covering primary legal materials, namely The constitution of The Republic of Indonesia Year 1945, the Civil Code, Law No. 8 Year 1999 concerning Consumer Protection, Law No. 29 Year 2004 concerning Medical Practice, Law No. 44 Year 2009 concerning Hospitals, Law No. 36 Year 2009 concerning Health, Law No. 36 Year 2014 concerning Health Workers, and Minister of Health Regulation No. 290/MENKES/PER/III/2008 Regarding the Approval of Medical Measures, secondary legal materials namely legal literature that related to health law, such as health law books, legal journals and thesis / legal scientific research that discusses health law, and tertiary legal materials which including the Big Indonesian Dictionary (KBBI), and others.

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[3] Syahrul Machmud, 2008, *Penegakan Hukum dan Perlindungan hukum Bagi Dokter yang Diduga Melakukan Medikal Malpraktek*, Mandar Maju, Bandung, page. 46.

[4] Yuliati, 2005, *Kajian Yuridis Perlindungan Hukum bagi Pasien dalam Undang-Undang RI No 29 Tahun 2004 Tentang Praktik Kedokteran berkaitan dengan malpraktik*, Fakultas Hukum Universitas Brawijaya, Malang, page. 3.

[5] Edi Warman, 2003, *Perlindungan Hukum Bagi Korban Kasus-Kasus Pertanahan*, Pustaka Bangsa Press, Medan, page. 59.

[6] Setiono, 2004, *Rule of Law (Supremasi Hukum)*, Magister Ilmu Hukum Program Pascasarjana Universitas Sebelas Maret, Surakarta, page. 3.

[7] Philipus M. Hadjon, 1987, *Perlindungan Hukum Bagi Rakyat Di Indonesia. Sebuah Studi Tentang Prinsip-prinsipnya. Penanganannya oleh Pengadilan dalam Lingkungan Peradilan Umum dan Pembentukan Peradilan Administrasi Negara*, PTBina Ilmu, Surabaya, page. 5.

E. ANALYSIS AND DISCUSSION

1. Rights That Should be Obtained by Patients in Health Services

Rights and obligations are not a collection of rules or regulations, but a balance of power in the form of individual rights on the one hand which is reflected in obligations to the opposing party, these rights and obligations are given by law.[8] Health law covers the legal components of the health sector that intersect with each other, namely medical / dental law, nursing law, clinical pharmacy law, hospital law, public health law, environmental health law and so on.[9] The relationship between the patient and the doctor cannot be seen as something that stands alone, but rather as part of the overall relationship between health services and the community.[10] Therefore the patient's relationship with health workers in obtaining health services is entwined in an Agreement referred to as a Therapeutic Agreement.

In terms of discussing the rights of patients in health services, the patient's position is as a consumer as Article 1 point 2 of Law No. 8 Year 1999 concerning Consumer Protection, that: *"Consumers are every user of goods and / or services available in the community, both for the benefit of themselves, their families, other people and other living things and not for trade."* Because patients are consumers who receive health services provided by doctors, in general patients are also protected by Law No. 8 Year 1999 concerning Consumer Protection, whose rights are listed in Article 4, that: *"Consumer rights are:*

a) The right to comfort, security and safety in consuming goods and / or services;
b) the right to choose goods and / or services and to obtain said goods and / or services in accordance with the exchange rate and conditions and guarantees promised;
c) the right to information that is true, clear, and honest about the condition and guarantee of goods and / or services;
d) the right to be heard and complain about the goods and / or services used;
e) the right to obtain appropriate advocacy, protection and efforts to resolve consumer protection disputes;
f) the right to receive guidance and consumer education;
g) the right to be treated or served properly and honestly and not discriminatory;
h) the right to receive compensation, compensation and / or compensation, if the goods and / or services received do not comply with the agreement or are not as intended;
i) rights regulated in the provisions of other laws and regulations."

In addition to the rights as regulated in the Consumer Protection Act, the rights of patients are also guaranteed in the lex specialis law which regulates more specifically regarding health services aimed at providing protection for patients, namely in Article 52 of Law No. 29 Year 2004 concerning Medical Practice, that: *"Patients, in receiving services in medical practice, have the right:*

a) get a complete explanation of the medical treatment referred to in article 45 paragraph (3);
b) ask for the opinion of a doctor or other doctor;
c) get services according to medical needs;
d) refuse medical treatment;
e) get the contents of the medical record."

In addition, the patient's rights are also listed in article 32 of Law No. 44 Year 2009 concerning Hospitals, that: *"Every patient has the right:*

a) obtain information about the rules and regulations that apply in hospitals;
b) obtain information about the rights and obligations of patients;
c) obtain services that are humane, fair, honest and without discrimination;
d) obtain quality health services in accordance with professional standards and operational procedure standards;
e) obtain effective and efficient services so that patients avoid physical and material losses;
f) submit complaints about the quality of service obtained;
g) choosing a doctor and a treatment class in accordance with his wishes and the applicable regulations in the Hospital;
h) ask for consultations about the disease he suffered from other doctors who have a

[8] Sudikno Mertokusumo, 2005, Mengenal Hukum Suatu Pengantar, liberty, Yogyakarta, page. 40.
[9] Amri Amir dan M. Yusuf Hanafiah, 2008, *Etika Kedokteran dan Hukum Kesehatan*, edisi 4, Penerbit Buku Kedokteran EGC, page. 5.
[10] H.J.J. Leenen dan P.A.F. Lamintang, 1991, *Pelayanan Kesehatan dan Hukum*, ctk. Pertama, Bina Cipta, Bandung, page. 62.

Practice License (SIP) both inside and outside the Hospital;

i) *get the privacy and confidentiality of the illness suffered including medical data;*
j) *obtain information that includes diagnosis and procedures for medical treatment, the purpose of medical treatment, alternative actions, risks and complications that may occur, and the prognosis for the actions taken and the estimated cost of treatment;*
k) *approve or refuse actions to be taken by health workers for their illnesses;*
l) *accompanied by his family in critical condition;*
m) *carrying out worship according to religion or beliefs adopted as long as it does not interfere with other patients;*
n) *obtain security and safety during treatment in the Hospital;*
o) *submit proposals, suggestions, improvements to the hospital's treatment of him;*
p) *refuse spiritual guidance services that are not in accordance with the religion and beliefs professed;*
q) *suing and / or suing the Hospital if the Hospital is suspected of providing services that are not in accordance with standards either civil or criminal; and*
r) *complaining about hospital services that are not in accordance with service standards through print and electronic media in accordance with statutory provisions."*

2. Legal Protection as well as Patient's Legal Efforts in Health Services

Legal protection consists of two words, namely protection and law, where protection is a series of activities to guarantee and protect someone, while the law is a whole of the regulations that must be obeyed by everyone and those who break them are subject to sanctions.[11] According to Setiono, legal protection is an act or an effort to protect the community from arbitrary acts by the authorities that are not in accordance with the rule of law, to realize order and order to enable humans to enjoy their dignity as human beings.[12] There are 2 (two) forms of legal protection, firstly preventive legal protection means that the people are given the opportunity to express their opinions before the government's decision gets a definitive form that aims to prevent disputes. Second, repressive legal protection aimed at resolving disputes.[13]

The need for a legal protection for patients in health services because health workers are obliged to provide health services according to the size or standard of health services to patients as consumers of health services. The patient's right is to get compensation if the service received is not as it should be. Important legal protections discussed in this journal are repressive legal protections in the event of a loss to the patient and how to resolve the dispute.

By Civil Law, the patient has the right to claim compensation on the basis of default which according to article 1234 of the Civil Code, achievement can be in the form of giving something, doing something, and not doing something. In an agreement, one party is entitled to an achievement and the other party is obliged to achieve. Where the party entitled to demand an achievement in this case can be doctors or patients. Instead the doctor or patient can be the party that is obliged to fulfill the achievement. And if this achievement is not in accordance with what was promised, it can demand the fulfillment of that achievement. In addition, it can also claim compensation based on unlawful acts committed by doctors based on Article 1365 of the Civil Code, that: "Every act that violates the law, which brings harm to others, obliges the person who because of his mistake to publish the error, compensates for the loss", so that patients can take legal action by suing a doctor for unlawful acts. To be able to file a lawsuit based on Unlawful Acts, four conditions must be fulfilled as mentioned in Articles 1365 and 1401 of the Civil Code, namely:[14]

1) The patient must experience a loss.
2) There is an error or negligence (beside the individual; the hospital can also be responsible for the mistakes or omissions of its employees).
3) There is a causal relationship between loss and error.
4) The act is against the law.

In addition, doctors as health workers can also be prosecuted on the basis of negligence resulting in losses to patients where the lawsuit on the basis of negligence is regulated in Article 1366 of the Civil

[11] Edi Warman, *Op.Cit.,* page. 59.
[12] Setiono, *Op.Cit.*, page. 3.
[13] Philipus M. Hadjon, *Op.Cit.,* page. 5.
[14] Yunanto, Pertanggungjawaban Dokter Dalam Transaksi Terapeutik, Jurnal *Law reform* – April 2011 Vol. 6 No.1, page. 111.

Code, that: *"Everyone is responsible not only for losses caused by his actions, but also for losses caused due to negligence or carelessness"*.

In the consumer protection law, due to the patient's position as a consumer receiving health services, the patient also gets legal protection under Law No. 8 Year 1999 concerning Consumer Protection, so that legal action can be taken to resolve disputes or disputes that refer to the Consumer Protection Act, which is in the form of filing a lawsuit against business actors, in this case hospitals / doctors, both to public justice institutions and to an institution specifically authorized to settle disputes between consumers and business actors.

Likewise in the Health Act which has regulated the patient's right to claim compensation for those who cause harm to him in health services, as in Article 58 paragraph (1) Law No. 36 Year 2009 concerning Health, that*: "Everyone has the right to claim compensation for a person, health worker, and / or health provider that causes losses due to errors or negligence in the health services they receive"*, so it is expected that with legal protection against patients can accommodate patients in obtaining their human rights in health services.

F. CONCLUSION

Based on the formulation of the problem as discussed in this journal, the conclusion that can be given, namely the rights of patients has been regulated and guaranteed in several relevant laws and regulations, which includes Law No. 8 Year 1999 concerning Consumer Protection, Law No. 29 Year 2004 concerning Medical Practice, and Law No. 44 Year 2009 concerning Hospitals, where there is a need for legal protection given to patients so that their rights can be fulfilled maximally. Legal protection for patients has also been accommodated in several laws and regulations such as the Civil Code, Law No. 8 Year 1999 concerning Consumer Protection, and Law No. 36 Year 2009 concerning Health, in which the legal remedy mechanism in the form of claims for compensation against a person, health workers, and / or health providers that cause harm to patients for health services provided.

G. REFERENCES

Book

Amri Amir dan M. Yusuf Hanafiah, 2008, *Etika Kedokteran dan Hukum Kesehatan*, edisi 4, Penerbit Buku Kedokteran EGC.

Edi Warman, 2003, *Perlindungan Hukum Bagi Korban Kasus-Kasus Pertanahan*, Pustaka Bangsa Press, Medan.

H.J.J. Leenen dan P.A.F. Lamintang, 1991, *Pelayanan Kesehatan dan Hukum*, ctk. Pertama, Bina Cipta, Bandung.

Nasikun, 1993, *Sistem Sosial Indonesia*, PT. Raja Grafindo Persada, Jakarta.

Philipus M. Hadjon, 1987, *Perlindungan Hukum Bagi Rakyat Di Indonesia. Sebuah Studi Tentang Prinsip-prinsipnya. Penanganannya oleh Pengadilan dalam Lingkungan Peradilan Umum dan Pembentukan Peradilan Administrasi Negara*, PTBina Ilmu, Surabaya.

Sudikno Mertokusumo, 2005, Mengenal Hukum Suatu Pengantar, liberty, Yogyakarta.

Syahrul Machmud, 2008, *Penegakan Hukum dan Perlindungan hukum Bagi Dokter yang Diduga Melakukan Medikal Malpraktek*, Mandar Maju, Bandung.

Journal and Legal Scientific Research

Setiono, 2004, *Rule of Law (Supremasi Hukum)*, Magister Ilmu Hukum Program Pascasarjana Universitas Sebelas Maret, Surakarta.

Yuliati, 2005. *Kajian Yuridis Perlindungan Hukum Bagi Pasien Dalam Undang-Undang RI Nomor 29 Tahun 2004 Tentang Praktik Kedokteran Berkaitan Dengan Malpraktik*, Fakultas Hukum Universitas Brawijaya, Malang.

Yunanto, Pertanggungjawaban Dokter Dalam Transaksi Terapeutik, Jurnal *Law reform* – April 2011 Vol. 6 No.1.

Legislation

United Nations Declaration of Human Rights (UN).

Civil Code.

Indonesia, The constitution of The Republic of Indonesia Year 1945.

_____, Law No. 8 Year 1999 concerning Consumer Protection.

_____, Law No. 29 Year 2004 concerning Medical Practice.

_____, Law No. 44 Year 2009 concerning Hospitals.

_____, Law No. 36 Year 2009 concerning Health.

_____, Law No. 36 Year 2014 concerning Health Workers.

_____, Minister of Health Regulation No. 290/MENKES/PER/III/2008 Regarding the Approval of Medical Measures.

Internet

https://kbbi.web.id/sejahtera, accessed on 3 November 2019 at 18:30 WIB.

CRIMINAL LAW RENEWAL TO PRETRIAL JUDGMENT CONSIDERATIONS

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ABSTRACT

Pretrial, Judge competencies are basically the same as general justice in their routines related to the task of judges in adjudicating. According to Sudarto, the judge's duty as a law enforcer, a judge is required to act to make decisions based on a sense of justice and fight for it. If a judge violates his code of conduct, then even though the state security apparatus works professionally with complete regulations, everything will remain in vain. Legal developments that occur at this time have expanded the pretrial object which is not only as regulated in Article 77 of the Criminal Procedure Code only, because on April 28, 2015, the Constitutional Court in its decision Number: 21/PUU-XII/2014. The legal issue in this paper is How criminal law reform plays a role in the decisions of judges in judicial cases. This writing is supported by a review of the existence of Indonesian pretrial literature and legal research research methods that map theories, concepts, legal provisions, structured legal events and cone toward discussion of the issues raised.

The results discussed in legislative policy are the most strategic stage seen from the entire policy process, to operationalize criminal law. It is at this stage that the criminal system and criminal punishment policy lines are formulated, which at the same time form the basis of legality for the next stages, namely the stage of criminal application by the court body and the stage of criminal conduct by the criminal implementing apparatus. Renewal that is done by applying the noble value of Indonesian law itself cannot be separated from Pancasila, therefore in every legal product including jurisprudence, it must not conflict with the five principles stipulated in Pancasila.

Conclusion of writing, pretrial is expected to create a monodualistic balance between public and individual interests, protection / interests of perpetrators of crime (the idea of criminal individualization) and victims of criminal acts, legal certainty, flexibility / flexibility and fairness, are not tools to escape suspects from their responsibilities and defile the true ideals of law.

Keywords: Pretrial, Judgment Consideration, Law Renewal, Human Rights

A. INTRODUCTION

The pretrial institution was born from inspiration originating from the existence of Habeas Corpus rights in the Anglo Saxon Justice System, which provides fundamental guarantees of human rights, especially the right of independence. The Habeas Corpus Act gives a person the right to pass a court order demanding (challenging) the official who detains himself (police or prosecutor) to prove that the detention is not illegal (illegal) or legal in accordance with applicable legal provisions. This is to ensure that the deprivation or restriction of independence of a suspect or defendant has actually fulfilled the applicable legal requirements and guarantees of human rights. [1]

Criminal Procedure Code as an instrument that regulates pretrial institutions in law enforcement and not as an independent judiciary and not as a court-level institution that has the authority to give final decisions on a criminal case. A pretrial institution is only a new institution whose characteristics and existence are:

a. It is a unit inherent in every District Court, where this pretrial is only found at the District Court level as a unit of duty that is not separate from and with the court concerned
b. Pretrial is not outside or beside or equal to the District Court
c. The administrative, technical, equipment and financial administrative is subject to and united with the District Court, and is under the leadership and supervision and guidance of the head of the relevant District Court

[1] Adnan Buyung Nasution, *Praperadilan VS Hakim Komisaris : Beberapa Pemikiran Mengenai Keberadaan Keduanya*, Jurnal Penelitian Universitas Sumatera Utara Medan. 2011.

d. The management of the judicial function is part of the judicial function of the District Court itself[2]

Associated with a theoretical study of criminal law, theories in criminal law include: Criminal theories develop following the dynamics of community life as a reaction to the emergence and development of crime itself which continues to color the social life of people from time to time. Various thoughts arise regarding criminal benefits, so that there are several theories and concepts of criminal punishment, namely absolute theory (retributive) which means retaliation against the wrongdoing of the perpetrators, then a relative theory (deterrence / utilitarian) to reduce the occurrence of similar criminal acts, after that the theory of incorporation (integrative) which is a combination of the two previous theories, treatment theory and social protection theory (social defense) related to prevention efforts that protect the surrounding community to minimize its impact: [3]

Pretrial regulated in Article 1 point 10 of the Criminal Procedure Code is the authority of the District Court to examine and decide according to the method regulated in this law, concerning:

a. Legality or not of an arrest and or detention at the request of the suspect or his family or other party at the power of the suspect;
b. The validity of the investigation or the prosecution at the request of law or justice;
c. A request for compensation or rehabilitation by a suspect or his family or other party for a proxy whose case has not been submitted to the court.

Legal developments that occur at this time have expanded pretrial objects that are not only as stipulated in Article 77 of the Criminal Procedure Code only, because on April 28, 2015, the Constitutional Court in its decision Number: 21/PUU-XII/2014 decided one of them that Article 77 letter a The Criminal Procedure Code is contradictory to the 1945 Constitution as long as it does not include the determination of suspects, confiscation and search. That is, after the decision of the Constitutional Court, testing whether or not the determination of the suspect is the object of pretrial.

The development of this law caused various reactions from various parties, there were those who praised the reason that it was an improvement in criminal procedural law which increasingly protected human rights. There are also parties who disagree with the reason that it has violated the principle of legality, which should only be stated in the Criminal Procedure Code, which is regulated as a pretrial object, which can be submitted to the pretrial proceedings. While the validity of determining a suspect is not included in the object that can be submitted to the pretrial under the Criminal Procedure Code.

The pretrial petition for the validity of the determination of the suspect began when Judge Sarpin Rizaldi granted Budi Gunawan's pretrial petition in the South Jakarta District Court. At that time, one of the pretrial petitions submitted and received was the validity of determining whether a suspect was made by the Corruption Eradication Commission (KPK) against Budi Gunawan. Judge Sarpin's verdict is not the first decision that grants the pretrial petition for the validity of determining the suspect. At least, there is 1 (one) decision before the decision of Judge Sarpin that granted the request, namely the decision of Judge Suko Harsono in a pretrial case with applicant Bachtiar Abdul Fatah at the South Jakarta District Court. [4]

Based on the aforementioned background description the writer is interested in describing systematically with regard to the discussion **Criminal Law Renewal To Pretrial Judgment Considerations.**

B. PROBLEMS

1. How criminal law renewal role in pretrial judgement considerations?

C. LITERATURE REVIEW

Indonesian Pretrial Existance

The existence of pretrial institutions aims to provide protection for human rights which also functions as a means of monitoring horizontally, or with a more assertive sentence it can be said that the holding of a pretrial has the purpose of being a means of horizontal supervision with the aim of providing protection to human rights especially the rights of suspects and defendants.

[2] M. Yahya Harahap, *Pembahasan Permasalahan dan Penerapan KUHAP (Pemeriksaan Sidang Pengadilan, Banding, Kasasi, dan Peninjauan Kembali) Jilid II*,Sinar Grafika, Jakarta , 2008, pg.1

[3] Petrus Irwan Panjaitan dan Samuel Kikilaitety, *Pidana Penjara Mau Kemana*, 2007, pg. 6-27

[4] *http://www.gagasannasional.com/pra-peradilan-atas-sah-tidaknya-penetapan-tersangka/.* taked on March 11th 2019.

The basis for the realization of pretrial according to the Guidelines for the Implementation of Criminal Procedure Code is as follows:

"Considering that in the interest of examining a case, there should be reductions of the rights of the suspect, but nevertheless should always be based on the provisions stipulated in the law, then for the purposes of supervision of the protection of the rights of the suspect / defendant an institution called a pretrial. [5]

The task of pretrial in Indonesia is indeed limited, in Article 78 relating to Article 77 of the Criminal Procedure Code it is said that those who exercise the authority of district courts examine and decide on the following:

a. the illegality of arrest, detention, cessation of investigation or cessation of prosecution;
b. compensation and / or rehabilitation for a person whose criminal case is terminated at the level of investigation or prosecution.[6]

Pretrial is led by a Single Judge who is appointed by the head of a district court and is assisted by a Registrar. In Article 79, Article 80, Article 81 the pretrial duties are detailed covering three main points, as follows:

a. A request for an examination of the validity of an arrest or detention submitted by a suspect, family or proxy to the head of the district court, stating the reasons.
b. A request to examine whether or not a termination of an investigation or prosecution is valid can be submitted by the investigator or the public prosecutor, a third party of interest to the head of the district court by stating the reasons.
c. Requests for compensation and / or rehabilitation due to the illegality of arrest or detention or due to the legal termination of an investigation or prosecution are filed by a suspect or third party with an interest in the head of the district court by stating the reasons.

Based on the description above, it is known that in accordance with the Criminal Procedure Code, regarding the legality of determining whether the status of a suspect is good by an investigator of the Republic of Indonesia state police officer or a certain civil servant official who is given special authority by law, is not a pretrial object nor is the court's authority to adjudicate. Decision of the Constitutional Court (MK) No. 21/PUU-XII/2014 provides an expansion of the pretrial object by adding the suspect's designation as the pretrial object.

Pretrial is a new institution whose characteristics and existence are:

(1) Being and constituting an entity attached to a District Court, and as a court institution, it is only found at the District Court level as a task force that is not separate from the District Court,
(2) Pretrial is not outside or beside or equal to the District Court, but only a division of the District Court,
(3) Judicial, personnel, equipment, and financial administration unite with the District Court, and are under the leadership and supervision and guidance of the Chair of the District Court

D. RESEARCH METODH

This writing is supported by a legal research method, which is a scientific activity based on certain methods, systematics, and thinking, which aims to study one or several specific legal phenomena by analyzing them unless an in-depth implementation of the legal facts is also attempted.[7] a solution to the problems that arise in the symptoms concerned. [8]

The method used in this study uses legal research, which is an alternative approach that examines the doctrinal study of the law with regard to the legal issues studied, namely the description of the legal events of the implementation of pretrial in Indonesia as one form of the realization of human rights within the scope of state justice. In addition, it was analyzed concretely related to legal reforms that have an impact on the existence of pretrial in Indonesia today in general.

E. RESULTS AND DISCUSSIONS

Criminal law enforcement basically comes from the material and formal provisions. A brief history of Indonesia records that prior to the enactment of the Law of the Republic of Indonesia Number 8 of 1981 concerning the Criminal Procedure Code (KUHAP), criminal procedural law as a guideline for general justice is the Het Herziene Indonesisch Reglement (HIR) Stb. 1941 Number 44 which is a product of law in the colonial period with various aspects of the era, in which there are several obstacles, weaknesses, shortcomings and benefit the authorities or invaders,

[5]M. Yahya Harahap, *Pembahasan Permasalahan dan Penerapan KUHAP (Pemeriksaan Sidang Pengadilan, Banding, Kasasi dan Peninjauan Kembali)*, Sinar Grafika, Jakarta, 2008, pg. 49.
[6]Andi Hamzah, *Hukum Acara Pidana Indonesia*, Sinar Grafika, Jakarta, 2010, pg. 189.
[7]Suteki, Galang Taufani, *Metodologi Penelitian Hukum (Filsafat, Teori dan Praktik)*, (Yogyakarta: Thafa Media, 2010), pg. 29
[8]Soerjono Soekanto, *Pengantar Penelitian Hukum*, (Jakarta: UI Pres, 1986), pg. 43

even in particular ignoring the protection of human rights, legal uncertainty and justice. For example, uncertainty about preliminary actions in the legal process in terms of arrest, search, seizure, detention, rights and status of suspects, defendants, legal assistance, duration and uncertainty in the process of settlement of cases at all levels of investigation. [9]

Efforts so that Indonesian legislation does not cause negative effects in its enforcement, then since its formation must pay attention or accommodate the diversity values as a manifestation of the legal interests of the communities where the laws and regulations are enforced.[10] In this regard, the existing diversity values are also applied in line with the development of the law-making system which not only adheres to its shaping instruments from its national aspect but also international rules adapted to Indonesian local wisdom, so that its enforcement is truly guided by the noble values of the nation itself.

In Pretrial, the competence of judges is basically the same as the general court in its routine related to the task of the judge in hearing. According to Sudarto, the judge's duty as a law enforcer, a judge is required to act to make decisions based on a sense of justice and fight for it. If a judge violates his code of conduct, then even though the state security apparatus works professionally with complete regulations, everything will remain in vain.[11]

A judge is required to be able to accept and try various cases submitted to him, because as a law enforcer the judge is considered to have knowledge of the law (Ius curia novit), and even a judge can be sued if he refuses a case submitted to him. As a law enforcer, a judge has an important function in completing a case, namely giving a ruling on the case. But in giving the verdict, the judge must be in a free state. Free means that the judge is free to judge, not influenced by anything or anyone. This becomes important because if the judge gives a decision because it is influenced by something other than the context of the case then the decision does not achieve the desired sense of justice. In carrying out its function as a judge, there are several conditions that must be fulfilled by a judge. These requirements are tough, skilled and responsive. Resilient means tough in dealing with all circumstances and mentally strong, skilled means knowing and mastering all existing and still applicable laws and regulations, and being responsive means that conducting an examination of cases must be done quickly, correctly and adjusting to the wishes of the community.

Pretrial as an institution that was born simultaneously with the enactment of Law No. 8 of 1981 concerning the Criminal Procedure Code. Pretrial is not an independent or independent judiciary regardless of the district court, because of the formulation of Article 1 point 10 jo. Article 77 of the Criminal Procedure Code can be seen that pretrial is only an additional authority granted to a district court (only to a district court).[12]

The pretrial institution is not a separate body, but only an authority of the district court. The granting of this authority is aimed at enforcing law and justice simply, quickly and cheaply in order to restore dignity, ability / position and compensate victims who feel disadvantaged. Pretrial institutions are also new institutions that are not found in HIR criminal procedure law. With pretrial, it is guaranteed that a person is not arrested or detained without a valid reason. Arrests are only carried out on the basis of a strong allegation on the basis of sufficient preliminary evidence, while the provision of preliminary evidence is submitted its assessment to the investigator. This opens up the possibility as a reason for filing a pretrial hearing. [13]

Pretrial was established by the Criminal Procedure Code to ensure the protection of human rights and for law enforcement officials to carry out their duties consistently. With the existence of a pretrial institution, the Criminal Procedure Code has created a control mechanism that functions as an institution that has the authority to supervise how law enforcement officials carry out their duties in criminal justice.[14] The jurisdictional functions are part of the judicial functions of the District Court itself.[15]

Renewal of Criminal Law Against Judge's Decision

Law reform efforts in Indonesia that have begun since the proclamation of independence on August 17, 1945, through the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) cannot be released from the foundation and at the same time the national goals to be achieved as formulated in the Preamble of the 1945 Constitution, especially the fourth paragraph.

Included in the issue of policy in setting criminal sanctions, the policy of setting criminal sanctions in legislation. Legislative policy is the most strategic stage seen from the entire policy process, to

[9] P.A.F. Lamintang dan Theo Lamintang, *Pembahasan KUHAP Menurut Ilmu Pengetahuan Hukum Pidana & Yurisprudensi*,Sinar Grafika, Jakarta, 2010, pg.7.
[10] Maroni, *Problematika Penggantian Hukum-Hukum Kolonial Dengan Hukum-Hukum Nasional Sebagai Politik Hukum*, Jurnal Dinamika Hukum Vol.12 No.1 Januari 2012
[11] Sudarto. *Kapita Selekta Hukum Pidana*. Alumni.Bandung, 1983. pg.27
[12] Ratna Nurul Afiah, *Praperadilan dan Ruang Lingkupnya*, Akademika Pressindo, Jakarta, 1986, pg.3.
[13] *Ibid*, pg.4.
[14] Moch. Faisal Salam, *Hukum Acara Pidana dalam Teori & Praktek*, Mandar Maju, Bandung, 2001, pg. 124.
[15] *Ibid*, pg. 125.

operationalize criminal law. It is at this stage that the criminal system and criminal punishment policy lines are formulated, which at the same time form the basis of legality for the next stages, namely the stage of criminal application by the court body and the stage of criminal conduct by the criminal implementing apparatus.[16]

The background and urgency of holding criminal law reforms can be viewed in terms of sociopolitical, sociophilic, social-cultural aspects, or from various aspects of policy (specifically social policy, criminal policy, and law enforcement policy). Thus, criminal law reform in essence implies, an attempt to re-orient and reform criminal law in accordance with the central values of sociopolitics, sociophilosophysics, and sociocultural societies of Indonesia which underlie social policies, criminal policies, and law enforcement policies in Indonesia.[17]

Applying the noble value of Indonesian law itself, cannot be separated from Pancasila, therefore in every legal product, including jurisprudence, it must not conflict with the five principles stipulated in Pancasila.

Therefore, the renewal of criminal law should be based on the basic ideas of Pancasila, which are the foundation of the national life values that are aspired and explored for the Indonesian people. The basic ideas of Pancasila contain a balance of values / ideas in them. The following is the balance of ideas/values intended: [18]

1. Religious
2. Humanistic,
3. Nationalism,
4. Democracy,
5. Social Justice.

In its development, the pretrial object has expanded not only as regulated in Article 77 of the Criminal Procedure Code, through the Constitutional Court Decision Number: 21/PUU-XII/2014, which among others ruled that Article 77 letter a of the Criminal Procedure Code is contrary to the 1945 Constitution as long as does not include the determination of suspects, confiscations and searches. That is, after the decision of the Constitutional Court, the validity of testing whether a suspect is determined to be the object of a pretrial can be appealed to a pretrial judge.

After the validity of the Constitutional Court Decision Number: 21/PUU-XII/ 2014, the pretrial object experienced an expansion not only as stipulated in Article 77 of the Criminal Procedure Code but after the Constitutional Court's ruling, the judicial review of the determination of the suspect to be the object of pretrial can be appealed to pretrial judges. Pretrial was formed with the aim of protecting human rights. However, after the Constitutional Court Decision Number 21/ PUU-XII/2014, the pretrial is actually used as a basis by the suspects to protect and escape from the snares of the law because at this time there are a lot of suspects, especially suspects who submit pre-trial proceedings as a suspect and this greatly affects the law enforcement process because it seriously interferes with the investigation process and because there are still many Judges who misinterpret the Constitutional Court's ruling and have committed legal irregularities so that the purpose of establishing a pretrial institution to protect human rights is not achieved and instead it even protects suspect.

The nature of the existence of pretrial institutions, is a form of supervision and an objection mechanism to the law enforcement process which is closely related to guaranteeing the protection of human rights. However, in its journey, the pretrial institution was unable to answer the problems that existed in the pre-trial process. "The oversight function of pretrial institutions is only post facto and the examination is only formal in that it emphasizes the objective element, while the subjective element cannot be monitored by the court.

Based on the description above, according to the writer, the legal basis for the judge's judgment in granting a pretrial petition with the object of determining a suspect is based on the decision of the Constitutional Court Number 21/PUU-XII/ 2014. theory of legal discovery by a judge according to Herman Kantorowicz as quoted by Ahmad Rifai that many laws contain emptiness and the judge's duty to fulfill it. This theory defends an extension of the deciding power of justice. The rigid dogmatic use of laws should work for reasons that do not deviate from the event to be decided. Even though it is not so free as actually some of the followers of this doctrine desire, it is still far more free from the law and the system of the law than before.

The legal basis of the judge who granted the pretrial petition with the object of determining the suspect based on the consideration of the Constitutional Court's Decision. invalid after going through a pretrial hearing, if the determination of the suspect is not based on at least two valid pieces of evidence. While the assessment of the legal force of the two instruments of evidence, the authors still argue that it is the authority of the judge who hears the substance of the case.

Basically, the Criminal Procedure Code determines the determination of suspects as a result of

[16] Syaiful Bakhri, 2009, Perkembangan Stelsel Pidana Indonesia, Total Media, Yogyakarta, pg.87

[17] Barda Nawawi Arief, 2009, *Tujuan dan Pedoman Pemidanaan*,Badan Penerbit Universitas Diponegoro, Semarang, pg.29

[18] Barda Nawawi Arief, 2011, *Pembaharuan Hukum Pidana Perspektif Kajian Perbandingan*, Bandung, PT. Citra Aditya Bakti, pg. 3

a long series of investigations that all proceedings can be sued to the court, so that the determination of suspects which constitutes an investigation ground makes no sense to be sued again through pretrial. law enforcement will be bothered with pretrial which will be launched by the suspects. Presumably this effort will be massive as an initial resistance to law enforcement. In addition, the submission of pretrial against the determination of the suspect will deny the principle of law quickly, simply, and at a low cost, because the possibility of the suspect conducting several pretrial trials. This condition will affect the resistance material that law enforcement will bring to the trial, because there are many other agendas that need serious attention and this benefits the suspect.

F. CONCLUSIONS

If related to the concept of renewal of criminal law (material criminal law system and its principles) which is being fought at this time for later to be applied in national material and formal law, then it must be based on the main ideas / ideas mentioned earlier. In principle, the idea is simply given the idea of balance. This idea of balance includes several things, namely:

1. Monodualistic balance between public interests and individual interests;
2. The balance between the protection/interests of the perpetrators of crime (the idea of criminal individualization) and victims of criminal acts;
3. Balance between objective factors (actions/outward) and subjective (people/inner attitudes);
4. Balance between formal and material criteria;
5. Balance between legal certainty, flexibility/flexibility and fairness;
6. Balance state values and universal values.

Associated with pretrial which is currently a suspect tool to try to escape from the legal bond after the status is determined after the investigation process is expected not to be misused solely to avoid the legal consequences of the abused suspect, but rather as an instrument supporting legal certainty that there is his right as a free human being and have maximum self-defense efforts through legal procedures so that justice and the benefits of the law can be realized.

G. REFERENCES

Literature

Bakhri Syaiful, 2009, *Perkembangan Stelsel Pidana Indonesia*, Yogyakarta: Total Media

Faisal Salam Moch. 2001,, *Hukum Acara Pidana dalam Teori & Praktek,* Bandung: Mandar Maju

Hamzah Andi, 2010, *Hukum Acara Pidana Indonesia*, Jakarta, Sinar Grafika

Harahap M. Yahya, 2008 *Pembahasan Permasalahan dan Penerapan KUHAP (Pemeriksaan Sidang Pengadilan, Banding, Kasasi, dan Peninjauan Kembali) Jilid II*, Jakarta: Sinar Grafika

Irwan Panjaitan Petrus dan Samuel Kikilaitety, *Pidana Penjara Mau Kemana*, 2007

Lamintang P.A.F. dan Theo Lamintang, 2010, *Pembahasan KUHAP Menurut Ilmu Pengetahuan Hukum Pidana & Yurisprudensi*, Jakarta: Sinar Grafika, Jakarta

Maroni, 2012, *Problematika Penggantian Hukum-Hukum Kolonial Dengan Hukum-Hukum Nasional Sebagai Politik Hukum,* Jurnal Dinamika Hukum Vol.12 No.1 Januari

Nasution Adnan Buyung, 2011, *Praperadilan VS Hakim Komisaris : Beberapa Pemikiran Mengenai Keberadaan Keduanya*, Medan: Jurnal Penelitian Universitas Sumatera Utara

Nawawi Arief Barda, 2009, *Tujuan dan Pedoman Pemidanaan,*Semarang: Badan Penerbit Universitas Diponegoro

Nawawi Arief Barda, 2011, *Pembaharuan Hukum Pidana Perspektif Kajian Perbandingan,* Bandung: PT. Citra Aditya Bakti

Nurul Afiah Ratna, 1986, *Praperadilan dan Ruang Lingkupnya*, Jakarta: Akademika Pressind

Soekanto Soerjono, 1986, *Pengantar Penelitian Hukum*, Jakarta, UI Pres

Sudarto. 1983, *Kapita Selekta Hukum Pidana*. Bandung: Alumni

Suteki, Galang Taufani, 2010, *Metodologi Penelitian Hukum (Filsafat, Teori dan Praktik),* Yogyakarta, Thafa Media

Yahya Harahap M., 2008, *Pembahasan Permasalahan dan Penerapan KUHAP (Pemeriksaan Sidang Pengadilan, Banding, Kasasi dan Peninjauan Kembali)*, Jakarta, Sinar Grafika

Regulations

Undang-Undang Nomor 1 Tahun 1946 tentang Kitab Undang-Undang Hukum Pidana

Undang-Undang Nomor 8 Tahun 1981 Kitab Undang-Undang Hukum Acara Pidana

Others

http://www.gagasannasional.com/pra-peradilan-atas-sah-tidaknya-penetapan-tersangka/

LEGAL PROTECTION AGAINST MEDICAL TREATMENT PERFORMED BY NURSES

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ABSTRACT

Rights have been imprinted since humans were born and are attached to anyone, one of which is the right to health which is one of the constitutional rights of citizens regulated in the 1945 Constitution of the Republic of Indonesia. Every development effort must be based on health insights in the sense of development National must pay attention to public health and is the responsibility of all parties both government and society. Authorized and responsible parties in carrying out health services are referred to as Health Workers, one of the Health Workers is Medical Personnel. Doctors are included as one of the Medical Personnel where Doctors in carrying out medical actions are assisted by Nurses. The emergence of legal issues that will be discussed in this journal relates to the legal relationship that occurs both between doctors and nurses and nurses with patients where nurses in carrying out medical actions actually get delegated authority from doctors. If a medical action taken by a nurse against a patient is detrimental to the patient, it is necessary to analyze whether the nurse's actions can be accounted for while the action is a delegation of duties and authority that should be carried out by the doctor. This research has 2 (two) problem formulations, namely: 1) What is the legal relationship between nurses and doctors?; and 2) What is Legal Protection Against Medical Treatment Performed By Nurses?. The research method used in the study of this legal journal is the juridical-normative research method, where the data used is secondary data which includes several legal materials, consisting of the first: primary legal material, namely the Civil Code, the Constitution of the Republic of Indonesia Year 1945, Law Number 36 Year 2009 concerning Health, Law Number 38 Year 2014 concerning Nursing, Minister of Health Decree Number 1239 / MenKes / SK / XI / 2001 concerning Nurse Registration and Practice, and Minister of Health Regulation No. 2052 / Menkes / Per / X / 2011 concerning Practice License and Implementation of Medical Practices; second: secondary legal materials, namely books and journals and scientific research on health law; and third: tertiary legal material which includes the Kamus Besar Bahasa Indonesia (KBBI).

Keywords: Medical Measures, Nurses, Doctors, Legal Protection.

A. INTRODUCTION

Rights have been imprinted since humans were born and are attached to anyone, including the right to freedom, the right of human beings and human rights, the right to love others, the right to beautiful openness and spaciousness, the right to be free from fear, the right of life, the right of spiritual rights, the right of consciousness, the right for peace, the right to give, the right to receive, the right to be protected and protect and so on.[1] The right of every person to obtain a decent living is a right not to be negotiable. These rights are basic capital for everyone so they can enjoy other rights, such as the right to education or the right to health.[2] The right to health is one of the constitutional rights of citizens regulated in the 1945 Constitution of the Republic of Indonesia, as a formal document containing: the results of the nation's political struggle in the past; the views of national figures who wish to be realized, both for the present and the future; a desire (will) by which the development of the life of the national constitution is to be led; the highest levels of development of the nation's state administration.[3]

Health as a basic human right so that it is included as one of the human rights that must be upheld in the life of the nation and state is regulated in the 1945 Constitution of the Republic of Indonesia, as follows: "Every person has the right to live in

[1] Mansur Fagih, 1999, *Panduan Pendidikan Politik Rakyat*, Insist, Yogyakarta, page. 17.
[2] M. Syafi'ie, *Instrumentasi Hukum HAM, Pembentukan Lembaga Perlindungan HAM di Indonesia dan Peran Mahkamah Konstitusi, Jurnal Konstitusi*, Vol. 9 No. 4 Desember 2012, Kepaniteraan dan Kesekretariatan Jenderal Mahkamah Konstitusi RI, page. 685.
[3] H. Sri Soemantri, *Undang-Undang Dasar 1945 Kedudukan dan Artinya Dalam Kehidupan Bernegara, Jurnal Demokrasi dan HAM*, Vol. 1 No. 4 September-November 2001, The Habibie Center (THC), page. 87.

peace and harmony, to live and get a good and healthy environment and have the right to get health services".[4] Every thing that causes health problems in Indonesian society will cause huge economic losses for the country. Every effort to improve the degree of public health also means investment in the country's development. This makes every development effort must be based on health insights in the sense that national development must pay attention to public health and is the responsibility of all parties both government and society.[5]

Authorized and responsible parties in carrying out health services are referred to as Health Workers. Health worker is every person who devotes himself in the field of health and has knowledge and / or skills through education in the field of health which for certain types requires authority to carry out health efforts.[6] As for in Law Number 36 Year 2009 concerning Health grouping Health Workers, which reads as follows: "Health workers can be grouped according to their expertise and qualifications, including covering medical personnel, pharmaceutical personnel, nursing staff, community health workers and the environment, nutrition workers, physical ignorance workers, medical technical personnel, and other health workers "[7]

One of the medical personnel is a doctor. Legal Relationships between Doctors and Patients in the health services provided by Doctors contained in the Therapeutic Agreement. A therapeutic transaction is an agreement between a doctor and a patient, in the form of a legal relationship that gives birth to rights and obligations for both parties. Therapeutic agreement is a legal relationship in the form of an agreement between the doctor and the patient in terms of health services.[8] The object of this agreement is an effort or therapy to cure the patient.[9]

Although the legal relationship that occurs between the doctor and patient, but the doctor in carrying out medical actions aided by nurses. A nurse is someone who has graduated from Nursing tertiary education, both inside and outside the country, which is recognized by the Government in accordance with the provisions of the legislation[10]. The emergence of legal issues that will be discussed in this journal relates to the legal relationship that occurs both between doctors and nurses and nurses with patients where nurses in carrying out medical actions actually get delegated authority from doctors. When a doctor delegates his responsibilities to the nurse, legally means that he has transferred legal responsibility in the action, meaning that when the patient is harmed as a result of the delegation of responsibility, the nurse also becomes a victim because of his professional duties and status.[11]

If a medical action taken by a nurse against a patient is detrimental to the patient, it is necessary to analyze whether the nurse's actions can be accounted for while the action is a delegation of duties and authority that should be carried out by the doctor. Therefore, this is where legal problems arise, one of which is in the aspect of civil law, which is based on the Civil Code that every act that violates the law and brings harm to others, obliges the person who caused the loss due to his mistake to replace the loss.[12] So that in this journal will be discussed regarding the legal relationship between nurses and doctors, as well as legal protection for medical actions carried out by nurses.

B. PROBLEM STATEMENT

The formulation of the problems to be discussed in this legal research journal is as follows:

1. What is the legal relationship between nurses and doctors?
2. What is Legal Protection Against Medical Treatment Performed By Nurses?

C. LITERATURE REVIEW

Theory of Transfer of Responsibilities

According to H.D Stout authority is an understanding derived from the law of government organizations, which can be explained as all the rules relating to the acquisition and use of governmental authorities by public law subjects in public law

[4] Indonesia, the Constitution of the Republic of Indonesia Year 1945, Article 28H.
[5] Winda Wijayanti, *Eksistensi Hukum Perawat Sebagai Tenaga Kesehatan Selain Tenaga Kefarmasian Terhadap Hak Atas Pelayanan Kesehatan*, Jurnal Dinamika Hukum Vol. 13 No. 3 September 2013, page. 513.
[6] Indonesia, Law on Health, Law No. 36 Year 2009, Article 1 point 6.
[7] Ibid., Elucidation of Article 21 paragraph (1).
[8] Annya Isfandyrie, 2006, *Tanggung Jawab Hukum dan Saksi bagi Dokter*, Prestasi Pustaka, Jakarta, page. 57.
[9] Bahder Johan Nasution, 2005, *Hukum kesehatan Pertanggungjawaban Dokter*, Rineka Cipta, Jakarta, page. 11.
[10] Indonesia, Law on Nursing, Law No. 38 of 2014 concerning Nursing, Article 1 point 2.
[11] Gunawan Aineka, Tanggungjawab Perawat Terhadap Pasien Dalam Pelimpahan Kewenangan Dokter Kepada Perawat, JOM Fakultas Hukum Volume II Nomor 1 Februari 2015, page. 3.
[12] The Civil Code, Article 1365.

relations.[13] Legitimate authority when viewed from the source from which the authority was born or obtained, there are three categories of authority, namely Attributes, Delegations and Mandates, which can be explained as follows:[14]

1) Authority of Attributes
   Authority attributes are usually outlined or derived from the distribution of power by legislation. In carrying out this attributive authority the implementation is carried out by the official or agency stated in the basic regulation. The attributive authority regarding responsibility and accountability rests with the official or agency as stated in its basic regulations.
2) Delegation Authority
   The delegation's authority derives from the delegation of one government organ to another based on statutory regulations. In the case of delegation authority responsibilities and accountability are transferred to those who are given the authority and delegate to the delegates.
3) Mandate authority
   Mandate authority is an authority originating from the process or procedure of delegation from a higher official or agency to a lower official or agency. The authority of the mandate is in the routine relations between superiors and subordinates, except where expressly prohibited.

D. RESEARCH METHOD

The research method used in the study of this legal journal is the juridical-normative research method, where the data used is secondary data which includes several legal materials, consisting of the first: primary legal material, namely the Civil Code, the Constitution of the Republic of Indonesia Year 1945, Law Number 36 Year 2009 concerning Health, Law Number 38 Year 2014 concerning Nursing, Minister of Health Decree Number 1239 / MenKes / SK / XI / 2001 concerning Nurse Registration and Practice, and Minister of Health Regulation No. 2052 / Menkes / Per / X / 2011 concerning Practice License and Implementation of Medical Practices; second: secondary legal materials, namely books and journals and scientific research on health law; and third: tertiary legal material which includes the Kamus Besar Bahasa Indonesia (KBBI).

E. ANALYSIS AND DISCUSSION

1. Patient's Right to Medical Record Based on Human Rights

A nurse is a person who has passed a nurse education that is recognized by the government and complies with applicable laws and regulations. Nurses who carry out government duties are Civil Servants who are given duties, responsibilities, authority and to carry out nursing services to the public at health facilities.[15] Nurses in the Minister of Health Decree Number 1239 / MenKes / SK / XI / 2001 concerning Nurse Registration and Practice are those who have graduated from nurses education both at home and abroad in accordance with the provisions of the applicable laws and regulations.[16] The authority of nurses is the right of autonomy to carry out nursing care based on ability, level of education and position of health facilities.[17]

To meet the ever-increasing demand for doctors as medical personnel increasingly need the help of other health workers, especially nurses primarily to treat patients both before and after the diagnosis of tarapi and other actions in the hospital, for that reason if initially the nurse's education is sufficient with the Nurse Education School or the equivalent High school and midwives plus one year of midwifery education, diploma, S1, S2, and Nursing programs have now been developed.[18]

In nursing practice, the nurse's function consists of:[19]

a. Independent function, is an independent function and does not depend on others in taking action to meet basic human needs.

[13] Ridwan HR, 2013, *Hukum Administrasi Negara*, PT Raja Grafindo Persada, Jakarta, page. 71.
[14] Nur Basuki Winanrno, 2008, *Penyalahgunaan Wewenang dan Tindak Pidana Korupsi*, Laksbang Mediatama, Yogyakarta, page. 70-75.
[15] Koerniatmanto Soetoprawiro, 2002, *Pengaturan Perlindungan Hak-Hak Perempuan dan Anak-anak Dalam Hukum Kewarganegaraan Indonesia*, Jurnal Ilmiah Hukum Univrsitas Katolik Soegijapranata, Tahun 2010, page. 8.
[16] Minister of Health Decree Number 1239 / MenKes / SK / XI / 2001 concerning Nurse Registration and Practice, Article 1 point 1.
[17] Sri Praptiningsih, 2007, *Kedudukan Hukum Perawat dalam Upaya Pelayanan Kesehatan di Rumah Sakit*, PT. Rajagrafindo Persada, Jakarta, page. 34.
[18] Mohammad Fadli Dg. Patompo, *Kebijakan Formulasi Hukum Pidana Dalam Penanggulangan Malpraktek Keperawatan*, e Jurnal Katalogis, Volume 6 Nomor 4 April 2018, page. 49.
[19] Sri Praptianingsih, *Op.Cit.*, page. 32-33.

b. Interdependent function, is a function performed in a team group that is interdependent among one another.
c. The dependent function, is the function of carrying out its activities upon or instructions from other nurses.

In the Big Indonesian Dictionary (KBBI), "relationship" implies "contact", "contact", "connection", "bonding, and "relationship".[20] The legal relationship has three elements, namely the existence of people whose rights and obligations face each other, the existence of objects that apply based on their rights and obligations, and the existence of a legal relationship between the owners of rights and obligations or the relationship to the object concerned.[21]

The Legal Relationship between the Doctor and the Patient that raises the rights and obligations that must be fulfilled by both the Doctor and the Patient initially occurs and is bound in an agreement called Therapeutic. Therapeutic transactions are activities in the implementation of medical practice in the form of individual health services or referred to as medical services based on their expertise and skills, as well as accuracy.[22] So on this basis, transactions or therapeutic agreements occur between the doctor and the patient, not between the nurse and patient. Therefore there is a legal relationship between nurses and doctors.

Whereas the Nurse here is legally related to the Doctor in terms of delegating authority to carry out medical actions given by the Doctor to the Nurse. One legal basis for the delegation of medical measures is contained in Minister of Health Regulation No. 2052 / Menkes / Per / X / 2011 concerning Practice License and Implementation of Medical Practices, which reads: "Doctors or dentists can provide the transfer of a medical or dental action to nurses , midwives or certain other health workers in writing in carrying out medical or dental actions".[23] Related to delegation of authority in health services, Doctors and Nurses have legal relations, both delegation of authority in the form of delegates or mandates, in this case Nurses cannot take their own discretion but take action in accordance with what was delegated or mandated by doctors as medical personnel. In delegating authority to carry out medical actions, not all medical actions can be done by Nurses.[24] Therefore, in fact the Nurse has his own main duties, where in the legal relationship between the Doctor and the Nurse, one of the Nurses' duties is to carry out medical actions on the basis of delegating authority given by the Doctor.

2. Doctor's Obligation to A Patient's Medical Records Based on Human Rights

According to Satjipto Raharjo, the function of law is to protect one's interests by allocating a power to him to act in the framework of those interests. This allocation of power is carried out in a measured manner, in the sense of being determined in terms of breadth and depth.[25] According to Philip Hardjo, there are two forms of legal protection for the people, namely:[26]

a. Preventive legal protection means that people are given the opportunity to submit their opinions before a government decision gets a definitive form that aims to prevent disputes.
b. Legal protection that aims to resolve disputes.

For nurses, in accepting a delegation of duties from the doctor to him, adhering to Law Number 38 Year 2014 concerning Nursing, which reads:[27]

a. Execution of tasks based on delegation of authority as referred to in Article 29 paragraph (1) letter e may only be given in writing by medical personnel to nurses to carry out any medical actions and evaluate their implementation.
b. The delegation of authority as referred to in paragraph (1) can be done by delegation or mandate.

Regarding the validity of the delegation of authority given by doctors to nurses can be seen in Law Number 38 Year 2014 concerning Nursing,

[20] Kamus Besar Bahasa Indonesia, Pusat Bahasa Departemen Pendidikan Nasional, 2008, page. 530.
[21] R. Soeroso, 2001, *Pengantar Ilmu Hukum*, Sinar Grafika, Jakarta, page. 269.
[22] Veronica Komalawati, 2002, *Peranan Informed Consent Dalam Transaksi Terapeutik (Persetujuan Dalam Hubungan Dokter dan Pasien)*, PT. Citra Aditya Bakti, Bandung, page. 56.
[23] Indonesia, Minister of Health Regulation No. 2052 / Menkes / Per / X / 2011 concerning Practice License and Implementation of Medical Practices, Article 23 Paragraph (1).
[24] Aning Pattypeilohy, dkk., *Kekuatan Hukum Pelimpahan Wewenang dari Dokter Kepada Perawat Ditinjau dari Aspek Pidana dan Perdata*, Jurnal Legality Vol. 25, No.2 September 2017- Februari 2018, page. 177.
[25] Sajipto Raharjo, 2006, *Ilmu Hukum*, Citra Aditya Bakti, Bandung, page. 18.
[26] Philipus M. Hardjo, 1988, *Perlindungan Hukum bagi Rakyat Indonesia*, Bina Ilmu, Surabaya, page. 5.
[27] Indonesia, Law on Nursing, *Op.Cit.*, Article 32 paragraph (1) and (2).

where in organizing Nursing Practices, Nurses are assigned as: a. provider of Nursing Care; b. counselors and counselors for clients; c. manager of Nursing Services; d. Nursing researchers; e. executing tasks based on delegation of authority; and / or f. executing the task in a state of certain limitations.[28]

One of the duties of a Nurse in health care is the execution of tasks based on delegation of authority. Execution of tasks based on the delegation of authority can only be given in writing by medical personnel to the Nurse to take any medical action and evaluate its implementation.[29] The medical person referred to is included a doctor so that in this case the doctor can grant authority to the nurse. The delegation of authority can be carried out by delegation or mandate.[30]

Delegation of authority by delegation to take any medical action given by medical personnel to the Nurse accompanied by delegation of responsibilities.[31] The mandate delegation of authority is given by medical personnel to nurses to carry out any medical actions under supervision.[32] The responsibility for medical action on the delegation of authority lies with the grantor of authority.[33]

Delegation of authority by delegation or mandate should be done in writing through a letter of delegation of authority. This shows that there is a legal relationship born from an engagement that gives rise to rights and obligations for Nurses and doctors as givers of authority. The use of this authority may not be detrimental to other parties, and if negligence arises in the delegation of authority through a mandate, the doctor is responsible for the loss and negligence incurred by the Nurse who was given that authority. This is because in the delegation of authority for medical action the main responsibility remains with the doctor who gave the order, whereas the Nurse is only responsible for implementing it. Unlike the delegation of authority through delegation, responsibility for losses and losses arising from the delegation are borne by the Nurse as the recipient of the delegation of authority.[34] Based on this, the legal protection that can be given to nurses who carry out medical actions needs to be seen from the way that authority is delegated, where if the authority is given by delegation, then if a condition is detrimental to the patient, then the responsible person is the nurse as the recipient of the delegation of authority from Doctors because the delegation of authority is given to the Nurse along with the delegation of responsibility for medical actions carried out by the Nurse, conversely if the delegation of authority in carrying out medical actions is carried out in a mandate from the Doctor to the Nurse, then the doctor remains responsible because the Doctor only delegates authority over medical actions , and not by delegating responsibility for the implementation of the medical measures so that if the medical action carried out by the Nurse causes harm to the patient, the doctor is responsible for it.

F. CONCLUSION

This section discusses the conclusions of the two discussion of the formulation of the problem in the study of this legal journal, that the legal relationship between doctors and nurses in health care is related to delegation of authority from doctors to nurses both by delegation and mandate as a basis for nurses to carry out medical actions, then regarding legal protection that can be given to Nurses who carry out medical actions seen from the way delegation of authority, if delegation of authority is given by delegation, then the person responsible for loss of patient is the Nurse, whereas if the delegation of authority is carried out in a mandate, then the person responsible is Doctor.

G. REFERENCES

Book

Annya Isfandyrie, 2006, *Tanggung Jawab Hukum dan Saksi bagi Dokter*, Prestasi Pustaka, Jakarta.

Bahder Johan Nasution, 2005, *Hukum kesehatan Pertanggungjawaban Dokter*, Rineka Cipta, Jakarta.

Mansur Fagih, 1999, *Panduan Pendidikan Politik Rakyat*, Insist, Yogyakarta.

Philipus.M. Hardjo, 1988, *Perlindungan Hukum bagi Rakyat Indonesia*, Bina Ilmu, Surabaya.

Ridwan HR, 2013, *Hukum Administrasi Negara,* PT Raja Grafindo Persada, Jakarta.

R. Soeroso, 2001, *Pengantar Ilmu Hukum*, Sinar Grafika, Jakarta.

Sajipto Raharjo, 2006, *Ilmu Hukum*, Citra Aditya Bakti, Bandung.

[28] *Ibid.*, Article 29 paragraph (1).
[29] *Ibid.*, Article 32 paragraph (1).
[30] *Ibid.*, Article 32 paragraph (2).
[31] *Ibid.*, Article 32 paragraph (3).
[32] *Ibid.*, Article 32 paragraph (5).
[33] *Ibid.*, Article 32 paragraph (6).
[34] Aning Pattypeilohy, dkk., *Op.Cit.*, page. 179.

Sri Praptiningsih, 2007, *Kedudukan Hukum Perawat dalam Upaya Pelayanan Kesehatan di Rumah Saki*t, PT. Rajagrafindo Persada, Jakarta.

Veronica Komalawati, 2002, *Peranan Informed Consent Dalam Transaksi Terapeutik (Persetujuan Dalam Hubungan Dokter dan Pasien)*, PT. Citra Aditya Bakti, Bandung.

Journal and Legal Scientific Research

Aning Pattypeilohy, dkk., *Kekuatan Hukum Pelimpahan Wewenang dari Dokter Kepada Perawat Ditinjau dari Aspek Pidana dan Perdata*, Jurnal Legality Vol.25, No. 2 September 2017- Februari 2018.

H. Sri Soemantri, *Undang-Undang Dasar 1945 Kedudukan dan Artinya Dalam Kehidupan Bernegara, Jurnal Demokrasi dan HAM*, Vol. 1 No. 4 September-November 2001, The Habibie Center (THC).

Kamus Besar Bahasa Indonesia, Pusat Bahasa Departemen Pendidikan Nasional, 2008.

Koerniatmanto Soetoprawiro, 2002, *Pengaturan Perlindungan Hak-Hak Perempuan dan Anak-anak Dalam Hukum Kewarganegaraan Indonesia*, Jurnal Ilmiah Hukum Univrsitas Katolik Soegijapranata, Tahun 2010.

Mohammad Fadli Dg. Patompo, *Kebijakan Formulasi Hukum Pidana Dalam Penanggulangan Malpraktek Keperawatan*, e Jurnal Katalogis, Volume 6 Nomor 4 April 2018.

M. Syafi'ie, *Instrumentasi Hukum HAM, Pembentukan Lembaga Perlindungan HAM di Indonesia dan Peran Mahkamah Konstitusi, Jurnal Konstitusi*, Vol. 9 No. 4 Desember 2012, Kepaniteraan dan Kesekretariatan Jenderal Mahkamah Konstitusi RI.

Nur Basuki Winanrno, 2008, *Penyalahgunaan Wewenang dan Tindak Pidana Korupsi*, Laksbang Mediatama, Yogyakarta.

Winda Wijayanti, *Eksistensi Hukum Perawat Sebagai Tenaga Kesehatan Selain Tenaga Kefarmasian Terhadap Hak Atas Pelayanan Kesehatan*, Jurnal Dinamika Hukum Vol. 13 No. 3 September 2013.

Legislation

Civil Code.

Indonesia, Constitution of the Republic of Indonesia Year 1945.

_____, Law Number 36 Year 2009 concerning Health.

_____, Law Number 38 Year 2014 concerning Nursing.

_____, Minister of Health Decree Number 1239 / MenKes / SK / XI / 2001 concerning Nurse Registration and Practice.

_____, Minister of Health Regulation No. 2052 / Menkes / Per / X / 2011 concerning Practice License and Implementation of Medical Practices.

THE PATIENT CHOOSES TO REFUSE MEDICAL TREATMENT OF DOCTORS AND LEGAL PROTECTION OF DOCTORS AND HOSPITALS VIEWED FROM THE PERSPECTIVE OF MEDICAL ETHICS AND MORALITY

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ABSTRACT

Medical treatment which is an ethical decision, a doctor who must consider the values that live in society, the profession, patients and consider ethical and moral principles. Currently medical ethics has been heavily influenced by developments in human rights, especially in the fulfillment of patient's rights to medical treatment. In fulfilling the patient's rights and decisions, it is necessary to have legal protection for doctors and hospitals which will be viewed and reviewed in terms of medical ethics and morality. In answering this problem, the author conducts normative juridical research or library legal research, to obtain secondary data consisting of primary legal material and secondary legal material in the form of laws and legal experts. The data obtained were analyzed through the method of syllogism and interpretation using deductive thinking patterns. The data collection technique used is the library study technique.

Keywords: Human Rights, Medical Treatment, Morality Of Medicine

I. INTRODUCTION

Medical action which is an ethical decision, a doctor who must consider the values that live in society, the profession, the patient and consider ethics, moral principles, and specific decisions in the clinical case at hand. A medical action is not contrary to the law if it meets the conditions that have medical indications, to achieve a concrete goal, carried out according to the rules that apply in medical science and has received the consent of the patient. Every medical action must be accounted for, both ethically and legally.

Ethics has been an integral part of medicine at least since the time of Hippocrates. Hippocrates produced many works on medical science and medical ethics. A Greek medicine expert who was considered a pioneer of medical ethics in the 5th century BC. From Hippocrates emerged the concept of medicine as a profession, where medical experts make promises in front of the public that they will place the interests of their patients above their own interests.[1]

Ethics is the study of morality systematically reflection on morals, caution and analysis of moral decisions and good behavior in the past, present or future. Morality is the value dimension of human decisions and actions. The language of morality includes words such as rights, responsibilities, and goodness and traits such as good and bad, right and wrong, appropriate and incompatible. According to this dimension, ethics is primarily how to know (knowing), while morality is how to do it (doing). The relationship between the two is that ethics tries to provide rational criteria for people to make decisions or act in a way among the choices of other ways.

Medical ethics is one branch of ethics that deals with moral problems that arise in the practice of medicine. Medical ethics is closely related but not the same as bioethics (biomedical ethics). Medical ethics focuses mainly on problems that arise in medical practice while bioethics is a very broad subject dealing with moral problems that arise due to developments in more general biological sciences.[2]

At present medical ethics has been heavily influenced by developments in human rights, especially in the fulfillment of patients' rights to medical treatment. Human rights are stated in the United Nations Universal Declaration of Human Rights and other documents that have been received and formally written. Human rights that are especially important in medical ethics are the right to life, free from discrimination, free from torture and cruelty,

[1] Williams, John R, 2005, *Panduan Etika Medis*, Penerbit Ethics Unit of the World Medical Association Cetakan: Pertama.

[2] Siswati Sri. *Etika dan Hukum Kesehatan dalam perspektif undang-undang kesehatan.* Jakarta: PT Rajagrafindo persada. 2013.

free from inhumane and inappropriate treatment, free opinion and expression, equality in getting public services in a country, and medical services.

Medical ethics is also very related to law. In almost all countries there are laws that specifically regulate how doctors must act in relation to ethical issues in patient care and research.[3] But ethics and law are not the same. Very often, even ethics set standards of behavior that are higher than the law, and sometimes ethics allows doctors to need to violate laws that require unethical actions.

From the legal aspect, the relationship between the doctor and the patient is the relationship between the legal subject and the legal subject regulated in the rules of civil law which are basically based on mutual agreement, so in this relationship there are mutual rights and obligations; the doctor's right is the patient's obligation and the patient's right is the doctor's obligation. Respecting the rights of patients is one of the standard operational procedures for medical treatment and therefore the patient has the right to refuse or choose a second opinion on medical actions taken by doctors. Therefore, there must be an informed consent that will protect doctors as medical workers and patients as users of health services.

A doctor in carrying out his obligations to patients is always not immune from mistakes and mistakes that can bring negative consequences on patients. In this case various things can arise, one of which is the rejection of medical action by patients from the perspective of ethics and morality in medicine. As an example of a case where a patient suffers from heart disease and is advised by a doctor to perform operations according to medical operational standards, but has other opinions and refuses to do the medical treatment suggested by the doctor. In this case a patient has the right to refuse an action to be taken against him and end the treatment and treatment at his own responsibility, after obtaining clear information about his illness.

Doctors in carrying out daily practice often find ethical issues that can sometimes develop into an ethical dilemma. A doctor is always faced with moral judgment to make an ethical clinical decision. In this case when something happens to the patient due to his own decision then the need for legal protection of doctors and hospitals, so there is no misunderstanding and the demands of patients and families to doctors and hospitals.

[3] *Ibid*

II. PROBLEM STATEMENT

Medical practice is a series of activities carried out by medical professionals for patients who need help in an atmosphere of mutual trust and are engulfed by all emotions, hopes, and concerns of human beings. Helping as a humanitarian act aimed at saving, which is carried out under the control of conscience and free will, must be legally accountable. When the diagnosis can be established and the choice of therapy has been decided based on knowledge, the next question that will arise is whether the patient approves the therapy chosen by doctor and what the consequences will be if the patient refuses the therapy given by the doctor. The problem discussed in this paper is about how the rights and obligations of patients to medical actions to be performed by doctors and how legal protection for doctors and hospitals in terms of medical ethics and morality.

III. LITERATURE REVIEW

1. **Beauchamp and Childress elaborate on the four basic moral principles and the rules below. The four basic rules are:** [4]
   a. *Respect for Autonomy*
      Autonomy in the literature is a rule that regulates oneself calmly and unhurriedly. The basics of respect for autonomy are closely related to the basis of respect for human dignity with all its characteristics because it is a human who has values and has the right to ask. Autonomy is a personal rule that is free from interference from other parties. Beuchamp and Childress formulated this as the word "the act of autonomy is not only intended to control restrictions by others".
   b. *Beneficence*
      According to Beuchamp and Childress's theory, this principle or rule not only requires humans to treat each other as autonomous beings and does not hurt them, but also demands that they be able to judge the good of others further. These actions are regulated in the basics of benefit.
   c. *Non-maleficence*
      The purpose of this principle is to protect someone who is incapable (disabled) or non-autonomous. As explained earlier, this person is also protected by the principle of doing

[4] Beuchamp TL, Childress JF. *The principle of biomedical ethics*, ed 3rd. New York: Oxford University Press; 2001.

good (beneficence). The correct ethical answer is that by seeing further good from oneself, it is not permissible to hurt others.

d. *Justice*
Beuchamp and Childress state that this theory is very closely related to one's fair attitude towards others, such as deciding who needs medical help firstly viewed from the severity of the disease.

When a patient comes to a doctor, the question that first arises in the mind of the doctor is what I will do and whether the patient agrees to the treatment options given by the doctor. There are four approaches that can be used to solve this dilemma:[5]

a. *Single Principle Theories*
The principle here is to choose one principle by defeating the other principles after careful consideration.
b. *Ranking (Lexically Ordering) Principles*
The principle here is that we rank (lexical) of the existing principles and decisions are taken on the principle in the highest order.
c. *Balancing*
The principle is that decisions are made by balancing existing principles.
d. *Combining ranking and balancing*
The principle here is that we try to rank and as far as possible make them in one group. But in practice it is very difficult, because the many values with each other beat each other and cannot be balanced.

In everyday life a doctor is always faced with moral judgment to make an ethical clinical decision. The term moral judgment can be defined as 4 (four) different things. First, the activity of thinking whether the moral value of the giving object (can be in the form of an action, personal, institutional or state) has a specific moral nature, can be in the form of general (such as: truth, crime) or specific (insensitive, integrity). Second, the state created by the view that the object has a moral nature. Third, that there is a meaning to the situation: what we see, rather than what we see. Fourth, the term can be read as appreciation or praise, leading to good morals which are also commonly called moral acuity or moral wisdom.[6]

2. Dedi Afandi, Basic principles of bioethics in ethical clinical decision making, Andalas medical magazine vol 40, September 2017

The conclusion in the journal is the use of basic principles of bioethics is one method that can be used in ethical clinical decision making. The concept of prima facie will make it easier for doctors to make ethical medical decisions in daily life. By increasing understanding and training in the use of basic principles of bioethics in everyday life it is hoped that they will be able to maintain better doctor relations.

3. Mayeda M, Takase K. Need for enforcement of ethicolegal education – an analysis of the survey of postgraduate clinical trainers. BMC Medical Ethics, 2005

In Japan, paternalistic-like treatment continues to occur in clinical practice. It could be a relatively simple process to help doctors to understand the mental pain that patients experience and their distrust toward doctors, by carefully teaching them the processes of medical malpractice suits using past precedents. This might lead doctors to develop a deeper understanding of patient's standpoints. Many patients feel dissatisfied with the treatment they receive from doctors. The facts and issues shown in prece- dent cases reflect this distrust of patients toward doctors, and can increase the distrust that doctors feel toward patients if they are read without appropriate instructions.

4. Braddock CH, Edwards KA, Hasenberg NM, Laidley TL, Levinson W: Informed decision making in outpatient practice: time to get back to basics. JAMA.

Informed decision making among this group of primary care physicians and surgeons was often incomplete. This deficit was present even when criteria for informed decision making were tailored to expect less extensive discussion for decisions of lower complexity. These findings signal the need for efforts to encourage informed decision making in clinical practice. How well do physicians foster the informed participation of patients in important clinical decisions? Many clinician-authors have called for a shift toward a view of informed consent in

[5] Veatch RM. *The principle of autonomy and the doctrine of informed consent in: The basics of bioethics*. New Jersey: Prentice-Hall, Inc; 2000.

[6] Craig E. Moral Judgment. *The Routledge of philosophy*. London: Routledge; 1998.

which the emphasis is on a meaningful dialogue between physician and patient instead of a unidirectional, dutiful disclosure of alternatives, risks, and benefits by the physician. This expanded view is termed informed decision making. Despite these calls for more sharing of decision making with patients, we know little about the extent to which patient-physician discussions of clinical decisions achieve informed patient participation.

5. Koh Y: Residents' preparation for and ability to manage ethical conflicts in Korean residency programs. Academic Medicine. 2001, 76: 297-300.

Respect for patient autonomy, which balances the principle of beneficence, has been the central principle under-pinning recent changes in medical practice in Korea. These changes have been prompted by court rulings in malpractice cases, which have emphasized the importance of informed consent, and by the influence of Western medical ethics on Korean physicians. If they are to respect patient's autonomy, physicians must be able to respectfully and compassionately listen to patients and fully and truthfully disclose to patients information about their medical conditions and treatments. However, the residents who responded to this survey seemed to be uncomfortable disclosing bad news directly to a patient, and many had obtained consent from patients without fully explaining the medical procedures.

Legal protection according to Indonesian grammar consists of two words, namely protection and law. Protection is protected from the word protection, so it must be protected, protected, protected and protected. In seeking legal understanding, almost all legal experts who provide approved legal resolutions are also different, this is at least partially acceptable to the triangle and form, and the greatness of the law, so it does not allow people to unite in one after all satisfying results. The meaning of the word consumer protection without conditions. There is no protection, other parties protect and there are no ways to protect, thus, the word protector means, namely about protection or action, involving certain parties for certain parties by using certain ways.[7]

[7] Wahyu Sasongko, 2007, *Ketentuan-Ketentuan Pokok Hukum Perlindungan Konsumen, Penerbit UNILA*, Bandar Lampung.

IV. RESEARCH METHODS

In writing in general, it can be distinguished between research data obtained directly from the community and the second is literature writing data whose data is obtained from library materials. This research was conducted based on normative legal research. The normative legal research method examines the law conceptualized as a norm or rule that applies in society and serves as a reference for everyone's behavior, so that normative legal research focuses on positive law, and uses qualitative analysis systematically and then uses deductive methods by drawing conclusions from general to special.

V. ANALYSIS AND DISCUSSION

1. RIGHTS AND OBLIGATIONS OF THE PATIENT A MEDICAL ACTION THAT WILL BE DONE BY A DOCTOR

The patient's rights are actually human rights that originate from the basic rights of individuals in the health sector, (*the right of self determination*), although in fact the fundamentals are the same, the right to health services is often considered more basic, in the doctor's relationship with the patient, the patient is relatively in a weak position, lack of ability he patient to defend his interests in a health care situation causes the need to raise the patient's rights in dealing with health professionals, so the patient's right comes from the right to himself, thus the patient is an independent legal subject who is considered to be able to make decisions for his own interests.

At this time the patient has the rights and obligations stipulated in Article 52 of Law Number 29 of 2004 concerning Medical Practices where otherwise the patient has the right to refuse medical treatment, but in other cases the patient also has an obligation to comply with the advice and instructions of the doctor. Knowledge-based agreement is one of the core concepts of medical ethics today. The right of patients to make decisions about their health care has been enshrined in legal and ethical rules throughout the world. Patients have the right to determine themselves, free in making decisions that concern themselves. The doctor must tell the patient the consequences of the decision taken.

The patient has the right to obtain the information needed to make his decision. Patients must understand clearly what the purpose of an action taken by the doctor and what results will be obtained, and what are the effects if the action is not done. As a patient must receive information, diagnoses and about

the therapy, treatment or actions they will undergo, then the patient will be in a position to be able to make decisions based on his understanding of how to proceed. Based on the knowledge and understanding of the patient has the right to refuse treatment, even if the refusal can cause disability or death.

The interpretation of the doctor and patient relationship is like a paternal relationship where the doctor makes a decision and the patient can only accept it. But this time it was no longer acceptable both ethically and legally. Because many patients are unable or unwilling to make health care decisions for themselves, patient autonomy is sometimes very problematic. Other aspects of the relationship are equally problematic such as the doctor's obligation to maintain patient confidentiality in the era of medical records as well as the doctor's duty to survive also get requests to speed up death.[8]

In case the patient has the right to refuse medical treatment from a doctor then this has a risk, with the limitation of patients who do not have expertise in medical science it will be a problem and have a risk where the impact will occur on patients who will experience failure in the action medical and also has a risk to doctors and hospitals that must be held accountable for the risks of medical actions taken by doctors for the patient's decision that medically the doctor has provided advice and prior information about what to do and what risks the patient will experience when not implementing the advice from the doctor.

2. LEGAL PROTECTION OF DOCTORS AND HOSPITALS VIEWED FROM MEDICAL ETHICS AND MORALITIES

The experts in the field of health carry out the profession based on a job that contains risks. If the person concerned has carried out his duties correctly according to professional benchmarks (professional standards), then the person concerned must receive legal protection.[9] The legal responsibilities of doctors and health workers are based on professional code of ethics, the development of professional code of ethics to be obeyed and implemented by its supporters contains 3 (three) objectives, namely a professional code of ethics makes it easy to make decisions efficiently, individually the professional developers often need direction for directing his professional behavior, and professional ethics create a pattern of behavior expected by his customers professionally.[10]

The development of the relationship between doctors and patients, but in essence what doctors do is a form of health care. Leenen's opinion was quoted by Dany Wiradharma, that the obligations of doctors or dentists in carrying out health services can be divided into 3 (three) groups, namely obligations arising from the nature of medical care where doctors must act in accordance with the standards of the medical profession or carry out their medical practices legally artist, the obligation to respect the rights of patients derived from human rights in the field of health and obligations relating to the social function of health care.

A very important belief in the relationship between doctor and patient generally means that doctors should not neglect patients whose treatment they have done. The only reason that can end a doctor's relationship with a patient is if the patient needs another doctor's care for a different skill set. If the examination or action is beyond a doctor's capacity he must leave it to another doctor who has the necessary skills. However there are many other reasons why a doctor wants to end a relationship with a patient, such as the doctor moving or stopping practicing, patient refusal or inability to pay for care, doctor or patient dislike, patient refusal to do doctor's orders, etc. That reason may be acceptable, but it can also be unethical. When taking action doctors must pay attention to the code of ethics or other appropriate instructions and carefully examine their motives. Doctors must be prepared to be able to justify their actions, towards themselves, to patients, and to appropriate third parties. In such cases doctors and hospitals must obtain legal protection when a risk befalls a patient so that one day doctors and hospitals are free from the demands of patients who refuse to do doctor's advice or orders that are in accordance with the scientific knowledge of doctors and according to medical operational standards.

The legal relationship between a doctor and a patient is included in the *Inspanningverbintenis* type agreement because the therapeutic transaction carried out by the doctor is a form of health effort in order to achieve patient recovery based on complaints of the patient's illness and his medical science. Doctors do not provide a guarantee of certainty in curing the disease, but with the endeavor and expertise of

[8] Bertens K, 1986, *Apa itu Paternalisme dan Sejauh Mana Dapat Dibenarkan*. Seri Etika Biomedis.
[9] Herkutanto, Soerjono Soekanto, 1987. *Pengantar Hukum Kesehatan*, Remadja Karya, Bandung.
[10] Koeswadji, Hermien Hadiati, 2002. *Hukum Untuk Perumahsakitan*, Citra Aditya Bhakti, Bandung

doctors is expected to help in the healing effort. The therapeutic contract is equated with *inspanningverbintenis*, because in this contract the doctor is only trying to cure the patient and the efforts made are not necessarily successful.[11]

To avoid this misunderstanding, an agreement and agreement between the patient and the doctor is needed. Before a therapeutic transaction is carried out by a doctor, it starts with *informed consent*. The existence of this informed consent can provide a sense of security for doctors when performing medical actions on patients and can be used as self-defense if the results of medical actions by doctors results are not as desired by the patient and the patient's family. If the patient has given informed consent to the health worker or doctor, then the position of the health worker or doctor becomes strong because in the informed consent it has been stated that if the health worker or doctor or dentist fails to carry out the obligation, the patient will not sue the health worker or doctor.

The most important thing in informed consent is that information can be understood by patients, therefore it is important for doctors who will carry out a medical action to deliver a complete explanation in language that is easily understood by patients. A doctor is expected to be able to communicate well with the patient or the patient's family in terms of explaining the diagnosis of the disease and the medical actions to be taken because as a patient must understand and be able to accept all the consequences that will arise against him.

Therapeutic transactions which are part of the doctor and patient agreement, which in the Civil Code are regulated in Chapter III (three) of the Civil Code Article 1313 of the Civil Code defines the agreement is an act with which one or more people commit themselves to one or more other people. As part of the agreement between the doctor and the patient is considered valid if it meets the legal requirements of the agreement stipulated in the 1320 Civil Code, namely the agreement of those who bind themselves, the ability to make an engagement, a certain thing referred to in the therapeutic agreement is a healing effort, and a halal cause and does not violate decency.

VI. CONCLUSION

At present the patient has the rights and obligations stipulated in Article 52 of Law Number 29 Year 2004 Regarding Medical Practices where the patient has the right to refuse medical treatment, but in other cases the patient also has an obligation to comply with the advice and instructions of the doctor. In the context of medical services, according to the principle of autonomy, a doctor must respect patient autonomy, and he must treat adults as adults and not as children. Doctors are required to provide complete information to patients, and may not impose a decision on the patient. After obtaining all necessary information, the patient has the right to make final decisions about all matters relating to him, including medical treatment. Therefore, in the context of the principle of autonomy, as long as the patient himself is still able to receive information and make decisions, it is not enough if the information is given to the family only, and the decision is taken by family members. Relying on family decisions (for example signing an operating license) is clearly a paternalistic act. According to the second principle (the principle of benefit), a doctor must do the best for his patients. In the Hippocrates oath the doctor's promise was stated that he would avoid anything that would harm the patient. "*I will apply dietetic measures for the benefit of the sick according to my ability and judgment; I will keep them from harm and injustice*" (*The Hippocratic Oath*). If the patient wants something that is detrimental to himself, this means that the patient is irrational. If the patient is treated paternalistically, then the patient will be grateful after he is aware and can see the problem in reasonable proportions. But if the patient continues to force and refuse medical action to be carried out by the doctor, it is important that there is an informed consent that will protect the doctor and the hospital from the demands of the patient and family if there is an effect and risk to the patient.

VII. REFERENCES

Braddock CH, Edwards KA, Hasenberg NM, Laidley TL, Levinson W: *Informed decision making in outpatient practice: time to get back to basics*. JAMA. 1999

Beuchamp TL, Childress JF. *The principle of biomedical ethics, ed 3rd*. New York: Oxford University Press; 2001.

Craig E. Moral Judgment. *The Routledge of philosophy*. London: Routledge; 1998.

[11] Salim H.S. dan Erlies Septiana Nurbani, 2014, *Perkembangan Hukum Kontrak Innominaat Di Indonesia (Buku Kedua)*, Sinar Grafika, Jakarta.

Herkutanto, Soerjono Soekanto, 1987. *Pengantar Hukum Kesehatan*, Remadja Karya, Bandung.

Koh Y: *Residents' preparation for and ability to manage ethical conflicts in Korean residency programs*. Academic Medicine. 2001

Koeswadji, Hermien Hadiati, 2002. *Hukum Untuk Perumahsakitan*, Citra Aditya Bhakti, Bandung.

Maliangga, Jendri, *Hak Informed Consent Sebagai Hak Pasien Dalam Perlindungan Hak Asasi Manusia*, Lex et Societatis, Volume I, Nomor 4, Bulan Agustus, Tahun 2013.

Mayeda M, Takase K. Need for enforcement of ethicolegal education – an analysis of the survey of postgraduate clinical trainers. BMC Medical Ethics. 2005; 6:8.

Prawiroharjo P, Meilia PDI. Dokter beriklan: *Sebuah tinjauan menurut Kode Etik Kedokteran Indonesia (KODEKI)*, 2012.

Siswati, Sri, 2013. *Etika dan Hukum Kesehatan dalam perspektif undang-undang kesehatan*, PT Rajagrafindo persada, Jakarta.

Tutik, Titik Triwulan, 2010, *Perlindungan Hukum Bagi Pasien*, Prestasi Pustaka, Jakarta.

Veatch RM. *The principle of autonomy and the doctrine of informed consent in: The basics of bioethics*. New Jersey: Prentice-Hall, Inc; 2000.

Williams, John R, 2005, *Panduan Etika Medis*, Penerbit Ethics Unit of the World Medical Association Cetakan: Pertama.

Wiradharma, Danny, 2003, *Aspek Etis dan Yuridis Tindakan Medis*, Penerbit Universitas Trisakti, Jakarta.

STRENGTHENING OF LEGAL CULTURE IN THE IMPLEMENTATION OF PUBLIC SERVICES AS EFFORTS TO UPHOLD HUMAN RIGHTS (HAM) IN INDONESIA

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ABSTRACT

Community participation in public services is both a right and an obligation starting from planning to evaluation. Community participation will be able to guarantee democratic justice, ie all citizens will be treated equally in a state administration and have implications for equal access rights in the process of governance. The principle of democratic justice in the administration of government is a human right for citizens which then has implications for the obligations of each country to guarantee its sustainability.

Agenda that must be carried out in strengthening the legal culture in the administration of public services, namely: (1) increasing the ability of the legal structure to convince the public that the implementation of public services is truly oriented to the people and social justice and able to carry out their duties non- discriminatory; (2) the public service provider must create an educated public so that the public can understand the law of public services well and implement the rules of the law for public services and can provide advice and supervision to the authorized agencies

Keywords: Legal Culture, Human Rights

A. INTRODUCTION

Government is essentially a service to the community. Government is not held to serve itself, but to serve the community and create conditions that enable every member of the community to develop their abilities and creativities to achieve common goals[1].

At present, the paradigm of governance has experienced a shift from the paradigm of rule government to good governance. The government in carrying out government, development and public services in the perspective of good governance, is not merely left to the government (state) or state only, but must involve all components, namely internal bureaucracy and society. There are at least three reasons why the discourse of good governance

becomes actual, namely: (1) there is still a lot of corruption and various forms of irregularities in the administration of the state; (2) regional autonomy policy which is a big hope for the democratic process as well as concerns about the failure of the program; and (3) the lack of government and private sector bureaucracy services that are not yet optimal in meeting the needs and interests of the public.[2]

Conceptually, the essence of good governance in the context of public service delivery is: (1) there is an obligation on the part of the state apparatus to carry out its functions and authorities based on the principles of good governance; (2) there is recognition of the human rights of every citizen and community of the government, administrative behavior, and quality of service results that are qualified; (3) the diversity of types and fields of public services as a result of the diversity of public affairs and interests that must be met through the administration of public services.[3]

Furthermore, in Article 3 of Law Number 25 Year 2009 regarding Public Services (UUPP), the specific objectives of the UUPP are formulated as follows: (1) the realization of clear boundaries and relationships between the rights, responsibilities, obligations and authorities of all parties related to public service delivery; (2) the establishment of a proper public service system in accordance with the general principles of good governance and corporation; (3) the fulfillment of public service delivery in accordance with statutory regulations, and (4) the realization of legal protection and compliance for the public in the administration of public services.

Targets to be achieved with the issuance of UUPP are: (1) the realization of legal references regarding the implementation of public services; (2) the realization of legal certainty for the implementation of investment (investment) in Indonesia; (3) the formation and organization of an appropriate public service provider is formed; (4) management of

apparatuses of public service providers that is effective, effective and well targeted; (5) the realization of supervision in the administration of public services; (6) the realization of community participation in the administration of public services.[4]

The performance of public service providers, seen from the service delivery pattern, is still far from the UUPP's ideals, namely: less responsive, less informative, less accessible, less coordinative, tends to be bureaucratic, does not want to hear complaints, criticisms and suggestions, and inefficiency. Meanwhile, from Human Resources (HR), there seems to be a lack of professionalism, competence, empathy, and ethics. The Governance and Decentralization Survey Institute added that poor public services are marked by the still high levels of service discrimination, lack of service certainty, low levels of community satisfaction, and even services tend to be 'commodities'.

The results of the Governance Assessment Assessment (GAS) study also show that the government has not been able to carry out public services and policies properly. This is indicated by the low accessibility of various types of public services in the regions. In various regions, there are still many public service providers that do not yet have service standards and the uncertainty of costs and service times. This uncertainty is the cause of the emergence of corruption, collusion and nepotism (KKN) practices in the administration of public services. Service users who are unable to deal with uncertainty tend to prefer paying higher fees to obtain certainty about the time and quality of service. Instead, this situation is exploited by public service providers to meet their personal interests and needs.5

During 2004-2011, the Ministry of Home Affairs noted that 158 regional heads consisting of governors, regents and mayors were involved in corruption. At least 42 DPR members were also dragged into corruption in the 2008-2011 period and in the 2009-2011 period there were 30 DPR members from 4 political parties involved in the alleged bribery case of the election of Bank Indonesia's Senior Deputy Governor. The same thing also happened in the KPU institutions, the Judicial Commission, the Commission, the Directorate General of Taxes, Bank Indonesia, and BKPM. Throughout 2010, the Supreme Court imposed sanctions on 107 judges, 288 prosecutors' employees, and 294 police officers who were dismissed from the National Police service6.

Sunaryati specifically categorizes 20 forms of maladministration, namely: the first group, forms of maladministration related to the timeliness in the public service process, which consists of actions to delay, not deal with, and neglect obligations; the second group, forms of maladministration that reflect partiality so as to create a sense of injustice and discrimination, which consists of conspiracy, collusion, nepotism, acting unjustly, and obviously unjust; third group, forms of maladministration that more reflect forms of violations of laws and regulations, which consist of forgery, violations of the law, and acts against the law; fourth group, forms of maladministration related to authority / competence or provisions that have an impact on the quality of public services of public officials to the public, which consists of actions outside competence, officials who are not competent to carry out tasks, interventions that affect the process of providing public services, and actions that deviate from the fixed procedure; the fifth group, the form of maladministration that reflects the arrogance of a public official in the process of providing public services to the public, which consists of arbitrary actions, abuse of authority, inappropriate actions; the sixth group, forms of maladministration that reflect active acts of corruption, which consist of extortion or requests for monetary compensation, control of other people's belongings without rights, and embezzlement of evidence.

B. PROBLEM FORMULATION

The problem is that efforts to improve the delivery of public services have so far focused more on improving the substance and legal structure, but weak on aspects of legal culture. Lawrence Friedman stressed that in law enforcement efforts, a balanced improvement of the three components is needed. Meanwhile, Soerjono Soekanto stated that law enforcement includes the legal component, law enforcement, public legal awareness, and facilities and infrastructure.

Departing from the above problems, this paper will elaborate on: the concept of law enforcement, community participation in public services, and efforts to strengthen the community's legal culture in public services.

C. Literature Review

1. Justice Theory

   Justice Theory from J. Rawls, he developed the basis of justice is that everyone has the same rights from their natural positions. Therefore, for justice to be achieved the structure of the

political, economic and regulatory constitution regarding property rights must be the same for all people. Basically, the theory of justice to overcome two things, namely the difference and the principle of fair equality of opportunity. The essence of the difference principle is that social and economic differences must be regulated so as to provide high benefits for the least established.

The term social economic difference in the principle of difference leads to inequality in the prospect of a person to get the basic elements of welfare, income, authority. Whereas the principle of fair equality of opportunity for those who at least has the opportunity to achieve the prospects for the welfare of opinion and authority. Those who according to J. Rawls must be given special protection. Because according to him, the theory of justice.[7]

2. Legal Protection Theory

Philipus M. Hadjon distinguishes legal protection for the people in 2 (two) types, namely:

a. Legal protection means that the provisions of the law can be presented as an effort to prevent acts of violation of the law. This effort is implemented by establishing normative legal rules.
b. Preventive legal protection aims to prevent disputes, which direct government actions to be careful in making decisions based on discretion. Repressive legal protection aims to resolve disputes, including handling them in the judiciary.

According to Soerjono Soekanto, the function of law is to regulate the relationship between the state or the community and its citizens, and the relationship between fellow citizens, so that life in society runs orderly and smoothly, so that with the relationship between the community and the government, legal protection between the government becomes harmonious. With the interaction between the government and the community, the legal consequences are that the legal task is to achieve legal certainty (for the sake of order) and justice in society. Legal certainty requires the creation of general rules or generally accepted rules. In order to create a safe and secure atmosphere in society, the rules must be enforced and implemented firmly.

D. RESEARCH METHOD

The type of approach used in this study is the statutory approach and the field approach. The statute approach is carried out by examining the laws and regulations relating to the delivery of public services as an effort to uphold human rights (HAM), with the aim to be known about the consistency and suitability of a law with other laws, between statute and constitution or between regulation and law.8

E. DISCUSSION

1. Concepts of Law Enforcement of Public Services

Law enforcement is a series of processes to describe the values, ideas, ideals, and subsequently become the legal objectives. Legal aspirations or legal objectives contain moral values, namely justice (Rechtsvaardigheid), certainty (Rechtszekerheid), and expediency (Doelmatigheid). The existence of a law is recognized if the moral values contained in the law are able to be implemented. The failure of the law to realize the value of the law is a threat to the "bankruptcy" of existing laws. "Poor" legal implementation of moral values will be distant and isolated from the community.

The essence and meaning of law enforcement conceptually lies in the activity of aligning the relationships of values outlined in the rules and manifesting attitudes and actions as a series of translation of the final stages of value to create, preserve, and maintain peace in the association of life.9

In practice, the ideals or ideas of legal certainty, justice, and benefits are almost impossible to achieve in all three in a balanced way. If legal certainty is one of the pendulum direction of law enforcement, then the other pendulum direction, namely justice and usefulness will be reduced, and vice versa.

Emphasis on one aspect of either certainty or justice is strongly influenced by the legal traditions that are adopted. Countries that adhere to the Civil Law tradition that is based on law and legislation will lead to legal certainty; whereas countries that adhere to the Common Law tradition which originate in custom and case law, the sense of justice of the community is more accommodated through judge made law. In addition to certainty and fairness aspects, in law enforcement, consideration must also be given to the usefulness or usefulness aspects of community law, not because the law is implemented or enforced, instead anxiety arises in the community, because the law is for the community and not the community for the law.

Law enforcement as a process is essentially a

variable that has correlation and interdependence with other factors. Lawrence M Friedman revealed three factors that determine the process of law enforcement, namely the substance, structure, and cultural components. The three components are a system, meaning that the components will determine the process of law enforcement in society and cannot be converted to one another. Failure on one component will impact on other factors.

Meanwhile, according to Abdul Mukthie Fadjar, there are four factors that must be considered in enforcing public service law to be able to approach the achievement of certainty, justice, and expediency, namely: (1) a substantial factor in the rule of law; (2) structural factors, namely law enforcement apparatus; (3) cultural factors, in this case the legal awareness of the "justiciabel"; and (4) managerial factors, in this case the administrative management of the organization.10

Based on substantial factors, the legal regulations to be upheld (rules) must be clear and firm and do not contain multiple interpretations. Therefore, in making laws must pay attention to the philosophical aspects (values and principles proclaimed by the public), juridical (procedures for making them right and not conflicting with each other), and sociological (in accordance with reality and demands community). The question is whether the laws and regulations relating to the administration of public services have met the substantial requirements of the rule of law or not.

Structural factors are very much determined by the law enforcement apparatus, namely people or officials who are directly related to the implementation, maintenance, efforts to maintain the law and if deemed necessary in accordance with their functions regulated by law, can enforce the law. Requirements that must be fulfilled by a good law enforcer, among others: must master the meaning of existing legal rules, both written and unwritten; has extensive knowledge and insight; can follow the development of society and their needs; must know the limits of authority, and have skills in carrying out their duties; and of course have integrity or honesty. Law enforcers that are commonly known are the courts, prosecutors, the police, and advocates who are referred to as chess enforcers of law enforcers, and even government agencies related to the application of law can also be categorized as law enforcement11. Cultural factors require legal awareness (conviction) of community members to avoid prohibited acts, carry out their duties and obligations as citizens, and understand the legal consequences if they violate the law. The legal awareness of the 'justiciabel' is strongly influenced by the culture, knowledge, and level of education of the people. The legal awareness of the "justiciabel" is a bridge that connects legal regulations with one's legal behavior. This is included in the category of values and attitudes that influence the operation of law in society, which is also called legal culture. Managerial factors relate to the process of coordinating and integrating the factors that determine whether or not effective enforcement of ideas (goals) in the administration of public services, namely legal factors (law), law enforcement, facilities or facilities, and the legal culture of the community. Thus, the success or failure of law enforcement is not determined by only one factor, but also at least by the four factors proportionally.

Efforts developed by state administrators in realizing the quality of public service delivery tend to pay attention to the substance and structure of the law but not to the legal culture. Friedman12 reminded that the legal culture in the form of the overall attitude and value system of the community and the legal awareness of the community, is the "gasoline of justice" that determines how the law should apply in society. This means that legal nonsense in public services can be enforced without the support of awareness, knowledge, and understanding of legal subjects in society.

Another thing that is no less important is the existence of a certain level of autonomy for the organization (institutions of public service providers) in realizing the legal ideas (objectives) of the administration of public services. Autonomy is needed in order to manage the available resources, namely: human resources, physical resources, financial resources, and other resources needed to move the organization.

2. Participation Of The Community In Public Services

Participation can be defined as participating, participating in an activity, from planning to evaluation. In a political perspective, Huntington and Nelson provide an understanding of political participation as the activities of civilians who aim to influence government decision making. The World Bank Participation Study Group formulates community participation as a process through stakeholders that influence and share control over the initiatives and decisions and development resources that affect them.13

The above conception is believed to be able to guarantee democratic justice, namely that all citizens will be treated equally in the administration of the state. This equation implies that all levels of society have the right to access in the process of governance without any difference. The principle of democratic justice in the administration of government is a human right for citizens which then has implications for the obligation of each country to guarantee its sustainability. The International Covenant on Civil and Political Rights stipulated by UN General Assembly Resolution 2200 A (XXI) in Article 25 stipulates that: "Every citizen must have rights and opportunities without any distinction". Similar provisions are also contained in Law Number 39 of 1999 concerning Human Rights, the eighth part concerning the right to participate in government (Article 43). These provisions are an important basis for the community that provides opportunities to exercise their human rights in public participation in the process of implementing democratic governance in Indonesia.

Sherry Arnstein as quoted by Rival G. Ahmad14 in A Ladder of Citizen Participation made a scheme of 8 (eight) levels of people's participation in deciding policies. The highest or first level is citizen control. The second level of delegation of authority (delegated power), at this level the authority of the community is greater than the state administrators in formulating policies. The third level, partnership (partnership), namely the existence of a balance of relative power between the community and holders of power to plan and make decisions together. The fourth to sixth levels indicate pseudo participation consisting of placements, consultations and information. Seventh and eighth levels, therapy and manipulation that indicate lack of participation. On the steps of community policy group therapy, policy victims are encouraged to complain to the authorities but it is unclear whether the complaint is followed up or not. Unfortunately, on the ladder of manipulation state institutions justified community groups to act as if they were participating when in reality what was happening was the co-optation and repression of the authorities.

Meanwhile, Wilcox in Purwanto differentiated the level of community participation into five types, namely providing information, consulting, joint decision making, taking joint actions, and supporting activities that arose from community initiative. According to Wilcox, at the level of community participation, it will be very dependent on what interests are to be achieved. For strategic policy making that affects the lives of many people, the community must be fully involved. While in technical decision making, providing information to the public is very adequate.

3. Strengthening the Community's Legal Culture

Etymologically, reinforcement comes from the word "strong" which means a lot of energy or more ability, while the word "reinforcement" has the meaning of deeds, things and so forth that reinforce or strengthen. In terminology, reinforcement means the effort to strengthen something or things that were weak become stronger. This strengthening is based on the existence of something weak to be made strong so a strengthening process is carried out.

Strengthening is divided into two types, namely positive reinforcement and negative reinforcement. The direction and purpose of the two types of reinforcement are the same, namely to encourage stronger behavior that has been displayed but with different forms and material reinforcement. Positive reinforcement is carried out by giving positive things in the form of praise, gifts, or other valuable things to the perpetrators of deeds that are considered good and want to increase the frequency of their appearance. Meanwhile, negative reinforcement is carried out by reducing certain things that are pleasing to the offender, by reducing certain things that have so far been felt as punishment, unpleasant, or becoming something burdensome for the offender.

The purpose of strengthening in the context of strengthening the legal culture of public service delivery, includes:

a. Dissemination, namely the dissemination of the substance of the UUPP concerning the scope of public services, guaranteed community rights, service provider obligations and sanctions in the event of a violation by the service provider to the public in order to have the knowledge, understanding and understanding as expected by the UUPP.
b. Optimization means the substance of the UUPP that has been transformed is expected to be understood, known, believed, and implemented as a whole or maximum.
c. Improvement, namely strengthening carried out as an effort to increase knowledge, understanding, and understanding of the public about the Company Law so that the implementation of public services can be

carried out in accordance with the breath and the mandate of the Company Law.

d. Renewal, which is a cultural change in the administration of public services that is different from the previous one for the better and is increasing in accordance with the principles of the delivery of public services.

Satjipto Rahardjo15 stressed that law enforcement always involves humans and human behavior. The law cannot be upright by itself, that is, the law is not able to realize its own promises and wills contained in legal regulations. Solly Lubis added, legal awareness is a guide to mental attitude and behavior towards problems that have a legal aspect that includes knowledge of the intricacies of the law, appreciation or internalization of the values of justice and compliance or compliance with applicable law. Meanwhile, the level of awareness is the weight of knowledge, appreciation, and obedience to the applicable law which is shown by ways of thinking and doing in everyday relationships.

F. CONCLUSIONS

Conceptually, law enforcement is essentially a variable that has a correlation and interdependence between the factors of substance, structure, and culture. The three components are a system, meaning that the components will determine the process of law enforcement in society and cannot be converted to one another. That is, efforts to realize the quality of public service delivery which only rests on improving the aspects of the substance and legal structure, can be sure that the breath and mandate of the UUPP cannot be enforced.

Community participation in public services is both a right and an obligation starting from planning to evaluation. Community participation will be able to guarantee democratic justice, ie all citizens will be treated equally in a state administration and have implications for equal access rights in the process of governance. The principle of democratic justice in the administration of government is a human right for citizens which then has implications for the obligations of each country to guarantee its sustainability.

Agenda that must be carried out in strengthening the legal culture in the administration of public services, namely: (1) increasing the ability of the legal structure to convince the public that the implementation of public services is truly oriented to the people and social justice and able to carry out their duties non-discriminatory; (2) the public service provider must create an educated public so that the public can understand the law of public services well and implement the rules of the law for public services and can provide advice and supervision to the authorized agencies.

G. REFERENCES

Agus Dwiyanto, Realizing Good Governance, Gajah Mada, Yogyakarta, 2005. Agus Dwiyanto (et.al.), Performance of Local Governance in Indonesia, PSKK UGM In collaboration with partnerships, Yogyakarta, 2007.

Agung Hendarto and Nizar Suhendra, Good Governance and Strengthening of Regional Institutions, Indonesian Transparency Society (MTI), Jakarta, 2002.

C.F.G. Sunaryati Hartono, Investigation Guide for the Indonesian Ombudsman, Jakarta, 2003.

Chambliss William J., and Robert B. Seidman, Law, Order and Power, Addison-Westley, Mass, 1971.

Erwan Agus Purwanto and Wahyudi Kumorotomo, Public Bureaucracy in the Semi-Parliamentary Political System, Gava Media, Yogyakarta, 2005.

Huntington, Samuel P. and Joan Nelson, Political Participation in Developing Countries, Rineka Cipta, Jakarta, 1994.

Jimly Asshiddiqie, Indonesian Constitution and Constitutionalism, Jakarta, Press Constitution, 2005.

M. Ryaas Rasjid, Decentralization in Supporting Regional Development in Administrative Development in Indonesia, LP3ES Library, Jakarta, 1998.

Mp3 Community Cares for Public Services, What's with Law No. 25 of 2009 concerning Public Services ?, TIFA Foundation, Jakarta.

Satjipto Rahardjo, Law Enforcement: A Sociological Review, Genta Publishing Publisher, Yogyakarta, 2009.

Sirajjudin, Didik Sukriono and Winardi, Law on Public Service Based on Participation and Information Openness, Setara Press (Insrans Publishing Group), Malang, 2011.

Soedjono Dirdjosisworo, Introduction to Legal Studies, CV. Rajawali, Jakarta, 1984. Solly Lubis, Politics and Law in the Reformation

Era, CV. Mandar Maju, Bandung, 2000.

[1] M. Ryaas Rasyid, Decentralization in Supporting Regional Development in Administrative Development in Indonesia, Jakarta: Library LP3ES, 1998, p. 139

[2] Agung Hendarto and Nizar Suhendra, Good Governance and Strengthening Regional Insitution, Jakarta: Indonesian Transparency
Society (MTI), 2002, p. vii

[3] Sirajuddin, Didik Sukriono and Winardi, Law on Public Service Based on Participation and Information Openness, Malang: Setara Press (Insrans Publishing Group), 2011, p. 7

[4] Ibid., P. 8

[5] Agus Dwiyanto (et.al.), Local Governance Performance in Indonesia, Yogyakarta: PSKK UGM in collaboration with the Partnership, 2007, p. 17

[6] Kompas, Monday, June 20, 2011, "Worrying Moral Damage", p. 1, column 2

[7] The theory of justice describes his attempt to generalize and abstract the social contract theory expressed by Locke, Rousseau and Kant. In this way Rawls hopes that the theory can be developed so that no more real rejection is open. In addition, this theory seems to provide a systematic assessment of justice as a higher than the traditional traditional utilitarianism, so he admitted, the resulting theory of justice is "thick with Kantian style". John Rawls, Justice Theory: The Basics of Political Philosophy to realize Social Welfare in the State, (Yogyakarta; Student Library, 20060, p. Vi. In the Dissertation Summary, Jonlar Purba, Law Enforcement of Ordinary Patterned Criminal Acts Using Restorative Justice in the Perspective Criminal Law Reform, (Jakarta; Doctoral Program, Postgraduate Law, Jayabaya University), page 29

[8] Peter Mahmud Marzuki, *Penelitian Hukum*, Prenada Media, Jakarta, 2005., hlm. 133

[9] Soedjono Dirdjosisworo, Introduction to Legal Studies, Jakarta: CV. Rajawali, 1984, p. 127

[10] Abdul Mukthie Fadjar, "Concerns of Fading Law Enforcement and Legal Authority in Indonesia", Paper presented at the Workshop of Doctorate Forum at the Faculty of Law, Universitas Brawijaya, June 30, 2011, p. 3

[11] Ibid., P. 3

[12] Lawrence M. Friedman, "Legal Culture and Social Development", Law and Society, Vol. 4, 1969, p. 9

[13] Management of Urban Infrastructure and Facilities (MPSP), "Community Participation in Planning and Programming for Urban Infrastructure and Development (Participant Modules)", Malang City Government in Collaboration with USAID, 2002

[14] Rival G. Ahmad (et.al.), "From Parliament to Public Spaces: Initiating Participatory Policy Making", Journal of Jentera Law, 2nd Edition, 2003, p. 109

[15] Satjipto Rahardjo, Law Enforcement: A Sociological Review, Yogyakarta: Genta Publishing Publisher, 2009, p. ix

PROGESSIVITY, RESPONSIVITY AND LEGAL CERTAINTY OF INFORMED CONSENT IN THERAPEUTIC TRANSACTION WILL PROTECT THE PATIENT AND DOCTOR

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ABSTRACT

Informed consent in therapeutic transaction is explanation about the disease of the patient, management of disease, prognosis and consent of the patient that the patient agree with management of the disease by the doctor. Such informed consent could be written or unwritten depend on risk of management of the disease, if it is hight risk, informed consent has to be written, if it is low risk, informed consent may unwritten. This study will discuss how does informed consent implemented according to progressive law, according to responsive law and concerning legal centainty. The result of the study can be seen that informed consent will be more protected the patient and doctor. Protected the patient is means that the patient will receive excellent medical services from the doctor and the doctor will do the best they have. The doctor will tell the truth honestly his competencies to cure and manage the disease of the patient. Both of them, doctor and patient respect each other and more put forward their own obligation than their own right. It seems that progessive law is phylosophical side of informed consent, responsive law is sosiological side of informed consent and legal certainty is juridical side of informed consent.

Keywords: Informed Consent, Progessive Law, Responsive Law And Legal Certainty.

A. INTRODUCTION

Currently the treatment of doctors to the patients, commonly referred to as therapeutic transactions. Therapeutic transactions contain an agreement (*verbintenis*) between the doctor and the patient to find and determine the right treatment, therapy or treatment for the problem or disease suffered by the patient[1]. The agreement on this therapeutic issue is different from the agreement in general, because there are special things that affect the occurrence of the agreement. Before the doctor carries out treatment or manage the patient, there must be consent from the patient, and before there is consent from the patient, the doctor must explain to the patient, what is the patient's illness, prognosis, the purpose and benefits of the treatment to be taken, so that the patient understand about the disease and treatment to be taken. This is called informed consent. Informed consent must be carried out, in written or unwritten depend on risk of the treatment. If it is hight risk, informed consent has to be written.

Through such informed consent, the patient learns about his destiny in relation to his illness, whether he can recover completely or be cured but with disability or even ends in death. Health, disability and death are a set of rights inherent in human existence, so informed consent in therapeutic transaction is a human right. In accordance with Article 1 point 1 of Indonesian Law No. 39 of 1999 concerning Human Rights which states that, "Human Rights are a set of rights inherent in the nature and existence of humans as God's creatures and are His gifts that must be respected, upheld and protected by the state, law, government and everyone for the sake of honor and protection of human dignity". Therefore informed consent must be carried out in a therapeutic transaction, both because regulations or laws say so and because of human rights.

Informed consent is a legal product that must be implemented so that the therapeutic transaction is successful and protects both the patient and the doctor who provides the service. To achieve this success, the informed consent must be carried out in a way or theory or carried out according to the types of law that have been created by legal experts who have been verified. In this paper, the type of law is the type of progressive law from Prof. Satjipto Rahardjo (2004) and the type of responsive law from Nonet-Selznick, 1978. In addition, to achieve successful implementation of informed consent in therapeutic transactions, informed consent must pay attention to the principles of legal certainty . In this

[1] Zaeni Asyhadie, 2018. The Aspects of Medical Law in Indonesia. Second edition. PT. Raja Grafindo Persada Depok.

paper the opinions of a number of legal experts relating to legal certainty will be raised, for example; Gustav Radburch, Jan Micchial Otto, J van Apeldoorn, etc.

The main thoughts of Prof. Satjipto Rahardjo in the type of progressive law are 4, namely; 1. law for humans, not humans for law, 2. progressive law refuses to maintain the status quo in law, 3. civilization of written law will bring the consequences and risks of giving other meanings or to be given other meanings purposely, and 4. progressive law gives great attention to the role of behavior human in law[2]. In essence, progressive law teaches that law is for humans, not humans for law. Humans create laws for justice, purposivenes and legal certainty in their societies, but when the law is no longer appropriate to apply in their society, then the law must be changed as needed and even replaced with new laws. Progressive law teaches us to judge by heart (*kokoro* = Japanese) and place more emphasis on the obligations of each party's rights. If this teaching is applied in the implementation of informed consent in therapeutic transactions, patients will pay more attention to their obligations than their rights, as well as doctors who provide health care pay more attention to their obligations to patients, so of course it will bring more success in therapeutic transactions, which furthermore, it will be more secure and more protected for patients and doctors. Increasingly applying the type of progressive law (**progressivity**), informed consent in therapeutic transactions, will more protect patients and doctors.

The type of responsive law of Nonet-Selznick is the highest legal evolution after the type of repressive law and autonomous law. In the repressive type of law, the law represses the people and is blunt to the authorities, then increases to the type of autonomous law, where the law is very rigid both towards the authorities and to the people. Autonomous law has a purpose only to procedural justice. Then comes the third type of law, responsive law. The emergence of responsive law was caused by social problems that hit the United States in the 1950s, such as mass protests, urban unrest, abuse of power, poverty, crime, etc. Responsive law teaches that law must respond to all parties concerned with the law, both to the authorities and to their people. Responsive law is results-oriented, to the objectives to be achieved outside of the law, so as to obtain substantial justice[3]. The hallmark of responsive law is to look for the implied values contained in regulations and policies. If this responsive law (**responsivity**) is applied at the time of carrying out informed consent in a therapeutic transaction, then of course it will be more secure for patients and doctors, because informed consent will respond to patient needs and physician obligations.

Meanwhile, legal certainty is one of the three fundamental pillars of law. According to one German legal philosopher, Gustav Radburch[4], the three fundamental pillars of law are legal certainty, justice and purposiveness. So it is clear that no matter how progressive (**progressivity)** the law is carried out, how high the responsiveness (**responsivity**) of the law, it will be meaningless if it does not pay attention to the principles of legal certainty. Legal certainty implies that the existing law must be carried out according to the rules. Law must be carried out without hesitation to implement it, law must be textually and contextually clear. Therefore, at the time of its creation, sociologically, the law must be convinced that the law will be implemented by the community. Thus, returning to informed consent, informed consent will be protect the doctors and patients when observing the principles of legal certainty. Doctors will be safer when there is a "side of patient " who "capitalizes" the case by submitting unreasonable charges under the pretext of "malpractice", even though the therapeutic transaction goes well, the patient recovers without disability. By implementing the principles of **legal certainty**, the patient will be protected because informed consent is carried out properly.

With the background above, an persuade to doctors will be written to carry out their obligations properly in therapeutic transactions and an appeal to patients to understand their rights and obligations with the title: **"Progressivity, Responsivity and Legal Certainty of Informed Consent in Therapeutic Transactions Will Protect The Patients And Doctor "**.

[2] Satjipto Rahardjo, 2004. Let the law flow. Critical notes about human struggles and law. Penerbit Buku Kompas. Jakarta.

[3] Orinton, 2013. Theory of Responsive Law. Downloaded from www.orintononline.blogspot.com, on 15-12-2019 , 06.00.

[4] Wikipedia. Legal Centainty. Downloaded from www.en.m.wikipedia.org, on 12-12-2019, 06.00.

B. PROBLEM STATEMENT

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

1. Is the informed consent has to be written in therapeutical transaction ?
2. What are the medical services that has to be written informed consent ?
3. What are to be written in informed consent ?
4. What are legal centainty of informed consent ?

C. LITERATURE REVIEW

1. Informed consent.

"Informed" means information, "consent" means consent, which concretely "Every medical or dental action that will be carried out by a doctor or dentist against a patient must be approved. Approval is given after the patient gets a complete explanation "(Article 45 paragraph (1) and (2) Indonesian Law no. 29 of 2004 concerning Medical practice). The doctor's explanation to the patient about the patient's illness, the action to be taken and the prognosis and the patient's consent of the action to be taken, do not always have to be written. This is in accordance with Paragraph (4) Article 45 of Indonesian Law no. 29 of 2004, where agreements can be made in writing or not in writing.

Thus, informed consent is a normal thing in a transaction, including therapeutic transactions. Therapeutic transactions or therapeutic agreements or also known as therapeutic contracts are agreements known in the health service sector. Informed consent is a basic right for a patient to obtain information about his disease which will further determine his destiny (prognosis), whether he can recover from his illness, whether he can still live normally, or can still live but with disabilities or even will end in death. This concerns the right to life for a human being. The right to life concerns the rights inherent in the nature and existence of humans as God's creatures. Therefore an explanation to the patient about his illness and his prognosis and the benefits of the action to be taken, is the patient's human rights. This is in accordance with Article 1 point 1 of Indonesian Law No. 39 of 1999 concerning Human Rights which states that, "Human Rights are a set of rights inherent in the nature and existence of human beings as creatures of God Almighty and are His gifts that must be respected, upheld and protected by the state, law, government and everyone for the honor and protection of human dignity".

The need for informed consent on therapeutic transactions, began to think about its usefulness in the Nuremberg Medical Trial court that took place from December 1945 - August 1947 to investigate and judge the Medical War Crime, in World War II[5]. On March 4, 1945, doctors released from the Auschwitch concentration camp told how prisoners were treated as guinea pigs in research conducted by the Nazi party. They were given medication and medical action without being told what for and how it would affect their bodies. However, the term informed consent was first used in 1957 by a attorney, Paul G. Gebhard, at a trial of a medical malpractice case in a United States court. Next developed the term informed consent in therapeutic transactions. It tracing its history of checking for of these practices :

1. A patient agrees to a health intervention base on understanding of it.
2. Patients have multiple choices and is not compelled to choose a particular one.
3. The consent include giving permission[6].

In paragraph 5 of Article 45 of Indonesian Law No. 29 of 2004 concerning Medical Practice, every hight risk medical services have to implemented written informed consent signed by the right to give consent. At present, written informed consent has been carried out in hospitals, in health centers and in clinics. Informed consent can be in the form of General Consent, i.e. informed consent when the patient first enters or first treatment, informed consent for general anesthesia, informed consent for surgery and other actions that have a high risk of morbidity and mortality, for example; blood transfusion, dialysis , etc.

2. Progressive Law.

Progressive Law created by Prof. Satjipto Rahardjo in 2004 is a type of law that has the following characteristics[7]:

a. Law is for humans, not humans for law.
   Humans are social creatures who like to gather, help each other, mutual cooperation so that a community that is harmonious and peaceful,

[5] Albertus Fredi Susanto, 2014. Etical Aspect of Informed Consent Implementation. Kasih Magazine, Edition 37th (Januari-Maret 2014). Communication of Panti Wilasa Hospital, Dr. Cipto, Semarang. Downloaded from www.pantiwilasa.com on 10-11-2019, 06.15.

[6] Wikipedia. Informed Consent. Downloaded from www.en.m.wikipedia.org, on 7-12-2019, 06.00.

[7] Satjipto Rahardjo, 2010. Enforcement Of Progressive Law. Penerbit Buku Kompas. Jakarta.

formed a society that respects each other and helps each other to help achieve prosperity. But sometimes in daily interactions there arises a sense of incompatibility, there is a sense of discomfort because of the words, or actions that are not pleasing to others. A norm must be agreed upon by the community to arise, so that a sense of comfort arises in the community's association. These norms will eventually become rules and subsequently these regulations will become law in the community. Where there is a community there is a law (*ubi societas ibi ius,* Cicero, 106-43BC).

Law is needed by the community in order to create justice and purpossiveness for human beings who are in the community. The law must provide welfare and happiness for the people around them. But in the development of human civilization, there is a possibility that the law is no longer compatible with human civilization, the law is slow but sure it will certainly no longer provide justice and benefits for humans, then the law must be replaced, partially replaced or even replaced as a whole. Thus, it will always happen, people make laws and they also break it down, if it is felt to be no longer compatible with the conditions of society at that time. This is one of the characteristics of Progressive law namely law for humans, not humans for law.

b. Progressive law refuses to maintain the status quo in law.

Maintaining the status quo in law means the same as saying that humans do not develop, while humans and nature continue to change, what does not change is change itself. Humans cannot possibly maintain the status quo in law, because the law only applies to a certain period of time. Very unlikely in today's modern era, using the law used in the stone age, and vice versa. In addition, the way a person interprets a law will also differ from time to time.

c. Progressive Law recognizes that civilization of written law will bring the consequences and risks of giving other meanings or to be given other meanings purposely.

Progressive Law recognizes that there are differences in legal hermeneutics or the interpretation of the law of each person who reads it, which means the law will give different meanings to individuals and there may be those who deliberately give other meanings for personal gain or their clients. A law enforcer is expected to be able to read the legal texts with his heart. Because of the many interpretations of the law from the same text, each law has explanations for each verse of the articles of the law. Progressive law places more emphasis on unwritten law than written law if this is possible. The unwritten law turns out to be easier to understand for the parties concerned than if the law was written.

There is a gap when writing ideas of rules or laws in text form. Although it is correct when examined word by the word, but it still causes other meanings when interpreted contextually. We have often heard from legal critics, that the law is flawed from birth, because it is not in accordance with the original idea of the law or regulation was made. Progressive Law emphasizes that regulations or laws are already in the minds of each person, which should be done and which should not be done. Progressive law prefers that everyone knows his obligations more than his rights.

d. Progressive Law gives great attention to the role of behavior human in law.

Human behavior in the law will be different from each nation, will be different if the community is also different. With the same law, but carried out by different nations will produce a different social order. With this view, Progressive law gives great attention to human behavior in law. In law, humans also develop in accordance with the development of time and nature.

3. Responsive Law

Responsive Law is the third level of law from Phillippe Nonet and Philip Selznick, 1978[8]. They distinguish three basic modalities or "statements" related to law in society:

a. Repressive law is law as repressive servant of power.

b. Autonomous law is law as a separate institution capable of taming repression and protecting its integrity.

c. Responsive Law is law as a facilitator of various responses to social needs and aspirations.

[8] Philippe Nonet dan Philip Selznick, 1978. Law and Society in Transaction : Toward Responsive Law. Harper & Row 1978, translate in Bahasa by Raisul Muttaqien, et al, 2018. Penerbit Nusa Media. Bandung.

Responsive law is the highest evolution of the three laws.

Repressive law is a tool of the government or the authorities to repress and pressure society to obey the law. Rules and laws are carried out harshly on society, while laws and regulations are blunt or do not apply to government or authorities. Discretion is very broad and opportunistic. Everything is done for the sake of public order. This happened because of the lack of power from the authorities. So, in times of difficult situations the authorities will use repressive methods in handling the problems. Sometimes they act this way not for bad purposes, but because they do not have any other way to overcome, by taking sanctuary for the purpose of public order and the safe functioning of government.

By implementing this repressive law, there is injustice, poverty, ignorance and widespread destitution in society. Then comes the autonomous level of law in society. Regulations and laws must be independent, must not be disturbed and must be obeyed both by the government and by the community. The law is treated rigidly, sacredly and everything must be according to procedure. Then achieve justice only at the level of procedure (procedural justice), while the objectives of the rule or law are not achieved (substantial justice). Although the law is carried out with very high legal certainty, but does not produce the expected objectives, the law must still be implemented. The law must be upheld even though the sky will collapse (*fiat justitia ruat caelum*).

To respond to such matters, the community arrived at a responsive legal level. Responsive law is implemented to respond to the needs of the authorities and the community, the law is implemented to achieve a goal, so that its legitimacy is substantial justice.

The characters of each type of law are presented briefly in Table 1.

TABLE 1. THREE TYPES OF LAW[9]

Perspectiv e	represive law	Autonomic law	**responsive law**
End of law	Order	Legitimation	**Competence**
Legitimac y	Social defend and raison d'etat	Procedural fairness	**Substancial justice**
Rules	Crude and detailed but only weakly binding on rule makers	Elaborate; held to bind rulers as well as ruled	**Subordinate of the principles and policy**
Reasoning	Ad hoc; expendient and particularistic	Strict adherence to legal authority;vuln erable to formalism and legalism	**Purposive; enlargement of cognitive competence**
Discretion	Pervasive; opportunistic	Confined by ruler; narrow delegation	**Expanded, but accountable to purpose**
Coercion	Extensive; weakly restrained	Controlled by legal constraints	**Positive search for alternatives, e.g; incentives, self-sustaining systems of obligations**
Morality	Communal morality; legal moralism; "morality of constraint"	Institutional morality; i.e, preoccupied with the integrity of the legal process	**civil morality; "morality of cooperation "**
Politics	Law subordinated to power politics	Law "independent" of politics; separation of powers	**legal and political aspirations integrated; blending of powers**
Expectati ons of obedience	Unconditionally ; disobedience *per se* is punished as defiance	Legally justified rule departures, e.g, to test validity of statutes or orders	**Disobedienc e assesed in light of substantive harms; Perceived as raising issues of legitimacy**
Participat	Submissive	Access	**Access**

[9] Phillippe Nonet dan Philip Selznick. 1978. "Law and Society in Transation : Toward Responsif Law". Routledge. New York. USA

ion	compliance; criticism as disloyalty	limited by established procedures; emergence of legal criticism	**enlarged by integration of legal and social advocacy**

Phillippe Nonet dan Philip Selznick. 1978. "Law and Society in Transation : Toward Responsif Law". Routledge. New York. USA

4. Legal certainty

According to Prof. Faisal Santiago, 2016, legal or law is a written rule made by the authorities intended for society for the creation of order and peace[10]. Certainty is a matter of (condition) certainty; provisions; statute [11]. So, legal certainty is a written provision or rule made by the authorities intended for the community for the sake of order and peace. The authority here means the sovereign government or executive body that makes rule or law in general. Law without certainty will not be a good guideline for human life. Where there is no legal certainty, there is no law (*ubi jus incertum, ibi jus nullum*)

According to J L van Apeldoorn[12], legal certainty has two aspects; first, regarding matters that can be determined in concrete matters, meaning parties seeking justice want to know what is the law in specific cases before they start a case; second, legal certainty means securing the law.

Meanwhile, Jan Michiel Otto[13] requires 5 things for the occurrence of legal certainty, namely:

a. There are rules that are clear, consistent and easily accessible, published by and recognized by the state.
b. The ruling agencies (government) apply these legal rules consistently and also obedient and obey them.
c. Citizens in principle adapt their behavior to these rules.
d. Independent and impartial judges (judiciary) apply these rules consistently when they resolve legal disputes, and
e. Concrete court decisions carried out.

Juridically, this legal certainty is very important, therefore a law or regulation to be made must be carefully thought out, that the regulation, philosophically, is in accordance with the culture of the local community, in accordance with the opinions of the people who are exist and indeed already run by some of these communities so that they are convinced that the laws or regulations that will be made, can be implemented properly by the community. Then when the rules or laws are made textually, socialization must be carried out and necessary changes are made if there are some things or words that are not in accordance with what is in society. It is often difficult to put ideas or thoughts into words. Therefore, the regulation or law must be adjusted textually and contextually, before promulgation. If this is not implemented then of course, the regulations or laws cannot be implemented by the community, then legal certainty cannot be carried out anyway.

D. RESEARCH METHODE

1. Research Approach : Conceptual Approach[14]
2. Research Spesification : Juridical-normative
3. Research Characteristic : Analytical-descriptive
4. Research Data : Primary and secondary

E. ANALYSIS AND DISCUSSION

1. Progressive laws and their relevance to informed consent.

The Progressive Law Paradigm, Satjipto Rahardjo, 2004 there are 4, namely :

a. Law is for humans, not humans for law.

We must have confidence that a law or a regulation is for humans, not vice versa. Similarly, informed consent in therapeutic transactions. Therapeutic transactions which in the past were known as requests for help from a patient or family affected by "disaster", either due to accident or illness, to those considered "smart person", "smart

[10] Faisal Santiago, 2008. Commercial Law and Bankruptcy in Faisal Santiago, 2012. Introduction of Business Law. Penerbit Mitra Wacana Media. Jakarta.
[11] Department of National Education, 2008. Bahasa Indonesia Dictionary. 4 th Edition. Penerbit PT. Gramedia Pustaka Utama. Jakarta.
[12] J Van Apeldoorm, translate in Bahasa by Tristam Moeliono in Sidharta, 2006. The Legal Professional Morality of Framework for Thinking. PT. Revika Aditama. Bandung. Page 82-83.
[13] Jan Michial Otto, translate in Bahasa by Tristam Moeliono in Sidharta, 2006.The Legal Professional Morality of Framework for Thinking.PT. Revika Aditama. Bandung. Page 85.
[14] ……., 2013. Approach in Legal Research. Downloaded from www.ngobrolinhukum. wordpress.com on 14-12- 2019, 06.00

person" did not provide an explanation of what the patient's illness was nor does it mention what the drugs or actions are for. However, the patient is very grateful to the "smart person" even though the patient did not recover and even the patient died.

The question is why patients don't ask or don't dare to ask. Because the position of "smart person" is higher than the patient, besides that the patient and his family think that the disease is a disgrace to the family and is a punishment from the Almighty. On the "smart person" side, why does the "smart person" not provide an explanation of the disease and the treatment / action given, because it assumes that the patient will not understand and even other people will not understand about the disease, only he alone can understand about the disease, the important thing is to help and be grateful when healed. Besides that, "smart person" in that society, have a higher social position. It appears that at that time there was no thought at all about informed consent, but the therapeutic transaction could go well.

In 1945, after the completion of World War II, many countries announced their independence from the invaders, including the Republic of Indonesia, began to emerge opinions regarding respect for human rights. World War II, leaving many war crimes and human rights violations in every aspect of human life, including in the field of health[15]. Informed consent which is one of human right, began to be considered at that time. On March 4, 1945, doctors who were released from Nazi concentration camps under the leadership of Adolf Hitler at Auschwitch, told how prisoners were carried out as guinea pigs in research conducted by the Nazi. They were given medication and medical action without being told what and how they would affect their bodies. For this reason, they urged allies and neutral states to take the case to court and from December 1945 - August 1947 the Nuremberg Medical Trial was underway to investigate and try this Medical War Crime. This and at this time the history of the birth of informed consent was upheld to respect human rights.

The description above is evidence that informed consent in a therapeutic transaction, as a law or a regulation is for humans, that is to respect human rights.

b. Progressive Law refuses to maintain the status quo in law.

In accordance with the above paradigm, informed consent must also not maintain the status quo. Maintaining the status quo means understanding informed consent that is constant, undeveloped, while therapeutic transactions or health services continue to grow and now reach digital-based health services. Informed consent is no longer static, but dynamic informed consent has begun to be used. Therefore informed consent must also develop to adjust the form and type of health services performed. Informed consent that is actually an explanation to the patient / family about the disease, the actions to be taken and the prognosis of the disease, must still be done in various ways even though by digital (on line) as well and or with dynamic informed consent.

c. Progressive Law recognizes that written legal civilization will bring forth all the consequences and risks of giving or being given another meaning.

Along with existing regulations or laws that informed consent does not need to be written, if the action to be taken does not have a high risk of morbidity or mortality. Even approval of medical procedures can be done by the patient nodding, if the patient's condition is in an emergency and the patient cannot talk, while medical services must be carried out immediately to save his life (life saving).

Progressive law teaches us that written law will have the risk of being interpreted and be understood differently from the original idea. We all understand that there will be a bias when the ideas of the human mind are written in the form of words. Simple things can be complicated if written in words. Even when the words have been agreed to the truth, it still creates problems when the law is interpreted contextually. Therefore, we must be careful in the law, if it does not need to be written and can not be written, it must prefer that which is not written. Likewise, informed consent, if allowed is not written, then it should not need to be written. The words in the informed consent made by the doctor, can be interpreted differently by the patient.

d. Progressive Law pays great attention to the role of human behavior in law.

This is in accordance with the development of current health services, the type and form of informed consent made at present, adjusting to the example of the Indonesian Medical Council and has been approved by the Hospital Accreditation Committee, National level accreditation and by the International Joint Commission (JCI) Accreditation for Hospital, International level accreditation. Before signing the

[15] Ibid number 5

agreement, the patient is given an explanation of the disease, until they know what they are. This is evidenced by the patient / family's signature on the patient's education form, another part of the informed consent. Likewise, during the discussion about the actions to be taken, patients and their families are given the opportunity to submit questions and opinions, and even determine the type of action therapy according to their wishes and knowledge. Patients are given the opportunity to seek second opinions from other doctors or other hospitals in finding a cure for their illness, especially now patients can know independently of an illness by opening the internet on a cell phone in his hand. Even today, there is an online way for people to get treatment for their illness, so the informed consent which has been referred to as a static informed consent has also begun to change with dynamic informed consent. This must be realized by doctors, dentists and other health workers in providing services to patients, that the role of human behavior in therapeutic transaction.

2. Informed consent must be carried out responsively.

Twenty-six years before Satjipto Rahardjo, in 2004 put forward Progressive law,

Philippe Nonet and Philip Selznick in 1978 had written a book entitled: "Law and Society in Transition: Toward Responsive Law" published by Harper & Row, 1978 and translated into Bahasa by Raisul Muttaqien in 2018. Nonet and Selznick proposed three gradations of legal types namely starting from Repressive Law Types, Autonomous Law Types and Responsive Law Types. The type of repressive law is characterized by regulations that are sharp downward, but are blunted upwards or are said to be loud and detailed but apply weakly to lawmakers. Autonomous Law types are characterized by extensive and detailed regulation; binds both government and his people, while Responsive Law Types are characterized by subordinates of principles and policies.

Responsive Law reinforces the ways in which openness and integrity can support each other despite the conflict between the two. Responsive law considers social pressures as a source of knowledge and opportunities for self-correction. To be responsive, the system needs to be open in many ways, need to encourage participation, and need to anticipate new social interests that allow these things to be known in difficult situations.

How to implement responsive informed consent ? Following is the Table of Responsive Law Relevance with Informed Consent:

The Relevance of Responsive Law With Informed Consent

No	Perspective	Responsive Law	Responsive Informed Consent
1.	End of Law	Competence	In accordance with the competence of doctors who give medical services
2.	Legitimacy	Substantive Justice	Patients understand and agree on the medical services to be taken
3.	Rules	Subordinat to principle and policy	Ethical and discipline to informed consent regulations
4.	Reasoning	Purposive; enlargement of cognitive	Performed in writing on high risk medical services and textualy adjusting the details of the medical services to be performed
5.	Discretion	Expanded; but accountable to purpose	Textually written outline, contextually can explain the medical services to be taken and possible complications
6.	Forces	Positive search for alternatives, e.g; incentives, self-sustaining systems of obligations	State and write risk and medical service alternative
7.	Morality	Civil Morality; "morality of cooperation"	Patients believe in doctors, doctors try to do the best, according to the competencies and professional standards
8.	Politic	Legal and political aspirations integrated; blending of powers	Etics authority and legal certainty of informed consent
9.	Expectations of Obedience	Disobedience assesed in light of substantive harms;	Cooperative, patients submit fully about treatment /medical

		perceived as raising issues of legitimacy	services to doctors and doctors carry out medical services in accordance with their competencies and the update professional standards
10.	Particip ation	Access enlarged by integration of legal and social advocacy	Patients and their families are invited to discuss in determining the choice of act medical services / treatment

So, according to the authors, informed consent must be carried out responsively, not autonomously moreover repressively. In accordance with what was written by Prof. Faisal Santiago, 2014[16], in his book Introduction to Law: "In order for the law to function in society, **the law should be responsive**, meaning that it is a means of responding to the needs and aspirations of the community, and the law will be effective in the community, if the law is based on living laws in community and to meet the community accepted and supported by the community (from community to community) "

3. Legal Certainty of Informed Consent

Legal certainty is a written provision or rule made by the authorities intended for the community for the sake of order and peace. In this case, the ruler is a legitimate and sovereign government. Informed consent which is an explanation of the disease and agreement of the medical services given by the patient to the doctor who will carry out the treatment /medical services, has been required by the government through Indonesian Law No. 29 of 2004 concerning Medical Practice. There are also many regulations, decisions and manuals that regulate informed consent.

The following are the laws and regulations regarding informed consent:

a. Indonesian Law number 29 of 2004 concerning Medical Practice.
b. Indonesian Law number 23 of 1992 concerning Health
c. Regulation of Indonesian Minister of Health number 290 of 2008 concerning Agreement of Medical Services
d. Regulation of Indonesian Minister of Health number 1419 / Men.Kes / Per / X / 2005 concerning Organizational Medical Practice
e. Manual for Approval of Medical Action by Indonesian Medical Council, November 2006.

It appears that there are already many laws regarding informed consent, all that's left is how to implement it properly, thus securing doctors when providing services to patients. The legal certainty of informed consent requires two things in its implementation, the first is the existence of rules or laws regarding informed consent and it is clear how to implement it, the second is that the rules or laws are implemented both textually and contextually. Informed consent may be carried out in writing and must be written in action / treatment that has a high risk, then who should provide an explanation to the patient / family and who should receive the explanation. Informed consent must be written, usually written in full, including the possible complications, but often the patient / family still demands if complications occur.

This happens because, even though written informed consent is clear, there are still gaps that are not written in the informed consent. It is not possible to write down all doctor's actions in detail and sequence, without a word left, even the operation / action report made by a doctor is sometimes incomplete. Operational reports may not be written all in informed consent, because it is very long and uses medical terms that cannot be understood by patients. Plus the suspicion of the patient / family for errors or negligence committed by doctors or other health workers, so that patients / families are not satisfied, complaints and can lead to court. For that informed consent, it must be written as completely as possible and it is possible that the text or informed consent form is different in each different surgery.

If informed consent has been carried out in accordance with the type of progressive law, in accordance with the type of responsive law and with the principle of legal certainty, there is still a dispute between the patient and the doctor, even up to the court, then we submit it to the judge so that the judge can decide the medical dispute case in accordance with the principle of legal certainty, purposiveness and providing justice from both parties. In accordance with what was delivered by Prof. Faisal

[16] Faisal Santiago, 2014. Introduction to Law. Cintya Press. Jakarta. Page 97

Santiago[17], in his book Collection of Essays of Legal Notes, 2016: "The important duty of judges is, they are obliged to adjust the laws to the reality in people's lives. If the law cannot be implemented according to its wording, it must be interpreted, so that the judge can give a verdict that truly reflects a sense of justice and can create **legal certainty** in society. So interpreting the law is a legal obligation of the judge in law enforcement".

F. CONCLUSION

Informed consent in therapeutic transactions is one of communication media between patients and doctors. This communication must be utilized as well as possible by doctor and patient, so there is good agreement / cooperation (verbintenis), from both parties. The more informed consent in a therapeutic transaction is carried out in accordance with progressive law (**progressiveness**) the better it protects doctors and patients. The more informed consent in a therapeutic transaction is carried out in accordance with responsive law (**responsiveness**) the better it will protect the patients and doctors. And of course the more informed consent in this therapeutic transaction pays attention to the principles of **legal certainty**, the more secure doctors and patients will be.

In detail, informed consent in a therapeutic transaction will better protect the patient and doctor, if, as follows :

1. In accordance with the type of Progressive Law :
    a. Doctors try as much as possible to heal and please patients, with high competence and professional standards.
    b. Patients with high awareness believe in the expertise of doctors and doctors honesty, that doctors do the best to heal the disease of patients.
    c. Doctors and patients are equally concerned with their respective obligations rather than demanding their rights.
2. In accordance with the type of Responsive Law :
    a. Provide the opportunity for the patient to seek "second opinion" with other doctors or other hospitals and given the opportunity to take part in determining the treatment or surgery to be performed.
    b. Informed consent is carried out according to the type of therapy or operation to be carried out.
3. Implemented in accordance with the principles of legal certainty :
    a. The implementation of informed consent is based on the existence of regulations and laws governing informed consent.
    b. Informed consent is made textually and contextually, in accordance with the actions to be taken, so that if there is a claim in court, the judge can decide on the medical dispute with the principles of legal certainty, purposiveness and fulfill a sense of justice on both sides.

It seems that progessive law is phylosophical side of informed consent, responsive law is sosiological side of informed consent and legal certainty is juridical side of informed consent.

D. REFFERENCE

Indonesian Law No 39 of 1999 concerning Human Rights

Faisal Santiago, 2010. Investment Law. Penerbit Cintya Press. Jakarta.

Hj. Emma Dysmala, 2012. Thought Towards Progressive Law. The Journal of Yuridika Insights, Vol. 27 No. September 2, 2012 Bandung. Downloaded from www.ejournal.stbh.ac.id on 8-9-19, 10:00

Dei Ravena, 2010. Discourse on Progressive Legal Concepts in Law Enforcement in Indonesia. in the Journal of Yuridika Insights, Vol. 23 No. September 2, 2010, Bandung. Downloaded from www.ejournal.stbh.ac.id on 8-9-19, 10:15

Mukhidin, 2014. Progressive Law as a Legal Solution That Welfare of the People, in the Journal of Legal Reform, Vol. 1 No. September 3-December 2014. Downloaded from www.jurnal.unissula.ac.id on 9-9-19, 10:00

Ade Saptomo, 2019. Legal Culture and Local Wisdom, A Comparative Perspective. FHUP Press. Jakarta.

Ade Saptomo, 2015. Early Studying Law, Legal Theory and Philosophy of Law. FHUP Press. Jakarta. Download from www.dosen.univpancasila.ac.id at 15-9-'19, 10.15.

Amiruddin, Zainal Asikin, 2018. Introduction to Legal Research Methodologies. Revised

[17] Faisal Santiago, 2016. Collection of Essays of Legal Notes. Cintya Press. Jakarta.

Edition. Tenth Printing. PT Raja Grafindo Persada, Depok.

----------, 2015. Legal Certainty Theory. Downloaded from www.skripsifakhukum.blogspot.com on 16-11-19, at 09.00

Herman Andreij Adriansyah, 2010. Responsive Law. Responsive Law Book Review (Philippe Nonet and Philip Selznick). Downloaded from www.mknunisri.blogspot.com on 12-12-2019 at 06.15.

Unknown, 2014. Concept of Responsive Law. Downloaded from www.catatantugashukum.blogspot.com on the 12-12-2019 at 06:45.

LEGAL REVIEW OF LAW PROTECTION THEORY IMPLEMENTATION IN DISPUTE OF ADMINISTRATIVE COURT

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ABSTRACT

Law Number 5 of 1986 established Administrative Court as an institution authorized to resolve administrative problems / disputes, implementation of Article 10 paragraph (2) of Law Number 4 of 2004 concerning Judicial Power. The importance of the existence of this Administrative Court is because its position is one of the main milestones in realizing a just and prosperous state. In Article 116 of Law Number 51 Year 2009 concerning the Second Amendment of Law Number 5 of 1986 concerning State Administrative Court will reduce the pessimism of the justice seekers community towards the existence of the State Administrative Court as an institution of control over the government as well as law protection for the people seeking justice.

Keywords: Law Protection, Dispute Of Administrative Court**.**

A. INTRODUCTION

Article 1 subsection (3) In the Constitution of Act 1945 that "*Indonesia is a law country*". Associated to the sentence above, the meaning of law country is inseparable from its pillar which is legal sovereignty. Besides, the founders of the state in forming the Indonesian state government have determined another pillar, namely populace sovereignty. Those things create communist integral combination between the legal sovereignty and the populace sovereignty. Afterwards, it is contradicted and strictly separated between the law state on the one hand and on power state on the other hand which can be transformed as in the form of dictatorship or other similar form, which is not desirable either implemented in this country.[1]

The existence of a country called law country is reflected in several things, which are usually said to be the features of law country (*rechtsstaat*) which commonly found in Constitution Act 1945, that are:[2]

1. The guarantee of human rights (and citizens);
2. The division of power within the state (*Scheiding van macht*);
3. The Government in fulfilling their duties and obligations should be based on law, written or unwritten;
4. The existence of independent judicial power, including the State Administrative Court.

The third feature, that is the implementation of duties and obligations of the government which must be based on law carries certain consequences, which in the law aspect, it is used as a rail foundation for the government in carrying out its duties and responsibilities, on the other aspect the same law can be used as a basis for judicial testing of government action. In addition the third element will create the fourth element, which is a test instrument to the actions of the government it self.

In the basic concepts of administrative law, the major elements of administrative law are known as the law regarding the power of government once associated with the law regarding community participation in the implementation of legal governance concerning legal of governmental organizations and the law regarding to legal protection for the people.[3]

Those three aspects above are related to one another, such as the function of administrative law (normative functions, instrumental function, and guarantee function) which are also interrelated to each other. Normative functions related to the normalization of governing power which is clearly related firmly to the instrumental function used by the government to use governing power, which in turn norms of government and government instruments used must guarantee legal protection for the people.[4]

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[1] Sjachran Basah, *Perlindungan Hukum Terhadap Sikap Tindak Administrasi Negara*, Alumni, Bandung,1992, h. 1

[2] Sri Soemantri M, *Kemandirian Kekuasaan Kehakiman Sebagai Prasyarat Negara Hukum Indonesia*, Makalah, Seminar "50Tahun Kemandirian Kekuasaan Kehakiman diIndonesia", FH UGM,1995

[3] Philipus M. Hadjon, et.al, *Pengantar Hukum Administrasi Indonesia*, Gadjah Mada University Press, Yogyakarta, 1994, h. 28.

[4] Philipus M. Hadjon, *Fungsi Normatif Hukum Administrasi Dalam Mewujudkan Pemerintah Yang Bersih*, Pidato

The existence of government action should be based on applicable legal provisions as features / elements of a law country, and the existence of testing instruments toward government action itself, surely in turns need to provide protection for the people interest if the government's actions intersect or even collide with the interest of the people, so that the interests of the people do not necessarily have to be sacrificed in case of collisions as a result of government action.

In order to enforce the law and provide legal protection for the people towards the government action, it is necessary to have a state organ that was given the duty and authority to supervise the judicial assessment regarding to government actions that cause harm to the people interest. Oemar Seno Adji, by typing Fredrich Julius Stahl's thoughts on the rule of law formally stated that in principle and in general all actions concerning and detrimental to everyone or their rights can be monitored by the Court.

Thus it appears that the intended state organ as a specific supervisor of government actions is submitted to the court which in this case to the State Administrative Court. Friedrich Julius Stahl himself argued that the State Administrative Judicature (Administrative Court) is an absolute element of a law country. [5]

The existence of the Administrative Court is associated with the State Government system according to the 1945 constitution reveals its urgency while still being aware that is still enough time to develop the law of material administration in Indonesia in order to create clean governance.

The establishment of Administrative Courts in Indonesia which is regulated in Law Number 5 of 1986 in conjunction with Law Number 9 of 2004 in conjunction with Law Number 51 of 2009 is an implementation provision of Article 10 subsection (1) of Law No. 14 of 1970 concerning Basic Provisions on Judicial Power. In the judicial aspects of the Administrative Court, the formal idea to form an Administration Court has been realized. The existence of the Administrative Court is an absolute prerequisite for an effort to achieve a clan and authoritative government (*clean governance*) as well as obeying the law. This also proves the existence of legal protection towards government actions that are not accordance with the principle of "*rechtematigheid van bestur*" that harms the interest of people.

B. PROBLEM STATEMENT

Based on the description above, then this paper focuses on the discussion concerns the existence of the Administrative Court in relation to the legal protection for the people, with the main issues:

1. How is legal protection system for the people in Indonesia after the establishment of the the Administrative Court?.
2. What kind of Legal Protection Theory is adopted in Indonesia?.

C. LITERATURE RIVIEW

In formulating the terms of legal protection for the people in this paper, the terms of "*of the government*" or "toward the government action" are not included, considering a few things:

1. The term of "*people*" already implies as opposed to the term "*government*", the term of people essentially means which being governed.
2. With the inclusion of "*of the government*" or "*toward the government action*" could give the impression that there is a confrontation between the people as parties who are ordered and the government who give the order. Those points of view are certainly contrary to the philosophy of life in our country, which looked at the people and the government as a partner in creating the ideals of state life.[6]

Theoretically, a country must be based on the law country theory which according to Friedrich Julius Stahl characterized, which is characterized by:

1) The Human Rights Guarantee;
2) The Distribution of Power;
3) The Legality;
4) The Judicial Administration,

With "*the government action*" as a central point (associated with legal protection for people), it can theoretically be distinguished into two types according to *Philip M Hadjon*, which are:

1. Preventive legal protection theory
2. Repressive legal protection theory

On preventive legal protection theory, the people are given the opportunity to raise an objections (*inspraak*) or thought before a government decision gets a definitive form. So this preventive protection

Penerimaan Jabatan Guru Besar pada Fakultas Hukum UNAIR, Surabaya, 1990, h, 6.

[5] Kuntjoro Purbopranoto, *Beberapa Catatan Hukum tata Pemerintahan dan Peradilan Administrasi Negara*, Alumni, Bandung, 1978, h. 85.

[6] Philipus M. Hadjon, *Perlindungan Bagi Rakyat di Indonesia*, PT. Bina Ilmu, Surabaya,1987,h. 1-2.

could be used before a government decision is made. Thus, this preventive legal protection will encourage governments to be more careful to take or not taking a decision. Conversely, repressive legal protection is aimed at resolves disputes.

This last legal protection was used not at the time before the government issued a decision, but after the government decision was issued and the decision creates a disputes that needed a settlement.

D. RESEARCH METHODS

This study uses the type of normative research, using the approach of the Law (s*tatute approach*) and the conceptual approach (*conceptual approach*). This approach is used because the object of this study is a Juridical Review of the Application of Legal Protection Theory in State Administration Disputes in Law Number 5 of 1986 concerning State Administrative Court, jo. Law Number 9 Year 2004, jo. Law Number 51 Year 2009 along with other relevant laws and regulations, to be analyzed in line with existing legal concepts in general administrative law, are related to the practice of case resolution in District Courts and Administrative Courts.

The study was conducted with library research to obtain primary legal materials in the form of regulations and secondary legal materials. namely the relevant legal bibliography. Research is also conducted to examine the archives District Court and State Administrative Court regarding the issue of implementation (*execution*) of court decisions particularly efforts Forced to Board or the Administrative Officer who does not want to implement the Court judgment that has legally binding.

E. ANALYSIS AND DISCUSSION

Based on the division of the legal protection mentioned above, the means of legal protection can also be distinguished by its objectives into two, which are: 1). Preventive legal protection means (*aimed at preventing disputes*), and 2). Repressive legal protection means.

1). Preventive Legal Protection Means

This means of preventive legal protection in its development is lagging behind especially when compared with the repressive means of legal protection. As a comparison, in England, it used a premise that the issue of protecting the human rights of citizens should already reflected in the preparatory stages or before the issuance of government is decreed. Based on such those ideas, in England, it is recognized the existence of a public inquiry or in English term known as "*hearing*". Definition of a public inquiry or hearing is that the opinion of parties that would be subject to a decision must be heard by dependent/independent party, this hearing procedures are generally arranged in a law 1958 and several subsequent laws were given since 1962.[7]

As the same system in England, In the United States also known to had a public inquiry procedure or "*hearing*". This procedure applies both to make its decisions that aimed for general as well as individual. For the decision of general nature, this public inquiry procedure is intended for people to participate in making general regulation. However this procedure can be ruled by "*administrative agency"* that concerned if it considers the use of this procedure is not necessary or practical, or even contrary to the public interest.

Such provision is allowed by law, but the conditions must be done carefully and explicitly specify the motive in the decision concerned. As for the decisions of the individual, then a series of procedures that includes the determination of a grace period to hold a public inquiry, notification, information to the public, the terms of the government's impartiality, the obligation to hear the statement of the parties, and so on. If the decision is in the form of granting or revoking a permit, then the obligation to hold a contradictory procedure is an absolute requirement.[8]

2). Repressive Legal Protection Means

In European countries, especially those who use a " *civil law system* " there are two judicial instruments namely General and Administrative Courts. Conversely for countries that adhere to the "common law system" only known by the existence of one judicial organ which known as "ordinary court". Meanwhile for the Scandinavian countries, it has developed a legal protection institution for the people known as the "*Ombudsman* ".[9]

Judicature Administration in France organized by the judicial institutions below:[10]

1. Administrative Court (*Les teribunatie administrative*)
2. The Council of State (*Le council d'etat*)
3. Special Administrative Tribunal

[7] Paulus Effendie Lotulung, *Beberapa Sistem Tentang Kontrol Segi Hukum Terhadap Pemerintah*, Edisi ke-2, PT. Citra Aditya, Bandung, 1993, h. 25.
[8] Ibid, h.73
[9] Ibid, h.5
[10] Paulus Effendie Lotulung, Op.Cit., h.19-21

In Indonesia, repressive means of legal protection for the people are known to have several foundations which can be grouped into:

1. The court within the Administrative Court (PTUN);

2. The court within the District Courts;
4. Government agencies which are the institutions administrative appeals.
3. Specific Agencies.[11]

The Administrative Court (Administration Judicature) has a prominent role which as a control or supervisory institution so that government actions continue move on the legal track, as well as the protector of the rights of citizens against abuses of authority or arbitrariness by government officials. The characteristics inherent in the supervision institution in the area of the State Administrative Judicature (administration judicature) are mainly:[12]

- *externa, b*ecause it was conducted by an agency or institution outside the government;
- *A priori*, as it is always done after a controlled actions occus
- *Legality* or control a legal aspect, because only assess from a legal aspect. Repressive legal protection that are on the government agency is an administrative appeals institution after the enactment of Law No. 5 of 1986 known and be part of the administration effort.

Based on the Constitution of Act 1945, Article 1 subsection (3) in Indonesia adheres to the low country theory, more specifically the law theory of *Friedrich Julius Stahl* in adoption, especially with the adoption of the existence of the State Administrative Judicature. The result of Administrative Judicature symposium organized by BPHN in 1976 states that the administration does not guarantee judicial process pure and objective, considering it still takes place in the arrangement of executive officials or the state administration. Therefore the administrative appeal is not become a real judicature yet. Besides the administrative appeal is required, the State Administration Judicature is needed to guarantee an objective judicial process.

The objectivity of supervision through administrative rechtspaak (*justice*) is expected to complement the supervision of administrative appeals. This is exactly what lies behind the establishment of the State Administrative Judicature as the realization of the ideals of the formation of a judicial administration which became independent outside the government organizations. However the question that arises after is whether the supervisory function of the State Administrative Judicature is able to effectively provide protection law (*law protection*) for the people toward government actions or in other words the judiciary can function to supervise government action is in accordance with legal regulations (*rechtnatige*),

From the description above, the presence and existence of the State Administration of justice for Indonesian which is actively implementing development, is truly an absolute necessity. Thus the purpose of development is to create public welfare, which are a just and prosperous society that can run well.

Theoretically, in Indonesia, the theory of repressive legal protection is dominant . Legal protection of repression relies on dispute resolution through the judiciary, while settlement outside the court has not been adequately used. In a sense, the theory of preventive legal protection which rests on prevention to prevent a state administration dispute has not been adequately carried out.

In Indonesia, there is no special arrangement regarding preventive means of legal protection. It might be due in addition to means of prevention is still relatively new (to Western countries), which led to legal literature administration in Indonesia has not discussed much about the issue, and in addition of thinking about the means of legal protection in 1964 which is more focused on the establishment of administrative tribunals as a repressive legal protection.[13]

The function of the State Administrative Judicature is to resolve disputes arising in the field of state administration, which can be seen in parts of the considerations letter d of Law Number 5 of 1986 which states:

> *That to resolve the dispute, it is required a Administrative Court that is able to dispense justice, truth, orderliness, and law enforcement, so as to provide shelter to the people, particularly in the relationship between the Agency or Official State Administration with the community.*

[11] Rochmat Soemitro, *Masalah Peradilan Administrasi Dalam Hukum Pajak*, Disertasi, Cet. IV, Eresco, Bandung, 1976, h.44
[12] Paulus Effendie Lotulung, Op.Cit., h. xvii
[13] Phlilipus M. Hadjon, Perlindungan Hukum Bagi Rakyat diIndonesia, Op.Cit., h. 4

In connection with the issue of Administration dispute and legal protection for the people, in the General Explanation of Law Number 5 of 1986 broadly stated that in accordance with its purpose, the dispute must be a dispute that arising in the area of State Administration between a person or legal entity with the State Administration Agency or Official as a result of the issuance of a State Administration decision which is considered to violate the rights of civil persons or legal entities. Thus, the Administrative Court is formed in the context of providing legal protection for justice seekers , who felt themselves disadvantaged due to a State Administration decision. However, in this relation, it is important to realize that besides individual rights, the community also has certain rights. This community right is obtained in the common interest of people who live in the community. Those interests are not always consistent, even sometimes it may clash with each other. To ensure the fairest resolution of the conflict between different interests, the principle of principles embodied in our country's philosophy, Pancasila.

Thus, the aspects of legal protection for the people contained in preamble and General Explanation of the Law Number 5 of 1986 above can be expressed as follows:

1. The legal protection in the field of State Administration is given to individuals or private legal entities subject to consequences of a State Administrative Decree ;
2. Legal protection through a judicial control mechanism by the Administrative Court is conducted at the time the State Administration Dispute occurs ;
3. The legal protection to people seeking justice must be done in considering a balance of two-dimensional interests that must be protected, which are:
   - Dimensions of individual interest;
   - Dimensions of community interest (*the common interests of people living in the community*).
4. Legal protection for people against legal action of agencies or officials in State Administration in the scope of testing (*toetsing*) aspect of the legality of an administrative decision.

Thus after the establishment of the State Administrative Judicature, it proves that theory espoused Repressive Legal Protection and management of the State Administration dispute and legal protection system for the people of Indonesia, involve three channels, that are:

1. Through the Administrative Court and Administrative Military Court (*especially for handling an administrative decision Military*) which both stand at the Supreme court, as regulated in Law Number 14 of 1970 jo. Act 35 of 1999;
2. Through the Districk Court, as provided in provisions in Article 134 or Article 160 HIR or article 160 RBg and the existence of jurisprudence of the Supreme Court which gave authority to the General Courts;
3. Through the Governing Council whose existence is based on the Law that governs them and not culminating in the Supreme Court.

F. CONCLUSIONS

The Administrative Court which is the implementation of judicial power in Indonesia does not have absolute authority which in general can carry out its function as the only form of justice that can be used as a means of legal protection for the people, because in reality the court is a special court that cannot adjudicate all dispute "governmental act", and limited authority is limited only to adjudicate a certain State Administration Dispute especially toward the State Administration Decree.

From the analysis it can be concluded that in Indonesia tend to be adhered to the theory of repressive legal protection that is characterized by the existence of administrative tribunals.

In the future, in addition to being adhered to by the Repressive Legal Protection Theory, a mechanism for the Preventive Legal Protection Theory was also developed. This is justified by making suggestions that require the issuance of State Administration Decrees to involve the broadest public participation.

G. REFERENCES

Arinanto, Satya, *Pembangunan Hukum dan Demokrasi*, Jakarta : Dasa media, 1993.

Basah, Sjachran, *Perlindungan Hukum Terhadap Sikap Tindak Administrasi Negara*, Alumni, Bandung, 1992

Lotulung, Paulus Effendie, *Beberapa Sistem tentang Kontrol Segi Hukum Terhadap Pemerintah* : Seri Perbandingan Hukum Administrasi, Cetakan Pertama, Revisi. Bandung : PT. Citra Aditya Bakti, 1993

M. Hadjon, Philipus, *Perlindungan Hukum Bagi Rakyat di Indonesia*: Sebuah Studi tentang Prinsip-Prinsipnya Penanganan oleh Pengadilan Dalam Lingkungan Peradilan Admintrasi, Surabaya: Bina Ilmu,1987

----------, Pengantar Hukum Administrasi Indonesia, Gadjah Mada University Press, Yogyakarta, 2005.

Purbopranoto, Kuntjoro, *Beberapa Catatan Hukum Tata Pemerintahan dan Peradilan Administrasi Negara*, Alumni, Bandung, 1978.

Soemantri, M Sri, *Kemandirian Kekuasaan Kehakiman Sebagai Prasyarat Negara Hukum Indonesia*, Makalah, Seminar ”50 Tahun Kemandirian Kekuasaan Kehakiman di Indonesia”, FH-UGM, 1995.

Setiadi, Wicipto, *Hukum Acara Pengadilan Tata Usaha Negara*: Suatu Perbandingan, Jakarta : Rajagrafindo Persada, 1995.

Indonesia. *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*. Amandemen Keempat.

_____ *Undang-Undang tentang Ketentuan-Ketentuan Pokok Kekuasaan Kehakiman*, Undang - Undang Nomor 14 Tahun 1970, jo. Undang - Undang Nomor 35 Tahun 1999, Jo. Undang - Undang Nomor 48 Tahun 2009.

_____ *Undang-Undang tentang Mahkamah Agung*, Undang-Undang Nomor 14 Tahun 1985, jo. Undang - Undang Nomor 5 Tahun 2004, jo. Undang - Undang Nomor 3 Tahun 2009.

_____ *Undang-Undang tentang Peradilan Tata Usaha Negara*, Undang - Undang Nomor 5 Tahun 1986, jo. Undang - Undang Nomor 9 Tahun 2004, jo. Undang - Undang Nomor 51 Tahun 2009.

MEDICAL COURT AGAINST MEDICAL DISPUTES IN THE HOSPITAL

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ABSTRACT

This research aims to analyze the application of legal protection and the weaknesses of the application of the legal protection of the medical profession in the resolution of medical disputes between doctors and patients at this time. Descriptive analytical methodology is used as a knife analysis to explain the picture of the legal reconstruction of the protection of the medical profession in the resolution of medical disputes. This research is understood as library research, namely research on secondary material.

The doctor profession is a very noble profession. Professional competence as outlined in Clinical previlege 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. Most medical disputes in Indonesia are triggered by unexpected events (adverse events) and unfortunately it has become public opinion that every Adverse event is malpractice and is always herded into the criminal part.

From legal channels, it can be through Civil Law, Criminal Law, or Consumer Protection Law. If through ethical channels, Law Number 29 Year 2004 regarding Medical Practices has mandated the establishment of the Indonesian Medical Disciplinary Honorary Council (MKDKI) which is tasked with examining and deciding complaints on cases of alleged violations of disciplinary doctors and dentists. In the Civil Court, there is a tendency for the parties to end their dispute through peace and always recommend professional organizations.

Law No.29 / 2004 on Medical Practice actually mandates the Indonesian Medical Disciplinary Board (MKDKI) to become a kind of "judge" of doctors. But unfortunately the decision issued by MKDKI is still limited to disciplinary issues which are not binding on criminal proceedings that can arise in the future.

*I*f we want to be faster without a convoluted bureaucracy that we have to wait for the MKDKI decision before it is recommended to the general court (or the doctor becomes an expert witness at the trial), then the most appropriate is the need for a medical court to be made.

Keywords: Malpractice, Adverse Event, Medical Court

A. INTRODUCTION.

Hospitals as a place for public health services are expected to provide complete and holistic health services, ranging from emergency emergency care, Outpatient installation services, providing inpatient services, as well as quality and affordable supporting installations by the community. The hospital has a duty to prioritize the healing and recovery efforts of its patients.[1] Aside from being a profession-intensive and labor-intensive institution, a hospital is a very complex organization because it is capital intensive, technology intensive, system intensive, and quality intensive and risk intensive so as to enable the unexpected occurrence of medical personnel including the doctors.

The doctor profession is a very noble profession. In carrying out his profession, a doctor must not reject a patient. A doctor must prioritize the interests of others and society in addition to his personal interests. In order to be able to carry out its role as a doctor / medical professional, the doctor's profession, 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 privilege 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.

The relationship between doctor and patient can be legally incorporated into a contract. A contract is a meeting of minds of two people on a matter. The first party commit itself to provide services, while the second party accepts the provision of the service. Patients come to the doctor to be given treatment services while the doctor accepts to give it.

[1] Republic of Indonesia Law number 44/2009 on Hospital**.**

Thus, the nature of the relationship has 2 characteristics:

A. There is a consensual agreement, based on mutual agreement from the doctor and patient regarding the provision of medical services.

B. The existence of a trust (fiduciary), because the contract relationship is based on mutual trust trusting each other.[2]

Patient safety incidence are any unintentional events and conditions that result in or have the potential to result in preventable injury to patients.[2] Most medical disputes in Indonesia are triggered by unexpected events (adverse events) and unfortunately it has become public opinion that every Adverse Event is malpractice and is always herded into the criminal part.

According to **Safitri Hariyani Saptogino, S.H., M.H**, medical disputes are disputes arising from legal relations between doctors and patients in an effort to heal. The relationship between doctors and patients in medical science generally takes place as an active-passive biomedical relationship. In this connection, the superiority of doctors to patients in the field of biomedical science is clearly seen, that is there is only active activity on the part of doctors while patients are passive. The passivity of the patient is certainly based on a sense of trust in the doctor's ability to perform healing or treatment.[3]

Legal relationship between doctors and patients may occur because of two things, namely the relationship due to the contract (therapeutic) and the relationship due to the law (zaakwarneming). In a **contractual relationship**, the doctor and the patient are deemed to have agreed to an agreement if the doctor has initiated a medical action against the patient, while the relationship due to the law arises because of the obligations imposed on the doctor. In a **therapeutic contract**, the relationship begins with a question and answer (anamnesis) between the doctor and the patient, examination, enforcement of the diagnosis until the planned medical action to be carried out. Patient's approval of the medical action that will be carried out after obtaining complete information from the doctor is the principle of informed consent. The legal relationship that occurs because of the law between doctors and patients is based on the existence of obligations imposed on the doctor's profession. The doctor is obliged to carry out emergency relief on the basis of humanity, unless he is sure there is someone else on duty and able to do it.[4]

Based on the existing set of regulations and dispute resolution procedures, medical disputes can be resolved through legal and ethical channels. From legal channels, it can be through Civil Law, Criminal Law, or Consumer Protection Law. Settlement of medical disputes through Civil Law can be seen from the aspect of therapeutic agreement. Typically, the article used is a default (broken promise) or it could be against the law. From the Criminal Law there are several elements of offense both regulated in the Criminal Code and Law Number 36 Year 2009 regarding Health. [5]

Whereas through Consumer Protection Law, regardless of the polemic whether the doctor & patient relationship can be equated with the business & consumer relationship, dispute resolution can be through the General Court or the Consumer Dispute Resolution Agency (BPSK).

If through ethical channels, Law Number 29 Year 2004 regarding Medical Practices has mandated the establishment of the Indonesian Medical Disciplinary Honorary Council (MKDKI) which is tasked with examining and deciding complaints on cases of alleged violations of disciplinary doctors and dentists. There is also a Medical Ethics Honorary Council (MKEK) formed by the Indonesian Doctors Association (IDI) to uphold the ethics of the medical profession.

The community of medicine and hospitals must be honesty because in reality there are still many weaknesses and shortcomings in implementing good clinical governance, besides not being able to perfectly fulfill the principles in designing safer health care systems. in order to prevent or at least reduce the occurrence of adverse events (unexpected events).

Doctors are part of the community, and as members of the community they can commit ordinary crimes (everyday crime); like stealing, cheating, persecuting, raping and so on. In addition, doctors are also professionals (practitioners of medicine) so that they can also commit crimes in the context of doctor-patient relationships in the medical field or around the implementation of medical actions (medico crime), which consists of:

[2] Ministry of Health, 2017
[3] Safitri Hariyani, Sengketa Medik Alternatif Penyelesaian Perselisihan Antara Dokter Dengan Pasien, Jakarta: Diadit Media, 2004, page. 11.
[4] Priharto Adi. Formulasi Hukum Penanggulangan Malpraktik Kedokteran. Kanun Jurnal Ilmu Hukum, No. 60, Th. XV (Agustus, 2013). 271
[5] Undang – Undang Nomor 36 Tahun 2009

a) Medico-patient crime (a crime committed against a patient, for example: taking a cellphone while the patient is sleeping) and
b) Medico-professional crime (a crime using the knowledge and medical skills, such as euthanasia or doing medical actions that are not based on medical indications in order to get more money).[6]

At present, the resolution of medical disputes in Indonesia is mostly resolved through public justice which we know together with the process is very complicated, long and convoluted and the ending has no legal certainty. Even on the other hand there is an impression of an attempt to criminalize the profession. Investigating medical and substantial procedures is not easily understood by the police, prosecutors or civil or general criminal judges. There needs to be an understanding that cases in carrying out the practice of the medical profession are special laws (lex specialis) which need to be handled specifically as well.

Seeing several medical dispute decisions that have ever existed, both in the Criminal Court and the Civil Court, there are several things that need attention. Patients or public
prosecutors in the Criminal Court have difficulty in proving the mistakes made by doctors because of their common concern with medical techniques.

In the health service activities known as the "medical risk", which is the possibility of something that is not desired by patients and doctors in a series of medical action processes both from the risk of injury, disability, until death. Even medical risks can occur at the place of treatment facilities, such as hospitals, clinics, pharmacies, etc. As long as the doctor has implemented the Standard Operational Procedures (SOP) correctly, the medical risk that occurs cannot be blamed on the doctor. For example a patient who has certain health conditions or certain allergies, who previously did not know the condition while the doctor has also applied SOPs by asking and conducting a series of pre-operative medical procedures cannot be blamed if later medical conditions occur the patient experiences anaphylactic shock or allergic reactions. which can cause shock and death.

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In the Civil Court, there is a tendency for the parties to end their dispute through peace and always recommend professional organizations. The most ideal dispute resolution between doctor and patient can be seen from three sides, namely the patient, the doctor and the procedure. If from the patient's side, of course dispute resolution through ethical channels is not a satisfying choice. Because not only is the material restricted to professional ethics, but from topics of discussion that are not general in nature and difficult for ordinary people to understand. In addition, the possibility of decisions made through this route are administrative in nature which are generally not directly related to the patient, so that it can cause dissatisfaction for the patient.[8]

Meanwhile, if seen from the doctor's side, of course this path is better. Because the Disciplinary Examination Council at MKDKI who checks the alleged violations comes from a medical background and a legal degree, so it's psychologically easier to argue. Decisions in the form of suspension and suspension of practice permit still open opportunities for doctors to continue to carry out their profession without having to lose their good name because the disciplinary examination proceedings are conducted in a closed manner.[9]

Republic of Indonesia Law No.29/2004 on Medical Practice actually mandates the Indonesian Medical Disciplinary Board (MKDKI) to become a kind of "judge" of doctors. But unfortunately the

[6] Garwood-Gowers, A, Wheat, K, Tingle, J, 2005., Contemporary Issues in Healthcare Law and Ethics, Reed Elsevier

[7] Intan, https://medium.com/@intanmutias/resiko-medik-ditinjau-dari-hukum-kesehatan

[8] Safitri Hariyani Saptogino, artikel: Penyelesaian Sengketa Medik di Indonesia, Maret 14, 2019. http://siplawfirm.id/penyelesaian-sengketa-medik-di-indonesia

[9] Sapta Aprilianto. Peran MKDKI terhadap dugaan kelalaian medis dokter, Jurnal Yuridika Vol 30 No 3/ 2015, http://dx.doi.org/10.20473/ydk.v30i3.1954

decision issued by MKDKI is still limited to disciplinary issues which are not binding on criminal proceedings that can arise in the future. There must be a decision and medical logic before it becomes legal logic.

This medical court needs to involve the medical profession (MKDKI), investigators (Police) and Medical Law so that the process of resolving medical disputes can be carried out quickly, integrated and not rambling and there is legal certainty. With this integrated medical justice, it is hoped that legal decisions that include elements of justice (gerechtigkeit), legal certainty (rechtssicherheit) and expediency (zwechtmassigkeit) have their place for justice seekers. The task of MKDKI is to analyze whether the Unexpected Event (adverse event) or that is not predicted in carrying out the practice of the medical profession is a criminal or negligent act. If it is proven that there is a criminal act against the law, of course this is considered by the judges in making decisions, so that the articles of the element of "negligence" and "intentional" do not stand alone in the eyes of formal law.

It is a bit of a contrast indeed when this country has a special court on Tax, Commerce, Religion and Industrial Relations, the affairs of the "lives" of people who are in direct contact with the duties of the medical profession are not contained in a special court.

B. RESEARCH METHODS

This study aims to analyze the application of legal protection and the weaknesses of the application of the legal protection of the medical profession in the resolution of medical disputes between doctors and patients at this time. In addition, this study also analyzes the reconstruction of the legal protection of the medical profession in the resolution of medical disputes between doctors and patients based on fairness values.

Descriptive analytical methodology is used as a knife analysis to explain the picture of the legal reconstruction of the protection of the medical profession in the resolution of medical disputes. Through an empirical juridical approach and using constructivism paradigm, it is expected that the writer can describe various primary and secondary data processed and analyzed in order to reconstruct the legal protection of the medical profession in the resolution of medical disputes between doctors and patients based on fair value. So that the view that originally generalized all doctor's actions, was reconstructed with principles, standards, rules so that standardized doctors must be protected as well as protected patients.

The normative juridical approach is by reviewing or analyzing secondary data in the form of secondary legal materials by understanding the law as a set of positive rules or norms in applicable legislation, so this research is understood as library research, namely research on secondary material.[10]

C. PROBLEM FORMULATION

Based on the background explanation described above, the problems that will be formulated with regard to the Medical Court regarding the occurrence of medical disputes in hospitals include the following:

1. Are all medical disputes resolved through legal channels?
2. Why is a medical dispute a criminal threat?
3. What is the position of the Medical Judiciary for the resolution of medical disputes in the hospital?

D. LITERATURE REVIEW.

Hospitals as a place for public health services are expected to provide complete and holistic health services, ranging from emergency emergency care, Outpatient installation services, providing inpatient services, as well as quality and affordable supporting installations by the community. The hospital has a duty to prioritize the healing and recovery efforts of its patients (Law No. 44 of 2009).

Aside from being a profession-intensive and labor-intensive institution, a hospital is a very complex organization because it is capital intensive, technology intensive, system intensive, and quality intensive and risk intensive so as to enable unexpected events at hospitals conducted by the medical personnel included doctors.

Doctor profession is a very noble profession. In his service, a doctor must prioritize the interests of others and the community in addition to his personal interests. In order to be able to carry out its role as a doctor/medical professional, the doctor's profession, 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 previlege is an absolute requirement that must be possessed so that medical personnel in carrying out

[10] Soerjono Soekanto, Penelitian Hukum Normatif suatu tinjauan singkat, Raja Grafindo, Jakarta, 1985, p. 15.

their duties are truly measurable and as far as possible avoid various unexpected events.

Unexpected events in the form of misdiagnosis and errors in the treatment process and other errors can occur during the process of providing health services in the hospital. These errors have the potential to cause injury to patients and some are not. The author is sure and certain that no doctor intends to harm his patients. A doctor is just a human who tries to help patients seek to seek healing with the blessing of Allah SWT. However, guaranteeing safety of actions is the most fundamental thing in the delivery of health services. Patient safety is a first priority that must be implemented by the hospital, so that patient services can be guaranteed safety and in order to maintain the quality of security and image of services in the hospital.

Types of incidents that can occur at a hospital:

A. Sentinel events: A negligence resulting in death or serious injury, permanent loss of function that is not related to the natural course of the disease or underlying condition.
   For examples:
   1. Suicide occurrence in patients in the treatment period.
   2. Death, paralysis, coma or other large permanent losses due to drug administration errors.
   3. The operation incident was on the wrong side.
   4. etc.
B. Unexpected event (Adverse event): An incident event that results in injury to the patient.
   1. The occurrence of the transfusion reaction.
   2. The incidence of drug side effects
   3. Errors in drug administration
   4. etc.
C. Near injury (Near Miss): incidents that have been exposed to patients.
   1. Patient not visited by a doctor
   2. Patients injected with syringes are not disposible.
   3. The patient runs out of medication.
   4. Patients are not treated due to damaged equipment.
   5. Patient tightness, O_2 is not available.
   6. New patients are not delivered by officers.
   7. Doubtful laboratory results.
   8. Laboratory results, radiology are exchanged with other patients.
   9. etc.
D. Potential Injury Conditions (Reportable Circumtance): A condition/situation that has the potential to cause injury, but no incident has occurred. Example:
   1. ICU is very busy but the number of medical staff is always lacking.
   2. Placement of the standby defibrillator in the emergency room turns out to be damaged and cannot be used.

Republic of Indonesia Law No.44/2009 concerning Hospitals explains that hospitals are required to apply 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 risks, reporting and analysis of incidents, the ability to learn from incidents and their follow-up, as well as implementing solutions to minimize risks and prevent injuries caused by errors caused by taking an action or not taking actions that are should be taken.

Patient safety incidents are any unintentional events and conditions that result in or have the potential to result in preventable injury to patients (Ministry of Health, Republic of Indonesia, 2017). The incident reporting system is designed to obtain information about patient safety. Good patient safety incident reporting can support efforts in identifying risks to incidents that have the potential to cause patient safety threats (Gunawan et al., 2015).

Most medical disputes in Indonesia are triggered by unexpected events and unfortunately it has become public opinion that every Adverse event is malpractice. During the period of 2006-2015, 317 suspected cases of malpractice were reported to the Indonesian Medical Council. of which 114 cases involved general practitioners, followed by 76 cases of surgeons, 56 cases of obstetricians (obstetricians) and 27 cases of pediatricians. Legal disputes often occur due to loss/failure of the treatment process suffered by patients. Therefore the government is responsible for issuing patient safety policies.[11]

In the framework of providing medical/health services, a doctor/medical person/health facility (Hospital, etc.) must of course still have to obey and

[11] Setyo Trisnadi. Perlindungan Hukum Profesi Dokter Dalam Penyelesaian Sengketa Medis; Jurnal Pembaharuan Hukum, Volume IV No. 1 Januari - April 2017

follow the rules / provisions on the application of medical and nursing knowledge. Compliance with SOP/medical/nursing management rules both in the context of establishing a diagnosis, procedures for carrying out actions and other activities related to medical treatment must be carried out and monitored so that there is a guarantee that the series of health service activities carried out at the hospital is in accordance with the norm.

The reciprocal relationship to medical services is almost certainly based on mutual need, mutual trust, sympathy and empathy between doctors/medical personnel and patients. Because it is packaged in the form of health services, service providers and patients will naturally emerge as service recipients who eventually develop a transactional service. This is where the beginning of the problem of medical services arises, where the patient hopes that the doctor/medical staff can provide the best service for him, but on the other hand the doctor besides having the ability also has the ability limit. Things that occur outside the limits of the ability of a medical person often cause unexpected events to result in a medical dispute.

Settlement of medical disputes if conflicts occur between doctors/medical personnel as providers of medical services and patients as recipients of services often use legal channels. This will certainly not be very beneficial for all parties (both service providers and recipients). Health care/treatment activities are now complemented with treatment protocols (Standard Operating Procedures/SOPs) or Clinical Pathways. But the fact that is often faced is the same diagnosis in different cases the results/treatment response can be different. The sensitivity and specificity factors of the patient have a great influence on the response/success of the treatment. Settlement through legal channels that require a long time and costs are not small, sometimes the decision is very rigid and even painful one or even both parties. Therefore, mediation/communication between the two parties to the dispute is the best way to resolve it.

D. DISCUSSION

As an ordinary human being, of course, a doctor/medical staff will also not escape the criminal acts both in daily life or when carrying out professional activities. In his daily life he could carry out illegal actions such as cheating, stealing, drug cases, torturing, raping, etc. In carrying out their profession, doctors/medical personnel may also be subject to criminal sanctions (medical-professional crime/criminal acts using their medical knowledge and skills), for example, if they deliberately carry out an abortion outside the medical indication (malpratice).

Malpractice is often associated with medical practice. Malpractice is a term used by certain professional groups (it can be doctors, law, accountants, etc.) to describe deviations, failures, mistakes and the inability to do professional practice. In general, only from the professional group that understands and knows of Malpractice. Outside the profession it is difficult to understand Malpractice and often misinterpretations occur. In the case of medical disputes based on the Unexpected Event , of course we must wisely determine attitude. Unexpected Event is an event that is equally undesirable by doctors and patients. Unexpected Event is an accident. In the event of the Unexpected Event we should focus on immediately reviewing / analyzing the incident whether it is in accordance with the procedure of action (SOP) that has been set or not.

Unexpected Event which is properly managed is expected to improve safety culture in all aspects of service activities besides of course it can be used as material for monitoring and evaluation of all existing SOPs.

The definition of Malpractice according to WMA in 1992 and the difference with misfortune (untoward result) is:

- Malpractice : “Medical malpractice involves the physician’s failure to conform to the standard of care for treatment of the patient’s condition, or lack of skill, or negligence in providing care to the patient, which is the direct cause of an injury to the patient”.
- Untoward Result : “An injury occuring in the course of medikal treatment which could not be foreseen and was not the result of any lack of skill or knowlegde on the part of the treating physician is an untoward result, for which the physician should not bear any lability”.

So Malpractice can occur because: Ignorance , Negligence , lack of skill, lack of fidelity in the performance of professional duties/duties (not loyal, dishonest to professional duties), intentional wrong doing (intentionally wrong) and illegal or unethical practice (not in accordance with medical ethics). Things that are sometimes associated with Malpractice are: actions without permission,

carelessness, inaccuracy, no right/authority and violating procedures where all of them result in loss, disability, danger or death.

There are several scholarly opinions regarding the meaning of malpractice:

a. Veronica said that malpractice is a mistake in carrying out the profession that arises as a result of obligations - obligations that must be carried out by doctors**.**[12]

b. Ngesti Lestari interpret malpractice literally as the implementation or wrong action.[13]

Cases in carrying out the practice of the medical profession are special laws (lex specialis) which need to be dealt with specifically as well. Parsing procedural and substantial medical matters is not easily understood by the police, prosecutors or civil or general criminal judges. There must be a decision and medical logic before it becomes legal logic.

One important thing that must not be forgotten in order to obtain patient consent is to provide information in advance, which we know as Informed Consent, which is a permit or statement of agreement from a patient that is given freely, consciously and rationally after he gets the information he understands from the doctor about the illness.

On October 19, 1982, the Secretariat Attorney General's Secret Circular Letter No.B006/ R-3/I/1982 was published on the Medical Professional Case in order not to proceed with the case before consultation with the local Health Service official or the Republic of Indonesia Ministry of Health. The Constitutional Court has also issued Decision of the Constitutional Court No.4/PVV-V/2007 that medical disputes are settled first through professional justice.

MKDKI's task should be to analyze whether adverse events or those that are not predicted in carrying out the practice of the medical profession are criminal acts or misadventures. That is, through MKDI analysis if it is proven that there is a criminal act because the doctor is against the law (anrechtmatige-daad), of course this is considered by the judges in making decisions, so that the articles on the element of "negligence" and "intentionality" do not stand alone in the eyes of formal law.

If this is done first through the MKDKI trial process before the general court, then the legal ruling which includes elements of justice (gerechtigkeit), legal certainty (rechtssicherheit) and expediency (zwechtmassigkeit) get its place for justice seekers.

But if we want to be faster without a convoluted bureaucracy that you have to wait for the MKDKI decision before it is recommended to the general court (or the doctor becomes an expert witness at the trial), then the most appropriate is the need for a medical court to be made.

It is a bit of a contrast indeed when this country has a special court on Tax, Commerce, Religion and Industrial Relations, the affairs of the "lives" of people who are in direct contact with the duties of the medical profession are not contained in a special court.

The values of Pancasila give birth to the recognition and protection of human rights in the unitary state of unity which upholds the spirit of kinship in achieving mutual prosperity. Therefore, an important thing that needs to be stated is the principle of harmony based on kinship.[14]

Legal protection is one of the functions of the law namely the concept where the law is expected to provide justice, order, certainty, usefulness and peace. The state must be able to guarantee/provide legal protection to its citizens according to the values of the Pancasila.[15]

Legal protection based on Pancasila reflects the recognition and legal protection of human dignity and values based on Pancasila values that uphold the spirit of kinship in achieving mutual prosperity. Legal protection should start from the importance of respect for individuals so that their rights and obligations are not violated**.**[16]

Legal protection starts from the interest of respecting individuals so that their rights and obligations are not violated. The legal protection of the doctor profession is actually already regulated in RI Law No. 44 of 2009 concerning Hospitals article 50: "Doctors or dentists in carrying out medical practice have the right to obtain legal protection as long as carrying out their duties in accordance with professional standards and operational procedure standards." However, in addition to the law which provides legal protection for the medical profession, there are also several other laws that actually contain criminal threats against the health profession. In

[12] Veronika Komalawati, Hukum dan Etika dalam Praktik Dokter, Sinar Harapan, Jakarta 1989

[13] Ngesti Lestari, "Masalah Malpraktek Etik Dalam Praktek Dokter ", Kumpulan Makalah Seminar tentang Etika dan Hukum Kedokteran diselenggarakan oleh RSUD Dr. Saiful Anwar , Malang, 2001

[14] Guwandi , Trilogi Rahasia Kedokteran , Balai Penerbit FKUI, Jakarta , 1992 , hal 17 – 30.

[15] Guwandi , Trilogi Rahasia Kedokteran , Balai Penerbit FKUI, Jakarta , 1992 , hal 17 – 30.

[16] Hadjon P. M. , 1987, Perlindungan Hukum Bagi Rakyat di Indonesia, Bina Ilmu, Surabaya,h. 84.

several articles in the Criminal Code and also in the Hospital Law as well as the Medical Practices Act, several articles were found that were subject to criminal threats. Even some administrative matters (regarding STR, SIP, practice signpost, etc.) are also criminal threats.

Law No. 29 of 2004 concerning Medical Practices made by this legislative body the material in it is too technical. Laws that are too technical will cause them to be rigid and vulnerable to non-principle changes so that the consequences will not be long-lasting.

With the passing of Law No. 29/2004 on Medical Practice, this actually is actually a bad precedent for health services in Indonesia. The Health Law is designed to unite various regulations in the field of health that are spread (diversified) in various legislative products (including the Law on Health Fundamentals, the Law on Health Personnel, the Law on Mental Health, the Law on Occupational Health, the Law on Occupational Health, the Law on Hygiene and Sanitation, Plague Law and many more).

The practice of medicine (also about health facilities including hospitals) should be sufficiently regulated in a government regulation as mandated by the Health Act. With the promulgation of Law No. 29 of 2004 concerning Medical Practices (and also the Hospital Law), what has been successfully integrated into the Health Law has been broken down as before.

It is very understandable in making a law (including the Medical Practice Act) that of course will accommodate all inputs and consider various problems that arise in the community including compromise compromise from various perspectives according to the interests of the general public. Therefore it will be very difficult to get a law without flaws. The law will be a guideline/reference when the Act is issued. However, in different situations and conditions 10 years later it is not certain that the Law is still valid and up to date to be used.

Satjipto Rahardjo (professor of sociology of Undip's law), said that we cannot just hand over the next journey of a law (including Law no. 29 of 2004 on Medical Practice) only to the law, let alone law that is carried out normatively-dogmatically. Many of the laws in our place are sometimes incompatible.

As a sovereign nation that has been independent for 74 years, regulations and legislation in Indonesia are good. But the facts in society (if related to social and cultural norms of Indonesia) ethical norms, disciplinary norms and legal norms of implementation cannot be separated. This causes the understanding of each person is different.

In other countries (Malaysia and Singapore), crimes against doctors are only applied for intentional tort due to professional relations between doctors and patients. Nevertheless, patients can still sue doctors to pay compensation in the context of restoring the right to negligence that has been done by doctors.

E. CONCLUSIONS.

Patient safety is a top priority that must be implemented by the hospital, so that patient services can be guaranteed safety and in order to maintain the quality of security and image of services in the hospital.

Unexpected Event is an accident, which is unexpected/planned. Unexpected Event which is properly managed (used as material for monitoring and evaluation), is expected to improve safety culture in hospitals.

Ethical aspects, medical aspects and juridical aspects are always considered aspects in every clinical case faced by a doctor in making clinical decisions.

Improvements to Law No. 29 of 2004 concerning Medical Practices is expected to be carried out by the Government together with the Parliament to provide rules/guide lines for the procedure of resolving medical disputes ranging from investigations, investigations, prosecutions if necessary with up to the verdict. The current legal process is very tiring, requires quite a long time, costs are not small and long-winded.

There is a need for medical court involving medical elements, investigators and the medical legal community which is expected to be able to resolve medical dispute cases that are practical, fast, accurate, fair and dignified in order to create legal certainty for medical personnel and also to avoid the criminalization of medical personnel.

REFERENCES:

Book.

Cecep Triwibowo, Etika dan Hukum Kesehatan, Nuha Medika, Yogyakarta, 2014, page.16.

Danny Wiradharma, Hukum Kedokteran, Jakarta: Binarupa Aksara, Cet. I, 1996, page. 42.

Garwood-Gowers, A, Wheat, K, Tingle, J, 2005., Contemporary Issues in Healthcare Law and Ethics, Reed Elsevier

Guwandi , Trilogi Rahasia Kedokteran , Balai Penerbit FKUI, Jakarta , 1992 , hal 17 – 30.

Guwandi, Dokter Pasien dan Hukum, Fakultas Kedokteran UI, Jakarta , 1996. p 11.

Hadjon P. M. , 1987, Perlindungan Hukum Bagi Rakyat di Indonesia, Bina Ilmu, Surabaya,h. 84.

Kode Etik Kedokteran Indonesia.

Ngesti Lestari, ”Masalah Malpraktek Etik Dalam Praktek Dokter ”, Kumpulan Makalah Seminar tentang Etika dan Hukum Kedokteran diselenggarakan oleh RSUD Dr. Saiful Anwar , Malang, 2001

Priharto Adi. Formulasi Hukum Penanggulangan Malpraktik Kedokteran. Kanun Jurnal Ilmu Hukum, No. 60, Th. XV (Agustus, 2013). 271

Safitri Hariyani, Sengketa Medik Alternatif Penyelesaian Perselisihan Antara Dokter Dengan Pasien, Jakarta: Diadit Media, 2004, page. 11.

Safitri Hariyani Saptogino, artikel: Penyelesaian Sengketa Medik di Indonesia, Maret 14, 2019.

Setyo Trisnadi. Perlindungan Hukum Profesi Dokter Dalam Penyelesaian Sengketa Medis; Jurnal Pembaharuan Hukum, Volume IV No. 1 Januari - April 2017

Soekidjo Notoatmodjo, Etika dan Hukum Kesehatan, Rineka Cipta, Jakarta, 2010, page.44.

Soerjono Soekanto, Penelitian Hukum Normatif suatu tinjauan singkat, Raja Grafindo, Jakarta, 1985, hlm 15.

Sri Siswati, Etika dan Hukum Kesehatan dalam Perspektif Undang-Undang Kesehatan, Rajawali Pers, Jakarta, 2013.

Ta’adi, Hukum Kesehatan: Sanksi dan Motivasi bagi Perawat, Buku Kedokteran EGC, Jakarta, 2013, page. 5.

Veronika Komalawati, Hukum dan Etika dalam Praktik Dokter, Sinar Harapan,Jakarta 1989.

Legislation:

Undang-Undang Nomor 8/1999 tentang Perlindungan Konsumen

Undang-Undang Nomor 29/2004 tentang Praktik Kedokteran

Undang-Undang No.36/2009 tentang Kesehatan

Undang-Undang No.44/2009 tentang Rumah Sakit

Internet.

https://medium.com/@intanmutias/resiko-medik-ditinjau-dari-hukum-kesehatan

Sapta Aprilianto. Peran MKDKI terhadap dugaan kelalaian medis dokter, Jurnal Yuridika Vol 30 No 3/ 2015, http://dx.doi.org/ 10.20473/ ydk.v30i3.1954

MEDIATION EFFECTIVENESS AS A MEANS OF FAIR SETTLEMENT OF BUSINESS DISPUTE

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ABSTRACT

Mediation is an alternative form of business as an option in the context of resolving business disputes in addition to dispute resolution through litigation processes. Dispute resolution through mediation is considered to be more effective than through litigation (court) because the settlement can be satisfying for both parties, because it is decided by jointly desired choices together. There is no win-lose option (win-loss), but there is only a win-win option. The mechanism for dispute resolution through mediation is regulated in Supreme Court Regulation No. 1 of 2008 concerning Mediation Procedures in the Court. To be more effective in its mechanism it needs to be supported through the development of a legal culture.

Keywords: Effectiveness, Dispute Resolution, Mediation And Legal Culture

A. INTRODUCTION

The increasingly rapid development of law in the community has also led to the diversity of conflicts and disputes that occur and develop among the people. along with the growth and development of conflicts or disputes that arise, it causes the interests of the parties to the dispute to further attempt to resolve the dispute in question through the conventional system, namely through a judicial or litigation process.

If at first the dispute resolution process through the court (litigation) is the only legitimate and official institution in dispute resolution that arises in the community that has been regulated based on a specified procedural law (due to process) for it, so outside the system litigation court there is no other institution that can carry out functions in dispute resolution. So that the judiciary becomes the first resort and the last resort.

As a result of the foundation where almost all dispute resolution must go through the court, it can be understood if later in its development the judiciary tends to be formalistic and slow in the settlement process because of the various legal efforts that must be undertaken to arrive at the end of the dispute. Not to mention the verdict which sometimes does not reflect legal certainty and a sense of justice, because in the end the parties to the dispute must be confronted with the fact that there are losers and winners.

The growth and development of disputes that have also arisen lately have become increasingly complex and diverse. The desire to settle a fast and effective and also efficient, so that the pattern of dispute resolution through the judicial process is considered to be no longer in line with these ideal desires like a quick and short dispute resolution but also can produce and satisfy the parties to the dispute.

Forms of dispute resolution through formal justice institutions that have been running so far can no longer be expected to meet the needs of the community in general and moreover in the business world (trade) by business practitioners who apparently demand and want a pattern or form of dispute resolution that can done in a simple, fast and low cost and no exception while still raising a sense of justice and legal certainty in accordance with the desired goals.

In connection with such judicial conditions, business actors in the framework of entering the current era of globalization are looking for patterns of dispute resolution outside the justice system (non-litigation) that is known as Alternative Dispute Resolution (ADR).

Alternative Dispute Resolution (ADR), which was developed in the context of dispute resolution, especially in the trading business in Indonesia, has gained legal recognition through Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution.

However, when examined by Law Number 30 Year 1999, it emphasizes more on the discussion of the Arbitration aspect solely and very little discussing issues related to Alternative Dispute Resolution aside from being very common, because it does not state

clearly and explicitly about alternative forms of settlement the dispute in question.

In Law Number 30 of 1999, it is stated that alternative forms of dispute resolution other than arbitration are:

1. Consultation
2. Negotiations;
3. Mediation, and
4. Conciliation or Expert Assessment.

The unclear form and how the mechanism desired by Law Number 30 Year 1999 may make the parties who want to resolve disputes that arise through this alternative mechanism raise doubts related to their effectiveness in resolving and solving problems or disputes that arise. Therefore, to eliminate doubts about it, the form and mechanism must be fully supported by an appropriate legal system and legal instruments and legislation concerning the existence of the institution and also the pattern of the mechanism it does.

Settlement of a dispute cannot only be seen micro, which is only resolving and resolving a dispute (dispute settlement), but it must also be seen from its macro purpose, which is to create a sense of justice for the parties to the dispute.

Besides that, because this institution is expected to truly function and play an optimal role in resolving disputes arising, of course it is expected that the decisions of these Alternative Dispute Resolution institutions truly have binding legal force for the parties involved in consensualism that happened. All of this is none other than in the context of the growth of a legal certainty and perspective and also contributes a sense of justice. It means to settle a dispute which then gives birth to a decision from the chosen institution or an agreement that has been developed between the parties, do not just become a decision or consensus that is temporary to later lead to legal uncertainty which in the end will also lead to injustice in the law. It is not impossible that bias can occur, a dispute which in its settlement does not lead to justice and legal certainty will lead to a new dispute.

In the end the settlement patterns adopted by the parties return to the pattern or form of settlement to or through the judiciary (litigation). If this happens then it means that the desired Alternative Dispute Resolution mechanism is not effective and only becomes an act or form of settlement that is pseudo or temporary. This will be possible because it is fully realized that the Alternative Dispute Resolution Institution is basically not an official judicial body (ordinary court) that has the authority and authority to enforce what has been its decision, but is only an institution that is domiciled as extra judicial , so that the products it produces are not final and binding.

Therefore, there will be many challenges in the framework of empowering the concept of dispute resolution through this alternative institution, especially in thinking of the conception of law to be used as input in strengthening its existence so that this institution will truly be an effective and efficient alternative in resolving disputes. which occurs specifically, especially in the scope of trade by business people.

In other words, this Alternative Dispute Resolution is chosen by business actors in resolving disputes that arise because it is significantly different from the choice of dispute resolution through litigation, not only in terms of legal certainty, contribution of justice, effectiveness and time efficiency. No less important is such dispute resolution will not influence the relationship and trust (relationship and trust) that have been established so far by the parties or business operators. Therefore, this alternative dispute resolution will basically be the first resort (the first resort) and at the same time also be expected to be the last resort (the last resort) on dispute resolution that happened.

Based on the description stated above, the writer is interested in writing by taking the topic of " **Mediation Effectiveness as A Means of Fair Settlement of Business Dispute".**

Why "mediation" is the author's choice, because among the alternative forms of dispute resolution that are currently and continue to be developed is through the mechanism of "mediation" and "mediation" in general using a win-win solution approach in a simple way and process. However, to be able to obtain optimal results in dispute resolution through mediation, of course, it must be supported by legal institutions so that it can truly run effectively. This supporting factor will be the study in this paper.

B. PROBLEM STATEMENT

Based on the background description of the problem outlined above, the issues to be raised are as follows:

1. How effective is business dispute resolution through mediation?
2. What supporting factors can support the effectiveness of business dispute resolution through mediation?

C. RESEARCH METHODS

This research is a normative legal research as one of the studies in legal science, namely a research conducted by examining library materials or secondary data with an emphasis on the effectiveness of mediation issues as a just business dispute resolution along with the supporting facilities in the form of regulatory regulations and development legal culture.

D. Analysis and Discussion

1. Effectiveness of Dispute Resolution through Mediation

The term mediation is etymologically derived from Latin, mediare which means “in the middle”. The word "mediation" comes from the English "mediation" which means the dispute resolution which involves the third party as the mediator or mediate dispute resolution, and the mediator is called the mediator or mediator.[1]

In the Indonesian Dictionary, it is generally stated that what is meant by mediation is the process of involving a third party in settling a dispute as an advisor.[2]

According to Black’s Law Dictionary, mediation as "A Method of nonbinding dispute resolution involves a neutral third party who tries to help the disputing parties reach a mutually agreeable solution ".[3]

Christopher Moore believes that mediation is an intervention in a dispute by a third party that can be accepted by the disputing party, is not part of both parties and is neutral. While John W Head stated that, mediation is an intermediary procedure in which a person acts as a vehicle to communicate between the parties so that their differing views on the dispute can be understood and may be reconciled.

As for the opinion according to H. Priyatna Abdulrasyid, mediation is a peaceful process between parties to a dispute involving a third party as a mediator with an effective and voluntary process accepted by the parties.

The mediation dispute resolution process which aims to enable the parties to the dispute can discuss their differences privately with the help of a neutral third party or also called the mediator. So, the mediator helps the parties to understand the views of the other parties in relation to the disputed issues, and further helps them make an objective assessment and the overall situation or situation that is ongoing during the negotiation process. Therefore, the mediator must remain neutral, always foster good relations, speak the language of the parties, listen actively to emphasize potential benefits, minimize differences and emphasize similarities, aiming to help the parties negotiate better on a settlement a dispute.

The problem is whether the dispute resolution through mediation can be effective and beneficial for the parties to the dispute, namely through a win-win solution approach, that is, no party dominates the victory and no party feels absolutely defeated, which then creates dissatisfaction. An effectiveness basically shows a success in terms of whether or not the target has been set.

As we know, national development in the economy has become one of the mainstays of Indonesia and various other countries and is developing in line with the rapid pace of science and technology which demands that it meets the elements of protection and development of creative economy by creating new and original creations as a form of manifestation of the results human intellectual thought, therefore it is hoped that the contribution to the country's economy can be more optimal. Intellectual Property can contribute financially because it has a high economic value, so that it can have a positive impact on the growth or development of the national economy. However, complex economic growth and increased competition have the potential to lead to disputes or conflicts that are deemed necessary for quick, easy and low-cost solutions. Therefore, there is no other alternative except to create dispute resolution more effectively and efficiently without having to sacrifice the interests of the parties which would actually cause a prolonged loss and far from legal certainty.

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[1] John Echols dan Hasan Shadily, *Kamus Inggris Indonesia,* Cet. Ke xxv (Jakarta: Gramedia Pustaka Utama, 2003), hlm. 377. Pengertian yang sama dikemukakan juga oleh Prof. Dr. Abdul Manan, *Penerapan Hukum Acara Perdata di Lingkungan Peradilan Agama,* (Jakarta: PT. Kencana, 2005), hlm. 175. Lihat juga Joni Emirzon, *Alternatif Penyelesaian Sengketa di Luar Pengadilan (Negosiasi, Mediasi, Konsiliasi, Arbitrase)*, (Jakarta: PT. Gramedia Pustaka Utama, 2001), hlm. 69

[2] Tim Penyusun Kamus Pusat Pembinaan dan Pengembangan Bahasa, *Kamus Besar Bahasa Indonesia,* (Jakarta: Balai Pustaka, 2000), hlm. 640.

[3] Bryan A Garner (ed.), Black,s Dictionary, Thompson-West, 2004, hlm. 335. Dikutip dalam Sholahuddin Harahap, *Pelaksanaan Mediasi Menurut Perma Nomor 1 Tahun 2008 Berikut Permasalahannya*. Dalam Jurnal Syiar Hukum Fakultas Hukum UNISBA. Vol. 13 No. 2, Juli 2011, hal. 130.

According to Adam Smith, as quoted by M. Yahya Harahap[4], the factors that can most improve the welfare of the people of a country are, one of which is acceptable justice, in the sense of a judicial system that is capable and deft in resolving business disputes quickly and at low cost.

Conventionally, dispute resolution is generally done through a court or also called litigation. Dispute resolution through court (litigation) is basically not a bad settlement, but rather as an institution of choice provided by the State in the context of a neutral legal settlement. Therefore, the settlement (dispute) through the court (litigation) remains a choice for those who want it. However, for business people involved in a dispute presents valuable lessons that the dispute resolution through the court sometimes causes dissatisfaction because the decision made by the court is not in accordance with a sense of justice and desire, although it must be recognized that dissatisfaction is based on mere subjectivity.

As a response and reaction to the dissatisfaction subjectivity, a desire arises to settle disputes outside the court or also referred to as non-litigation. This pattern is a third wave cycle in obtaining justice (the third wave access to justice).

Settlement of disputes outside the court is said to be done through Arbitration and Alternative Dispute Resolution (APS), namely consultation, negotiation, mediation, conciliation, or expert judgment as stipulated in Law Number 30 of 1999. However, what can be resolved is disputes in the field of trade or business so that disputes that arise are not related to business and cannot be held peace then are not included in the object of the settlement of the Act.[5]

Mediation is one alternative dispute resolution (ADR) that uses a win-win solution approach[6] with a simpler process and way in order to provide access to justice that will be more satisfying to business actors or parties seeking justice with the help of a mediator as a supporter and also distribute aspirations in the effort to find a bright spot in the resolution of disputes for the parties.[7]

Therefore, for the parties in dispute, especially for business actors who prioritize their business interests, the actual resolution of disputes through mediation is the right choice from the aspect of effectiveness and efficiency, both in the resolution of the time and the satisfaction that might result from the settlement obtained, without having to sacrifice things that ultimately lead to dissatisfaction.

A dispute resolution through mediation is considered effective because the resolution can be satisfying for both parties, because it is decided through a joint choice that is desired jointly. There is no win-lose option, but there is only a win-win option. In other words, the effectiveness shows a success in terms of whether or not the targets set by the disputing parties have been previously achieved.

In addition, the effectiveness of the use of mediation as an alternative dispute resolution (business) is also reflected in the principles adopted in mediation, namely:[8]

a. Mediation is a dispute resolution process based on the principle of volunteerism through a negotiation;
b. Obligation of participation of all parties in the mediation process;
c. Maximum effort to reach consensus;
d. The use of a restructuring approach with a pattern of "best commercial practice";
e. Respect the rights of the parties concerned.

From the description as stated above, it can be seen that the active involvement of the parties that illustrates the role of these parties, so that the active involvement and role of the parties concerned is a characteristic picture of the principles of mediation, in time will of course produce an agreement which is indeed encouraged to resolve the dispute in totality.

The characteristics of the mediation principles illustrated are:[9]

Accessible; everyone who needs can use mediation, there is no rigid procedure in relation to the characteristics of mediation between one another;

Voluntary; Everyone who takes part in the mediation process must agree and can decide at any time if he wishes they cannot force to accept a mediation result if he feels the mediation results are not favorable or satisfying himself;

Confidential; The parties want to feel free to say anything and be open to mediation;

Facilitative; Mediation is the creativity and problem-solving approach to the problem at hand and relies on the mediator to help the parties reach an agreement permanently and impartially.

[4] M. Yahya harahap. 1997. *Beberapa Tinjauan Mengenai Sistem Peradilan dan Penyelesian Sengketa*. Bandung. PT. Citra Aditya Bakti. Hlm. 149.

[5] Sudana, *Efektivitas dan Efesiensi Penyelesaian Sengketa Kekayaan Intelektual Melalui Arbitrase dan Mediasi Berdasarkan Undang-Undang Nomor 30 Tahun 1999*. Vol. 2 No. 1, Juni 2018, hal. 82

[6] win-win solution, which is a negotiation between two parties that will get the same amount of profit. The opposite of a win-win solution is a win-lose solution and a lose-lose solution.

[7] See Article 1 paragraph (7) of the Supreme Court Regulation Number 1 of 2008 concerning Mediation Procedures in the Court.

[8] Efektifitas pelaksanaan Mediasi di Pengadilan Negeri. Jakarta. Puslitbang Hukum dan Peradilan. Badan Litbang Diklat Kumdil Mahkamah Agung RI. 2017. Hlm. 35

[9] *Ibid.*

2. The mechanisms and supporting factors that can support the effectiveness of business dispute resolution through mediation

A dispute is generally resolved through a mechanism that has been arranged, in the resolution of disputes through district courts or also called litigation. The mechanism is regulated in civil procedural law. What is meant by civil procedural law itself is a legal regulation governing how the material civil law is obeyed by a judge's regulation. More concrete it is said that the civil procedural law regulates how to submit claims for rights, examine, decide on, and implement, rather than the verdict in the opinion of Prof. Dr. Sudikno Mertokusumo, SH,[10] while the mechanism for dispute resolution through mediation is still unclear about the mechanism.

Currently the mechanism for dispute resolution through mediation is regulated through Supreme Court Regulation No. 1/2008 concerning Mediation Procedures in the Court which replaces Supreme Court Regulation No. 2/2003.

Viewed from the PERMA title No. 1 of 2008 concerning Mediation Procedures in the Court, we will also be able to understand that the Mediation intended in the PERMA is mediation that is integrated with the court and not mediation as a stand-alone dispute resolution agency. This means that mediation can only proceed when there are first lawsuits in the form of lawsuits that are entered and registered in court. Before the process of examining the main points of the lawsuit from the dispute submitted, the dispute resolution process is carried out through mediation.

Mediation institutions can indeed be provided outside the court, usually in the National Mediation Center and mediation in the courts which are referred to by various terms including: Court - Integrated Mediation, Court-Annexed Mediation, Court Dispute Resolution, Court Connected ADR, Court - Based ADR etc.[11]

Thought to include mediation in the process and an integral part of the procedural law in the court is in considering the letter b PERMA No. 01 of 2008 which states: "that the integration of mediation into court proceedings can be one of the effective instruments in overcoming the problem of case trials in the courts and strengthening and maximizing the functioning of court institutions in dispute resolution in addition to adjudicative judicial processes".

Introducing and incorporating mediation into court proceedings can be one of the effective tools to overcome the problem of case stock in the courts and strengthen and maximize the function of non-judicial institutions for dispute resolution in addition to adjudicating litigation.[12]

Actually, judicial court mediation has been regulated in Articles 130 and 131HIR for Java and Madura and 154 and 155 RBG outside Java and Madura. Article 130 HIR and 154 RBG states that:

Paragraph (1) If on a predetermined day both parties come to the court, the district court through its chairman seeks to achieve peace between the two parties.

Paragraph (2) If such peace can be reached, then a deed is made in the hearing, in which both parties are punished for obeying the contents of the agreement that has been reached, which deed has the same strength and is carried out in the same manner as a decision ordinary.

Paragraph (3) the stage of such a decision cannot be appealed.

Article 131 HIR and 155 Rbg paragraph (1) states that:

If the parties come but they cannot be reconciled, it must be mentioned in the minutes of the trial, then the letter entered by them is read and if one party does not understand the language used in the letter, then translated by the interpreter appointed by the chairman (presiding judge) into language understood by those who don't understand "

Supreme Court Regulation (PERMA) Number 1 of 2008 concerning Mediation Procedures in the Court as an elaboration of Article 130 HIR - Article 154 Rbg is the latest PERMA replacing PERMA Number 2 of 2003. Several Updates adorn the birth of the new PERMA as a refinement of several previous PERMAs One of the reforms included: the possibility of justice seekers to mediate at the appeal, cassation and reconsideration level,[13] the possibility of a peace agreement that occurred outside the court to be strengthened into a peace deed[14] and an increase in the mediation deadline to 40 days and can be extended for another 14 days.

Supreme Court Regulation No. 1 of 2008 actually imitate the Wakai and Chotei models, which are Japanese-style dispute resolution procedures.

Literally, what is called wakai is the concept of peace, while what is meant by chotei is mediation. But wakai and chotei basically refer to the settlement

[10] Anonim, *"Hukum Acara Perdata Rangkuman"*,(https://andruhk.blogspot.com/ 2012/07/hukum-acara-perdata. html, Diakses pada tanggal 6 Desember 2019.

[11] Naskah Akademik Mediasi. Jakarta. Puslitbang Hukum dan Peradilan Badan Litbang Diklat Kumdil Mahkamah Agung RI. Hal. 13.

[12] Sholahuddin Harahap, *Pelaksanaan Mediasi Menurut Perma Nomor 1 Tahun 2008 Berikut Permasalahannya*. Dalam Jurnal Syiar Hukum Fakultas Hukum UNISBA. Vol. 13 No. 2, Juli 2011, hal. 127

[13] See Article 21 of the Supreme Court Regulation Number 1 of 2008 concerning Mediation Procedures in the Court.

[14] See Article 23 of the Supreme Court Regulation No. 1/2008 concerning Mediation Procedures in the Court.

process which we also know in Indonesia as mediation through the courtroom. The difference is that dispute resolution through chotei must be submitted through the Chotei Commission (chotei iin). The strict procedure requires judge Chotei to comply with established rules. In Japan alone, Chotei is becoming less popular than Wakai. Wakai's strength lies in the referee who only needs one mediator judge. Judge mediators are also released to develop dispute resolution techniques.[15]

Viewed from several points of view, settlement with the mediation process provides many benefits for those who seek justice. Shorter time taken automatically will reduce costs to the lowest possible, whereas from an emotional standpoint, a solution carried out with a win-win approach will provide convenience for the parties, because some agreements are made by those who seek justice in accordance with their wishes as known as the principle of freedom and the principle of consensuality.

In its development PERMA No.2 of 2003 was considered to be still less effective so that the mediation procedure in court was refined to be PERMA No. 1 of 2008. These improvements were made due to PERMA No. 2 of 2003 experiencing problems, therefore its application is not effective in court. PERMA No. 1 of 2008 was issued to accelerate and also facilitate the resolution of disputes and also provide greater access to those who seek justice. The presence of PERMA is intended to be able to provide certainty, orderliness, fluency in the process of reconciling the parties.

In Article 4 PERMA No. 1 of 2008 determines cases that can be sought mediation are all civil disputes submitted to the court of first instance, except cases that are settled through commercial court procedures, industrial relations courts, objections to the decisions of the consumer dispute resolution body and objections to the decisions of the business competition supervisory commission.

PERMA No. 1 of 2008 trying to provide a more comprehensive, more complete, more detailed regulation and reinforcement in relation to the mediation process in court. He directed the parties that litigate to pursue the peace process in detail, and also accompanied by giving a consequence, for violations, of the procedures that must be carried out, namely sanctioning null and void decisions on a judge's decision that did not follow or ignore PERMA No. 1 of 2008.

Between PERMA No. 1 of 2008 compared to PERMA No. 2 of 2003, then the 2003 PERMA did not impose sanctions and also in this 2003 PERMA many aspects were not regulated, especially mediation at the appeal and cassation level, whereas PERMA No. 1 of 2008 regulates the possibility of this matter.

Fundamental changes in PERMA No. 1 of 2008, can be seen in Article 4, namely the limitation of cases that can be mediated. However, these provisions have not been able to determine specific criteria regarding cases that can be mediated or that cannot be mediated. This PERMA approach is a very broad approach. In this PERMA, all cases as long as they are not included in the excluded criteria, then it is required to take mediation first.

What about dispute resolution done through mediation conducted outside the court to be able to obtain legal certainty in the form of a decision that has legal force and can be implemented? Because the mediation developed by the Indonesian legal system requires court-connected mediation to be mediated, the mechanism adopted must still go through the court. This is regulated in article Chapter VI concerning "Agreement outside the Court", in article 23 which regulates namely:

1) The parties with the help of a certified mediator who successfully resolves disputes outside the court with a peace agreement can submit the peace settlement to the competent court to obtain a peace deed by filing a lawsuit.
2) Submission of a claim as referred to in paragraph (1) must be accompanied or accompanied by a peace agreement and documents that prove there is a legal relationship between the parties and the object of the dispute.
3) Judges before the parties will only strengthen the peace agreement in the form of a peace deed if the peace agreement fulfills the following conditions:
    a. In accordance with the wishes of the parties;
    b. Not against the law;
    c. Does not harm third parties;
    d. Executable;
    e. In good faith.

Provisions in article 23 PERMA No. 1 of 2008 when this is seen gives rise to the appearance of a conflict with the provisions stipulated in article 2 concerning the Scope and Strength of PERMA.
Article 2 reads:

(1) This Supreme Court Regulation only applies to mediation related to litigation in court.

[15]Anonim, *"Wakai dann Chotei, Prosedur Penyelesaian Sengketa ala Jepang"* (https://www.hukumonline.com/berita/baca/hol20046/iwakaii-dan-ichoteii-prosedur-penyelesaian-sengketa-ala-jepang/, Diakses pada tanggal 6 Desember 2019). Untuk memahami Wakai ini dapat dipelajari dan dibaca dalam buku Prof. Yoshiro Kusano. *Wakai. Penyelesaian Sengketa Ala Jepang*. Jakarta. Grafindo Books Media.

(2) Every judge "mediator" and the parties must follow the dispute resolution procedures through mediation provided for in this regulation.
(3) Not undergoing mediation procedures based on this Regulation is a violation of the provisions of Article 130 HIR and or Article 154 RBg which results in a decision being null and void.
(4) Judges in the consideration of case decisions must mention that the case in question has been sought for peace through mediation by mentioning the name of the mediator for the case in question.

Based on article 2 paragraph (1) as quoted above, it creates the impression that mediation taken outside the court as referred to in article 23 does not apply and must be repeated because it is done outside the court proceedings.

To avoid the mediation mechanism that raises doubts in its implementation, it is time for the dispute resolution mechanism (business) through mediation to be renewed by expanding the scope of the regulation regarding mediation as a whole and regulated not only in the form of a Supreme Court Regulation but regulated and set forth in the form of a law specifically regulating the mediation business dispute resolution mechanism. Perhaps this is also the hope of the Supreme Court as illustrated in the considerations in letter (d) of PERMA No. 1 of 2008, namely: "that while waiting for statutory regulations and taking into account the authority of the Supreme Court in regulating court proceedings that have not been adequately regulated in legislation, then for the sake of legal certainty, order and smoothness in the peace process of the parties to resolve a civil dispute is deemed necessary to stipulate a Supreme Court Regulation ".

To be more effective and efficient in the mechanism of dispute resolution through mediation must also be supported by the factor of developing a legal culture for business people, because the law will not be able to work optimally without creating a good legal culture, as stated by Lawrence M. Friedman that culture law contains the values, views and attitudes that influence the operation of law.[16] Satjipto rahardjo stated that "the legal culture is a component to understand the operation of the legal system as a process, in which legal culture functions as a motor for justice. Thus, without the support of a conducive legal culture, a regulation or law could not be realized as expected by both legal planners and the community as the target of the law. [17]Cultural reasons, according to Erman ragukguk, caused people to tend, setting aside the court as a place to settle disputes arising between them.[18]

Furthermore, quoting Victor H. Li in his book Law Without Lawyer (Comparative View of Law in China and The United States) and Fenno Henderson in the Concilition and Japanese Law - Tokugawa and Modern, also stated by Erman Rajagukguk,[19] that Eastern societies such as China and Japan traditionally does not like the court, because the court is considered as a place for bad people who do not obey the law, so that they are traditionally very reluctant to bring their civil disputes before the court. And to maintain harmony, civil disputes tend to be resolved through mediation and conciliation.

Thus, mediation is not only supported by laws and regulations as the legal basis of the mechanism, but is also supported by the behavior of business people by fostering the development of a legal culture as a means for optimal regulation to work.

Integrating various supporting factors towards dispute resolution as stated, it is hoped that mediation as a means of equitable dispute resolution will be achieved.

E. Conclusion

A. Conclusion

1. Mediation is an alternative dispute resolution (ADR) that is considered effective because the resolution can be satisfying for both parties, taken through jointly desired choices together. There is no win-lose option (win-loss), but only a win-win option. In other words, the effectiveness shows a success in terms of whether or not the targets set by the disputing parties have been previously achieved.
2. The mechanism for resolving disputes through mediation is regulated through Supreme Court Regulation (PERMA) Number 1 of 2008 concerning Court-connected Mediation Procedures because the mechanism adopted must still go through the court.
3. Legal culture is a supporting factor in the successful operation of the dispute resolution process through mediation.

B. Suggestions

[16] Emmy Warassih Pujirahayu. *Hukum Dalam Perspektif Sosial*. Penyunting Satjipto Rahardjo. Alumni. Bandung.1981.hlm.124

[17] Satjipto Rahardjo. Hukum dan Masyarakat. Bandung. 1980. Hlm. 85.

[18] Erman Rajagukguk. Budaya Hukum dan Penyelesaian Sengketa Perdata di Luar Pengadilan. Artikel dalam Jurnal Magister Hukum Pasca Sarjana UII. Vol. 2 No. 4. 2000. Hlm.1.

[19] *Ibid.* Hal. 1-2

1. Mediation as an alternative dispute resolution must be developed by building awareness for the parties so that the dispute resolution that occurs can be through mediation so that its effectiveness can run and get better.
2. the dispute resolution mechanism (business) through mediation must be updated by broadening the scope of the regulation concerning mediation as a whole and regulated not only in the form of a Supreme Court Regulation but stipulated and set forth in the form of a law specifically regulating the dispute resolution mechanism mediation business.
3. Developing legal awareness through the formation of a legal culture for business practitioners, so that dispute resolution through mediation can work more effectively.

REFERENCES

Book

Abdul Manan, 2005. *Penerapan Hukum Acara Perdata di Lingkungan Peradilan Agama,* (Jakarta: PT. Kencana).

Emmy Warassih Pujirahayu. 1981.*Hukum Dalam Perspektif Sosial*. Penyunting Satjipto Rahardjo. Alumni. Bandung.

Joni Emirzon, 2001. *Alternatif Penyelesaian Sengketa di Luar Pengadilan (Negosiasi, Mediasi, Konsiliasi, Arbitrase),* (Jakarta: PT. Gramedia Pustaka Utama).

M. Yahya harahap. 1997. *Beberapa Tinjauan Mengenai Sistem Peradilan dan Penyelesian Sengketa*. Bandung. PT. Citra Aditya Bakti.

Prof. Yoshiro Kusano. *Wakai. Penyelesaian Sengketa Ala Jepang*. Jakarta. Grafindo Books Media.

Satjipto Rahardjo. 1980.*Hukum dan Masyarakat*. Bandung.

Dictionary

John Echols dan Hasan Shadily. 2003. *Kamus Inggris Indonesia,* Cet. Ke xxv (Jakarta: Gramedia Pustaka Utama).

Tim Penyusun Kamus Pusat Pembinaan dan Pengembangan Bahasa. 2000.*Kamus Besar Bahasa Indonesia,* (Jakarta: Balai Pustaka).

Internet

Anonim, "*Wakai dann Chotei, Prosedur Penyelesaian Sengketa ala Jepang"* (https://www.hukumonline. com/berita/baca/hol20046/iwakaii-dan-ichoteii-prosedur-penyelesaian-sengketa-ala-jepang/,Diakses pada tanggal 6 Desember 2019).

Anonim, *"Hukum Acara Perdata Rangkuman"*, (https://andruhk.blogspot.com/ 2012/07/hukum-acara-perdata.html, Diakses pada tanggal 6 Desember 2019).

Journal

Erman Rajagukguk. Budaya Hukum dan Penyelesaian Sengketa Perdata di Luar, Pengadilan. Artikel dalam Jurnal Magister Hukum Pasca Sarjana UII. Vol. 2 No. 4. 2000.

Mahkamah Agung. Naskah Akademik Mediasi. Jakarta. Puslitbang Hukum dan Peradilan , Badan Litbang Diklat Kumdil Mahkamah Agung RI.

Mahkamah Agung. Efektifitas pelaksanaan Mediasi di Pengadilan Negeri. Jakarta.Puslitbang Hukum dan Peradilan. Badan Litbang Diklat Kumdil Mahkamah Agung RI. 2017. Hlm. 35

Sholahuddin Harahap, *Pelaksanaan Mediasi Menurut Perma Nomor 1 Tahun 2008 Berikut Permasalahannya*. Dalam Jurnal Syiar Hukum Fakultas Hukum UNISBA. Vol. 13 No. 2, Juli 2011.

Sudana, *Efektivitas dan Efesiensi Penyelesaian Sengketa Kekayaan Intelektual Melalui Arbitrase dan Mediasi Berdasarkan Undang-Undang Nomor 30 Tahun 1999*. Vol. 2 No. 1, Juni 2018.

THE INFLUENCE OF LEGAL CULTURE IN LAW ENFORCEMENT BY THE INDONESIAN NATIONAL POLICE AS AN EFFORT OF HUMAN RIGHTS IN INDONESIA

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ABSTRACT

As a law enforcement officer in carrying out their duties, a police is required to instill a sense of trust in the communities, because upholding the authority of the law in essence means instilling the value of trust in the communities. In addition to instilling the value of trust in the communities, a police is also required to have professionalism in enforcing the law. Ability in law enforcement is an important factor for the police to realize as much as possible the protection of every citizen. As a component of the justice system, the police have a key position for an effective or not, a human rights protection is. Therefore, this study carried out discussion and/or study of the questions *Firstly*, how is the influence of the legal culture in law enforcement by the Indonesian National Police, and *Secondly* how is the concept of fulfilling human rights in the law enforcement process by the Indonesian National Police. The type in this study is normative juridical, and analyzed descriptively qualitatively. As for the results of the discussion in this study are: *First*, that the influence of the legal culture in law enforcement by the Indonesian National Police in which the development of a culture of law enforcement may be done by applying law enforcement based on *due process model*, seeking to resolve the cases quickly, simply and inexpensively, the establishment of special units accelerates handling cases, criminal acts assertively and professionally. Furthermore, *Secondly* the concept of fulfilling human rights in the process of law enforcement by the Indonesian National Police in Indonesia by the enactment of the Indonesian National Police Regulation No. 8/2009 concerning the Implementation of Human Rights Principles and Standards (HAM) in the Implementation of the Indonesian National Police Duties is a concept from the enactment of regulations as an effort to fulfill Human Rights in the process of law enforcement by the Indonesian National Police, good police should be able to make morality an integral part of their work.

Keywords: Law Enforcement, Legal Culture, Human Rights

A. INTRODUCTION

Plato (in Huda), stated that good governance is ruled by law. Then it was developed by Aristotle, who stated that a good state is a state ruled by the constitution and rule of law.[1] According to Aristotle, that the ruling in the State is not human but a fair mind, and decency determines the merits of a law.[2]

Paradigm in the enforcement of human rights (HAM), does not only cover one aspect, namely the protection of human rights, but there are three important aspects in the framework of respect (to respect), protection (to protect), and fulfillment (to fulfill). The implementation of respect, protection and fulfillment of human rights should be in line with universal human rights principles that are recognized and adopted by countries in the international scope.

The state of Republic of Indonesia recognizes and upholds human rights and basic human freedoms as rights that are inherently attached to and can not be separated from humans that must be protected, respected and upheld for the sake of increasing human dignity, welfare, happiness, and intelligence and justice. The regulation specifically governs human rights is contained in the Law Number 39 of 1999 concerning Human Rights (State Gazette of the Republic of Indonesia Number 165 of 1999, Supplement to the State Gazette of the Republic of Indonesia Number 3886, hereinafter referred to as the Human Rights Law). Article 1 of the Human Rights Law states that human rights are "a set of rights inherent in the nature and existence of human beings as the God's creature and is His gifts that must be respected, highly respected, and protected by the state, law, government, and everyone for the honor and protection of human dignity and status ".[3]

Indonesia is a State of Law. This has been stated expressly in the explanation of the 1945 Constitution that "The Republic of Indonesia is based on law (*rechstaat*)", not based on mere power (*machstaat*). One of the main characteristics of the rule of law lies in its tendency to judge the actions taken by the communities on the basis of legal regulations. Discussion about law is always related to the issue of law enforcement in the broadest sense is also the enforcement of justice

The growth and development of society is always in line with the growth and development of all aspects of needs, including in terms of comfort and safety needs. In this modern era where the progress of

[1] Ni'matul Huda, State of Law, Democracy and Judicial review, Yogyakarta, UII Press, 2005, p. 1
[2] Ibid
[3] See Article 1 of Law No. 39 of 1999 concerning Human Rights,

society is quite rapid, along with the rise of demands for the supremacy of law, human rights, globalization, democratization and transparency which have given birth to a new paradigm in seeing the purposes, duties, functions, authority and responsibility for the parties related to law enforcement in this matter particularly the Indonesian National Police's officers. At present the Indonesian National Police (POLRI) is burdened with hopes by the public for the implementation of the tasks of the Indonesian National Police which are increasing and be oriented to the communities they serve.

The Police are street law enforcement officers who face to face directly the communities and criminals. The role of the police is generally known as maintaining the *Kamtibmas* (Security and Public Order) as well as serve as law enforcement officers in the criminal process. In Article 2 of Law Number 2 of 2002 concerning the Indonesian National Police, "The Police Function is one of the functions of the Government of the State in maintenance of the public order and security, law enforcement, protection, and services to the public". Article 4 of Law Number 2 Year 2002 also highlights "The Indonesian National Police is aimed at enforcing domestic security which includes maintaining the people's security and order, the order and upholding of the law, carrying out protection, and services to the communities, as well as maintaining public peace by upholding the human rights. "As the law enforcement officers in carrying out their duties, the police are required to instill a sense of trust in the communities, since upholding the authority of the law in essence means instilling the value of trust in the communities. In addition to instilling the value of trust in the communities, the police are also required to have professionalism in enforcing the law. Ability in law enforcement is an important factor for the police to realize as much as possible the protection of every citizen. As one component of the justice system, the police have a key position for an effective or not, the human rights protection is.

As the law enforcement officers in carrying out their tasks, the police are required to instill a sense of trust in the communities, because upholding the authority of the law in essence means instilling the value of trust in the communities. In addition to instilling the value of trust in the communities, the police are also required to have a professionalism in enforcing the law

The Indonesian National Police (Polri) has the authority to enforce law based on positive law, namely the Criminal Procedure Code (KUHAP) and the Law of the Indonesian National Police (Law No. 2 of 2002). In law enforcement this often contains two dimensions, namely providing legal protection to the communities, but other dimensions have a potential to be abused and tend to harm the communities. Many legal cases handled by the police have received appreciation from the communities but not a few have received criticisms from the communities. The Criminal Procedure Code gives the police considerable authority to take legal steps against a suspect. If the authority is not mandated and not monitored, they has the potential to be overused.

The Civil and Political Rights Covenant, Code of Conduct for Law Enforcement Officials, placing a heavy duty of protecting the communities on law enforcement officials, especially the police. But in reality, there are still deviations of police behavior that are contrary to that requirement. The tendency that take places is that violence by the police which is not only personal violence, but also a structural violence, using an indirect means to reveal or resolve problems. In this case, the people were placed in the position of worth to be blamed, the information on the case was wrapped unilaterally by the police, and allegedly to free the officers responsible for a riot. Then in certain ways is justified that there are parties who provoke.

Such argument is basically a common sense which is a product of intellectual despair. By quickly placing a case as a complex and unique, simply as a failure or the inability of the police. This formalist argument ignores the base of interests and background of violence that grows in the dynamics of society, on the other hand the law enforcement practices that take place in this country also experience severe illnesses. This is indicated by the number of issues addressed to law enforcement officials, be it the police, prosecutors or judges, for example, about the large number of corruptors released by the court, and even if convicted they served the sentence only as much as to the punishment of a chicken thief.[4]

Therefore, the simplification taken can negate the social relations that are behind it. The background of the phenomenon of violence in the communities and the police needs to be studied comprehensively. This shows that there are still problems that need to be addressed to control the police in the use of violence. During this time the supervision of the implementation of police duties can be said to be very weak.

B. PROBLEM STATEMENT

Based on the description above, it is necessary to conduct a discussion and/or study on the First question, how is the influence of legal culture in law enforcement by the Indonesian National Police, and Secondly how is the concept of fulfilling Human Rights in the law enforcement process by the Indonesian National Police in Indonesia.

C. LITERATURE RIVIEW

1. Concept of Law Enforcement

[4] Achmad Ali, Legal Deterioration in Indonesia, Bogor, Ghalia Indonesia, 2005, p. 1

Law enforcement can also mean the administration of law by law enforcement officials and by anyone who has an interest in accordance with their respective authorities according to applicable law. Criminal law enforcement is a unified process that begins with the investigation, arrest, detention, trial of the defendant and ends with the correction of the convicted.[5]

Lawrence M. Friedman argues that effective and successful or not, the law enforcement depends on three elements of the legal system, namely the structure of law, the substance of the law and the culture of law. The legal structure concerns the law enforcement officials, the legal substance includes the set of laws and legal culture is a living law adopted by a community.
About the legal structure Friedman explains: [6]

> *"To begin with, the legal system has the structure of a legal system consist of elements of this kind: the number and size of courts; their jurisdiction ... Structure also means how the legislature is organized ... what procedures the police department follow, and so on. The structure, in the way, is a kind of cross section of the legal system ... a kind of still photograph, with freezes the, action. "*
> *(The* structure of the legal system consists of the following elements, number and size court, its jurisdiction (including the type of case they are authorized to investigate), and procedure to appeal from court to court. Structure also means how the legislature is organized, what is permissible and not permissible be carried out by the president, the existing procedures that are followed by the police and so forth. So the legal structure consists of legal institutions intended to run the existing legal apparatus.)

Structure is a pattern that shows how the law is enforced according to formal requirements. This structure shows how the courts, law-makers and legal bodies and the legal process operate and be operated. In Indonesia, for example, if we talk about the structure of the Indonesian legal system, then includes the structure of law enforcement institutions like the police, prosecutors and the court.

The definition of law enforcement according to Satjipto Rahardjo is a process to bring legal desires into reality.[7] The so-called legal desire here are none other than the thoughts of the legislatures formulated in the legal regulations. The formulation of the mind of the lawmakers as outlined in the law regulation will also determine how the law enforcement is carried out. In reality, the law enforcement process culminates in its implementation by law enforcement officials themselves.

According to Soerjono Soekanto there are several factors that determine whether the law enforcement process can run effectively or not, namely: [8]

1. community expectations; namely whether the law enforcement is in accordance or not with the values of society;
2. there is motivation from the people to report violations to the law enforcement bodies;
3. ability and authority of law enforcement bodies.

Law enforcement that runs effectively will bring social change in accordance with what is expected by lawmakers. Yet in reality, the social changes expected by lawmakers still cannot be achieved. This is due to the factors that may influence the ongoing social changes, namely the encouraging and inhibiting factors. Factors that encourage, for example, the contact with other cultures, advanced education systems, tolerance of deviant behavior, open stratification, heterogeneous population, and dissatisfaction with certain areas of life.

Whereas inhibiting factors, for example the lack or absence of relationships with other communities, the development of science that is too late, the attitude of society that is too traditionalistic, the interests that have been firmly embedded, the fear of shaking in the integration of culture, prejudice towards new things, ideological barriers, and maybe also customs that have been strongly institutionalized.

Law enforcement is a problem in almost every country, especially for developing countries. In Indonesia, legal problems are numerous and varied both in their qualifications and in their modus operandi. Because of the many legal problems, many also have not or might not be solved.

According to Lawrence M. Friedman, the legal system includes three aspects, namely: structural, substantial and cultural aspects. In order for the rule of law to be realized, of course all three systems must run well simultaneously.

2. Legal Culture

The law is basically not just a black and white formula as outlined in various forms of legislation, but the law should be seen as a symptom that can be observed in people's lives through the behavior patterns of their citizens. This means that the law is strongly influenced by non-legal factors such as: values, attitudes, and views of the communities which are commonly referred to as legal culture. It is this culture / law that causes the difference in law enforcement between one communities and another.
Issues relating to law as a system, where the law is assessed from 2 different sides, namely:

[5] Harun M. Husen, Crime and Law Enforcement in Indonesia, Jakarta, Rineka Cipta, 1990, him. 58
[6]
[7] Lawrence M. Friedman, American Law, W.W. Norton and Company, New York, 1984, P. 5-6
[8] Soerjono Soekanto, Law Enforcement, Jakarta, BPHN & Binacipta, 1985, him. 62-63

1. Law is seen as a value system, where the whole law in the context of law enforcement is based on a grundnorm which then becomes a source of value as well as a guide for law enforcement itself;
2. Law is seen as part of society (social reality), where law cannot be separated from the communities environment because in this case, law is one of the subsystems of other social subsystems.

As for Lawrence M. Friedman explained that law as a system has the following components:[9]

1) Structure, namely in the form of institutions created by the legal system to support the operation of the legal system itself such as: district courts, administrative courts, and so on;
2) Substance in the form of legal norms used by law enforcers and those regulated;
3) Legal culture in the form of ideas, attitudes, expectations, and opinions about law that as a whole influences a person to comply or not comply with the law.

Regarding legal culture or legal culture, Friedman argues: *"The third component of the legal system, of legal culture. By this we mean people's attitudes toward the law and legal system their belief ... in other words, is the eliminate of social thought and social force which determines how law is used, avoided, or abused* ". (Legal culture involves legal culture which is a human attitude (including the legal culture of law enforcement officers) towards the law and legal system. No matter how structured the legal structure is to carry out the established legal rules and how well the quality of legal substance is created without the support of legal culture by people involved in the system and society then law enforcement will not work effectively.)

The law actually has a reciprocal relationship with the communities , where the law is a means / tool to regulate the communities and work within the communities itself while the communities can be an obstacle or a social tool / tool that allows the law to be applied as well as possible.

3. Human Rights in the Aspects of the Duty of the Police

In general, in every country that adheres to the rule of law, there are always three basic principles in force, namely the supremacy of law, equality before the law, and law enforcement in a way that is not contrary to the law (due process) of law). An important principle in the rule of law according to Munir Fuady is equal protection or equality before the law.[10] In practice in state, the implementation of human rights properly and responsibly depends very much on political will, political commitment and political action from the state organizer. This is where the discourse of democracy sticks out, namely a country that puts forward the well-being of the people's survival. Thus, in the practice of democratic life as a constitutional basis (fundamental law) in a country, it becomes an inseparable part of law enforcement efforts.[11] The concept of human rights is needed in the life of the nation and state so that the purpose of the state is to realize the life of the people who are dignity can be achieved. The conception of human rights is expected to be able to limit the authority of the authorities, so that most countries in the world place a concept of human rights in the constitution of their country.[12]

Human rights for law enforcers are human rights principles and standards that apply universally to all law enforcement officers in carrying out their duties. Human rights as referred to in Article 5 paragraph (1) of the Regulation of the Head of the Indonesian National Police of Indonesia (Perkap) Number 8 of 2009 concerning the Implementation of Principles and Standards of Human Rights in the Implementation of Duties of the Indonesian National Police, which are included in the scope of duties of the Indonesian National Police, include:[13]

a. The right to justice: everyone, without discrimination, has the right to obtain justice by filing complaints and reports in criminal cases, and hearing through a free and impartial judicial process, in accordance with procedural law that guarantees an objective examination by honest and fair judges to obtain a fair and correct decision
b. Right to personal freedom: everyone is free to choose and have political beliefs, express opinions in public, embrace their respective religions, must not be enslaved, choose citizenship without discrimination, free to move, move and reside in the territory of the Republic of Indonesia
c. The right to security: everyone has the right to protection of personal, family, honor, dignity, ownership, security and security as well as protection from the threat of fear of doing no actions;

[9] Lawrence M. Friedman, Op.cit.

[10] Munir Fuady, Modern Legal State Theory (Rehctstaat), Refika Aditama, Bandung, 2009, p, 207.

[11] Majda El Muhtaj, Human Rights Dimensions; Unraveling Economic, Social and Cultural Rights, Jakarta: Rajagrafindo Persada, 2009, him. 60

[12] M. Hutauruk, Human Rights and Citizens. Jakarta, Erlangga, 1982, p 13

[13] See Article 5 paragraph 1 of Perkap No. 8/2009 concerning the Implementation of Principles and Standards of Human Rights in the Implementation of Duties of the Indonesian National Police

d. The right to be free from arbitrary arrest, the right to be free from enforced disappearance;
e. Special rights for women: special protection for women from threats and acts of crime, violence and discrimination that occur both inside and outside the household that are done solely because she is a woman;
f. Special rights of children: protection or special treatment of children who are victims of crime and children who are in conflict with the law, namely: the right of non-discrimination, the best interests of children, the right to life, survival and development and respect for the opinions of children;
g. Special rights of indigenous peoples;
h. Special rights of minority groups, such as ethnicity, religion, people with disabilities, sexual orientation.

A for the basic concepts of protecting human rights in the performance of police duties include:[14]

a. All people are born free and have the same dignity and rights, they are endowed with reason and conscience and should associate with one another in brotherhood.
b. Everyone has the right to all the rights and freedoms contained in international and national human rights instruments with no exceptions whatsoever, such as racial, color, gender, language, religion, politics or other views, national or social origins, property rights, birth or other position.
c. Restrictions on other human rights can only be limited under the law with the sole purpose of ensuring the recognition and respect for the rights and freedoms of others and to fulfill just demands according to moral considerations, religious values, security and public order in a democratic society.
d. Protection (to protect), promotion (to promote), respect (to respect), and fulfillment (to fulfill) human rights are the responsibility of the state, especially the government.
e. Every person has the right to get recognition, protection, respect and fulfillment of human rights they have. f. Human rights are the foundation of the principle of justice as a bridge to civilized behavior that is created and recognized by the world communities.
f. Human rights have been codified in international law and are recognized by International tribunal and become part of the law and country policy in the world.
g. Human rights do not distinguish between race, ethnicity, ideology, culture / religion / belief, philosophy, social status, and sex or sexual orientation, but prioritize a commitment to mutual respect to create a civilized world.
h. Human rights for all people throughout the world, both the weak and the strong, to justify the needs and aspirations of humans and are therefore above the interests of all groups. In addition, it was explained also related to human rights protection instruments that need to be considered by each member of the Indonesian National Police in carrying out their duties based on Article 27, Article 28 and Article 29 of the 1945 Constitution of the Republic of Indonesia.

D. RESEARCH AND DISCUSSION

This research was conducted using normative juridical research methods. namely research on positive legal principles and legal principles carried out by evaluating relevant legal norms (laws and regulations).

1. Type of Research
   This type of research in terms of the purpose of legal research can be divided into two, namely:
   a. Normative legal research, which is a type of research that includes research on legal principles, legal systematics, the level of legal synchronization, legal history research, and comparative law research.
   b. Sociological or empirical legal research, which is a type of research consisting from research on legal efficiency and legal identification. This type of research conducted for this paper is "normative legal research" that is by examining the quality and truth of a legal norm. Research with this method aims to determine whether a legal rule is in accordance with legal norms, whether norms in the form of prohibitions or orders are in accordance with principles law, and whether someone's actions are in accordance with legal norms or principles.[15]
2. Types of Data
   There are two types of data in terms of where they are obtained, namely primary data and secondary data. Primary data is data obtained directly from the communities. While secondary data is data obtained from the literature. In this case what is meant by

[14] See Article 4 Perkap No. 8 of 2009 concerning the Implementation of Principles and Standards of Human Rights in the Implementation of the Duties of the Indonesian National Police

[15] Peter Mahmud Marzuki, Legal Research, Jakarta, Kencana, 2008, p. 47

literature is the data collection technique that is carried out is by document study or library study.[16]

Legal research in this paper is normative legal research, therefore the data used are secondary data. Secondary data is data obtained from library research and documents, which are the results of research and processing of other people who are available.[17] Secondary data can be in the form of writing, tables or pictures in the form of laws and regulations, the writings of experts, the results of measurements, and so forth.

Secondary data in this legal research can be classified into 3 (three), namely

a. Primary Legal Material, namely legal materials that have authority. Primary legal materials consist of legislation and their hierarchy.[18] The primary legal materials used in this thesis are:
   1) Criminal Code
   2) Criminal Procedure Code
   3) Law Number 39 of 1999 concerning Human Rights
   4) Law Number 22 of 2002 concerning the Indonesian National Police
   5) Regulation of the Head of the Indonesian National Police (Perkap) Number 8 of 2009 concerning the Implementation of the Principles and Standards of Human Rights in the Implementation of Duties of the Indonesian National Police.

b. Secondary legal material, which is legal material that explains primary legal material, which consists of legal science literature and scientific work that is related to the problem discussed.[19] The secondary legal material in writing this research is in the form of books, journals and dissertations.
c. Tertiary legal materials, i.e. legal materials that provide instructions or explanations for primary legal materials and secondary legal materials, such as abstracts, official government publications, official minutes, scientific magazines, documents, dictionaries, encyclopedias, and websites related to the writing of this research.[20]

Data obtained through literature study will be analyzed descriptively qualitatively. Qualitative descriptive analysis is a method of analyzing data that groups and selects data obtained from field research according to its quality and correctness.[21] Through the process the data obtained will be analyzed inductively qualitatively to arrive at conclusions, so that the main issues examined in this study will be answered. [22]

E. ANALYSIS AND DISCUSSION

1. Effect of Legal Culture in Law Enforcement by the Indonesian National Police

The real law can be seen as a cultural product. The legal system is a cultural subsystem consisting of various layers, from the highest visible layer to the deepest layer. The top layer is an artifact that can be captured by the senses, but is more the final product. In a cultural perspective, this layer contains human creation in the form of a social system, technology, and art. In the legal system, this layer contains a system of rules and institutions for law enforcement. The second layer is the values that are believed and obeyed by people and manifested in the products of cultural artifacts.

In the world of law, these values must become the spirit of the formation of the rule of law, institutional arrangement, and interpretation of law enforcement by law enforcement officers. These values contain universal and particular values that are believed by the Indonesian people. The next layer, which is the deepest layer, are the basic assumptions held by each individual society about human identity, about truth, and about the individual's relationship with society and nature. In the field of law, this layer is the assumption of the communities and law enforcement officials about identity as civilized human beings, about the truth, and about the noble task of working to uphold the law. This assumption will give birth to the tradition of communities law compliance on the one hand, on the other hand give birth to the glory of the task of upholding justice. Of the three layers above, we are still at the level of the skin or artifacts.

The new layer of value is touched by a variety of new ideas that encourage law enforcement to be carried out to realize the Pancasila values and values. Value layers are of concern, for example in

[16] Sri Mamuji, Legal Research and Writing Methods, Jakarta, University of Indonesia Legal Research Agency, 2005, p. 32.
[17] Hilman Hadikusuma, Work Paper Methods or Legal Science Thesis, Bandung, Mandar Maju, 1995, him. 65
[18] Mardalis, Research Method A Proposal Approach, Jakarta: PT Bumi Aksara, 1995, p. 67.
[19] Nomensen Sinamo, Legal Research Methods, (Jakarta: Bumi Intitama Sejahtera, 2009), p. 35
[20] Peter Marzuki, Op.Cit., p. 68
[21] Ronny Hanitjo Soemitro, Legal Research Methodology and Jurimetry, Jakarta: Ghalia Indonesia, 1994, p. 51.
[22] Bambang Sunggono, Legal Research Methods (An Introduction), Jakarta, RajaGrafindo Persada, 2001, p. 195-19611

progressive legal thinking and substantive justice. The layer that is often overlooked is the basic layer in the form of individual beliefs of law enforcement officers and people. This does not mean that the rule and institutional system of law enforcement officers is not important. Both can be used as a means of social engineering to revive the spirit of values and strengthen individual integrity.

Public trust in the Indonesian National Police is still low, even far below the KPK, TNI and Presidential Institution which are considered as trusted institutions. The Chief of Police believes that various problems relating to law enforcement are considered to be unprofessional and discriminatory, low performance is caused by an extraordinary corrupt culture, where there have been deviations in procurement, thinking about how to compete for money and competing for wet positions, as well as organizational culture and personnel culture that disappointing in the eyes of the public. Admittedly, Polri's bureaucratic reform on cultural aspects needs to get more intense attention, given that the revamping of cultural aspects has not been encouraging compared to reforming instrumental and structural aspects. This cannot be separated from the fact that cultural reform is closely related to changes in the paradigm, attitude, nature and behavior of the Police HR.

In the field of law enforcement, the intensity of public attention to the process of law enforcement should encourage the Indonesian National Police to build a commitment to uphold the supremacy of the law, to demand that the Indonesian National Police act and behave independently in upholding the law, acting according to the law, fulfilling a sense of justice, legal certainty, considering the principle of expediency , and upholds human rights and democracy in completing case handling in a transparent and accountable manner.

Law enforcement must be avoided as far as possible from political, economic and business interests which lead to the unilateral use of legal instruments. Investigators must keep their distance not to be pulled unilaterally by political interests. Investigators must also ensure that the law enforcement process holds the principle of prudence and high accuracy, to ensure that law enforcement efforts are not counterproductive and impressive against a background of political interests, business interests, extortion or other interests outside the professionalism of law enforcement itself.

The development of a culture of law enforcement can be carried out by implementing law enforcement based on the due process model, seeking to resolve cases quickly, simply and inexpensively, establishing special units to accelerate case handling, criminal acts firmly and professionally, building a realtime and integrated case handling database, strengthen investigation oversight, strengthen the public complaints system and justice seekers to Propam which is more responsive and develop cooperation among other criminal justice system components.

2. Fulfillment of Human Rights in the Law Enforcement Process by the Indonesian Police in Indonesia

The Indonesian National Police is a force that is always needed by the communities to monitor the communities in violation of communities rules agreed upon by the communities itself. Therefore, with the presence of the Indonesian National Police, it is expected that order and security can be guaranteed as appropriate. The main function of the Indonesian National Police is law enforcement and protecting and protecting people. With the granting of a large authority must be balanced by adequate social control as the responsibility carried out by the Indonesian National Police. The Indonesian National Police as law enforcers are required to be able to conduct investigations and inquiries into every form of criminal act, including efforts to prove scientifically by taking advantage of science and technology to protect human rights. Actualization of this role as law enforcement are:

(1) Mastering and proficient in criminal and civil procedural law so that they are able to deal with every legal problem appropriately and can overcome cases of human rights violations at the pre-trial level.
(2) Mastering the techniques and tactics of investigation and investigation so as to be able to make light and the disclosure of every criminal act that occurs.
(3) Having a strong spirit and determination to become a "Crime Hunter" with the motto "Even though the sky will collapse tomorrow, the law must still be upheld."
(4) Able to take advantage of advances in science and technology to help reveal scientific evidence of cases of crime that have occurred.
(5) Able to coordinate with all relevant agencies in their efforts to uphold the law according to the criminal justice system in the framework of protecting human rights.

The assertiveness of enforcing the rule of law will certainly contribute to legal compliance and awareness of the importance of law in civilized societies. Strengthening individual basic assumptions about humanity, truth, and relationships with the social and natural environment is very important to foster human integrity. These humans will form the legal culture of the communities and the legal culture of law enforcement officers. This is certainly a big work that cannot be done sectorally. Therefore, the agenda of developing a legal culture cannot only be carried out by means of socialization of laws and regulations, but must become a national and be

integral to the efforts to realize an Indonesian nation with dignity and integrity.

The police as a living law seeks to apply theoretical legislation in the midst of a pluralistic society. This is very different from other law enforcement officials such as prosecutors, judges, prison officials and advocates. The police directly involved in finding and uncovering cases that occur with betting ranks and lives in the life of the community.[23] The police usually face various choices to achieve the objectives in completing their work, then the assessment of the police is based on how he is able to make the right action choices for the right goals . In short, good police are able to make morality an integral part of their work. The work of police who may use violence is aimed at achieving one of the many moral goals, namely human survival. Faced with such demands, police work is morally problematic.

By the issuance of the National Police Regulation No. 8 of 2009 concerning the Implementation of the Principles and Standards of Human Rights in the Implementation of the Duties of the Indonesian National Police is a concept from the birth of the regulation as an effort to fulfill human rights in the law enforcement process by the Indonesian National Police.

F. CONCLUSION

Based on the description above it can be concluded that the influence of the legal culture in law enforcement by the National Police where the development of a culture of law enforcement can be done by implementing law enforcement based on due process models, seeking to resolve cases quickly, simply and inexpensively, the formation of special units to accelerate the handling of cases, acts criminal force firmly and professionally, building a real-time and integrated case handling database, strengthening investigative oversight, strengthening the public complaints system and justice seekers to the more responsive Propam and developing cooperation between other criminal justice system components. Furthermore, the concept of fulfilling human rights in the process of law enforcement by the Indonesian National Police in Indonesia with the issuance of the National Police Regulation No. 8/2009 concerning the Implementation of Human Rights Principles and Standards (HAM) in the Implementation of the Republic of Indonesia's National Police Duties is a concept from the birth of regulations as an effort to fulfill rights Human Rights in the process of law enforcement by the Indonesian National Police in Indonesia, good police are able to make morality an integral part of their work.

G. REFERENCES

Achmad AH, *Legal Deterioration in Indonesia*, Bogor, Ghalia Indonesia, 2005 Bambang Sunggono, Legal Research Methods (An Introduction), Jakarta, RajaGrafino Persada, 2001

Harun M. Husen, *Crime and Law Enforcement in Indonesia*, Jakarta, Rineka Cipta, 1990

Hilman Hadikusuma, Working Paper Making Method or Legal Science Thesis, Bandung, Mandar Maju, 1995

Hutauruk, M., *Human Rights and Citizens*. Jakarta, Erlangga, 1982 Friedman, Lawrence M, American Law, W.W. Norton and Company, New York, 1984.

Mardalis, *Research Method A Proposal Approach*, Jakarta: PT Bumi Aksara, 1995

Majda El Muhtaj, *Human Rights Dimensions*; *Unraveling Economic, Social, and Cultural Rights*, Jakarta: Rajagrafindo Persada, 2009

Munir Fuady, *Modern Law State Theory (Rehctstaat)*, Refika Aditama, Bandung, 2009

Nomensen Sinamo, *Legal Research Methods*, Jakarta: Bumi Intitama Sejahtera, 2009

Ni'matul Huda, *State of Law, Democracy and Judicial review*, Yogyakarta, UII Press, 2005

Nur Alamsyah, *Justice Against Serious Crimes against Human Rights*, Medan, LBH, 2000

Peter Mahmud Marzuki, *Legal Research*, Jakarta, Kencana, 2008, him. 47. Ronny Hanitjo Soemitro, Legal Research Methodology and Jurimetry, Jakarta: Ghalia Indonesia, 1994

Satjipto Rahardjo, *Law Enforcement Issues*, Bandung: Sinar Baru., 1983

Soerjono Soekanto, *Law Enforcement*, Jakarta, BPHN & Binacipta, 1985

Sri Mamuji, *Research Methods and Legal Writing*, Jakarta, Legal Research Institute of the University of Indonesia, 2005

[23] Nur Alamsyah, Justice Against Serious Crimes against Human Rights, Medan, LBH, 2000, p. 44-46

LAW ENFORCEMENT IN LEGAL CULTURE PERSPECTIVE FOR CONSUMER PROTECTION OF PHARMACEUTICAL PRODUCTS

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ABSTRACT

One form of pharmaceutical products is cosmetics. Nowadays, public considers that cosmetics are not only a secondary need, but have become a primary need. Cosmetics distributed in Indonesia must have a production permit in the form of a notification issued by the National Agency of Drug and Food Control (NADFC). This notification is mandatory to convince public that the cosmetics meet the safety, usefulness and quality requirements. Unfortunately, there are still many cosmetics - without production and marketing authorization - that do not have notifications. The juridical approach used is the statutory approach, concept and judicial decision, while the case study analysis used authoritarian reasoning. The Government of Indonesia has actually carried out a Legal Culture, namely in the case of Law Enforcement on the Criminal Act of Distribution of Pharmaceutical Products (in this case cosmetics) without a production permit and distribution permit - but not yet maximally - based on Law No. 36/2009 on Health. The government provides legal protection to consumers by requiring businesses to register their cosmetic products for notification before being circulated in Indonesia.Other insurance given to consumers using cosmetics is by surprise inspection (inspection) conducted by NADFC and related agencies to eliminate cosmetics without notification on the market, and NADFC will release a public warning about cosmetics that are not safe for consumption by consumers. If the consumer has inconvenience due to the circulation of cosmetics without notification, he can file a legal remedy

Keywords: Law Enforcement, Criminal Acts, Legal Culture, Consumer Protection, Pharmaceutical Products, Cosmetics, Cosmetic Distribution, Distribution Permit, Production Permit, Notification.

A. INTRODUCTION

Health development as mandated by Law No. 36/2009 on Health and Presidential Regulation Number 72 of 2012 concerning the National Health System (hereinafter abbreviated as NHS) must be guided by NHS.NHS as a way of implementing health development is a collection of elements or subsystems that have their respective functions, so as to ensure the achievement of the system's goals That is very much influenced by the performance of the existing Subsystem, one of the NHS Subsystems in the form of Pharmaceuticals, Medical Devices and Food. Based on Article 1 paragraphs 4 and 5 of Law No. 36/2009 concerning Health, Pharmaceutical Products are medicines, medicinal ingredients, traditional medicines, and cosmetics.[1]According to the Regulation of the Head of NADFC Republic of Indonesia, Cosmetics are materials or preparations intended for use on the outside of the human body (epidermis, hair, nails, lips and external genital organs), or teeth and oral mucous membranes, especially to cleanse, scent, change appearance, and / or improve body odor or protect or maintain the body in good condition.[2]

Indonesia as a developing country, is inseparable from various problems of violations and various kinds of crimes can threaten the welfare and order of society. One of them is crime in the health sector.

Juridically, criminal offenses in the health sector are regulated in Law No.36 / 2009 Concerning Health. The law has described various types of criminal acts in the health sector, including not providing first aid to patients, without permission to establish traditional health service practices, selling organs / tissues, plastic surgery / reconstruction to change someone's form, abortion, sale and purchase of blood, pharmaceutical crime (Pharmaceutical Products) and / or medical devices, and so on.

Empirically, there are currently many criminal acts occurring in the health sector, one of dominant

[1]Law of the Republic of Indonesia Number 36 of 2009 concerning Health, Article 1 Paragraphs 4 and 5, page 1.

[2] Regulation of the Head of the Republic of Indonesia Drug and Food Control Agency No.HK. 03.1.23.12.11.10052 2011 concerning Supervision of Cosmetic Production and Distribution, Article 1, Paragraph 1, page 3.

crime is the pharmaceutical field. For that reason, it is necessary to improve the quality of health services, not apart from understanding of rights and obligations, namely understanding of aspects health aspects in particular, in order to avoid the snares of the law in carrying out health tasks.

The community's need for health protection is something that cannot be negotiated anymore, because it directly involves the needs of the primary community. It is the government's obligation to enforce existing laws and regulations to overcome various increasingly complex problems in the health sector.

According to Law No. 36/2009 Concerning Health is mentioned regarding criminal sanctions, as follows:

a. Article 196: "Any person who intentionally produces or circulates Pharmaceutical Products and / or Medical Devices that does not meet the standards and / or safety, efficacy or usefulness, and quality requirements as referred to in Article 98 paragraph (2) and paragraph (3) shall be liable with a maximum imprisonment of 10 (ten) years and a maximum fine of Rp1,000,000,000.00 (one billion rupiah)."
b. Article 197: "Every person who intentionally produces or circulates a Pharmacy and / or Medical Device that does not have a marketing authorization as referred to in Article 106 paragraph (1) shall be liable to a maximum imprisonment of 15 (fifteen) years and a maximum fine of Rp1. 500,000,000.00 (one billion five hundred million rupiahs)."

Cases that often occur in society today relating to the criminal acts of Pharmaceutical Products (cosmetics) are very diverse, as happened in Jakarta, Aceh (Tapaktuan), Ambon (Masohi), Kudus, Medan, Jambi, and Sleman (Yogyakarta) . From these cases the criminal punishment of the perpetrators is sometimes still considered inappropriate by the impact of the perpetrators' actions..Often proven or unproven perpetrators (Defendants) in the trial due to inaccurate Article charged by the Public Prosecutor so that the perpetrators' actions meet or do not meet the elements of the article charged, or lack of evidence that can convince the Panel of Judges, so that in its decision the Panel of Judges drops free criminal or imprisonment under the demands of the Public Prosecutor (lighter than the indictment), and / or even do not need to serve a sentence of imprisonment (only a probation criminal). Even in a number of cases, even though the Panel of Judges has stated that the perpetrators (Defendants) have been proven legally and convincingly to carry out the criminal acts that were charged to him, the verdict still remains light..

B. PROBLEM STATEMENT

Based on the background description of the title selection above, the following research problem boundaries can be identified.

a. What are the efforts of the Government (read: Law Enforcement Apparatus) in Law Enforcement viewed from the perspective of Legal Culture for Consumer Protection against Pharmaceuticals (Cosmetics) Without Circular Permission.
b. Why are there still a lot of fake Pharmaceutical Products (cosmetics) that are fake / illegal without a marketing authorization.

By knowing the limits of the problem mentioned above, the authors set the problem to be answered in the study are as follows:

1. Whether Law Enforcement of Criminal Acts "Deliberately Producing or Circulating Cosmetic Pharmacy Supplies Without Circular Permission" has been carried out by the Judge and in accordance with criminal sanctions in Article 197 of Law No. 36/2009 About Health ?
2. Whether the Judge's Consideration handed down the Verdict by stating the element of "Producing" or the element of "Circulating" in Article 197 of Law No. 36/2009 About Health is not proven legally and convincingly in accordance with the facts revealed in the trial?
3. Is the Judge's Consideration Dropping a Criminal Decision lighter than the demands of the Public Prosecutor by stating the element of "Producing" or the element of "Circulating" in Article 197 of Law No. 36/2009 About Health is proven legally and convincingly in accordance with the facts revealed in the trial?

C. LITERATURE REVIEW

- Decree of the Head of NADFC and Regulation of the Head of NADDFC.
- Republic of Indonesia's Minister of Health Regulation.

- Government Regulation No. 72/1998 concerning Safeguarding Pharmaceutical Products and Medical Devices (LN Year 1998 No. 138, TLN No. 3781).
- Law No. 36/2009 on Health (LN of 2009 No. 144, TLN No. 5063).
- Law No. 8/1999 concerning Consumer Protection (LN No. 1999, TLN No. 3821).

D. RESEARCH METHODS

In this research the following research methods are used: **(1) Research Type**: normative legal research, which refers to the rules of outward behavior such as laws, regulations and literature which contain concepts theoretically which are then linked to the problem that will be discussed in this research; **(2) Research Specifications**: in legal research has several approaches that can be used to obtain information from various aspects of the issue being tried to find the answer, namely the statute approach (statute appoarch) and the case approach (case approach); **(3) Data Sources (Legal Materials)**: Sources of research can be divided into two: Primary legal materials are legal materials that are authoritative, meaning that they have authority, consisting of laws and judges' decisions, namely: [a] Law No . 8/1981 concerning Criminal Procedure Law (LN 1982 No.76, TLN No. 3209); [b] Law No. 36/2009 concerning Health (LN of 2009 No.144, TLN No. 5063); [c] PP No. 72/1998 concerning Safeguarding Pharmaceuticals and Medical Devices (LN 1988 No.138); [d] PP No. 51/2009 concerning Pharmaceutical Work (LN of 2009 No. 124); [e] Permenkes No. 445/1998 concerning Ingredients, Dyes, Substratum, Preservatives, and Sunscreens in Cosmetics; [f] North Jakarta District Court Decision Number: 1774 / Pid.B / 2010 / PN.Jkt.Ut., with the Defendant: WINALDI CHANDRA ALIAS AWI; [g] Decision of PN Tapaktuan Number: 79 / Pid.B / 2013 / PN.Ttn., with Defendant: JUNI MUHAMMAD, SE Bin MUHAMMAD; [h] Decision of PN Tapaktuan Number: 62 / Pid.B / 2014 / PN.Ttn., with Defendant: YULIZAR Bin JAFRI and SYUKRI Bin JAFRI; [i] Decision of PN Masohi Number: 130 / Pid.Sus / 2014 / PN.Msh., with Defendant: USMAN; [j] Kudus District Court Decision Number: 57 / Pid.Sus / 2015 / PN.Kds., with the Defendant: ABDUR ROHMAN Bin NURHADI; [k] Decision of PT Medan Number: 739 / Pid.Sus / 2014 / PT-MDN, with Defendant: CIEN IN Alias AFEN; [l] Jambi District Court Decision Number: 478 / Pid.Sus / 2015 / PN.Jmb., with the Defendant: LIANA Binti DAUD MONG; [m] Decision of PT Yogyakarta Number: 82 / Pid.Sus / 2018 / PT.YKK., with Defendant: SITI NURLAELA Binti HARTO PRAYITNO. While the secondary legal sources used in writing this research are literature books, legal writings , and legal journals relevant to the issues discussed; **(4) Data Collection Techniques:** The author uses data collection techniques in two kinds of data collection methods, namely (a) For Primary Data: Collected from several laws, judges' decisions; (b) For Secondary Data: Obtained from legal publications including textbooks, legal dictionaries, and legal journals.; (5) **Population, Samples and Sampling Techniques**: The population in this study is a group of subjects or data obtained from Judge Decisions throughout Indonesia. How to choose the sample in this research proposal the method / technique of sample selection is random (random), starting from Jakarta, Aceh (Tapaktuan), Ambon (Masohi), Kudus, Medan, Jambi to Sleman (Yogyakarta); **(6) Data Analysis (Legal Materials): Analysis used by researchers in the following way** : (a) Identifying legal facts and eliminating irrelevant matters to determine the legal issues to be solved; (b) Collection of legal materials and if deemed to have relevance also non-legal materials; (c)Examine the legal issues raised based on the material that has been collected; (d)Draw conclusions in the form of arguments that answer legal issues; (e)Provide a prescription based on the arguments that have been built in the conclusions. In accordance with these steps, the writer has identified legal materials that have been collected in the form of judges' decisions and related regulations such as the Criminal Procedure Code, Law No. 36/2009 Concerning Health, and Law No. 8/1999 on Consumer Protection, then systematically compiled using prescription methods, that is, each analysis will be returned to legal norms because the test tool is a legal norm based on the logic of deduction (from the general to the specific). Then map out the legal issues that will be discussed.

E. ANALYSIS AND DISCUSSION

The law is basically not just a black and white formula as outlined in various forms of legislation, but the law should be seen as a symptom that can be observed in people's lives through the behavior patterns of their citizens. This means that the law is strongly influenced by non-legal factors such as: values, attitudes, and views of the community which are commonly referred to as Legal Culture / Culture. The existence of this Culture / Legal Culture has

caused differences in law enforcement between one community and another.

In this regard, there are 3 (three) fundamental issues concerning legal culture / culture, namely: The first issue is a matter relating to law as a system, where the law is assessed from 2 (two) different sides, namely: (1). Law is seen as a system of values, where the whole law in the context of law enforcement is based on a *Grundnorm* which then becomes a source of value as well as a guide for law enforcement itself; (2) Law is seen as part of society (social reality), where law cannot be separated from the community environment because in this case, law is one of the subsystems of other social subsystems..

As for Lawrence M. Friedman explained that law as a system has the following components: (1) Structure, namely in the form of institutions created by the legal system to support the operation of the legal system itself such as: district courts, administrative courts, and so on; (2) Substance in the form of legal norms used by law enforcers and those regulated; (3) Legal culture in the form of ideas, attitudes, expectations, and opinions about law that as a whole influences a person to comply or not comply with the law.

The law actually has a reciprocal relationship with the community, where the law is a means / tool to regulate the community and work within the community itself while the community can be an obstacle or a social tool / tool that allows the law to be applied as well as possible. According to Emile Durkheim, the relationship between law and society can be seen from 2 (two) different types of society, including: (1) Society with mechanical solidarity based on the nature of togetherness among its members so that the law is repressive that functions to maintain the togetherness; (2) A society with organic solidarity based on the nature of individualism and the freedom of its members so that the law becomes restitutive which only serves to maintain the continuity of community life.

H.LA. Hart also pointed out 2 (two) types of society, namely: (1) A society based on the primary rules of obligation, where the community consists of only a small community so that life is only based on kinship alone. This type of society does not require official and detailed regulations so there is no differentiation or specialization of law enforcement agencies; (2) Society based on secondary rules of obligation, where the society is already modern, so that there is a need for differentiation and institutionalization in the field of law which causes the pattern of law enforcement to be encompassed with bureaucratic elements.

If we look at the actual reality, the development of law in Indonesia was not followed by the development of the community. This was because a discrepancy between the values chosen by the government that deliberately prepared for the modern legal system with the values lived by the people who are still traditionally so that our society is not ready to accept the modern legal system and consequently the laws made by the government are meaningless to the community.

The relationship between the function of law and the consequence of legal culture. Law is not enough to only function as social control, but the law is expected to be able to move the community to behave in accordance with new ways / patterns in order to enact the goals that are craved. Respecting this, awareness is needed the law of the community as a bridge that connects the legal rules with the behavior of community members. Such conditions lead to what has been decided through the law cant be implemented properly in society because it is unmatched with the values, views, and attitudes lived by the community. The development that occurred in Indonesia can be identified that the social structure of the nation was apparently not likewise the modern law chosen by the authorities in case it resulted in many inequality in the implementation of modern law itself. According to Lon Fuller, there are 8 (eight) principles of legality that must be followed in making the law include: (1) There must be regulations first; (2) The regulation must be announced; (3) The regulation may not apply retroactively; (4) The formulation of regulations must be understood by the people; (5) The law may not ask for the implementation of things that are not possible; (6) There must be no conflict with one another; (7) Rules must be rigid and may not be changed frequently; (8) There must be a balanced between the actions of the legal officials and the regulations that have been made.

The guidelines that we must encouragehereof, besides any law made in the end is very much driven by the legal culture in the form of values, glimpse and attitudes of the people worried. If legal culture is neglected, it can be ensured that there will be a failure of the modern legal system marked by the rise of assorted symptoms such as: (a) False information about the contents of the legal regulations to be transfered to the public, (b) There is a distinctness between what is desired by the laws encourage the

practices adopted by the community, (c) the community prefers to continue to reactlikewise what has become the values and views in their lives. Daniel S. Lev then made clear the legal system and legal culture, in accordance which the legal system emphasized procedure, whereas the legal culture itself consisted of 2 (two) components, namely: (1) Procedural legal values in the form of regulatory methods community and conflict management; (2) Substantial legal values in the form of fundamental assumptions regarding the distribution and use of resources in society, especially regarding what is fair and not according to the community.

A legal system maybe said to be effective if human behavior in society is alike what has been driven in the pertinent legal regulations. Paul and Dias in this regard declared 5 (five) circumstances that had to be met to make the legal system effective, including: (1) Whether or not the meaning of the rule of law was easy to understand; (2) Whether or not the community is knowledgeable about the contents of the relevant legal rules; (3) Efficient and effective mobilization of the rule of law; (4) The existence of a dispute resolution mechanism that is not only easy to reach by the community but must also be quite effective in resolving disputes; (5) There is an acceptance and recognition that is evenly distributed among the community that the rules and regulations of the law are in fact effective.

If we look at the truth that is living in Indonesia, especially in rural areas, it is clear that the values contained in the law are different from the values that have been inherent in the life of rural communities. This is because the level of knowledge of the villagers is still low so that it is difficult for them to understand what the law wants. In facing this condition, there are several things that need to be considered, namely: (a) The role of the implementing bureaucracy namely the village head is very important to make the law effective in the community, (b) The need for legal communication to be carried out well so that the public understands the existing law , (c) Means of delivering the contents of a legal regulation must be acceptable so that the society can play role in the process of legal mobilization. In addition, the effectiveness of law can also be achieved by instilling new values through the institutionalization process so that it can turn into a new pattern of behavior in the context of shaping public legal awareness. It can be understood that efforts to instill a new legal culture can be achieved if the institutionalization process has been carried out properly and seriously for the sake of creating public legal awareness.

The third problem is the role of culture / legal culture in the operation of law, this means it involves how to foster legal awareness. The issue of fostering legal awareness is closely related to various factors, especially the attitude of law enforcers, meaning that law enforcers have a large role in fostering the growth of public awareness. Legal awareness in this context means awareness to act in accordance with legal provisions and serves as a link connecting the regulations law with the behavior of members of the community. Lawrence M. Friedman called it part of legal culture. Further facts show that even though there are new elements in the rule of law, our society is actually the holder of a role (*adressat*) patterned behavior in accordance with its own legal awareness. This means that what has become the hope of the legislators has not yet been accomplished. There are 3 (three) main variables which according to Seidman can be used to find out in case someone will act alike the law or not, namely: (1) Whether the norm has been acknowledged (socialization of legal products); (2) Are the norms in harmony with the objectives applied to the position (synchronization of legal products); (3) Is the role holder driven by deviant motivation (motivational factor).

Seidman's theory teaches that role-holders can have motivation, both those who want and those who don't want to adjust to the norm. Meanwhile, role holders can also have behaviors that may conform or that may not conform. This theory is then known as deviation theory. There is a mismatch between the roles expected by the norm and the real behavior of the community as explained by the aberration theory above, because the legal function is no longer merely a social authority but as a means to form new behavioral patterns so as to give birth to a new society that is sought-tell me. Based on modern conception, this legal function is used as a means to accomply social engineering. However, unfortunately, the legal function as social engineering is apparently not always supported by the social life in which the law is enforced so that it must be backed by a high level of community legal awareness. we frequentlyconfront is that there are still many discrepancy in the fulfillment of the law as well as disinclination to apply the provisions of the law that have been introduced and other tendency that are less supportive in adhere to the law.

Thus, the advancement of legal apporeciation should be familiarized to attempt to bolster the values

that guide the relevant legal regulations and look out to legal communication factors so that the contents of the legal regulations can be accepted by the public as a target of the legal regulations themselves.

According to SoejonoSoekamto, "Law enforcement is the activity of harmonizing the relations of values that are set out in the rules, fixed views and manifesting them in attitude, acting as a series of rewording of the final level of values to create peace of life" marked by several factors that are very closely associated, namely: First, the Law and the rules themselves, so that there is a need for harmony between existing laws and regulations; Second, sufficient legal implementation facilities, because often the law is difficult to enforce or even not handled because the facilities to enforce it are inadequate or unavailable; Third, awareness and legal certainty and the behavior of the community itself; Fourth, mental law enforcement officers. In this case, direct legal actors such as police, prosecutors, lawyers, judges, prison officers and so on because basically law enforcement is very dependent on the mentality of the law enforcement officers.

F. CONCLUSION

1. Law enforcement in addition to being determined by its own legal rules, facilities, mentality of law enforcement officials, is also highly dependent on the awareness and compliance factors of the community, both personally and in their particular social communities. Finally, it returns to the human factor (culture) also determines the real style; in the last examination it is the human being that counts. So that the existence of good and right laws does not automatically guarantee a good and true community life. The presence of police, prosecutors, judges, lawyers as direct and formal law enforcers does not guarantee the rule of law and the rule of law. Nevertheles parliament is chosen through elections with a large fee, democracy does not automatically grow.
2. In the manufacturing and distribution of cosmetics, Lisence is a preventive instrument carried out by the Government (Central) and the Regional Government to decide and administer the production of cosmetics in order to meet the requirements of safety, benefit and quality.
3. In controlling the circulation of cosmetics containing hazardous substances and harming public health, licensing as a preventive instrument must be followed by administrative law enforcement and criminal law enforcement.
4. Cosmetic products without marketing authorization are illegal products where producers are not registered at the Indonesian National Drug and Food Control Agency as a result of pre-market supervision such as the production flow process, raw materials used, hygiene and sanitation during production cannot be watched carefully.
5. From a number of cases, criminal law enforcement for criminal acts of cosmetics circulation with no production permit and marketing authorization is related to Law No. 36/2009 on Health, the sanctions are still not maximized.

G. REFERENCES

Book

Amri Amir. 1997. Interest in Health Law. Widya Medika, Jakarta.

Andi Hamzah. 1986. Legal Dictionary. Gahlia Indonesia, Jakarta.

Andi Hamzah. 1994. Principles of Criminal Law. Rineka Cipta, Jakarta.

Ansori Sabuan, Syarifuddin Pettanasse, and Ruben Achmad. 1990. Criminal Procedure Law. Angkasa, Bandung.

Kemdikbud Language Board. 2016. Big Indonesian Dictionary Edition V. Language Development and Coaching Agency, Ministry of Education and Culture of the Republic of Indonesia, Jakarta.

Bambang Waluyo. 1996. Proof System in Indonesian Judiciary. Sinar Grafika, Jakarta.

Danny Wiradharma. 2010. Guidance on Medical Law Lecture. Sagung Seto, Jakarta.

Eddy O.S. Hiariej. 2012. Theory and Proof Law. Erlangga, Jakarta.

Edi Sigar and Ernawati. 1996. Women's Smart Book. Pustaka Delapratasa, Jakarta.

Endang Pudjiwati. 2015. Cosmetics and Cosmetic Medicine Regulations. RI FDS Agency, Central FDS in Semarang.

Gatot Supramono. 1998. Indictment and Judge's Decision. Djambat, Jakarta.

Harahap, M. Yahya. 2008. Discussion of Problems and Implementation of Criminal Procedure Code. Sinar Grafika, Jakarta.

Iqbal Hasan. 2002. Principles of Research Methodology and Its Applications. Ghalia Indonesia, Jakarta.

Kuffal, HKM. 2013. Evidence Not Valid Evidence.UMM Press, Malang.

Moeljatno. 2000. Principles of Criminal Law. Rineka Cipta, Jakarta.

Moh. Nazir 1988. Research Methods. Ghalia Indonesia, Jakarta.

Pakpahan, Normin S., et al., 1997. Dictionary of Elliptical Economic Laws, First Edition. The Elliptical Economic Law Development Project (Economic Law Improved Procurement Systems), Jakarta.

Peter Mahmud Marzuki. 2006. Legal Research. Kencana Prenada Media Group, Jakarta.

Rusli Muhammad. 2007. Contemporary Criminal Procedure Law. Citra Aditya Bakti, Bandung.

Soekidjo Notoatmodjo. 2010. Health Ethics and Law. Rineka Cipta, Jakarta.

Sri Mamudji, et al., 2008. Legal Thesis Thesis. National Legal Development Agency, Ministry of Law and Human Rights of the Republic of Indonesia, Jakarta.

Sri Siswati. 2013. Health Ethics and Law in the Perspective of the Health Act. Raja Grafindo Persada, Depok.

Sudigdo Sastroasmoro and Sofyan Ismael. 2008. Basics of Clinical Research Methodology, 3rd Edition. Sagung Seto, Jakarta.

Teguh Prasetyo. 2014. Criminal Law. Raja Grafindo Persada, Depok.

Yan Permana Puspa. 1977. Complete Legal Dictionary. Various Sciences, Semarang.

Journal

Andin Rusmini. 2016. "Criminal Act of Circulation and Misuse of Pharmaceutical Drugs Without Circular Permission According to Law No. 36/2009 About Health ", Al 'Adl, Volume VIII, Number 3, September - December 2016, Sultan Adam College of Law, Banjarmasin.

Lilik Pudjiastuti. 2016. "Licensing as an Instrument for Legal Protection in the Distribution of Cosmetics Safe for Public Health", Licensing in the Era of Citizen Friendly, ISBN: 978-602-361-070-9, Faculty of Law, Airlangga University, Surabaya.

Syafrina Maisusri. 2016. "Law Enforcement Against Criminal Acts on the Distribution of Imported Drugs that Do Not Have a Distribution Permit by Civil Servant Investigators at the Central Board of Drug and Food Supervisors in Pekanbaru", JOM Faculty of Law, Volume III, Number 2, October 2016, Pekanbaru.

Legislation

Decree of the Head of NADFC Number HK.00.05.4.3870 of 2003 concerning Guidelines for Making Good Cosmetics.

Decree of the Head of NADFC Number HK.03.1.23.08.11.07517 of 2011 concerning Technical Requirements for Cosmetic Materials.

Minister of Health Decree No. 386 / Menkes / SK / IV / 1994 of 1994 concerning Guidelines for Advertising Over-the-counter Drugs, Traditional Medicines, Medical Devices, Cosmetics, Household Health Supplies, and Food and Beverages.

Regulation of the Head of NADFC Number HK.03.1.23.12.11.10052 of 2011 concerning Supervision of Cosmetic Production and Distribution (State Gazette of the Republic of Indonesia of 2011 Number 942).

Regulation of the Head of NADFC Number HK.03.42.06.10.4556 of 2010 concerning Operational Instructions Guidelines for Making Good Cosmetics.

Regulation of the Head of NADFC Number HK.03.1.23.12.10.12123 of 2010 concerning Guidelines for Product Information Documents.

NADFC Head Regulation Number HK.03.1.23.12.10.12459 of 2010 concerning Cosmetic Technical Requirements.

NADFC Head Regulation Number HK.03.1.23.04.11.03724 of 2011 concerning Supervision of Cosmetics Imports.

Regulation of the Head of NADFC Number HK.03.1.23.07.11.6662 of 2011 concerning Requirements for Microbial and Heavy Metal Contamination in Cosmetics.

NADFC Head Regulation Number HK.03.1.23.08.11.07517 of 2011 concerning Technical Requirements for Cosmetic Materials.

Regulation of the Head of NADFC Number HK.03.1.23.12.11.10689 of 2011 concerning the Form and Types of Certain Cosmetics Preparations that can be Produced by the Cosmetics Industry that has a Production Permit for Class B.

NADFC Head Regulation No. 19 of 2015 concerning Cosmetic Technical Requirements.

Minister of Health Decree Number 1175 / Menkes / Per / VI / 2010 Year 2010 concerning Cosmetics Production Permit.

Minister of Health Decree Number 1176 / Menkes / Per / VIII / 2010 Year 2010 concerning Cosmetic Notifications.

Minister of Health Decree Number 1799 / Menkes / Per / XII / 2010 of 2010 concerning the Pharmaceutical Industry.

Government Regulation No. 72/1998 concerning Safeguarding Pharmaceutical Supplies and Medical Devices (LN Year 1998 No. 138, TLN No. 3781).

Law Number. 36/2009 on Health (LN of 2009 No. 144, TLN No. 5063).

Law Number. 8/1999 concerning Consumer Protection (LN No. 1999, TLN No. 3821).

Internet / Website

https://jdih.kemenkeu.go.id/fulltext/2009/36TAHUN2009UUPenj.htm accessed 11 March 2019.

https://jdih.kemenkeu.go.id/fulltext/2009/36Tahun2009uu.htm accessed 11 March 2019.

http://drampera.blogspot.com/2011/06/hukum-k Kesehatan.html?m=1 accessed 3 March 2019.

http://www.hukum-hukum.com/2017/05/pidana-kosmetik-tanpa-permin-production.html accessed 11 March 2019.

LEGAL ANALISYS OF DETERMINATION OF THE COURT IN SEX OF CHILDREN BASED ON ISLAM LAW (CASE STUDY)

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ABSTRACT

This research was conducted to understand that the determination of sex of children is very important especially to children who have an unclear sex. The presence of the state through the power of judges by using legal considerations, including considering the religious rules adopted (in this case, muslim children), is needed to be able to provide protection of children in matters of identity and sex with legal certainty. The determination of the court regarding sex of children will be the basis of other agencies, namely the Population Service to be able to make changes in the sex of the child's birth certificate. This study uses normative juridical research methods because the processing and analysis are based on the research data consisting of primary, secondary 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 children. The results of the study can be concluded that there is a need for the knowledge and understanding of judges about the rules in Islam (according to the religion of the child) about gender changes in children who have unclear sex. Good cooperation between practitioners of law, religion, medicine, and the Population Service will be able to provide a sense of calm for the condition of the child because he has gained gender status in accordance with legal certainty.

Keywords: Determination of Court, Islamic Religion, Gender, Children.

A. INTRODUCTION

Sex that is not clear or there are two images of external sex signs that are equally clear in one individual or more precisely known in the medical world as Disorder of Sex Development (DSD). This is a congenital abnormality that occurs due to genital development at the chromosome level , gonads or anatomy. Unclear sex is indicated by the presence of an unclear external genitalia of male or female, or the presence of both sexes in one child.

The incidence of DSD is 1: 4500-1: 5000 babies born alive. Most come to the doctor at the age of more than 2 years, even some who have just realized they have a gender is not clear whether male or female.

In Islamic Religion, groups of people who have confusion in determining their sex called khuntsa. Medically the sex of a khuntsa can be seen from external physical examinations and supporting examinations which cannot show explicitly whether the sex is male or female.

In general sex is divided into two biologically determined human sexes that are attached to a specific sex. For example, human sex (sex) men are humans who have or are that men are those who have a penis and produce sperm. Women have reproductive organs, such as the uterus and channels to give birth, produce eggs, have a vagina, and have tools for breastfeeding. These characteristics are biologically inherent in humans who have a female sex. That is, biologically the genitals or the sexes cannot be exchanged or replaced. Gender is permanently immutable and is God's nature.

Gender is a human trait based on the definition of a socio-cultural nature, not a definition derived from biological physical features such as sex. In the fiqh literature the term khuntsa musykil is a person who has male and female genitalia or does not have both at all.

People who have dual sex perform medical actions in the form of sex operations to obtain certainty. Genital surgery is an act of repairing or perfecting someone's genitals due to abnormalities at birth or due to gender replacement.

The issue of Human Rights cannot be separated from countries that have a concept of the rule of law. Fulfillment of the implementation and protection of human rights is one of the main focuses of a country that attaches itself as a rule of law that has an obligation to uphold human rights as a condition for the rule of law itself, either through the constitution or the constitution or regulations others are a reference for the walk of a country. sex and can be well received by the family and its environment, so

that children can grow and develop according to their potential.

Children are included in vulnerable groups against human rights violations, abuse, bulying, violence, exploitation and discrimination in addition to groups of women, people with disabilities and minority groups.

The right to practice worship according to his religion must be protected from an early age, so that children feel comfortable and calm in worship because in Islam the religion is distinguished between men and women in matters of clothing, clothing in conducting prayers and their standing position

Law No. 35 of 2014 concerning Amendments to Law No. 23 of 2002 concerning Protection of Children has the aim of ensuring the fulfillment of children's rights to live, grow, develop and participate optimally in accordance with human dignity and dignity, and obtain protection from violence and discrimination for the realization of quality, noble and prosperous Indonesian children. The principles used in the Child Protection Act are non-discrimination, the best interests of children, the right to life, survival and development and respect for children's opinions

But the sex adjustment operation does not only concern the problem of medical science, but also involves a broader field in society, including the field of law. Legal steps regulated in Indonesia can be found in Law Number 24 Year 2013 concerning amendments to Law Number 23 Year 2006 in Article 1 number 1, it is explained that the Population Administration, it is said that the recording of other important events was carried out by the Civil Registration Officer upon request concerned after the establishment of a district court which has obtained permanent legal force. In the explanation stated that other important events are events determined by the district court to be recorded at the Implementing Agency, including changes in sex. However, there is no clearly stated process and stages that must be passed so that someone who needs sex before reaching the district court.

The Court's decision regarding sex change was first carried out by the Central Jakarta District Court in 1973 in the case of adults who had sex change operations abroad. Certainly different from the determination of the District Court regarding gender changes in cases in children to be the author of the study, specifically for children who have genitals is unclear whether male or female or even both.

Problems will arise if the determination of the sex of a child who has a double gender is different between the beginning and has been stated in the citation of the birth certificate with the actual sex medically. At present there is no legal regulation regarding procedures for changing sexes in children. Law Number 24 of 2013 concerning Population Administration, does not regulate in detail this matter. 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, try, and decide on a case filed on the grounds that the law does not exist, but is obliged to examine and try, so that even though there are no rules governing it but there is no legal process that cannot be completed.

Determination of the existing court regarding gender adjustment in children, apparently has different aspects of legal considerations and findings, so that clear rules are needed to guide judges in making decisions appropriately and do not require a long time. This will greatly help the child and his family to provide appropriate education and parenting from an early age according to the sex of the child.

The most important part in a court decision is about the legal considerations chosen by the judge during a session, if the legal considerations are good including the consideration of religious rules adopted by religious experts as expert witnesses, then the decision will be good too, and vice versa. Thus encouraging writers to look deeper into the legal basis, especially religious considerations through the statements of scholars as expert witnesses of the Islamic Religion that are used in hearings on changes in children's sex.

The Indonesian Ulema Council (MUI) in its fatwa on Gender Change and Refinement Number 03 / Munas-VIII / MUI / 2010 dated July 27, 2010, decided / determined that perfecting the genitals for a khuntsa whose genital function was more dominant or vice versa , through a legal genital enhancement operation may.

Legislation on children has received attention from the government for 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 the recognition of children's rights and our government has an obligation to fulfill the provisions contained in the Convention on rights child. We hope that the implementation of what has been mandated by the Act can increase and Indonesian children can live in a safe, healthy and conducive environment in accordance with the child's soul. There is no legal aspect research in the Decision of the Court regarding

changes in the sex of children based on the Child Protection Act in Indonesia.

B. PROBLEM STATEMENT

If it turns out there is no clear form of genitals whether male or female, it will cause 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.

Changes in sex in cases of external genitalia that are not clear can be done when the child is still in the age of the child or when he is an adult because the person concerned feels irregularities in the form of the genitals or due to psychological problems that arise because the physical form does not match the gender listed in the birth certificate or residence identification card owned (KTP, passport or school diploma). This certainly creates a psychological, social and administrative burden on the population concerned.

Determination of sex basically has no legal basis, but gender status is an individual right and is very important in social life, for example in marriage, inheritance, religious worship and social relations in everyday life

C. LITERATURE REVIEW

Primary legal materials sourced from legal materials that have a legally binding force 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 that is not an official document, includes textbooks, legal journals and comments on court decisions, scientific work, papers relating to the problem under study. Tertiary legal materials such as legal dictionaries and internet media 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 process of a baby is very important and crucial in people's lives. A clear form of genitals in newborns will certainly make it easier for doctors / midwives and families to ascertain the sex and giving the name of the baby in accordance with the sex.

Giving a baby's name naturally 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.

The request for sex determination is an attempt to fulfill a person's human rights, this is in accordance with article 3 paragraph (2) of Law Number 39 of 1999 concerning Human Rights which reads "Every person has the right to recognition, guarantee, protection and legal treatment fair and have legal certainty and equal treatment before the law "

The application for sex determination through the court is in accordance with the contents of Article 17 of Law Number 39 of 1999 concerning Human Rights, "Everyone without discrimination has the right to obtain justice by filing requests, complaints and suits, both in criminal, civil and administrative cases as well as be tried through a free and impartial judicial process in accordance with procedural law which guarantees an objective examination by honest and fair judges to obtain a fair and correct decision.

The legal consequences will inevitably follow the change in gender, namely the change in population data. This can be seen in article 77 of Law No.23 of 2006 concerning Population Administration, it states that "No one can change, replace, add to his identity without the permission of the Court".

In accordance with the contents of article 77 of Law No. 23 of 2006 concerning Population Administration, a person who wishes or has carried out medical actions in the form of surgery or non-operation on his genitals is unclear whether male or female are of a different sex. previously written in population documents (for example: birth certificate), must submit a change of identity data to the court through a request for a change in legal status from someone who is female to someone who is male or vice versa.

Article 10 paragraph (1) of Law Number 48 Year 2009 concerning Judicial Power states that "The court is prohibited from refusing to examine, try, and decide on a case filed under the pretext that the law does not exist or is unclear, but it is obligatory to examine and try it" .

The court through the judge gets the mandate from Article 10 paragraph (1) of Law Number 48 Year 2009 concerning Judicial Power, which represents the Court as the last pillar to find justice for the community and for the sake of law which has a strong reason, must answer the legal needs of the community by finding the law. if there is no legal regulation on the case handled, as long as it does not conflict with existing law, propriety and decency, so that the determination of sex change is an answer and

a legal discovery because there is no rule that governs it, so there is no legal vacuum. . In legal discovery, the judge explores the values of the law that lives in the community, including medical findings that are taken into consideration by the judge in determining the sex of a person who has unclear or double sex.

Judges or litigants need information and opinions from someone who has the competence and experience in the case he is handling because the case being studied is beyond the scope of a judge's knowledge and experience, as in the case of determining gender changes. Judges need expert opinion and proof of physical or laboratory examination letters or radiology or psychology as one of the considerations to avoid judges from making final conclusions.

Determination of the Court of sex that changes from before on a child will be able to provide psychological peace in children, legal certainty and orderly population administration. This will certainly give happiness to families and children born with unclear or multiple genitals to get the same growth and development opportunities as other children.

D. RESEARCH METHODS

This research is a library research because it is done through data collection in the form of library materials from books, case studies and court decisions related to this research.

The author will conduct a study on the District Court Decision Decision that has been published in the Directory of the Decision of the Supreme Court of the Republic of Indonesia through the website decisionusan.mahkamahagung.go.id. Establishment of the Mungkid District Court in 2015.

E. ANALYSIS ANDDISCUSSION

Starting from the birth of CA in December 2013 at Budi Rahayu Hospital, Magelang. The birth process is by cesarean section, said to be female sex and a birth certificate has been made with female gender.

When the CA is around 2 (two) months according to the two grandmothers of the child, the genitals have lumps resembling male genitals. So the CA was taken for a doctor's examination and was referred to Dr. Hospital. Sardjito Yogyakarta. After a physical and supportive examination, it was concluded that CA has a male sex.

His father CA submitted an application for sex change in the birth certificate on June 4, 2015 at the Mungkid District Court.

Determination of sex status in the District Court is a concrete case where there are no regulations governing it so it does not include the legal basis on which to determine it. The judge reconstructed the facts and revealed at the trial that was strengthened with evidence, 2 witnesses and 2 expert witnesses with evidence from the Sardjito Hospital, Yogyakarta, which was authentic deed.

Witness, Statement of expert pediatrician and genetic consultant at Sardjito Hospital Yogyakarta. The results of expert examinations are without the testes, the penis sticks down and does not appear out, the urethra hole is at the base of the penis, not at the tip of the penis.

The result of chromosome examination is a 46 XY karyotype, the conclusion: male genotype. An ultrasound examination was performed to look for the testes, no ovaries were found, no uterus was found and no female genital marks were found.

Considering, that in his petition, the Petitioner requested that the District Court of Mungkid provide a determination regarding the change in the name and sex status of the Petitioner's child, which was originally named CA to the female sex as stated in the Birth Certificate Quotation Number Al.6770344824 issued by the Magelang District Civil Registry Office. became named with the male gender.

Considering, that Article 3 paragraph (2) of Law Number 39 Year 1999 concerning Human Rights regulates that every person has the right to recognition guarantees of protection and fair legal treatment and to obtain legal certainty and equal treatment before the law. Furthermore Article 17 of Law Number 39 Year 1999 concerning Human Rights regulates that every person without discrimination, has the right to obtain justice by filing requests, complaints and lawsuits, both in criminal, civil and administrative cases and 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 relating to the recording of important events, Elucidation of Article 56 paragraph (1) of Law Number 23 Year 2006 concerning Population Administration as amended by Law Number 24 Year 2013 concerning Amendment to Law Number 23 Year 2006 concerning Population Administration and Article 97 paragraph (2) and paragraph (3) of Presidential Regulation No. 25/2008 concerning Requirements and Procedures for Population Registration and Civil Registration,

regulates that what is meant by "other significant events" are events determined by the District Court to be recorded at the implementing agency, including changes in gender.

Considering, that because based on the religious evidence the Petitioner is Islamic and based on Article 42 paragraph (2) of Law Number 23 of 2002 concerning Child Protection as amended by Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection, it is regulated that before the child can make his choice, the religion adopted by the child follows the religion of his parents, so in considering religious views on gender changes in this case the Court uses considerations in the view of Islam.

Considering, that the Indonesian Ulema Council (MUI) in its fatwa on Amendment and Improvement of Gender Number 03 / Munas-VIII / MUI / 2010 dated July 27, 2010, decided / stipulated:

Gender Replacement:

1. Changing genitals from men to women or vice versa which is done intentionally, for example by sex change operations, the law is haram;
2. Helps to change sex as point 1 is forbidden;
3. Determination of the validity of the sex status due to the sex replacement operation as in point 1 is not permitted and does not have shar'i legal implications related to the replacement;
4. The legal status of the sex of the person who has performed the sex change operation as referred to in point 1 is the same as the original sex as before the sex change operation, even though he has obtained a court decision;

Improving genitals

1. Improving the genitals for a khuntsa whose male genital function is more dominant or vice versa, through the operation of improving the genitals the law may;
2. Help make improvements to the genitals as referred to in point 1 of the law may;
3. The operation to improve the genitals as referred to in point 1 must be based on medical considerations, not just psychological considerations;
4. Determination of the validity of the sex status as a result of the sex enhancement operation as referred to in point 1 is permitted, so that it has syar'i legal implications related to the improvement;
5. The legal status of the sex of the person who has performed the sex enhancement operation as referred to in point 1 is in accordance with the sex after the refinement even though the court has not obtained a court decision related to the change in status.

Considering whereas according to the medical considerations above, the medical action taken by the doctor against the sex organs of the Petitioner's child is intended to perfect the genitals of the Petitioner's child so that they are in their proper place and can function as they should, due to an ambiguous gender condition genetalia). Therefore, if it is related to the MUI fatwa above, the change in the sex status of the Petitioner's child, which was originally a woman to be a male, is a refinement of the genitals and this is permissible in the teachings of Islam.

Considering, that based on judicial, medical, psychological, and religious considerations as described above, the Court is of the opinion that the change in the sex status of the Petitioner's child is not against the law so as to ensure legal certainty for the Petitioner's child for the change in his gender status as well as for the benefit and justice necessary this determination. Therefore, the petition of the Petitioner's petition regarding the change in the sex status of the Petitioner's child has the reason to be granted.

Considering, that in social life, giving a name to someone should be adjusted to their gender so that the person feels comfortable with his name in interacting in society.

In the case of sex change that was submitted by Mr. CA's son, was accepted and registered with the District Court of Mungkid dated June 4, 2015.

The condition that encourages a father to apply for a change of name and gender is his child at the age of 2 months there are small lumps similar to male sex even though at birth it looks like a female genitals. After a medical examination and surgery on the genitals of the applicant's child, it was stated that the CA was a boy and the doctor gave advice on changing the name and sex before the next surgery was performed on the applicant's child.

Judges' considerations in addition to covering witness testimonies who knew the child from birth and medical statements from experts, which attracted judges also used the consideration of Article 56 paragraph (1) of Law No.23 of 2006 concerning Population Administration as amended by Act No.24

of 2013 concerning amendment of Law No. 23 of 2003 concerning administration concerning Population Administration and Article 97 paragraphs (2) and (3) of the Republic of Indonesia Presidential Regulation No. 25 of 2008 concerning Requirements and Procedures for Population Registration by the District Court to be recorded at the implementing agency.

The judge used the consideration of the Indonesian Ulema Council (MUI) Fatwa on Sex Change and Refinement number 03 / Munas-VIII / MUI / 2010 dated July 27, 2010 and was declared permissible for the act of perfecting the genitals, but it was haram if the operation aimed at sex change.

Judge's consideration is also to use Article 3 paragraph (2) of Law No.39 of 1999 concerning Human Rights which regulates the right of everyone to the recognition of guarantees of protection and fair legal treatment and legal certainty.

Judge's consideration by using Article 42 paragraph (2) of Law No. 23 of 2002 concerning Protection as amended by Law No. 35 of 2014 concerning Amendments to Law No. 23 of 2002 concerning the Protection of Children is very interesting because it uses the Islamic view of changes in gender in this case, according to which embraced by the child concerned.

The request for sex status determination is a case in concreto that does not yet have a clear legal basis, but is not a reason for the court to reject this request, because based on Article 10 Paragraph (1) of Law No. 48 of 2009 concerning judicial authority states that: The court is prohibited from refusing to examine, try, decide on a case filed under the pretext that the law does not exist or is unclear, but it is obligatory to examine and try it.

The mandate of the court carried out by the court given through the judge in Article 10 paragraph (1) of 2009, that the judge is a representation of the court as the last pillar to find justice for the community and in the interests of law with a strong reason, must answer the legal needs of the community by exploring and finding the law if there is no legal regulation for the case handled, as long as it does not conflict with the existing law.

Judges are considered to be aware of 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 over consideration 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 further with a deductive logic process in cases or cases that have the same scope.

Based on adagium curia novit jus, a judge is considered to know and understand all the laws, therefore the judge has the authority to determine which objective law must be applied in accordance with the subject matter of the case concerning the legal relations of the parties in litigation because it is an obligation and authority of a judge, is not the right of the parties and is not obliged to be proven by the parties because the judge is considered to know all the laws.

In carrying out legal reconstruction, a judge certainly needs another party in the form of expert testimony because the judge is certainly not capable of mastering various scientific fields, one of which is for example the problem of medicine.

Based on strong considerations and the suitability of each piece of evidence in the form of letters, witnesses and experts found in the trial, the judge certainly and certainly can realize the legal objectives of protection, protection, and peace of mind for people seeking legal certainty.

Determination of sex change CA is a law enforcement (rechtsvervijnings) by the judge by following the development of medical science and technology and making evidence of medical examination as an authentic deed to provide legal certainty about the ambiguous and unclear sex status contained in a child.

The identity of a child is something that is very important and will always be used in all aspects of life, so that the government made special rules listed in Law No. 23 of 2002.

In Article 5 of Law Number 23 Year 2002, it is said that every child has the right to a name as an identity and citizenship status.

How important it is for children to get their name and gender as early as possible. Social and legal issues in cases of children with unclear or multiple genitals. Factors causing a lot of "sexual misconduct", for example, lack of knowledge or inaccurate examination of labor assistants to identify the sex of a baby or it is difficult to determine the sex because of the shape that is not assertive and can resemble male or female. This is where consultation is needed to medical staff who are more competent supported by blood tests, ultrasonography, and chromosome analysis.

The right to worship is also closely related to gender, especially for children who are Muslim, whether he has to wear a mukena or sarong when

praying. Article 6 of Law Number 23 Year 2002 states that every child has the right to worship according to his religion, thought and expression in accordance with the level of intelligence and age, in the guidance of parents.

In making decisions in cases of sex change in children, judges should collect as much and quality data as possible so that they can be used as strong legal considerations to produce good, fair and correct legal certainty products. It is also necessary to avoid repeating mistakes that have occurred previously in determining the sex status of a child.\

Hard and smart work is needed from all parties, including the public, central government, regional governments, related institutions, judiciary, religious, medical, educational, nongovernmental organizations and mass media to raise awareness of human rights, especially children's rights.

Actually we still have a big homework that is when it has been determined the certainty of the sex of children who have genitals that are not clear. When is the right time to reconstruct or repair a child's genitals, how many hospitals have a special team to handle DSD cases, how much are the costs incurred by the family or how much are the costs borne by the State when using National Health Insurance through BPJS. This problem is not only faced by developing countries, even in developed countries also still face challenges, especially in the fields of etholoLegal and law.

Further research is needed with more court decisions and of course with more laws and regulations, so that more complex and comprehensive aspects of analysis can be analyzed. With the hope that the results of this study can be a starting point and as a basis for further research.

F. CONCLUSION

Based on the discussion of the results of research on the Decision of the Mungkid District Court, Central Java, Indonesia, the authors draw the following conclusions:

1. An application for a change in sex can be determined through a District Court Decision and the Judge can make a decision within a short time (less than 2 months) even though it is an in-concrete case that does not yet have a clear legal basis.
2. Legal considerations used in determining sex change in children are documentary evidence, expert witnesses, Law No. 24 of 2013 concerning Amendments to Law Number 23 of 2006 concerning Population Administration and Law No. 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection.
3. Judge's consideration in terms of Islam is the Fatwa of the Indonesian Ulema Council (MUI) concerning Amendment and Improvement of Gender number 03 / Munas-VIII / MUI / 2010 dated July 27, 2010.
4. The court's decision regarding sex change in children has provided legal certainty and guarantees of children's rights in a name as self-identity for children born with unclear genitals.

G. REFERENCES

Book

Hutson etc, 2012, Disorders of sex development, Springer, Berlin.

Mertokusumo, S, 2014, *Legal discovery*, Cahaya Atma Pustaka, Yogyakarta.

Soerjono Soekanto, 2014, *Factors affecting law enforcement*, Rajawali Press, Jakarta.

Batubara dkk, 2017, *Children's endocrinology textbook*, Balai Penerbit Ikatan Dokter Anak Indonesia, Jakarta.

Journal

Dellyana, Shant 1998, The concept of law enforcement, Liberty, Yogyakarta.

Handayani, I 2013, 'Urgency of child protection in Indonesia (study of legal perspectives)', Bestuur ed. 02.

Klarisa, Sampurna, B 2017, 'Legal certainty of gender change in Indonesia'. Proceeding Annual Meeting.

Hoesin, I 2003, 'Protection of vulnerable groups in the perspective of human rights', Bali.

Marzuki, PM, 2005, Legal research, Kencana, Jakarta.

Lawrence Meir Friedman, 2009, *Legal system: social science perspective, translated by* M Khozim, Nusa Media, Bandung,.

Purwanti, A 2016, 'Disorder o f sex development: Problems faced in Indonesia', Med Hosp vol.4, no.1.

Risdalina, 2016, 'The legal standing of the status of gender change in the perspective of human rights and population administration'. Jurnal Ilmiah Advokasi.; vol. 4:no. 02.

Sonata, D, 'Normative and empirical legal research methods: typical characteristics of legal research methods'.

Widhiatmoko, B Suyanto, E 2013, 'The legality of sex change in people with ambiguous genitalia in Indonesia', Jurnal Kedokteran Forensik Indonesia vol.15, no.1.

Rajagukguk E, *Indonesian judges endorse sex replacement and refinement, accessed* 12 Maret 2018 at 9.45 pm,http://uai.ac.id/wp.-content/upload/2017/07/01.

Rika Dwi Setiawati, *Law and Human Rights, Accessed on* 24 November 2018 at 8 pm. https://rikadwisetiawati.wordpress.com/matkul-hukum/hukum-dan-ham.

Legislation

Indonesia, The Constitution of The Republic of Indonesia Year 1945

Keputusan Menteri Kesehatan Republik Indonesia No 191/MENKES/SK/III/1989 concerning The Appointment of Hospitals and Expert Teams as Sites and Operations for Gender Adjustment Operations

Law Number 39 Year 1999 concerning Human rights.

Law Number 23 Year 2002 concerning Child Protection.

Law Number 23 Year n 2006 concerning t Population Administration.

Law Number 36 Year 2009 concerning Health.

Law Number 24 Year 2013 concerning Changes above Law Number 23 Year 2006 concerning Population Administration

Law Number 35 Year 2014 concerning Changes above Law Number 23 Year 2002 concerning Child Protection.

Fatwa MUI Number 03/Munas/VIII/2010.

NATIONAL ASSURANCE TO FULFILL THE HEALTH RIGHTS OF PRISONERS AT CORRECTIONAL FACILITY

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ABSTRACT

Human rights (HAM) in general can be interpreted as rights that inherent in human beings from birth because of the grace of God Almighty that couldn't be revoked by anyone unless determined by the law that limits it. Health right is one of the main rights that influence the fulfillment of other rights. The principle of fulfillment is non-discrimination, therefore the fulfillment and guarantee of the health rights must also be given to humans who based on the law are restricted in their rights, namely the prisoners who are undergoing a detention period and sentence in prison. Therefore, this research conducts a discussion and/or study of the questions (1) how the legal guarantees of the health rights for prisoners while in the correctional facility.; (2) how is the efforts of the Government of the Republic of Indonesia in guaranteeing and fulfilling the health rights of prisoners during the sentence. The type of this research is normative juridical, by evaluating relevant legal principles. From the discussion, it is known that the right to constitutional health and is a fundamental and invaluable human right. Four principal elements must be obeyed by the government in fulfilling health rights, are availability, accessibility, quality, and equality. Equality is intended that health services must be accessible without discrimination including prisoners. The efforts and role of the Indonesian Country to fulfill the health rights of prisoners have been regulated by several laws and regulations which become guarantees and a legal basis. In providing guarantees for the health rights of prisoners in correctional facility, the government of Indonesia has made the provision of the health budget to support health facilities such as health clinics and prisoners hospital care which is supported by the infrastructure of health care as well as meets decent standards, there can be accessed by all prisoners which free of charge.

Keyword: Human Rights, Health Rights, Prisoners

A. INTRODUCTION

Human rights (HAM) in general can be interpreted as rights that inherent in human beings since birth because of the grace of God Almighty that couldn't be revoked by anyone unless determined by the law that limits it[1] Because human rights are the rights that obtained at the time of his birth as a human being, human rights include rights which, if revoked or reduced, will result in a reduced degree of humanity. The measure of the degree of humanity always develops under the civilization of its people.

Human rights are the only values that are universally recognized, even though the value system is not like ideology or religion, nor a closed value system.[2]

Because human rights are fundamental and inherent rights to universal human identity,[3] then there are several main rights to determine the degree of humanity, one of them is the health rights with all the other rights to receive health care. Because health is a healthy state, physically, mentally, spiritually and socially that allows everyone to live productively socially and economically. [4]

In Indonesia, health right is the constitutional right of every citizen,[5] therefore, the law in Indonesia recognizes and guarantees the health rights as a human right and it is one of the welfare elements that must be realized, efforts to maintain and improve the health status of the community which is conducted to the fullest extent based on non-discriminatory, participatory, and sustainable principles.[6]

[1] Ramdlon Naning, Aim and Image of Human Rights, (Jakarta: UI Criminology Institute, 1983), P.8
[2] Manfred Nowak, Introduction to the International Human Rights Regime, Martinus Nijhoff Publishers, (Translator Sri Sulastri, 2003), Pg. 1
[3] Majda El-Muhtaj, Human Rights in the Indonesian Constitution, (Jakarta: Prenada Media Group, 2007), Pg. 19-20
[4] Law Number 36 of 2009 on Health, Article 1 section (1)
[5] The 1945 Constitution of the Republic of Indonesia, Article 28H section (1)
[6] Law Number 36 of 2009 on Health, op.cit., Part of Considering

Because health right is a fundamental and constitutional right of every Indonesia citizen which the implementation of the fulfillment of its rights has to be done with the principle of non-discrimination. Then, the effort to fulfill and guarantee the health rights should be given to the man who based on the law are restricted in their rights, namely the prisoners who are undergoing a detention period and sentence in prison.

According to the Constitution of the Republic of Indonesia, Number 12 of 1995 on Penitentiaries (Penitentiary Law), detention centers for prisoners and detainees which were originally called "Prisons" were changed by "Correctional Facilities" which the implementation uses correctional facilities system[7]. And also changed the term or name for the Occupants of Correctional Facilities which are currently referred to as Correctional Facilities Prisoners[8] namely prisoners who are people who have been convicted by the court and have permanent legal force or are prisoners, namely people who are still in the justice process. Whereas civil servants who are tasked with guiding prisoners and detainees in correctional facilities are referred to as Correctional Officers.

Article 2 of the Penitentiary Law, states that Correctional Facilities in principle have the duty and function to conduct prisoners aimed to prevent the occurrence of criminal acts, restoring balance, and resolving conflicts, as well as improving prisoners and preparing prisoners so that they can later be able to blend in and socialize with the community.

The 1945 Constitution of the Republic of Indonesia states that the Republic of Indonesia is a nation of laws,[9] The essence of the nation of laws deals with the idea of the rule of law that is juxtaposed with the idea of people's sovereignty or democracy.[10] As a consequence in every nation of laws, the law must be the base and foundation for every act and action in the life of the nation, state and society. So the law must have the highest position in the country. The nation of law principle is the principle of recognition and protection of human rights, which has a primary place and often referred to be the goal of the nation of law.[11]

Thus, related to the health rights of prisoners which is a fundamental right and constitutional rights which must be guaranteed, fulfilled and protected by the country, it needs to be seen and studied how the legal guarantees are given by the government for the health rights of prisoners and how the government's efforts in fulfilling the health rights of prisoners assisted while undergoing the process of punishment and imprisonment in a correctional facility

B. PROBLEM STATEMENT

Human rights are the rights that inherent in human beings since birth because of the grace of God Almighty, which are rights which, if revoked or reduced, will result in reduced degrees of humanity. One of the main rights that determine the degree of humanity that is the health rights with all the other rights to obtain health care, including the right to obtain health care facilities and services. As with other human rights, the fulfillment of health rights for citizens must also be implemented based on the non-discrimination principle, which means that everyone is in the same position to obtain guarantees and fulfillment of these rights. Including correctional facility for the prisoners whose rights are partially restricted or temporarily revoked by the law, which the limit of their independence but related to health care, those prisoners have the same rights as other citizens.

Indonesia as a nation of law that has also ratified the human rights convention must be obedient and submissive with the rules which have been set in that human rights convention. One of them is that the government as the national organizer is given an obligation to guarantee, protect and fulfill the human rights of its citizens.

According to the description, it is necessary to discuss and/or study several problems, there are: **First**, how the legal guarantees of the health rights for prisoners while in the correctional facility, and **Second**, how the legislation can provide legal guarantees of the government efforts in guaranteeing and fulfilling the health rights of prisoners during the sentence and detention in correctional facility.

[7] Law of the Republic of Indonesia Number 12 on 1995 on Correctional Article 1 section (2), which reads: "The system of Corrections is an institution on the direction and limits as well as ways of guiding the prisoners based on Pancasila implemented in an integrated manner between the builder, nurtured, and community to improve the quality of Prisoners in order to be aware of mistakes, improve themselves, and not repeat the crime so that it can be re-accepted by the community, can actively play a role in development, and can live reasonably as a good and responsible citizen ".

[8] *Ibid*., Article 1 section (5)

[9] Constitution of the Republic of Indonesia Year 1945, Article 1 section (3)

[10] Jumly Assidiqy, in Joko Sasmito, Introduction to the State of Law and Human Rights, (Malang: Setara Press, 2018), p. 1

[11] Philpus M. Hadjon, *Legal Protection for the Indonesian*, (Surabaya: PT. Bina Ilmu, 1987), P.71

C. LITERATURE REVIEW

Definitively, rights are a normative element that serves as guidelines for behaving, protecting freedom, immunity and guaranteeing the opportunity for humans to maintain their dignity. In principle, rights have three elements, they are the owner of the right, the scope of the right and those who are willing to implement the rights. These elements are integrated into the basic understanding of rights.[12]

Human rights can be interpreted as fundamental rights in human beings. Which terminologically, human rights are generally interpreted as basic rights or gifts from God Almighty.[13] Human rights can also be interpreted as basic rights or fundamental rights because they contain rights that are fundamental (grounded) for human life. Some experts interpret human rights as follows:

- According to A. Masyhur Effendi, Human rights are fundamental and inherent with the universal human identity. Human rights can also be interpreted as a sacred basic right, which is inherent in every person/human being, given by God forever, when its use does not prejudice the basic rights of other members of society.[14]
- According to Miriam Budiardjo, Human Rights that have been obtained and brought along with birth or presence in the life of the community.[15]
- According to John Locke, human rights are rights granted directly by God the Creator, therefore no power in the world can revoke it.[16]

Therefore Todung Mulya Lubis stated that analyzing human rights, it means has examined and analyzed the totality of life, how far our lives provide a natural place for humanity.[17]

One of the main rights that determine the degree of humanity is health right with all other sets of rights to obtain health care. Because the health right is a constitutional right of every Indonesian and is one of the elements of welfare that must be realized so that efforts to maintain and improve the status of public health to the fullest implemented based on non-discriminatory principles.

Discrimination is one of the main elements in the principle of equality. This principle of non-discrimination ensures that no one can negate the rights of others because of external factors such as race, skin color, sex, language, religion, politics or other perspectives, nationality, ownership, birth status, or others.[18]

Because health right is fundamental and constitutional of every Indonesian which the fulfillment must be implemented based on non-discrimination principles. So the efforts to fulfill and guarantee the health rights must also be given to every citizen including to the man who's their rights are restricted by law, namely prisoners who are undergoing detention and serving time in prison.

According to the Constitution of the Republic of Indonesia, Number 12 of 1995 concerning Penitentiaries (Penitentiary Act), detention centers for prisoners and detainees which were originally called "Prisons" were changed by "Correctional Facilities" which the implementation uses correctional facilities system.[19]

The efforts of implementation to fulfill the health rights as a health effort implemented by the Penitentiary must also be in line with the legal rules in the administration of health care. As explained by the Health Law, health efforts are every activity and/or series of activities which is conducted in a solid, integrated and continuous manner to maintain and improve the health status of the community in the form of disease prevention, health promotion, curative, and health recovery by the government and/or community.[20]

The compliance with the law in the implementation of the health rights of prisoners under the correctional facility is important because, as a nation of law, it must have the highest position in the life of the nation, state and society. Included in all actions of the Government towards its community.

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[12] Osgar S. Matompo, et al, Law and Human Rights, (Malang: Intrans Publishing: 2018), P. 1.
[13] Philipus M. Hadjon, op.cit., P. 39
[14] A. Masyhur Effendi, "the effectiveness of the Ad Hoc Human Rights Court Against the Eradication of Serious Human Rights in Indonesia ", Paper presented at the National Seminar on Human Rights Quo Vadis Human Rights Protection Based on Laws for Social and Political Development in Indonesia Post Presidential Elections organized by the Indonesian Law and Human Rights Institution (LHKI) in collaboration with BEM Universiotas Kanjempuan, Malang on December 18, 2004., P.1.
[15] Miriam Budiardjo, *Fundamentals of Political Science*, (Jakarta: Gramedia Pustaka Utama, 1999), P. 120.
[16] John Locke, *Two Treatises of Civil Government*. J. W. Grough Blackwell (Ed), (Newyork: Oxford, 1964), P. 28.
[17] Todung Mulya Lubis, *Legal Aid and Structural Poverty*, (Jakarta: LP3ES: 1984), P. 14.
[18] Osgar S. Matompo, et al, op.cit., P. 15.
[19] Law of the Republic of Indonesia article 12 of 1995 on Corrections, Loc. Cit.
[20] *Ibid*., article 1 section (11).

D. RESEARCH METHODS

This research was conducted using normative juridical research methods. It is called as reference law research conducted by examining reference materials or secondary data.[21] Therefore, reference data which used as the main data is the primary legal materials in the form of norms or basic rules and legislation, this research also uses secondary legal materials such as the research and opinions of academics and legal experts.

This research was conducted through a study of positive legal principles and legal principles which conducted by evaluating relevant legal norms (laws and legislation). Research on evaluating positive law was conducted by evaluating the compatibility between one rule of law with other legal norms, or with the principles of law recognized in existing legal practice, which conducted by examining reference materials or secondary data.[22]

E. ANALYSIS AND DISCUSSION

1. Legal Assurance of the Health Rights for the Prisoners While in the Correctional Facility

Health rights as part of the main rights have been set up in several national and international legal instruments. These provisions state that health care is the right of individuals and the nation is the party that has the responsibility in fulfilling health rights, including the rights derived from them, such as the right to obtain health services and facilities.

In international law, health right is regulated in several conventions and covenants such as:

- General Declaration of Human Rights[23] Article 25 section (1) which guarantees that every person has the right to an adequate standard of living for the health and well-being of himself and his family, including the right to food, clothing, housing, and health care as well as the necessary social services, and the right to guarantee at the time of being unemployed, suffering from illness, disability, being widowed/widower, elderly or other conditions that impact in lack of income, which is beyond his control;
- International Covenant on Economic Social Rights [24] in Article 12 section (1) which stipulates that the Participating Countries of this Agreement recognized the fundamental right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and Article 1 2 section (2) letter d which regulates the action that taken by Countries Parties to this Agreement to achieve the full realization of this right, including creating conditions which would assure to all medical service and medical check in case of illness.
- Convention on the Elimination of All Forms of Violence Against Women, [25] in Article 12 section (1) which stipulates that participating countries must make appropriate regulations to eliminate discrimination against women in the field of health care and to ensure that health services, including services related to family planning, are based on equality between men and women;
- Convention on the Rights of the Child [26] Article 24 stipulates that every child is entitled to the best standards of health care and medical care, clean water, nutritious food, and a clean and safe living environment. All adults and children need to have access to health care information.

The convention and the Covenant as an entirety have been ratified by Indonesia through various laws and legislation, it means that these conventions and covenants also stand as binding law in the Republic of Indonesia.

In the instrument of Indonesian law, health right is also a constitutional right of every citizen guaranteed by the Constitution of 1945. The guarantee of the health rights by Constitution of 1945 can be seen in Article 28 H section (1) which states that " every people have the right to live in physical

[21] Soerjono Soekamto and Sri Mamuji, *Normative Legal Research A Short Review*, (Jakarta: Raja Grafindo, 2010), P. 13-14.

[22] Bagir Manan, "Legal Research ". *Journal of Law Research and Development*, Number 1-1999. (Research Institute of Padjadjaran University, 1999) P. 3 - 6

[23] https://www.komnasham.go.id/files/1475231326-deklarasi-universal-hak-asasi--$R48R63.pdf, Downloaded on December 9, 2019, at 23:18 WIB

[24] https://referensi.elsam.or.id/wp-content/uploads/2014/09/Kovenan-Internasional-Hak-Ekonomi-Sosial-dan-Budaya.pdf, Downloaded on December 9, 2019, at 23.31 WIB

[25] https://www.balitbangham.go.id/pocontent/peraturan/Konvensi%20Mengenai%20Penghapusan%20Diskriminasi%20Terhadap%20Perempuan.pdf, Downloaded on December 9, 2019, at 23.59 WIB.

[26] https://www.unicef.org/indonesia/id/konvensi-hak-anak-versi-anak-anak,Downloaded on December 10, 2019, 00.00 WIB.

and spiritual prosperity, to live and to get a good and healthy environment and the right to obtain health services", and Article 34 section (3) which guarantees that" the Country is responsible for the provision of adequate health services and public service facilities."

Provisions in the 1945 Constitution regulated further in Law No. 36 of 2009 on Health which clearly states that:

a. That health is a right for every human being and an important element that must be realized under the ideals of the Indonesian as referred to Pancasila the State philosophy and the Preamble of the 1945 Constitution of the Republic of Indonesia.
b. That all activities and efforts to improve the status of public health are conducted to the fullest extent based on non-discriminatory, participatory, protection and sustainable principles which are very important for the formation of Indonesian human resources, enhancing national resilience and competitiveness for national development. [27]

Furthermore, Law No. 36 of 2009 on Health, Article 1, section (11) explains that " Efforts to health is every activity and/or a series of activities were implemented in a solid, integrated and continuous to maintain and improve the health status of the community in the form of disease prevention, health promotion, curative, and health recovery by the government and/or community [28].

Because the efforts to fulfill and protect the health rights must be implemented one of them by the non-discrimination principle, and health care is an absolute right that must be obtained by every citizen of Indonesia with no exception to the Prisoners. There is no justification for discriminating against any citizen who needs medical services because if that happens there has also been a violation of human rights and is not following the 1945 Constitution Article 28 H section (1).

When a prisoner undergoes a sentence handed down by the court, then his rights as a citizen will be limited. By-Law No.12 of 1995, inmates are convicts who undergo the crime of missing independence in the Penitentiary. Although the convicted person loses his or her independence, there are prisoners' rights that remain protected in the Indonesian penitentiary system.

According to the description above, it can be seen that the health right is a human and constitutional right of every Indonesian, and this has been guaranteed and regulated by the laws mentioned above. Also, the arrangements relating to the efforts of the state to guarantee health rights of each citizen not only provide health care and prevention but also include rights that are derived from it, as an effort to form and encourage human welfare.

2. The Government of the Republic of Indonesia Efforts to Assure and Fulfill the Health Rights of Prisoners During Their Sentencing and Detention in Correctional Facilities

Health is a fundamental and invaluable human right for the implementation of other human rights. Everyone has the right to enjoy the highest standards of health that are affordable and conducive to human life. Health rights are closely related and depend on the realization of other rights as stated in the Charter of Human Rights, including the right of food, employment, education, dignity, as well as non-discrimination, equality, prohibition on persecution, access to information and freedom of association, opinion and movement.[29]

Indonesia has ratified various instruments of international law on human rights, one of them is the Covenant on Economic, Social and Cultural Rights. Thus, Indonesia automatically is given responsibility for the fulfillment, protection, and respect for the health rights of its citizens. Indonesian has obligations that must be implemented immediately in connection with health rights, for example, guarantees that rights will be granted without discrimination in any form whatsoever.[30]

The National obligation to respect, protect and fulfill the health rights of every citizen can be explained which is basically as follows:[31]

1. The Obligation to Respect;
   - Obligation to respect equal access to available health services and not prevent individuals or groups from accessing available health services.

[27] Law no. 36 of 2009 on Health, General Explanation Section
[28] Law No. 36 of 2009 on Health, Article 1 section 11

[29] Committee on Economic, Social and Cultural Rights, General Comment No. 14. Right to the Highest Affordable Health Standard. Congregation to: 22. Geneva (25 April - 12 May 2000). 3rd Agenda. Implementation of the International Covenant on Economic, Social and Cultural Rights, https://referensi.elsam.or.id/2014/09/komentar-umum-14-hak-atas-standar-kesehatan-tertinggi-yang-dapat-dijangkau-pada-komentar-umum-kovenan-internasional-hak-ekonomi-sosial-dan-budaya-icescr/, Downloaded December 12, 2019, 00.22 WIB
[30] *Ibid.*
[31] Commission for Missing Persons and Victims of Violence (Contrast), *National Health Insurance, Right to Health and State Obligations*, "Information Brochure"..

- Obligation not to take actions that disturb health, such as activities that cause environmental pollution.

2. The Obligation to Protect
   - Obligation to take actions in the field of legislation and other actions to ensure that citizens have equal access to health services if provided by a third party.
   - Obligations to take actions in the field of legislation and other actions to protect people from violations in the health sector by third parties.
3. The Obligation to Fulfill
   - Obligation to adopt national health policies and to provide a sufficient portion of available health funds.
   - Obligation to provide the necessary health services or to create conditions where every citizen (equivalent) has adequate and sufficient access to health services, including health care services as well as clean drinking water and adequate sanitation.

From the explanation above, it can be seen that the role of the country in fulfilling the health rights of citizens is conducted by preparing the budget and providing health services and ensuring access to adequate health services.

There are 4 (four) elements of principle that must be obeyed by the government in fulfilling the health rights, they are availability, accessibility, quality, and equality. Availability is intended as the availability of many health service facilities such as hospitals, primary health care, clinics and health facilities such as medicines, health workers and sufficient health financing. Accessibility requires that health services are economically and geographically affordable. Quality is intended that health services meet appropriate standards. And equality is that health services must be accessible equally to everyone, especially for vulnerable groups [32] and the community in special situations.

It can be interpreted that groups of people who are in special situations, including citizens who are in situations that their human rights are limited by law. One of the groups of people who restricted his rights are prisoners based on the legal of a court ruling, the right to his freedom deprived for a certain time. Correctional Facilities is the place to guide the prisoners which is a Technical Implementation Unit under the Directorate General of Corrections of the Ministry of Law and Human Rights.

Even though the prisoners have lost their independence, but their human rights as a human being must still be protected by the Indonesian penitentiary system. As guaranteed by Law Number 12 of 1995 on Penitentiaries in Article 14, it is regulated that prisoners have the right to obtain health services.

To implement the mandate of Law No. 12 of 1995 on Penitentiary and as an effort to fulfill the health rights of prisoners, every Penitentiary or Correctional Facility has been equipped with a clinical clinic as a unit responsible for the implementation of health services and its implementation is under the guidance service section. Each health unit will be prepared by medical personnel who are on duty 24 hours in turn.

To support and strengthen the work of health services conducted by the health unit in the Minister of Law and Human Rights of the Republic of Indonesia through the Minister of Law and Human Rights Regulation of the Republic of Indonesia Number M.HH-11.OT.01.01 of 2011 on Hospital Organizations and Work Procedures. Cipinang Care Hospital has established the Correctional Health Care which is a technical service unit.

Cipinang Care Hospital has the task to organize a complete, harmonious, integrated and sustainable recovery and continuous with other improvement health efforts for prisoners, and immigration detainees, as well as for the community and employees within the Ministry of Law and Human Rights. and make a referral effort.[33]

Technically, Correctional Health Care is a referral medical service for existing medical service units in correctional facilities. This can be seen from the function of the Correctional Health Care:[34]

1. Implementation of Medical service;
2. Implementation of Nursing and care services;
3. Implementation of Medical and non-medical service;
4. Implementation of human resources
5. Implementation of referral services; and
6. Implementation of general administration and finance.

[32] *Ibid*.

[33] Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number M.HH-11.OT.01.01 of 2011 concerning the Organization and Work Procedures of Cipinang Shelter Hospital established the Shelter Hospital, Article 2

[34] *Ibid*, Article 4

To support the financial treatment for the community and support the health program for the community, through Act No. 24 of 2011 concerning the National Social Security System (SJSN), on January 1, 2014, the Government of Indonesia established the National Health Insurance (JKN) implemented by the Indonesian National Health Insurance System (BPJS) on the principle of equity, namely equality in obtaining health services under medical needs.

To manifest justice in the health sector for the prisoners, the signing of agreement memorandum between the Chief of the Indonesian National Police General, Tito Karnavian with Director of National Health Insurance System (BPJS), Fachmi Idris witnessed by Ministry of Defence, Ryamizard Ryacudu . With this agreement memorandum, the prisoners officially become a class III National Health Insurance System (BPJS) member so that if they are sick they can be immediately referred to the hospital.[35]

According to the description above, it can be seen that the government has made efforts to guarantee of the prisoner's health rights through the provision of health budgets to support healthcare facilities such as health clinics in each unit of technical community service and Correctional Health Care which has a referral function and supported by the health facilities such as medicines and health workers and meet appropriate standards. The health service and facilities provided are accessible to all prisoners without charge.

F. CONCLUSION

According to the data and the description above can be concluded that Indonesia as a country that has ratified various international legal instruments on human rights, the nation is the party that has the responsibility in fulfilling, protecting and respecting the human rights of every citizen, one of them is the health right. The health right is a fundamental and invaluable human right for the realization of other human rights.

There are 4 (four) principal elements that must be obeyed by the government in fulfilling the health rights, they are availability of health service facilities, accessibility to health services both economically and geographically, the quality of health services meets appropriate standards and equality where health services must be accessible equally without discrimination including community in special situations. One of the community group which their human rights are restricted are prisoners because of the legal basis through a court decision, their right to independence is deprived of a certain time.

The efforts and role of the Republic of Indonesia to fulfill the health of prisoners have been regulated by several laws and legislation which become guarantees and a legal basis. Because in Indonesian law, the health right is a constitutional right of every citizen.

As a technical and concrete action in providing the guarantees to the health rights of prisoners in correctional facilities, the government has made maximum efforts including providing health budgets to support health facilities such as health clinics in each community technical service unit and Correctional Health Care which has referral function and supported by health facilities such as medicine and health workers and meet proper standards. The health facilities t is accessible to all prisoners without charge.

G. REFERENCES

Bagir Manan, "Research in the Field of Law". Journal of Law Research and Development, No. 1-1999, Research Institute of Padjadjaran University, 1999

John Locke, Two Treatises of Civil Government. J. W. Grough Blackwell (Ed), Newyork, Oxford, 1964

Joko Sasmito, Introduction to the State of Law and Human Rights, Malang, Setara Press, 2018

Majda El-Muhtaj, Human Rights in the Indonesian Constitution, Jakarta, Prenada Media Group, 2007

Manfred Nowak, Introduction to the International Human Rights Regime, Martinus Nijhoff Publishers, 2003

Miriam Budiardjo, Fundamentals of Politi Sciences, Jakarta, Gramedia Main Library, 1999

Osgar S. Matompo, et al, Law and Human Rights, Malang, Intrans Publisihing: 2018

Philpus M. Hadjon, Legal Protection for the Indonesian People, Surabaya, PT. Bina Ilmu, 1987

Ramdlon Naning, Aim and Image of Human Rights, Jakarta, UI Criminology Institute, 1983

[35] https://krjogja.com/web/news/read/59900/Napi_Dilindungi_JKN_KIS

Soerjono Soekamto and Sri Mamuji, Normative Legal Research A Brief Review, Jakarta, Raja Grafindo, 2010

Todung Mulya Lubis, Legal Aid and Structural Discipline, Jakarta, LP3ES: 1984

Law of the Republic of Indonesia Number 36 of 2009 concerning Health

The 1945 Constitution of the Republic of Indonesia

Law of the Republic of Indonesia Number 12 of 1995 Concerning Corrections

Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number M.HH-11.OT.01.01 of 2011 concerning the Organization and Work Procedures of Cipinang Shelter Hospital established the Shelter Hospital

A. Masyhur Effendi, "The effectiveness of the Ad Hoc Human Rights Court Against the Eradication of Serious Human Rights in Indonesia", Paper presented at the National Seminar on Human Rights Quo Vadis Human Rights Protection Based on the Malang Law on 18 December 2004

https://www.komnasham.go.id/files/1475231326-deklarasi-universal-hak-asasi--$R48R63.pdf, Downloaded on December 09, 2019

https://referensi.elsam.or.id/wp-content/uploads/2014/09/Kovenan-Internasional-Hak-Ekonomi-Sosial-dan-Budaya.pdf, Downloaded on December 9, 2019

https://www.balitbangham.go.id/pocontent/peraturan/Konvensi%20Mengenai%20Penghapusan%20Diskriminasi%20Terhadap%20Perempuan.pdf, Downloaded on December 9, 2019

https://www.unicef.org/indonesia/id/konvensi-hak-anak-versi-anak-anak, Downloaded on December 10, 2019

https://referensi.elsam.or.id/2014/09/komentar-umum-14-hak-atas-standarkesehatan-tertinggi-yang-dapat-dijangkau-pada-komentar-umum-kovenan-internasional-hak-ekonomi-sosial-dan-budaya-icescr/, Downloaded on December 12, 2019

STOP VIOLENCE TOWARD CHILDREN!

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ABSTRACT

Violence toward children is a phenomenon and simultaneously a big problem that exists in every country, community, ethnic or religion group. It is irrespective of the social status of the child or the family. It happens at home, at the kindergarten, out in the street, among friends, in child care facilities, at law inforcement institutions, etc. Children become victims to different forms of violence and abuse: physical, psychological, sexual, bullying, online, neglect, trafficking, sexual and labor exploitation, or arranged child marriages.

Violence impacts the physical and mental development of children, reducing their learning skills, their ability for verbal interaction or for joining peer groups. Violence may hinder their development and prevent them from becoming fully functional adults and good parents. In its extreme form, violence can even cause death. However, violence toward children must stop and must be stopped. The reason is because violence destroys the lives of children. Destruction of the children's lives means too the destruction of family dan society, the destruction of nation and state.

In order to obtain a deep understanding of this topic, it is used in this study a juridical nomative legal research which are written in library material such the 1945 Constitution, the Law Number 23 of Year 2002 concerning the Child Protection. Certainly the other source of this study is book and many articles which are seeked and found in internet.

Keywords: Violence toward Children, Human Rights, Protection of Children

A. INTRODUCTION

As we know, children are young men or women who are not coming yet to the old age. They do not experience yet the puberty. From the psychology point of view, children are those who are in a period of development from babyhood to the five years old or six years old age. This period is called too a period of pre-school until the years of elementary school. In this side, sometimes they have already come the old age, but their mentality are still childish.

In other point of view, children are the second generation. They are the opposite of their parents. The old men are the children of their parents even if they have come already to the old age. According to article 1 point 2 of Law Number 35 of 2014 concerning Amendment to Law Number 23 Year 2002 concerning Child Protection, "a child is someone who is not 18 (eighteen) years old, including a child who is still in the womb."[1]

In relation to society or state, chidren are pioneer of the new generation. The children will continue the ideal and the idealism of the Nation. They will become the future of the state. They are the resources for the establishment of the country. They are the assets of the nation. The future of our nation and state lies on the hand of our nowadays children. The characters of today's children become an important key to the future of our country. More beter the character of children today is, more beter too the future life of nation is. On the contrary, more uglier the character of children today is, more uglier too the future life of nation is.[2]

Because of this reason, treatment of children is very decisive for the development of children. Children must be free and must be delivered from every form of violent conduct and bad treatment toward them. In every form, violence toward children will destroy the life and the future of children. With violence toward children we cut off the hope, the dream and the idealism of the children. Besides, with violence toward children we kill the hope and the dream, the idealism and the future of family and society, nation and state and even of the world.

In reality, children who find violent treatment bear some bad impacts in their lives. Emotionally children who experience hard or violent conditions can exhibit fear, guilt, isolation and low self-esteem. Young children who are exposed to both domestic violence and child abuse were also more likely to commit an assault and participate in delinquent behaviour in their adolescence than those who are not exposed at all. That is why stop violence against children. Every child has the right to protect from all forms of violence.

[1] Cf. Adolf Setiabudi Soeprajogo, *Human Rights Perspective in Legal Protection of Children as Victims of Sexual Violence*, in *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, p. 41.

[2] Andy Lesmana, *Definisi Anak*, from Internet: https://id.m.wikipedia.org>, Bekasi, November 28, 2019.

B. PROBLEM STATEMENT

Based on the future perspective of the life of children, the statement of the problem will be focused on these some questions:

1. What and how is the fact of Violence toward Children?
2. What is the motives of Violence toward Children?
3. What is the effect or impact of Violence for the life of Children?
4. What must be done for stopping Violence toward Children and for helping the children who suffer violence?

C. LITERATURE RIVIEW

By the point of literature review, I mean the concept or ideas about violence toward children which are written in the literature or books I take and I use to perform this scientific job. Certainly as far as possible , I look for not only primary legal material sources such as laws, books and journals or seminars, but also second sources in the internet. Primary legal material sources I have and use in this study is Constitution of the Republic of Indonesia of Year 1945, Law of the Republic of Indonesia No 35 of 2014 Amending Law on Child Protection (No. 23/2002). The book is "Pelayanan Profesional Gereja Katolik Dan Penyalahgunaan Wewenang Jabatan." The only Journal or Seminar is "Proceeding Book International Scientific Seminar Law Enforcement And Human Right Comparative Study Law Enforcement And Human Right Between Indonesia & Thailand Thammsat University Thailand, Bangkok, 6 September 2019."

The main idea written in these primary legal material sources is about the right of every person including children to develop fully and to live wholly as human being. For this reason, Indonesian Constitution of the year 1945 in article 28C paragraph (1) declares that "every person has the right to develop themselves through meeting their basic needs, having the right to education and benefitting from science and technology, art and culture, in order to improve quality of life and for welfare of mankind."[3] This statement of Constitution means that the government has authority and responsibility for maintaining the neglected children, including street children.

Very close and very concret to this statement of Indonesian Constitution of year the 1945 is the declaration of article 59 of Law Number 35 Year 2014 concerning Child Protection. It declares that "government and other state institutions are obliged and responsible for providing sepecial 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."[4]

By realization of this declaration, every person, particularly every child as described in article 12 of Law Number 39 of 1999 concerning Human Rights, can become "a man of faith, piety, responsibility, morality, happy and prosperous in accordance with human rights."[5]

D. RESEARCH METHODS

The research method in this study is the study of literature using the books, articles and internet. This method of research includes primary legal material such as Constitution and Law of the Republic of Indonesia in relation to the human rights of children, especially the right of children that must be protected and maintained in society, nation and state of Indonesia.

E. ANALYSIS AND DISCUSSION

1. FACT OF VIOLENCE TOWARD CHILDREN

In daily life, we find very often the fact of violence toward children. In general definition, violence toward children is a kind of maltreatment toward children which is done to them by the other people. The forms of maltreatment can be physical, sexual and emotional abuse, neglect and exploitation on children. Boys and girls are at equal risk of physical and emotional abuse and neglect, and girls are at greater risk of sexual abuse.

In this meaning, violence toward children includes all faces and forms of violence against people under 18 years old. For infants and younger children, violence mainly involves child maltreatment such as physical, sexual and emotional abuse, neglect and exploitation at the hands of parents and other authority figure in society. In addition to child maltreatment, when children reach adolescence, peer violence and intimate partner violence become highly prevalent.[6]

We can see the fact of violence not only in the world in general, but also in Indonesia in particular. The fact of violence testifies that yet violence toward children persists until now. Often, it remains hidden. Many cases are not reported or investigated.

Generally in the global world, every five minutes a child dies from violence. This is a report The

[3] Cf. Darryrahman Diyan Baskoro & Hadi Purnomo Sientje Kurniawti, *The Right To Education As Human Rights For Children*, in Proceeding Book ..., p 159.

[4] *Ibid*., p. 162.

[5] *Ibid*., p. 161.

[6] Cf. World Helath Organization,*Violence and Injury Prevention*, from Internet: https://www.who.int>, Bekasi, December 7, 2019.

Global Partnership to End Violence Against Children 2016. Moreover, WHO 2016 reported that one billion children – over half of all children ged 2 to 17 – are estimetd to have experienced emotional, physical and sexual violence. According to UNICEF research in 2014, one in 10 girls – 120 million – under the age of 20 has been subjected to forced sexaual acts. The same research of UNICEF showed in year 2016 that nearly one in 10 children – 250 million worldwide – lives in a country affected by conflict. At least one in six children entering an SOS Children's Villages' programme has previously experienced violence.[7]

Particularly in Indonesia, we find also the same fact of violence toward children. One in three women and girls experience violence in their lifetime, while more than a third of boys experience physical violence. Violence against children is pervasive in homes, schools and communities in Indonesia. Bullyng and shaming are common in schools, with 18 per cent of girls dan 24 per cent of boys affected. Boys are especially at risk of physical attacks in school.

According to KPAI, portraits of cases of violations of children's rights from year to year occur fluctuatively. In these portraits 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. Among these cases 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.[8]

At context of school, teachers often use physically and emotionally violent forms of punishment to discipline children. They also lack knowledge and skills to recognize and report violence and refer studenst to services to address any harm they have experienced.

Adolescent girls are more likely than boys to be subjected to harmful traditional practices such as child marriage and female genital mutilation (FGM). One out of every nine girls are married before age of 18, and girls from the poorest households are five times more likely to be married as children than their wealthiest counterparts. The rate of FGM is high, at 52 per cent.

Child marriage, in addition to being a child rights violations, perpetuates the intergenerational cycle of poverty by forcing girls out of school, impairing their long term education, ability to earn a living and contribute to the development of their communities.

On the legal front, childhood violence has yet to be prohibited in all settings (rape in marriage is still permiteed), and the justice for children system does not yet prioritize protection for all children in contact with the law.

Less than 0.1 per cent of the total government budget is dedicated to protecting children from violence. Complex public administration procedures and the lack of a mandated authority for child protection make the effective delivery of services for vulnerable children challenging. In addition, around 17 percent of children under 18 do not have a birth certicitae, compromising their ability ti access key services.[9]

2. THE MOTIVES OF VIOLENCE TOWARD CHILDREN

According to Sumarno, the official Leader of PPPA of the West Kalimantan Province, there are 7 (seven) factors as the motives of violence toward children in the family and society, namely economy factor, social media, younger marriage, the instability of character, social surrounding, discrimination of treatment toward male and female in society and the view of violence as the problem of family itself and not as the social problem.[10]

Economically, the poverty of family often causes the violence toward children. Parents or caregivers cannot fulfill the need of children. They cannot earn the children's need of food, education and welfare of life. The economy pressure or the economy difficulties pushes the family members (parent or older brother or sister) to act violently to children when they cannot fulfil the need of children. They treat malevolently the children.

In relation to social media, violence toward children springs from the influence of social medias. Today, many kinds of mass media such as audio media, visual media and printing media very often give witnessing violence in the home or community for influencing people, especially the younger and the children.[11] The presentation of Television shows terrible events and happenings occurred every where not only sexually but also socially. In fact, according to **Tempo, 2006**, 62 % of television shows and other social media erect and create violence of behaviour in the family life and society.[12] Exposure to violence through media such as TV or movies and youtube) at home and community or in the cinema become one of significant cause of violence toward children.

[7] SOS Children's Villages, *Violence Against Children: A Global problem*, from Internet: https://www.sos.children villages.org>, Bekasi, December 7, 2019.
[8] Cf. Adolf Setiabudi Soeprajogo, *Op,Cit.*, p. 42.
[9] Cf. UNICEF Indonesia, *Child Protection*, from Internet: https://www.unicef.org>, Bekasi, December 7, 2029.
[10] Wahidin, Reporter of Tribun Pontianak, *7 Faktor Penyebab Terjadinya Kekerasan Pada Perempuan dan Anak*, dari Internet: https://pontianak.tribunnews.com>, Bekasi, December 8, 2019.
[11] Cf. Anggunjgoen, *Pemicu Kekerasan Yang Terjadi Di dalam Masyarakat*, from Internet: https://goenable.wordpress.com>, Bekasi, December 8, 2019.
[12] Cf. Zaini Achmad, *Stop! Kekerasan Pada Anak*, from Internet: https://www.kompasiana.com>, Bekasi, December 10, 2019.

Regarding the younger marriage, many parents (father or mother) are not responsible for the life of their children. Parents cannot look for and cannot possess the job or occupation for maintaining the live of family in general, and the life of children in particular. Sometimes we find also a fact of the disfunction of family. The children have parents (father or mother) only by name or by law, but by fact their parents cannot do anything for maintaining and continuing the life of the children.

The same condition happens in case of instability of character. Perpetrators including parents, family members, teachers, caretakers or caregivers in this case have a previous aggressive or violent behaviour. They had a bad history of life. It means that their aggressiveness sprang from family heredity or genetic factor. It can be also that they were a victim physical abuse or a victim of bullying. They have a lack of attention or respect for the human rights to life of others. In other side, they have low self worth.

The cause of violence toward children comes also from surroundings. In this case, the perpetrators engage in the harmful behaviour and violent action because of the influence of their peers who are used to do violence in life. They have experienced abuse or neglect because of witnessing the harmful sorroundings nearby.

Moreover, violence toward children comes from the discriminative treatment toward male and female child. Generally, there is discriminative view on man and women, by which man or male stays at first rank, while woman or female stays at second rank. Very often woman is viewed as someone who has no right and authoriry like man. Because of this view, children of different sex or gender fight each other in the family and society.

Sometimes people or neighbours gaze the action of violence toward children as the internal problem of family and not as the problem of society. That is why society or neighbours cannot take part fully in looking for solution to overcome the violence. They see and consider that violence toward children is not their case or their responsibility. They are apathetic to the problem of violence which is taking place at the other families.

The last but not the least is the opportunity for access to weapons and the use of drugs and/or alcohol. When perpetrators have weapons or knives or other sharp objects at hand, they are very easy to do violence to the others as well as to children. They are facilitated to frighten the children they like. Also when they are rich people, they can attempt the children to do what they want such as sexual abuse or some other kinds of pleasure. The same event occurs when the perpetrators use the drugs or alcohol. They cannot control themselves on doing violence toward others, particularly to children.

3. IMPACT OF VIOLENCE ON CHILDREN

Violence toward children has lifelong impacts on health and well-being of children, families, communities and nations. Violence toward children can bring some bad impacts on the life of people, especially the life of children themselves.

Firstly, violence toward children can result in death. Herein, youth violence kills. Homicide, which often involves weapons such as knives and firearms, is among the top 3rd cause of death in adolescents, with boys comprising over 80% of victims and perpetrators. Each day, about 14 young people are victims of homicide.[13]

Secondly, violence toward children can lead to severe injuries. Fore every homicide, there are hundreds of predominantly male victims of youth violence who sustain injuries because of physical fighting and assault. In fact, about 1.300 young people are treated in emergency departments for nonfatal assault related to injures.

Thirdly, violence toward children can impair brain and nervous system development. Exposure to violence at an early age can impair brain development and damage other parts of the nervous system as well as the endocrine, circulatory, musculoskeletal, reproductive, respiratory and immune systems, with lifelong consequences. As such, violence toward can negatively affect cognitive development and results in educational and vocational under-achievement.

Fourthly, violence toward children can result in negative coping and health risk behaviours. Children exposed to violence and other adversities are substantially more likely to smoke, misuse alcohol and drugs, and engage in high risk sexual behaviour. They also have higher rates of anxiety, depression, other mental health problems and suicide. They could also end up with lower empathy and compassion for others. Exposure to violence could harm the emotional and mental development of young children and adolescents.[14]

Fifthly, violence toward children can lead to unintended pregnancies, induced abortions, gynaecological problems and sexually transmitted infections, including HIV. In fact, violence occurred in the family has been found to be associated with adverse birth outcomes. The effect of being born with low birth weight and preterm can result in immediate and long term health and developmental problems. Physical, mental health problems and negative health behaviours are some of maternal factors that are

[13] Cf. CDC Centers for Disease Control and Prevention, *Violence Prevention*, from Internet: https://www.cdc. gov>fastfact>, Bekasi, December 14, 2019.

[14] Cf. National Research Foundation, *effects of Violence on children*, from internet: https://www.nrf.ac.za>content>, Bekasi, December 16, 2019.

associated with intimate partner violence during pregnancy.[15]

Sixthly, violence toward children can contribute to a wide range of non-communicable diseases as children grow older. The increased risk for cardiovascular disease, cancer, diabetes and other health conditions is largely due to the negative coping and health risk behaviours associated with violence.

Seventhly, violence toward children can impact opportunities and future generations. Children exposed to violence and other adversities are more likely to drop out of school, have difficulty finding and keeping a job, and are at heightened risk for later victimization and/or perpetration of interpersonal and self-directed violence, by which violence toward children can affect the next generation.[16]

4. SOLUTION TO OVERCOME VIOLENCE TOWARD CHILDREN

In this point, we want to look for and simultaneously to discuss the way out or solution for overcoming the violence toward children. There are two main ideas to analyse this topic, namely the strategy to prevent violence toward children and some concret ways to stop it.

4a. THE STRATEGY OF PREVENTION OF VIOLENCE TOWARD CHILDREN

Violence toward children can be prevented. In order to prevent and to respond to violence toward children. It needs the efforts that systematically address risk and protective factors at all four interrelated levels of risk, namely individual, relationship, community and society. Under the leadership of WHO, there are in general seven strategies for ending violence toward children.

First strategy is implementation and enforcement of laws. The Indonesian government has made addressing violence against children a priority in its policy agenda. It is also committed to making significant progress in protecting Indonesian children from all forms of violence. As one of its key measures, Indonesia has adopted the National Strategy End of Violence against Children and Child Protection National Action Program which gives a comprehensive framework to prevent and respond violent incidents.[17]

There are two examples in this strategy, that is banning violent discipline and restricting access to alcohol and firearms. To practice this strategy, article (2) paragraph 76J of Law No 35 of the Republic of Indonesia concerning Child Protection declares that: "every person is prohibited expressly to locate, to permit, to involve, to enjoin child in the misuse, production and distribution of alcohol and other addictive substances."[18]

Second strategy is norms and values change such as altering norms that condone the sesual abuse of girls or aggressive behaviour among boys. Juridically, according to Indonesian Law No 35 concerning Child Protection in paragraph 80, perpetrators riceive punishment following the kind of crime or violence they do to children. Generally they are put into prison for five years or 15 years and also pay money to the government about one hundred million rupias or 3 milliard rupias.[19]

In recent years, the government of Indonesia has made significant steps to strengthen children's protection from harm and abuse with a focus on building knowledge on the extent of violence; strengthen the legal and regulatory framework and its enforcement; and improving the eguality of the services provided, especially to the victims of violence.[20] In this case, the national strategy of Indonesia involved consultations with both government and civil society, including all relevant national ministries, local government agencies, various national and sub-national non-government organizations, the private sector, the media, religious and community groups. It also engaged children by conducting a combination of face-to-fae and online consultations with children.[21]

Third strategy is safe environments. The safe environments can be done by identifying neighbourhood 'hot spots' for violence and then addressing the local causes through problem oriented policing and other interventions.

Herein, we identify the conditions that lead to violence and then change them. These measures address people who do not yet show signs of violent behaviour and address any risk factors in their lives which make them more likely to engage in violent behaviour at a later stage.

This stage of prevention aims to prevent the occurrence of violence by addressing the root cases. Examples include public information and awareness-raising campaigns, educational programmes, early-

[15] Tariku Laelago cs, *Effect of Intimate Partner Violence On Birth Outcomes*, from Internet: https://www.ncbi.nlm.nih.gov>, Bekasi, December 16, 2019.

[16] Cf. World Health Organization, *Violence Against Children*, from Internet: https://www.who.int>, Bekasi, December 9, 2019.

[17] Cf. Elly Burhaini Faizal, *The Emergency of Sexual Violence Against Children in Indonesia*, from Internet: www.thejakartapost.com>, Bekasi, January 9, 2020

[18] Cf. Badan Kerjasama Bina Lanjut Imam Indonesia (BKBLII), *Pelayanan Profesional Gereja Katolik Indonesia Dan Penyalahgunaan Wewenang Jabatan*, Penerbit Kanisius, Yogyakarta, 2018, p. 39.

[19] Cf. Tribun Lampung.co.id, *Ini Hukuman Bagi Pelaku Kekerasan Terhadap Anak*, from Internet: https://lampung.tribunnews.com>, Bekasi, December 12, 2019.

[20] Cf. Unicef Indonesia: *Child Protection Fact Sheet – Violence against Childre*n, from internet: https: www.medbox.org>preview, Bekasi, January 9, 2020.

[21] Cf. Pribudiarta Nur Sitepu, *End Violence Against Children*, from Internet: https://www.end-violence.org>indonesia, Bekasi, January 9, 2020.

childhood interventions and establishment of policy frameworks.[22]

Fourth strategy is parental and caregiver support of family. The example of this strategy is providing parent training to young first time parents.

In this strategy, we have to make sure children that they have caring adults in their lives. Research has shown that kids need a minimum of five caring adults to help them grow up happy and healthy. It isn't just parents who have an impact on their kids. Grandparents, aunts, uncles, teachers, counsellors, and family friends can serve as positive role models to our kids. Parents can hurt themselves and their children by creating an isolated environment around them. Encourage kind, compassionate, and ethical people to be involved in your child's lives.

Fifth strategy is income and economic strengthening such as microfinance and gender equity training. In this strategy we have to give prioritisation of protecting children through education, child survival, nutrition, water and sanitation at a way of all extremely important.[23] In fact, a school curriculum that neglects moral and character building has been singled out as one of the cause of crimes. So is very important for government to start developing an education system that builds the good character of students, beginning from the children.[24]

Sixth strategy is response services provision. The example of this strategy is ensuring that children who are exposed to violence can access effective emergency care and receive appropriate psychosocial support.

In this strategy, we have to help children to develop a conscience by (a) being attuned to them, (b) not being violent toward or in front of them, (c) providing a secure, safe base for them, and (d) by repairing when we slip up. We all make mistakes as parents, but openly admitting and apologizing for these mistakes shows our kids that we are human, that they are not to blame, and that they too should demonstrate care and concern.[25]

Seventh strategy is education and skills for children who suffer violent and harmful situation. This strategy can be realized by ensuring that children attend school and providing life and social skills training.[26] In addition, violence involving adolescents in this strategy can be prevented by preschool enrichment programmes to give young children an educational head start; life skills training; assisting high-risk adolescents to complete schooling; reducing alcohol availability through enactment and enforcement of liquor licensing laws, taxation and pricing, and restricting access to firearms.[27] Besides, stricter alcohol rules and tougher sanctions for sex crime perpetrators might be crucial in preventing sexual violence against children.[28]

4b. SOME WAYS TO STOP VIOLENCE TOWARD CHILDREN

There are some things that kids or children can do to stop violence.

Firstly, children must learn and be teached to settle arguments with words, not fists or weapon or other sharp things. They must learn to respect, to hear others and engage in dialogue with others. But they must not stand around and form an audience in the place where violence and harmful events take place.

Secondly, children must learn safe routes for walking in the neighbourhood, and know good places to seek help. Trust your feelings, and if there is a sense of danger, get away fast. It is very safe if children must not let be alone at home and not let them walk alone in the neighbourhood. The parents or the other trusted persons must accompany children when they are going out to another place or village. Children never go anywhere with someone they and their parents do not know and trust. It must be remembered here that Indonesia topped the list with 84 percents of school-aged children reported varying degrees of abuses, which includes gender-based violence, physical and sexual abuse, emotional violence, and the threat of violence in school, on the way to school and at home.[29]

Thirdly, people, especially children as victim of violence must report any crimes or suspicious actions to the police, school authorities, and parents. They must be willing and brave to testify if needed. By principle, if you think or know a child or whoever is being abused or is at risk of harm, there is a lot you can do to help them. You should encourage them to talk about it, either to you or to police or to other authorities. It may happen that you yourself are being abused emotionally, physically or sexually. In case that you are the victim, it is important that you must tell someone. There is no shame in asking for help.[30]

[22] Cf. Saferspaces, *How Can We Prevent Violence?*, from Internet: https://www.saferspaces.org.za>, Bekasi, December 12, 2019.
[23] Cf. Alex Whiting, *How Do We Stop Violence Against Children?*, from Internet: https://www.weforum.org>2015/09, Bekasi, December 13, 2019.
[24] Cf. Elly Burhaini Faizal, Op.Cit.
[25] Cf Lisa Firestone Ph.D, *7 Ways to Stop Violence at Every Age*, from Internet: https://www.psychologytoday.com>, Bekasi, December 12, 2019.
[26] Cf. World Health Organization, *Violence Against Children*, from Internet: https://www.who.int>, Bekasi, December 10, 2019
[27] Cf. Alexander Butchart, *Preventing Violence Against Children: What Approaches Work?*, from Internet: https://www.unicef.irc.org>article>, Bekasi, December 13, 2019.
[28] Cf. Elly Burhaini Faizal, Op.Cit.
[29] Cf. TEMPO.CO, *ICRW: 84% of School-Aged Indonesian Children Experiences Violence*, from Internet: https://en.tempo.co>read>icrw-84, Bekasi, January 9, 2020.
[30] Cf. Department of Communities and Justice, *What to do when there is violence or abuse*, from Internet: https://www.facs.nsw.gov.au>abuse, Bekasi, December 16, 2019.

Fourthly, when children stay at house, they must not open the door to anyone they or their parents do not know or trust. It is better not to order children to meet a stranger guest who came to the door.

Fifthly, if someone tries to abuse children, tell children to say no and get away, and tell a trusted adulth. It is not the victim's fault, if the children tell the adulth people about someone who tries to abuse them. The right to talk or to speak does not belong only to the older people, but also to children. Like every person, also every child has the same right of living, of growing and feeling[31], including the right of speaking and telling to whoever the harmful experience they have in their lives.

Sixthly, children must not use alcohol and other drugs, and stay away from places and people associated with them. Parents or other authorities have to prohibit the use of alcohol and other drugs and everythings provoked to violence or harm.

Seventhly, the childrens need to stick and join with friends who are also against violence and drugs, and stay away from known trouble spots. Children have to associate with good friends for working or playing togother for the development of their talents and creativities. Through this opportunity, they can build up their good characters and behabiours. In this way, children can learn to get involved to make school safer and better such as having poster contests against violence, holding anti-drug rallies, counselling peers, and settling disputes peacefully. If there is no program, people must help them to start one of this program!

Eightly, people or parents must help younger children learn to avoid being crime victims. They must set a good example and volunteer to help with community efforts to stop crime.[32]

In this way, as parents or takeholders we have to teach our children how to calm down when they are upset. The best way to do this is to lead by example. It is important to demonstrate our own resilience, problem solving and coping strategies in front of our children. This does not mean acting tough or hiding your feelings. In opposite, it means demonstrating healthy techniques for handling conflict and emotion in our own life and encouraging them to do the same.

CONCLUSION

To conclude this study, it is important to say and to insist that violence toward children is a serious problem, even a crime to oppose humanity. That is why violence toward children must be stopped. Every person in the family and society, in nation and state, also in the world and all its institutions must take part and responsibility in all efforts to end it. All people and all institutions of the nation and state and also of the world must build coordination and partnership not only at national level but also at international level.

In fact, coordination and partnership offer the opportunity for everyone who believes in ending violence against children to come together, combine their efforts and maximize their impact. Governments, international organizations, NGOs and civil society, academia, the privat sector and children themselves can all find a place in this collective endeavour. Coordination and partnership will fully involve all partners in line with the principles of inclusiveness and transparency. Each of these stakeholders can make a valuable contribution and this will be reflected in the partnership's governance arrangements.

[31] Cf.. Yohana Yembise, Menteri Pemberdayaan Prempuan dan Perlindungan Anak (PPPA), *Ini Dia Suara Anak Indonesia pada Puncak HAN 2019 di Makasar*, Selasa (23//7/2019), from Internet: www.galamedianews.com>, Bekasi, December 16, 2019.

[32] Cf. Los Angeles Police Department, *Ten Things Kid Can Do To Stop Violence*, from Internet: www.lapdonline.org>content_basic...>, Bekasi, December 11, 2019.

REFERENCES

Book:

Badan Kerjasama Bina Lanjut Imam Indonesia (BKBLII), *Pelayanan Profesional Gereja Katolik Indonesia Dan Penyalahgunaan Wewenang Jabatan*, Penerbit Kanisius, Yogyakarta, 2018.

Legislation:

Undang-Undang Dasar Negara Repbulik Indonesia Tahun 1945

Undang-Undang Negara Republik Indonesia Nomor 23 Tahun 2002 tentang Perlindungan Anak sebagaimana telah diubah dengan Undang-Undang Nomor 35 Tahun 2014 tentang Perubahan atas Undang-Undang Nomor 23 Tahun 2002 tentang Perlindungan Anak.

International Scientific Seminar:

Adolf Setiabudi Soeprajogo, *Human Rights Perspective in Legal Protection of Children as Victims of Sexual Violence*, in *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.

Darryrahman Diyan Baskoro & Hadi Purnomo Sientje Kurniawti, *The Right To Education As Human Rights For Children*, in 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.

Internet:

Alexander Butchart, *Preventing Violence Against Children: What Approaches Work?*, retrieved from Internet: https://www.unicef.irc.org> article>, at Bekasi, on December 13, 2019.

Alex Whiting, *How Do We Stop Violence Against Children?*, retrieved from Internet: https://www.weforum.org>2015/09, at Bekasi, on December 13, 2019.

Andy Lesmana, *Definisi Anak*, retrieved from Internet: https://id.m.wikipedia.org>, at Bekasi, on November 28, 2019.

Anggunjgoen, *Pemicu Kekerasan Yang Terjadi Di dalam Masyarakat*, retrieved from Internet: https://goenable.wordpress.com>, at Bekasi, on December 8, 2019.

CDC Centers for Disease Control and Prevention, *Violence Prevention*, retrievd from Internet: https://www.cdc.gov>fastfact>, at Bekasi, on December 14, 2019.

Department of Communities and Justice, *What to do when there is violence or abuse*, retrieved from Internet: https://www.facs.nsw. gov.au>abuse, at Bekasi, on December 16, 2019.

Elly Burhaini Faizal, *The Emergency of Sexual Violence Against Children in Indonesia*, retrieved from Internet: www.thejakartapost.com>, at Bekasi, on January 9, 2020.

Lisa Firestone Ph.D, *7 Ways to Stop Violence at Every Age*, retrieved from Internet: https://www.psychologytoday.com>, at Bekasi, on December 12, 2019.

Los Angeles Police Department, *Ten Things Kid Can Do To Stop Violence*, retrieved from Internet: www.lapdonline.org>content_basic...>, at Bekasi, on December 11, 2019.

National Research Foundation, *effects of Violence on children*, retrieved from internet: https://www.nrf.ac.za>content>, at Bekasi, on December 16, 2019.

Pribudiarta Nur Sitepu, *End Violence Against Children*, retrievd from Internet: https://www.end-violence.org>indonesia, at Bekasi, on January 9, 2020.

Saferspaces, *How Can We Prevent Violence?*, retrievd from Internet: https://www.saferspaces.org.za>, at Bekasi, on December 12, 2019.

SOS Children's Villages, *Violence Against Children: A Global problem*, retrieved from Internet: https://www.sos.childrenvillages.org>, at Bekasi, on December 7, 2019.

Tariku Laelago cs, *Effect of Intimate Partner Violence On Birth Outcomes*, retrieved from Internet: https://www.ncbi.nlm.nih.gov>, at Bekasi, on December 16, 2019.

TEMPO.CO, *ICRW: 84% of School-Aged Indonesian Children Experiences Violence*, retrieved from Internet: https://en.tempo.co>read>icrw-84, at Bekasi, on January 9, 2020.

Tribun Lampung.co.id, *Ini Hukuman Bagi Pelaku Kekerasan Terhadap Anak*, retrieved from Internet: https://lampung.tribunnews.com>, at Bekasi, on December 12, 2019.

UNICEF Indonesia, *Child Protection*, retrieved from Internet: https://www.unicef.org>, at Bekasi, on December 7, 2029.

Unicef Indonesia: *Child Protection Fact Sheet – Violence against Children*, retrieved from internet: https: www.medbox.org>preview, at Bekasi, on January 9, 2020

RESTORATIVE JUSTICE IN NEGLIGENCE OF MEDICAL AS AN ALTERNATIVE OF JUSTICE SYSTEM IN INDONESIA

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ABSTRACT

Medical practice is not a profession that could be performed by anyone. It is only allowed to be performed by competent medical professionals who meet certain standards. According to the law of medical practice, if medical professional is suspected to have performed medical malpractice, it has to be settled first with **mediation**. Medical malpractice is a medical risk crime. Therefore, this problem needs an alternative way to be settled with the approach of restorative justice, an approach that focus on the restoration of justice and balance between doctor and patient involved in a case which prioritizes local cultural values based on deliberation. Restorative justice in medicine can be implemented to return conflict to the individuals affected by the case, such as patient, doctor, family, and/or society. Law enforcement with restorative justice is expected to settle the loss and suffer of the patient and family, as well as doctor's burden of guilt, as forgiveness is given by the patient and family.

Keywords: Medical Malpractice, Criminal Justice System, Renewal of Criminal System, Restorative Justice

1. Introduction

Health services basically aim to carry out promotive, preventive (preventive), treatment (curative) and recovery (rehabilitation) efforts, including medical services that are based on an individual relationship between doctors and patients who need healing for their illnesses. Doctors are parties who have expertise in the medical or medical field who are considered to have the ability to carry out medical actions. While the patient is a sick person who is unfamiliar with his illness and entrusts himself to be treated and restored physically by a doctor. Therefore, the doctor is obliged to provide the best medical services for patients. In providing these services sometimes arise unintended consequences although doctors have tried their best to use medical science and technology as optimum as possible and follow the professional standards and operational procedure standards.[1]

However, if a doctor or other health care provider commits negligence (culpa) which is a form of error that does not have an intentional element, but also is not something that happens by accident, usually the doctor will be sued by the patient. Therefore, in this case there is no ill will from the doctor as a professional who acts according to his competence. Sometimes negligence in carrying out medical actions can cause dissatisfaction with doctors in carrying out treatment efforts according to the medical profession, one of which can cause harm or complications to patients, which is medical risk beyond the doctor's control.

Medical practice is not a job that can be done by anyone, but can only be done by a group of medical professionals who are competent and meet certain standards. Theoretically there is a social contract between the professional community and the general public. This contract gives the right to the professional community to regulate autonomy and standards of profession. Instead the patient / general public is entitled to get services according to the standards created by the professional community. Thus, the doctor has responsibility for his profession in terms of medical services to his patients. Doctors as a profession have a duty to strive for patient recovery.[2]

In the provisions of Article 29 of Law Number 36 in 2009 regarding health practice, if health personnel is suspected of negligence in carrying out their profession, it must be

Mediation is an effort to resolve conflicts by involving a neutral third party, which does not have the authority to make decisions that help the parties involved in the case to reach a solution accepted by both parties.

However, if the community finds negligence committed by a doctor, it will usually be directly reported to the police, even though it does not violate the law based on Law No. 29 of 2004 regarding Medical Practice, article 66.

The criminal punishment system in the Criminal Law basically maintains a retributive paradigm, which provides appropriate retaliation for crimes committed by perpetrators and is still focused on prosecuting perpetrators of crimes, not paying attention to recovery of damages and the suffering of the victims.

Retributive implementation has not been able to recover the losses and suffering experienced by victims. Even though the perpetrator was found guilty and sentenced, the condition of the victim could not return to normal. With this weakness, the idea of a punishment system oriented to victim recovery and victim suffering arises, which is called restorative justice, because victims are the most disadvantaged parties because of the crime.

By using the normative juridical method, it can be concluded that the resolution of conflicts with restorative justice can accommodate the interests of the parties, including victims because victims are involved in determining sanctions for perpetrators.

Restorative justice in the medical world can be implemented especially in returning conflict to the most affected parties, namely patients, doctors, and families / communities. With law enforcement through restorative justice it is hoped that the losses and suffering suffered by patients and their families can be resolved and the burden of doctor's guilt can be reduced because they have received forgiveness from patients and their families.

The practice of criminal law enforcement creates new breakthroughs as legal reform is known as Restorative Justice. Restorative Justice or Restorative Justice implies a restoration of relations and the admittance of wrongdoing by the perpetrators of the crime against the victim of the crime (his family) in a peace effort outside the court with the intent and purpose so that legal problems arising from the occurrence of the crime can be resolved properly for the sake of reaching agreement between the parties. [3]

The restorative justice approach needs to be reconstructed its norms in statutory provisions, so that it can be used as a legal basis for law enforcement officials in solving cases of medical negligence, in order to fulfill a sense of fairness, benefit and legal certainty.

Actually, medical negligence is a medical risk crime, it is necessary to settle alternative approach to medical negligence criminal cases with a restorative justice approach, which emphasizes the conditions for creating justice and balance (recovery) between involved doctors and patients through mediation that prioritizes the values of local wisdom based on deliberation. Resolution criteria for medical negligence cases through restorative justice are settlement of cases outside the court of law through apologies of doctors and patients forgiving them, then an agreement arises between the doctor and the patient and his family followed by the doctor's responsibility so that the interests/losses of the patient can be restored.

This restorative justice model should have been endeavored from the beginning before the investigation process with National Police as its mediator, which remained within the scope of the integrated criminal justice system. This approach could recover the loss suffered by the patient, but also can eliminate the shame and guilt from the doctor due to medical actions beyond his ability because this is a medical risk that must be accepted by the patient.

Many settlements in medical negligence in medical practice do not fulfill a sense of justice, especially for doctors who result in doctors being included in the criminal sphere and convicted until finally imprisoned.

The purpose of this study is to find the root of legal problems in the regulation of restorative justice law in the criminal justice system in Indonesia. This study uses normative juridical research methods. This normative legal research is conducted in a descriptive qualitative manner, that is, the material or legal materials are collected, sorted for further study and their contents are analyzed, so that the synchronization level, the appropriateness of norms, and the submission of new normative ideas are known.

2 .Problem Formulation

Based on the description that has been submitted in writing this research paper will discuss the following matters:

a. Can restorative justice be applied as an alternative in the criminal justice system in Indonesia?
b. How is the application of restorative justice (restorative justice) to medical negligence committed by doctors?

3. Research Objectives

a. To provide an alternative to the settlement of medical negligence in the justice system in Indonesia that adheres to local wisdom.

b. To illustrate that restorative justice can be applied based on effectiveness and efficiency in the resolution of medical negligence cases in Indonesia.

4. Discussion

Medical Negligence

Disputes between doctors and patients are disputes arising from the relationship between the two legal subjects in making efforts to heal. Disputes arise due to patient dissatisfaction which is generally caused by allegations of negligence committed by doctors. Such negligence often occurs due to lack of information that should be a right and obligation for both side. Negligence of the doctor can result in losses suffered by patients in the form of injury / disability even to death, but to prove the negligence is not easy because patients with their commonness often do not understand the problems that occur.

There are two types of patient doctor relationships in healing efforts, namely contractual relationships (therapeutic transactions) and relationships due to the Law. In a contractual relationship, the doctor and the patient are considered to have agreed to an agreement, in which the doctor has initiated a medical treatment to the patient. Whereas in relation to the Law, it arises because of the obligations imposed on doctors. In the doctor-patient relationship the most important thing is information, because information from both parties is the basis for implementing medical treatment. Both doctor-patient relationships bear responsibility from various aspects, namely from Civil Law, Criminal Law, Administrative Law, Ethics and Professional Discipline.

Individual health care is a service in the field of medicine that involves doctors and patients. Like the relationship between people, then in the relationship of medical services there are always advantages and disadvantages arises during the implementation of medical services. Moreover, the relationship between patients and doctors always has something to do with the importance of healing the disease even to save human lives, so that the relationship is very unique because there is a dependency of patients in this case is giving up confidence in the expertise of doctors in healing or rescue efforts.[4]

Transaction is a reciprocal relationship that is produced through communication, whereas therapeutic is defined as something that contains an element or value of treatment. In juridical terms, therapeutic transactions are defined as the legal relationship between doctors and patients in a professional medical service based on competencies that are in accordance with certain expertise and skills in the medical field. Because medical practice is a service that provides assistance or assistance based on patient confidence in doctors and is not a business relationship that is oriented to the full advantage.[5]

The achievement of a therapeutic contract is not the result achieved (*resultaats verbintennis*), but rather a genuine effort (*inspanings verbintennis*). The relationship between this contract and the medical actions included in it are already in the legal field, so they must be maintained through legislation and refer to certain standards.[6]

If something unexpected happens the implementation of medical services, which is a loss that must be suffered by the patient, is always the doctor must be responsible? Often the patient always believes that the loss suffered by the patient is caused by an error made by the doctor, even though to prove the loss was caused by a doctor's mistake is not an easy job. Many factors cause these losses / failures in medical practice. As for doctors, claiming losses from patients is a very avoidable thing even to be feared because it involves the good name and credibility as the bearer of a profession that has been considered noble because it deals with saving lives. That many lawsuits are feared to cause doctors to perform overstandard or substandard to avoid the risk of demands which will ultimately harm patients themselves as users of doctor's services.[7]

In Law No. 29 of 2004 concerning Medical Practice implicitly stated that medical disputes are disputes that occur because the patient's interests are harmed by the actions of a doctor or dentist who is carrying out medical practice.

Doctors and patients are the two legal subjects that are related in medical law. Both form medical and legal relationships. The medical relationship between doctor and patient is a relationship whose object is healthcare in general and health services in particular.

In carrying out the relationship between doctor and patient, the implementation of the relationship between the two is always regulated by certain regulations so that harmony occurs in its implementation. As is known the relationship without rules will cause disharmony and confusion.[8]

Juridically, it is often disputed whether unpleasant medical actions can be included in the notion of persecution which is a concept in criminal law. However, the fulfillment of the three conditions

above becomes the basis for medical actions that are in accordance with the law.

Negligence includes two things: doing something that should not be done or not doing something that should be done. However, an action can be categorized as criminal malpractice if it meets the formulation of criminal offense, that is, the act must be a despicable act with an incorrect mental attitude and carried out with intention, carelessness or negligence.[8]

There is a crucial difference between ordinary crimes and medical crimes, in ordinary crimes the main concern is "consequences", whereas in medical crimes is the "cause". Although fatal, if there is no element of neglect or error, then the doctor cannot be blamed.

Different perception of people who use medical services regarding the results of medical services is because they do not understand that the engagement between doctors and patients is verbintennis inspannings which is an obligation to try with all efforts. While they consider the final results to be the most important, if the final results do not match their expectations, they will sue the doctor by calling it malpractice.

Criminal Justice System in Indonesia

When we discuss the issue of justice bureaucracy or the law enforcement subsystem, then we are talking about formal discussion, which is related to the use of state facilities or institutions in an effort to tackle crimes commonly known as the Criminal Justice System.

Given the variety of functions carried out by each institution, it is not easy for the Criminal Justice System to talk about the Integrated Criminal Justice System. This is because the subsystems are under their respective parent organizations, the investigation subsystems such as the police and prosecution subsystems are under the executive structure, while the courts are under the judiciary, but the implementation of the decision (criminal execution) subsystem is under the executive body again so that the integrated criminal doctrine justice system is only more symbolic discourse than a substantial problem. In reality these institutions are pursuing their respective goals in accordance with their own institutional targets, so that the desired integrated principle has not been realized to date.

Criminal Justice System is defined as a system in the society to tackle crime problems. Tackling means the effort to control crime is within the limits of community tolerance. This system is considered successful if most of the reports and complaints from people who are victims of crime can be "resolved" by submitting the perpetrators of crimes to a court of law and found guilty and convicted.

Remington and Ohlin define the Criminal Justice System as a system approach to the criminal justice administration mechanism which is the result of interactions between statutory regulations, administrative practices and social attitudes or behavior. Understanding the system itself contains the implications of an interaction process that is prepared rationally and efficiently to provide certain results with all its limitations.

The ultimate goal of the Criminal Justice System in the long term, namely to realize the welfare of society which is the goal of social policy, in the short term that is to reduce the occurrence of crime and recidivism, if this goal is not achieved then it can be ensured that the system does not run properly.

In order to increase effectiveness, all system components must work integrally in the sense that a working subsystem must pay attention to the other subsystems as a whole. Or in other words, the system will not work systematically if the relationship between police and the prosecutor's office, between the police and the court, between the prosecutor's office and the penitentiary, the penitentiary with the court itself. The absence of functional relationships between these subsystems will make vulnerability in the system, resulting in fragmentation, inefficiency and ineffectiveness.

Fragmentation and ineffectiveness can be simply measured through a non-reduced crime rate, and also through indicators that lawbreakers commit crime repetition. A function of a subsystem if it experiences fragmentation from other subsystems can cause fragmentation which reduces the effectiveness of the system. Effectiveness and inefficiency are measured by the success of social approaches to crime in general.

Regarding punishment, according to Hulsman, referring to the modern movement, criminal justice reform remains oriented towards realizing modernization in criminal justice and emphasizing social integration. The concept offered by Hulsman is a re-socialization that must be widely understood both as a traditional concept which is an act of alienating perpetrators, but also involves actions taken by the environment in which the individual is concerned. The re-socialization process is a form of

acceptance and participation carried out by the perpetrators and the community.

The reasons underlying new developments in re-socialization are to be considered in the context of the new concept of social reaction. The ultimate goal of the re-socialization concept offered by Hulsman is to avoid punishment as a last resort in the form of deprivation of liberty, therefore the terminology used is "alternative" and "substitute for prison", with fines and restitution highlighted. Thus, the judge can choose whether to use sanctions that were previously seen as accessories or complements and the association can even provide probation in certain cases or guarantees in the form of dispensations or reduced sentences.

Actually medical negligence is negligence committed by medical personnel (doctors / dentists) and is a medical crime according to criminal law, which in reality is not easy to prove because medical personnel generally provide medical services in earnest and to maintain the health or restore the health of the patient, The medical personnel is no obliged to guarantee the recovery of the patient health. In the event that a patient receives medical services carried out by the team of medical personnel and the patient receives medical services carried out by a team of medical personnel and the patient suffers an injury of death, then the only criminal and civil liahle is the medical team whose action directly results in the patient experiencing injury or death.

Medical personnel cannot be held liable if the patient suffers an injury or death due to negligence of health workers and or due to negligence of health cara facilities (Hospital) and such negligence is the responsibility of the health workers and health care facilites concerned. Therefore there must be a separation of responsibilities of medical personnel (doctor/dentists), other health workers and or health care facilities.

Reform Of The Criminal Law System

Effort to reform the criminal law is something that must be considered from now on, especially in health law related to doctor and other health professionals As stated that politically and culturally, the implementation of the Indonesian criminal code (KUHP) in Indonesian actually cannot be accounted for anymore. Although the criminal code has made various changes and adjusments, it does not make the effort referred to as an effort to reform the criminal law in the real sense and has a national character. This assertion is due to changes in the criminal code as a product of the nation it self, and the reform of the criminal law must touch philosophical aspects, namely changes or orientation to the priciples to the level of the underlying values. The urgency of changing the criminal code is based on practical and sociological political considerations. Political reasons, namely as and independent country, it is natural that the republic of Indonesia has a national Penal Code. The task of legislators to nationalize all legislation from the colonial era and these effort must be based on Pancasila as the source of all sources of law. The legal breakthrough in question was indeed carried out by a judge in several decisions, but unfortunately the action was not continued any more. The reason is simple, law enforcers are not entirely willing to take the risk of making legal breakthroughs by creating new norms by imposing sanctions on unlawful acts.

In Achieving the goal of creating order (order) the state acts within the limits prescribed by law. Like wise when they want to impose punishement. The use of santions for deprivation of liberty Is carried out selevtively and limitatively. Selectively means that the judge must be careful. it is also a picture of the penalties, reflecting past barbarity. Criminal Law is seen as a means of confrontation between fellow human beings.[9]

One possibility is to implement a legal breakthrough by adopting the concept of restorative justice which began to be developed in the international order. The use of legal sanctions especially deprivation of liberty must be minimized in accordance with the principle of *ultimum remidium*. Therefore, judges are given the discretion to choose or determine criminal sanctions that are appropriate to be imposed on the perpetrators by considering aspects of the victims as well as the social impacts that may result.[10]

Restorative Justice as an Alternative

Restorative justice is a form of justice that is centered on the needs of victims, perpetrators of crime, and the community. Unlike retributive justice which emphasizes punishment for perpetrators of crime, restorative justice is concerned with the recovery of victims, perpetrators of crime, and society. This is because in every crime, the victim first suffers as a result of the crime. Furthermore, the perpetrators of crime as those who are responsible for the actions they have committed are demanded to be responsible for their actions. With responsibility, his dignity is restored. The community must be restored,

because crime also damages the harmony of life in society.[11]

The concept or idea of restorative justice was initiated by the United Nations in the tenth congress in Vienna, Austria in 2000 specifically to discuss the issue of restorative justice. According to the United Nations Restorative Juctice is an alternative model in the Criminal Justice System which is defined as a unique response to crime, which must be distinguished both from the point of rehabilitative and retributive theory.

Restorative justice is a process whereby all parties, taking into account their involvement in a specific violation, jointly resolve collectively to deal with the consequences of the violation and its future implications.[12]

The method used in the solution emphasizes reparation and prevention rather than putting a sentence on the perpetrator. Thus, restorative justice is another form of information settlement or semi-formal conflict resolution as a reflection of current trends related to individualization and reduction of state functions.[13]

This is closely related to other initiatives to mobilize local communities in solving crime problems, such as strengthening community policing and communities that rely on crime prevention.

According to the United Nations the concept of Restorative Justice is claimed as a model that offers greater oversight of the decision retrieval mechanism of traditional procedures even where their participation is fully supportive while the interests of the accused can be better served because it is less favorable for recidivism and preventive action in general.

The application of the concept of restorative justice can be used for more effective crimes committed by perpetrators of crimes and other minor crimes. In addition, the use of this concept is also intended specifically as a means to reduce the imprisonment population which is increasingly showing the capacity of prison inmates.

So as explained earlier, the focus of restorative justice is on the recovery and reconciliation of victims, perpetrators of crime, and society. To achieve this goal, the reconciliation process undertaken by restorative justice involves all parties, namely victims, victims' families, communities, and perpetrators of crime.

Unlike the judicial process which only involves officials in the judiciary such as judges and prosecutors as well as perpetrators of crimes and defenders, restorative justice involves all parties involved in criminal acts, namely victims, perpetrators, and the public.

Restorative justice is not concerned with the punishment that must be carried out by the perpetrators of crime, but the compensation that must be paid to recover the damage and loss suffered by the victim and the community. In determining the amount of compensation, joint discussions were also conducted involving victims and the community. No matter how much the punishment carried out by the perpetrators of crime will not heal the wounds of victims and damage to society. But compensation that is jointly negotiated in deliberations involving perpetrators, victims and the community will restore and reconcile all parties.[14]

Full trust in medical personnel for their ability to provide medical services to patients based on their knowledge, expertise, abilities, and medical skills is a logical consequence in providing health services to patients, however it can happen otherwise that the actions given by doctors as medical personnel are acceptable different by patients.

For example, doctor's actions are planned and carried out to provide healing to patients, sometimes the opposite happens which harms the patient, such as complications or can cause disability and death. This usually causes conflicts and disputes between patients and doctors.

With the concept of restorative justice (restorative justice) in the form of peace, agreement will be reached between doctors, patients, and the community, and this event does not need to be continued to law enforcement agencies such as the police, public prosecutors, or judges in court. To facilitate the creation of a legally binding peace process it should be advisable to create a special institution formed outside the government to bring peace to the parties to the dispute due to negligence by the Medical Personnel. This institution may be under the auspices of the general court or separate from the judiciary to work to make peace so that disputes between doctor-patient can be resolved peacefully, quickly, easily and beneficially according to the concept of restorative justice without going through general justice as has been done so far.

Institutions formed to carry out restorative justice in the process can request expert witnesses' opinions from other medical personnel in accordance with the interests of peace.

In conclusion, there are five pillars of restorative justice that form the basis of breakthroughs in criminal justice:

a. Restorative justice is the restoration of relations between perpetrators, victims and the community by holding meetings to obtain mutual agreement.
b. Restorative justice emphasizes the relationship with the obligation of lawbreakers to provide compensation to victims and the community.
c. Restorative justice is an effort to improve between victims, perpetrators, and the community by providing accountability for violations that have been committed.
d. Restorative justice in its implementation can consider the use of medical experts whose competence is consistent with the case being reconciled.
e. Restorative justice in its implementation needs to be established non-governmental institutions in dealing with peace due to medical negligence in accordance with statutory regulations.
f. Restorative justice emphasizes the value of respect for everyone (respect) so that dialogue and mutual benefit occurs.

5. Conclusions

Based on the discussion we have described above, it can be concluded that:

a. Settlement of disputes through restorative justice (restorative justice) can be used as an alternative to making legal breakthroughs if there is a dispute over medical negligence between patients and doctors, because the mechanism is very simple by bringing together patients, doctors, and families so as to obtain agreement without going through the court.
b. The application of restorative justice (restorative justice) for medical negligence by doctors due to the alleged negligence is actually a medical risk that is difficult to distinguish from negligence that actually occurs, therefore restorative justice is possible to bring together doctors, patients and the community.

6. Suggestions

a. It should be immediately determined and implemented the concept of restorative justice (restorative justice) in Indonesia in resolving allegations of medical negligence committed by doctors by involving patients and the community.
b. The form of implementation of the implementation of restorative justice (restorative justice) is proposed to form an institution outside the government in dealing with peace due to medical negligence allegedly carried out by doctors by involving patients and the community in order to obtain an agreement that is mutually beneficial to the parties.

REFERENCES

1. Abdurrahman Konoras, *Aspek Hukum Penyelesaian Sengketa Secara Medis di Pengadilan,* Jakarta: PT Raja Grafindo Persada, 2017
2. Adami Chazawi, *Kejahatan Terhadap Tubuh dan Nyawa,* Cetakan ketiga, Jakarta: Raja Grafindo Persada, 2004.
3. Nomensen Sinamo, *Hukum Kesehatan dan Sengketa Medik*, Jakarta: Permata Aksara, 2019.
4. Anny Isfandyarie, *Malpraktek dan Resiko Medik dalam Kajian Hukum Pidana,* Prestasi Pustaka, Jakarta, 2005
5. Bakler, J. Nasution, *Hukum Kesehatan dan Pertanggungjawaban Dokter,* Rineka Cipta, Jakarta, 2005
6. Mudzakir Iskandar Syah, *Tuntutan Hukum Malapraktik Medis,* Jakarta: Bhuana Ilmu Populer, 2019
7. Muntaha, *Hukum Pidana Malapraktik Pertanggungjawaban dan Penghapusan Pidana,* Jakarta: Sinar Grafika, 2017
8. Barda Nawawi Arif, *Penegakan Hukum Pidana Penanggulangan Kejahatan,* Kencana Pranada Media, Jakarta, 2008
9. Mardjono Reksoduputro, reflection on legal reform journet, Jakarta: RI National Law Commission, 2013
10. Bambang waluyu, Law Enforcement in Indonesia, Sinar Grafika, Jakarta 2016
11. Wahid Eriyantouw, *Keadilan Restoratif dan Peradilan Konvensional dalam Hukum Pidana,* Jakarta: Universitas Trisakti, 2009
12. Yoachim Agus Tridiatno, *Keadilan Restoratif,* Yogyakarta: Cahaya Atma Pustaka, 2015
13. Desriza Ratman. *Mediasi Non Litigasi Terhadap Sengketa Medik dengan Konsep Win-win Solution,* Jakarta: PT Elex Media Komputindo, 2012
14. Natangsa Surbakti, *Peradilan Restoratif Dalam Bingkai Empiri, Teori dan Kebijakan,*Yogyakarta: Genta Publishing, 2015

POSTPONEMENT AND TERMINATION OF LIFE SUPPORT TO CRITICAL ILL PATIENTS ASSOCIATED WITH MEDICAL, BIOETHICAL AND MEDICOLEGAL ISSUES IN INDONESIA

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ABSTRACT

The controversies that often arises in the medical society are postponement and termination of life support, which call as withholding and withdrawing life support. Withholding life support is delaying the provision of new or advanced life support therapy without stopping ongoing life support therapy, while withdrawing life support is stopping some or all life support therapy that has been given to the patient. The decision was not only based on medical aspects but also related to bioethics and medicolegal aspects. Medical practitioners in carrying out their profession must be responsible for patient health (professional responsibility) and responsible of law (legal responsibility) and pay attention to the basic moral principles, namely autonomy, beneficence, non-maleficence and distributive justice. In terms of medical, bioethical and medicolegal aspects in Indonesia, withholding and withdrawing life support is legal. Further research is needed in terms of religious and cultural norms in Indonesia.

Keywords: Withholding Life Support, Withdrawing Life Support, Criticall Ill, End Of Life

A. INTODUCTION

Indonesia is a country of law in which various norms govern every aspect of life. In the medical society, the medical ethics, medical profession standards, medical competence, medical law, religious law, and other laws that apply in the society govern every medical decision and action. Many medical disputes occur in this hospital. One of the causes of the medical disputes is the absence of good communication (informed consent) among health workers, the patients, and their families which often causes the patients' and families' dissatisfaction towards medical diagnoses, therapies, medical actions, medical decisions, and complications arising from therapy and medical treatment which then results in disability to death. There are times when the patients and families are not given clear information about the benefits, risks, and complications of the medical treatment that may occur, so that accusations of malpractice often arise.

Issues that often arises in the hospital are postponement and termination of life support or which called as withholding and withdrawing life support. The postponement of life support therapy (withholding life support) is postponing the provision of new or advanced life support therapy without stopping an ongoing life support therapy, while the termination of life support therapy (withdrawing life support) is terminating some or all life support therapies that have been given to the patient.[1] Withholding and withdrawing life support are different from euthanasia because withholding and withdrawing life support aim to follow the process of the natural illness and do not make the decision to speed up death and end life. Meanwhile, euthanasia actively takes the decision to speed up death and end life. Simply put, the term "withholding life support" means no longer doing resuscitation. On the other hand, with "withdrawing life support", once the withdrawal of therapy is decided, the ventilator and inotropic (pacemaker) must be stopped, heavy sedation usually appears and death will occur immediately.

B. PROBLEM STATEMENT

Do postponement and termination of life supports in critically ill patients are allowed in Indonesia?

C. LITERATURE REVIEW

Issues of withholding and withdrawing life support is controversial. Opposition and debate among health practitioners, legal practitioners, community and religion leaders are still happening today. Decision making regarding the critical patients' conditions is a very difficult problem. The decision is not only made based on medical aspects, but also related to bioethics and medicolegal aspects. In carrying out the health profession, medical practitioners must realise that they have to be responsible for the patients' health (professional

responsibility) and responsible in terms of law (legal responsibility) for the services provided.[2]

Medical practice must be based on moral principles that must be implemented, that are, autonomy which means that every medical action must obtain approval from the patients (or immediate family, in a case that the patients cannot give their consent), beneficence means every medical action must be intended for the good of the patients, non-maleficence means that every medical action must not worsen the patients' condition, and distributive justice means that medical attitudes or actions must be fair.[3,4] In carrying out these moral rules, doctors are often faced with the clash of moral rules. The rules of autonomy often clash with the rules of beneficence, or when the rules of beneficence clash with the rules of non-maleficence. Conflicts of moral basic rules also occur in dealing with critical patients. It is when the patients have an incurable disease or when they are permanently disabled (vegetative state). Difficult decisions between the doctors, patients, and families must be made. On one side, the patients and families want the patients not to be given further therapy to maintain their lives, but the doctors refuse. Or in other cases, when the families want a life support device on the permanent vegetative patients to be stopped and the doctors refuse to do it.

One of the cases that can be used as a reference is the case of Karen Anne Quinlan in 1985 in New Jersey, United States. She had a permanent brain defect (coma) due to consuming a mixture of alcohol and valium. A team of doctors in a local hospital could save her life, but she was sustained by a breath aid (ventilator) for her survival. When the breathing aid was removed, it would be able to end her life. Karen's parents wanted the ventilator to be revoked and let their child die. However, the team of doctors refused to do it, so that the case was resolved through the court. The decision was that The Supreme Court of New Jersey granted right to Joseph Quinlan, Karen's father, as the legal guardian of Karen. The request to revoke the ventilator was approved.[5]

The positive law and ethics of Indonesian medicine state that decisions and actions to postpone and terminate life support are legal and do not violate Indonesian medical ethics. There are various kinds of indications that must be fulfilled in establishing this decision, including that the patients are in a condition of palliative care (brain stem death), cannot be cured, prolonging their lives will even increase their pain and suffering, and the patients' and families' consent are obtained. In this case, the patients and families have understood about the condition of the illness suffered which is then documented and signed by the relevant parties.

The facts are often different. Doctors or health care facilities sometimes refuse to carry out the withholding and withdrawing of life support. This is associated with violation of doctor oaths, medical ethics, and moral and religious norms. In this paper, the author discusses the attitudes of doctors and health care facilities toward withholding and withdrawing life support in terms of medical, bioethical, and medicolegal aspects.

D. RESEARCH METHODS

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.

E. ANALYTIC AND DISCUSSION

A doctor has the responsibility to treat the patients, perform health services to cure illnesses, recover health, and maintain and improve the health of a person or family according to the Law Number 36 of 2009.[6] Practically, the doctors are often faced with various patient conditions, ranging from mild, moderate, or severe illness. Patients with severe illness can also be said that they are in a critical condition which means very sick or very injured and can lead to death or termination of life.

The issues that develop in intensive care are the care at the end of life and it is still a matter of debate until today. Advances in medical science and development of medical devices have enabled the death process to be avoided or extended. There are many cases where the patients can still live even though the existing therapy is no longer responsive. This is due to the support of breathing aids, pacemakers, and the provision of fluids and nutrients. In addition, dialysis, cardiopulmonary resuscitation (CPR), defibrillation, intubation, and tracheostomy have been proven to prolong or avoid the process of death. However, this medical support cannot cure the patients from the severe illness they suffer. Herein lies the dilemma of the doctors and the patients whether to continue this treatment or not. In some cases, treatment does not longer benefit the patients, while in other cases, the patients or families do not longer want the treatment to continue.

Triggered by various cases and dilemmas above, the concept of postponing and terminating life support is born or often called withholding and withdrawing life support. Decision making regarding this matter is very difficult and influenced by several factors which are not only the severity of the disease, but also in terms of ethics, religion, culture, and legal background. Currently, some countries controversially take a radical step of terminating life directly with medical actions, but many other countries prohibit active euthanasia.

In the United States, patient autonomy is highly valued. The implementation of withholding and withdrawing life support cannot be contested if it is the request of the patients and their legal guardians. The practice has been morally accepted in accordance with certain laws and gives broad rights for the patients or patient representatives to determine the time, means, and manner of their death. In contrast to the Korean society, withholding and withdrawing life support are not yet supported by law and culture, and require descendants and immediate family to do the best for the family on behalf of devotion, so as to make the decisions become difficult for the doctors and family members. Withholding life support in intensive care units is also usually decided without official documentation before doctors are convicted by the Supreme Court for providing assistance and conspiracy related to the murder for withdrawing life support from dying patients.[7,8] Another example is France. This country does not regulate the postponement and termination of life support, but the fact says that this practice has been carried out widely. In a population-based study, 53% of death in intensive care unit is caused by therapy restrictions. In the decision to postpone and terminate this therapy, 54% is determined by the ICU medical team and only 44% involves the family in the decision-making process.[9]

Medical Aspects

There is a general consensus which states that postponing and terminating life support in terminal patients are decisions that allow the disease to progress according to its course. This is not a decision to bring the patients to their death, so that it can also be called as passive euthanasia, while euthanasia actively brings the patients to the end of their lives. For example, by removing the ventilator and terminating the drugs to uncured patients, are the doctors said to kill the patients? According to the consensus, they are not. The purpose of these actions is to increase comfort and not death, so stopping the ventilators and drugs are not euthanasia.

According to the Regulation of the Minister of Health of the Republic of Indonesia Number 37 of 2014,[10] death is divided into clinical or conventional death and brain stem death. The determination of clinical or conventional death is based on the cessation of the function of the heart system and respiratory system permanently. Meanwhile, three competent doctors determine brain stem death, two of whom are anaesthetist and neurologist. The brain stem is an organ that regulates the function of other vital organs such as heart and lungs, so that with the death the brain stem, the patient can be said to have died. As soon as the patient is confirmed dead, all life support therapy must be stopped. The time of death is determined based on when the patient is declared to undergo brain stem death, and not when the breathing and heart aids are stopped.

Bioethical Aspects

Doctors must feel free and without pressure to give specific advice to the patients and families who are grappling with this difficult decision. Doctors must be wise in giving honest advice which is based on medical knowledge and personal experience. They need to show empathy and provide sufficient space and time to explain about the patients' conditions, provided therapeutic options, complications that may arise, and life expectancy of the patients. A humanistic approach is highly needed in this condition. In presenting the determination of the postponement and termination of life support, the doctors must respect the patients' autonomy, the families must be explained about the illness, and be ensured that they understand it.

The patients' and families' religious background strongly influence the decision making regarding the implementation of the postponement and termination of life support. Therefore, these factors must be considered in making the decision regarding life-sustaining therapy, in the increasingly multicultural, multiracial, and diverse society in terms of religious beliefs. Recognising this pluralism is fundamental in providing high quality end-of-life care. The concept of postponing and terminating life support is consistent with the teachings of Islam in which the majority of Indonesia's population is Muslim.[7,8] In the Asian culture, making a decision to postpone and terminate life support from parents can be considered unfilial.[8] It would be a disgrace for the family if one family member decides to end the life of another family member and it is feared that they will get karma (retribution). Meanwhile, the concept of postponing and terminating life support in the Indonesian multicultural society is not yet known with certainty due to the absence of further research.

Medicolegal Ascpect

In positive law, Indonesia does not recognise the practice of active euthanasia. However, the postponement and termination of life support are

regulated in the Regulation of the Minister of Health Number 37 of 2014.[10] It is said that the patients who are in an incurable state due to their illness and medical treatment is in vain, the termination or postponement of life support therapy can be done. The policy regarding the condition of the patients who are in a terminal state and when medical action has been in vain is set by the director or the head of the hospital. The decision to terminate or postpone the life support therapy for medical treatment of patients is made by a team of doctors who treat the patients after consulting with a team of doctors appointed by the medical committee or ethics committee. The plan for terminating or postponing the life support therapy must be informed and obtains approval from the patients' families or those representing the patients.

The Regulation of the Minister of Health explains that if there are cases of patients in terminal conditions and the treatment provided is considered to be in vain, then the doctor who treats the patients can seek approval from the director or the head of the hospital to postpone and terminate the life support. Further, the hospital director will request a medical committee or ethics committee to form a team of doctors to assess the patients' condition. If the clinical death or brain stem death has occurred, the team of doctors is entitled and obliged to take action to postpone and terminate life support with the permission of the families or those who represent the patients. Every information and approval given must be documented and signed by both parties.

The Regulation of the Minister of Health Number 37 of 2014[10] also confirms that the patients' families can ask the doctor to terminate or postpone the life support therapy or ask to assess the patients' condition for the termination or postponement of life support therapy. This request can only be made if the patients are incompetent, but have passed on their message about it or the message is already delegated to a certain person. Another possibility is that the patients are incompetent and have not passed on their message, but their families belief that if the patients are competent, they will decide as such based on the beliefs and values they hold. If the patients are still able to make the decision and express their own wishes, then the decision is in the hands of the patients and must be fulfilled. If there is a mismatch between the request of the families and the recommendation of the medical and ethics committee team, in which the families still request the termination or postponement of life support therapy, the legal responsibility is on the families' side.

This regulation explains about the autonomy of the patients, families, or the legal guardians of the patients towards the medical decision that will be made. The doctor has no right to refuse, obstruct, or ignore the medical choice that is decided even if it can cause the patients' disability or death. In this case, the legal responsibility lies with the patients, families or legal guardians.

F. CONCLUSION

Indonesia does not recognise active euthanasia, but has a positive law that legalises the postponement and termination of life support in terminal patients whose illness cannot be cured or the treatment provided is in vain. Based on the medical, bioethical, and medicolegal aspects, the postponement and termination of life support are permitted. Further research is needed on postponing and terminating life support in terms of religious and cultural norms prevailing in Indonesia.

REFERENCES

1. Republik Indonesia, Peraturan Menteri Kesehatan Republik Indonesia Nomor 37 year 2014. In. Jakarta: Menteri Kesehatan Republik Indonesia; 2014.
2. Hanafiah MJ, Amir A, Etika Kedokteran dan Hukum Kesehatan. In. Jakarta: EGC, p203, 2009.
3. O'Rourke K, A Primer for Health Care Ethics. Essays for pluralistic society. Washington DC: Georgetown University Press; 2000.
4. Beauchamp TL and Childress JF, Principles of biomedical ethics (4th ed). New York: Oxford University Press, 1994.
5. Stewart RS, Withholding and Withdrawing Life Support: Moral Dilemmas, Moral Distress, and Moral Residue. Online Journal of Health Ethics, 4(2), p 1-26, 2007.
6. Republik Indonesia, Undang-Undang Republik Indonesia Nomor 36 year 2009 Tentang Kesehatan. In. Jakarta: Kesehatan K, editor.
7. Manalo MFC, End-of-Life Decisions about Withholding or Withdrawing Therapy: Medical, Ethical, and Religio-Cultural Considerations. Palliat Care, 7:1-5, 2013.
8. Park JH, Koh SO, Cho JS, Na S, Evaluation of Informed Consent for Withholding and Withdrawal of Life Support in Korean Intensive Care Units. Korean J Crit Care Med, 30(2):73-81, 2015.
9. Ferrand D, Robert R, Ingrand P, Withholding and withdrawal of life support in intensive-care units in France: a prospective survey. The Lancet article Vol 357 issue 9249 p9-14, 2001.
10. Republik Indonesia, Peraturan Menteri Kesehatan Republik Indonesia Nomor 37 tahun 2014.

POSITION OF WOMEN IN HINDU BY HERITAGE BALI LAW

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ABSTRACT

The Balinese adhere to the patrilineal system, so that inherited inheritance is a boy who has grown and married, while the daughter is not an heir. The consequences of this system greatly affect the position of women in terms of inheritance. The still strong patrilineal culture prevailing in indigenous Balinese society makes the position of women not fully acknowledged, even in the case of female decision making is not taken into account. The obligations of Hindu women in family, marriage and society are not much different from men's obligation, this should be a consideration to give women the opportunity to have equal status with men, especially in the customary law of Bali. This study aims to answer issue: how the development of inheritance rights of Hindu women in Bali customary law. The research method used normative research by examining a number of rules about customary law relating to the inheritance of Hindu women who have not fully gained equal status with men as stipulated in the teachings of Hinduism. The results obtained in the period before 1900 the life of Hindu society Bali applies the absolute purusa system which only recognizes heirs is a boy, but after 1900 there has been a development with some jurisprudence and there is a decision of Majelis Utama Desa Pakraman (MUDP) Number 01/Kep/Psm-3/ MDP Bali/X/2010 which states that women have the right to inherit, even though they are only entitled to enjoy the treasure rich parents and after marriage get a tetatadan property and for parents who are able to give the treasure for the sake of maintaining the sustainability of his life, so with the rules at least happen gender equality.

Keywords: Traditional Balinese Inheritance Law, Gender Equality

A. INTRODUCTION

Indonesian society adheres to a variety of different religions and beliefs, having different family systems. Theoretically, lineages can basically be classified into three systems of kinship or kinship, which are as follows:[1]

a. Patrilineal Family System
   Namely the family system that draws lineage according to the line of fathers, where according to this system the position of men is more prominent than the position of women, especially in terms of inheritance. For example: Batak people, Balinese people, Nias people, Sumba people, and others.
b. Matrilineal Family System
   Namely the family system that draws lineage according to mother line, where according to this system the position of women is more prominent than the position of men in terms of inheritance. Example: The Minangkabau people.
c. Parental or Bilateral kinship system
   Namely the family system that draws a lineage based on the line of father and mother, where according to this system the position between men and women in terms of inheritance is balanced or equal. Example: Javanese, Sundanese, Acehnese, Kalimantanese, and others.

Of the three kinship or kinship systems above, each system greatly influences the distribution of inheritance, because this determines who has the right to become an heir, but this does not mean that the same customary system will apply the customary inheritance legal system the same also, in other words there are variations.

In a cultural context, the notion of legal culture referred to can be refined into a set of ideas, norms which serve as guidelines for saying, behaving, acting in accordance with what is expected by most local residents. Thus, it could be that the community's intended ideas are in the form of norms contained in customary law, religious law, and state law.[2]

Customary law is the rules of behavior that apply to indigenous people and foreign eastern people, who on the one hand have sanctions (hence the law) and on the other hand are not codified (hence adat).[3]

[1] Nani Soewondo, Position of Indonesian Women in Law and Society, Ghalia Indonesia, Jakarta, 1984, p. 47

[2] Saptomo, Legal Culture and Local Wisdom: A Comparative Perspective (Jakarta, FHUP Press, 2019), p. 39.

[3] Hilman Hadikusuma, Introduction to Indonesian Traditional Law, Cet.II, Mandar Maju, Bandung, 2003, p. 15

In Indonesian Customary Law, three inheritance systems are found, namely:[4]

1. Individual inheritance system, in an individual inheritance system, individual heirs inherit the inheritance. Individual inheritance systems tend to be found in parental societies. In parental societies there are equal rights and obligations to girls and boys. Girls have the same inheritance rights as boys over inheritance. The hallmark of this system is that inheritance can be shared among heirs as found in bilateral communities in Java.
2. The system of collective inheritance, in a system of collective inheritance, the heirs jointly inherit the inheritance. The characteristic is that the inheritance is inherited by a group of heirs who together constitute a kind of legal entity. Where the assets are called heirlooms, they cannot be distributed among the heirs and they can only be distributed to them (only have usage rights as in the Minangkabau people).
3. Majorate Inheritance System, in the major inheritance system, the eldest son according to his type controls the inheritance with the right and obligation to regulate and manage the interests of his younger siblings on the basis of deliberation and consensus of the members of the heir group. Characteristics of most of the inheritance inherited by a child alone, such as in Bali, where there is a major right of the oldest son.

The customary legal system is certainly based on the mindset of the Indonesian people, which is not the same as the mind that controls the Western legal system. To be aware of the customary legal system, one must explore the basics of the mind that lives in Indonesian society.[5] Adat is a reflection of the personality of a nation and is one of the incarnations of the soul of the nation concerned from century to century. Therefore, every nation in this world has its own customs, one with the other is not the same. Because of this inequality, custom is the most important element that gives identity to the nation concerned.

Furthermore, in customary law, the family system is an important part, especially in inheritance law, therefore the main point of the description of customary inheritance law starts from the form of society and family characteristics found in Indonesia according to the hereditary system.

As for what is meant by offspring in the customary family law is ancestral unity, meaning that there is a blood relationship between one person and another person, two or more people who have blood relations. So the only ancestor here is a descendant from one another.[6]

Women as mothers, as wives, and sometimes as fathers who work to meet the needs of their household life. On the other hand the inheritance system in Bali which adheres to a patrilineal family system that is influenced by Hinduism, girls as heirs because of the status as legitimate children ie children born when both parents are bound in legal marriages, but do not get part of the inheritance. In the inheritance system in Bali, the principles in the kepurusa family are the same as the family system adopted in the Manawa Dharmasastra book, known as one of the books of Hindu Law.[7] This is inseparable from the religion of the majority of Balinese. In principle, the heir is the closest to the testator through the purusa bloodline (male).[8]

B. PROBLEM STATEMENT

This study aims to answer issue: how the development of inheritance rights of Hindu women in Bali customary law.

C. LITERATURE REVIEW

Inheritance in the Balinese before 1900 was only based on dresta or customs, because there were no rules governing inheritance as a basis for reference, thus habits were used by the Balinese in the distribution of inheritance. These habits are not at all related to the position of women. So, it can be said that the position of women is not as an heir so that they are not entitled to the inheritance of their parents. Whereas a married girl, in the sense of marrying in and out of her husband's membership, usually gets souls or tetatadan (inherited property) from her parents in accordance with the economic capabilities of the female parents.

If we connect the inheritance system that is generally known with the inheritance system of Balinese indigenous people, the Balinese indigenous people adhere to a patrilineal family system, where in reality socially, the indigenous Balinese people are familiar with these three types of inheritance systems with various variations depending on the village, kala, patra and type or type of inheritance. In an individual inheritance system, it is usually carried out on assets that can be divided, such as in the use of

[4] Nani Soewondo, Op. Cit, p. 47
[5] Soepomo, Chapters on Customary Law, PT.Pradyana Paramita, Jakarta, 2000, p. 23.
[6] Soerojo Wignjodipoero, Introduction and Principles of Customary Law, Haji Masagung, Jakarta, 1983, p. 108.
[7] Wayan P.Windya, Introduction to Balinese Customary Law, Documentation and Publication Institute at the Faculty of Law, Udayana University, 2006, p. 78-79.
[8] Potential Interest, Some Aspects of Customary Law, (Liberty, Yogyakarta, 1987), p. 60-61.

land, rice fields and others. The major inheritance system can also be seen in the case of inheritance in the form of inheritance that cannot be divided up that is magical religio, such as places of worship, heirlooms and so on that contain magical powers. In certain cases, it can also be seen that the system of inheritance of the major is, if the heirs are still small, then the right of ownership of the inheritance will be transferred to the eldest son, who served as a substitute for parents. In this major inheritance system, it is very dependent on the leadership of the eldest child in his position as a substitute for parents who have died in managing wealth and use it for the benefit of all family members. The eldest child in his position as the successor to the responsibility of the deceased parent is obliged to care for and care for his other siblings, mainly responsible for the use of inheritance and the lives of his younger siblings until they can settle down and stand alone. Each heir only has the right to use and enjoy the results of the joint estate, without the right to control and possess individually.

In the event of a marriage, the woman decides her relationship with her family and enters the family of the male party. With a patrilineal family system connected with inheritance law, it is the son who is the original heir, because the son is the successor to the obligations, both obligations to his own parents and obligations relating to customs and religion in the society concerned.

In accordance with the position of boys in the patrilineal family system, it can be stated the opinion of Hilman Hadikusuma, who states:[9]

Boys as heirs can be identified in the patrilineal kinship system, which is mostly found in the Batak Land, Lampung, Bali and also in the Namitri Jayapura area, Irian Jaya. Basically, the right to inherit inheritance in these regions is boys, especially boys who are adults and have families, while daughters are not heirs but can be beneficiaries of inheritance to carry as inheritance into their marriages, following her husband's side.

So if we notice that the position of women in customary law, especially patrilineal family law, also does not give women the opportunity to demand equal rights. Because according to this system those who have a more dominant position are boys. In the Balinese Customary Law which includes heirs is a boy in a purusa (fatherly) relationship. So the consequence of this provision is that Hindu girls are not heirs.

The year 1900 was used as a benchmark in seeing the development of women's inheritance rights in Balinese society, because in 1900 a masterpiece (regulation) was inherited by the Dutch colonial government in this case the Resident of Bali and Lombok, better known as Peswara 1900. The 1900 Peswara was initially only just applied to residents of Hindu Bali from the Regency of Buleleng, but then the peswara in 1915 was also applied to residents of all of South Bali. The patrilineal system influences the inheritance system in Balinese customary law. This kinship system is used as a justification weapon by the community in the distribution of inheritance, because in the patrilineal system only takes into account male lineages. Therefore in Bali, only boys are entitled to inherit while girls are not entitled to inherit. Hindu women in Bali have traditionally lived in sub-ordination in several aspects of life, especially aspects of customary inheritance law.

October 15, 2010 is a very spectacular milestone for the existence of Hindu women in Bali in customary inheritance law. On that date, a seminar was held by the Bali Pekraman Main Assembly (MUDP), which was a breakthrough made by MUDP Bali on the position of Balinese women in customary inheritance law. Decree of the Great Supper III of Bali MUDP No.01 / Kep / Psm-3 MDP Bali / X / 2010, 15 October 2010: Balinese women receive half of their purusha inheritance rights after deducting 1/3 of their inheritance and conservation interests. Only if Balinese women convert to other religions, they are not entitled to inheritance rights. If the parents are sincere, then remain open by giving away funds or voluntary provisions.[10] This breakthrough in Bali MUDP is a step that dilutes the legal rigidity of Balinese customary inheritance, which has been passed down for centuries and has discriminated against women for centuries.[11]

Not only regarding the decision of the Bali MUDP and other jurisprudence in the Book of Manawa Dharmasastra also regulates the inheritance of women even though it is also stated that men are heirs. Sloka IX.118 states that:[12] But to the sisters, the brothers will give a part of their portion, each one quarter of the portion; those who refuse to give it will be ostracized.

D. RESEARCH METHODS

The research method used in this paper is the normative legal research method. Research in the context of this writing is normative, which is based

[9] Hilman Hadikusuma, Op. Cit, p. 79

[10] Bali Post, a Multi-Function Balinese Woman But Marginalized

[11] Sukerti, Ni Nyoman. Inheritance Rights of Women in Balinese Customary Law A Case Study. (Denpasar-Bali, 2012, Udayana University Press), p. 93.

[12] Pudja, G and Tjokorda Rai Sudharta. Manawa Dharmasastra (Manu Dharmasastra) or Vedic Smrti Compendium of Hindu Law. Surabaya: Paramita, 2004.

on logical and coherent thinking by examining the applicable laws and regulations and their relation to the issues discussed. Normative research methods or library legal research methods are methods or methods used in legal research conducted by examining existing library materials.

E. ANALYSIS AND DISCUSSION

In connection with the family system adopted by the indigenous Balinese people is a patrilineal system, that is, a lineage based on the fatherly line, the son has the right to inherit is a child (sentana). Basically, boys are heirs in patrilineal society influenced by several factors, namely:[13] 1). Family lineages are based on boys. Daughters cannot continue pedigree (family lineage). 2). In the household, the wife is not the head of the family. Children use the family name (surname) of the father, the wife is classified into the family (surname) of their husband. 3). In adat a woman cannot represent her parents (father) because she is a member of her husband's family. 4). In the case of husband and wife divorce, the care of children is the responsibility of his father. The son will later be the heir of his father both in customs and property.

In the inheritance system in Bali, the principles in the kepurusa family are the same as the family system adopted in the Manawa Dharmasastra book, known as one of the books of Hindu Law.[14] This is inseparable from the religion of the majority of Balinese. In principle, the heir is the closest to the testator through the purusa bloodline (male).[15]

So it is clear that in customary inheritance law in Bali which adheres to a patrilineal family system, the position of a daughter is not an heir of the inheritance of her parents. This is not in accordance with the formulation of article 28 D paragraph (1) of the 1945 Constitution of the Republic of Indonesia which reads: "everyone has the right to recognition, guarantees, protection and certainty of law that is fair and equal treatment before the law". Hindu women in Bali should have the same position as men before the law, so Hindu women have the right to inherit from their parents. Hindu women should get the same attention as men, because during their lifetime women also carry out their obligations such as caring for their parents during their lives, so that they deserve to be considered as heirs.

Nowadays the inheritance in Balinese society has experienced a development, especially towards equal rights in inheritance for Balinese Hindu women. Based on the Decision of the Main Assembly of Pakraman Village, Bali Province Number: 01 / KEP / PSM-3 / MDP BALI / X / 2010, October 15, 2010. Balinese women receive half of the purusa inheritance rights after deducting 1/3 for inheritance and conservation purposes. Only if Balinese women convert to another person's religion, they are not entitled to inheritance rights. If the parents are sincere, remain open by giving soul or voluntary provisions.

F. CONCLUSION

The position of women in Balinese indigenous communities who use a patrilineal family system also gets inheritance rights based on the Decision of the Main Assembly of Pakraman Village, Bali Province Number: 01 / KEP / PSM-3 / MDP BALI / X / 2010, October 15, 2010.

REFERENCES

1. Bali Post, a Multi-Function Balinese Woman But Marginalized
2. Hilman Hadikusuma, Introduction to Indonesian Traditional Law, Cet.II, Mandar Maju, Bandung, 2003, p. 15
3. Nani Soewondo, Position of Indonesian Women in Law and Society, Ghalia Indonesia, Jakarta, 1984, p. 47
4. Potential Interest, Some Aspects of Customary Law, (Liberty, Yogyakarta, 1987), p. 60-61.
5. Pudja, G and Tjokorda Rai Sudharta. Manawa Dharmasastra (Manu Dharmasastra) or Vedic Smrti Compendium of Hindu Law. Surabaya: Paramita, 2004.
6. Saptomo, Legal Culture and Local Wisdom: A Comparative Perspective (Jakarta, FHUP Press, 2019), p. 39.
7. Soepomo, Chapters on Customary Law, PT.Pradyana Paramita, Jakarta, 2000, p. 23.
8. Soerojo Wignjodipoero, Introduction and Principles of Customary Law, Haji Masagung, Jakarta, 1983, p. 108.
9. Sukerti, Ni Nyoman. Inheritance Rights of Women in Balinese Customary Law A Case Study. (Denpasar-Bali, 2012, Udayana University Press), p. 93.
10. Wayan P.Windya, Introduction to Balinese Customary Law, Documentation and Publication Institute at the Faculty of Law, Udayana University, 2006, p. 78-79.

[13] Ibid, p. 45-46
[14] Wayan P.Windya, Op.Cit, p. 78-79.
[15] Potential Interest, Op.Cit, p. 60-61.

POSITION OF THERAPEUTIC AND INFORMED CONSENT AGREEMENT ACCORDING TO THE CIVIL CODE

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ABSTRACT

Health care is always synonymous with the relationship between doctors and patients, which is called a therapeutic agreement. The goal in the doctor and patient relationship, namely the achievement of the patient's interests in the form of medical treatment and healthcare, however, due to the relationship between doctor and patient is a legal relationship between two legal subjects as supporters of rights and obligations, the law protects both parties. In juridical terms, in a therapeutic agreement it always requires an informed consent. Basically, informed consent is an agreement so that it must comply with the rules in the Civil Code and Regulation of the Ministry of Health of the Republic of Indonesia Number 290 / Menkes / PER / III / 2008 concerning Approval of Medical Measures, however in practice, there has been found cases of signing of informed consent conducted by the patient's family who is underage which is feared, for it could cause the informed consent to be legally flawed. The purpose of this thesis is to find out and analyse the validity and legal consequences of informed consent signed by the patient's family who are underage in accordance to the Civil Code and the Regulation of the Ministry of Health of the Republic of Indonesia Number 290 / Menkes / PER / III / 2008 regarding Approval of Medical Action.

The approach used by the author in writing this thesis is a normative juridical approach and research specifications are analytically descriptive by reviewing library materials that are supported by field research. Data analysis using qualitatively normative analysis methods. The data obtained in the form of secondary data of primary, secondary and tertiary legal materials were obtained through library research, as well as primary data through field research obtained are based on interviews.

Based on the results of the study, obtained the first result, informed consent signed by the patient's family who is underage is invalid if it is reviewed based on the Civil Code of the Ministry of Health Regulation of the Republic of Indonesia Number 290 / Menkes / PER / III / 2008 concerning Approval of Medical Actions. The second result, the legal consequence of the illegality of informed consent signed by the patient's family which is underage, can be cancelled, nullified and voided by law, where this has consequences, namely the agreement can be cancelled by the parties, but if this agreement is not to be cancelled it will be automatically cancelled or ended due to a violation of the law.

Keywords: Agreement Law, Healthcare Law, Informed Consent

A. BACKGROUND

The ideals of the Indonesian people listed in the preamble to the 1945 Constitution, as well as being a national goal of the Indonesian nation, are to protect the entire nation of Indonesia and all of Indonesia's territory and advance in public welfare, national education and participate in carrying out world order based on independence, eternal peace and social justice[1]. 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 Health.

Health is a basic right, inherent in every human being. The right to health for every person is regulated in the 1945 Constitution Article 28H Paragraph (1) of the second amendment which states "every person has the right to live in physical and spiritual prosperity, to live and to have a good and healthy living environment and the right to obtain health services". In the declaration of Human Rights by the United Nations (UN) in 1948 supporting the Human Rights to life contained in Article 3, namely "every one has the right to life and security of person" and Article 1 Covenant of Civil and political rights (1966) states "all peoples have the rights of self determination".

Law number 36 of 2009 concerning Health does not specifically define Health Services, in Article 1 number 7 it only discusses health facilities that are defined as a tool and / or place used to carry out

[1] Explanation of Health Law Number 36 of 2009 concerning Health.

health service efforts, both promotive, preventive, curative and rehabilitative activities carried out by the Government, regional government and / or the community. Health effort itself is mentioned in Article 1 number 11, "Healthcare is 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 promotion, treatment of diseases, and health recovery. by the government and / or the community".

Health law is all legal provisions that relate directly to maintenance and health services, it concerns the rights and obligations to receive health services (both individuals and the community) as well as from health service providers in all aspects, their organizations, facilities, health service standards and others. other. The government now realizes that healthy people are the main asset and goal in achieving a just and prosperous society. Regulations and legal provisions are not only in the medical field, but include all fields of health such as pharmaceuticals, medicines, hospitals, mental health, public health, occupational health, environmental health and others[2]. This collection of regulations and legal provisions is referred to as health law. Article 3 of Law Number 36 of 2009 concerning Health explains that health development aims to increase awareness, willingness and ability to live a healthy life for everyone so as to realize the highest degree of public health, as an investment for the development of socially productive human resources and economical.

The doctor and patient relationship is a relationship that has a special nature, where doctors as those who provide health services and patients as those who receive health services, because basically the doctor and patient relationship is a relationship based on trust and confidence where patients believe and believe that the doctor will do maximum effort in curing patients.

Doctors in the effort to heal patients must obtain the consent of the patient concerned, as stated in Article 1 number 1 of the Ministry of Health Regulation Number 290 / MENKES / PER / III / 2008 concerning Approval of Medical Measures that Approval of medical measures is the consent given by the patient or immediate family after getting a full explanation of the medical or dental measures that will be performed on patients. Article 1233 of the Civil Code states that an agreement is born because of an agreement or because of the law, while in article 1313 it is stated that an agreement is an act in which one or more people commit themselves to one or more people.

Subekti mentions that an agreement is an event where someone promises to someone else or where two people promise someone else or where two people promise to do something[3]. If it is related to the patient doctor's relationship, it is basically a contractual relationship. The relationship starts when the doctor states verbally or in an attitude or action that shows the doctor's willingness. Like accepting registration, giving serial numbers, recording medical records, and so on. The contractual relationship between doctor and patient is called a therapeutic contract[4].

In 2011 there was an elderly patient aged 70 years who was taken to the hospital with complaints of difficulty defecating and the doctor's diagnosis at that time was the narrowing of the anal canal so that it needed widening surgery (anoplasty), the patient's family agreed to take the action. Before the operation was carried out, the nurse came to the ward to bring an Informed Consent sheet to be signed, and at that time the only patients who looked after the patients were their 16-year-old grandchildren, so the grandchildren signed them.

B. PROBLEM IDENTIFICATION

1. How is the validity of the Informed Consent signed by the patient's family underage in terms of the Civil Code Law?
2. What are the legal consequences of the Informed Consent signed by the patient's family who are underage in terms of the Civil Code Law?

C. LITERARY REVIEW

At first the nature of the mind doctor-patient relationship based on Paternalism, the patient doctor relationship based on trust (fiduciary relationship). People who are sick will leave 100% of their treatment to the opinions of their doctors, because as a doctor he knows better and will choose what is best for his patients. In the past the patient surrendered and entrusted treatment to himself to his doctor and will accept the consequences whatever happens. Even

[2] Amir Amri, *Bunga Rampai Hukum Kedokteran*, (Jakarta: Widya Medika, 1997), page. 29

[3] S Subekti, *Hukum Perjanjian*, (Jakarta : PT Intermasa, 1987) hal 1.

[4] Sofwan Dahlan, *Hukum Kesehatan*, cetakan ke III Semarang : Badan Penerbit Universitas Diponegoro), page 33.

if you die today, it is considered that the will of God Almighty has been changed drastically as a result of humans. Human rights are now the main point in the relationship before what to do with the patient. The risks must be, what are the consequences, if not done, are there other alternatives and so on. This is what is called the Informed Consent.[5]

Once upon a time in ancient Greece and Rome physicians obtained concentrations from patients based on general therapeutic purposes. His 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 obtains a legal basis, because the court is getting stronger and stronger recognition of a person's human rights to decide what to do with himself.[6]

If someone voluntarily, without being assigned, represents the affairs of others, with or without the knowledge of that person, then he secretly ties himself to continue and complete the affair, so that the person he represents his interests can do the business himself. He must burden himself with everything that is included in the matter. He must also carry out all the obligations he must bear if he accepts the power that is stated explicitly (Article 1354 Civil Code)

There is a relationship between doctor and patient based on an obligation to provide medical assistance which is charged by the community to the doctor through the principle of Tort, and not as an event that arises from a contract that exists between the parties. Therefore, a doctor's obligation should be seen as something that is largely based on a medical professional relationship, that is a hybrid that can arise in several contexts and which can give rise to rights and obligations regardless of the agreement made by the parties.[7](King, 1977; 8 -9)

Patient rights arising from therapeutic transactions are regulated in Article 52 of Law Number 29 Year 2004 concerning Medical Practices, including:

a. Obtain a complete explanation of medical treatment as referred to in Article 45 paragraph (3).
b. Ask other doctors for their opinions
c. Get services that meet medical needs
d. Refuse medical treatment
e. Getting the contents of the medical record

Patients' rights are regulated in the medical practice law, also listed in the Medical Code of Ethics (KODEKI), which states as follows:

a. The right to life, the right to his own body and the right to die naturally
b. The right to obtain humane medical services in accordance with the standards of the medical profession
c. Obtain an explanation of the diagnosis and therapy from the doctor who treats it
d. The right to refuse planned diagnostic and therapeutic procedures can even withdraw from therapeutic transactions
e. The right to obtain an explanation of the medical research to be followed and to refuse or accept participation in the medical research.
f. The right to be referred to a specialist if necessary, and returned to the referring doctor after the completion of consultation or treatment to obtain treatment or follow up.
g. The right to confidentiality or personal medical records
h. The right to obtain an explanation of hospital regulations
i. The right to contact with family, counsellors or clergy and others as needed during treatment at the hospital
j. The right to obtain an explanation of the details of the cost of hospitalization, medication, laboratory examinations, X-ray examinations, ultrasonography (USG), CT-Scan, Magnetic Imagining (MRI) and so on, (if done) costs of operating rooms, delivery rooms, doctor fees and etc.

Obligations of patients in therapeutic transactions are regulated in Article 53 of Law No. 29/2004 concerning medical practice, namely:

a. Provide complete and honest information about his health problems.
b. Obey the doctor's advice and instructions
c. Comply with the applicable provisions in health care facilities and provide compensation for services or services received

[5] J,Guwandi, SH, *Hukum Kesehatan* , Jakarta : FKUI, 2005, page 46.
[6] Ibid, hlm 45.
[7] Veronica Komalawati, *Peranan Informed Consent dalam Transaksi Terapeutik*, Bandung, : PT Citra Aditya Bakti , 2002, page 85

Doctor or dentist in Article 50 of Law Number 29 Year 2004 concerning Medical Practices in carrying out medical practices has the right:

a. Obtain legal protection as long as carrying out duties in accordance with professional standards and operational procedure standards
b. Providing medical services according to professional standards and operational standards
c. Obtain complete and honest information from patients or their families
d. Get rewarded for services.

Health Service according to Lavely and Loomba is an effort that is carried out alone or together in an organization to improve and maintain health, prevent diseases, treat diseases and restore health aimed at individuals, groups, or communities[8]

Basically a good health services, must have several basic requirements, including[9]:

1. Continuous Availability
   The first basic requirement for good health services is that health services must be available in the community and be sustainable. This means that all types of health services needed by the community are not difficult to find, and their presence in the community is at any time that is needed.
2. Acceptable and reasonable
   The second basic requirement for good health services is that which is acceptable to the community and is natural. This means that health services are not contrary to public beliefs and beliefs. Health services that are contrary to customs, culture, beliefs and beliefs of the community, and are of a non-voluntary nature, are not a good health services.
3. Easily Achievable
   The third basic requirement for good health services is that which is easily achieved by the community. Understanding the achievements referred to here is viewed from the point of location. Health services that are too concentrated in urban areas, meanwhile are not found in rural areas, are not good services.
4. Very reachable
   The definition of affordability that is meant here is from a cost standpoint. In order to realize this situation, the cost of health services must be paid according to the economic capacity of the community.
5. Good in quality
   The definition of quality here is that which refers to the level of perfection of health services provided, which on the one hand can satisfy the service users and on the other hand the correct procedures. Thus, the health service is one of the activities of health efforts both oriented toward disease prevention and health promotion, as well as oriented towards the treatment of diseases and health recovery.

Hospital organizations have structural and functional personnel and the function of said structural personnel is generally more directed to the determination, application, control, support and supervision of operational policies. A hierarchical order is always needed so that the boss can instruct something to his subordinates. Each position has authority based on the legitimate legitimacy of the Hospital owner, whether owned by the central, regional, or private owners. Individual position holders cannot escape from the competency requirements in accordance to the position mandated to him.[10]

D. RESEARCH METHOD

This research was conducted using the normative juridical approach method, namely legal research which is often referred to as literary research where this research was conducted by prioritizing literary research or secondary data and how it is implemented in practice. The normative juridical approach was used in this study because the problems to be investigated revolved around the laws and regulations and their implementation in practice[11].

The specifications in this study are descriptive analytical, which provides as much detailed data as possible about a situation or other symptoms. This research is expected to be able to describe comprehensively, systematically, factually, and accurately the problems that are examined regarding

[8] Syahrul Mach,ud,SH,MH, "*Penegakan Hukum dan perlindungan Hukum Bagi Dokter yang Diduga melakukan Medikal Malpraktik*", Bandung; Mandar Maju, page 78.
[9] Azrul Anwar, *Pengantar Administrasi Kesehatan*, Tangerang : Binarupa Aksara, 2010. Page. 45-46.
[10] Endang Wahyatui Yustina, *Mengenai Hukum Rumah Sakit*, Bandung : Keni Media, 2012, page 15.
[11] Ronny Hanitijo Soemitro, Metodologi Penelitian Hukum dan Jurimetri, Cet. 4, Jakarta:
Ghalia Indonesia, 1990, page. 11.

the implementation of informed consent in the hospital which is connected with the provisions that govern it, and then an analysis is carried out to obtain a solid conclusion(s).

E. ANALYSIS AND DISCUSSION

A therapeutic agreement in this case is manifested in the form of informed consent is the same as an agreement in general, so it must comply with the provisions of the legality of the agreement as stipulated in Article 1320 of the Civil Code and the provisions in the Minister of Health Regulation Number 290 / Menkes / PER / iii / 2008 concerning Approval of Medical Measures.

As mentioned in Article 1 number 7 of the Health ministerial law number 290/2008, competent patients are adult or non-child patients according to statutory regulations or have / have been married, have no physical awareness, are able to communicate naturally, do not experience any mental illness so as to be able to make decisions freely.[12] If this is related to the provisions in Article 13 paragraph (1) Health ministerial law 290/2008 which states that consent is given by a patient or family of competent patients, or it can also be said that someone is legally capable of making an agreement as stated in the Civil Law. In the above case it can be seen that the informed consent which is the basis of the agreement to perform an operation to dilate the anal canal (Anaplasty) to the patient is approved and signed by the patient's family, in this case carried out by the grandchild, although in practice nothing happens to the patient, but still The signed informed consent was legally flawed.

Article 1320 of the Civil Code contains provisions regarding the conditions for validity of the agreement, namely:[13]

1. Agree those who bind themselves; Agree to those who bind themselves (de toestemming van degenen die zich verbinden);
2. The ability to make an agreement (de bekwaamheid om eene verbintenis aan teaan);
3. A certain object (eene bepald ondewerp objekt); and,
4. A just cause (eene geoorloofde oorzak).

The first and second conditions are called subjective conditions, while the third and fourth conditions are called objective conditions. Subjective conditions are conditions relating to the state of the subject or parties making the agreement. Objective conditions are conditions relating to the object or content of the agreement made by the parties. In making an agreement, all four conditions must be fulfilled. In the event that an agreement made does not meet the subjective conditions of validity of the agreement, then the agreement can be cancelled (vernietigbaar or voidable) by one of the parties requesting the cancellation. Meanwhile, if an agreement is made that does not meet the objective requirements of the validity of the agreement, then the agreement is null and void by law (nietig van rechtsweg or null and void), meaning that the agreement that was made was considered to have never existed or never occurred since the very beginning.

The second condition, namely the ability to make an agreement. Capability (bekwaam) is a general requirement to be able to carry out legal actions legally that is, they must be mature, healthy-minded, and not prohibited by a statutory regulation to carry out certain acts. Article 1330 jo. Article 330 of the Civil Code states that agreements cannot be made by children who are not yet capable, namely children who have not reached the age of 21 years or have never been married. Judging from the sense of justice it is really necessary that the person who makes the agreement must really have the ability to realize all the responsibilities that will be borne by the act. So, that means to be able to enter into an agreement, the parties must be in a condition of capacity that is allowed or felt to be an appropriated and appropriate in the assessment of both parties.

Based on what the authors have stated above, it can be concluded that the informed consent contained within the therapeutic agreement must be bound to the provisions contained in the Civil Code, especially Article 1320 and Article 1338, and also other legislation which regulates informed consent, one of which is the Regulation of the Ministry of Health of the Republic of Indonesia Number 290 / Menkes / PER / III / 2009 concerning Approval of Medical Measures.

The informed consent that was signed by the family of the underage patient had fulfilled the first condition of the validity of the agreement, that is, the agreement of those who bound themselves. As explained earlier, the agreement of those who bind themselves means that the parties making the agreement have agreed or there is a corresponding

[12] Article 1 number 7 Regulation of the Minister of Health of the Republic of Indonesia Number 290 / Menkes / PER / III / 2008 concerning Approval of Medical Measures.
[13] Article 1320 of the Civil Code

will or mutually agreeing to their respective wishes, which was born by the parties with no coercion, error, and fraud. In a therapeutic agreement, this is marked by the arrival of patients to the doctor's office to ask for help to overcome their health problems. In therapeutic agreements doctors and patients act as legal subjects. This has been clearly illustrated when the patient is taken for treatment by his family to the doctor and then both parties have communicated about what happened to the patient and what are the next steps that must be taken for the patient's recovery. Then, it is known that it is necessary to carry out an operative action to dilate the anal canal (anoplasty) to the patient, at that time the patient's family immediately approves the operative action that the doctor will take orally to the patient, however, as stated in Article 3 paragraph (1) of the Minister of Health Republic of Indonesia Number 290 / Menkes / PER / III / 2008 concerning Approval of Medical Measures, that every medical action that contains a high risk must obtain written approval signed by those entitled to give consent, then in this case a written medical action approval is required due to an operative actions of widening the anal canal (anoplasty) , such is a medical action that contains a high risk, so that after the patient is hospitalized and ready to undergo said medical action an informed consent form is made that states the consent of the patient or the closest patient's family to the medical action will be performed on the patient and this is approved by the patient's family.

Then, the informed consent that was signed by the patient's family who was underage had fulfilled the third requirement of the validity of the agreement, namely the existence of a certain matter. As explained before, that the object of this agreement must be certain, at least the type must be determined, whereas if the amount is not determined it is also okay, as long as it can then be determined or calculated, however, there is a uniqueness that becomes a certain thing or an object in a therapeutic agreement that blows it with other agreements in general, that is, where the object is not the outcome of the main purpose of the agreement, but rather lies in the efforts made to cure the patient (inspection of promises). This has been clearly illustrated after the patient or the patient's family and the doctor communicates with each other about what happened to the patient, then the doctor makes an anamnesis and makes a diagnosis of what the patient is experiencing, after which the doctor offers operative steps to provide healing to the patient, that is by performing an enlargement of the anal canal (anoplasty), and the patient or family of the patient agrees. Then, the doctor also performs operative action to dilate the anal canal (anoplasty) to the patient in accordance with the procedure and reap success, after which the patient becomes healthy again as usual.

The informed consent that was signed by the patient's family is underage does not meet the second requirement of the validity of the agreement, namely the ability to make an agreement. As explained earlier, being competent (bekwaam) is a general requirement to be able to carry out legal actions legally, that is, they must be mature, have a healthy mind, and are not prohibited by a statutory regulation to do a certain act. In a therapeutic agreement, a doctor can be said to be capable if he has completed the licensing required by a doctor to practice and has the competence and authority in accordance with the license issued for him.

An agreement that does not meet the conditions for validity of the agreement as determined imperatively in Article 1320 of the Civil Code, both subjective and objective conditions will have the following consequences:

1. "Non-existence", meaning that there is no agreement, if there is no agreement;
2. "Vernietigbaar", meaning that the agreement can be canceled, if the agreement arises because of a defect of will (wilsgebreke) or because of inadequacy (onbekwaamheid) or in other words the agreement does not meet the legal requirements of the first and / or second agreement in Article 1320 of the Law the Civil Code, which means that this is related to not meeting subjective conditions, so that the agreement can be canceled; and,
3. "Nietig", means that the agreement is null and void, if the agreement does not have a particular object or subject matter or the object cannot be determined and has a prohibited cause or cause or in other words the agreement does not meet the legal requirements of the third and / or fourth agreement in Article 1320 of the Civil Code, which means that this is related to not fulfilling objective conditions, so that the agreement is null and void.

Regarding the cancellation and cancellation of the agreement provided for in the Eighth Part of Book III of the Civil Code. Article 1446 of the Civil Code states that:

> "All agreements made by minors, or persons under abilities are null and void by law, and for claims made by or and their parties, must be declared null and void, solely on the grounds of immaturity or ability."[14]

The consequences of this article are mentioned in Article 1451 of the Civil Code, namely:[15]

> "The statement of the cancellation of the agreements based on the incompetence of these persons in Article 1330, results in the recovery of the goods and persons concerned as they were before the agreement was made, with the understanding that everything that has been given or paid to unauthorized persons, results the agreement can only be reclaimed if the goods concerned are still in the hands of the unauthorized person, or if it turns out that this person has benefited and what has been given or paid for or if what has been enjoyed has been used for his interests. "

The informed consent in the case above is said to be invalid because it does not fulfil two of the four conditions for the validity of the agreement stipulated in Article 1320 of the Civil Code, namely the ability of the parties to make agreements and legal reasons.

The legal consequences of not fulfilling the ability of the parties to make the agreement as one of the subjective conditions for the validity of the agreement, namely the agreement can be cancelled. The agreement can be cancelled at the request of the party giving the agreement freely and / or who is not capable. Article 1266 of the Civil Code regulates that there are 3 conditions for the cancellation of the agreement, one of which is the judge's decision, but because Book III of the Civil Code is set, then this rule can be set aside and the parties can determine that to cancel the agreement does not require a judge's decision. The right to request the cancellation of this agreement is limited within 5 years as stipulated in Article 1454 of the Civil Code, but in the case of a therapeutic agreement this matter seems to be ruled out, because as stipulated in Article 5 paragraph (1) of the Regulation of the Minister of Health of the Republic of Indonesia Number 290 / Menkes / PER / III / 2008 concerning Approval of Medical Measures, it is explained that the approval of medical measures can be cancelled or withdrawn by the approver before the start of the action. This is because in a therapeutic agreement that is the object of the agreement, namely the operative action carried out in accordance with the procedures and professional ethics of the doctor / dentist, not the end result of the operative action. [16]So, if the new agreement is cancelled by the party who gives its approval after the medical action has been taken, then this has no meaning anymore. As long as the agreement is not cancelled, it remains binding for the parties.

F. REFERENCES

Azrul Anwar, *Pengantar Administrasi Kesehatan*, Tangerang : Binarupa Aksara, 2010.

Endang Wahyatui Yustina, *Mengenai Hukum Rumah Sakit*, Bandung : Keni Media, 2012.

J,Guwandi, SH, *Hukum Kesehatan* , Jakarta : FKUI, 2005.

Ronny Hanitijo Soemitro, *Metodologi Penelitian Hukum dan Jurimetri, Cet. 4*, Jakarta: Ghalia Indonesia, 1990.

Subekti, *Hukum Perjanjian*, Jakarta : PT Intermasa, 1987.

Sofwan Dahlan, *Hukum Kesehatan*, cetakan ke III Semarang : Badan Penerbit Universitas Diponegoro.

Syahrul Mach,ud,SH,MH, "*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.

[14] Article 1446 of the Civil Code
[15] Article 1451 of the Civil Code
[16] Article 5 paragraph (1) Regulation of the Ministry of Health of the Republic of Indonesia Number 290 / Menkes / PER / III / 2008 concerning Approval of Medical Measures

LEGAL CULTURE ON HEALTH MAINTENANCE IN AVIATION

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ABSTRACT:
Aviators are one of the factors that determine flight safety. Every decision taken on a flight is entirely within the responsibility of the flight, in this case the aviator captain in charge. Flight safety is influenced by the health of the pilot, where a pilot must be mentally and physically fit. A good legal culture needs to be developed so that awareness in maintaining health is an important role for the aviation safety. Analysis were conducted using descriptive method and the results showed legal culture on health maintenance in aviation have been well organized. Legal culture on health maintenance in aviation is the important key rule to regulate the aviation procedure. Good cooperation is needed between the governments, airlines company, pilots and other stake holder to promote legal cuture on health maintenance in aviation.

Keywords: Legal Culture, Health Maintenance, Aviation

A. INTRODUCTION

Aviators are one of the factors that determine flight safety. Every decision taken on a flight is entirely within the responsibility of the flight, in this case the aviator captain on duty. The cost to graduate an aviator is expensive which can reach hundred millions rupiah that must be spent until a pilot completes his education. After they get accepted in an airline companies, they are required to pass the education and training in accordance with the aircraft license that they will carry. For this reason, the pilot is one of human resources that need to be well safeguarded by their own airline company, including their health. [1]

Flight Safety is influenced by the health of the pilot, where a pilot should be physically and mentally healthy as determined in Act Number 1 of 2009 concerning Aviation (hereinafter referred to as the Aviation Law) Article 59 that:[2] Aircraft Personnel that has license is mandatory to:

a. Work in accordance with the provisions of their field;
b. Maintain the capabilities; and
c. Conduct periodic medical checkup

The implementation of health screening under the law is conducted by the designated institution, Directorate General of Civil Aviation Medical (DGCA), which provides the complete medical check up and releases the medical statement. From here a pilot will be deemed eligible or not for flight duty, where after undergoing a thorough medical examination and if declared passed by a medical team, consisting of aviation doctors, a health certificate will then be issued. The health certificate is valid for six months and therefore the medical check up should be done regularly every 6 months.

On 25th July 2006, we heard the news of an Indonesian airline aviator collapsed during his flying duty Bali to Adelaide via Melbourne. According to information, after the passenger boarding and aircraft doors were closed, he required an emergency assistance. The airport medical team immediately arrived, did the resuscitation, and brought him to the nearest hospital. At 01.35 am, the pilot was announced with Death on Arrival in the hospital. Based on his medical records, since 1997 he has hyperlipidemia issu. Then on 2006, he was hospitalized because of stroke for 3 days and he did not report the incidence to the Aviation health doctor. This was happened before his next medical checkup schedule so he was not suspended due to medical issue after the incidence.

In terms of aviation safety, the role of aviator is very important, which according to the International Civil Aviation Organisation (ICAO), the authority and the responsibilities of aviator as captain of the aircraft commander, as follows:

1. Responsibility for the state of the airplane, the welfare of the crew, flight preparation, and flight success.

[1] K. Martono. Hukum Penerbangan: Berdasarkan UURI No.1 Tahun 2009. CV. Mandar Maju, Bandung. 2009
[2] Indonesian Civil Aviation Act of 2009 No.1

2. The right to give orders to the crew and passengers, especially in the event of a criminal offence in an aircraft.
3. Have the authority to take all necessary actions for flight safety.
4. Administrative obligations e.g. recording birth and death in an aircraft.
5. Deciding when and how to request assistance in search and rescue operations in the event of an air transport accident in accordance with the provisions of the Chicago Convention 1944.

With periodic health check up in the aviation, we can prevent various flight accidents in Indonesia. This is in accordance with the provisions of Aviation Law Article 58, which states:

(1) Each aircraft personnel are required to have a competency license or certificate
(2) Aircraft personnel who are directly related to the conduct of aircraft operations, are required to have an official and valid license
(3) The license as referred in paragraph (2) is granted by the Minister after fulfilling the following requirements:
    a. Administrative
    b. Physically and mentally healthy
    c. Have a certificate of competence in its field
    d. Pass the exam
(4) The Certificate of competence as referred in paragraph (3) letter c is obtained through education and/or training organized by an accredited institution

But whether with the health certificate, is the pilot's health status guaranteed to be healthy for the next 6 months? In some cases where a pilot has decreased health, for example suffering from a chronic disease (such as Diabetes Mellitus, Hypertension, etc.) but the disease is still controlled and as long as the disease is controlled, it does not cause a bad influence on his duties, so he is still considered eligible for flight assignments . The pilot was given flexibility by the aviation doctor as long as his condition did not interfere with his flight assignments. In this case, the health certificate (which is valid for 6 months) will have no meaning, because it turns out that the pilot is not necessarily healthy for a period of 6 months from the issuance of the health certificate. So that if something unexpected happens to the plane and the passengers entrusted to the pilot, known to have a chronic (though controlled) disease, usually the first presumption for the cause will be on the pilot's health condition.

A good legal culture needs to be developed so that awareness in maintaining health is an important role for aviation safety. Based on her background above, the writer is interested in writing about legal culture in the maintenance of aviation health.

B. PROBLEM STATEMENT

Based on the explanation above, the formulation of the problem can be taken as follows:

1. How is the legal arrangements regarding of Health Maintenance in Aviation?
2. How is the legal culture on Health Maintenance in Aviation?

C. LITERATUR REVIEW

Legal culture, in its most general sense, is one way of describing relatively stable patterns of legally oriented social behaviour and attitudes.[3] The legal basis for regulating the health inspection requirements for pilots in Indonesia is regulated in the Law of the Republic of Indonesia Number 1 of 2009 concerning Aviation. In this Aviation Law, several articles and paragraphs that relate directly to Aviation Health, such as Article 58 paragraph three point (b) which can be analyzed that physical and mental health is one of the prerequisites for each flight personnel to obtain a competency certificate. Based on the explanation of Article 58, the party entitled to declare flight personnel in a state of physical and mental health is a health unit that has the qualifications to conduct a medical examination of flight personnel. Thus, this article regulates the health of flight personnel, including pilots, where the health is stated by qualified agencies conducting medical examinations for flight personnel. The word mandatory of course in a legal perspective has consequences if it is not done. Then in Article 59, first paragraph (c) explains the obligation of flight personnel to carry out periodic medical examinations, the period of which is adjusted to the class of the proposed health certificate. The provisions of Article 59 mean to emphasize the provisions of Article 58, that to fulfill the physical and mental health requirements, every aircraft personnel, including pilots, must have periodic health checks. The word must of course have legal consequences if not implemented.[4]

[3] Nelken, David. Using Concept of Legal Culture. Heinonline 2004, downloaded on January 18, 2020.
[4] Republic of Indonesia Minister of Transportation Regulation

ICAO (International Civil Aviation Organization) as the world aviation authority regulates the pilots' health inspection obligations in the Manual of Civil Aviation Medicine, Document 8984 of 2008, where the basis of the examination aims to obtain aviation health certificate based on the class of each air crew, which is regulated in Annex 1 Chapters 1,2, and 6. The form of legal arrangements in Indonesia, where Indonesia as an ICAO member country is obliged to ratify these rules, which are then used as the legal basis for conducting a pilot health check in Indonesia.[5] The implementing regulations for the Aviation Law still refer to it.

Legal culture on Health Maintenance in Aviation is a new paradigm and obligation to create aviation safety. Synergy cooperation is needed between the government, the airlines, and the aviators themselves.

D. RESEARCH METHODS

This research method used in this study was normative legal research, namely research conducted by examining existing legal materials by conducting research on certain legal issues and then examined using the statutory approach (The Statute Approach) which means that the law is conceptualized as what is written in the legislation or law drafted as a rule or norm.[6] This study used primary and secondary legal materials that have been systematically compiled with descriptive analysis techniques.

E. DISCUSSION

1. Legal Arrangements Regarding of Health Maintenance in Aviation

Legal arrangements regarding of aviation health maintenance are related to several regulations. Aviation Law Article 53 states that every person is prohibited from flying or operating an aircraft that can endanger the safety of aircraft, passengers, goods, and/or residents or interfere with security and public order or harm the property of others. Article 54 further states that everyone who was on the plane during the flight was prohibited from doing actions that could endanger the security and safety of the flight. The cpnsequences of this violation are stated to be subject to sanctions in the form of freezing to the revocation of health certificates and flight licenses. Health surveillance for flight personnel, especially pilots is carried out routinely by the Directorate General of Civil Aviation Ministry of Transportation of the Republic of Indonesia. As stipulated in the Minister of Transportation Regulation of the Republic of Indonesia Number PM 69 of 2017 concerning Civil Aviation Safety Regulations Part 67 (Civil Aviation Safety Regulations Part 67) Regarding Health Standards and Certification of Aviation Personnel (hereinafter referred to as PKPS PM), that medical tests for pilots are carried out once every 6 months. The stages to obtain health certification for flight personnel include health tests:

1. Eyes;
2. Ears, nose, throat and equilibrium;
3. Mental;
4. Neurological;
5. Cardiovascular;
6. General medical conditions.

Health care based on health dictionary is defined as maintaining health status by aviation and related aviation health institutions. Under the Aviation Law Article 1, the pilot captain is a pilot assigned by the company or aircraft owner to lead the flight and is fully responsible for flight safety during the operation of the aircraft in accordance with statutory regulations. Pursuant to Government Regulation No. 3/2001 concerning Aviation Security and Safety (hereinafter referred to as PP Aviation Security and Safety) Article 1, the flight captain is the flight crew appointed and assigned to lead an aviation mission and is responsible for flight safety and safety during aircraft operation flying and/ or helicopters that are technically functioning normally.

In the world of aviation, a health check-up for pilots is defined as a periodic health check on a pilot's health status by a competent doctor in the field of flight (aviation doctor), where in Indonesia the medical check-up is carried out every 6 months. Each country has its own regulations regarding health checks for its carriers.

In Indonesia, health checks on pilots, as well as flight crew and flight operations personnel are carried out at the Aviation Health Center. The Aviation Health Center already has a Certificate of Medical for the medical examination of the flight personnel according to ICAO Regulation Part 67 standard, where the flight doctors at the Aviation Health Center number 16 people. The Aviation Health Center not only conducts health checks on pilots, but also cabin crew, Air Traffic Controller (ATC) officers and field

Number PM 69 Year 2017 Concerning Civil Aviation Safety Regulations Part 67 Regarding Health Standards and Aviation Personnel Certification

[5] Manual of Civil Aviation Medicine, Document 8984 of 2008

[6] Soerjono, Soekanto. Penelitian Hukum Normatif: Suatu Tinjauan Singkat. CV. Rajawali, Jakarta. 1985.

officers at the airport. Examinations for pilots are more than any other flight crew, including physical examination, blood, urine, eyes, audio, teeth, x-rays and heart.

Health care in aviation is a legal culture that must be carried out by pilots during their professional duties. Legal culture in maintaining good aviation health is one of many procedures to create and maintain national aviation safety.

2. Legal Culture on Health Maintenance in Aviation

German legal expert, F.C. von Savigny believes that cultural factors play an important role in determining the legal style of a society, even a nation. Every nation that is united by the same historical frame, usually has one national soul (Volksgeist). The law is not made, but rather grows together with the community. In a more modern theory, Leon Duguit from France concluded that objective law did not grow from the soul of the nation or from the law, but rather was built on social solidarity. That is, thanks to the bond of social solidarity, the life of a nation can run in an orderly manner, and the law can be upheld. Two approaches thinked by Savigny and Duguit reflect the view that law as a pattern of social behavior on a macro scale. Law is associated with the soul of the nation and social solidarity. On the other hand, there is a view that sees law more as patterns of social behavior on the meso and micro scale. Community behavior when in contact with the law can be used as an example. The behavior of car and motorcycle riders in dealing with traffic signs on the road, or the behavior of the people who were present at the trial while attending the trial, are some concrete examples of the meso and micro approach in the community's legal culture.

From the perspective of subjects that shape the legal culture, Legal culture can be divided into two by Friedman. There are an external legal culture that engages the wider community in general and an internal legal culture, which is a culture developed by law enforcement officials. Regardless of whether the patterns of behavior that are allowed to occur continuously are good or bad for the life of law in society, this is how a legal culture will be created. Here the unwritten law applies, that repetitive patterns of behavior will eventually be "agreed" binding on all citizens. A good legal culture will contribute to establishing a healthy legal system, while a bad legal culture will encourage the emergence of a sick legal system.

A healthy legal culture is manifested in the form of legal awareness (rechtsbewustzijn), while a sick (unhealthy) legal culture is demonstrated through a sense of law (rechtsgevoel). J.J. von Schmid (1965:63) who correctly distinguishes the two terms. According to him, *"Van rechtsgevoel dient men te spreken bij spontaan, onmiddelijk als waarheid vastgestelde rechtswaardering, terwijl bij het rechtsbewustzijn men met waarderingen te maken heeft, die eerst middelijk, door nadenken, redeneren en argumentatie aan nemelijk gemaakt worden."*, Schmid stated more or less that sense of law is the community's evaluation of the law that is expressed spontaneously, directly, and as it is, while legal awareness is more an indirect assessment because legal awareness departs from the results of thought, reasoning, and argumentation.

The legal culture in maintaining Aviation health must be carried out by pilots who carry out their flight duties. A good legal culture will make aviation safety in Indonesia improve. Carrying out their duties as a pilot with a busy flight schedule can result enforcement to work to the limit of his ability. Not infrequently there are aviators who are sick but can not take some drugs because they contain the effects of drowsiness and choose to consume drugs to maintain health. If a pilot uses illegal drugs while driving an aircraft it can cause accidents that endanger passengers. For these, aircraft accidents pilots may be liable for criminal sanctions in accordance with those stipulated in the Criminal Code (hereinafter referred to as the Criminal Code) and the Aviation Law. In Article 438 of the Aviation Law it is stated that a pilot who is in danger or another aircraft and does not notify him of the traffic control agency and because of his actions resulting in the loss of property of others is sentenced to a maximum of 8 (eight) years in prison, if for that reason causes the death of another person is sentenced to a maximum of 10 (ten) years in prison. For this reason, a safe and secure culture must be considered by the pilots who are the main actors who are required to maintain health in carrying out their flight duties.

F. CONCLUSION

Based on the existing discussion, it can be concluded that:

1. Legal arrangements regarding of maintenance of aviation health have been well arranged starting from the Aviation Law to its derivatives. The role of the government in this

case as the main responsible for flight safety through enforcement of the Aviation Law is required, as well as the role of the airlines themselves to better supervise their pilots. Synergy cooperation is needed between the government, the airlines, and the aviators themselves.

2. The application of legal culture in the maintenance of aviation health has largely been carried out well, it only needs to be increased awareness of the legal culture of aviation health maintenance in supporting the safety of national aviation.

F. 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, Jakarta. 2009.

Legislation:

Manual of Civil Aviation Medicine, Document 8984 of 2008

The 1945 State Constitution of the Republic of Indonesia

Indonesian Civil Aviation Act of 2009 No.1

The Criminal Code

Republic of Indonesia Minister of Transportation Regulation Number PM 69 Year 2017 Concerning Civil Aviation Safety Regulations Part 67 Regarding Health Standards and Aviation Personnel Certification.

Journal and Internet:

Susanti. Jurnal Penelitian Perhubungan Udara Warta Ardhia. Vol. 38 No.2, June 2012, downloaded on January 18, 2020.

Jawardi. Strategi Pengembangan Budaya Hukum. Penyuluh Hukum Badan Pembinan Hukum Nasional Kementerian Hukum dan Hak Asasi Manusia, downloaded on January 18, 2020.

Nelken, David. Using Concept of Legal Culture. Heinonline 2004, downloaded on January 18, 2020.

Sesse, Muh. Sudirman. Budaya Hukum dan Implikasinya Terhadap Pembangunan Hukum Nasional. STAIN Parepare. Jurnal Hukum Diktum, Vol.11 No.2, July 2013 page 171-173, downloaded on January 18, 2020.

Shidarta. Apa Itu Budaya Hukum. Bina Nusantara University Faculty of Humanities, downloaded on January 18, 2020.

THE FORM OF LEGAL PROTECTION FOR COMMUNITIES THAT FINISH THE COURT THROUGH TRADITIONAL JUSTICE

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ABSTRACT

In the life of Provincial society South Sulawesi, the customary dispute settlement was done by culture institution. The application of customary dispute settlement in Provincial society South Sulawesi is supported by any general principles that can provide protection for the rights of disputed parties.

There are some alternative dispute settlement methods in the community life, it is commonly through formal way (litigation) and also can be used through informal ways (non-litigation). One of informal dispute settlement is through a customary approach which is undertaken by culture institution. The dispute settlement through custom approach has the main the purpose that is to keep harmony and relationship among the community, not only providing the legal certainty but also the justice. From the standpoint of sociology customary law in question is a law that can fulfill the function of legal ideology as implied by cultural values because the rules are perceived and accepted by the community as appropriate behavior patterns to control behavior in a dynamic and responsive society to changes around him as a living law that is more useful and easy to implement because it has become part of the applicable law in the community.

As a living law, customary law always changes or shift and, where there is a shift in life patterns Public. There are parts of customary law that can survive and some are disappear. The field of law that can survive is the field of law sensitive nature, which touches on cultural values and beliefs society such as family law and inheritance law, whereas in neutral law which is the scope of public law such as law criminal and economic law, changes occur even in customary law this field can be said to have no more validity "the living law" is a living law and is being actual in a society, so that no further reactualization is needed. "The living law" is not something static, but is changing from time to time. "The living law" is the law that lives in society, can be written or may not be written. Likewise "the living law" can tangible customary law (which is not written), can also be customary law modern (unwritten) originating from the West and Islamic Law in certain legal fields.

Keywords: Legacy Cultures, Fundamental Rights, Provincial Society South Sulawesi.

A. INTRODUCTION

The Alliance of Indigenous Peoples of the Archipelago (AMAN) which has formulate various declarations, statements, programs and efforts which concerns the empowerment of indigenous peoples which is certain as well concerning traditional institutions that need our mutual attention.

In the congress a Decree No.02 / KMAN / 1999 dated March 21, 1999 concerning the Declaration of Community Alliance Indigenous Archipelago (AMAN) consists of:

1. The custom is something that is sublime and becomes the foundation the life of the main indigenous people
2. The customs in the archipelago are very diverse, because there is no place for state policies that apply uniformly.
3. Long before the state was established, the indigenous people in the archipelago had first able to develop a living system as desired and understood by yourself. Therefore the state must respect the sovereignty of these indigenous peoples.
4. Indigenous peoples basically consist of human beings who other. Therefore, indigenous people are also entitled to decent and proper life according to its social values applicable. For this reason, all actions taken by the state are out the propriety of universal humanity and not according to taste justice understood
5. The basic custom of a sense of togetherness is the same fate, the community the customs of the archipelago must work hand in hand for the realization decent and sovereign peoples' lives.

Provision of legal certainty as a form of protection for communities who resolve cases through customary law is still a polemic in the lives of local communities. Because the position of the

victim as a party in mediation still has not received legal protection.

Disputes on the one hand are common in this situation people's lives, but on the other hand creates disharmony and imbalance of people's lives. In community life that is communal and and is based on principles togetherness then harmony and life balance are the ideal order that always wants to be maintained. Disruption of things Such, as the occurrence of disputes must be immediately terminated. In the life of the state now there are several alternatives how to resolve disputes, can be through formal justice institutions *(litigation)* and allows for *resolution* outside the court *(no litigation)*. In the reality of community life is often found in dispute resolution cases outside the court.

One mechanism for dispute resolution in outside the court is through a customary approach. Settlement via The customary approach referred to is the settlement of the dispute with culture mechanisms and by culture institutions. In bugis, there are known traditional institutions which function to regulate, organize, and maintain harmony in people's lives. Function of guarding community harmony is implemented through preventing it from happening disruption or violation and resolve the issue, dispute or cases that occur in society.

B. PROBLEM STATEMENT

The main issues that can be put forward in implementation this research is:

1. How is the role of Customary Law in Provincial society South Sulawesi is associated with the formation of laws and regulations regional invitations or national legislation?
2. What is the position of Customary Law in South Sulawesi Province at present anticipating the era of globalization

C. AIM AND PURPOSE

1. Giving legal certainty as a form of protection to the community through customary justice
2. Restorative justice as a theory and the value of living and actual law in society is used as a revitalization of customary law

D. LITERATURE REVIEW

With the enactment of Law No.22 of 1999 concerning Regional Autonomy (later revised) into Law No.32 of 2004, the existence of customary law again play a role. Making Local Regulations (*Perda*) according to needs, Local cultural values lead to an understanding of the very Customary Law is required. Amendments to the 1945 Constitution in article 18 B paragraph (2) states:"The state recognizes and respects the units of customary law communities along with their traditional rights as long as they are alive and in accordance with the development of society and the principles of the unitary state of the Republic Indonesia, which is regulated in the Law ". Likewise in Chapter X A regulating human rights article 28-I paragraph (3) strengthens the position of the law culture by stating that: cultural identity and traditional community rights respected in harmony with the development of the era of civilization**.**

Justice in the text and context of the Republic of Indonesia Law No.48 of 2009 concerning judicial power, requires access to justice placed on the basis of legal centralism. In article 2 paragraph (3) it says "all courts in the entire territory of the Republic of Indonesia are countries regulated by law". The legal perspective on centralism is thought to bring a sign of death for justice outside the state's judicial authority. However, the principle of the administration of judicial power by state justice, there is an unwritten constitution that is the will of the people regarding justice in the name of the law that lives in society as a manifestation of the needs and legality of public order and peace that is not always able to be realized by the state judicial bodies.

In customary law there is no distinction or division of law into in civil law or criminal law as we distinguish in formal legal context. Accordingly, the dispute intended in the context of customary dispute resolution is all forms violation of customary law and all civil and criminal matters.

The author will discuss whether the traditional court decision so far has binding legal force? What efforts can be made by customary justice stakeholders and the government so that customary court decisions have stronger ties. Whatever the form or nature of the dispute, the resolution is intended for realize the harmony of society. Purpose this is what you want to achieve in each customary dispute resolution. From various studies on mediation it was revealed that dispute resolution has been corrupted by various practices and by the legal principles of each region. In some tribes or culture communities, such as South Sulawesi violations of "SIRI" decency are resolved by acting alone or resolved outside or in formal justice, as is often called customary justice in the community, village consultation in the village or family consultation in the family environment.

The teaching of completing can be implemented through completion peaceful resolution, which in this context is the resolution of disputes customary. The above description shows that the dispute resolution traditionally realized in the form of a peaceful settlement. Through customary resolution, it is desirable to achieve this settlement of cases, end of disputes without too much pay attention to right or wrong, lose or win. Its final destination it is hoped that community peace will be achieved. After a dispute resolved, the community remains in peace and harmony, the parties who are dispute will get back together, will end hostilities and will accept each other. Determination of right or wrong is not the main goal, even if it is considered in granting certain obligations as a sanction

The study of the form of legal protection and certainty towards customary court decisions is limited only to the area of customary criminal law and its relation to customary courts which cover disputes. With such a scope, the direction of culture justice in the national justice system that has a practical purpose is "savoir pour prevoir, prevoir pour prevenier". It means because knowing can predict, and because it can predict, we can plan solutions to solve it.

Study of theoretical perspectives on mediation and customary justice, as well as recognition of customary justice in national legal frameworks, not only because of customary law and justice that has taken root in Indonesian society, but also because customary law in its content is living law, so it is an important part of efforts embodiment of restorative justice and healing conflicts that occur between fellow citizens or between community groups with one another community.

The implementation of the Emergency Law No.1 / 1951 which originally required the unity of the judicial power structure, by abolishing customary justice turns out in article 1 paragraph (3) to take exception by saying, the provisions mentioned in paragraph (1) do not in any way reduce the power that has so far been granted to peace judges in the villages as customary law leaders. The village peace judge, working to settle disputes between villagers, also gave a cross decision made an amendment to customary legal of the Provincial society South Sulawesi tribes to regulate the apportionment of legacy customary law. Therefore, the apportionment of legacy is regulated based on the principle of justice and compassion to all reconciling the community and representing the village inside and outside and can appoint its legal authority.

E. RESEARCH METHODS

Method of approach.

This research can be classified as legal research is explanatory, using a juridical approach normative, namely in the form of discovery and analysis of conformity between the legal paradigm, principles and the basis of positive legal philosophy with its reality, regarding logical and and consequences juridical arising as a result of reforms and the era of globalization

Research material.

The data needed in this study is data secondary, obtained from the literature review. Secondary data in the field of customary law is seen in terms of its binding power can be differentiated into primary raw materials and raw materials secondary, and empirical data that analyzes the problem customary law, especially in South Sulawesi Province.

Primary legal materials are library materials contains new and current scientific knowledge, or new understanding of known facts about an opinion, idea or idea, which consists of:

a. Basic Norms of Pancasila
b. The 1945 Constitution
c. Decree of the MPR
d. Laws governing the application of law custom. Especially in South Sulawesi Province.
e. Other laws and regulations which are related with the Development of Customary Law in Sulawesi Province South.

F. ANALYSIS AND DISCUSSION

At the data presentation stage, all data that has been obtained, collected and classified, then arranged in a comprehensive arrangement. This data analysis is done in a manner inductive analysis. The process starts from the premises positive legal norms that are known, and end in the discovery of legal principles and subsequently doctrines.2 In addition an analysis is also carried out from a philosophical and socio-economic point of view solve problems as already explained in the description above. Primary legal materials are library materials contains new and current scientific knowledge, or new knowledge about new facts about an opinion, or idea.

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As a living law, customary law always changes or shift and, where there is a shift in life patterns Public. There are parts of customary law that can survive and some are disappear. The field of law that can survive is the field of law sensitive nature, which touches on cultural values and beliefs society such as family law and inheritance law, whereas in neutral law which is the scope of public law such as law criminal and economic law, changes occur even in customary law this field can be said to have no more validity.

Change or shift of customary law as living law can arise due to:

1. Changes to the legal awareness of the people themselves, arise because of there are changes in values in the community itself. This legal awareness according to Paul Scholten, is legal awareness contained in every human being regarding existing laws, and expected laws exist. The emphasis there are values about the function of law, not an evaluation of concrete events in society
2. Shifting due to contact with religious values, for example in research on inheritance
3. Shifts due to court decisions, in this case for example in jurisprudence about Batak girls getting legacy

"The living law" is a living law and is being actual in a society, so that no further reactualization is needed. "The living law" is not something static, but is changing from time to time to time. "The living law" is the law that lives in society, can be written or may not be written. Likewise "the living law" can tangible customary law (which is not written), can also be customary law modern (unwritten) originating from the West and Islamic Law in certain legal fields.

Constitutionally (Article 18 B paragraph (2) and Article 28 I paragraph (3) 1945 Constitution) the rights of indigenous peoples are recognized, but on condition that:

a. As long as it's alive,
b. As long as it is in accordance with the development of society, era and civilization,
c. As long as it is in accordance with the principles of the Unitary Republic of Indonesia and as long as it is regulated by law.

Therefore, in relation to "the living law" in Sulawesi South, then "the living law" which is the legal rules actual life in the reality of people's legal life, is already more much more comes from Modern Western Law than Islamic Law.

There is very little customary law in South Sulawesi, and even then it is limited to only certain areas of law and increasingly marginalized.

There are some alternative dispute settlement methods in the community life, it is commonly through formal way (litigation) and also can be used through informal ways (non-litigation) through traditional justice.

Mediation is a process where victims and perpetrators meet and communicate with each other, and with the help of third parties, directly or indirectly, makes it easy for victims to express what their needs and feelings are, and allows the offender to accept and be responsible for their actions.

Mediation is developed on the basis of working principles which include:

1) Handling conflicts. The mediator is in charge of making the parties forget the legal framework and encourage those involved in the communication process towards a win-win solution.
2) Process oriented. Mediation is more oriented to the quality of the process rather than the outcome, which includes raising the awareness of the wrongdoer, the needs of the

conflict being resolved, and the victim's silence from fear.

3) Informal processes. Mediation is an informal process, not bureaucratic, avoiding strict legal procedures.
4) Active and autonomous participation of the parties. More specifically revitalization of traditional justice like mediation is the reason for creating a lot of space for access to justice and the development of alternative paths of dispute resolution according to the feelings and legal awareness of the people surrounding the dispute.

In the Customary Judicial Guidebook issued by the MAA contained several principles or principles that become the reference for resolving disputes customary. In the book, the settlement of disputes is customary termed with the Customary Court.

The principles referred to are:

1. **Trusted or Trustworthy.** The trial is based on the trust of the people because of that the functionaries are trusted traditional figures.
2. **Responsibility.** The implementation of culture justice is based on the responsibility for its implementation to the parties, the community.
3. **Equality Before the Law.** The judiciary must not discriminate, gender, social status, age. Everybody everyone has a position and rights which same in front of culture.
4. **Fast, Cheap and Easy.** The judicial process is carried out quickly, must not be dissolved, and easy. The decision must be affordable to be implemented by Public.
5. **Sincere and Voluntary.** Must not force the parties to settle the case through customary justice.
6. **Settlement of Peace.** This customary court is intended to truly really solve the problem, in order to restore balance and harmony of people's lives.
7. **Deliberation / Consensus-Building.** Decisions made in culture justice are based on results consensus agreement based on customary law.
8. **Openness to the Public.** All judicial proceedings (except certain cases, such as cases family) run openly.
9. **Be honest.** The implementation of customary justice is conducted honestly. Every traditional leader may not take advantage in any form of material good and non material in handling cases.
10. **Diversity.** Customary courts respect the diversity of customary provisions in various ways customary law sub system that applies in the community.
11. **Presumption of innocence.** Customary law does not justify vigilantism. In court proceedings, the parties must be deemed not guilty until a verdict.
12. **Fair.** Culture court decisions must be fair and the verdict is applied in accordance with the quality of the case and the economic level of the parties. According to customary law, customary dispute resolution is permanent pay attention to the rights of parties who take part. Functionaries CultureTrial must always guarantee the protection of the rights of the parties who have a license / litigation. Protection of this right is implemented in settlement mechanism of the dispute. The mechanism is accommodating the principles of Thesa, Anti-Thesa and Sinthesa, as is commonly used in formal justice, with its completion steps, in a manner brief as follows.
    - Complaints / reports (can also be with the initiative of customary functionaries)
    - Preparatory and Security Meetings if needed
    - Search sat dispute
    - Decision preparation hearing
    - Offering alternative settlement (which is not a violation of culture / not concerning two parties)
    - Decision making meeting / Announcement
    - Implementation of Decision

G. CONCLUSION

Dispute resolution through an culture approach is an alternative the resolution of an accident that occurs in the community. The ultimate goal is to restore harmony, harmony and balance of people's lives. Mediation has been applied and applied to resolve cases in the community, although the existence and application of it varies according to the institutions and institutions that govern it, but mediation has lived and is in accordance with the justification of the underlying legal instruments and institutions, as well as various concepts, philosophies, social cultures that cover it.

In customary law if someone violates customary law, then the head and traditional leader give a customary reaction (culture sanction) then the related person cannot be dropped again for the second time as a defendant in the trial of the State Judiciary, with the same indictment, violating customary law and imposed criminal imprisonment according to the Criminal Code (article 5 paragraph (3) sub b of the Emergency Law No. 1 of 1951. The implementation of the Emergency Law No.1 / 1951 which originally required the unity of the judicial power structure, by abolishing customary justice turns out in article 1 paragraph (3) to take exception by saying, the provisions mentioned in paragraph (1) do not in any way reduce the power that has so far been granted to

peace judges in the villages as customary law leaders. The village peace judge, working to settle disputes between villagers, also gave a cross decision.

REFERENCES

Kitab Undang-Undang Hukum Perdata (Burgerlijk Wetboek, Staatsblad 1847 No. 23)

Wulansari, C. Dewi, 2016, Hukum Culture Indonesia – Suatu Pengantar, Bandung : Refika Aditama

Darmodiharjo, Darji, dan Sidharta, Penjabaran Nilai-Nilai Pancasila dalam Sistem Hukum Indonesia, PT. Raja Grafindo Persada, Jakarta, 1996.

Setiady, Tolib, 2009, Intisari Hukum Culture Indonesia (Dalam Kajian Kepustakaan), Bandung : Alfabeta

Soekanto, Soerjono, 2003, Hukum Culture Indonesia, Jakarta : Raja Grasindo Persada

Waluyo, Bambang. 2015. Penegakan Hukum di Indonesia. Jakarta: Sinar Grafika.

Winarta, Frans Henda. Hukum Penyelesaian Sengketa Arbitrase Nasional Indonesia dan Internasional. Jakarta: Sinar Grafika.

H. M. Laica Marzuki, *Siri, Bagian Kesadaran Hukum Rakyat Bugis – Makasar(Sebuah Telaah Filsafat Hukum)***,** Hasanuddin University Press, 1995.

H. M. Naszir Said, *Silariang, Siri' Orang Makassar*, Cetakan kedua, (Makassar: Pustaka Refleksi, 2005).

Halilintar Lathief, *Bissu Pergulatan Dan Peranannya di Masyarakat Bugis***,** (Makassar: Desantara, 2004)

Achmad Ali, *Reaktualisasi "The Living Law" Dalam Masyarakat Sulawesi Selatan*, Makalah disampaikan dalam Seminar tentang Revitalisasi dan Reinterpretasi Nilai-nilai Hukum Tidak Tertulis Dalam Pembentukan dan Penemuan Hukum, diselenggarakan oleh Dep. Hukum dan HAM RI bekerjasama dengan FH Universitas Hasanuddin dan Kawil Dep. Hukum dan HAM RI Provinsi Sulawesi Selatan, Makasar, 28 – 29 September 2005.

Mattulada, "*Bugis Makasar Manusia dan Kebudayaannya* ", Berita Antropologi. Fak. Sastra UI, Juli 1974

H. M. Laica Marzuki, Siri, Bagian Kesadaran Hukum Rakyat Bugis – Makasar (Sebuah Telaah Filsafat Hukum), Hasanuddin University Press, 1995, hal. 166.

H. M. Naszir Said, Silariang, Siri' Orang Makassar, Cetakan kedua (Makassar:Pustaka Refleksi, 2005).

H. M. Laica Marzuki, Siri, Bagian Kesadaran Hukum Rakyat Bugis – Makasar (Sebuah Telaah Filsafat Hukum), Hasanuddin University Press, 1995.

Achmad Ali, Reaktualisasi "The Living Law" Dalam Masyarakat Sulawesi Selatan, Makalah disampaikan dalam Seminar tentang Revitalisasi dan Reinterpretasi Nilai-nilai Hukum Tidak Tertulis Dalam Pembentukan dan Penemuan Hukum, diselenggarakan oleh Dep. Hukum dan HAM RI bekerjasama dengan FH Universitas Hasanuddin dan Kawil Dep. Hukum dan HAM RI Provinsi Sulawesi Selatan, Makasar, 28 – 29 September 2005.

Achmad Ali, Reaktualisasi "The Living Law" Dalam Masyarakat Sulawesi Selatan, Makalah disampaikan dalam Seminar tentang Revitalisasi dan Reinterpretasi Nilai-nilai Hukum Tidak Tertulis Dalam Pembentukan dan Penemuan Hukum, diselenggarakan oleh Dep. Hukum dan HAM RI bekerjasama dengan FH Universitas Hasanuddin dan Kawil Dep. Hukum dan HAM RI Provinsi Sulawesi Selatan, Makasar, 28 – 29 September 2005.

Halilintar Lathief, Bissu Pergulatan Dan Peranannya di Masyarakat Bugis, (Makassar: Desantara, 2004)

Winarta, Frans Henda. Hukum Penyelesaian Sengketa Arbitrase Nasional Indonesia dan Internasional. Jakarta: Sinar Grafika.

Mattulada, "Bugis Makasar Manusia dan Kebudayaannya ", Berita Antropologi. Fak. Sastra UI, Juli 1974

Winarta, Frans Henda. Hukum Penyelesaian Sengketa Arbitrase Nasional Indonesia dan Internasional. Jakarta: Sinar Grafika.

Mattulada, "Bugis Makasar Manusia dan Kebudayaannya ", Berita Antropologi. Fak. Sastra UI, Juli 1974

Wulansari, C. Dewi, 2016, Hukum Culture Indonesia – Suatu Pengantar, Bandung : Refika Aditama

Setiady, Tolib, 2009, Intisari Hukum Culture Indonesia (Dalam Kajian Kepustakaan), Bandung : Alfabeta

Soekanto, Soerjono, 2003, Hukum Culture Indonesia, Jakarta : Raja Grasindo Persada

LEGAL PROTECTION OF HOSPITALS TO CLAIMS NOT PAID BY BPJS RELATED TO HOSPITAL RIGHTS IN LAW NUMBER 44 YEAR 2009 CONCERNING HOSPITALS

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ABSTRACT

Payment of hospital claims against BPJS does not proceed as mandated by legislation, resulting in inadequate service provided by hospitals due to lack of operational funds which ultimately is disruption of public facilities. The problem arises because the cooperation agreement between the BPJS and the Hospital does not heed the principles of the agreement, including the principle of freedom of contract. The problem in this study is how the legal protection of hospitals against claims that are not paid by BPJS is related to hospital rights in Law Number 44 year 2009 concerning Hospitals. The method used in this study is a normative juridical method, namely legal research conducted by examining literature or secondary data as a basic material to be investigated by conducting a search of the regulations and literature relating to the problem under study. The analytical method used in this study is a qualitative juridical method. The results of this study are the legal protection of hospitals against claims that are not paid by BPJS related to the rights of hospitals in Law Number 44 year 2009 concerning Hospitals that can take non-litigation paths other than mediation, namely by arbitration through an agreement of the a party to a written agreement regarding the determination of dispute resolution through an arbitration institution. Apart from that, it can also be through litigation, the hospital can submit a lawsuit to the district court. The legal basis for the hospital to submit a lawsuit to the district court is Article 30 of Law Number 44 year 2009 concerning Hospitals concerning hospital rights and Article 1365 of the Civil Code**.**

Keywords: BPJS, Hospital, Mediation.

A. INTRODUCTION

The dynamics of the development of the Indonesian people have raised challenges along with demands for handling unresolved issues. One of them is the implementation of social security for all people mandated in Article 28 H paragraph (3) and Article 34 paragraph (2) concerning the right to social security.[1] In an effort to realize the objectives of the national social security system it is necessary to establish an organizing body in the form of a legal entity based on the principle of mutual cooperation. Health Social Security Organizing Agency is a State-Owned Enterprise specifically assigned by the government to provide health care insurance for all Indonesian people, especially for civil servants, recipients of civil servants and military / police, Veterans, Pioneer of independence and their families and other business entities or even ordinary people (hereinafter referred to as BPJS).

Based on Law Number 24 year 2011 concerning the Social Security Organizing Agency, BPJS has several authorities, among others, making agreements with health facilities regarding the amount of payment for health facilities that refers to tariff standards set by the Government and making or terminating work contracts with health facilities.

In carrying out its duties, BPJS collaborates with health facilities both private and government. In the era of the National Health Insurance System (hereinafter referred to as "SJSN"), health facilities were divided into 2 namely first level health facilities (FKTP) and advanced facilities (FKTL), which included in the FKTP were private clinics, puskesmas and family doctor practices while those included as advanced health facilities in this case are hospitals both private and government.

Every hospital that will work with BPJS, BPJS will send a written cooperation agreement made and signed by the head of the BPJS branch as the first party and the hospital director representing the hospital as the second party. The cooperation agreement is carried out on the basis of Article 1320 of the Civil Code regarding the legal conditions of the agreement. One of the cooperation agreements

[1] Michael Raper, *Negara Tanpa Jaminan Sosial*, Jakarta: Trade Union Rights Centre, 2008, p. 2—3.

between BPJS and hospitals is related to payment of health facilities.

Based on Article 38 paragraph (1) of Presidential Regulation Number 111 year 2013 concerning Amendments to Presidential Regulation Number 12 year 2013 concerning Health Insurance, BPJS Health is required to pay Health Facilities for services provided to Participants no later than the 15th (fifteenth) of each current month First level Health Facility that uses a capitation payment method based on capitation and 15 (fifteen) days after the claim document is received in full for the advanced level referral Health Facility.

This is confirmed by Article 12 paragraph (2) letter b of the Minister of Health Regulation No. 71 year 2013 concerning Health Services in the National Health Insurance which states the right of Health Facilities to receive payment of claims for services provided to Participants no later than 15 (fifteen) working days from claim documents received in full. Because BPJS is a government product that reports directly to the President, it is in accordance with the doctrine of gestureist, namely state actions relating to civil law or actions relating to commercial matters (private law or acts of commercial) that can be considered as appropriate trade in general. In this case, immunity cannot be given to the state for action *(jus gestionis)*.[2] Based on this, state actions are civil in nature *iure gestionis*, then the state cannot be given immunity.

Problems arise, when payment of hospital claims against BPJS does not proceed as mandated by laws and regulations, so that the bad effect is not optimal services provided by hospitals due to lack of operational funds which ultimately is disruption of public facilities. The problem arises because the cooperation agreement between BPJS and the Hospital does not heed the principles of the agreement, including the principle of freedom of contract. This happened at the Ulin Regional General Hospital Banjarmasin, South Kalimantan.

The Cash of the Ulin Regional General Hospital Banjarmasin, South Kalimantan, is being disrupted. Because the claims BPJS Health claims from June to August have not yet been paid. The value reaches Rp. 78 billion.[3] The director of Ulin Banjarmasin Hospital Kudus Suciati was quite worried about this. If the claim is not paid until next October, it will immediately disrupt the hospital's finances.

Payment of hospital claims against BPJS that are not running properly would naturally result in obstruction of services provided by the hospital to its patients which of course also contradicts Article 30 of Law Number 44 year 2009 concerning Hospitals concerning hospital rights, one of which is receive compensation for services.

B. PROBLEM STATEMENT

Based on the background above, the problem in this study is how the legal protection of hospitals against claims that are not paid by BPJS is related to the rights of the hospital in Law Number 44 year 2009 concerning Hospitals?

C. LITERATURE RIVIEW

The word mediation comes from the English language "mediation", which means the resolution of disputes involving third parties as intermediaries called "mediators". Supreme Court Regulation No. 1 of 2008 concerning Mediation Procedures in the Court defines mediation as a way of resolving disputes through a negotiation process to obtain the agreement of the parties with the assistance of the mediator.

Some of the principles of mediation are voluntary or subject to the agreement of the parties, in the civil field, simple, closed and confidential, and mediate or are facilitators. These principles are the main attraction of mediation, because in mediation the parties can enjoy the principles of secrecy and secrecy that are not in the litigation process. The litigation process is relatively open to the public and does not have the secret principles as possessed by mediation.[4]

D. RESEARCH METHOD

1. Types of Research

This research is basically a normative juridical study, because the target of this study is the normative law or method in the form of legal principles and the legal system.[5] Normative research in this study is research that describes or describes in detail, systematic, comprehensive and in-depth about the rationale for legal

[2] Sevrine Knuchel, "State Immunity and the Promise of Jus Cogens", *Northwest Journal of International Human Rights* Vol. 9, 2011, p. 162.

[3] https://www.jawapos.com/jpg-today/29/09/2019/tunggakan-bpjs-kesehatan-capai-rp-78-miliar-rsud-ulin-terancam-lumpuh/., accessed December 12, 2019 in 10.19 WIB.

[4] Frans Hendra Winarta, *Hukum Penyelesaian Sengketa Arbitrase Nasional Indonesia dan Internasional*, Jakarta: Sinar Grafika, 2013, p. 16.

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

protection of hospitals against claims that are not paid by BPJS associated with hospital rights in Law Number 44 Year 2009 Concerning Hospital.

2. **Nature of Research**
   This research is descriptive because it illustrates the applicable laws and regulations and is associated with legal theories in the practice of its implementation relating to the problem to be examined.
3. **Data Analysis**
   The data obtained will be analyzed by qualitative analysis.

E. ANALYSIS AND DISCUSSION

In an effort to settle claims that have not yet been paid by BPJS to the Hospital, based on the provisions of Article 49 of Law Number 24 Year 2011 concerning the Social Security Organizing Agency, states that the aggrieved party whose complaints cannot be resolved by the unit, the settlement of the dispute can be done through a mediation mechanism. The requirement for mediation is that each non-judge mediator must have a professional certificate from an institution that has been accredited by the Supreme Court. The mediator certificate can only be issued if the prospective mediator has attended the training for 40 hours according to the syllabus of the Supreme Court. In addition they must pass the written exam and simulation exam.

The excess of claim settlement that has not been paid by BPJS to the hospital through mediation is that the problem can be resolved effectively and efficiently in the sense that the resolution of the conflict is done informally, does not waste time and costs are not too expensive. However, until now, when the payment of claims made by the hospital has not been paid by the BPJS, the form of settlement has only reached the stage of negotiations without an intermediary as the mediator. According to the author, this is due to several factors as stated by Lawrence W. Friedmann in legal system theory.

According to Friedman, the legal system consists of three elements, namely structural elements, substance and legal culture.[6] Based on this, the effectiveness of Article 49 of Law Number 24 Year 2011 concerning the Social Security Organizing Agency in the effort to settle claims that have not yet been paid by BPJS to the Hospital is as follows:

1. **Structure Element Factor**

The structural aspects by Friedman are formulated as follows:[7]

> *"The structure of a legal system consists of elements of this kind. the number and size of courts; their yurisdiction (that is, what kind of cases they hear, and how and why), and modes of appeal from one court to another. Structure also means how the legislature is organized, how many members sit on the Federal Trade Com,nission, what a president can (legally) do or not do, what procedures the police department follows, and so on ".*

Referring to the above formula, the DPR and the government are structural elements of the legal system. DPR and government institutions as structural elements are structural aspects of the legal system. It is known that in the effort to settle claims that have not yet been paid by BPJS to the Hospital there are still obstacles. These obstacles, namely in the process of issuing Law Number 24 year 2011 concerning the Social Security Organizing Agency.

Article 38 paragraph (1) of Presidential Regulation Number 111 year 2013 concerning Amendment to Presidential Regulation Number 12 year 2013 concerning Health Insurance states that BPJS Health is obliged to pay for Health Facilities for services provided to Participants no later than the 15th (fifteenth) of each current month for Facilities First-level health using a pre-paid payment method based on capitation and 15 (fifteen) days since the claim document has been received in full for an advanced referral Health Facility.

According to the author, these provisions are normatively good, but in reality, payment of hospital claims against BPJS does not work as mandated by legislation. Based on this problem, based on Article 49 of Law Number 24 Year 2011 concerning the Social Security Organizing Agency in an effort to settle claims that have not been paid by BPJS to the Hospital, it can be done through mediation.

The author is of the opinion that an implementing regulation equal to Government Regulation is needed in the application of Article 49 of Law Number 24 year 2011 concerning the Social Security Organizing Agency. That is because the regulation of the Cooperation Agreement between the BPJS and the Hospital is a new regulation that also requires the regulation of dispute resolution procedures through

[6] Lawrence W Friedman, *Legal Theory*, New York: Columbia University Press, 1967, p. 14.

[7] *Ibid.*

mediation. The regulation states what is meant by mediation, its elements, then procedures for the appointment of special mediators who are experts in the science of agreement and health science, to simulating disputes that can be resolved through mediation. With this special arrangement, when there is a dispute between BPJS and the hospital, a guide is available for resolution and a mediator who is expert in his field is available.

2. Legal Substance Factors

The second element of the legal system is the substance of the law. Friedman's explanation of the substance of the law is as follows:

> "*By this is meant the actual rules, norms, and behavior patterns of people inside the system. This is, first of all, "the law "in the popular sense of the term-the fact that the speed limit is fifty-five miles an hour, that burglars can be sent to prison, that 'by law' a pickle maker has to list his ingredients on the label of the jar*".

Thus, Friedman said, what is meant by the substance of the law is the existing regulations, norms and rules about human behavior, or what is commonly known as "law" is the substance of the law.

It is known that based on the provisions of the National Mediation Center, each non-judge mediator must have a professional certificate from an institution that has been accredited by the Supreme Court. The mediator certificate can only be issued if the prospective mediator has attended the training for 40 hours according to the syllabus of the Supreme Court. In addition they must pass the written exam and simulation exam. This is in accordance with Article 5 of the Republic of Indonesia Supreme Court Regulation No. 01 year 2008 concerning Mediation Procedures in the Court.

The problem that arises is that in Article 49 of Law Number 24 Year 2011 concerning the Social Security Organizing Agency does not clearly regulate the provisions of a mediator who specifically handles disputes between BPJS and hospitals. According to the author, we need a mediator who masters well the issues not only about the agreement, but also about health science, because the parties to the dispute are related to health.

Based on this, according to the author, we need a mediator who is trusted by both the BPJS and the hospital. That is because the ability of a mediator will determine the success of the mediation process. In addition to understanding and mastery of mediation concepts and techniques, a mediator must understand the substance of the problem that is the object of the dispute.

Apart from that, the trust and commitment of the parties greatly influence the success of a mediation process.[8] Therefore, the author is of the opinion, the government can assign the Health Office to work with the Supreme Court in conducting training as a key requirement to become a mediator. Therefore, when there is a dispute between BPJS and the hospital, the Health Office can play a role as a mediator.

3. Legal Culture Factors

Regarding the legal culture, Friedman interpreted it as the attitude of the community towards the law and legal system, regarding beliefs, values, ideas, and expectations of the community regarding law. In his writing Friedman formulated it as follows:

> "*By this we mean people's attitudes toward law and the legal system- their beliefs, values, ideas, and expectations, in other words, it is that part of the general culture which concerns the legal system*".

The business community primarily wants a simple, fast, and relatively low-cost dispute resolution, and produces a win-win solution, and guaranteed confidentiality. Settling a slow dispute will be able to disrupt the performance of business people in moving the wheels of the economy and requires a relatively large cost. The litigation process tends to create new problems, which is slow to solve, requires high costs, is not responsive and creates hostility between the parties to the dispute.[9]

Based on these reasons, most business communities prefer to settle their disputes through Alternative Dispute Resolution out of court which they consider more appropriate than dispute resolution through the courts. This is the main choice in terms of solving the problem when the claim payment made by the hospital has not been paid by BPJS.

The author is of the opinion, the origin of the claims that have not been paid by BPJS to the

[8] Patawayati, Patient Satisfaction, "Trust and Commitment: Mediator of Service Quality and Its Impact on Loyalty an Empirical Study in Southeast Sulawesi Public Hospitals", IOSR *Journal* of Business and Management IOSR-JBM, Volume 7, Issue 6 Jan. - Feb. 2013, p. 11.

[9] Priyatna Abdurrasyid, *Arbitrase dan Alternatif Penyelesaian Sengketa APS*, Jakarta: Fikahati Aneska, 2011, p. 36.

Hospital is due to the cooperation contract between the BPJS and the hospital that was formed from the existence of an agreement made in a standardized standard, where the agreement was prepared by the BPJS and if there are articles or parts that are lacking approved by the hospital, then can not immediately revise. Revisions will be made in the coming year after the agreement is reviewed taking into account input from the hospital by the Ministry of Health. This means that the agreement violates the principle of freedom of contract, which should be between the BPJS and the Hospital having the same position.

The result is, when there is a claim that has not been paid by BPJS to the Hospital, according to the law, the form of settlement is through arbitration. However, the problem is that both the BPJS and the hospital do not really understand the stages of dispute resolution through mediation, such as special conditions for becoming a mediator or the difficulty of finding a mediator that is certified and truly mastering issues about the hospital and BPJS also becomes constrained separately, so that mediation does not work as a settlement of claims payments made by the hospital has not been paid by BPJS.

Based on this, according to the Author, an active role from the government is needed, such as through the Department of Health, especially the Public Relations section to disseminate to BPJS and the hospital about the application of Article 49 of Law Number 24 Year 2011 concerning the Social Security Organizing Agency. The socialization is needed so that BPJS and hospitals can know well how the process of dispute resolution through mediation.

In mediating efforts to settle dispute claims that do not find common ground, the hospital who feels aggrieved over claims that have not been paid by BPJS, can take other legal efforts, namely through litigation or non-litigation other than mediation.

In legal efforts through litigation, the hospital can submit a lawsuit to the district court. The legal basis for the hospital to submit a lawsuit to the district court is Article 30 of Law Number 44 year 2009 concerning Hospitals concerning hospital rights and Article 1365 of the Civil Code which confirms that "Everyone is responsible, not just for damages caused by acts - deeds, but also for losses due to negligence ". The element of intent in the act against the law is deemed to exist if the act committed intentionally has certain consequences on the physical and / or mental or property of the victim, even though it is not an intentional to injure (physically or mentally) of the victim.

Article 1365 Civil Code contains the principle of "liability based on fault" with the burden of proof on patients. This is in line with Article 1865 of the Civil Code which stipulates that every person who postulates that he has a right, or to assert his own rights or to deny someone else's rights, refers to an event obliged to prove the existence of that right or event.

Apart from that, because BPJS is a product of the government which is directly responsible to the President, it is in accordance with the doctrine of gestureist, namely the state's actions relating to civil law or actions relating to commercial matters (private law or acts of commercial) which can be considered as trading in general. Therefore, if there are disputes arising from the consequences of these actions, then the state can be sued through legal efforts at the judiciary. Because it involves state actions that are civil in nature or gestational, state cannot be granted immunity.[10]

Besides the hospital can immediately file a lawsuit to the district court. According to the author, both the BPJS and the hospital can take the non-litigation in addition to mediation, namely by means of arbitration. With the agreement of the parties in a written agreement regarding the determination of dispute resolution through an arbitration institution, negating the right of the parties to submit a dispute resolution or difference of opinion contained in the agreement to the district court.

This is also confirmed in Article 60 of Law Number 30 year 1999 concerning Arbitration and Alternative Dispute Resolutions which determine the Arbitration Award is final and has permanent legal force and is binding on the parties. Because disputes arising between BPJS and hospitals are not trade disputes, but disputes relating to services, such as mediation that requires special mediators, in an effort to resolve disputes through arbitration also requires special Arbitrators in charge of hospitals and health.

The Indonesian National Arbitration Board (BANI) can make a new arrangement regarding the resolution of disputes specifically related to services, with the appointment of an Arbitrator who is expert in his field, so that the arbitration award issued by BANI is a decision that gives a sense of satisfaction to both parties (win-win solution) and the parties continue to collaborate well.

Based on the description above, according to the author, the alternative role of dispute resolution in resolving disputes needs to be continuously introduced and promoted to the general public as well

[10] Sevrine Knuchel, *Loc.Cit*.

as the professional community who are involved in the world of legal education and other legal professions, because they have various advantages. Alternative dispute resolution based on consensus philosophy and high cultural heritage needs to be developed and used guidelines and basis in solving problems / disputes faced both private and public.[11]

F. CONCLUSION

Legal protection of hospitals against claims that are not paid by BPJS is related to hospital rights in Law Number 44 year 2009 concerning Hospitals is that they can take non-litigation paths other than mediation, namely by means of arbitration through the agreement of the parties in a written agreement regarding the determination of dispute resolution through arbitration institutions. Apart from that, it can also be through litigation, the hospital can submit a lawsuit to the district court. The legal basis for the hospital to submit a lawsuit to the district court is Article 30 of Law Number 44 year 2009 concerning Hospitals concerning hospital rights and Article 1365 of the Civil Code.

REFERENCES

Books

Abdurrasyid, Priyatna, *Arbitrase dan Alternatif Penyelesaian Sengketa APS*, Jakarta: Fikahati Aneska, 2011.

Friedman, Lawrence W. *Legal Theory*, New York: Columbia University Press, 1967.

Raper, Michael, *Negara Tanpa Jaminan Sosial*, Jakarta: Trade Union Rights Centre, 2008.

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

Widnyana, I Made, *Alternatif Penyelesaian Sengketa dan Arbitrase*, Jakarta: PT. Fikahati Aneska, 2014.

Winarta, Frans Hendra, *Hukum Penyelesaian Sengketa Arbitrase Nasional Indonesia dan Internasional*, Jakarta: Sinar Grafika, 2013.

Journal

Knuchel, Sevrine, "State Immunity and the Promise of Jus Cogens", *Northwest Journal of International Human Rights* Vol. 9, 2011.

Patawayati, Patient Satisfaction, Trust and Commitment: Mediator of Service Quality and Its Impact on Loyalty An Empirical Study in Southeast Sulawesi Public Hospitals, IOSR *Journal* of Business and Management IOSR-JBM, Volume 7, Issue 6 Jan. - Feb. 2013.

Legislation

Indonesia, The 1945 Constitution of the Republic of Indonesia.

Indonesia, Code of Civil law.

Indonesia, Law Number 24 Year 2011 Concerning the Social Security Organizing Body.

Indonesia, Law Number 40 Year 2004 Concerning Social Security Systems.

Indonesia, Law Number 44 Year 2009 Concerning Hospitals.

Indonesia, Law Number 36 Year 2009 Concerning Health.

Indonesia, Law Number 30 Year 1999 Concerning Arbitration and Alternative Dispute Resolution.

Internet

https://www.jawapos.com/jpg-today/29/09/2019/tunggakan-bpjs-kesehatan-capai-rp-78-miliar-rsud-ulin-terancam-lumpuh/., accessed December 12, 2019 in 10.19 WIB.

[11] I Made Widnyana, *Alternatif Penyelesaian Sengketa dan Arbitrase*, Jakarta: PT. Fikahati Aneska, 2014, p. 25.

SULTAN AT GROUND IN PERSPECTIVE OF LAW NUMBER 5 OF 1960 AND HUMAN RIGHTS

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ABSTRACT

Indonesia is the largest archipelago in the world, with more than 17,000 islands, which are divided into 34 provinces today. Pancasila as the nation's philosophy and the 1945 Constitution of the Unitary State of the Republic of Indonesia as its legal basis. Special regions and special autonomy in Indonesia are regions formed on the basis of their origins or based on history, natural wealth, cultural customs and religion. Agrarian Law Number 5 of 1960 is a combination of Dutch and customary law. Land ownership rights are regulated in article 19 paragraph 2 of the law in the form of land certificates, while the customary law is in the form of government recognition of ownership of an area by people who have cultural hereditary without requiring legality in the form of land certificates such as Ulayat Land of inner Baduy tribal and the status of land that is published from local regulations that have special features. Law number 13 of 2012 authorizes the Special Region of Yogyakarta to regulate land ownership rights in managing and utilizing Sultanaat ground and Duchy land for the greatest possible development of culture, social interests, and community welfare through the Cultural Heritage Legal Entity. This paper discusses whether there are conflicting legal norms between the Land Law (Basic Agrarian Law) and the Law of Special Region of Yogyakarta in terms of limiting land ownership rights in the sultanate region of Yogyakarta (Sultanaat Ground) for non-indigenous residents based on Instruction letter of the Deputy Governor of DIY (Special Region of Yogyakarta) Number 898/I/A/1975, in terms of human rights. The issue of land ownership status in the Yogyakarta area has arisen after one of the non-indigenous citizens has filed a lawsuit against discrimination of PerDaIs (Regulation of Special Region), but the court does not grant the suit. In the case of limiting the status of land ownership rights, the application of PerDaIs is not an attitude of discrimination for non-indigenous citizens because they can still own and manage a land in the form of Cultivation Rights Title and/or Building Rights Title aimed at protecting weak economic groups. Since the issuance of the 2014 Government Administration Law, theoretically the instruction of deputy regional head made in 1975 has become one of the government administration decisions that can be reviewed at PTUN State Administrative Court), but cannot be applied because this law does not have a retrospective principle. However, the legal system in Indonesia provides space for reviewing of the law product of regional regulation. Among them through the Regulation of the Ministry of Agrarian & Spatial Planning/Head of BPN (National Land Agency) Number 11 of 2016 concerning Settlement of Land Cases and the path of executive review mechanism by the Regional Government and the Regional Representative Council of DIY.

Keywords: Sultanaat Ground, Basic Agrarian Law, PerDais, Human Rights

INTRODUCTION

Indonesia is the largest archipelago in the world. Indonesia has more than 17,000 islands, consisting of around 300 tribes and 360 language dialects. Before becoming a unitary state, Indonesia was a collection of kingdoms spread throughout the archipelago and in 1928 bound itself to be a nation through the pledge of the Youth Oath which contained one Language, one Nation and homeland of Indonesia. On August 17, 1945 the pledge was concreted into a State, namely the Unitary State of the Republic of Indonesia (NKRI). The majority of Indonesian people are Muslim. The national language is "Indonesian". The number of Indonesian citizens is estimated at 250 million last 2016. It has the principle of Pancasila and the 1945 Constitution of the Unitary State of the Republic of Indonesia as its legal basis and in the form of republic as stated in article 1 paragraph (3) of the 1945 Constitution which states that: The State of Indonesia is a State of law **and** in the preamble of the opening of the 1945 Constitution CHAPTER I article 1; The State of Indonesia is a Unitary State, in the form of a Republic.

The government system in Indonesia is mostly adopted from the Netherlands, so that the naming is absorbed from the Dutch language which is actually

also the absorption of Latin Language. Province in Indonesia is a political entity that has a level below the state. When Indonesia proclaimed the independence in 1945, Indonesia only consisted of 8 Provinces, namely Sumatra, Kalimantan (Borneo), West Java, Central Java, East Java, Maluku, Sulawesi, Lesser Sunda (Nusa Tenggara Islands) and 2 Special Regions those are Special Region of Surakarta and Special Region of Yogyakarta. Then in 1949-1949 based on the Results of the Round Table Conference in Den Haag. The Netherlands recognizes Indonesia as a union, where Indonesia consists of 15 states and 1 Republic of Indonesia.

Then a few months later the 15 states merged to become part of the Republic of Indonesia. On August 17, 1950 Indonesia again became a unitary state until now. Political development and the ongoing development process accompanied by increasing population and diverse needs in each region and based on the aspirations of the people through the regional representative council, the Indonesian government gives authority to regulate its respective regions in the form of regional autonomy and special regional status. This is in accordance with the mandate of article 18 paragraph 1 and 2 of the written 1945 Constitution;

1) "The Unitary State of the Republic of Indonesia is divided into provinces and the province areas are divided into regencies and cities, each of which has a regional government, which is regulated by law".
2) "The provincial, regency, and municipal government shall regulate and manage its own governmental affairs according to the principle of autonomy and co-administration task".

In 2019, 34 provinces are formed and the establishment of 4 Special Regions and special autonomy within them. Special regions and special autonomy in Indonesia are areas formed by the rights of their origin and history. In the history of Indonesian state administration there is a development of the definition of special regions from the time of BPUPKI/*Investigating Committee for Preparatory Work for Indonesian Independence* (1945) to the present. Some special regions and special autonomy in Indonesia based on history, natural wealth, cultural customs and religion and the national capital include;

1. Papua, governed by Law number 21 of 2001 concerning Special Autonomy of Papua. This autonomy regulates in three ways, namely in terms of terminology, institutional and financial dimensions.
2. DKI Jakarta, Regulated through Law number 10 of 1964, declared the Special Capital Region of Greater Jakarta to remain as the Capital of the Republic of Indonesia under the name Jakarta. Then in 1999, through Law Number 34 of 1999 concerning the Provincial Government of the Special Capital Region of the Republic of Indonesia Jakarta, the name of the regional government was changed to the Provincial Government of DKI Jakarta. Then amended again in the Law Number 29 of 2007 concerning the Provincial Government of the Special Capital Region of Jakarta as the Capital of the Unitary State of the Republic of Indonesia.
3. Aceh, Regulated in Law 44/1999 the privileges of Aceh in the field of organizing religious life in the form of the implementation of Islamic sharia for adherents in Aceh, while maintaining harmony between religious believers, including: worship, ahwal alsyakhshiyah (family law), muamalah (civil law), jinayah (criminal law), qadha' (justice), tarbiyah (education), da'wah (preaching), syiar, and Islamic defense. Privileges in the field of organizing traditional life include Wali Nanggroe Institution and the Aceh Customary Institution (eg Aceh Traditional Council, Imeum mukim, and Syahbanda).
4. Yogyakarta, Regulated in Law Number 13 of 2012, the Special Region of Yogyakarta has been a special region since its establishment in de jure in 1950, and since its recognition is de facto in 1945[81]. In the law on the formation of DIY, DIY has a legal status as a special region as provincial level. The privilege lies in the regional head and deputy regional head, namely Sultan and Paku Alam and the authority in the land sector (Sultanaat Ground).

In connection with theme related to legal culture and human rights, the writer would like to analyze how land ownership rights (Sultanaat Ground/SG) in the Special Region of Yogyakarta based on the Instruction of Deputy Regional Head of DIY Number K.898/I/A/1975 dated March 5, 1975 concerning restrictions on the status of land ownership in the form of Building Rights Title and Cultivation Rights Title is not freehold of Indonesian Non-Indigenous Citizens viewed from the perspective of the Agrarian Law nuber 5 of 1960 and human rights contained in Pancasila and the 1945 Constitution.

As we all know, Special Region of Yogyakarta (DIY) is regulated in Law Number 13 of 2012 has the authority that is Special in the form of Regional Government (Special Region Regulations) which includes:

a) The procedure for filling the title, position, duties and authority of the Governor/Deputy Governor. Privileges in the field of procedures for filling title, position, duties, and authorities of the Governor and Deputy Governor, among others, special requirements for candidates for governor of DIY are Sultan Hamengkubuwana who is enthroned, and the deputy governor is Duke of Paku Alam who is enthroned.
b) Government Institution of Special Region of Yogyakarta (DIY), Privileges in the field of DIY Government Institution, namely institutional structuring and determination, by Perdais, to achieve effectiveness and efficiency of governance and public service based on the principles of responsibility, accountability, transparency, and participation by taking into account the form and structure of original government.
c) Culture, Privileges in the field of culture that is maintaining and developing creations, tastes, intentions, and works in the form of values, knowledge, norms, customs, objects, arts, and noble traditions rooted in the DIY society, which are regulated by perdais.
d) Land, Privileges in the land sector, namely Sultanaat and Duchy are authorized to manage and utilize the Sultanaat ground and the Duchy land intended for the greatest possible development of culture, social interests, and community welfare.
e) (e). Spatial Planning, Privileges in spatial planning, namely the authority of the Sultanaat and Duchy in spatial planning on the management and utilization of the Sultanaat ground and the Duchy land.

Sultanaat Ground in the perspective of Law Number 5 of 1960, Basic Principles of Agrarian and Human Rights

The case of land ownership rights in the Special Region of Yogyakarta arises after a person with the initial H (Non-Indigenous), a resident of Kraton Sub-district, Yogyakarta City, filed a lawsuit in the Yogyakarta District Court for the Instruction Letter of Deputy Governor of Yogyakarta Number 898/I/A/1975 regarding Prohibition of Land Ownership for Non-Indigenous People. The long history of the Yogyakarta region from the time of the Dutch to the period of independence between the citizens of Yogyakarta and certain ethnicities led to the issuance of the Instruction Letter of Deputy Governor of DIY Number 898/I/A/1975 concerning Prohibition of Land Ownership for Non-Indigenous Citizens.

This restriction is to protect local communities and consider issues of security and justice for the descendants of the Yogyakarta Palace and indigenous people. The regulation prevents excessive control of land to descendants or non-indigenous people. However, if examined further, these regulations only apply to the ownership status of Freehold, while the status of Building Rights Title (HGB) and Cultivation Rights Title (HGU) are still permitted for Non-Indigenous citizens.

The Sultanate/Pakualaman in the special regional authority forms a special legal entity called the Cultural Heritage Legal Entity. The agency is tasked with registering, re-certifying with the National Land Agency (BPN) the ownership status of Keprabon and non-Keprabon lands. Several policies have been made regarding the land owned by the Sultanate (Sultanaat Ground), among others:

1. Certification of Land belongs to the Legal Entity of the Sultanate/Pakualaman (Duchy). Covering forest; beach; wedi kengser; and village land. National Land Agency of Yogyakarta Special Region re-examines the origin of land that has become community Freehold according to Rijksblad Number 16 and 18 of 1918, if it is not certified freehold (*eigendom*) then the land will change the ownership to Ownership Rights of the Sultanate/Pakualaman. (Kedaulatan Rakyat, October 2, 2013, title: *BPN DIY Siap Sertifikat Tanah SG*).
2. Title transfer of the Village Land certificate from the village belongs to the Legal Entity of the Sultanate/Pakualaman. Law Number 6 of 2014 concerning Villages and Governor Regulation of DIY Number 65 of 2013 mandates that village treasury land is village wealth that must be certified as the property of the village as a legal entity. The Governor has issued Governor Regulation Number 112 of 2014 which instructed the Village Government through the Regent/Mayor to make a request for renaming the village land certificate that has been issued from the Ownership Right of the Village Government

into the Legal Entity of the Cultural Heritage of the Sultanate/Duchy (Pakualaman) (Radar Jogja, January 23, 2015).

3. Requests for extension of the Right to Use, HGB, Enhancement of Rights, and Title Transfer to State land controlled by the Regional Government of the Special Region of Yogyakarta, individuals, foundations, state institutions, and private institutions and that each application must obtain permission from the Governor of the Special Region of Yogyakarta (Sultan HB X) as a form of implementation of the Privileges Law.
4. Special Region Regulations in the field of Land, Government Authority of DIY in the field of land has been determined in (Special RegionRegulations) Perdais Number1 point 5 and 6 of 2013, In this Article explain the status of ownership of keprabon dan non keprabon land;
5. *Point 5. Sultanaat Ground is land owned by the Sultanate which includes Keprabon and non-Keprabon land contained in Regencies/Cities within the DIY area.*
6. *Point 6. Duchy Land is land owned by Duchy which includes Keprabon and non-Keprabon land contained in Regencies/Cities within the DIY area.*

Understanding the Sultanaat Ground is lands that are originally owned and controlled by the Sultanate which are known as Sultanaat Ground. Sultanaat Ground includes Keprabon Land, which is the land used for ceremonies in the palace area and Non-Keprabon Land in the form of beaches, forests, land with no ownership rights and temporary ownership rights. Non-Keprabon lands owned or utilized by the community are collected and examined the history of their origins. If proven to be owned by Sultanaat Ground, the ownership will be transferred to the Cultural Heritage Legal Entity. The position of the community on the land is as a non-owner beneficiary with ownership status in the form of Building Rights Title (HGB) and Cultivation Rights Title (HGU). The laws and regulations relating to agrarian affairs in Indonesia are regulated in Law Number 5 of 1960 concerning Basic Agrarian Regulations. The Agrarian Law in Indonesia is a blend of western law of Dutch heritage and customary law in Indonesia.

The law originating from the Netherlands can be seen in the form of written law in the form of laws or regulations. One example of a written law of land ownership rights can be seen in article 19 paragraph 2 point c in the form of land certificate, while accommodated customary law is in the form of government recognition of ownership of an area by a group of people who have cultural traditions that have been passed on for generations without requiring legality in the form of land certificate, one example is the recognition of the status of customary/ulayat land in several regions of Indonesia such as Ulayat Land of inner Baduy tribal and the status of land issued by a special regional regulation.

The Basic Agrarian Law is divided into 2 parts, the first part is the regulation of agrarian natural resources, the second part regulates the types of land rights. Arrangement of land rights in the Basic Agrarian Law Number 5 of 1960, in Article 2 point 2 to 4 written;

- (2) *The controlling right of the State referred to in paragraph (1) of this article gives the authority to:*
  - *a. To regulate and administer the designation, use, supply and maintenance of earth, water and space;*
  - *b. To determine and regulate legal relations between people and earth, water and space,*
  - *c. To determine and regulate legal relations between people and legal actions concerning earth, water and space.*
- *(3) The authority derived from the controlling right of the State in paragraph 2 of this article is used to achieve the greatest prosperity of people, in the sense of happiness, prosperity and independence in society and Indonesian legal state which are independent, sovereign, just and prosperous.*
- *(4) The controlling right of the State can be empowered by the autonomous regions and customary law communities, only as necessary and not in conflict with national interests, according to the provisions of Government Regulations.*

In the aforementioned article and point, it is clearly stated that the State has the authority and rights to regulate and divide the land intended for the welfare and benefit of the wider community. Instruction of the Deputy Head of the Special Region of Yogyakarta Number K.898/I/A/1975 dated March 5, 1975 concerning limitation of granting land rights to a Non-Indigenous citizen basically contains a policy so that Non-Indigenous People who want to buy land owned by people, firstly they must coordinates with the Cultural Heritage Legal Entity, because people who want to sell their land to Non-

Indigenous citizens are required to return the status of the land to the regional government through the cultural heritage legal entity after the land has returned to the state land, then who has an interest in this case, Non-Indigenous citizens can apply an application to obtain the status of the Cultivation Rights Title or Building Rights Title.

The policy of limiting land ownership rights for non-indigenous citizens is also confirmed in several Special Region Regulations including:

1) Letter of the Regional Government of DIY Province Number 593/00531/RO I/2012 (May 8, 2012);
2) Governor's Letter Number 430/3703 (November 15, 2010);
3) Letter of Caretaker Head of Regional Office of BPN DIY Number 287/300-34/BPN/2010;
4) Letter of Head of Regional Office of BPN DIY Number 640.05/24.99/BPN/2000 (October 26, 2000);
5) Letter of Head of BPN of Bantul Regency Number 640/922/2000 (November 9, 2000).

This policy of Sultanaat Ground is in line with the Agrarian Law as stipulated in article 11 point 1 and 2 regarding limitation of the freehold;

(1) "*The legal relationship between people, including legal entities, with earth, water, and space and the authorities that originate from that legal relationship will be regulated, so that the purpose referred to in article 2 paragraph (3) and prevented mastery over the life and other people's work that transcends borders"*.

(2) "*Differences in the state of society and the laws of the people where necessary and not against national interests are taken into account by guaranteeing the protection of the interests of economically weak groups"*.

In the context of the privileges of the Special Region of Yogyakarta, with its historical origins, the dualism of the position of regional head as well as the head of traditional monarchy (sultanate and duchy) who still have authority to manage and use the land. The above article emphasizes that the government of the Special Region of Yogyakarta may apply PerDaIs in the form of sultanaat ground because this is a combination of written law coupled with unwritten law (cultural customs) but still pays attention to legal protection and human rights corridors in accordance with article 28 of the 1945 Constitution. As we know there are three Human Rights that prevail in the world today;

1. Individualisme; This individualisme is often known as liberalism (freedom) which is introduced by John Locke and Jan Jaques Rousseau and quoted by Max Boli Sabon in his book *Hak Asasi Manusia* (p. 87) is a concept that says that humans have been in natural life (naturalist status) has human rights, including rights that are privately owned. Human rights include the right to life, the right to freedom and independence, and property rights (the right to own something).

2. Marxism; Marxism according to Mujaid Kumkelo, et al in his book *Fiqh HAM (Ortodoksi dan Liberalisme Hak Asasi Manusia dalam Islam)* (p. 34) is a concept which is taken from the philosopher Karl Marx, where the concept rejects the theory of natural rights, because a right is country ownership or collectivity (*respository of all rights*).

3. Integralism; Integralism is a concept of the state presented by Soepomo, according to which the state is the law, where if the state is happy, it means happiness for each individual and group as well, because individuals and groups love the motherland. Thus, the rights that come from humans as autonomy themselves are contradictory according to the integralistic principle, because individual interests are the interests of the state, and vice versa.

Based on the principle of the State philosophy, namely Pancasila in the 4th principle of Pancasila which reads "Democracy guided by the inner wisdom in the unanimity arising out of deliberations amongst representatives" implies that sovereignty is in the hands of people through the people's representative institution and the government. This value prioritizes the interests of the state and nation rather than personal and group interests. In addition, another value contained in this principle is the principle of consensus in formulating something or solving a problem. Another basis can be seen from the 1945 Constitution in several articles such as Article 28 J, the 1945 Constitution point 1 and 2;

1) Everyone must respect the human rights of others in the orderly life of society, nation and state.

2) In exercising their rights and freedoms, every person is obliged to submit to the limitations stipulated by law with the sole purpose of ensuring recognition and respect for the rights of

freedom of others and to fulfill fair demands in accordance with moral considerations, religious values, security, and public order in a democratic society.

So the above statement can be taken to mean that every person/citizen is required to always comply with regulations that have been enforced under the law. If it is related to the Yogyakarta perdais which limits land ownership rights for non-indigenous citizens, if it is reviewed from the 4th principle of Pancasila, Article 28 letter J paragraph 1 and 2, Yogyakarta Privileges Law, Agrarian Law, the interests of Yogyakarta people in maintaining the preservation of cultural customs and regional privileges which has been stipulated in the Privileges Law through the Sultanaat Ground ownership system issued by the Yogyakarta regional government does not violate human rights.

In terms of limiting the status of land ownership rights, the application of the instruction of Deputy Regional Head of DIY Number K.898/I/A/1975 dated March 5, 1975 is not an attitude of discrimination because it is for non-indigenous citizens.

Because they can still own land but with the status Cultivation Rights Title and/or Building Rights Title, because in this context the PerDaIs aims to protect weak economic groups and it is known as positive discrimination or discrimination which has a positive impact, this rule is aimed at justice from the socio-economic side.

The regulation can be changed if the economic condition of Yogyakarta people is good and small and medium businesses are getting stronger. In the perspective of administrative law or state administration law, the legal policy set forth by administrative officials in the form of instruction is the implementation of discretionary authority. Such legal products are known as beleidsregel (policy rules). Since the issuance of the 2014 Government Administrative Law, theoretically the instruction has become one of the administrative decisions that can be reviewed at PTUN, but in the context of the instruction of deputy regional head made in 1975, the UUAP (Government Administrative Law) cannot be applied backwards for reviewing the Instruction because this Law has no principle which is retrospective.

The legal system in Indonesia provides space for reviewing the legal products of regional regulation by using several settlements. Based on the Regulation of the Ministry of Agrarian & Spatial Planning/Head of BPN Number 11/2016 concerning Settlement of Land Cases, it can first refer to the regulatory mechanism either through complaints or initiatives from the land office itself. Another route can be through the executive review mechanism by the Provincial Government of DIY so that the legal uncertainty and discrimination against certain ethnic groups do not occur again even though this has non-binding legal force. In addition, if economic conditions are also improving and the gap in society is not large, then this policy can certainly be reviewed.

Bibliography / Legal Basis:

The 1945 Constitution;

Law Number 5 of 1960 concerning Basic Agrarian Principles

Law Number 13 of 2012 concerning Special Region of Yogyakarta

Law Number 39 of 1999 concerning Human Rights;

Law Number 11 of 2005 concerning Ratification of the International Covenant on Economic, Social and Cultural Rights (International Covenant on Economic, Social and Cultural Rights);

Law Number 12 of 2005 concerning Ratification of the International Covenant on Civil and Political Rights (International Covenant on Civil and Political Rights).

References:

Max Boli Sabon. 2014. *Hak Asasi Manusia*. Jakarta: Universitas Atma Jaya;

Mujaid Kumkelo dkk. 2005. *Fiqh HAM (Ortodoksi dan Liberalisme Hak Asasi Manusia dalam Islam) Malang: Setara Press;*

Jimly Ashiddique. 2005. *Hukum Tata Negara dan Pilar-Pilar Demokrasi*, Jakarta: Kompress;

Teguh Presetyo. 2017. *Filsafat, Teori, dan Ilmu Hukum: Pemikiran Menuju Masyarakat yang Berkeadilan dan Bermartabat*. Depok: Raja Grafindo;

Pidato Soepomo dalam sidang Badan Persiapan Usaha-Usaha Persiapan Kemerdekaan (BPUPK) pada tanggal 31 Mei 1945. Lihat, Risalah Sidang Badan Penyelidik Usaha-usaha Persiapan Kemerdekaan Indonesia (BPUPKI), Panitia Persiapan Kemerdekaan Indonesia (PPKI) 28 Mei 1945 - 22 Agustus 1945.

THE BASIC APPLICATION OF CONTRACTUAL FREEDOM TO INFORMED CONSENT IN THERAPEUTIC AGREEMENTS AS A MEANS OF LEGAL PROTECTION FOR THE PARTIES TO MEDICAL ACTION

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ABSTRACT

This study related with the contractual freedom of contracting, including therapeutic agreements implemented using informed consent involving medical personnel (doctors) and patients. The focus of this study was on how the basic exercise of freedom of expression in informed consent in therapeutic agreements is a legal protection effort for parties to medical action. The research method used is normative jurisprudence using secondary data. The results show that the basic application of contractual freedom to informed consent in therapeutic agreements does not occur. This is because the therapeutic agreement has been made in the standard form, so the patient has the only option, which is take it or leave it. Therefore, as a means of legal protection on behalf of the parties, the physician is obliged to provide the patient with as much information as is mandated in Article 45 paragraph (3) Law No. 29 of 2004 concerning Medicine Practice. In addition, there are forms regarding medical rejection approval as well as a second opinion statement and a patient request home form.

Keywords: The Basics of Contracting Freedom, Informed Consent, Legal Protection.

A. INTRODUCTION

The Civil Code adheres to a fundamental the basis of contractual freedom, which provision is contained in Article 1338 paragraph (1) of the Civil Code which states that all legally binding agreements are lawful for those who make them.[1] The principle of contractual liberty is a principle that states that everyone can basically make a contract for anything, as long as it is against the law, morality, and public order. The freedom to make such an agreement means that a person can create individual rights not governed by book III of the Civil Code, but are governed by the agreement legally binding as the law for those who make it.

According to Rutten, the legal principles of the treaty set forth in Article 1338 of the Civil Code are 3 (three), namely:

1. The basis that the treaty was generally not formal but conciliatory, meaning that the agreement was terminated by a mere will or consensus called the principle of consensualism.
2. The basis that the parties must fulfill what has been promised, that the agreement is a law for the parties called the basis of the binding power of the agreement.
3. The basis of contractual freedom, that is, the person who is free to enter into or not enter into an agreement, freely determines the content, operation and terms of the agreement, of a particular form or not and freely chooses which law he will apply to the agreement.[2]

Based on the three principles above, the most important is the principle of freedom of contract, since it is the basis of civil law, in particular the law of alliance. Rutter argues that the principle of contractual liberty is not written in many words in the law but that all of our civil law is based on it.[3] This principle also applies to therapeutic agreements.

A therapeutic agreement is a treatment agreement, because one party (the patient) wishes to heal and the other party (the doctor) wishes to treat the patient and seek the patient's recovery. The agreement was born based on an agreement between the two parties without any mistakes, coercion or fraud, and acts as a law for the parties and must be carried out in good faith.[4]

Therapeutic agreements are executed using informed consent involving medical personnel

[1] Etty Mulyati, *Kredit Perbankan*, Bandung: Refika Aditama, 2016, p. 96.

[2] Purwadi Patrik, *Asas Itikad Baik dan Kepatutan Dalam Perjanjian*, Semarang: Fakultas Hukum Universitas Diponegoro, 1982, p. 3.

[3] *Ibid.*, p. 4.

[4] Y.A. Triana Ohoiwutun, *Bunga Rampai Hukum Kedokteran*, Malang: Bayumedia, 2007, p. 8.

(doctors) and patients. In carrying out such therapeutic agreements, both parties must be responsible and perform their respective obligations. On the other hand, both parties are also given rights by law, so that both parties have legal protection as well.

In most cases, informed consent is prepared from the hospital in the form of a standard or commonly referred to as standard agreement, and if there is a section or section that is not approved by the patient or physician, it cannot be immediately revised. So there is a weakness of informed consent in the form of a standard agreement. The disadvantage is that it does not fulfill the contractual basis of freedom which is one of the fundamental principles of a treaty. The basis of contractual freedom relates to the content of the agreement that when made in a standard form, the patient has the only option, which is take it or leave it.

B. PROBLEM STATEMENT

Based on the background outlined above, the key issue to be addressed is how the basic application of contractual freedom to informed consent in therapeutic agreements as a means of legal protection for the parties to medical action?

C. LITERATURE RIVIEW

1. Therapeutic Agreements

According to Bahder Johan Nasution, a therapeutic agreement is a transaction to determine or attempt to find the most appropriate therapy for patients performed by a doctor. So, the object in this therapeutic agreement is not the patient's recovery, but rather looking for the right effort to cure the patient. Therapeutic agreements as part of private law are subject to the rules set out in the Civil Code as the basis for the engagement. As for Article 1233 of the Civil Code in the article stated that "each engagement can be born from an agreement or because of the law".

Therapeutic agreement was born from an agreement, this is due to an agreement from both parties. At the time the doctor will start a medical action against the patient, with the ability of the doctor to strive for health or healing of the patient, otherwise the patient agrees to the therapeutic action taken by the doctor. Then the doctor is obliged to perform health services with full sincerity, by deploying all abilities in accordance with professional standards set by law.

2. Informed Consent

According to Hanafiah and Amir, informed consent is all conditions related to the patient's illness and what medical actions the doctor will take and other matters that the doctor needs to explain to the patient or family's questions.[5] Informed consent means a statement of willingness or rejection after receiving sufficient information. Thus, those who are given information are sufficiently aware of all the consequences of the actions that will be taken against him before he makes a decision. The explanation given to the patient at least includes the diagnosis and procedure for the action, the purpose of the action, alternative actions and risks, risks and complications that may occur, and the prognosis for the actions taken and the estimated financing.[6]

Based on Article 3 of the Minister of Health Regulation No. 290 / MENKES / PER / III / 2008 the purpose of informed consent is:[7]

a. Providing protection to patients against the actions of doctors who are not actually needed and there is no basis for medical treatment that is done without the knowledge of the patient.
b. Providing legal protection to doctors against a failure and is negative, because modern medical procedures are not without risk, and in every medical action there is inherent risk.

3. Legal Protection

According to Philipus M. Hadjon, legal protection is the protection of dignity and dignity, as well as recognition of human rights owned by legal subjects based on the legal provisions of arbitrariness. According to Philipus M. Hadjon, there are two legal protection facilities, is:[8]

a. Means of preventive legal protection, namely in this preventive legal protection, legal subjects are given the opportunity to raise objections or opinions before a government decision gets a definitive form. The aim is to prevent disputes. Preventive legal protection means a great deal of government action based on freedom of action because with the existence of preventive legal protection, governments are encouraged to be careful in making decisions based on discretion.

[5] M. Jusuf Hanafiah dan Amri Amir, *Etika Kedokteran dan Hukum Kesehatan*, Jakarta: BGG, 1999, p. 62.
[6] *Ibid.*
[7] Article 3 Regulation of the Minister of Health of the Republic of Indonesia Number 290 / MENKES / PER / III / 2008 concerning Approval of Medical Measures.
[8] Philipus M. Hadjon, *Perlindungan Hukum Bagi Rakyat di Indonesia*, Surabaya: PT. Bina Ilmu, 1987, p. 30.

In Indonesia there are no specific arrangements regarding preventive legal protection.

b. Means of repressive legal protection, namely legal protection aimed at resolving disputes. The handling of legal protection by the General Courts and Administrative Courts in Indonesia falls into this category of legal protection. The principle of legal protection against government actions rests and comes from the concept of recognition and protection of human rights because according to history from the west, the birth of the concepts of recognition and protection of human rights is directed to the limitations and placement of community obligations and government. The second principle that underlies legal protection for acts of government is the principle of the rule of law. Associated with the recognition and protection of human rights, the recognition and protection of human rights takes first place and can be linked to the goals of the rule of law.

Legal protection has the meaning of protection by using legal means or protection provided by law, aimed at the protection of certain interests, namely by making the interests that need to be protected into a legal right. In legal science "Rights" is also called subjective law. Subjective law is an active aspect of the legal relationship given by objective law (norms, rules, recht).[9]

4. Contractual Freedom

Article 1338 of the Civil Code states that "all agreements made by law are legally binding on those who make them." The sub-section concludes that this Article 1338 of the Civil Code contains a basis for making an agreement (contractual liberty) or adopting an open system. By emphasizing the word "all", the Article appears to provide a statement to the public of its right to make any agreement (as long as it is legally made) and that agreement will bind those who make it a law. In other words, in terms of agreement it is possible to make laws for yourself. The provisions of the treaty law apply only when they are or are not regulated or not contained in the agreement made.

The law of the treaty is a complementary law which can also be inferred from Article 1339 of the Civil Code Procedure which states: "Agreements are not only binding on the things expressly stated in them but also for everything in the nature of the agreement required by law, practice or law. ". Article 1339 of this Code provides that the parties to the agreement are bound by:

a. What is promised;
b. Obedience / justice;
c. Habits;
d. The law.

Based on Article 1339 of the Civil Code the written agreement law (Civil Code) is in the final sequence. This means that in cases not regulated in the agreement or not contrary to propriety / justice and not regulated in unwritten (customary) law, then the provisions in the law are applied. The Civil Code (written law) is only a supplement that is only used or applied in the event that the provisions are not found in the agreement, propriety or custom.[10]

D. RESEARCH METHODS

1. Types of Research

This research is essentially a normative juridical study, since the purpose of this research is the law or normative method of the principles of law and the legal system.[11] The normative research in this study is a study that elaborates or describes in detail, systematically, thoroughly and in depth the basic application of contractual freedom to informed consent in therapeutic agreements as a means of legal protection for the parties to medical action.

2. Nature of Research

This research is descriptive because it illustrates the applicable laws and regulations and is associated with legal theories in the practice of its implementation relating to the problem to be examined.

3. Data Analysis

The data obtained will be analyzed by qualitative analysis.

E. ANALYSIS AND DISCUSSION

Informed consent is an agreement to carry out medical treatment in which contains an agreement / patient's approval for medical efforts to 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 might happen. As a form of approval for medical action, informed consent has legal force, whereby a letter signed with its own awareness without coercion from any party can be used as evidence in filing a lawsuit in court.

[9] *Ibid.*, p. 270.

[10] R. Subekti, *Hukum Perjanjian*, Jakarta: PT Intermasa, 2005, p. 128.

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

Under Article 1320 of the Civil Code, there are four conditions for the validity of an agreement, i.e:[12]

1. Agree those who bind themselves.
2. The ability to make an engagement.
3. Regarding a certain thing.
4. A lawful cause.

The first two conditions, called subjective conditions, because of the people or subjects who entered into the agreement, while the last two conditions are called objective conditions because of the agreement itself or the object of the legal actions carried out. Based on this, the informed consent is an attempt to fulfill subjective requirements, because the informed consent is a form of statement from the patient of an agreement on medical action.

In general, informed consent has been prepared from the hospital in the form of ready-made forms or commonly referred to as standard agreements, and if there are articles or sections that are not approved by the patient, then they cannot directly revise. According to the author, there are weaknesses in the presence of informed consent in the form of standard agreements.

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 that if made in a standard form, the patient only has a choice, namely take it or leave it.

According to the Author, the main legal basis for informed consent is Article 1320 of the Civil Code, namely, the agreement of both parties, the ability to perform legal acts, the existence of objects, and the existence of lawful causes. According to the Author, informed consent is a treaty based on Article 1320 of the Civil Code, one of which is that the treaty is considered valid when it fulfills the principle of contractual freedom that one is free to determine the content of the agreement, so in the informed consent is made in the form of a standard agreement which is of course the agreement is only determined by the hospital, so the agreement formed in the informed consent does not reach perfection.

Article 1338 of the Civil Code states that all agreements made legally are legally binding on those who make them. The provisions of Articles 1320 and 1338 of the Civil Code contain the principles and principles of freedom to enter into contracts or agreements. In civil law every person is given the right to make agreements both in form and charge, so long as they do not violate the provisions of law, morality, obedience to society (Article 1337 of the Civil Code). Once the agreement has been reached and the parties are bound, the next concern is the implementation of the agreement itself.

According to the Author, in general, patients or families of patients are those whose medical knowledge is not as good as the doctor and the current state of emergency that requires the patient or the patient's family to sign the medication. Therefore, the physician is obligated to provide the patient with as much information as is mandated in Article 45 paragraph (3) of Law No. 29 of 2004 concerning Medicine Practice.

This is because informed consent only imposes an obligation on physicians to provide information on matters relating to medical action. However, the evidence was given verbally, so that in the event of a legal dispute in the future, neither the patient nor the patient's family could be considered as evidence in court.

Accordingly, there is a need for legal protection for the parties, as the therapeutic agreement made by the hospital is a standard agreement. The legal protection for these parties is:

1. Preventive Legal Protection
   According to Philipus M Hadjon, preventive legal protection is protection aimed at preventing disputes. The author is of the opinion that efforts to prevent medical disputes between doctors and patients are before the signing of the therapeutic agreement is carried out by the patient or the guardian of the patient, so the doctor must provide clear information to the patient as mandated in Article 45 paragraph (3) of Law Number 29 2004 concerning Medical Practice. Apart from that, there is also a form about the approval of refusal of medical action and also a second opinion request statement form and a return form at the request of the patient.
   The purpose of making a form in every medical action is so that both parties, namely doctors and patients get legal protection, especially preventive legal protection that aims to avoid disputes in the future.
2. Repressive Legal Protection
   Repressive legal protection is used when the dispute occurs. As for the form of repressive legal protection if there is a miss communication between the patient and the doctor, the Hospital management provides an alternative solution, namely through mediation as regulated in Article 29 of Law Number 36 Year 2009 concerning Health which states that in the case of health personnel suspected of negligence in carrying out his profession, negligence must be resolved first through mediation.
   Mediation is a problem-solving negotiation process in which impartial and neutral outsiders work with disputing parties to help them obtain satisfactory agreements. Unlike judges or arbitrators, mediators do not have the authority to decide disputes between the parties. But in this case the parties empowered the mediator to help them solve the problems between them. The assumption is that third parties will be able to

[12] R. Subekti, *Op.Cit.*, p. 17.

change the strength and social dynamics of conflict relations by influencing the parties' personal trust and behavior by providing knowledge or information or by using a more effective negotiation process, and thereby helping participants to resolve disputed issues.[13]

In order for a mediation to succeed, a mediator must have the ability to build the parties' trust, which is the attitude that the mediator must show to the parties that he or she has no interest in resolving the dispute. Mediators only help the parties to end the dispute, remembering that every human being naturally wants to be free of conflict and strife. In addition, a mediator must show empathy to the parties, that he or she has a concern for disputes that are abusive to both parties. This sense of empathy is mediated by striving to find a way out, so that the parties can resolve the dispute.

Mediators or intermediaries that play a very important role and are essential in the achievement of mediation outcomes, is:[14]

a. Help the parties to negotiate if negotiations carried out directly by the parties did not reach an agreement.
b. Help the parties make effective and productive communication.
c. Helping the parties establish key priorities for resolving disputes.
d. Facilitating the parties so as to minimize the gap that exists between them.
e. Help the parties sort out the complex problems they face so that the meeting can continue.
f. Working together with the parties minimizes the differences encountered to end the dispute peacefully.
g. Explain the position of each party and provide ideas / views that are realistic to the demands / desires of each in the context of an effort to bring them together.
h. Help reduce hostility and tension between the parties and encourage cooperation.
i. Help the parties create and analyze settlement options.
j. Helping the parties pour out their solutions in the form of a written agreement.
k. Help monitor the fulfillment and implementation of the agreementt.

With the mediator's role being very important in the mediation process, the conditions for being a mediator are very strict. Based on Article 5 of the Republic of Indonesia Supreme Court Regulation No. 01 of 2008 concerning Mediation Procedures in the Court, each non-judge mediator must have a professional certificate from an institution that has been accredited by the Supreme Court. The mediator certificate can only be issued if the prospective mediator has attended the training for 40 hours according to the syllabus of the Supreme Court. In addition they must pass the written exam and simulation exam.

The ability of a mediator largely determines the success of the mediation process. In addition to understanding and mastery of mediation concepts and techniques, a mediator must understand the substance of the problem that is the object of the dispute. In general dispute resolution, the role of the mediator in the mediation process can be divided into 4 (four) stages, is:[15]

a. The mediator conducts case selection.
b. The mediator outlines the mediation process and its role.
c. The mediator helps the parties by exchanging information and bargaining.
d. The mediator assists the parties in drafting the agreement.

In addition to the role of mediator as such, in order for mediation to succeed successfully, the parties must have a fair bargain, because even if there is a mediator as intermediary with the above role, in the process of mediation the decision to reach an agreement is still taken by the parties dispute. In addition, the parties should also maintain and cherish the good relationship between them in the future.

As with any negotiation, according to the Author the resolution of the parties' issues of mediation is also positive or advantageous, among others:

a. The cost is relatively cheaper and the process is faster than the court process.
b. The results achieved are more satisfying for the parties to the dispute.
c. Informal.
d. Be informative, so that both parties can listen and respond directly.
e. Mediation is confidential, so the disputes faced and the outcome of the agreement are only known by the parties.
f. Maintaining existing relationships or ending relationships in a more friendly way.

Accordingly, in the event of a miss communication between the doctor and the patient on medical action, the mediation solution is the best way, since mediation, a win-win solution is mutually beneficial to all parties, so that all parties have the

[13] Gary Goodpaster, *Negosiasi dan Mediasi: Sebuah Pedoman Negosiasi dan Penyelesaian Sengketa Melalui Negosiasi*, Jakarta: ELIPS Project, 1993, p. 201.

[14] I Made Widnyana, *Alternatif Penyelesaian Sengketa dan Arbitrase*, Cetakan III, Jakarta: PT. Fikahati Aneska, 2014, p. 119-120.

[15] I Made Widnyana, *Op.Cit.*, p. 162.

same rights. fulfilled. The author also argues that in order to create a win-win solution, there is a need for good faith in the parties to resolve the issue through mediation.

This good faith is required in an effort to avoid unfair advantage or misleading others, to be honest in fulfilling their obligations or to comply with all agreements made including mediation that has been agreed upon in the settlement form. In Article 1338 the Penal Code states: "All agreements made in accordance with law shall be lawful to those who make them. The agreement may not be revoked except by agreement of the parties or for reasons specified by law. The agreement must be executed in good faith. "

In addition to mediation and negotiation, the form of legal protection for physicians against informed consent in hospital therapeutic agreements is through the Disciplinary Session in the Honorary Council of Medical Disciplines of Indonesia. In accordance with Article 55 of Law No. 29 of 2004 on the Practice of Medicine, the Honorary Council of Indonesian Medical Discipline was formed with the purpose of upholding the discipline of physicians and dentists in the maintenance of medical practice.

If any person who is aware or of his or her interests is harmed by the actions of a physician or dentist in the practice of medical practice, he or she may make a written submission to the Chairperson of the Honorable Assembly of the Indonesian Medical Discipline.[16] Complaints must at least contain the identity of the complainant, the name and address of the place where the doctor or dentist practices and the time the action was taken and the reason for the complaint.[17]

The Indonesian Medical Disciplinary Board will examine and provide decisions on complaints relating to the discipline of doctors and dentists. If an ethics violation is found, the Indonesian Medical Disciplinary Honorary Board will continue to complain to professional organizations. Disciplinary sanctions referred to in paragraph (2) may be in the form ofa:

a. giving written warning;
b. recommendation to revoke registration certificate or practice permit; and / or
c. the obligation to attend education or training in medical or dental education institutions.

F. CONCLUSION

The basic application of contractual freedom to informed consent in therapeutic agreements does not occur. This is because the therapeutic agreement has been made in the standard form, so the patient has the only option, which is take it or leave it. Therefore, as a means of legal protection on behalf of the parties, the physician is obliged to provide the patient with as much information as is mandated in Article 45 paragraph (3) Law No. 29 of 2004 concerning Medicine Practice. In addition, there are forms regarding medical rejection approval as well as a second opinion statement and a patient request home form.

[16] Article 66 paragraph (1) of Law Number 29 Year 2004 concerning Medical Practices.
[17] Article 66 paragraph (2) of Law Number 29 of 2004 concerning Medical Practices.

REFERENCES

Books:

Goodpaster, Gary, *Negosiasi dan Mediasi: Sebuah Pedoman Negosiasi dan Penyelesaian Sengketa Melalui Negosiasi*, Jakarta: ELIPS Project, 1993.

Hadjon, Philipus M. *Perlindungan Hukum Bagi Rakyat di Indonesia*, Surabaya: PT. Bina Ilmu, 1987.

Hanafiah, M. Jusuf dan Amri Amir, *Etika Kedokteran dan Hukum Kesehatan*, Jakarta: BGG, 1999.

Mulyati, Etty, *Kredit Perbankan*, Bandung: Refika Aditama, 2016.

Nasution, Bahder Johan, *Hukum Kesehatan*: *Pertanggungjawaban Dokter*, Jakarta: Rineka Cipta, 2005.

Ohoiwutun, Y.A. Triana, *Bunga Rampai Hukum Kedokteran*, Malang: Bayumedia, 2007.

Patrik, Purwadi, *Asas Itikad Baik dan Kepatutan Dalam Perjanjian*, Semarang: Fakultas Hukum Universitas Diponegoro, 1982.

Subekti, R. *Hukum Perjanjian*, Jakarta: PT Intermasa, 2005.

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

Widnyana, I Made, *Alternatif Penyelesaian Sengketa dan Arbitrase*, Cetakan III, Jakarta: PT. Fikahati Aneska, 2014.

Regulations:

Code of Civil Law.

Law Number 29 of 2004 concerning Medical Practices.

Law Number 36 of 2009 concerning Health.

Regulation of the Minister of Health of the Republic of Indonesia Number 290 / MENKES / PER / III / 2008 concerning Approval of Medical Measures.

Republic of Indonesia Supreme Court Regulation Number 01 Year 2008 Regarding Mediation Procedures in the Court.

PENAL MEDIATION AND RESTORATIVE JUSTICE IN HANDLING THE CRIMINAL ACTS OF MEDICAL NEGLIGENCE AS RENEWAL TO THE CRIMINAL JUSTICE SYSTEM

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ABSTRACT

The concept of restorative justice in the implementation of penal mediation of current legal perspective and also examines the implementation and construction of of legislative policies in the renewal of the upcoming criminal law. The result of this study shows that in the concept of restorative justice, the existence and position of the victims as patients was recognized. The patient's family was involved in the case settlement. Penal mediation is one form of the implementation of restorative justice, namely by rehabilitation, resocialization, restitution, reparation, and compensation in completing a medical practice legal case. The goal that is expected from penal mediation in positive criminal law is for the root of values that is promoted by restorative justice stems from traditional values in traditional society, namely balance, harmony, and peace in society. Penal mediation in legal cases of medical practice principally does not exist in regulations, but some regulations shows that the completion of medical practice legal cases outside of court has been given a place for upholding the law and justice. The application of restorative justice in the resolution of medical negligence legal cases is a concept of penal mediation that must be understood by the public and can be applied properly.

Keywords: Malpractice, Penal Mediation, Restorative Justice, Medical Dispute

A. BACKGROUND

Penal mediation is one form of the implementation of restorative justice, namely rehabilitation, resocialization, restitution, reparation and compensation in completing a criminal act of medical practice and looking at a crime or crime is not just a matter of a criminal offender (doctor) with the State representing the victim (patients), and leave the settlement process only with the perpetrators (doctors) and the State (public prosecutors).[1] Mediation of penalties in medical practice criminal cases is not in principle in the Laws and Regulations, but several Laws and Regulations presented show that the settlement of medical practice criminal cases outside the court process has been given a place. However, in essence the provisions above only provide the possibility of the settlement of cases of criminal acts of medical practice outside the court, not yet constituting mediation of penalties which are recognized as alternative institutions for settling cases of medical practice criminal acts outside the court. Healthy living is a major human need besides education, that's why the medical profession that provides health services to everyone in need, is considered a "noble profession".

Medical science itself is considered to be the oldest science in the world besides the Science of Religion, was pioneered by a Greek philosopher, Hypocrates, who was later named the Father of Medicine, more or less in 400 years BC. Since then medical science, has become a profession, which has developed very rapidly from time to time, especially after the 20th century, along with the development of electronic technology and information technology that is so amazing. Various supporting facilities ranging from diagnostic equipment, as well as therapy, continue to increase in sophistication from time to time, which makes it easier for doctors or other health professionals to treat patients' illnesses.

Along with these conditions, it is a must that the rules or regulations need to be prepared to answer various challenges and problems that will be faced by a doctor in order to be able to carry out their practice optimally.

In carrying out his profession, a doctor will be escorted by 3 (three) norms, namely Ethics, Discipline, and Law.

a. Ethical Norms, concerning morals, it is hoped that every doctor will carry out his profession

[1] Arief, Barda Nawawi, *Mediasi Penal Penyelesaian Perkara Di Luar Pengadilan*, Semarang: Pustaka Merdeka, 2008, p.56.

accompanied by good mentality and attitude.

b. Discipline Norms, concerning competence and Standard Operating Procedures, which show the knowledge and skills of a doctor in carrying out his profession
c. Legal Norms, concerning aspects of state rules and laws, which can have criminal, civil or administrative implications

In essence, the Code of Ethics aims to prevent a doctor from doing bad, while Discipline and the Law to prevent doctors from doing wrong. Philosophically, in order to obtain maximum results in any activity, the laws and regulations must always be put in front of precede any activities that will be carried out, including the field of health services. Laws and regulations that apply in Medical Practice must be useful and able to protect recipients of health services, in this case patients, also to health care providers, in this case doctors & other health workers. The question is, what are the legal instruments and rules imposed by this is already optimal enough as a regulator in the implementation of medical practice in this country? To be honest, the real answer is "not yet" Das solen, as stated in the rule of law, with various administrative, criminal or civil sanctions, contained in the Law, both lex generalist and lex specialist, should be able to answer all challenges and problems in the world of practice medical.

But the reality in the field is still not able to answer what actually happened (das sein), so that there are various cases and problems in the field of Medical Practice, with various excesses:

1. Many doctors then choose to change their profession to work in another field, because they consider that the risks that must be faced, especially regarding threats or legal sanctions that apply in the Medical Law, are not balanced with the income or salary received as a doctor.
2. Many doctors, especially specialists, are reluctant to carry out risky medical measures, rather than having to assume legal risks, if unexpected things happen. They prefer the way to refer patients to referral centers, such as RSCM, etc., even though the case should be handled by themselves.
3. The declining quality of health services in Indonesia, resulting in many patients from the middle and upper classes prefer to seek treatment abroad, Singapore, Malaysia, Thailand, etc., because they feel they get better medical services than medical treatment in their own country.

   The criminalization of doctors is increasing from day to day, especially since the enactment of the Medical Practice Law and other Health Laws.

Things like this, if not addressed properly and comprehensively, will result in further lowering the quality of the medical profession in Indonesia. If there is a doctor suspected of doing wrong, for example there is a medical negligence that has a bad result and then the patient or family feels dissatisfied, then one way to take is to report the problem to the Police as the criminal law enforcement (general). Furthermore, the Police as investigators will process the matter in accordance with the provisions of the Criminal Procedure Code (the legal event from P1 to P53), which may be said to be a conventional Criminal Justice System.

For a doctor who is considered negligent in carrying out his duties and have a negative impact on his patients, in advance the laws and laws that apply today, are still categorized as equivalent or equated with the negligence of an angkot driver who drives his vehicle recklessly crashing into pedestrians to death, as regulated in articles 359 and 360 of the Criminal Code, with a criminal threat of three to five years in prison / confinement.

Whereas medical negligence is clearly very different from general negligence, both philosophically and literally:

- Medical negligence that is allegedly carried out by a doctor, for example a surgeon who is deemed to have failed to operate so that the patient dies, will at least meet 3 (three) elements:
  1. There is no intention or intent (mens rea)
  2. Conducting surgery or making injury to someone is legally permissible or constitutes legal representation for a doctor, and does not exist in the general public.
  3. The purpose of therapy and medical treatment for the doctor is to help accompanied by a sense of humanity, which is already part of the doctor's oath
- As for general negligence, not accompanied by the elements mentioned above.

Undergoing a criminal process in this country, will require a very long time, very draining energy, thoughts and costs, then the consequences, both reported, in this case the doctor or other health

workers, even the reporter himself, in this case the patient / family, will displaced and as if there is no legal certainty. You can imagine if this happened in a peripheral area, a small town that only had a surgeon, and happened to be hit by a case. The doctor will experience psychological stress, not focus on work, with the result of sacrificing the interests of the wider community, especially in health services. To answer this problem, it is necessary to find an immediate solution to deal with cases related to Medical Crimes, especially the alleged medical negligence. One way is to impose a breakthrough or legal renewal in the Criminal Justice System, namely Penal Mediation. This is in line with the spirit of the settlement of criminal law with the principles of right, simple, fast and inexpensive, but it still leads to the achievement of the legal goals themselves, namely: certainty, fairness and expediency.

In positive law in force in Indonesia, criminal cases cannot be resolved outside the court, although in practice in certain cases it is possible to resolve cases outside the court. Some criminal cases are sometimes resolved through law enforcement desks, through peace mechanisms, through adat institutions, etc.[2]

B. PROBLEM FORMULATION

Based on the description above, the authors find the issues to be discussed relating to the title above, namely as follows: How is Penal Mediation and the Implementation of Restorative Justice in the Management of Medical Negligence as a Renewal of the Criminal Justice System?

C. Purpose of Writing

A writing must have a clear and definite purpose, because the goal will be the direction and guidance in conducting writing. The objectives to be achieved in this paper are:

To find out and analyze how Penal Mediation and the Implementation of Restorative Justice in the Management of Medical Negligence as a Renewal of the Criminal Justice System.

D. DISCUSSION

I. Medical Crime

Crimes committed by doctors in carrying out their practice, basically can be categorized into:[3]

1. Crimes with intentional elements (dolus), namely the existence of elements of bad intentions (mens rea), for example the practice of abortion without medical indication. This is regulated in article 75 paragraph (2) of the Criminal Code and specialist lex is regulated in articles 75 to 77 of Law no. 36 of 2009 concerning Health;
2. Criminal acts without intentional element (culpa), ie the doctor is considered to have committed negligence which has a negative impact on the patient, because he is practicing medicine that is not in accordance with the SOP or the established Professional Standards. This is regulated in articles 359 and 360 of the Criminal Code and specialist lex is regulated in article 80 of Law no. 36 of 2014 concerning Health Workers;
3. Administrative offenses, namely doctors practicing medicine without being equipped with predetermined requirements, such as Registration Certificate (STR) and Practice License (SIP). This is regulated in article 512a. The Criminal Code and specialist lex are regulated in article Law no. 29 of 2004 concerning Medical Practice.

Crime in point number 2, namely medical negligence, ranks the highest number of alleged medical offenses, which are sometimes reported by the public, in this case by patients or their families, as' medical malpractice "

II. Malpractice

Criminal acts by doctors or dentists who are generally often referred to as "malpractice", this can happen because of the following things:

a. Doctors or dentists lack knowledge of medical practices that are generally accepted among the medical or dental profession.
b. Providing medical or dental services under professional standards.

[2] Mudzakkir, Alternative Dipute Resolution (ADR), *Penyelesaian Perkara Pidana dalam Sistem Peradilan Pidana Indonesia*, workshop paper, Jakarta, January 18, 2007.

[3] H.R Hariadi, *Sorotan Masyarakat Terhadap Profesi Kedokteran*, paper presented at the workshop on *Penanganan Terpadu Masalah Etik dan Hukum*, Surabaya, 23 September 2000 p. 1, in Endang Kusuma Astuti, *Transaksi Terapeutik dalam Upaya Pelayanan Medis di Rumah Sakit*, Bandung : Citra Aditya Bakti, 2009, p. 234-238.

c. Committing gross negligence or providing services with no care and caution
d. Carrying out medical actions that are against the law.

If viewed from the legal aspects of malpractice, the guidelines to consider are:[4]

1. Deviations from the standards of the medical profession
2. Mistakes made by doctors, either in the form of deliberate or negligent
3. As a result of medical actions that have caused material or physical damage (injury, disability or death) / mental

Sofyan Dahlan, stated the proof of error or negligence of a doctor, with 4D elements:[5]

1. Duty, which is the obligation arising from a therapeutic relationship
2. Dercliction of duty, which is not carrying out obligations that should be carried out
3. Damage, i.e. the occurrence of loss or injury
4. Direct causation, i.e. there is a direct relationship (cause and effect), between an injury that occurs with a failure to carry out an obligation

In accordance with the Criminal Justice System, then in every occurrence of suspected criminal acts (general), it will begin with the investigation process and continue the investigation, carried out by police officers, including medical or medical crimes. This is where there will be difficulties, because it must be proven in advance that the doctor has performed medical procedures that are not in accordance with standard operational procedures or professional standards, which lead to an act that can be categorized as "negligence". Whereas the police investigators as investigators and also the Prosecutors' Office as prosecutors, even the judges later, have never received education or knowledge about Medical Science. Therefore, in practice in the field, the process of investigating cases of Medical Crimes will take a long time and protracted, if handled with conventional methods in accordance with the existing Criminal Justice System. For this reason, a legal breakthrough in its handling needs to be sought, one of which is to use the Penal Mediation method.

III. Penal Mediation in the Criminal Justice System

In the Criminal Justice System in Indonesia, legal settlement through Penal Mediation, is a new legal instrument in the resolution of criminal cases outside the court, as an alternative to conventional criminal case resolution, through criminal justice which is applied in a limited way, and in practice begins in juvenile criminal justice.

Diversion can be carried out at the level of case investigation at the level of investigation, prosecution and before the case examination in court. If this version is successful, the agreement in the version will be determined by the decision of the Chair of the Court. But if it fails, then the prosecutor will prepare the indictment as a basis for the devolution of court cases, then the conventional court process continues

In the RKUHP, the concept of mediating penalties or diversions regulated in Law Number 11 of 2012 concerning the Juvenile Justice System is adopted as a Legislative policy, and can be extended to other criminal acts, for example certain medical crimes. Several definitions of mediation of penalties Stuart M. Widman, formulate mediation of penalties as a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute. Mark William Baker, mediation of penalties is the process of bringing victims and perpetrators together to reach a mutual agreement with restitution as a foothold of the norm.

Mediation of the law from several angles of legal study:

Judged from the perspective of the division of law based on its contents, known as the classification of public law, for the public interest (algemene belangen) and private law, for individual interests (bijzondere belangen). the public nature of criminal law shifts in character, because it also relatively enters the private sphere, known and practiced in mediating penalties, as a form of settlement of cases outside the court.

Analyzed from the perspective of its terminology, mediation of penalties is known as: mediation incriminal cases, mediation in criminal matters, victim offenders mediation, offenders victim arrangement (UK), strafbilddeling (Dutch), de mediation penale (France). Basically, mediating

[4] Muhamad Sadi Is, *Etika & Hukum Kesehatan, Teori dan Aplikasinya di Indonesia*, Kencana, Jakarta, 2014, p. 45.
[5] *Ibid*., p. 45.

penalties is one form of dispute resolution outside the court (Alternative Dispute Resolution / ADR).

Benefits to be taken in resolving criminal acts through "Penal Mediation" include, among others[6]:

- Reduce feelings of victim revenge
- Reducing the accumulation of cases in court and reducing prison inmates who are currently over capacity
- Reducing the high costs of solving criminal cases
- Give the perpetrator and victim the opportunity to communicate about crimes that harm the victim
- Seek settlement of criminal cases by perpetrators and victims that are relatively acceptable to both parties

The benefits of Penal Mediation can reduce the accumulation of cases at the level of judex facti (PN / PT), especially for types of small or light cases such as:

- Violations as stipulated in the third book of the Criminal Code
- Criminal offense (tipiring), which is threatened with imprisonment / confinement for a maximum of 3 (three) months or a fine of Rp. 7,500
- Minor crimes provided for in the Criminal Code: articles 302, 315, 352, 384, 373, 379, 482, and 362
- Crimes as provided for in articles 359 and 360 (negligence)
- Crimes committed by children (Law no. 3 of 1977)
- Crimes as regulated in Law no. 23 of 2004 concerning the Elimination of Domestic Violence
- Medical dispute resolution (certain)

In essence the Criminal Justice System can be assessed through approaches from the legal, sociological, economic and management dimensions. This aspect is said so because in the Criminal Justice System, there are elements that support the existence of the process.
Satjipto Rahardjo, said[7]:

"There are several options for studying a legal institution such as the Criminal Justice System (SPP) or the Criminal Justice System, which is a broader legal approach and approach, such as sociology, economics and management. From a professional point of view, SPP is commonly discussed as an independent legal institution. From here we pay attention to the principles, doctrines, and laws that govern the SPP. In law, such an approach is called "positivist-analytical"

Criminal acts will lead to "criminal sanctions", which is a prime guarantee (prime guarantor) and at the same time as a primary threat (prime threatener) and is a tool or means to deal with crime. The weakness of the existing Criminal Justice System is the position of the victim and the community who have not yet gotten their positions, so that the interests of both are ignored. Meanwhile, in the model of solving criminal cases using the restorative justice approach (restorative justice), the active role of the two parties is important in addition to the role of the perpetrators[8]. Basically, restorative justice is not a new concept, where its existence is as old as the criminal law itself. Marck Levin stated that the approach that was once considered obsolete, old-fashioned, traditional, was now considered to be a progressive approach.

Dignan, definition of Restorative Justice[9] :
Restorative justice is a new framework for responding to wrongdoing and conflict that is rapidly gaining acceptence and support by educational, legal, social works, and counceling professionals and community group. Restorative justice is a valueed-based approach to responding to wrongdoing and conflict, with a balanced focus on the person harmed, the person causing the harm, and affected commuinity.

The concept of customary law in Indonesia as a forum for traditional justice institutions, also has a concept that can be described as the root of restorative justice. In Indonesia the characteristics of customary law in each region in general are very

[6] Salman Luthan, *Mediasi Penal Dalam Tindak Pidana Medik Dalam RUU KUHP*, at the symposium of the Indonesian Doctors Association, in order to commemorate the day of health legal awareness, in Jakarta, July 20, 2019.

[7] Kenneth J. Peak, Justice Administration, Department of Criminal Justice, University of Nevada, 1987, p. 25 further analyzes whether the components of the criminal justice system consist of process, network, non-system, and system.

[8] Eva Achjani Zulfa, *Mediasi Penal: Perkembangan Kebijakan Hukum Pidana*, Paper, Jakarta, 2011 p. 5-6

[9] Muladi and Barda Nawawi Arief, *Teori-Teori dan Kebijakan Pidana*, Publisher PT. Alumni, Bandung, 1992 p. 15-16.

supportive of the application of restorative justice. This can be seen from the general characteristics of Indonesian customary law, views on customary violations / adat offenses and the proposed settlement model. A simple model of the restorative justice approach actually exists in Indonesian society in resolving conflicts by deliberation. This model in the language of "Restorative Justice" is known as the "conference, circle or victim offender mediation" model (VOM)

IV. Penal Mediation and Restorative Justice in Medical Negligence

Medical negligence by a doctor and bad consequences for patients, such as worsening conditions of the disease, permanent disability, or even death, commonly referred to as "malpractice". If something happens like the above, the patient or his family will report to the police, as a general criminal investigator.

Until now the police still handle the case as a general criminal, based on the General Criminal Law, namely the Criminal Code (lex generalis) and several other laws such as the UUPK and the Law on Health Personnel, in accordance with the process regulated in the Criminal Procedure Code. With the passage of time and change of time, which requires efficiency factors in all aspects of life, both ways / methods, time, cost, etc., then this feels outdated and out of date. Even in the country of origin of the Indonesian Criminal Code, namely the Netherlands has long revised several articles on Criminal Acts, as well as legal sanctions.

Penal Mediation and Restorative Justice, is a legal tool that is very suitable for dealing with Medical Negligence, will more fulfill the elements or principles in Criminal Justice, with the ultimate goal: legal certainty, justice and expediency. In the offense of complaints of medical practice in which the investigation is proceeding based on the complaint of the victim, the patient or his family, the solution is found through mediation of the penalty, both before the complaint is made so that the victim (patient) or his family does not submit a complaint, or if the complaint has been made by the victim. Here the role of the police is not as a mediator, but only as a witness who witnesses the completion of the criminal case through a peace agreement. In addition to complaint offenses in medical practice cases, doctors and patients usually resolve the cases themselves by mediation.

Indeed the negligence of a doctor in carrying out his profession, is very different from the general criminal, as stipulated in the Criminal Code articles 359 and 360:

- No element of intent (mens rea)
- Therapy or medical treatment of a doctor always starts from efforts or efforts to help to help and humanity
- Legal representation for a doctor in carrying out his duties, from diagnostic procedures to therapies or medical measures, such as injury to the human body performed by a surgeon

In resolving criminal acts of medical negligence through mediation penalties, legal steps can be taken as follows:

1. Public Prosecutors (Prosecutors) and Medical Personnel (doctors or dentists), who are declared as suspects, can enter into an agreement so that the case is not forwarded to the Court, but is settled by pursuing a peace agreement or agreement
2. The peace agreement can only be reached, as long as the Medical Personnel is deemed sufficient evidence of medical negligence:
   a. Willing to pay criminal sanctions to the state fines, the amount of which was agreed by the prosecutor and the medical staff concerned
   b. Willing to pay compensation in the form of compensation to patients or their families, according to their agreement.
3. An agreement to make a Peace Agreement can:

a. Offered by the Prosecutor to patients or their families who have been injured or died, or:
b. Submitted by the patient or family with the prosecutor

4. In the case that the Prosecutor and the patient or family have not reached an agreement to make a peace agreement, while the case has been submitted in court, the Peace Agreement must be offered by the Panel of Judges who hear the case.
5. If an agreement to make peace between the medical staff and the patient / family is reached, then the agreement is stated in the Judge's Decision

6. As long as the medical person has reached an agreement with the patient / family, a following provisions shall be made:
   a. The patient or family loses the right to file a lawsuit in a civil court
   b. The medical personnel concerned will no longer be prosecuted and convicted again and sued on a legal basis, in the future
7. If a peace agreement is reached on the basis of an offer by the Panel of Judges, the Judge decides that compensation must be paid by medical personnel to the patient / family, at least as much as the cost of the hospital, doctor's medical services, medicines, and other costs which is considered appropriate by the Panel of Judges

Restorative Justice in medical negligence is basically avoiding sanctions imprisonment or confinement to medical personnel who are found guilty, which can be replaced with criminal fines or criminal social work:[10]

1. The Panel of Judges who will hear the case, before starting with the examination of the case is obliged to provide an opportunity for the reporting party and the patient to make peace (mediation), as stipulated in the mediation penalty
2. If a peace agreement is reached between the two parties to the dispute, a peace certificate must be made which must be carried out by the parties (because the medical criminal case is basically a criminal or complaint offense)
3. If peace is not reached, the judge will examine the case based on the available evidence, including the main one is the MKDKI Decision and Expert Statement from the Medical College
4. The final verdict of the Panel of Judges refers to Restorative Justice:
   - The threat of imprisonment / confinement a maximum of 1 (one) year in cases with serious negligence, resulting in serious injury or death.
   - If additional crimes are needed, for example by revoking the Practice License within a certain time, required to work socially, etc.

E. CLOSING

I. Conclusions

From the description stated earlier, conclusions can be drawn, namely:

- Settlement of disputes through mediation processes, actually only exists in civil disputes, but in the practice of criminal cases, it is also often resolved outside the court, through the various representations of law enforcement officials or through peace mechanisms. In the development of theoretical discourse and the renewal of criminal law in various countries, there is a strong tendency to use "mediating penalties" as an alternative to solving problems in the field of criminal law. Recommended models are:
  a) Informal mediation
  b) Traditional village or tribal moots
  c) Victim-offender Mediation
  d) Reparation negotiation
  e) Family and community group conferences
- Penal Penal mediation can be carried out if the parties involved in the negotiations are aware of and respect the results obtained in the process, because the most important principle in mediation is the recognition of wrongdoing and forgiveness by the injured party due to a criminal act, to reach a settlement in the form of win-win solution or that can be accepted by both parties.

II. Suggestion

The suggestions that the author can convey in connection with the problems in this paper are:

- Settlement of criminal cases through Penal Mediation and Restorative Justice, is a choice that should be prioritized in handling criminal cases in the future.
- Medical criminal cases that refer to alleged medical negligence that is considered to have harmed the patient or his family, should be handled specifically and not equated with general negligence crimes that are usually handled conventionally, then mediation and restorative justive penalties are one of the right answers. Even

[10] Eva Achjani, Zulfa, *Keadilan Restoratif*, Jakarta, Badan Penerbit Fakultas Hukum Universitas Indonesia, p.

for medical crimes, there is a discourse to abolish the sentence of imprisonment / confinement, enough with a fine, it can even more effectively the deterrent effect on the culprit.

REFERENCES

Literature :

Abdurrahman Konoras, Dr. SH., MH., *Aspek Hukum Penyelesaian Sengketa Secara mediasi di Pengadilan,* Rajawali Per, Jakarta, 2017.

Andi Samsam Nganro, DR., SH., MH., *Kumpulan Kuliah "Sistem Peradilan Pidana" di Program Pasca Sarjana, Fakultas Hukum Universitas Jayabaya, Jakarta, 2018.*

Atmasasmita, Romli, Prof., Dr., SH., LLM., *Sitem Peradilan Pidana Kontemporer*, Kencana, Jakarta, 2013.

Eddi Junaidi,, dr. SPOG., SH., M.Kes, *Mediasi dalam Penyelesaian Sengketa Medik*, Rajawali Pers, Jakarta, 2011.

Jonlar Purba, Dr., SH., MH., *Penegakan Hukum Terhadap Tindak Pidana Bermotif Ringan dengan Restorative Justice*, Jala Permata Aksara, Bekasi, 2017.

Kadri Husin, Prof., Dr., SH., MH., Budi Rizki Husin, SH.MH., *Sistem Peradilan Pidana di Indonesia*, Sinar Grafika, Jakarta, 2016.

Lilik Mulyadi, Dr., SH., MH., *Mediasi Penal Dalam Sistem Peradilan Pidana Indonesia*, PT. Alumni, Bandung, 2015.

Muhamad Sadi Is, SH., MH., *Etika Hukum Kesehatan*, *Teori dan Aplikasinya di Indonesia*, Kencana, Jakarta, 2014.

Salman Luthan, Dr., SH., MH., *Mediasi Penal Dalam Tindak Pidana Medik dalam RUU-KUHP, dalam simposium Hari Kesadaran Hukum Kedokteran, di Hotel Acasia*, Jakarta tanggal 20 Juli 2019.

Soekidjo Notoatmodjo, Prof., Dr., *Etika & Hukum Kesehatan*, Rineka Cipta, Jakarta, 2010.

Teguh Prasetyo, Prof., Dr., SH., Msi., *Hukum Pidana*, Rajawali Pers, 2016.

Laws and regulations:

1945 Constitution

Criminal Code (KUHP)

Law Number 29 Year 2014 Regarding Medical Practices

EFFORTS TO ELIMINATE AND TAKE ACTION ON CRIMINAL ACTORS OF MARKETING, FRAUD, BRIBERY, AND MONEY LAUNDERING USING CORPORATE CRIME RULES

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ABSTRACT

The Republic of Indonesia, as mandated by the 1945 Constitution, was formed for a very noble purpose, including to protect the entire nation of Indonesia, to advance public welfare, and to educate the country.
The vast area and abundant wealth is an extraordinary attraction for businesses throughout the sector. An attitude of professionalism does not always accompany the desire to get profits for business people. The legal system that is not yet stable, the convoluted bureaucracy, has provoked business actors to cheat. Weaknesses of the law, overlapping regulations, weak oversight has provoked business actors to commit crimes in the name of profits for the corporation that shelter them. At present, the Corporate Crime has not been adequately touched or even barely heard, and business people can enjoy the corporate crime comfortably.

Keywords: Corporations, Laws, And Crime

A. INTRODUCTION.

The company, as an organization, is formed or started from an idea or ideas of the human mind, where the idea is transformed into a set of activities that want to be carried out by two or more people. To achieve goals and gain followers, or succeed in creating demand for a new product or service, the organization will be able to survive, grow, and become a reality.[1] Every company that wants to succeed has to understand specific areas that provide the most significant possibility or potential to achieve success. Needs to be addressed what the company wants to go to, what direction the company want to take, and what the target is.[2]

In legal relations, humans are not the only supporters of rights and obligations. Besides, there are still supporters of rights and obligations called legal entities (*rechtspersoon*) to differentiate from humans (*natuurlijk persoon*). So there is a form of law (*rechtsfiguur*) that is a legal entity that can have rights, legal obligations and can establish legal relations.[3] Indonesia currently has a lot of legal entities; not all of them follow the principles of good corporate governance.

On an international scale, April 4, 2016, the world was shocked by the news regarding leaked documents, better known as "Panama Papers." This document presents information about various state leaders, political officials and officials, business people, athletes, and professionals who use the services of law firm Mossack Fonseca in Panama for business purposes, disguising ownership, and tax avoidance.[4]

Likewise, in Indonesia, many companies, both legal and non-legal entities, are used for actions that are outside the provisions of the objectives of the legal entity or corporation but are used for money laundering, disguising the ownership of proceeds from crime (corruption), or fraud and embezzlement as is the case today.

Like it or not, it must be recognized that a corporation as an entity or legal subject of its existence has contributed significantly to Indonesia's economic growth, but in reality, many corporations commit various criminal acts (corporate crime). Many laws in Indonesia have placed corporations as subjects of criminal acts that can be held accountable. However, cases with corporate legal subjects that have been proposed during criminal proceedings are still minimal due to insufficient guidelines regarding the handling of criminal cases by corporations.

B. PROBLEM STATEMENT.

From the explanation above, the problem formulated is how law enforcement efforts in

[1]Imas Rosidawati W., Juli Asril, *Hukum Organisasi Perusahaan*, Aria Mandiri Group, Bandung, 2015, p8-9.
[2]*Ibid*, p11.
[3]*Ibid*, p25.
[4]*Indonesia Corruption Watch*, Tersedia (on line) http://www. cita.or.id/opini/ artikel/ beneficial-ownership-bo .

ensnaring and prosecuting perpetrators of embezzlement, fraud, bribery, money laundering, and also ensnare by using the principles of corporate crime.

C. LITERATURE REVIEW.

a. Definition of Corporation

Based on Law Number 8 of 2010 concerning the Prevention and Eradication of Money Laundering Criminal Acts, corporations have the understanding of a collection of people, and/or organized wealth, both legal entities and non-legal entities.

Quoting the opinion of Rudi Prasetya, "corporation" is a term commonly used among criminal law experts to refer to what is common in other fields of law, specifically in the area of civil law, as a legal entity, or what is referred to in the Dutch as *rechtspersoon*.[5]

Hans Kelsen defines a corporation as a group of individuals who are treated by law as a unit, that is, as a "person" who has the rights and obligations of the individuals who make it up. Corporations are seen as "private" because legal regulations establish certain rights and obligations regarding the interests of corporate members but do not constitute the rights and obligations of members and are therefore interpreted as the rights and obligations of the corporation itself. Those rights and obligations are created primarily by the actions of corporate organs.[6]

Satjipto Rahardjo, in his book entitled "The Science of Law," states that what is meant by corporations is "the body he created consists of a corpus, namely the physical structure and into it the law incorporates the animus elements that make the body have a personality. Because this legal entity is a legal creation, except for its creation, its death is determined by law."[7]

According to the Great Indonesian Dictionary, a corporation can be interpreted as a legal business entity or legal entity or as a company or a massive business entity or several companies that are managed and run as a large company.[8]

Corporations according to the Black's Law Dictionary are interpreted as: *"an entity (usually a business) having authority under Law to act as a single person distinct from the share holders who own it and having rights to issue stock and exist indefinitely, a group or succession of persons established in accordance with legal rules into a legal or juristic person that has legal personality distinct from the natural persons who make it up, exist indefinitely apart from them, and has the legal powers that its constitution gives it".*[9]

b. Definition of Criminal Act.

Crimes have a conceptual understanding of actual events in the field of criminal law, so that criminal acts must be given a scientific meaning and clearly defined to be able to separate them from common terms in the society. As revealed by a criminal law expert, Prof. Moeljatno, SH, who argues that the definition of a crime according to his terms, namely criminal acts is: "*Actions that are prohibited by a legal rule which prohibits accompanied by threats (sanctions) in the form of certain penalties, for anyone who violates the ban*."[10]

c. Definition of Corporate Criminal Act.

Criminal Acts by Corporations are criminal offenses that can be held liable to corporations following laws governing corporations.[11]

d. Definition of Corporate Crime.

What is meant by corporate crime is an action in the form of doing or not doing by an association or legal entity through its organs, which brings profit or is expected to bring profit to the legal entity or association. Corporate crime is done by violating the legal rules included in public order so that it can be classified as a criminal offense, which results in widespread harm to others or society. Therefore, criminal penalties are imposed on such associations or bodies through an appropriate criminal procedure.

e. Definition of Lawsuit

According to the Civil Procedure Law in Article 1 number 2, a lawsuit is a claim for rights that contains a dispute and submitted to a "court" for a decision. Sudikno Mertokusumo[12], a claim for rights is an action aimed at obtaining protection granted by the court to prevent vigilanteism

[5]Muladi dan Dwidja Priyatno**,***Pertanggungjawaban Korporasi Dalam Hukum Pidana*, STHB, Bandung, 1991, hlm. 13.

[6] Hans Kelsen, Teori Hukum Murni *(translated from General Theory of Law and State)*, translation: Somardi, Rindi Press, Jakarta, cet 1, 1995, p98.

[7] Satjipto Rahardjo, *Ilmu Hukum*, Citra Aditya Bakti, Bandung, 2000, p13.

[8] Tim penyusun,Penerbit Balai Pustaka, Jakarta, 2001, p596.

[9] Bryan A. Garner, (Editor in chief), *Black's Law Dictionary*, seventh Edition, Minim, West Publishing co, St Paul, 1999, *page.* 341.

[10] Moeljatno, *Asas-asas Hukum Pidana*, Bina Aksara, Jakarta, 1987, p54)

[11] Perma No. 13 Tahun 2016, available online.

[12]UPI available online *http://upipagow.blogspot.co.id/2013/11/pengertian-dan-penjelasan-tentang*, (accessed April 24, at 07:04).

(eigenrichting). Darwan Prinst, a lawsuit is a request submitted to the "Chair of the District Court" in charge of a claim against another party and must be examined according to specific procedures by the court, and then a decision is made on the suit.

D. RESEARCH METHOD.

Theoretically, there is a measurement to determine corporate criminal liability, starting from identification theory, vicarious liability, and delegation depending on the position of the case, which is the party that made a mistake (mens rea) in the corporate crime. "Depending on how the case. For example, if the perpetrators of corporate crime are employees, the identification theory can be applied. Corporate criminal responsibility can be delegated to or as a whole of the management of the corporation (vicarious liability)," Surya said.[13]

Several legal theories existing in corporate criminal acts,[14] first, **identification theory**, a corporation can commit crimes through individuals who act for and on behalf of corporations that have high positions or play the key to corporate decision making. "Attribution of management errors is a corporate error,"[15]

As long as the chief director is involved, he can be said to be the perpetrator. However, if the director only acts as a display and does not make a mistake, then he cannot be said to be a corporate criminal offender.

Second, **vicarious liability**, explaining that someone can be held responsible for criminal acts committed by others because they are considered as corporate management. In its development, this theory gave birth to absolute liability or liability without fault, which means that the perpetrators who do not have mens rea (bad intentions), such as the application of violations in the Traffic and Road Transportation Law. "This theory then gives birth to strict liability as applied in Environmental Law."

Third, the delegation theory. This theory continues criminal liability placed or attached to someone who was given a delegation by the directors to carry out corporate authority.

Fourth, aggregation theory, the criminal liability that can be borne by the corporation, if the deed is done by several people who meet the element of the offense, which is interrelated with one another and does not stand alone. For example, the perpetrators of inclusion, people who take orders, and fabricate a corporate crime.

Fifth, the theory of working culture capital, the written and implied corporate policies affect the way the corporation works and can be held liable for criminal liability. If the actions of someone who has a rational basis, the corporation authorizes or allows the act. "Mistakes are seen from the daily culture of the corporation. This theory underlies the birth of PERMA No. 13 of 2016 concerning Procedures for Handling Criminal Cases by Corporations ". These theories also underlie the birth of the Corruption Eradication Law. Article 20 paragraph (1) of the Law on the Eradication of Corruption states that in the event that a criminal act of corruption is carried out by or on behalf of a corporation, criminal prosecution and enforcement can be carried out against the corporation and or its management. "This rule uses identification theory, that is, the management is demanded."

In this case, theories that applicable to the process of criminal punishment of a legal entity include: ultra vires, agency theory, power of attorney theory, alter ego, respondeat superior, piercing the corporate veil, deep pocket theory, strict liability, vicarious liability, reverse proof, fiduciary duty, in-house management rule, and insider trading.

E. ANALYSIS AND DISCUSSION.

1. Corporate Crime Theory.

The criminal theory against legal entities then gave rise to the concept of corporate crime. Examples of these corporate crimes are environmental crime, money laundering, tax evasion, bankruptcy crime, illegal logging, banking crime, capital market crime (including insider trading), falsification of goods/documents, professional crime, crime in the field of intellectual property rights, and consumer crime.

Corporate crime has specific characteristics. Among the characteristics of corporate crime include:

1. Bring profit (economical or not) or be done with an economic motive for the company.
2. Bringing negative consequences to others or bringing negative consequences that extend to the community (eg, a crime against the environment).
3. Usually done with sophisticated and unconventional modes. For example, done

[13] Surya Jaya, Jurnal Hukum Online tersedia online https://www.hukumonline.com/berita/baca/lt5cc6c36e5eb56/kenali-teori-ini agar-efektif-menindak-kejahatan-korporasi/
[14] Prija, Jurnal Hukum Online, Ibid.
[15] Ibid.

through financial engineering that is difficult to detect.

The purpose of criminal punishment for a legal entity is to seek justice for perpetrators and victims, and public order. Nevertheless, what is more prominent in corporate criminal acts is its aim to cause a "deterrent effect." So, if the executives are sentenced only to the criminal, this does not deter the company, because the company can immediately replace the old management with the new one.[16]

Criminal acts committed by a company/corporation, so that it is charged with criminal liability, is a new development. Moreover, what has been the theories that impose civil liability on these legal entities or their members. Therefore, until now, the criminal legal entity against the pros and cons of the experts. Opinions that are pro to corporate criminal offenses present the following reasons. [17]

1. Just imprisoning company management is not strong enough to suppress this corporate crime.
2. Because it turns out that corporations increasingly play an essential role.
3. To protect the public better by punishing companies.
4. Criminal action against corporations is an effort not to convict weak parties such as management or employees of a company.

As for those who are counter to the corporation's prosecution, state the very technical reasons including: [18]

1. The problem of error or will in a criminal act only exists in natural humans.
2. Material behavior, as required by some crimes, can only be done by natural humans (eg, stealing, killing), et cetera.
3. Crimes which constitute deprivation of freedom of persons shall not be liable to crime.
4. Criminalizing a corporation is the same as convicting an innocent party because there is no criminal intent in the legal entity.
5. In practice, it turns out that it is not easy to determine the norms when the criminal is the company, or the management, or both.

Forms of Corporate Crime.

The existence of a corporation today is often followed by violations or even illegal acts, including violations of criminal law. One example of a crime that is often committed by a corporation is environmental pollution, consumer fraud, advertising fraud, doing unfair business or even committing criminal acts in the economic field such as banking crimes; customs and excise crimes; capital market crime; embezzlement; corruption; or passive even active money laundering, which not only harms individuals or the wider community but also has the potential to cause a state loss and even world economic losses.

Development and Problems of Corporate Crime.

Various countries, including Indonesia, generally determine the corporate criminal act of crawling (creeping corporate crime) and turning in the environment (vicarious circle), with the following way: at the beginning, people who are responsible for a crime are members/owners/shareholders. Furthermore, the criminal act committed by a person in his position as director of the company. Legal theories developed teach that companies can also commit corporate crimes but are still together with their directors, for example, in the case of directors' actions that fall into the category of ultra vires doctrine or in-house management rule. During World War II, there was a theory that stated that corporations themselves could commit crimes in full with or without criminal acts committed by their management. The next development is that the company itself together with its members/shareholders in committing criminal acts together. For example, through the application of the theory of *piercing the corporate veil*.

Nevertheless, the later development was to re-charge the criminal offense to the members/shareholders of the company, even though the crime was committed by a legal entity, for example, through the theory of piercing the corporate veil. So, as in a circle, that is to return to the origin of the development of corporate crime.[19]

Then, as it was well known, theories about the punishment of legal entities have not been developed so long. In the United States, it has been developing since 1909, namely in the case of New York Central and Hudson River R.R. versus the United States. In the Netherlands, it has been developing since 1950 after it was mentioned in the Wet Op de Economische Delicten, but in the Dutch criminal law it was officially in force since September 1, 1976, and in

[16] Munir Fuady, *Teori-Teori Besar (Grand Theory) dalam Hukum*, Prenamedia, Jakarta, 2013, p197-198.
[17] Muladi and Dwidja Priyatno, *Pertanggungjawaban Pidana Korporasi*, Kencana, Jakarta, 2010, p47.
[18] *Ibid*, p46
[19] Munir Fuady, *loc cit*, p98-200.

Indonesia itself, it was introduced since 1951 in the Stockpiling Law, and in 1955 in the Law on Economic Crimes. And then, published several other laws in Indonesia that allow criminal offenses committed by companies/corporations, for example, Law on the Environment, Law on Eradicating Corruption, Law on Crime of Money Laundering, Law on Forestry, Minerba Law.

Then, as already explained that many juridical issues will be discovered when criminal acts are applied to corporations / legal entities. In this case, the juridical issues that will be faced when establishing a company as a criminal offender, include:

1. Because it is not a natural person, a legal entity does not have a "heart intent/will" (mens rea, criminal intent).
2. Because they are not natural humans, it is difficult to find criminal errors in legal entities. In this case, the guilty are humans. Criminal law requires that there is no crime without error (vide article 1 of the Indonesian Criminal Code), or what is called the *nullun delictum nulla puna* principle.
3. Many models of imprisonment are imposed on companies as corporations, such as the death penalty, hanging, and imprisonment.
4. If in criminal proceedings the law enforcers often make arrests (for example, so as not to lose evidence), but if criminal against a legal entity, such detention cannot be carried out.
5. Who should appear in court when a legal entity is criminally processed. If the management of a legal entity must be present, because the management must defend himself personally, they would likely pass all the blame on the legal entity.

However, there is a keen enough legal interest that those who can be convicted or those who can commit a crime are not only human beings, but also legal entities. Even the current universal tendency is strongly supported by theories in criminology, assuming that legal entities can also be the perpetrators of a crime. The reason is that:

1. To foster a deterrent effect for the company or the owner of the company so that it could prevent a repeat of similar actions in the future, both by the same company and others.
2. If only the directors are convicted, the company or its owners/shareholders can continue to do business without any effect because when the directors are convicted, the company only needs to replace the directors.
3. Penalties for fines or extensive damages often can only be borne by the company, whereas directors as paid people generally do not have enough funds of that size.
4. Without the criminalization of the company, it would be very unfair and burdensome for the directors of the company.
5. Criminalization of the company can be seen as a form of business risk that must be borne by the company, as well as if there are business profits that become the company's profit.
6. Penalties against companies can encourage company owners, for example, through a general meeting of shareholders, to prevent new acts of crime that harm the community or public order.
7. To avoid unjust enrichment if the company can enjoy the results of a criminal offense.

Professor Muladi, as quoted from Clinard and Yeager, stated that the use of criminal sanctions on new corporations could be carried out after considering the following factors.[20]

1). The amount of loss to the public; 2) The extent of involvement of executives from the company, 3) The length of time the violation was committed, 4) The frequency of violations, 5) The intention of the offender to break the law, 6) The existence of bribery, 7). Mass media reporting level, 8) Previous judge's decision on a similar case, 9) The dark history of the company's past, 10) Possible deterrent effect, 11) The level of involvement of the company.

2. Handling of Corporate Criminal Cases

Many national laws govern corporate crime in Indonesia, including the Law on Money Laundering (TPPU Law), the Corruption Act (Corruption Act), the Forestry Act, the Mining Law (Minerba), the PP Environmental Act (PPLH), the Spatial Planning Law, et cetera. Violations of these provisions are very few, even if it cannot be said of the number of fingers that dragged the corporation to court. The Law on Money Laundering (TPPU), stipulates the provisions in article 6 regarding the provisions on corporate involvement and article 7 concerning the principal and additional penalties.

Law on Money Laundering (UU TPPU).
Article 6

[20] Muladi and Dwidja Priyatno, loc cit, p20.

(1) In the event of the crime of Money Laundering, as referred to in Article 3, Article 4, and Article 5 committed by the Corporation, the crime is imposed on the Corporation or Corporate Controlling Personnel.

(2) A criminal is imposed on a Corporation if the crime of Money Laundering:

a. performed or ordered by Corporate Control Personnel;
b. conducted in the context of fulfilling the aims and objectives of the Corporation;
c. carried out following the duties and functions of the offender or the giver of the order; and
d. done to provide benefits to the Corporation.

Article 7

(1) The major crime imposed on the Corporation is a fine of no more than IDR 100,000,000,000 (one hundred billion rupiahs).

(2) In addition to the fines as referred to in paragraph (1), Corporations may also be imposed in the form of:

a. announcement of the judge's decision;
b. freezing some or all of the Corporation's business activities;
c. revocation of business license;
d. dissolution or prohibition of Corporations;
e. confiscation of Corporate assets for the state; or
f. Corporate takeovers by the state.[21]

Some laws have accommodated the problem of corporate criminal offenses by specifying the principal and additional penalties. The reasons for the imposition of sanctions on corporations in each field are different, but basically, if there is an attachment to the corporation either in the form of a direct position (position) as a policymaker, orders from superiors or interests for the corporation. Based on this, the author presents the necessary criminal provisions and additional crimes for 6 (six) types of laws as the table below.

From the classification, there are 4 (four) types of handling corporate criminal acts as follows:

a. Has set the details contained in the PPLH Law and TPPU Law.
b. Lack of detail is in the Mining Law (Minerba) and the Forestry Law.
c. Very common in the Corruption Act.
d. Has not set about the criminal law of the Criminal Law Corporation (KUHP).

[21] Undang-Undang Tindak Pidana Pencucian Uang, online Pdf.

F. CONCLUSION.

Criminal sanctions based on the Criminal Code are not comparable with the amount of money that can be enjoyed. The corporation is not responsible for criminal sanctions. Corporate activities can continue to run with the image as if the "innocent corporation" is only the culprit who is guilty and deserves to be convicted.

Center for Reporting and Analysis of Financial Transactions (PPATK), as a transaction analysis center, has not been able to take preventive action, so that this incident can trigger embezzlement and fraud that has the category of "extraordinary crime" because it involves so many people being harmed. If traced from the beginning, how the owners of First Travel developed and left only IDR 1.3 million in their account, then surely there were suspicious flows of funds.

The Evil and Fraud Criminal Actors are even willing and able to risk their credibility to commit a crime because of legal snares that have mild criminal sanctions. Perpetrators of crimes that because of their actions do not cause property that can be hidden by any means to be tracked and taken by force by statutory provisions will provide lessons for other potential perpetrators to commit similar acts..

Recommendations are mainly given to the makers of the Act, those who use the Law both the police, the Prosecutor's Office, and the Court. As an organ of government, the House of Representatives is required to be more observant in completing the provisions in the Criminal Code (KUHP), which are still considered to be very lame. The main criminal provisions in the form of rupiah with an amount that is "very astonishing" or imprisonment of imprisonment for perpetrators of a crime does not show the principle of justice at all. As illustrated, these criminal offenses may be subject to additional crimes both to individuals and corporations with the provisions of returning the embezzled amount of money without reducing sanctions imprisonment. Impoverishing the perpetrators of embezzlement, fraud, and corruption, as carried out in various countries, has succeeded while still a dream for us, the people of Indonesia. According to Law No. 17 of 2003 concerning State Finances, the repayment of state losses must be returned; in addition to the criminal application and penalties for the State Civil Apparatus, similar cases can be applied to corporations.

Law support is needed to support the implementation of sanctions for criminal offenses that

can be related to corporations, such as the problem of bribery, embezzlement, and fraud by using corporations as a tool. It is time to determine the deterrent effect applied to corporate criminal offenders. Using articles in Perma No 13 of 2016 as procedural law is an opportunity for investigators, prosecutors, and judges to investigate, prosecute, and decide on a case based on justice. Enjoying the assets resulting from the criminal activity after the completion of the criminal sanction of imprisonment and or running the corporation from behind bars because the corporation is free from charges must be immediately removed. Lawsuits against corporations carried out in Indonesia to date[22] have only occurred once.

Enforcement of corporate crimes to someone who is part of the corporation and, at the same time, impose sanctions on the corporation is a breakthrough that needs to be done. The courage of these three institutions must emerge to change conditions that in no way make crimeless.

G. REFERENCES.

Books:

Bryan A. Garner, (Editor in chief) (1999), *Black's Law Dictionary*, seventh Edition, St Paul, West Publishing co.

Dwidja Priyatno (2004)**,***Kebijakan Legalisasi Tentang Sistem Pertanggungjawaban Pidana Korporasi di Indonesia Disertasi*, Bandung, STHB.

Hans Kelsen (1995), *Teori Hukum Murni (translated from General Theory of Law and State)*, Translation: Somardi, Jakarta, rindi Press.

Imas Rosidawati W., Juli Asril (2015), *Hukum Organisasi Perusahaan*, Bandung, Aria Mandiri Group.

Moeljatno (1987), *Asas-asas Hukum Pidana*, Jakarta: Bina Aksara.

Muladi and Dwidja Priyatno (1991)**,***Pertanggungjawaban Korporasi Dalam Hukum Pidana*, Bandung, STHB.

Munir Fuady (2013), *Teori-Teori Besar (Grand Theory) dalam Hukum*, Jakarta, Prenadamedia Group.

Satjipto Rahardjo (2000), *Ilmu Hukum*, Bandung, Citra Aditya Bakti.

Tim penyusun (2001), *Kamus Besar Bahasa Indonesia*, Jakarta, Penerbit Balai Pustaka.

Regulations:

Kumpulan Kitab Undang-Undang Hukum, KUHPerdata, KUHP, KUHAP (2014). Jakarta, Wacana Intelektual.

Peraturan Mahkamah Agung Nomor 13 Tahun 2016, *tentang Tata Cara Penanganan Perkara Tindak Pidana Oleh Korporasi.*

Undang-Undang *Tindak Pidana Pencucian Uang, online Pdf.*

Undang-Undang Nomor 31 Tahun 1999 *tentang Pemberantasan Tindak Pidana Korupsi*.

Undang-Undang Nomor 20 Tahum 2001 *tentang Perubahan Atas Undang-Undang Nomor 31 Tahun 1999 tentang Pemberantasan Tindak Pidana Korupsi*.

Internet:

M. Syarif Laode available online https://acch.kpk.go.id/images/ragam/*makalah /pdf/ iibic/puri-ratna*.

Indonesia Corruption Watch, available (on line)http://www.cita.or.id/opini/ artikel/ beneficial-ownership-bo.

UPI available online *http://upipagow.blogspot.co.id/2013/11/pengertian-dan-penjelasan-tentang*.

[22]M.Syarif Laode, available online https://acch.kpk.go.id /images/ragam/makalah/pdf/iibic/puti-ratna.

LEGAL CERTAINTY OF AMBIGUOUS GENITALIA IN GENDER REASSIGNMENT SURGERY IN INDONESIA

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ABSTRACT

Ambiguous genitalia or sex ambiguity is a disorder in which sufferers have dubious genetic, anatomic and / or physiological characteristics between men and women. In Indonesian this is called dubious or confusing gender. Also called dual sex because sometimes the clitoris is very large, so it looks like there are two genitals. The problem in this study is how legal certainty towards ambiguous genitalia in gender reassignment surgery in Indonesia? 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 certainty towards ambiguous genitalia in gender reassignment surgery in Indonesia has been regulated in the Decree of the Minister of Health of the Republic of Indonesia No. 226 / MEN.KES / SK / VI / 1979 Concerning the Establishment of a Standing Committee on Sex Change. However, the arrangement is not yet at the level of law, so that there is a chance for sex surgery in the hospital and doctors or surgical teams who are not authorized to carry out gender reassignment surgery. Therefore, it is necessary to issue a special regulation on the level of the law regarding the requirements of doctors or surgical teams and hospitals regarding sex reassignment surgery. This needs to be done in order to prevent the occurrence of practices of sex reimbursement operations illegally in hospitals that do not have medical equipment as standard set by the government.

Keywords: Legal Certainty, Ambiguous Genitalia, Gender Reassignment Surgery.

A. INTRODUCTION

Ambiguous genitalia or sex ambiguity is a disorder in which the sufferer has doubtful genetic, anatomic and or physiological characteristics between men and women. In Indonesian this is called dubious or confusing sex. Also called double sex because sometimes the clitoris is very large, so it looks like there are two sexes.[1]

In general, gender [2] babies are usually without difficulty can be known with certainty, male or female, shortly after birth. Even with ultrasonography (USG), the sex can be recognized since the baby is still in the womb. Sex in general also will not change forever, and become one of personal identity from birth.[3]

Not always the baby's sex is easy to distinguish, sometimes there are babies with external genitalia that do not clearly indicate the sex of male or female. This situation is called ambiguous genitalia, and can occur in one in 4500 births, but for some reason, the helper together with parents often force themselves to determine the sex of the baby, and make it an identity for the baby.[4]

Errors in determining sex can have an impact on all aspects of a child's life, on parents, the environment, and also the law because it is related to data on population documents. Children have become "victims of error" parenting, fostering and sharpening parents and the environment in the past, which of course tends to be adapted to gender.

Boys are given clothes and toys that are different from girls, as well as by raising and educating them.

[1] Bambang Widhiatmoko, Edy Suyanto, "Legalitas Perubahan Jenis Kelamin Pada Penderita *Ambiguous genetalia* Di Indonesia", *Jurnal Kedokteran Forensik Indonesia*, Vol. 15 No. 1, Januari – Maret 2013, p. 13.

[2] Based on health law, in determining a person's sex, there are at least 5 important aspects that need to be considered, namely: a chromosome aspect, b aspects of the primary genital organs in the genitals of the testes and ovaries, c aspects of the secondary genitalia of the external genital organs namely the penis and vulva and vagina, d Hormonal aspects and e Psychological aspects. A normal male is characterized by the presence of XY chromosomes, testes that produce spermatozoa and male hormones, penis organs, Testosterone dominance and psychology as befits a man. While normal women are characterized by the presence of XX chromosomes, ovaries that will produce ovum and female hormones, female genitalia vulva, clitoris, labium mayus, and vagina, progesterone dominance and psychiatric traits as befits women. See: Sofwan Dahlan, "Legal and Ethical Aspects of Disorder Of Sexual Development Management", expert opinion in Stipulation Number 20 / Pdt.P / 2009 / PN.Ung. See: Reni Asmawati, "Hukum dan Pergantian Kelamin: Studi Tentang Pertimbangan Hakim dalam Penetapan Pengadilan", *Naskah Publikasi*, Fakultas Hukum Universitas Muhammadiyah Surakarta 2013, p. 5—6.

[3] Bambang Widhiatmoko, Edy Suyanto, *Op.Cit.*, p. 12.

[4] *Ibid.*

In terms of socializing, undergoing education, socializing, etc. there are also differences based on gender. These things will affect the attitude, behavior, mental and psychological child. In young children, psychosocial problems may not yet occur, but in older children an identity crisis can occur. Parents who suffer from this disorder will also feel anxiety, sadness and confusion.[5]

For patients with ambiguous genitalia, medical efforts can be made to adjust or improve the shape of the genitals. This is as contained in Stipulation Number 518 / Pdt.P / 2013 / PN.Ung.

Supriyanti is the son of Sukiyo and Suliyem who were born in Semarang Regency on August 8, 1990, with a female (female) sex. However, when Supriyanti grew and grew to show signs both physically and clinically tended to be a figure of a male sex. Therefore, in May 2011 a medical examination was conducted at Dr. RSUP Kariadi Semarang and subsequently by the Gender Adjustment Team Dr. Kariadi / FK. UNDIP Semarang performed medical treatment as a certificate of gender identity from Dr. Bambang Wibowo, Sp.OG. dated November 20, 2012 which states clinically Supriyanti is male.[6]

Through a statement about gender identity from Dr. Bambang Wibowo, Sp.OG., then Supriyanti submitted a request for determination to the Semarang District District Court in Ungaran to replace population documents and other documents to change information from female to male. Apart from that, the name written and read Supriyanti, a woman, was born in Semarang Regency on August 8, 1990, changed her name to Bagus Supriyanto, a man born in Semarang District on August 8, 1990, the son of a Sukiyo couple with Suliyem.[7]

B. PROBLEM STATEMENT

Based on the above background, the problem in this study is how the legal certainty of ambiguous genitalia in sex replacement operations in Indonesia?

C. LITERATURE RIVIEW

Sex replacement is a surgical operation to change the sex from male to female or vice versa. Changing the sex of men to women is done by cutting the penis and testes, then formed the female sex, and enlarge breasts. While changing the sex of women into men is done by cutting the breast, closing the female genital tract, and implanting male genital organs (penis). Genital replacement is also followed by psychological therapy and hormonal therapy.[8]

Based on the patient's acknowledgment it is known that they claim to be treated fairly by parents, while the disorder they have experienced has been felt since they were small but the parents did not realize it. This was also found in respondents of transsexuals in the research conducted by Ro'fah that although transsexuals could not be sure when they began to feel any abnormalities, they had a uniform opinion about the rejection of the opinion that their transsexual conditions were caused by an imbalance of psychological development in the family or environmental conditioning on him.[9]

C. RESEARCH METHOD

1. Types of Research

This research is basically a normative juridical study, because the target of this study is the normative law or method in the form of legal principles and the legal system.[10] Normative research in this study is research that describes or describes in detail, systematic, comprehensive and in-depth about the role of the legal certainty of ambiguous genitalia in sex replacement operations in Indonesia.

2. Nature of Research

This research is descriptive because it illustrates the applicable laws and regulations and is associated with legal theories in the practice of its implementation relating to the problem to be examined.

3. Data Analysis

The data obtained will be analyzed by qualitative analysis.

D. ANALYSIS AND DISCUSSION

Legal Certainty Against Ambiguous Genitalia in Gender Replacement Operations in Indonesia

Sex replacement through surgery can be done on a patient who has an indication:

[5] *Ibid.*
[6] Assign Number 518/Pdt.P/2013/PN.Ung.
[7] Assign Number 518/Pdt.P/2013/PN.Ung.
[8] Atiqah Hamid, *Buku Pintar Halal Haram Sehari-hari*, Yogyakarta: Diva Press, 2012, p. 139.
[9] Ro'fah Setyowati, *Fenomena Operasi Kelamin Bagi Transeksual (transeksual) (Tinjauan Hukum Perdata, Hukum Islam, dan Masyarakat*, Semarang: Pustaka Magister, 2007, p. 22.
[10] Soerjono Soekanto dan Sri Mamuji, *Penelitian Hukum Normatif-Suatu Tinjauan Singkat*, Jakarta: Rajawali Press, 2007, p. 10.

1. Gender doubts male or female. Usually found and carried out surgery when still a baby or children.
2. Genital abnormalities with multiple types or commonly called hermaphrodite sufferers.
3. Sex discrepancies both biologically, psychologically and socially, for example a transsexual.

Based on this, a legal instrument is needed in order to provide legal certainty for the actions of doctors in carrying out sex replacement operations. This is as stated by Sudikno Mertokusumo, that legal certainty is a legal guarantee carried out, that those who are entitled according to the law can obtain their rights and that decisions can be implemented.[11]

According to Sudikno Mertokusumo that the community expects benefits in the implementation or enforcement of the law. The law is for humans, so the implementation of law or law enforcement must provide benefits or uses for the community. Do not let it be precisely because the law is implemented or enforced it will even cause unrest within the community itself.[12]

For this reason, a person suffering from genital abnormalities has the right to make improvements to the sexes. This is stated in Article 27 of the 1945 Constitution of the Republic of Indonesia which guarantees that every citizen has an equal position in law and government. In Article 28 one of them regulates that recognition as a person before the law is a human right that cannot be reduced.

Then in Article 21 and Article 29 of Law No. 39 of 1999 concerning Human Rights states that the right of every person to the integrity of himself both physically and spiritually and every person has the right to legal recognition to actualize himself in accordance with his personal circumstances. Apart from that, in Article 2 of Law No. 23 of 2006 concerning Population Administration regulates the right of each resident to obtain a population document based on Article 58 of Law No. 23 of 2006 explains that population administration includes personal data including gender in accordance with the situation of each population.

Self-identity certainly can not be separated from gender. Gender is one of the main elements of personal identity that is possessed from birth, even from conception. Names, as the main elements of other personal identities, are generally given by parents also based on their sex. Therefore, in an effort to improve the sex, based on the Decree of the Minister of Health of the Republic of Indonesia No. 226 / MEN.KES / SK / VI / 1979 Concerning the Establishment of the Gender Replacement Standing Operations Committee, a committee was formed which had the task, including:

1. Prepare and propose an authorized hospital to carry out sex replacement operations through a Decree of the Minister of Health on the proposal of the Head of the Regional Office of the Ministry of Health;
2. Prepare and propose doctors or surgical teams authorized to carry out sex replacement operations through a Decree of the Minister of Health on the proposal of the Head of Regional Office of the Ministry of Health;

The implementation of sex adjustment operations is then regulated in Minister of Health Decree No. Republic of Indonesia. 191 / MENKES / SK / III / 1989 Concerning the Appointment of Hospitals and Expert Teams as Sites and Operations for Gender Adjustment Operations containing hospitals appointed by the government to carry out sex adjustment operations as well as doctors or surgical teams authorized to carry out sex replacement operations.

If the implementation of sex adjustment operations, the patient can submit a request to the court to change identity as a condition of population administration including personal data including gender according to the situation of each resident. This is as regulated in Article 77 of Law No. 23 of 2006 concerning Population Administration which regulates that no one can change / replace / add to their identity without the court's permission. Based on this, the state has guaranteed the rights of its citizens who want to carry out sex adjustment operations, provided that all positive legal provisions have been fulfilled. This is as happened to Supriyanti in Stipulation Number 518 / Pdt.P / 2013 / PN.Ung.

The considerations of the judge to grant the petition are as follows:

> "Considering, that in the Petitioners' Court had submitted evidence of letters marked P-1 through P-11 and 5 (five) witnesses namely witness Suliyem, witness Ali Qoimun, witness Ngadiman, witness Suharno and witness Achmad Zulfa Juniarto;
>
> Considering, that based on the testimony of witness Suliyem who was the biological mother

[11] Sudikno Mertokusumo, *Mengenal Hukum,* Yogyakarta: Universitas Atmajaya Yogyakarta, 2010, p. 160.
[12] *Ibid.,* p. 161.

of the Petitioner, that the Petitioner was born in the village assisted by the village midwife and since birth physically appeared to be female and given the name Supriyanti which had also been strengthened with evidence of a letter marked P-5;

Considering, as witness statement Suliyem, witness Ali Qoimun, witness Ngadiman and witness Suharno in their development Petitioners in their daily life tended to behave and be male, including in daily relationships;

Considering, that according to witness testimony of Suliyem, due to changes in the attitudes and behavior of the Petitioner, in 2003 until 2011 there was a medical examination at the Kariadi Central General Hospital in Semarang and 3 operations had been carried out which were confirmed by P evidence -11 in the form of Certificate Number: HK.00.01 / I.IV / 2506/2012 dated November 20, 2012, concerning Gender Identity signed by Dr. Bambang Wibowo, Sp.OG (K), doctor at Kariadi Center General Hospital Semarang;

Considering, that as witness statement Achmad Zulfa Juniarto who is a member of the Team that handles and operates the Petitioner, the examination shows that the Petitioner has a chromosome showing 46 XY and with a high testosterone hormone of 1053 ng / dl indicating 100% of the male generals and the existence of information from a psychiatrist who explained that if the Petitioner was still forced to be a woman, then there would be prolonged depression;

Considering, as witness statement Achmad Zulfa Juniarto also strengthened with evidence of a letter marked P-11 which states that the Petitioner is recommended to be male;"

Based on these considerations, the author is of the opinion, it appears that the panel of judges has positioned themselves as a minor premise by looking at the facts of the trial which tend to be medical, then related to the major premise which rests on Law Number 23 Year 2006 concerning Population Administration and the Law Law Number 39 of 1999 concerning Human Rights without considering the Minister of Health's Decree No. 191 / MENKES / SK / III / 1989 Concerning Appointment of Hospitals and Expert Teams as Sites and Operations for Gender Adjustment Operations. This can be seen when the judge considers the statements of witness Suliyem, witness Ali Qoimun, witness Ngadiman and witness Suharno who stated Supriyanti in her daily life tended to behave and be male in nature, including in daily intercourse.

Based on this, it can be stated that Supriyanti has suffered transsexual since childhood. This information was further strengthened by the results of the applicant's medical examination from 2003 to 2011 at the Kariadi Central General Hospital Semarang with the results of the examination that Supriyanti had ambiguous genetalia in the form of an abnormality in which the patient had genetic, anatomic and or physiological characteristics doubting among men men and women.

Analysis of Kadarwoko, SH.M.Hum as a Judge at the Semarang District District Court in Ungaran was strengthened by the opinion of expert witnesses, namely doctor Achmad Zulfa Juniarto who was a member of the Team that handled and operated Supriyanti, stating that from the examination it was found that Supriyanti had a chromosome showing 46 XY and with a high testosterone of 1053 ng / dl indicates 100% of a male's generation and there is a statement from a psychiatrist who explains that if Supriyanti continues to be forced into a woman, she will experience prolonged depression.

This medical examination was of course based on the desire of Supriyanti who came to the Semarang Kariadi General Hospital to conduct a medical examination. Then the Kariadi Center General Hospital Semarang formed a team of experts to conduct an examination of Supriyanti. The medical action carried out by the expert team was of course based on the approval of Supriyanti called the informed consent.

Approval of medical procedures is related to the obligation of doctors to provide information to patients and the obligation to carry out medical procedures in accordance with medical professional standards. The medical actions taken by Achmad Zulfa Juniarto who are members of the Team that handles and operates Supriyanti are:

1. Doing a lengthy examination in 2004 by taking a sample of his testes and apparently having a chromosome showing 46 XY, then doing a hormone test the result is a high testosterone of 1053 ng / dl indicating 100% of the male generals;
2. In the examination it was found that the egg organ had not descended above, then took a sample of the testicles and from the results of

the examination there appeared to be symptoms of a tumor;
3. In 2009 the testicles were taken in the groin toward the abdomen;
4. The results of the psychiatric examination showed 100% of the results were generalized of men;
5. In the examination, initially in the Petitioner's body there were two genital organs of the penis and vagina, with only a hole as deep as 1 (one) cm, while the penis before therapy was 4.1 cm in length, and after being carried out in therapy the woman's penis shrank to 3.2 cm, then perform male therapy again and his penis enlarges again to 4.3 cm;
6. In examination, the Petitioner's penis can be erect but if married / married 100% cannot have offspring because the testes have been taken;
7. Applicant's breasts arise naturally and have been operated;
8. The results of the scaning were not found in the female organs and from the USG data there were no uterus and ovaries.

Based on this, according to the Author, the judge used the opinion that biological factors were the cause of Supriyanti suffering from ambigius genetalia, so that the ambitious position of genetalia as a consideration in sex replacement operations based on Stipulation Number 518 / Pdt.P / 2013 / PN.Ung was as evidence of a letter contained in the photocopy of Certificate from RSUP Dr. Kariadi, Number HK.00.01 / I.IV / 2506/2012, dated November 20, 2012, on behalf of Supriyanti and also witness evidence from expert doctors' statements.

Although the judge did not consider the provisions in the Minister of Health Decree of the Republic of Indonesia No. 191 / MENKES / SK / III / 1989 Concerning Appointment of Hospitals and Expert Teams as Sites and Operations for Gender Adjustment Operations. However, based on the facts of the trial, Supriyanti's sex adjustment surgery was performed at the Kariadi Central General Hospital, Semarang, so that the hospital and the doctor who carried out the sex adjustment operation had been carried out in accordance with procedures determined by the Indonesian Doctors Association.

Based on the facts of the trial, then using Article 3 paragraph (2) of Law Number 39 of 1999 concerning Human Rights, explains that everyone has the right to recognition of guarantees, protection and fair legal treatment and to obtain legal certainty and equal treatment before the law, and Article 17 of the Law states that every person without discrimination, has the right to obtain justice by filing requests, complaints and lawsuits, both in criminal, civil and administrative cases and tried through a free and impartial judicial process, in accordance with the procedural law which guarantees an objective examination by an honest and fair judge to obtain a fair and correct decision, the judge grants the request for a change of sex and a change of name.

According to the author, the determination of Kadarwoko, SH.M.Hum as a Judge at the Semarang District District Court in Ungaran for the request for a change of sex and a change of name submitted by Supriyanti was appropriate, although the judge did not consider the provisions governing the procedures for carrying out a gender adjustment operation such as location the hospital and the expert team implementing the sex adjustment operation as stipulated in the Decree of the Minister of Health of the Republic of Indonesia No. 191 / MENKES / SK / III / 1989 Concerning Appointment of Hospitals and Expert Teams as Sites and Operations for Gender Adjustment Operations. Therefore, it is necessary to conduct socialization to court judges related to legal provisions governing the implementation of gender adjustment operations. This needs to be done so that the judge can reject the request for a change of sex and change of name if the procedure for carrying out the sex adjustment operation is not in accordance with the applicable legal provisions.

E. CONCLUSION

The legal certainty of ambiguous genitalia in sex replacement operations in Indonesia has been regulated in the Decree of the Minister of Health of the Republic of Indonesia No. 226 / MEN.KES / SK / VI / 1979 concerning the Establishment of the Gender Replacement Standing Operations Committee. However, the regulation is not yet at the level of the law, so there is an opportunity for genital surgery in hospitals and doctors or surgical teams who are not authorized to carry out sex replacement operations.

REFERENCES

Books:

Hamid, Atiqah, *Buku Pintar Halal Haram Sehari-hari*, Yogyakarta: Diva Press, 2012.

Mertokusumo, Sudikno, *Mengenal Hukum*, Yogyakarta: Universitas Atmajaya Yogyakarta, 2010.

Setyowati, Ro'fah, *Fenomena Operasi Kelamin Bagi Transeksual (transeksual) (Tinjauan Hukum Perdata, Hukum Islam, dan Masyarakat,* Semarang: Pustaka Magister, 2007.

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

Journal:

Dahlan, Sofwan, "Legal and Ethical Aspects of Disorder Of Sexual Development Management", expert opinion in Stipulation Number 20 / Pdt.P / 2009 / PN.Ung. See: Reni Asmawati, "Hukum dan Pergantian Kelamin: Studi Tentang Pertimbangan Hakim dalam Penetapan Pengadilan", *Naskah Publikasi,* Fakultas Hukum Universitas Muhammadiyah Surakarta 2013.

Widhiatmoko, Bambang, Edy Suyanto, "Legalitas Perubahan Jenis Kelamin Pada Penderita *Ambiguous genetalia* Di Indonesia", *Jurnal Kedokteran Forensik Indonesia*, Vol. 15 No. 1, Januari – Maret 2013.

Legislation:

The 1945 Constitution of the Republic of Indonesia.

Code of Civil law.

Law Number 29 of 2004 concerning Medical Practice.

Law Number 36 of 2009 concerning Health.

Law Number 44 of 2009 concerning Hospitals.

DEVELOPMENT OF THE LIFE OF CONSTRUCTION CITIZENS IN THE INSTITUTIONAL INSTITUTION THROUGH WORK GUIDANCE AS FORM

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ABSTRACT

Penitentiary has the duty and function to guide fostered citizens which aims to prevent the occurrence of criminal acts, restore balance, and resolve conflicts, as well as improve fostered citizens and prepare fostered citizens so that they will later be able to blend healthily with the community. The penitentiary needs to implement a correctional system that is oriented towards coaching. In human rights law, fostering the personality and independence of prisoners fostered is an effort to fulfill human rights, namely the right to education and self-development opportunities. Therefore, this research conducts discussion and/or study of the questions (1) how the laws and regulations govern the organization of job training and skills for prisoners; (2) how laws and regulations can provide legal guarantees for the implementation of job training and skills for prisoners as a form of fulfillment of human rights. This type of research is normative juridical, by evaluating relevant legal norms. From the discussion, it is known that from the existing regulations, the guidance carried out by the Correctional Institution is oriented towards coaching so that the target people can improve their personality so that they do not repeat the crime that they have committed and can continue to live and rebuild their lives to obtain a prosperous life and be able to coexist with other communities. And the work education program carried out by the Penitentiary in Indonesia, is part of efforts to fulfill the right to life, the right to education and the right to the welfare of prisoners, and the development of the life skills of prison-assisted citizens through the guidance of skills and work done has succeeded in increasing the ability and the life skills of the assisted residents who take part in the program.

Keyword: Penitentiary, Job Guidance, Human Rights

A. INTRODUCTION

At the beginning of Indonesia, the place of execution for prisoners or detainees was called a Prison. With time, the term "Prison" was changed to the Penitentiary Institution. This term change departs from the duties and functions of the prison at that time which was not only as an executing institution but also a prison for the guidance of prisoners and detainees.

The concept of correctional was first conceived by the Minister of Justice of the Republic of Indonesia, Sahardjo in 1962 which stated that the task of the prison service was not only carrying out the sentence but also a far heavier task of returning people convicted of crime into society.[1]

In 1995, the Republic of Indonesia Law No. 12 of 1995 concerning Correctional Institutions (Correctional Act) was born. Based on this law, "Prison" was renamed "Correctional Institution" which is abbreviated as PRISON or often also called LP which its implementation uses a penal system.[2]

The Penitentiary Act also changes the term or name for the Inmates of Correctional Institutions called Penitentiary Prisoners (WBP)[3] i.e prisoners who are people who have been convicted by the court and have permanent legal force or also prisoners, those who are still in the judicial process. Whereas civil servants who are tasked with guiding prisoners

[1] Lembaga Pemasyarakatan, https://id.wikipedia.org/wiki/ Lembaga_Pemasyarakatan, Di Unduh pada tanggal 3 Desember 2019 Jam 11.30 WIB

[2] Undang-Undang Republik Indonesia Nomor 12 Tahun 1995 Tentang Pemasyarakatan Pasal 1 angka (2), yang berbunyi: "*Sistem Pemasyarakatan adalah suatu tatanan mengenai arah dan batas serta cara pembinaan Warga Binaan Pemasyarakatan berdasarkan Pancasila yang dilaksanakan secara terpadu antara pembina, yang dibina, dan masyarakat untuk meningkatkan kualitas Warga Binaan Pemasyarakatan agar menyadari kesalahan, memperbaiki diri, dan tidak mengulangi tindak pidana sehingga dapat diterima kembali oleh lingkungan masyarakat, dapat aktif berperan dalam pembangunan, dan dapat hidup secara wajar sebagai warga yang baik dan bertanggung jawab*".

[3] Undang-Undang Republik Indonesia Nomor 12 Tahun 1995 Tentang Pemasyarakatan Pasal 1 angka (5)

and detainees in correctional facilities are referred to as Correctional Officers.

Based on Article 2 of the Penitentiary Law[4], Penitentiary has the duty and function to guide fostered citizens which aims to prevent the occurrence of criminal acts, restore balance and resolve conflicts, as well as improve fostered citizens and prepare fostered citizens so that they will be able to mingle later in a healthy manner with the community.

Guidance activities for prisoners in prisons are carried out with 2 types of coaching, namely fostering personality and independence.[5] One of the activities of fostering independence for correctional community residents is done through education and life skills development, one of which is through fostering craft skills.

The role of Correctional Institutions in carrying out the development of craft skills is to guide the form of providing material about craft skills, providing infrastructure that is needed, as well as assisting prisoners directly until the target residents can make crafts well. Thus, fostered people must be equipped with skills by the abilities and understanding of the norms of life and involve them in social activities that can foster self-confidence in community life, so that fostered citizens can live independently and be able to compete with the community without committing the crime again.[6]

In the perspective of human rights law, fostering the personality and independence of prisoners can be referred to as efforts to implement the fulfillment of human rights, namely the right to education and self-development opportunities. Because for every prisoner, only the limits of independence are deprived and/or reduced according to the law but the rights to live and develop themselves are fundamental rights that must not be reduced and must be fulfilled by the state.

Thus it needs to be seen whether the implementation of fostering for prisoners in the Correctional Institution that have been carried out based on the applicable laws and regulations has been in line with human rights law related to the right to get an education to develop themselves.

B. PROBLEM STATEMENT

Related to the function of correctional institutions, one of which is to guide the prisoners so that later they are free to be able to blend in healthy with the community. Penitentiary conducts an independent coaching program that is education and life skills development in the form of which are job training and skills programs. This is part of the efforts to fulfill the human rights of prisoners who are carried out so that prisoners can continue to live and rebuild their lives to get a prosperous life and live side by side with other communities.

But in the implementation of job and skills training programs for prisoners conducted by correctional institutions often face problems and obstacles that make work and skills training for prisoners such as ineffective. These constraints may occur due to regulations, facilities and opportunities, incomprehensive guidance, facilities and financial support by the state as well as factors of interest of fostered citizens in these activities.

Based on the description, it is necessary to discuss and/or study the first question, how the laws and regulations govern the implementation of job training and skills for prisoners, and Second, how legislation can provide legal guarantees for the implementation of job training and skills for prisoners as a form of fulfillment of human rights so that the target people can healthily return to life with the community after serving their sentence. and no longer repeat his actions.

C. LITERATUR REVIEW

Correctional Institution or PRISON is a place to carry out the formation of Prisoners and correctional students who are Technical Implementation Units[7] under the Directorate General of Corrections of the Ministry of Law and Human Rights. Duties and Functions of Corrections Institutions are to carry out guidance for inmates. Guidance for inmates is based on a penal system. The penitentiary system is implemented to shape the target people to be fully human, aware of mistakes, improve themselves and not repeat criminal acts so that they can be re-accepted by the community, can actively play a role

[4] *Sistem pemasyarakatan diselenggarakan dalam rangka membentuk Warga Binaan Pemasyarakatan agar menjadi manusia seutuhnya, menyadari kesalahan, memperbaiki diri, dan tidak mengulangi tindak pidana sehingga dapat diterima kembali oleh lingkungan masyarakat, dapat aktif berperan dalam pembangunan, dan dapat hidup secara wajar sebagai warga yang baik dan bertanggung jawab.*

[5] Keputusan Menteri Kehakiman Republik Indonesia No: M. 02-PK.04.10 Tahun 1990

[6] Siti Khafidhoh, Peranan Lembaga Pemsyarakatan terhadap Narapidana Melalui Pemberdayaan Keterampilan Usaha di Lembaga Pemasyarakatan Kedung Pane Semarang, (Semarang: IKIP PGRI Semarang, 2013)

[7] *Ibid*, Pasal 1 angka (3).

in the development and can live properly as citizens who are good and responsible.[8]

Even though the prisoners have lost their independence, there are human rights that must be protected in the Indonesian penitentiary system.

Human Rights (HAM) are basic rights possessed by every human person without whom we cannot live as human beings. In human rights law, every person has the right to get respect, protection, and fulfillment of human rights from the state which is carried out without discrimination. Therefore, prison-assisted citizens who are serving their sentences in civil service institutions must also obtain guarantees from the country to fulfill their rights as human beings.

Related to the function of correctional institutions, one of which is to guide the prisoners so that later they are free to be able to blend in healthy with the community. Penitentiary conducts an independent training program, namely education and life skills development, which includes work training and skills programs that are carried out as part of efforts to fulfill the prisoners' rights, namely the right to life[9], the right to develop themselves[10] and the right to welfare[11], so that citizens correctional facilities can continue to live and rebuild their lives to obtain a prosperous life and coexist with other communities.

Coaching comes from the word "Bina" which means the same as "getting up", so coaching can be interpreted as making efforts to change something so that it becomes new that has high values or to make something more appropriate or suitable to the needs and become better and more useful.[12] Coaching can also be interpreted as an effort made consciously, planned, organized, and directed to improve the attitudes and skills of students with actions, direction, guidance, development, and simulation, and supervision to achieve goals.[13]

According to Murray (1983) work or career guidance can be said as a range of interconnected work activities; in this case, a person advancing his life by involving a variety of behaviors, abilities, cycles, needs, aspirations, and ideals as a span of one's own life.[14]

Understanding Life Skills or commonly referred to as life skills when viewed in terms of language comes from two words namely Life and skill. Life means life, while skill is a skill, intelligence, skill. So life skills in language can be interpreted as skills, intelligence, life skills. Generally in everyday use, people refer to life skills in terms of life skills.[15]

Life Skills are not merely meant to have certain skills, but they must have the basic abilities of functional supporters such as reading, calculating, formulating, and solving problems, managing resources, working in teams, continuing to learn in the workplace using technology.[16] according to Anwar (2004: 20) Life skill education program is education that can provide practical skills used, related to the needs of the job market, business opportunities and economic or industrial potential in society.[17]

D. RESEARCH METHODS

This research was conducted using normative juridical research methods. that is, research on positive legal norms and legal principles carried out by evaluating relevant legal norms (laws and regulations). This evaluation research on positive law is carried out by evaluating the compatibility between one rule of law with another or with the principles of law recognized in practice existing law, which is

[8] *Ibid*, Pasal 2
[9] Undang-Undang Republik Indonesia Nomor 12 Tahun 1995 Tentang Pemasyarakatan Pasal 9 ayat (1), (2), dan (3).
[10] *Ibid*, Pasal 11, Pasal 12, Pasal 13, Pasal 14, Pasal 15, dan Pasal 16.
[11] *Ibid*, Pasal 36 ayat (1), (2), dan (3), Pasal 37 ayat (1), dan (2), Pasal 38 ayat (1), (2), (3), dan (4), Pasal 39, Pasal 40, Pasal 41 ayat (1), dan (2), dan Pasal 44
[12] Pramudji, *Kerjasama Antar Daerah Dalam Rangka Pembinaan Wilayah: Suatu Tinjauan Dari Segi Administrasi Negara: Sutau Tinjauan Dari Segi Administrasi Negara*, (Jakarta: Bina Aksara, 1985), Hal.7
[13] Hidayat dalam Dinar, M dan Farid, M., *Pembinaan Anak Penyandang Masalah Kesejahteraan Sosial diUnit Pelaksana Teknis Dinas (UPTD) Kampung Anak Negeri Kota Surabaya*. (Surabaya: Universitas Negeri Surabaya, 2014). Hal. 2
[14] Murray dalam Pratama, E. dan Fauzi, A., "Efektifitas Program Bimbingan Kerja Dalam Mengembangkan *Life Skill* Warga Binaan Penjara" *Journal of Nonformal Education and Community Empowerment*, Volume 2 (2), Desember 2018, Hal. 131
[15] Pratama, E. dan Fauzi, A., "Efektifitas Program Bimbingan Kerja Dalam Mengembangkan *Life Skill* Warga Binaan Penjara" *Journal of Nonformal Education and Community Empowerment*, Volume 2 (2), Desember 2018, Hal. 133
[16] Depdiknas, *Konsep Pengembangan Model Integrasi Kurikulum Pendidikan Kecakapan Hidup (Pendidikan Menengah)*, (Jakarta: Badan Penelitian dan Pengembangan Pusat Kurikulum, 2007), Hal. 5
[17] Anwar dalam Pratama, E. dan Fauzi, A., "Efektifitas Program Bimbingan Kerja Dalam Mengembangkan *Life Skill* Warga Binaan Penjara" *Journal of Nonformal Education and Community Empowerment*, Volume 2 (2), Desember 2018, Hal. 133

carried out by examining library materials or secondary data.[18]

Library data is used as the main data, namely primary legal material in the form of norms or basic rules and regulations. And also using secondary legal materials such as research results and opinions of academics and legal experts.

E. ANALYSIS AND DISCUSSION

1. Legislation that Regulates the Implementation of Job Training and Skills for Penitentiary Guides

The Republic of Indonesia is a rule of law state[19] in which all aspects of life in society, nation, spirit, and governance must always be based on law. The Unitary State of the Republic of Indonesia is therefore obliged to uphold the law and must provide a sense of justice for all people especially those who need legal protection and are guaranteed by the State.

This principle of justice provides the concept that every citizen is equal in the eyes of this law stating one rule of law. The principle of equality in law is very important to be upheld, especially in social life.

The implementation of imprisonment with the penal system in Indonesia currently refers to Law Number 12 of 1995 Concerning Corrections. In the General Explanation of the Penitentiary Law which is the legal basis for the legal and philosophical change of ideas from a prison system to a penal system, it regulates the implementation of the penal system in Indonesia which states that:[20]

1) For the State of Indonesia which is based on Pancasila, new thoughts on the function of punishment which are no longer merely imprisonment are also an effort of rehabilitation and social reintegration. Corrections Prisoners have given birth to a system of guidance that has been known for more than 30 (thirty) years and is called the Penitentiary System.
2) The imprisonment system which emphasizes the elements of revenge and detention accompanied by "prison house" institutions is gradually seen as a system and means that is not in line with the concept of rehabilitation and social reintegration so that prisoners are aware of their mistakes, no longer willing to commit criminal acts and return to being citizens who are responsible for themselves, their families, and the environment.

In principle, the Penitentiary Act emphasizes a paradigm and a cosmic change from an imprisonment system that emphasizes an element of revenge that does not by the guidelines of the times, it has changed to a penal concept that emphasizes rehabilitation and fostering efforts so that prisoners can continue to live and rebuild their lives to gain a prosperous life and coexist with other communities.

In implementing the fostering of fostered citizens, several regulations specifically regulate the work activities of prisoners namely;

1. Law Number 12 of 1995 concerning Corrections; in the preamble of this law, it is stated that in essence the Correctional Prisoners as human beings and human resources must be treated properly and humanely in an integrated coaching system.
2. Government Regulation No. 31/1999 concerning Guidance and Guidance of Prison Assisted Citizens; Article 3 of this Government Regulation confirms that some forms of fostering and guiding personality and independence for prisoners are work skills, job training, and production.
3. Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number M.HH-05.OT.01.01 of 2010 dated 30 December 2010 concerning the Organization and Work Procedure of the Ministry of Law and Human Rights of the Republic of Indonesia stated that the Guidance for Independence implements policy preparation, guidance and technical implementation in the fields of:
   1) Skills Training Guidance or Training Activities;
   2) Industrial and Service Work Activities,
   3) Agriculture and Plantation Work Activities; and
   4) Fisheries and Animal Husbandry Work Activities.

Related to the fostering of prisoners, regulated by the Circular of the Minister of Justice of the Republic of Indonesia dated May 31, 1989 Number: M.01-

[18] Bagir Manan, "Penelitian di Bidang Hukum". *Jurnal Hukum Puslitbangkum*, Nomor 1-1999. (Lembaga Penelitian Universitas Padjadjaran, 1999) Hal. 3 - 6
[19] Undang Undang Dasar Negara Republik Indonesia Tahun 1945, Pasal 1 angka (3)
[20] Dwidja Priyanto, *Sistem Pelaksanaan Pidana Penjara di Indonesia*, (Bandung: Refika Aditama, 2006), Hal. 102

PK.03.01 of 1989 concerning Management Procedures and Administration of Work Workshop Activities which are then regulated technically by the Implementation Guidelines of the Director-General of Corrections Number: E-04.PK.03.01 of 1990 concerning Implementation of the Circular of the Minister of Justice of the Republic of Indonesia dated May 31, 1989 Number: M.01-PK.03.01 of 1989 concerning Management Procedures and Administration of Work Workshop Activities, which regulates:

1) Definition of a workshop as a productive activity.
2) Diversification and development of workshops.
3) Financial system.
4) Type of workshop activities.
5) Making reports on workshop activities.

In its journey, to strengthen the training program through job training and skills for prisoners, the Ministry of Law and Human Rights of the Republic of Indonesia issued regulations of the Minister of Law and Human Rights of the Republic of Indonesia Number 35 the Year 2018 Concerning Revitalization of Correctional Organizations. Which specifically states that this regulation was issued to optimize and strengthen the implementation of correctional services to achieve criminal objectives, i.e conduct training so that prisoners do not repeat legal actions and educate them so that they have social and entrepreneurial skills that are supported by a safe and conducive situation, it is necessary to organize and reform the correctional management.[21] Where the revitalization of correctional services is carried out aimed at:[22]

a. Improve the implementation of correctional tasks and functions;
b. Improving the objectivity of changing the behavior of detainees, prisoners, and clients as a guideline in the implementation of services, guidance, and guidance;
c. Enhancing the role of Community Guidance;
d. Improve the implementation of security in prisons and detention centers;
e. Increase the protection of ownership rights over evidence resulting from criminal acts.

In the regulations regarding the revitalization of administration services are also regulated specifically related to fostering for prisoners, namely:

1) Provision of Prisoner Guidance program and time to assess changes in attitudes and behavior of Prisoners in the Medium Security Prison as referred to in Article 18 shall be based on the results of Litmus and recommendation of the prison observation team session.
2) Prisoner Development Program as referred to in paragraph (1) includes :
   a. beginner level education and skills training;
   b. advanced level of education and skills training; and
   c. advanced level education and skills training.
3) Every Prisoner who has attended an advanced level of education and skills training as referred to in paragraph (2) letter c is given a certificate of ability and expertise by the Head of Prison.
4) The implementation of the Prisoners Development Program as referred to in paragraph (2) shall be carried out with training and education methods.
5) The implementation of the Prisoner Guidance program as referred to in paragraph (2) can be carried out outside prisons through an assimilation program in the form of apprenticeships.
6) Provisions regarding the technical guidelines for the implementation of the Prisoners Development Program as referred to in paragraph (2) shall be determined by the Director General.

From the explanation of the existing legislative regulations, it can be seen that the correctional system implemented by the Correctional Institution is indeed oriented towards fostering prisoners so that the target population can improve their personality so that they do not repeat the criminal acts that they have committed and can continue to live and build their lives. return to obtain a prosperous life and be able to live side by side with other communities.

2. Implementation of Job Training and Skills for Penitentiary Guided Citizens as a Form of Fulfillment of Human Rights

[21] Peraturan Menteri Hukum Dan Hak Asasi Manusia Republik Indonesia Nomor 35 Tahun 2018 Tentang Revitalisasi Penyelenggaraan Pemasyarakatan, Bagian Meniambang huruf (a)
[22] *Ibid*, Pasal 2

Guidance for correctional fostered residents is carried out based on the correctional fostering system which is implemented based on:[23]

a. Guarding

Guarding is the treatment of Penitentiary Guides to protect the community from the possibility of a repeat of the criminal offenses by Penitentiary Guides, as well as providing their prisoners with the provision of their lives to become useful citizens in the community.

b. Equality of treatment and service

Equality of treatment and service is the provision of the same treatment and service to the Prisoners Citizens without distinguishing people.

c. Education

Education is that the implementation of education and guidance is carried out based on Pancasila, including the cultivation of family spirit, skills, spiritual education, and opportunities to perform worship.

d. Coaching

Guidance is that the implementation of guidance is carried out based on Pancasila, including the cultivation of family spirit, skills, spiritual education and opportunities to perform worship.

e. Respect for human dignity

Respect for human dignity is that as a person who is lost, Correctional Guidance Citizens must still be needed as human beings.

f. Lost independence

Is the only suffering Loss of independence is the only suffering is the correctional prisoners must be in prison for a certain time, so have the full opportunity to fix it. While in prison the prisoners in prison get their other rights like humans, in other words, their civil rights remain protected such as the right to obtain health care, food, drink, clothing, bedding, training, skills, sports, or recreation.

g. Guaranteed right to stay in touch with family and certain people.

The guaranteed right to stay in touch with family and certain people is that even though the Prison-Based Citizens are in prison, they must be kept close and introduced to the community and should not be alienated from the community, among others relating to the community in the form of visits, entertainment to prisons from free community members, and the opportunity to gather with friends and family such as the family visiting program.

In implementing the above principles and to realize the development of human resources for skilled and cultured inmates. that is form correctional fostered citizens (prisoners) so that they become fully human, aware of their mistakes, improve themselves, do not repeat criminal acts, can play a role in development, can live naturally as good citizens and responsible so that they can be re-accepted by the community, then every inmate must undergo coaching during their criminal period. Penitentiary citizens need to develop life skills for the Guided Citizens through work guidance during the sentence period in the correctional institution. Life skills development is carried out with the intention that prisoners have sufficient skills so that after being free they are expected to be able to compete in the labor market and/or be able to live independently so that they can be useful for themselves, family, community, nation, and state.

Because prisoners who are undergoing punishment in the institution only have their independence which is legally deprived for a certain time but their rights as human beings still have to get guarantees from the country to fulfill their rights as human beings. Because Human Rights (HAM) are basic rights possessed by every human person without whom we cannot live as human beings. In human rights law, every person has the right to get respect, protection, and fulfillment of human rights from the state which is carried out without discrimination.

In connection with the function of correctional institutions, efforts to fulfill the human rights of prisoners who must be fulfilled include the right to life, the right to develop themselves and the right to welfare, so that prisoners can continue to live and rebuild their lives to obtain a prosperous life and coexist with other communities.

For this reason, the Penitentiary as a training center conducts several work skills education activities that are developed, such as encouraging production activities in several prisons, exhibiting the work of prisoners, and strengthening cooperation with related agencies in developing prisoners' work activities.

[23] Undang-Undang Republik Indonesia Nomor 12 Tahun 1995 Tentang Pemasyarakatan Pasal 5

Referring to the data of the Directorate General of Corrections, several prisons can be put forward that have been able to encourage the productivity of prisoners' work activities. Despite the production capacity, the involvement of prisoners, the continuation of activities, and the marketing of these products must continue to be improved. Several prisons which are capable of encouraging good productivity can be stated, including:

1. Binjai prison; the product produced is brick with the amount of PNBP deposited reaching Rp. 24,000,000 per year.
2. Sukamiskin Prison; Its main activities are in the field of printing with a production capacity of 20,000 pcs.
3. Karawang prison; is a prison that can produce rice with a production capacity of 2 tons per harvest.
4. Semarang prison; has developed shoe production which is the result of collaboration with CV. Sinar Terang Sentosa and has produced 1,000 products.
5. Madiun prison; able to produce 11,424 pieces of furniture products and 4,200 pieces of paving blocks which are work activities carried out independently.
6. Porong prison in Surabaya; produce 1,200 sets of furniture products, 931 sets of a backrest, 7,325 kg of natural stone, and open a laundry service that has served 1,214 customers. This activity can absorb 110 inmates.
7. Prison Watampone; focusing prisoners' work activities in the field of making red stone. Until 2013 it has been able to produce as many as 20,000 red stones.
8. Rutan Selong; carrying out work activities in the field of making paving blocks capable of producing 4,909 pieces and making brick making at 7,005 units.

Based on the data and the explanation above shows that guarantees for human rights must be carried out even if prisoners are deprived of their right to independence because efforts to fulfill human rights must be carried out without discrimination.

The work education program conducted by the Penitentiary in Indonesia, based on the data above, can be said to have succeeded in increasing the ability and survival of fostered citizens even in the period of fostering in the prison the fostered citizens can produce.

For this reason, work training programs for fostered citizens to encourage life skills for correctional fostered citizens must be given legal guarantees as a mandatory program for fostered citizens, so that the expected goals in the penal system can be successful. This is important because in the existing laws and regulations there is no regulation regarding the obligation for prisoners to follow the work guidance program in Penitentiary. Because of its importance, supporting in the form of facilities, workspace and marketing access must also be prepared by the Government.

F. CONCLUSION

Based on the data and description above, it can be concluded that the correctional system is implemented to form the target population to be fully human, aware of mistakes, improve themselves and not repeat the crime so that it can be re-accepted by the community, can actively play a role in development and can live naturally as a good and responsible citizen.

From the regulation of the law which becomes a legal guarantee for the development carried out by the Correctional Institution, it can be seen that the penitentiary system implemented by the Correctional Institution is oriented towards the fostering of prison fostered citizens so that the fostered citizens can improve their personality so that they do not repeat the criminal acts that they have committed and can repeat continue to live and rebuild his life to obtain a prosperous life and be able to live side by side with other communities.

And because efforts to fulfill human rights must be carried out without discrimination, efforts to fulfill and guarantee human rights must be carried out sacred even to prisoners whose rights are freed. The work education program carried out by the Penitentiary in Indonesia is part of efforts to fulfill the right to life, the right to education and the right to the welfare of prisoners, and based on existing data, the effort to improve the life skills of prisoners through the skills and work guidance programs that have been carried out succeeded in increasing the ability and life skills of the target people who participated in the program. Even in the formation of prison in fostered citizens can do production and earn income.

G. REFERENCES

Bagir Manan, "Penelitian di Bidang Hukum". *Jurnal Hukum Puslitbangkum*, Nomor 1-1999, Lembaga Penelitian Universitas Padjadjaran, 1999

Depdiknas, *Konsep Pengembangan Model Integrasi Kurikulum Pendidikan Kecakapan Hidup (Pendidikan Menengah)*, Jakarta, Badan Penelitian dan Pengembangan Pusat Kurikulum, 2007

Dinar dan Farid, *Pembinaan Anak Penyandang Masalah Kesejahteraan Sosial diUnit Pelaksana Teknis Dinas (UPTD) Kampung Anak Negeri Kota Surabaya*, Surabaya, Universitas Negeri Surabaya, 2014

Dwidja Priyanto, *Sistem Pelaksanaan Pidana Penjara di Indonesia*, Bandung Refika Aditama, 2006

Enggi Pratama dan Ahmad Fauzi, "Efektifitas Program Bimbingan Kerja Dalam Mengembangkan *Life Skill* Warga Binaan Penjara" *Journal of Nonformal Education and Community Empowerment*, Volume 2 (2), Desember, 2018

Pramudji, *Kerjasama Antar Daerah Dalam Rangka Pembinaan Wilayah: Suatu Tinjauan Dari Segi Administrasi Negara: Sutau Tinjauan Dari Segi Administrasi Negara*, Jakarta, Bina Aksara, 1985

Siti Khafidhoh, *Peranan Lembaga Pemsyarakatan terhadap Narapidana Melalui Pemberdayaan Keterampilan Usaha di Lembaga Pemasyarakatan Kedung Pane Semarang*, Semarang, IKIP PGRI Semarang, 2013

Undang-Undang Dasar Negara Republik Indonesia Tahun 1945

Undang-Undang Republik Indonesia Nomor 39 Tahun 1999 Tentang Hak Asasi Manusia

Undang-Undang Republik Indonesia Nomor 12 Tahun 1995 Tentang Pemasyarakatan

Peraturan Menteri Hukum Dan Hak Asasi Manusia Republik Indonesia Nomor 35 Tahun 2018 Tentang Revitalisasi Penyelenggaraan Pemasyarakatan

Keputusan Menteri Kehakiman Republik Indonesia No: M. 02-PK.04.10 Tahun 1990

Surat Edaran Menteri Kehakiman Republik Indonesia Nomor: M.01-PK.03.01 Tahun 1989 Tentang Tata Laksana Pengelolaan dan Pengadministrasian Kegiatan Bengkel Kerja

Petunjuk Pelaksanaan Direktur Jenderal Pemasyarakatan Nomor: E-04.PK.03.01 Tahun 1990 tentang Pelaksanaan Surat Edaran Menteri Kehakiman Republik Indonesia Tanggal 31 Mei 1989 Nomor: M.01-PK.03.01 Tahun 1989 Tentang Tata Laksana Pengelolaan dan Pengadministrasian Kegiatan Bengkel Kerja

Lembaga Pemasyarakatan, https://id.wikipedia.org/wiki/Lembaga_Pemasyarakatan

THE CHEMICAL CASTRATION PUNISHMENT TO PERPETRATORS OF CHILD SEXUAL ABUSE AS A CHILD PROTECTION LAW REFORM

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ABSTRACT

Child's rights are an integral part of human rights and a child's rights are constitutional rights of the child which must be protected, respected and fulfilled by the state, government and society. One of the problems of child protection that becomes a concern and threat to life, growth, and development of the child is child sexual abuse. Because child sexual abuse is getting increase every year and can threaten the strategic role of children as the future generation of the nation and state, the Government of Indonesia has determined that child sexual abuse as an extraordinary crime. Through Government Regulation in Lieu of Law No. 1 in 2016 of Second Amendment to Law Number 23 in 2002 of child protection, the Government of Indonesia regulates the aggravation of punishment for child sexual offenders, one of which is the addition of chemical castration penalties. This Government Regulation in Lieu of Law was enacted into law through Law Number 17 in 2016. But the threat of castration punishment on child sexual offenders has caused a reaction of rejection from Human Rights Institutions in Indonesia and the Indonesian Medical Association (IDI) because they are considered as cruel and inhuman punishment and it defies their code of ethics. Therefore, to ensure the Law Reform of children protection from sexual abuse can be carried out and have an impact as envisioned, a legal system is needed that ensures the implementation and application of criminal acts in the form of chemical castration can be effective, by strengthening the implementation of chemical castration offenses and strengthening the substance of chemical castration criminal law enforcement regulations so that it can be carried out and have the expected impact of serving a deterrent effect for the offenders and legal protection for the victims.

Keywords: Sexual Abuse, Child Protection, Chemical Castration, Law Reform

A. INTRODUCTION

Child sexual abuse is included in the classification of extraordinary crime which is currently increasing in cases in Indonesia both in terms of quantity and quality of the case. Castration punishment regulated in child protection laws is a form of the country's seriousness in protecting the children from sexual abuse and is expected to serve a deterrent effect for the offenders and become an example for the community.

d become an example for the community.

A child is a gift of God Almighty, which is inherent dignity as a human being. Child also as the buds, potentials and future generations of the nation's ideals of struggle, so that every child can be able to bear these responsibilities, then the child needs to get the broadest opportunity to grow and develop optimally, both physically, mentally and socially, and need a protection effort to realize the welfare of children by providing guarantees of the fulfillment of their rights and the existence of treatment without discrimination[1].

In 1990, Indonesia had ratified the UN Convention on the Rights of the Child (International Convention on the Right of the Child - ICRC) through Presidential Decree Number 36 in 1990. The legal steps for the ratification of the Convention on the Rights of the Child also continued with the issuance of Law Number 39 in 1999 of Human Rights, which regulates and or provides legal guarantees for the implementation of the protection and fulfillment of child's rights. This State Recognition of the Rights of the Child is also evident in the Second Amendment of the Indonesian Constitution which in the section on human rights regulates the rights of the child which states that every child has the right to survive, grow and develop

[1]Republic of Indonesia, *Amendment to Law Number 23 in 2002 of Child Protection*, UU Number 35 in 2014, consider section

and has the right of protection from violence and discrimination.[2]

This becomes the legitimacy of positive law in Indonesia that child's right is an integral part of human rights and child's rights are constitutional rights of the child which must be fulfilled by the Nation.

This positive legal step also continued with the ratification of Law Number 23 in 2002 of Child Protection, which was reformed to Act Number 35 in 2014 of Amendment to Law Number 23 in 2002 of Child Protection and then re-made into Law Number 17 on November 9, 2016, of enacting the Government Regulation in Lieu of Law Number 1 in 2016 of Second Amendment to Law Number 23 in 2002 of Child Protection into Law (hereinafter referred to as Law 17/2016)[3].

Nowadays one of the threats to child survival and development is child sexual abuse which is getting increase both in quality and quantity. The Witness and Victim Protection Agency states that cases of sexual abuse from 2016 to 2019 keep increasing significantly. Because child sexual abuse is in a very worrying situation. Therefore, the child protection efforts have to be started as early as possible, so that later children can participate optimally for the development of the nation and state.[4]

This policy gets the pros and cons of the community. Those who support the application of chemical castration additional sanctions approve this as a preventive measure and as a deterrent effect for the child sex offenders who repeat their actions. Whereas those who refuse to consider chemical castration punishment are a violation of Human Rights, because they are torture and degrading the dignity, and a setback in the management of Indonesian criminal law.[5]

As a positive law, for the first time, the chemical castration penalty was applied by the Mojokerto District Court and Surabaya High Court which imposed a castration chemical sentence as well as a 12-year prison sentence and an Rp100 million fine against Muhammad Aris (21 Years), convicted of the rape of nine children. This decision made Aris the first rape perpetrator convicted of chemical castration in Indonesia. However, about this court ruling, the Indonesian Medical Association refused to be the executor, because it was considered defied the fatwa of the Medical Ethics and Honorary Council and the principles in the Indonesian Medical Ethics Code.

B. PROBLEM STATEMENT

1. How are the child protection and castration punishment for perpetrators of child sexual abuse in the legal system in Indonesia?
2. How can chemical castration punishment be a law reform of child protection from sexual crimes that can be implemented and provide legal certainty?

C. LITERATUR REVIEW

1. Child Protection

Child protection is all activities to guarantee and protect children and their rights so that they can live, grow, develop and participate optimally following human dignity, and get protection from violence and discrimination.[6]

Child's rights are the constitutional rights of children, this can be seen in the 1945 Constitution, in the human rights section Article 28B section (2) governing child's rights. Therefore, the child's rights are a part of human rights that must be guaranteed, protected, and fulfilled by parents, family, community, state, government, and regional government.[7]

2. Child Sexual Abuse

Abuse or assault is any act against a child that results in physical, psychological, sexual, and/or neglect or suffering, including threats to commit acts, coercion or deprivation of liberty unlawfully.[8]

Whereas child sexual abuse according to International End Child Prostitution in Asia Tourism (ECPAT) is a relationship or interaction between a child and an older person or adult such as strangers, siblings or parents where the child is used as an object of satisfying the sexual needs of the offender. This act is carried out using force, threats, bribes, deception and even pressure. Activities of child sexual abuse do not have to involve physical contact between the perpetrator and the child as a

[2] See The 1945 Constitution of the Republic of Indonesia article 28 B section (2)
[3] Republic of Indonesia State Gazette of 2016 Number 237, Addendum to Republic of Indonesia State Gazette Number 5946
[4] See Law Number 35 in 2014, op.cit. Article 1 number (2)
[5] www.fimela.com/lifestyle-relationship/read/4048879/pro-kontra-hukuman-kebiri-kimia-untuk-pelaku-kekerasan-seksual-terhadap-anak, accessed 18 Sept 2019
[6] Law Number 35 in 2014, loc.cit. Article 1 section (2)
[7] Law Number 35 in 2014, loc.cit. Article 1 section (12)
[8] Law Number 35 in 2014, loc.cit. Article 1 section (16)

victim. The forms of sexual violence itself can be in the act of rape or sexual abuse.[9]

3. Law Enforcement

Law enforcement is the process of carrying out efforts or the actual functioning of legal norms as guidelines for actors in traffic or legal relations in the life of society and the state. Law enforcement is an effort to realize legal ideas and concepts that people expect to become a reality. Law enforcement is a process that involves many things.[10]

Joseph Goldstein distinguishes criminal law enforcement into 3 parts, they are Total enforcement, which is the scope of criminal law enforcement as formulated by the substantive criminal law. Full enforcement, after the total scope of criminal law enforcement, is reduced the area of no enforcement in law enforcement, law enforcement is expected to maximum law enforcement. Actual enforcement, according to Joseph Goldstein, full enforcement is considered not a realistic expectation, because of the limitations in the form of time, personnel, investigation tools, funds and so on, all of which lead to the necessity of discretion and the rest is called actual enforcement. [11]

4. Legal System

According to Lawrence M. Friedman the legal system has three components: (1) The structure of the existing legal institution is intended to run the existing legal instruments; (2) Substance which is the applicable rules, norms and community behavior contained in the system; (3) Culture, is beliefs, values and what is expected from the existence of law and the legal system by the community.[12]

5. Legal Hierarchies

Hans Kelsen in the theory of the level of legal hierarchies (Stufentheorie) argues that legal hierarchies are tiered and multi-layered in a hierarchy (arrangement) in the sense of a higher norm applicable, sourced and based on higher norms, and so on. Legal norms are always sourced and based on the norms above, but to the bottom of the legal norms are also sources and become the basis for norms that are lower than thereof.[13]

D. RESEARCH METHODS

This research was conducted using normative juridical research methods, that are testing and reviewing data relating to the problem being discussed and comparing it with the legal norms that ruled it.[14]

This research was conducted using a study of positive legal norms and legal principles carried out by evaluating relevant legal norms (laws and regulations). Research on evaluating positive law is done by evaluating the terms of conformity between one rule of law with other legal norms, or with the principles of law recognized in existing legal practice, which is carried out by examining references material[15] as the main data, consisting of primary legal material namely legal material that has authority (authoritative) consisting of Legislation, official recor ds in making a statutory regulation, judge's decision.[16] Secondary legal material, namely all legal publications which are unofficial documents. [17] And tertiary legal materials or supporting legal materials such as dictionaries, encyclopedias, journals, newspapers, and non-legal publications materials. [18]

E. ANALYSIS AND DISCUSION

In 1990, Indonesia ratified the International Convention on the Rights of the Child through Presidential Decree of the Republic of Indonesia Number 36 in 1990 on August 25, 1990, and became "effective" or legally and politically binding in Indonesia from 5 October 1990. Thus the UN Convention on the Rights of the Child has become Indonesian law and is binding on all Indonesian communities. As a juridical and political consequence of this ratification, Indonesia then enacted several

[9] Ivo Noviana, *Sexual Violence Against Children: Impacts and Handling*, https://ejournal.kemsos.go.id/index.php/Sosioinforma/article/viewFile/87/55, accessed 27 September 2019

[10] Shant Dellyana, *Concept of Law Enforcement*, (Yogyakarta: Liberty, 1988), p. 32

[11] Joseph Goldstein, *Police Discretion Not to invoke the Criminal Proses: Low – Visibilty Disision in the Administration of Justice*, dalam Goerge F. Cole, Criminal Justice: Law and Politics, second edition, 1975

[12] Lawrence M. Friedman, *American Law*, (New York: W.W. Norton and Company), 1984, P

[13] Maria Farida Indrati Soeprapto, *Law Science*, (Yogyakarta: Kanisius, 2010), p. 41

[14] Soerjono Soekamto dan Sri Mamuji, *Normative Legal Research a Brief Review*, (Jakarta: Raja Grafindo, 2010), p. 13-14.

[15] Bagir Manan, "*Research in the Field of Law*". Journal of Law Research and Development, Number 1-1999. (Research Institute of Padjadjaran University, 1999) p. 3-6

[16] Zainuddin Ali, *Legal Research Methods*, (Jakarta, Sinar Grafika, 2013), p. 47.

[17] SoerjonoSoekanto & Sri Mamudji, *Legal Research....,Op.Cit.*, p. 33-37

[18] *Ibid*

laws relating to child protection efforts. But this law only regulates child protection for more specific child protection issues.

In 1999, Law Number 39 in 1999 concerning Human Rights was enacted, which in Chapter III of the Tenth Part, there were fifteen (15) articles governing and or providing legal guarantees for the protection and fulfillment of a child's rights. Thus it can be ensured that child's rights are an integral part of human rights.

In the Reformation era when at the amendment of the 1945 Constitution, the rights of children entered and expressly regulated in the 1945 Constitution in Article 28 B section (2), guaranteeing that every child has the right to survive, grow and develop and has the right for protection from violence and discrimination. This provides a legal guarantee that the child's rights and child protection efforts are the constitutional rights of the child so they must be guaranteed by the state and government. Therefore, the child can not only be seen as human beings in small size, whose lives are dependent on adults, but the legal child also has rights that must be fulfilled, protected and respected by the state, government and society through legal actions and certain efforts so that the child can grow and develop optimally.

This legal guarantee by the state and the government for child's rights was then demonstrated by the enactment of Law Number 23 in 2002 of Child Protection which was reformed to Law Number 35 in 2014 of Amendments to Law Number 32 in 2002 of child protection. The law is a legal basis that is specialist (*lex specialis*) in efforts to protect and fulfill the child's rights in Indonesia.

Thus, it means that the state has recognized and is obliged to guarantee the fulfillment of a child's rights in Indonesia and is obliged to protect children from a variety of conditions and conditions that can threaten the life and development process which is the constitutional right of children.

Nowadays, one of the problems of child protection that becomes a concern and a threat to the life, growth, and development of children is sexual abuse or what in legal terms is referred to as sexual child abuse. Data on the number of cases of child sexual abuse is keeping increase significantly every year.

According to the Child Protection Commission Indonesia, of the 2,637 complaints of child violence reported in 2013, 48% or around 1,266 cases were cases of child sexual abuse. [19] The Witness and Victim Protection Agency noted an increase in cases of child sexual abuse which occurred since 2016 by 25 cases, then increased in 2017 to 81 cases, and the peak is in 2018 became 206 cases. That number, said Edwin, continues to grow every year.[20] In the percentage can be seen an increase in cases of child sexual abuse which in 2017 increased by 224% and then in 2018 again increased by 154%.

The increase also occurred in applications for protection and legal assistance for criminal acts of sexual violence against children. According to him, in 2016, there were 35 victims, then increased in 2017 to 70 victims and 149 victims in 2018. This data also showed an increase of 100% in 2017 and in 2018 it increased again by 112.8%.

In response to the situation of child sexual abuse which continues to increase, the Government of Indonesia has designated sexual crimes against children as extraordinary crimes. Because child sexual abuse can not only threaten and endanger the lives of children. To give a deterrent effect on perpetrators and as an effort to prevent child sexual abuse, on Wednesday, May 25, 2016, the Government of Indonesia enacted to Government Regulation in Lieu of Law No. 1 in 2016 of the Second Amendment to Law Number 23 in 2002 of Child Protection.

In Government Regulation in Lieu of Law No. 1 in 2016 there have been changes or additions to the threat of confinement, criminal charges, additional penalties, and other actions for adults as perpetrators of sexual child abuse, they are:

1. For crimes that cause more than one victim, resulting in serious injuries, mental disorders, infectious diseases, disruption or loss of reproductive function, and/or and/or death, perpetrators sentenced to death, life imprisonment, or a crime of at least 10 years and at most 20 years old;
2. Addition of 1/3 of the criminal threat to the recidive;
3. Criminal actions in the form of chemical castration and the installation of additional electronic and criminal detection devices in the form of announcing the identity of the perpetrators for perpetrators of recurring crimes (recidive) and perpetrators of crimes that cause

[19] Ivo Noviana, loc.cit.
[20] https://news.detik.com/berita/d-4640789/kpai-sebut-kasus-kekerasan-seksual-anak-meningkat-akibat-pengaruh-digital, accessed 15 January 2020

more than one victim, resulting in serious injuries, mental disorders, infectious diseases, disturbed or loss of reproductive function, and / or death victims;

4. The criminal action is imposed for a maximum period of 2 years and is implemented after the convict has a basic crime
5. The implementation of criminal acts is regularly monitored by ministries that carry out government affairs in the legal, social and health fields announcing the identity of the perpetrators;
6. Arrangements for the implementation of criminal acts are further regulated in Government Regulations.

Then following the procedures for the formation of laws in Indonesia, Government Regulation in Lieu of Law No. 1 in 2016 was passed through Law Number 17 of 2016 concerning Ratification of Government Regulations In lieu of Law Number 1 of 2016 of the Second Amendment to Law Number 23 in 2002 of Child Protection. Which is the Considering section explaining that the reason for the implementation of chemical castration sanctions is to remember that child sexual abuse is increasing every year and can threaten the strategic role of children as future generations of the nation and state, so it is necessary to increase criminal sanctions and provide an action against perpetrators of sexual abuse.

Thus, it is known that the addition of articles of a threat to perpetrators of child sexual abuse aims to serve a deterrent effect for perpetrators and legal guarantees for child protection and will provide space for judges to decide on the maximum sentence.

The enact of the regulation that ruled of the threat of castration punishment on perpetrators of child sexual abuse caused a reaction of rejection from the National Commission on Human Rights of the Republic of Indonesia and provides a view which in principle rejects the threat of chemical castration criminal acts for perpetrators of child sexual abuse. In his view, the National Commission on Human Rights stated:[21]

1. In giving the punishment through castration can qualify as a cruel and inhuman punishment and is not following Indonesia's constitution and commitment in the field of human rights;
2. Additional punishment by castration (both chemical and medical operations) can also be qualified as a violation of rights, namely a violation of the right to consent to a medical action and the right to protect one's physical and mental integrity;
3. The castration penalty should be reconsidered and not published. National Commission on Human Rights considers that the handling of child sexual abuse, in this case also women ask for a comprehensive action and consistent and not only centered on punishment but also rehabilitation and preventive such as the development of a social protection system for children.

The Indonesian Doctors Association also refuses to become the executor of chemical castration punishment for perpetrators of child sexual abuse, they believe that the implementation of chemical castration penalties is defied to the Indonesian Medical Code of Ethics and is defy to the duties and functions of doctors which are healing and respect for life humans naturally. The medical profession that adheres to the principle of evidence-based medicine considers that the effectiveness of chemical castration is still a question because there are no adequate double-blind studies to prove its effectiveness. This then becomes the foundation of the Indonesian Doctors Association's attitude which rejects the involvement of doctors as castration executors. The rejection of the Indonesian Doctors Association was conveyed through the fatwa of the Medical Ethics Council Number 1 in 2016 of Chemical Castration.[22]

In the academic text of Law Number 17 in 2016, castration punishment aims to prevent repeat similar crimes by perpetrators. In law enforcement, criminal sanctions that have the aim of protecting the community must be supported by law enforcement mechanisms to serve a deterrent effect for the perpetrators or (potential) other perpetrators. This is in line with the view of Van Hamel which states that the purpose of criminal law is as follows:[23]

1. The criminal must contain an element of unity to prevent criminals who have the opportunity not to carry out their bad intentions;

[21]https://www.komnasham.go.id/files/20160215-keterangan-pers-pandangan-komnas-$UNY0CK.pdf, accessed 28 September 2019

[22] Soetedjo, et al, *Overview of Medical Ethics as the Executor of Castrated Punishment*, (Journal of Indonesian Medical Ethics Vol.2 No.2 June 2018), P. 67 – 71 doi: 10.26880/jeki.v2i2.18.

[23] Andi Hamzah, *Criminal Law Principles*, (Jakarta: Rineka Cipta, 2010), p.35.

2. The criminal must have an element of correcting the convicted person;
3. the Criminal has the element of destroying criminals who are impossible to fix;
4. The sole purpose of a criminal is to maintain the rule of law.

Increasing data on the number of cases of child sexual abuse each year shows that the existing regulations at the time were not able to provide a deterrent effect for perpetrators. One of the reasons is that the Criminal Law that applies from year to year does not change, while crime and the way it is implemented develops. This causes the criminal who should be able to provide protection and prevention no longer function as it should. Therefore, it needs a new legal effort to provide a deterrent effect as well as preventive measures to reduce or not even occur cases of child sexual abuse.

In this situation, criminal law reform is needed. Reform of criminal law is an attempt to re-orient and reform criminal law by the central values of the sociopolitics, socio-philosophy and socio-cultural aspects of Indonesian society, which in essence must be pursued with a policy-oriented approach and at the same time with the value-oriented approach.[24] Reform of Criminal Law must be implemented with a policy approach because indeed it is essentially only part of the policy or policy. If every policy also contains value considerations, the renewal of criminal law must also be oriented to a value approach.[25]

Therefore, the criminal act in the form of chemical castration is a reform of the criminal law related to the protection of child sexual abuse. But to ensure that this legal reform can be implemented and have an impact as envisioned in its formation, a legal system that guarantees the implementation and application of criminal acts in the form of chemical castration can be effective and provides a deterrent effect for perpetrators and legal protection for victims.

Because criminal acts in the form of chemical castration have become a positive law in Indonesia, chemical castration criminal penalties have been applied by the judges of the Mojokerto District Court in deciding sexual abuse cases with defendant Muhamad Aris of 20 years who has forcibly coerced 11 child victims from 2015 to 2018. Surabaya District Court Judge also ruled the castration chemical cast sentence against the defendant Rahmat Slamet Santoso after being found guilty of molesting 15 of his students as scoutmaster since 2015. But the castration chemical cast criminal sentence has not been implemented because as the chemical castration law, penalties will be implemented after the defendant underwent the imprisonment and there are no technical instructions yet for implementing castration chemical penalties.

Lawrence M. Friedman stated that the legal system has three components there are structure, substance, and culture[26] Thus to ensure the application of criminal acts in the form of chemical castration can go effectively and provide legal certainty, 3 things must be done by the government:

1. The structure of the chemical castration criminal act must be strengthened from both the body in the justice system to the body involved in carrying out the decision courtroom;
2. The substance of the regulation of the implementation of the chemical castration criminal law must also be strengthened by making technical implementation rules. Hans Kelsen in the theory of the legal hierarchies (Stufentheorie) argues that legal hierarchies are tiered and multi-layered in a hierarchy (arrangement) in the sense of a higher norm applicable, sourced and based on higher norms, and so on. Legal norms are always sourced and based on the norms above, but to the bottom of the legal norms are also sources and become the basis for norms that are lower than thereof.[27] Therefore, the technical regulations for the implementation of chemical castration crime must originate from the norms of the Act that ruling the criminal chemical castration. The source of the norm is not only about article norms but also the rationale and legal desire that underlies the birth of chemical castration criminal rules for perpetrators of child sexual abuse;
3. Regulation on the technical implementation of the criminal chemical castration must be able to build confidence, values and what is expected from the existence of the law and legal system by the community so that the technical regulations can lead to a legal culture in the community about the problem of child sexual

[24] Barda Nawawi Arief, *Flower of Criminal Law Policy*, (Jakarta: Kencana, 2010), p. 29
[25] *Ibid*., p. 30
[26] Lawrence M. Friedman, loc.cit.
[27] Maria Farida Indrati Soeprapto, *Law Science*, (Yogyakarta: Kanisius, 2010), p. 41

abuse and can encourage the community participation in efforts to child protection.

F. CONCULUSION

Because sexual violence against children is increasing every year and can threaten the strategic role of children as the future generation of the nation and state, the Government of Indonesia has designated sexual crimes against children as extraordinary crimes. To provides a deterrent effect on the perpetrators and as an effort to prevent child sexual abuse, the Government needs to increase the criminal sanctions and provide action against perpetrators of sexual abuse. Through Government Regulation in Lieu of Law No. 1 in 2016 of the Second Amendment to Law Number 23 in 2002 of Child Protection, the Government of Indonesia regulates the imposition of crimes for perpetrators of child sexual abuse, one of which is the addition of chemical castration penalties. This Government Regulation in Lieu of Law was then enacted into Law Number 17 in 2016.

Chemical castration criminal is a criminal law reform related to child protection from sexual abuse. But to ensure that this legal reform can be implemented and have an impact as envisioned in its formation, it needs a legal system that ensures the implementation and application of criminal acts in the form of chemical castration can be effective and must be strengthened. The structure of implementation of the criminal acts in the form of chemical castration must be strong from the justice system to the agencies that involved in implementing the court decisions and also strengthening the substance of chemical castration criminal law enforcement regulations by making technical implementation rules as legal guarantees for the implementation of criminal chemical castration so that the criminal law can be implemented and have the expected impact of giving deterrent effect to the perpetrators and legal protection for the victims.

G. REFERENCES

Andi Hamzah, *Criminal Law Principles*, Jakarta, Rineka Cipta, 2010

Barda Nawawi Arief, *Flower of Criminal Law Policy*, Jakarta Kencana, 2010

Joseph Goldstein, *Police Discretion Not to invoke the Criminal Proses: Low – Visibilty Disision in the Administration of Justice*, dalam Goerge F. Cole, Criminal Justice: Law and Politics, second edition, 1975

Lawrence M. Friedman, *American Law,* New York, W.W. Norton and Company, 1984

Maria Farida Indrati Soeprapto, *Law Science*, Yogyakarta, Kanisius, 2010

M. Taufik Makarao, et al, *Law on Child Protection and the Elimination of Domestic Violence*, Jakarta, Rineka Cipta, 2013

Shant Dellyana, *Concept of Law Enforcement*, Yogyakarta, Liberty, 1988

Soerjono Soekamto dan Sri Mamuji, *Normative Legal Research a Brief Review*, Jakarta, Raja Grafindo, 2010

Zainuddin Ali, *Legal Research Methods*, Jakarta, Sinar Grafika, 2013

The 1945 Constitution of the Republic of Indonesia

Law Number 35 in 2014, of Amendment to Law Number 23 Year 2002 concerning Child Protection

Bagir Manan, "Research in the Field of Law". Journal of Law Research and Development, Number 1-1999. (Research Institute of Padjadjaran University, 1999) p. 3-6

Ivo Noviana, *Sexual Violence Against Children: Impacts and Handling,* https://ejournal.kemsos.go.id/index.php/Sosioinforma/article/viewFile/87/55, accessed 27 September 2019

Soetedjo, et al, Overview of Medical Ethics as the Executor of Castrated Punishment, (Journal of Indonesian Medical Ethics Vol.2 No.2 June 2018), p. 67 - 71 doi: 10.26880/jeki.v2i2.18.

https://www.komnasham.go.id/files/20160215-keterangan-pers-pandangan-komnas-$UNY0CK.pdf, accessed 28 Sept 2019

https://news.detik.com/berita/d-4640789/kpai-sebut-kasus-kekerasan-seksual-anak-meningkat-akibat-pengaruh-digital, accessed 15 January 2020

tirto.id/pro-kontra-hukuman-kebiri-kimia-untuk-pemerkosa-anak-di-mojokerto, accessed 28 Sept 2019

www.fimela.com/lifestyle-relationship/read/4048879/pro-kontra-hukuman-kebiri-kimia-untuk-pelaku-kekerasan-seksual-terhadap-anak, accessed 18 September 2019

LEGAL PROTECTION FOR DIGITAL APPLICATION USERS FROM THE PERSPECTIVE CRIMINAL LAW BASED ON THE LAW OF THE REPUBLIC OF INDONESIA NUMBER 19 YEAR 2016 CONCERNING ELECTRONIC INFORMATION AND TRANSACTIONS

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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 enterpreneurs, however more on supporting the development and growth of those new enterpreneurs and give the security and convenience to the users of digital application from crimes.

Keywords: Criminal 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]

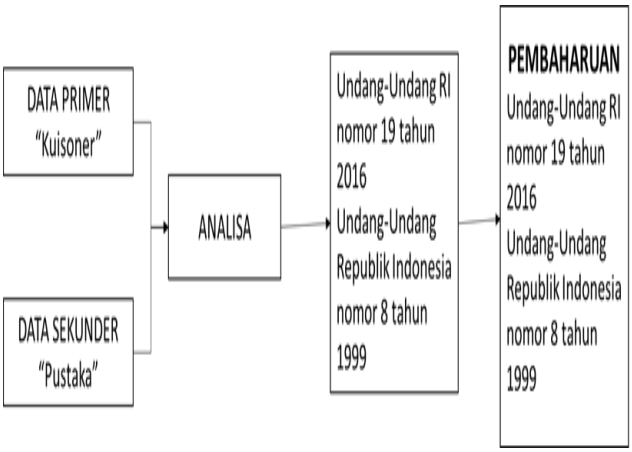
"The development of information technology shows the appearances various activities which are based on this technology namely e-government, e-commerce, education, e-medicine, e-laboratory, etc which all is based on electronic".[2]

Along with the rapid development of e-commerce business and the significant growth of new digital application enterpreneurs, to prevent various problems of crime which has and will be occured 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 Repubclic 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 accomodation 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,

[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

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 accomodated 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.

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:

a. Have good intentions in carrying out their business activities;
b. 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;
c. Treating or serving consumers correctly and honestly and not discriminatory;
d. Guarantee the quality of goods and/ services produced and/ traded based on the provisions of the applicable quality standards of goods and/ services;
e. Give an opportunity to the consumers to test, and/ try certain goods and/ services and provide guarantees and for the goods produced and/ traded;
f. Give compensations for losses due to the use and utilization of traded goods and/ services;
g. 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 provission 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 occured in the form of 4 types of conditions, namely:

a. do not do as what has been agreed to do
b. do the thing that has been promised buat not as promised
c. do the thing that has been promised but late
d. 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).

Criminal Fraud in Online Trading Transactions

Should be rememberred that the on line 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

[3] Prof . R. Subekti, S.H., Hukum Perjanjian, : https:// anilifitya. wordpress.com/2013/09/21/ hukum-perjanjian- prof- subekti/

and purchase transaction it is difficult to carry out an execussion 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.

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 threathened with criminallity 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 Rp. 1,000,000. 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

a. 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
b. The Law of the Republic of Indonesia Number 8 of 1999 concerning the Consumer Protection
c. Government Regulation Number 82 of 2012 concerning the System and electronic Transaction Operator
d. The Criminal Code

2. Internet

a. 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.
b. Mega Lois Aprilia, Endang Prasetyawati, Perlindungan Hukum Terhadap Data Pribadi Konsumen Pengguna Gojek : https://www. researchgate.net /publication/ 331659872_ PERLINDUNGAN_HUKUM_TERHADAP _DATA_PRIBADI_ KONSUMEN_ PENGGUNA_GOJEK, diakses pada tanggal 3 Juli 2019 pkl 23:00 wib.
c. 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
d. 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

3. Books

a. Ahmad M. Ramli H, 2006, Cyber Law dan Haki dalam Sistem Hukum Indonesia, Penerbit Amrico, Bandung, hlm. 1.
b. Wardiana. 2002, Aspek-Aspek Pemanfaatan ITE, hlm.1.

LEGAL PROTECTION OF THE PERSONS WHICH DO ABORTION

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I. INTRODUCTION

A woman who is pregnant can experience a miscarriage, due to several factors, including due to unintentional factors that occur, without the power / ability of the pregnant woman to prevent miscarriage of the womb so as not to occur. The inability of a woman, to prevent miscarriage, can be caused by a health problem that exists in a woman, as well as health problems that exist in the fetus itself, and unexpected accidents cause miscarriage. Did not rule out, the occurrence of abortion carried out intentionally by a medical expert, for reasons of the mother's mental safety, as well as the request of the mother herself, for various reasons, so she wanted to abort the womb without any medical indication.

A medical personnel who do abortion, need to get clear legal protection, and sided with him, if the attempt to abort the womb, is an attempt to save the soul of the mother. If the effort to save the soul of the mother is carried out by an obstetrician, without the legal protection attached to it, then the loss will be obtained by the doctor, who has good intentions for the safety of his patients' lives. Life feels unfair. Conversely, protection of the right to life of a prospective baby / fetus who has not yet been born, must also be a particular concern, so the implementation of abortion, must be considered carefully. Do not just do it by ignoring the right to life for a baby.

In fact, abortion is mostly done by women, not because of threats to their souls, but to social threats, where a woman who is not married, then gives birth to a baby, feels that she will get many problems in her later life, including social problems in, in society. Public punishment for having a baby without going through marriage, will be a sneer and social turmoil that is bad for the life of the mother and her own child, finally the mother decides to abort her womb.

Besides that, a woman's attempt to abort her womb, because of economic problems, where a mother feels not financially ready to support a baby, which later must be raised by consuming a living expense that is not small. It could be the problem of rape that causes a woman to become pregnant, will make the possibility of rejection of the baby by the mother who conceived it, and can not accept the presence of the prospective baby with sincerity, so there is an intention to abort it.

Or another reason, where a woman and her family, finally decided to abort the prospective baby she was carrying. This is what needs to get attention through the existence of laws and regulations stating, that a prospective baby has the right to have the opportunity to be born in this world. If the act of abortion of the fetus in the womb must be determined by law, about what can be the reason for abortion, so that both the person who helped to do it, and the mother fetus, can be legally protected for these actions

We will discuss how the protection given by the government to a prospective baby to be born, in order to be given the opportunity to be born in this world, in addition to the discussion of rights and legal protection to doctors or medical personnel who have to perform abortion, to a woman who must be saved his soul , because it is threatened the life of the woman who contains a prospective baby, if the pregnancy continues.

II. FORMULATION OF THE PROBLEM.

The first problem faced at this time is there is a legal umbrella for obstetricians, to be able to decide the act of abortion, without feeling pressured by the pursuit of punishment, is associated with medical indications, where a pregnant woman, will experience the risk of death if the pregnancy continues, so need medical treatment in the form of abortion.The legal protection is needed, so that obstetricians do not hesitate anymore in making the decision to carry out an abortion, and do not allow a very large risk for the soul of the fetus, by allowing the womb to continue to enlarge.

The second problem is the same, also faced by prospective babies who are entitled to get a good life. What is the legal umbrella for the fetus to get the right to life. Meanwhile, we know, a couple who does not want a baby in their relationship, is at risk of deciding a wrong decision, by aborting the baby's own content, for the sake of honor and ego. As well as how the legal umbrella to provide legal protection to the mother of the fetus she was carrying, to be able to abort her womb for the safety of her own life, so that the decision was an act that was legalized and kept her away from legal sanctions for the abortion of the womb.

These three things are related to one another. The first concerning an act of abortion, must save the doctor who has the authority in carrying out medical actions, to the mother who has a baby who is still alive, is associated with the fetus himself, who has the right to live to be born into the world, without any obstacles. and barriers created deliberately by others, to stop the process of birth. The three people who are entitled to get this sentence protection must get fair and just legal protection, taking into account the interests of the three parties. An action must not only give rights to one party, at the expense of the other party, but the regulation applies to the interests of the three parties, because the element of abortion, including the three interrelated parties, in carrying out the intended abortion activity.

So the problem is, how the three people who are intended to get legal protection well, without harming each other, but all three must be in a safe and lucky condition, with the act of abortion.

III. LITERATURE REVIEW.

1. Law No. 36 of 2009

a. Article 75 is formulated that:

1) Everyone is prohibited from having an abortion

2) Prohibitions as referred to in paragraph (1) may be excluded based on:

a) Indications of medical emergencies detected from an early pregnancy, both those that threaten the lives of mothers and / or fetuses, who suffer from severe genetic diseases and / or congenital defects, or which cannot be repaired making it difficult for the baby to live outside the womb; or

b) Pregnancy due to rape can cause psychological trauma to rape victims

3) The actions referred to in paragraph (2) can only be carried out after going through pre-action counseling and / counseling and ending with post-action counseling carried out by competent and competent counselors.

4) Further provisions regarding indications of medical emergencies and rape, as referred to in paragraph (2) and paragraph (3) shall be regulated by Government Regulation.

5) Another case with a health worker who is legally and convincingly proven to violate Article 75 paragraph (2) of Law No.36 of 2009, then the guilty person can be sentenced to a maximum of 10 (ten) years in prison and a maximum fine of Rp. 1,000,000,000.00 - (One Billion Rupiah).

b. Article 76, it is formulated that: Abortion as referred to in Article 75 can only be carried out:

1) Before the pregnancy is 6 (six) weeks calculated from the first day of the last menstruation, except in the case of medical emergencies;

2) By health workers who have the skills and authority that have certificates established by the minister;

3) With the consent of the pregnant woman concerned;

4) With the permission of the husband, except for rape victims; and

5) Health service providers who meet the conditions set by the Minister.

c. Article 77, it is formulated that: The government is obliged to protect and prevent women from abortion as referred to in Article 75 paragraph (2) and paragraph (3) which is unqualified, unsafe, and irresponsible and contradicts religious norms and statutory provisions .

2. Criminal Code

It was stated that the form of abortion was prohibited and there were no exceptions in the principles of Pancasila democracy. The following articles are in KUHP Article 299, Article 346 to 349 stated as follows:

d. Article 299

1) Anyone who intentionally treats a woman or orders that to be treated, is notified or there is hope that because the treatment can result in an abortion, is threatened with a maximum imprisonment of four years or a maximum fine of forty-five thousand thousand rupiah.

2) If the person who is guilty, commits for profit, or commits the crime as a livelihood or habit or he is a doctor, midwife or drug dealer, the criminal is added a third.

3) If the person who is guilty of doing the work in his work can be revoked his right to do the work.

e. Article 346

A woman who deliberately aborts or turns off her womb or orders someone else to be threatened with a maximum of four years in prison.

f. Article 347

1) Anyone who intentionally aborts or kills a woman without her consent is threatened with a maximum prison sentence of twelve years.

2) If the act results in the death of the woman, she is threatened with a maximum imprisonment of fifteen years.

g. Article 348

(1) Anyone who intentionally aborts or kills a woman's womb with his consent, is threatened with a maximum imprisonment of five years and six months.

(2) If the act results in the death of the woman, she is threatened with a maximum imprisonment of seven years.

h. Article 349

If a doctor, midwife or medicine person helps to commit a crime under article 346 and also helps to

commit one of the crimes in articles 347 and 348, then the crime specified in that article can be increased by one third and can be revoked the right to make a living in which the crime was committed.

3. PP No. 61 of 2014 Article 31 concerning Reproductive Health contains the following:

a. Article 31 paragraph (1)

In full reads: "Abortion can only be done based on:

1) Indication of medical emergencies; or
2) Pregnancy due to rape "

b. Article 31 paragraph (2) states: "The act of abortion due to rape as referred to in paragraph (1) b can only be carried out if the maximum gestational age is 40 (forty) days counting from the first day of the last menstruation"

IV. RESEARCH METHODS

This research method is through literature study, and normative law, where the existing problems are explored, will be resolved through a variety of legal literature that applies in Indonesia. Normative legal research is research into library materials or secondary data that includes primary legal materials such as laws and regulations.

V. ANALYSIS AND DISCUSSION

Let's discuss one by one the problems faced by the abortionists and the objects of the activity.

Law No.36 of 2009 concerning health, emphasizes and limits the freedom of health workers to provide health services to pregnant women (women), especially health assistance that causes death or death of a woman's womb.

If criminal provisions are linked about abortion (Article 346 to article 349 of the Criminal Code, with the formulation of Article 75.76.77 of Law No.36 of 2009 concerning health), as well as PP No. 61 Article 31 paragraph (1) and (2), it is understandable that the Health Act makers try to protect the fetus in the womb and the safety of the mother, because it must be based on the balance of a team of experts from various disciplines (religion, medical, law, psychology and so on), and medical treatment is only allowed to be carried out by people who have midwifery expertise and the person concerned is authorized according to law. Besides that, the act of abortion can only be done in certain places that have been determined by the government, and has adequate facilities and infrastructure to carry out medical actions relating to the death (death) of one's content.

Then the length of the criminal threat that can be imposed on doctors, midwives or drug assistants who helped realize the offense article 346, 347 and 348 of the Criminal Code is given a burden that is to add imprisonment to one third of the length of the basic sentences of articles that he has violated, even revoked rights to carry out their work, so that the threat of criminal punishment varies, but cannot be fined. This will be a very important consideration for someone who wants to deliberately carry out the act of abortion.

Criminal Code Article 346,347,348,349 which is the entire articles about the abortion book. Only emphasizing on women and those who deliberately violate or order others to abort their bodies must be punished for whatever reason. However, the strict Criminal Code rules have been softened by providing opportunities for abortion. As determined in Law No.36 of 2009 concerning health. so that in an emergency as an effort to save the lives of the mother and / or the fetus they contain, certain medical measures can be taken, protection of criminal law against victims of rape who have an abortion.

The act of abortion is for any reason prohibited because it is contrary to legal norms, religious norms, norms of decency, and norms of decency. However, the strict Criminal Code rules have been softened by providing opportunities for abortion. As determined in Law No.36 of 2009 concerning health. so that in an emergency as an effort to save the lives of the mother and / or the fetus they contain, certain medical measures can be taken.

While abortion in pregnant women can occur due to several reasons including: chromosome / genetic abnormalities, the environment in which the results of fertilization are not good or imperfect and the influence of substances that are harmful to the fetus such as radiation, drugs, tobacco, alcohol and viral infections, abnormalities in the placenta. This disorder can be in the form of impaired formation of blood vessels in the placenta caused by chronic high blood pressure, maternal factors such as chronic diseases suffered by the mother such as pneumonia, typhus, severe anemia, poisoning and toxoplasma virus infection, abnormalities that occur in the mother's genital organs such as disorders of the cervix, uterine deformities especially the uterus which curves backward (generally the uterus curves forward), myoma uteri, and congenital abnormalities in the uterus, etc.

This medical factor can cause an abortion, so that when a doctor treats the patient in question, then the possibility of an abortion exists. So to deal with pregnant women with their illnesses, an agreement is needed to agree to medical treatment with various risks that can occur to the baby they are carrying. The mother and her family also need to get a correct explanation, so as not to make a legal complaint, because there are medical actions that are at risk of abortion, so that the medical personnel in carrying out their medical actions, are not depressed and free in

carrying out their medical science, which aims to provide optimal health to these patients.

However, there are deliberate abortion by a health worker who has the skills and authority that has a certificate set by the minister, as referred to in Health Law No. 36 of 2009 article 75 and PP No. Article 31, for the sake of patient safety, those things that threaten the life of the patient so that abortion is needed, with consideration of experts and teams, can be done with legal protection in accordance with the material referred to above.

Likewise, the act of abortion to women who experience rape with expert judgment based on various risks, both psychological of the mother who was traumatized by the rape she experienced, then the abortion can be performed by medical personnel who have the skills and authority who have the certificate set by the minister in accordance with the appropriate meant by Health Law No. 36 of 2009 article 75 and PP No. 61 Article 31.

So a health worker needs legal protection by both the Government and the organizations that protect it. that is the organization that protects the medical profession through the MKEK which is a special body of the IDI Professional Association (Indonesian Doctors Association) formed under article 16 AD / ART / IDI. MKEK has the power and authority to conduct guidance, supervision and evaluation in the implementation of medical ethics, and then has an obligation, among others, to fight for medical ethics so that it can be upheld in Indonesia. One of them is in carrying out abortion activities to patients in accordance with the expectations of good intentions of all parties.

In addition to the protection given to medical workers who have met the criteria in carrying out their practice, mothers and fetuses also need to get attention, to ensure their rights get the best reasons for their good, through the Indonesian Medical Council (KKI) which is an organization that is useful to protect the community, where This organization provides guidance to doctors or dentists who practice together with professional organizations, can provide solutions to abortion activities to protect doctors, who must carry out their obligations as medical personnel, who provide health solutions to their patients. Including solutions to the safety of the soul of the mother of the fetus she was carrying, so abortion is needed. To uphold the discipline of doctors and dentists in the implementation of Medical Practices, the Indonesian Medical Disciplinary Honorary Council (MKDKI) was formed, which is an autonomous institution of the Indonesian Medical Council, and its duty is to be independent which will be accountable to KKI.

VI. CONCLUSION

The conclusion of this journal is, that the abortion involving activities of several parties will get legal protection by looking at several things, namely the factor of who other people are helping the fetus in carrying out the abortion. Obviously the other person must have the authority in carrying out abortion activities to the mother to the fetus in her womb.

The reasons accompanying the pregnant woman to be legalized in making the decision to be willing to abort the womb, namely the threat of his soul if the womb is not immediately aborted. Not because of the threat of economic problems or social problems over the birth of the baby they are carrying, because they are not married, are not ready to have babies, babies from rape, unwanted babies.

The reason for the baby's condition that is not possible to be born alive. The fetus may develop, but it will not be perfect if it is left alive because of the disorder that is owned by the baby. The baby who is suspected of being unable to be born with good and healthy condition, has threatened the life of the mother who is carrying it so that the loss of both the mother fetus and the fetus itself can be eliminated or reduced to the maximum extent possible by aborting the womb. So the abortion is solely carried out legally and legally with medical indications that can be accounted for both medically and socially in the midst of society, so that other people who have legality over their practice and the mother, together abort their contents get legal protection. legal and appropriate.

For that a health worker in carrying out their duties, it is necessary to conduct informed consent which is an agreement given by the patient or his family on the basis of an explanation of the medical actions to be taken against the patient, where intentionally or doles is someone doing something intentionally , must will the act and to realize / understand will be the result of his actions.

So legal protection is given to the health workers, the mother and the fetus itself, with various rules that must be met in the implementation of the abortion, so as not to cause a criminal act that can ensnare the health worker and the mother, get criminal and civil legal process, strengthened with organizations formed in the interest of protecting health workers and patients as intended.

JURIDICAL ANALYSIS OF INDONESIAN LEGISLATION AND ITS DEVELOPMENT RELATED TO THE IMPORTANCE OF THE BODY ORGAN TRANSPLANT

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ABSTRACT

The development of science and technology, including techniques for transplanting organs and tissues of the human body in Indonesia. Organ transplant is the medical treatment of choice to replace organs that are not functioning / organ failure. Healing and health recovery can be done through organ transplants and or human body tissues that are safe, quality, easily accessible, fair, effective, efficient and based on the needs of the community by considering religious, cultural, moral and ethical norms.

The purpose of transplanting organs and or tissues of the human body is for humanity and is prohibited from being commercialized. The research method is used by using this type of normative research. Government regulations governing transplants and / or human body tissues in force in Indonesia: Government Regulation No. 18 of 1981 concerning Clinical and Anatomical Corpse Surgery as well as the transplantation of tools or tissues of the human body, Law No. 29 of 2004 concerning the practice of medicine, Law No. 36 of 2009 concerning health, Law No. 44 of 2009 concerning Hospitals, Law No. 23 of 2014 concerning Regional Government, Minister of Health Regulation No. 37 of 2014 concerning Determination of Death and Utilization of Donor Organs, Regulation of the Minister of Health of the Republic of Indonesia No. 38 of 2016.The results of this study show that there are already strict regulations / laws governing organ transplants in Indonesia that reflect humanitarian values and legal certainty for donors and recipients can be applied in their entirety.

All religious in Indonesia allow transplant with humanitarian because the basic of all religions embraced in Indonesia is for the sake of humanity, goodness to help others in distress, mutual cooperation is a positive cultural value.

The government needs to think of a systematic system for the availability of donor organs and / or human body tissue and distribution to allocate organs throughout Indonesia as well as assist operational costs to prevent the sale and purchase / trading of illegal organs. There are data on the success of transplanted organs and tissues of the human body in Indonesia.

Keywords: Organ Transplant, Humanity, Law, Ethics, Law, Religion, Operational Costs, Illegal.

A. INTRODUCTION

Science and technology in the field of medicine today has developed rapidly. One of them is the human organ transplantation technique. Human organ transplantation is a medical technology for replacing a patient's organs that are no longer functioning with organs from other humans that are still functioning properly.

Organ transplantation has become one of the most meaningful solutions in the world of modern medicine, with many human lives being helped by this organ transplant. Supported by the advancement of science and technology in the field of human organ transplantation, the success rate of transplants performed is even higher. The survival rate of donor recipient patients is currently very high, so that as a result the demand for transplants and organs will also increase globally throughout the world including in Indonesia.

The high demand for transplants which is of course followed by high demand for organs is not followed by high levels of organ supply. According to data from WHO organ transplantation has been carried out in 91 countries in the world. In 2005 there were around 66,000 thousand kidney transplants, 21,000 liver transplants and 6000 kidney transplants carried out throughout the world. [1] Meanwhile, according to a report from the Mayo Clinic more than 101,000 people are waiting for organ transplant operations, and from that number increasing every year , and ironically, not everyone who needs a donor

[1] H.M. Markum Renal transplantation problem in Indonesia Acta Med Indonesia, 36 (2004), pp. 184-186

will get the donor as expected. Every day 19 people die in waiting to get an donor organ. people with kidney failure in Indonesia, who need kidney donors.

Based on the data above it can be seen that the need for donor human organs in Indonesia is quite high[2] [3]However, the high demand for these organs in Indonesia is also not followed by the availability of organs. Finding donor organs in Indonesia is still very difficult. The awareness of the Indonesian people, both individuals and family members to donate organs is still very low. The low public awareness of the importance of being an donor organ is driven by a lack of understanding of the importance of the availability of organs for other humans, for the survival of sufferers of organ failure, in addition to socioculture and religious views that inhibit awareness to donate organs. So it's not surprising that donors are very difficult to find in Indonesia.

The bad consequences arising from the problem of lack of organ availability while the demand for high organ donors is the emergence of illegal organ trafficking, illegal tourism and can further encourage human trafficking. Organ limitations cause the price of organs to become high, so that what arises in society is because economic needs are not uncommon to place advertisements that openly sell organs, then cases of baby abductions from hospitals or maternity clinics, as well as cases of street children Jasmine found in Japan,[4] [5] [6] [7]allegedly as an illegal organ acquisition. Illegal organ sales and forced organ harvesting must be prevented.

B. PROBLEM STATEMENT

Based on the background above, the problem study is:

1. What are the legal aspects of Indonesian law and legal certainty for donors and recipients regarding the importance of organ transplants?
2. How is the relationship between organ transplants and or tissues of the human body and donors in Indonesia between religious, geographic, socio-economic-cultural and ethical factors?
3. What problems arise as a result of a mismatch between the availability and demand of organs for transplantation?
4. How is the development of transplanted organs and tissues of the human body in Indonesia?

C. LITERATURE REVIEW

According to WHO, Transplantation is the transfer (engraftment) of human cells, tissues or organs from a donor to a recipient with the aim of restoring function (s) in the body.[8] So it can be concluded that transplantation or transplantation is the removal of cell organs, or tissues from the donor to others who need organ replacement due to organ failure, cell or tissue damage with the aim of restoring the function of damaged organs, cells, or tissue. However, in its development specifically for cells, the medical world, especially in the field of regenerative medicine, has now made it possible to regrow patient cells themselves with stem cells or cells extracted from damaged organs. In addition to the advances in organ transplantation techniques, the development of organ preservation techniques also has led to the discovery of anti-rejection drugs so that organs / tissues can be transplanted.

D. SEARCH METHODS

1. Types of Research

This research is basically a normative juridical study because the target of this study is the normative law or method in the form of legal principles and legal system. Positive law that examines health law regulations governing human organ trafficking based on Law Number 36 of 2009 concerning Health.

2. Nature of Research

This research is descriptive because it illustrates the applicable law and regulations also associated with legal theories in the practice of its implementation relating to the problem to be examined.

3. Data Analysis

There are a total of 629 kidney transplants recorded from 12 transplant centers across Indonesia since 1991 until 2017. Liver transplant began to be done since 2010 with live donors, 41 child patients and 6

[2] W. Prodjosudjadi Incidence, prevalence, treatment and cost of end-stage renal disease in Indonesia Ethn Dis, 16 (2 Suppl. 2) (2006) S2-14-6

[3] Usul Majadi Sinaga, "Inaugural Speech to Become a Permanent Professor in the Field of Surgical Medicine in North Sumatra", 28 July 2007

[4].Yusuke Shimazono; http://www.who.int/bulletin/volumes/ 85/12/06-039370

[5] .http: //www.mayoclinic.org/transplant/organ-donation.html

[6] Kamus Besar Bahasa Indonesia Online, http://pusatahasa. diknas.go.id/kbbi/index.php

[7] http://www.detiknews.com/read/2010/01/13/101511/ 1277295/ 10/ kisah-melati-korban-perd Commerce-organ-body

[8] World Health Organization, Transplantation, http://www.who.int/topics/transplantation/en/

adult patients from 2010 to 2018 with a success rate of survival 87%.

E. ANALYSIS AND DISCUSSION

Organ transplants are expected to not only make people experience the organ failure function with the hope of becoming healthy again to live longer. Disease healing and health recovery can be done through organ transplants. The development of organ transplants including the heart, liver transplants, kidneys, pancreas, lungs and several other organs including human body tissues such as muscles and nerves. Organizing organ transplants that are safe, quality, easily accessible, fair, effective, efficient and based on community needs must be carried out with a variety of considerations.

According to article 64 paragraph (1) of Law No. 36 of 2009 concerning health regulates disease healing and health recovery can be done through organ transplants and / or body tissues, drug implants and / or medical devices, plastic surgery and reconstruction, as well as the use of stem cells. Based on this article, organ transplantation is one of the ways to cure diseases and restore health which is allowed to be done, especially in Indonesia. The principle of organ transplantation is humanity.

Organ buying and selling is a weakness of the availability of organ donors which is a bit of a universal problem, there is no clear regulation and supervision of organ transplants, thus allowing illegal trade.

According to article 28 H paragraph (1) of the 1945 Constitution states that every person has the right to live physically and mentally prosperous, to live and get a good and healthy environment and the right to get health services. The Government's obligation to meet health conditions as human rights also has an international legal basis in article 2 paragraph (1) of the conversion of economic, social and cultural rights stipulated by the UN General Assembly 2200 A (XXI) dated 16 December 1966, that each state party The Covenant promises to take steps, both individually and through the assistance of international cooperation, especially in the economic and technical fields as long as resources are available to progressively achieve the full realization of the rights recognized by the Covenant by taking legislative steps . . Article 28 paragraph (4) of the 1945 Constitution states that the protection, promotion, enforcement and fulfillment of human rights is the responsibility of the state, especially the government. This government obligation is also emphasized in article 8 of Law no. 39 of 1999 concerning human rights. Article 7 of Law No. 36 of 2009 concerning health states that the government is responsible for increasing the degree of public health one of them by making regulations relating to health in this case is the regulation of organ transplants, in Law No. 36 of 2009, Minister of Health Regulation No. 38 of 2016 concerns the implementation of organ transplants. Government Regulation No. 18 of 1981 concerning Clinical and Anatomical Corpse Surgery as well as the transplantation of tools or tissues of the human body. In Law No. 23 of 1992 concerning health for violators who do not have expertise and authority, transplanting organs and tissues of the human body without the consent of the donor or heir, selling and buying organs and / or human body services are threatened with imprisonment for a maximum of 7 (seven) years and a maximum fine of Rp. 140,000,000 (one hundred forty million rupiah) as stipulated in article 81 paragraph (1) a, paragraph (2) a, article 80 paragraph (3) Organs and / or tissue transplants are for humanity and are prohibited from being commercialized. Based on existing laws, the state regulates the prohibition of trading persons and / or body tissues under any pretext.

Humanity according to the Big Indonesian Dictionary means human traits. Regarding one's rights and obligations, in-recipient organ transplants, donors, health workers and hospitals have their respective rights and obligations. The principle of legality of a health worker performing organ transplants is reflected in article 65 paragraph (1) of Law No. 36 of 2009 concerning Health that organ transplants and / or body tissues can only be carried out by health workers who have the expertise and authority to do so and are carried out in certain health services facilities. Health workers who carry out organ transplants must meet the requirements and permits regulated in legislation, according to professional standards and adhere to the Indonesian Medical Ethics Code (KODEKI). Meanwhile, as a form of protection for children who are vulnerable to exploitation of illicit trafficking in organ transplants and or body tissues, it is regulated in article 47 and article 85 of Law no. 23 of 2002 concerning child protection, provisions regarding types of criminal actions and criminal sanctions that can be imposed on the perpetrators. Then set.

1. Transplant Various Viewpoints

   Organ transplants can be viewed from various perspectives because they involve various dimensions of life. Organ transplants are a

medical procedure that most have aspects related dimensions other than the medical and ethical aspects themselves. For Indonesia, which is unique in addition to studying both aspects, it must also examine other aspects such as culture, religion, geography, social and economy

2. Transplant is seen from the Ethics Corner

As mentioned above in transplantation, two parties are needed: donor and donor recipient. Donors can be classified as living donors and dead donors. Living donors can come from families and non-families. However, in its current development, where poverty and the high level of need for organs has led to the emergency of commercial donors, those who provide their organs in exchange for money.

Transplantation from an Ethical standpoint must be considered in terms of 4 (four) basic principles of Biomedical Ethics [9][10][11]:

1. Respect for Autonomy. That donating organs is a noble deed. The decision to donate organs is a decision (autonomous donor) which is decided by itself without coercion from other parties.
2. Do not do evil or harm (Non Maleficence). Every transplant operation that is carried out always carries risks. Donors must be given an explanation of the risks that will arise when donating. Preparing a team of qualified doctors assisted with adequate technology can minimize the risk of failure of surgery. For kidney transplant surgery (nephrectomy) the reported failure rate is around 0.03% .52
3. Do goodness (Beneficence). The principle of doing good dictates that we do good to others, especially if there is no risk to the giver of goodness. In the case of organ transplants the good intention can be lost if the risk is higher.
4. Justice (Justice). The principle of fairness in organ transplants is more relevant to organ allocation, which involves fair treatment, equal and in accordance with the needs of patients who are not affected by other factors.

3. Transplantation is seen from the Corner of Religion

The role of religion plays the most important role in the regulation of donations and organ transplants in effect throughout the world. Therefore, Indonesia and its very religious population cannot simply dismiss this religious view in its regulation. Religion in Indonesia, which is also immersed in Indonesian culture, also plays an important role as a guide for behavior in Indonesian society. Religion in Indonesia according to Presidential Decree (Penpres) No.1 / PNPS / 1965 junto Law No.5 / 1969 concerning Prevention of Abuse and Blasphemy of Religion in its explanation article by article explains that the religions embraced by most of Indonesia's population are: Islam, Christianity, Catholicism, Hinduism, Buddhism, and Confucianism and beliefs.

a. Islamic Religious View. Islam believes in the principle of saving human lives. The majority of Islamic scholars from around the world, pray for the saving of human life and allow Organ Transplantation as a necessity for human survival.[12]
b. Buddhist Views. In Buddhism, donation is a noble thing to help others. The decision to become a donor is left to each individual to decide, clearly Buddhism strongly supports humanitarian action to help others through organ donation.[13]
c. Catholic Religious Views. Talking about the viewpoint of Catholicism regarding organ donation cannot be separated from the Vatican policy in this case the Pope as the leader of Catholicism worldwide. In general, the Catholic view of donations and organ and tissue transplantation is an act of charity and love.[14] Transplanting is morally and ethically acceptable to the Vatican. Pope Benedict XVI, who is the leader of the highest Catholic religion today, states "To be a donor organ means to carry out an act of love toward someone in need, toward a brother in difficulty." Organ donation is an individual decision which, due to its noble purpose, can

[9] .Malaysian Medical Council, Guidelines of the Malaysian Medical Council, Organ Transplantation, 14 November 2000
[10] Dolong, J., Marzuki M., & Zulmaizarna. 2002. Islam Untuk Disiplin Ilmu Kedoteran dan Kesehatan 1. Jakarta: Departemen Agama RI
[11] Indonesian Ministry of Health. Peraturan Menteri Kesehatan Republik Indonesia Nomor 52 Tahun 2016 Tentang Standar Tarif Pelayanan Kesehatan Dalam Penyelenggaraan Program Jaminan Kesehatan
[12] .A Sachedina, Islamic Views on Organ Transplantation, http://www.asu.edu/clubs/bioethics/islamic.pdf
[13] Nayake,Sri Dhammananda, Buddhist Attitude Towards Human Organs Donation http://www.mst.org. my / articles / buddhistview.html
[14] Zenit, The World Seen From Rome, Benedict XVI on Organ Donation "A Unique Testimony of Charity" ZE08110708 - 2008-11-07http: //www.zenit.org/article-24191? L = English

do it at any time for others. I also agree to give my organs to anyone who needs them.[15]

d. View of Christian Religion. Sacrifice and helping others are the basis of teaching for all Christians, so the decision to donate organs is a positive thing. For Christians, helping others in need is highly recommended. Christians view that donations and organ transplants are acts of love and follow Jesus' example.[16]
e. View of Hindu Religion. According to Hinduism Donation and Organ Transplantation can be justified on the grounds, that sacrifice to a person suffering, so that he is free from suffering and can enjoy health and happiness, is far more important, primary, noble and noble, than the integrity of human organs. who has edited it. But once again, this action must be done on the principle namely sincere, unconditional sacrifice and not done for the purpose of obtaining material benefits.

4. Donation and Transplantation are seen from the Socio-Cultural Corner

Indonesian culture greatly influences the perspective on organ transplants and donations in Indonesia. According to Gabriel C. Oniscu, MD, FRCS, John LR Forsythe, 1MD, FRCS in his journal An Overview of Transplantation in Culturally Diverse Regions, said that culture has a very large influence on transplants due to the complexity of the problems in transplantation compared to other fields in medicine. These cultural influences have brought different practical approaches in each country to be agreed with respect to the social and moral values of the local community.

The social and cultural aspects of Indonesian society that influence fear and misconceptions in viewing donations and organ transplants are:

a. Fear of death
b. b.Trust that organ harvesting would violate the sanctity of the body
c. Fears will be cut after death
d. d.Want to be buried in their entirety
e. e.Not like the idea of the existence of a kidney in a person's body
f. The concept of a wrong understanding of brain stem death
g. Donation ideas will tarnish trust

It is this cultural influence that ultimately reverses what religion allows. The Indonesian culture that gives the effect to encourage organ donation is a thick mutual cooperation culture in Indonesia. Helping each other when other people get a disaster is easily found in Indonesian society. Helping people who need Organ Donations and Transplants by helping to donate organs is a positive value of Indonesian culture.

5. Donation and transplantation are seen from a geographical angle

The territory of Indonesia, which consists of islands that spread from Sabang to Merauke, is very important to think about in connection with the pick up and delivery of organs to the transplant center, due to the very limited time of organ life. For this reason, good cooperation with transportation agencies in each region is needed so that pick-up and delivery is timely.

6. Donation and transplantation are seen from an economic angle

Economic factors are the end of various factors in relation to transplantation. There are several issues related to economic problems for donations and organ transplants :

a.Poverty. Poverty encourages organ trafficking like what happened in Iraq. Hundreds of people are believed to have sold their organs through intermediaries in Baghdad. The same thing has happened in Indonesia, this thing is proven by the arrest of two Indonesian citizens in Singapore, for selling their organs.[17] Although there is no official data on how many Indonesians have sold their organs, the arrest of the two people in Singapore is proof that this is indeed real.

b. Very high cost for organ transplants. The high cost of organ transplants as experienced by Bilqis where for liver transplants the cost required is between 800 million and 1 billion rupiah. As for the kidneys, the preparations for kidney transplants in domestic hospitals range from Rp. 28.5 to Rp. 35 million. The

[15].New Mexico Donor Services, Religious Views On Organs, Tissue And Blood Donation http://www.donatelifenm.org/religiousviews.htm#catholic

[16] BBC, Organ Donation, Christian teachings about the donation and transplant of human organs, http://www.bbc.co.uk/religion/religions/christianity/christianethics/organs.shtml

[17] Published in The Singapore Strait time on June 27, 2008, Sulaiman Damanik, 26 freelancers from Sumatra were promised S $ 23,700 in exchange for kidney living organs donated to Tang Wee Sung, 56, Executive Chairman of the CK Tang retail company.

total cost of a transplant in the country is IDR 80 to IDR 250 million

c. Organ Demand Supply. Non-fulfillment as economic law between demand and supply, is a condition that occurs in human organ transplants. A very lame comparison between high demand and supply of organs encourages people to do all kinds of efforts to get organs including getting from the black market. Reported success of total kidney organ transplants 629 from 12 transplant centers in Indonesia in the period 2011 to 2017.

Transplantation data began to be documented in 1991 even though the previous year had begun. Meanwhile, liver transplants began in 2010 with live donors, 41 pediatric patients and 6 adult patients from 2010 to 2018 with a survival rate of 87%.

F. CONCLUSION:

a. Progress in the field of science and technology with the existence of transplants of human organs, which is beneficial for human survival because by transplanting human organs that have been damaged or no longer functioning can be replaced with organs that are still functioning properly.

These Transplantation arrangements have been made rules:

1. Government Regulation No. 18 of 1981: Clinical and Anatomical Corpse Surgery and Transplantation of Human Body Tools or Tissues.
2. Law No. 23 of 1992 concerning Health
3. Law No. 29 of 2004 concerning Medical Practice
4. The 2005 Criminal Code draft, the article which regulates acts with commercial purposes in the implementation of organ or tissue transplantation.
5. Law No. 36 of 2009 concerning Health, articles 64 to 68, article 192 criminal sanctions.
6. Law No. 44 of 2009 concerning Hospitals
7. Law No. 23 of 2014 concerning Regional Government
8. Minister of Health Regulation No. 37 of 2014 concerning Determination of Death and Use of Donor Organs.
9. Regulation of the Minister of Health of the Republic of Indonesia No. 38 of 2016.

b. That there is no religious teaching adopted in Indonesia that prohibits the practice of organ donation or organ transplantation and / or human body tissue because the basis of all religions embraced in Indonesia is for the sake of humanity, goodness to help others in distress, mutual cooperation is a positive cultural value.

c. The imbalance between organ supply and organ demand in this world has gained people to compete in finding ways for the availability of organs.

The government needs to think of a systematic system that can distribute and allocate organs throughout Indonesia. Indonesia's unique geographical condition consists of island nations, so fast and good transportation is a prerequisite for the equitable distribution of organ allocations. The high price of organ transplant operations, so the government needs to think about the payment mechanism of the transplant. For Indonesia, the practice of organ donation should remain based on the principle of volunteerism and humanity.

REFERENCES

Books

P.N. Bennett, A. Hany **Barriers to kidney transplants in Indonesia: a literature review** Int Nurs Rev, 56 (2009), pp. 41-49.

D.Anderson Paul.2009. *Latihan dan Panduan Belajar Anatomi dan Fisiologi Tubuh Manusia*. Yogyakarta : EGC

ETIKA KEDOKTERAN dan HUKUM KESEHATAN. Jakarta 2012 :EGC

Journal

H.M. Markum **Renal transplantation problem in Indonesia** Acta Med Indonesia, 36 (2004), pp. 184-186

W. Prodjosudjadi **Incidence, prevalence, treatment and cost of end-stage renal disease in Indonesia** Ethn Dis, 16 (2 Suppl. 2) (2006) S2-14-6

Usul Majadi Sinaga, "Inaugural Speech to Become a Permanent Professor in the Field of Surgical Medicine in North Sumatra", 28 July 2007

M. Tonelli, N. Wiebe, G. Knoll, A. Bello, S. Bro wne, D. Jadhav, et al.**Systematic review: kidney transplantation compared with dialysis in clinically relevant outcomes**

Am J Transplant, 11 (2011), pp. 2093-2109

A. Marcelino, C.A. Mochtar, I. Wahyudi, A.R. H amid**Kidney transplantation: a new era of laparoscopic living donor nephrectomy in Indonesia**

Asian J Surg, 41 (2018), pp. 55-5

Oniscu, Gabriel C, Forsythe, John LR, An Overview of Transplantation in Culturally Diverse Regions, April 2009 Vol. 38 No. 4

Bulletin of the World Health Organization Bull World Health Organ vol.82 no.9 Genebra Sept. 2004, Organ trafficking and transplantation pose new challenges

Laws and Regulations

Malaysian Medical Council, Guidelines of the Malaysian Medical Council, Organ Transplantation, 14 November 2000

Dolong, J., Marzuki M., & Zulmaizarna. 2002. *Islam Untuk Disiplin Ilmu Kedoteran dan Kesehatan 1*. Jakarta: Departemen Agama RI

Indonesian Ministry of Health. Peraturan Menteri Kesehatan Republik Indonesia Nomor 52 Tahun 2016 Tentang Standar Tarif Pelayanan Kesehatan Dalam Penyelenggaraan Program Jaminan Kesehatan

Toh S, Chan M. Universal Healthcare Coverage in Indonesia - One year on

Internet

Yusuke Shimazono; http://www.who.int/bulletin/volumes/85/12/06-039370

http: //www.mayoclinic.org/transplant/organ-donation.html

Kamus Besar Bahasa Indonesia Online, http://pusatahasa.diknas.go.id/kbbi/index.php

http://www.detiknews.com/read/2010/01/13/101511/1277295/10/kisah-melati-korban-perd Commerce-organ-body

World Health Organization, Transplantation, http://www.who.int/topics/transplantation/en/

A Sachedina, Islamic Views on Organ Transplantation, http://www.asu.edu/clubs/bioethics/islamic.pdf

Nayake, Sri Dhammananda, Buddhist Attitude Towards Human Organs Donation http://www.mst.org. my / articles / buddhistview.html

Zenit, The World Seen From Rome, Benedict XVI on Organ Donation "A Unique Testimony of Charity" ZE08110708 - 2008-11-07http: //www.zenit.org/article-24191? L = English

New Mexico Donor Services, Religious Views On Organs, Tissue And Blood Donation http://www.donatelifenm.org/religiousviews.htm#catholic

BBC, Organ Donation, Christian teachings about the donation and transplant of human organs, http://www.bbc.co.uk/religion/religions/christianity/christianethics/organs.shtml

Aljazeeranet, Poverty drives Iraq organ trade, http://english.aljazeera.net/news/middleeast/2009/07/ 200972052636416787.html

http://english.aljazeera.net/news/middleeast/2009/07/200972052636416787.html

Published in The Singapore Strait time on June 27, 2008, Sulaiman Damanik, 26 freelancers from Sumatra were promised S $ 23,700 in exchange for kidney living organs donated to Tang Wee Sung, 56, Executive Chairman of the CK Tang retail company.

THE ROLE OF E-MEDICAL RECORDS IN THE ENFORCEMENT OF HEALTH LEGAL CERTAINTY (CASE STUDY: COMMUNITY OPTIMAL HEALTH SERVICES IN SUPPRESSING MEDICAL ETHICAL VIOLATIONS IN THE GATOT SUBROTO HOSPITAL RSPAD, JAKARTA)

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ABSTRACT

In the era of digitalization of information required disclosure of information from all aspects, especially in health services. The Gatot Subroto Army Central Hospital has become a Public Service Agency, which has been charged with improving health services. Towards zero accident, efforts will be made to speed up access to medical record data between electronic-based units, so that all patient conditions will be monitored at each place. The problem is, on the one hand, the existence of the obligations of hospitals and health workers to create and maintain the confidentiality of electronic medical records. Meanwhile, on the other hand, the strength of electronic medical records submitted in the form of a letter (given out of court) or as an expert's statement (delivered at trial) is freely judged by the judge. The purpose of this study is the existence of electronic medical records can be used as evidence for an expert in the liability dispute of a doctor who has committed negligence. The method used in this study uses a normative juridical study by examining the legal strength of evidence from electronic medical records in accordance with government regulation no. 26 of 1960 concerning doctor oaths and strengthening in article 187 of the Criminal Procedure Code by referring to article 186 as well as Article 79 paragraph (b) of Law Number 29 of 2004 concerning Medical Practices and administrative actions in the form of oral warnings, written reprimands to revoke Permit as regulated in Article 17 of the Minister of Health Regulation No. 269 in 2008.
Keywords: electronic medical records, zero accident, normative juridical, dispute.

I. INTRODUCTION

Health services aim to carry out prevention and treatment of diseases, including medical services carried out on the basis of individual relationships between doctors and patients who need healing. Medical services are facilities that provide clinical services in the field of diagnostics, and / or hospitalization. This medical service can be in the form of establishing a correct diagnosis according to the procedure, providing therapy, performing medical procedures according to medical service standards, and providing reasonable actions that are indeed needed for the patient's recovery. In this medical service, doctors play an important role. The maximum effort made by this doctor is to ensure that the patient can obtain the expected rights from the transaction, namely healing or recovering his health (Bertens, 2011). In Indonesia, health has been regulated in various regulations, such as Minister of Health Regulation (PERMENKES) to Law.

Matters regulated in the regulation ranging from activities carried out by health service providers to the occurrence of errors in medical activities. This is in accordance with the opinion which states that: Health law is a series of laws and regulations in the health sector that regulates medical services and medical facilities (Iswandari, 2006). The medical profession and other medical professionals are very noble and respected in the eyes of society. A doctor and medical personnel before practising their medical practice or medical services have gone through a fairly long education and training. Because of this profession (especially doctors) a lot of life expectancy and/or healing from patients and their families who are suffering from illness(Tarigan Sibero, 2016). The doctor and patient relationship is a civil law relationship, where the patient comes to the doctor to cure his illness, and the doctor promises to try to treat or cure the patient's illness.

Civil relations are legal relations carried out by parties who are in an equal position, at least when the parties will enter into certain legal relations. The emergence and legal protection of patients as consumers are preceded by the relationship between the doctor and the patient. The legal relationship between a doctor or dentist and patients in health services is commonly referred to as a therapeutic

transaction. The relationship between the doctor and the patient or therapeutic transaction is based on the existence of an agreement, an agreement in which the doctor tries his best to cure the patient. In addition to the relationship between doctors and patients, the role of the hospital in implementing patient protection is also very necessary. In the highly developed medical world, the role of hospitals is very important in supporting public health. From the hospital side, they should provide protection to patients as they should. This is justified in Law No. 8 of 1999 concerning consumer protection which states that the consumer is every user of goods and or services available in the community, both for self, family, others, and other living things and not for trade. Because of this, patients are generally protected by Law No. 8/1999 concerning Consumer Protection, Law No. 29 of 2004 concerning Medical Practices, and Law Number 36 of 2009 concerning Health.(Nurlindawati, 2018).

Medical errors are errors that occur when a treatment plan or procedure is submitted incorrectly. Or in other words that this medical error is an error that happens in health services which is a human error or human error. Medical errors can occur in various medical service units, such as hospitals, health centres, clinics, pharmacies, doctor's practice, to maternity hospitals that involve medication, surgery, diagnosis, examination equipment, and laboratories. In health services, medical records are known. When someone conducts an examination with a health worker or medical officer, then it will be recorded in the form of a medical record. This medical record contains more or less about patient data to the patient's disease history. There are medical records in the form of written and those in the form of electronic records (Irfan & Hidayat, 2018). The purpose of medical records is to support the achievement of orderly administration in the context of efforts to improve health services. Therefore this medical record contains patient administration data. Medical records have many uses which are divided into seven aspects. The following seven aspects are:

1. In terms of administrative aspects The contents of the medical record concerning actions based on authority and responsibility as medical personnel and nurses in achieving health service goals. 2. In terms of medical aspects. Medical records are used as a basis for planning treatment/care that must be given to patients because these medical records contain a history of the patient's disease. 3. In terms of legal aspects, medical records related to the existence of legal certainty guarantees on the basis of justice, in the context of enforcing the law and providing evidence to uphold justice. 4. In terms of financial aspects. The contents of the medical record can be used as a material to determine the cost of service payments. Without evidence of action/service records, then the payment cannot be accounted for.

5. In terms of research aspects, Medical record files have research value, because they contain data/information that can be used as research aspects.

6. From the educational aspect, The medical record file has educational value, because it includes data/information about the chronology of medical services provided to patients. 7. From the aspect of documentation. The contents of the medical record is a source of memory that must be documented and used as material for accountability and health facility reports (Sulistiyono, 2019).

The Central Army Hospital (RSPAD) Gatot Soebroto is the highest reference for Army Hospitals and general inspection services throughout Indonesia, demanded to improve medical services primarily in administrative compliance services, especially electronic medical recording. Electronic medical records are closely related to establishing a diagnosis for patients so they can prevent the occurrence of human errors in diagnosing diseases.

Based on the uses above, then when a medical error occurs, this medical record can be used as evidence to prove or uncover medical mistakes that occur. This happens because this medical record serves to provide legal certainty on the basis of justice which is a reference for health service providers in providing health services.

II. PROOF OF MEDICAL MISTAKES

The Gatot Subroto Army Central Hospital as an army health service centre has diagnostic, therapeutic and intervention radiology services, including Mammography, 3 / 4D Ultrasonography, Echocardiography, Magnetic Resonance Imaging (MRI) 3 Tesla, Magnetic Resonance Angiography, MSCT - 64 Slices, Digital Subtraction Angiography (DSA), Linac - CT Simulator, Magnetic Resonance Angiography, MSCT - 128, cobalt. Other facilities for Nuclear Medicine Diagnostics and Therapy consist of Bone Scanning, Myocardial Perfusion Scanning, Renogram, Thyroid Scanning, Brain Scanning), Thyroid Carcinoma Ablation, Persistent Hyperthyroid Ablation and Clinical Pathology and Anatomy consisting of Bronchoscopy, Endoscopy, Trans Magnetic Stimulation (TMS), Colposcopy, Electro Enchepalo Graphy (EEG), Electro Myo Graphy

(EMG), Audiometry, Periapical and Panoramic Dental X-rays, Dental Prosthetic Laboratory(RSPAD, 2020).

Some of these facilities are equipped with storing patient data in each laboratory so that when needed in enforcing several cases involving doctors and patients can be known. In improving patient services, RSPAD emphasizes electronic medical records, so they can be linked between departments if needed. The purpose of electronic filing is to minimize errors made by each doctor in making diagnostic decisions for each patient. Errors in treatment will result in lawsuits both to the doctor and the local hospital.

The proof is very important in criminal procedure law. Because of the results of this proof can be known whether or not someone has committed a crime. To prove the occurrence of medical errors is not an easy matter because there are many obstacles that may arise. As entitled to determine the occurrence of medical errors is the Indonesian Honorary Disciplinary Board. This is in accordance with Article 1 number 14 of the Minister of Health Regulation No. 2052 / MENKES / PER / X / 2011 Regarding Practice License and Implementation of Medical Practices which states that the Indonesian Medical Disciplinary Honorary Board is an authorized institution to determine whether there are mistakes made by doctors and dentists in the application of medical and dental disciplines and set sanctions.

Therefore, it is necessary to determine the determination of the Indonesian Medical Disciplinary Board to determine that someone (a doctor) made a medical error. Moreover, this is necessary considering that law enforcement officials, especially judges, do not have specialization in the medical field. So as to maintain the principle of presumption of innocence, this is indeed necessary. In the medical world, the medical record is one of the evidence that can be used in a court hearing. This is in accordance with Article 13 paragraph (1) point (b) Permenkes Number 269 / Menkes / Per / III / 2008 which states that the use of medical records can be used as evidence in the process of law enforcement, medical and dental discipline and enforcement of medical ethics and dentistry ethics.

III. MEDICAL RECORD IN ITS ROLE AS EVIDENCE OF HEALTH SERVICE DELIVERY ACTIONS

Medical record is not a health services but is proof of that service provided by health care providers to patients. Before discuss further medical records, and it needs to be understood first anyone related to the medical record. Basically, people who are related to medical records consist of patients, doctors and dentists, and health workers. In Permenkes RI RI Number 269 / Menkes / Per / III / 2008, there is a definition of these three things. In Article 1 paragraph (5) a patient is defined as every person who conducts a consultation his health problems to obtain the necessary health services both directly and indirectly to the doctor or dentist.

In Article 1 paragraph (2) doctors and dentists are defined as doctors, specialist doctors, dentists and dental specialists graduating from medical or dental education both domestically and abroad that are recognized by the Government of the Republic of Indonesia in accordance with statutory regulations. And Article 1 paragraph (4) certain health workers can be defined as health workers who participate in providing health services directly to patients other than doctors and dentists. Referring to Article 2 of Government Regulation Number 32 of 1996 concerning Health Workers, doctors and dentists with health workers are two different things. Article 2 Government Regulation Number 32 of 1996 states (Sulistyani & Syamsu, 2015):

1. Article 2 paragraph (1) states that health workers consists of : Medical personnel; Nursing staff; Pharmaceutical workers; Community health workers; Nutritionist; Physical power ignition; Medical, technical staff.
2. Article 2 paragraph (2) states that what is meant by medical personnel are doctors and dentists. At the beginning of the development of the medical world in Indonesia, medical records were not really noticed. Recording medical data only uses patient cards called "status". This is because, in the past, this was not so important because it did not create problems. But as time evolved, people began to realize the importance of medical records.

Even in the past, there were almost no or even no claims against health care providers (Yudhi Haryanto, 2015) now there are already many lawsuits against patients against health care providers. Including lawsuits using medical records as evidence. Actually, the provision of health services carried out by doctors and/or dentists have standardized patients. As which the author has said before is that standard known as the standard profession. So the action is taken by doctors against patients actually must be in accordance with the standards that profession. So the

doctor's actions towards these patients aside accountable to patients, also accountable to the Indonesian Medical Ethics Code Assembly. Medical records are who, what, where and how to care for patients while in the health service. To complete the medical record must have sufficient data written in a series of activities to produce a diagnosis, guarantee, treatment and final results. In its development, medical records are now made in the form of electronic records. This is in accordance with Article 2 paragraph (1) Permenkes RI Number 269 / Menkes / Per / III / 2008 concerning Medical Records which states that medical records must be written, complete and clear or electronically.

Electronic medical record / electronic health record is an activity to computerize the contents of the health record (a medical record) starting from (collecting, processing, analyzing and presenting data) relating to activities health services (Giyana, 2012). This electronic medical record is, of course, very important in facilitating the treatment of patients who are in a different place from his medical record. For example, when a patient is in city A, but his medical record is in city B, while he needs the medical record to do treatment in city A, then the patient can ask the holder of his medical record (health service providers, such as doctors) to send it via electronic media. In this regard, indeed, patients have the right to access or view personal health information. A transmission and reception of information through telecommunications certainly will be known by telecommunications operators.

This is based on Article 41 of Law Number 36 the Year 1999 concerning Telecommunications which states that in the framework verification of the use of telecommunications facilities above demand for telecommunications service users, organizers telecommunications must record the use of facilities telecommunications used by users of telecommunications services and can record information in accordance with regulations current regulation. Associated with confidentiality medical record, of course, this can be dangerous confidentiality. Therefore, based on Article 42 paragraph (1) Law Number 36 of 1999 concerning Telecommunications states that telecommunications service providers are required keep information sent and / or received by telecommunications service customers through the telecommunications network and / or telecommunications services that it provides (Winahyu & Dewi, 2013). Seeing the formulation of the article, even though there is a recording done by the telecommunications service provider, the contents of the matter recorded must still be kept confidential. So that the shipment of medical records from a doctor or health care provider to a patient through telecommunications services will be kept confidential.

Based on the above, it is clear that medical records contain the contents of the patient's personal confidentiality that belongs to the patient by health workers must be open to the rights of patients and closed to third parties who are not interested/authorized according to law to know the confidentiality in the medical record. Therefore, medical records have legal value because their content concerns the issue of legal certainty guarantees on the basis of justice in the context of enforcing the law and providing evidence to uphold justice. So it is clear that the medical record is very important in medical services.

Medical records can be a guide in the delivery of health services. In addition, medical records can also be medical documents in the event of a legal conflict both in a professional court and in a district court. This is in accordance with what the author has stated before that based on Article 13 paragraph (1) point (b) of the Republic of Indonesia Minister of Health Number 269 / Menkes / Per / III / 2008 which states that the use of medical records can be used as evidence in the process of law enforcement, medical and dental disciplines and enforcement of medical ethics and dentistry ethics. Thus, health service providers for medical records can be a means of defence and written alibi statements regarding the existence of professional duties that are carried out well, there is no negligence of duties and in accordance with professional standards that have been approved by patients or their families. Besides that for the patient himself, the medical record file can be used by the patient or his family according to the law as a basis for conducting a lawsuit or prosecution in a court of law with applicable legal procedures(Astuti, 2009).

IV. CONCLUSION

1. Based on Permenkes Number 269 / Menkes / Per / III / 2008, the medical record is a file that contains notes and documents about the patient's identity, examination, treatment, actions, and other services that have been given to patients. Medical records are very important in medical services. Record medical can be a guide in the delivery of health services.

2. Medical records have legal value because their contents concern the problem of guaranteeing legal certainty based on internal justice efforts to uphold the law and provide evidence to uphold justice. Therefore, medical records can also be medical documents in the event of a legal conflict both in a professional court and in a district court.
3. SPAD as a national referral hospital has carried out electronic medical recordings in each department so that an increase in patient services so that it can minimize errors made by doctors in making a diagnosis.

REFERENCES

Astuti, D. W. (2009). *Kedudukan Hukum Rekam Medis Dan Infprmed Consent Sebagai Alat Bukti Dalam Kasus Malpraktek*. Universitas Islam Indonesia, Yogyakarta.

Bertens, K. (2011). *Etika Biomedis*. Kanisius, Yogyakarta.

Giyana, F. (2012). Analisis Sistem Pengelolaan Rekam Medis Rawat Inap Rumah Sakit Umum Daerah Kota Semarang. *Jurnal Kesehatan Masyarakat Universitas Diponegoro*, *1*(2), 48–61.

Irfan, M., & Hidayat, S. (2018). Mediasi Sebagai Pilihan Penyelesaian Sengketa Medik Dalam Hukum Positif Indonesia. *Jurnal IUS*, *6*(3).

Iswandari, H. D. (2006). Aspek Hukum Penyelenggaraan Praktik Kedokteran:Suatu Tinjauan Berdasarkan Undang-Undang No. 9/2004 Tentang Praktik Kedokteran. *Jurnal Manajemen Pelayanan Kesehatan*, *09*(02), 52–57.

Nurlindawati, E. A. (2018). Budaya Keselamatan Pasien Oleh Perawat Dalam Melaksanakan Pelayanan Di Ruang Rawat Inap. *JIM FKEP*, *III*(4), 196–204.

RSPAD. (2020). Penunjang Diagnostik. Retrieved From Http://Www.Rspadgs.Net/Id/Page/Penunjang-Diagnostik

Sulistiyono, A. (2019). Majelis Kehormatan Disiplin Kedokteran Indonesia (Mkdki) Untuk Dapat Menjamin Keadilan Dalam Hubungan Dokter Dan Pasien. *Jurnal Pasca Sarjana Hukum UNS*, *VII*(1), 29–38.

Sulistyani, V., & Syamsu, Z. (2015). Pertanggungjawaban Perdata Seorang Dokter Dalam Kasus Malpraktek Medis. *Lex Jurnalica*, *12*(2).

Tarigan Sibero, S. P. (2016). Kedudukan Rekam Medis Dalam Pembuktian Malpraktik Berdasarkan Undang-Undang Nomor 36 Tahun 2009 Tentang Kesehatan. *JOM*, *III*(1), 1–15. Https://Doi.Org/10.7202/1016404ar

Winahyu, R., & Dewi, L. (2013). Wajib Simpan Rahasia Kedokteran Versus Kewajiban Hukum Sebagai Saksi Ahli. *Perspektif*, *XVIII*(3), 136–147.

Yudhi Haryanto, E. (2015). Kedudukan Rekam Medis Dalam Pembuktian Perkara Malpraktek Di Bidang Kedokteran. *Lex Crimen*, *IV*(2), 151–159.

REVIEW ON FREEDOM LAW TO EXPRESS AN OPINION IN THE PUBLIC IN THE PERSPECTIVE OF HUMAN RIGHTS

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ABSTRACT

Legal State with human rights cannot be separated one from another, because one of the characteristics of a law state is the protection to the human rights, including to guarantee the freedom to express an opinion in the public. In accordance with the 1945 Constitution, Indonesia is a democratic legal state where the people have sovereignty. The purpose of regulation to express an opinion in the public to substantiate a favorable climate for the development of participation and creativity of every citizen is the realization of right and responsibility in the life of democracy. In expressing the opinion in the public, every citizen must be responsible and have obligation to respect the right and freedom of other people and comply with the existing laws and regulations.

Keywords: Legal State And Human Rights.

A. INTRODUCTION

Basic freedom and basic rights which are mentioned as human rights which attach to the human being are naturally as a gift from God the Almighty. These rights cannot be denied. The denial to the rights means to deny the human dignity. Therefore, the state, government, or any organization have the obligation to acknowledge and protect the human rights in every human being without exception. This means that the human right must always become a starting point and purpose in the implementation of the life to have community, to have a nation, and to have a state.

In line with the aforesaid view, Pancasila (The Five Principles of the Nation) contains thought that the human beings are created by God the Almighty by having two aspects, namely, individualistic aspect (personal) and sociality aspect (to have a community).

Therefore, the freedom of everybody is limited by the human rights of other people. This means that everybody has the obligation to acknowledge and respect the human rights of other people.[1]

To express an opinion in the public constitutes one of the human rights which is guaranteed by the Article 28 of the 1945 Constitution which reads: "The freedom to have a union and gathering, to express thoughts verbally and in writing and so on are stipulated by the law". The freedom to express an opinion is in line with the Article 19 Universal Declaration of Human Rights which reads: "Everybody has the right to the freedom to have and express an opinion, in this case including the freedom to have an opinion by not getting disturbance and to search, receive and conveying information and opinion by any means whatsoever and without looking at the limits". The realization of the will of a citizen to freely express an opinion verbally and in writing and so on must still be maintained in order that the whole social order and institutionalization both infrastructure and suprastructure to be free from deviation or legal violations which are in contravention to the purpose, aim and direction for the openness process in the establishment and upholding of the law so that it does not create social disintegration, but it must be able to guarantee sense of security in the life to have a community.

As such, the freedom to express an opinion in the public must be carried out with full sense of responsibility, in line with the existing laws and regulations and international legal principles as contained in the Article 29 of the Universal Declaration of Human Rights which among other things stipulate the following matters:

1. Everybody has obligation to the community which enables to develop his character freely and fully;
2. In the implementation of his right and freedom, everybody must be subject solely to the limitation stipulated by the law with the purpose to guarantee the acknowledgement and appreciation to the right and freedom of other people, and to fulfill fair

[1] Indonesia, Law Number 39 Year 1999 Regarding Human Rights, State Gazette Year 1999 Number 165 Supplement to the State Gazette Number 3886, General Explanations paragraph 1 and 2

conditions for morality, order, and public welfare in a democratic society;

3. These right and freedom are not allowed at all to be in contravention to the purpose and principles of the United Nations Organization.

To be linked to the development in the field of law which comprises of legal material, law employees, legal facility and infrastructure, legal culture and human rights, the government of the Republic of Indonesia is under the obligation to realize it in the form of political attitude which is giving aspiration to the openness in establishing and holding the law.[2]

The freedom to express an opinion constitutes human rights for everybody, by its implementation has the obligation not to violate the rights and freedom of other people. It is impossible to realize and uphold the human rights in case of violating the law and not respecting the human rights of other people.

B. PROBLEM STATEMENT

The problems as the right of freedom to express an opinion in the public are carried out with sense of responsibility by respecting the rights and freedom of other people and in accordance with the existing laws and regulations.

C. LITERATURE REVIEW

1. Law State Theory

The thought on the state and law began to emerge in the ages of Ancient Greece, where the freedom to think and express an opinion started to begin, which was started by Socrates through teaching about complying with the law which was later continued by Plato (429-347 BC) that a good state is a state ordered with constitution and legal sovereignty. The idea of a law state arose in the West in the XVII century and XIX century, the idea about the democracy gets a concrete form as a political system or government system.[3]

Stahl Concept regarding legal state is marked by 4 main elements, namely:

a. Acknowledgment and protection to the human rights;
b. The state is based on the theory of Trias Politika;
c. The government is carried out based on the laws and regulations;
d. The existence of state administration justice which has duty to handle cases on act against the law by the government.

According to A.V. Dicey that a legal state is a state which has the rule of law, namely (1) supremacy of law; (2) equality before the law; (3) the constitution based on individual rights).[4]

Bintan R. Saragih put forth the concept of a legal state which is as a state where the action of the government as well as its people are based on the law to prevent arbitrary actions from the government and the action of the people which is conducted according to their own free will.[5]

2. Theory of people's sovereignty and Democracy

The theory of people's sovereignty emerges as a reaction to the theory of king's sovereignty which mostly produces tyranny and misery to the people. The originator of the theory of the people's sovereignty is Jean Jacques Rousseau, in his theory regarding the community agreement where in a state, natural liberty has changed into civil liberty where the people have their rights. As far as the will is concerned, the human beings are directed to the public interest jointly as a nation, therefore all the will is united to become a general will which is called volonte general, the trust to public will from the people which becomes the basis of the state construction. The law must constitute the expression of the public will. Democracy occupies a vital position in its link to the distribution of power in a state, with the power of a state which is acquired from the people which must be used for the welfare of the people. In its development later the development of the term of democracy has a fertile period and the shifting towards the modernization in the era of renaissance. In this period a new thought arose about the relationship between ruler and the state with other party, namely the thought about the power of Niccolo Machiavelli (1469-1527), and contra social thought and distribution of power from Thomas Hobbes (1588-1979), John Locke (1632-1704), Montesquieu (1689-1755).[6]

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[2] Indonesia, Law Number 9 Year 1998 regarding the Freedom to Express an Opinion in the Public, State Gazette Year 1998 Number 181, Supplement to the State Gazette Number 3789, General Explanations Paragraph 1 and 2

[3] Tundjung Herning Sitabuana, *Berhukum di Indonesia*, Jakarta Konstitusi Press, 2017, p33-34

[4] H. Juhaya S. Praja, *Legal Theory and its Application*, Bandung, CV Pustaka Setia, 2014, p135

[5] H. Salim HS and Erlies Septiana Nurbani, *Teori Hukum dan Aplikasinya*, Jakarta, PT RajaGrafindo Persada, 2016, p4

[6] Bahder Johan Nasution, *Negara Hukum dan Hak Asasi Manusia*, Bandung, Mandar Maju, 2014, p55-56

Democracy is a form or system of a government, where all the people participate to govern both through people representative body and beyond the people representative Institution in deciding a government political decision. That the character of democracy is (1) the existence of freedom for the people to participate in the implementation of the government (2) the existence of the equality of the law and government, meaning that both the people and the government are subject to the supremacy of the law. Immanuel Kant was interested in the freedom, equality and independency in its relationship with the basic rights which universally is owned by everybody.[7]

The stress of Kant to the freedom or human autonomy constitutes a value and condition for all other values. Without respecting the autonomy of the heart of human beings, any goodness to the human beings is not good. The attitude to respect the law of morality is a form of an attitude to respect the value and dignity of a human being. The moral conduct requires a human being to respect the value existing in the human being itself and other people.[8]

D. RESEARCH METHOD

This research uses a normative legal research method which is acquired from the book material named secondary data comprising of:

a. Primary Legal Material, namely binding legal material consisting of:
   1) Norm (basis) or basic rule namely the opening or preamble of the 1945 Constitution.
   2) Basic regulation, Contents of the 1945 Constitution and Decree of the People's Consultative Assembly.
   3) Laws and regulations.
b. Secondary Legal Material, which gives explanations on the primary legal material such as Bill, research results, work results from legal circle and so on.[9]

The approach used in this research is the approach of law, by studying the law and regulation related to the contents of law which is being handled to learn whether there are consistency and conformity between one law and other law or the Constitution to solve a problem which is being faced, to understand the contents of a philosophy existing behind the law. Apart from the above, the conceptual approach namely to build a concept which constitutes a reference in this research which is deriving from the laws and regulations and doctrines developing in the legal studies.[10]

The research in this thesis refers to the legal norms or existing laws and regulations in Indonesia related to the freedom to express an opinion in the public in the context of the Law Number 39 Year 1999 regarding Human Rights and Law Number 9 Year 1998 regarding the Freedom to Express an Opinion Before the Public. In this research a description will be given on how the freedom to express opinions is implemented before the public which constitutes human rights and basic obligation of the human being to respect the human rights of other people.

E. ANALYSIS AND DISCUSSION

1. Definition and Legal Basis of Freedom to Express an Opinion.

The obligation to respect the human rights especially the freedom to express an opinion is regulated in the 1945 Constitution in the Article 28E which emphasizes that everybody has the right to the freedom to have a union, to have a gathering and express opinions.

According to the Article 23 paragraph 2 of the Law No. 39 year 1999 everybody is free to have, express and spread opinions in accordance with his conscience verbally and/or in writing through printing and/or electronic media by observing religious values, moral conduct, rule and order, public interest, and national integrity. And also the Article 25 of the law which stresses that everybody has the right to express an opinion in the public, including the right to strike in accordance with the laws and regulations.

According to the **Article 1 of the Law No. 1 Year 1998** regarding the Freedom to Express Opinions In the Public which is meant by:

1. The freedom to express an opinion is the right of every citizen to convey thoughts verbally, in writing, and so on freely and with responsibility in accordance with the existing laws and regulations.
2. In the public is in front of many people, or other people also including at a place which can be visited and/or seen by everybody.

[7] Ibid, p57-58
[8] Hawasi, *Immanuel Kant, Langit berbintang di Atasku Hukum Moral di Batinku* , Jakarta, Poliyama, 2003, p52-53
[9] Soerjono Soekanto, Sri Mamudji, *Peneltian Hukum Normatif*, Jakarta: PT RajaGrafindo Persada, 2015, p12-13
[10] Peter Mahmud Marzuki, *Penelitian Hukum* , Jakarta: Prenadamedia Group, 2016, Page 133-134.

3. Rally or demonstration is activity carried out by a person or more to express thoughts verbally, in writing, and so on demonstratively in the public.
4. A parade is a way to express an opinion by carrying out pageantry on a public road.
5. Public meeting is an open meeting conducted in order to convey an opinion with a certain theme.
6. Free pulpit is activity to convey opinions before the public which is conducted freely, openly without a certain theme.

Article 2

1) Every citizen, individually or in group, is free to express an opinion as the realization of the right and responsibility to have democracy in the life to a community, to have a nation, and to have a state.
2) The expression of opinions in the public is carried out in accordance with the laws and regulations.

Explanations:

Paragraph (2)

What is meant by "Expression of an opinion in the public" means to express an opinion verbally, in writing and so on. "The expression of an opinion verbally" among other things are: speech, dialogue, and discussion. "The expression of an opinion in writing" among other things are: petition, picture, pamphlet, poster, brochure, circular, and banner.

As to the meaning of "and so on" among other things are attitude, silent and hunger strike.

Article 5

The citizen who expresses the opinion in the public has the right:

a. To express an thought freely;
b. To get legal protection.

Explanation of Letter a: What is meant by "to express thought freely" is to express an opinion, view, will, or feeling free from physical or psychic pressure, or limitation which is in contravention of the purpose as specified in the Article 4 of this law.

Explanation of Letter b: The phrase of "to get legal protection" is including therein the guarantee of safety.

Article 6

The citizen who express an opinion in the public has the following obligation and responsibility:

a. To respect the rights and obligations of other people;
b. To respect moral regulation which is known publicly;
c. To comply with the existing laws and regulation;
d. To maintain and respect the security and public rule and order; and to keep the integrity, union and unity of a nation.

Explanations

Letter a: What is meant by "to respect the rights and freedom of other people" is to participate to keep and maintain the right and freedom of other people to live securely, good orderly and peacefully.

Letter b: What is meant by "to respect moral regulations which are acknowledged by the public" is to pay careful attention to religion norms, moral conduct, and politeness in the community life.

Letter d: What is meant by "to keep and respect the security and public rule and order" is an act that may prevent the rise of danger to the public welfare both concerning people, goods and health.

Letter e: What is meant by "to keep the integrity, union and unity of a nation" is an act which may prevent the rise of hostility, hatred or insult to a tribe, religion, race and among groups in the community.

2. The implementation of the Right of Freedom to Express an Opinion in Indonesia.

The freedom to have an opinion in the public both verbally and in writing and the freedom to have an organization constitute a right of every citizen which must be acknowledged, guaranteed and fulfilled by the state. Indonesia as a democratic legal state, where the people who has sovereignty has regulated the guarantee to the freedom to have a union and to have gathering and freedom to express an opinion both verbally and in writing in the 1945 Constitution and Law Number 39 Year 1999 and the Law Number 9 Year 1998 regarding the Freedom to Express an Opinion in the Public regarding the Freedom to Express an Opinion in the Public. The Article 28 of the 1945 Constitution specifies that the freedom to have a union and to have a gathering, to express thoughts both verbally and in writing and so on are stipulated by the law. The Article 1 paragraph (1) of the Law Number 9 Year 1998 regarding the Freedom to Express an Opinion in the Public, mentions that the freedom to express thoughts is the right of every citizen to convey thoughts verbally, in writing and so on freely and with responsibility in accordance with the existing laws and regulations. The conditions are adopted to the protection of human rights which are regulated in the Article 19 of the Universal Declaration of Human Rights.

The state which states itself as a legal state and democracy may be measured from the existence of the upholding and fulfillment to the law and Human

Rights in the environment to have a nation and to have a state. Nowadays all countries declare themselves as legal states and democracy. Only their system which is different. Each legal system has difference, but basically it has the same ideals namely the implementation of a democratic state and highly respect the law. Between a legal state and the human rights, it cannot be separated from one to another, this matter is related to the characteristics of a legal state itself, among other things the existence of protection to the human rights, if in a legal state the human rights are not protected, the state is not a legal state but a dictator state with a very authoritarian government.

To John Dewey, the heart of the democracy is a condition where the human choice (freedom) constitutes something principal, although the democratic government is built above the principles of freedom and equality, however it is not limited only to such matter, the democracy is related to human problems universally, which constitutes more a political concept to empower the whole force of the community for the interest of universal humanity.[11]

The freedom to have an opinion or independence to have an opinion constitute one of the human rights namely the rights to have an opinion and to express an opinion. The Human Rights constitute the category of a fundamental right. A right which is available in the first generation in the history and development of human rights, namely it is classified in the politic and civil right. It is called fundamental because far before the people generate a state organization, the people is already given the most essential right and freedom.[12]

The freedom to express an opinion has several functions. This constitutes one of the forms of implementing the Human Rights. With the giving of right to express an opinion in the community means one of the Human Rights is already acknowledged, guaranteed and fulfilled. The freedom to express an opinion also functions as one of the forms of the implementation of the democracy. In the 1945 Constitution of the Unitary State of the Republic of Indonesia, the Article 1 Paragraph 2 it mentions that the highest sovereignty is in the hands of the people. Therefore the implementation of a democratic legal state is not separated from the channeling of the opinion of the people through the government and representative institution. The existence of freedom to express an opinion makes the implementation of people' supervision to the government becomes easier.

The people can use the channel of the people's representation and mass media to express an objection, recommendation, and critics for the implementation of a state. It is expected that with the supervision by the people, the government will tend to have a more careful attitude and try as best as they can in the implementation of its duty.

In the congress of year 1965, the International Commission of Jurist stipulated the elements of the existing Rule of Law as follows:(1) Constitutional Protection; (2) Free and unbiased court of justice; (3) Free general election; (4) Freedom to express thoughts and to have a union; (5) Duty of opposition.[13]

From the aforesaid description, it appears that the function of freedom to express thoughts is very important. Sometimes, the expressing of the thoughts may also bring a split or break-up in case of not complying with the rule in expressing the opinion. In view of this matter, the Law No. 9 Year 1998 regarding the Freedom to Express Thoughts in the Public regulates on the right and obligation of a citizen in expressing the thoughts in the public. In this law, it sets forth also the forms and procedure of expressing thoughts in the public. The form of expressing the thoughts also varies, namely a rally, parade, public meeting, parade, and free pulpit.

3. Human Basic Obligation

Apart from the human rights, it is a basic obligation of the human being namely a set of obligations which if it is not carried out, it will not enable for the implementation and upholding of the human rights (Article 1 paragraph 2 of the Law 39 Year 1999).

The human basic obligation is set forth in the Law Number 39 Year 1999, namely:

Article 67

Everybody who is in the territory of the state of the Republic of Indonesia is obliged to comply with the laws and regulations, unwritten law, and international law regarding human rights which have been accepted by the state of the Republic of Indonesia.

[11] Bahder Johan Nasution, Op clt, p59

[12] https://ekasandy.wordpress.com/2012/01/18/kebebasan-berpendapat-berdasar-atas-undang-undang-nomor-9-tahun-1998-tentang-kebebasan-mengemukakan-pendapat-di-muka-umum-ditinjau-dari-perspektif-hak-asasi-manusia/

[13] Tundjung Herning Sitabuana, Op Clt, p46

Article 69

(1) Everybody is under the obligation to respect human rights of other people, morale, ethics, and law and order to have a life to have a community, to have a nation, and to have a state.

(2) Every human rights of a person creates a basic obligation and responsibility to respect mutually the human rights of other people and to become the duty of the government to respect, protect, uphold, and improve it.

Article 70

In implementing his right and obligation, everybody is under the obligation to be subject to the limitation stipulated by the Law with the purpose to guarantee the acknowledgement and respect to the right and freedom of other people and to fulfill a fair claim in accordance with the consideration of morale, security, and general rule and order in a democratic community.

Therefore the Article 3 of the Law No. 9 Year 1998 specifies 5 principles of freedom to express thoughts in the public, 3 of them are as follows:

1. **Principle of Balance between the Right and Obligation**

   The citizen who express thoughts in the public has the right to express thoughts freely and acquire legal protection (Article 5 of the Law No. 9 Year 1998). But the citizen is also under the obligation and responsible to respect the rights and freedom of other people, respect moral regulations which are publicly acknowledged, comply with the existing laws and regulations, maintain and respect the security and public rule and order, and maintain the integrity, union and unity of a nation. In order not to create problems, the expression of the opinions in the public must be in balance between the right and obligation.

2. **Principles of Benefit**

   Therefore, in expressing the opinions, the opinions must be based on our wish to have benefit.

   In line with the function, the legal signals must have autonomous, responsive characteristics and reduce or leave behind the character which is repressive in nature (to oppress). By holding firmly to the principles, therefore the Law No. 9 Year 1998 which constitutes regulative laws and regulations, in one side it protects the right of a citizen and on the other side it may prevent pressure, both physically and psychically in the upholding of the law.

Indonesia thinks that all the components of its people in the case of expressing the opinion so as to realize a favorable climate for the development of the participation and creativity of every citizen.[14]

In order not to create a conflict of freedom to express thoughts with the right of freedom of other people, therefore it sets forth the Article 6 of the Law No. 9 Year 1998 which emphasizes that that the citizen who expresses the opinion in the public is under the obligation and responsible:

a. To respect the rights and freedom of other people;
b. To respect publicly acknowledged morale rules;
c. To comply with the law and the existing laws and regulations;
d. To maintain and respect the security and public rule and order; and maintain the integrity and unity of a nation.

Explanations of Letter a: What is meant by "to respect the rights and freedom of other people" is to participate to keep and maintain the right and freedom of other people to live safety, orderly, and peacefully.

Explanations of Letter b: What is meant by "to respect publicly acknowledged morale rules" is to regard religions norms, moral conduct, and politeness in the life to have a community.

Explanations of Letter d: What is meant by "to maintain and respect the security and public rule and order"

Explanations of Letter e: What is meant by "maintain the integrity and unity of a nation" is an act which may prevent the rise of hostility, hatred or insult towards the tribe, religion, race, and among groups in the community.

There are three forms of freedom namely existent freedom as a form of our capability to decide our own action, secondly is the social freedom as a form of freedom which we accept from other people, thirdly is interrogative freedom in the form of responsibility in the human being before or after taking an action as a form of its actual and intellectual freedom. Moreover in the state system, where everybody is free in balance with the freedom of other people.[15]

Related to the aforesaid matter, the implementation of freedom to express an opinion in the public as the human rights must be responsible and under the obligation to respect the law, rights and

[14] https://guruppkn.com/asas-kemerdekaan-mengemukakan-pendapat

[15] Muhammad Erwin, *Filsafat Hukum*, Jakarta, PT RajaGrafindo Persada, 2016, p343

freedom of other people to avoid the implementation of the human rights which violates the human rights of other people, because if this matter is not implemented, it does not enable to implement and uphold the human rights.

F. CONCLUSION

Freedom to express opinions is the human rights of everybody without exception, to justify the thoughts and opinions of a person is only due to having a different opinion is an action to violate the human rights, not democratic and authoritarian.

Everybody is free to express opinions in the public both verbally and in writing through printing as well as electronic media by observing public interest and the national interest in accordance with the universal declaration of HUMAN RIGHTS year 1948, 1945 Constitution, Law No. 9 year 1998 and Law No. 39 Year 1999.

In the joint living reality a conflict often happens between the right of freedom to express opinions of a person and the right of freedom of other people, so that to avoid such matter not to happen, everybody who expresses thoughts in the public is under the obligation to respect the right of freedom of other people and to comply with the existing laws and regulations.

G. REFERENCES

Books:

Bahder, Johan Nasution. 2014. *Negara Hukum dan Hak Asasi Manusia*. Bandung: Mandar Maju.

Erwin, Muhammad. 2016. *Filsafat Hukum*, Jakarta, PT RajaGrafindo Persada.

Hawasi. 2003. *Immanuel Kant Langit berbintang di Atasku Hukum Moral di Batinku*. Jakarta: Poliyama.

HS, Salim and Erlies Septiana Nurbani. 2017. *Penerapan Teori Hukum*. Jakarta: PT RajaGrafindo Persada.

Marzuki, Peter Mahmud. 2016. *Penelitian Hukum*, Jakarta: Prenadamedia Group.

Praja, Juhaya S. 2014. *Teori Hukum dan Aplikasinya*, Bandung, CV Pustaka Setia.

Sitabuana, Tundjung Herning. 2017. *Berhukum di Indonesia*. Jakarta: Konstitusi Press.

Soekanto, Soerjono and Sri Mamudji. 2015. *Peneltian Hukum Normatif*, Jakarta: PT RajaGrafindo Persada.

Regulations:

Undang-Undang Dasar 1945.

Undang-Undang Nomor 39 Tahun 1999 tentang Hak Asasi Manusia.

Undang-Undang Nomor 9 Tahun 1998 tentang Kemerdakaan Menyampaikan Pendapat Dimuka Umum.

Internet:

Eka Sandy available online *https://ekasandy.wordpress.com/2012/01/18/kebebasan-berpendapat-berdasar-atas-undang-undang-nomor-9-tahun-1998-tentang-kebebasan-mengemukakan-pendapat-di-muka-umum-ditinjau-dari-perspektif-hak-asasi-manusia/*

Ranti Fatya Utami available online *https://guruppkn.com/asas-kemerdekaan-mengemukakan-pendapat*

LEGAL CERTAINTY OF PEACE AGREEMENT (*ACTA VAN DADING*) MADE IN A NOTARY

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ABSTRACT

The deed issued by a notary public is strong evidence in a case process. Duties and authority of Notaries regulated in Article 15 of Law Number 2 of 2014 concerning Amendment to Law Number 30 of 2004 concerning Notary Position that is to make an authentic deed regarding all deeds, agreements, and provisions required by laws and / or regulations that is desired by the parties concerned to be stated in an authentic deed, guarantee the certainty of the date of making the deed, keep the deed, give a grosse, copy and quote of the deeds all of which as long as the making of the deeds are not also assigned or excluded to other officials or others stipulated by the Act -invite. Thus, the deed which is part of the duties and authority of other appointed officials, a notary can make it. One of the authorities of the Notary is to make a peace act or a *Dading*. Peace is an agreement between the two parties whose contents are to surrender, promise or hold an item. A peace agreement that results from a dispute resolution process must be written in a form that aims to prevent the re-emergence of the same dispute in the future.

Keywords: Deed, Law, Notary and Deed of Peace

A. INTRODUCTION

Letters as written evidence are divided into two, namely letters that are deeds and letters that are not deeds. While the deed is further divided into authentic deed and private deed. Making this authentic deed is the main work as well as the authority of the Notary.[1] Notarial Deed should be carried out at the Notary office except for the making of certain deeds, if this is violated, the deed made by or before the Notary is not authentic and only has the power as the private deed.[2]

Duties and authorities of the Notary as stated in Article 1 paragraph (1) of Law Number 2 of 2014 concerning Amendment to Law Number 30 of 2004 concerning Notary Position is to Make an authentic deed regarding all deeds, agreements, and provisions required by legislation and / or as desired by the parties concerned, to be stated in an authentic deed, guarantee certainty of the date of making the deed, keep the deed, give a grosse, copy and quote the deed, all as long as the making of the deed is not assigned or excluded to the official or other person specified by law.

An authentic deed as a deed drawn up by a Notary is theoretically a letter or deed that was intentionally deliberately formally made for proof in the future if a dispute occurs. It is officially said because it was not made privately.[3] Whereas dogmatically, according to article 1868 the Civil Code reads: "An authentic deed is a deed made in the form determined by the Act by or in the presence of a public official authorized for that at the place the deed was made." An authentic deed is explained that it is a deed in the form determined by the Act (Welke in de wetterlijke vorm is verleden) and made by or in the presence of public employees (*door of ten overstaan van openbare ambtenaren*) in power for that (*Daartoe Bevoegd*) where the deed was made. This written peace agreement made before a notary public can be used as evidence for the parties to be presented before a judge (the court) because the content of the peace is equated with the decision of a judge who has permanent legal force.

B. PROBLEM STATEMENTS

Based on the explanation above, there are several issues which will be elaborated further in relation to the discussion of the Deed of Peace (*Acta van dading*) made before the Notary Public as follows:

1. What is the position of the Deed of Peace (*Acta van dading*) made before a Notary with the Deed of Peace (*Acta van dading*) declared before the trial (before the judge)?

[1] Mertokusumo, Sudikno , Hukum Acara Perdata Indonesia, Yogyakarta: Liberty, 1998

[2] *Ibid.*page 149

[3] *Ibid.*

2. How is the execution of the Deed of Peace (*Acta van dading*) made before a Notary?

C. LITERATURE REVIEW

This writing emphasizes the application of a theoretical system that is normative by referring to the applicable laws and regulations such as the legislation concerning the Notary Position, namely Law Number 2 of 2014, Amendment to Law Number 30 of 2004, Law Book of Law Civil Code, *Herzien Inlandsch Reglement*, and other laws or regulations relating to peace both litigation and non-litigation. And also do not forget to refer to the basis of legal theories that have been put forward by legal experts such as Gustav Radbruch who gave birth to the concept of legal certainty and Fitzgerald's concept which gave birth to the concept of legal protection.

D. RESEARCH METHODS

The research method used is the Normative Juridical Approach method, which is a legal method examining library materials or secondary data. Research used in this method also emphasizes legal norms, as well as trying to examine the rules of law that apply in society.

E. ANALYSIS AND DISCUSSION

1. Position of the Deed of Peace (Acta van dading) made before a Notary with the Deed of Peace (Acta van dading) declared before the trial (before the judge)

Deed is a letter as evidence that is signed, containing the event which is the basis of a right or engagement, which was made deliberately for the purpose of proof. So to be classified in terms of a deed the letter must be signed. The necessity of signing a letter to be called a deed originates from Article 1869 of the Civil Code which reads "A deed that cannot be treated as an authentic deed, either because it is not authorized or incompetent of the general official concerned or due to a defect in its form, has power as writing privately when signed by the parties."[4]

Law Number 2 of 2014 concerning Amendment to Law Number 30 of 2004 concerning the Position of Notary has mandated the Notary as an authentic deed maker who inherently authorizes his authority. Furthermore, it states that the Notary Deed has the strength as the strongest and most complete written evidence, unless the parties concerned can prove the opposite satisfactorily before a court hearing. Regarding the power of a Notarial Deed as evidence, it can generally be said that the Notarial Deed is divided into three types of proofing powers, namely:

1. The power of proof is outward (*uitwendige bewijskracht*). *Uitwendige bewijskracht* is a strength of proof in terms of the ability of the deed itself to prove to be an authentic deed. This capability based on Article 1875 of the Civil Code that cannot be granted to a deed made under the hand (privately). A deed made under the hand is valid, that is, as the party's true origin, to whom the deed is used, if the person who signs it recognizes the truth of the signature if it is legally recognized by the person concerned.While authentic deeds prove their validity automatically.
2. Strength of formal proof (*fornale bewijskracht*)
   Fornale bewijskracht is the certainty that an event or fact in the deed is actually carried out by a Notary or explained by the parties who come before. This means that the official concerned has stated in writing as stated in the deed as being carried out and witnessed in his position. In a formal sense, as far as the official deed is concerned, the deed proves the truth of what is witnessed, that is, seen, heard, and also carried out by the Notary himself as a public official in carrying out his position. In the case of a deed under the hand (private deed), this only includes the fact that the statement was given, if the signature contained in the deed under the hand is recognized by the person who signed it or is considered as having been recognized according to the law. In the formal sense, the truth or certainty of the date of the authentic deed is ensured, as long as it is related to the deed of the parties that they explain as described in the deed, while the truth of the statements themselves is only certain between the parties themselves.The authentic deed applies the power of formal proof and applies to everyone, namely what exists and is above their 24 signatures. However, there are exceptions or denials of the strength of this formal evidence. First, the denying party can immediately not acknowledge that the signature affixed in the deed is their signature. The deniers can say that the signature that appears to be affixed by them is actually affixed by someone else and therefore in this case what is known as a falsification of the signature.Second, the denying

[4] Sudikno Mertokusumo, Hukum Acara Perdata Indonesia, Yogyakarta: Liberty, 1998, hlm 139

party can state that the Notary in making the deed made a mistake, but does not deny the signature that is in the deed. This means that the deniers do not question the formality of the deed but instead question the substance of the deed. Thus what is being questioned is a statement from an incorrect Notary (*intelectuele valsheid*).The denying party does not accuse there is falsification but alleges an error which may not be intentional so that the accusation is not on the strength of formal proof but the strength of material proof of the notary's statement. In proving this, according to the law, all matters within the formal legal corridors of evidence can be used.

3. The strength of proof of material (*materiele bewijskracht*). *Materiele bewijskracht* is the certainty that what is stated in the deed is a valid proof against those who make the deed or those who get the rights and applies to the public unless there is evidence to the contrary. This means that not only is the reality proven by an authentic deed, but the contents of the deed are considered to be proven as true to every person, who requests that the deed be made as a proof against him *(preuve preconstituee).*Thus the authentic deed concerning the contents contained is valid as true, has certainty as true, then it becomes legally proven among the parties; therefore if used before the court is sufficient and that the judge is not allowed to ask for other proof of evidence in addition to the authentic deed. Judges are bound by authentic evidence because if it is not the case then it can be questioned what is the use of the law appointing officials assigned to make an authentic deed as evidence if the judge can simply override the deed made before the official. Authentic deeds can be divided into deeds made by officials (*acte ambtelijk, procesverbaal acte, verbaalakte*) and deeds made before the parties (*partijakte). Acte ambtelijk* is a deed made by an official who is given the authority to do so. The official explained what he saw and what he did. The *acte ambtelijk* initiative originates from the official concerned and does not come from the person whose name is listed on the deed. Partijakte is a deed made before an official who is authorized to do so. Partijakte is made in the presence of officials at the request of the parties concerned. Regarding these two types of deeds, differences can be made in terms of their nature.In the legal certificate, this deed is still valid as a means of proof if there is one or more of those who have not signed it, provided the Notary mentions why the parties did not sign it. Whereas in partijakte such things will lead to other things. In Partijakte if one party does not sign the act, for example in a cooperation agreement, then it can be considered that the party does not approve the cooperation agreement unless not signing it is based on strong reasons, especially in the physical reason. This means that the deed was not signed because of reasons that could be interpreted that the party did not approve the agreement, such reasoning must be clearly stated by the Notary in the deed concerned.[5]

The object of the agreement is regulated in Article 1853 of the Civil Code. The objects of the peace agreement are:

1. Peace can be established regarding civil interests arising from a crime or violation. In this case, peace does not prevent the prosecutors from prosecuting the crime or offense concerned;
2. Every peace only concerns with the matter that is contained in it. Whereas the relinquishment of all rights and demands is related to the dispute that caused the peace. In Article 1858 paragraph (1) of the Civil Code, conciliation between the parties must be in written form. So it can be concluded that the written form of the peace agreement meant by the law is an authentic written form, which is made before a competent authority in this case is a notary.[6]

This written peace agreement made before a notary public can be used as evidence for the parties to be presented before a judge (the court) because the content of the peace is equated with the decision of a judge who has permanent legal force. Basically, the substance of peace can be done freely by the parties, but the law regulates various types of peace that cannot be carried out by the parties. Peace that is not allowed is:

1. Peace regarding the occurrence of an oversight regarding the person concerned or the subject matter;
2. Peace that has been carried out by means of fraud or coercion;
3. Peace regarding a mistake of sitting down a case about a void of rights, unless the parties have made a settlement about the cancellation with a firm statement;
4. Peace which is held on the basis of letters which are later declared to be false;

[5] Sudikno Mertokusumo, Op. Cit. hlm 149
[6] *Ibid.*, Pasal 1853.

5. Peace regarding a dispute that has ended with a decision of a judge who has obtained a definite legal force, but is not known by the parties or one of the parties. However, if an unknown decision is still appealed then the peace regarding the dispute concerned is valid;
6. Peace is only a matter of affairs, whereas from the letters found later it turns out that one of the parties is not entitled to it.[7]

Deed of Notary peace is an authentic deed which has three types of proof, namely the Power of Outward Proof, Formal Strength of Proof, Material Proof of Strength and in the end only becomes an ordinary deed that does not have an executing element and is not binding as a whole because other legal remedies can still be done in the future when a dispute occurs again.In contrast to the peace deed made in court which is based on the theory of legal certainty, the strength of the law inherent in the peace decision is regulated in article 1858 of the Civil Code and Article 130 paragraphs (1) and (2) HIR.There are 3 points related to the legal force inherent in the decision of the peace deed made in court, which are as follows: the strength is equal to the decision that has permanent legal force, has an executive power, the Peace Act Verdict is incomparable.

2. **Implementation of Deed of Peace (*Acta van dading*) made before the Notary**

According to Article 1862 of the Civil Code an agreement regarding a dispute has ended based on a court decision but if it is not realized by the parties or one of them results in the cancellation of the agreement, therefore the establishment of a peace deed originating from such agreement can be submitted for cancellation.This is in line with a peace deed made before a notary to resolve disputes between the parties but does not have strong legal certainty in the absence of its executorial element.

The deed of peace made by the parties to settle the dispute is a general agreement that is binding on book III of the Civil Code on obligatory which is not bound by Article 130 H.I.R Jo. PERMA Number 1 Year 2008. Article 130 HIR recognizes and requires the peaceful resolution of disputes which reads:

"If on the appointed day both parties come then the district court with the help of the chairman tries to reconcile them"[8]

The peace deed made in accordance with Article 130 HIR paragraph (3) of the decision of the peace deed cannot be compared in other words to the decision covered by appeal and cassation legal efforts. This was also confirmed in the Supreme Court Decree number 1038 K / Sip / 1973 that an appeal against a peace decision would not be possible.

Based on Article 154 RBG / 130 HIR the decision of peace is the highest decision and therefore there is no appeal and highest court against it. The deed of peace is automatically attached to the executive power as befits a court decision with permanent legal force. The deed of peace made by the parties by putting aside the contents of the court's decision is not included in the category of the peace deed according to Article 130 HIR even though the legal conditions of the agreement according to the provisions of Article 1320 of the Civil Code are fulfilled. Such matter resulted in the deed of peace made by the parties that did not have permanent legal force, so that it was still possible to be able to carry out other legal remedies. The deed of peace drawn up by the parties to the dispute by failing to comply with the provisions of Article 130 of the HIR can be requested for cancellation:

> *"The parties that first settled the agreement without the intervention of the judges then the peace agreement was asked to the judge to pour in the form of a peace certificate. Thus, it is clear from the peace agreed by the parties to the litigation, the intervention of the judges is very small, only in the form of making a peace deed which is handed down as a court ruling which contains the punishment of the parties to obey and fulfill the agreement of the peace. "*[9]

Based on this, the deed of peace was made by the parties to the dispute without asking the judge so that the peace made by the parties was poured into the deed made by the judge. This is because if the deed of peace is not made through the Panel of Judges, the deed is only valid as an ordinary deed which is only binding on the parties and has no executive power. If a dispute arises between the parties to a dispute regarding the contents of the deed of peace made by another official or notary public, the parties will request the cancellation of the peace certificate and resume legal appeals or the highest court, or Judicial review.

[7] Salim, Hukum Kontrak, Teori dan Teknis Penyusunan Kontrak, (Jakarta : Sinar Grafika, 2006), hal. 94
[8] Pasal 130 H.I.R Jo. PERMA Nomor 1 Tahun 2008.
[9] Pasal 130 HIR.

Therefore, the deed of agreement made by a notary in essence can still be replaced by a peace agreement deed decided by the Court because it does not have binding legal certainty because it does not contain an executing element. Although the parties must fulfill the deedit is made before the notary, the deed is a normal agreement so that it can be possible to do another execution with the existence of a deed of peace from the court, so other legal efforts may not be possible because it is final.

F. CONCLUSION

According to a theoretical study, the deed of peace (*Acta van dading*) made before a Notary with another deed (*Acta van dading*) declared before a court (before a judge) has a difference in its legal position although theoretically the authority in making an authentic deed is attributive authority which is given by the state to the Notary Public includes the deed of peace (*Acta van dading*).The deed of peace (*Acta van dading*) stated before the trial (before the judge) has binding legal certainty because it is final and has executive rights. In this matter, it needs to be reviewed in making the substance of legislation related to products produced by a Notary who is given attributive authority by the State as the maker of the deed including the deed of peace so that the deed has the same position as the deed of peace (*Acta van dading*) stated before judges so that they have binding and final legal force and have executive rights.

G. REFERENCES

Books

Sudikno Mertokusumo, Hukum Acara Perdata Indonesia, Yogyakarta: Liberty, 1998

Salim, Hukum Kontrak, Teori dan Teknis Penyusunan Kontrak, (Jakarta : Sinar Grafika, 2006)

Laws and Regulations

Law Number 2 of 2014 Amendment to Law Number 30 of 2004 concerning Notary Position

Code of Civil law HIR PERMA Number 1 of 2008

JURIDICAL ASPECTS OF MEDICAL DISPUTE SETTELEMENT IN MEDICINE MALPRACTICAL CASE

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ABSTRACT

Dispute resolution that is considered ideal for the parties is a settlement that involves the parties directly so as to enable an open dialogue, thus a joint decision is most likely to be achieved. This study aims to find out how the legal arrangements for Medical Dispute Settlement in Medical Malpractice Cases and how the implementation of Legal Protection Against Medical Dispute Settlement in Medical Malpractice Cases. The research method used in this study is normative legal research with the approach of legislation (statue approach). and historical approach. The result of the study which can be concluded include: 1. Legal Regulations Against Medical Dispute Settlement in Medical Malpractice Cases can be divided into 3 (three) forms of regulation. First, Regulation of Civil Law Against Medical Disputes in Medical Malpractice Cases where medical disputes in civil law occur because of two possibilities, namely achievement (Article 1239 of Civil Code). The basis for medical accountability is an act against the law (onrechtmatige daad) Article 58 of Law Number 36 of 2009 concering Health. Second is Criminal Law Arrangement Against Medical Disputes in the Case of Medical Malpractice which is contained in the Criminal Code, Law Number 23 of 1992 concering Health in conjunction with Law Number 26 of 2009 concering Health and Law Number 29 of 2004 concerning Medical Practises After the Court Decision Constitution. Medical Dispute Settlement in Medical Malpractice Cases is carried out through two lines, namely ligigation and on litigation. 2. Implementation of Legal Protection Against Medical Dispute Settlement in Malpractice Cases of Medicine Regarding Patient Protection is found in Article 56, Article 57, Article 58. To reduce malpractice, it can also be seen from the implementation of the formation of the Honorary Assembly of Indonesian Medical Ethics. This Assembly will determine cases that occur are ethical violations or violations of law. Besides that, a Medical Dispute Settlement Body (BPSM) was also formed. This Medical Dispute Settlement Institution is an institution that is formed specifically to resolve medical disputes that arise. The trial proceduresand mehanisms that are used are fast, precise and do not require expensive fees.

Keywords: Juridal Aspects, Settlement, Medical Disputes, Medical Malpractice

A. INTRODUCTION

The medical profession and medical personnel are a very noble and respected profession in the eyes of the public. A doctor before carrying out his medical practice or medical service has gone through a long education and training, because of this profession many life expectancy or healing depends on patients and their families who are suffering from illness. The doctor or health worker as an ordinary human being is full of risks, because the possibility of a disabled patient even dying after being treated by a doctor can occur, even though the doctor has carried out his duties in accordance with the *Standard Operating Procedure*(SOP) and or good medical service standards. This kind of situation should be called medical risk, and this risk is sometimes interpreted by parties outside the medical profession as *medical malpractice.*

Legally the case can be submitted to a criminal or civil court as a malpractice for verification based on the standards of the medical profession. A doctor may be subject to Article 359, 360, and 361 of the Indonesian Criminal Code if the malpractice is carried out with extreme caution (cupla lata), serious and careless mistakes.

People who suffer from medical malpractice need medical dispute resolution in the case of medical malpractice. To create a form of legal certainty and guarantee health care services and to accommodate these needs in addition to the Criminal Code the government has issued a medical practice law, namely Law Number 23 of 1992 Jo Law Number 36 of 2009 concerning Health and Law Number 29 of 2004 concerning Doctor Practices.

B. PROBLEM STATEMENT

Based on the background described above, the writer formulates the problem as follows:

1. What is the legal arrangement for the Settlement of Medical Disputes in Cases of Medical Malpractice?
2. How is the implementation of Legal Protection Against Medical Dispute Resolution in Medical Malpractice Cases?

C. LITERATURE REVIEW

1. Medical Disputes in Law

Medical disputes in law are also known as malpractice. Actually, from the origin of the word malpractice is not only aimed at the health profession but also the profession in general, but after generally starting to be used abroad, the term is now associated or directed at the health profession.

The understanding of practice has not yet been uniform. With the malpractice not yet regulated in the existing legislation (lacks legal certainty), the handling and resolution of the malpractice problem also becomes uncertain. The problem is compounded by the absence of (and almost impossible) standardization of health professional service standards.

Thus the most appropriate and right to determine the denial of service standards for health professionals is the Medical Committee at the hospital in question. The current situation, the health corps sentiments that protect each other among natural professionals make it difficult to send objective efforts, so that cases of malpractice only enter the "ice box" and are not handled anymore.

2. Overview of Practice Malls

The types of practice malls include:

a. Ethical Malpractice

What is meant by ethical malpractice is that doctors perform actions that are contrary to medical ethics. Whereas medical ethics as outlined in KODEKI is a set of ethical standards, principles, rules or norms that apply to doctors.

Side effects or negative impacts of advances in medical technology include:

- Contact or communication between doctor and patient decreases
- Ethics is contaminated with business interests
- Prices for medical services are getting higher, etc.

Concrete examples of the misuse of advances in medical technology that are ethical malpractices include:

- In the diagnostic field
- Laboratory tests carried out on patients are sometimes not necessary if the doctor wants to examine more thoroughly.
- In the field of therapy

Various companies that offer antibiotics to doctors with the promise of convenience that will be obtained by doctors if they want to use these drugs, sometimes can also affect the consideration of doctors in providing therapy to patients.

b. Juridical malpractice

The term malpractice is always identified with the medical profession even though this malpractice is intended for a profession that is doing wrong (wrong doing) in carrying out his profession.

The definition of malpractice is not found in legislation in Indonesia such as the Law on Medical Practice. Health Act, Hospital Law or Consumer Protection Law so that the definition of malpractice can be taken based on legal experts as seen from several definitions of malpractice below:

- Coughlin's Dictionary of Law Malpractice is professional misconduct on the part of professional person, such a physician engineer, lawyer, accountant, dentist, veterinarian. Malpractice maybe a result of ignore, neglect, or lack of skill or fidelity in the professional duties; intentional wrong doing; or unethical practice.
- Stedman's Medical Dictionary Malpractice is mistreadment of disease or injury through ignorance of criminal intent
- Black's Law Dictionary Malpractice is any professional misconduct, unreasonable lack of skill. This term is usually applied to such conduct by doctors, lawyer, and accountants. Failure of onerendering professional services to exercise that degree of skill and learning commonly applied under all the circumtance in the community by the average prudent reputable member of the profession with the result of injury, lost, or damage to the resipient of those entittled to rely upon them. It is any professional misconduct, unreannable lack of skill or fidelity in professional or judiciary

duties, evil practice or legal or immroral conduct.

- The Oxford Illustrated Dictionary, ed, 1975 Malpractice is wrong doing; (law) improper treatment of patient by medical attendent; illegal action for one's own benefit while in position of trust.

In the Malpractice definition there are two terms that must be distinguished, namely error and neglect:

1. Errors (dolos, intentional, vorstz, willens en wetens hadelen)
    a. In the broadest sense All medical actions or related to the medical scope which are prohibited directly by law, such as: abortion (abortion provokatus criminalinal), euthanasia, falsification of medical documents, granting of sick or health certificate , does not provide emergency help.
    b. In the sense that the actions taken are based on an element of intent that can be seen from the actions that are directed, with known results, the existence of legal rules that prohibit it and sometimes based on motivational pay.
2. Negligence (culpa, negligence)
    a. In a broad sense the doctor's work is in accordance with professional standards and which is allowed by law, but sometimes working under standards is not careful and does not carry out obligations to fulfill the rights of patients, such as giving informed consent, keeping confidential office, not giving referrals, and others.
    b. In a narrow sense All these actions have no motive and no intentional element and are solely due to the negligence or negligence of a doctor inadvertently or recklessly in carrying out medical actions that actually result unexpectedly, such as being left behind during the operation.

3. Overview of Patients and Doctors

a. Patient understanding

Article 1 paragraph (10) of Law Number 29 Year 2004 concerning Medical Practice states: "Patients are all people who consult their health problems to obtain the necessary health services either directly or indirectly to the doctor or dentist".

Article 1 paragraph (3) of Act No.44 of 2009 concerning Hospitals is painful:

"Patients are all people who consult their health problems to obtain the necessary health services, both directly and indirectly at the hospital."

Obligations of patients according to Law No.29 of 2004 Medical Practices in Article 53 states as follows:

1) Provide complete and honest information about his health problems.
2) Obey the advice and instructions of your doctor or dentist
3) Comply with the applicable provisions in health care facilities, and provide compensation for services received.

b. Doctor's Definition

Astuti defines a doctor as a person who has the proper authority and permission to conduct health services, specifically examining and treating diseases and carried out according to law in health services.

Article 50 of Law No. 29 of 2004 concerning medical practice mentions the right of doctors in carrying out their professional duties. 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 operational procedure standards.
2. Conduct medical practice in accordance with professional standards and operational procedure standards
3. Obtain honest and complete information from patients or their families.
4. Receive service fees.

In relation to doctors' obligations to patients, the Indonesian Medical Ethics Code (KODEKI) states:

Article 10: Every doctor must be sincere in using all his knowledge and skills for the benefit. In the event that he is unable to carry out an examination or treatment then upon the patient's consent , he must refer the patient to a doctor who has expertise in thedisease .

Article 11: Every doctor must provide an opportunity for the patient to always be able to deal with his family member and counselor in court and / or in other matters.

Article 12: Every doctor must keep everything he knows about a patient, even after the patient's death.
Article 13: Every doctor is obliged to carry out emergency assistance as a humanitarian task , except if he is sure there are others who are willing and able to provide it.

D. RESEARCH METHODS

A scientific method can be trusted arranged by using an appropriate method. The method is a way of working or working procedures to be able to understand the objects that are the target of the relevant science. Methods are guidelines, the way a scientist learns and understands the environments that are faced. In this study the authors used the following methods:

a. Types of research

Normative law research. Where normative legal research refers to the legal norms contained in legislation and court decisions and legal norms that exist in society. [94] In addition, by looking at synchronizing a rule with other rules in a hierarchical manner. So that normative legal research focuses on an inventory of positive law, principles and doctrines of law, legal discovery in concreto cases, systematic law, synchronization levels, comparative law and legal history.

Based on the explanation above, the author decides to use the method of normative legal research to examine and write the discussion of this dissertation as a normative research method in research efforts and the writing of this dissertation is accompanied by the suitability of the theory with the research methods needed by the author.

b. Approach Method

In legal research there are several approaches, with the approach the researcher will get information from various aspects of the issue being tried to find the answer. [96] A normative research certainly must use a statutory approach, because what will be examined are various legal rules which are the focus as well as the central theme of a study.

The approach method in this research is the statutory approach (state aproach). and historical approach.

c. Data Analyst

The data that has been collected from library research is then processed in a systematic, logical and juridical way qualitatively classified, which is a method of literature study results in the form of describing problems using theories and describing them in sentences and summarized using deductive methods. that is a way of drawing a conclusion from general to specific propositions.

E. ANALYSIS AND DISCUSSION

a) **Civil Code Regulations Against Medical Disputes in Medical Malpractice Cases**

In the perspective of civil law, claims for alleged medical negligence can use the following articles:

- Default, using article 1239 of the Civil Code. This article can be used if the legal relationship formed between the doctor-patient is a result-oriented agreement (resultaat verbintenis).
- Negligence using Article 1365 of the Civil Code as follows: "Everyone is responsible not only for losses caused by his actions, but also for losses due to negligence or carelessness".

In this case what is applicable is Article 58 of Law Number 36 Year 2009 Concerning Health, 1365 Civil Code (Article 1401 BW) regarding the provisions of unlawful acts. To be able to file a lawsuit based on acts that violate the law must be met 4 (four) conditions as mentioned in Article 1365 of the Civil Code, namely:

1. Patients must experience a loss;
2. There is a mistake or negligence (besides the individual, the hospital can also be responsible for the mistakes or omissions of its employees);
3. There is a causal relationship between loss and error;
4. That act is against the law

b) **Settlement of Medical Disputes in Cases of Medical Malpractice**

The legal system in Indonesia, one of which is a component of substantive law, including criminal law, civil law and administrative law does not recognize the building of "malpractice" law.

The term medical law was originally used as a translation of the Health Law used by the World Health Organization. Then Health Law is translated with health law, while the term medical law is then used as part of the health law

which was originally called medical law as a translation and medical law.

For this reason, special assessment is still needed to obtain a definition of terms and limitations of the term medical malpractice that is unique to Indonesia (if necessary so far), as a result of the thinking of the Indonesian people based on the nation's culture which can then be accepted as a legal culture (legal culture) in accordance with the national health system.

From this explanation, we can conclude that the problem of malpractice in Indonesia can be fulfilled through 2 channels, namely the litigation (judicial) and non-litigative (non-judicial) channels.

1. Settlement of Medical Disputes Through Non-Litigation Pathways (outside the Judiciary) Mediation disputes are regulated in Article 130 HIR, Article 154 RGB, and PERMA No.1 of 2008 concerning Mediation, which in Article 1 paragraph (7) defines mediation as a way of resolving disputes through a negotiation process to obtain the agreement of the parties with the assistance of the mediator. The presence of mediation in resolving medical disputes is very reasonable because not all medical dispute issues must be resolved by litigation in court. In addition, mediation can also be carried out by MKDKI (Indonesian Medical Disciplinary Honorary Council) as an institution that maintains the honor of doctors / dentists in carrying out medical scientific disciplines
2. Completing Medical Segketa through Litigation (Judicial) Pathway

His conviction is not enough if the person has committed an act that is against the law or is against the law. So even though his actions meet the formulation of offense in the law and are not justified, it does not yet meet the requirements for criminal conviction. For transfers, there is still a need for conditions, namely that the person who commits the act has an error or is guilty. In connection with this, the principle of "no criminal without fault" applies, the principle adopted by the Indonesian Criminal Code and other countries, would be contrary to the sense of justice if someone is convicted of a crime even though he is not guilty at all. A person cannot be held accountable (convicted) if he did not commit a criminal act, but even if he committed a criminal act, he cannot always be convicted.

To determine the upcoming formulation policy, the writer uses a comparative study including the Criminal Code, the 2008 Criminal Code Concept, Law Number 29 Year 2004 Post Constitutional Court Ruling.

About Causing death or injury due to negligence Article 592 2009 Criminal Code Concept of the 2008 Criminal Code Concept of the Criminal Code

- Article 592: Any person who due to negligence causes others injury resulting in illness or obstruction in carrying out their position, profession, or livelihood for a certain period of time, shall be sentenced to a maximum of 2 (two) years imprisonment or a maximum of category II fines.
- Article 359: Anyone whose negligence causes the death of another person is threatened with a maximum imprisonment of five years or a maximum sentence of one year.
- Article 593: If the criminal act referred to in Article 592 is carried out in carrying out a position or profession, then the penalty can be added by 1/3 (one third).
- Article 360: Anyone who for his negligence causes another person to be seriously injured, is threatened with a maximum imprisonment of five years or a maximum sentence of one year.

c) **Implementation of Legal Protection Against Medical Dispute Resolution in Medical Malpractice Cases**

Related to Patient Protection is found in the following articles. Article 56

1. Everyone has the right to accept or reject part or all of the relief measures that will be given to him after receiving and understanding information about these actions in full.
2. The right to accept and reject as referred to in paragraph 1 does not apply to:
    a. Disease sufferers whose diseases can be transmitted quickly to wider society;
    b. The state of someone who is unconscious; or
    c. Severe mental disorders.

3) Provisions regarding the right to accept or reject as referred to in paragraph 1 are regulated in accordance with statutory provisions.

Article 57

1) Everyone has the right to confidential personal health conditions that have been revealed to the health service provider.
2) Provisions regarding the right to confidential personal health conditions as referred to in paragraph 1 do not apply in cases of:
   a. Statutory order;
   b. Justice order;
   c. Permission in question;
   d. Community interest; or
   e. Interests of the person.

Regarding compensation, there are in: Article 58

1. Everyone has the right to claim compensation for a person, health worker, and / or health provider who causes loss due to errors or negligence in the health service 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 the disability of a person in an emergency.
3. Provisions regarding the procedure for filing a claim as referred to in paragraph 1 shall be regulated in accordance with the provisions of the legislation.

d) **Establishment of Medical Dispute Resolution Board (BPSM)**

One of the policies offered is a model of medical malpractice settlement in Indonesia in the future is a model of medical dispute resolution through the Medical Dispute Resolution Institute. This Medical Dispute Settlement Institution is an effort to solve specific medical dispute problems and is an answer to resolve medical disputes which has been felt unsatisfactory both by the public / patients when they have to litigate before a public court because the doctrine is difficult to prosecute and always conspires with IDI in order to protect colleagues.

It is important to bind the Medical Council in the future it can be expected to focus more on managing the medical education, both general and specialist. This institution has a trial procedure using one of the Alternative Dispute Resolution (ADR) forms, namely the Mini Trial Institute. Mini Trial is a new form of ADR and is very popular in the American business community. This form is considered as the most effective and efficient choice for resolving disputes. If the parties agree to seek a solution through a mini trial, the process of completing the mini trial model consists of 5 (five) steps quickly and simply as follows:

1. Mini trial agreement or called agreement to use mini trial, meaning that the parties agreed to submit the dispute through the mini trial institution;
2. Case preparation, or case preparation, is limited to a period of 1 to 2 months. The purpose of the preparation of the case gives the parties the opportunity to collect various documents deemed important to be submitted in connection with the dispute in question;
3. Hearing the information or information hearing, in this stage the process of opening a mini trial began in a closed meeting attended by the parties, the position of the advisor was not as a judge but acted as a neutral third party guiding the delivery of information;
4. The advisor gives his opinion, at this stage the parties must attend alone and not be accompanied by a lawyer. The contents of the opinion explain the strengths, vices and weaknesses of each party, and how it would be if the case was brought to court in litigation. Although the advisors opinion is not binding, either on the parties or court judges;
5. Discussing the settlement or discuss settlement, the parties held a meeting and was not attended by the advisor, because since he expressed his opinion, its role and function ended automatically. Whether or not the dispute settlement agreement has been reached is entirely left to the wishes and wishes of the parties concerned.

F. Conclusion

Based on the description of the results of research and discussion of the writing of this thesis can be drawn several conclusions as follows:

1. Legal Regulations Against Medical Dispute Resolution in Medical Malpractice Cases can be divided into 3 (three) forms of regulation. First, the Civil Code Relief Against Medical Disputes in Medical Malpractice Cases where medical disputes in

civil law occur because of two possibilities, namely the achievement of wan (Article 1239 Civil Code) and negligence (Article 1365 Civil Code). The basis for medical accountability is an act against the law (onrechtmatige daad) Article 58 of Law Number 36 Year 2009 Concerning Health. The second is the Criminal Law Regulations Against Medical Disputes in the Case of Medical Malpractice which is contained in the Criminal Code, Law Number 36 Year 2009 Concerning Health and Law Number 29 Year 2004 Concerning Medical Practices Post Constitutional Court Ruling. Settlement of Medical Disputes in Medical Malpractice Cases is carried out through two channels namely litigation and non-litigation.

2. Implementation of Legal Protection Against Medical Dispute Resolution in Medical Malpractice Cases Regarding Patient Protection is found in Article 56, Article 57, Article 58. To reduce the occurrence of malpractice also involved in the implementation of the formation of the Indonesian Medical Ethics Honorary Council. This Assembly will determine the cases that occur are ethical violations or violations of the law. Besides that, the Medical Dispute Settlement Body (BPSM) was formed. This Medical Dispute Settlement Institution is an institution that is specifically formed to resolve medical disputes that arise. The trial procedures and mechanisms are used quickly, precisely and do not require expensive costs.

F. References

Undang-Undang :

Undang-Undang Nomor 29 Tahun 2004 tentang Praktik Kedokteran

Undang-Undang Nomor 36 Tahun 2009 tentang Kesehatan

Undang-Undang Nomor 44 Tahun 2009 tentang Rumah Sakit

Undang-Undang Nomor 39 Tahun 1999 tentang Hak Asasi Manusia

Peraturan Menteri Kesehatan RI :

Peraturan Menteri Kesehatan Nomor 290 tetang Persetujuan Tindakan Kedokteran

Peraturan Menteri Kesehatan Nomor 269 tentang Perizinan Rekam Medis

Peraturan Menteri Kesehatan Nomor 147 tentang Perizinan Rumah Sakit

PBM Menteri Dalam Negeri dan MENKES Nomor 162 tentang Pelaporan Kematian Dan Penyebab Kematian.

Peraturan Presiden :

Keppres Nomor 12 Tahun 1994 tentang Badan Pertimbangan Kesehatan Nasional

Keppres Nomor 56 Tahun 1995 tentang Majelis Disiplin Tenaga Kesehatan

Perpres Nomor 27 Tahun 2009 tentang Pelayanan Terpadu

Peraturan Pemerintah :

Peraturan Pemerintah Nomor 18 Tahun 1981 tentang Bedah Mayat Klinis Dan Bedah Mayat Anatomis Serta Transplantasi Alat Dan

Peraturan Pemerintah Nomor 18 Tahun 1980 tentang Transfusi Darah

Peraturan Pemerintah Nomor 28 Tahun 2004 tentang Keamanan, Mutu dan Gizi Pangan

Books

Adami Chazawi, Kejahatan Terhadap Tubuh dan Nyawa, PT Raja Grafido Persada, Jakarta

Sofyan Dahlam, Hukum Kesehatan Rambu-Rambu Bagi Profesi Dokter, Badan Penerbit Undip, Semarang

M. Jusuf Hanafiah , Etika Kedokteran dan Hukum Kedokteran

Bambang Purnomo, Hukum Kesehatan,Bahan Kuliah Pasca Sarjana UGM, Magister Hukum Kesehatan

Nyoman Serikat Putra Jaya, Kapita Selekta Hukum Pidana, Badan Penerbit Universitas Diponegoro, Semarang, 2001

Barda Nawawi Arief, Masalah Penegekan Hukum Pidana dalam Penanggulangan Kejahatan. Jakarta , Kencana, 2008

J. Guwandi, Pengantar Ilmu Hukum dan Bio-etika, Jakarta : Fakultas Kedeokteran Universitas Indonesia, 2009

Crisdiono M.Achadiat, Dinamika Etika dan Hukum Kedokteran dalam Tantangan Zaman, Jakarta : Penerbit Buku Kedokteran, 2004

Oemar Seno Adji, Etika Profesional dan Hukum Pertanggungjawaban Pidana Dokter, (Jakarta;Erlangga, 1991)

Satjipto Raharjo, Ilmu Hukum, PT. Citra Aditya Bakti, Bandung, 2000

Philipus M. Hadjon, Perlindungan Hukum Bagi Rakyat Indonesia, PT. Bina Ilmu, Surabaya: 2013

Lili Rasjidi dan I.B Wysa Putra, Hukum Sebagai Suatu Sistem, Bandung : Remaja Rusdakarya, 2011

Carl Joachim Friedrich, Filsafat Hukum Perspektif Rumah Sakit Historis, Bandung: Nuansa dan Nusamedia, 2015

John Rawls, A Theory of Justice, Cambridge, Massa Chusetts, The Belknap Press of Harvard University Press

http://www.pengertianartidefinisi.com/pengertian-hukum-yuridis

http://prasko17.blogspot.co.id/2013/04/pengertian-sengketa-umum-dan-sengketa.html

http://www.kompasiana.com/indra.wibisana/definisi-malpraktek-di-indonesia-berbeda

WOMEN WORKERS RIGHTS IN THE FIELD OF HEALTH

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ABSTRACT

The importance of national development in the field of employment is because the rights of Indonesian citizens to obtain decent work and livelihoods have been guaranteed in the 1945 Constitution of the Republic of Indonesia. The principle of equality as a form of recognition that women also have the same rights as men in get a job. Women who work have rights that must be fulfilled without discrimination. However, by nature there is a very significant difference between women and men, so that in order to protect women, there are rights that are only specifically given to women workers, namely specifically in women's reproductive health rights. Based on this explanation, this research will discuss what are the rights of women workers in the health sector, as well as the forms of sanctions imposed on employers who violate the rights of women workers in the health sector. This research has 2 (two) problem formulations, first: What are the Rights of Woman Workers in the field of health?; and second: What is the form of sanctions imposed on employers that violate the rights of Woman Workers in the field of health?. The research method in writing this journal is juridical-normative legal research, with secondary data covering primary legal material, namely the Constitution of the Republic of Indonesia Year 1945, Law Number 36 of 2009 concerning Health, Law Number 7 of 1984 concerning Ratification of the Convention Regarding the Elimination of All Forms of Discrimination Against Women (Convention on the Elimination of All Forms of Discrimination Against Women), Law Number 39 of 1999 concerning Human Rights, and Law Number 13 of 2003 concerning Manpower; secondary legal materials, namely books, journals and scientific research on health law; and tertiary legal material, namely dictionaries and encyclopedias.

Keywords: Women's Rights, Health, Employment, Reproduction.

A. INTRODUCTION

National development is a series of sustainable development efforts that encompasses the entire life of the people, nation and state to carry out the task of realizing the national goals contained in the Preamble of the 1945 Constitution of the Republic of Indonesia, which is to protect the entire nation and all of Indonesia's blood spills, promote prosperity general, educating the life of the nation, and participating in carrying out world order based on freedom, eternal peace and social justice. National development is inseparable from the role of human development itself where the development in question is the development of Indonesian society as a whole to create a prosperous, just, and prosperous society.

The importance of national development in the field of employment because the rights of Indonesian citizens in obtaining jobs and decent livelihoods is one of Human Rights. Indeed, Human Rights have existed since human nature was born in this world, thus Human Rights are not a new thing.[1] The right to obtain decent work and livelihood are guaranteed in Article 27 paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which reads: "*Every citizen has the right to work and a decent living for humanity.”* Because the right to obtain employment is a human right that must be fulfilled for every Indonesian citizen, for the importance of recognizing the principle of equality for all citizens without exception, which principle is also recognized in Article 27 paragraph (1) of the 1945 Constitution of the Republic of Indonesia, which reads: *"All citizens are at the same position in law and government and are obliged to uphold the law and government without exception."* In accordance with the role and position of the workforce, employment development is needed to improve the quality of labor and its participation in development and to improve the protection of workers and their families in accordance with human dignity and dignity.[2]

The principle of equality is a form of recognition that women also have the same rights as men in obtaining work. This principle of equality eliminates discrimination, therefore every citizen has the same

[1] Ramdlon Naning, 1988, *Cita dan Citra Hak-HAM di Indonesia*, Lembaga Kriminologi Program Penunjang Bantuan Hukum Universitas Indonesia, Jakarta, page. 8.

[2] Sonhaji, *Beberapa Permasalahan Perlindungan Pekerja Outsourcing Berdasarkan Permenakertrans Nomor 19 Tahun 2012*, Jurnal Masalah - Masalah Hukum, Vol. 46, No. 2, April 2017, page. 191.

rights before the law and government regardless of religion, ethnicity, gender, position or class. Rights and freedoms really need to be owned by everyone without discrimination, including not discriminating based on sex, men and women have the same degree.[3] The principles that underlie rights for women include gender perspective and anti-discrimination rights in the sense of having rights like men in the fields of education, law, work, politics, citizenship and rights in marriage and their obligations.[4] When getting a job, a woman also has rights that must be fulfilled, namely getting wages according to her work, getting safe and healthy working conditions, equal opportunities to be able to increase her work to a higher level, including the right to get training to improve the quality of his work.[5]

Women who work have rights that must be fulfilled without discrimination. This relates to Article 5 paragraph (3) of Law Number 39 of 1999 concerning Human Rights which reads: "*everyone who belongs to a vulnerable group of people has the right to receive treatment and protection with more regard to their specificities."* referred to in this article are the elderly, children, the poor, pregnant women and people with disabilities (Explanation of Article 5 paragraph (3) of Law Number 39 of 1999 concerning Human Rights).

However, by nature there is a very significant difference between women and men, so that in order to protect women, there are rights that are only specifically given to women workers, namely specifically in women's reproductive health rights. The rights of women workers aim to protect women from the risk of disruption of reproductive functions.[6] This is affirmed in Article 49 paragraph (2) of Law Number 39 of 1999 concerning Human Rights, which reads: *"Women have the right to get special protection in the implementation of their work or profession against matters that can threaten their safety and or health with regard to their reproductive functions."* For this reason special rights granted to women workers cannot be seen as a discrimination between woman workers and male workers considering that these rights must naturally be fulfilled against women. Based on this explanation, this research will discuss what are the rights of women workers in the health sector, as well as the forms of sanctions imposed on employers who violate the rights of women workers in the health sector.

B. PROBLEM STATEMENT

Formulation of the problem in this study:

1. What are the Rights of Woman Workers in the field of health?
2. What is the form of sanctions imposed on employers that violate the rights of Woman Workers in the field of health?

C. LITERATURE REVIEW

Worker Protection

According to the law, manpower has a meaning that is all matters relating to labor at the time before, during and after the period of employment.[7] There are rights for workers both woman and man workers, namely wages, hours of work, holiday allowances, labor social security, layoff compensation, and the right to rest / leave.[8] According to Satjipto Raharjo, legal protection is to provide protection for the rights that have been harmed by others and that protection is given to the community so that they can enjoy all the rights granted by law.[9] Work protection can be done either by providing guidance, compensation or by increasing human rights social and economic physical protection through norms that apply in the company. Theoretically work protection is divided into 3 (three), namely:[10]

a. Social protection, which is a protection relating to social enterprises, whose purpose is to enable workers / laborers to develop their lives as humans do in general, and especially as members of the community and family members.
b. Technical protection, which is a type of protection relating to businesses to keep workers / workers from the danger of accidents that can be caused by working tools or materials that are

[3] Saparinah Sadli, 2000, *Hak Asasii Perempuan Adalah Hak Asasi, Dalam Pemahaman Bentuk-Bentuk Tindak Kekerasan Terhadap Perempuan Dan Alternatif Pemecahannya,* Pusat Kajian Wanita dan Gender, Universitas Indonesia, Jakarta, page. 1.

[4] Rhona K. M. Smith dkk dalam Suparman Marzuki, 2008, *Hukum Asasi Manusia,* PUSHAM UII, Yogyakarta, page. 269.

[5] Abdul Hakim, 2009, *Dasar-Dasar Hukum Ketenagakerjaan Indonesia*, PT. Citra Aditya Bakti, Bandung, page. 2.

[6] Darwin dan Wijaya, *Kesehatan Reproduksi Pekerja Wanita,* Jurnal Populasi Vol 5, No 2 (1994), page. 57.

[7] Joni Bambang S., 2013, *Hukum Ketenagakerjaan*, Pustaka Setia, Bandung, page. 46.

[8] Editus Adisu dan Libertus Jehani, 2007, *Hak-Hak Pekerja Perempuan*, Visi Media, Tangerang, page. 5.

[9] Satjipto Rahardjo, 2006, *Ilmu Hukum*, PT Citra Aditya Bakti, Bandung, page. 35.

[10] Zaeni Asyhadie, 2007, *Hukum Kerja Hukum Ketenagakerjaan Hubungan Kerja,* Raja Grafika, Jakarta, page. 78.

done. This protection is more commonly referred to as work safety.

c. Economic protection, which is a type of protection relating to efforts to provide workers / laborers with an income that is quite useful to meet daily needs for themselves and their families, including in the case of workers / laborers unable to work because of an event against their will. This type of protection is usually called social security.

D. RESEARCH METHODS

The research method in writing this journal is juridical-normative legal research, with secondary data covering primary legal material, namely the Constitution of the Republic of Indonesia Year 1945, Law Number 36 of 2009 concerning Health, Law Number 7 of 1984 concerning Ratification of the Convention Regarding the Elimination of All Forms of Discrimination Against Women (Convention on the Elimination of All Forms of Discrimination Against Women), Law Number 39 of 1999 concerning Human Rights, and Law Number 13 of 2003 concerning Manpower; secondary legal materials, namely books, journals and scientific research on health law; and tertiary legal material, namely dictionaries and encyclopedias.

E. ANALYSIS AND DISCUSSION

1. Rights of Woman Workers in the field of health

This principle of equality which eliminates discrimination applies to all aspects of life, especially in employment, where there are several provisions which give meaning that every worker who does not see gender or other predicate has the same opportunity and right to get the same work and treatment without discrimination from the company where they work. But there are also some rights which are only given to woman workers in order to provide protection to them. Protection of workers, especially women, means the obligation of employers to fulfill the rights of women workers so that protection of women workers must be carried out in accordance with applicable legal provisions.[11] Every woman has special rights related to human rights that are recognized and protected by law. Women's Rights where women are categorized as vulnerable groups who have a special place in the regulation of guaranteeing human rights protection. There are several laws and regulations governing the rights of women workers in the health sector, some of which are Law Number 7 of 1984 concerning Ratification of the Convention Regarding the Elimination of All Forms of Discrimination Against Women (Convention on the Elimination of All Forms of Discrimination Against Women), Law Number 39 of 1999 concerning Human Rights, Law Number 13 of 2003 concerning Labor, and Law Number 36 of 2009 concerning Health.

Protection of women's reproductive rights is contained in the Convention Regarding the Elimination of All Forms of Discrimination Against Women (Convention On The Elimination Of All Forms Of Discrimination Against Women), which has been ratified by Law Number 7 of 1984, namely in Article 11 paragraph (1) letter f, which reads: *"States parties are obliged to make all appropriate efforts to eliminate discrimination against women in the field of work in order to ensure equality of rights between women and men especially the right to protection of health and safety in working conditions, including on protection for reproduction."* and in Article 12 paragraph (1), which reads: *"States parties must make appropriate efforts to eliminate discrimination against women in the health sector in order to provide certainty, based on equality between women and men, opportunities for health services, including those related to de with family planning."*

Then the reproductive rights of women based on Law Number 39 of 1999 concerning Human Rights are contained in Article 49 paragraph (2), which reads: *"Women have the right to get special protection in the implementation of their work or profession against things that can threaten safety and or health related to women's reproductive functions."* What is meant by special protection of reproductive functions is contained in the Elucidation of Article 49 paragraph (2), which reads: *"What is meant by "special protection of reproductive functions" is health services related to menstruation, pregnancy, giving birth, and giving an opportunity to breastfeed a child."* Then in Article 49 paragraph (3), which reads: *"The special rights inherent in a woman due to her reproductive function, are guaranteed and protected by law."*

Furthermore, the reproductive rights of women workers in Law Number 13 of 2003 concerning Manpower, in which for the sake of guaranteeing

[11] Ariestia Ayu Ananda, *Pemenuhan Hak-Hak Tenaga Kerja Perempuan Oleh Perusahaan (Studi Terhadap Hak-Hak Perempuan Yang Bekerja Pada Apotek Di Kota Pekanbaru),* Jurnal Online Mahasiswa (JOM) Fakultas Hukum Volume II No. 1 Februari 2015, page. 3.

women's reproductive rights, women are given the right to leave, so that during their leave, women workers still get their rights in the form of the right to get full wages based on Article 84 of Law Number 13 of 2003 concerning Manpower, which reads: *"Every worker / laborer who uses the right to rest as referred to in Article 79 paragraph (2) letters b, c, and d, Article 80 and Article 82 has the right get full wages."* The reproductive rights of women workers are set out in several articles, as follows:

1) Article 81 paragraph (1) of Law Number 13 of 2003 concerning Manpower, which reads: *"Woman workers / laborers who experience menstrual pain and notify employers, are not obliged to work on the first and second days of menstruation."* this confirms that women workers are given the right to leave menstruation.
2) Article 82 paragraph (1) of Law Number 13 of 2003 concerning Manpower, which reads: *"Women workers / laborers are entitled to a break of 1.5 (one and a half) months before it's time to bear children and 1.5 (one and a half) months after giving birth according to the calculation of the obstetrician or midwife."* This article confirms that woman workers are given the right to maternity leave and maternity leave for a total of 3 (three) months from before and after childbirth.
3) Article 82 paragraph (2) of Law Number 13 of 2003 concerning Manpower, which reads: *"Woman workers / laborers who experience miscarriages are entitled to a 1.5 (one and a half) month's break or in accordance with the statement of the obstetrician or midwife."* This article confirms that woman workers are given the right to leave.
4) Article 83 of Law Number 13 of 2003 concerning Manpower, which reads: *"Woman workers / laborers whose children are still breastfeeding should be given the appropriate opportunity to breastfeed their children if it must be done during work time."* This article confirms that woman workers are given the right to breastfeed if breastfeeding must be carried out during work time.

In addition to the aforementioned several articles, there are woman workers' rights that must be fulfilled by the employer who employs them, as follows:

1) Article 76 paragraph (2) of Law Number 13 of 2003 concerning Manpower, which reads: *"Employers are prohibited from employing pregnant women workers / laborers who, according to the doctor's statement, are dangerous to the health and safety of their wombs and themselves when working between 23:00 to 19:00 07.00."* This article emphasizes the prohibition on employers to employ pregnant women at certain hours (between 23:00 and 07:00) which according to the doctor's statement is dangerous for the health and safety of the womb and himself.
2) Article 93 paragraph (1) and (2) letter b of Law Number 13 of 2003 concerning Manpower, which reads: (Article 93 paragraph (1)) *"Wages are not paid if workers do not do work";* (Article 93 paragraph (2) letter b) *"The provisions referred to in paragraph (1) do not apply, and the employer is obliged to pay wages if the woman worker / laborer is sick on the first and second days of her period so they cannot do the work."* emphasized that the employer was obliged to pay the wages of woman workers who could not do work due to illness on the first and second days of her period.
3) Article 153 paragraph (1) letter e of Law Number 13 of 2003 concerning Manpower, which reads: *"Employers are prohibited from terminating work relations on the grounds that women / workers are pregnant, giving birth, conceiving, or breastfeeding their babies."* stressed that employers cannot arbitrarily terminate employment with women workers on the grounds that the woman worker is pregnant, giving birth, conceiving, or breastfeeding her baby, thereby protecting woman workers.

In addition to the reproductive rights of women workers, in general there are regulations regarding women's reproductive rights in health services as Article 74 paragraph (1) of Law Number 36 of 2009 concerning Health, which reads: *"Any reproductive health service that is promotive, preventive, curative, and / or rehabilitative, including reproduction with assistance carried out safely and healthfully by taking into account the specific aspects, especially the reproduction of women."* Based on the aforementioned several articles, the health rights of women workers namely reproductive rights have been guaranteed in several laws and regulations.

2. Legal Protection as well as Patient's Legal Efforts in Health

Although it has been regulated in detail about the reproductive rights of women in several laws and regulations as discussed in the previous discussion, if the employer is not sanctioned if the employer violates the rights of women workers, it will result in women workers not getting their rights as it should be, sanctions are therefore very important for the fulfillment of rights.

Impacts that are immediately felt by women workers when their rights are not fulfilled by the company are as follows:[12]

a. Very dangerous for pregnant workers if exposed to chemicals or radiation in the production environment so that it can cause fetal defects to death in the fetus.
b. The absence of menstruation leave, pregnancy and childbirth to woman workers has an impact on the disruption of the woman reproductive organs.
c. Not giving time to breastfeed will have a direct impact on the feeding needs of woman working babies.
d. No pickup is met for women workers who work at night, risking / potential for immoral violations and crimes against these workers.

Based on Law Number 13 of 2003 concerning Manpower that there are sanctions for criminal acts and violations, sanctions for criminal offenses are regulated in Article 185 paragraph (1) of Law Number 13 of 2003 concerning Labor, which reads: *"Whosoever violates the provisions referred to in Article 42 paragraph (1) and paragraph (2), Article 68, Article 69 paragraph (2), Article 80, Article 82, Article 90 paragraph (1), Article 143, and Article 160 paragraph (4) and paragraph (7), shall be subject to a maximum of 1 (one) year imprisonment and a maximum of 4 (four) years and / or a fine of at least Rp 100,000,000.00 (one hundred million rupiah) and a maximum of Rp.400,000,000, 00 (four hundred million rupiah)."* This article regulates sanctions if the employer does not provide leave rights for women who give birth and miscarry. Whereas the criminal act of violation is regulated in Article 186 paragraph (1) of Law Number 13 of 2003 concerning Manpower, which reads: *"Anyone who violates the provisions as referred to in Article 35 paragraph (2) and paragraph (3), Article 93 paragraph (2), Article 137, and Article 138 paragraph (1), shall be liable to a minimum of 1 (one) month imprisonment and a maximum of 4 (four) years and / or a minimum fine of Rp 10,000,000.00 (ten million rupiah) and a maximum of Rp. 400,000,000.00 (four hundred million rupiah)."* This article sets out sanctions for employers who do not pay the wages of women workers who cannot do work due to illness on the first and second days of their periods. Then in Article 187 paragraph (1) of Law Number 13 of 2003 concerning Manpower, which reads: *"Whoever violates the provisions referred to in Article 37 paragraph (2), Article 44 paragraph (1), Article 45 paragraph (1), Article 67 paragraph (1), Article 71 paragraph (2), Article 76, Article 78 paragraph (2), Article 79 paragraph (1), and paragraph (2), Article 85 paragraph (3), and Article 144, are subject to sanctions imprisonment for a minimum of 1 (one) month and a maximum of 12 (twelve) months and / or a fine of at least IDR 10,000,000.00 (ten million rupiah) and a maximum of IDR 100,000,000.00 (one hundred million rupiah)."* As well as several other articles governing sanctions against employers who violate the reproductive rights of women workers, which are expected to provide sanctions to ensure that women workers have fulfilled their rights properly.

F. CONCLUSION

Based on the discussion above, the conclusions that can be given are as follows:

1) The rights of women workers in the health sector are regulated in several laws and regulations governing the rights of women workers in the health sector, some of which are in Law Number 7 of 1984 concerning Ratification of the Convention Regarding the Elimination of All Forms of Discrimination Against Women (Convention On The Elimination Of All Forms Of Discrimination Against Women), Law Number 39 of 1999 concerning Human Rights, and Law Number 13 of 2003 concerning Labor, where each of these laws guarantees reproductive rights women workers where these rights can only be given to women workers in order to provide protection to them.
2) Forms of Sanctions Provided Against Employers Who Violate the Rights of Women Workers in the Health Sector are regulated in Law Number 13 of 2003 concerning Manpower in particular sanctions against employers who violate the rights of women workers are regulated in Article 185 paragraph (1), Article 186 paragraph (1) and Article 187 paragraph (1) which distinguishes

[12] Hesti Widyaningrum, *Pencegahan terhadap Pelanggaran Hak Perempuan Sebagai Pekerja berdasarkan Undang-Undang Nomor 13 Tahun 2003,* Jurnal Pengabdian kepada Masyarakat UBJ (Juni), Vol 1, No 2 (2018), page. 91-92.

sanctions for criminal acts and violations, where the importance of sanctions is applied so that women workers get their rights in the field of health as they should.

G. REFERENCES

Book

Abdul Hakim, 2009, *Dasar-Dasar Hukum Ketenagakerjaan Indonesia*, PT. Citra Aditya Bakti, Bandung.

Editus Adisu dan Libertus Jehani, 2007, *Hak-Hak Pekerja Perempuan*, Visi Media, Tangerang.

Joni Bambang S., 2013, *Hukum Ketenagakerjaan*, Pustaka Setia, Bandung.

Ramdlon Naning, 1988, *Cita dan Citra Hak-HAM di Indonesia*, Lembaga Kriminologi Program Penunjang Bantuan Hukum Universitas Indonesia, Jakarta.

Rhona K. M. Smith dkk dalam Suparman Marzuki, 2008, *Hukum Asasi Manusia*, PUSHAM UII, Yogyakarta.

Satjipto Rahardjo, 2006, *Ilmu Hukum*, PT Citra Aditya Bakti, Bandung.

Zaeni Asyhadie, 2007, *Hukum Kerja Hukum Ketenagakerjaan Hubungan Kerja*, Raja Grafika, Jakarta.

Journal and Legal Scientific Research

Ariestia Ayu Ananda, *Pemenuhan Hak-Hak Tenaga Kerja Perempuan Oleh Perusahaan (Studi Terhadap Hak-Hak Perempuan Yang Bekerja Pada Apotek Di Kota Pekanbaru)*, Jurnal Online Mahasiswa (JOM) Fakultas Hukum Volume II No. 1 Februari 2015.

Darwin dan Wijaya, *Kesehatan Reproduksi Pekerja Wanita*, Jurnal Populasi Vol 5, No 2 (1994).

Hesti Widyaningrum, *Pencegahan terhadap Pelanggaran Hak Perempuan Sebagai Pekerja berdasarkan Undang-Undang Nomor 13 Tahun 2003*, Jurnal Pengabdian kepada Masyarakat UBJ (Juni), Vol 1, No 2 (2018).

Saparinah Sadli, 2000, *Hak Asasii Perempuan Adalah Hak Asasi, Dalam Pemahaman Bentuk-Bentuk Tindak Kekerasan Terhadap Perempuan Dan Alternatif Pemecahannya*, Pusat Kajian Wanita dan Gender, Universitas Indonesia, Jakarta.

Sonhaji, *Beberapa Permasalahan Perlindungan Pekerja Outsourcing Berdasarkan Permenakertrans Nomor 19 Tahun 2012*, Jurnal Masalah - Masalah Hukum, Vol. 46, No. 2, April 2017.

Legislation

Indonesia, the 1945 Constitution of the Republic of Indonesia.

_____, Law Number 36 of 2009 concerning Health.

_____, Law Number 7 of 1984 concerning Ratification of the Convention Regarding the Elimination of All Forms of Discrimination Against Women (Convention On The Elimination Of All Forms Of Discrimination Against Women).

_____, Law Number 39 of 1999 concerning Human Rights.

_____, Law Number 13 of 2003 concerning Manpower.

EFFORTS TO STRENGTHEN CUSTOMARY LAND OWNERSHIP IN LAKE TOBA REGION THROUGH THE LEGAL ASPECT IN PERSPECTIVE OF UPHOLDING HUMAN RIGHTS

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ABSTRACT

Legal conflict between the government and indigenous people in the surrounding area of Lake Toba lately often occurs due to the impact of the use of customary land which is used for government program that makes Lake Toba become one of international standard tourist destination in Indonesia. Tourism promotion in Lake Toba aims to boost its tourism industry which has been considered less than other tourist attractions, whereas Lake Toba has a number of tourist sites that are no less beautiful than other tourist attractions. In order to realize the tourism program, the government invites foreign and domestic investors that engaged in the tourism industry to participate in the form of investment in infrastructure such as the construction of airports, road traffic, hotels, and other investments that can support the tourism industry in the Lake Toba region. The use of land to build tourism infrastructure on Lake Toba often ignores and even tends to sacrifice the rights of the Bataknese, causing physical and legal conflicts. The Bataknese who live around Lake Toba feel excluded from the use of the land they have inhabited for years. They felt that their ownership of their land was taken over by the government on the basis of law which not in favor of the Bataknese.

Keywords: Customary Law, Human Right, Ownership and Management of Land

A. INTRODUCTION

1. Background

Lake Toba is the biggest volcanic lake in the world with a crater area of 1145 square kilometers. In the middle of the lake, which is surrounded by 7 regencies, there is an island named Samosir which size is almost the same as Singapore.[1] If Lake Toba is the caldera from the eruption, then Samosir Island is a volcanic island in the middle of the caldera. Samosir Island is not alone, in the middle there is a "lake on the lake", namely the Lake Sidihoni and Lake Aek Natonang. The natural wonders of Lake Toba offer the charm of green mountains that spoil the eyes, the air that soothing the heart, the expanse of clear water that refreshes the mind, as well as other wonders that can only be found when we arrive there. That is why the lake with a length of 100 km and a width of 30 km is so easy to steal hearts, becoming one of the 10 tourist priority destinations in Indonesia. Besides being blessed with natural beauty and rich history, Lake Toba is also inhabited by people who are full of sincerity consider it as an inseparable part of life. It is this community that plays an important role in caring for the cultural treasures around Lake Toba starting from the social system, language, and the gastronomy.

President Joko Widodo on July 29, 2019 has declared Lake Toba to be an international class tourist destination because Lake Toba with its surroundings truly offers an unforgettable experience. Lake Toba itself is believed to be no less beautiful than Lake Wakatipu in New Zealand, which is already worldwide known with its beautiful views of the lake and mountains. Not to mention the sensation of the scenery of Huta Ginjang and Beta Hill can still compete with the legendary beauty of Switzerland's nature. Another natural beauty is the hot spring of Sipoholon, with all kinds of uniqueness believed to be no less than Pamukkale in Turkey. In order to realize Lake Toba as a premium international tourism destination, the government plans to invest funds from the state budget (APBN) of more than 3.5 trillion IDR and non-state budget of 10 trillion IDR through the participation of private parties, especially those in the tourism sector. The government believes that the development of various basic infrastructure of the tourism sector on Lake Toba will bring in many domestic and foreign investors who really want to invest their capital around the Lake Toba region will affect the culture and land ownership which has

[1] Lake Toba is surrounded by 7 districts, namely: Simalungun, Toba Samosir, North Tapanuli, Humbang Hasundutan, Dairi, Karo, and Samosir

been part of the identity of the Batak tribe inhabiting the region.

The practice of utilizing customary land in Indonesia so far has been deemed not in favor of the local indigenous community. Frequently we heard the rights of indigenous peoples to their land in our country are deprived of many elements that twisted the Constitution, especially article 4 Law number 5 of 1960 concerning agrarian basic law (UUPA).[2] Article 4 of this PA Law makes the person responsible not to seize customary land for their benefit. Indigenous peoples are disadvantaged through this act. Conflict over customary and state law related to customary land in Indonesia are increasingly high. In general, conflicts occur because state law manipulates customary law to regulate land. Even if there are conflicts between state and customary law regarding customary land, state law still regulates and protects the existence of customary law, especially in regulating customary rights or customary land.

2. Formulation of the Problem

Based on the background of the problem, the problem formulation was prepared: "What is the legal effort to maintain customary land ownership in the area around Lake Toba in the context of dealing with the promotion of Lake Toba into an international standard premium tourist destination in the perspective of human rights enforcement."

3. Research Method

The writing of this paper uses the conceptual approach that needed to understand, capture, and accept. In the concept of traditional law about a land is the religious communalistic are the ones who viewed Indonesian people always prioritize community interests.[3] Through this concept approach will be understood and answer the problem formulation.

B. LITERATURE VIEW

4. Characteristics of Lake Toba

Lake Toba is a lake in Indonesia that become one of the world's famous because of its natural beauty. Aside from its natural beauty, Lake Toba has an interesting side for scientists, namely the characteristics and history of the formation of Lake Toba and its astronomical and geographical location that affected the spreading of typical flora and fauna on the lake. Lake Toba is the record holder of the largest lake in Indonesia as well as in Southeast Asia.[4] Besides being a tourist destination, this lake is also the location of various research or scientific projects because of its uniqueness. Lake Toba is located in the province of North Sumatra, and it has an island in the middle of it named Samosir. Astronomically, Lake Toba is located at coordinates $2^{o}21'32''$-$2^{o}56'28''$ north latitude and $98^{o}26'35''$ east longitude. The northern latitude coordinates indicate that Lake Toba is located not far from the equator. This causes Lake Toba and its surroundings to have a tropical climate, which is almost the same time the sun shines every month. This tropical climate also allows a variety of species from various plants to grow around this lake. Vegetation from various plants can also be seen quite a lot around this lake because of its fertile volcanic soil. Administratively and geographically, Lake Toba is surrounded by 7 districts, namely: Simalungun, Tobasa (Toba Samosir), North Tapanuli, Humbang Hasundutan, Dairi, Karo, and Samosir.

5. Tourism Potential of Lake Toba

The beauty of Lake Toba, which is located in the province of North Sumatra, is heard all over the world. With its status as a tecto-volcanic lake, Lake Toba offers a beautiful natural charm with green hills and crystal clear water. Not only that, around Lake Toba there are many potential natural and cultural tourism sites such as the Holbung Hill, Balige City, to a variety of charming waterfalls, ranging from Sigura-Gura to Efrata.[5] There are around 28 potential tourist locations that can be developed as

[2] Basic Agrarian Law No. 5 of 1960 Article 4 paragraph (1) On the basis of the state's right to control as referred to in article 2, there are various kinds of rights to the surface of the earth, called land, which can be granted to and owned by people, both alone and together - the same as other people and legal entities; (2) The rights to land referred to in paragraph (1) of this article authorize the use of the land concerned, as well as the body of the earth and water and the space therein, only necessary for interests directly related to the use of the land in the limits under this law and other higher legal regulations; (3) Apart from land rights as meant in paragraph (1) of this article, also the rights to water and space are also determined.

[3] Oloan Sitorus. (2004). Capita Selecta Comparison of Land Laws, Initial Printing. Indonesian Land Policy Partners. Yogyakarta

[4] Regional Infrastructure Development Agency, Lake Toba Area Profile: Incubation of Lake Toba Area. Page 01 – 28, 2017.

[5] Sigura – gura waterfall is also used as a hydroelectric power plant (PLTA) with the power plant being built 200 m below ground level. This generating machine consists of 2 large rooms, namely: the power plant room and the main transformer room. With 4 power generation devices (turbines), Sigura - gura can provide 206 MW of electricity.

international class tourist destinations. This fact attracts the attention of President Joko Widodo, who held his trip to North Sumatra on July 29, 2019 while establishing the Lake Toba tourism area to become an international premium tourist destination.

Since it was designated as one of the 4 super priority destinations in Indonesia, the development of the Lake Toba tourism area continues to be intensified by the Indonesian government.[6] In terms of accessibility, Lake Toba will be supported by 3 airports: Kualanamu Airport, Silangit Airport and Sibisa Airport. In addition, land access has also begun to increase, along with the construction of highway and improvement of Lake Toba Ring Road and Samosir Ring Road. The Ministry of PUPR has built a 61.7 km long of Medan - Kualanamu highway. The Medan-Parapat highway will also be built. Infrastructure development and accessibility are considered important to support the smooth access of tourists to the Lake Toba and surrounding areas. Tourism potential of Lake Toba is already very capable to be sold in domestic and foreign markets, but must be supported by good access. The accessibility is the selling point to the tourists who are going on a vacation, especially tourists who only have a very limited duration by utilizing the weekend. The government is currently incessantly building infrastructure and developing amenities in the Lake Toba region. With the accessibility and improvement of amenities, the packaging opportunity is also expected to become more than usual, and has a great opportunity to be sold in the domestic and international markets.[7] In addition to the appeal of its natural beauty, the cultural value that possessed by the Bataknese who inhabit the Lake Toba region must be promoted because foreign tourists tend to prefer cultural attractions that they can't found in their home countries.

6. Customary Rights in the National Law

Article 3 of UUPA number 5 of 1960 normatively accommodates customary rights which state, "Bearing in mind the provisions in articles 1 and 2 of the implementation of customary rights and similar rights of indigenous peoples, as long as in reality they are still there, must be such that it is in accordance with national and state interests based on national unity and may not conflict with other higher laws and regulations ". The meaning of article 3 provides an acknowledgment with certain limitations regarding the existence and implementation. According to Boedi Harsono in his book "Indonesian Agrarian Law", he mentions that the reasons of the designers and the establishment of the UUPA not to regulate customary rights because by regulating them, both in determining the criteria for existence and registration will preserve the existence of customary rights, while naturally there is a tendency to weaken them.[8]

In reality, the uncertainties on the existence requirements of customary rights are one of the factors that influence the marginalization of the rights of indigenous and tribal people. Without objective criteria, parties that dealing with customary law communities (government or private / investors, BUMN) can unilaterally deny the existence of a community. Objectively, the bargaining position of customary law is faced with parties whose positions are stronger in terms of politics and capital that are clearly out of balance. Due to the unclear formulation in article 3 of UUPA number 5 of 1960, resulting in a fact that allows a lot of interpretation in terms of harming the indigenous people.

Regulation of the Minister of Agrarian Affairs / Head of National Land Agency Number 5 of 1999 concerning Guidelines for Settlement of Customary Rights of Customary Law Communities and Law Number 6 of 2014 concerning Villages. In the laws and regulations mentioned among other things: the criteria for the existence of customary rights with respect to the subject, object, and authority. Article 2 of this regulation mentioned that the criteria for determining the existence of customary rights consisted of three elements, namely: the existence of indigenous peoples, the existence of territories, and the existence of customary legal arrangements regarding management, customary tenure that is still active, the use of customary land rights that are applicable and adhered by the community of customary law.[9]

[6] Four super priority tourist destinations determined by the Indonesian government, namely: Mandalika, Labuan Bajo, Borobudur, and Lake Toba.

[7] Amenities: various facilities outside of accommodation that can be utilized by tourists during a tour in a place, such as restaurants, souvenir shops and public facilities (houses of worship, health facilities, parks).

[8] Customary rights are authority, which according to customary law is owned by the customary law community over a certain area which is the environment of its citizens, where this authority allows the community to take advantage of natural resources, including land in the region for its survival.

[9] Customary rights and similar rights from customary law communities, (hereinafter referred to as customary rights), are authorities which according to customary law belong to

The entire set of laws and regulations intended to protect customary rights or customary community rights including customary land. However, there is a lack of clarity in the regulations regarding customary rights, including the customary land, leaving various inadequate interpretations with the aim of protecting these lands. Frequently in its implementation, it often creates weaknesses over the obscurity used by certain parties to ignore the protection of the rights of indigenous people.

Forestry Law (UUK) No. 41 of 1999 concerning customary law, but does not contain customary rights in the articles that it describes, which governs limited customary law communities who dwell inside and surround forest area. The Law on Forestry only recognizes the status of state forests and the status of privately owned forests, where customary forests are included in state forests, because forest activities and utilization of forest products are carried out on state forests and not their customary forests, so they can give HPH the private / investors or BUMN in state forests, how are the rights of indigenous and tribal peoples in the state forests including the customary forests. For this reason, the regulation on the existence of customary rights is more appropriate for the land agency, because customary rights relate to the legal relationship between customary law communities with the land and the environment of their territories.[10]

7. Utilization of Customary Land

With the enactment of law No. 25 of 2007 concerning investment specified regarding services and/or licensing of land rights, it can be granted and extended in connection with issues of cultivation rights (HGU), building rights (HGB), and usage rights regulated in article 21 letter a and article 22 paragraph (1) of investment law. But the constitutional court has annulled the provisions of this article by re-enacting UUPA and PP No. 40 of 1996 concerning HGU, HGB, and usage rights.

Guided by PP No. 40 of 1996, Agrarian State Minister / Head of BPN number 9 of 1999, especially in granting HGU various documents that must be attached are location permit or permit to designate land use or land reserve permit in accordance with regional spatial planning and evidence ownership of land acquisition followed by evidence in the form of the release of forest area, or the release of customary land rights, other land acquisition documents. Based on this, finally the HGU was issued. This could happen at the time there were no claims from the customary law community, because they did not know about the existence of these rights or the company had taken methods to approach some members of the customary law community. However, because in the past the rights of indigenous people have not obtained the normative norms, so a formal approach is more prominent.

Empirical facts show the existence of claims from indigenous people who felt excluded from the process of granting such rights, which are located in the area of the indigenous people. This has led to the demands of indigenous people so that customary land or customary rights are recognized and also give the opportunity to the community to participate in business activities or conduct cooperation / partnerships through BUMN or large private sector to create a business or investment climate which is better and conductive, both for local and foreign entrepreneurs in the territory of the indigenous people, so it does not cause a shift in the rights of indigenous peoples (in this case: the land) which are human rights.

8. The Right to Rule the Country

In accordance with the principle of *Domein Verklaring* (Ownership Statement) adhered to by the Dutch government as contained in article 1 of *Agrarische Belsuit*, all land that is completely free from one's rights (both based on customary law and western law) is considered to be *Vrij Landsdomein* (Free Land of the Country), i.e., which is fully owned and controlled by the state. The approach of the colonial government was apparently taken over by the Indonesian government in the form of the right to control the state. With the right to control the state over land containing three authorities that can be delegated to the community as stipulated in paragraph 2 paragraph (2) and (4) of the UUPA, the delegation of authority that occurs in practice is given to agencies or departments which are then popularly known as management rights, while it has never been applied to the indigenous people. In UUPA, the existence of management rights is not regulated nor is it included as one of the forms of rights meant in

certain customary law communities over certain areas which constitute the environment of their citizens to take advantage of natural resources, including land, in that region, for its survival and life, arising from outward and inward relations between generations and the uninterrupted relationship between the customary law community and the concerned area.

[10] Aarce Tehupiory, Customary Land Laws: Ownership and Processing of Land in the Perspective of Customary Land Laws

Article 16 of UUPA. Delegation of authority to control the state in terms of management gives the impression of a very broad authority.

Thus, the state's right to control the land granted by UUPA No. 5 of 1960, which is interpreted based on Article 33 of the 1945 Constitution. The right to control the state only gives the state the authority to formulate "policies (*beleid*)", conduct "regulations (*regelen*)", "management (*besturen*)", "management (*beberen*)", and "supervision (*toezicht bouden*)".[11] It is this authority which criticism has been misused by the central government and regional governments, among others by prioritizing and prioritizing large companies and mostly using foreign funds to utilize lands that are traditionally controlled by indigenous peoples. UUPA No. 5 of 1960 also stipulates that on the basis of the right to control the country, the state can also regulate in the taking of natural resources contained in earth, water and space.

The right to control the state which if related to Article 33 of the 1945 Constitution is intended to "as much as possible the prosperity of the people" has been interpreted as the right of the government (central and regional) to grant various types of licenses to large mining, forestry, plantation and agricultural companies. Generally, those who can take advantage of the conditions requested by the permits are large companies with foreign funds. The problem that often arises is the shifting of the truth of the use of controlling rights which has the nucleus of 'regulating' within the framework of populism to 'own' in the framework of pragmatism to implement growth-oriented economic development programs. Indigenous people's impoverishment occurs because the government leaves the ideological design of the UUPA, namely from populism to liberal individualism. The shift in the choice of values and the breakthrough in ideological design are then suppressed by other problems such as no serious attention to community lands under customary law known as customary rights. There are many cases that have been filed concerning the amount of land that is supposed to be an indigenous community transferred to another party. The absence of formal evidence about customary land and community members sometimes legally liquid and very flexible, so it has facilitated the annexation of these customary lands.

In terms of state authority, according to the author, it is limited to two things. *First*, matters governed by the state may not result in violation of human rights guaranteed by the 1945 Constitution. *Second*, substantive restrictions, that the regulations made by the state must be relevant to the objectives to be achieved, namely as much as possible for the prosperity of the people. And this authority cannot be delegated to the private sector because it involves public welfare laden with mission services. With the delegation to the private sector, part of the community will create a conflict of interest and therefore not possible because it will lead to a conflict of interest. According to the authors, a sense of justice has not been felt significantly by the community, especially regarding individual rights in the state of land for public purposes.

9. Land Rights in Human Rights Conception

The International Law and Human Rights perspective on land rights in the conception of Human Rights (HAM) must be placed in the context of one's right to obtain a decent living, that is, the fulfillment of the needs for clothing, food, and shelter; and in the context of the right of a group of people (certain communities) to continue their cultural life. For groups of people whose livelihoods are economically, socially or culturally dependent on control of land, then their rights to land are guaranteed and fulfilled: absolute human rights itself. The availability or guarantee of their rights to land in an adequate area in a sustainable manner will make them get a decent livelihood in a sustainable manner. The state must guarantee the continuation of their rights to land (*secure of tenure*), which means providing guarantees of the opportunities for citizens whose lives and descendants are citizens and human beings.

In the perspective of human rights, guarantees of land tenure as a means to achieve a decent life and improve the quality of life are contained in a number of key documents on the enforcement of human rights: Declaration of Human Rights (UDHR), International Covenant on Economic, Social and Cultural Rights (ICESCR), International Covenant on Civil and Political Rights (ICCPR).[12] Land as a basic right of every person is guaranteed in the 1945 Constitution. Further affirmation regarding this matter is manifested by the issuance of Law No. 11 of

[11] Marjono Reksodiputro, "1960 Agrarian Law and Customary Law Society (Need for Agrarian Reform)" Legal Design Vol. 11 No. 3 April 2011, pp 22.

[12] Indonesia has ratified the international covenants in 2005. Law No. 11/2005 was issued to ratify the ICESCR ratification and Law No. 12/2005 to ratify the ICCPR, while ICIPR was ratified in 2006. As a country that has ratified it, the Indonesian government is obliged to obey and implement the contents of each of the covenants

2005 concerning Ratification of the International Covenant on Economic, Social, and Cultural Right.

The regulation of land as a means of meeting basic human needs can be seen in various laws and regulations. Awareness of the importance of land functions related to human rights (HAM) began to be felt since the era of reformation. Starting with the issuance of Law No. 39 of 1999 concerning Human Rights, the importance of the right to live, maintain life, and improve living standards (Article 9 paragraph (1)) requires the availability of land to fulfill the right to welfare in the form of property, which can be owned for oneself or together with other people for their development, and also for the community.

In the perspective of human rights, guarantees of land tenure as a means to achieve a decent life and improve the quality of life are contained in a number of key documents on the enforcement of human rights such as the Universal Declaration of Human Rights, the Covenant on the Rights of Indigenous Peoples. The ratification of this declaration will show a clear indication of how the international community is very concerned and serious in its efforts to protect individual and collective rights of indigenous peoples. Although this declaration is not legally binding and therefore does not provide legal obligations to the government, the declaration explicitly states that land rights are fundamental in human rights, but the group of people whose lives are highly dependent on land in order to achieve a decent livelihood can be interpreted as covered and guaranteed in the draft. Based on this, it is as must for the state to implement and guarantee the enforcement of human rights, including the rights of indigenous people as a group of citizens whose lives depend heavily on land.[13]

C. ANALYSIS AND DISCUSSION

The phenomenon of the transfer, sale of land, and conflicts over customary land which has been increasing lately will affect the cultural relations of the community, because land and indigenous peoples have a close relationship with one another. The meaning of the land's position in customary law has a relationship between the customary law and its land creating the rights that give the community as a legal group, the right to use the land for the benefit of the community. For indigenous people, the land has a very important position. The government is obliged to give recognition to indigenous people whose customary land is needed for development. Recognition is not given in the form of money, but in the form of construction of public facilities or other forms that benefit the local community. The confession is intended to give trust to the indigenous people that the customary land is used properly and with clear legal certainty.[14] The land owned by the indigenous people is indeed Indonesian land and the government has the right to use it for the benefit of the state, but without ignoring the customary law regarding the land concerned. Local governments in this case can act as facilitators, coordinators, and policy makers. With regard to the existence of customary land, a true conceptual understanding is needed by paying attention to its synchronization with higher regulations. With the principle of respect for human rights and the principles of the rule of law, if the land that is released for investor needs expires during the validity period then the land will become customary land or in other understanding the land will become the property of the locals once more.

The execution of land for the construction of the Lake Toba tourism road area in order to follow up on the government's program in developing the tourism sector in Lake Toba and its surrounding areas was met with resistance from the local community, especially those living in the village area of Sigapiton, Ajibata sub-district, Tobasa Regency, North Sumatra, resulting in clashes between the authorities and local indigenous people.[15] Indigenous people in the area consider that the land they have occupied so far is an ancestral land that they have been fighting for a long time from the hands of the Dutch colonizers. Since long time ago their ancestors had inhabited the place to live and do daily life activities such as hunting and farming. This is an example of a conflict between indigenous people and the government that only uses the power approach to take over control of the customary land. Indigenous people often do not participate in dialogue with the

[13] Firdaus, Land Rights for Indigenous People in the Human Rights Perspective, Human Rights News Vol. December 2, 2015, pp. 14-18.

[14] This was conveyed by Aarce Tehupiory, the Chairperson of the Indonesian Agrarian Reform Institute, in a discussion: "The Role of Customary Laws in the Utilization of Indigenous Land in the Lake Toba Area" held at the Indonesian Christian University on May 8, 2015.

[15] In the last ten years, National Commission of Human Rights (Komnas HAM) has received thousands of complaints of alleged human rights violations. Komnas HAM uses its functions and authorities to contribute to efforts to resolve cases of human rights violations. Settlement of the cases that were complained about had a positive impact on the victim.

government in implementing a program related to the use of customary land. In the concept of sustainable Lake Toba tourism development, the government should prioritize a participatory social-cultural approach to local indigenous people. The government's point of view is the recognition of indigenous people's rights of the land is an obstacle in the development process. Indigenous people should have to take part in determining the direction and model of development. Therefore, the recognition of rights is a must before the development of tourism mapping the area or customary land. The result, recognized in local regulations. After that, a new destination design based on the landscape and culture of the Lake Toba region was started by involving indigenous people.[16]

In order to develop Lake Toba into an international standard premium tourist destination, the government and its indigenous people must join forces to maintain, nurture, manage and develop the customary land which is entrusted by the ancestor. For that, the government needs to do a number of things, including:

1. To clarify and strengthen the cultural identity of 6 tribes (Toba, Karo, Simalungun, Mandailing, Angkola, and Pakpak) as the owners and residents of Lake Toba. Each of these Batak tribes must continually nurture and express the uniqueness of each tribe in cross-ethnic social relations, such as: language, clothing, architecture, culinary, and other elements of cultural identity.
2. To maintain and nurture the spirituality and indigenous knowledge systems. Rituals as a medium of communication with the creator of the universe, the ancestors in each tribe continue to be cared for. Rituals that have been lost need to be explored and adapted to the needs. The traditional knowledge system that was lost was explored, documented and practiced again in daily life. It is no less important to revive traditional expertise as a basis for developing a culture-based creative economy, tribes such as musicians, weavers, sculptors, drug gatherers, and others.
3. To maintain the integrity of Bonapasogit (the homeland of each tribe) as a cultural area and the tribal customary work system. Each tribe jointly maps customary territories in their respective Bonapasogites based on territorial and land tenure systems, both based on family and communal clans in all social units that applied to each tribe.
4. To maintain, strengthen, and develop custom institutions, both in the form of rules (customary law) and customary institutions, which are able to regulate and taking care of each customary community as a sovereign, independent, and dignified social unit.

Presidential Regulation No. 81 of 2014 which compiles the regulation of Lake Toba region plans comprehensively should be able to capture its momentum by indigenous peoples living in the area. The regulation specifically mentions the role of the community in spatial planning in the Lake Toba region. The role of indigenous people can be carried out at the planning, utilization, and control of spatial use, in the form of input, supervision, reporting in the event of alleged irregularities and violations. As well as filing an objection to the decision of the official in charge of development that is deemed not in accordance with the spatial plan in order to make Lake Toba as an international standard tourist destination. This momentum cannot be missed by the Batak indigenous people. It is time to invite all figures and investors to contribute to the development of environmentally sustainable, based on state law and customary law.

Related to the use of the land in the Lake Toba region in order to support the government program to promote Lake Toba tourism area, both central and regional governments must pay attention to regulations that support the management of customary land. The rights of indigenous people as a collective unit for all resources in their territory, commonly known as customary rights, are basically rights relating to management, as well as the use of resources.[17] With regard to environmental preservation in the Lake Toba region, it is necessary to have regulations from the local government to maintain perennials as water retainers, both communal and on individual land and consistent

[16] Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia, "The State recognizes and respects the customary law community units along with their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State Republic of Indonesia, which are regulated in Constitution"

[17] In Law No. 32 Year 2014 Concerning Regional Government Article 1 (one) No. 43 that the regency / city government has the authority to determine the status of customary land and determine the existence of indigenous people along with the protection of the culture and local wisdom of indigenous people

monitoring mechanisms. Provisions regarding customary rights under Batak customary law are inseparable from the clan kinship called the clan customary community. Customary institutions, village communities or overseas clans and religious institutions need to support the empowerment of indigenous and tribal people. There are several things that can be done to preserve the ownership of indigenous peoples over customary land, namely:

1. Environmental preservation is based on the recognition of customary rights.
2. Preservation of tribal cultural customs through various activities in overseas and in 3. traditional villages.
3. Support the creative economy of the village by building village hall buildings in each traditional village.

The call of the nomads (the Bataknese who live outside of Batak land) that invites the Batak indigenous people who live in their hometowns to not sell their land, but rather rent it out. There is an affirmation of this appeal, how to make the Bataknese who live in their hometowns not hesitate and need not be afraid. The reason is quite convincing that the Batak indigenous people had already existed in this area, long before the unitary state of the Republic of Indonesia existed. This call emerged as a response to the planned development of tourism in the Lake Toba region, which would certainly require large amounts of land. Good for the construction of road infrastructure, airports, ports and other infrastructure. Also touted for the construction of hotels and resorts and for office buildings formed by the central government which will later be tasked with managing the development in the Lake Toba region. To this agency, 500 hectares of land will be given the right to manage the land. We can see this development plan in Presidential Decree No. 81 of 2014 concerning Spatial Planning for Lake Toba and the surrounding area, and Presidential Decree No. 49 of 2016 concerning the Lake Toba Tourism Zone Management Authority Agency signed by President Jokowi on June 1, 2016.

It should be appreciated the emergence of this much concern from migrants to their hometown. Even though questions and anxiety arose: are there still customary lands owned by Batak indigenous people today? Which customary land is meant in the appeal so that it is not for sale but should be leased? This question and anxiety sign is certainly not without reason because so far it has been very difficult to resolve land conflicts that arise as a result of the presence of development and industrial investors in the area around Lake Toba. Not only that, the central government in this case the forestry ministry always offers conflict resolution options which in essence place the Batak indigenous people as not the owner but as the party who controls and manages state land (state forest area), so the settlement options offered by the government are community forestry, community plantations, village forests, and partnership concepts. This means that these options state that the status of the land or forest claimed by the community as customary land or their customary forest is state land or state forest. In other words, customary lands or customary forests have not been explicitly recognized by the state, so in this case the community is only possible to submit an application to the state to cultivate or extract the products from the forest, and for a certain period of time. Ironically, MK Decision No. 35 / PUU-X / 2012 which states that "Customary forests are not State forests," cannot necessarily be implemented in reality.[18] Again, there are still various proof requirements for the existence of indigenous people which are certainly related to the existence of the customary forest. This means that there must be a local regulation regarding the recognition of the rights of these indigenous peoples.

Land is a basic right for every human being. Both individually and collectively, they have a series of links for their survival through the land. Land in this context is a place, location, or space that is used as a source of continuation of life for everyone. Good for a place to live, a place to build social life, have history, a place to grow crops, a place to take the necessities of life (health, water, clean air), a place for nature conservation (flora and fauna). It is also important that land has ownership rights, with various legal grounds (customary law and national law). The 1945 Constitution recognizes land rights in a variety of interests, such as ownership rights that must not be arbitrarily taken, the right to residence. Likewise, various other laws and regulations that recognize land rights. State obligations to land rights:

[18] Forestry Law number 41 of 1999 Article 1 No. 6 juncto article 5 paragraph (1) and paragraph (2) contains clear provisions and one meaning / interpretation that is even though customary forests are included as part of state forests, their existence is still recognized in the environment customary law community. That is, the state does not intend to release customary forests from customary law communities and place them as a direct part of state forests. Customary forests remain within the authority of customary law communities

1. Respect Land Rights. The state is obliged to ensure that everyone individually and collectively can enjoy "Land Rights" or the various rights as stated above. The state is not justified in disturbing or even taking away land or various rights related to land, especially if it is taken arbitrarily, without information, without process, and without the right reasons. This is the reason that actually disturbs human rights. Conversely, there are sufficient reasons for example if there is a natural disaster, then people who live on certain land can be moved properly and within a certain period of time.
2. Protecting Land Rights. The State is obliged to ensure the protection of every person, both individually and jointly, if there is an effort from certain parties who take actions that cause Land Rights or other rights related to Land Rights can be or have been violated.
3. Fulfill Land Rights. The state is obliged to provide legal and administrative rules, including the fundamental customary law that applies to certain lands or lots to the extent that they do not interfere and injure other rights. Such as providing facilities and other support, to ensure guaranteed use of land and land for a better life.[19]

D. CONCLUSSION

In order to anticipate the reduction or loss of ownership and use of customary land around the Lake Toba region due to the government's plan to increase the tourism potential of Lake Toba to become a premium international tourist destination, it is necessary to make legal protection of these ownership rights by both the Central Government and Regional Governments so that the value of the sublime value of local customs or culture is not lost due to the effects of globalization.

REFERENCES

Ali, Chidir. (1979). Yurisprudensi Indonesia tentang Hukum Agraria. Binacipta. Bandung.

Ardiwilaga, R. Roestandi. Dalam Aslan Noor. (2006). Konsep Hak Milik Atas Tanah Bagi Bangsa Indonesia ditinjau dari Ajaran Hak Asasi Manusia. CV. Mandar Maju. Bandung.

Aartje Tehupeiory, Pentingnya Pendaftaran Tanah di Indonesia, Jakarta: Penebar Swadaya Group, 2012.

Boedi Harsono. (2003). Hukum Agraria Indonesia Sejarah Pembentukan UUPA Isi dan Pelaksanaannya. Jilid I Hukum Tanah Nasional, Cetakan Kesembilan (Edisi revisi). Djambatan. Jakarta.

Badan Pengembangan Infrastruktur Wilayah, Profil Kawasan Danau Toba: Inkubasi kawasan Danau Toba. Hal 01-28, 2017.

Bedner Adrian dan Ward Berenschot, "*Tantangan bagi Pengakuan Hak Atas Tanah Komunal di Indonesia : Sebuah Pengantar*", Dalam Van Vollenhoven Institue dan Bappenas. Masa Depan Hak-hak Komunal atas Tanah : Beberapa Gagasan untuk Pengakuan Hukum, 2010.

Hatta, H. Mohammad. (2005). Hukum Tanah Nasional dalam Perspektif Negara Kesatuan, Cetakan I. Media Abadi. Yogyakarta.

Oloan Sitorus. (2004). Kapita Selekta Perbandingan Hukum Tanah, Cetakan Perdana. Mitra Kebijakan Tanah Indonesia. Yogyakarta.

Supomo, R. (1983). Hubungan Individu dan Masyarakat dalam Hukum Adat. Cetakan ke-4. Pradnya Paramita. Jakarta

Maria Sumardjono, Kebijakan Pertanahan Antara Regulasi dan Implementasi, Cet.1, Jakarta : Kompas, 2005

Simanjuntak, Bungaran Antonius. *Arti dan Fungsi Tanah bagi Masyarakat Batak Toba, Karo, Simalungun.* Jakarta: Yayasan Pustaka Obor Indonesia, 2015. Hlm.vii.

Surojo Wignjodipuro, *pengantar dan asas-asas hukum adat,* Jakarta : Gunung Agung, 1983.

[19] Law No. 5 of 1960 concerning Basic Regulations on Basic Agrarian Affairs (UUPA) Article 2 paragraph (4) emphasizes that the right to control from the state above can be empowered to the autonomous regions and customary law communities, merely necessary and not in conflict with national interests, according to the provisions of Government Regulation.

LEGAL PROTECTION OF INDONESIAN MIGRANT WORKERS IN THE PERSPECTIVE OF HUMAN RIGHTS

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ABSTRACT

Labor rights need to be protected because for the sake of business continuity, so the role of labor is needed. The purpose of legal protection for workers is to guarantee the basic rights of workers. The basic rights of workers or human rights are guaranteed and upheld in the Constitution of Republic Indonesia Year 1945. It is a right for every citizen to work and a decent living as specified in Article 27 paragraph (2) of the Constitution of Republic Indonesia Year 1945, and is a right for citizens The state is free to choose a place to work, therefore it is possible for Indonesian citizens who want to work not in the territory of the State of Indonesia but abroad so that the person is referred to as Indonesian Workers, so that the State should guarantee the fulfillment of the rights of Indonesian Workers. This study has 2 (two) problem formulations, first: what is the regulations form of Indonesian Workers?; Second: what is the legal protection form for Indonesian Workers who work outside the territory of the Indonesian State?. The research method in writing this journal is juridical-normative legal research, with secondary data covering primary legal material, which includes the Constitution of Republic Indonesia Year 1945, and Law Number 18 Year 2017 Regarding the Protection of Indonesian Migrant Workers, secondary legal material which includes legal books, journals law and thesis / legal scientific research discussing employment, and tertiary legal materials which include language dictionaries, etc.

Keywords: Indonesian Migrant Workers, Legal Protection, Human Rights (HAM).

A. INTRODUCTION

In carrying out business activities, it is necessary to have the role of Manpower in the continuity of the business world, for this reason, Manpower must have their rights protected. The purpose of legal protection for workers is to guarantee the basic rights of workers and guarantee equality and non-discriminatory treatment on any basis to realize the welfare of workers and their families while still taking into account the progress of the business world and the interests of employers.[1] Worker's basic rights as well as citizens' rights are always guaranteed and upheld in the Constitution of Republic Indonesia Year 1945 with the terminology of Human Rights. Human rights are defined as rights inherent in human dignity as God's creatures and these rights are under human since birth to the earth so that these rights are natural (natural) and do not constitute human or state gifts.[2]

Based on Article 28D paragraph (1) of the Indonesia Constitution Year 1945 Constitution of Republic Indonesia Year 1945 it is mandated that "every person has the right to recognition, guarantees, protection and fair legal certainty and equal treatment before the law", the principle contained in that article is that for all Indonesian citizens at the same time its position in the law and its rights must be upheld in law. More specifically for the Workers, that it is the right of every citizen to decent work and livelihoods as specified in Article 27 paragraph (2) of the Constitution of Republic Indonesia Year 1945 that "Every citizen has the right to work and livelihood that is decent for humanity." So that the State should guarantee the rights of its citizens who work, including also guaranteeing freedom for citizens to choose where to work and work as what, so it is possible for Indonesian citizens who want to work not in the territory of the State of Indonesia but abroad so that this person is referred to as Indonesian Workers.

Indonesian Workers who work abroad or can be referred to as migrant workers is *"a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national"*[3]. Migrant workers exist in all economic sectors. They play an important role in

[1] Joni Bambang, 2013, *Hukum Ketenagakerjaan*, Pustaka Setia Bandung, Bandung, hal. 269.

[2] Mahfud MD, 2001, *Dasar dan Struktur Ketatanegaraan Indonesia*, Rieneke Cipta, Jakarta, hal. 127.

[3] *International Convention on the Protection of the Rights of All Migran Workers and Members of Their Families*, 1990, which has been ratified with Law Number 6 Year 2012.

economic growth both for the home country and the host country.[4]

Based on this, a question arises as to whether Indonesian law can protect and uphold the human rights of Indonesian Workers working abroad in Indonesian Legislative Regulations considering that Indonesian Workers do not work in the territory of the Indonesian State. However, because human rights have universal values which means they do not know the limits of space and time,[5] it is necessary to analyze the Indonesian Legislation that regulates Indonesian Workers and how to protect their law.

B. PROBLEM STATEMENT

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

1. What is the Regulations form of Indonesian Workers?
2. What is the legal protection form for Indonesian Workers who work outside the territory of the Indonesian State?

C. LITERATURE REVIEW

Indonesian Workers

Indonesian Workers who work abroad or can be referred to as migrant workers is *"a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national"*[6] Migrant workers exist in all economic sectors. They play an important role in economic growth both for the home country and the host country.[7] Indonesian Workers or Indonesian Migrant Workers are all Indonesian citizens who will, are, or have done work by receiving wages outside the territory of the Republic of Indonesia.[8] Indonesia has several statutory regulations that specifically regulate Indonesian Workers, namely Law Number 6 Year 2012 which ratifies the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (International Convention Concerning Protection of the Rights of All Migrant Workers and Members of Their Families), and Law Number 18 Year 2017 Regarding the Protection of Indonesian Migrant Workers.

D. RESEARCH METHOD

The research method in writing this journal is juridical-normative legal research, with secondary data covering primary legal material, which includes Constitution of Republic Indonesia Year 1945, and Law Number 18 Year 2017 Regarding the Protection of Indonesian Migrant Workers, secondary legal material which includes legal books, journals law and thesis / legal scientific research that discusses employment, and tertiary legal materials which include language dictionaries, and others.

E. ANALYSIS AND DISCUSSION

1. Regulations Form of Indonesian Workers

The sending of labor abroad is mostly done by developing countries which have limitations in providing employment in their countries, and tend to have a very large population without being offset by opening new jobs. Indonesia, which is one of the developing countries that have a large population (or the 4th largest in the world after China, India and America) is also not spared from this problem so that one of the policies taken by the Government in solving this problem is to send workers it works abroad.[9]

Indonesian Workers or Indonesian Migrant Workers are all Indonesian citizens who will, are, or have done work by receiving wages outside the territory of the Republic of Indonesia.[10] Unlike the case with Foreign Workers or Foreign Migrant Workers, where each person is not an Indonesian citizen who is able to do work, both inside and outside the employment relationship, in order to produce services or goods to meet the needs of the community.[11]

One of the causes of the complexity of the problems faced by Indonesian Workers is the lack of protection and fulfillment of their rights and their family members from almost all parties concerned. At the same time, problems also occur because Indonesian Workers themselves consciously or unconsciously lack understanding of legal and human rights issues that are actually very important to protect themselves during migration.[12] For this reason, legal instruments that function to protect Indonesian Workers working abroad are needed.

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[4] Koesrianti,*Kewajiban Negara Pengirim dan Negara Penerima atas perlindungan pekerja Migran*, *Jurnal Diplomasi*, Vol 2 No 1, Maret 2010, hal 20.

[5] Muladi, 2005,*Hak Asasi Manusia*, Refika Aditama, Bandung, hal. 70.

[6] *International Convention on the Protection of the Rights of All Migran Workers and Members of Their Families*, 1990, which has been ratified with Law Number 6 Year 2012.

[7] Koesrianti,*Kewajiban Negara Pengirim dan Negara Penerima atas perlindungan pekerja Migran*, *Jurnal Diplomasi*, Vol 2 No 1, Maret 2010, hal 20.

[8] Article 1 point 2 Law Number 18 Year 2017 Regarding the Protection of Indonesian Migrant Workers.

[9] Deny Tri Wahyudi, *Perlindungan Hukum Terhadap Tenaga Kerja Indonesia Di Luar Negeri*, Mimbar Keadilan, Jurnal Ilmu Hukum Juli – November 2015, hal. 173.

[10] Article 1 point 2 Law Number 18 Year 2017 Regarding the Protection of Indonesian Migrant Workers.

[11] Abdul Khakim, 2009, *Dasar-Dasar Hukum Ketenagakerjaan Indonesia*, Citra Aditya Bakti, Bandung, hal. 27.

[12] Lalu Hadi, 2013, *Urgensi Ratifikasi Konvensi Internasional Tahun 1990 Tentang Pelindungan Buruh Migran Dan Keluarganya*, Mataram: Fakultas Hukum Universitas Mataram, hal. 318.

One form of commitment of the State of Indonesia in providing maximum protection for Indonesian Workers is to ratify several International Conventions related to manpower. Several International Conventions relating to labor have been ratified by the Government of Indonesia to date, namely: (a) Convention No. 29 concerning Forced Labor; (b) Convention No. 98 concerning the Applicability of the Basics of the Right to Organize and Collective Bargaining; (c) Convention No. 100 on Equal Remuneration; Convention No. 87 concerning Freedom of Association and Protection of the Right to Organize; (d) Convention No. 105 concerning the Elimination of Forced Labor; (e) Convention No. 111 concerning Discrimination in Employment and Occupation; (f) Convention No. 138 concerning Minimum Age for being allowed to Work, and (g) including Law No. 5 of 1998 concerning Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment. In addition, Indonesia also has several statutory regulations that specifically regulate Indonesian Workers, namely Law Number 6 Year 2012 which ratifies the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (International Convention Concerning Protection of the Rights of All Migrant Workers and Members of Their Families), and Law Number 18 Year 2017 Regarding the Protection of Indonesian Migrant Workers.

2. Legal Protection Form For Indonesian Workers Who Work Outside The Territory Of The Indonesian State

Legal Protection according to the definition of Satjipto Raharjo is to provide protection for human rights that are harmed by others and the protection is given to the community so that they can enjoy all the rights granted by law.[13] Legal protection must also be given to Indonesian Workers even if they work outside the territory of the Indonesian State. But in reality, even though the government has made various efforts to fulfill the rights of Indonesian Workers, these rights cannot be fulfilled well and caused various problems. Becoming an Overseas Indonesian Worker is a difficult choice for the workforce itself because working in another country requires more capabilities and skills, whereas they are generally armed with very minimal skills and expertise, as a result large risks are inevitable. Problems arise from when they leave until arrived home again. Before leaving, the problems that arose were document forgery, inadequate provisions and markup of service fees such as the cost of making a passport. In workplaces abroad, problems that arise are work violations of work contracts, documents taken by employers, acts of sexual harassment, are not permitted to communicate with family, physical, psychological, sexual violence, etc.[14]

According to Musni Umar, one of the root problems of Indonesian Workers actually arises because the construction of Law Number 39 Year 2004 concerning Placement and Protection of Overseas Workers is not able to protect prospective workers so that the protection of Indonesian Workers cannot be maximized.[15] Therefore, the State seeks to provide legal protection in such a way for Indonesian Workers working abroad where the State has accommodated the problem by revoking and replacing it with a new Law, Law Number 18 Year 2017 Regarding the Protection of Indonesian Migrant Workers . The guarantee of legal protection that can be given to Indonesian Workers who work outside the territory of Indonesia is not only given when Indonesian Workers work abroad but also the legal protection is given before and after work. Based on Article 7 of Law Number 18 Year 2017 Concerning the Protection of Indonesian Migrant Workers, which reads: “Protection of Prospective Indonesian Migrant Workers Indonesian Migrant Workers includes: a. Protection Before Work; b. Protection During Work; and c. Protection After Work.”

Legal protection given to Indonesian Workers before working as stipulated in Article 8 Paragraph (1) of Law Number 18 Year 2017 Regarding the Protection of Indonesian Migrant Workers, which reads: "Protection Before Working as referred to in Article 7 letter a includes: a. administrative protection; and b. technical protection. "The administrative protection referred to in paragraph (1) letter a includes at least: a. completeness and validity of placement documents; and b. stipulation of working conditions and conditions, and technical protection as referred to in paragraph (1) letter b at least include: a. providing information dissemination and dissemination; b. improving the quality of Prospective Indonesian Migrant Workers through work education and training; Social Security; facilitation of fulfilling the rights of Prospective Indonesian Migrant Workers; e. strengthening the role of job introduction functional employees; f. placement services in one-stop integrated services for the placement and protection of Indonesian Migrant Workers; and g. guidance and supervision (Article 8 Paragraph (2) and Law Number 18 Year 2017 Regarding the Protection of Indonesian Migrant Workers).

Legal protection given to Indonesian Workers while working as stipulated in Article 21 paragraph

[13] Satjipto Rahardjo, 2006, *Ilmu Hukum*, PT Citra Aditya Bakti, Bandung, hal. 54.

[14] Zulfikar Judge, *Perlindungan Hukum Bagi Tenaga Kerja Indonesia Di Luar Negeri*,*Lex Jurnalica Volume 9 Nomor 3, Desember 2012*, hal. 172.

[15] Abdullah Sulaiman,*Tuntutan Ekonomi Mempengaruhi Perburuhan Pasca Kemerdekaan: Kajian Historis Perlindungan Hukum Kaum Buruh*, Jurnal Mimbar Ilmiah Hukum, Vol. 7 No. 1 2004, Universitas Islam Jakarta, hal. 111.

(1) of Law Number 18 Year 2017 Regarding the Protection of Indonesian Migrant Workers, which reads: “Protection During Work as referred to in Article 7 letter b includes: a. data collection and registration by the employment attaché or appointed official of the foreign service; b. monitoring and evaluation of the Employer, employment and working conditions; c. facilitate the fulfillment of the rights of Indonesian Migrant Workers; d. facilitation of resolving labor cases; e. providing consular services; f. assistance, mediation, advocacy, and provision of legal assistance in the form of advocacy services by the Central Government and / or Representatives of the Republic of Indonesia and trusts in accordance with local state law; g. guidance for Indonesian Migrant Workers; and h. facilitation of repatriation.”

Then, legal protection given to Indonesian Workers after work as stipulated in Article 24 paragraph (1) of Law Number 18 Year 2017 Regarding the Protection of Indonesian Migrant Workers, which reads: "Protection After Work as referred to in Article 7 letter c includes: a. facilitation of returning home; b. settlement of Indonesian Migrant Worker rights that have not been fulfilled; c. facilitation for the management of Indonesian Migrant Workers who are sick and die; d. social rehabilitation and social reintegration; and e. empowering Indonesian Migrant Workers and their families.

F. CONCLUSION

Based on the formulation of the problems in this journal, the conclusion that can be put forward is the form of Indonesian Manpower Regulations is by ratifying international conventions that regulate Manpower so that the protection provided to Indonesian Workers can be maximized, and forming a special regulation governing Manpower Indonesian Work, namely Law Number 18 Year 2017 Regarding the Protection of Indonesian Migrant Workers, then forms of legal protection against Indonesian Workers working outside the territory of the Indonesian State based on Article 7 of Law Number 18 Year 2017 Regarding the Protection of Indonesian Migrant Workers including Prior Protection Work, Protection during Work, and Protection after Work so as to maximize the protection afforded to Indonesian Workers.

G. REFERENCES

Book

Abdul Khakim, 2009, *Dasar-Dasar Hukum Ketenagakerjaan Indonesia*, Citra Aditya Bakti, Bandung.

Joni Bambang, 2013, *Hukum Ketenagakerjaan*, Pustaka Setia Bandung, Bandung.

Mahfud MD, 2001, *Dasar dan Struktur Ketatanegaraan Indonesia*, Rieneke Cipta, Jakarta.

Muladi, 2005, *Hak Asasi Manusia*, Refika Aditama, Bandung.

Satjipto Rahardjo, 2006, *Ilmu Hukum*, PT Citra Aditya Bakti, Bandung.

Journal and Legal Scientific Research

Abdullah Sulaiman, *Tuntutan Ekonomi Mempengaruhi Perburuhan Pasca Kemerdekaan: Kajian Historis Perlindungan Hukum Kaum Buruh*, Jurnal Mimbar Ilmiah Hukum, Vol. 7 No. 1 2004, Universitas Islam Jakarta.

Deny Tri Wahyudi, *Perlindungan Hukum Terhadap Tenaga Kerja Indonesia Di Luar Negeri*, Mimbar Keadilan, Jurnal Ilmu Hukum Juli – November 2015.

Koesrianti, *Kewajiban Negara Pengirim dan Negara Penerima atas perlindungan pekerja Migran*, *Jurnal Diplomasi*, Vol 2 No 1, Maret 2010.

Lalu Hadi, 2013, *Urgensi Ratifikasi Konvensi Internasional Tahun 1990 Tentang Pelindungan Buruh Migran Dan Keluarganya*, Mataram: Fakultas Hukum Universitas Mataram.

Zulfikar Judge, *Perlindungan Hukum Bagi Tenaga Kerja Indonesia Di Luar Negeri,Lex Jurnalica Volume 9 Nomor 3, Desember 2012.*

Legislation

Indonesia, Constitution of Republic Indonesia Year 1945.

International Convention on the Protection of the Rights of All Migran Workers and Members of Their Families, 1990, which has been ratified with Law Number 6 Year 2012.

_____, Law Number 18 Year 2017 Regarding the Protection of Indonesian Migrant Workers.

THE ROLE OF THE INDONESIAN MEDICAL DISCIPLINARY BOARD IN RESOLVING DISPUTES IN DOCTOR'S DISCIPLINE AS AN EFFORT TO CREATE DOCTORS WHO ARE PROFESSIONAL AND HAVE INTEGRITY

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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 Kedoteran 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, Doctors' Discipline, Dispute Resolution.

A. INTRODUCTION

A doctor who understands medical science into his field, must not arbitrarily impose his will in examining or treating a patient without the patient being told about what he will do, so that from this autonomous right develops into a number of patient rights that must be respected by a doctor and if violated, the rule of law is waiting to impose sanctions on the doctor. Some of the patient's rights that are guaranteed by law are:[1]

1. The right to choose medical personnel (if the patient goes to the hospital).
2. The right to get information (informed consent).
3. The right to his own body, such as refusing medical treatment in part or in whole.
4. The right to die naturally (related to euthanasia).
5. The right to get the contents of the medical record.
6. The right to get a second opinion.
7. Right to get a referral, if the doctor concerned can no longer handle it.
8. Right to confidential office / medical secret.

Due to medical therapeutic transactions, the patient's position is very beneficial with many rights that must be fulfilled by doctors or hospitals. This is because doctors have scientific dominance to carry out medical practices in accordance with the patient's condition, but are not dominant in terms of legal standing, so that patients get an advantage in legal protection. Doctors are penalized if they violate a patient's right both criminally (secret position in Article 322 of the Criminal Code, euthanasia in Articles 338, 340, 344, 345, 359 of the Criminal Code), civil (informed consent of medical / negligence actions - Law No. 36 of 2009 concerning Health), and administrative (disciplinary sanctions and revocation of SIP - Law No. 29 of 2004 concerning Medical Practices).

When a patient gets a result of a treatment or medical action that is not in accordance with what he expected and has side effects or undesirable effects of a form of treatment or medical action (medical risk), then simply, a patient says or even judges that the doctor has done what is called "Medical Malpractice". Especially if this statement or accusation has been published to the public domain, usually through the mass media, then the doctor has

[1] Desriza Ratman, *Mediasi Non Litigasi Terhadap Sengketa Medik Dengan Konsep Win-Win Solution*, Jakarta: PT Elex Media Komputindo, 2012, p. 52.

been convicted and has been lured by public opinion that he was declared guilty.

In a therapeutic transaction, it is stated that the doctor-patient relationship occurs because there is an agreed object (in accordance with Article 1234 of the Civil Code), which is giving something, doing something or not doing something that is not fulfilled.[2] When the promised achievement does not fulfill one of the rights (usually the patient's right) is violated, then there is what is called a broken promise or default which in medical circles is called medical malpractice.[3]

According to the Black's Law Dictionary states:

"Malpractise is any professional misconduct, unreasonable lack of skill. This term is usually applied to such conduct by doctors, lawyers, and accountants. Failure of onerendering pro fessinal services to exercise that degree of skill and learning commonly applied under all the circumtance in the community by the average prudent reputable member of the profession with the result of injury, loss or damage to the resipient of those entittled to rely upon them. It is any professional misconduct, unreaonable lack of skill or fidelity in professional or judiciary duties, evil practise or illegal or immoral conduct.

Based on this, it can be said that a malpractice is if a doctor cannot meet the Medical Professional Standards,[4] is the minimum ability (knowledge, skill and professional attitude) that must be mastered by a doctor or dentist to be able to carry out professional activities independently in the community created by professional organizations (Permenkes No 512/2007 on Medical Practice License and Practice of Article Practice) 1 point 9).

In carrying out his profession, a doctor at least already has the provision of scientific disciplines learned in college depending on the level in stages and can be accounted for in its implementation. Therefore, to provide legality for the knowledge of a doctor or dentist, every graduate of his education must be taken through a competency test to obtain a competency certificate as a professional standard.

As for what is assessed from the competency test as a standard of the profession is a minimum ability to behavior (attitude), skills (skils) and knowledge (knowledge), it is referred to as basic or core competencies which are further recommended to add knowledge and skills to obtain additional competencies or advanced. To assess whether a doctor has carried out his knowledge properly and appropriately in his medical practice, it is necessary to have an independent body or institution that functions as a "Judge" for the doctor if there are complaints or demands from the patient for his medical actions which are detrimental to the patient.[5]

In Article 54 paragraph (1) of Health Law No. 23 of 1992, it was stated that "Health workers who make mistakes or negligence in carrying out their profession may be subject to disciplinary action", and in paragraph (2), it is stated that "the determination of whether there is an error or negligence as referred to in paragraph (1) is determined by the Assembly Discipline Health workers ".

The Disciplinary Board of Health Workers is mandated to be stipulated in a Presidential decree. But until 2004 it had not yet been formed so that in Medical Practice Law No. 29 of 2004 an autonomous, independent and non-structural body was formed called the Indonesian Medical Council (KKI), whose membership was determined by the President on the recommendation of the Minister of Health.

This KKI has the functions of regulation, endorsement, and guidance of doctors and dentists who carry out medical practices, in order to improve the quality of medical services, and has duties:

1. Registering doctors and dentists
2. Ratify the standard of professional education for doctors and dentists.
3. Fostering the implementation of medical practices carried out with related institutions in accordance with their respective functions.

In upholding the discipline of doctors in carrying out their medical practices, the KKI formed an independent autonomous institution namely the Indonesian Medical Disciplinary Honorary Council (MKDKI) which are both domiciled in the national capital (Article 55 of the Medical Practice Law No.29 of 2004).

MKDKI on patient / community complaints can examine and provide decisions relating to the discipline of doctors and dentists (Article 67) and if in the examination of ethics violations are found, then MKDKI will forward the complaint to professional organizations, while the decision is binding on doctors and dentists concerned.

[2] J. Guwandi, *Hukum Medik (Medical Law)*, Jakarta: Balai Penerbit FKUI, 2007, p. 23—24.

[3] Rinanto Suryadhimirta, *Hukum Malpraktik Kedokteran*, Yogyakarta: Total Media, 2011, p. 13.

[4] Fred Ameln, *Kapita Selekta Hukum Kedokteran*, Jakarta: Grafikatama Jaya, 1991, p. 87.

[5] Desriza Ratman, *Op.Cit.*, p. 73.

B. Problem Statement

Based on the background above, the problem in this study is how the role of the Indonesian Medical Disciplinary Honorary Board in the resolution of disputes in the doctor's discipline as an effort to create a professional doctor with integrity?

C. Literature Riview

Ethical malpractice is an act in the service of medical practice that is contrary to medical ethics, as outlined in the KODEKI (Indonesian Medical Ethics Code). KODEKI is a set of ethical standards, principles, rules or norms that apply to doctors.[6] As is well known that the doctor's profession is a professional occupation that is not just a profession because not all jobs are called professions. The profession is a moral community that has shared ideals and values.[7] They form a profession because they are united by the same educational background and have the same expertise. The responsibility of a professional is towards his profession (internal) and to the community (external), so that a profession has its own characteristics / characteristics that will distinguish it from other types of work.

Based on the formulation of Leenen, a legal expert from the Netherlands, states the limits of the elements in the standards of the medical profession must meet the following elements:

1. Do carefully / thoroughly (zorgvuldig handelen), is associated with negligence so that if a doctor does not work carefully, then he has fulfilled the element of neglect.
2. A doctor must work according to the standard of medical science (volgens de Medische standaart), meaning that a doctor who practices must carry out his duties according to his knowledge or authority and competence, for example a general practitioner may not perform sectio caesaria, even if he is capable or capable do it based on his experience helping obstetricians and obstetricians.
3. Must have an average ability (average) compared to the same medical expertise category (gemiddaelde bewaamheid van gelijke Medische categor), the point is that if a general practitioner is declared to have committed negligence, then the person who states he is negligent is also a general practitioner, not a doctor expert or a specialist.
4. If a doctor is declared to have committed negligence, then the measurement is the same situation and condition of the colleague who judges him (gelijke omstandigheden), that is if an in-patient puskesmas doctor is declared to have neglected the patient, then it must be compared with general practitioners who are more or less the situation and condition of the puskesmas is similar or similar to the puskesmas of the accused doctor, so it cannot be compared to puskesmas doctors who work in the scope of urban puskesmas, which is possible when handling critical patients similar to the situation and conditions of rural puskesmas doctors, doctors of urban puskesmas are still can and can refer patients to the hospital.
5. Means and efforts that are comparable and proportionate to the purpose of the medical action, meaning that if a puskesmas doctor with all the means and simple efforts to carry out an action that is considered to cause negligence, then the one who must assess it is the puskesmas doctor who also has the means and efforts that are similar or similar to the doctor of the puskesmas who were accused, not compared to the general practitioner who served in a large hospital.

The doctor's relationship with the patient must be a partner. The doctor cannot be blamed if the patient is not honest, the medical records and informed consent are good and true.

C. Research Method

1. Types of Research

This research is basically a normative juridical study, because the target of this study is the normative law or method in the form of legal principles and the legal system.[8] Normative research in this study is research that describes or describes in detail, systematic, comprehensive and in-depth about the role of the Indonesian Medical Disciplinary Honorary Board in resolving medical disciplinary disputes in an effort to create doctors with professional and integrity.

2. Nature of Research

[6] M Yusuf Hanafiah, dan Amri Amir, *Etika Kedokteran dan Hukum Kesehatan*, Jakarta: EGC, 1999, p. 49.

[7] Heni Puji Wahyuningsih, *Etika Profesi Kebidanan*, Yogyakarta: Fitramaya, 2008, p. 5.

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

This research is descriptive because it illustrates the applicable laws and regulations and is associated with legal theories in the practice of its implementation relating to the problem to be examined.

3. **Data Analysis**
   The data obtained will be analyzed by qualitative analysis.

D. Analysis and Discussion

The Role of the Indonesian Medical Disciplinary Honorary Board in the Disciplinary Dispute of Doctors as an Effort to Create Doctors with Professional and Integrity

Article 29 of the Health Act says that in the case of health workers suspected of negligence in carrying out their profession, such negligence must be resolved first through mediation. In his explanation it was not clearly stated, to what body the mediation would be resolved, but the Medical Practice Law mandated the formation of a medical discipline settlement institution which later became known as the Indonesian Medical Disciplinary Honorary Council (MKDKI). MKDKI is not a mediating institution, in the context of mediating dispute resolution, but MKDKI is a State agency authorized to:

1. Determine the presence or absence of mistakes made by a doctor / dentist in the application of medical / dental disciplines; and
2. Establish sanctions for doctors / dentists found guilty.

Violation of discipline here is defined as a violation of the rules and / or provisions in the application of the discipline of medicine / dentistry. Doctors / dentists are considered to violate medical discipline if:

1. Practicing incompetently;
2. Not doing their professional duties and responsibilities properly (in this case not achieving standards in medical practice); and
3. Despicable behavior that damages the dignity and honor of his profession.

Matters which include violations of medical / dental disciplines, are dishonesty in practice, practice with physical and mental disabilities, make incorrect medical reports, provide "guarantee of healing" to patients, refuse to deal with patients without reasonable reasons, provide medical treatment without the consent of the patient / family, sexual harassment, abandonment of the patient when needing immediate treatment, instructing or carrying out additional checks / medication that is excessive, work not in accordance with medical care standards, and so on.

In the Indonesian Medical Council Regulation Number 15 / KKI / Per / VIII / 2006 concerning the Organization and Work Procedures of MKDKI and MKDKI at the Provincial Level, it is said that the task of MKDKI is:

1. Receiving complaints, examining, and deciding cases of violations of discipline of doctors and dentists submitted; and
2. Develop guidelines and procedures for handling cases of violation of discipline doctors or dentists.

In carrying out the above tasks, MKDKI has the authority to:

1. Receiving complaints of violations of the discipline of doctors and dentists;
2. Establish the type of complaint of violation of discipline or violation of ethics or not both;
3. Checking complaints of violations of the discipline of doctors and dentists;
4. Decides whether there is a violation of the discipline of the doctor / dentist and determines sanctions against the violation of the discipline of the doctor and dentist;
5. Carry out MKDKI decisions;
6. Arranging procedures for handling cases of violations of discipline doctors and dentists;
7. Compiling the MKDKI and MKDKI-P manuals;
8. Fostering, coordinating and overseeing the implementation of the MKDKJ-P tasks;
9. Make and give consideration to the proposal to establish MKDKI-P to the Indonesian Medical Council; and
10. Organizing information dissemination, counseling, and dissemination about MKDKI and MKDKI-P recording and documenting complaints, inspection processes, and MKDKI decisions.

Based on this, if there is a suspicion that the doctor has committed negligence, then in accordance with his authorities, MKDKI can accept the complaint and examine the complaint, if against the complaint: The doctor / dentist who complained has been registered at the Medical Council. Indonesia; Medical actions carried out by the doctor / dentist in question occurred after October 6, 2004 (after the

promulgation of Law Number 29 of 2004 concerning Medical Practices); There is a doctor-patient professional relationship in the incident; and There is a strong suspicion that there are violations of medical / dental discipline.

If these four things have been fulfilled, then the complaint is forwarded to the Disciplinary Examination Council (MPD) for examination. The nature of this MPD examination is closed, that is when MPD requests information from doctors and complainants separately. The MPD examination session was conducted in a closed manner with the aim that the MPD MKDKI session prioritize the principle of maintaining medical secrets and disciplinary enforcement by MKDKI essentially carried out in order to foster and improve the performance of doctors and dentists. However, in reading the decision on the results of the MPD examination, the hearing of the reading of this decision is open in nature.

If the doctor or dentist complained by MPD MKDKI is proven to have committed disciplinary violations, then according to the Medical Practice Act, disciplinary sanctions in MKDKI decisions can be in the form of:

1. Giving written warning;
2. Recommendation for revocation of STR or SIP; and / or
3. Obligation to attend education or training in medical or dental education institutions.

This MKDKI decision is final and binds the doctor / dentist complained of, KKI, the Ministry of Health, Regency / City Health Service, and related agencies The doctor / dentist who is complained may file an objection to the MKDKI decision to the Chair of the MKDKI within 30 days no later than 30 days since the decision has been read or accepted by submitting new evidence supporting its objection.

Historically and seen from the purpose of its formation, the large number of public complaints to MKDKI shows that the community is actually pessimistic about the results of the settlement that has been resolved by the court. The process that is protracted and costs a lot of money, causes the community to turn to settlement through MKDKI, because as an independent institution the aim is to examine the performance of doctors, whether they have met the specified discipline or not. Unlike the settlement through MKEK, where the dominance of the settling party comes from the doctors themselves, so the subjectivity of the settlement is very dominantly influential.

In general, this suspension decision may not have a significant impact on doctors, compared to the decision of the District Court which grants patients a claim that could reach hundreds of millions of rupiah, but again, that the decision on the medical profession is suspected of negligence or error, both it is only a suspension, but it has a psychological impact on the doctor to regain the trust of the community or patients.

Based on this, the settlement mechanism through MKDKI should be prioritized first, before being resolved through the criminal prosecution mechanism by the police and the civil claim mechanism in the Court. The reason is that MPD MKDKI in conducting an examination of whether or not a doctor is doing medical negligence / error is of course with the statement of the doctor or dentist as witnesses who are experts in the medical field in question.

However, it is proper if MKDKI does not only look for mistakes and practice by just looking at the norms of scientific discipline. The author agrees, that any undesirable events arising from the actions of the doctor, the doctor should also provide accountability by proactively providing information when taking action to the patient, so that opzet, culpa lata, ie negligence of the nature of the error can be seen. large, and cause losses from the nature of the error. Of course in addition to MKDKI resolving the unlawful nature in medical discipline, the nature of criminal wrongdoing is also inherent in the actions of the doctor.

Both MKDKI or the authority of criminal institutions, if you also have to look at other benchmarks besides 2 things, namely: actus reus (objective conditions) in the form of errors, either in the form of opzet (intentional) and / or culpa (negligence / negligence) and acts against the law (wederrechtelijkheid); and the existence of mens rea (subjective conditions), that is, the perpetrators are legally responsible. These other parameters are:

1. The normal zorgvuldigheid (accuracy) of a doctor;
2. A diagnosis has been made (position, development and state of medical science) and therapy (the presence of psychological, psychological and compilation factors that arise unexpectedly).
3. Professional standards, in the form of:
   a. Average ability;
   b. Category and condition equal (same category and condition);

c. The fulfillment of the principle of proportionality and the principle of subsidiarity in the purpose of carrying out medical / medical measures.

In other words, some of these requirements will always have relevance to each other as Professional Competency and Geographic Competency of Experts, all of this in the context of the general standard of profession.

With the existence of the MKDKI institution authorized to examine and resolve disputes between doctors and patients suspected of negligence or medical practice errors, it is expected to be the first and last form of dispute resolution. Because if, this institution has given a decision, that a doctor has violated discipline and given a sanction in the form of a suspension, then the patient or patient's lawyer who knows this decision, can bring this MKDKI decision to be disputed in the realm of law through a civil, criminal, or even claim to administrative court though.

Although in the MKDKI decision it is clearly stated, that the results of the MKDKI examination and decision cannot be used as evidence or used as evidence in civil or criminal justice. However, the judge must not reject the evidence submitted by the patient or the patient's lawyer.

If this happens, MKDKI is not an institution expected by doctors to mediate in disputes between doctors and patients, but as an institution that participates in making rashes between the 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 workers from the threat of lawsuits). If this happens, then again, the injured person will not be the doctor or medical profession organization, but the community itself will be examined by the doctor.

E. Conclusion

The role of the Indonesian Medical Disciplinary Board in resolving medical disciplinary disputes in an effort to create professional doctors with integrity is to uphold the discipline of doctors through the acceptance of complaints of violations of doctor and dentist discipline. For this complaint, the Indonesian Medical Disciplinary Board will carry out a mechanism to determine whether there is a mistake made by a doctor / dentist in the application of medical / dental disciplines and set sanctions for doctors / dentists found guilty.

REFERENCES

Books:

Ameln, Fred, *Kapita Selekta Hukum Kedokteran*, Jakarta: Grafikatama Jaya, 1991.

Diantha, I Made Pasek, *Metodologi Penelitian Hukum Normatif Dalam Justifikasi Teori Hukum*, Jakarta: Prenada Media Group, 2016.

Guwandi, J. *Hukum Medik (Medical Law)*, Jakarta: Balai Penerbit FKUI, 2007.

Hanafiah, M Yusuf dan Amri Amir, *Etika Kedokteran dan Hukum Kesehatan*, Jakarta: EGC, 1999.

Ratman, Desriza, *Mediasi Non Litigasi Terhadap Sengketa Medik Dengan Konsep Win-Win Solution*, Jakarta: PT Elex Media Komputindo, 2012.

Suryadhimirta, Rinanto, *Hukum Malpraktik Kedokteran*, Yogyakarta: Total Media, 2011.

Wahyuningsih, Heni Puji, *Etika Profesi Kebidanan*, Yogyakarta: Fitramaya, 2008.

Legislation:

The 1945 Constitution of the Republic of Indonesia.

Code of Civil law.

Law Number 29 of 2004 concerning Medical Practice.

Law Number 36 of 2009 concerning Health.

Law Number 44 of 2009 concerning Hospitals.

THE EFFECTIVENESS OF LEBAK REGENCY LOCAL REGULATION TO PROTECT THE "KASEPUHAN" CUSTOMARY LAW COMMUNITY WITH REGARD TO THE TRADITIONAL FOREST CONFLICTS

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ABSTRACT

Lebak Regency of Banten Province, has enacted a Local Regulation (Perda) No. 8 of 2015 on Recognition, Protection and Empowerment of the Customary Law Community of Kasepuhanas to protect and recognize the existence of the Customary Law Community of Kasepuhan. Natural resource conflicts in the Halimun area has implications that the basic rights of the Kasepuhan community as Indonesian citizens are not fulfilled, including, but not limited to the fact that they are prohibited to enter the forest to meet their basic needs such as sustenance and shelter. The Local Regulation of Lebak Regency, Banten Province, in fact has not been able to protect the Customary Law Community of Kasepuhan in the conflict with other Parties in terms of Customary Forest conflict.

Keywords: Local Regulations, Customary Law Community, Conflicts, Customary Forests.

A. INTRODUCTION

In Indonesia, the state law is considered to have a higher position in natural resource management than the customary law[1]. The country often takes unilateral policies in managing natural resources without involving local people who depend on these natural resources. At this time a 'barren dualism' is taking place, namely the state enforcing legislation which is certain to be unworkable and not in line with the local application, as a result the legislation is certainly ignored but the actions of local people are criminalized[2].

In order to clarify the authority of regencies/cities and provinces in the field of land, a Presidential Decree (Keppres) No. 34 of 2003 concerning National Policy in the Land Sector was also issued. Article 2 paragraph (1) determines that part of the Government's authority in the field of land is carried out by the district/city governments, and paragraph (2) determines that there are nine government authorities in the field of land carried out by the district/city governments, one of which is the determination and resolution of problems of customary land rights.

In addition to agrarian conflicts, the struggle for customary land continuously happens to this day. The agrarian disputes involving local customary groups throughout Indonesia are disputes over the control of economic resources and are rooted in everyday culture believed and guaranteed as their customary rights, such as hunting forests, ex-fieldsscrub forests, pasture land, and annual crop land[3].

B. PROBLEMS STATEMENT

Based on the description as mentioned above, the following problems can be identified, namely:

1. How does Lebak Regency Government of Banten Province protect and recognize the Rights of the Customary Law Community of Kasepuhan?
2. How is the effectiveness of and what is the role of Local Regulation in resolving the Kasepuhan Customary Law Forest Conflict?

C. LITERATURE REVIEW

The history of the thoughts or idea of a nation based on the rule of laws is actually very old, far older than the age of the science of state or even political science. According to Aristotle, a good state is a state that is ordered based on a constitution and rule of law. There are three elements of constitutional government namely first, government is carried out in the sake of public interests; second, government is

[1] Larson,A.M.(2012).*Tenurerightsandaccesstoforests: Atrainingmanualforresearch*.Bogor:CIFOR.

[2]Benjamin, C. E. (2008). *Legal pluralismand decentralization*: naturalresource- m an agem en t in Mal i .*World Development*,*36*, 2255–2276.

[3] Ruwiastuti,MariaRita.2000.SesatPikir:PolitikHukumAgraria.Yogyakarta:INSISTPressdanPUSTAKA PELAJAR

carried out according to laws which are based on general provisions, not arbitrary laws which override conventions and constitutions; third, constitutional government means government carried out at the will of the people, not in the form of coercion imposed by despotic governments[4].

Boedi Harsonourged that the definition of agrarian and of Agrarian Law in the UUPA (Basic Agrarian Law - BAL) has a broad sense. The definition of Agrarian includes the land, water and natural resources contained therein. The definition specified in Article 48 of the BAL, includes the space above the land and water that contains energy and elements that can be used for efforts to maintain and develop the land's fertility[5].

A legal protection according to Satjito Rahardjo is an effort to protect one's interests by allocating a Human Rights power to him to act in the framework of his interests[6].

D. RESEARCH METHOD

The primary data in this study were collected through a field research. The data were collected using observation techniques, interviews with informants who knew the problem under study and documentation. In addition, the secondary data were collected through a library research.

Research Location and Time

This study was conducted in Cibeber District (Kecamatan), Lebak Regency. The location was deliberatelychosenbecause the Kasepuhan traditional village is located here on the slopes of Halimun SalakMountain. The duration of the study was 2 (two) days on 13 and 27 October 2019.

E. ANALYSIS AND DISCUSSION

1. Protection and Recognition of the Customary Law Community of Kasepuhan Rights by Lebak Regency Government, Banten Province.

The Customary Law Community of Kasepuhan is widely found in Cibeber District, Lebak Regency, Banten Province. Cibeber is a district in Lebak Regency, Banten Province, Indonesia. Cibeber district is better known as Cikotok District, which is famous for the oldest gold mines in Indonesia. In this district there are many historic buildings such as Cikotok guesthouse, Cikotok dam and others. Kasepuhan village which is located on the slopes of Halimun Salak Mountain, has several Kasepuhan traditional villages which include:

1. Kasepuhan Adat Cisungsang
2. Kasepuhan Adat Cibadak
3. Kasepuhan Giri Mukti village
4. Kasepuhan Citorek
5. Kasepuhan Ciptagelar
6. Kasepuhan Karang
7. Kasepuhan Cirompang, etc.

Amendment to Law Number. 22 of 1999 which was later amended by Law Number 32 of 2004 concerning Regional Government, marks the start of regional autonomy which is hoped that it can trigger a regional development in accordance with the interests and wishes of the region, and represent a new hope for empowerment of customary and tribal peoples and their rights. This can be seen by the existence of village autonomy, which explicitly confirms the village is returned to its origin, namely adat.

Lebak Regency Government, Banten Province, has issued a Local Regulation (Perda) No. 8 of 2015 concerning Recognition, Protection and Empowerment of the Customary Law Community of Kasepuhan in order to protect and recognize its existence. The objectives of establishment of this Local Regulation are to:

1. Provide legal certainty regarding the existence, customary territories and the rights of the Kasepuhan Community;
2. Protect the rights and strengthen the Customary Law Community of Kasepuhan's access to land, water and natural resources.
3. Increase the participation of *Incu Putu* in decision making at the Customary Institution (Incu Putu means the a Kasepuhan citizen who is bound by customary law that applies to the Kasepuhan).
4. Realize dispute resolutions based on recognition and respect for the rights of the Customary Law Community of Kasepuhan and their customary law.

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[4] RidwanHR,*HukumAdministrasiNegara*(Jakarta:PT. RajaGrafindoPersada,2006), page.2

[5] BoediHarsono,*Hukum Agraria Indonesia, sejarah pembentukan Undang-Undang Pokok Agraria, isi dan pelaksanaannya*, Djambatan,Jakarta, 2002,hlm. 3.

[6] SatjitoRahardjo,*Sisi-SisiLaindariHukumdiIndonesia*,(Jakarta:Kompas,2003),hal 121.

5. Achieve a sustainable management of customary territories based on customary law.
6. Improve the welfare of the Customary Law Community of Kasepuhan.
7. Realize regional development policies that recognize, respect, protect and fulfill the rights of the Customary Law Community of Kasepuhan.
8. Protect the value system that determines the Customary Law Community of Kasepuhan' s social, economic, political, cultural institutions and customary laws.

In addition to the above objectives, the Local Regulation of Lebak Regency also aims to recognize, protect, and fulfill the rights of the Customary Law Community of Kasepuhan, which include:

1. hak ulayat (the customary rights);
2. the rights of Kasepuhan individual citizensto land and natural resources;
3. the right to obtain benefit sharing from genetic resources and traditional knowledge by outsiders;
4. the right to development;
5. the right to spirituality and culture;
6. the right to the environment;
7. the right to get special education services;
8. the right to health services;
9. the right to obtain population administration services;
10. the right to take care of oneself;
11. the right to exercise customary law and justice;
12. the right to be heard for tegur aspirations in administration of village government and the election of village heads;
13. Other rights regulated in statutory regulations.

So we can conclude that Lebak Regency of Banten Province has determined to implement the Protection and Recognition of the Rights of the Customary Law Community of Kasepuhan by issuing the Local Regulation (Perda) No. 8 of 2015 concerning the Recognition, Protection and Empowerment of the Customary Law Community of Kasepuhan in the context of Protection and Recognition of the existence of the Customary Law Community of Kasepuhan.

2. The Effectiveness and Role of Local Regulation (Perda) Number 8 of 2015 in resolving the Kasepuhan Customary Law Forest Conflict.

Natural resource conflicts that occur in Halimun area have implications that the basic rights of Kasepuhan people as Indonesian citizens are not fulfilled. It includes prohibition of entering the forest to fulfill their sustenance and shelter needs. According to the Ciptagelar women, they felt severe torture in connection with the prohibition of cutting wood, both for renovation of houses and for firewood, because it affected their family's welfare. However, they were still patient enough to feel the bitterness that they had to experience. The most painful suffering and pain is when they were considered as thief in their own land. To dispel the anxiety and bitterness of life, women in Kasepuhan Ciptagelar chose to survive by obeying the flow of life; they were resigned even though they had to submit to the rules (the State) that shackle them. On the other hand, they believed that *baris kolot* would one day try to change the situation by providing the best for them. For the Customary Community of Kasepuhan in general, the existence of *baris kolot* is a hope. They are considered parties who are able to solve their problems, especially about their arable land which is considered to be in conflict with the Halimun Salak Mountain National Park(TNGHS).

The consequences of the prohibition of entering the forest is that the *ngahumatradition* in Kasepuhan Karang and Kasepuhan Cirompang slowly began to disappear. In fact, *huma* is a Sundanese culture that is managed with a rotating system. This rotating system is a process of planting circulation and a period of soil rest. Behind this planting rotation, after the rice harvest comes, the land is then rested as fallow. This is a time of nutrient return in the soil. Ecologically, the soil is relatively more fertile. A few years later the function of *the huma* turns into a *reuma*, where it grows diverse medicinal plants.And when these plants begin to rise, *huma*land will return to the forest. The loss of these *reuma*and *huma* has a major impact on Kasepuhan women who use medicinal plants for the treatment of postnatal mothers as well as causing a break in women's knowledge to concoct medicinal plants from the older generation to the younger generation. Regarding the involvement of customary women,

so far there has never been an involvement of women in decision-making, including the land acquisition strategy. However, for them, this is not a big problem as long as there are *baris kolot* that are considered to be able to voice their desires and can change their lives. The change that Kasepuhan Customary Community really crave at the moment is a sense of security and comfort when they have to enter the forest.

In other Kasepuhan, there are many evidences that the Kasepuhan community's limited access to land and other forest resources contributes strongly to the poverty in the Kasepuhan community. The increasing loss of humain Kasepuhan Cirepang, along with the inclusion of Raskin assistance (rice for the poor) into the area causes the Cirompang people increasingly helpless and far from the ideals of food sovereignty. The Health access and insurance are fading and even disappearing. One of the reasons is the increasing loss of access to *reuma* (a place of medicinal plants) and of inheritance of traditional knowledge of the Kasepuhan community to the younger generation who are increasingly hampered due to the loss of the source of knowledge that is usually obtained from timber product that could have been planted in their own gardens. The conflicts with their continuous implications are caused by a variety of factors, including:

1. The absence of corrections to various natural resource management policies, ranging from the existence of laws, government regulations, ministerial regulations to central or regional. The overlapping applicable policies are the root cause of the problem that must be deciphered in this country.
2. The unclear corrections to boundaries and areas of conservation claims.
3. The absence of complete and comprehensive conflict resolution by addressing the root causes of the problem.
4. The unclear status and function of the forest areas, including the paradigm of forest area management by the Ministry of Forestry, which is more about the status of the forest area, not the function of the forest.
5. The uncertainty in the management of natural resources in the area.
6. Local Regulation (Perda) No. 8 of 2015 of Lebak Regency, Banten Province, has not been able to protect the Customary Law Community of Kasepuhan in conflict with other parties in the case of Customary Forest conflicts.
7. The unchanging paradigm in the management of conservation areas, where humans are considered as a threat in the conservation areas.

These various factors that sustain the conflicts are related to one another.

In the dynamics of the conflict that occurred, the Kasepuhan community's position remained a party that was often disadvantaged and subordinated and violated its basic rights. The Constitutional Court Decision number 35, which clearly and constitutionally rectifies the forest territorialization in the name of the State Forest, and oblige to return the customary forest area back to the lap of Customary Communitys, has not become the basis for resolving the forest conflicts in the Kasepuhan area of the Halimun Salak Mountain National Park (TNGHS) until now.

In the context of local policies, Lebak Regency Government has basically issued a regional policy product that gives recognition to the Customary Law Community (MHA) in the form of a Local Regulation on the Baduy Community, including:

1. Local Regulation (Perda) No.13/1990 concerning the Foster and Development of Baduy Customary Community Institutions in Lebak Regency;
2. Local Regulation (Perda) No.32/2001 concerning Protection of the Baduy Community’s Customary Rights. Not only in the form of Local Regulations,
3. Lebak Regency Government also issued a policy in the form of a Decree of Lebak Regent regarding the Protection of the Kasepuhan Customary Communitys in Lebak Regency, namely a Decree of the Lebak Regent No.430/Kep.318/ Disporabudpar/2010 concerning Recognition of the Existence of Customary Communitys of Cisitu Kesatuauan Sesepuh Adat Banten Kidul in Lebak Regency which was later perfected by the issuance of Decree of the Lebak Regent No.430/Kep.298/Disdikbud/2013 concerning the Recognition of the Existence of Customary Community in the South Banten Customary Territories in

Lebak Regency covering 17 Kasepuhans namely Cisungsang, Cisitu, Cicarucub, Ciherang, Citore, Bayah, Coral, Guragog, Pasireurih, Garung, Karang combong, Jamrut, Cibedug, Sindangagung, Cibadak, Lebaklarang, and Babakanrabig. The group represents a community that has a close relationship with forest resources and has rules that have been implemented in a hereditary way.

Decree (SK) of Lebak Regent is another opportunity that can be utilized by Kasepuhan to cover the legality of the existence of all Kasepuhan in Lebak Regency as a "bridge" for the issuance of the Kasepuhan Confession Local Regulation in Lebak Regency. Just mention the Decree of Lebak Regent No.430/Kep.318/Disporabudpar/2010 concerning the Recognition of the Existence of the Cisitu Customary Community Unity of Cisitu South Banten Elder Unity in Lebak Regency which was then improved by the issuance of the Decree of Lebak Regent No.430/Kep.298/Disdikbud/2013 concerning the Recognition of the Existence of Customary Community in South Banten Territories in Lebak Regency which includes 17 Kasepuhan. The Regent's Decree was a temporary response to the efforts made by Kasepuhan since 2006 to obtain recognition from the State.

In the context of the National Park, referring to Permenhut No.P.56/2006 concerning the National ParkZoning, basically the Halimun Salak Mountain National Park Office (TNGHS) already has a mechanism to accommodate all the odds that occur before the establishment of the National Park, namely Special Zone mechanism. The zoning of Halimun Salak Mountain National Park (TNGHS) has been just ratified by the Director General of PHKA and was already in effect while the National Park was still in the status of an Appointment Decree. More than 22 MoUs were signed by BTNGHS. The form of compromise offered by BTNGHS to Kasepuhan is contained in the 2014-2023 Halimun Salak National Park Management Plan document which states that the Kasepuhan rice fields and gardens are accommodated in the Kasepuhan Special Zone, provided that there must be MoU between the Kesepuhan and BTNGHS in a Spatial Plan. As long as this MoU does not exist, Kasepuhan is considered illegal in managing its own authority.

The seriousness of the government is needed, especially the parties involved in forest governance in ensuring the management of natural resources in the forest area, both in the context of forest, water and mining resources as well as the natural resources within them. If these demands are not met, it is not surprising that the natural resource conflicts in the Halimun are and their implications will continue.

F. CLOSING

With a historical picture of the Kasepuhan along with its traditional wealth and the dynamics of conflicts and demands as described above, it is necessary to affirm that the Kasepuhan Customary Community is part of Indonesian citizens who must be recognized for their existence, politically, socio-culturally, and economically as well as their ecology, and territorial rights in the forest area. Historically the Kasepuhan has existed long before Indonesia's independence, as evidenced by territorial, institutional and value systems that are still strong today and are recognized, both nationally and internationally.

However, the presence of managers from various regimes, both production forests managed by Perum Perhutani, conservation forests managed by BTNGHS, and private mining managers,has created a variety of violations, marginalization, violence, conflicts in various dimensions and social levels inherited to the present. These conditions are increasingly perpetuated due to the absence of serious corrections to the various root causes of conflicts and violations as well as the problem of neglecting the basic rights of Kasepuhan community until now. Thus, it is imperative to correct the various regulations, policies and other regulations in the forest governance and management and provide a serious and comprehensive resolution to such problems particularly in terms of fulfillment of the Customary Law Community’s Rights in the Forest Zone.

G. REFERENCES

Benjamin, C. E. (2008). *Legal pluralism and decentralization*: natural resource-management in Mali.*World Development*,*36*,2255–2276.

Boedi Harsono, *Hukum Agraria Indonesia, sejarah pembentukan Undang-Undang Pokok Agraria, isi dan pelaksanaannya*, Djambatan, Jakarta, 2002, hlm. 3.

Larson, A.M. (2012). *Tenure rights and access to forests: A training manual for research*. Bogor:CIFOR.

Ridwan HR, *Hukum Administrasi Negara* (Jakarta : PT. Raja Grafindo Persada, 2006),hal.2.

Ruwiastuti, Maria Rita. 2000. Sesat Pikir: Politik Hukum Agraria. Yogyakarta: INSIST Press dan PUSTAKA PELAJAR.

Satjito Rahardjo, *Sisi-Sisi Lain dari Hukum di Indonesia*, (Jakarta: Kompas, 2003),hal 121.

ALTERNATIVE DISPUTE RESOLUTION TO REDUCE COSTS, ENERGY, AND TIME ISSUED BY DJP TAXPAYER OR DISPUTE SETTLEMENT IN TAXATION

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ABSTRACT

The tax revenue target which entailed by the Directorate General of Taxation (DJP) every year is always increasing. However, in the last 5 years tax revenues are not always achieved. One solution is to increase tax revenues by way of aggressive action against the taxpayer , which measures the tax collection by the law is carried out both persuasive and repressive. Tax collection action occurred because his existing differences in interpretation between the DJP as the agency authorized to issue Tax Assessment Letter (SKP) with taxpayer, as an individual or entity that receives SKP. If this happens, taxpayer can make legal effort to appeal to the tax court related to decisions made by the DJP.

Taxpayer objection filed by the above decree issued by the DJP SKP is called the tax dispute. If the action taken by the DJP is very aggressive in terms of collecting tax revenue, it is thus a tax dispute that occurred in Indonesia will increase. Increasing cases of tax disputes would be costly, time, and effort both issued by the DJP or by taxpayer.

One of the alternative solutions that may be made by both parties to get a Win-win Solution is to Alternative Dispute Resolution.

Keywords: Tax, Tax Dispute, Alternative Dispute Resolution.

A. INTRODUCTION

Taxes are a cash contribution to the people of the state under the Act (which can be imposed) by not receive reciprocal services (cons achievement) directly demonstrated and used to pay for general expenses.[1] Taxes contributed greatly to the development of the country, because the tax has Budgetair function then becomes very important for tax revenue.[2] This can be seen in the details of the State Budget (APBN) in 2019, where the budget has been set at IDR. 2165.1 trillion, about 82.5% of them, equivalent to IDR. 1786.4 trillion comes from tax revenue. The figure would have a much larger portion than revenues from other sources, such as grants and NonTax Revenue (non-tax) contributed by themselves are IDR. 0.4 trillion and IDR. 378.3 trillion. With the state budget figures set at it's definitely not an easy task for the Ministry of Finance.

Ministry of Finance through the Vertical Unit Echelon I under it namely the Directorate General of Taxation (DJP) have a duty to the state revenue `. With the magnitude of the target carried, certainly not easy for the DJP to collect tax revenue. Various efforts have been made by the DJP in order to realize the tax revenue of the target, but over the last 5 years revenue target always misses the target. Over the last 5 years, acceptance of tax target is always below 90%. Only in 2018 the realization of the target of tax receipts reached 92%.[3]

To overcome this problem, one solution by the DJP is doing Tax Reform. Starting in 1983, which is done by changing the Tax Reform Act of Official Assessment system becomes Self-Assessment System. In 1991-2000 conducted Tax Reform, namely simplification of taxes. Reforms in 2000-2001 by setting a vision, mission, and blue print. Tax Reform Volume I conducted in 2002-2008, namely the modernization of tax administration and the amendments to the Law on Taxation. In the years 2009-2014 Tax Reform, Volume II conducted by an increase in internal control. In 2016 enacted the Tax Amnesty Act. Years 2017-2020 Volume III conducted Tax Reform, namely consolidation, acceleration, and Continuity Tax Reform.

This is in accordance with the Decree of the Minister of Finance as stipulated in the KMK No. 885

[1]Rochmat Soemitro in the Official Siti 2014, P.1. "Taxation: Theory and Cases".
[2]Idem. P 3.
[3] www.kemenkeu.go.id

/ KMK.03 / 2016 on Tax Reform Team. One of the pillars of Tax Reform, Volume III of this is by way of reforming legislation. Legislation Reform conducted with the aim to make tax policy broadening the base of taxation, provide legal certainty, reduce compliance costs, and increase tax revenues.

In his duty to collect revenues, the tax authorities in all countries will be always in contact with the tax dispute. This is because the activities of collecting tax revenue has a significant relationship with the incidence of the tax dispute in which the more aggressive tax authorities to collect taxes, the more likely the number of disputes multiply.

Indonesia, the Directorate General of Taxation (DJP) in particular, should begin to give special attention to the settlement of tax disputes. The larger and continually rising revenue target from year to year make the DJP must use a variety of ways to collect revenues from the taxation sector for the achievement of revenue targets imposed. Demands to meet these targets make DJP also must agaresif perform tax collection, where this aggressiveness could potentially increase the number of tax disputes, the DJP should make every effort to avoid the addition of a significant number of Tax Disputes.

Trends in tax disputes in Indonesia, generally tends to increase from year to year. Even in the future, this number is predicted to continue to rise due to current issues in the world of taxation, such as law enforcement Tax Forgiveness program after the adoption of the OECD Transfer Pricing Guideliness 2017 in Indonesia.

Tax dispute resolution requires a long time. If we look from the UU No 28 Tahun 2007 concerning Third Amendment to Law No. 6 of 1983 on General Provisions and Tax Procedures procedure that can be performed taxpayers to settle tax disputes there are two scopes, namely objections and appeals.[4] After the objection and appeal process, taxpayer can make efforts lawsuit.[5] The last attempt or extraordinary effort to do taxpayer is by way of judicial review. Disputes over taxation that exists, can only apply for a judicial review of 1 (one) time during the legal process is done. The total time required for this process is more or less 3 (three) years. If this is happen, then the DJP and taxpayer equally as disadvantaged in many ways, such as the loss of cost, energy, and time. One alternative that can be used as a solution to overcome this problem is by means of Alternative Dispute Resolution (ADR). ADR include negotiation, mediation, and arbitration.[6]ADR already known in some countries to resolve their tax disputes, such as in the United States of America (USA) and Europe. The use of ADR in dispute resolution model in a non-litigation does not preclude the case is in litigation settlement. Litigation dispute resolution remain employed when non-litigation settlement did not produce results. Thus, the use of ADR is one of the mechanisms of dispute resolution.[7] Based on the above, I am interested to explain whether Alternative Dispute Resolution Reduce Costs, Energy, And Time Issued By Djp Taxpayer Or In Tax Dispute Settlement.

B. PROBLEM STATEMENT

How alternative dispute resolution can provide a solution to the problems of tax dispute resolution in Indonesia between DJP and taxpayer?

C. LITERATURE Riview

1. Definition Of Alternative Dispute Resolution (ADR)

   Alternative Dispute Resolution (ADR) is an institution of dispute settlement by way of consultation, negotiation, mediation, conciliation or expert judgment recognized in Article 1 point 10 of Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution.[8]

   Another definition of ADR Refers to a set of practices and techniques Aimed at permitting the resolution of legal Disputes outside the courts. It is normally thought to encompass mediation, arbitration, and a variety of "hybrid" processes by the which a neutral facilitates the resolution of legal Disputes without formal adjudication.[9]

   Alternative dispute redessal method are being increasingly acknowledged in field of law and commercial sectors both at National and International levels. Its diverse methods can helps the parties to resolve their disputes at their own terms cheaply and expeditiously. Alternative dispute redressal techniques are in addition to the Courts in character. Alternative dispute redressal techniques can be used in

[4] Law on General Provisions and Tax Procedures Article 25
[5] Law on General Provisions and Tax Procedures Article 23
[6] Nugroho, Revelation. "Use of Mediation in Dispute Resolution Business". News Letter No. 21, June 1995.
[7] Resko Basuki Wibowo. "Comparative Study of Some Alternative Dispute Resolution Business Model" Pro ustitia No. 4, 1996, p 25.
[8] Law No. 30 of 1999: Arbitration and APS.
[9] Robert Mnookin: Harvard Law School, "Alternative Dispute Resolutions": 1998

almost all contentious matters, which are capable of being resolved, under law, by agreement between the parties. Alternative dispute redressal techniques can be employed in several categories of disputes, especially civil, commercial, industrial and family disputes.[10]

ADR is often interpreted as an alternative to litigation, but often also be interpreted as an alternative to adjudication. When referring to the alternatives to litigation then the whole mechanism of dispute resolution outside the court, including arbitration forms part of ADR. If ADR is referring to the alternative to adjudication, the dispute resolution mechanisms that are konensual or cooperative as well as negotiation, mediation, and conciliation.[11]

System application of ADR have been done by some countries. USA and Australia have implemented and admits that ADR is effective and efficient in resolving tax disputes. With the ADR system, the dispute can be resolved in the early stages of the dispute process so that the savings taxation, energy, and time of the DJP and Taxpayer.

2. Definition Of Tax Dispute

"Disputes tax is is a dispute arising in the field of taxation between the taxpayer or person in taxes with the competent authorities as a result of the issuance of the decision can be lodged appeal or lawsuit to the Tax Court based on the laws of taxation, including a lawsuit over the implementation of billing under the Act Forced Tax collection Letter ".[12]

While understanding the disputes of jurisprudence by Black.s Law Dictionary is "A Conflict of controversy especially one that has given rise to a particular lawsuit." Based on such understanding, the dispute is a conflict, controversy, or debate among several parties that would lead to a lawsuit. A conflict, controversy or debate that poses no one tuntuan law by one party it could not be called a dispute.

a) Objection
Remedies can be done by taxpayer or tax guarantor against a decision that may be filed objections to the amount of the tax provisions in the SKP, based on legislation applicable tax.

b) Appeal
Remedies can be done by taxpayer or tax guarantor against a decision which can be appealed, according to the legislation applicable tax.

c) Suit
Remedies can be done by taxpayer or personnel of Taxes on the implementation of tax collection or the decisions may be filed lawsuit, based on the laws and regulations applicable tax.

d) Judicial review
Extraordinary legal remedy that can be performed by a Taxpayer or personnel of Taxes on the implementation of tax collection or the decisions may be filed a judicial review against the decision of an appeal or a lawsuit from the judiciary putausan taxes.

Taxpayer or Tax undertaking in a lawsuit filed against:

1) Forced Letter implementation, Implementing Seizure Warrant, or Announcement Auction;
2) Decision prevention in the context of tax collection;
3) Decisions relating to the implementation of the tax decision, other than those specified in Article 25 paragraph (1) and Article 26; or
4) Issuance of tax assessments or Decree objection that the publication does not conform with the procedure or the procedure set out in the provisions of the tax legislation.[13]

Tax Court is conducting power Courts of Justice for Taxpayer or tax Insurers seek justice against tax disputes.[14] Tax Dispute Resolution System in Indonesia there are two, namely:

1. Completion Administratively
Settlement of tax disputes administratively taken by the DJP both positions (ex-officio) and Based on the petition taxpayer.
2. Settlement In Court

[10] Idem.
[11] Suyud Margo. "Business Dispute Resolution" .2010. p 30
[12] Law Number 14 Year 2002 regarding the Tax Court, Article 1 point 5
[13] Law of General Provisions and Tax Procedures Article 23 paragraph (2)
[14] Diaz Prantara, "Indonesian Taxation Revised Edition 2, P.155.

Taxpayers who are not satisfied and do not agree on the results of the settlement of tax disputes administratively in the DJP may appeal or appeals to the Tax Court. An appeal or a lawsuit by the Tax Court is final and binding. Although the resolution of an appeal or lawsuit already has permanent legal force, taxpayers who are not satisfied and do not agree they are given the opportunity by law to file a judicial review to the Supreme Court. Reconsideration is an extraordinary legal remedy filed a court ruling which has permanent legal force and submitted to the Supreme Court.[15]

D. RESEARCH METHODS

This research is a study design in various activities to find out if that is the proper law to be applied inkonkrito to accomplish certain things.[16] This study was supported by research methods comparative study, comparing similarities and differences as a phenomenon to look for factors / situations how that can cause a particular event.

E. ANALYSIS AND DISCUSSION

Indonesia's tax disputes handled by the Tax Court found in three locations across Indonesia, including Jakarta, Yogyakarta and Surabaya. The tax dispute is handled by the Tax Court dispute cases include income tax and value added tax (within the scope of DJP), customs and excise (within the scope DJBC) and property tax (DJP and Local Government). Number of files a tax dispute have an upward trend in the last 5 years. Tax disputes originating from the DJP dominate the number of tax disputes in the Tax Court with an average of more than 65% in the last year. Having risen consistently in the four previous years, in 2016 there was a decline file a dispute that goes to both the Tax Court of DJP, DJBC and local governments, amounting to 19%. Specialty of the DJP, one of the causes of this decline is the Tax Forgiveness program initiated by the government in mid-2016 so many taxpayer revoke its tax dispute cases. In harmony with the increasing number of incoming files, settlement of tax disputes also increased the number of incoming files, settlement of tax disputes also increased from year to year. In fact, the completion in 2016 recorded the biggest growth in the last 5 years by 42%. settlement of tax disputes also increased from year to year. In fact, the completion in 2016 recorded the biggest growth in the last 5 years by 42%. settlement of tax disputes also increased from year to year. In fact, the completion in 2016 recorded the biggest growth in the last 5 years by 42%.

The increasing number of incoming files and the amount of tax dispute resolution in the Tax Court can not be separated from the increased value of SKP is the source of tax disputes. In fact, as of December 31, 2016, there were IDR 122 Trillion reception in dispute and the country is still stuck because there is no decision or verdict. The increase in nominal shows that the number of tax disputes increased more than the number of completion.

Of the upward trend of the tax dispute, one that can be the solution to their settlement is Disupute Alternative Resolutions. Discussion of the ADR at this time is limited to the application of ADR Systems of the United States (USA) given a same of Dispute Resolution System of International Taxation and Best Practice that has been applied by the USA.

Various Forms of Developing Alternative Dispute Resolution.

DJP with taxpayer can be seeked out of court tax by following the steps of ADR. This path can be taken to reduce the risk of settlement of tax dispute costly, energy, and time-consuming.

Several alternative methods that can be used to get the DJP and taxpayer Win-win Solutions is with some of the following ways:

a. Negotiations

Negotiation is a two-way communication designed to reach an agreement when both parties have different interests the same or different.[17]

Negotiation techniques there are four, namely:[18]

1) Competitive Negotiation Techniques
Competitive negotiation technique termed the negotiations is a lot.
2) Cooperative Negotiation Techniques
Assume the negotiator opponent not as an enemy but as a partner seeking common ground.
3) Negotiation Techniques Soft and Hard

[15] Wahyudi: Tax Dispute: 2013.
[16] Soejono, SH, Legal Research Methods, Rineka Copyright, Molds Second, Jakarta, in 2003, Pg. 110.
[17] Fisher, Roger and William Ury, Getting to Yes: Negotiating an Agreement Without Giving In, London Business Book, Ltd., (1991).
[18] Idem.

Negotiations Soft puts the importance of good relations between the parties. This technique emphasizes the style of negotiation risky deal that is false birth and to produce a pattern of "win-lose".

Hard negotiations to yield and using threats. Her aim is to look for the victory.

4) Interest Based Negotiation Techniques.

This technique is used as a middle way offer from Soft-Hard technique. These techniques have been selected for election of one of the potentially hard techniques found deadlock in the negotiations, especially if a hard negotiator will meet with same style tough negotiator who also is soft while negotiating potential as a loser.

Negotiation techniques already exist in the stage of the initial examination conducted between functional tax inspectors (Officers Tax which has been granted the ability and special education to conduct tax audits with a given ID) with taxpayer when taxpayer came to the Tax Office to be asked right clarification on data / findings in tax audits. Taxpayer for exacting SKP rebuttal published, as well as additional data or information, written or unwritten can be used as a negotiating tool to see whether SKP published by the DJP is correct or not. If functional tax inspectors found indications preliminary evidence, that crime in the area of taxation will be followed up with a tax investigation. Proof Starters are circumstances, actions, and / or evidence in the form of information, text, or objects that can give indication of a strong presumption that is or has been a criminal offense in the area of taxation undertaken anyone who may cause harm to the state revenue.[19]

b. Mediations

The definition of mediation by Haley Nolan a short term structured task oriented, participatory invention process. Disputing parties work with a neutral third party, the mediator, to reach a mutually acceptable agreement.[20]

Another defination is Facilitated negotiation according to Kovach. It process by the which a neutral third party, the mediator. Assists disputing parties in reaching a mutually satisfaction solution ".[21]

7 Functions Mediator by Fuller in (Riskon and Westbrook)[22]

7 mentions the mediator functions as a catalyst, educator, translator, resource person, bearer of bad news, the agent of reality, and scapegoat.

1) As a catalyst that the presence of a mediator in the negotiations proeses able to encourage the birth of a constructive atmosphere for discussions.
2) As educators means someone trying to understand the aspirations, proesdur work, limited political and business constraints of the parties. Therefore, he must try to get involved in the dynamics of the differences between the parties.
3) As a translator, it means that the mediator should strive to convey and formulate proposals which one party to the other party through language or catchy phrase by the other party, without prejudice to the objectives achieved by the proposer
4) As a speaker, means a mediator must utilize the resources available information.
5) For people with bad news, it means that a mediator should be aware, that the parties in the negotiations can be emotional proeses, the mediator must hold separate meetings with the parties to accommodate various proposals.
6) As an agent of reality means that mediator must try to give meaning unambiguously to one party that the target is impossible / unreasonable to be achieved through negotiations
7) As a scapegoat, it means that a mediator must be prepared to blame for instance in making a deal negotiation results.

The mediator functions could be taken over by a third party, that from reviewers

[19]Diaz Priantara, 2000, the Tax Investigation, Djambatan, Jakarta, p. 26.

[20] Nollan-Halley and M. Jaqueline, Alternative Dispute Resolution, West Publishing Co., USA, 1992.hlm 56.

[21]Kimberlee K. Kovach, Mediation Principle and Practice, West Publishing Co. St. Paul, 1994, p 16.

[22]Leonard L. Riskin, and James E. Westbrook, Dispute Resolution and Lawyers, West Publishing-b, St. Paul, 1987.hlm 96.

objected. Reviewers objections are employees of the DJP has the task to conduct a review of the objection, the reduction or elimination of administrative sanction, and the reduction or cancellation of improper tax assessments filed by taxpayer. Reviewers objection is little judge to decide the dispute between the Tax Audit and Taxpayer.

c. Conciliation

According to the 2002 UNCITRAL Model Law on International Commercial Conciliation defines Conciliation

"a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons (—the conciliator‖) to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute".[23]

Conciliation is the early stages of the mediation process with reference to the application; if someone filed against the mediation process, and demands proposed claimant may receive in his capacity as the respondent, then at the stage of such means has been obtained without continuing settlement talks, because the respondent with goodwill / goodwill are willing to accept what is proposed party claimant.[24]

Judging from the above understanding, Conciliation is a process that allows it to be applied early, because the DJP and taxpayer can come to terms regarding the tax dispute without the need to proceed to the next stage.

d. Minitrial

Minitrial is a new form of ADR and very popular in the American business community. This form is considered as the most effective option and efficiently resolve business disputes.

Minitrial process consists of five stages items, namely

1) minitrial agreement (agreement is use minitrial), meaning tha the parties agree to submit a dispute settlement through minitrial institution. This gift can be orally and can be written (in writing), in the which Formulated way and the deadline of completion phasing.
2) case preparation, in the which case the parties are given the opportunity to collect the various documents deemed important to be submitted in connection whit the dispute. The time period is usually limited to between one and two weeks.
3) Hearning information (inforation learning), for the which it opens and begins the minitrial process in a closed-door meeting between the parties faced by top managers and executives of the parties, and delivered in front of Reviews their designated advisors, advisors'position and functions, not as law, who are authorized to take verdict, but only act as a neutral third party, guiding the course of the conveyed information in a confidential minitrial.
4) advisor given opinions, to executives of both parties, should not be Attended by top managers and lawyers.the Contain opinions given an explanation of the strenghts, ugliness, and weaknesses of each side and how the judhe should resolve the dispute should the case be brought to justice.
5) Discussing the settlement, the executives of both parties hold a meting without the presence of an advisor, since he has given since his role and function has ended his role by meeting itself.the Discussed the dispute resolution based on the information submitted by each party in relation to the opinions Expressed by the advisor.whether or not a dispute settlement agreement is Reached is entirely left to the will and will of the executives concerned.[25]

[23]UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002 (United Nations 2002). Available at www.uncitral.org. See also Dobbins -UNCITRAL Model Law on International Commercial Conciliation: From a Topic of Discussion Possible to Approval by the General Assembly‖ (2002) 3 529 LJ Wing Pepp Disp.

[24]Margono, Suyud. "Business Dispute Resolution", 2010. Hlm.71.

[25] Idem; 71-72.

Thus Spake the role of advisor in the minitrial process is similar to the role of mediator and conciliator.

For the succes of a minitrial is strongly influenced by the abylityof the advisor to establish a legal opinion from the statements of the parties, so as to arouse the feelings of the partie towards a compromise solution.

e. Summary Jury Trial

Summary jury trial includes the disputing parties appoint and collect a few people in a group that will act as the jury.

Lawyers representing both parties submit disputes. After that, the lawyers instructed the jury to make a decision, and the decision was taken based on the reasons stated in the case of delivery problems.[26]

Some judges may be appointed from independent parties of government to help make decisions on taxation sengekata between DJP with taxpayer. These parties may consist of layers of society also understands the legal background, such as the police, the Indonesian National Armed Forces, etc.

Upon the decision of the jury, the DJP and taxpayer can think about whether to accept / do not. If there is no agreement as well, the last effort that can be taken legal way that is in the Tax Court.

F. CONCLUSION

Indonesia is a country that has a high tax targets. Conditions dispute settlement system of taxation in Indonesa very similar to those applied in the United States. Application of ADR has been done there, and is effective in resolving disputes and taxation. Taxation dispute settlement there are 5 stages: negotiation, mediation, concilitaion, mini-trial, and summary jury trial. Before finalizing the tax dispute to the tax court, it helps the application of ADR is performed by a modified according to the needs and the legal system of Indonesia.

Application of ADR in Indonesia may not be applied at this time. However, to do a literature review, comparative studies, and a direct survey of the application of ADR in the United States or in the neighboring countries that have a tax dispute settlement system are similar to those in Indonesia, this may be the best solution. It should be possible given the existing dispute resolution taxation now costs, effort, and a lot of time. Moreover, the condition of the current globalization era, the President of the Republic of Indonesia, Joko Widodo said that would be done for regulatory simplification in one big rule in legal protection in the form of the Omnibus Law. Existing law in the realm of the Omnibus Law also targeting the Tax Legislation. With the existence of legal certainty and the ease of dispute resolution in Indonesia, this can be a special attraction for Investors to invest in Indonesia. Therefore, with the existence of ADRs, investment growth and economic development in Indonesia are expected to increase

G. REFERENCES

Literature

Black, Henry Campbell. 1990. Black's Law Dictionary. St. Paul Minn; West Publlching Co.

Fisher, Roger and William Ury, 1991, Getting to Yes: Negotiating an Agreement Without Giving In, London Business Book, Ltd.

K. Kovach, Kimberlee, 1994, Mediation Principle and Practice, West Publishing Co. St. Paul.

Law Reform Commission, 2010, Alternative Dispute Resolution: Mediation And Conciliation, 35-39 Shelbourne Road, Ireland.

L. Leonard, Riskin, and James E. Westbrook, 1987, Dispute Resolution and Lawyers, West Publishing-b, St. Paul.

Margono, Suyud 2010, Business Dispute Settlement Alternative Dispute Resolutions (ADR), Jakarta: Ghalia Indonesia.

Mnookin, Robert. 1998Alternative Dispute Resolutions, Harvard Law School.

Nollan-Halley and M. Jaqueline, 1992, Alternative Dispute Resolution, West Publishing Co., USA

Nugroho, Revelation. 1995 Use of Mediation in Dispute Resolution Business. News Letter No. 21, Indonesia.

Priantara, Diaz, 2013, the Indonesian Tax Revised Edition 2, Jakarta: Partners Media Discourse.

Resko, Basuki Wibowo, 1996, Comparative Study of Alternative Dispute Resolution Models Business. Pro ustitia No. 4 1996.

Officially, Siti, 2017 Taxation: Theory and Cases, Yogyakarta: Salemba Four.

[26] Idem; 72.

Soejono, SH, 2003, the Legal Research Methods, Jakarta: Rineka Copyright, Molds Second.

Wahyudi, 2013, the Tax Dispute, South Tangerang: College of Accountancy.

Other sources

www.kemenkeu.go.id
www.pajak.go.id

Laws and regulations

Law of the Republic of Indonesia Number 28 Year 2007 Third Amendment Act No. 6 of 1983 About General Provisions and Tax Procedures

Law - Law of the Republic of Indonesia Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution

Law Number 14 Year 2002 regarding the Tax Court

MEDICAL DISPUTE SETTLEMENT THROUGH MEDIATION AS AN ALTERNATIVE DISPUTE RESOLUTION

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ABSTRACT

Health care is a patient's right as a basic right and comes from individual basic rights, the right of self determination, or z*elfbeschikkingsrecht*. There are 2 (two) types of legal relationships that occur between patients and doctors in health care, namely relationships due to the occurrence of therapeutic contracts and relationships due to regulations. In the relationship between a doctor and a patient, a medical dispute may occur because the patient's interests are impaired by the actions of the doctor or dentist who practices medicine. For this reason, a process is needed to resolve the medical dispute. The dispute resolution process can be used in two ways, namely litigation (through court) and non litigation. Settlement of disputes through non-litigation channels, namely the Alternative Dispute Resolution regulated in Act Number 30 Year 1999 Concerning Arbitration and Alternative Dispute Resolution. One alternative form of Dispute Resolution that can be carried out is mediation, so this research will discuss the causes of medical disputes, as well as arrangements regarding medical dispute resolution through mediation as Alternative Dispute Resolution. This study has 2 (two) problem formulations, first: What causes medical disputes?; and second: What are the arrangements regarding the settlement of medical disputes through mediation as an Alternative Dispute Resolution?. The research method in writing this journal is juridical-normative legal research, with secondary data that includes: (1) primary legal material, namely the Civil Code; The Constitution of the Republic of Indonesia Year 1945; Law Number 30 Year 1999 Concerning Arbitration and Alternative Dispute Resolution; Law Number 29 Year 2004 concerning Medical Practices; Law Number 36 Year 2009 concerning Health; Law Number 44 Year 2009 concerning Hospitals, and Supreme Court Regulation Number 1 Year 2008; (2) secondary legal materials, namely books and journals of health law; (3) tertiary legal materials which include the Large Indonesian Dictionary (KBBI) and the Black's Law Dictionary.

Keywords: Alternative Dispute Resolution, Medical Disputes, Mediation.

A. INTRODUCTION

Health services are Human Rights as stated in Article 28H of the 1945 Constitution of the Republic of Indonesia, which reads: *"Every person has the right to live in physical and spiritual well-being, to live, and to have a good and healthy environment and to be entitled to health services."* For this reason, health services are the patient's right. The patient's right is actually a basic right and comes from the individual basic right, the right of self determination, or zelfbeschikkingsrecht. Rights in the Black's Law Dictionary mean as a right that contains several meanings, including natural rights, political rights and civil rights. The right to determine one's own destiny is closer to personal rights, namely the right to personal security that is closely related to life, body parts, health, honor, and the right to personal freedom.[1]

There are 2 (two) types of legal relationships between patients and doctors in health care, namely relationships due to the occurrence of therapeutic contracts and relationships due to regulations. In the first relationship, it starts with an agreement (not written) so that the will of both parties is assumed to be accommodated when the agreement is reached. The agreement reached was in the form of approval of medical action or even rejection of a medical action plan. Relationships due to laws and regulations usually arise because of the obligations imposed on doctors because of their profession without the need for patient approval. Both of these relationships give birth to legal responsibilities, professional responsibilities and ethical responsibilities of a doctor. A doctor or dentist who commits an offense can be prosecuted in several courts, for example in the legal field there are civil courts, criminal courts and administrative courts. In addition doctors or dentists can also be brought before the Ethics Court

[1] Hermien Hadiati Koeswadji, 1984, *Hukum dan Masalah Medik*, Airlangga University Press, Surabaya, page.

in professional organizations (MKEK and MKEKG), and the Professional Discipline Court by (MKDKI).

The agreement that arises from the therapeutic transaction (healing) is called inspanningsverbintenis, which is an engagement that must be done carefully and with great effort *(met zorg en inspanning)*.[2] In practice, the health services provided by doctors are efforts to succeed in their medical actions.[3] However, the patient's dissatisfaction with the actions of doctors and other health professionals in providing such health efforts can trigger medical disputes.[4] Law Number 29 Year 2004 concerning Medical Practice implicitly states that medical disputes are disputes that occur because the patient's interests are harmed by the actions of a doctor or dentist who practices medicine. Thus a medical dispute is a dispute that occurs between users of medical services and medical service providers in this case patients with doctors / hospitals. The problem that arises most often in all cases of patient demands for hospitals is generally a miscommunication problem that occurs so that the proper term is "Medical Disputes".[5]

The term dispute originates from the English translation of dispute or geding in Dutch. Dean G Pruit states that a dispute is a perceived divergence of interest or a belief that the aspirations of the parties to the dispute are not achieved simultaneously.[6] Salim HS states that disputes are disputes, disputes, or disputes that occur between one party and another party and / or between one party and various parties relating to something of value, whether in the form of money or objects.[7] Disputes will always occur in any existing legal relationship, including legal relations between patients and doctors, for this reason it is necessary to take steps to resolve the dispute.

According to the Big Indonesian Dictionary (KBBI), settlement is the process of how to accomplish. Resolving is defined as facilitating, ending, clearing or deciding, arranging to reconcile (disputes or quarrels) or arranging something so that it becomes good.[8] The dispute resolution process can be used in two ways, namely litigation (through court) and non litigation. Dispute resolution through non-litigation namely Alternative Dispute Resolution.[9] Dispute resolution through alternative ways should be regulated in Law Number 30 Year 1999 Concerning Arbitration and Alternative Dispute Resolution, where in Article 6 paragraph (1) the law reads: *"Disputes or civil disagreements can be resolved by the parties through alternatives dispute resolution based on good faith aside the litigation settlement in the District Court."* In resolving medical disputes, it should be carried out with a non-litigation process, namely Alternative Dispute Resolution due to medical disputes arising from the health rights of patients violated by doctors / hospitals, so that decisions resulting from the settlement of such disputes must be a win-win solution by prioritizing the interests of patients as well as doctors / hospitals. One alternative form of Dispute Resolution that can be carried out is mediation, so this research will discuss the causes of medical disputes, as well as arrangements regarding medical dispute resolution through mediation as Alternative Dispute Resolution.

B. PROBLEM STATEMENT

The formulation of the problem in this legal research journal is as follows:

1. What causes medical disputes?
2. What are the arrangements regarding the settlement of medical disputes through mediation as an Alternative Dispute Resolution?

C. LITERATURE REVIEW

Theory About Alternative Dispute Resolutions

Understanding disputes in the Indonesian dictionary is a conflict or conflict. Conflict means the existence of opposition or disagreement between people, groups, or organizations against an object problem. In resolving disputes through non-litigation, we are familiar with Alternative Dispute Resolution (ADR), which in the perspective of Law Number 30 Year 1999 Concerning Arbitration and Alternative Dispute Resolution, Alternative Dispute Resolution is an outside dispute resolution institution. the court is based on the agreement of the parties by disregarding litigation dispute resolution in court. The forms of

[2] D. Veronica Komalawati, 1989, *Hukum dan Etika dalam Praktek Dokte*r, Pustaka Sinar Harapan, Jakarta, page. 84.
[3] Sofwan Dahlan, 2000, *Hukum Kesehatan Rambu-Rambu bagi Profesi Dokter*, Badan penerbit Universitas Diponegoro, Semarang, page. 33.
[4] Wila Chandrawila Supriadi, 2001, *Hukum Kedokteran*, Mandar Maju, Bandung, page. 12.
[5] Eddi Junaidi, 2011, *Mediasi Dalam Penyelesaian Sengketa Medik*, Raja Grafindo Persada, Jakarta, page. 4.
[6] Dean G Pruit dan Jeffrey Z Rubin, 2004, *Konflik Sosia*l, Pustaka Pelajar, Yogyakarta, page. 9-10.
[7] Salim HS, 2013, *Penerapan Teori Hukum pada Penelitian Desertasi dan Tesis*, Raja Grafindo Persada, Jakarta, page. 137.
[8] Departemen Pendidikan dan Kebudayaan, 1989, *Kamus Besar Bahasa Indonesia*, Balai Pustaka, Jakarta, page. 801.
[9] Anggraeni Endah Kusumaningrum, *Mediasi Dalam Penyelesaian Sengketa Medis Sebagai Upaya Perlindungan Pasien*, Jurnal Hukum Dan Dinamika Masyarakat Vol.14 No.1 Oktober 2016, page. 71.

dispute resolution out of court or referred to as Alternative Dispute Resolution are regulated in Article 1 point 10 of Law Number 30 Year 1999 Concerning Arbitration and Alternative Dispute Resolution, which reads: *"Alternative Dispute Resolution is a dispute resolution agency or dissent through procedures agreed by the parties, namely settlement outside the court by means of consultation, negotiation, mediation, conciliation, or expert judgment."*

D. RESEARCH METHODS

The research method in writing this journal is juridical-normative legal research, with secondary data that includes: (1) primary legal material, namely the Civil Code; The Constitution of the Republic of Indonesia Year 1945; Law Number 30 Year 1999 Concerning Arbitration and Alternative Dispute Resolution; Law Number 29 Year 2004 concerning Medical Practices; Law Number 36 Year 2009 concerning Health; Law Number 44 Year 2009 concerning Hospitals; and Supreme Court Regulation Number 1 Year 2008; (2) secondary legal materials, namely books and journals of health law; (3) tertiary legal materials which include the Large Indonesian Dictionary (KBBI) and the Black's Law Dictionary.

E. ANALYSIS AND DISCUSSION

1. Rights That Should be Obtained by Patients in Health Services

The basis for a doctor's obligation is the existence of a professional contractual relationship between medical personnel and their patients, which raises general obligations and professional obligations for the medical personnel. Professional obligations are outlined in professional oaths, professional codes of ethics, various service standards, and various operational procedures.[10] The health law emphasizes that in providing services, health workers are only responsible for the efforts made *(Inspanning Verbintennis)* and do not guarantee the final results (*Resultalte Verbintennis).*[11]

Health services basically aim to carry out prevention and treatment of diseases, including medical services carried out on the basis of individual relationships between doctors and patients who need healing but doctors often make mistakes that result in malpractice to patients.[12] In the world of medicine, you must know the term of malpractice. According to Zulkifli Muchtar, malpractice is any medical error made by a doctor for doing work below the standard.[13]

The definition of malpractice in some of the literature can be described as follows:

a. In the Black's Law Dictionary, the definition of malpractice is: *"Malpractice is any professional misconduct, unreasonable lack of skill. This term is usually applied to such conduct by doctors, lawyers, and accountants. Failure of onerendering professional services to exercise that degree of skill and learning commonly applied under all the circumtance in the community by the average prudent reputable member of the profession with the result of injury, loss, or damage to the recipient of those entittled to rely upon upon upon them. It is any professional misconduct, unreannable lack of skill or fidelity in professional or judiciary duties, evil practice or legal or immoral conduct."*[14]
b. In The Oxford Illustrated Dictionary, 2nd ed, 1975, the definition of malpractice is: *"Malpractice is wrong doing; (law) improper treatment of patients by medical attendents; illegal action for one's own benefit while in position of trust."*[15]
c. In Coughlin's Dictionary of Law, the definition of malpractice is: "*Malpractice is a professional misconduct on the part of professional person, such as a physician engineer, lawyer, accountant, dentist, veterinarian. Malpractice maybe a result of ignoring, neglect, or lack of skill or fidelity in the professional duties; intentional wrong doing; or unethical practice."*[16]
d. In Stedman's Medical Dictionary, the definition of malpractice is: *"Malpractice is mistread of*

[10] Arif Dian Santoso, *Penyelesaian Sengketa Medik Melalui Mediasi Oleh Majelis Kehormatan Disiplin Kedokteran Indonesia (MKDKI) Untuk Dapat Menjamin Keadilan Dalam Hubungan Dokter Dan Pasien*, Jurnal Pasca Sarjana Hukum UNS Volume VII Nomor 1 Januari - Juni 2019, page. 32.

[11] *Setiati Widihastuti, dkk., Mediasi Dalam Penyelesaian Sengketa Kesehatan di Jogja Mediation Center,* Jurnal Sosia Vol. 14, No. 1 Mei, 2017, page. 18.

[12] Danny Wiradharmairadharma, 1999, *Penuntun Kuliah Kedokteran dan Hukum Kesehatan,* Kedokteran EGC, Jakarta, page. 7.

[13] Soedjatmiko, 2001, *Masalah Medik dalam Malpraktek Yuridik,* Citra Aditya Bakti, Malang, page. 32.

[14] J. Guwandi, 2007, *Medical Law (Hukum Medik),* Balai Penerbit FKUI, Jakarta, page. 23-24.

[15] *Ibid.*

[16] Fred Ameln, 1991, *Kapita Selekta Hukum Kedokteran,* Grafikatama Jaya, Jakarta, page. 83.

disease or injury through ignorance of criminal intent."[17]

The medical dispute originated from the allegation that the doctor / hospital committed malpractice. There are 3 (three) legal aspects that can be used to determine malpractice, namely deviations from the standards of the medical profession, mistakes made by doctors, either in the form of deliberate or negligence, and the consequences that occur due to medical actions that cause both material and non material losses, or physical (injury or death) or mental.[18] Malpractice can also be called medical negligence where medical negligence can arise due to default or unlawful acts. The things that cause default include: a) Not doing what according to the agreement must be done; b) Doing what is according to agreement must be done but late to fulfill it or not on time; c) Doing what according to the agreement must be done but not perfect; and d) Do what according to the agreement should not be done.

In connection with the legal relationship between the doctor and the patient, the patient's demands to hold the doctor accountable because in the opinion of the patient there has been a "default" in the medical services carried out by the doctor against the patient, the doctor can be prosecuted based on the default in three ways, namely:[19]

a. If the doctor does not fulfill the achievement at all, it means that the doctor did not take any medical action (diagnosis or therapy), causing harm to the patient;
b. The doctor fulfills the agreement late means that the doctor performs medical actions, but is too late so that it causes harm to the patient;
c. Doctors mistakenly perform medical procedures.

In the perspective of civil law, lawsuits for alleged medical negligence can use the following articles:

a. Default, using article 1239 of the Civil Code, where this article can be used if the legal relationship formed between the doctor and the patient is an outcome-oriented agreement *(resultaat verbintenis).*
b. Negligence by using article 1366 of the Civil Code as follows: "Everyone is responsible not only for losses caused by his actions, but also for losses due to negligence or carelessness".

With the emergence of legal consequences resulted in the emergence of obligations that is legal liability for doctors against losses that occur in patients. The form of doctor's coverage is:[20]

a. Liability due to default, for example: health services provided are not in accordance with what was originally promised.
b. Liability due to acts against the law, for example: violations of professional standards that cause harm to patients.

The law regulates the rights of patients if they feel disadvantaged over the health services they receive, namely in Article 58 paragraph (1) of Law Number 36 Year 2009 concerning Health, which reads: *"Everyone has the right to claim compensation for a person, health worker, and / or health providers that cause losses due to errors or negligence in the health services they receive."* Even so, the law also provides an opportunity for the injured party to health services to take the criminal law as stipulated in Article 32 letter (q) of Law Number 44 Year 2009 Regarding Hospitals, which reads: *"every patient has the right to sue and / or sue the Hospital if the Hospital is suspected of providing health services that are not in accordance with standards either civil or criminal."*

A very important consequence of non-fulfillment of the agreement (default) is that the injured party can ask for compensation for the costs, losses and interest that he suffered.[21] Article 1243 of the Civil Code states that: *"Reimbursement of costs, losses, and interest due to not fulfilling an agreement, only then begins to be obliged, if the debtor, after being declared negligent to fulfill the agreement, continues to neglect it or if something must be given or made, can only be given or made within the grace period that he has exceeded."* Thus if a doctor performs a default as described above, then he must be responsible for providing compensation to patients.

2. Legal Protection as well as Patient's Legal Efforts in Health Services

Mediation must be carried out in medical disputes which have been regulated in Article 29 of

[17] J. Guwandi, 2007, *Op.Cit.*, page. 22-23.
[18] Anny Isfandyarie, 2005, *Malpraktek dan Resiko Medik dalam Kajian Hukum Pidana*, Prestasi Pustaka, Jakarta, page. 111.
[19] Sri Ratna Suminar, *Alternatif Penyelesaian Sengketa Antara Dokter Dengan Pasien Dalam Malpraktek,* Jurnal Syiar Hukum, Vol 8, No 3 (2006), page. 173.
[20] Bahder Johan Nasution, 2005, *Hukum Kesehatan Pertanggungjawaban Dokter*, PT. Rineka Cipta, Jakarta, page. 63.
[21] Mariam Darus Badrulzaman, 2001, *Kompilasi Hukum Perikatan*, Citra Aditya Bhakti, Bandung, page. 19.

Law Number 36 Year 2009 concerning Health which confirms the role of settlement through out-of-court channels in medical disputes, *namely "In the event that a health worker is suspected of negligence in carrying out his profession, such negligence must solved first through mediation."* This regulation has clearly stipulated the role of mediation in the resolution of medical disputes, especially outside the court, leaving aside the settlement through legal or litigation.

Mediation is one of the Alternative Dispute Resolution mechanisms as regulated in Act Number 30 Year 1999 Concerning Arbitration and Alternative Dispute Resolution. The law also emphasizes Alternative Dispute Resolution in the form of mediation (and the use of experts), it does not even rule out the possibility of dispute resolution through other alternatives. Article 6 Paragraph (1) of Law Number 30 Year 1999 Concerning Arbitration and Alternative Dispute Resolution states that: *"Disputes or disagreements can be resolved by the parties through alternative dispute resolution based on good faith by overriding litigation settlement in district courts."* This article is a legal basis that if a dispute occurs in the civil sphere, a non-litigation route can be adopted, namely the Alternative Dispute Resolution and overrule the litigation path in the district court.

The mediation process has several advantages when compared to litigation in court, these benefits are: a) Flexible, voluntary, fast, inexpensive, appropriate, needs, neutral, confidential, based on good relations; b) Improve communication between disputing parties; c) Helps to release anger towards the other party; d) Increase awareness of the strengths and weaknesses of each party's position; e) Knowing hidden things or issues related to disputes that were not previously realized; and f) Getting creative ideas to resolve disputes, while the shortcomings of litigation in court when compared to mediation are: a) A protracted or prolonged process for obtaining a final and binding decision; b) Cause tension or hostility between the parties; c) Judges' abilities and knowledge are limited and general in nature; d) Cannot be kept secret; e) Not able to accommodate the interests of foreign parties; f) Weak judicial administration and bureaucracy system; and g) Judge's decision may not be accepted by one of the parties because it sides with one of the parties or is considered unfair.[22]

Mediation is a non-litigation approach in dispute resolution that is recognized by positive law in Indonesia, which is pursued through a familial approach, promoting the principles of humanity and justice in order to maintain good relations to end existing disputes. Mediation is appropriate because it is mutually beneficial (mutual winning). In addition, the closed process has been able to protect the confidentiality of the parties to the dispute, and the deliberation process for joint decision making, able to place an equal bargaining position between the patient and the doctor or hospital in the dispute. Collective agreements obtained through mediation to end health disputes, will be set forth in a peace memorandum or a peace deed that is final and binding.[23]

The advantages of mediation in the resolution of modern medical disputes have the following characteristics:[24]

a. Voluntary. The decision to mediate is left to the agreement of the parties, so that a decision can be reached that is truly the will of the parties.
b. Informal is flexible. Unlike litigation (court), the mediation process is very flexible. Even the parties can be assisted by the mediator to design their own mediation procedures.
c. Interest based. In mediation there is no search for who is right or wrong, but rather to safeguard the interests of each party.
d. Future looking (looking ahead). Because it is more protecting the interests of each party, mediation emphasizes more on maintaining the relationship of the parties to the dispute going forward, not oriented to the past.
e. Parties oriented. With informal procedures, the parties concerned can actively control the mediation process and make a settlement without relying too heavily on lawyers / lawyers / advocates
f. Parties control. Dispute resolution through mediation is the decision of each party. The mediator cannot force the agreement to be reached; lawyer / lawyer can not delay time or

[22] Asep Sukohar, dkk., *Penyuluhan Mediasi Sengketa Medik pada Dokter yang akan Diambil Sumpah di Fakultas Kedokteran Unila*, Jurnal Pengabdian Masyarakat Ruwa Jurai, Volume 1, Nomor 1, Oktober 2015, page. 72.
[23] *Setiati Widihastuti, dkk.*, *Op.Cit.*, page. 18.
[24] Ari Yunanto, Helmi, 2010, *Hukum Pidana Malpraktek Medik, Tinjauan dan Perspektif Medikolegal*, Andi Offset, Yogyakarta, page. 34

take advantage of the ignorance of the client in the case of a trial such as in court (litigation).

There are twelve steps in order for the mediation process to succeed, namely: 1) Establishing relationships with the parties to the dispute; 2) Choosing a strategy to guide the mediation process; 3) Collect and analyze background information on disputes; 4) Develop a mediation plan; 5) Building trust and cooperation between the parties; 6) Start a mediation hearing; 7) Formulate the problem and set the agenda; 8) Reveal hidden interests; 9) Generating dispute resolution options; 10) Analyze dispute resolution options; 11) Final bargaining process; and 12) reach a formal agreement.[25]

The mediation procedure in the court is regulated based on the Republic of Indonesia Supreme Court Regulation Number 1 of 2008, in which Article 4 of the Supreme Court Regulation states that: *"all civil disputes submitted to the First Level Court must first be resolved through peace with the assistance of a mediator."* Exceptions are for some cases that are settled through the Commercial Court Procedure, the Industrial Relations Court, the Objection of the Decision of the Consumer Dispute Resolution Agency, and the Objection of the Decision of the Business Competition Supervisory Commission. Therefore, based on the Republic of Indonesia Supreme Court Regulation Number 1 Year 2008, it does not rule out the possibility of medical dispute resolution through mediation, as required in Act Number 36 of 2009 concerning Health.

F. CONCLUSION

Based on the discussion above, the conclusion is as follows:

1) The cause of a medical dispute is that the doctor commits an error that results in malpractice to the patient, where malpractice is any medical error made by the doctor for doing work below the health service standard, so that it harms the patient, and the patient has the right to claim compensation for the doctor / home illness that causes loss due to errors or negligence in the health services it receives.
2) Arrangements regarding the resolution of medical disputes through mediation as an Alternative Dispute Resolution, namely in Law Number 36 Year 2009 concerning Health and the Supreme Court Regulation Number 1 Year 2008 which confirms that mediation must be carried out in medical disputes, where mediation is one of the Alternative Dispute Resolution outside the court that can override settlement through legal or litigation.

[25] Boulle L., 1996, *Mediation: principles process practice,* Butterworth, Australia, page. 78.

G. REFERENCES

Book

Anny Isfandyarie, 2005, *Malpraktek dan Resiko Medik dalam Kajian Hukum Pidana,* Prestasi Pustaka, Jakarta.

Ari Yunanto, Helmi, 2010, *Hukum Pidana Malpraktek Medik, Tinjauan dan Perspektif Medikolegal*, Andi Offset, Yogyakarta.

Bahder Johan Nasution, 2005, *Hukum Kesehatan Pertanggungjawaban Dokter*, PT. Rineka Cipta, Jakarta.

Dean G Pruit dan Jeffrey Z Rubin, 2004, *Konflik Sosia*l, Pustaka Pelajar, Yogyakarta.

Departemen Pendidikan dan Kebudayaan, 1989, *Kamus Besar Bahasa Indonesia*, Balai Pustaka, Jakarta.

D. Veronica Komalawati, 1989, *Hukum dan Etika dalam Praktek Dokte*r, Pustaka Sinar Harapan, Jakarta.

Eddi Junaedi, 2011, *Mediasi Dalam Penyelesaian Sengketa Medik*, Raja Grafindo Persada, Jakarta.

Fred Ameln, 1991, *Kapita Selekta Hukum Kedokteran*, Grafikatama Jaya, Jakarta.

Hermien Hadiati Koeswadji, 1984, *Hukum dan Masalah Medik*, Airlangga University Press, Surabaya.

J. Guwandi, 2007, *Medical Law (Hukum Medik),* Balai Penerbit FKUI, Jakarta.

Mariam Darus Badrulzaman, 2001, *Kompilasi Hukum Perikatan*, Citra Aditya Bhakti, Bandung.

M. Chief, 2000, *Black's Law Dictionary,* West Group, St. Paul.

Salim HS, 2013, *Penerapan Teori Hukum pada Penelitian Desertasi dan Tesis*, Raja Grafindo Persada, Jakarta.

Sofwan Dahlan, 2000, *Hukum Kesehatan Rambu-Rambu bagi Profesi Dokter*, Badan penerbit Universitas Diponegoro, Semarang.

Wila Chandrawila Supriadi, 2001, *Hukum Kedokteran*, Mandar Maju, Bandung.

Journal and Legal Scientific Research

Anggraeni Endah Kusumaningrum, *Mediasi Dalam Penyelesaian Sengketa Medis*

Sebagai Upaya Perlindungan Pasien, Jurnal Hukum Dan Dinamika Masyarakat Vol.14 No.1 Oktober 2016.

Arif Dian Santoso, *Penyelesaian Sengketa Medik Melalui Mediasi Oleh Majelis Kehormatan Disiplin Kedokteran Indonesia (MKDKI) Untuk Dapat Menjamin Keadilan Dalam Hubungan Dokter Dan Pasien,* Jurnal Pasca Sarjana Hukum UNS Volume VII Nomor 1 Januari - Juni 2019.

Asep Sukohar, dkk., *Penyuluhan Mediasi Sengketa Medik pada Dokter yang akan Diambil Sumpah di Fakultas Kedokteran Unila,* Jurnal Pengabdian Masyarakat Ruwa Jurai, Volume 1, Nomor 1, Oktober 2015.

Setiati Widihastuti, dkk., *Mediasi Dalam Penyelesaian Sengketa Kesehatan di Jogja Mediation Center,* Jurnal Sosia Vol. 14, No. 1 Mei, 2017.

Sri Ratna Suminar, *Alternatif Penyelesaian Sengketa Antara Dokter Dengan Pasien Dalam Malpraktek,* Jurnal Syiar Hukum, Vol 8, No 3 (2006).

Legislation

The Civil Code.

Indonesia, the Constitution of the Republic of Indonesia Year 1945.

_____, Law Number 30 Year 1999 concerning Arbitration and Alternative Dispute Resolution.

_____, Law Number 29 Year 2004 concerning Medical Practices.

_____, Law Number 36 Year 2009 concerning Health.

_____, Law Number 44 Year 2009 concerning Hospitals.

_____, Supreme Court Regulation Number 1 Year 2008.

THE PERSPECTIVE OF LOCAL GOVERNMENT MONITORING LAW TO PREVENTING CORRUPTION

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ABSTRACT

Local government financial monitoring still has problems. Some indications of these problems are low budget absorption capacity, low efficiency, and low effectiveness of budget spending, and high level of corruption. Local government financial monitoring has not been able to improve the performance of local government financial management, so, it has not been able to become an instrument for corruption prevention. This indication can be seen from the high number of local government heads, and high official local government who is suspected of corruption cases. This research is intended to analyze local government financial monitoring regarding law and legislation related to local government financial management, monitoring, and corruption. To increase the prevention of corruption in local governments, a strong monitoring system is needed and involves the participation of many parties, especially the public, as taxpayers, and the true owners of the local government budget. Changes institutional structure of local government financial monitoring, and improvement of local government financial management regulations, especially the use of information technology, are expected to improve the performance of regional financial supervision in the context of preventing corruption.

Keywords: Monitoring, Financial, Corruption

A. INTRODUCTION

The high level of corruption in the local government is predicted because the mechanism of preventing corruption in the local government is considered to be minimal. One of the prevention instruments that is also not yet considered optimal is the regional financial monitoring system. Although the supervisory apparatus has been regulated through applicable legislation, the mechanism is not in line with what is expected.

Corruption Eradication Commission (KPK) released data in 2017, the budget leaks in the local government reached 20-40%. This value is calculated based on the estimation of the total value of state financial losses for corruption cases in the local government handled by the KPK.

Local government monitoring arrangements have basically been regulated through several laws. Both external supervisory agency such as *Badan Pemeriksa Keuangan* (BPK-Audit Board of Indonesia), internal supervisory agency such as *Badan Pengawas Keuangan dan Pembangunan* (BPKP-Finance and Development Agency) and APIP (Local Government Inspectorate). Thus, in fact local government financial monitoring has detailed and complete regulations.

Government external supervision through the BPK, is routinely carried out every year to conducting financial audit, but in some cases of corruption actually occurs in some areas whose audit status is without any identified exceptions (*Wajar Tanpa Pengecualian*-WTP). An example of the case for this condition occurs in North Sumatra Province which gets a WTP but the local government head is involved in the problem of corruption. An audit conducted by the BPK has not become a guarantee that local government that have received the title of WTP are free from corruption.

For internal government monitoring there is the Financial and Development Supervisory Agency (BPKP) base on Articles 2 and 3 of Presidential Regulation Number 192/2014 concerning BPKP which has the duty and authority to formulate a government internal supervision policy; conducting audits, reviews, and monitoring activities on budget planning, implementation and accountability; government internal supervision; coordination and

synergy of intergovernmental oversight supervisors violations and other oversight functions.

Furthermore, in accordance with Government Regulation No. 12 of 2017 concerning the Development and Supervision of Local Government Operations, tiered monitoring is set up starting from the Internal Supervisory Apparatus (APIP-Aparat Pengawas Internal Pemerintah), Local Government Heads, DPRD and public.

A complete set of laws and regulations governing regional government monitoring is expected to improve the quality, effectiveness, and efficiency of public services and regional development. But in its implementation, it still raises several obstacles and problems. The problems in the implementation of local government finances still occur. Low absorption, low efficiency, and effectiveness of spending, and the high level of corruption.

B. PROBLEM STATEMENT

From 2004 to 2019, the number of local government heads caught in corruption cases in the KPK reached 124 local government heads. This condition will be greater if the data is combined with corruption cases handled by the Police, and the Attorney. Following these conditions, this research focuses on the analysis of local government financial monitoring issues, so that, it has not been able to resolve obstacles and problems related to local financial management. This research attempts to answer, how has the structure of regional financial monitoring changed so that it can improve supervision performance? How to increase the role of supervisory institutions, and the community in regional financial monitoring, so that corruption prevention can be done?

C. LITERATURE REVIEW

Definition of Financial Monitoring

According to Lyndal F. Uwick, monitoring is an effort for something to be carried out in accordance with established regulations and instructions that have been issued. Monitoring of local government finances is intended so that local government financial management can be carried out in accordance with applicable regulations and meet the objectives of local government financial management, namely to provide maximum benefit to the public.

Furthermore, monitoring can be viewed from two sides, namely:

1. Monitoring from a legal standpoint, namely oversight to assess the legal aspects of the case. The Monitoring is carried out to ensure that all programs and policies in the management of Local Government Finances are carried out in accordance with applicable laws and regulations. In the context of Legal Monitoring, Monitoring is aimed at ensuring that Local Government financial management is carried out without legal violations, including administrative law, civil law, and corruption law.
2. Monitoring and assessing the usefulness of a program or policy. Monitoring of benefits is carried out to ensure the implementation of Local Government Financial management has been carried out according to its objectives, namely financing for development and public services in order to improve the welfare of the public.

Monitoring of the management of local government finances consists of two types of supervision, namely supervision of regional revenue and supervision of regional financial expenditures. Monitoring of regional revenues includes revenues from the tax sector as well as other non-tax revenues. Whereas monitoring of regional financial expenditures, among others, is the budgetary responsibility of the state, the budget is the responsibility of the government. This research focuses more on local government financial management rather than expenditure. This research focuses more on local government financial management rather than expenditure.

Monitoring in the regional financial expenditure sector includes the stages of planning, implementation, payment, and accountability for the management of regional assets. Monitoring at the regional financial expenditure stage is an important step in preventing corruption. Because most of the corruption occurs in the process of procurement, including at the planning, tender, and contract implementation stages.

Basically, monitoring consists of supervision that is preventive and repressive. Preventive supervision is carried out before an event occurs. When an act of a local government financial management official has the potential to violate the applicable provisions, then the supervision function is to provide advocacy so that the action is not carried out. Repressive supervision is done by measuring what has happened compared to what should have happened. When

deviations occur, they will be subject to sanctions in accordance with applicable regulations.

Laws and Legislation of Local Government Monitoring

When Indonesia was Independent In 1945, Indonesia did not have a national legal system. Therefore, to fill the legal vacuum, the 1945 Constitution still enforces all the Dutch colonial legacy regulations, until a new law is issued as a substitute. For the law on state finances, it still applies to the legacy law of the legacy of the Netherlands, namely *Indische Comptabiliteitswet*, better known as ICW Stbl. 1925 No. 448. Subsequently amended and enacted in State Gazette 1954 Number 6, 1955 Number 49, and finally Law Number 9 of 1968, which was first established in 1864 and entered into use in 1867, *Indische Bedrijvenwet* (IBW) Stbl. 1927 No. 419 jo. Stbl. 1936 No. 445 and *Reglement for Administrative Beheer* (RAB) Stbl. 1933 No. 381. Meanwhile, in conducting the auditing of state financial accountability the *Instructie en verdere bepalingen voor de Algemeene Rekenkamer* (IAR) Stbl. 1933 No. 320.

In the interest of state financial monitoring, Government Regulation Number 11/UM/1946 was issued the establishment of Indonesia Audit Board (BPK) on January 1, 1947, and Article 2 of the government regulation stated that the composition and operation of the BPK still referred to the *Algemene Rekenkamer* which is still a Dutch heritage.

The Dutch colonial state financial legislation continued to be used for a long period until the reform movement finally took place in 1998. This reform movement was triggered by a monetary crisis that continued to widen in multidimensional crises, including economic, social and legal crises. The main demand of this movement is to seek reform in all fields and to demand the eradication of corruption.

Massive reform movements continue to develop, including demands for the development of a legal system of state financial management that is clean and free of corruption, collusion and nepotism (KKN).

Financial reform in Indonesia was marked by the birth of three packages of laws (Laws) on state finances, namely Law No. 17/2003 concerning State Finance, Law No. 1/2004 concerning the State Treasury, and Law No. 15/2004 concerning Inspections, Management and Responsibility of State Finances. With reforms in the financial sector, the role of the BPK has become even more central with Law No. 15/2004 concerning Examination, Management and Responsibility of State Finances and Law No. 15/2006 concerning Indonesia Audit Board. These packages of state financial laws were born to correct the weaknesses of the past state financial management system by changing the type, format and structure of the country's financial statements and clearly defining the schedule for preparing its accountability.

In addition to reforming state finances law, the reform movement also produced a different government system than before. If during Sukarno Regime (1945-1966) and Suharto Regime (1966-1998) the government system adopted a centralized system, then after the reform era, through Law No.32/2004 concerning Regional Autonomy, the government system became decentralized. To strengthen the decentralized government system, Indonesia also issued Law No. 32/2004 concerning Regional Government. Then to strengthen the regional financial system, also issued Government Regulation No. 58/2005 concerning Regional Financial Management. In the case of guidance and supervision, Government Regulation No. 79/2005 concerning Guidance for Regional Development and Administration of the Government is issued.

After 10 years of validity, Law Number 32/2004, then replaced with Law Number 23/2014 concerning Regional Government. Likewise, the regulation of state financial management changed from Government Regulation Number 58/2005 concerning Local Government Financial Management to Government Regulation Number 12/2019 concerning Local Government Financial Management and Government Regulation Number 79/2005 to Government Regulation No.12/2017 concerning Development and Supervision of Implementation Local Government.

There are several reasons for the change due to several reasons:

1. that the implementation of local government is directed to accelerate the realization of people's welfare through improving services, empowerment, and public participation, and enhancing regional competitiveness by taking into account the principles of democracy, equality, justice and the uniqueness of an area in the system of the Unitary State of the Republic of Indonesia;
2. that the efficiency and effectiveness of the administration of local government need to be

improved by paying more attention to aspects of the relationship between the Central Government and the local government and between regions, the potential and diversity of the region, as well as opportunities and challenges of global competition in a unified system of state government administration; and

3. whereas Law Number 32/2004 concerning Regional Government is no longer in accordance with the development of conditions, state administration, and demands for the implementation of regional government so that it needs to be replaced.

The role of monitoring is very important in the prevention and eradication of corruption. Even though the legal instruments for supervision in local government are complete both in terms of content and levels, implementation needs to be optimized. If supervision is reliable, it is hoped that efforts to fight corruption can succeed. Supervision is expected to be more instrumental in eradicating corruption with a preventive, investigative/repressive and educative approach.

In the long period, the success of eradicating corruption will depend on the success of reducing the intention and opportunity for corruption justification. This subtly requires a more ethical engineering of social order. For this reason, the paradox of repressive success must be accompanied by the effectiveness of preventive and educative supervision.

D. RESEARCH METHODS

This research uses the normative juridical method by using secondary data in the form of legislation, books, journals, articles related to regional budget monitoring and corruption prevention. The legal approach is carried out by resolving normative legal problems that rely on critical and in-depth review with reference to literature and other relevant legal documents.

E. ANALYSIS AND DISCUSSION

BPK Institutional Strengthening

BPK has a central role in supervision and monitoring state finances, including local government finance therein. In accordance with Article 6 paragraph (1) of Law Number 15/2006 concerning BPK, this agency has the task to examine the management and responsibilities of state finances carried out by the Central Government, Regional Governments, Other State Institutions, Bank Indonesia, State-Owned Enterprises, Public Service Agencies, Regionally-Owned Enterprises, and other institutions or bodies that manage state finances. Paragraph (3) states that BPK audits include financial audits, performance audits, and examinations with specific objectives.

The extent of BPK's authority in conducting supervision and examination of state finances, so that the BPK is demanded to be a strong institution that is able to protect state finances from all potential irregularities and abuse.

In carrying out its duties, the BPK has received several criticisms including:

1. The absence of audit standards (SOP Audit) creates a gap between the BPK auditor and the Local Government Auditee. The gap referred to is the perception of the BPK Auditor and the Auditee of the Local Government which often differs in determining whether an act of the regional financial management official is a violation or not. On the other hand, often one BPK auditor and another BPK auditor have different opinions on the same issue. So, there is no legal certainty for the auditee in determining whether a particular action violates the applicable provisions or not.
2. From tracking the applicable laws and regulations in relation to regional financial management, it is not found how the synergy between the government's internal supervisors, BPKP and APIP with BPK's external audit. Therefore, legislation and audit systems are needed that synergize between internal supervisors and external supervisors in order to improve the optimization of monitoring.
3. Developing an electronic-based monitoring system and audit system (e-Monitoring and e-Audit) that is integrated with the e-Budgeting and eProcurement systems in the local government. By building an electronic system of monitoring and audit, the BPK's task in carrying out its duties will be more effective and efficient.

Merging BPKP and APIP

In the administration of local government, based on Law Number 23/2004 concerning Regional Government as mentioned in Article 9, there are three functions that must be carried out by the Local Government, namely absolute government affairs are government affairs which are fully the authority of the central government. Concurrent affairs are government affairs that are divided between the

central government and regional governments, both provincial and district/city. Finally, general government affairs are government affairs which become the authority of the president as head of government.

Local government monitoring matters are concurrent affairs, where the central government and local governments share roles in carrying out the internal monitoring functions of government. The monitoring function representing the central government is represented by BPKP in accordance with Presidential Regulation Number 192/2014 concerning BPKP. Whereas the supervisory function representing the local government is represented by APIP in accordance with Government Regulation Number 12/2017 concerning Development and Supervision of Regional Government Operations.

In carrying out its duties, BPKP only plays a role in regulating the monitoring policy and conducting the supervision process when requested by the regional government. With this function, BPKP cannot conduct supervision and direct correction of violations committed by local financial management officials. However, BPKP as a central government agency is directly responsible to the President and not to the regional head.

On the other hand, APIP Regional Government has the duty to carry out direct supervision of the implementation of local government budget management. But APIP's position is subordinate to the local government and responsible to the local government head. So, when irregularities occur involving regional heads or other high-ranking officials in the regional government, APIP does not have enough power to conduct monitoring.

Therefore, in order to improve the role of local government monitoring, there needs to be a renewal of the rules and institutions between BPKP and APIP. To improve the effectiveness of regional government monitoring, APIP is not placed under the head of the region, but placed under the direct president such as BPKP, although the task remains to specifically oversee certain local governments both provincial and district/city. With APIP's position under the president directly and not under the head of the region, APIP can avoid potential conflicts of interest with the head of local government or other high-ranking officials in the local government.

On the other hand, BPKP which previously only had policy and coordination functions related to monitoring, then its role was upgraded to become a government supervisory agency. With this change in structure, the BPKP and APIP can compete to become an internal government supervisory agency that can be more effective in overseeing the performance of local governments.

Empowerment of DPRDs and Public in Local Government Monitoring

Based on Government Regulation No. 12/2017 concerning Development and Supervision of Regional Government Operations, the function of regional government oversight is not only carried out by APIP, but also by regional heads, DPRD and public. But in practice, especially the DPRD and public have limitations in conducting oversight.

Based on Article 20 paragraph (2) of Government Regulation No. 12/ 2017 it is stated that DPRD supervision covers the implementation of regional regulations, the implementation of legislation and the implementation of follow-up to the results of audits of financial statements by BPK. Based on these provisions, it appears that the DPRD's monitoring function in the supervision of regional finances is only related to the BPK examination report. Whereas the crucial stages of regional financial supervision actually occur during planning, implementation and accountability. The supervisory function mandated by this provision is more focused on monitoring the results of the audit after the budget execution is carried out.

Public monitoring is regulated through Article 21 Government Regulation Number 12/2017, which states that monitoring by the public is one form of community participation in the administration of local government. Furthermore, it is stated that the supervision of the community can be carried out individually, representative groups of observers, or representatives of legal entities that have concern for the implementation of local governments.

Juridical modern regional financial management must be set forth in a set of legal regulations in accordance with the principles of "good financial governance" in the form of openness and public participation. Regulations regarding government supervision regulated through Government Regulation No. 12/2017 must be supported by an adequate system to facilitate the DPRD and the public to conduct supervision. With the budget mechanism that is not currently open to the public, the DPRD and the public have limited instruments to conduct monitoring. Therefore, a set of rules is needed to require all local governments to announce and submit planning, implementation, accountability and all

assets owned through information technology systems that can be easily accessed by the DPRD and public.

On the other hand, in accordance with its duties the DPRD can follow up on all BPK audit results both for preventive and law enforcement as a follow-up to BPK's findings. In the realm of preventive measures, DPRD and Regional Heads can conduct evaluations and reforms in sectors deemed vulnerable to violations and irregularities in the implementation of regional financial management. On the repressive side, the DPRD can encourage law enforcement on any irregularities in the management of regional finances that are indicated to violate the law.

With a transparent electronic system, the process of monitoring local government finances will be easy to implement. The DPRD and public will know how the planning, implementation, accountability and asset processes carried out by the regional government include knowing irregularities or mistakes that have the potential to cause irregularities or even deliberately aimed at the interests of corruption.

Developing Integrated Monitoring System

The digital age that offers extraordinary that has never been offered by technology before. With digital implementation, all systems will be easily integrated, connected and accessed by the community without the constraints of time and place.

To improve the quality of regional financial monitoring, it is necessary to issue regulations that govern or require all processes related to regional financial management to be carried out electronically and integrated with all related systems. Law No. 11/2008 concerning Information and Electronic Transactions has enabled the use of massive technology in the life of government today. Likewise, the mandate regarding the use of electronic systems in government since 2003 has been mandated through Presidential Instruction Number 3/2003 concerning National Policies and Strategies for e-Government Development.

It seems that the government needs to issue higher legal rules to regulate the use of e-Government in Indonesia Government. The rule of law will require all government agencies, including local governments to develop a system of electronic governance.

In relation to local government financial monitoring that applies to all of Indonesia, the electronic system that is currently available is an electronic procurement system, both for e-Planning, eProcurement and e-Marketplace. But for the e-Budget, the implementation of the budget and payment only a small portion of local governments have developed it, such as the Provincial Government of DKI Jakarta and the City Government of Surabaya. Whereas for local government e-Monitoring has not been developed at all.

To encourage the use of e-Budgeting and e-Monitoring, it needs to be regulated in separate laws that require each local government to use an electronic system that is integrated with the existing eProcurement system. With the development of an integrated system, every stage local government finance, both planning, implementation, accountability and assets can be monitored by all parties easily. Moreover, if BPK and BPKP/APIP also develop a monitoring system that is integrated with other systems, the monitoring process can be carried out more effectively and efficiently. To facilitate the implementation of this policy, reform of the regional financial supervision system should be included in the central government omnibus law policy. So that the improvement of the function of regional financial supervision in the context of preventing corruption effectively carried out.

Improvement of Regional Financial Monitoring Performance in the framework of Corruption Prevention

Improving the quality of monitoring of local financial management is a strategic step to prevent corruption. The fact that corruption is rife in the regions involving regional heads and other high-ranking regional officials is an indication that the corruption prevention system in local financial management is still long.

Corruption prevention can be done by increasing the role of supervision, both internal and external, so that renewal of the structure of the supervisory body and the supervision mechanism is needed. The monitoring function that is spread in many internal and external supervisory institutions on one side of the supervision process makes the oversight function overlap. On the other hand, the absence of synergy among supervisory institutions makes each supervisory institution run its own. So that the quality and results of supervision are not optimal preventing corruption. In addition, the supervisory institution must also synergize with other stakeholders related to corruption prevention and corruption enforcement, including with law enforcement officials.

In terms of rules, the supervisory mechanism must be improved by establishing standardized SOPs so that supervision can provide legal certainty to all parties. This includes the development of an electronic audit system, e-Audit, to increase the ease and speed of the audit process.

F. CONCLUSIONS

1. The role of local government financial monitoring cannot yet become an effective instrument in preventing corruption. This happens because there are several obstacles and problems that must be immediately addressed. These problems include unclear monitoring SOPs that have legal certainty, supervisory human resources which still need to be improved, overlapping oversight functions and ineffective public supervision in the implementation of local government financial management.
2. Some strategies to enhance the role of supervision in preventing corruption are the improvement and simplification of the structure of the supervisory body, particularly the centralization of the government's internal supervisory agency, placing the government's internal oversight body under the president directly and not under the head of the region, developing a transparent and integrated information system with all systems others are related to the management of local government finances and increase public participation in supervision.
3. Regional financial corruption is currently at an alarming stage, so that in order to optimize corruption prevention, arrangements regarding regional financial supervision in order to prevent corruption must be included in the central government omnibus law policy.

G. REFERENCES

Book

Bohari, Hukum Anggaran Negara, Penerbit Rajawali Persada, 1995

Nomensen Sinano, Hukum Anggaran Negara, Pustaka Mandiri, 2009

Nur Basuki Minarno, Penyalanggunaan Wewenang dalam Pengelolaan Keuangan Daerah yang Berimplikasi Tindak Pindana Korupsi, Laksbang Mediatama Yogyakarta, 2010

Soekarwo, Berbagai Permasalahan Keuangan Daerah, Universitas Airlangga, 2003

Journal

Haryono Umar, Pengawasan untuk Pemberantasan Korupsi, Kemendikbud, 2014

Luchman Sanjaya, Optimalisasi Pengawasan Pengelolaan Keuangan Daerah di Kabupaten Sidoarjo, JKMP, Vol.3, No.1, Maret 2015

Sutarto Kurnia Setiawan, Karakteristik Individu dan Karakteristik Organisasi serta Pengaruhnya terhadap Kinerja Pemeriksa BPK RI Perwakilan Provinsi Lampung, Tesis Magister Universitas Lampung, 2014

Online News/Article

https://nasional.kompas.com/read/2017/04/03/13445571/data.kpk.ungkap.kebocoran.anggaran.di.daerah.capai.40.persen

https://news.detik.com/kolom/d-4618675/opini-wtp-versus-korupsi

https://databoks.katadata.co.id/datapublish/2019/07/13/sejak-2004-hingga-2019-terdapat-124-kepala-daerah-terjerat-korupsi

STATE RESPONSIBILITY FOR VICTIMS OF MEDICAL DISPUTES FROM THE PERSPECTIVE OF HUMAN RIGHTS

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I. INTRODUCTION

Good health services are part of the national development goals. Because health care is a human right and one of the elements of well-being that must be realized in accordance with the ideals of the Indonesian people as referred to in the Pancasila and the 1945 Constitution of the Republic of Indonesia. Every activity is in an effort to maintain and improve the highest public health status - the height is carried out based on the principle of non-discrimination, participatory, and sustainable in the context of the formation of Indonesian human resources, as well as increasing national resilience and competitiveness for national development[1]

Every thing that causes health problems for the people of Indonesia will cause huge economic losses for the country, and every effort to improve the level of public health also means investment in the country's development. Provisions in the 1945 Constitution above are further regulated in Law No. 36 of 2009 concerning Health. The right to health has economic, social and cultural aspects. This right has an economic and social character because this right tries to ensure that individuals do not suffer social and economic injustice regarding their health.

The development of the world of health today is quite rapid, not only concerning various diseases that arise, but also the technology of disease management and its increasingly sophisticated supporting facilities. Unfortunately, this is not directly proportional to the regulations governing health care relations so it does not rule out the possibility of legal problems in handling health. Legal issues that arise in the handling of health are widely known to the public as medical malpractice.

Malpractice is actually not a new problem, but this malpractice has been known to humans since ancient times. As proof that this malpractice has existed since time immemorial is the existence of one of the "Code Hammurabi" who was born around 2250 BC, which states that: "If a doctor dissects a patient who has been seriously injured by using a lancet knife made from bronse and cause death, or operate on an infection that occurs in someone's eye with the same knife, but damages that person's eye then they will cut off the doctor's fingers. "[2]

The expression of medical malpractice directly in clinical cases with undesirable outcomes is inappropriate or unfair. The term which is actually neutral before any evidence is adverse clinical incident, adverse event, or medical accident, which is generally used in British libraries (in the American literature more often used the words medical error early on, which is also not neutral. Adverse clinical incidents or medical accidents describe clinical events or events that are compatible or contrary to expectations, without first determining what causes the undesired event and who is guilty. This is in accordance with the legal principle of presumption of innocence, until the error is truly proven.

There are a number of medical disputes that have arisen quite interesting to us, including the Prita Mulyasari case, Jered den jeydeen case, Ghamam Arjadn case, Lim Ahui case, Dian Nita A case, Meilani case and many other medical dispute cases. The malpractice case that had captured the attention of the Indonesian people occurred at the end of October 2015. At that time, the victim named Falya Raafan Blegur, the son of the two couples Ibrahim Blegur and Eri Kusrini died due to alleged malpractice committed by one of the doctors at Awal Bros Hospital, Bekasi. Falya was treated in the ICU since Thursday, October 29, 2015, before finally exhaling the last breath on Sunday, November 1, 2015.[3] Settling these cases requires a long time to finish, requires large costs and the main rights should be obtained for health what is worth it is being neglected, the harm caused is not only material but

[1] Nomensen Sinamo, *Health law and medical disputes*, Jala Permata aksara, Jakarta 2019, Page 2

[2] Sri Siswati, *Health Ethics and Law in the Perspective of the Health* Act Ed 1, Prints 3, Depok Rajawali Press, 2017, Page 3

[3] https://lifestyle.okezone.com/read/2018/10/20/481/1966555/3-kasus-malpraktik- throwing-indonesia-salah-potong-kelamin- balance-suntik-mati accessed on 20 December 2019

also spiritual. The state as the decision maker in this matter plays an important role in protecting the rights of citizens to provide quality and perfect health services. So the authors are interested in conducting research on this issue as outlined in the writing of scientific papers with the title " STATE RESPONSIBILITY FOR VICTIMS OF MEDICAL DISPUTES FROM THE PERSPECTIVE OF HUMAN RIGHTS"

II. FORMULATION OF THE PROBLEM

There are two problems that will be examined in this study, namely:

1. Why should the state be responsible for victims of medical disputes in terms of human rights?
2. What is the government policy regarding medical dispute resolution ?

III. LITERATURE REVIEW

A. Overview of Health Law

The concept of "healthy", the World Health Organization (WHO) formulates in a very broad scope, namely "the perfect state whether physical, mental or social, not only free from disease or weakness / disability". In this definition, health is not just free from disease or disability. Even people who are not sick are certainly not necessarily healthy. He should be in perfect condition, both physically, mentally, and socially.

The healthy understanding raised by WHO is an ideal situation, in terms of biological, psychological and social aspects so that a person can carry out activities optimally. The healthy definition proposed by WHO contains 3 characteristics, namely:

1. Reflecting attention on individuals as humans
2. Look healthy in the context of internal and external environment.
3. Healthy is defined as a creative and productive life.

Healthy is not a condition but an adjustment, and is not a condition but a process.[4]

In RI Law No. 23 of 1992 health is also stated to contain a mental and social dimension: "Health is a state of well-being of the body, soul and social that enables everyone to live productively socially and economically".[5]

Health law is all legal provisions that relate directly to the maintenance and service of health. This concerns the rights and obligations of receiving health services (both individuals and community service) as well as from the implementation of health services in all aspects, organizations, facilities, health service standards and others. The government now realizes that healthy people are the main asset and goal in achieving a just and prosperous society. Regulations and legal provisions are not only in the field of medicine, but cover all fields of health such as, pharmaceuticals, medicines, hospitals, mental health, public health, occupational health, environmental health and others. This collection of legal regulations and provisions is what is meant by health law.[6]

If seen health law, then it includes:

1. Medical law
2. Nursing law (Nurse law)
3. Hospital law
4. Environmental pollution law
5. Waste law (from industry, household, etc.)
6. Pollution laws (noise, smoke, dust, odors, poisonous gases)
7. Penalties for equipment that uses X-rays (Cobalt, nuclear)
8. Work safety law
9. Laws and other regulations that are directly related that can affect human health.

The legal basis for health is stipulated in the relevant laws and regulations, namely Law No. 36 of 2009 concerning health. This law is the foundation of every health business provider. Therefore, it is better for everyone who is engaged in health services to know and understand what is regulated in the law. The purpose of this law is to improve the health of all members of the community. So that the implementation of health must follow the provisions set.[7]

The health law also has several functions, namely:

1. Tools to improve the effectiveness and effectiveness of the implementation of health development which includes health efforts and resources.
2. Reaching increasingly complex developments that will occur in the future.
3. Provide legal certainty and protection for health service providers and recipients.

The principle of law is a basic norm that is elaborated from positive law and by law is not

[4] https://kekeanisa20091995.wordpress.com/2014/03/24/definisi-sehat-according-who-world-health-organization/Description on 20 December 2019

[5] https://www.google.com/search?client=firefox-b-d&q=UU+about+health+92 accessed on 20 December 2019

[6] Amir Amri, Bunga Rampai Health Law, Widya Medika, Jakarta 1997, p.29

[7] Alexandra Indriyanti, Health Ethics and Law, Reader Book Publisher, Jogjakarta 2008 Page 172

considered to originate from more general rules. In health science, several principles are known, namely:

1. 1.Sa science et sa conscience means that the intelligence of a health expert must not be in conflict with his conscience and humanity. Usually used in the regulations of the rights of medical personnel, medical personnel have the right to refuse medical treatment if it is against their conscience.
2. Agoti Salus Lex Suprema namely patient safety is the highest law.

As for the Act as a source of health law include:
1. 1945 Constitution
2. Law No. 29/2004 on the practice of medicine
3. Law No. 36/2009 concerning health
4. Law No. 44/2009 concerning hospitals
5. Law No 36/2014 concerning health workers
6. PP No 46/2014 concerning health information systems
7. PP No. 61/2014 concerning reproduction
8. PP No 33/2012 concerning exclusive breastfeeding
9. PP No.109 / 2012 concerning securing materials containing addictive substances such as si
10. And others.[8]

B. Overview of Human Rights

Understanding of human rights can be analyzed from the understanding contained in the law and expert views.

1. Article 1 number 1 of Law Number 39 of 1999 concerning Human Rights.

Human Rights are:

"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 human dignity. "

The essence of human rights in this definition, which is a set of rights. Rights or rights (English) or recht (Dutch) or richtig (German) are conceptualized as:

"The authority or power of a person or legal entity to do something because it has been determined in the legislation or the right authority for something or demand something"[9]

2. Joel Feinber. He presents an understanding of human rights. Human rights are:

"As general moral rights concerning something that is fundamentally important and equally owned by all people, without conditions and cannot be contested. Whether these rights are included in the moral category in the strict sense, I leave them as open problems that should be resolved. through argumentation, and not through definition.[10]

Human Rights are basic human rights that are brought from birth as a gift from God, not a gift from a ruler. This right is very fundamental or fundamental to human life and life which is a natural right that cannot be separated from human life.[11] Universally, the world community recognizes that every human being has a number of rights that belong to him since his existence as a human being is recognized, even though that human has not yet been born into this world.[12]

There are three grounds for the making of this law, which includes a philosophical foundation, a juridical basis and a sociological foundation. The philosophical foundation of the drafting of this law is contained in the consideration consider. In the consideration, it is stated that: Humans as creatures created by God, who have the task of managing and maintaining the universe with full responsibility for the welfare of mankind, by his creator, are granted the right basic rights to ensure the existence of dignity and dignity of himself and harmony of the environment.

The classification of human rights, which in English is called the classification of human right, while in Dutch it is called de indeling van de mensenrechten has been regulated in Law Number 29 of 1999 concerning Human Rights. Human rights are classified into ten groups which include:

1. Right to live
2. The right to have a family and to carry on children;
3. The right to self-development;
4. The right to justice;
5. The right to personal freedom;
6. The right to security;
7. Right to welfare;
8. The right to participate in government;
9. Women's rights; and
10. Child rights.

[8] Nomensen Sinamo, Health law and medical disputes, Jala Permata aksara, Jakarta 2019, Page 20

[9] Ministry of Education and Culture, *Large Indonesian Dictionary*, Balai Pustaka, akarta 1989 Pg 292.

[10] Joel Feinberg, *Fundamental Human Rights in the Philosophy of Law and Political Philosophy*, Maumere, Ledalero, 2004, p. 15

[11] Erdiansyah, *Protection of Human Rights and Development of Democracy in Indonesia*, Journal of the Constitution, Vol III, No.2 November 2010 p.146

[12] OC.Kaligis, *Legal Protection of the Rights of the Suspect, Defendant, and Convicted*, Bandung PT.Alumni, 2006, p.49

The right to life is the right of every person to exist or exist above the world. The right to life has been found in article 9 of Law Number 29 of 1999 concerning Human Rights. The right to life is divided into five types, which include: 6 Article 9 of Law No. 29 of 1999

1. Life;
2. Maintain life;
3. Improve the standard of living;
4. Live peacefully, safely, peacefully, happily, prosperously and physically; and
5. For a good and healthy living environment.

Thus the nature of respect and protection of human rights is to safeguard the safety of human existence as a whole through a balanced action that is a balance between rights and obligations, as well as a balance between individual interests and the public interest.[13]

The right to justice, which in English, is called rights to justice, while in Dutch, called rechten tot de rechte is the right of every person to carry out an act or treatment that is not biased and defend their rights. This right is regulated in Article 17 through Article 19 of Law Number 29 Year 1999 concerning Human Rights.

C. General Review of State Responsibilities

State responsibility theory or state responsibility is used as a framework for implementing State responsibility in a regional agreement. Initially in terms of terminology, according to Goldie the term "responsibility" is used to indicate the obligation (duty) or to indicate the standard fulfillment of a social role set by the particular legal system. While the term "liability" is used to refer to the consequences of a mistake or failure to carry out an obligation or to meet a certain standard that has been set.[14] The term 'state responsibility' has not yet been explicitly stated and is still developing to find an established and solid concept.

In essence, the birth of State responsibility is based on 2 theories namely risk theory and error theory. Both of these theories have their own logic and argumentation. Risk theory determines that a country is absolutely responsible for every activity that has a very harmful effect even though the activity is an activity that has legal legality. This theory then gave birth to the principle of absolute responsibility or objective responsibility. Unlike the theory of risk, the theory of error states that the responsibility of the State arises when the actions of the State can be proven to contain an element of error.[15]

The state's obligation to "respect", "protect" and "fulfill" every human right. The state's obligation to respect is a negative obligation not to act or to hold back, the obligation to protect is a positive obligation to protect individuals against certain actions by third parties, and fulfillment is to provide or facilitate certain services for every citizen.

The obligations of the state to protect and fulfill the right to health are proposed as follows:

1. Obligation to respect:
   - Obligation to respect equal access to available health services and not prevent individuals or groups from accessing them to available services.
   - Obligation not to take actions that disturb health, such as activities that cause environmental pollution.
2. The obligation to protect:
   - Obligation to take steps in the field of legislation and other steps to ensure that citizens have (equal) access to health services if provided by a third party.
   - Obligations to take steps in the field of legislation and other steps to protect people from violations in the health sector by third parties.
3. Obligations to fulfill:
   - Obligation to adopt national health policies and to provide an adequate portion of available health funds.
   - Obligations to provide the necessary health services or create conditions under which citizens have adequate and adequate rights to health services, including health care services as well as safe drinking water and adequate sanitation

IV. RESEARCH METHODOLOGY

This type of research, namely normative legal research. The approach used includes the conceptual approach, the Law approach and the philosophical approach. Legal material collection techniques, namely documentary studies. Data analysis uses qualitative analysis.

[13] TIM ICCE UIN Jakarta Democracy, Human Rights and Civil Society, Jakarta, 2003, Prenada Media, p.201

[14] Marsudi Muchtar, Abdul Khair and Noraida, Environmental Health Law, Yokjakarta, 2016. p.39.

[15] Huala Adolf, State aspects of international law, CV Rajawali, Jakarta, 1991, Page 174

V. DISCUSSION AND ANALYSIS

A. State responsibility for victims of medical disputes based on the human rights perspective.

Discussion about victims of medical disputes relating to human rights means discussing the dimensions of human life. Human rights and their protection do not exist because they are given by society and the good of the State, but based on their dignity as human beings. Recognition of human existence signifies that humans as living beings are God's creations, Allah SWT deserves positive appreciation.

Health is a human right and one of the elements of well-being that must be realized in accordance with the ideals of the Indonesian people referred to in the Pancasila and the 1945 Constitution of the Republic of Indonesia has been explained in Law Number 36 of 2009 concerning health. Health is a healthy state, both physically, mentally, spiritually and socially that allows everyone to live productively socially and economically (MOH, 2010). In the development and progress of the world in the current era of globalization, respect for human rights should be respected, upheld and protected by the State, either through actions or through laws that are not implemented or ignored, one of which is human rights violations victims of medical disputes.

In the Indonesian Medical Ethics Code, it has been stressed that protecting the lives of every human being is an obligation that must be kept in mind by every doctor. In carrying out their duties the doctor or dentist in order to use all the knowledge and skills possessed for the benefit of patients properly should not force themselves beyond its ability to provide treatment, if it is not possible to refer patients. However, if the doctor or dentist in carrying out his work has made every good effort in accordance with the expertise and professional abilities expected of him (Inspaning verbinteins), but experienced failure in healing patients, such as disability, death and so on, so he could not be held responsible. In connection with this matter, of course, it can be distinguished what is meant as a good effort and irresponsible, negligent or careless.

The understanding of victims that underlies the study of victimology is initially limited to crime victims, that is, victims who arise as a result of violations of the provisions of the material criminal law, including medical disputes, must also receive attention. Policies on the protection of the interests of victims are an integral part of efforts to improve social welfare that cannot be separated from the goals of the state, namely to "protect all Indonesians" and "to advance public welfare", or in other words that policies on the protection of victims are essentially an integral part of the overall community protection policy, namely in order to achieve social welfare.

Therefore, providing protection to individual victims of malpractice at the same time also means understanding providing protection to the community, because the existence of individuals in this case is as an element for the formation of a society, or in other words, that society is composed of individuals, therefore , between the community and the individuals are intertwined. The consequence is that between individuals and the community each has rights and obligations. Although it is recognized that between society and individuals, in many cases have different interests, but there must be a "balance" arrangement between the rights and obligations between the two.

The argument for promoting legal protection for victims of medical disputes is based on social contract arguments and social solidarity arguments. The first states, the state can be said to monopolize all social reactions to crime and prohibit acts of a personal nature (eigenrichting). Therefore, in the event of a crime and bring victims, the state must also be responsible for paying attention to the needs of the victims. The second argument states that, the state must take care of its citizens in meeting their needs or if their citizens experience difficulties, through cooperation in society based on or using the means provided by the state. This can be done through improving services from regulating rights.

Based on this thinking, it can be said that the protection of victims is a form of government obligation to its citizens, because victims have the right to do so. Victim protection can be in the form of direct victim protection in the form of providing compensation by the perpetrator of a criminal offense to the victim, referred to as "restitution"; and compensation provided by the state to victims as suspects, defendants, convicts or other parties who receive treatment / actions without reason based on the applicable laws and regulations carried out by law enforcement officers. This type of compensation is referred to as "compensation". Restitution and compensation are part of the policy in an effort to reduce the suffering of victims. The purpose of making policies to reduce suffering for victims is said to be the most important goal, because in doing so

will be able to further empower the community and guarantee their lives.

The type of loss suffered by the victim, not only in physical form such as the costs incurred for healing physical injuries and the possibility of loss of income or benefits that might be obtained, but also losses that are nonphysical that are difficult and may even not be valued in money. Therefore, in the event of a crime and bring victims, the state must also be responsible for paying attention to the needs of the victims. The second argument states that, the state must take care of its citizens in meeting their needs or if their citizens experience difficulties, through cooperation in society based on or using the means provided by the state. This can be done through improving services from regulating rights.

According to Barda Nawawi Arief, the notion of "victim protection" can be seen from two meanings, namely:

1. Can be interpreted as legal protection for not being a victim of a criminal offense ”(meaning protection of human rights or for one's legal interests)
2. Can be interpreted as "protection to obtain guarantees / legal compensation for the suffering / loss of people who have become non-criminal victims" (Identical to the victim's sponsorship). The form of compensation can be in the form of restoration of good name (rehabilitation), restoration of equanimity (inter alia, by forgiveness), compensation (restitution, compensation, social security benefits), and so on.

Of the two meanings of the protection of victims, then basically there are two types of protection that can be given directly by law, which is preventive in the form of legal protection not to become a victim of criminal acts and repressive protection in the form of protection / compensation for the suffering / loss of people who have become victims not criminal. Related to the two characteristics of victim protection that can be provided by the law, then essentially preventive and repressive protection plays an equally important role in providing protection to the community, given that the people who have been victims should not be allowed to suffer without any protection from the state. and conversely preventing people from becoming victims is also a major pressure point. The concept of victim protection has been seen as a legal right in essence is part of the problem of protection of human rights, so basically the concept of human rights can be viewed as a legal right.

B. Settlement of Medical Disputes

Medical disputes are disputes arising from legal relations between doctors and patients in an effort to heal. The relationship between doctors and patients in medical science generally takes place as an active-passive biomedical relationship .[16] In this connection, the superiority of doctors to patients in the field of biomedical science is clearly seen, that is there is only active activity on the part of doctors while patients are passive. The passivity of the patient is certainly based on a sense of trust in the doctor's ability to perform healing or treatment. In a health service, the relationship between the health service provider and the recipient of the health service is called the relationship of trust. Usually called a teraupetic transaction. In a contractual relationship, the doctor and the patient are deemed to have agreed to an agreement if the doctor has initiated medical treatment against the patient, while the relationship due to the law arises because of the obligations imposed on the doctor.

The legal relationship that occurs because of the law between doctors and patients is based on the existence of obligations imposed on the doctor's profession. The doctor is obliged to carry out emergency relief on the basis of humanity, unless he is sure there is someone else on duty and able to do it. This state of emergency overrides the principle of informed consent. In the book: The Law of Hospital and Health Care Administration written by Arthur F. Southwick, there is a theory that states the source of an act of malpractice, namely: [17]

1. Breach of Contract Theory
2. The theory of willful acts (International Tort)
3. Negligence theory

The cause of disputes between doctors and patients is if the patient's dissatisfaction with the doctor arises in carrying out treatment efforts. This dissatisfaction is due to the alleged error or negligence of the doctor in carrying out his duties so as to cause harm to the patient. Often the cause of medical disputes due to incomplete medical information, late submission, or even misinformation has an impact on the medical actions taken. Losses suffered by patients due to negligence or errors from doctors can be referred to as medical malpractice. In the Black Law Dicitionary states that "medical malpractice is A doctor's failure to exercise the degree of care and skills that a physician or surgeon

[16]Danny Wiradharma, Medical Law, Jakarta: Binarupa Aksara, ,PG 42

[17] Sri Siswati, Health Ethics and Law, Rajawali Pers, Depok 2017. Pg.142

of the same medical specialty would use under similar circumstances".[18]

Based on the existing set of regulations and medical dispute resolution procedures, medical disputes can be resolved through non-litigation and non-litigation non-professional institutions, namely through the Consumer Dispute Resolution Board (BPSK) and through the Mediation Forum for complaints and resolution of health services while non-profession litigation through civil justice, criminal justice and administrative justice. Settlement of medical disputes can also be done through professional institutions, namely the Medical Ethics Honorary Council (MKEK), the Medical Staff Disciplinary Assembly (MDTK), the Indonesian Health Workers Assembly (MTKI) and the Indonesian Medical Disciplinary Honorary Council (MKDKI). Settlement of medical disputes through Civil Law can be seen from the aspect of therapeutic agreement aspects. Typically, the article used is a default (broken promise) or can be done with unlawful acts.

From the Criminal Law line because there are several elements of offense both regulated in the Criminal Code and Law Number 36 Year 2009 regarding Health. Whereas through the Consumer Protection Law, regardless of the polemic whether the doctor & patient relationship can be equated with the business & consumer relationship, dispute resolution can be through the General Court or Consumer Dispute Resolution Agency (BPSK). Before choosing which path to use by patients in resolving their problems related to medical disputes, patients are expected to review the advantages and disadvantages of each path in advance.

If seen several medical dispute decisions that have ever existed, both in the Criminal Court and the Civil Court, there are several things that need attention. Patients or public prosecutors in the Criminal Court have difficulty in proving mistakes made by doctors because of their common concern with medical techniques. In the medical world, there is a known "medical risk", namely the possibility of something undesirable for both patients and doctors in a series of processes good medical action from the risk of injury, disability, until death. Even medical risks can occur at the place of treatment facilities, such as hospitals, clinics, pharmacies, etc.

As long as the doctor has implemented the Service Operational Standards (SOP) correctly, the medical risk that occurs cannot be blamed on the doctor. For example a patient who has certain health conditions or certain allergies, who previously did not know the condition while the doctor has also applied SOPs by asking and conducting a series of pre-operative medical procedures cannot be blamed if later medical conditions occur the patient experiences anaphylactic shock or allergic reactions. which can cause shock and death. The disputing parties must of course be able to prove whether the alleged loss suffered by the patient is caused by a doctor's malpractice action or is indeed a medical risk. This proof can be said to be quite complicated and certainly requires expert testimony from the medical or medical fields.

If through the General Court, both the patient and the doctor side is not an ideal choice, given the relatively long examination process, relatively high court costs, and the difficulty of proof. Not to mention the nature of the case review that is open to the public will risk harming the good name of both parties. The alternative dispute resolution through BPSK is worth considering because of the involvement of the parties directly, allowing for a win-win solution. The BPSK examination process is carried out with the principle of a fast, simple, inexpensive, and closed trial. The closed nature can maintain the confidentiality of the process for doctors in order to maintain their credibility and patients in terms of confidentiality of medical history. Finally, the final and binding nature of the award makes the legal certainty of the parties guaranteed and accelerates the implementation of the decision.

VI. CONCLUSION

Indonesia in its responsibility as a constitutional state must provide protection for basic rights (human rights), especially the rights of its people to obtain quality and perfect health services, apparently in its implementation it has not been carried out by the State to the maximum. The right to health at this time is inevitable as part of human rights. Therefore, the State is obliged to respect, protect and fulfill the health status of its people which is of high quality and plenary.

Legal certainty in providing protection to patients, as well as maintaining and improving the quality of health services by health workers has been determined by various regulations. Every violation (whether a violation of professional ethics, or violation of professional discipline, or violation of

[18] Safitri Hariyani, Alternative Medical Disputes Settlement of Disputes Between Doctors and Patients, Jakarta: Diadit Media, 2004, p.11

the law) can be done by law enforcement. Settlement of medical disputes can be done through non-professional institutions and non-litigation professional institutions or litigation. Non-profession through the Consumer dispute resolution agency and complaints mediation and problem solving forum, can also be through non-professional litigation institutions namely through civil, criminal and State administrative courts. Professional institutions can be in the form of MKEK, MDTK, MTKI and MKDKI.

VII. REFERENCES

Book

Adolf, Huala, 1991, Aspects of the State in International Law, Cv Rajawali, Jakarta

Butarbutar, Elisabth, 2018, Legal Research Methods, PT Refika Aditama, Bandung

Ministry of Education and Culture, 1989, Large Indonesian Dictionary, Balai Pustaka, Jakarta

Erdiansyah, 2010, Protection of Human Rights and Democracy Development in Indonesia, Journal of the Constitution

Joel Feinberg, 2004, Fundamental Human Rights in the Philosophy of Law and Political Philosophy, Maumere, Ledalero

Kaligis, OC, 2006, Legal Protection of the Rights of the Suspect, Defendant and Convicted, PT.Alumni, Bandung

Muchtar, Masruadi, Abdul Khair, 2016, Environmental Health Law, Jogjakarta

Nazmi, Didi, 1992, Conception of the State of Law, Angkasa Raya Padang.

Masriani Tiena, 2004, Introduction to Indonesian Law, Sinar Grafika, Jakarta.

Priyitno Dwidja, 2018, Bunga Rampai Indonesian Criminal Law, Pustaka Reka Cipta, Bandung

Roberia, 2019, Health Insurance Law, Gramata Publishing, Bekasi

Teguh Prasetyo, 2017, Law Reform Presfekti Dignified Justice Theory, Setara Press, Malang

Sri Siswati, 2013, Health Ethics and Law in the Health Law Perspective, PT RajaGrafindo Persada Depok

Salim HS, Nurbaini, 2016, Application of Legal Theory to Dissertation and Thesis Research, PT Rajagrafindo Persada Depok

Sinamo Nomensen, 2019, Law on Health and Medical Disputes, Jala Permata Aksara, Bekasi

Soekanto, Soejono, 2006, Introduction to Legal Research, UI Press, Jakarta

Safitri Hariyani, 2004, Alternative Medical Disputes Settling Disputes Between Doctors and Patients, Diadit Media, Jakarta

UIN, ICCE Jakarta Team 2003, Democracy of Human Rights and Civil Society, Prenada Media, Jakarta.

Regulatory Regulations

1945 Constitution

Law No 39/1999 concerning Human Rights

Law No 29/2004 concerning the practice of medicine

Law No 36/2009 on health

Law No 44/2009 concerning hospitals

Law No 36/2014 concerning health workers

PP No 46/2014 concerning health information systems

PP No. 61/2014 concerning reproduction

PP No 33/2012 concerning exclusive breastfeeding

PP No.109 / 2012 concerning securing materials containing addictive substances

ASPECT OF FULFILLING HUMAN RIGHTS TO LAW ENFORCEMENT IN UNFAIR BUSINESS PRACTICES BY BUSINESS ACTORS OF E-COMMERCE TO CONSUMERS

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ABSTRACT

The rapid economic growth today in the globalization era has changed the way transactions in the business world from the real world to the virtual world, having given birth to a variety of new legal problems for consumers in e-commerce, undeniably it will have an impact on business practices, among them fierce competition even leads even to fraudulent business or unfair competition, where consumers often do not have a strong bargaining position and put consumers in a weak position. The author conducted a discussion and/ or study of (1) how the relation of fulfilling human rights to consumer protection in e-commerce transactions. (2) how law enforcement efforts in dealing with fraudulent business practices by e-commerce business actors to consumers This type of research is normative juridical, by evaluating relevant legal rules. From the discussion it is identified that (1) in the legal protection of consumer rights in cyberspace, with the rapid development of e-commerce has negative impacts on consumers placing consumers in a weak bargaining position. In the fulfillment of human rights in the protection of consumers the should guarantee its citizen who is dealing with the law. (2) To anticipate fraudulent business practices is through legal settlement. In general, the law relating to this issue is civil law, criminal law and administrative law.

Keywords: Human Rights, E-Commerce, Consumers.

A. INTRODUCTION

In this modern era and globalization era the changes have occurred in various fields of life, including the development of information and communication technology which plays an important role in development. Information and communication technology has changed the behavior of people and human civilization globally. The development of information technology has caused the world to be borderless and caused significant social change to take place so rapidly. In its rapid development of science and technology in the last ten years it has had an impact on the level of human civilization which has brought a profound change in shaping patterns and behavior of the people.[1] The rapid advancement of science has occurred in the fields of telecommunications, information, and computer. Especially with the convergence of telecommunications, information and computers. From the phenomenon of convergence, nowadays people call it an information technology revolution.

National development in Indonesia must be carried out with the principle of independence. The principle of independence in national development can be seen in Article 33 paragraph (4) of the 1945 Constitution which reads "The national economy is based on economic democracy with the principles of togetherness, environmental insight, independence, and by maintaining a balance of progress and national economic unity".[2]

Human existence both as individuals and social beings, lack meaning when their rights are limited to the expression of rights in the political and security fields. Humans also need food and drink, health, the right to enjoy welfare, and other rights in the socio-economic field. All human rights in the economic sector are decisive in realizing human wholeness in general as beings who have dignity and dignity. In any case, consumer protection will be closely related to human rights which must be respected and upheld by the state. Therefore fulfilling the people's right to get satisfaction and comfort becomes absolute in an era where development is being actively carried out.

Rights in the field of consumption relate to Article 25 of the Universal Declaration of Human Rights which stipulates that every person has the right

[1] BPHN, Legal Review of Telecommunications, Information and Computer Convergence, 1998, p.. 3

[2] See Article 33 paragraph (4) of the 1945 Constitution of the Republic of Indonesia

to an adequate standard of living for the health and well-being of himself and his family, including the right to food, clothing, housing and health care as well as the necessary social services, and has the right to guarantee at the time of being unemployed, suffering from illness, disability, being widowed / widower, reaching old age or other conditions that result in lack of income, which is beyond his control.

Law is very much needed as a guideline governing social life in all its aspects, be it social, political, cultural life and its role in economic development. In this economic activity, it is precisely the law that is needed, because economic resources are limited on the one hand and unlimited demand or the need for economic resources on the other hand, in order to prevent conflicts between fellow citizens in fighting over these economic resources. It is clear that law has an important role in economic development to realize social welfare.[3]

In order to achieve this goal, we are faced with the progress of trade economic activities that are increasingly open, so that Indonesia is faced with various challenges as a result of this openness. For this reason, it is demanded to be able to have strong competitiveness. In the industrial sector, for example, the rapid growth of the electronic industry can drive development in the economic field, because the development of the industry has a positive impact that can accommodate the workforce whose findings will be able to add to people's income.

By the rapid growth of the economy today in the globalization era there has been a change in the way transactions in the business world from the real world to the virtual world, has given birth to a variety of new legal issues for consumers in e-commerce, undeniably will have an impact on business practices, including intense competition even leading to fraudulent business or unfair competition (unfair competition), where consumers often do not have a strong bargaining position and place consumers in a weak position. The growth of the e-commerce industry in Indonesia is increasingly rapid despite the slowing economic pace of the country.

According to the Director General of Consumer Protection and Code of Conduct of Commerce Widodo, at least five frauds were found in online trading transactions. First, the length of time to deliver goods that are not as promised. Second, the goods do not comply with the provisions. Third, items cannot be returned if damaged. Fourth, the cancellation of unilateral sales even though payment has been made. Fifth, refunds that take a long time.[4]

Usually the Business Actors apply a standard clause to consumers "goods that have been purchased cannot be returned", do not apply if the goods are defective and cannot be operated. If goods received by consumers are damaged and cannot be used, then the seller is obliged to provide compensation in the form of goods or money.

Deceptive business practices usually provide attractive advertisements so that many people are tempted by advertisements in the media. An advertising which according to its function is to position the product in the minds of consumers, as a means of communication by producers to deliver persuasive messages related to goods and services produced, but in reality not a few advertisements actually mislead the public. Many advertisements that are broadcast through the mass media are giving false or false information in order to gain benefits that are contrary to ethics or the law. For misleading advertisements, it can be in the form of deceptive pricing or deceptive promotion.

Cases that are detrimental to consumers in terms of the use of electronic goods are considered to be quite a lot happening now. Today, various sales methods are carried out to achieve sales targets or prioritize being able to gain market share and profits, carried out by business actors by seeking products that appear attractive at very affordable prices.

For this reason, the government made a statutory provision that should be able to protect consumers with the issuance of Law No. 8/1999 concerning Consumer Protection (Statute Book No. 42/1999, Supplement to Statute Book No. 3821, hereinafter abbreviated to UUPK). This UUPK is expected to be able to overcome such complex consumer problems in Indonesia and can become a legal basis for the government and consumer protection agencies. This UUPK came into force on April 4, 2000.

In the dynamics of law enforcement in Indonesia against fraudulent business practices by e-commerce businesses against consumers, this can be ensnared with criminal provisions where an element of crime has occurred in the purchase of electronic goods in online media and e-commerce that are not in accordance with advertisements and goods which is not in accordance with consumer orders.

[3] Susanti Adi Nugroho, Business Competition Law in Indonesia in Theory Practice and Application of the Law, First Edition, Jakarta, Kencana, 2012, p. 1-2

[4] https://katadata.co.id/berita/2016/02/18/pemerintah-beberkan-kecebus-e-commerce, accessed on 26 December 2019

B. PROBLEM STATEMENT

Considering the impact caused by deviant behavior in the business world is widespread and very large both on society and on the country's economy, it is reasonable to ask, firstly how is the fulfillment of human rights to consumer protection in e-commerce transactions. Furthermore, the second problem is how law enforcement efforts in overcoming fraudulent business practices by e-commerce business actors against consumers.

C. LITERATURE RIVEW

The definition of law enforcement according to Satjipto Rahardjo is a process to bring legal desires into reality.[5] The so-called legal desires here are nothing but the thoughts of the legislature formulated in the legal regulations. The formulation of the mind of the lawmaker as outlined in the law regulation will also determine how law enforcement is carried out. In reality, the law enforcement process culminates in its implementation by law enforcement officials themselves.

According to Soerjono Soekanto there are several factors that determine whether the law enforcement process can run effectively or not, they are:[6]

1. community expectations; namely whether the law enforcement is in accordance or not with the values of society;
2. the existence of motivation from people to report unlawful acts to the law enforcement agencies;
3. ability and authority of law enforcement agencies.

Law enforcement that runs effectively will bring social change in accordance with what is expected by lawmakers. But in reality, the social changes expected by lawmakers still cannot be achieved. This is due to the factors that can influence the ongoing social change, namely the factors that encourage and inhibiting factors. Factors that encourage, for example the contact with other cultures, advanced education systems, tolerance of deviant behavior, open stratification, heterogeneous population, and dissatisfaction with certain areas of life.

On the other hand, Jerome Frank, also talked about various factors involved in the law enforcement process. Some of these factors besides the legal norms, also include political, economic, moral prejudice and personal sympathy and antipathy.[7]

Meanwhile, Lawrence M. Friedman sees that the success of law enforcement always requires the functioning of all components of the legal system. The legal system in Friedman's view consists of three components, namely the legal structure component, the legal substance component and the legal culture component. Legal structure (legal structure) is the trunk, framework, eternal form of a system. The substance of the law (legal substance) the actual rules and norms used by institutions, the reality, the forms of behavior of the actors observed in the system. The legal culture (legal culture) is the ideas, attitudes, beliefs, hopes and opinions about the law.[8]

Regarding the term "fraudulent business practices", a clear understanding is needed so that there is a common perception. In connection with this terminology there are several terms used by several writers including: competition against the law, competition that is not permitted, competition is not permitted, competition that is not polite, unfair competition, or competition that should not.

Conklin quoted from Staven Box uses the term business crime to refer to crime in the business world. What is meant by business crime is:[9] An illegal act, punishable by criminal action, which is committed by an individual or a corporation in the course of a legitimate occupation or pursuit in the industrial or commercial sector for the purpose of obtaining money or property , avoiding the payment of money or the loss of property, or obtaining business or personal advantage.

From the Conklin definition, conclusions can be drawn about the elements contained in them, namely:

(1) An act against the law which is threatened with criminal sanctions.
(2) What is done by a person or corporation in their legal work or in their business in industry or trade.
(3) For the purpose of:
    (a) getting money or wealth
    (b) avoiding paying money or avoid losing or losing wealth.
    (c) obtaining business or personal benefits

[5] Satjipto Rahardjo, Law Enforcement Issues, Bandung: Sinar Baru., 1983, p. 24
[6] Soerjono Soekanto, Law Enforcement, Jakarta, BPHN & Binacipta, 1985, p. 62-63
[7] Theo Huijbers, Philosophy of Law, Yogyakarta: Canisius, 1991, p.. 122
[8] Lawrence M. Friedman, American Law, W.W. Norton and Company, New York, 1984, p. 5-6
[9] Staven Box, Power, Crime and Mystification, London and New York: Tavistock Publication, 1983, p.20.

D. RESEARCH METHODS

This research was conducted using normative juridical research methods. namely research on positive legal principles and legal principles carried out by evaluating relevant legal norms (laws and regulations). Research on evaluating positive law is done by evaluating the terms of conformity between one rule of law with other legal norms, or with the principles of law recognized in existing legal practice, which is carried out by examining library materials or secondary data.[10]

Library data is used as the main data, namely primary legal material in the form of norms or basic rules and regulations. And also using secondary legal materials such as research results and opinions of academics and legal experts.

E. ANALYSIS AND DISCUSSION

1. Fulfillment of Human Rights Against Consumer Protection in E- Commerce Transactions.

In Indonesia until now, the struggle, protection and enforcement of human rights are still focused on political and security issues so that other aspects of human rights have not been touched as they should. In general, the protection and enforcement of human rights in Indonesia is still half-hearted. One aspect of human rights that until now has not been properly touched in the protection and enforcement of human rights is in consumer protection. The implication is increasingly worrying that the acceleration of communities empowerment in the fields of consumer and human rights is still lacking. While producers are more concerned with company profits amid increasingly fierce competition and ignore consumer interests.

In the United States, the initial movement for legal protection for consumers was marked by the aim and philosophy that the regulation was intended to provide assistance or protection to low-income consumers, improve the way distribution and quality of goods and services in the market and increase competition among business actors.[11] Oughton and Lowry see consumer protection law as a modern phenomenon typical of the twentieth century, but as stated in legislation, legal protection for consumers themselves began a century earlier.[12]

Communities as consumers have various rights in accordance with Article 4 of Law No.8 of 1999 concerning Consumer Protection, including:

a. the right to comfort, security and safety in consuming goods and / or services;
b. the right to choose goods and / or services and to obtain said goods and / or services in accordance with the exchange rate and conditions and guarantees promised;
c. the right to true, clear and honest information about conditions and guarantee of goods and / or services;
d. the right to be heard his opinions and complaints on goods and / or services used;
e. the right to advocacy, protection and dispute settlement efforts on consumer protection appropriately;
f. the right to consumer guidance and education; g. the right to be treated or served properly and honestly as well non-discriminatory;
g. the right to receive compensation, compensation and / or compensation, if the goods and / or services received do not comply with the agreement or are not as intended;

Speaking of universal consumer rights can not be released with the struggle for consumer interests that received strong recognition when consumer rights were formulated clearly and systematically.

If consumers are truly to be protected, then consumer rights must be fulfilled, both by the state and business actors, because the fulfillment of these consumer rights will protect consumer losses and various aspects. Starting from the rights of consumers above, things need to be questioned from where these rights are obtained. How these rights can be enjoyed, maintained and when there are guarantees of protection. Universally, these rights are rights inherent in every consumer. Because e-Commerce transactions are without national borders, the elaboration and implementation of these rights is in the national laws of each country.

In legal protection for consumer rights in cyberspace, the rapid development of e-commerce has a negative impact on consumers who place consumers in weak bargaining positions. Broadly

[10] Bagir Manan, "Research in the Field of Law". Jumal Puslitbangkum Law, Number 1-199. (Research Institute of Padjajaran University, 1999). P. 3-6

[11] Donald P. Rosthschil & David W. Carrol, Consumer Protection Reporting Service, Volume One. Maryland: National Law Publishing Corporation, 1986, p. 24

[12] David Oughton and John Lowry, Textbook on Consumer Law. London: Blackstore Press Ltd, 1997, p. 10-11

speaking, several problems that arise relating to consumer rights in e-commerce transactions can be found, including:

1. Consumers do not directly see the products offered;
2. There is no clear information about the products offered and / or there is no certainty whether consumers have obtained a variety of information that is worth knowing, or which is duly needed to make a decision in the transaction;
3. Unclear status of legal subjects, from business actors;
4. There is no guarantee of transaction security and privacy as well as an explanation of the risks associated with the system used, especially in the case of electronic payments both by credit card and electronic cash;
5. Unbalanced risk loading, because generally against the sale and purchase on the internet, the payment has been paid in advance by the consumer, while the goods are not necessarily received or will follow later, because the guarantee is that there is a guarantee of shipping goods not receiving goods;
6. Transactions that are borderless in nature, raise questions about the legal jurisdiction of which countries should be enforced. If it is linked between consumer rights that are universally recognized with consumer rights in e-commerce transactions, then consumer rights are very risky to be violated and put consumers in e-commerce transactions in a weak bargaining position, especially consumers of transactions e-commerce that is carried out across countries.

The powerlessness of consumers in dealing with these business actors is clearly very detrimental to the interests of the communities . In general, business actors take cover behind standard contracts or standard contracts that have been signed by both parties (between business actors and consumers).[13]

In trading via online, one does not know in which country the transaction information can be accessed, so the jurisdiction becomes the main important issue in cyberspace. [14] From the perspective of international civil law, the connection with information technology activities is the need to expand national jurisdiction, this is in view of the legal issues that arose from reaching out to other countries' jurisdictions.[15] For this reason cross-border cooperation is needed. countries that are within the scope of international law, cooperation for something that is not affordable by the national law of a country. All of this Cooperation certainly needs to be contained in legal products. In fulfilling the Rights of A $ H6i Man in the protection of the country's consumers must guarantee every citizen who is in conflict with the law.

In law, the right legal product is an international agreement. International treaties will bind countries that sign or ratify. With the characteristics of e-commerce like this, consumers will face a variety of legal issues and legal protection regulations for consumers who are currently unable to protect consumers in cross-country e-commerce transactions in Indonesia. In e-commerce transactions there are no more national borders, so the consumer protection laws of each country like those of Indonesia will not be enough to help, because e-commerce operates across borders (bonder less). In this connection, legal protection for consumers must be carried out with an international approach through harmonizing law and the cooperation of law enforcement agencies.

2. Law Enforcement in Tackling the Unfair Business Practices by E-Commerce Business Actors Against Consumers

The various obstacles faced in the development of e-commerce5 are even more complex, such as infrastructure limitations, lack of laws, guarantee of transaction security and especially human resources that can be pursued at the same time as efforts to develop e-commerce institutions.[16] Legal issues concerning protection consumer rights are increasingly urgent in the case of a consumer conducting e-commerce transactions with merchants in one country or different countries. In buying and selling through the internet, fraud often occurs. These frauds can occur involving the existence of business

[13] Gunawan Widjaja and Ahmad Yani, Law on Consumer Protection. Jakarta: Gramedia Pustaka Utama, 2001, p. 1

[14] Yansen Darmanto Latip, Choice of Law and Choice of Forum in International Contracts. Jakarta: FH-UI Postgraduate Program, 2002, p. 153

[15] Hikmahanto Juwana, Economic Law and International Law. Jakarta: Lentara Hati, 2002, p. 34

[16] Azhar Muttaqin, "E-commerce transactions in the Review of Islamic Sale and Purchase Law", Journal ULUMUDDIN, Vol. VI, Th. IV, (January - June 2010), P 459-460

actors, goods purchased, prices of goods, and payments by consumers. Fraud involving a business actor, for example the business actor concerned is a fictitious shop.[17]

With the characteristics of e-commerce like this, consumers will face a variety of legal issues and legal protection regulations for existing consumers who have not been able to protect the rights consumers in cross-border e-commerce transactions in Indonesia. If the e-commerce transaction is no longer a national boundary, then the consumer protection laws of each country such as those of Indonesia will not be enough to help, since 0-cothmal B09s operate across borders. In this connection, legal protection for consumer rights must be carried out with an international approach through harmonizing law and cooperation with law enforcement institutions.[18]

Fraudulent business practices can be categorized as economic crime. The characteristics of these economic crimes are more organized in the form of legal entities (corporation. The perpetrators are people who have high and respectable socioeconomic status and commit these crimes in relation to their occupation.[19] In addition to the Criminal Code which regulates criminal sanctions in practice fraudulent business there are special provisions stipulated in laws outside the Criminal Code, such as Law No.8 Tahwn 1999 on Consumer Protection. In the provisions of Article 62 of Law No.8 of 1999 concerning Consumer Protection which contains provisions of criminal sanctions. From the standpoint of the sanctions characteristic, this Article can be grouped into two groups, namely:

1. Criminal sanctions are based on special criminal law determined in Law No.8 Year 1999, regulated in Article 62 paragraph 1 and 2.
2. Criminal sanctions that are subject to the provisions of other criminal laws, namely violations that result in serious injury, serious illness, permanent disability or death are subject to applicable criminal provisions. The following will describe both types of criminal sanctions.20

Criminal sanctions based on the special criminal law can also be divided into 2 types of severity of punishment, namely:

1. Imprisoned for a maximum of 5 (five) years or a maximum fine of Rp.2,000,000,000.00 (two billion rupiah), for acts that violate the following provisions:
   a. Article 8 concerning prohibitions for Business Actors not to producing, offering and selling goods or services does not meet or does not comply with that standard required.
   b. Article 9, regarding the prohibition of Business Actors from offering, promoting, advertising goods and / or services incorrectly
   c. Article 18 concerning prohibitions for Business Actors to use standard clauses that are detrimental to consumers.
2. To be imposed with a maximum imprisonment of 2 (two) years or a maximum fine of Rp. 500,000,000.00 (five hundred million rupiah), for acts that violate:
   a. Article 11 concerning the prohibition of Business Actors from misrepresenting or misleading consumers in the case of sales which are conducted by sale or auction, by declaring such goods and / or services as if they have met the quality standards;
   b. Article 16 concerning the prohibition of Business Entities in offering goods and / or services through orders to: not fulfill orders and / or agreements for settlement times as promised; do not keep the promise #tas a service and / or achievement.
   c. Article 17 paragraph (1) sub-paragraph d and sub-paragraph f about customers' violations by Business Actors by: not containing information about the risk of using goods and / or services; violates the ethics and / or provisions of the laws and regulations regarding advertising.

In dealing with ‘deviant behavior’ in the business world, governments are more inclined to resolve administratively. Settlement like this sometimes does not produce optimal results because for large companies or corporations, payment of compensation fines in a certain amount is only considered as an 'accident' factor so that the force of force to stop deviant deviations is not heeded. On another occasion it is not impossible that they will repeat the crime again. The ambivalent attitude of the government in

[17] Abdul Halim Barkatullah, Legal Protection for Consumers in Cross-Country E-commerce Transactions in Indonesia, Yogyakarta: FH Ull Press, 2009, p. 4
[18] Budi Agus Riswandi, Law and Internet in Indonesia, Yogyakarta: Ull Press, 2003,
[19] Jay A. Sigler, Understanding Criminal Law, Little Brown and Company, Boston: 1981, p. 115

enforcing legislation in the economic sector is thought to be based more on the scale of development priorities.

Legislation that specifically regulates 'Consumer Protection' and 'Dishonest Competition' apparently still does not function optimally. The non-optimization of the law forces us to look into general laws. In dealing with criminal cases with a new dimension, the ability of law enforcement officers in the field of science and technology is needed. Developments in the field of computers or other fields require law enforcement officials to keep pace with these developments, if they do not want to lag far behind.

To anticipate fraudulent business practices is through legal channels. In general, the law relating to this issue is civil law, criminal law and administrative law. The extent to which these regulations can be relied upon in protecting the interests of consumers will be described below. First, civil law, which generally relates to agreements, compensation and breach of contract. These provisions are only general in nature so it is not easy to apply to special cases relating to fraudulent business practices by producers. Second, criminal law, which generally deals with selling, offering and distributing goods that are harmful to health or life, fraudulent competition, deceiving consumers and counterfeiting of products. The application of these KUHP articles, although still reliable, seems to be very forced. Third, administrative law, contains legal norms which are basically regulating, fostering and supervising the behavior of business actors in carrying out their business activities. Even though this legal admission is sectoral in nature, it regulates certain problems, but it is a weakness. Administrative regulations have more administrative functions, so that psychologically there is no economic benefit for economic actors to comply with

F. CONCLUSION

After the discussion and analysis in the previous chapter, the author concludes that in the legal protection of consumer rights in cyberspace, with the advent of e-commerce, it has a negative impact on consumers who place consumers in a weak bargaining position. In the fulfillment of Human Rights in the protection of state consumers must guarantee every citizen who is in conflict with the law.

To anticipate fraudulent business practices, there are legal channels. In general, the law relating to this period is civil law, criminal law and the law of law. The extent to which these regulations can be relied upon in protecting the interests of consumers will be described below. First, civil law, which generally relates to agreements, compensation and breach of contract. Second, criminal law, which generally deals with selling, offering and distributing goods that are harmful to health or life, fraudulent competition, deceiving consumers and counterfeiting of products. Third, administrative law, contains legal norms which are basically regulating, fostering and overseeing the behavior of business actors in carrying out their business activities.

G. REFERENCES

Abdul Halim Barkatullah, *Legal Protection for Consumers in Cross-Country E-commerce Transactions* in Indonesia, Yogyakarta: FH Ull Press, 2009

Bagir Manan, "*Research in the Field of Law*". Puslitbangkum Legal Journal, Number 1-1999. (Padjadjaran University Research Institute, 1999)

Box, Staven, *Power, Crime and Mystification*, London and New York:

Tavistock Publication, 1983

BPHN, *Legal Review of Telecommunications, Information, and Computers Convergence*, 1998

Budi Agus Riswandi, *Law and Internet in Indonesia*, Yogyakarta: Ull Press, 2003

Friedman, Lawrence M. *American Law*, W.W. Norton and Company, New York, 1984

Gunawan Widjaja and Ahmad Yani, Law Regarding Consumer Protection. Jakarta: Gramedia Pustaka Utama, 2001

Hikmahanto Juwana, *Economic Law and International Law*. Jakarta: Lentara Hati, 2002

Huijbers, Theo, *Philosophy of Law*, Yogyakarta: Kanisius 1991 Oughton, David and John Lowry, Textbook on Consumer Law, London: Blackstore Press Ltd, 1997

Rosthschil, Donald P. & Carrol, David W., *Consumer Protection Reporting Service*, Volume One. Maryland: National Law Publishing Corporation, 1986

Satjipto Rahardjo, *Law Enforcement Issues*, Bandung, Sinar Baru., 1983 Sigler, Jay A., *Understanding Criminal Law*, Little Brown and Company, Boston: 1981

Soerjono Soekanto, *Law Enforcement*, Jakarta, BPHN & Binacipta, 1985

Susanti Adi Nugroho, *Business Competition Law in Indonesia in Theory Practices And Legal Applications*, First Edition, Jakarta, Kencana, 2012,

Yansen Darmanto Latip, *Legal Choices and Forum Choices in International Contracts*. Jakarta: FH-UI Postgraduate Program, 2002

https://katadata.co.id/berita/2016/02/18/pemerintah-beberkan-kecurangan-e-commerce, accessed on 26 December 2019

A COMPARATIVE EVALUATION OF THE ACEH GOVERNMENT LAW WITH THE PANCASILA PARADIGM

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ABSTRACT

The implementation of Law No. 11, Year 2006 pertaining to the Aceh Government, did not achieve the results it sought, that is, for the betterment of Aceh citizens. The implementation of the law mandated that the central government allocate funds for Special Autonomy (*Otonomi Khusus)* for a total sum of Rp 163 trillion ($11.7 billion) over a period of 20 years. The Special Autonomy is now in its ninth year.

Contrary to its original intent, the Aceh Government law has given rise to several *qanun* or local laws within Aceh that contradict the philosophical foundations of Pancasila and the Constitution of the Republic of Indonesia. These local laws are not in line with the Pancasila paradigm, a paradigm that proposes religious freedom, human rights, unity, democracy and justice. Instead, these local laws impose unease and injustice for the Aceh citizens.

These *qanun* released by the Aceh Government are especially discriminatory against women and religious minorities such as the Christian people in Aceh Singkil regency. Due to these local laws, women in Aceh are subject to raids by security forces because they are deemed to be improperly dressed. Moreover, public lashing for crimes such as gambling, fornication and drinking alcohol are on open display for everyone to see, including children. There are no such laws in Indonesia that permit nor condone torture.

Keywords: Pancasila, Aceh, Syariat Islam, Special Autonomy

INTRODUCTION

The Republic of Indonesia was built upon the philosophy and ideals of the Pancasila and the Constitution of the Republic of Indonesia, these are the pillars that uphold the Indonesian government and its people. The Constitution guarantees the rights of the wide variety of cultures, customs and people of Indonesia. *Bhinneka Tunggal Ika*, meaning "Unity in diversity" is Indonesia's national motto. The motto aptly describes Indonesia's diversity and the importance of maintaining unity despite differences.

In a momentous decision, the Indonesian Government and its House of Representatives released Law No. 11, Year 2006 regarding the Aceh Government[1] (Aceh Government Law) which became the foundation for the establishment of Aceh as a Special Autonomous region, providing the regional government with wide authority on the basis that it benefits the people of Aceh.

In the context of the formation of the Aceh Government Law, the Indonesian government and the House of Representatives took a strategic step in accordance with public policy and law making theories, the author's theoretical framework - based on a constitutional paradigm[2] - can be seen in the preamble* (*konsideran)* as follows:

First, the preamble emphasizes in its first part that the Republic of Indonesia and its government, in accordance with the constitution acknowledges and respects the various special regions governed under the law;

Second, in accordance with the historied journey of governance of the Republic of Indonesia, Aceh is a special regional government due to its tumultuous journey and its resilient people;

Third, that resilience and fighting spirit comes from life perspective based in Islamic law, which birthed a strong culture based in Islam. In history, Aceh and its people were invaluable in helping the Republic of Indonesia gain and defend its independence;

[1] In Article 1 paragraph 4 of Law No. 11 Year 2006 concerning the Government of Aceh, it is explained that the Government of Aceh is the provincial government in the system of the Unitary State of the Republic of Indonesia based on the 1945 Constitution which carries out government affairs carried out by the Aceh Regional Government and the House of Representatives The regions of Aceh are in accordance with their respective functions and authorities.

[2] Lubis, M. Solly, *Serba-serbi Politik dan Hukum*, Mandar Madju, Bandung, 1998, p. 7. See also: Salman,Otje, Susanto, Anthon F. *Teori Hukum Mengingat, Mengumpulkan dan Membuka Kembali*, Rafika Aditama, 2013, pp.67-68.

*Edited to fit the English language.

Fourth, the establishment of a special autonomy and development in Aceh has not fully realized prosperity, social justice, as well as the advancement and fulfillment of human rights. Therefore, the governance of the special autonomous region of Aceh needs to be reconsidered with the principles of good governance;

Fifth, the earthquake and subsequent tsunami that happened in Aceh showed that Indonesia and its people have become more united when it was rebuilding affected cities and its people, its shows that the Indonesian government and its people have the potential to solve conflicts peacefully, wholly, sustainably and honorably within the framework of the Republic of Indonesia.

The conclusion to the preamble further emphasized that in order for the establishment of the Aceh Government to run more smoothly and orderly with legal certainty[3], there needs to be a strong legal foundation; the formation of the Aceh Government Law.

Observing the construction of legal norms written in the preamble, legal drafting[4] theories suggest that the preamble contains substantially more content. The author's analysis is as follows:

First, philosophically, the drafting of the Aceh Government Law was to establish justice[5] and prosperity for the people of Indonesia; *second*, empirically, the law in question provided a more practical approach in order to support the establishment of Special Autonomy for the Aceh Province. At the same time, the approach also provided an opportunity to resolve the conflict in a peaceful, inclusive, sustainable and honorable way for the Republic of Indonesia;[6] *Third*, the end goal was to provide legal certainty[7] for the Aceh Province as a Special Autonomy.

The author's research found that there was a gap phenomena,[8] or deviation, as the mandates of the law were not being fully carried out by the government and left much to be desired. Firstly, the Aceh Government Law was not communicated very well, leaving much ambiguity, which later gave way to the formation of various *qanun*, local laws that deviated from the principles of the Pancasila and the 1945 Constitution. Secondly, the Aceh regional government failed in bringing prosperity and justice to the people Aceh as promised by the Aceh Government Law. Thirdly, during the lawmaking process,[9] the government hesitated in executing its policy on Special Autonomy of the Aceh Province, and eventually never sought to reevaluate the Aceh Government Law after it was executed.

The author analyzes the application of the Aceh Government Law by comparing it to the Pancasila paradigm, the foundation on which the Republic of Indonesia was built upon. Specifically, paragraph four of the Indonesian constitution which states: "One and Only God, on just and civilized humanity, on the unity of Indonesia and on democratic rule that is guided by the strength of wisdom resulting from deliberation/representation, so as to realize social justice for all the people of Indonesia."

RESEARCH QUESTION

Based on what the author has written in the introduction, the author believes that the formulation of the research questions that need further discussion or analysis are as follows:

1. Is it true that application of the Special Autonomy in the Aceh Province correlate with the increased religious morals as well as the firm application of just and civil human rights for the people of Aceh?
2. Is it true that the application of the Special Autonomy in the Aceh province embedded a spirit of unity and cooperation among the people of Aceh within the framework of the Pancasila?
3. Is it true that the application of the Special Autonomy in the Aceh province realized

[3] Praja, Juhaya, *Teori Hukum dan Aplikasinya*, CV Pustaka Setia, Bandung, 2011, pp. 171-172.

[4] Wignjosoebroto, Soetandyo, *Hukum Konsep dan Metode*, Setara Press, Malang, 2013, p. 26.

[5] Kusumaatmadja, Muchtar, *Konsep-konsep Hukum dalam Pembangunan*, PT Alumni, Bandung, 2002, pp. 13, 34. Compared to Salman S., Otje, *Filsafat Hukum (Perkembangan & Dinamika Masalah)*, Refika Aditama, Bandung, 2012, p. 57.

[6] Zainal, Suadi, *Transformasi Konflik Aceh dan Relasi Sosial-Politik di Era Desentralisasi*, *Jurnal Sosiologi*, LabSosio, Pusat Kajian Sosiologi FISP-UI, 2016, p. 82.

[7] Hamidi, Jazim, *Revolusi Hukum Indonesia Makna, Kedudukan, dan Implikasi Hukum Naskah Proklamasi 17 Agustus 1945 dalam Sistem Ketatanegaraan RI*, Konstitusi Press, Jakarta & Citra Media, Yogyakarta, 2006, p. 62. See also: Rasjidi, Lilli and Putra, Ida B. W., *Hukum Sebagai Suatu Sistem*, Fikahari Aneska, Bandung, 2012, p. 50-51.

[8] Rumengan, Jemmy, *Metode Penelitian*, Citapustaka Media Perintis, Bandung, 2013, p. 19. See also: Lubis, Solly, *Filsafat Ilmu dan Penelitian*, CV. Mandar Maju, Bandung, 1994, p. 16-17.

[9] Mahfud MD, Mohammad., *Politik Hukum di Indonesia*, Raja Grafindo Persada, Jakarta, 2012, Hal. 363. Lihat juga Soeryarespationo, *Politik Hukum*, Cita Pustaka Media Perintis, Bandung, 2011, Hal. 73.

social justice and prosperity for the people of Aceh?

LITERATURE REVIEW

During the process of researching this paper, the data was collected from primary, secondary, and tertiary sources, as follows: *First,* the primary legal material that will be the normative postulate of analysis are: The philosophical paradigmatic values as embodied in the foundation of the state, i.e., Pancasila, along with government laws and local laws in Aceh.

Second, the secondary legal material that will be used by the author as a basis for normative legal foundations are textbooks that discuss the Special Autonomy of the Aceh Province, and research papers that discuss the topic. *Third,* tertiary material that will be used include: research papers, journals, magazines or news articles that discuss the topic.

RESEARCH METHODOLOGY

A. Research Specification

This legal study is divided into two parts: normative legal research, otherwise known as doctrinal legal research, and its non-doctrinal counterpart sociological (empirical) research.

B. Approach

This paper combines two approaches, doctrinal legal research and empirical research. The mechanism of research with this combined approach method is carried out by means of deductive and inductive reasoning.

C. Data Gathering

The author conducted literary research and legal research .

ANALYSIS AND DISCUSSION

As a special autonomous region, Aceh's legal foundation, Law No. 11 Year 2006, (Aceh Government Law), gave the province authority to establish sharia law. [10] The general consensus in the region is that the aspirations of the Aceh Government Law is in accordance with Islamic law. The Aceh people's unique worldview is reflected in the writing of one of Aceh's prominent clerics Sheikh Abbas Ibnu Muhammad alias Teungku Chik Kutakarang during the 18th century, in his book titled *Tadhkirat al-Rakidin* (1889), in his book he writes: "*Adat ban adat hukom ban hukom, adat non hukom sama keumba; tatkala mufakat adat non hukom, nanggore seunang hana goga,*" which translates to "custom follows custom, [sharia] law follows law, laws and custom cannot be seperated, when custom is in agreement with law, the state is joyous[11]."

Additionally, Prof. H. Hilman Hadikusuma, S.H. said that Islam is a sensitive subject for the Aceh people. Islam is a part of his identity. For him, law is sharia law, and goes hand in hand with custom, therefore custom needs to be in accordance with Islamic law, custom has its own penalties and cannot be separated from Islamic law, he equates custom and sharia like the cornea and the iris. An Acehnese adage shares a similar sentiment, "*hukom ngon adat lagee zat ngon sipheuet,*" which translates "laws and customs are like elements and their properties[12]."

Even so, the Aceh Government Law must function within the ideological framework of the Indonesian nation, that is the Pancasila and the constitution. Therefore laws in Aceh must abide by the tenets of the Pancasila; "One and Only God, on just and civilized humanity, on the unity of Indonesia and on democratic rule that is guided by the strength of wisdom resulting from deliberation/representation, so as to realize social justice for all the people of Indonesia," which is also written in the preamble to the constitution [13].

Therefore the values intrinsic to the Pancasila are the benchmark to which the Aceh Government Law is subject to. Essentially, the Pancasila has five paradigms; religious, humanitarian, unity, democracy and social justice.

From the religious paradigm, the Indonesian constitution ensures and safeguards the people's

[10] Article 125 of the Aceh Government Law which states: (1) Islamic Sharia implemented in Aceh includes aqeedah, shariah and morals; (2) Islamic Sharia as referred to in paragraph (1) includes worship, *ahwal alsyakhshiyah* (family law), *muamalah* (civil law), *jinayat* (criminal law), *qadha* (justice), *tarbiyah* (education), preaching, syiar , and the defense of Islam; (3) Further provisions regarding the implementation of Islamic sharia as referred to in paragraph (1) are regulated by the Aceh Qanun.

[11] Alfian, Teuku H. I., *Aceh dalam Bingkai Negara Kesatuan Republik Indonesia*, Translation of the paper titled "The Aceh Question" submitted at the International Conference on Aceh Problems in Washington D.C., United States, April 3, 1999, p. 42

[12] Hadikusuma, Hilman, *Antropologi Hukum Indonesia*, PT Alumni, Bandung, third print, 2019, p. 83.

[13] Article 1 Decree of the People's Consultative Assembly of the Republic of Indonesia No. XVIII / MPR / 1998, that the Pancasila as referred to in the Preamble of the 1945 Constitution is the state foundation of the Unitary State of the Republic of Indonesia must be implemented consistently in the life of the state. See also Law No.: 12 of 2011 concerning the Formation of Regulations and Regulations which affirms in Article 2 namely Pancasila is the source of all sources of state law.

freedom of religion as written in Article 28E paragraph (1) which states: Everyone is free to embrace religion and worship according to his religion, paragraph (2) Everyone has the right to freedom to believe in beliefs, express thoughts and attitudes in accordance with his conscience. However, the exercise of this right is subject to limitations in the law as referred to in Article 28J paragraph (2) of the 1945 Constitution.

Indonesia recognizes Islam, Christianity, Protestant, Catholicism, Hindu, Buddhism, and Confucianism. Additionally, the Indonesian Constitutional Court on November 7th, 2017, ruled in favor of and acknowledging other faiths[14].

The freedom of religion in the religious paradigm of the Pancasila implies that the Indonesian people should feel safe to practice whatever religion or faith they choose. Subsequently, this also implies that people of other religions should not impose their beliefs onto others, even if it is the faith of the majority of Indonesians.

Meanwhile, in Aceh, the presence of the Aceh Government Law inadvertently gave the region special permission implement sharia law in Chapter XVII on Sharia and its Practice. As elaborated in Article 125 of the Aceh Government Law which states: (1) Islamic Sharia implemented in Aceh includes aqeedah, shariah and morals; (2) Islamic Sharia as referred to in paragraph (1) includes worship, *ahwal alsyakhshiyah* (family law), *muamalah* (civil law), *jinayat* (criminal law), *qadha* (justice), *tarbiyah* (education), preaching, syiar , and the defense of Islam; (3) Further provisions regarding the implementation of Islamic sharia as referred to in paragraph (1) are regulated by the Aceh Qanun.[15]

Furthermore, Article 126 paragraph (1) states that every Muslim in Aceh must obey and practice the sharia; paragraph (2) Every person who lives or is in Aceh must respect the implementation of sharia.

Prior to the issuance of the Aceh Government Law, the regional government issued a number of local laws (*qanun)* with the legal basis being Law No. 18 of 2001 concerning Special Autonomy for the Special Region of Aceh as the Province of Nanggroe Aceh Darussalam.

Among these are Aceh Qanun No. 10 of 2002 concerning Sharia Courts; Qanun No. 11 of 2002 concerning the Implementation of Sharia in Aqeedah, Worship and Islamic Symbols; Qanun No. 12, 13 and 14 of 2003 concerning *Khamr, Maisir* (Gambling) and *Khalwat* (Fornication), Qanun No. 7 of 2004 concerning Management of Zakat and Qanun No. 10 of 2007 concerning Baitul Mal. These qanuns are still in effect after the issuance of Law No.: 11 of 2006 concerning the Government of Aceh.

The application of the qanuns that received the most attention was related to regulations regarding Muslim clothing. In Article 13 (1) Qanun No. 11 of 2002 concerning the Implementation of Sharia in Aqeedah, Worship and Sharia, it is stated that every Muslim is obliged to dress in Muslim clothing. If violated, Article 23 will be imposed, namely: anyone who does not wear an Islamic dress as referred to in Article 13 paragraph (1) shall be sentenced to *ta'zir* after going through a process of warning and guidance by *Wilayatul Hisbah* (the body in charge of overseeing the implementation of Sharia). *Ta'zir* punishment can be in the form of prison or public caning.[16]

The Explanation of Qanun No. 11 of 2002 defines “Muslim clothing” as non-transparent garment that covers the body, and does not show the shape of the body. This explanation is very vague, and has no clear boundaries, resulting in various interpretations in its implementation.

In fact, according to a study by the Institute for the Study of Democracy and Human Rights, Demos, the application of Aceh Qanun No. 11 of 2002 concerning the Implementation of Sharia in Aqeedah, specifically regarding Muslim clothing, mainly affects women.

Demos provides an example in a case where a female college student, along with 100 other women were raided by the Wilayatul Hisbah. The female student was wearing a hijab, a shirt and long jeans, but the officers insisted that she violated the *qanun.*[17]

There was also another incident where the HKI Suka Makmur church in Aceh Singkil was burnt down by the masses because they deemed it to be

[14]Tempo.co, *MK Putuskan Aliran Kepercayaan Masuk Kolom Agama KTP*, 7 November 2017. (https://nasional.tempo.co/read/1031506/mk-putuskan-aliran-kepercayaan-masuk-kolom-agama-ktp/full&view=ok)

[15]Article 1 No. (21) of Law No. 11 of 2006 concerning the Government of Aceh states that the Aceh Qanun is a statutory regulations similar to provincial regulations governing the administration of government and the life of the people of Aceh. See also the Elucidation of Article 7 paragraph [2] letter of Law No. 10 of 2004 concerning the Formation of Regulations that more firmly categorize qanun as a regional regulation. The explanation of the article reads, Included in the types of Provincial Regulations are qanun that apply in NAD and Perdasus and Perdasi in Papua.

[16]Aceh Qanun No. 11 of 2002 concerning the Implementation of Sharia in the Field of Aqeedah, Worship, and Islamic Sharia.

[17]Abidin, Zainal, et al., *Analisis Qanun-Qanun Aceh Berbasis Hak Asasi Manusia*, Lembaga Lembaga Kajian Demokrasi dan Hak Asasi Demos, Jakarta, 2011, p. Xvii.

without permit on October 13 2015, nine others were demolished by the municipal police (Satpol PP). After the incident, the Christian citizens of Aceh built makeshift churches for their service. Many of these makeshift churches were built on palm plantations in order to avoid oppression from the Muslims in the area.[18]

Acquiring permits to build a church in Aceh is very stringent, as the permit requires 150 churchgoers and the support of 120 people in the area, these requirements are based on Aceh Government Regulation No. 25 Year 2007 concerning Guidelines for Establishing Houses of Worship. Subsequently, the Aceh regional government released the Aceh Qanun No. 4 Year 2016 concerning Guidelines for the Maintenance of Religious People and Establishing Houses of Worship, which decreased the churchgoer requirement by ten, making it 140, and the support of non-Christian local residents by ten as well, making it 110.

Furthermore, the permit also requires a written recommendation from the *geuchik* (village chief), *imuem mukim* (head of customary government), *camat*, Head of the Office of the Ministry of Religion, and Forum for Religious Harmony, and a certificate of land status and plans for building drawings. In comparison, the Joint Decree (SKB) of Two Ministers No. 8 and 9 of 2006 states that the establishment of a house of worship needs 90 followers and 60 supporters.

The Ministry of Religion released Religious Harmony Index 2019 (KUB) which placed Aceh at the very bottom out of 34 provinces in Indonesia with a score of 60.2, in first place with the highest score was West Papua, with 82.1, the survey was conducted in May and June of 2019.[19]

Issues of religious harmony triggered by the conflict in Aceh automatically means that Law No. 11 of 2006 has rocked the joints of the humanitarian paradigm. While it is true that the law concerning the Government of Aceh gives flexibility to the application of sharia in Aceh, that does not mean the denial of freedom of religion for other communities. Whereas in the second precept of the Pancasila it states that practicing religions and beliefs must also be grounded on a just and civilized basis of humanity. These two cases represent a phenomena where the second precept of the Pancasila and the 1945 Constitution were ignored almost entirely.

This failure of upholding the humanitarian paradigm is also reflected in the application of public caning in Aceh. The canings are punishment for violators of Qanun No. 12, 13, and 14 of 2003 for drinking alcohol, gambling, and fornication, as well as Qanun No. 7 of 2004 on *zakat* (charity) and Qanun No. 10 of 2007 on *Bayt al-mal* (House of Money).

The application of penal law has proliferated since issuance of Aceh Qanun No. 6 of 2014 on Jinayat Law. This Qanun regulates criminal acts , offenses in positive law (criminal). Only, in the Jinayat Law in Aceh, criminal arrangements are not thoroughly chosen, i.e. typically relating to sex (adultery, rape, and sexual harassment), intoxication, and gambling. The execution of caning is regulated in Qanun No. 7 of 2013 concerning Jinayat Procedural Law.[20]

The caning is carried out in the courtyard of mosques in Aceh. The mosque, a place of worship transforms into an arena of sorts where criminals are punished. The caning is public and can be witnessed by anyone, including children. As of April 2018, the Government of Aceh and the Ministry of Law and Human Rights made an agreement for caning to be carried out in prison. One of the considerations was to not be witnessed by children and not to be videotaped.

Nevertheless, it does not mean that the caning punishment is feasible. Because Article 28 i paragraph (1) of the 1945 Constitution mentions 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, and the right not to be prosecuted based on retroactive laws is a human right that cannot be reduced under any circumstances. It is clearly stated here that every human being has the right not to be tortured. Criminal Law that still applies in Indonesia does not recognize the punishment of torture of convicted persons.[21]

The public canings are a far cry from human rights values enshrined by international conventions. Indonesia has extensively bound itself to various international treaties on human rights.

Indonesia has ratified six major international human rights treaties, namely: a). International Convention on the Elimination of All Forms of Discrimination against Women, ratified by Law No. 7 of 1984; b). International Convention Against Torture

[18]BBC.com, *Kisah umat Kristen di Aceh Singkil yang terpaksa beribadah di bawah tenda*, 21 November 2019. (https://www.bbc.com/indonesia/indonesia-50456294)

[19]Detik.com, *Menag Umumkan Indeks Kerukunan Beragama 2019*, Rabu 11 December 2019. (https://news.detik.com/berita/d-4818287/menag-umumkan-indeks-kerukunan-beragama-2019/2)

[20]Article 262 (1) Qanun No. 7 of 2013 concerning Jinayat Procedural Law states whip punishment is held in an open place to be seen by the people present.

[21]Article 10 of the Criminal Code, namely criminal consists of: a. basic crimes: 1. capital punishment; 2. imprisonment; 3. imprisonment; 4. criminal fines; 5. criminal cover. b. additional penalties 1. revocation of certain rights; 2. confiscation of certain items; 3. announcement of the judge's decision.

and Other Cruel, Inhuman or Degrading Treatment or Punishment, ratified by Law No. 5 of 1998; c). International Convention on the Elimination of All Forms of Racial Discrimination, ratified by Law No. 29 of 1999; d). The International Convention on the Rights of the Child, ratified through Presidential Decree No. 36 of 1990; e). International Covenant on Economic, Social and Cultural Rights, ratified by Law No. 11 of 2005; and f). International Covenant on Civil and Political Rights, ratified by Law No. 12 of 2005.[22]

Corporal punishment, whether it is caning or even mutilation, violates outright International Conventions on Civil Rights and Politics, as well as International Convention on the Elimination of All Forms of Discrimination against Women and the International Convention on Children's Rights. The Human Rights Commission clearly prohibits any form of torture because it is deemed inhumane and degrading mentally and physically. These international conventions prohibit any form of corporal punishment, as well as excessive punishment enforced to discipline or serve as an example.[23]

The Anti-Torture Commission, tasked with overseeing the implementation of the Anti-Torture Convention specifically discussed the corporal punishments conducted in Aceh during 2008, the discussion deemed the public caning to be excessive and contradicted the convention. In its concluding observation, the Commission recommended that Indonesia reevaluate laws in Aceh that permit corporal punishment, and erase them because they went against the laws of the convention.[24]

The author's following analysis is based on the unity paradigm. If the content of a regulation produces conflict regarding its interpretation and shakes the foundations of the religious and humanitarian paradigms, it consequently affects the unity paradigm. For example, in the case of dismantlement and burning of churches, and the complicated process it takes to build new houses of worship are bound to sow seeds of discord and disunity. Meanwhile, the third precept of the Pancasila clearly embodies a vision of unity of people and of the nation over the interests of a certain group.

The situation became increasingly dire at the issuance of Aceh Qanun No. 3 of 2013 concerning Flags and Aceh Symbols that was put in place on March 25, 2013. The controversy is readily apparent within its content, in the preamble which mentions the Memorandum of Understanding between the government of the Republic of Indonesia and the Free Aceh Movement, Helsinki, August 15, 2005, also known as the Helsinki MoU, as the main consideration for the formation of this qanun. The Helsinki MoU is a peace agreement to resolve the armed conflict between the Free Aceh Movement and the Unitary State of the Republic of Indonesia which took place since 1976.

Meanwhile preambles to every product of law in the country must consider life views, consciousness, and legal aspirations that concur with the spirit and philosophy of the nation, built upon the foundations of the Pancasila and the 1945 Constitution.

Regarding the shape of the flag referred to Aceh Qanun No. 3 of 2013 concerning the Aceh Flag and Coat, in Article 4 paragraph (1) it is mentioned that the Aceh Flag is rectangular in shape with a width of 2/3 (two thirds) of the length, two straight lines white at the top, two straight white lines at the bottom, one black line at the top, one black line at the bottom, and in the middle a star moon with red, white and black colors. This flag is reminiscent of the flag of the Free Aceh Movement.

Article 6 Paragraph (4) Government Regulation Number: 77 of 2007 concerning Regional Symbols, states that the design of regional logos and flags may not have parallels in principle or in whole with the design of logos and flags of banned organizations or separatist organizations / associations / institutions / movements in The Unitary State of the Republic of Indonesia. Even in the Elucidation of Article 6 Paragraph (4) it is explicitly stated that what is meant by the design of logos and flags of banned organizations or separatist organizations / associations / institutions / movements in this provision for example logos and Crescent Flags used by separatist movements in Aceh Province, logos the Mambruk bird and the Morning Star used by the separatist movement in Papua Province, and the Benang Raja flag used by the separatist movement in Maluku Province.

Consequently, the Ministry of Home Affairs revoked the qanun through Minister of Home Affairs' decree No. 188.34-4791 2016 dated May 12, 2016. However, the Government of Aceh and the Aceh People's Representative Council still considers Aceh Qanun No. 3 of 2013 concerning the Aceh Flag and Coat as active, as a result of the Coordination Board meeting Aceh People's Representative and the Government of Aceh on August 5, 2019.[25] Therefore the Government of Aceh and the Aceh People's Representative Council are still nursing conflicts with the Central Government.

[22]Abidin, Zainal, et al., *Analisis Qanun-Qanun Aceh Berbasis Hak Asasi Manusia*, Demos Democrats, Jakarta, 2011, p. Xvii
[23]Abidin, Zainal, et al., *Ibid.* p. XVIII
[24]Abidin, Zainal, et al., *Ibid.*
[25]Suara.com, Viral Kemendagri Batalkan Qanun Bendera dan Lambang Aceh Ini Responnya, 7 August 2019 (https://www.suara.com/news/2019/08/07/110531/viral-kemendagri-batalkan-qanun-bendera-dan-lambang-aceh-ini-respon-dpra)

These discords within the religious, humanitarian and unity paradigm suggest a potential rift within the democratic paradigm as well. The democratic paradigm in this sense does not mean that the majority gets to decide the fates of others, rather that the minorities have the very same rights that the majority do. The values embedded within the fourth precept of the Pancasila dictate that every citizen of Indonesia has the same stature, rights, and responsibilities. It is unconstitutional for the majority to impose their wills onto the minority.

The democratic philosophy is absent, or vague at best, in the various local laws issued in Aceh. This phenomena has consequently marginalized Christian citizens living in the Aceh Singkil regency.

From a legal standpoint, when analyzing the implementation of the Aceh Government Law, the qanun that have been established have mainly focused on crimes and politics, as we are yet to see any local laws that aspire to protect and enrich the lives of Aceh citizens. For instance, local laws that focus on the economic development of the people and investment.

Even the local criminal laws (*jinayat)* only seem to apply to the average person, meanwhile politicians and businesspeople seem to be exempt. We are yet to see qanun that deal with white-collar crimes such as corruption, collusion and abuse of power, while corruption is prominent issue Aceh. Like the case of Abdullah Puteh, Governor of Aceh in 2000-2005 that received 10 years in prison in 2004 in corruption case for buying a helicopter.[26] There is also the case of Irwandi Yusuf, Aceh Governor for 2017-2022 who received 8 years in 2019 for bribery.

According to the Indonesian Macro Poverty Analysis data from the Central Statistics Agency of the Republic of Indonesia, on 20 December 2019, Aceh ranks first as the poorest population in Sumatra, and the sixth position throughout Indonesia, after Papua, West Papua, East Nusa Tenggara, Maluku and Gorontalo. On the contrary, according to the Provincial Financial Statistics data published by the Central Statistics Agency of the Republic of Indonesia on December 19, 2019, Aceh was included in the five provinces with the most regional budget revenues reaching Rp.17.3 trillion, the largest budget outside of Java.

While the Law on the Government of Aceh provides for the welfare of the people of Aceh supported by the budget for the right to special autonomy funds for 20 years, starting in 2008 and will be stopped in 2027. The amount is Rp. 163 trillion. The budget is intended to finance development, especially the development and maintenance of infrastructure, empowering the people's economy, alleviating the poor, and funding for education, social and health.

CONCLUSION

The implementation of the Aceh Government Law has not realized its legal aspirations to bring prosperity to the people of Aceh, instead the law has inadvertently made way for local laws, qanun, to be issued in the region, some of which contradict the very essence and ideology of the Indonesian nation, the Pancasila, and the 1945 Constitution.

Some research assessments have also reached the conclusion that these local laws also violate human rights and proliferate social injustice for the people of Aceh. The local laws issued in Aceh do not benefit nor will it bring prosperity, as we are also yet to see a local law designed to regulate government officials and businesspeople. The laws in Aceh are sharp to bottom and dull to the top.

The people of Aceh are still impoverished even though the Aceh Government Law is fortified by a special budget for the special autonomous region that is Aceh.

Below are a few causes that need to be evaluated:

1. The content of the law written in Law No. 11 of 2006 concerning Government can be described as hollow and full of holes, giving leeway to dubious interpretations. Therefore it is imperative that the law be changed in order to rid of vague interpretations. Specifically, the law needs to fortify its ties to the nation’s ideology; the Pancasila and the 1945 Constitution.
2. It is imperative that a task force is formed in order to oversee the implementation of laws across Indonesia, and oversee the local laws produced by regions across the country. These laws are then are to be held to the standards of the Pancasila paradigm and corrected as such. There is also a possibility to create a space for legal excavation based on the principles of common law, which also needs to stay within the framework of the nation’s ideology.
3. There needs to be an agreed upon standard concept of criminal law to which regional laws and regulations are bound to, this of course needs to be in accordance with the National Criminal Law, in this case the Criminal Law Code.

[26]Detik.com, *Puteh Korupsi 2 Heli Divonis 10 Tahun Nyagub Lagi*, 20 July 2016 (https://news.detik.com/berita/d-3257301/puteh-korupsi-2-heli-divonis-10-tahun-dijalani-5-tahun-dan-nyagub-aceh-lagi)

REFERENCES

A. Books

Hilman Hadikusuma, *Antropologi Hukum Indonesia*, PT Alumni, Bandung, 3rd printing, 2019.

Jazim Hamidi, *Revolusi Hukum Indonesia Makna, Kedudukan, dan Implikasi Hukum Naskah Proklamasi 17 Agustus 1945 dalam Sistem Ketatanegaraan RI*, Konstitusi Press, Jakarta & Citra Media, Yogyakarta, 2006.

Juhaya S. Praja, *Teori Hukum dan Aplikasinya*, CV Pustaka Setia, Bandung, 2011.

Lilli Rasjidi dan Ida Bagus Wyasa Putra, *Hukum Sebagai Suatu Sistem*, Fikahari Aneska, Bandung, 2012.

Moh. Mahfud MD., *Politik Hukum di Indonesia*, Raja Grafindo Persada, Jakarta, 2012.

Muchtar Kusumaatmadja, *Konsep-konsep Hukum dalam Pembangunan*, PT Alumni, Bandung, 2002.

Otje Salman, Anthon F. Susanto. *Teori Hukum Mengingat, Mengumpulkan dan Membuka Kembali*, Rafika Aditama, 2013.

Soetandyo Wignjosoebroto, *Hukum Konsep dan Metode*, Setara Press, Malang, 2013.

Soeryarespationo, *Politik Hukum*, Cita Pustaka Media Perintis, Bandung, 2011.

Solly Lubis, *Serba-serbi Politik dan Hukum*, Mandar Madju, Bandung, 1998.

B. Laws and Regulations

Law No. 11 of 2006 concerning the Government of Aceh

Aceh Qanun No. 11 of 2002 concerning the Implementation of Sharia in the Field of Aqeedah, Worship, and Islamic Sharia.

Aceh Qanun No. 6 of 2014 concerning Jinayat Law.

BIP Editorial Team, the 1945 Constitution, Publisher of the Popular Science Bhuana, Jakarta, 2020.

C. Journals and Guidebooks

Suadi Zainal, *Transformasi Konflik Aceh dan Relasi Sosial-Politik di Era Desentralisasi*, Jurnal Sosiologi, LabSosio, Pusat Kajian Sosiologi FISIP-UI, 2016

Teuku Haji Ibrahim Alfian, *Aceh dalam Bingkai Negara Kesatuan Republik Indonesia*, A translation of the paper titled "The Aceh Question" delivered at the International Conference on Aceh Issues in Washington D.C., United States,April 3, 1999.

Zainal Abidin dkk., *Analisis Qanun-Qanun Aceh Berbasis Hak Asasi Manusia*, Institute for the Study of Democracy and Human Rights Demos, Jakarta, 2011

D. Printed and Web Media

Suara.com, 7 Agustus 2019, Viral Kemendagri Batalkan Qanun Bendera dan Lambang Aceh Ini Responnya, (https://www.suara.com/news/2019/08/07/110531/viral-kemendagri-batalkan-qanun-bendera-dan-lambang-aceh-ini-respon-dpra).

BBC.com, 21 November 2019, *Kisah umat Kristen di Aceh Singkil yang terpaksa beribadah di bawah tenda*, (https://www.bbc.com/indonesia/indonesia-50456294).

Detik.com, 11 Desember 2019, *Menag Umumkan Indeks Kerukunan Beragama 2019*, (https://news.detik.com/berita/d-4818287/menag-umumkan-indeks-kerukunan-beragama-2019/2)

Tempo.co, 7 November 2017, *MK Putuskan Aliran Kepercayaan Masuk Kolom Agama KTP*, (https://nasional.tempo.co/read/1031506/mk-putuskan-aliran-kepercayaan-masuk-kolom-agama-ktp/full&view=ok)

GOVERNMENT BUREAUCRATIC REFORM AS AN INSTRUMENT FOR COMBATING CORRUPTION IN INDONESIA

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ABSTRACT

Combating corruption in Indonesia, with the increasing disclosure of corruption cases involving members of DPR (the House of Representatives), public officials such as Regents, Mayor and officials of state-owned or BUMN companies taht have not been touched by law enforcement agencies, this further proves that since the refrom era, many corruption perpetrators have been committed by state officials adn government administrators. In fact, the large number of DPR members and other public officials, arrested by the KPK (the Corruption Eradication Commission) show that state and government official as important targets in efforts to eradicate corruption cases will continue to emerge, even though the KPK as one of the institutions continues to take legal action and remedies. The problrm is the state administration and government administrators are an alternative to be considered in combating corruption in Indonesia. Furthermore, the study of this paper is normative by verifying through literature review.

Keywords: Bureaucratic Reform Instrument to Flight Corruption**.**

A. INTRODUCTION

Combating corruption in Indonesia, with more and more disclosure of corruption cases involving members of the DPR, public officials such as regents, mayors and officials of state-owned or state-owned company legal entities that have not been touched by law enforcement agencies, this further proves that since the reform era, it turns out that in general the perpetrators of corruption were committed by state officials and government administrators. In fact, the increasing number of DPR members and other public officials arrested by the KPK shows that the corruption eradication institution has the guts to make the state administrators and the government administrators an important target in efforts to eradicate corruption in Indonesia. Concretely, the state officials and the government administrators who become the new center of power are now one of the main sources of corruption in Indonesia.

The KPK's strategic efforts certainly have an important meaning because they can signal to the public that no institution is immune from law enforcement. What the KPK has done by carrying out a series of arrests, searches and wiretaps or through a sting operation (OTT), to combat corruption in Indonesia is certainly very important and must be respected as a step forward. However, given the large scope of corruption activities and the large number of corruptors, prosecuting corruption perpetrators by the KPK is not enough.

The ability of the KPK and other law enforcement agencies to take action is not comparable with the number of new corruption cases that have arisen. The capacity of law enforcement in corruption cases is not comparable with the capacity of corruption production machines in Indonesia. The corruption market in Indonesia is huge and cannot be stopped unless Indonesia is able to shut down the corruption production machine. Efforts to stop the engine that forms corruption behavior have not been much thought of. Meanwhile, prevention is often cheaper and more effective than taking action against corrupt behavior. One way to stop the operation of the machinery that forms corruption is to reform government bureaucracy as an instrument to fight corruption in Indonesia.

When corruption in the government bureaucracy has not been eliminated, corruption cases will continue to emerge. When the capacity of law enforcement can be increased, the government will find it difficult to imprison the corruptors because there is no more space left in the prison to accommodate the corruptors. Especially in a situation like now, where the law enforcement process is considered not able to create deterrent effects, because of the low sentences given to corruptors by the court.

B. PROBLEM STATEMENT

Why are reforms to the state administration and the government administrators an alternative to be considered in combating corruption in Indonesia?

C. ANALYSIS AND DISCUSSION

1. Bureaucratic Reform

Various views of the legal community, bureaucracy bring together supply of and demand for corruption. Bureaucratic mechanisms often create rent-seeking actors, both actors inside and outside the bureaucracy who see an opportunity to create rent from bureaucratic mechanisms and institutions. Bureaucratic mechanisms and institutions can create opportunities for exchanges between the use of bureaucratic authority with money, facilities, and other sources of enjoyment. Stakeholders who need the privileges of government and bureaucracy, among others: licensing, facilities, power, and services are often willing to buy it and exchange it for money, facilities, and other sources of enjoyment needed by bureaucratic agents and other powers.

Bureaucratic procedures and work processes that are poor, not transparent, and full of uncertainty create opportunities for actors inside and outside the bureaucracy to exchange privileges for money, facilities, and other sources of enjoyment. Bureaucratic officials and intermediaries who see certain privileges such as: authority, services, and government facilities and bureaucracy have high values for citizens and their stakeholders.

On the other hand, residents and stakeholders who feel the process of obtaining these privileges naturally are very difficult and full of uncertainty feel that paying the value of achievement is far more beneficial than letting themselves be full of uncertainty. Under these conditions bad bureaucracy can create a market for corrupt transactions. Poor bureaucracies, both institutions and mechanisms, often bring together renters and those who can afford to be able to obtain privileges from the government and its bureaucracy.

In fact, in some cases of corruption such as those that occur in land acquisition, infrastructure tender bids, project brokers, candidates for winning state officials such as the case of intermittent replacement of members of the legislature used by unscrupulous members of the KPU and many more cases that lead to criminal acts of corruption. From this case it is clear how bureaucratic institutions and mechanisms can become a market for corruption, which finds a supply of and demand for corruptions.

Bureaucracy as an area of corruption does not only occur at high levels of corruption involving unscrupulous members of Parliament, but also in the bureaucracy at the grassroots. In organizing public services needed by citizens such as licensing services, KTP (identity cards), birth certificates, passports, and driver's licenses, bureaucratic institutions and their ministries also create markets for corruptors. With this fact, it proves that the bureaucracy brings together rent-seeking actors, intermediaries, and citizens who want services easily and quickly to conduct corrupt transactions. Bureaucratic officials, who realize that their authority can be exchanged for money, exchanges the use of their authority with money to citizens who use the service either directly or through intermediaries services.

Allowing bureaucratic ugliness to continue because it is the same as letting corrupt practices continue. From this perspective, reforming the government bureaucracy is a necessity for the eradication of corruption in Indonesia. Whatever the KPK, law enforcement and anti-corruption activists do to eradicate corruption without eliminating the source of corruption, which is bad bureaucracy, will not be able to solve the problem of corruption.

Observing the importance of the answers to the problems of this paper, that the problems faced by the bureaucracy in Indonesia are very complex, multidi¬mensional, and are related not only to internal bureaucratic problems but also to the wider environment such as corrupt political, legal and cultural systems.

From the internal perspective of the bureaucracy, prominent issues include the institutional structure of the bureaucracy which is still very fragile. This is reflected in the structure which is very hierarchical, divided into narrow squares and not connected properly, and its orientation towards excessive procedures. This poor bureaucratic structure creates another problem that is no less serious, namely the tendency of bureaucracy to develop long, complicated and inefficient work processes. Moreover, coupled with its orientation towards excessive control makes the work process in the bureaucracy very complex and full of uncertainty.

From the side of the bureaucratic apparatus, so far the bureaucracy has developed the wrong mindset, figure, and behavior because it tends to position itself more as an agent of power than an agent of service. The Indonesian bureaucracy inherits values and institutions which historically have never been designed to be tools to serve citizens but rather to

serve the interests of power. As a result, the mindset, figure, and behavior that stand out in the bureaucratic apparatus in Indonesia are precisely the figure and behavior as rulers rather than as service agents. By having this mindset, figure and behavior, the bureaucratic apparatus tends to act as rent-seeking rather than as a service agent.

The development of a culture of power in the bureaucracy, and given the complexity of the problems faced by the government bureaucracy in Indonesia and the relationship between one problem and another, the effort to build a bureaucracy must be done holistically. The development of the reform program must touch on various dimensions of the problem so that changes in one aspect of the bureaucracy are not co-opted by other aspects of the bureaucracy.

2. Institutional Restructuring

The increasingly complex life of society and its increasingly varied needs creates pressure on the bureaucracy to respond appropriately and quickly. Bureaucratic failure to respond appropriately to the dynamics of the environment often encourages those who need bureaucratic services to find shortcuts in order to meet their needs in the way that they expect.

Bureaucratic officials who see the needs of citizens and stakeholders to find short cuts (priveleges) in the service process, see it as an opportunity to hunt rent. For residents, these shortcuts have a high value and are able to exchange them for money, facilities, and other sources of enjoyment that they control. Under these conditions bureaucracy creates opportunities for transactions between bureaucratic actors who are rents and those outside of the bureaucracy who seek privileges.

A hierarchical and fragmented bureaucratic structure, which only recognizes vertical relationships tends to reduce the optimal use of information because it impedes bureaucratic access to utilize information available in other bureaucratic units. Decision making and problem solving in bureaucracy cannot be done by using all the information in the bureaucracy.

In the context of eradicating corruption, bureaucratic designs such as this tend to obstruct the transparency of the work process because between units and interconnections between bureaucratic units. Opportunities to hide information in rattgka to hunt rent are more open in hierarchical organizations than matrix organizations, which open up opportunities for horizontal relationships.

The structure of the bureaucracy must be changed into a matrix, because the matrix can loosen rigid and complex bureaucratic barriers. The relationship pattern that has so far only been vertical can be enriched by a horizontal relationship pattern. Horizontal interconnection between units within the bureaucracy and between bureaucracies can be strengthened through the development of an organizational organization. The flow of information becomes more fluid and extends through the bulkhead sections, sections, offices, and offices so as to encourage openness and functional interrelationships between units within the bureaucracy and between the bureaucracy itself. The capacity of the bureaucracy to respond to changes and dynamics within and outside itself becomes increasingly high. Kirrezja bureaucracy in serving citizens and answering their needs will get better. Therefore, the need for citizens to find shortcuts in accessing government bureaucratic services can be reduced.

The behavior of the bureaucracy and its officials who are often opposed to the behavior of the people may indicate that the bureaucracy in Indonesia tends to be uprooted from its cultural roots. In weber bureaucracy as it applies in Indonesia now job descriptions are individual, the relationship that applies is the relationship between people, and job responsibility is individual. Competition tends to be based on competition between individuals. Relationship between family and togetherness does not get a proper place in bureaucracy which is concerned with groups.

In weberian bureaucracies based on individualism, the issue of accountability tends to be understood simply as the mere relationship between subordinates and superiors. Accountability of a bureaucratic apparatus is a person's responsibility to superiors not to colleagues, groups and organizations. This kind of model of accountability that often makes collegial relationships, cooperation and accountability of a person to the group, and their concern for the interests and mission of the organization is very low. Government bureaucracy which has tended to develop individual instruments and competition traditions to realize performance can enrich itself with group-based instruments and the tradition of cooperation.

Accountability which so far has only relied on individual accountability can be enriched with group accountability. The tradition of shared accountability in community life outside the bureaucracy can be

transferred into the life of the government bureaucracy. In group accountability, one's accountability is not only to the leader but also to the group. Patterns of relationships between people that have only been vertical, namely the relationship between subordinates and their superiors, can be enriched with horizontal patterns of relationships. Both of these relationship patterns need to be developed together in the government bureaucracy in Indonesia. Both can complement and strengthen the concept of accountability that has been developed in the government bureaucracy.

Besides being elitist in nature, this oversight mechanism tends to be ineffective because it does not provide an opportunity for all people in the bureaucracy to supervise each other. Control of corruption in the bureaucracy can only be done if there is a mechanism that allows everyone to supervise each other and prevent the abuse of power for personal and group interests.

The reduced space for individual rent-seeking will reduce the supply of corruption. The greater the possibility of corruption behavior to be open when done in congregation will be able to reduce the desire to do corruption. Especially when the oversight mechanism in the bureaucracy becomes more effective because the oversight mechanism developed by the merit bureaucracy is comprehensive, open, and participatory. Supervision mechanism like this will make everyone in the bureaucracy have access and opportunity to supervise each other, thereby reducing the supply of and demand for corruption in the bureaucracy.

3. Reforming the Role of Bureaucracy

In the history of the bureaucracy in Indonesia, the figure of the bureaucracy as a ruler is very prominent. This is because as long as the bureaucracy and its officials tend to be placed more as agents and power tools than as service agents. Bureaucracy is formed and managed to achieve the goals of power, including. maintaining security and order, controlling people's behavior and making sure they comply with the rules and regulations, including maintaining the continuity of power.

In this relationship pattern, the opportunity for bureaucracy to conduct rent-seeking behavior is wide open. They realize that they have power which if used will affect the lives of their citizens. Conversely, citizens who need bureaucratic and government services and have limited instruments to control the behavior of the bureaucracy and its officials become very powerless when dealing with their bureaucracy. When the mechanism for voice and exit is limited, citizens become very dependent on the bureaucracy. Such a situation becomes very fertile ground for the development of corrupt behavior.

To avoid this kind of thing continuing, then redefinition of the role and figure of the bureaucracy is needed. The role and figure of the bureaucracy as a ruler and instrument of power must be immediately evicted and replaced with other roles that are relevant to the challenges faced by the Indonesian people in realizing a democratic state and capable of actively playing politically and economically on a global scale. In order for the bureaucracy to play an optimal role, the role of the bureaucracy as a service agent for sovereign citizens needs to be developed immediately. The bureaucracy and its officials must be able to act as an instrument of service to improve people's welfare.

The role of bureaucratic reform as an agent of service and empowerment of citizens must be institutionalized in the life of the bureaucracy and its apparatus. For this reason, a new language needs to be made to replace the language that has been used to represent the roles and figures of the bureaucracy. New values and symbols need to be created to replace the values and symbols that currently teach the bureaucratic apparatus as a figure of authority.

When bureaucratic reform and its apparatus succeed in developing their role as agents of service and community empowerment, the opportunity for bureaucracy to become a market for corruption for the actors within it and agents outside the bureaucracy will become smaller. Instead the role of the bureaucracy as an arena of service and empowerment for citizens who need it becomes even greater. In this role the bureaucracy and its officials have two interrelated sides and strengthen its existence. As an arena for bureaucratic service, it positions itself as an agent and citizens as principals. As agents, the bureaucracy and its officials are subject to the needs and aspirations of citizens (principal). That is, what services would be held and how to organize them should be consulted with residents. Citizens have voices that must be respected by the bureaucracy and when citizens are not satisfied with bureaucratic services and their apparatuses, citizens can exit and the bureaucracy can lose its political legitimacy.

As an agent of bureaucratic empowerment, bureaucracy can act as a facilitator, regulator, and promoter for its citizens so that they can optimize their existence both socially, politically, or

economically. As a facilitator of the bureaucratic apparatus through its empowerment of information, networks and other resources, it can encourage its citizens to play their role in the social, economic and political fields so that they are more independent and competitive. Whereas as a promoter of bureaucracy and its officials can act to give way to its citizens so that they can optimize their social, political and economic roles in a natural and dignified manner.

Changing the role and figure of the bureaucracy and its officials from the authorities to servants and community empowerment is certainly not an easy thing. Creating new languages, values, and symbols is not as easy as turning the palm of the hand. In order to form new behaviors, the new language, values and symbols must be translated into the new code of conduct. The effort requires hard work, serious and time. However, the government bureaucracy in Indonesia has no choice but to make changes, if it does not want to lose its role in accelerating Indonesia's transition to a democratic country, free from corruption, and able to improve the welfare of its citizens.

4. Empowerment of Information and Communication Technology (ICT) in Government Bureaucracy

Improving the quality of information and communication technology in government bureaucracy has a strategic role not only to improve government performance but also in combating corruption. From the internal side of the government bureaucracy the increase in ICT can increase the access of the bureaucratic apparatus to information. Information that originally flowed through the hierarchy of power can be extended to all people in the bureaucracy. Internal transparency will become more widespread and information distortion can be avoided. When transparency becomes increasingly widespread in the bureaucracy, the space available for bureaucratic apparatus to hunt for wild money (rent) from the use of its power becomes increasingly limited.

The expanded access of the bureaucratic apparatus to information about the budget, programs and projects that are in its bureaucracy, leadership decisions, and various other aspects of bureaucratic life make the development of horizontal oversight mechanisms easier.

The bureaucracy can develop a comprehensive monitoring system by integrating a horizontal oversight mechanism with its existing vertical oversight mechanism. The bureaucracy is not only accountable to superiors but also to colleagues. ICT adoption will also be able to improve the work process of bureaucracy which has tended to be complicated and consumes a lot of energy both bureaucratic energy or citizens who use bureaucratic services. Orientation to excessive control often makes the hierarchy arrangement and level become long. Especially when the bureaucratic work process is associated with the hierarchy of power. The work process of the bureaucracy is not only long but also complex and complex.

For user users and stakeholders, improving the quality of ICTs in government bureaucracy makes transparency of services related to costs, time, and ways easily doable. Improving the quality of ICT mastery in the bureaucracy also makes citizen interaction with the service regime simpler and easier, so that the need to pay extortion and bribes in order to obtain privileges is lower.

In summary, increasing ICT content in the bureaucracy can reduce opportunities for corruption, through fewer opportunities for hunting rents available to bureaucratic actors and decreasing the need to pay extortion and bribes from citizens and stakeholders. ICTs make corruption transactions in the bureaucracy even more difficult.

D. CONCLUSION

Strategic efforts to combat corruption in Indonesia require comprehensive policies including law enforcement, the development of anti-corruption culture and traditions, enhancing the capacity of civil society, and improving governance practices. The actions and efforts taken by the KPK and the government to bring corruption perpetrators to justice, look for various ways of making corruptors become deterrent as currently discouraged by making corrupt uniforms and requiring them to do social work is certainly very important.

However, if not followed by government bureaucratic reform, these efforts will not be able to solve the problem of corruption in Indonesia. As long as the government bureaucracy in Indonesia is still pathological as it is now, the bureaucracy will still be ordered as a market and facilitator of corrupt behavior. Therefore, bureaucratic reform is a necessity if we want to build an Indonesia free from corruption.

To carry out bureaucratic reform on state administrators and administrators of Indonesia needs to make many changes not only to restructure the institutional structure of the bureaucracy that

currently still tends to maintain feudalistic, but also reconstruct the values, assumptions, and symbols that have been the basis of the development of government bureaucracy .

Bureaucratic reform of state administrators and administrators of Indonesia must of course also have to reconstruct the role and figure of the future Indonesian bureaucracy to be developed. The role and figure of the bureaucracy and the government apparatus that emphasizes more power than service and places itself more as a ruler need to be immediately abandoned. The bureaucracy in Indonesia has a dual role, on the one hand they are demanded to be able to portray themselves as service agents, but on the other hand they are also expected to become empowerers and community facilitators so that they can play their social, economic and political roles independently, productively and competitively.

REFERENCES

Agus Sumartono, *Reformasi Birokrasi Publik di Indonesia*. Jakarta: Pamator Press,2012

Agus Irawan, *Reformasi Tata Pemerintahan dan Otonomi Daerah.* Jakarta; Cempaka Media, 2013

Azis Budianto, *Pemberantasan Korupsi di Indonesia*, Jakarta; Cintya Press, Jakarta, 2015

Handoyo Pranoto, *Kegagalan Birokrasi dan Reformasi Pemerintahan*, Yogyakarta; Jakal Press, 2016

Noer Muhammad Azis, *Kinerja Tata Pemerintahan Daerah di Indonesia*, Jakarta; Cintya Press, Jakarta, 2017

Permono Adinegoro, *Reformasi Sistem Pemerintahan di Indonesia*, Jakarta; Media Pena Mas, 2011

Sudaryatin, *Mekanisme Penyelenggaraan Hukum Administrasi Negara*, Jakarta; Agung Media, Jakarta, 2011

Yulia Marbun, *Teladan dan Pantangan dalam Penyelenggaraan Pemerintahan dan Otonomi Daerah*, Jakarta; Pena Media, 2017

THE JURIDICAL ANALYSIS OF A SPECIALIST'S PRACTICE WHO IS INCOMPETENCE WHICH RESULTED IN MORTALITY AND DEATH

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ABSTRACT

The legal relationship between doctors and patients from a civil standpoint is in a legal engagement. Doctor is a profession that is very noble in the eyes of society because this profession is directly related to humans as objects and related to human life and death. Health services basically aim to carry out prevention and treatment of diseases, including medical services carried out on the basis of individual relationships between doctors and patients who need healing but doctors often make mistakes that result in malpractice to patients. Some cases are not the authority of doctors in carrying out their practice and should be carried out by doctors who have the competence to provide assistance and in accordance with their authority or responsibilities. At present there is still a tendency to occur irregularities in medical treatment. Deviations here are defined as medical actions that are not in accordance with the Code of Medical Ethics, professional and legal standards, even though doctors in the field have tried to carry out services according to existing standards. So it can be mentioned as an alleged act against the law. As for the most undesirable if for unlawful acts carried out by the Doctor resulting in death and Mordibitas, then this legal journal research will discuss the legal liability of death and morbidity caused by specialist doctors who do not have the competency management of complications. This research has 2 (two) problem formulations, namely: (1) How is the legal liability for death and morbidity caused by specialist doctors who do not have the competency in managing complications?; and (2) How is the law of evidence of death and morbidity caused by doctors as malpractice?. The research method in writing this journal is juridical-normative legal research, with secondary data that includes primary legal material, namely the Civil Code (KUHPer), the Criminal Code (KUHP), The constitution of The Republic of Indonesia Year 1945, Law Number 36 of 2009 concerning Health, and Regulation of the Minister of the Republic of Indonesia Number 32 of 1996 concerning Health Workers; secondary legal materials, namely books, legal journals and materials from the internet that discuss health law; tertiary legal material which includes the Law Dictionary and Language Dictionary.

Keywords: Malpractice, Specialist Doctors, Morbidity and Death, Legal Liability.

A. INTRODUCTION

The ideals of the Indonesian people as stated in the Preamble to the Constitution of the Republic of Indonesia Year 1945 are to protect all Indonesians and educate the life of the nation, and to participate in carrying out world order based on independence, eternal peace and social justice.[1] In order to achieve the ideals of the nation, national development is held in all areas of sustainable life which is a series of development that is comprehensive, integrated, and directed. Health development as one of the national development efforts is directed towards achieving awareness, willingness, and the ability to live a healthy life for each population in order to realize optimal health degrees.

The legal relationship between doctors and patients from a civil standpoint is in a legal engagement. A legal engagement is a bond between two or more legal subjects to do or not do something or give something (1313 jo. 1234 the Civil Code). Something called achievement. A legal agreement was born by 2 (two) causes or sources, one by an agreement (1313 the Civil Code) and the other by law (1352 the Civil Code). What is meant by legal relations (rechtsbetrekking) is a relationship between two or more legal subjects or between legal subjects and legal objects that apply under the rule of law.[2]

Doctor is a profession that is very noble in the eyes of society because this profession is directly related to humans as objects and related to human life and death. From the first society knows there are some fundamental characteristics inherent in a doctor, namely the existence of good social integrity and wise behavior. Therefore, if there is a mishandling of

[1] Opening of the Constitution of the Republic of Indonesia Year 1945, Paragraph IV.

[2] Andi Hamzah, 1986, *Kamus Hukum*, Ghalia Indonesia, Jakarta, page. 244.

the patient, either resulting in disability or death is often silenced by the patient / family because they consider all of that is God's destiny. But at this time such a view began to change, more and more often we hear and know of doctors who are sued / sued by patients or families both in the civil and criminal fields.

Health services basically aim to carry out prevention and treatment of diseases, including medical services carried out on the basis of individual relationships between doctors and patients who need healing but doctors often make mistakes that result in malpractice to patients.[3] In the world of medicine, you must know the term of malpractice. According to Zulkifli Muchtar, malpractice is any medical error made by a doctor for doing work below the standard.[4]

In the period 2010-2011 obtained facts about unlawful acts against the authority of medical services resulting in death and morbidity. There were 13 (thirteen) perinatal deaths (newborns) and 6 (six) maternal deaths (maternity) which were obtained from data lists of death and morbidity tracking.[5] A research conducted by Johns Hopkins University School of Medicine predicts that there are around 250 thousand people in the United States who died due to errors of doctors and nurses. If that number is included in the list made by the Center for Disease Control and Prevention, then 'doctor error' can be the third leading cause of death, after heart disease and cancer.[6] Even so, the number of 250 thousand people is only a prediction, considering that medical errors are never used as a cause of death listed in a person's death statement.

Some cases are not the authority of doctors in carrying out their practice and should be carried out by doctors who have the competence to provide assistance and in accordance with their authority or responsibilities. At present there is still a tendency to occur irregularities in medical treatment. Deviations here are defined as medical actions that are not in accordance with the Code of Medical Ethics, professional and legal standards, even though doctors in the field have tried to carry out services according to existing standards. So it can be mentioned as an alleged act against the law. The most undesirable if the actions against the law committed by the doctor result in death and Mordibitas. Death or mortality is a fatal result or in one word “death”. The word “Mortality” comes from the word “Mortal” which comes from another word “Mors” (death). The opposite of death, of course, is eternity. Death is different from morbidity (pain).[7] Definition of Morbidity is a state of illness; occurrence of diseases or conditions that change health and quality of life.[8] Based on the descriptions above, the research of this legal journal will discuss the legal liability of death and morbidity caused by specialist doctors who do not have the competency management of complications.

B. PROBLEM STATEMENT

Problem formulation in this study:

1. How is the legal liability for death and morbidity caused by specialist doctors who do not have the competency in managing complications?
2. How is the law of evidence of death and morbidity caused by doctors as malpractice?

C. LITERATURE REVIEW

Theory About Health Law

Health law regulates the rights and obligations of each service provider and service recipient, either as individuals (patients) or community groups.[9] The meaning of medical law is the part of health law concerning medical services.[10] Health law according to H.J.J. Lennen is the entire legal provisions that are directly related to health services and the application of the rules of the civil law, state administrative law, and the criminal law in relation to this matter.[11]

The same thing was conveyed by Van Der Mijn, health law can be formulated as a set of regulations relating to the provision of care and also its application to the civil law, the criminal law, and the

[3] Danny Wiradharmairadharma, 1999, *Penuntun Kuliah Kedokteran dan Hukum Kesehatan*, Kedokteran EGC, Jakarta, page. 7.

[4] Soedjatmiko, 2001, *Masalah Medik dalam Malpraktek Yuridik*, Citra Aditya Bakti, Malang, page. 32

[5] Diah Arimbi, *Kajian Perbuatan Melawan Hukum Terhadap Wewenang Pelayanan Bidan Praktik Mandiri Di Kabupaten Banyumas*, Jurnal Dinamika Hukum Vol. 13 No. 2 Mei 2013, page. 219.

[6] https://www.cnnindonesia.com/gaya-hidup/20160513191548-255-130582/kesalahan-medis-bisa-jadi-penyebab-kematian-ketiga-di-dunia, accessed on 27 December 2019 at 18:30 WIB.

[7] https://aepnurulhidayat.wordpress.com/2016/04/11/pengertian-mortalitas-by-aep-nurul-hidayah/,accessed on 27 December 2019 at 18:35 WIB.

[8] http://menurutparaahli.com/tag/pengertian-morbiditas/, accessed on 27 December 2019 at 18:40 WIB.

[9] Soekidjo Notoatmodjo, 2010, *Etika dan Hukum Kesehatan*, Rineka Cipta, Jakarta, page. 44.

[10] Sri Siswati, 2013, *Etika dan Hukum Kesehatan dalam Perspektif Undang-Undang Kesehatan*, Rajawali Pers, Jakarta, page. 11.

[11] *Ibid.*, page. 13.

state administrative law.[12] There are several legal principles in health science, namely:[13]

a. *"Sa science et sa conscience"* means the knowledge and the conscience. The purpose of this statement is that of an expert's intelligence health must not be in conflict with his conscience and humanity. Usually used in regulating the rights of doctors, where doctors have the right to refuse medical treatment if it is contrary to his conscience.
b. *"Agroti Salus Lex Suprema"* means patient safety is the highest law.
c. *"Deminimis noncurat lex"* means the law does not interfere in trivial matters. This relates to negligence committed by health workers. As long as such negligence does not adversely affect the patient, the law will not sue.
d. *"Res Ipsa liquitur"* means the facts have spoken. Used in cases of malpractice where negligence does not need further proof because the facts are clear.

D. RESEARCH METHODS

The research method in writing this journal is juridical-normative legal research, with secondary data that includes primary legal material, namely the Civil Code (KUHPer), the Criminal Code (KUHP), The constitution of The Republic of Indonesia Year 1945, Law Number 36 of 2009 concerning Health, and Regulation of the Minister of the Republic of Indonesia Number 32 of 1996 concerning Health Workers; secondary legal materials, namely books, legal journals and materials from the internet that discuss health law; tertiary legal material which includes the Law Dictionary and Language Dictionary.

E. ANALYSIS AND DISCUSSION

1. Rights That Should be Obtained by Patients in Health Services

As a legal subject, doctors in carrying out actions or actions in the community association, distinguished between daily actions related to the implementation of the profession and actions that are not related to the profession. Likewise, the legal responsibilities of doctors are distinguished between legal responsibilities related to the implementation of their profession and legal responsibilities that are not related to the implementation of their profession. The doctor's attachment to the legal provisions in carrying out his profession is the legal responsibility of the doctor which includes:

a. The field of administrative law, contained in Law Number 9 of 1960 concerning Health Principal, Law Number 36 of 2014 concerning Health Workers, and so on.
b. In the area of Criminal Law, namely the Criminal Code (Law Number 1 of 1946), includes Articles 48-51, 224, 267, 268, 322, 344-361, 531 of the Criminal Code.
c. In the area of Civil Law, specifically regarding the provisions in the Civil Code Book III on Contract Law.

All professionals in carrying out their work must be in accordance with what are called professional standards (measures). So, not only health workers who have to work in accordance with medical professional standards. The bearers of other professions also have professional standards determined by each. However, the profession of the profession outside the doctor is rarely related to the loss of a person's life or to cause disability, so it may not be so disputed.[14]

In the Indonesian Medical Ethics Code (KODEKI) governing General Obligations, Article 2 states: "A doctor must always strive to carry out his profession in accordance with the highest professional standards." While Article 7a states that, "a doctor must, in every medical practice, providing competent medical services in full technical and moral freedom, accompanied by compassion and respect for human dignity."[15]

Criminal liability arises if first of all it can be proven that there has been a professional error, for example an error in diagnosis or an error in the way of treatment or treatment or error of treatment by an incompetent doctor. In general, every action or deed that has been done must be accounted for by everyone. As stated by Berkhouwer and Vorstman, there are at least 2 conditions that result in liability in law, namely: (1) "... the consequences can be calculated first. (2) Inadvertence in doing something (or not doing it)."[16]

[12] Cecep Triwibowo, 2014, *Etika dan Hukum Kesehatan*, Nuha Medika, Yogyakarta, page. 15.
[13] Alexandra Indriyanti Dewi, 2008, *Etika dan Hukum Kesehatan*, Pustaka Book Publisher, Yogyakarta, page. 166.
[14] Anny Isfandyarie, 2006, *Tanggung Jawab Hukum Dan Sanksi Bagi Dokter*, Buku I, Prestasi Pustaka, Malang, page. 191.
[15] Ari Yunanto, 2010, *Hukum Pidana Malpraktik Medik*, Penerbit Andi, Yogyakarta, page. 12.
[16] Soerjono Soekanto, 1983, *Aspek-aspek Hukum dan Etika Kedokteran di Indonesia*, Grafiti Pers, Jakarta, page. 67.

In health services, negligence arising from the actions of a doctor is "negligence due to". Therefore, the criminal is the cause of the arising of consequences, for example, the actions of a doctor who causes disability or death of people under his care, so that the act can be harmed to him.[17]

Negligence causing death or serious injury that may be found in the practice of health care is an offense that can be qualified as a crime. In order to impose a sentence in an event, it must first be proven that there is a causal relationship between behavior or neglect and death or serious injury patient, and concerned with their behavior or negligence.[18]

Medical errors cause many cases of death (mortality) and morbidity. Medical error is one of the highest causes of death (mortality). Some types of medical errors that can lead to death include surgery operation errors, medication errors, and improper doses as well as treatments by doctors who do not have the competency in managing complications.

Morbidity is a condition where a person is said to be ill if a perceived health complaint causes disruption of daily activities that is not being able to carry out work activities, take care of the household, and normal activities as usual.[19] Death or mortality is one of the three components of the demographic process that affects population structure, the other two components are birth (fertility) and population mobility.[20] Death can be interpreted as the event of the permanent disappearance of all signs of life, which can occur any time after a live birth.[21] According to the United Nations and WHO, death is the permanent disappearance of all signs of life that can occur any time after a live birth. Still birth and miscarriage are not included in the definition of death.

The Medical World establishes 3 (three) phases of death, from clinical death, brain death to the final phase of biological death where the body becomes rigid and the decay process begins. But insisting someone has died medically is also not easy. There is a long and partly incomprehensible process, towards the final phase of people actually dying biologically. Morbidity has 2 (two) definitions. In the narrow sense and in a broad sense. In the narrow sense is an event of pain or pain, in a broad sense it has a more complex meaning, not only limited to statistics or measures of the event, but also to the factors that influence it (determinant factors), such as social, economic and other factors.

Negligence or negligence essentially contains 3 (three) elements, namely the perpetrator doing (or not doing, *het doen of het nietdoeni*), other than what he should have done (or not doing) so that by doing so (or not doing) has committed acts against the law. The second element, the perpetrators have been negligent, careless, or lack of thought. The third element, the actions of the offender can be reproached and therefore, the offender must be responsible for the consequences that occur because of the act.[22]

A doctor who in his medical assignment deviates from the standards of the medical profession and is proven that the doctor deviates from the standards of the medical profession, fulfills the culpa lata / negligence / carelessness and the actions result in fatal / serious consequences, the doctor may be subject to sanctions in violation of Article 395 of the Criminal Code that is due to carelessness or Article 360 of the Criminal Code resulted in another person seriously injured / died.[23]

For example, due to errors / negligence resulting in patients dying, disability or other unpleasant consequences, the doctor can be held accountable for these consequences as contained in the Criminal Code (KUHP) Chapter XXI about causing people to die or injury due to their fault. These provisions can be seen in the articles below:

a. Article 359 of the Criminal Code: "Whosoever, due to his faults, causes the death of a person to be imprisoned for five years or confinement for one year".
b. Article 360 of the Criminal Code paragraph (1): "Anyone who, for their wrongdoing, causes seriously injured people to be punished with imprisonment for up to five years or a sentence of imprisonment for one year".
c. Article 360 of the Criminal Code paragraph (2): "Anyone who, due to his mistake, causes a person to be injured in such a way that the person becomes temporarily ill or does not carry out his position or work temporarily, is

[17] Syahrul Machmud, 2012, *Penegakan Hukum dan Perlindungan Hukum Bagi Dokter Yang Diduga Melakukan Medikal Malpraktek*, Cet. I, Karya Putra Darwati, Bandung, page. 58.
[18] F. Tengker, 2007, *Bab-bab Hukum Kesehatan*, Penerbit Nova, Bandung, page. 67.
[19] Sirusa BPS, *Angka Kesakitan (Morbiditas)*, diakses dari https://sirusa.bps.go.id/, accessed on 27 December 2019 at 18.50 WIB.
[20] Bagoes Mantra, 2010, *Demografi Umum*, Pustaka Pelajar, Yogyakarta, page. 74.
[21] *Ibid.*
[22] Cecep Triwibowo, *Op.Cit.*, page. 288.
[23] Moh. Hatta, 2013, *Hukum Kesehatan & Sengketa Medik*, Liberty, Yogyakarta, page. 85.

sentenced to a nine-month prison term or a sentence of up to six months in prison, or a fine as high as Rp. 4500,-"

d. Article 361 of the Criminal Code: "If the offense described in this Chapter is carried out in an occupation or occupation, then the sentence can be increased by a third and the offender may be dismissed from his job, at which time the crime was committed and the judge can order that the decision be announced".

Civil liability by a doctor who has made a mistake and caused a loss to his patient is regulated in Article 1365 of the Civil Code stated as follows: "Every act that violates the law, which brings harm to others, obliges the person who due to wrongful issuance of the loss, compensates for the loss".

With the development of the concept of human rights, the need for protection of the rights of patients is increasing, so the government includes the obligation of health workers not to make mistakes when carrying out their profession, namely in Law Number 36 of 2014 concerning Health Workers, in Article 84 it is stated that: Article 84: (1) "Every Health Worker who commits gross negligence resulting in the recipient of a seriously injured Health Service being sentenced to a maximum imprisonment of 3 (three) years". (2) "If the gross negligence referred to in paragraph (1) results in death, each Health Worker shall be liable to a maximum imprisonment of 5 (five) years".

Likewise, Regulation of the Minister of the Republic of Indonesia Number 32 of 1996 concerning Health Workers in Article 23 which states that: (1) "Patients are entitled to compensation if the health services provided by health workers as referred to in Article 22 result in disruption of health, disability or death due to errors or negligence". (2) "The compensation referred to in paragraph (1) shall be carried out in accordance with the applicable laws and regulations".

2. Legal Protection as well as Patient's Legal Efforts in Health Services

Adami Chazawi gives a definition of a doctor's malpractice as a doctor or a person who is under his command intentionally or neglects to perform actions (active or passive) in the practice of medicine to patients at all levels that violate professional standards or violate the law. But unfortunately so at this time there is no uniformity of opinion regarding the exact meaning or understanding of malpractice in Indonesia. This situation is understandable because so at present there is no normative law (based on the law) that regulates malpractice.

In criminal law, a person's mistake / negligence is measured by whether the perpetrator of the crime is capable of being responsible, that is if his actions are determined by 3 (three) factors, namely: (1) The inner state of the perpetrator of the crime; (2) There is an inner connection between the perpetrator of the crime and the act with the act he did, which can be in the form of: (a) Intentional (dolus); or (b) Negligence / negligence (culpa); and (3) Absence of forgiving reasons.

To prove professional mistakes in the medical field, of course, requires the standards of the medical profession that are only determined by the professional group itself. The assumption of the doctors that the professional group must pay more attention to their interests and protect them, so it is necessary to have a legal regulation that protects doctors to make the best profession possible. And what must be maintained by professional groups is professional honor. The honor of doctors in carrying out the profession, should be interpreted as a doctor in carrying out his profession in accordance with applicable medical profession standards in accordance with the goals of medical science.

If in the case where the doctor is a party (cases of errors / negligence of the doctor in carrying out the profession), one of the obstacles that will be encountered in the verification process is the "expert statement" regulated in article 186 of the Criminal Procedure Code. In Article 186 of the Criminal Procedure Code that is intended with expert information, namely if it is associated with the relationship between doctors and patients, it can be stated in both written and unwritten form. Written expert statements can be in the form of a Medical Record which formally constitutes a collection of records regarding matters related to the course of the disease and treatment / treatment of patients.

While in terms of the material, the contents of the medical record consist of the patient's identity, records about the disease, results of the laboratory examination, X-rays, ultrasound examination and others. Medical records function as an administrative tool when the activity is in the hospital, and as a means of communication and information between doctors and patients. The legal function of the medical record is that the medical record can function as evidence in the event of a disagreement / demand from the patient, and on the other hand as legal protection for the medical record doctor can function

as a financial means because it can be used to calculate the costs of care and treatment that the patient needs.

Medical records for patients are evidence that can be used as a basis for whether certain medical actions taken by doctors against patients are in accordance with professional implementation standards. The more complete the medical record, the stronger its function as evidence that provides legal protection for doctors. From this description it can be concluded that the medical record has a dual function as evidence, namely as evidence of expert testimony (articles 186 and 187 of the Criminal Procedure Code), and as evidence of letters (article 187 of the Criminal Procedure Code).

Doctors must be responsible for losses incurred, because of mistakes in carrying out the profession. The strength of evidence from evidence evidence assessed according to article 188 paragraph (3) of the Criminal Procedure Code is conducted wisely and wisely in each particular situation, after a careful and thorough examination based on his conscience as well as information obtained from the process of handling health enforcement efforts. The nature of the evidentiary power of witness testimony is the same as evidence of evidence, expert statements and letters which have free evidence.

According to article 189 paragraph (14) of the Criminal Procedure Code that the strength of evidence from the testimony of the accused is not enough to prove that the accused is guilty of carrying out the act of the accused must be accompanied by other evidence. Here is the power of evidence evidence for the actions that are charged to convince the judge, as stated in modern Criminal Code that the reproach of an action lies in the relationship between the inner state of the perpetrator with the actions he did, but in the evaluation of that relationship. Judgment is in the hands of the judge, because the core of the error lies in the assessment and psychological condition that becomes a measure, based on the facts that existed before the incident, at the time of the incident and after the incident, the judge assessed the inner state of the offender. The evidence evidence that can indicate whether there is a match between the other evidences, so that the judge is convinced of the actions that have been committed by the defendant.

F. CONCLUSION

The conclusion that can be elaborated on the above discussion is regarding the legal liability of death and morbidity caused by specialist doctors who do not have the competence in managing complications, that criminal liability arises if first of all it can be proven that there has been negligence in the diagnosis or error in the way of treatment or Even the treatment or error of handling by an incompetent doctor, where the negligence causes death (mortality) and morbidity which constitutes offenses that can be qualified as a crime, for that doctor must be accountable both criminally (Article 359 of the Criminal Code, Article 360 of the Criminal Code paragraph (1), Article 360 of the Criminal Code paragraph (2), and Article 361 of the Criminal Code), as well as civil law (Article 1365 of the Civil Code). Then regarding the law of proof for death and morbidity caused by doctors as malpractice, that to prove professional error in the medical field requires standards of the medical profession that are only determined by the professional group itself where in the law of proof in cases of negligence / negligence of doctors in carrying out the profession, wrong one evidence used is an expert statement (regulated in article 186 of the Criminal Procedure Code) written in the form of a medical record as evidence that can be used as a basis for whether certain medical actions taken by doctors against patients are in accordance with professional implementation standards.

G. REFERENCES

Book

Adami Chazawi, 2007, *Malpraktik Kedokteran, Tinjauan Norma dan Doktrin Hukum*, Bayu Media, Bandung.

Alexandra Indriyanti Dewi, 2008, *Etika dan Hukum Kesehatan,* Pustaka Book Publisher, Yogyakarta.

Andi Hamzah, 1986, *Kamus Hukum,* Ghalia Indonesia, Jakarta.

Anny Isfandyarie, 2006, *Tanggung Jawab Hukum Dan Sanksi Bagi Dokter,* Buku I, Prestasi Pustaka, Malang.

Ari Yunanto, 2010, *Hukum Pidana Malpraktik Medik*, Penerbit Andi, Yogyakarta.

Bagoes Mantra, 2010, *Demografi Umum,* Pustaka Pelajar, Yogyakarta.

Cecep Triwibowo, 2014, *Etika dan Hukum Kesehatan,* Nuha Medika, Yogyakarta.

Danny Wiradharmairadharma, 1999, *Penuntun Kuliah Kedokteran dan Hukum Kesehatan,* Kedokteran EGC, Jakarta.

F. Tengker, 2007, *Bab-bab Hukum Kesehatan,* Penerbit Nova, Bandung.

Harmien Hadiati Koeswadji, 1998, *Hukum Kedokteran,* PT.Citra Aditya Bakti, Bandung.

Moh. Hatta, 2013, *Hukum Kesehatan & Sengketa Medik,* Liberty, Yogyakarta.

Soedjatmiko, 2001, *Masalah Medik dalam Malpraktek Yuridik,* Citra Aditya Bakti, Malang.

Soekidjo Notoatmodjo, 2010, *Etika dan Hukum Kesehatan,* Rineka Cipta, Jakarta.

Soerjono Soekanto, 1983, *Aspek-aspek Hukum dan Etika Kedokteran di Indonesia,* Grafiti Pers, Jakarta.

Sri Siswati, 2013, *Etika dan Hukum Kesehatan dalam Perspektif Undang-Undang Kesehatan,* Rajawali Pers, Jakarta.

Syahrul Machmud, 2012, *Penegakan Hukum dan Perlindungan Hukum Bagi Dokter Yang Diduga Melakukan Medikal Malpraktek,* Cet. I, Karya Putra Darwati, Bandung.

Journal and Legal Scientific Research

Diah Arimbi, Kajian Perbuatan Melawan Hukum Terhadap Wewenang Pelayanan Bidan Praktik Mandiri Di Kabupaten Banyumas, Jurnal Dinamika Hukum Vol. 13 No. 2 Mei 2013.

Legislation

The Civil Code.

The Criminal Code.

Indonesia, The constitution of The Republic of Indonesia Year 1945.

_____, Law Number 36 of 2009 concerning Health.

_____, Regulation of the Minister of the Republic of Indonesia Number 32 of 1996 concerning Health Workers.

Internet

https://www.cnnindonesia.com/gaya-hidup/20160513191548-255-130582/kesalahan-medis-bisa-jadi-penyebab-kematian-ketiga-di-dunia, accessed on 27 December 2019 at 18.30 WIB.

https://aepnurulhidayat.wordpress.com/2016/04/11/pengertian-mortalitas-by-aep-nurul-hidayah/, accessed on 27 December 2019 at 18.35 WIB.

http://menurutparaahli.com/tag/pengertian-morbiditas/, accessed on 27 December 2019 at 18.40 WIB.

Sirusa BPS, *Angka Kesakitan (Morbiditas)*, diakses dari https://sirusa.bps.go.id/, accessed on 27 December 2019 at 18.50 WIB.

HUMAN RIGHTS AND INDONESIA LAW ENFORCEMENT IN STUNTING CHILDREN

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ABSTRACT

Stunting is a chronic nutritional problem that has an impact on children's health and the country's economy. The government has tried to reduce stunting as a mandate of the constitution, but Indonesia is still among the third countries with the highest prevalence of stunting in the world. This study aims to analyze the views of human rights for children with stunting and formulate efforts to uphold human rights against the problem of stunting. The type of research used is normative law research. The legal material that was collected was analyzed qualitatively by describing the existing theories logically, systematically to obtain significant and scientific results. The results showed that the high prevalence of stunting as evidence of government failure in law enforcement against the problem of malnutrition. Ignoring children's rights is a form of human rights violations committed by the state. Need to regulate the law related to stunting as a manifestation of state responsibility in upholding children's rights. Prevention and handling of edits is carried out holistically in various sectors with commitment and synergy between the central / regional government, parents, family and community.

Keywords: Law Enforcement; Human Rights; Stunting

INTRODUCTION

Indonesia is a country that is famous for being rich in natural resources, which seems to be inseparable from the problem of nutrition that has been happening for a long time. Non-serious handling of malnutrition causes various kinds of chronic diseases, one of which is stunting. a Stunting state is a chronic nutritional problem caused by undernourished nutrition for a long time. This occurs because food intake that is not in accordance with nutritional needs Stunting occurs starting from the womb and is only seen when a child is two years old. According to UNICEF, stunting is defined as the percentage of children aged 0 to 59 months, with height below minus (moderate and severe stunting) and minus three (chronic stunting) measured by the WHO Stunting output growth standards due to many factors. such as family economics of disease or various infection many times. Good environmental conditions that clean air pollution can not affect stunting.

Not infrequently also non health problems become the root and stunting problems, such as economic, political problems, social, culture, poverty lack of empowerment of women and the problem of environmental degradation.

PROBLEM STATEMENT

One focus of the current government is the prevention of stunting as an effort so that Indonesian children can grow and develop optimally and effectively with emotional, social and physical abilities that are ready to learn and are able to innovate and compete at the global level, Stunting is not only affected by physical growth (short stature), but also influence brain development which obviously influences his ability and achievement in productivity school and creativity in productivity ages.

Symptoms caused by stunting including shorter bodied children for children his age, lean body proportions are normal but the child look younger / smaller for his age, low body weight for his age and delayed bone growth.

Disorders of growth and development in children due to malnutrition if not getting early intervention will continue into adulthood.

The problem of malnutrition (stunting) is nothing new because the government has long taken a policy through *stunting* prevention programs in Indonesia.

LITERATURE RIVIEW

In addition, the government has protected the rights of children such as the right to life, the right to health, the right to growth and development like humans in general as stipulated in the Article 28 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia (UUD NKRI) of 1945 affirmed that: "Every child has the right to survival, growth and development as well as the right to protection

from violence and discrimination", in addition, in various laws and regulations governing the right to life of children such as Law Number 4 of 1979 concerning Children's welfare, Law Number 23 of 2002 concerning Child Protection, Law Number 36 of 2009 concerning Health, is even regulated in Act Number 39 of 1999 concerning Human Rights.

Stunting should be a concern of the government, given the fairly serious impact on children and have implications for the nation's future. From this phenomenon, the focus of the study in this study, namely the protection and enforcement of human rights law for children with stunting.

Then the formulation of the problem that can be drawn, namely how the views of human rights against children with stunting and how the enforcement of human rights against the problem of stunting.

The purpose of this study is to examine the views of human rights against children with stunting and analyze how the enforcement of human rights against stunting.

RESEARCH METHODS

Type of research used in systematic to get significant and scientific results so that the focus of the study can be explained in accordance with the phenomena that occur then give description about what should be done.

DISCUSSION

A. Child Sufferers from Human Rights Perspective Stunting

The analysis used in this study is a qualitative analysis using primary legal materials and secondary legal materials. Primary legal material is binding legal material, and consists of basic principles, namely Opening of the 1945 Constitution of the Republic of Indonesia, Basic Regulations namely the Body of the 1945 Constitution, Legislation relating to the protection of children's rights. While secondary legal material is material that provides an explanation of primary legal material and is obtained by researchers from library research and documentation of research results. The stage of gathering legal material in this research is through document study. Legal materials that have been collected will be analyzed qualitatively by describing or explaining the theory logically. The state must be responsible for the welfare of the community, especially families who are not well off as mandated in Article 34 of the constitutionThe 1945 Constitution which states the poor and neglected children are maintained by the state There are three forms of obligations and responsibilities of the state in the context of protecting human rights-based children, namely:

a. Obligation to respect is the obligation of the state not to interfere in regulating its citizens when exercising their rights. In this case, the state has an obligation to take actions that will hinder the fulfillment of all stunting rights of children.
b. Obligation to protect is the obligation of the state to act actively to guarantee protection. This means that the state is obliged to take actions to prevent violations of all child rights by parties.
c. Obligation to fulfill is the obligation and responsibility of the state to act actively so that all citizens can be fulfilled their rights including the rights of children with stunting. The state is obliged to take legislative, administrative, legal and other measures to fully realize the child's human rights.

Government program policies relating to the handling of stunting as a manifestation of the protection of children's rights which are constitutional rules that protection of children is part of human rights. Therefore, the recovery of children from stunting is the responsibility of the state so that children live a decent life. Every child has the right to good health services, the right to food (nutritional intake). the right to welfare. This right is recognized in the statutory regulations namely the 1945 Constitution of the Republic of Indonesia, Law Number 4 of 1979 concerning Child Welfare, Law Number 23 of 2002 concerning Child Protection, Law Number 36 of 2009 concerning Health, Law Number 3 of 1997 concerning Juvenile Justice, the Food Law, is even regulated in Law Number 39 of 1999 concerning Human Rights. While the special rights of children with stunting have not been specifically regulated in national law.

According to the Human Rights Theory of natural rights: Human rights are rights that belong to all human beings at all times and in all places by virtue of being born as human beings. Human rights are rights possessed by all humans at all times and places based on their destiny as humans. Humans who take the lives of the nation's children because of the unavailability of protection and health services can be categorized as human rights violations. Violation of the right to health is a violation of the constitution. Therefore, the failure of the government to maximize the policy of stunting prevention and

restoration of children's health is a form of human rights violations committed by the state, because it does not fulfill the constitutional rights of children. If the child with stunting is not restored, it will damage the future of the child and the nation and even cause death. The rights violated by the state are healthy rights, rights of growth and development. children's welfare rights, the right to education, the right to an adequate standard of living, and includes the right to life. The right to life is a non derogable right that cannot be restricted under any circumstances as a gift from God. Implementation of the protection of children with stunting is a shared obligation and responsibility namely the state, society, family and parents which includes juridical, economic, social and cultural protection. Therefore, in fulfilling the basic rights of children. then the responsibility is carried out holistically in collaboration with stakeholders.

B. Enforcement of Human Rights Against *Stunting*

Stunting is a multidimensional problem of children's health so that the government has set stunting as one of the priority programs based on Law No. 36 of 2009 concerning Health and Law No. 18 of 2012 concerning Food. On that basis, the government made a number of policies, namely stipulating Presidential Regulation Number 42 of 2013 which regulates the Implementation of the National Plans for the Acceleration of Nutrition Improvement. The Roadmap to Accelerate Nutrition Improvement consists of four main components which include advocacy, cross-sectoral assessments, development of specific and sensitive programs, and database development. Nutrition interventions, both direct (specific) and indirect (sensitive), need to be carried out jointly by ministries / agencies and other stakeholders.23 Minister of Health Regulation 17/2018 concerning Amendments to the Minister of Health Regulation regarding General Guidelines for the Distribution of Government Assistance in Environment Ministry of Health by Providing Supplementary Food for Pregnant and Toddler Mothers and Providing Nutrition Education in Providing Local Supplementary Food for Pregnant Women and Toddlers. Year 2019. The Minister of the village signed PDTT Permendes No. 16 of 2018 Utilization of village funds for Posyandu, Minister of Health Regulation No. 39 of 2016 concerning Guidelines for Implementing Healthy Indonesia Programs with a Family Approach. Therefore, efforts to reduce the prevalence of stunting include focusing on pregnant and childbirth women, toddlers, school-age children, teenagers, and young adults.

Poverty is a condition that closes human accessibility in various possibilities. Closing the accessibility is an obstacle to the implementation of one's human rights. Therefore, the elimination of poverty is a major part of the human rights enforcement strategy. Based on the legal system theory as stated by Lawrence M. Friedman that efforts to uphold the child's constitutional rights as guaranteed by the 1945 Constitution of the Republic of Indonesia and other regulations must be done both through the aspect of legal substance (rules), structure and cultural aspects.

In the substance aspect, children's rights are human rights and for their interests the children's rights are recognized and protected by law. Based on these considerations, the state has enacted several laws and regulations with the legal substance of guaranteeing children's human rights which are basic rights that are inherently inherent in children who must be protected, respected and defended by anyone. National law has guaranteed the implementation of children's rights in general, but it is not enough because there are no laws and regulations that explicitly regulate the rights of children with stunting.

Stunting can not be done individually (scattered) because it will not have a significant impact. Efforts to prevent stunting must be carried out in an integrated and convergent manner with a multisector approach. Therefore, the government must ensure that all ministries / institutions as well as development partners, academics. Professional organizations, civil society organizations, private companies, and the media can work hand in hand in efforts to accelerate the prevention of stunting in Indonesia. Not only at the central level, integration and convergence of stunting prevention efforts must also occur at the local level up to the village level.

From these problems, what is really needed in upholding the human rights of children with stunting is synergy, a fair commitment between the government, parents, family and society in implementing children's rights as human rights demands in a sovereign state.

It is proven by the fact that there are still many reports related to inadequate service and the existence of discriminatory treatment for some people.36 Poor patients (aged children) getting health services discriminating 37 Acts which are against children's rights constitute violations of constitutional rights as affirmed in the 1945 Constitution of the Republic of

Indonesia that "Every person has the right to be free from discriminatory treatmentwhich is discriminatory on any grounds and has the right to get protection against such discriminatory treatment ". The state should be responsible for this matter so that sanctions are not only imposed on those who prevent the giving of breastfeeding41, but also must be given to mothers who deliberately do not provide exclusive breastfeeding unless for medical reasons.

The government continues to move in protecting children from stunting, even though it is more focused on prevention rather than handling. The actions show that the government has not been serious. will be more effective by increasing supervision in carrying out prevention and handling of stunting.

All the efforts made by the government must be based on the spirit that the existence of the rule of law must be able to make its people happy in accordance with the country's objectives based on in the spirit of empathy, dedication, determination and high commitment. The government should not only be obliged to uphold human rights, but also the general public, especially parents and families. However, one thing to keep in mind is the need for professionalism so that the development, enforcement and promotion of human rights are not arbitrary. The expected enforcement and promotion of human rights is in accordance with the legal corridors as Indonesia is a democratic state of law. The failure of the state in carrying out its obligations can be used as a basis for prosecution in court in the context of upholding human rights. Despite the rejection of state accountability as the theory of state sovereignty that state power is supreme and unlimited so that the state can impose its will without regard to other parties so that it is impossible to sue the court. However, as a state of law (rechstaat), it is not impossible that the state cannot be prosecuted in court. The state has violated the most fundamental right, which is healthy according to WHO, which is physically, mentally, socially and spiritually. Physical health is an important component in the whole sense of being healthy. Mental health is as a condition that allows optimal physical, intellectual, and emotional development of a person and the development goes in harmony with the surrounding circumstances. Spiritual health; Spiritual is an additional component to the understanding of health by WHO and has an important meaning in people's daily lives. Social health is an atmosphere of life in the form of a feeling of security, peace and prosperity, adequate food, clothing and shelter.

CONCLUSION

The government has implemented various prevention and handling stunting programs as efforts to protect human rights for children, but their implementation has not been maximized. As a result the stunting rate does not match the standards set by WHO. The failure is a form of human rights violations committed by the state against children with stunting because they are unable to protect and fulfill the basic rights of children. The rights violated by the state are rights to health, the right to grow children. the right to protection, the right to child welfare, the right to education, the right to an adequate standard of living and including the right to life which is a gift of God (*the right of non derogable*).

Stunting can have implications for children's health in both the short and long term and have an impact on the country's economy. The government, parents, family and community have not been serious in protecting the rights of children for stunting sufferers *(political will)*.

Protection of human rights for children should be emphasized in the constitution and legislation more specifically with the material:

1. Rights and obligations of children with stunting.
2. Government responsibility
3. The rights and obligations of parents
4. Professionalism in health services in stunting prevention and handling
5. Community participation.
6. Facilities and infrastructure.
7. The depth of supervision.
8. Legal sanctions.

SUGGESTION

The implementation of prevention and handling of stunting has not been maximized, it is necessary to have special arrangements related to aunting, and the government must conduct effective and efficient supervision of the implementation of government program policies as an act of upholding children's rights.

In terms of protecting the healthy rights of children who are indicated stunting (before the age of two years) the government needs to provide intensive treatment in facilitating the recovery of children's health by improving the nutritional intake of stunting

children, as well as paying attention to children's play and rest time. For that action, it will stimulate the growth hormone of children so that children with stunting can be restored. Law enforcement against children with stunting must be done holistically in various sectors with high commitment and synergy between the government, full people, families and the community.

REFERENCES

Al-Atok,A.Rasyid. "*Negara Hukum Indonesia"* (2016): 1–18. http://lab.pancasila.um.ac.id/wp-content/uploads/2016/05/Negara-HukumIndonesia-Oleh-A-Rosyid-Al-Atok.pdf.

Ali, Ahmad. *Menguak Teori Hukum (Legal Theory) Dan Teori Peradilan (Judicial Prudence)*. Ke 5. Jakarta: Kharisma Putra Utama, 2013.

Ashry. *Bahan Ajar Hak Asasi Manusia*. Makassar, 2018.

Asshidiqie, Jimly. *Merawat Dan Memenuhi Jaminan Hak Konstitusional Warga Negara*. Jakarta, 2010.

Attamimi, A. Hamid. *Peranan Keputusan Presiden Republik Indonesia Dalam Penyelenggaraan Pemerintahaan Negara*. Jakarta, 1990.

Kementerian Kesehatan RI. "*Penurunan Stunting Jadi Fokus Pemerintah*." *Kementerian Kesehatan RI*. Jakarta, 2018.

Kurnia, Titon Slamet. *Hak Atas Derajat Kesehatan Optimal Sebagai HAM Di Indonesia*. Bandung: PT. Alumni, 2007.

Mahmud Marzuki, Peter. *PenelitianHukum*. Revisi. Jakarta: KencanaPranada Media Group, 2016.

Mayasari, Diana, Reni Indriyani, BagianIkkom, FakultasKedokteran, Universitas Lampung, PoltekkesKemenkesTanjungkarang, and Bandar Lampung. "*Stunting, FaktorResiko Dan Pencegahannya Stunting, Risk Factors* and Prevention" 5 (2018): 540–545.

Jurnal Kesehatan Komunitas. "*Permasalahan Anak Pendek (Stunting) Dan Intervensi Untuk Mencegah Terjadinya Stunting (Suatu Kajian Kepustakaan) Stunting Problems and Interventions to Prevent Stunting (* A Literature Review)" 2, no. 5 (2015).

Peraturan Presiden Nomor 42 Tahun 2013 yang mengatur mengenai Pelaksanaan Gerakan Nasional Percepatan Perbaikan Gizi.

Peraturan Menteri Kesehatan Nomor 39 Tahun 2016 tentang Pedoman Penyelenggaraan Program Indonesia Sehat dengan Pendekatan Keluarga

Undang-Undang Dasar Negara Republik Indonesia Tahun 1945

Undang-UndangNomor 4 Tahun 1979 tentangKesejahteraanAnak

Undangundang No. 39 Tahun 1999 tentang HAM

Undang-undang No. 23 Tahun 1992 tentang Kesehatan,

Undang-UndangNomor 23 Tahun 2002 tentang PerlindunganAnak

Undang-undang No. 18 Tahun 2012 tentang Pangan

THE PATIENT CHOOSE HARMFUL PROCEDURE: PATIENT'S AUTONOMY VS PHYSICIAN'S MORALITY

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ABSTRACT

Human society is predominantly governed by certain norms. This omnipresent code of conduct regulated every aspect of human life, including medical and clinical profession. As ethical norm belongs to the tenets of humanity, every person having to do with medical profession must necessarily follow this rule in delivering safe and high-quality medical deliverance to the patients. Accordingly, each consequences and risks which might be appear in undertaking a medical service have to be thoroughly considered in its relation to the main principles regulating medical aspect. One can regard such principle as the Medical Ethic. However, as the very nature of ethical principles tend to be abstract and vague, it can lead to various interpretation, and thus also to multifarious contradiction in its implementation. Although patients nowadays have the absolute autonomy to decide what kind of treatment they prefer or whether or not they would like to commence such treatment, the doctors must be allowed considerable authority to provide pertinent advice and deliberate undertaking in accordance to the principle of beneficence towards their patients. In fact, the principles consist not only the aforementioned principles, but also the principle of autonomy, non-maleficence, beneficence, and also justice. This paper will endeavor to thoroughly examine and discern these principles.

Keywords: Ethics, Medical Ethics, Clinical Ethics, Moral Norms.

I. INTRODUCTION

Health services in its implementation always adhere to medical ethics. Moral ethics or philosophy, is a branch of philosophy that is centered on norms and values, right and wrong actions and what should be done or not. In other words this comes after reflection, argument and analysis of a thought about what should be done under certain conditions. The relationship between doctors and patients has been widely discussed since few decades ago, especially regarding the obligation of a doctor to prevent disease and treat those who are sick and injured. Doctors are expected to be good. However, a revolution has taken place where doctors have been linked to unethical behavior in several experiments on Nazi rezin in the first world war. In the past forty years, technological advances such as dialysis, transplantation and the use of mechanical ventilation have been widely used and the refusal of paternalism has changed both the ability of medical science to extend the lives and behavior of patients and society to medical devices that are commonly found. Medical ethics is also called bioethics, this has become a critical analysis study of ethical issues that arise in the relationship between legal science. Medicine, life, theology and biotechnology.[1]

Ethics is the study of actions taken by a moral basis, to determine whether they are good (commendable) or bad (despicable). Only moral agents can act ethically or unethically. A moral agent is someone who is able to know and understand the good and the bad and is able to rationally choose one from the other. So, when a wild animal kills someone, it causes suffering and danger, but that action is not considered an unethical or immoral act of the animal; animals are unable to know or understand the dangers that occur and are more likely to act based on instincts than rational choices. Even humans who do not have certain intellectual or moral development may not be able to act ethically or unethically, like a child who carelessly, but accidentally, injures or kills someone by releasing a firearm, or a very crazy person who accidentally turns on fire by leaving the stove and causing the death of others. Another important consideration is the relationship between law and ethics in general and medical ethics in particular. The law sets out broad behavioral restrictions, most of which apply to everyone, and some of them apply to doctors and other health care providers. However, it is important to understand that, because the law establishes a minimum level of acceptable behavior, one can act within the law and still act unethically.[2]

Moral is an action that is crystallized by its consequences. Beauchamp & Childress in 1979 put forward four principles of approach to medical ethics.

These principles are autonomy, beneficence, nonmaleficence and justice. Since then, this principle has become very well-known and has become a standard model for learning medical ethics and subjects in medical schools in the UK. The four principles of this approach have become well-known and can be used in many situations. However, this certainly has limitations. It is difficult to use this principle in complex situations and when someone is in conflict with this principle.[1]

Patient autonomy is a fundamental, but a challenging, professional medical ethics principle. The idea that individual patients must have the freedom to make choices about their lives, including medical problems, has been found. However, this is not always the case, especially in communist countries where paternalistic attitudes have been intertwined in all relationships including medical relations. The patient's expectations and the role of the doctor in patient-doctor relationships can change. The idea that individual patients must have the freedom to make choices about their lives, thus medical problems, has become increasingly prominent in democratic countries over the past 50 years. In general, more emphasis has begun to be placed on the problem of patient autonomy in medical facilities lately. For example, information is more likely to be given to patients, patient consent is explicitly sought, and it is increasingly recognized that patients have the right to make medical decisions about themselves. However, despite these changes in medical practice, we find sufficient evidence that medical paternalism remains inherent in the medical profession.[3] This is certainly a challenge in making medical action decisions by most professional medical personnel. With all considerations, an explanation of an action, risk, its advantages and disadvantages must be explained in detail so that all decisions taken can obtain good consent and not cause moral conflict between one party and the other.

The issue

One may say that the realm of ethical norms in the medical as well as clinical fields is as quintessential as the practice of medicine itself. Every action undertaken by doctor, nurse and other medical staff must necessarily be reflected as an implementation of certain ethical norms. As legal norms tend to be really specific in regulating some aspects of medical conducts, it is also arguably true that the providence of the law itself cannot provide the same amount of protection to those having medical treatment and services. In other words, the shadow of the law has its own limitations. Therefore, one should devise another societal mechanism to safeguarding the deliverance of high-quality medical services.

In accordance to the nature of human being, which is not only a social being, but also an ethical being, such mechanism could be conceived within that human ethical nature itself. It means that his or her action is guided and governed by a certain principles and rules guaranteeing the survival both of himself and the society in which he or she belongs. The collection of such rules might be hailed as one of the basic tenets of humanities. Accordingly, this paper aims to investigate and discern what kind of ethical and moral principles governing the professional standard of medical service deliverance. In doing so, it also intends to describe its relevance to the actual modern practice of medical profession.

Methode

The focus of this paper is to describe the guiding ethical principles governing the conduct of medical and clinical patients. As its main object are abstract societal and legal norms, the approach used in this paper will be a juridical normative approach. Such approach utilized existing pertinent theories, concepts, principles and rules related to the issue discussed in this paper. Accordingly, primary sources such as regulations, rules, and legal provisions applicable in the medical sector will be of use in this paper. Moreover, this paper also investigates other doctrines and theories of medical ethics conceived by certain author as a secondary additional source.

II. DISCUSSION

Clinical ethics is the application of ethical theories, principles, rules and guidelines to clinical situations in medicine. Ethical principles and virtues must be applied to all doctors, regardless of their personal, religious and spiritual beliefs. Thus, medical ethics is a transnational, transcultural, and interfaith ethic that is a professional standard. Ethics can be extended to professional responsibility, mortality, etiquette, values, and attitudes. Ethics tends to focus on moral goods rather than natural items.[4] Over the years, four principles have formed a common working foundation for modern American bioethics - beneficence, nonmaleficence, justice autonomy - have been linked to Drs. James Childress and Thomas Beauchamp.

Autonomy

Autonomy is a norm that requires us to respect the decision of an adult human who has the ability to make decisions. Three conditions are needed to carry out autonomous actions for those who have the capacity to choose:

- **Intention**
- **Understanding**
- **There is no desire to influence / control their actions**

Some moral rules or obligations have been derived from the principle of autonomy such as honesty, respect for the privacy of others, maintaining confidential information and receiving concern for intervention in patients. Feinberg argues that autonomy requires at least the ability to decide decisions for oneself without the influence of others with sufficient level of knowledge and understanding to make choices. They must be someone who has the capacity to decide on certain actions. Problems sometimes arise related to the health of a patient who is in a coma or incompetent due to age or mental disorder.

Beneficience

The principle of beneficience is a moral obligation to do good that benefits others. The two main aspects of beneficience are benefiting others and balancing the benefits of dangerous risks / actions. The principle of beneficence supports some moral rules or obligations such as maintaining and maintaining the rights of others, preventing injury to others, eliminating situations that can cause injury, helping them with diasbility, helping those in danger.

Nonmaleficence

The principle of nonmaleficence holds that there is an obligation not to do dangerous actions to others and relate to the term primum non nocere which means first do no dangerous actions to others. The principle of nonmaleficence supports several rules such as not killing, not causing pain or suffering incapacity, do not commit violations.

Justice

The principle of justice requires that we simultaneously distribute benefits, risks, costs and resources. In justice, there are several rules such as equality, the same actions according to needs, the same effort for everyone, the same contribution, and the same services.[5, 6]

Patient autonomy is a fundamental principle in professional medical ethics. The ability to recognize and develop it, and its various dimensions, is widely regarded as an important clinical competency for doctors. However, the concepts in the medical and ethical literature, as well as their practical implementation, still pose ongoing challenges to medical practice. On a different spectrum, paternalism stands on the opposite side of autonomy. The purpose of paternalism, like autonomy, is to do the good of the same moral agent, the patient. Paternalism has become one of the traditional characteristics of handling decision making in medicine. This implies that doctors make decisions based on what they see in the patient's best interests, even for patients who can make decisions for themselves. This attitude assumes that doctors always know better than patients what is good for patients. Three serious moral conflicts have emerged as a result: first, beneficence and autonomy have been polarized with one another when they should complement each other; second, the moral portion of the doctor for autonomy received little attention; and third, "autonomy" of medical ethics, itself, has been under serious threat. The doctor-patient relationship is a moral equality with rights and obligations on both sides and must be balanced so that doctors and patients act mutually to each other while respecting their respective autonomy.

For several decades, the principle of beneficence has not received much medical ethics. Some doctors sometimes violate this principle first. But there is no reliable ethical conflict that has been carried out until a quarter of a century ago when patient autonomy was declared a prima facie moral principle with a weight equal to or greater than beneficence. Progressively since then, patient autonomy has become the dominant principle that forms doctor-patient relationships. The practice of beneficence is often opposed by respect for autonomy. It is impossible to act without permission or without 'autonomy' approval. For this reason Engelhardt privileges the principle of giving permission and determining good deeds is a personal decision, and the kindness that can be determined by a patient can often be different from the decision of his doctor or caregiver. Therefore beneficence must overlap in part with autonomy; patients want to be given different levels of information, and may want to choose a particular direction for their care because in their view it is the greatest good.[6] However, this may differ from the perspective and opinion of the doctor, so it

is often a challenge. Many of these challenges arise related to the beginning of life such as contraception, artificial reproduction, abortion, neonates with severe abnormalities, and two other issues that are often of concern namely euthanasia and suicide assistance.[7]

Health care workers now have the right to refuse any procedures that they consider morally illegal or, in their opinion, can endanger patients. However, the right of rejection on the basis of conscience is currently under close supervision. Medical procedures such as doctor-assisted abortion and suicide which are usually not medically indicated, but which can be requested by the patient, are a type of medical treatment which is the second expression of patient autonomy. When health care providers use their consciences in a way that rejects patients' direct access to these procedures, many claim that patient autonomy has been suppressed by the religious beliefs of a health care professional. It is said that this procedure represents a choice where patients must be able to exercise autonomy; an autonomy that should not be suppressed by the beliefs of health care professionals. In response to such arguments, many argue that religious freedom is the constitutional right of health professionals; and as such, professionals may not be forced to participate in actions that conflict with their belief systems. However, this line of defense directs the opposition to conclude that health professionals are unprofessional and unconstitutional to impose their belief systems on patients in ways that limit patient freedom.[8]

In the medical context, abortion is divided into two: spontaneous and artificial abortion. Spontaneous abortion is an abortion that occurs by itself, due to factors beyond human ability while artificial or provocative abortion is an abortion that occurs as a result of an action. Artificial abortions are classified into two namely therapeutic and criminal. Therapeutic abortions are performed to save the lives of mothers who are at risk if the pregnancy is still maintained while criminal abortion is an act of abortion without medical indication.

The issue of abortion in the medical code of conduct until a while ago was banned, but now it can be tolerated under certain conditions by health professionals in several countries. Whereas in medical ethics, doctors are only responsible for their patients. In Indonesia, the act of abortion is regulated legally in the criminal law regulations or commonly abbreviated as the Criminal Code (KUHP). In Indonesia, the state prohibits abortion and the sentence is quite severe. Abortion laws are regulated in the Criminal Code article 299, 346, 347, 348 and 349. These chapters regulate the prohibition of abortion for both perpetrators, helpers and those related to this criminal act. In practice, a health worker in carrying out his profession for humanity on the basis of health considerations can be limited by this rule. Therefore, this was followed up with the emergence of law number 36 of 2009 concerning health, which stated that the act of abortion in some medical conditions could be done if it was the only way that medical personnel or health workers had to do to save the life of a mother who had a problem health or serious complications during pregnancy. Chapter 75 also states that everyone is prohibited from carrying out abortion but is excluded based on indications of medical emergencies that have been detected at an early age, both threatening the life of the mother and the fetus, who suffers from a serious genetic disease, or congenital defects makes it difficult for the baby to live outside the womb; or pregnancy due to rape which can cause psychological trauma for rape victims. Government regulation number 61 of 2014 concerning reproductive health chapter 31 article 2 adds that the act of abortion due to rape can only be done if the gestational age is 40 days at the latest calculated from the first day of the last menstruation.[9]

The problem of abortion is often associated with medical ethics, where requests for pregnancy abortion are patient autonomy even though they know it violates the law. However, as a doctor, if there is no indication, the doctor cannot fulfill the patient's 'autonomy', because of the non-maleficence principle he holds and the applicable legal regulations in practicing medicine. Not a few were found also patients who tried to abort his pregnancy and endanger him to meet the requirements of abortion. Doctors can also have an abortion if there are medical indications such as continuous bleeding that threatens the life of the mother if it continues.

Another problem that is often discussed is euthanasia. Euthanasia and suicide with help are often considered morally equal but are practically different in the eyes of the law. This is distinguished by its definition, delaying or stopping unwanted, futile or inappropriate medical treatment or the provisions of palliative care. This usually appears as a result of a patient's pain or suffering. If you fulfill the request, of course a doctor will violate a medical ethics code that is considered unethical even if the patient himself or close family requests it. However, a competent patient still has the right to refuse any medical action

even if it can cause death. Again this is associated with patient autonomy and the morality of a doctor who treats patients. However, if the doctor has made every effort to provide information to the patient about the disease, procedures, actions of benefits and losses by making informed consent and possible success, they must respect the patient's decision whether to start or continue a therapy.[7]

In the Netherlands, euthanasia is still permitted by law provided there are clear standards. In the United States there were also cases where patients were allowed to be given lethal injections to those with terminal illness. However, in Indonesia, there is one form of euthanasia known in Indonesian law namely euthanasia at the request of the patient / victim himself. This is clearly stipulated in the Criminal Code chapter 344 where anyone who seizes the life of another person at the request of the person who is clearly stated with sincerity is threatened with imprisonment for a maximum of twelve years. This article explains that murder or termination of life at the request of a patient or victim as a form of autonomy still violates the applicable legal rules and is threatened with criminal sanctions for those who do it. Thus, this means that one cannot end his own life even if they ask for it. Even a terminal sick person, a doctor still applies the principle of beneficence where they strive for every means to maintain the lives of patients because they have the right to good palliative care.

III. CONCLUSION

In living life, in practice, a doctor often finds ethical issues that can develop into ethical dilemmas. Medical ethics focuses mainly on problems that arise in medical practice, critical reflection on an action and the development of autonomy and beneficence in medical decision making. This certainly forms the moral foundation of the patient doctor's relationship. The doctor can do the best for the patient's interests in accordance with the indications and applicable laws. Autonomy that violates the law will remain guilty in the eyes of the law, even though in principle medical ethics is an ethical violation. However, if these actions endanger the patient himself, then the doctor also violates the ethics of beneficence and non-maleficence. Clinical decision making must be done carefully and with detailed explanations of a procedure or action, risks, benefits, losses and complications that can occur in fulfilling the patient's rights to prevent further conflicts and misunderstandings in patient and doctor relationship.

Closing

A thorough examination of several principles highlighted in this paper indicates that the patient doctor relationship appears to be one of contradicting each other. The aversion of medical paternalism which leads to the principle of autonomy is its example. It ought to be conducted in such way that it may not contradict the existing regulation which actually purports to protect the patient itself. On one hand, patient is being safeguarded by the principles of autonomy and non-paternalism, but on the other hand, the doctor and other medical staff must also be protected by the ideas of beneficence and non-maleficence toward its patients. Nevertheless, one should not conclude that medical ethics are no others than a bunch of contradiction not applicable to the real-life situation. In fact, it should be regarded as the guidelines for both the doctor and patients to conduct any medical undertaking after thoroughly considering every aspect and consequences necessarily related to such undertaking.

REFERENCES

1. Lawson AD. What is Medical Ethics? Trends in Anaesthesia and Critical Care. 2011; 1(1): 3-6.
2. Taylor RM. Ethical Principles and Concepts in Medicine. Handbook of clinical neurology. 2013; 118: 1-9.
3. Murgic L, Hébert PC, Sovic S, Pavlekovic G. Paternalism and Autonomy: Views Of Patients and Providers in a Transitional (post-communist) Country. BMC Med Ethics. 2015; 16(1): 65.
4. Patil AB, Dode P, Ahirrao A. Medical Ethics in Abortion. Indian Journal of Clinical Practice. 2014; 25(6): 544-7.
5. Jahn WT. The 4 Basic Ethical Principles That Apply to Forensic Activities are Respect for Autonomy, Beneficence, Nonmaleficence, and Justice. J Chiropr Med. 2011; 10(3): 225-6.
6. Lawrence DJ. The Four Principles of Biomedical Ethics: A Foundation for Current Bioethical Debate. Journal of Chiropractic Humanities. 2007; 14: 34-40.
7. Williams JR. Panduan Etika medis (Medical Ethics Manual). Sagiran, editor. Yogyakarta: Pusat Studi Kedokteran Islam Fakultas Kedokteran Universitas Muhammadiyah Yogyakarta; 2005.
8. Pellegrino ED. The relationship of autonomy and integrity in medical ethics. Bulletin of the Pan American Health Organization. 1990; 24(4): 361-71.

9. Tangko N. Tindak Pidana dengan Sengaja Mengobati untuk Menggugurkan Kandungan. Lex Crimen. 2016; 5(2): 1-4.

TOWARDS LEGAL REFORM IN INDONESIA: HEALTH EQUIPMENT TAX THAT CATEGORIZED AS LUXURY GOODS IS A VIOLATION OF HUMAN RIGHTS IN HEALTH

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ABSTRACT

Health right is one part of human rights. In Indonesia, protection about health rights are contained in the second principles of Pancasila, artcle 34 paragraph (3) of the 1945 constitution, and article 4 of law number 36 year 2009 regarding health.However, medical devices are classified as a luxury tax (law number 42 year 2009 and regulation of the minister of finance number 6/PMK.010/2017). Using a normative juridical method with a qualitative approach, the author examines arrangements related to health services in Indonesia in the context of upholding the human rights, legal analyst of the imposition of import duty on medical devices classified in PPNBM (sales tax on luxury goods) from the point of view of upholding human rigths in the field of health and legal reforms related to the tax on medical devices to be consistent with the enforcementof human rights in Indonesia. The fact of related regulations for the enforcement of human rights in the health sector in Indonesia is in harmony with the Pancasila and the 1945 constitutions. However, if it is linked to the medical device tax which is included in the luxury good tax, the health rights are harmed because health cost is becoming more expensive. Therefore, a legal discovery, discovery is needed related to the regulation of the medical device tax so that is in harmony with the enforcement of human rights in the health sector in accordance with Pancasila and 1945 constitution.

Keywords : Health Rights, Medical Devices Tax, Luxury Goods Tax, Tax Law Reform in the Health Sector.

A. INTRODUCTION

The health right is one of the human rights which is inherent in natural human beings because of their position as a human. In the opening of the 1945 constitutions of the Republic of Indonesia, it was stated that the ideals of the Indonesian people were to protect the entire Indonesian nation and all of Indonesia's blood and to promote public welfare, educate the nation's life and participate in carrying out world order based on freedom, eternal peace, and social justice. In addition, Pancasila as the basis of the state guarantees the protection of human rights, namely the second principles "just and civilized humanity". In the article 34 paragraph (3) 1945 contitution stated "The state is responsible for the provision of adequate health service facilities". Article 4 law number 36 year 2009 regarding health, also stated that "everyone has the right to health". Health is an important part of realizing public welfare. Therefore, health must be sought by the state so that access to health services can be felt by all people from Sabang to Merauke without exception.

Tax is one of the sources of the state revenue, so with this income, the state can finance the welfare services of the community/citizens. In Indonesia, medical devices are classified as tax burden on luxury goods. PPnBM according to Article 5 Law number 42 year 2009 is a tax imposed on goods classified as luxury carried out by producers (entrepreneurs) to produce or import in their business or work activities. Government-owned health facilities, all procurement of equipment is borne by the state budget. But this will create a very large budget for procurement. This will automatically erode the total cost and health budget by 5% of the APBN, WHO recommends at least 15% of the state budgets. The impact is that budget items that can be allocated for other needs will be absorbed very large "only" by buying that expensive medical equipment. Not to mention the various deviations and "mark ups" that occur, because the PPNBM parity is ranging from 10% to 200% (article 8 of Law number 42 of 2009). Private health facilities are also affected, higher tax on medical supplies will lead to huge capital purchases. The end of the "return" of this capital will be borne by the patient later. It is very clear we see and experience

where "the amount" of examination and treatment costs in hospitals and private clinics.[1]

There is a survey, in the period of 9 years (2006-2015), the number of Indonesian patients seeking treatment abroad jumped to 100%. In the survey, the main destination is Malaysia as much as 80% and the rest are Singapore and Thailand. One reason for treatment abroad is the relatively low cost of treatment compared to Indonesia. As stated by the Chairperson of the Indonesian Doctors Association (IDI) Daeng M. Faqih, for example open heart surgery treatment in Penang, Malaysia, with the same quality in Indonesia, the cost can be half lower than Indonesia. In Indonesia it costs Rp250 million, while in Malaysia it costs Rp100 million, it is due to the tax exemption factor. In Penang, Malaysia, medical equipment tax is 0% so that hospital management can reduce service costs.[2]

Chairperson of the Association of Indonesian Medical Devices and Laboratory Equipment, H Sugihadi said that the fair price of customs or HPP is in accordance with the level of 1.4 or 40 percent of the price when buying from overseas exports. The import costs include insurance, freight forwarding, import duty tax, Import VAT, PPNBM, PPh 22, bank administration fees, as well as transportation and insurance services.[3]

The importance of health rights for the enforcement of human rights in Indonesia, the need for harmonious legal arrangements make health services more affordable to all people. Related to the imposition of import duty on medical devices classified as PPNBM (Sales Tax on Luxury Goods) is a matter that needs to be reviewed and legal reform is needed to comply with the enforcement of human rights guaranteed by Pancasila and the 1945 Constitution. That is because the classification of medical devices into the luxury goods tax that is currently happening is contrary to the enforcement of human rights itself. Interesting backward view of the situation, the authors set the Title, Towards Legal Reform in Indonesia: Health Equipment Tax that Categorized as Luxury Goods is Violations of Human Rights in the Health Sector**.**

B. PROBLEM STATEMENT

1. What are the arrangements related to health services in Indonesia in the context of upholding human rights?
2. How is the legal analysis of the imposition of import duty on medical devices classified in PPNBM (Sales Tax on Luxury Goods) viewed from the perspective of human rights enforcement in the health sector?
3. How should the legal reforms related to the tax on medical devices be in line with the enforcement of human rights in Indonesia?

C. LITERATURE REVIEW

1. Welfare State

A system in which in a democratic government, both the government and the state play an important role to regulate and provide full welfare to the community/citizens. The state must guarantee each individual without differentiating his social status to gain access to basic services, such as education, health, social protection, etc.

2. Human Right

Human Rights is basically a right inherent in natural human beings because he is a human. Once he is a human, then human rights are attached to him.[4] Miriam Budiarjo said that human rights are rights that humans have acquired and brought along with their birth in social life. It is more clearly explained that these rights are owned without distinction on the basis of nationality, race, religion or sex, and are therefore fundamental and universal. Human rights are not dependent on their existence and do not originate from humans and do not depend on humans, but from institutions higher than humans. Therefore, human rights cannot be undermined, cannot be revoked and cannot be frustrated by any positive law. Even with this principle, every positive law is directed to comply with the principles of human rights.[5]

[1] https://www.kompasiana.com/jamesallan.rarung/5745cfe672937365169ce537/alat-kesehatan-bukan-barang-mewah-apakah-akan-terwujud?page=all, diakses tgl 2 Juli 2019 pukul 13.29 WIB

[2] Eva Rianti, *Berobat Ke Malaysia Lebih Murah Daripada di Indonesia, Ini Penyebabnya*, https://lifestyle.bisnis.com/read/20190407/106/908765/berobat-ke-malaysia-lebih-murah-daripada-di-indonesia-ini-penyebabnya, diakses 13 Desember 2019 pukul 11.05 WIB.

[3] https://www.jawapos.com/ekonomi/bisnis/06/05/2018/industri-alkes-keluhkan-rendahnya-penawaran-pemerintah-dalam-e-katalog/, diakses tgl 2 Juli 2019 pukul 13.44 WIB

[4] Wibianto,A., *Jalan Kemanusiaan: Panduan untuk Memperkuat Hak Asasi Manusia*, (Yogyakarta: Lapera Pustaka Utama, 1999) dalam http://kompasiana.com/bemfisipui/556534 6eb27a6136539224fd/hak-asasi-manusia-karena-manusia-mulia-maka-tegakkan -matrabatnya, diakses pada 14 Desember 2018

[5] Budiarjo, M., *Dasar dasar Ilmu Politik*, (Jakarta: Gramedia Pustaka Utama, 1991) dalam

Human rights are indeed unnecessary and cannot be confused with law. The principle of the origin of rights, affirms that human rights first existed before governance. It became very clear that the law is not a source of human rights, so the law cannot abolish human rights. Human Rights can be upheld through legal proceedings. Concerns about freedom without limits, cannot be used as an excuse to negate human rights. Therefore, the importance of law is to regulate the scope and method of exercising that right. Rules that are made so as not to deny the existence of human rights.[6] The health rights are included in human rights.

3. Hierarchy of Legal Norms

Hans Kelsen argues that the legal norms are tiered and layered, lower legal norms apply, sourced and based on higher norms, higher norms apply, sourced and based on even higher norms, and so on up to a norm that cannot be explored further and are hypothetical and fictitious, namely the basic norm (grundnorm). Basic norms are the highest norm in a legal norm.[7] Then by Hans Nawiasky, the legal norm perfected by dividing these norms into 4 different namely:[8]

a. *staatsfundamentalnorm* (fundamental norm of the country), in Indonesia is Pancasila
b. *staatsgroundgezets* (basic rules of the state), in Indonesia are the body of the 1945 constitutions, the decree of the People's Consultative Assembly and the Constitutional Conflict .
c. *Formell Gezets* (formal law), in Indonesia is law.
d. *Verordnung & Autonome Satzung* (implementing regulations and autonomous regulations), in Indonesia the implementing regulations are sourced from the delegation authority while the autonomous regulations come from the attribution authority.

4. Tax Theory

Tax theoty consist of several theories below:[9]

a. Insurance Theory. The meaning is the imposing of taxes to the public at a premium for public interest such as subsidies and security.
b. Interest Theory. The life and property of the community must be protected so that the interests of the community can be carried out well, so that a significant amount of costs is needed, so that the costs incurred by the government are borne by the public in the form of taxes.
c. Pikul Style Theory. The tax that must be paid must be in the style of pikul with the size of the income and expenses of a person or an entity and therefore subject to a minimum amount of income to taxable income.
d. Consecration Theory. The state has the absolute right to collect taxes from its people. The community realizes that paying taxes is an obligation to prove the mark of its devotion to the state so that the government of the country runs well and smoothly.
e. Buying Power Theory. This purchasing power is closely related to the people's ability to transact with other parties. The more luxurious the goods purchased by the community, the greater the tax that will be levied. This related tax is known as VAT (Value Added Tax) and PPnBM (Sales Tax on Luxury Goods).

5. Legal Reform

Sudikno Mertokusumo, Professor of Law at Gadjah Mada University, the discovery of law is the process of establishing law by judges or other law officers who are tasked with carrying out the law on concrete events. The discovery of the law is the concretization, crystallization or individualization of the rule of law (das sollen) which is general in nature by remembering concrete events (das sein). Furthermore, according to Sudikno, concrete events need to be looked for in general and abstract laws. Concrete events must be met by legal regulations. Concrete events must be linked to the rule of law in order to be covered by the rule of law. Instead, the legal regulations must be adjusted to the concrete events so that they can be applied.[10]

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http://kompasiana.com/bemfisipui/5565346eb27a6136539224fd/hak-asasi-manusia-karena-manusia-mulia-maka-tegakkan -matrabatnya, diakses pada 14 Desember 2018

[6] *Ibid*

[7] Maria Farida Indrati S., *Ilmu Perundang-Undangan*, (Yogyakarta: Penerbit Kanisius, 2007), hlm. 41.

[8] *Ibid*, hlm. 44-56

[9] https://www.akuntansilengkap.com/pajak/8-teori-dan-asas-pemungutan-pajak/, diakses pada 2 Juli 2019 pukul 14.05 WIB.

[10] Sofiah Hasanah, Perbedaan Das Sollen dengan Das Sein, https://www.hukumonline.com/klinik/detail/ulasan/lt5acd738a592ef/perbedaan-idas-sollen-i-dengan-idas-sein-i, , diakses 24-10-2019 pukul 04.30.

A similar sentiment was also conveyed by Sabian Utsman in his book Progressive Legal Research Methodology, (p.17), das sollen and das sein found in legal research. Legal research at least discusses what the law should be as a legal fact (das sollen) expressed by legal experts at the theoretical level (law on the books), at this level more on the study of normative basics (law in the form of ideals how it should be) with what actually (das sein) refers to the law as a fact, namely the law that lives and develops and processes in society (law in action).[11]

6. **Das Sollen**

According to Sudikno Mertokusumo, Professor of Law at Gadjah Mada University, legal discovery is the process of establishing law by judges or other law officers who are tasked with carrying out the law on concrete events. The discovery of the law is the concretization, crystallization or individualization of the rule of law (das sollen) which is general in nature by remembering concrete events (das sein). Furthermore, according to Sudikno, concrete events need to be looked for in general and abstract laws. Concrete events must be met by legal regulations. Concrete events must be linked to the rule of law in order to be covered by the rule of law. Instead, the legal regulations must be adjusted to the concrete events so that they can be applied. Das Sollen is what is supposed to be law as a legal fact expressed by legal experts on a theoretical level (law in the books), namely law in the form of ideals as they should be, such as:

a. 2nd principle of Pancasila
   Pancasila is the basis of the Indonesian State, being the source of all sources of law in Indonesia. Pancasila is a ground-norm as a guideline and philosophy of life that must be upheld in the life of the nation and the state. In the formation of laws and regulations must be in accordance with Pancasila. Second Precepts Pancasila guarantees the protection of human rights for all Indonesian people "Fair and civilized humanity". No exception to the right to access health services is the state's responsibility.
b. The Preambule of the 1945 Constitutions of the republic Indonesia
   The Preamble to the 1945 Constitution of the Republic of Indonesia states that the aspirations of the Indonesian people are to protect all Indonesians and all Indonesian blood and to advance public welfare, educate the nation's life and participate in carrying out world order based on freedom, eternal peace and justice, social, health are an important part of realizing public welfare. Therefore, health must be endeavored by the State so that access to health services can be felt by all Indonesian people from Sabang to Merauke without exception.
c. Article 34 Paragraph (3) of the 1945 Constitution
   The state is responsible for the provision of adequate health service facilities and public service facilities; meaning that health development 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 human resources that are socially productive and the state is obliged to make health facilities and infrastructure and services adequate and quality public services, such as health centers, hospitals and public services in villages, sub-districts and districts.

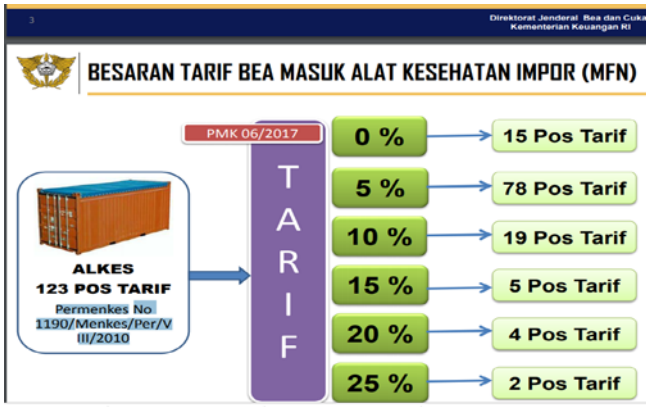
7. **DAS SEIN**

Das Sein is a law as a fact (the real thing), which is the law that lives and develops in society (law in action).

a. Law Number 42 year 2009 concerning the Third Amendment to Law Number 8 year 1983 concerning Value Added Tax of Goods and Services and Sales Tax on Luxury Goods Sales Tax on Luxury Goods according to Article 5 Law number 42 year 2009 is a tax that is imposed on goods classified as luxury carried out by producers (entrepreneurs) to produce or import in their business or work activities.
b. Regulation of the Minister of Finance relating to health which is classified in the Sales Tax on Luxury Goods. Tax rates for medical/medical devices are widely available in 6/PMK.010/2017 concerning the determination of the classification system of goods and the imposition of import duty tariffs on imported goods, there are

[11] *Ibid.*

classifications of tariffs for medical devices as follows:[12]



In the Minister of Finance Regulation Number 6/PMK.010/2017, there are even tax rates of up to 25%. As a result, health costs in Indonesia are increasing becoming a burden on patients. The high tax imposed on medical devices causes health costs in Indonesia to be more expensive compared to neighboring countries, say Malaysia, Thailand and Vietnam. That is because medical devices in the country are tax-free so as to reduce the cost of financing them.

D. RESEARCH METHODE

The problem approach used in this research is to use the normative juridical problem approach which is emphasized on the principles of law, systematic law, synchronization of law, history of law and comparative law.[13] The type of this research is descriptive and prescriptive with qualitative data analysis approaches. In this study, exposure to health is human rights and their arrangements with Indonesian law as well as tax regulations related to medical devices that conflict with the enforcement of human rights related to health. It will also be explained in relation to the theory oh the level of the legal norm (*stufentheory*) from Hans Kelsen whis was later perfected by Hans Nawiasky.

The regulations that used in this study are the 1945 Constitution, Law Number 36 year 2009 regarding Health, Law Number 42 year 2009 regarding the Third Amendment to Law Number 8 year 1983 regarding Value Added Tax and Services and Sales Tax on Luxury Goods, Regulation of the Minister of Finance related to health which is classified in Sales Tax on Luxury Goods and Regulation of the Minister of Health related to the import of medical devices. By analyzing the existing regulations, it will be clear whether the medical device tax regulation in Indonesia is in accordance with Pancasila or contrary to Pancasila.

The data analysis approach that author use is a qualitative data analysis approach. In this research, the application will be explained in full what is obtained from the results of the study of documents, the author's thoughts as a person engaged in the health profession will then be analyzed in relation to applicable laws and regulations. Thus, it will be comprehensively answered related to legal reform in the health sector so that it is compatible with the enforcement of human rights in the health sector.

E. ANALYSIS AND DISCUSSION

The health right is one of Human Rights, which is inherent in natural human beings because he is a human being. In a welfare state, a democratic government, the government and the state play an important role to regulate and provide full welfare to the community/citizens. The state must guarantee each individual without differentiating his social status to gain access to basic services, such as education, health, social protection, etc. Indonesia is included in the welfare state as stated in the opening of the 1945 Constitution of the Republic of Indonesia. It is stated that the ideals of the Indonesian people are to protect all Indonesians and all of Indonesia's blood and to promote public welfare, educate the national life and participate in carrying out world order, based on independence, eternal peace and social justice. In addition, Pancasila as the basis of the state guarantees the protection of human rights, namely the Second principal "just and civilized Humanity". Health is an important part of realizing public welfare. Therefore, health must be sought by the state so that access to health services can be felt by all Indonesian people from Sabang to Merauke without exception. In the 1945 Constitution, article 34 paragraph (3) states "the State is responsible for the provision of adequate health service facilities and public service facilities". In addition, through

[12] Direktorat Jenderal Bea dan Cukai Kementerian Keuangan RI PENELITIAN TARIF DALAM SKEMA IMPOR BARANG 3 Direktorat Jenderal Bea dan Cukai Kementerian Keuangan RI http://regalkes.depkes.go.id/informasi_alkes/Bea%20Cukai.pdf, diakses pada 22-10-2019 pukul 16.35 WIB.

[13] Bambang Waluyo, *Penelitian Hukum dalam Praktek*, (Jakarta: Sinar Grafika, 2002), hlm. 13-15.

Article 4 Law Number 36 Year 2009 regarding Health, states that "Everyone has the right to health". Thus, up to this discussion, arrangements related to the protection of health rights in Indonesia are actually in accordance with the hierarchy of legal norms that originate from the groundnorm namely Pancasila.

Pancasila used as a guidance and philosophy of life for the Indonesian people (*grundnorm/ staatsfundamentalnorm*). In the hierarchy of legal norms, Hans Kelsen put forward the theory of the level of legal norms (*stufentheory*). Then by Hans Nawiasky, the legal norm perfected by dividing these norms into 4 different namely:

a. staatsfundamentalnorm (fundamental norm of the country), in Indonesia is Pancasila
b. staatsgroundgezets (basic rules of the state), in Indonesia are the body of the 1945 constitutions, the decree of the People's Consultative Assembly and the Constitutional Conflict .
c. Formell Gezets (formal law), in Indonesia is law.
d. Verordnung & Autonome Satzung (implementing regulations and autonomous regulations), n Indonesia the implementing regulations are sourced from the delegation authority while the autonomous regulations come from the attribution authority.

Tax is one of the sources of state revenue through which that income, the state can finance the expenditure of the state / its citizens. The problem that arises is the compilation of taxes, which is the reason people become injured because of high taxes resulting in higher health costs. As in the medical device tax, taxes on medical devices result in the cost of health services that must be paid by the community.

In Indonesia, medical devices are classified as a tax burden on luxury goods (Law number 42 year 2009 and Minister of Finance Regulation Number 6/PMK.010/2017). In Article 5 Act Number 42 of 2009 concerning the Third Amendment to Act Number 8 year 1983 concerning Value Added Tax on Goods and Services and Sales Tax on Luxury Goods, Sales Tax on Luxury Goods is a tax that is imposed on goods classified as luxury carried out by producers (businessman) to produce or import in his business or work activities. In the Minister of Finance Regulation Number 6/PMK.010/2017, there are even tax rates of up to 25%. As a result of high taxes, hospital operating costs also increase and in the end the health costs, which are a burden for patients in Indonesia become expensive. When compared with Malaysia which exempts taxes for medical devices, the health costs in Malaysia are cheaper compared to Indonesia.

Thus, it can be said that the state of life, one of which is from the sick, is with high health costs due to high medical device taxes. The imposition of high taxes on medical devices violates human rights and contradicts Pancasila as the basis of the state and the 1945 Constitution as the constitution. In Indonesia, Pancasila as grundnorm/staatsfundamentalnorm, becomes the source of all sources of legal regulations under it. All legal regulations must be in accordance with Pancasila. The 1945 Constitution as the state constitution/staatsgroundgezets must be in harmony with Pancasila. The law must be in harmony with the 1945 Constitution and Pancasila, and so on.

Therefore, there is a need for legal reform regarding the regulation of the tax on medical devices so that they are in harmony with human rights in the health sector. According to the author, a recent study is needed between what should be law as a legal fact (das sollen) revealed by legal experts on the theoretical level (law in the books) and on the study of normative basics (law in the form of ideals how it should be) with what actually (das sein) is more to the law as a fact, namely the law that lives and develops and processes in society (law in action).

Laws related to medical device tax must be adjusted to the enforcement of human rights in the health sector. Based on buying power theory, the more luxurious the goods purchased, the more expensive the tax that must be paid by the public. Medical devices are still imported products from abroad. This is because the productivity of medical devices in Indonesia is still inadequate. However, categorizing medical devices as luxury items, in the author's view, is wrong. Medical devices are needed to support health services. The tax on medical devices should be zero percent. With the tax exemption, hospital operations will also be reduced so that health costs that will later be charged to patients will be even cheaper. This will be in line with the spirit of the second principle of the Pancasila and the ideals of the Indonesian people in the 1945

Constitution of the Republic of Indonesia, which is to protect all Indonesians and all Indonesian bloodspots and to promote public welfare, educate the nation's life and participate in carrying out order a world based on independence, eternal peace and social justice.

F. CONCLUSION

Pancasila is a guideline and philosophy of life of Indonesian people (ground-norm) and the 1945 Constitution as a state constitution. Pancasila as the basis of the state guarantees the protection of human rights, namely the Second principles "just and civilized Humanity". In the article 34 paragraph (3) 1945 Constitution, states "the State is responsible for the provision of adequate health service facilities and public service facilities". In addition, through Article 4 Law Number 36 Year 2009 regarding Health, states that "Everyone has the right to health". Thus, up to this discussion, arrangements relating to the protection of health rights in Indonesia are already in accordance with the hierarchy of legal norms that originate from the groundnorm, namely Pancasila.

However, the regulation of medical device tax, which is classified as a tax burden on luxury goods (Law number 42 of 2009 and Minister of Finance Number 6/PMK.010/2017) is contrary to the spirit of upholding human rights in the health sector. The high tax imposed on medical devices causes health costs in Indonesia to be more expensive compared to neighboring countries, say Malaysia. Thus, it can be said that the state of life, one of which is from the sick, is with high health costs due to high medical device taxes. Based on the constitution, the state guarantees human rights, but on the other hand the state also imposes high taxes on medical devices. As a result, health that is supposed to be a human right becomes expensive because of the high tax. This has become contradictory.

Therefore, there is a need for legal reform or the discovery of new laws related to tax regulations for medical devices so that they are in harmony with the enforcement of human rights in the health sector. The tax on medical devices should be zero percent. With the tax exemption, hospital operations will also be reduced so that health costs that will later be charged to patients will be even cheaper. This will be in line with the spirit of the second principle of the Pancasila and the ideals of the Indonesian people in the 1945 Constitution of the Republic of Indonesia, which is to protect all Indonesians and all Indonesian bloodspots and to promote public welfare, educate the nation's life and participate in carrying out order a world based on independence, eternal peace and social justice.

G. REFERENCES

A, Wibianto. *Jalan Kemanusiaan: Panduan untuk Memperkuat Hak Asasi Manusia*, (Yogyakarta: Lapera Pustaka Utama, 1999) dalam http://kompasiana.com/bemfisipui/5565346eb27a6136539224fd/hak-asasi-manusia-karena-manusia-mulia-maka-tegakkan - matrabatnya, diakses pada 14 Desember 2018

M, Budiarjo. *Dasar dasar Ilmu Politik*, (Jakarta: Gramedia Pustaka Utama, 1991). dalam http://kompasiana.com/bemfisipui/5565346eb27a6136539224fd/hak-asasi-manusia-karena-manusia-mulia-maka-tegakkan - matrabatnya, diakses pada 14 Desember 2018

S, Maria Farida Indrati. *Ilmu Perundang-Undangan*, (Yogyakarta: Penerbit Kanisius, 2007).

Waluyo, Bambang. *Penelitian Hukum dalam Praktek*, (Jakarta: Sinar Grafika, 2002).

Indonesia, Undang-Undang Dasar Negara Republik Indonesia 1945, Batang Tubuh.

Indonesia, Undang Undang Dasar Negara Republik Indonesia Tahun 1945.

Indonesia, Undang-Undang Tentang Kesehatan, UU No. 36 Tahun 2009, LN No. 144 Tahun 2009, TLN No. 5063.

Indonesia, Undang-Undang Nomor 42 Tahun 2009 tentang Perubahan Ketiga Atas Undang-undang Nomor 8 Tahun 1983 Tentang Pajak Pertambahan Nilai Barang dan Jasa dan Pajak Penjualan Atas Barang Mewah.

Indonesia, Peraturan Menteri Keuangan Republik Indonesia Tentang Penetapan Sistem: Klasifikasi Barang dan Pembebanan Tarif Bea Masuk Atas Barang Impor, No. 6/PMK.010/2017.

https://www.kompasiana.com/jamesallan.rarung/5745cfe672937365169ce537/alat-kesehatan-bukan-barang-mewah-apakah-akan-

terwujud?page=all, diakses tgl 2 Juli 2019 pukul 13.29 WIB

Tim Publikasi Kata Data, Infografik: Berobat ke Luar Negeri Favorit Masyarakat Indonesia, https://katadata.co.id/infografik/2019/08/21/infografik-berobat-ke-luar-negeri-favorit-masyarakat-indonesia, diakses 13 Desember 2019 pukul 10.35 WIB.

Eva Rianti, Berobat Ke Malaysia Lebih Murah Daripada di Indonesia, Ini Penyebabnya, https://lifestyle.bisnis.com/read/20190407/106/908765/berobat-ke-malaysia-lebih-murah-daripada-di-indonesia-ini-penyebabnya, diakses 13 Desember 2019 pukul 11.05 WIB.

https://www.jawapos.com/ekonomi/bisnis/06/05/2018/industri-alkes-keluhkan-rendahnya-penawaran-pemerintah-dalam-e-katalog/, diakses tgl 2 Juli 2019 pukul 13.44 WIB

https://www.akuntansilengkap.com/pajak/8-teori-dan-asas-pemungutan-pajak/, diakses pada 2 Juli 2019 pukul 14.05 WIB.

Sofiah Hasanah, Perbedaan Das Sollen dengan Das Sein, https://www.hukumonline.com/klinik/detail/ulasan/lt5acd738a592ef/perbedaan-idas-sollen-i-dengan-idas-sein-i, , diakses 24-10-2019 pukul 04.30.

Direktorat Jenderal Bea dan Cukai Kementerian Keuangan RI Penelitian Tarif Dalam Skema Impor Barang 3 Direktorat Jenderal Bea dan Cukai Kementerian Keuangan RI http://regalkes.depkes.go.id/ informasi_alkes/Bea%20Cukai.pdf, diakses pada 22-10-2019 pukul 16.35 WIB.

REVIEW OF TRADITION IN THE CASE OF WOMEN IN INDONESIAN PERSPECTIVE OF HUMAN RIGHTS

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ABSTRACT

The study analyzed in terms of Human Rights on the implementation of the practice of female circumcision tradition in Indonesia. Meaning circumcision / female genital mutilation is the removal of some of the rituals of the entirethe external female genitalia . This term is used to describe a variety of traditional practice of partial or total elimination of the external female genitalia for cultural reasons, religious and or social. The tradition of female circumcision is run as traditions (customary law) and even some people consider as the teaching of the Islamic religion, in practice female circumcision there began to be limited to the symbolic ceremony, to cut off the clitoris surface .. The tradition of female circumcision is done even by organizing a big celebration, in some communities in Indonesia.

In the government of Indonesia, there are several rules that regulate concerning female circumcision, both contain guide health workers in the implementation of female circumcision, as well as the implementation of the ban on female circumcision. Rules of the government emerged as a result of social and cultural impetus. Although the UN has issued a ban on the implementation of female circumcision, but in Indonesia there has been no clear law to prohibit female circumcision.

Keywords: Circumcision of Women, Female Genital Mutilation (FGM), Human Rights, Tradition.

A. INTRODUCTION

The tradition of female circumcision in Indonesia can not be denied that until now reaping the pros and cons, while male circumcision is not .Menilik of the world there is a difference indeed health benefits, circumcision of boys and girls.

Circumcision on boys is encouraged because it has a variety of health benefits. Even for Moslems male circumcision must be done. Cultural practice of circumcision on boys is by removing the foreskin that covers the skin skin of the glans penis (foreskin). The purpose of performing circumcision on a boy can not be separated for the health side. Keeping the pubic net from a pile of fat contained in the skin folds prepuce (smegma), circumcision may also lower the risk of various diseases including, gonorrhea, herpes, cervical cancer, urinary tract infections, infection transmission of Human Immunodeficiency Virus (HIV), and Human Papilloma virus (HPV).

While women are anatomically, not all have the foreskin that covers the clitoris and urinary tract them so that not all girls need to be circumcised. Religious ideology for the majority, followed by the traditions of certain communities to health reasons to perform female circumcision.

According to the World Health Organization (WHO), there are four types of female circumcision:

1. Type 1: clitoridectomy, ie removal of the clitoris or the skin covering the clitoris (foreskin).
2. Type 2: Excision, namely the removal of the clitoris with partial or total excision of small lips perumpuan genitalia (labia minora), with or without excision of part or all big lips female genitalia (labia majora).
3. Type 3: Infibulation, namely cutting part or all of the external female genitalia with stitching / narrowing of the vaginal opening, with or without removal of the clitoris.
4. Type 4: All sorts of other procedures performed on the woman's genitalia for non-medical purposes, including penusukkan, perforation, slicing, and etching of the clitoris.[1]

In the discussion there are several terms to define the circumcision of women, as well as some other concepts, are difficult to define the term, there is a mention FGM - Female Genital Mutilation (FGM), there is a mention of female circumcision as Female Circumcition (FC) ,[2]

Experts propose and terms related to the field they pursue, and their arguments that FGM or FC is

[1] http://www.who.int/reproductivehealth/topics/fgm/overview/en/

[2] Journal of Political Science & Public Affairs, Fishaka KG, 17 April 2016

the right term to define traditional practices regarding the removal. of the external female genital organs. However, in terms of female circumcision FGM is commonly used name.

The World Health Organization (WHO) estimates that more than 200 million girls and women worldwide have been subjected to female circumcision, with about three million girls are at risk each year., Most women undergo circumcision before they are 15 years old.[3]

The global survey newest of UNICEF noted that this phenomenon is also widespread in global, a survey published in February 2016 reported there are approximately 60 million women and girls undergo circumcision, it puts Indonesia in third place after Egypt and Ethiopia among the 30 countries that carry out the tradition of circumcision in women.[4]

Traditional circumcision procedure differs according to the local area or ethnic groups, The practice of circumcision is rooted ingender inequality, efforts to controlfemale sexuality, And the idea of purity, modesty and beauty. Such practices are usually initiated and carried out by women who saw it as a source of honor, and that worried daughter and grandchildren will experiencesocial exclusion,

The health impacts depending on the procedure; The effects can include ongoing infection, difficulty urinating and menstrual discharge,chronic wounds, developmentcyst, The inability to get pregnant, complications during childbirth, and fertilization fatal. The health benefits are unknown.

Although in some countries have banned the practice of circumcision in women, but this time the tradition of circumcision in women is still ongoing, and there is no ban specifically on the practice of circumcision on women in Indonesia, this is due to the circumstances and demands of society that recognizes that circumcision in women is a tradition , and symbols of religion.

The State recognizes and respects units of indigenous and tribal peoples and their traditional rights long as they live, and in accordance with the development of society and the principles of the Unitary Republic of Indonesia, which is regulated by law[5], For that the state does not prohibit altogether the practice of female circumcision,

B. PROBLEM STATEMENT

This article tries to convey a review that implementation of the tradition of female circumcision in Indonesia it is a violation of human rights, especially against children and women, except in certain engineering techniques

C. LITERATURE REVIEW

Narrative review of the literature, which is in the form of Law, government regulation, scientific papers in domestic and international covers current knowledge including the substantive findings, as well as theoretical and methodological contributions to the theme of this paper.

D. RESEARCH METHODS

Types of researchThis is a normative legal research that examines the law as norms, rules that are in the Book of the Law, and other laws and regulations. This is a normative legal research study conducted by reviewing the library materials. In this normative research study also called doctrinal which the use of legislation and expert opinion.

E. ANALYZE AND DISCUSSION

1. Implementation of the tradition of female circumcision in Indonesia

The tradition of female circumcision in Indonesia allegedly came from immigrants from Africa through Yemen, which then trade in the country through the Sulawesi region and then to Java. The tradition of female circumcision with great ceremony, is still done in a number of communities of Sulawesi, while the practice is still carried out in the region of Gorontalo, Lombok, Java, Madura, Maluku, Ternate Muslim majority, although this tradition has no legal basis to Islam, but difficult to abolish this tradition, in some other areas, female circumcision performed in infancy and often coincides with the ear piercing,

In Indonesia, female circumcision is usually performed hereditary mainly carried out by an artisan and traditional circumcision, health workers, religious leaders and even his wife by using a small knife, scissors, glass, needles, by scraping the skin that covers the front of the clitoris without injuring the clitoris. Technically wounding the circumcision using special sterile disposable needles. So it is clear that the WHO is the act of FGM is banned female circumcision is not. Peoples who practice circumcision on women perform the tradition of the socio-cultural view it as a precondition maturity or the transition from childhood to adulthood to be able to do the wedding childbirth and other communities,

[3] https://www.bbc.com> world> 2016/02
[4] data@unicef.org, Data and analytics section of the data division of research and policy Unicef, February 2016
[5] The Constitution of 1945 Article 18, paragraph 2

as controller of sexuality for adult women, as a sign of obedience to the teachings religion,

In terms of religion, female circumcision is done by Muslims. Assembly of Indonesian clerics issued a fatwa allowing female circumcision action because this is one form of worship.

1. Circumcision for men and women including the disposition (regulation) and the symbols of Islam.
2. Circumcision of women is makrumah (worship recommended)[6].

In the MUI fatwa also explain the limits and manner of female circumcision, namely: female circumcision is quite simply removes the membrane covering the clitoris. Female circumcision should not be taken too far, such as cutting or injuring the clitoris (incision and excision), which would be dangerous and harmful. Circumcision is usually performed after birth until puberty and beyond. Based on research in the tradition of circumcision in Indonesia, most of the women are circumcised before the age of fifteen.

In Indonesia there are rules about female circumcision, in 2006 through the Ministry of Health. The government made the perpetration ban on female circumcision, because it is considered medically dangerous, so do including human rights violations. However, the Indonesian Ulema Council (MUI) issued a fatwa saying female circumcision can still be done if the baby's parents asked for the records of security both physically and psychologically baby.

On November 15, 2010 the government issued Minister Regulation No.1636 / Menkes / Per / XII / 2010 on female circumcision. The government again allow circumcision procedure at the urging of the Indonesian Ulema council on the grounds that implementation of circumcision in Indonesia is different from Female Genital Mutilation extreme method / Cutting deleted by the United Nations, the government subsequently allow female circumcision by medical personnel. Such as doctors and midwives as well as arranging details on female circumcision methods.

Considered controversial by women activists, ended on 6 February 2014 the government revoked Permenkes No.1636 / Menkes / Per / XII / 2010 on female circumcision, and replace with Decree No. 6 of 2014 the contents of a mandate for the Advisory Council of the Health and Syara ' k to publish guidelines for the implementation of female circumcision on the safety and health of women are circumcised and do not perform female genital mutilation (female genital mutilation).

2. Relevance of Human Rights of Female Circumcision

United Nations condemned the practice of circumcision on women and girls in practice is contrary to human rights, to the dignity of women and girls. For women and children who live and work in communities that implement the practice of female circumcision, they do not have the opportunity to select or reject as is generally done before they mature. Due to the strong background of customs and cultures, without medical reason, WHO finally issued new guidelines saying that female circumcision is a violation of human rights. WHO also urged health professionals no longer do this kind of procedure.

Female circumcision reflects inequality, even an extreme form of discrimination against women. It is almost always carried out on minors and is a violation of children's rights. The right to be free from gender discrimination has been secured and is expressed in international human rights instruments. Defines discrimination against women based on gender is any distinction, exclusion made on the basis of sex which has the purpose or mengakibatkanberkurang and elimination of the rights and fundamental freedoms in the public domain and domestic [7]. This practice also violates a person's right to health, security and physical integrity, the right to freedom from torture and cruel, inhuman or degrading human dignity, and the right to life when the procedure results in death. The right to life has been arranged and guaranteed in (Article 6) International Covenant on Civil and Political Rights (ICCPR). The general view regarding female genital mutilation (FGM) refers to the adoption of the UN Declaration on Human Rights, especially since three decades ago traditional practices of female circumcision became a central issue viewed as a violation of human rights of women and children, especially girls.

> "*Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex.* "[8] (Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, gender).

[6] The MUI fatwa 9A No. 2008 dated May 7, 2008

[7] Article 1 of the CEDAW

[8] Article 2 of the Universal Declaration of Human Rights

Circumcision in women can affect the health and welfare of women, and do not provide physical benefits of psychological and biological for girls and women, practice a tradition that may have an impact on the health of a long, bladder and urinary tract infections, cysts, infertility, and increased risk of childbirth complications and newborn deaths. Even Human Rights Watch has released a report that female circumcision adversely affect the long, physical, sexual and psychological

In 2013 the United Nations (UN) estimates that 140 million women in Asia, the Middle East and Africa who practice circumcision. In addition, UNICEF also said there are 30 million girls under 15 years are circumcised. In order to stop the practice of circumcision are considered dangerous, the United Nations through the CEDAW Committee in 2013 set each on 6 February is celebrated as International Day Against Female Circumcision No Tolerance.

F. CONCLUSION

There are differences of opinion with respect to the practice of female circumcision is a tradition based on a universal view and the view of culture / traditions, and religion. Universal outlook with emphasis on human rights are universal and tied closely to every individual regardless of gender, skin color, language, culture, religion, ethnicity and more. status, according the UN Declaration on Human Rights against the practice of FGM being perceived as a tradition that endanger the health and life and violate the human rights of children and women,

The right for girls and women to be free from violent treatment. While the cultural relativist support for the continuation of the practice of female circumcision as a cultural tradition of a society, do not worry about the negative consequences of the tradition, this. Their opinion that all cultures are equal, correct and ethical, and each culture has the freedom to practice all that is relevant and valuable to society regardless of the response and the perspective of other cultures.

Because there is no culture to evaluate the practices of other cultural traditions as a moral, ethical and valid or not,

This view applies in Indonesia, these types of practices are allowed female circumcision is a type of circumcision are not excessive, namely that only removes praepotium membrane that covers the clitoris, not circumcision which cut or wound (incision and excision)

G. REFERENCE

__ Constitution of 1945
__ Law No. 39 of 1999 on HakAsasiManusia
__ Ministry of Health No. 1636 / Menkes / PER / XI / 2010
on Female Circumcision ..
_Minister of Health Regulation No. 6 In 2014, for revoke Permenkes No. 1636 / Menkes / PER / XI / 2010.
___https://kumparan.com/kumparannews/fakta-medis-sunat
women-in-kelindan-tradition-and-religion
__ Universal of Declaration of Human Rights
__ data@unicef.org, Data and analytics division of the data section
Unicef's research and policy,
___Center for Reproductive Rights 2006, Female Genital Mutilation: A Matter of Human Rights, New York: Center for Reproductive Rights.
___The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

IMPLEMENTATION OF BUSINESS LAW IN STATE / PROVINCES ASSET SAVING

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ABSTRACT

Optimization of the management of state/province assets is a mandate of the constitution, UUD 1945. There are gaps and redundancy in terms of statutory regulations. Business law is used as a driving force to synchronize and align rules and develop the competence of supervisory resources. Empowerment and enhancement/increase of supervisory roles and competencies also are major rules for the forces.

Keywords: Business Law, State/Province Asset Saving, Empowerment Supervisor

BACKGROUND

The vision of legal development in the Republic of Indonesia is to create law abiding and democratic through a national legal system development that serves the interests of the Indonesian people and nation within the framework of the Unitary State of the Republic of Indonesia. This is in accordance with the objectives of the State, namely protecting the entire people and nation, as well as spilling Indonesian territories, advancing public welfare, educating the nation's life and participating in implementing world order based on independence, eternal peace and social justice based on Pancasila and the 1945 Constitution. The aim of nation formulated and listed in the Preamble of the 1945 Constitution.

In accordance with Article 23 of the 1945 the Third Amendment, it is stated that the State Revenue and Expenditure Budget (hereinafter referred to as the "State Budget" known as "APBN") is a form of management of state finances which is determined annually based on law. This determination is carried out in an open, transparent and responsible manner for the greatest prosperity of the people. The Draft State Budget is submitted by the President to be further discussed with the Parliament or House of Representatives and takes into account the considerations of the Regional Representative Council. Approval from the Parliament and the consideration of the Senators Council are the determining factors whether or not the draft can be implemented or not in the following fiscal year. If the budget is not approved, then the President runs the previous year's revenue and expenditure budget.

In accordance with Law no. 17 of 2003 concerning State Finance which states that State Finance is all rights and obligations of the state that can be valued in money, as well as everything in the form of money or goods that can be made state property in connection with the implementation of these rights and obligations. From this law it can be quantified the implementation of the rights and obligations of the State in measurable amounts.

Constitution has stated that a number of important production branches have clearly stated that the important production branches of the earth, water and natural resources contained therein are controlled by the State. Contrast this with a number of actions to privatize state assets by the Government and Provinces. There have been a number of actions to privatize state assets carried out by the Government to individuals and foreigners which have an adverse impact on the nation. If dividends that were previously generated by SOEs (known as "BUMN") were mostly directly transferred to the state treasury, by transferring ownership of assets, the Government would automatically only get income from taxes, even though it was too small if the revenues of SOEs were still under the control of the Government itself.

There are still many actions to privatize state assets to date, due to looser regulations in this field. Private ownership of state assets is not only carried out by SOEs and other government-owned companies through privatization, but also private ownership of state assets by state officials, through the transfer of state assets to private property by former officials and third parties. This is a potential opportunity loss of benefits of these assets which were originally intended for the greatest prosperity of the nation.

Other obstacles faced by the ministry in managing assets related to ownership include

problems with ownership certificates and legal challenges over assets. In juridical-normative terms, state assets are divided into three state sub-assets, namely: First, those which are managed by the government themselves are called State Property (BMN), for example land and buildings of Ministries / Institutions, cars belonging to Ministries / Institutions. Second, managed by other parties is called separated state assets, for example state capital participation in the form of shares in BUMN, or initial assets in various state-owned legal entities (BHMN) which are declared as separate assets based on the law of their establishment. Third, controlled by the state in the form of potential wealth related to land, water, air and natural resources contained therein and controlled by the state as the highest organization, for example, mining, coal, oil, geothermal, ex-foreign nationalization assets, and cultural heritage.

The management of state / province wealth and assets is a strategic aspect that is managed by the Government, both central and regional level. This strategic aspect is part of the optimization of state assets in order to provide maximum benefits for all Indonesian people.

The management of state / province asset assets is currently carried out in coordination with the State Asset Management Institute (LMAN), which is structurally located at the Ministry of Finance of the Republic of Indonesia through the Director General of State Assets.

Basically, state / province assets that are still idle or assets that are not maximally managed or underutilized will give potential loss of benefits and opportunity loss of these assets and even become a burden to the state.

On the other hand, state / province assets that are misused or even transferred to individuals or companies also cause losses to the State. The amount of potential benefits, both financial and non-financial benefits that can be obtained if the asset is successfully utilized, invested or exchanged known as asset swap with the highest use value principle, is quite significant. In addition to potential loss of benefits also opportunity loss, idle asset management also creates double inefficiency because it is still allocated and charged to the State or Province Revenue and Expenditure Budget (known as “APBN / APBD”) in the form of maintenance and maintenance costs as well as the procurement of new assets to support the implementation of tasks Government daily. In the event that the number of idle assets increases, the more inefficient and inefficient the Government is in managing assets. Moreover, if there is a takeover or embezzlement of State / Province assets carried out by individuals or companies that do not own or represent the interests of the Government, the next aspect that must be managed is the internal supervision of the Government. This is one aspect of the Government's performance that needs improvement.

Based on the Strategic Plan of the Ministry of Finance for 2015-2019, in terms of value, the potential assets owned by the government are very large. This can be seen from the value of state property (BMN) in the form of fixed assets which has increased significantly, from the value of BMN as of December 31, 2005 of Rp. 237.78 trillion, in 2014 it has reached Rp. 1,796.73 trillion (Semester I LKPP 2014). Until 2016, this value continued to increase.

The significant growth in asset value, especially for the value of BMN in the form of fixed assets, was the result of an inventory and appraisal of all assets of Ministries / Agencies which was carried out in the 2017-2012 period. The implementation of inventory and appraisal is part of improving asset management, which has also been proven to be able to boost BPK's opinion on the Central Government Financial Report (LKPP) from a Disclosure of Opinion (TMP) / disclaimer to Fair with Exceptions in 2009.

One of the reasons for the disclaimer opinion on LKPP before 2009 (2004-2008 period) was related to the presentation of asset data on the balance sheet where the reasonableness was not yet certain. Therefore, starting in 2007, the Ministry of Finance through DJKN launched a 3T program, namely Administrative Order, Physical Order, and Legal Order, where one of the priority activities is the implementation of inventory and assessment. This activity aims to increase the accountability of asset management from an administrative and physical perspective, as well as improve the presentation of asset values in LKPP.

Until now, improvements in the governance of state assets have been continuously carried out. Some of the activities that are currently still running include the certification of BMN in the form of land. This activity is part of the legal order program for assets. The acceleration certification program was started in 2012, namely through identification and data collection activities on BMN in the form of land. In that year, the BMN in the form of land has been identified totaling 87,497 plots. Some of them, namely 46,193 fields, have been certified, while the

remaining 41,304 will be certified gradually. The accelerated certification program was implemented starting in 2013 with a priority on the settlement of BMN in the form of land that has a free and clean status: proof of complete ownership, physically controlled, and not in dispute.

Looking at the data on the trend of achieving BMN certification in the form of land, it can be concluded that the average realization of certification completion per year only reaches 3,070 fields. Therefore, it is estimated that the certification process will take approximately 13 years to complete. However, the Ministry of Finance, through the DJKN, continues to accelerate the BMN certification program by conducting a crash program with the Ministry of ATR / BPN and Bappenas, so that it is hoped that certification completion can be faster or at least in line with the Agrarian Reform target of the Ministry of ATR / BPN, where all land parcels are Indonesia in 2025 must be certified.

Improvement of asset governance through administrative, physical, and legal order programs. Several minimum standard that must be implemented such as the minimum standard of state asset management in the rescue and identification of state assets. Therefore, simultaneously with the implementation of the program, the next thing that must be done by the Ministry of Finance is to ensure that state assets are used optimally. The performance indicator "asset utilization ratio to total fixed assets" is the indicator chosen to monitor the utilization / use of state assets. Apart from aiming to ensure orderly administration / recording of assets, this indicator can also provide information about the value of assets used to support the implementation of ministries / agencies, the value of assets that are under capacity so that they can be utilized / collaborated with third parties, the value of assets that are delivered to other parties in the context of implementing government programs (grants), or the value of assets used as state equity participation. This means that through this indicator, the growth of the portfolio in asset value and its utilization are constantly monitored.

During its development, asset management has experienced a paradigm shift, from an asset administrator to an asset manager. Therefore, in 2017, the Ministry of Finance began measuring asset management performance in terms of how much economic benefits were obtained from managing state assets. The economic benefits are measured by the value of state revenues and the value of savings in spending resulting from asset management activities. Through this measurement, it is hoped that the assets owned by the state are not only limited to usage, but also managed optimally and professionally so that later they will also contribute to supporting the capacity of state finances. The pattern of optimizing state revenue through asset management can be carried out through leasing schemes, cooperation in utilization, building for transfer, building for handover, and others. Meanwhile, the pattern of optimizing spending savings can be carried out by means of a scheme of transferring idle assets at a ministry / agency to another agency that is in need both for the implementation of tasks and functions as well as for supporting government priority programs. An example of asset support for the government's priority program in 2016 is the provision of assets in Lampung, Batam, Padang and Gowa for the million houses program.

Apart from this, in 2016, the Ministry of Finance has also formed the State Asset Management Agency (LMAN), as a unit that is specifically tasked with optimizing idle assets under the management of the Minister of Finance as State General Treasurer (BUN). . Apart from being an idle asset operator, LMAN is also given a mandate by the government to carry out a special land bank function, which plays a role in the provision and funding of land for national strategic projects.

The management of state assets has an increasingly strategic role in supporting economic development and growth. Therefore, the Ministry of Finance is seriously working to optimize this role, so that state assets are no longer seen as passive resources, but can productively be managed and developed for the benefit of the community. The strategy that will be used to achieve this is by building an actual and accurate asset database, and implementing an asset management strategy based on the highest and best use principles. The hope is that each asset value owned by this country can provide positive returns in accordance with the best potential for these assets.

PROBLEM FORMULATION

Based on the foregoing, the main problems to be explored are as follows:

1. Identify existing provisions and synchronize current regulations and legal products related to the management of state / regional assets.
2. Identifying a number of cases that are at the level of field implementation compared to the

provisions stipulated in a number of applicable legal products.

3. Identifying a number of proposals that can bridge a number of existing legal provisions or products so that they can be sharpened according to the current context.

THEORY FRAMEWORK AND CONCEPT

The thinking framework of this papers is to ensure that the current legal products are in accordance with the current state / regional asset management conditions, including aspects of supervision and control of the management, as well as aspects of coordination at the field level. In the event that there are things that have not been regulated in accordance with the legal product, this shall be submitted as a suggestion for additions or revisions to the current provisions.

In terms of implementation in the field, there are a number of irregularities or misuse but cannot be managed with existing legal products, then a new legal product is proposed that can accommodate these conditions, in the form of a framework that can be used for drafting laws related to the result.

1. Theoretical Framework

Referring to the UUD 1945 above, the role of the Government is to manage the existing resources including water, land, air and the resources contained therein for the greatest benefit of the Indonesian people. In its management, the Government carries out these functions in various forms: state institutions, regional governments to state-controlled enterprises.

As state institutions, local governments and business entities, all rules and legal principles apply to them, and are legal subjects who are capable of carrying out legal actions with other legal subject both with individuals and other legal entities.

Basically, business law regulates legal relationships between legal entities, directors and other institutions. In the rule of civil law, for example, it is clear that a legal entity is a civil law subject to make an agreement or contract with a party that can sue and be prosecuted in court in a civil relationship. Business law consists of 2 different things, namely Law and Business, each of which have a unique definition.

According to HMN Purwosutjipto SH, law is the whole norm, which by state control or community rulers are declared or considered as binding regulations for some or all members of the community, with the aim of establishing a system desired by the ruler. Meanwhile, business can be defined as all activities that involve the procurement / provision of goods and services needed and desired by others for the purpose of making a profit.

The purpose and function of business law is to regulate and protect businesses from a number of risks that occur in the future. Below are some of the objectives of business law :

1. Ensuring the efficient and smooth functioning of the market mechanism.
2. Protecting various types of businesses, especially for Small and Medium Enterprises (UKM)
3. Help improve the current financial system.
4. Providing protection for an economic actor or business actor.
5. Creating a safe and fair business for all business people.

The law is made to create a safe, orderly, and peaceful life with the same business law. The functions of business law include :

1. Become a source of useful information for business people.
2. Business actors can better understand their rights and obligations when building a business, so that their business does not deviate from existing rules and has been written in the law.
3. Business people understand better their rights and obligations in a business activity.
4. The realization of fair, honest, fair, healthy, dynamic and just business attitudes and behavior or activities because they have legal certainty.

Business law itself has a fairly broad scope and has been regulated in law. In general, the scope of business law includes several things, including business entities and activities including buying and selling of investments, employment, financing, guarantees of debt and securities, intellectual property rights, insurance and others.

Sources of law applicable in Indonesia in Indonesia are sources of material law and sources of formal law. Material sources of law are laws that are seen in terms of their content and originate from the determinants of the content of the law, namely the socio-economic conditions, religions and legal systems of other countries.

Meanwhile, formal sources of law are sources of law relating to the procedure or method of formation and can be directly used to create laws. Sources of formal law include statutory regulations such as the Constitution, laws, government regulations, presidential decrees, as well as regional regulations, treaties, doctrine from legal experts and jurisprudence from judge decisions.

The two sources of law above are the basis for the formation of business law or law that is used in law. In addition, business law also comes from an agreement made by the parties who carry out transactions.

Article 1338 of the Civil Code applies the principle of freedom of contract where the parties can determine for themselves the rules contained in the agreement they have agreed to and the agreement will be valid legally as a binding reference for the parties.

2. Conceptual Framework

Basically, the conceptual framework of this research is to look for gaps / gaps between formal law and material law in effect in Indonesia, specifically related to the management of state / regional assets in business law review and to bridge it.

The development of material law in Indonesia has basically attempted to balance a number of practices, jurisprudence or collective agreement at the field level, especially to regulate the management of state / regional assets. From a number of cases that occurred, there were still gaps that became loopholes of law violations and were strengthened by weak supervision. Business law is one of the material laws that can be an entry point to arrest / ensnare the violators of the law and become a tool to strengthen legal instruments in managing every violation at the field level. Business law, along with a number of principles that govern it, can be legal tools that provide maximum impact on supervision and law on any violations.

CONCLUSION

The role of business law in the context of saving state / regional assets can be strengthened by aligning and identifying gaps in a number of related regulations, so that redundancies and uncertainty are not obtained. With a comprehensive gap analysis and alignment, any loophole in policy level is managed.

The process of aligning provisions and regulations is carried out jointly by the government and parliament with the aim of obtaining maximum results and synchronizing regulations at the central and regional levels. Mapping of central and regional interests must be carried out in a transparent and clear manner. Business law is used as a driving force to shape the direction of management and rescue of assets controlled by the state / region.

At the grassroots level, there is a need for increased competence and expertise related to saving state assets. To increase the competencies will give impact into respective supervisor influence.

From the institutional side, it is necessary to strengthen the existing supervisory institutions in order to obtain useful value from the supervision of the process.

BIBILIOGRAPHY

Arief,Barda Nawawi.1995.Penelitian HukumNormatif (SuatuUpayaReorientasiPemahaman). Penataran MPIH di UnsoedPurwokerto. 11-15 September 1995.

Harahap, Yahya. 2008. Hukum Acara Perdata. Cetakankedua. SinarGrafika Jakarta.

Santosa, BimaPriya et.al. LembagaPengelolaanAsetTindakPidanaTertentu. Jakarta : The Nederland –Indonesia National Legal Reform Program (NLRP).

Indonesia. Undang-UndangNomor 17 Tahun 2003 tentangKeuangan Negara.

----------. Undang-UndangNomor 1 Tahun 2004 tentangPerbendaharaan Negara.

----------. PeraturanPemerintahNomor 27 Tahun 2014 tentangPengelolaanBarangMilik Negara/Daerah.

----------. PeraturanMenteriKeuanganNomor 3/PMK.06/2011 tentangPengelolaanBarangMilik Negara yang BerasaldariBarangRampasan Negara danBarangGratifikasi.

THE IMPLEMENTATION OF SANDE BASED ON THE CUSTOMARY LAW OF BESEMAH AT DISTRICT OF PASEMAH AIR KERUH, REGENCY OF EMPAT LAWANG

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ABSTRACT

Traditionally, a pledge in Indonesian society has various names, such as *menggadai* (Minang Kabau), *adol sende* (Java), *ngajual akad* or *ngajual gade* (Sunda), and *menjual gade* (Riau and Jambi). Similarly, in the District of Pasemah Air Keruh, Regency of Empat Lawang, Province of South Sumatra, or in general, the area of Besemah's customary law, it is known as *Sande*. *Sande* in this District of Pasemah Air Keruh is implemented under the Customary Law, and the objects of *sande* are in the form of immovable properties, such as paddy land, farmland, or house. *Penyande* or the person who will pledge on his farm, paddy field, or house, must firstly express his intention to his family or neighbor that he needs some money to fulfill his needs. After his family or neighbor has agreed, then an agreement is made in writing by stating the nominal amount of money that required or submitted to *penyande*, determining the time period of *sande*, as well as agreeing the type of chosen *tating* (recipient), whether *kuase* or *biase*. Next, the said agreement letter is signed by both parties, acknowledged by Head of the Sub-district and signed also by the witnesses, which are both from *Penyande* and *Penating* (Recipient of *Sande*). In the event that *penyande* is not able to redeem until the specified period of time, a new agreement will be made by prolonging the period of time, adding *tatingan* money and carrying it out amicably in family spirit. *Sande* in the community of Pagar Alam is grounded on their wishes to fulfill any sudden needs or to get immediate funds, such as for medical treatment costs, education fee, paying debts, business capital, and saving money. Stratified *Sande* is part of the Land Pledge Law which still exists today in the District of Pasemah Air Keruh, Regency of Empat Lawang, at the Province of South Sumatra. The objects of *Sande*according to the Customary Law Community of Pasemah Air Keruh are lands and non-lands. For the community of Pasemah Air Keruh, *Sande* becomes a step to solve their economic problems without having a fear of losing the object of *Sande* and this is a culture in the Customary Law Community of Pasemah Air Keruh. Stratified *sande* in the Customary Law Community of Pasemah Air Keruh occurs at the desire of *Sande* holders to pay the price to *Sande* giver and requires *Sande* giver to hand over his land to the pledge holder by fulfilling the provisions applied to *Sande*, while the related land has already been pledged on another person. The object of *sande* does not always have to be excluded from the authority of *Sande* giver, but it can still be controlled by *Sande* giver, which is called as Non-Authorized *Tating*, while the object of *Sande*which must be removed from *Sande* holder is called Authorized *Tating*. Non-authorized *tating*is one of the distinctive characteristics of *Sande*institution in the Customary Law Community of Pasemah Air Keruh, therefore *sande*sellercan pledge again his land, both with and without *sande*buyer's consent.

Keyword: *Sande* is an instrument for the community to obtain a loan in the form of money with a guarantee on their property.

A. INTRUDUCTION

Background

A pledge agreement, according to Customary Law, considers a pledge on land or other immovable property as a right that gives obligations, not because of a loan agreement. Yet, borrowing money and other legal actions incur debts. A pledge holder has the right to collect the results incurred by and from the land that becomes the right of pledge holder, as the interest of such debt, until the pledge is redeemed by pledger.

For the community in the District of Pasemah Air Keruh, a land pledge is traditionally called as "*sande*", namely a form of agreement that causes one’s land to be handed over to one elsein order to receive a cash loan under an agreement, stating that pledger or land owner can redeem, while pledge holder has the right to enjoy any results produced

from the said land until the land or collateral is redeemed from pledge holder or land owner.

The driving factor of *sande* in the District of Pasemah Air Keruh is generally due to economic needs of its community, and it is experienced by the middle to lower classes of society. Nearly 50% of the middle to lower classes who own land have done *sande*, especially those whose children are still attending school and having no casual employment other than farming. When compared with money loan procedure at financial institutions, either banks or non-banks, *sande*process is very easy, since it does not require a long time to get some money. In addition, *sande* is considered very safe for both parties, because *sande* is a way to solve their financial difficulties without having a fear of losing the object of *sande*when they cannot redeem. For the Customary Law Community in the District of Pasemah Air Keruh, *sande* is not bound by a period of time, therefore it can last as long as possible and be passed on by their heirs.

The form and process of *sande*for the community in the District of Pasemah Air Keruhcan be classified into 2 (two) as follow:

a. *Sande*made in writing and verbally. Verbally, *sande* is very easy and fast enough under an agreement by both parties that relating to the price and object of *sande*. The payment and handover of the land are witnessed by the owner of lands which adjacent to the object of *sande*. It is assumed then that s*ande* has been implemented.
b. *Sande*made in writing. *Sande*made in writing is an agreement between both parties as written on a stamped paper and then signed by both parties, witnesses and sometimes in the presence of village officials or tribal council in order to obtain legal protection for the implementation of *sande*, as the result.

In Customary Law, a pledge is an independent agreement that includes movable and immovable objects. It means that any objects can be the pledge objects. For the community in the District of Pasemah Air Keruh, all objects can become the object of *sande*, although, in general, they only make agricultural land and plantation as the objects of *Sande*.

Unlike the pledge in National Agrarian Law, the object of pledge is only movable object, while immovable object is still secured by hypothecation or mortgage. Additionally, in the land pledge relating to *sande*case for the indigenous people in the District of Pasemah Air Keruh, said *sande* is not bound by a period of time. That is also different with the provisions in National Agrarian Law. Many public criticisms regardthe time period for *sande* is, in fact, very detrimental to the pledger. This is due to many people who are unable to redeem the pledge, thus the pledge will last for a lifetime, even to the heirs.

This case creates a big problem for *Sande* giver regarding their ability to pay pledge or *sande* money, even though the society prefers to consider the pledge according to Customary Law rather than National Law. Difficult process and formal procedure relating to the pledge in National Agrarian Law become one of the factors on why the people in District of Pasemah Air Keruh choose their Customary Law on *sande*, since it is much easier and less formal. Therefore, they can fulfill their immediate needs, not waiting for such a long time. However, in today's globalization era, Indonesia is expected to be able to foster and pay a deep attention to Customary Law as a system that meets the community's needs by reforming any legal system derived from the colonies or that considered to be no longer feasible in order to have legal system that can provide legal protection and certainty for the whole society, with the guidance and foundation of Pancasila and Constitution of the State of Republic of Indonesia of 1945.

In this globalization era and digital systems, Indonesia is expected to be able to foster and pay a deep attention to Customary Law as a system that meets the community's needs by reforming any legal system derived from the colonies or that considered to be no longer feasible in order to have legal system that can provide legal protection and certainty for the whole society. In the Constitution of State of Republic of Indonesia of 1945, Article 33 paragraph (3) states that the earth, water and natural resources contained therein shall be controlled by the State and used as much as possible for the prosperity of the people. Similarly, the Law on Agrarian Principles states that all lands shall be controlled by the State.

The aforesaid provisions mean that the State as an organization of power has the authority as explained in Article 33 paragraph 3 of the Constitution of State of Republic of Indonesia of 1945, as follow:

1. Managing and organizing the allocation, use, supply and maintenance;
2. Determining and managing the rights of use on the benefitsof the earth, water and airspace;

3. Determining and managing the legal relationship between people and their actions toward the earth, water and airspace.

Fulfilling the needs of life and providing a living are obliged for every human being, including the Customary Law Community in District of Pasemah Air Keruh. In order to fulfill the necessities of life, it can be done by pledging on land or *sande*, in which there is a legal relationship between *sande* giver and *sande* holder. However, the culture of *sande* in District of Pasemah Air Keruh has not guaranteed a legal certainty for its Customary Law Community, thus it requires a regulation regarding a land pledge (*sande*) that carried out under a common law.

For that reason, the law requires a political law in order to change *sande* agreement that contains injustice and exploitive elements. The changes on the legal rules regarding *sande* agreement which grounded on a customary law are in line with the spirit of Article 53 in the Law Number 56/Prp/1960, and, in fact, today's Customary Law Community itself is gradually starting to open up and desire a change in the customary law system that can guarantee their justice and protection.

In order to realize such protection, it needs a study for the recognition and protection in Legal Construction, Legal Character and Process,Land Pledge (*Sande*) Institution for the Customary Law Community in District of Pasemah Air Keruh.

B. PROBLEM STATEMENT

Based on the aforementioned, the Author has outlined the formulation of Problems to be discussed in this writing, as follow:

1. How is the legal process of *Sande* carried out by the Customary Law Community in District of Pasemah Air Keruh according to Agrarian Law applied today?
2. How is the legal protection implemented for *Sande* holder within the Customary Law Community in District of Pasemah Air Keruh?

C. RESEARCH METHODS

This study aims to explain and describe (1) the implementation process of *sande* according to Customary Law in District of Pasemah Air Keruh, and (2) to explain and describe the background of the community in District of Pasemah Air Keruh by doing *sande* (agricultural land pledge). This type of research is empirical legal research by using qualitative approaches, while the sources of this research data are primary and secondary data. The results of the analysis are outlined in writing in the form of a paper adapted to the writing format in Scientific Journal.

D. ANALYSIS AND DISCUSSION

1. Legal process of *Sande*for Customary Law Community in District of Pasemah Air Keruh

a. *Sande* as a customary pledge associated with Agrarian law

The implementation of *Sande* in District of Pasemah Air Keruh is carried out under Customary Law, and the objects of *sande* are immovable, which are paddy land, farmland, plantation, gold and houses. *Penyande* or the person who will pledge on his farm, paddy field, plantation, gold and house, must firstly express his intention to his family or neighbor that he needs some money to fulfill his needs. After his family or neighbor has agreed, then an agreement is made in writing by stating the nominal amount of money that required or submitted to *penyande*, determining the time period of *sande*, as well as agreeing the type of chosen *tating* (recipient), whether *kuase* or *biase*. Next, the said agreement letter is signed by both parties, acknowledged by Head of the Sub-district and signed also by the witnesses, which are both from *Penyande* and *Penating* (Recipient of *Sande*). In the event that *penyande* is not able to redeem until the specified period of time, a new agreement will be made by prolonging the period of time, adding *tatingan* money and carrying it out amicably in family spirit. *Sande* in the community of Pagar Alam is grounded on their wishes to fulfill any sudden needs or to get immediate funds, such as for medical treatment costs, education fee, paying debts, business capital, and saving money. Stratified *Sande* is part of the Land Pledge Law which still exists today in the District of Pasemah Air Keruh, Regency of Empat Lawang, at the Province of South Sumatra. The objects of *Sande* according to the Customary Law Community of Pasemah Air Keruh are lands and non-lands. For the community of Pasemah Air Keruh, *Sande* becomes a step to solve their economic problems without having a fear of losing the object of *Sande* and this is a culture in the Customary Law Community of Pasemah Air Keruh. Stratified *sande* in the Customary Law Community of Pasemah Air Keruh occurs at the desire of *Sande* holders to pay the price to *Sande* giver and requires *Sande* giver to hand over his land to the pledge holder by fulfilling the provisions applied to *Sande*, while

the related land has already been pledged on another person.

Sande in the Customary Law Community of Pasemah Air Keruh applies from generation to generation, meaning that as long as *sande* has not been redeemed, it will be passed on to their children and grandchildren. *Sande* by Customary Law is fundamental, in which any form of agreement in Customary Law starts at the basis of psychology, family relationship and helpfulness in harmony with the behavior of Indonesian people who always prioritize cooperation, mutual aid and caring for others.

The objects of *sande* can be in the form of paddy fields, farmland, plantations, gold or other valuable objects, but, among the community of Pasemah Air Keruh, the objects of sande are commonly paddy fields and farmland. Paddy fields become the most-liked for *sande* holders, because it can be harvested twice a year or more, while the farmlands only harvest 1 (one) time a year. *Sande* holders prefer to choose paddy fields, then farmland, plantation and gold. There are 2 types of *sande*, namely: *sande tating kuase*(*sande* by submitting the object of *sande* to *sande* holder) and *sande tating* without *kuase* (*sande*by keeping the control on the object of *sande* to *sande* giver with a profit sharing system). *Sande tating kuase*occurs when the value of *sande* is in a large amount, while when the value of *sande* in a small amount, it is called*sande tating* without *kuase*. However, the community who conducts *sande* by *tating kuase* is more dominant if compared to *sande* without *kuase*. This is because *sande*by *tating kuase*is considered to be more beneficial for the recipient of *sande* objects. If the recipient of *sande*holds the object of *sande*, then the recipient of *sande*can manage the object of *sande* and obtain the results from the object of *sande* managed. In *sande* by *tating* without *kuase*, the recipient of *sande*will only receive compensation from the interest whose amount was promised when the agreement was made.

In connection with this *sande* by customary law, it is certainly very detrimental to the owner of the object of *sande*, because in addition to uncertain period of time, the interest rate on the loans they receive are also very high, thus Government of Indonesia, in this case National Land Affairs Body as input material and information in relation to the recognition and protection of customary land pledge or *sande*for the Customary Law Community in District of Pasemah Air Keruh, shall provide legal protection.

This customary pledge system in the form of *sande* at least causes several legal problems, which in turn, it may trigger injustice toward the owner of the object of *sande*, among others:

1. In *sande* agreement, the position of the Owner is on the weak side, because owning the object of *sande* means that he will lose the right to control, work on and take benefits from the results of *sande* managed;
2. The control on the object of *sande*is transferred to the person holding *sande* until the owner of the object is able to pay the debt along with the agreed interest;
3. No binding period of time for the person who holds *sande*to return the object of *sande* to *sande* owner;
4. No calculation of value or amount regarding the results obtained by the person who holds *sande*as he manages the object of *sande*;

From the factors stated above, the loan agreement by this traditional *sande* system clearly creates injustice for *sande* owner, and regarding this injustice, there is no customary law is applied in District of Pasemah Air Keruh that can provide legal protection to the owner of the object of *sande*.

Land *sande*according to the customary law in this District of Pasemah Air Keruh has a correlation to national Agrarian Law, for example as mentioned in the general explanation of Law Number 56 Prp of 1960 item 9a which states as follows: A pledge shall mean the relationship between a person and a land of another person who has debt of money, and as long as the debt has not been fully paid, the said land remains in the possession of the lender (pledge holder) and during that period of time the whole crop yield becomes the right of pledge holder, which is then called as the interest from the debt (Law No. 56/1960). The basic Law on Land Pledge is Article 53 in the Law No. 56/Prp/1960 concerning the Determination of Agricultural Land Areas, stating that the pledge right shall be a temporary right which sought to be deleted in a short time as a follow-up to Article 7 in the Law Number 56/Prp/1960 concerning the Determination of Agricultural Land Areas, aiming to delete the transaction of land pledge based on Customary Law in Indonesia. However, the judicial institution in its application is still inconsistent, thus there are two regulations for a land pledge, namely national Agrarian Law and Customary Law. This dualism, at the end, will create the uncertainty of legal protection.

Rights and Obligations of the Parties in Land Pledge Agreement. The pledger, after receiving the pledge money, will immediately hand over the pledged land to the party who gave the money or to be called as the pledge holder. The pledger can at any time redeem his land, provided that the pledge holder has harvested the crop yield at least once.

If the pledged land is destroyed, the pledger cannot be sued for returning the pledge money already received. If there is a difference in the value of the money at the time of the pledge and redemption, then the risk must be borne together with the pledge holder. After paying the pledge money, the pledge holder has the control over the pledged land to manage it and entitled to use and collect the land products.

If at any time the pledge holder needs money, he has the right to do the pledge deepening with the permission from the land owner or to transfer the pledge if without the permission from the land owner. If the land is destroyed due to natural disasters, for example floods, thus the pledge holder may not demand the return of his pledge money. The pledge holder is obliged to return the pledged land after the object of mortgage has been controlled for 7 (seven) years, and if not until 7 (seven) years, the repayment of pledge money is still calculated as much as the amount of money received by the owner of pledged object.

In a pledge that is accompanied by an agreement, if within the specified time period, the pledger cannot redeem his land, then under the District Court, the pledge holder can own the pledge land according to the agreement, and, if necessary, by adding more money based on the price of the land when outright sale. However, they usually avoid the settlement through this District Court wherever possible, because they think that the dispute settlement through this District Court takes a long time.

b. *Sande* by customary pledge viewed from the Civil Code

The guarantee or joint and several obligation is the responsibility or commitment of a person as mentioned in Article 1131 in the Civil Code. In Article 1131 of the Civil Code, it is stated the objects used as collateral shall be movable and immovable property, which both already exist at the present and in the future.

In the legal term, “guarantee” is a legal provision that regulates between the lenders by receiving debt due to the existence of debt. There are four elements that must exist in a guarantee, which are: firstly, the legal norms; secondly, the grant of guarantee and the guarantee recipient; thirdly, the guarantee itself; and fourthly, the credit facilities.

Some provisions contained in Civil Code and Commercial Code are fully regulating or having relation with the debt guarantee. Besides that, there are also regulation of laws, namely the Law Number 4 of 1996 concerning the Mortgage on Land and Land-Related Objects, the Law Number 42 of 1999 concerning the Fiduciary, and the Law Number 21 of 1992 concerning the Shipping.

The guarantee itself can be imposed on several types of security rights, namely Pledge Right, Right of Hypothecation, Mortgage Rights, and Fiduciary Rights. The first is the Pledge Right that is regulated in Book II, Article 1150-1160 of the Civil Code.

Article 1150 in the Civil Code states that a pledge shall mean a right that obtained by creditor upon movable property, which is given to him by the debtor or other person on his behalf to guarantee a debt and give authority to the creditor to repay the goods in advance from other creditors, except the costs for auctioning the goods and any costs incurred to maintain the property, as the same costs must take precedence. Usually, the object used as guarantee in a pledge is in the form of movable property. A pledge is an accesoir agreement, namely an additional agreement that depends on the underlying agreement.

Right of Hypothecation. According to Article 1162 in the Civil Code, a hypothecation shall mean a material right on immovable property in order to take the compensation thereof for the settlement of an obligation. Immovable property that can be used as guarantee is the land with Right to own, Right to build, and registered Right to cultivate; Multi-level Housing, including the building ground or right to own multi-level housing unit; as well as Indonesian ships with up to 20 m3 of gross loadswhich already registered. A hypothecation agreement isbound by a specific form that must be made with an authentic certificate.

Mortgage Right. The legal basis for mortgage right is the Law Number 4 of 1996. Article 1 number 1 in the Law on Mortgage Right states about the Mortgage Right on land and land-related objects. Thus, the mortgage right includes the land and any objects on it. This mortgage agreement is for more specific repayment and prioritizing the position of certain creditors toward other creditors.

Fiduciary Right. Fiduciary shall mean a guarantee over an object based on trust, provided that

the object whose ownership right is transferred remains in the possession of the owner of the object. According to the Law Number 4 of 1996 in Article 1 paragraph (2), fiduciary guarantee shall mean the guarantee of tangible movable objects as well as immovable objects, especially buildings which cannot be encumbered by mortgage rights. So far, the fiduciary agreement has pressed the registration on movable and immovable objects. Fiduciary agreement must be registered or recorded in its ownership certificate.

2. Legal protection for the owner of *sande* object as Customary Law Community in District of Pasemah Air Keruh

Legal protection for the owner of *sande* object is difficult and almost having no guarantee of legal protection. It is because *sande* is privately arranged, by only involving witnesses without the presence of official authorities, especially for *sande* that is arranged verbally. In point of fact, on the one hand, the owner of the object of *sande*must have evidence that the object of *sande* pledged to *sande* holder is only limited to the act of *sande*, not being sold to *sande*holder. In this context, it can be seen that in order to obtain legal protection, the owner of the object of *sande*must have evidence in the form of an agreement which agreed together, made in writing, legalized by the local authorities, at least head of the village, along with the witnesses, and signed by both parties, village officials and witnesses. By this, thus, the owner of the object of *sande*has evidence that his land is only for the act of *sande*, not being sold.

Meanwhile, there is no legal protection for *sande*holder, because *sande* is privately arranged which only involves witnesses, without official authorities, particularly for *sande* that is arranged verbally. In order to obtain legal protection, *sande*holder must have evidence in the form of agreement letter which agreed together, made in writing, legalized by competent authorities, which at least head of the village and followed by witnesses, as well as signed by both parties, its village officials and witnesses.

If compared to the pledge based on an agreement of Civil law, this act is very different. In the civil law, a pledge agreement with a guarantee will have a value of legal certainty, both related to the certainty in the time period, principal value of the debt, interest value, and guarantee for repaying the debt by installments, as well as guarantee for the return of pledge object.

Furthermore, the aforementioned is clearly not found in *sande* agreement system. In *sande* agreement system, the owner of the object of *sande* does not have a guarantee in term of time period for returning the object of *sande*and no reduction of the debt from the crop yields as the land is cultivated by *sande* holder.

Consequently, regarding *sande* agreement in the District of Pasemah Air Keruh, many owners of the object of *sande*have difficulty to redeem their lands that already pledged to *sande* holder.

Moreover, in this *sande* agreement, the legal position between the owner of the object of *sande* and the person giving *sande* is very unbalanced, even though Article 28D in the Constitution of State of Republic of Indonesia of 1945 already provides a guarantee that ***"every citizen shall have the right on a fair legal recognition, guarantee, protection, and certainty, as well as equal treatment before the law".***

D. CONCLUSION

The legal process of *sande*among Customary Law Community in District of Pasemah Air Keruh is by an agreement between two parties, giving a land to the pledge holder who must pay an amount of pledge money to *sande* giver based on family spirit and helpfulness. Thus, the object of land pledge (*sande*) does not have to be excluded from the authority of pledger. It is only the status of pledger that changes, from owning to working on under a profit sharing system. In addition, the Customary Law Community in District of Pasemah Air Keruh will terminate the land pledge (*sande*) due to the payment of pledge money to the pledger, not because its period of time expires.

The legal protection of *sande*holder is based on the current National Agrarian Law. If the holder of stratified *sande*does not know that the said object of *sande*has been pledged, then *sande*holder is protected by the law. Otherwise, if *sande*holder knows that the object of *sande*has been pledged but still receives *sande*, meaning that there is no good faith from *sande* holder, then *sande* holder will not obtain the legal protection.

In particular, regarding the tribal council, they must socialize the legal process and construction of land pledge (*sande*) to the community, thus their community will know their rights and obligations of *sande*holder and *sande* giver. On another side, regarding the community, they must preserve the characteristics of land pledge (*sande*) as their local culture, by upholding the family values and principle

of helpfulness, thus they will really be helped when they pledge their lands.

At the end, regarding both parties, in order to get recognition and protection of the land pledge (*sande*), they should make an agreement in written form and carry it out in the presence of traditional leaders/ village officials/ administrative officers. They must also socialize the importance of the pledge that made in writing, since it is functioned as evidence that a pledge has been held and having legal certainty. This effort is made to obtain recognition and protection from the government as regional asset. Moreover, it can be national asset, considering that it is a cultural heritage and included in one of the customs among a lot of national cultural sources, especially in term of land pledge (*sande*) in Customary Law Community at the District of Pasemah Air Keruh. Indeed, the unbalanced legal position between the owner of the object of *sande* and *sande* holder in the District of Pasemah Air Keruh must be eliminated by, in the future, providing the legal rules, thus the owner of the object of *sande* can get legal recognition and protectionas the owner of the pledged land. The value of justice and equality before the law, thus, can be realized.

F. REFERENCES

Ahmadi Miru and Sakka Pati, Hukum Perikatan. (2008). Hukum Perikatan. Jakarta: Grafindo Persada.

Albar,S.Sabari. *et al*, (2010). Pokok-pokok Hukum Adat: Unsri

Bernard.L.Tanya, *et al*, (2010), Teori Hukum, Strategi Tertib Manuasia Lintas Ruang dan Generasi: Genta Publishing.

Gunawan Winadi, (2010). Reforma Agraria, Perjalanan yang Belum Berakhir, Jakarta: Prenada Media Grop.

Herlien Budiono,(2006). Asas Keseimbangan bagi Hukum Perjanjian Indonesia: Hukum Perjanjian Berlandaskan Asas-asas Wigati Indonesia, Bandung: Citra Aditya Bakti.

ImanSudiyat,(1981). Hukum Adat Sketsa Asas, Yogyakarta: Liberty.

Kasmir, (2008). Bank dan Lembaga Keuangan Lainnya, Revised Ed., Rajawali Pers.

M.Koesnoe, (1992). Hukum Adat Sebagai Suatu Model Hukum, Bandung:PT. Mandar Maju.

M.Erwinand Amrullah Arpan, (2008), Filsafat Hukum Mencari Hakikat Hukum, Unsri, Revised Ed., Second Ed.

Rahmadi Usman,(2008), Hukum Jaminan Keperdataan,Jakarta: Sinar Grafika.

Soemarsono in Liliek Istiqama, (1982), Hak-Hak Gadai Atas Tanah Setelah Berlakunya Hukum Agrarian Nasional, Surabaya: Usana Offset.

Ter Haar, Asas-Asas dan Susunan Hukum Adat, Jakarta: Pradnya Paramita.

Urip Santoso,(2008).Hukum Agraria dan Hak–Hak Atas Tanah,Jakarta:Kencana Prenada Media Group

Zainuddin Ali,(2011).Metode Penelitian Hukum, Jakarta: Sinar Grafika

EFFECTIVENESS OF ARTICLE 3 LAW NUMBER 20 OF 2001 CONCERNING ERADICATION OF CRIMINAL ACTS OF CORRUPTION ON THE ILLEGAL VILLAGE DESA (DD) IN TANJUNG MENANG VILLAGE PRABUMULIH CITY

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ABSTRACT

The background in this study is that implementation of this Village Fund (DD) provision is often misused by the village apparatus using the funds more for personal gain. Salary is low, below the salary level for surviral, this study is 1) The Effectiveness of Article 3 Law Number 20 of 2001 concerning the eradication of corruption against the misappropriation of village Funds (DD) in Tanjung Menang Village, Prabumulih City ? The research method used is empirical research. Data sources used in this study consist of primary data and secondary data. Based on the results of the study showed that the effectiveness of the implementation of Article 3 of law no.20 of 2001concerning the eradication of corruption of against the misapparopriation of Village Funds (DD) in the village of Tanjung Menang, Prabumulih City was not effective because of the imposition of 1 (one) year 6 (six) month and a fine of Rp. 50.000.000,- (Fifty million rupiah) is not / less effective and 2) there are abstracles to the ineffectiveness of Artice 3 of law Number 20 of 2001 concerning the eradication of corruption against the misappropriation of village Funds (DD) in the eradication of corruption againt the misappropriation of village Funds (DD) in Tanjung Menang Village, Prabumulih city, namely due to weak supervision, in terms of law, lack of community participation, weakness goverment and law enforcement officials in dealing with corruption.

Keywords: Effectiveness, Legislation, Countering Criminal Offenes, Village Funds (DD).

A. PREMININARY

Ratification of law number 6 of 2014 concerning villages is the first step for villages to exercise their authority. In this law the local government stipulates that the village is a legal community unit that has the authority to take care of the interests of the local community based on their origin and customs. The local area is recognized in the national government system and is within the district area.

The village is a representation of the smallest legal community unit that has existed growing along with the history of Indonesian people's lives and became an inseparable part of the life structure of the Indonesian people. As a form of state recognition of the village. Particularly in the context of clarifying the functions and authority of villages, as well as strengthening the position of villages and village communities as subjects of development, a policy on structuring and regulating villages is required with the enactment of Law Number 6 of 2014 concerning villages.

One of the village's authorities is making regulations on village funds (DD) as part of the village's fiscal authority to regulate and manage its finances in implementing village laws, various regulations derived from laws have been issued to regulate various matters so that village development can proceed as mandated village law. These regulations are stipulated at various levels, starting from government regulations, relevant ministerial regulations (Minister of finance regulations, Minister of the Interior regulation, and village ministerial regulations, underdeveloped regional development and transmigration) to supplementary regulations issued by the regions. So that the various regulations implementing the village law can be implemented properly, it is necessary to harmonize the formulation of policies in each ministry aimed at increasing efficiency, effectiveness, transparency and accountability in the use of village funds. And for that the government drafted a joint decree (SKB) of 4 ministers, namely: the Minister of the Interior, the Minister of Finance, the Minister of National Development Planning / Head of Bapennas and the Minister of Underdeveloped Villages and the transmigration of the 4 Ministerial Decree including the strength of the role and synergy between ministries in planning , budgeting, allocation,

implementation, monitoring and evaluation, strengthening supervision to the local district / city government.

Village funds in their management are carried out in an orderly, obedient to the provisions of the legislation, efficient, economical, effective, transparent, and responsible by taking into account the sense of justice and propriety and in the name of the interests of local communities, listed in government regulation number 22 of 2015 concerning funds villages are calculated based on the number of villages and by taking into account the population, poverty rate, area size, and the level of geographical difficulty of village funds transferred through the district / city APBD to be subsequently transferred to the APBDesa. Village fund management in district / city APBD in accordance with statutory provisions in the area of regional management.

Village fund management in the APBDesa is carried out in accordance with statutory provisions in the field of village financial management. In the village law there are also village funds sourced from the state budget. Village funds are a concrete form of state recognition of village origins and village-scale local authority. The village fund is expected to provide additional energy for the village in carrying out development and village empowerment, towards a strong, advanced and independent village.

Under Law No. 6 of 2014 concerning villages, the Government also issued Government Regulation No. 60 of 2014 concerning village funds received from APBN funds and directly received by villages. According to the Ministry of Villages, the village funds will be received by 3% in 2015, up to 6% in 2016, up to 2017 reaching 10% and village funds can amount up to 1 billion. Village funds that are large enough according to the village apparatus must be accountable to both the central government and village governments.

Village development is a top priority in national development. To be able to manage and account for the use of these funds, the village government must understand how village financial managers, according to Permendegri Number 113 of 2014 article 1 which includes planning, implementation, administration, reporting, and accountability. RI Government Regulation Number 60 of 2014 article village funds are funds sourced from the state budget (APBN) which is intended for villages that are transferred through the district / city regional income and expenditure budget and is used to finance government administration, implementation, development, fostering, community, and community empowerment

Minister of Home Affairs Regulation No.37 of 2007 regarding village financial management which provides a basis for village autonomy in practice is not merely normative. Therefore village financial management is an overall activity that includes planning, budgeting, administration, reporting, accountability and supervision giving authority to manage village finance and village funds (DD) based on Government Regulation No.72 of 2005. The village should be more open and responsive to the process of recording accounting and financial management so that the village hopes to manage its finances and report it transparently, accountably, participatively, and do it in an orderly and disciplined budget both in terms of income and sources of income also manage budget expenditure.

In practice relating to village finances, Law No. 6 of 2014, is considered to bring fresh air to villages in Indonesia. Hi this is because there are 3 features in Law No. 6 of 2014 namely the first amount of funds flowing into the village (Article 72) secondly the income of the village head (article 66) and thirdly the authority of the village head in managing village finances (article 75) with the passing of the Law on this village, then each village will get funding from the central government through the National Budget is approximately 1 billion per year.

Village funds are funds sourced from the state income and expenditure budget intended for villages that are transferred through the district / city village income and expenditure budget and are used to finance governance, development implementers, community development and community empowerment (Government Regulation No. 22 2015) . The village fund in its management is carried out in an orderly manner, obedient to the provisions of the laws and regulations, efficient, economical, effective, transparent and responsible by taking into account the sense of justice and propriety and prioritizing the interests of the local community, listed in government regulation No. 22 of 2015). About the village. The allocation of village funds is calculated based on the number of villages and by taking into account the population, poverty rate, area and geographical difficulty level. Village funds are transferred to the APBDesa. Village fund management in district / city APBD in accordance with statutory provisions in the area of regional management. Village fund management in the APBDesa is carried out in

accordance with statutory provisions in the field of village financial management.

This is in line with information obtained in the Sriwijaya Pos newspaper explaining that the South Sumatra provincial government through the Community Empowerment and Village Government (BMMPD) agency in 2017 will provide funds of Rp. 720,000,000 million for each village on Sriwijaya earth. Head of South Sumatra Office Yusnin explained that there were 2,859 villages in 14 districts / cities in South Sumatra that would receive village funds in 2017. The actual distribution depends on the conditions of each village. But if the average is around Rp. 720,000,000 (seven hundred twenty million rupiah). The village funds will be disbursed in March or April for the first phase of both July and August. For the disbursement system, 60 percent is paid in the second phase, 40 percent, although there are a number of villages in South Sumatra that are subscribed to disasters, the government is not discriminating in funding.

According to the deputy head of the special committee for the Village Law Plan, Budiman Sudjatmiko stated the amount of 10 percent of the balance funds received by the district / city in the regional budget (APBD) after deducting special allocation funds must be given to the village. This means that around Rp.104.6 trillion in funds is shared by around 72,000 villages. So that a total of Rp. 1.4 billion per year per village. The breakdown of the amount of village funds for the city of Prabumulih: Number of villages (15 villages) basic allocation (565,640) per district / city (8,484,706) Formula allocation (3,350,706) so the total village fund (11,835,306) is a source from the Financial Agency 2018 area.

The village government as the recipient of village funds is to include village funds in the village income and expenditure budget. This is intended so that the accountability of the allocated village funds can be integrated with the accountability of the village income budget. It is hoped that through this mechanism financial accountability for village funds can be guaranteed

Since the enactment of Law Number 32 of 2004 concerning regional government, the frequency of corrupt practices has increasingly involved various stakeholders and bureaucratic circles in the regions. Until now the practice of corruption continues to mushroom in government circles, the village as one example of the many corruption cases that are currently in the spotlight of law enforcement and the community. To cope with the occurrence of various kinds of corruption, special strategies from all fields are needed although to eliminate the practice of corruption altogether is impossible but at least there is an effort to suppress the occurrence of corruption is something that is impossible but at least there is an effort to suppress the occurrence of criminal acts of corruption. As article 3 of Law Number 20 of 2001 concerning eradicating criminal acts of corruption states that "Anyone who has the purpose of benefiting himself or another person or a corporation, abuses his authority, opportunity or means because of his position or position that can be detrimental to the country's finances or the country's economy shall be sentenced to life imprisonment or imprisonment for a minimum of 1 year and a maximum of 20 years and or a fine of at least 50 million rupiah and a maximum of 1 billion. ".

Corruption in practice, both in its modus operandi and because of its massive negative impact, has been categorized as an extra ordinary crime in corruption cases involving village officials in various modes, ranging from fraud and irregularities in administrative, physical and budgetary costs. , financial assistance from the province, to the Village Fund (DD). Corruption in Indonesia has been so astonishing that it has even hit regional governments, according to Bambang Poernomo "dissatisfaction has resulted in crises in the socio-political, economic and cultural fields". For this reason, in addition to reducing the conditions that give rise to such crimes, criminal law policies must also be upheld.

B. FORMULATION OF THE PROBLEM

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

1. How is the effectiveness of article 3 of Law Number 20 of 2001 concerning the eradication of corruption against the eradication of village funds (DD) in the village of Tanjung Menang in the city of Prabumulih?
2. What are the obstacles to the ineffectiveness of article 3 of Law Number 20 of 2001 concerning the eradication of corruption against the eradication of village funds (DD) in Tanjung Menang village, Prabumulih city?

C. RESEARCH METHODS

To analyze this research the writer uses empirical research type. Because the title raised refers to Law Number 20 of 2001 article 3 on the handling of criminal acts of misappropriation of village funds

(DD) and case studies in the village of Tanjung Menang, Prabumulih city. This research method is a method used in gathering research data and comparing with predetermined size standards.

This type of research in this research is empirical juridical which in other words is a type of sociology legal research and can also be referred to as field research, which examines the applicable legal provisions and what happens in reality in the community. Or in other words, namely a study conducted on the actual situation or real conditions that occur in the community with a view to knowing and finding the facts and data needed, after the required data is collected then it leads to solving the problem.

D. ANALYSIS AND DISCUSSION

1. Effectiveness of Article 3 of Law Number 20 Year 2001 Concerning Eradication of Corruption Crimes Against Mitigation of Village Funds (DD) in Tanjung Menang Village, Prabumulih City.

The village development government through improving public services in the village, advancing the village economy, overcoming development gaps between villages and strengthening rural communities as subjects of the development of village development priorities namely for development for example village roads, while village empowerment for example is used to empower village BKB

In order to support the implementation of village functions and functions in the administration of government and village development in all aspects in accordance with their authority, Law No. 6 of 2014 provides a mandate to the government to allocate village funds. The village funds are budgeted every year in the APBN given to each village as a source of village income, this policy as well as integrating and optimizing the entire budget allocation scheme from the government to the village that has been there so far. At present there is still a village-based Ministry / Institution (K / L) budget reaching around 0.28% of the total K / L budget in 2017. Going forward, these funds should be integrated in the village fund funding scheme, so that village development becomes optimal

One important aspect in the implementation of village funds is the distribution of village funds from the APBN to the village government. Although the village fund is the right of the village government but in its implementation the distribution of village funds still involves the roles and functions of the district / city government in accordance with their authority. To realize the principles of transparency and accountability and ensure the achievement of the use of village funds, the process of channeling village funds requires several criteria that must be met beforehand both by the village government and by the district / city. Provisions related to channeling village funds are regulated in Minister of Finance Regulation No. 50 / PMK.07 / 2017 concerning management of transfers to regions and village funds, as amended by Government Regulation of Finance Number 112 / PMK.07 / 2017.

Village funds sourced from the National Budget are a form of state recognition of the legal community unit that has the authority to manage and manage government affairs, the interests of the local community based on initiatives, original rights and / or traditional rights. In addition, the granting of village funds is also intended to support the improvement of community welfare and equitable development, and the government's commitment to seriously strengthen the implementation of regional autonomy and fiscal decentralization, as well as the manifestation of the implementation of Nawacita, specifically the third goal of developing Indonesia from the periphery by strengthening regional and village development within the framework Homeland.

The village fund sourced from the APBN is one of the important points of its birth. Village Law No. 6 of 2014 concerning village funds. Village funds are a tangible form of state attention to the existence of villages because with village funds the recognition of original rights (Recognition) and local scale village authority (subsidiarity) can already be seen and felt by the community. The distribution of village funds by the central government to the village government has been going on for 3 years. In 2015 the number of villages Rp. 20.76 Trillion, in 2016 Rp. 46, 98 trillion and in 2017 Rp. 60 trillion for the number of villages 74,954 with the priority of using and empowering local scale community self-management.

There is another problem related to every village in the Pajar Bulan sub-district, namely the existence of the village apparatus budget which considers that the budget documents are not published because they are confidential. Budget details that are not published because they are confidential. Details of the budget which is transparent about governance practices. Whereas the model in good governance in village governance is to do with regard to village financial management in PERMENDAGRI Number 37 of

2007 in article 2 which states that village financial management must be carried out with The principle of transparency is accountable, participatory and carried out in an orderly and disciplined budget.

During this time in the village has received village funds but in reality can not be utilized and managed to the maximum because many people do not fully know about the usefulness of the village funds. The community is only invited in the village community but is not further involved in the management of village funds, so the community participation is only partially involved directly in the management of village funds, and the villages have not yet realized a system of openness and between village officials and the community so that the potential for fraud.

The direction and strategy of the government's village development and village policy can not be separated from the President's vision and mission to develop Indonesia from the periphery by strengthening regions and villages within the framework of the Republic of Indonesia. These efforts include the allocation of village funds which are more focused on poverty alleviation and addressing disparities between villages. The 2015-2019 National Medium-Term Development Plan (RPJMN) is a vision, mission and agenda (Nawa ideal) that serves as a guideline for ministries / institutions in formulating strategic plans and bases in monitoring and evaluating the RPJMN. Can also be a reference for people who participate in the implementation of normal development.

Evaluation is needed to ensure that there are no irregularities in every stage of village fund management. The evaluation is carried out in stages from the central to the regional level. The factors that cause corruption are as follows:

1. Weak religious and ethical education
2. Colonialism. A foreign government does not upload the loyalty and obedience needed to stem corruption.
3. Lack of Education. But in reality now corruption cases in Indonesia are carried out by corruptors who have high intellectual abilities, educated and respected so that this reason can be said to be inappropriate.
4. Poverty. In the corruption case that is rife in Indonesia, the perpetrators are not based on poverty but greed, because they are not from the poor but the conglomerates
5. The absence of strict sanctions.
6. Substantial environmental scarcity for anti-corruption actors.
7. Structure Goverment.
8. Radical change. When the value system undergoes a radical change, corruption emerges as a transitional disease.
9. State of society. Corruption in a bureaucracy can reflect the state of society as a whole.

The most important factor in the dynamics of corruption is the moral and intellectual circumstances of community leaders. Circumstances and intellectuals in the configuration of other conditions. Several factors can tame corruption, although they will not be discussed.

1. Positive attachment to government and spiritual involvement and the task of national and public progress and bureaucracy.
2. Efficient administration and appropriate structural adjustment of machinery and governance rules so as to avoid creating sources of corruption.
3. Favorable historical and sociological conditions.
4. The functioning of an anti-corruption system.
5. Influential group leadership with moral and intellectual standards.

Crime is a social phenomenon that occurs in society, until now efforts to prevent and deal with it are still carried out in various ways. Crime must be eradicated because it impedes the achievement of people's welfare, as Saparinah Sadli said that deviant behavior is a real threat or threat to the social norms that underlie life or social order, can cause individual tensions or social tensions, and is a threat real or potential for the continuation of social order.

B. Ineffective Constraints Article 3 of Law Number 20 Year 2001 concerning Eradication of Corruption Crimes Against Mitigation of Village Funds (DD) in Tanjung Menang Village.

Achievement of village funds so far still needs improvement. The task of the government to plan, manage and oversee village funds in the future will be even tougher. The government is always working to make village funds more pro-poor. In addition, the compiled regulations also produce an effective, efficient and accountable village fund management system so that the government's goals through the allocation of village funds can be realized. For this

reason, it is necessary to strengthen institutional capacity and human resources, both the village government community apparatus as well as village mentoring personnel, and to improve transparency, accountability and supervision in managing village funds and village finances.

Based on the results of interviews with the Village Fund Supervisory Agency stated that the constraints of ineffectiveness Article 3 of Law Number 20 of 2001 concerning the eradication of corruption against the eradication of village funds (DD) in the village of Tanjung won the city of Prabumulih, namely because:

1. Weak Supervision
   In general, supervision is divided into two, namely internal supervision (functional supervision and direct supervision by the leadership) and external supervision (supervision from the legislature and the public)
2. In terms of law
   Factors can be seen from two sides, on one side of the legislative effect and the other side of weak law enforcement and also the abuse of the defendant's authority as village head by not organizing village governments based on budget policies set by the village consultative body (BPD) and contrary to regulations legislation.
3. Lack of community participation.
   It has become a mandatory law for the community to participate in combating corruption. There are at least four reasons why people must actively participate in fighting corruption. First by looking at the roots of corruption. Second, the impact of corruption on society. Third, the benefits of fighting corruption.
4. Weak government officials and law enforcement in dealing with corruption.

The eradication of corruption against the eradication of village fund (DD) in the village of Tanjungwin, the city of Prabumulih can be identified through the results of direct interviews with the Tanjung Menang village government as the agency in charge of implementing village fund management, up to the evaluation and reporting stages of fund management villages in enhancing physical development in Tanjung Menang village, Prabumulih city. Both the Tanjung Menang village government, Prabumulih city. Both the Tanjung Menang village government of Prabumulih city and the village community stated the constraints on the ineffectiveness of Law Number 20 of 2001 article 3 on the handling of criminal acts of misappropriation of village funds (DD) are as follows:

1. Human Resources
   The intended resource here both relates to the amount and ability of the village government in managing village funds, more specifically the ability of the village head and treasurer to manage the allocation of village funds obtained from the village budget. Interview with Mr. Asmedi as head of the Tanjung Menang village, Prabumulih city.
   The quality of human resources that is still low in the village government of Lakapodo is very influential with the planning to be carried out so that it is necessary to improve the quality of human resources in the village government apparatus so that the village government apparatus can increase their respective expertise in accordance with the knowledge that the village apparatus has.
   The results of the above interview are in line with Mr. Rudianto as the Tanjung Menang village secretary in the city of Prabumulih stating that:
   The quality of human resources in the village of Tanjung Menang in the city of Prabumulih as an internal factor is generally classified as very low, which as far as education from the village government apparatus is lacking, but actually this problem can be overcome by providing guidance and opportunities for training.
   The results of an interview with Mr. Dedes Pratama as treasurer of the village of Tanjung Menang, Prabumulih, stated that:
   We have difficulty in preparing a letter of accountability for the subsequent disbursement of funds, due to the weakness of human resources by village officials, most do not understand how to operate a computer properly so that they are slow to complete the letter of accountability, in addition some of the data is sometimes not stored. This is evidenced by the inability to carry out village fund management activities in making accountability reports (LPJ) so that it must use the assistance of a third party that is not from the Team for implementing village fund management and is also not part of the

Tanjung Menang village apparatus in the city of Prabumulih.

2. Information
   Information provided by the village government regarding the management of village funds is unclear. Aside from having never conducted socialization before, in the village development stage the village government also merely stated the nominal village funds obtained. However, there is no further explanation related to the objectives of village fund management, how to use the budget or how the community plays a role in each stage of village fund management.
   From the research results the lack of information obtained by the community from the district / city government so that people do not know at all their function as a direct supervisory team in managing the allocation of village funds, but the community only knows that there is and has been implemented development in the village.
3. Community Participation
   The role of community participation in the management of village funds cannot be separated from community involvement, because the community is part of the members of the village administration. Therefore as a village government in this matter. The village head and village officials need to be aware that in managing the allocation of village funds the participation of village communities is needed so that the financial management of village funds can be allocated according to plan such as the construction of dug wells and nutmeg seed procurement. However, what happened in the village of Tanjung Menang in the city of Prabumulih did not involve community participation in the management of village fund allocations, this was indicated by the small number of people present as well as those who expressed aspirations / opinions related to the activities to be carried out.

E. CONCLUSION

1. The effectiveness of the implementation of article 3 of law No. 20 of 2001 concerning the eradication of corruption crime against countermeasures of misappropriation of village funds (DD) in the village of Tanjung Menang Prabumulih city has not been effective because of a 1 (one) year 6 (six) month criminal sentence and a fine of Rp. 50,000,000 (fifty million rupiahs) no / less effective. For that reason, with just a penal policy to prevent and eradicate corruption, a non-penal policy is also required (looking for factors that cause corruption and social policy development carried out by the government must touch the interests of the public, rational and lame.
2. The ineffective obstacle of Law Number 20 of 2001 concerning the Eradication of Corruption Crimes Against Repetition of Misappropriation of Village Funds (DD) in the village of Tanjung Menang, Prabumulih City is due to:
   (1) Weak Oversight. In general, supervision is divided into two, namely internal supervision (Supervision Functional and direct supervision by leaders) and those that are external (Oversight from the Legislature and the public)
   (2) In terms of law. The legal factor can be seen from two aspects of the legislation aspect and the other side is the weak law enforcement in carrying out village government based on budget policies set by the village consultative body (BPD) and contrary to the laws.
   (3) Lack of community participation. It is a mandatory law for the community to participate in combating corruption. There are at least four reasons why people must actively participate in fighting corruption, first by looking at the roots of corruption. Second, the impact of corruption on society. Third, the benefits of fighting corruption.

F. REFFERENS

Aloysius Wisnubroto, 2009, Kebijakan Hukum Pidana dalam Penanggulangan penyahgunaan komputer, (Universitas Atmajaya, Yogyakarta)

Abdul latif dan Hasbih Ali, 2011. Politik Hukum. PT. Sinar Grafika, Jakarta.

Barda Nawawi Arief,2010 Bunga Rampai Kebijakan hukum dalam sketsa (Fakultas Hukum UNDIP Semarang)

Bellefroid dan Moempoeni Martojo, 2010, Kapita selekta hukum pidana ctk ketiga (Citra Aditya Bandung)

Clerence J Dias Research On legal service and poverty : its relevance to the design of legal service program in developing countries wash UL Q 147 (1975) p 150.

Imam Saukani dan A Ahsin Thoari 2010, Dasar-dasar politik hukum, PT Raja Grafindo Persada, Jakarta.

Marpaung Leden 2009, Azaz-azaz teori praktek hukum pidana, Sinar Grafika, Jakarta

Muladi dalam syaipul bahkri 2010. Pidana denda dan korupsi. Total Media. Yogyakarta.

Moh. Mahpud M.D 2009. Pergulatan Politik Hukum dan hukum di indonesia. Gama media, Yogyakarta.

O.C.Kaligis 2006. Pengawasan terhadap Jaksa selaku penyidik tindak pidana khusus dalam pemberantasan korupsi, PT Alumni Bandung.

Raida L Tobing dkk 2011. Efektivitas Undang-undang Money Loundering, badan Jakarta Pembinaan Hukum Nasional. Kementrian Hukum dan HAM RI.

Soerjono Soekanto 2005, Efektipitas Hukum dan Peranan Saksi, Remaja Karya Bandung.

Perundang – undangan

Peraturan menteri dalam negeri No. 37 tahun 2007 tentang pengelolaan keuangan desa.

Undang-undang Nomor 20 tahun 2001

Permenpan Nomor 4 tahun 2007.

Undang-undang Nomor 6 tahun 2014.

Dokumen, Jurnal dan internet

Dokumen Badan keuangan daerah 2017

Departemen pendidikan dan kebudayaan 2008 Kamus kamus besar Indonesia, Balai Pustaka, Jakarta.

Surat kabar online http:/media press.com/diakses 11 mei 2018 pukul 17.00 wib.

www.sripo.com terbit Rabu 1 maret 2017 diakses 11 mei 2018 pukul 17.05 wib.

www.sripo.com. Diakses 11 mei 2018 pukul 17.10 wib.

FAKE VACCINES DISTRIBUTION IN CHILDLEGAL PERSPECTIVE PROTECTION

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ABSTRACT

Children are the future of nation because children will become adults and will replace us in running the government, this will determine the progress of a country. The future of the nation depends on the quality life of children today. To achieve the goal to be a developed and strong country, of course we must prepare children or future generations. Investing in children is very important on sustainable development and progress of a nation. Therefore, Government is obliged to protect the rights of children to ensure the growth and development into a healthy and resilient adult human being.

In Indonesia the law in terms of protecting children rights is materially quite good, many laws govern the protection of children's rights. In the 1945 Constitution article 28 B every child has the right to survive, growth and development and is entitled to protection from violence and discrimination . In this article clearly thatthe government is obliged to provide protection of children from violence that can occur in the community both from the family environment it self or in the wider community. The Law of the Republic Indonesia number 4 of 1979 concerning children welfare, the government guarantees the welfare of children with the aim of ensuring that children can grow and develop into healthy, intelligent and resilient adults.

One case of the circulation of fake vaccines distribution is a threat to the protection of children to obtain the right to survive and also the right of child development and development, where children are the main objects affected. Giving the fake vaccines causes the child's immunity against certain diseases is not optimal, so the child is vulnerable to a disease. If the child often suffers from disease will be able to interfere with child development and development can even cause death. Giving fake vaccines can also cause the incidence of certain diseases will increase and even become an outbreak.

In the case of this fake vaccine the government has failed to provide protection to children, in terms of providing safe health services for children. In resolving this case the government must be wise, because improper settlement will bring bad impacts, the case of vaccine forgery will be repeated later.

Keywords: Fake Vaccines, Child Protection

INTRODUCTION

Health is a human right and one of the elements of well-being that must be realized in accordance with the ideals of the Indonesian people as referred to in the Pancasila and the 1945 Constitution of the Republic of Indonesia, the State is obliged to protect and ensure that every citizen gets good health insurance. In accordance with the objectives of Republic Indonesia listed both in the preamble to the 1945 Constitution of the Republic of Indonesia and in the Body or Contents of the 1945 Constitution. The objectives of the Republic of Indonesia are to protect all the people of Indonesia and all Indonesian blood and to advance general welfare, educating the nation's life. Health is also an important thing needed by the human body. Efforts to improve the quality of human life in the health department is very broad and comprehensive. Efforts to improve health for the community, both physical and non-physical, have been made early, one of which is by providing vaccines since they were children. Early childhood vaccines are urgently needed by children to protect the body from disease. Because children are the next generation of this nation, to produce a future generation that is reliable, strong and tough, needs to be prepared early on. One effort to create the next generation, the children must be tough, healthy and strong, and resistant to the disease. For the creation of children who are resistant to the disease, children must be immunized with vaccines. The efforts to prevent disease and improve health services. To improve health, it is necessary to provide vaccines for the body of a toddler or children.

Lately there has been a case of Fake Vaccines, it has been revealed that the circulation of fake vaccines has made people noisy recently. Various criticisms from some community leaders, especially child rights advocates, have urged the government to execute those responsible for the distribution of fake vaccines. Unfortunately, fake vaccines have been circulating in the community for 13 years. Therefore, accusations appear to some who are considered most responsible for this fake vaccine. Therefore, accusations appear to some who are considered most responsible for this fake vaccine. Fake vaccine case, does not give any effect and efficacy to the child, or can even be dangerous for the child himself. The state as a public authority has an obligation to protect Indonesian children from all forms of actions that will harm the children themselves. The fake vaccine case is not just a matter of drug counterfeiting and loss for consumers which has been well regulated in Law No. 36 of 2009 concerning Health as well as Law No. 8 of 1999 concerning Consumer Protection, but the issue of child protection must be given by the Government, lest children should be victims of powerlessness.

PROBLEM STATEMENT

1. In the case of fake vaccines the perpetrators are only charged under Article 197 of Law Number 36 Year 2009 regarding Health, the Consumer Protection Act, and the Law on Money Laundering.
2. Circulation of fake vaccines in the perspective of child protection law.

LITERATURE REVIEW

1. Fake Vaccines

Vaccines contain "viruses or attenuated bacteria" that are injected into the body by injection or by passing on which produce antibodies that function to provide immunity against a disease. In other words, vaccines can make a person's endurance better. However, if the vaccine given does not contain sufficient "virus" to increase endurance. Of course this will have a negative impact on health.

The purpose of vaccination is to provide immunity so that children are immune to an illness. With the immunity of children rarely contract a disease. Thus it will not interfere with or hinder the child's growth and development so that the child will experience optimal growth and development.

The impact of fake vaccines on children is most likely to occur so children are not immune to certain types of diseases. For example a child being vaccinated with influenza, if the vaccine given is fake the effect the body will have no resistance in preventing influenza virus infection. If this happens, it is necessary to reconsider giving a repeat vaccine to the child.

However, please note that the administration of fake vaccines depends on what content is present in the falsified liquid. If the vaccine contains harmful substances, then it is possible for fake vaccines to have a negative impact on children.

Fake vaccines, in the long run, can endanger public health in general and national security. From research conducted in India, it was concluded that the immunization program can increase the growth of children in certain areas in India.[1] From the research data it is found that children with complete immunization status have better growth than children whose immunizations are incomplete or not immunized. This shows the importance of immunization in children to maintainoptimal child growth and development. The explanation is that with the immunization program children have immunity against certain diseases so that the morbidity rate decreases. With healthy children the nutritional status of children becomes better.

Children who get fake vaccines theoretically can potentially not get immunity or the immune system. Children who get fake vaccines have the potential to not get antibodies, which can further cause disease outbreaks and can even cause a disease to develop into an epidemic. And of course it will cause more victims and even will cause death. If any of these cases occur, the makers of fake vaccine makers and dealers can be equated as killers, not just makers and dealers of fake drugs.

Vaccines really help the human body in dealing with a virus that will attack us someday. Because not all human bodies have the immunity that is able to resist attacks from the virus. Because not all human bodies have the immunity that is able to resist attacks from the virus. Therefore the government recommends giving vaccines to children in order to ward off viruses that are in the body. A rumor circulated that a fake vaccine had been circulated. The fake vaccine has been circulated and given by several health facilities and medical personnel. The presence of fake vaccines in the community at this

[1] Tobenna D. Anekwe, Santos Khumar The effects of a vaccination program on child anthropometry: evidence from India's Universal Immunization Program. Journal of Public Health, Volume 34, Issue 4, December 2012, Pages 489–497, https://doi.org/10.1093/pubmed/fds032.

time raises concerns for parents as well as the impact on their children who will be vaccinated.Spread of fake vaccines carried out by fake vaccine producers or distributors often trick customers by saying the vaccines offered are genuine vaccines. Manufacturers and distributors of fake vaccines also take advantage of opportunities when hospitals and clinics are short of vaccine stocks from official distributors. They also take advantage of the needs of hospitals looking for vaccines at prices that are much cheaper than usual.

2. **Child protection** :

Children as people who are physically and mentally do not have any ability, making children vulnerable to be treated improperly, therefore, so that children grow up to be strong and healthy children should be given good enough immunity. Giving vaccines to children is one of the efforts to provide immunity against these children.

At present there are quite a lot of understandings of children in Indonesia and their meanings differ according to various laws.

According to RI Law No. 23 of 2002 concerning Child Protection "Article 1 number 1 is someone who is not yet 18 (eighteen) years old, including children who are still in the womb."[2]

According to Law No.25 of 1997 concerning employment Article 1 number 20 "Child is a man or woman less than 15 years old"

According to RI Law No.21 of 2007 regarding the eradication of trafficking in persons Article 1 number 5 "A child is someone who is not yet 18 (eighteen) years old, including children who are still in the womb. "

According to Law No.44 of 2008 concerning Pornography Article 1 number 4, "A child is someone who is not yet 18 (eighteen) years old"

According to Law No. 3, 1997 concerning Juvenile Court Article 1 number 1 "Children are people who in the case of Naughty Children have reached the age of 8 (eight) years but have not reached the age of 18 (eighteen) years and have never been married"

According to RI Law No. 23 of 2002 concerning Child Protection, Article 1 number 1 "A child is someone who is not yet 18 (eighteen) years old, including children who are still in the womb."

According to Law No. 4 of 1979 concerning Child Welfare Article 1 number 2, "A child is someone who hasn't reached the age of 21 (twenty one) years and has never been married."

Convention on the Rights of the Child, Children are every human being under the age of 18, except based on what applies to the child it is determined that adulthood is reached earlier

Law No.39 of 1999 concerning Human Rights Article 1 number 5 "Children are every human being under the age of 18 (eighteen) years and not yet married, including children who are still in the womb if it is in their interest."

Article 45 of the Criminal Code "Children who are not yet mature if a person is not yet 16 years old"

Article 330 paragraph (1) Civil Code "A person cannot be said to be an adult if the person is not yet 21 years old, unless a person is married before the age of 21 years"

3. Legal basis related to child protection:

Convention on the Rights of the Child adopted by the General Assembly of the United Nations on November 20, 1989[3]

The United Nations has stated that:

1. Children have the right to care and special assistance.
2. Believe that the family, as a basic group of people and the natural environment for the growth and welfare of all members and especially children, must be given the necessary protection and assistance in such a way that they can fully assume their responsibilities within the community.
3. Recognize that children, for the full and harmonious development of their personalities, must grow in their family environment in an atmosphere of happiness, love and understanding.
4. Considering that children must be fully prepared to live in an individual and community life, and be encouraged by the ideals expressed in the Charter of the United Nations, and especially in the spirit of peace, honor, tolerance, freedom, equality and solidarity.
5. Bearing in mind that the need to provide special care for children, has been stated in the Geneva Declaration on the Rights of the Child in 1924 and in the Declaration of the Rights of the Child which was approved by the General Assembly on November 20, 1959 and recognized in the

[2] Law of the Republic of Indonesia Number No. 23 of 2002 concerning Child Protection.

[3] Convention on the Rights of the Child adopted by the General Assembly of the United Nations on November 20, 1989

Universal Declaration on the Rights Human Rights, in the International Covenant on Civil and Political Rights (especially in articles 23 and article 24), in the International Covenant on Economic, Social and Cultural Rights (especially article 10) and in the statutes and instruments used relevant from specialized bodies and international organizations that pay attention to child welfare.

6. Bearing in mind that as indicated in the Declaration on the Rights of the Child, "the child, for reasons of physical and mental immaturity, needs special protection and care, including appropriate legal protection, both before and after birth".
7. In view of the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Increase Placement and Use Nationally and Internationally; United Nations Minimum Standard Rules, for the administration of Juvenile Justice (Beijing Rules); and the Declaration on the Protection of Women and Children in Emergencies and Armed Conflicts.
8. Recognize the importance of international cooperation to improve the livelihoods of children in each country, especially in developing countries.

Law Number 39 of 1999 concerning Human Rights[4]

This law regulates the protection of human rights including children's rights. According to this Law, a child is meant, every human being under 18 (eighteen) years and not married, including children who are still in the womb.

Law Number 39 of 1999, in the Tenth Part concerning children's rights regulates the rights of children as follows:

1. The child's right to protection of parents, family, community and the State. (Article 52 (1))
2. Children's rights are human rights and for their interests the children's rights are recognized and protected by law even from the time of their womb. (Article 52 (2))
3. The child's right to live, maintain life, and improve their standard of living from the womb. (Article 53 (1))
4. The child's right to a name and citizenship status from birth. (Article 53 (2))
5. The right of every child with physical and / or mental disabilities to receive special care, education, training and assistance at the expense of the State, to guarantee that their lives are in accordance with human dignity, increase self-confidence, and be able to participate in community, national and state life. (Article 54)
6. The right of the child to worship according to his religion, think, and express his expression according to the level of intellect and age under the guidance of a parent or guardian (Article 55)
7. The child's right to know who his parents are, raised, and cared for by his own parents. (Article 56 (1))
8. The right of children to be cared for or adopted by others, in accordance with statutory provisions, if their parents are unable to raise and care for their children properly. (Article 56 (2))
9. The right of children to be raised, nurtured, cared for, educated, directed, and guided their lives by parents or guardians to adulthood in accordance with statutory provisions. (Article 57 (1))
10. The right of the child to get adoptive parents or guardians based on a court decision if both parents have passed away or because of a valid reason cannot carry out their obligations as real parents. Provided that the adoptive parents or guardians can carry out their obligations as real parents. (Article 57 (2) and (3))
11. The right of children to get legal protection from all forms of physical and mental abuse, neglect, ill-treatment and sexual harassment while in the care of their parents or guardians, or other parties or those responsible for the care of the child. (Article 58 (1))
12. The child's right to protection, so that parents, guardians or caretakers of children who carry out any form of physical or mental abuse, neglect, ill-treatment, and sexual abuse including rape and / or murder of children who should be protected should be subject to punishment. (Article 58 (2))
13. The child's right not to be separated from his parents against his own will, unless there are legal grounds and rules that show that separation is in the best interest of the child. (Article 59 (1))
14. The right of children to continue to meet directly and have a personal relationship permanently with their parents remains guaranteed by law. (Article 59 (2))

[4] Republik Indonesia., Undang-Undang R.I Nomor 39 Tahun 1999 tentang Hak Asasi Manusia

15. The right of children to obtain education and teaching in the context of personal development in accordance with their interests, talents, and intelligence levels. (Article 60 (1))
16. The right to seek, receive, and provide information in accordance with the level of intellect and age for the sake of development itself in accordance with the values of decency and propriety. (Article 60 (2))
17. The child's right to rest, mingle with peers, play, play, and be creative in accordance with their interests, talents, and intelligence levels for the sake of his development. (Article 61)
18. The right of children to obtain appropriate health and social security services, in accordance with their physical and mental spiritual needs. (Article 62)
19. The right of children not to be involved in incidents of war, armed disputes, social unrest, and other events that contain elements of violence. (Article 63)
20. The right of the child to obtain protection from economic exploitation activities and any work that endangers him so that it can interfere with his education, physical health, morals, social life, and mental and spiritual. (Article 64)
21. The right of children to obtain protection from exploitation and sexual abuse, kidnapping, child trafficking, as well as from various forms of abuse of narcotics, psychotropic substances and other additives. (Article 65)
22. The child's right not to be subjected to inhumane torture, torture or sentence. (Article 66 (1)

Law of the Republic of Indonesia Number 23 of 2002 concerning Child Protection

Article 4 states: "Every child has the right to be able to live, grow, develop, and participate appropriately in accordance with human dignity and dignity, and get protection from violence and discrimination."

Article 8 states: "Every child has the right to receive health and social security services in accordance with physical, mental, spiritual and social needs."

Article 44 states:

1. The government must provide facilities and carry out comprehensive health efforts for children, so that each child gets an optimal degree of health from the womb.
2. Provision of comprehensive health facilities and operations as referred to in paragraph (1) is supported by community participation.
3. Comprehensive health efforts as referred to in paragraph (1) include promotive, preventive, curative, and rehabilitative efforts, both for basic and referral health services.
4. Comprehensive health efforts as referred to in paragraph (1) shall be carried out free of charge for disadvantaged families.
5. Implementation of the provisions referred to in paragraph (1), paragraph (2), paragraph (3), and paragraph (4) shall be adjusted to the provisions of the applicable laws and regulations.

Article 45 states:

1. Parents and families are responsible for maintaining the health of children and caring for children from the womb.
2. In the case of parents and family who are unable to carry out the responsibilities referred to in paragraph (1), the government is obliged to fulfill them. (3) The obligations referred to in paragraph (2), their implementation is carried out in accordance with the provisions of the legislation in force.

Article 46 states: The state, government, family and parents are obliged to make sure that children born avoid diseases that threaten survival and / or cause disability.

Article 47 states:

(1) The state, government, family and parents are obliged to protect the child from the organ transplant attempt for another party.
(2) The state, government, family and parents are obliged to protect children from the following actions:
    1. taking the child's organs and / or children's body tissues without regard to the child's health;
    2. the sale and purchase of organs and / or tissues of the child's body; and
    3. health research that uses children as research objects without the permission of parents and does not prioritize the best interests of children.

RESEARCH METHOD

The writing approach used is the statutory concept approach, the conceptual approach, the case approach.

The statute approach is an approach that is carried out by studying the theory related to the title of the writing, then tested with the laws and regulations that

govern it, after that it is applied to the problems that are used as the object of writing.

Conceptual approach is an approach that is done by referring to legal principles that can be found in legal doctrines and the views of legal experts.

ANALYSIS AND DISCUSSION

1. In the case of fake vaccines the perpetrators were charged under Law Number 36 of 2009 concerning Health, the Consumer Protection Act, and the Law on Money Laundering.

Vaccination plays an important role in one's health in maintaining the body's immunity against disease. Vaccines are generally administered to children from an early age to 18 years.[5]

A vaccine is a biological product made from germs, a component of germs that has been weakened, killed, or genetically modified and is useful for actively stimulating the body's immunity. [6] Acts of crime related to counterfeit vaccines are a form of counterfeiting of drugs or related to pharmacy that is contained in Law No. 36 of 2009. In this law has been regulated what actions are prohibited relating to producing or distributing pharmaceutical preparations and / or medical devices that do not meet standards.[7]

That the perpetrators of the crime of counterfeiting vaccines can be snared using articles 196, 197 and 198 of Law No. 36 of 2009 concerning Health, besides that it is also snared with article 62 jo article 8 of Law No. 8 of 1999 concerning Consumer Protection.

Whereas the criminal provisions contained in article 196 state: Any person who intentionally produces or circulates pharmaceutical preparations and / or medical devices that do not meet the standards and / or safety, efficacy or usefulness, and quality requirements as referred to in Article 98 paragraphs (2) and paragraphs (3) shall be liable to a maximum imprisonment 10 (ten) years and a maximum fine of Rp1,000,000,000.00 (one billion rupiah).

Article 197 of Law No. 36 of 2009, states: Any person who intentionally produces or circulates pharmaceutical preparations and / or medical devices that do not have a marketing authorization as referred to in Article 106 paragraph (1) shall be liable to a maximum imprisonment of 15 (fifteen) years and a maximum fine of Rp1,500,000,000 , 00 (one billion five hundred million rupiah). Then the provisions of article 62 of Law No. 8 of 1999 concerning Consumer Protection is a criminal provision against the prohibitions set out in article 8 of Law No. 8 of 1999.

Law No. 8 of 1999 is intended to protect consumers from fraudulent deeds of business actors. With this law, consumers are expected to get legal protection from cheating, which causes harm to consumers.[8]

The issue of criminal liability is very closely related to the element of error. This can be seen in Article 6 paragraph (2) of Law Number 48 of 2009 concerning Judicial Power which states that: "no person can be convicted of a criminal act, except if the court, due to a valid evidentiary instrument according to the law, has the conviction that someone considered can be held responsible, has been guilty of an act that was indicted against him. [9] "From the provisions of the article it is clear that the element of error is a very decisive element of the consequences of a person's actions in the form of criminal conviction. To determine the existence of mistakes a person must meet several elements, namely: 1) the ability to be responsible to the maker, 2) the inner connection between the maker with his actions in the form of intentions (dolus) or negligence (culpa) which is called a form of error, 3) there is no reason for erasing or there is no forgiveness.[10] Based on this, the criminal liability requirements for perpetrators who produce or distribute fake vaccines must meet all three elements of criminal liability. The first thing is that the offender has the ability to be responsible, he knows or realizes that his actions are contrary to the law and determines his will in accordance with his awareness. Furthermore, the perpetrators do it intentionally or negligently. Deliberation is the willingness to do or not to do an act that is prohibited or ordered by law.[11] In this regard the Health Law prohibits acts of producing or distributing

[5] Hartono Gunardi dkk: *Jadwal imunisasi anak usia 0 – 18 tahun rekomendasi IDAI 2017*, Sari Pediatri 2017;18(5):417-22

[6] Direktorat Jenderal Bina Kefarmasian dan Alat Kesehatan, Direktorat Bina Obat Publik dan Perbekalan Kesehatan, 2009, *Pedoman Pengelolaan Vaksin*, *Departemen Kesehatan RI*, Jakarta, hal. 3.

[7] Law of the Republic of Indonesia Number 36 of 2009 concerning Health

[8] Law of Republic of Indonesia Number 8 of 1999 concerning Consumer Protection.

[9] Law of the Republic of Indonesia Number 48 of 2009 concerning Judicial Power

[10] Sudarto, 1983, Hukum dan Perkembangan Masyarakat, Sinar Baru, Bandung, hal. 73

[11] Leden Marpaung, 2009, Asas-Teori-Praktik Hukum Pidana, Sinar Grafika, Jakarta, hal. 13

pharmaceutical preparations that do not meet safety standards and / or requirements (Article 196) and which do not have a marketing authorization (Article 197).Based on Article 1 number 4 of the Health Law, pharmaceutical preparations are drugs, medicinal substances, traditional medicines, and cosmetics, therefore vaccines can be categorized as pharmaceutical preparations. Regarding negligence will occur if the offender does not use his mind or knowledge properly, in this case the offender who manufactures and circulates fake vaccines are aware of the effects caused or unexpected consequences will arise in the future from producing or circulating fake vaccines. The last element is that there is no excuse for forgiveness or there is no excuse for forgiveness, so the offender is not sick or mentally disturbed in accordance with Article 44 of the Criminal Code and there is no justification, where the perpetrator's actions are not justified by law.

Criminal sanctions against perpetrators producing or distributing fake vaccines in the form of imprisonment and also a fine as stated in Article 196 and Article 197 of the Health Act. The conditions for criminal liability against those who produce or distribute fake vaccines are that they must fulfill the element of error, namely the ability to be responsible to the maker, the inner connection between the maker and his actions in the form of intent (dolus) or negligence (culpa) which is referred to as a form of error, and the absence of reasons for the elimination of errors or no excuses for forgiveness, as well as fulfilling the elements contained in Article 196 and Article 197 of the Health Act.

2. **Circulation of counterfeit vaccines in the perspective of child protection law**.

From the previous explanation it can be concluded the impact of fake vaccines is very influential on the level of immunity of children, so children are vulnerable to an illness. Children will often experience pain that can affect nutritional status. It will further disrupt the child's growth and development.

Besides giving immunization with fake vaccines can hamper the purpose of immunization, which is to reduce the morbidity rate for infectious diseases and can even cause epidemics.

Given the impact on children, fake vaccines can prevent children from growing and developing optimally. Fake vaccine cases should be seen as a violation of child protection, the main thing is because the victims are children. If you see the provisions of Law No. 23 of 2002, which has been amended by Law No. 35 of 2014 and finally with Perpu No. 1 of 2016, there is no single article that regulates children who are victims of a crime resulting from a product and criminal sanctions for perpetrators who commit crimes in a product. Even though children have become the target of illegal products.

The makers of fake vaccines are actually aware that vaccines are made to provide immunity to children, thus the makers of fake vaccines are aware that children will be victims of these actions. That although it is true that the manufacture of fake vaccines and drugs that are made not in accordance with their properties is a violation of Law No. 36 of 2009 and consumers who have been harmed by fake vaccines are also acts that violate the provisions of Law No. 8 of 1999 concerning Consumer Protection, but actually when seen, the target of victims of manufacturing fake vaccines are children, while children must be protected from all forms of physical and psychological violence which are detrimental to the child itself, then here it has been the Child Protection Act applies.

CONCLUSION

Children are the nation's next generation that must get the attention of all parties, including families, communities and governments. To prepare the next generation, a child who is healthy, strong and resistant to all kinds of diseases is needed. To be resistant to the disease, children must be immunized by giving the vaccine. Circulation of fake vaccines is dangerous for the child himself. The state as a public authority has an obligation to protect Indonesian children from all forms of actions that will harm children. The fake vaccine case is not just a matter of drug counterfeiting and loss for consumers which has been well regulated in Law No. 36 of 2009 concerning Health as well as Law No. 8 of 1999 concerning Consumer Protection, but the issue of child protection must be prioritized by the Government. For this reason, it requires intelligence and courage of law enforcers to ensnare the makers of fake vaccines with child protection laws, by making appropriate legal constructions on the basis of case mapping as there is an element of the perpetrators' actions and the main victims are children.

REFERENCES

Hartono Gunardi dkk: *Jadwal imunisasi anak usia 0 – 18 tahun rekomendasi IDAI 2017*, Sari Pediatri 2017;18(5):417-22

Marpaung, Leden, 2009, Principles-Theory-Practice of Criminal Law, Sinar Grafika, Jakarta.

Sudarto, 1983, Law and Community Development, Sinar Baru, Bandung.

The Convention on the Rights of the Child, approved by the United Nations on November 20, 1989 and entered into force in Indonesia on August 25, 1990, with the ratification of the Convention through Presidential Decree No. 36 of 1990 dated 25 August 1990.

Tobenna D. Anekwe, Santos Khumar; *The effects of a vaccination program on child anthropometry: evidence from India's Universal Immunization Program*. Journal of Public Health, Volume 34, Issue 4, December 2012, Pages 489–497, https://doi.org/10.1093/pubmed/fds032.

Law of the Republic of Indonesia Number 36 of 2009 concerning Health

Law of the Republic of Indonesia Number 48 of 2009 concerning Judicial Power

Republic of Indonesia, Law R.I Number 39 of 1999 concerning Human Rights

The 1945 Constitution of the Republic of Indonesia. 4 of 1979 concerning Child Welfare.

Law of the Republic of Indonesia Number. 8 of 1999 concerning Consumer Protection.

Law of the Republic of Indonesia Number. 23 of 2002 concerning Child Protection.

Law of the Republic of Indonesia No. 35 of 2014 concerning Amendments to Law No. 23 of 2002 concerning Child Protection.

Government Regulation in Lieu of Law No. 1 of 2016 Second Amendment to Law No. 23 of 2002 concerning Child Protection

PATRONAGE OF FUNDAMENTAL RIGHTS AGAINST DISCRIMINATION OF LEGACY CULTURE IN BATAK KARO CIVILIZATION

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ABSTRACT

The legacy culture of Batak Karo civilization is ensured by the patrilineal kinship system. Patrilineal Kinship System occurs based on honest wed of Batak Karo matrimonial, particularly married brides coalesce to bridegroom's faction, therefore Batak Karo brides are not illegible to an heiress. As time pass, the palladium of human rights enlightenment towards discrimination of the legacy culture evolve, acquiesce to women's right and equity degree. On the occasion that legal culture issue remains to disconcert after colloquy, law enforcement will be implemented by an adjudicator under the decision of MA 179 / Sip / 1961 which declared gender equality towards legal culture. In other respect to the Supreme Court decision, the patronage is fortified by supporting aspects, such as economy, education, religion, and immigration. This improvement is the most acceptable legacy culture array by Batak Karo civilization in terms of the heiress, but in the case of the widow's heirs remain unacceptable.

Legacy law is part of Customary law in Indonesia, which rooted as tradition, intimacy, religion, concrete and visual, susceptible and transparent, tentative and adaptive law verbally or colloquy. In Batak Karo civilization, legal plurality is an irrefutable reality, in which men are more superior than women. On the contrary, there are tendencies women might get heiress from grant and testament as the generosity of his brother or sign of affection or appreciation. The patrilineal legacy culture is based on bilateral agreements.

Study of Batak Karo legacy culture apprehends on the apportionment and patronage of fundamental rights against discrimination of legacy culture in the Batak Karo civilization which elucidates the law for women's role and gender equity.The study of this literature utilized secondary data, categorized into juridical normative legal where the accession is based on theoretical abstract and statute approach. Supreme Court Decree No. 179 / K / Sip / 1961 made an amendment to customary legal of the Batak Karo tribes to regulate the apportionment of legacy between men and women. Therefore, the apportionment of legacy is regulated based on the principle of justice and compassion to all women of Batak Karo Civilization with respects.

Keyword: Legacy Cultures, Fundamental Rights, Batak Karo Civilization.

A. INTRODUCTION

Legacy was derived from Arabic words—*Al-miirats*—which mean grant something in contemplation of person or other folks. An embodiment of legacy varies from heirloom, testament, and tenure, which is often one's fate when the legator still alive, then inherited to the legatee as the legator passed away. Based on *fara'id* terminology, legacy is portrayed as "*tirkah*" which means anything that is inherited by legator after death. While *tirkah* is defined as the heirloom of the legator before being used for burial, paying off debts and his last will. If every expense and mortgage has been excluded, the assets are clear to be inherited (*al-irst*). Form of legacy is categorized into two types of properties, "Consignable" properties—such as vehicle, certificate of deposit and mining products; "Rigid" properties—such as house, land and obligation.

Legacy law is a law governing the transfer of assets left by a deceased person and the consequences for his heirs. Indonesian citizens of Chinese and European descent are subject to the Civil Code (Civil Code), and most Indonesian people are subject to Customary Law. In various regions, the provisions regarding legacy regulated in Islamic Law have permeated the Customary Law, because it is one of the communal religious Customary Laws.

Legacy law is one of the elements in Customary Law in Indonesia. The traditional legacy laws are traditional, religious, communal, concrete and visual, open and simple, can be changed and adjusted, not codified but verbally handed down, as well as colloquy and consensus. Customary legacy law covers legacy systems, legacy, heirs, legacy processes,

and legacy justice. The legacy system in Customary Law consists of:

1. Progeny legacy system, including patrilineal, matrilineal and parental or bilateral system;
2. Individual legacy system;
3. Collective legacy system;
4. Majorite legacy system;
5. Islamic legacy system;
6. Western legacy system.

One of the customary law communities in Indonesia which has a system of legacy of Patrilineal descent is the Karo Customary Law Society from North Sumatra. Legacy assets in Customary Law are divided into 4 parts, stated as Original Property, Gifted property, Livelihoods, material rights, and other rights. Heirs in Customary Law include biological children, stepchildren and adopted children, legacy *Balu* (widow or widower) and other heirs. The legacy process in Customary Law includes 2 (two) parts:

1. Before the testator dies, in the form of forwarding or transfer, appointment, message or will;
2. After the heir dies, in the form of mastery of legacy, division of legacy, legacy according to Islamic law.

Legacy justice can be carried out in order to find a way to resolve disputes over the legacy of indigenous and tribal peoples through family deliberations, traditional deliberations, and courts. Legacy law is an important element in community life, especially for customary law communities. For the Karo tribe, customary legacy law is an important element in social life as the Karo Customary Law Community. The Karo Customary Law inherits the influence of modernization and social change from various foreign parties so that it looks dynamic in the Karo Customary Law, which continues until this day.

The reality of the Karo indigenous people is found in legal plurality. Traditional Karo places men and women in an unbalanced position. Boys as clan bearers receive honours in various traditional events, including in the process of distributing the legacy. Karo men are positioned superior to women in various sectors of life. There is a tendency of parents, both men, especially mothers (wives), to give heirs to their daughters in two ways, stated as grants and wills. The awareness in the Karo community to give legacy to girls is due to the generosity of his brothers. Therefore, the property received by girls is called a gift, a sign of affection, or appreciation. The patrilineal-based legacy culture of Karo is moving towards bilateral-based legacy law.

Based on the results of the study it was found that the Supreme Court Jurisprudence of the Republic of Indonesia No. 179 / Sip / 1961[1] dated October 23, 1961, concerning girls as heirs and Jurisprudence of the Republic of Indonesia Court No. 100k / Sip / 1967 dated June 14, 1968, about widows as heirs. Both jurisprudences are the development of customary legacy law that works in protecting women in the Karo customary law community. In the patrilineal kinship system, which prioritizes boys who have clans, it is also possible for girls who are called *Beru* to receive the legacy as heirs as well.

B. PROBLEM STATEMENT

How patronage of fundamental rights against discrimination of legacy culture in the Batak Karo Civilization system works?

C. AIM AND PURPOSE

1. Apprehend on the apportionment of heirloom based on the legacy culture in Batak Karo civilization;
2. Apprehend on the patronage of fundamental rights against discrimination of legacy culture in Batak Karo civilization.

D. LITERATURE REVIEW

According to Lawrence Meir Friedman, a legal sociologist from Stanford University, there are four main elements of the legal system, stated as:

1. Legal Substance
2. Legal Structure
3. Legal Culture
4. Legal Impact

According to Lawrence Meir Friedman, the success or failure of law enforcement depends on Legal Substance, Legal Structure / Legal Institutions and Legal Culture. First: The Substance of Law: In Lawrence Meir Friedman's theory this is called the substantial system that determines whether the law can be implemented. The substance also means products produced by people who are in the legal system that includes decisions they make or new rules they draft.

According to Indonesian legal experts, Prof. Dr. Wirjono Prodjodikoro (1976), legacy law is defined

[1] The Supreme Court considers it a living law throughout Indonesia, so also in Tanah Karo, that the daughter and son of an inherited legacy, together are entitled to an inheritance in the sense that the boy's part is the same as Women.

as the law governing the position of one's assets after the heir dies, and the ways of transferring the assets to another person or heir. Although the notion of legacy law is not listed in the Civil Code Law of the Civil Code, the procedure for regulating legacy law is regulated by the Civil Code. Meanwhile, based on Presidential Instruction No. 1 of 1991, legacy law is a law that regulates inherit of ownership rights to the legacy's legacy, then determines who is entitled to become an heir and how much each part is.

The legal basis for legacy in Indonesia consists of three types based on community culture, religion, and government regulations. First is the customary legacy law - in the form of norms or customs in certain areas. Usually, unwritten and only applies to special areas.

In general, customary legacy law adheres to four systems, stated as hereditary, collective, major, and individual. Determination of the system is influenced by kinship relationships or patterns of life of the local community. Secondly, Islamic legacy law is implemented by Muslims in Indonesia. The law is listed in Articles 171-214 concerning the Compilation of Indonesian Laws. In this regulation, there are 229 articles that write about legacy according to Islam. Islam implements a bilateral individual legacy system - originating from the mother or father's side. Third - civil legacy law that refers to the western countries. This rule applies to all Indonesian people. Its provisions are included in Book II of the Civil Code (KUHP) Article 830-1130.

In Article 830 [2]of the Criminal Code concerning legacy stated that-legacy can be given to heirs if the owner of the property has died. In addition, for legacy to take place, the following basic elements are needed.

1. **Heir**
   An heir is a person who dies or someone who gives the legacy is called heir. Usually, the heirs bestow their assets or obligations or debt to another person or heir. An heir is a designation for people who give legacy. However, the gift is not only in the form of assets but also in debt and various other obligations to the heirs. As mentioned earlier - the testator must die in order to bestow a legacy. According to Islam, there are three conditions for the death of an heir, stated as intrinsic, *hukmi*, and *taqdiry*. Heirs are called intrinsic death if their death can be proven and witnessed by a minimum of two people. Meanwhile, judicial death occurs if the testator is declared dead or lost by the judge. However, the search must be carried out until the specified deadline. Finally, the death of *taqdiry* - the event of the death of a person with a known cause. For example, that person follows a battle in another country. However, there is a strong suspicion that he was killed in the war.
2. **Heirs**
   An heir is a person who receives a legacy referred to as an heir who is legally entitled to receive assets and liabilities, or debts left by the testator. Then, what is called heir? Both from the perspective of Islam, and the Criminal Code, heirs are interpreted as recipients of legacy that is legally valid based on the mandate of the owner. The main requirement to be an heir, that is to be open and not have anything to stop him. Regarding the identity of the heirs, explained in article 172 [3]of the Criminal Code.
3. **Legacy**
   Legacy is anything given to an heir to an heir, whether in the form of rights or property such as a house, car, and gold or obligations in the form of debt.

Indonesia is a multicultural country. The existing rules cannot even box the existing culture. The same applies to legacy law. In Indonesia, there is no legacy law that applies nationally. The existence of legacy law in Indonesia is cultural legacy law, Islamic legacy law, and civil legacy law. Each legacy law has different rules. The following explanation:

1. **Legacy Culture Law.** Indonesia is an archipelagic country which consists of various ethnic groups, religions, and customs that are different from one another. That affects the law in force in each class of society known as customary law. According to Ter Haar, a legal expert in his book entitled *Beginselen en Stelsel van het Adatrecht* (1950), customary legacy law is the rule of law governing the continuation and transition from centuries to both tangible and intangible assets of generations in generations of generations. following. Customary law itself is unwritten form, only in the form of norms and customs which must be obeyed by certain communities in an area and only applies in that area with certain sanctions for those who break

[2] Article 830 “Legacy only occurs when someone died”

[3] Article 172 "Heirs are considered Muslim if known from identity card or acknowledgement or practice or testimony, while for new-borns or children who are not mature, religion according to his father or environment"

them. Therefore, customary legacy law is much influenced by the social structure of kinship.

2. **2. Islamic Legacy Law.** Indonesia is a country with the largest number of Muslims in the world. Therefore, in the legacy system, there are two rules - civil law and Islam. The case of Islamic legacy refers to Law Number 3 of 2006 concerning Amendment to Law Number 7 of 1989 concerning Religious Courts. The rules for the distribution of legacy are based on the Qur'an An-Nisa verses 7, 11, 12, 33, and 176. The An-Nisa verse 11 regulates the legacy according to blood relations. In this letter, it states that: the son gets the legacy twice the daughter; two daughters get 2/3 of each property; if the heir has only one daughter, he is entitled to get half of the inheritor's assets; if the heir has a sibling, the mother is entitled to receive 1/6; If the heir does not have children or siblings, 1/3 of the wealth goes to his mother. Islamic legacy law applies to Indonesian people who are Muslim and regulated in Articles 171-214 Compilation of Indonesian Law, stated as Islamic legal material written in 229 articles. Islamic legacy law adheres to the principle of bilateral individual legacy, neither collective nor major. Thus, the heir can come from the father or mother. According to Islamic legacy law, there are three conditions for a legacy to be stated so that it can give a person or heir the right to receive legacy: The person who has passed down (heir) has died and can be proven legally he has died. So, if there is distribution or giving of assets to the family when the heir is still alive, it is not included in the category of legacy but is called a grant. The person who inherits (the heirs) is still alive when the inheritor dies. People who inherit and inherit have offspring or kinship, both straight line up ties like father or grandfather and straight down ties like children, grandchildren, and uncles.
3. **3. Formal Legacy Law.** In the application of legacy law, if an heir who has a religion other than Islam dies, then what is used is the legacy system based on legacy law following the Civil Code ("Civil Code").

According to the Civil Code, the principle of legacy is:

1. New legacy is open (can be passed on to other parties) if a death occurs. (Article no.830 Civil Code);
2. There is a blood relationship between the testator and heir, except for the husband or wife of the testator. (Article no.832 Civil Code), if they are still bound in marriage when the heir dies. That is, if they are divorced when the heir dies, the husband/wife is not the heir of the testator.

Civil legacy law or often called western legacy law applies to non-Muslim communities, including descendants of Indonesian citizens, both Chinese and European, whose provisions are regulated in the Civil Code (KUHP). Civil legacy law adheres to an individual system in which each heir acquires or owns legacy according to their respective parts. In civil law there are two ways to inherit, bequeath by law or bequeath without a will called *Ab-instentato*, while the heirs are called *Ab-instaat*. There are 4 classes of heirs based on the law: Group I consists of husband and wife and children and their offspring; Group II consists of parents and siblings and their offspring; Group III consists of grandfather, grandmother and so on and up; and Group IV consists of families in further sideways, including brothers and heirs of Group III and their offspring. Legacy based on a will in the form of a person's statement about what they want after they die which the author can change or revoke if he is still alive following the Civil Code Article 992. How to cancel must be with a new will or done with Notary Public.

The conditions for making this will apply to those who are aged 18 years or older and are married even though they are not yet 18 years old. Included among the groups of heirs based on wills are all those who are appointed by the testator through a will to be his heirs.

Based on the principle of legacy from the Criminal Code, an heir must have a blood relationship with the testator. For greater clarity, consider the four classes of heirs according to the following Criminal Code.

First, in class I (first), the husband or wife and/or descendants of the heirs are entitled to receive a legacy. In the chart above those who get legacy are his wife/husband and three children. Each one gets a 1/4 portion. Talking about children - as heirs - the provisions are written in Article 852[4] of the Criminal Code.

[4] "Children or offspring, even if born and in various marriages, inherit the legacy of their parents, grandparents, or their next bloody families in a straight line upward, regardless of sex or first birth."

The article states that children - who have blood relations with their parents - are entitled to receive a legacy. In this case, including children resulting from extramarital relations or divorce victims. This matter of legacy is also clearly regulated by Article 862-866 of the Indonesian Criminal Code. Mentioned in articles 862-866; heirs of a group of children resulting from relationships outside of legal marriages are entitled to 1/3 if the testator has a legitimate child or wife; 1/2 if the testator leaves a blood family, but does not have a legal descendant; 3/4 if the legal heir has a kinship with a further degree and; all legacy if the testator does not leave a legal descendant or family member. The fourth provision can change if the heirs or children from the relationship outside of marriage die. Then all legacy will fall into the hands of their legal descendants.

Second, these Group II are those who inherit if the heir does not have a husband or wife and children. Therefore, those who are entitled are the parents, siblings, and/or descendants of the heirs of the chart above, who are inherited from their father, mother, and two siblings. Each one gets ¼ part. In principle, the parental part must not be less than ¼ part. Provisions regarding class II heirs are regulated in Articles 854-856[5] of the Criminal Code.

Third, Group III In this group the testator does not have siblings, so the legacy is the family in a straight line up, both from the mother and father line. this chart which gets legacy is grandfather or grandmother both from father and mother. The division is broken down into ½ part for the father line and ½ part for the mother line. The rules for the distribution of third-class heirs are written in the Criminal Code Article 853-858. It states that heirs must have blood relations with their mother or father and above. If the kinship has the same degree of closeness, the legacy is shared equally. Conversely, if there are relatives whose degree of relationship is closer; heirs must prioritize these heirs. In subsequent articles, mentioning the rights of the heir's grandfather or grandmother regarding legacy. One of them is Article 854[6].

And fourth, Group IV In this group those who are entitled to legacy are blood relatives in the upper line who are still alive. They get ½ the portion. Whereas the heirs in the other line and the degree closest to the heir gets ½ the portion. follow the provisions in Article 858[7] that refer to Article 853 of the Criminal Code If there are no brothers and sisters and blood relatives still living in the two lines to the top, then the closest blood relatives in each line to the side of each side inherit half. If in one line to the side there are several blood relatives in the same degree, then they share between them head by head without reducing the provisions in Article 845[8]. Likewise, the higher degree groups close to the lower degrees. Before dividing the legacy, the heir must first be responsible for the debts left by the testator during his lifetime.

E. Research Methods

The study of this literature utilized secondary data, categorized into juridical normative legal where the accession is based on theoretical abstract and statute approach. Supreme Court Decree No. 179 / K / Sip / 1961 made an amendment to customary legal of the Batak Karo tribes to regulate the apportionment of legacy between men and women. Therefore, the apportionment of legacy is regulated based on the principle of justice and compassion to all women of Batak Karo Civilization with respects.

The research data was obtained from various sources from Cilandak Marine Hospital Library consist of literature and legislation from both hardcopy and softcopy of certain references. The development of the Karo Legacy Culture has also

"They inherit equal portions, head to head if the deceased are all family-related in the first degree and each has the right because of himself; they inherit stake by stake if all of them inherit part of it as a substitute. "

[5] Article 854 "If a person dies without leaving offspring and husband or wife, then the father or mother who is still alive will each receive one-third of the legacy and legacy if the deceased leaves only one brother or sister who has the remaining third "The father and mother each inherit a quarter, if the dead leave more brothers or sisters, and in that case, the latter gets the remaining two-quarters."

Article 855 "If a person dies without leaving offspring and husband or wife, and the father or mother has died earlier than him, then the father or mother who lives the longest gets half and the legacy, if the deceased leaves a brother or sister with only one person only; one third, if a brother or sister is left by two people; one-quarter portion, if more than two brothers or sisters are left behind. The remainder is part of the brothers and sisters. "

Article 856 "If a person dies without leaving a descendant or husband and wife, while the father and mother have died first, then the brothers and sisters inherit all his legacy. "

[6]

[7] Article 858 "If there are no brothers and sisters and also no blood relatives who are still living in one of the lines to the top, then half the legacy will be part of the family and blood relatives in the upward line who are still alive, while the other half will be part blood relatives in sideways and other upward lines, except in the case stated in the following article."

[8] Article 845 "The law does not distinguish male and female heirs, nor does it distinguish birth order. There is only a provision that if the heirs of the first class if there are still, then will close the rights of other family members in a straight line up or sideways."

been investigated by several researchers which add some tenacious points for some references.

This study aims to get comprehend knowledge on the apportionment of heirloom and patronage of fundamental rights against discrimination of legacy culture in Batak Karo civilization.

F. ANALYSIS AND DISCUSSION

A. Legacy Culture

Customary Legacy Law covers all principles, norms and legal decisions/provisions relating to the process of forwarding and transferring material / tangible property (*materiel goederen*) and intangible property or immaterial property (*immateriel goederen*) from one generation to the next generation. There are 4 (four) elements in customary legacy law, stated as: Norms, which regulate the process of passing on assets from heirs to heirs; the subject of legacy law, stated as a human who inherits a number of his property called the heir, and a group of people who receive an legacy from heirs called heirs; stated as legacy objects, stated as a number of tangible and intangible assets; stated as the process of transfer of a number of assets, including the process before and after the heir dies.

Customary legacy law covers the systems and principles of legacy law, concerning legacy, heirs and heirs and the way in which the legacy is transferred from the heir to the heir. The nation of Indonesia, which is pure in its mind, is based on kinship where the interests of peaceful living are prioritized over material and selfishness. If lately, there seems to be a tendency for families to prioritize material and damaging the harmony of kinship or neighbourliness, then it is a moral crisis, which among others is caused by the influence of foreign cultures that enter and affect the minds of the Indonesian people. The nature of customary legacy law, there are several, stated as:

1. Legacy according to customary legacy law is not a unit that can be valued at a price but is a unit that is not divided or can be divided according to the types and interests of the heirs. Customary legacy must not be sold as a unit and the money distributed to the heirs according to the applicable provisions as in Islamic legacy law or Western legacy law.
2. Customary legacy consists of assets that cannot be distributed and their ownership to the heirs and some that can be distributed. Undivided assets are the joint property of the heirs, may not be owned individually, but can be used and enjoyed.
3. Undivided traditional legacy assets can be pledged if the situation is very urgent based on the agreement of the traditional elders and related family members, so as not to violate the rights of kinship (*naastingsrecht*) in the harmony of kinship.
4. Customary legacy law does not recognize the principle of "*legitieme portie*" or an absolute part as the law of Western legacy (Article 913 of the Civil Code) or in the Al-Quran (*Surat An-Nisa*).
5. Legacy law does not recognize the right of legacy to demand that legacy is distributed to inheritors at any time as referred to in Article 1066 of the Civil Code or Islamic law. If the heir has a need or interest, while he is entitled to legacy, then he may submit his request to be able to use the legacy through deliberation and consensus with other heirs.

The principles of customary legacy are based on the principles of Pancasila are describes as below,

1. The principle of God and self-control Wealth is a blessing or a gift from God so that humans are obliged to give thanks to God Almighty. Gratitude is manifested from the maintenance of assets that can be tangible movable or immovable objects. The Precepts of Godhead become the basic principle in the Customary Law, to be able to control themselves and restrain the material passions to avoid the problem of legacy.
2. The principle of equality of rights and togetherness of rights based on the principle of fair and civilized humanity, the legacy in terms of distribution does not mean equal parts between men and women but is seen from the circumstances or needs of heirs who are having a harder time of life being given more parts than the heirs whose lives have been sufficient. Life harmony and family togetherness take precedence over the size of the distribution of legacy if necessary, legacy remains as a unit or not divided to be enjoyed by all heirs under the leadership of the management of legacy as determined in the customary law applicable in the customary law community.
3. The principle of harmony and kinship from the principles of Indonesian Unity, the principle of harmony in customary legacy law is a principle that is maintained to maintain a peaceful and peaceful family relationship in managing, enjoying and utilizing legacy that is not divided

for or in resolving disputes/problems of ownership distribution. legacy.

4. The principle of deliberation and consensus-based on the principle of popular precepts, led by wisdom in consultation/representation, then in regulating or completing legacy each heir has the same sense of responsibility and or the same rights and obligations based on mutual consultation and consensus. Every heir is obliged to respect, obey and implement the results of the agreement with sincere sincerity, good faith and from an honest conscience for the common good based on the teachings of God Almighty.
5. The principle of justice and p*arimirma* (compassion) A sense of justice based on the principle of social justice for all Indonesian people refers to a sense of justice based on the principle of *Parimirma*, which is the principle of compassion as well as the principle of harmony so that in dividing the ownership or use of legacy assets to the family members of the testator is determined in harmony and proportional to their interests and equity, taking into account their circumstances, position, services, works, and history.

Legacy system in customary law according to H. Hilman Hadikusuma includes Heredity System include the patrilineal system, which is a lineage system that is drawn according to the line of the father, so that the position of men is a more prominent influence than the position of women in legacy; The matrilineal system, which is a descendant system that is drawn according to the mother line so the position of women is a more prominent influence from the position of men in legacy; Parental or Bilateral system, which is a lineage system that is drawn along line parents or according to the two sides of the garage (father and mother), so that the position of men and women are not distinguished in legacy.

Legacy of individual or individual systems is a system of legacy in which each heir gets a share to be able to control and or own legacy according to their respective parts. This individual system is widely applicable among people with a Parental kinship system, or also among indigenous peoples who are strongly influenced by Islamic law. The goodness of the individual system is that through personal ownership, the heirs can freely control and have the legacy of their share to be used as living capital without being influenced by other family members.

Legacy whose legacy is passed on and transferred ownership from the heir to the heirs as an entity that is not divided into control and ownership, so that each heir has the right to seek, use or obtain the results of the legacy, and is carried out based on consultation and consensus.

Legacy of the major system is a collective legacy system, only the continuation and transfer of the right of ownership over the undivided property is delegated to the eldest child who serves as the head of the household or the head of the family replaces the position of father and mother as head of the family. There are 2 (two) major systems due to hereditary systems, stated as the Majorite Male system and the Majorite Women's system.

A legacy legal system that implements and settles legacy if the heir dies. The basis applies to the individual system when it is Al-Quran Surah IV An-Nisa. Legacy law is a change in the customary legacy law of the Arabs before Islam had a patrilineal family system. After the arrival of Islam, the Koran made changes as regulated by giving parts to women.

West Civil Legacy Law (BW) which adheres to a private, bilateral and grammatical system of customary legacy law that legacy must not be owned individually / privately, does not recognize the principle of "*legitime portie*" or an absolute part in which for heirs whose rights have been determined legacy rights or certain parts of legacy (as regulated in Article 913 [9]of the Civil Code or Al-Qur'an Surat An-Nisa [10]); Customary legacy law also does not recognize the right to demand that legacy be distributed to heirs, and the use of legacy can be submitted by consensus.

Legacy system as regulated in the Civil Code (BW) which adheres to the individual system, stated as legacy if the heir dies, then the legacy should be divided as soon as possible. Legacy is divided into 4 parts, Original assets, consisting of legacy and inherited assets; Wealth gifts, stated as gifts from husbands, gifts from parents, gifts from relatives, gifts from nephews, gifts from other people, gifts, wills; Livelihood assets, including joint assets, husband's assets, wife's assets; The material rights,

[9] Article 913 Article 913 Legitieme Portie or the inheritance of the law is the part and property that must be given to the heirs in a straight line according to the law, against which the dead may not set something, whether it be a grant between the living, and as a testament.

[10] For men there is a right part of the inheritance of both parents and their relatives, and for women there is a right of part (also) of the inheritance of both parents and their relatives, either little or many according to the part that has been set.

including the rights of use, rights (debts), other rights. Specificity in customary legacy seen from the legacy system based on heredity

1. In the customary law, the community adheres to the Matrilineal system, the legacy inheritors are women, girls, and their female descendants. If there are no daughters, there are 2 (two) possibilities, that is, boys can be used as substitutes and adopted by daughters and closest relatives.
2. The customary law community adheres to the Patrilineal system, stated as the path of legacy through male lines, male offspring and male descendants. If there is no son, the daughter may be made his successor, or by taking/adopting a son so that later he will get a son, or the son is adopted by a son from the nearest heir's relatives or as far away as agreed. If none, his daughter was adopted as an adopted child who would later become an heir. The issue of legacy is regulated and monitored by boys.
3. In the customary law community which adheres to the Parental system, with an individual legacy system. All issues regarding legacy are managed and managed by the family concerned, especially family members who are elder or respected. The management of legacy is generally temporary because in due course the asset will be divided again.

The grouping above does not include widows, widowers and adopted children as heirs, although they also become heirs. The general view of most Indonesian customary law communities is that those who are entitled to become heirs are those who have direct blood relations, both father and mother in a broad sense, stated as relatives, clans or tribes.

B. Karo Law of Legacy Culture

The Karo customary community occupies the Karo Plateau which is called the Tanah Karo. The original territories of the Karo culture community consist of Deli Serdang, Langkat, Simalungun, Dairi, Southeast Aceh, Binjai Municipality and Medan City. The combination of the Karo customary law community is followed by a dialect (variety of languages) today ranging from Langkat, Deli Serdang and the Karo Highlands to Tanah Alas (Southeast Aceh).

Customs for the Karo people are the life order of the Karo people, whether in personal, family, group or community life in various forms of human needs always. The Karo customary legacy legal system is not a stand-alone system, because it is related to the concept of a clan, sangkep sitelu kinship, customary land ownership or called land restoration. Each clan in the Karo land has a land clan that indicates the origin of the village from a clan. If there is a special change regarding the position of the child as an heir, it is casuistic.

The devolution of the Karo indigenous peoples is a devolution based on the line of fatherhood, in which case the right to Mewaris is a son. The daughter is not entitled to receive inheritance, only given a part of her siblings based on "darkness". There is no provision of the portion of the daughter in Karo Adat law.

Seen from various aspects of the law, this customary provision discriminates against the rights of women. Although in the provision of men is the head of the family, the reality that occurs in the Karo community, husband and wife alike work to meet the needs of households.

In the case of caring for elderly parents, usually, girls who better understand and pay attention to the circumstances of his parents. From childhood to child Beru, the role of girls in the Karo community is enormous. It is not that the daughter as an heir is an inevitable issue so that the case appears at the District Court Kabanjahe is a decree of the Supreme Court No. 179/K/SIP/1961 on 23 October 1961. The Supreme Court's decision rejected the cassation proposed by langkilled Sitepu and Ngadu Sitepu as plaintiff, with the decision that Rumbane Sitepu's daughter as the daughter of Rolak Sitepu (his father) and the seed of Ginting (his mother), had the same position as the boy in terms of inheriting the treasures of both parents.

The Supreme Court's decision gave changes to the Karo community's customary law order, especially in customary inheritance law. The MA decision is based on TAP MPR No. II year 1960. The contents of the MA verdict that MA considers it as a living law throughout Indonesia also in Tanah Karo, so girls and boys together are entitled to Treasures of inheritance, in the sense that the part of the boy is the same as the children's Section Women.

The principle of justice and parimirma (compassion) is based on the social justice of the whole people of Indonesia and shows appreciation for Human Rights (HAM), especially women in the customary law of Karo Culture, through the division of the Inheritance of sons Is the same as the girl's section.

G. CONCLUSION

Customary legacy law covers the systems and principles of legacy law, concerning legacy, heirs and heirs and the way in which the legacy is transferred from the heir to the heir. The legacy system in Customary Law consists of hereditary systems (Patrilineal, Matrilineal and Parental or Bilateral), individual legacy systems, collective legacy systems, majority legacy systems, Islamic legacy systems, and Western legacy systems. The legacy culture of the Karo indigenous people is legacy based on the patrilineal of descent, in this case, the right to inherit is a son. Women are not entitled to legacy, only given a part of their siblings based on "*kekelengen*".

When it comes to caring for elderly parents, it is usually girls who are more understanding and attentive to their parents' circumstances. From childhood to becoming a new-born child, the role of girls in the Karo community is enormous. Supreme Court Decree No. 179 / K / Sip / 1961 on October 23, 1961, gave a change to the customary legal arrangements of the Karo people, especially in customary legacy law, so that girls and boys together were entitled to legacy, in the sense that the portion of sons was same as the daughter's part. The principle of justice and *parimirma* (compassion) is based on the precepts of social justice for all Indonesian people and shows respect for human rights especially women in the Karo customary legacy law, through the distribution of the legacy of sons is the same as that of girls.

Pancasila has become the basis for binding the consistency of the Indonesian legal system so that the human rights norms contained in the 1945 Constitution can function both regulative and constitutively. The regulative function places human rights norms in the constitution (UUD) as a benchmark to test whether a positive law or law is in harmony with human rights ideals based on the Pancasila. As a constitutive function of determining without the spirit of human rights in the Constitution, positive law or law will lose its meaning as a law that is beneficial to the benefit of society.

H. REFERENCES

Satrio. J, *Hukum Waris*, Alumni, Bandung, 1992, h. 8.

Mawar Maria Pangemanan, *Kajian Hukum Atas Hak Waris Terhadap Anak Dalam Kandungan Menurut Kuhperdata*, *Lex Privatum*, Vol. IV/No. 1/Jan/2016

Cyntia P. Dewantoro, *Bagaiamana membagi waris menurt KUH Perdata*, Article nasional.kompas.com/ read/2008/05/28/08423140/bagaimana.membagi.waris.menurut.kuh.perdata

buku *Kiat Cerdas Mudah dan Bijak Dalam Memahami HUKUM WARIS* – karya: Irma Devita Purnamasari, S.H., M.Kn. (Kaifa, Desember 2012).

Kitab Undang-Undang Hukum Perdata (Burgerlijk Wetboek, Staatsblad 1847 No. 23)

Wulansari, C. Dewi, 2016, Hukum Adat Indonesia – Suatu Pengantar, Bandung : Refika Aditama

Hadikusuma, Hilman, 2015, Hukum Waris Adat, Bandung : Citra Aditya Bakti

Muh Idris, *implementasi hukum waris dan pengajarannya pada masyarakat kec. Poleang tengah kab. Bombana (perbandingan antara hukum adat, hukum islam dan hukum perdata)*, Jurnal Al-'Adl, Vol. 8 No. 1, Januari 2015

Darmodiharjo, Darji, dan Sidharta, Penjabaran Nilai-Nilai Pancasila dalam Sistem Hukum Indonesia, PT. Raja Grafindo Persada, Jakarta, 1996.

Rato, Dominikus, 2011, Hukum Perkawinan dan Waris Adat, Surabaya : Laksbang Yustitia Surabaya

Setiady, Tolib, 2009, Intisari Hukum Adat Indonesia (Dalam Kajian Kepustakaan), Bandung : Alfabeta

Soekanto, Soerjono, 2003, Hukum Adat Indonesia, Jakarta : Raja Grasindo Persada

RESPONSIBILITY OF THE STATE TO GUARANTEE RIGHTS OF LIFE AS A FUNDAMENTAL HUMAN RIGHT

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ABSTRACT

Right to life is a very fundamental right in the very existence of human rights which basically are born for the interest of humans themselves. It means that every human is expected to be able to enjoy the rights to life they inherently have. Therefore, it is expected a human is an intact being in the society so they can maintain their personality or self-identity they have. Humans have the right on their selves being intact apart from other people. For this reason, a guarantee of fundamental rights for humans is needed that must be understood and respected by every human being, because everyone on this planet needs these rights. Basically every human being is endowed by his Creator, inherent rights on his life, freedom and properties, which are their own and that cannot be transferred or revoked by the state. The right to life in ancient times, also known as natural rights and *ius naturale* of Roman law. However, because each human being has the equal rights, it is feared that each will recognize each other's rights and experience conflicts of interest with other human beings. To deal with this, John Locke postulates that in order to avoid such conflicts of interest or the uncertainty of life for these rights in nature, humanity has entered into a social contract or a voluntary bond, through which the use of their irrevocable rights are entrusted to the state authorities.

Keywords: Responsibility Of The State And Right To Life

A. INTRODUCTION

Right to life as a fundamental right owned by humans, the existence is inherent in human nature that since birth.[1] This is as a sign that human is a "whole human being" which is a creation of God Almighty that is equipped and endowed with a set of natural rights that are very basic or fundamental, because they must not be ignored and marginalized by anyone. The fundamental rights owned by humans are solely because they are humans, not because they are granted by the state, law or other human gift.

All human beings have the basic rights granted by their Creator, namely God Almighty, so that all human beings because of their rights have a high dignity and their existence must be recognized, respected and upheld by all people in the world.[2] Accordingly, the right to human life is universal in nature, meaning that its validity is not limited by a space or a place (applicable anywhere) is not limited to certain people, cannot be taken and separated and violated by others including the state in this case. All humans realize that the right to life for themselves as a whole human being for the sake of existence and recognition must be recognized in order to apply their rights and also to respect the right to life of others.

It's important to realize that every right of life is inherent in an obligation. Based on this mindset, so it can be said that there are rights to life or human rights there must also be obligations for other humans. So in the application of the right to life as a human right, the rule of law, the government and other human beings are obliged to pay attention to, recognize, respect and uphold the right to life as a human right and an obligation to their right to life.[3]

Mindfulness of the right to life as a fundamental right owned by every human being is to maintain the dignity and human dignity that begins since humans existence on the earth. This is due to the right of human to life to have existed since humans were born (*ipso facto and ab initio*) and is a natural right inherent in humans. History records that there have been various major events in the world as an effort to fight for the right to life as a basic right both through

[1] Asplund, Knut D. 2008, Law of Human Rights, Yogyakarta Pusham UII.
[2] Attamimi, A. Hamid, S. 1992 Pancasila Legal Aspects in the Legal Life of the Indonesian Nation, Jakarta : BP 7, Pusat.
[3] Alsaton, Phlip, dan Franz Magnis Suseno 2008. " Foreword in Knut D. Aspilun, Suparman Marzuki, Eko Riyadi (Eds) Law of Human Rights (p. XVII-XIX, Yogyakarta : Pusham UII.

the philosophical system of thought and directly through physical struggles by the people.[4]

The state is obliged to regulate how every human being exercises his rights. Every human being is emphasized to respect each other's rights as regulated by the state. In the case of regulation by the State, the state issues various laws and regulations to protect the fundamental rights owned by every citizen or individual residing in the state.[5]

In an effort to establish a state that upholds fundamental human rights, the founders of the United States of America sought justification in the theory of social contracts and natural rights. In the Declaration of U.S. Independence (1776) compiled by Thomas Jefferson, these notions were expressed in very clear and precise words, namely:

> We consider the following truths to be self-evident that all humans are created equal. His Creator has granted them certain rights which cannot be revoked. Among these rights are the right to life, freedom and the pursuit of happiness. To guarantee these rights, people established governments that obtain their genuine authority based on the consent (*kawula*) of those they govern.[6] That whenever a form of government undermines these ideals, the people have the right to change or unseat them.

Clearly and firmly, the demands that were better than those experienced in times both in United Kingdom, and when during the British colonies in North America, were made as noble ideals in the U.S Declaration of Independence, as a starting point for respect for basic human rights, to protect life, freedom and efforts to achieve the ideals that are happiness for humans.

Whereas other national legal rules governing the Right to Life is the Law of the Republic of Indonesia Number 39 of 1999 concerning Human Rights.

Through several articles in the aforesaid law the Right to Life was formulated, including:
Article 4:

The right to life, the right to free of torture, the right to personal freedom, mind and conscience, the right to embrace a religion, the to free of slavery, the right to be recognized as individuals and equality before the law, and the right not to be prosecuted on the basis of a retroactive law are rights human rights that cannot be reduced under any circumstances and by anyone.

Article 9:

(1) Everyone has the right to life, maintain life and improve their standard of living.
(2) Everyone has the right to life in peace, security, well-being, happiness, prosperity both physically and spiritually..
(3) Everyone has the right to a good and healthy environment.

Article 53 paragraph (1):
Every child from the womb, has the right to life, maintaining life and improve living standards.

B. RESEARCH METHODOLOGY

The research method in this study is normative juridical legal research, with the data examined are secondary data covering legal materials such as Article 28 A, Article 28 B paragraph (2), Article 28 H paragraph (1), Article 28 I paragraph (1) The 1945 Constitution of the Republic of Indonesia, Law of Republic of Indonesi No. 39 of 1999 concerning Human Rights, secondary legal materials such as legal theory, legal journals, scientific research, the internet and other legal materials, and finally tertiary legal materials such as Indonesian dictionaries, Legal Dictionaries, and so on.

C. FORMULATION OF PROBLEM

The formulation of the problem as the focus of the discussion material in this study is as follows:

1. How is the application and provisions of Indonesian law governing the Right to Life.
2. The responsibility of the state legally for the right to life of its citizens.

D. DISCUSSION

1. How is the application and provisions of Indonesian law governing the Right to Life.

Indonesia has a dimension that is not much different in looking at the right to human life as a fundamental right. In the Human Rights Charter stipulated in People's Consultative Assembly (MPR) Decree No. XVII / MPR / 1998 it is stated that human

[4] Brown, M.Ane. 2002, Human Rights and The Bordes of Suffering, Manchester, Manchester University Press.
[5] Dirdjosisworo, Soedjono. 2004 HAM, Democracy and the Rule of Law in the Context of Indonesia's National Resilience, A Paper In the Upgrading and Workshop of Citizenship Lecturers, All West Java Batch XVI Academic Year 2003/2004, Cooperation with Kodam III Siliwangi.
[6] Hadjon, Philipus M. 1987, Legal Proteciton of the People in Indonesia. Surabaya : Bina Ilmu.

beings are creatures of God Almighty who act as managers and maintainers of nature in a balanced and harmonious manner in obedience to Him. Humans are blessed with human rights and have the responsibility and obligation to guarantee the existence of dignity and the dignity of humanity, and to maintain harmony in life.[7] The right of human life is the basic rights inherent in human beings naturally, universally, and eternally as a gift from God Almighty, including the right to life, the right to have family, the right to develop themselves, the right of justice, the right for freedom, the right of communication, the right of security, and welfare rights, which therefore must not be ignored or deprived by anyone.[8] Furthermore, humans also have rights and responsibilities that arise as a result of the development of life in society.

The Charter of Human Rights emphasizes three basic rights owned by humans, apart from their attachment to other humans, namely the right to life, the right to have a family and to resume their descendants and the right to develop themselves.[9] The right to life is the most basic human right for every human being. The nature of the existence of these right is non-negotiable (non derivable rights). The right to life is perhaps the right that has the most fundamental value of modern civilization.[10] In a final analysis, if there is no right to life there would be no other human rights issues.

The right to life in the rule of international law is regulated by Article 3 of the Universal Declaration of Human Rights (UN), which states that every individual has the right to life, independence and safety. This provision clearly provides a guarantee for the right to life.

Another rule of international law that provides a clear formulation of the right to life is Article 6 of the ICCPR (International Covenant Civil and Political Rights). Article 6 paragraph (1) of the ICCPR states that:

Every human being has an inherent right to life. This right must be protected by law. No human being may arbitrarily be deprived of his life rights.

In other provisions, the right to life is also protected by Article 6 of the Convention on the Rights of the Child which states that States Parties to the Convention recognize that each child has inherent rights to his/her life. So that every child on earth can state that, "I must stay alive and grow as a human."[11]

In Indonesia, the formulation of the right to life is contained in several laws and regulations, one of them is the 1945 Constitution (UUD '45), the Amended 1945 Constitution through several Articles formulating the Right to Life as follows: [12]

Article 28 A:

Everyone has the right to life and has the right to defend his life and lives.

Article 28 B paragraph (2):

Every child has the right to survival and growth and has the right to protection from violence and discrimination.

Article 28 H paragraph (1):

Every individual has the right to life in prosperity, physically and mentally, to life and have a healthy environment and the right to health services.

Article 28 I paragraph (1)

The right to life, the right to free of torture, the right to freedom of thought and conscience, the right to embrace a religion, the to free of slavery, the right to be recognized as an individual before the law, and the right not to be prosecuted on the basis of a retroactive law are human rights can be not reduced under any circumstances.

2. The state's legal responsibility for the right to life of citizens.

That the rule of national law governing the Right to Life is the Law of the Republic of Indonesia Number 39 of 1999 concerning Human Rights. Through several Articles in the Law it is formulated with the Right to Life, among them:

Article 4:

The right to life, the right to free of torture, the right to personal freedom, mind and conscience, the right to embrace a religion, the to free of slavery, the right to be recognized as a person and equality before the law, and the right not to be prosecuted on the basis of a retroactive law are human rights that cannot be reduced under any circumstances and by anyone.

[7] Hata, H. 2005. Individuals in International Law. Bandung : STHB Press, Bandung.

[8] _____ 1996. "Law and Human Rights " in Bagir Manan (ed.), People Sovereignty, Human Rights, Dr. Sri Soemantri Martosoewignjo., S.H. Jakarta : Gaya Madia Pratama.

[9] Naning, Ramdlon. 1986. Aspects and Image of Human Rights in Indonesia, Jakarta : Criminology Institute University of Indonesia – Indoneisa Legal Aid Support Program.

[10] Purbopranoto, Kuntjoro. 1960. Human Rights and Pancasila State of the Republic of Indonesia, Jakarta : PT. Pradnya Paramita.

[11] Soemantri, Sri. 1987. Procedure and System of Constitutional Amendment. Bandung : Alumni

[12] Soepomo, R. 1966. " Indonesia Negara Hukum", The 1945 Constitution Administration System in Jakarta, 1996.

Article 9:

(1) Everyone has the right to life, maintain life and improve their standard of living.
(2) Everyone has the right to life in peace, security, well-being happiness, prosperity physcically and spiritually
(3) Everyone has the right to a good and healthy environment.

Article 53 paragraph (1):

Every child from the womb, has the right to life, maintain his/her life and improve living standards.

That the mechanism of law enforcement on the right to human life as a fundamental right actually has been guaranteed according to national law both contained in Pancasila as the Way of Life of the Indonesian Nation.[13] In the Preamble of the 1945 Constitution (torso) and other laws and regulations as described above, the mechanism for upholding human rights is closely related to violations and law enforcement, because if there is a violation of the principles and legal norms, a the process or mechanism is required in which its enforcement that is carried out and enforced by law enforcement agencies, law enforcers which by law have been given the task and authority to do so. [14]These agencies are the Constitutional Court, Human Rights Commission and other related institutions.

E. CONCLUSIONS

Based on the discussion that has been described above, the conclusion we can provide for this paper is that the State is responsible for protecting the right to life of its citizens as stipulated in the 1945 Constitution (UUD '45) , the amended 1945 Constitution, namely:

Article 28 A:

Everyone has the right to life and has the right to defend his life and lives.

Article 28 B paragraph (2):

Every child has the right to survival, and growing and has the right to protection from violence and discrimination.

Article 28 H paragraph (1):

Every person has the right to life in prosperity, physically and mentally, to have healthy residence and environment and the right to health services

The right to life, the right to free of torture, the right to freedom of thought and conscience, the right to embrace a religion, the to free of slavery, the right to be recognized as an individual before the law, and the right not to be prosecuted on the basis of a retroactive law are the human rights that can not be reduced under any circumstances.

Besides the 1945 Constitution, the State also guarantees the right to life of its citizens under the Law of the Republic of Indonesia Number 39 of 1999 concerning Human Rights as stipulated in Article 4 and Article 9.

REFERENCES

A. Books

Asplund, Knut D. 2008, Law of Human Rights, Yogyakarta Pusham UII.

Attamimi, A. Hamid, S. 1992 Pancasila Legal Aspects in the Legal Life of the Indonesian Nation, Jakarta : BP 7, Pusat.

Alsaton, Phlip, dan Franz Magnis Suseno 2008.“Foreword in Knut D. Aspilun, Suparman Marzuki, Eko Riyadi (Eds) Law of Human Rights (p. XVII-XIX, Yogyakarta : Pusham UII.

Brown, M.Ane. 2002, Human Rights and The Borders of Suffering, Manchester, Manchester University Press.

Dirdjosisworo, Soedjono. 2004 HAM, Democracy and Rule of Law in the Context of Indonesia National Resilience’, A Paper In the Upgrading and Workshop of Citizenship Lecturers, All West Java Batch XVI Academic Year 2003/2004, Cooperation with Kodam III Siliwangi

Hadjon, Philipus M. 1987, Legal Protection of the People in Indonesia. Surabaya : Bina Ilmu.

Hata, H. 2005. Individuals in International Law. Bandung : STHB Press, Bandung.

_____ 1996. “Law and Human Rights “ in Bagir Manan (ed.), People Sovereignity, Human Rights, Dr. Sri Soemantri Martosoewignjo., S.H. Jakarta : Gaya Madia Pratama.

Naning, Ramdlon. 1986. Aspects and Image of Human Rights in Indonesia, Jakarta : Criminology Institute University of Indonesia – Indonesia Legal Aid Support Program.

[13] Kusumaatmadja, Mochtar. 1975, Legal Upgrading in National Development. Bandung : Binacipta.
[14] Wahjono, Padmo. 1986. Indonesia is the State Based on Law. Jakarta : Ghalia Indonesia

Purbopranoto, Kuntjoro. 1960. Human Rights and Pancasila the State of Republic Indonesia, Jakarta : PT. Pradnya Paramita.

Soemantri, Sri. 1987. Constitution Amendment Procedure and System. Bandung : Alumni

Soepomo, R. 1966. “Indonesia is State of Law”, in The 1945 Constitution Administration System in Jakarta, 1996.

Kusumaatmadja, Mochtar. 1975, Development of Law in the Framework of National Development. Bandung : Binacipta.

Wahjono, Padmo. 1986. Indonesia the State under the Law. Jakarta : Ghalia Indonesia.

B. Laws and Other Regulations

1945 Constitution (UUD’45) Amended 1945 Constitution: Article 28 A, Article 28 B paragraph (2), Article 28 H paragraph (1), Article 28 I paragraph (1).

Law of Republic of Indonesia Number 39 year 1999 regarding Human Rights : Article 4 and Article 9.

GOVERNMENT'S RESPONSIBILITY FOR THE DEVELOPMENT AND SUPERVISION OF TRADITIONAL HEALTH SERVICES AS REGULATED IN LAW NUMBER 36 of 2009 CONCERNING HEALTH

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Abstract

Before the entry of modern healing by health workers, especially doctors, the Indonesian people had known and practiced healing from them and by themselves, called traditional healing. Traditional healing is indeed native to the Indonesian people themselves from generation to generation, until now. The problem in this study is why do people in Indonesia still use traditional health treatments? What is the responsibility of the government for the development and supervision of traditional health services as stipulated in Law Number 36 of 2009 concerning Health. The research method used is normative juridical using secondary data. The results of the study stated that the philosophy of the people in Indonesia still using traditional medical treatment is an informal relationship between traditional healers and their patients, thus making a friendly and friendly relationship like family. Government responsibility for the fostering and supervision of traditional health services as stipulated in Law Number 36 of 2009 concerning Health is contained in Article 61. Therefore, efforts from the government, in this case the Ministry of Health is that traditional medicine in particular, and services traditional health in general is a partner of modern health services in realizing the highest degree of public health in Indonesia, so the Ministry of Health and the Food and Drug Monitoring Agency (Badan POM) must carry out supervision and guidance as well as possible.

Keywords: Responsibility, Traditional Medicine, Law Number 36 of 2009 Concerning Health

.A. INTRODUCTION

Healing and treatment are two terms that are not the same, but also not different at all. Healing is an attempt made by someone against a person who is sick (patient) to recover. While treatment is an effort made by someone to treat a sick person (patient) to recover. Of these two terms, indeed healing has a broader understanding, compared to treatment.[1]

In doing this healing can be done in several ways, and one way is to provide medicine to patients (treatment). Other ways for people to get well, except for giving medicines are to regulate food (diet), massage and massage, physiotherapy, exercise, giving spells or other traditional methods.

Before the entry of modern healing by health workers, especially doctors, the Indonesian people had known and practiced healing from them and by themselves, called traditional healing. Traditional healing is indeed native to the Indonesian people themselves from generation to generation, until now.

Based on the results of existing studies, Indonesian population who are sick and self-medication, there are still 28.12% who use traditional medicine. Of those who seek treatment out, there are still around 4.0% of the Indonesian population, still seeking help from traditional medicine.[2]

This is understandable because the healing practices carried out by traditional healers are not based on the diagnosis of the disease itself. The diagnosis made by traditional medicine is more directed at the social-psychological diagnosis, especially how the patient's relationship with others, and what has been done by the patient to family, neighbors, friends, and others. Therefore, the treatment is mystical, incantations, or incantations. But on the other hand, some cases show that traditional medicine can cure patients, who previously failed to be handled by health workers or doctors.[3] This is as happened in alternative medicine from Ningsih Tinampi.

Ningsih Tinampi is a shaman from Pasuruan, East Java who has the ability to treat various diseases through alternative medicine. Based on the confession of Muji, one of his patients, stated that he

[1] Soekidjo Notoatmodjo, 2010, *Etika dan Hukum Kesehatan,* Rineka Cipta, Jakarta, p. 184.

[2] *Ibid.*

[3] *Ibid.,* p. 185.

had suffered from gastric pain for years and did not recover despite seeing a doctor. However, when treated by Ningsih Tinampi, the disease finally recovered.[4]

Based on this, it is actually possible for patients to seek help from traditional healers after a treatment failure has indeed occurred by health workers. Therefore, there needs to be attention from the government related to the development and supervision of traditional health services as mandated in Article 61 of Health Law No. 36 of 2009, concerning Traditional Health Services.

B. PROBLEM STATEMENT

Based on the background above, the problem in this study is:

1. Why do people in Indonesia still use traditional health treatments?
2. What is the government's responsibility for the fostering and supervision of traditional health services as regulated in Act Number 36 of 2009 concerning Health?

C. LITERATURE REVIEW

According to Atmadja, responsibility is as a freedom of action to carry out the tasks assigned, but in the end can not escape from the resultant freedom of action, in the form of prosecution to carry out properly what is required of him. This view is in line with the boundaries of the Administrative Encyclopedia that defines responsibility as the obligation of a person to carry out appropriately what is required of him.[5]

Mulyosudarmo divides the notion of accountability in two aspects as follows:[6]

1. Internal aspects, namely the responsibility that is realized in the form of a report on the implementation of power granted by the leadership in an agency.
2. External aspects, namely liability to third parties, if an action inflicts loss to another party or in other words in the form of liability for damages incurred to other parties for the act of office performed.

D. RESEARCH METHODS

1. Types of Research

This research is basically a normative juridical study, because the target of this study is the normative law or method in the form of legal principles and the legal system.[7] Normative research in this study is research that describes or describes in detail, systematic, comprehensive and in-depth about the government's responsibility for the fostering and supervision of traditional health services as regulated in Act Number 36 of 2009 concerning Health.

2. Nature of Research

This research is descriptive because it illustrates the applicable laws and regulations and is associated with legal theories in the practice of its implementation relating to the problem to be examined.

3. Data Analysis

The data obtained will be analyzed by qualitative analysis.

E. ANALYSIS AND DISCUSSION

1. The Philosophy of Society in Indonesia Still Uses Traditional Health Medicine

In the province of Aceh, traditional medicine has been very advanced. Traditional medicinal herbs from previous ancestors are still an alternative choice for the people of Aceh, especially those still living in rural areas. Many Acehnese still use traditional medicines because Aceh still has abundant plant wealth.[8]

In traditional medicine, it is always associated with two things, namely traditional healers, and traditional medicine, which can be explained in detail as follows:[9]

a. Traditional healers are people or institutions or services that carry out traditional medicine. Traditional medicine, known in Indonesia, can come from two sources, viz:
   1) Original from the Indonesian people themselves (various shamans),
   2) From outside Indonesia, namely from India and China (sinshe, acupuncture).

[4] https://jateng.tribunnews.com/2019/11/30/kesaksian-pasien-yang-berobat-ke-ningsih-tinampi-terkaget-kaget-antrenya-hingga-berbulan-bulan?page=3., accessed on December 10, 2019 at 09.58 PM.

[5] Sutarto, 2009, *Encyclopedia Admimsirasi*, Gramedia, Jakarta, p. 291.

[6] Suwoto Mulyosudarmo, 1997, *Peralihan Kekuasaan: Kajian Teoritis dan Yuridis Terhadap Pidato Newaksara*, Gramedia, Jakarta, p. 42.

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

[8] Ismail, "Faktor Yang Mempengaruhi Keputusan Masyarakat Memilih Obat Tradisional Di Gampong Lam Ujong", *Idea Nursing Journal*, Vol. VI No. 1 2015, p. 8.

[9] Hadi Siswanto, 2009, *Etika Profesi*, Putka Rihama, Yogyakarta, p. 31.

b. Traditional medicine is an object or herb as well as the method used to treat sufferers. Based on the objects, methods or methods used, there are also various things, among others:
   1) With herbs from plants. Usually used for herbs, leaves, flowers, roots, and bark. These herbs can be packaged in powder form or boiled directly, often called herbs, or in the form of extracts that are packaged in capsule form.
   2) With physical touch, i.e. if between healers doing healing with physical direct touch or with tools to sufferers, for example:
      a) Shaman broken bones
      b) Reflexology
      c) Acupuncture
         Although originally acupuncture was classified as a traditional method of treatment originating from China, but lately it has also been included in one way of modern medicine. Acupuncture education has also been opened or organized by hospitals, for example at Cipto Mangunkusumo Hospital. Some hospitals have also opened clinics or treatment by acupuncture.
   3) With meditation:
      a) Deep breathing.
      b) The healer together with the sufferer does meditation.
   4) In a spiritual way, through various ways, among others:
      a) Spell
      b) Prayers,
      c) Psychotherapy, and so on.

Along with the development of information technology, especially television, traditional medicine is also rife. Television programs both private and government have bloomed with traditional medicine shows in various forms and ways starting with prayer, incantations, hypnotism to using tools that are classified as modern.

The viability of traditional medicine from century to date has not subsided, even more prevalent as is the case with modern medicine. No decline in traditional medicine in this modern era has several reasons. These reasons are nothing but the advantages of this traditional medicine when compared to modern medicine, among others:[10]

a. Holistic Approach
   In general, traditional medicine uses a "holistic" approach in dealing with patients or "clients". Traditional medicine not only links the patient's illness with the physical environment, but is also associated with all aspects of the patient's life including social and spiritual. Traditional healing, especially in Indonesia, is very concerned with various aspects of the patient's background. Traditional healers see the cause of disease more because of the relationship between patients with social and spiritual life. Therefore, the way of healing is emphasized on social and spiritual nature, such as having to apologize or "njaluk ngapuro" (Java) to those who give life or to the spirits who are likely to be hurt by their patients.
b. Integrated Services (Healing and Care)
   The services provided by traditional healers are generally combined between healing and care or "curing and caring". They themselves treat and they themselves treat, not like modern medical services, doctors who treat (curing), nurses who care (caring). Because of the intense relationship between the healer and the patient, a close relationship occurs between them, even between the traditional healer and the entire family of the patient.
c. Family-friendly
   The relationship between traditional healers and patients is not as formal as between doctors and their patients in modern medicine. The relationship between the healer and the one being treated is a family relationship. So that if later, for example, his family or patients who are already sick get sick again can easily get help again even without being paid. Different with modern medicine, no matter how close the relationship between health workers or doctors and patients, every time asking for help must be charged.
d. Familiar, Friendly and Very Informal
   The informal relationship between traditional healers and his patients will give birth to a friendly and friendly relationship. Even though they did not know each other before, but during the treatment and post-healing process, the two sides formed a close relationship like a normal friendship. It can be said that the relationship between traditional healers and patients or former patients is very informal.
e. Medical Costs Adapted to What Patients Have (Don't Have Money)

[10] M. Yusuf Hanafiah dan Amri Amir, 1999, *Etika Kedokteran dan Hukum Kesehatan*, EGC, Jakarta, p. 62.

In modern medicine there is always a kind of transaction relationship, between service providers (health workers or doctors) and service recipients (patients). Of course the service provider must accept the compensation for his service, and the recipient of the service or service must provide compensation, in the form of money. But in traditional medicine this transaction relationship is not very visible. Service providers or traditional healers are not too demanding their rights, nor are service recipients or patients less burdened to give or pay to traditional healers. The reward for treatment is just a thank you, which may be in the form of money or other things, such as agricultural products (if in rural areas), even it is not uncommon to say thank you only in the form of "thank you very much".

f. Traditional Medicines are Generally Hereditary
Skills or abilities possessed by traditional healers in general or in large part are obtained from their parents, hereditary abilities. This is because there is no special education and training to develop the ability or skills of this traditional medicine. Except acupuncture as explained above.

g. Medicines Used
In general, the drugs used by traditional medicine prioritize herbal medicines. Therefore, it almost does not cause side effects compared with modern medicines that are certainly using chemicals.

Although traditional medicine has many advantages compared to modern medicine as described above, traditional medicine also has shortcomings or weaknesses, among others:

a. No Rational Diagnosis Is Done
Almost all traditional medicine in treating patients is not based on rational diagnosis of disease. Diagnosis is usually done irrationally, ie social, psychological and spiritual diagnosis. For example, asking patients whether they have had a bad relationship with other people, neighbors or other relatives, have not recently or rarely made pilgrimages to the tombs of the ancestors, have not given alms so far, and so on. Therefore, these traditional healers do not make a rational diagnosis, so the therapy or treatment of patients is also irrational. All patients have different diseases, but receive the same therapy. Even sometimes the treatment is dangerous for patients, for example, told to soak in the river every morning, or given water that is given a spell, and so on.

b. Requirements that are burdensome for patients
In the context of therapy or healing the patient, sometimes the patient or his family are asked for requirements, or do things that are very burdensome for the patient or the patient's family, for example:
1) Must make expensive and rare dishes, such as finding rare leaves in the forest, having to slaughter "smooth black" chickens (all of them are black, and so on);
2) Doing something that is even contrary to health, for example people with mental disorders are deprived and excluded from their environment, a person with malaria fever is told to soak in a river, and so on.

c. Increasing the Severity of Disease in Patients
Very often the treatment that results is not a cure, but rather the disease becomes worse. Many cases of mental illness sufferers due to stress, then by traditional healers it is advisable to be put alone, then this patient is put up by the family. Of course, because dipasung can not socialize with the environment, it will increase stress which ultimately does not get better, but worse.

2. The Government's Responsibility for the Development and Supervision of Traditional Health Services as Regulated in Law Number 36 of 2009 Concerning Health

In Health Law No. 36 of 2009, concerning Traditional Health Services is explicitly regulated through Article 59 to Article 61 which essentially includes the following:

a. Based on the treatment method, traditional health services are divided intoi:
1) Traditional health services that use skills.
2) Traditional health services that use herbs.

b. Traditional health services are fostered and monitored by the government so that benefits and safety can be accounted for and are not contrary to religious norms.

c. Every person who performs traditional health services using tools and technology must get permission from an authorized health institution.

d. The use of tools and technology for traditional health services must be accounted for in terms of their benefits and safety and does not conflict with religious and cultural norms of society.

e. The community is given the broadest opportunity to develop, improve and use traditional health services that can be accounted for in terms of benefits and safety.
f. The government regulates and supervises traditional health services based on public safety, interests and protection.

Based on this, the government has an obligation to facilitate the existence of this traditional medicine. Along with the increase in modern health services on the one hand, and on the other hand traditional health services are stagnant or stagnating (not developing). But the reality on the ground, traditional healing has positive aspects, without ignoring the negative aspects, then traditional medicine does not need to be turned off. Instead it must be fostered and developed, so that it becomes a partner of modern health services. Therefore, it can be stated that:

a. Traditional and modern medicine must work together, complement each other. Therefore modern medicine has a moral obligation to foster and guide traditional medicine.
b. Traditional and modern medicine are still equally needed by the community. Both types of treatment, which are still needed in the midst of the community, do not attack each other, but complement each other.
c. Traditional medicine is an alternative treatment. The public is reminded that traditional medicine is a form of healing or alternative health services, not primary. In choosing treatment, the community is directed primarily to "Modern Medicine", then only "Traditional Medicine". That is, traditional medicine is the last resort after modern medicine fails to cure.

So that traditional medicine can be in line with and in line with modern medicine, and also able to survive and develop in the midst of advances in health science and technology today, the efforts of the government, in this case the Ministry of Health is:

a. Traditional medicine needs to be fostered and monitored so that benefits and safety can be accounted for. Thus, traditional medicine in particular, and traditional health services in general are partners of modern health services in realizing the highest health status of Indonesian people.
b. Traditional medicine that can be accounted for benefits and safety needs to be improved and developed in order to realize optimal health status for the community. In order to account for the benefits and safety of this traditional health care treatment, the government, through the Ministry of Health and the Food and Drug Monitoring Agency must conduct supervision and guidance as well as possible.
c. Implications or implementation of guidance to traditional medical treatments and or services carried out by:
   1) Traditional Medication.Supervision and development of traditional medical services, especially traditional healers, is carried out by the "Sub Directorate of Traditional Medical Development, Directorate General of Medical Services, Ministry of Health of the Republic of Indonesia.
   2) Traditional Medicine. Supervision of the distribution and use of "Traditional Medicine" is carried out by the Center for Supervision of Traditional Medicine, Drug and Beverage Control Agency.

F. CONCLUSION

Based on the discussion above, the conclusion in this study is:

1. The philosophy of the people in Indonesia still using traditional medical treatment is the informal relationship between traditional healers and their patients, thus making a friendly and friendly relationship like family. The existence of an informal relationship also affects the cost of treatment that is cheap and can be adjusted to what is owned by the patient, and the drugs used by traditional medicine prioritize herbal medicines that do not cause side effects.
2. The responsibility of the government for the fostering and supervision of traditional health services as stipulated in Law Number 36 of 2009 concerning Health is contained in Article 61. Therefore, efforts from the government, in this case the Ministry of Health is that traditional medicine in particular, and traditional health services in general are partners of modern health services in realizing the highest degree of Indonesian public health, so that the Ministry of Health and the Food and Drug Monitoring Agency must conduct supervision and guidance as well as possible.

REFERENCES

Books:

Hanafiah, M. Yusuf dan Amri Amir, 1999, *Etika Kedokteran dan Hukum Kesehatan*, EGC, Jakarta.

Notoatmodjo, Soekidjo, 2010, *Etika dan Hukum Kesehatan*, Rineka Cipta, Jakarta.

Siswanto, Hadi, 2009, *Etika Profesi*, Putka Rihama, Yogyakarta.

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

Journal:

Ismail, "Faktor Yang Mempengaruhi Keputusan Masyarakat Memilih Obat Tradisional Di Gampong Lam Ujong", *Idea Nursing Journal*, Vol. VI No. 1 2015.

Laws and Regulations:

Indonesia, Law Number 36 of 2009 concerning Health.

Internet:

https://jateng.tribunnews.com/2019/11/30/kesaksian-pasien-yang-berobat-ke-ningsih-tinampi-terkaget-kaget-antrenya-hingga-berbulan-bulan?page=3., accessed on December 10, 2019 at 09.58 PM.

CONSTRUCTION AND LEGISLATION OF PENAL MEDIATION POLICY AS AN ALTERNATIVE FOR COMPLETION OF CRIMINAL ACTS OF MEDICAL PRACTICES IN RENEW OF CRIMINAL LAW

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ABSTRACT

The Draft Law of the Criminal Code (KUHP), especially the chapter which contains criminal and criminal acts against all criminal acts is in line with the mindset of reforming criminal law, in this case especially concerning the implementation and treatment of such methods that contain humanitarian basis and in accordance with the cultural values of the Indonesian people. This journal has 2 (two) problem formulations, namely: 1) The concept of Restorative Justice Penal Mediation as an alternative in the settlement of cases of Medical Practicing Crimes ?; 2) The application of Penal Mediation in the settlement of the current Medical Practice Criminal case? The research method used in this journal is juridical-normative legal research, with secondary data as researched data, including primary legal material, namely the Republic of Indonesia Constitution Law Number 29 of 2004 concerning Medical Practice, Law Number 36 of 2009 concerning Health, the Criminal Law Code, as well as other laws and regulations, secondary legal materials which include legal theory books, scientific journals and other materials, and tertiary legal materials which include legal dictionaries, language dictionaries and other ingredients.

Keywords: Construction and Legislation, Penal Mediation, Criminal Law Reform.

A. INTRODUCTION

Health as one of the basic human needs besides clothing, shelter, food and education, and is one of the basic social rights (the right to health care) and individual rights (the right of self determination) that must be realized in the form of the provision of safe health services , quality and affordable by the community. Therefore, every activity and effort to improve the level of public health must be carried out on the basis of humanity, balance, benefits, protection, respect for rights and obligations, justice, gender and non-discriminatory and religious norms (Article 2 of Law Number 36 Year 2009 concerning Health).

The Draft Law of the Criminal Code (KUHP), especially the chapter which contains criminal and criminal acts against all criminal acts is in line with the mindset of reforming criminal law, in this case especially concerning the implementation and treatment of such methods that contain humanitarian basis and in accordance with the cultural values of the Indonesian people. The policy to establish penal mediation which is a manifestation of restorative justice as an alternative to settling criminal cases in medical practice as a future criminal law reform that is part of the criminal justice process is very much needed in accordance with responsive legal theory that requires that the law is always sensitive to the development of society, so Penal mediation can be a means of resolving legal cases of lawful medical practice and the results of the agreement are binding on the parties, between doctors and patients and their families as well as law enforcement officers and the public so that cases of medical practice crimes that are resolved through mediation penalties abolish the authority to prosecute.

Law is no longer seen as a means of social control, but is also used as a means of community engineering (law as a tool of social engineering). Likewise, the use of sociological jurisprudence theory that studies the law is not only limited to the study of regulations but also sees the effect of and the operation of the law, that the function of law is not merely a means of social control but the law also functions as a means of engineering and social renewal better known as law as a tool of social engineering. Sociological jurisprudence uses a sociological perspective in understanding law that studies the interrelationships between the influence of law and society.

Medical practice crimes (malpractice) are increasingly happening and are being covered in national mass media coverage, both print and electronic media. It seems that conditions have now

changed, paternalistic and fiduciary relationships have begun to falter.

Triggers for disputes are misunderstanding, differences in interpretation, unclear arrangements, dissatisfaction, offense, suspicion, improper, fraudulent or dishonest actions, arbitrariness or injustice, and the occurrence of unforeseen circumstances and developments in science and technology that affect also medical world.[1]

On the other hand, the demands of the community are still the same, namely the implementation of high quality medical services that are never wrong and of course at low cost. It is this clash between interests that has led to various conflicts / disputes and allegations of alleged criminal acts in medical practice which then enter the realm of law, both civil and criminal.

In the process of settling cases of medical practice (malpractice) two lines can be used, namely litigation (court) and non-litigation / consensual / non-adjudication. Understand that court proceedings are costly and time-consuming processes. The conventional court system naturally opposes, often resulting in one party winning and the other party losing.

Meanwhile, sharp criticism of the judiciary in carrying out its functions is considered too dense, slow and time-consuming, expensive and less responsive to the public interest and considered too formalistic and too technical. That is the reason why there is a need to review the improvement of the justice system in an effective and efficient direction.

Weaknesses and dissatisfaction with the operation of the criminal justice system encourage the search for alternative solutions to the criminal justice system by resolving cases outside the criminal line, namely by mediating the penalties as a manifestation of restorative justice,[2] namely the need for thinking about resolving criminal cases through alternative dispute resolution (ADR) channels. with a view to resolving conflicts that occur between perpetrators and victims, also in order to overcome the rigidity / formalities in the existing criminal justice system, avoiding the negative effects of the existing criminal system, especially in finding other alternatives to imprisonment (alternatives to imprisonment / alternative to custody), and efforts to resolve cases of medical practice which are more familial, deliberative and still maintain human dignity and their satisfaction satisfying both parties (win-win solution) and to reduce the st agnation or the accumulation of 3 cases (the problem of court case overload) and for simplification of the criminal justice process

The principle of positive criminal law in Indonesia, criminal cases cannot be resolved outside the court, although in certain cases it is possible to settle cases outside the court. However, law enforcement practices in Indonesia are often also criminal cases resolved outside the court through law enforcement discretion, family peace mechanisms, deliberation mechanisms, adat institutions and so on. The implications of the practice of resolving cases outside the court all this time are indeed that there is no formal legal basis, so it is also common for an informal case to have been carried out peacefully through a family consultation mechanism, but it is still processed in court according to positive law in force.

As a consequence, the existence of penal mediation is increasingly applied as an alternative settlement of cases in the field of criminal law through restitution in the criminal justice process, indicating that the difference between criminal law and civil law is not so great and becomes dysfunctional.

Based on the background above, the authors raise the issue of how the concept of restorative justice in the implementation of mediation of the law from the perspective of current legislation and how it is applied as well as how the construction and legislation policy in the upcoming criminal law reform?

B. RESEARCH METHODS

The research method used in this journal is juridical-normative legal research, with secondary data as research data, including primary legal[3] material, namely the 1945 Constitution of the Republic of Indonesia and Law Number 29 of 2004 concerning Medical Practice, Law Law Number 36 of 2009 concerning Health, Law Number 36 of 2014 concerning Health Workers, as well as other laws and regulations, secondary legal materials which include legal theory books, scientific journals and other

[1] H.R Hariadi, Community Highlights on the Medical Profession, paper presented at the workshop on Integrated Management of Ethical and Legal Issues, Surabaya, 23 September 2000 p. 1 in Endang Kusuma Astuti, Therapeutic Transactions in Medical Services Efforts at Hospitals, Bandung: Citra Aditya Bakti, 2009, p. 234-238

[2] Barda Nawawi Arief, Legislative Policy in Crime Prevention with Prison Crimes, Semarang, Diponegoro University Publisher Agency, 2000, p. 169-171. (Hereinafter referred to as Barda Nawawi Arief 2)

[3] Suharsimi Arikunto, Research Procedure for a Practical Approach, Rieneka Cipta, Jakarta, 2002, p. 39

materials, and tertiary legal materials which includes legal dictionaries, language dictionaries, and other materials.

C. PROBLEM FORMULATION

The formulation of the issues that will be discussed in this journal are as follows:

1. The concept of Restorative Justice Penal Mediation as an alternative in the settlement of cases of the Medical Practice Criminal Act?
2. Application of Penal Mediation in the settlement of the Medical Practice Criminal case at this time?

D. DISCUSSION

1. The concept of Restorative Justice Penal Mediation as an alternative in the settlement of cases of the Medical Practice Criminal Act

According to Wright, that the main purpose of restorative justice is recovery, while the second goal is compensation.[4] This means that the process of overcoming crime through a restorative approach is a criminal settlement process, which aims to restore the situation which includes compensation for victims through certain methods agreed by the parties involved in it

According to UNODC, what is meant by restorative justice is approaches to solving problems, in their various forms, involve victims, perpetrators, their social networks, judicial bodies and the community.[5]

Penal mediation is one form of the implementation of restorative justice, namely rehabilitation, resocialization, restitution, reparation and compensation in completing a criminal act of medical practice and looking at a crime or crime is not just a matter of a criminal offender (doctor) with the State representing the victim (patients), and leave the process of settlement only with the perpetrators (doctors) and the State (public prosecutors).[6]

Restorative justice demands a criminal justice process to provide the fulfillment of the interests of the victim (patient and or his family) as the injured party as a result of the perpetrator's (doctor's) actions.[7] So that a paradigm shift in punishment is needed to place the mediation of penalties as part of the criminal justice system.

The author is of the opinion that at present the mediation of penalties in cases of criminal practice of medicine has not yet been regulated either in the Criminal Code, the Health Act, the Medical Practice Act and / or a separate Act, therefore in the future (ius contituendum) it needs to be thoughtful in more depth in what provisions should mediate the penalties in the case of a medical practice criminal act will be regulated, whether regulated in the Criminal Code, and separate laws and regulations under the Act or Regulation of the Supreme Court of the Republic of Indonesia and can make a law that can be sought dream.

Mediation of penalties in medical practice crime cases is not in principle in the Laws and Regulations, but several Laws and Regulations which show that, the settlement of medical practice criminal cases outside the court process has been given a place. However, in essence the provisions above only provide the possibility of the settlement of cases of criminal acts of medical practice outside the court, it is not yet a mediation of the penalties which are recognized as an alternative institution for settling cases of medical practice criminal acts outside the court.

2. The Implementation of Penal Mediation in the Settlement of Medical Practice Criminal Cases

In the offense of complaints of medical practice, the investigation is based on the victim's complaint, that is the patient or his family, the solution is found by mediation, both before the complaint is made so that the victim (patient) or his family does not submit a complaint, or if the complaint has been made by the victim.

Here the role of the police is not as a mediator, but only as a witness who witnesses the completion of the criminal case through a peace agreement. In addition to complaint offenses in medical practice cases, doctors and patients usually resolve the cases themselves by mediation. Meanwhile, at the prosecution stage, the researchers found that mediation of prosecution was carried out prior to the prosecution.

In this mediation the victim asks for compensation from the perpetrator, namely the doctor, however despite the agreement of the victim and the perpetrator to compensate the victim, the agreement does not eliminate the prosecution, so that the judicial process continues as it should, and the compensation agreement is only a consideration prosecutors in holding prosecutions, the decision remains in the hands of judges.

Penal mediation in medical practice criminal cases currently only alleviates claims, because there is no law governing the implementation of penal mediation along with the legal force of the deed of

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[4] Wright, 1991 p. 117 accessed from the website http://www.restorativejustice.org at January 1, 2020

[5] UNODC, *Handbook on Restorative Justice Programmes. Criminal Justice Handbook Series*, (Vienna: UN New York, 2006), p. 5

[6] Eva Achjani, Zulfa, Restorative Justice, Jakarta, University of Indonesia Faculty of Law Publishing Agency, p. 64

[7] Patria, Eny, 2011, "Disporitas Legal Justice in Indonesia Marginal Poor Society ", Law and Community Dynamics, vol, 8 No. April 2nd 2011.

agreement resulting from the mediation result of penal mediation. So, the perpetrators will be convicted but the criminal will be commuted. Meanwhile, in handling criminal cases that fall into the category of 'ordinary offense', such as cases that contain elements of negligence of doctors in carrying out medical actions such as Article 359 of the Criminal Code (because of negligence causes the death of others), then mediation is carried out in which the family the victim requests compensation from the doctor as the perpetrator with a deed of agreement that compensation has been paid to the victim's family.

However, even though an agreement has been made to compensate the victims' families, the prosecution process for the perpetrators of the criminal acts is still carried out, with the reason that the Prosecutor's Office works according to the normative rules, as long as there are no rules governing the position of mediation in the prosecution, the cases continue to be processed, but because payment has been made compensation, this reason is only one reason for the Prosecutor's consideration for the maximum slope of the suit.

In the results of research into the practice of mediating penalties in cases of medical practice by judges has never been done, because there are no normative rules governing them, because matters relating to the agreement of the perpetrators namely doctors and victims (patients) are at the level of investigation and prosecution, the judge only gives decisions by considering the matters stated in the indictment, one of which is an agreement reached through mediation before the case is submitted to the court.

The author is of the opinion that with the implementation of penal mediation in medical practice criminal cases even though legislation has not yet regulated it, there has been a paradigm shift in the existence of quasi private law into public law and by seeing the many practice of mediating penalties in resolving criminal cases of medical practice with good mechanisms not institutionalized or with institutionalized mechanisms such as in professional and customary justice, family deliberations, shows the community's need for penal mediation which is a manifestation of restorative justice as an alternative in resolving medical practice criminal cases in order to avoid difficulties in the criminal justice process.

E. CONCLUSION

The concept of restorative justice, the existence and position of the victim, that is, the patient is recognized and the patient or family involved in the case settlement. Penal mediation is one form of the implementation of restorative justice, namely by the rehabilitation, resocialization, restitution, reparation and compensation in completing a case of medical practice crime.

REFERENCES

A. Book

Barda Nawawi Arief, Legislative Policy in Combating Crimes with Prison Crimes, Semarang, Diponegoro University Publisher Agency. 2000

Endang Kusuma Astuti, Therapeutic Transactions in Medical Services Efforts at Hospitals, Bandung: Citra Aditya Bakti, 2009.

Eva Achjani, Zulfa, Restorative Justice, Jakarta, University of Indonesia Faculty of Law Publishing Board.

Huijbers, Theo, Philosophy of Law in the Path of History, Canisius, Yogyakarta. 1982

Suharsimi Arikunto, Research Procedure for a Practical Approach, Rieneka Cipta, Jakarta, 2002

UNODC, Handbook on Restorative Justice Programmes. Criminal Justice Handbook Series, Vienna: UN New York, 2006.

B. Journal

H.R Hariadi, Community Highlight on the Medical Profession, paper presented in a workshop on Integrated Handling of Ethical and Legal Issues, Surabaya, 23 September 2000.

Wright, 1991 accessed from the website http://www.restorativejustice.org at January 1, 2020

Patria, Eny, 2011, "Disporitas Legal Justice in Indonesia Marginal Poor Society ", Law and Community Dynamics, vol, 8 No. April 2nd 2011

C. Legislation

Indonesia, the 1945 Constitution of the Republic of Indonesia.

_____, Law Number 29 of 2004 concerning Medical Practices.

_____, Law Number 36 of 2009 concerning Health.

_____, Law Number 36 of 2014 concerning Health Workers.

Criminal Procedure Code

JURIDICAL ANALYSIS OF COMPARISON BETWEEN MEDICAL RISK WITH MEDICAL NEGLIGENCE

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ABSTRACT

Health is recognized internationally as one of the human rights that needs to be upheld, as well as in the laws of the State of Indonesia. Health services are provided to all Indonesian citizens as mandated by the Constitution of the Republic Indonesia Year 1945. Doctors as one of the Parties who provide health services to Patients have responsibilities and obligations that they must fulfill to Patients, where Patient's expectations for health services given by the doctor is that the patient gets a cure as there is a therapeutic agreement agreed between the patient and the doctor. But sometimes there are some conditions that result in the results of health services provided by doctors to patients not in accordance or far from what has been expected by both parties, where it can be called a medical risk, and those that occur due to medical negligence, but both both have 2 (two) different consequences, so in this study will discuss the comparison between medical negligence with medical risks. This research has 2 (two) formulations of the problem, namely: (1) How is the determination of the doctor's medical actions as a medical negligence or medical risk?; and (2) How is the comparative analysis between medical negligence and medical risk?. The research method used is *juridical-normative* legal research, with secondary data support consisting of: (1) primary legal material: the Constitution of the Republic of Indonesia Year 1945, the Criminal Code, Universal Declaration of Human Rights, Law No. 36 of 2009 concerning Health, Law No. 29 of 2004 concerning Medical Practices, and Government Regulation No. 290 / MENKES / PER / III / 2008 concerning Approval of Medical Measures; (2) secondary legal materials: health law textbooks, and health law journals; and (3) tertiary legal material: Language dictionaries and terms.

Keywords: Health Services, Medical Risk, Medical Negligence.

A. INTRODUCTION

Health is recognized internationally as one of the human rights that needs to be upheld. In the health literature, there are various terms used to refer to human rights in the health sector, such as "the right to health" (Human Right to Health), or "the right to health", or "the right to obtain a degree of health optimal "(The Right to Attainable Standard To Health).[1] The United Nations (UN) in 1948 established the Universal Declaration of Human Rights, in which regulates the right to health in Article 25 paragraph 1 and 2 of the Universal Declaration of Human Rights which reads: "Everyone has the right to live by living standards that is appropriate for himself and his family, includes also the fulfillment of food and beverage needs, clothing, housing, health services and other social services. In addition, there is a guarantee if in a state of not working, sick, disabled, divorced, elderly and others are beyond their abilities. Both mother and child are entitled to certain protections. All children, both born and outside marriage, must receive the same social protection.

Likewise in Indonesian law where health as a human right is guaranteed in the 1945 Constitution of the Republic of Indonesia, which is then translated into a special law namely Law No. 36 of 2009 concerning Health in which Article 4 of the law reads: "Everyone has the right to health." Health services are provided to all Indonesian citizens as mandated by Article 28H paragraph (1) of the 1945 Constitution of the Republic of Indonesia reads: "every person has the right to live in prosperity physically and mentally, to live and get a good and healthy living environment and the right to obtain health services".

Doctors as one of the parties that provide health services to patients have responsibilities and obligations that must be fulfilled. Doctor's obligations can be set out based on Article 51 of Law No. 29 of 2004 concerning Medical Practices, which reads: "Doctors or dentists in carrying out medical practices have an obligation: a) to provide medical services in accordance with professional standards and standard

[1] Eleanor D. Kinney, *The International Human Right to Health*, Indiana Law Review, Vol 34, page. 1559.

operating procedures and patient medical needs; b) refer the patient to another doctor or dentist who has better expertise or ability, if unable to conduct an examination or treatment; c) keep everything he knows about the patient, even after the patient's death; d) conduct emergency relief on the basis of humanity, except if he believes that someone else is on duty and is able to do it; and e) increase knowledge and follow developments in medicine or dentistry.

Doctors organize health efforts which based on Article 1 point 11 of Law No. 36 of 2009 concerning Health, which states: "Health efforts are any activities 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 promotion, treatment of diseases, and health recovery by the government and / or the community. "Quality control of health services is carried out from education, giving the authority of doctors and dentists to practice with the prerequisites to be registered and to carry out further training after practice.[2] Patient expectations are the patient's expectations for the health services they receive.[3] Patient's expectation of the health services provided by the Doctor is that the patient gets a cure as there is a therapeutic agreement agreed between the patient and the doctor. Therapeutic agreement as a contract made between the patient and the doctor in which the doctor tries to make the maximum effort to cure the patient in accordance with the agreement made between the two and the patient is obliged to pay the healing costs.[4] But sometimes there are several conditions that result in the results of health services provided by doctors to patients not in accordance or far from what has been expected by both parties, where it can be called a medical risk, and those that occur due to medical negligence.

Today the determination of the consequences of a medical action as a medical risk or medical negligence is often unclear, even though there are elements of different actions both between medical risk and medical negligence so that if there is a blurring in determining medical action it can result in losses to both parties especially doctors where if a result of a medical action is considered medical negligence but the consequences of the medical action can be categorized as a medical risk, the Doctor who performs the medical action must be held accountable, even if the result is out of his will because it includes a medical risk, so there is a need discussion of the comparison between medical negligence and medical risk.

B. PROBLEM STATEMENT

Formulation of the problem in this study:

1. How to determine the doctor's medical actions as medical negligence or medical risk?
2. What is the comparative analysis between medical negligence and medical risk?

C. LITERATURE REVIEW

Health Services

The guarantee of health services as a human right especially for Indonesian citizens has been guaranteed in article 28H paragraph (1) of the 1945 Constitution of the Republic of Indonesia: "every person has the right to live in prosperity physically and mentally, to live and obtain a good and healthy environment. and has the right to receive health services. " The definition of health services according to the Ministry of Health of the Republic of Indonesia (2009) is any effort carried out alone or jointly in an organization to maintain and improve health, prevent and cure illnesses and restore the health of individuals, families, groups and even the community. In accordance with the restrictions as above, it is easy to understand that the forms and types of health services found are many. Because all of this is determined by the organization of services, whether carried out individually or jointly in an organization, and the scope of activities, whether it only covers health care activities, disease prevention, disease recovery, health recovery or a combination thereof.[5]

D. RESEARCH METHODS

The research method used is *juridical-normative* legal research, with secondary data support consisting of: (1) primary legal material: the Constitution of the Republic of Indonesia Year 1945, the Criminal Code, Universal Declaration of Human Rights, Law No. 36 of 2009 concerning Health, Law No. 29 of 2004 concerning Medical Practices, and Government

[2] Konsil Kedokteran Indonesia, 2006, *Penyelenggaraan Praktik Kedokteran Yang Baik di Indonesia*, Jakarta, page. 3.
[3] Lateef F., 2011, *Patient expectations and the paradigm shift of care in emergency medicine*, J Emerg Trauma Shock, page. 163.
[4] H.S, Salim, 2004, *Hukum Kontrak Teori dan Teknik Penyusunan Kontrak*, Sinar Grafika, Jakarta, page. 46.
[5] Dahlan Sofyan, 1999, *Hukum Kesehatan, Rambu-rambu bagi Profesi Dokter*, Cetakan I, UNDIP, Semarang, page. 55.

Regulation No. 290 / MENKES / PER / III / 2008 concerning Approval of Medical Measures; (2) secondary legal materials: health law textbooks, and health law journals; and (3) tertiary legal material: Language dictionaries and terms.

E. ANALYSIS AND DISCUSSION

1. Determination of Doctor's Medical Actions as Medical Negligence or Medical Risk

Doctors have an obligation, one of which is to provide health services. Basically a doctor's practice is the provision of individual assistance by doctors to patients in the form of medical services. If someone comes to the doctor to take advantage of available medical services, a legal relationship exists between the doctor and the patient called therapeutic transaction. Legal relations that do not promise a cure or death of this kind are called inspanningsverbintenis, which is different from the usual legal relationship in agreement in general that promises a definite *result (risk overbentenis / resultaatververententenis).*[6] Therefore the results obtained from health services are uncertain results but can be estimated medical risks that may occur so that it must be informed to the Patient or Patient's Family first, so that the decision is in the hands of the Patient or Patient's Family to agree or disagree medical actions that will be carried out by the Doctor where to inform the medical risk is the Doctor's Obligation as stipulated in Law No. 29 of 2004 concerning Medical Practices which in essence prior to taking medical action on patients must obtain prior approval after the patient gets a full explanation that at least includes the diagnosis and procedures for medical action, the purpose of the medical action taken, other alternative actions and risks, risks and complications that may occur, and the prognosis for the actions taken.[7]

Medical risks that occur outside the will of the Doctor and Patient result in the loss of responsibility by the Doctor, so that in determining the consequences of the medical action as a medical risk so that the Doctor cannot be blamed for the medical consequences can be described as follows:

a. If the doctor has performed medical procedures in accordance with professional standards, medical standards and operational procedures standards. As for this matter, it has become the obligation of Doctors based on Law No. 29 of 2004 concerning Medical Practice, with the elaboration as follows:
   1) Article 44 paragraph (1) of Law No. 29 of 2004 concerning Medical Practice: "Doctors or dentists in carrying out medical practices are required to follow medical or dental service standards." Article Explanation: "What is meant by" service standards "are guidelines that must be followed by doctors or dentists in carrying out practices medical."
   2) Article 44 paragraph (2) of Law No. 29 of 2004 concerning Medical Practices: "Service standards as referred to in paragraph (1) are distinguished according to the type and strata of health service facilities." Article Explanation: "What is meant by" service facility strata "is the level of service that standards of personnel and equipment are according to ability which is given."

   If this has been fulfilled by the Doctor, then the Doctor has the right to obtain legal protection as long as carrying out the duties in accordance with professional standards and operational procedure standards.[8]
b. Medical approval that has been given by the patient and / or the patient's family, which can be referred to as informed consent. Informed consent literally consists of two words namely informed and consent. Informed means that you have received an explanation or information; whereas consent means giving consent or allowing, thus informed consent means an agreement given after receiving information.[9] Before conducting medical treatment, the doctor is obliged to provide an explanation to the patient and / or the patient's family about the diagnosis and also the procedures for the medical action, the purpose for the medical action carried out, as well as other alternative actions along with the risks that will occur, so that with the consent given both by Patients and Family Patients are considered to have known of the risks that will occur, so that if there is a medical risk as previously known, the risk cannot be blamed on the doctor. Regarding the approval of the medical procedure, it has been regulated in Articles 39

[6] Widodo Tresno Novianto, *Penafsiran Hukum Dalam Menentukan Unsur-Unsur Kelalaian Malpraktek Medik (Medical Malpractice)*, Jurnal Yustisia Vol. 4 No. 2 Mei – Agustus 2015, page. 489.

[7] Law No. 29 of 2004 concerning Medical Practice, Article 45 paragraph (1), (2) and (3).

[8] *Ibid.*, Article 50 letter a.

[9] Husein Kerbala, 2000, *Segi-segi Etis dan Yuridis Informed Consent*, Pustaka Sinar Harapan, Jakarta, page. 57

and 45 of Law No. 29 of 2004 concerning Medical Practices, and Government Regulation No. 290 / MENKES / PER / III / 2008 concerning Approval of Medical Measures.

Unlike the case with medical negligence where medical negligence or can be called a medical malpractice is the opposite of medical risk. The definition of medical malpractice as stated by Adami Chazawi, that medical malpractice is a doctor or a person who under his command intentionally or neglected to do an act (active or passive) in the practice of medicine to patients at all levels that violate professional standards, standard procedures, or medical professional principles, or by violating the law or without authority due to: without informed consent or outside informed consent, without a Practice License (SIP) or without a Registration Certificate (STR), not in accordance with the patient's medical needs; by causing a result (causal verband) harm to the body, physical and mental health or life of the patient, and therefore establishes legal liability for doctors.[10]

2. Comparative Analysis Between Medical Negligence and Medical Risk

In a certain medical act, there is always a risk inherent in the medical act (inherent risk of treatment). If the doctor performs the medical treatment carefully, with the patient's permission and based on the SPM (Medical Service Standards), but it turns out that the risk persists, the doctor cannot be blamed.[11] This can be called a medical risk as discussed in the previous section. Medical risk is a medical event or an uncertain condition that is not expected by the patient or doctor.

Guwandi compiled systematics for some basic exclusion of penalties or special mistakes in the medical field, namely:[12]

a. Treatment risk (risk of treatment): inherent or inherent risks, allergic reactions, complications in the patient's body.
b. Medical accident.
c. Non-negligent error of judgment.
d. Volenti non fit iniura.
e. Contributory negligence.

According to Guwandi the term malpractice is different from the term medical negligence. According to him Negligence is part of malpractice, but in malpractice it does not always have to have an element of neglect.[13] When viewed from its definition, the malpractice comes from the word malpractice, which has a broader understanding of the meaning of negligence that comes from the word negligence.

When analyzed from the side of punishment, where ordinary crime which becomes the main point of attention is the result of the act, whereas in medical crime it is precisely the cause or cause and process and not the effect earlier, it is because the doctor in carrying out his profession is based on his best efforts *(inspververbintenis)* not based on results *(resultaatverbintenis).*[14] As a result of the doctor's medical actions as a major factor that can determine whether the patient is carried out medical negligence or medical risk.

In the Criminal Code (KUHP), acts which cause another person to be seriously injured or die committed inadvertently are formulated in Articles 359 and 360 of the Criminal Code. The elements of articles 359 and 360 are as follows:

a. The element of negligence (culpa).
b. The existence of certain acts.
c. Due to severe injuries or the death of others.
d. The existence of a causal relationship between the form of action and the consequences of the death of others.

Based on this, when compared between medical risk and medical malpractice, both medical risk and medical malpractice contain certain forms of action, the result of serious injury or death of others, and the existence of a causal relationship between the form of an act and the result of the death of another person, where the act the same results in serious injuries or the death of others. However, there is 1 (one) element that is different from medical risk with medical malpractice, namely in the medical risk is not found the element of negligence, whereas in medical malpractice clearly found the element of negligence.

In addition, specifically in health services, negligence is also associated with services that do not meet (below) professional standards (medical service standards) which in practice also need to be used to distinguish between medical risk and medical

[10] Adami Chazawi, 2007, *Malpraktik Kedokteran: Tinjauan Norma dan Doktrin Hukum*, Bayumedia, Malang, page. 85.
[11] 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. 78.
[12] Guwandi, 2004, *Hukum Medik (Medical Law)*, Fakultas Kedokteran Universitas Indonesia, Jakarta, page. 46.
[13] *Ibid.*, page. 20.
[14] Crisdiono M Achadiat, 2007, *Dinamika Etika dan Hukum Kedokteran dalam Tantangan Zaman*, Penerbit Buku Kedokteran EGC, Jakarta, page. 110.

malpractice. If the patient has performed procedures according to medical service standards, but the patient has a serious injury or death, it is a medical risk. whereas for patients who suffered serious injuries or deaths as a result of doctors performing services below medical standards, this is referred to as medical malpractice.[15]

F. CONCLUSION

The conclusions that can be drawn from the discussion section of this study regarding the determination of medical measures and comparative analysis between medical negligence and medical risks that the legal relationship between doctors and patients called therapeutic transactions cannot promise definite results where the Doctor tries to make maximum efforts to cure patients , so that the possibility of medical risks arising outside the wishes of the Doctor or Patient, so that should have been informed in advance to the Patient and / or the Patient's Family, whereas medical negligence is not the case, then the difference between medical risk and medical negligence or medical malpractice is found the element of negligence in medical malpractice, whereas in medical risk there is no element of negligence, other than that medical risk occurs after medical services have been carried out by meeting medical service standards, whereas medical malpractice occurs when the medical care is not carried out in accordance with medical service standards.

G. REFERENCES

Book

Abdul Mun'im Idries, 1997, *Pedoman Ilmu Kedokteran Forensik*, Edisi Pertama Bina Rupa Aksara, Jakarta.

Amri Amir dan M. Yusuf Hanafiah, 2008, *Etika Kedokteran dan Hukum Kesehatan*, edisi 4, Penerbit Buku Kedokteran EGC.

Badan Pembinaan Hukum Nasional, 2011, *Pengkajian Hukum Tentang Perlindungan Hukum Bagi Upaya Menjamin Kerukunan Umat Beragama*, Kementerian Hukum Dan Hak Asasi Manusia, Jakarta.

Cecep Tribowo, 2014, *Etika & Hukum Kesehatan*, Nuha Medika, Yogyakarta.

Desriza Ratman, 2013, *Aspek Hukum Informed consent dan Rekam Medis Dalam Transaksi Terapeutik*, Keni Media, Bandung.

Gunawandi, 2007, *Hukum Medik (medical Law)*, Fakultas Ilmu Kedokteran Universitas Indonesia, Jakarta.

Kartono Muhammad, 1992, *aspek hukum dan etika kedokteran Indonesia*, Grafiti, Jakarta.

M. Achadiat, 2007, *dinamika etika dan hukum kedokteran dalam tantangan zaman*, EGC, Jakarta.

Ngesti Lestari, Masalah Malpraktek Etik, 2001, *Seminar Ilmiah Etika dan Hukum Kedokteran*, RSSA.

Soekidjo Notoatmodjo, 2010, *Etika dan Hukum Kesehatan*, Rieneka Citra, Jakarta.

Legislation

Universal Declaration of Human Rights.

The Criminal Code (KUHP).

Indonesia, The constitution of The Republic of Indonesia Year 1945.

_____, Law No. 36 of 2009 concerning Health.

_____, Law No. 29 of 2004 concerning Medical Practice.

_____, Government Regulation No. 290 / MENKES / PER / III / 2008 concerning Approval of Medical Measures.

[15] Anny Isfandyarie, 2005, *Malpraktek dan Resiko Medik*, Prestasi Pustaka, Jakarta, page. 125.

THE JURIDICAL ASPECTS OF DANGEROUS COSMETICS CIRCULATION UNDER THE PERCEPTIONS OF CONSUMER LEGAL PROTECTION IN INDONESIA

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ABSTRACT

This research aims to analyze legal protection for cosmetics consumer towards cosmetics circulation containing dangerous substance, and the responsibility of businessmen towards cosmetics products which harms consumers. The research method used in this study is sociological juridical approach, which is based on the legal approach that applies; from both laws and other laws and regulations and is also associated with the facts existed in society. The collected data will then be analyzed in accordance with the Law No.8 of 1999 concerning consumer protection, Law No. 36 of 2009 concerning Health, Indonesian Civil Code specifically the article 1365, 1366, 1367, and Government Regulation No.72 of 1998 concerning Pharmacy, and also the Decree of The Head of Indonesia National Agency of Drug and Food Control. The businessmen who produce cosmetics have to ensure that the products they produce is safe for consumption, is guaranteed, and qualified. Therefore, if there is any products causing harm to consumer, then the businessmen must be fully responsible for the burden of losses or harm suffered by the consumer. The responsibility from the businessmen can be in the form of compensation; can be in the form of refunds or replacement of goods of similar or equivalent value; health care; and/or appropriate compensation. Whereas, sanctions can be in the form of administrative sanctions up to criminal sanctions in accordance with applicable laws and regulations.

Keywords: Legal Protection, Consumers, Dangerous Cosmetics.

A. INTRODUCTION

The presence of various cosmetic products does give hope for women to appear more beautiful and attractive. The increased need for cosmetics is then utilized by some cosmetic manufacturers to obtain a large advantage by producing cosmetics without regard to the safety factor, benefits and quality. Consequently, many cosmetics circulate on the market without a distribution license number or use a fictionalized (fake) distributor license number[1]. Not only that, not listed cosmetics are also widely found to contain harmful chemicals for the skin such as mercury (HG), synthetic dyes (K10 and K3), hydroquinon, and retinoic acid. The hazardous material has actually been banned in cosmetics since 1998 with the issuance of regulation of the Minister of Health (Permenkes) RI No. 445/Menkes/Per/V/1998 concerning materials, dyestuffs, substratum, preservatives and sunscreen in cosmetics.

The public warning issued by the Agency for Drug and Food Control (BPOM) dated 14 November 2019 said that the findings of cosmetics containing prohibited substances dominated by cosmetic products containing mercury, hydroquinone and retinoic acid, found also 6 types of cosmetics that have been notified contain banned substances /hazardous substance ie: dyes prohibited (red K3) and heavy metals (lead In general, such goods may cause cancer (carcinogenic), fetal disorder (teratogenic), and skin irritation. All cosmetic findings containing forbidden/hazardous materials have been followed in administrative form, such as cancellation of notification or distribution permit, withdrawal and safeguarding of products from circulation, and destruction. In the last 5 years, the supreme decision of the Court of cosmetic litigants in the form of a sentence of sanctions is the highest judgment of 2 years 6 months. Explained further during the year 2019 BPOM RI still find products that have been announced in a public warning the previous year, but are still circulating in the market (https://www.pom.go.id, 16 Januari 2020)

From the explanation above, it is known that, although the Government has carried out various

[1] Etnawati, K., 2008, *Produk Kosmetik Instant Sebabkan Kanker*. Talkshow: Choose Your Cosmetics for Healthy and Beautiful Skin di Fakultas Kedokteran UGM Yogyakarta

legal efforts, oversight and enforcement of licensing procedures related to the production and circulation of cosmetics, but so cosmetics containing prohibited/harmful substances that are potentially detrimental to consumers are still circulating in the community. It takes various further efforts in the control of cosmetic circulation containing prohibited/harmful substances in the community. So that the consumer of cosmetics can be protected from businesses who are trying to produce and distribute cosmetics without regard to safety, benefits and quality factors.

B. PROBLEM STATEMENT

Based on the above description, the authors formulate research problems that will be examined as follows:

1. How the consumer legal protection of cosmetics from cosmetic circulation containing prohibited/harmful substances that will impact the consumer harm
2. What is the law enforcement of business actors who produce and distribute cosmetics without regard to security, benefits and quality factors.

C. LITERATURE REVIEW

1. Overview of Cosmetics

a. Safety, benefits and quality of cosmetics

Cosmetics in circulation must meet the standards and/or requirements of safety, benefits, quality, marking, claim, and be certified as in article 2 of the decision of the BPOM RI number HK. 03.1.23.12.11.10052 year 2011 on production and circulation monitoring cosmetics. Further mentioned that, one of the legal certainty towards consumer protection of the production of cosmetic products is regulated in article 2 of the Head regulation of POM number HK 00.05.4.1745 year 2003 about cosmetics, namely: cosmetics produced and or must comply with the following requirements: the materials used are standardized and meet the quality requirements and other requirements set forth; produced using good cosmetic making; and received a distribution permit from BPOM.

The safety of a cosmetic product is also regulated by the Government Regulation No. 72 year 1998 on the safety of pharmaceutical preparations, cosmetic is one form of pharmaceutical dosage as stipulated in article 1. While a cosmetic product can be said to be safe if it meets the criteria in article 2, namely: (1) Pharmaceutical preparations and medical devices produced and/or circulated must meet the requirements of quality, safety, and benefit. (2) Terms of quality, safety, and benefits as referred to in paragraph (1) to: (a) Pharmaceutical preparations which are of medicinal and medicinal materials in accordance with the requirements in the Pharmacope book or other standard books stipulated by the Minister. (b) Pharmaceutical preparations in the form of traditional medicine in accordance with the requirements in the book Materia Medika Indonesia stipulated by the Minister. (c) Pharmaceutical preparations in the form of cosmetics in accordance with the requirements in the book The Indonesian Cosmetic Codex stipulated by the Minister. (d) Health equipment in accordance with the requirements set by the Minister

To improve surveillance on the safety and quality of a cosmetic product, POM has a regulation on the matter in article 2, article 3, article 4, regulation of the head of POM body number 19 year 2015 about cosmetic technical requirements, namely: Article 2 (1) cosmetics in circulation must meet the technical requirements; (2) Technical requirements as intended in paragraph (1) include security requirements, benefits, quality, marking, and claims. Article 3 paragraph (1) Cosmetics must meet the requirements of safety and benefit evidenced through the results of the test and/or other empirical/scientific references; (2) Cosmetics that include claims of benefit should refer to the cosmetic claim guidelines as contained in the appendix which constitute an integral part of this regulation. Article 4 cosmetics must meet the quality requirements as stated in the Indonesian cosmetics Codex, other standards recognized, or in accordance with the provisions of the legislation.

b. Licensing in the cosmetics sector

Licensing in the field of cosmetics serves as an effort to conduct the selection and control of the activities of making and distribution of cosmetic products that are safe with the intention to provide quality assurance of cosmetic products traded to meet the safety standards, benefit and quality and on the other hand this permits provide legal certainty for entrepreneurs in doing business[2]. In accordance with the licensing legislation in the field of cosmetic business started from the process of making up to the distribution process, which includes: business license, production permit, distribution permit, import recommendation, and trading business license. According to its legality, the licensing in the field of

[2] Pudjiastuti, L., 2013, *Prinsip Hukum Pengaturan Perizinan Kefarmasian*, Disertasi, FH UNAIR

cosmetics has a different legal basis, functions and approvers.

c. Development and supervision of cosmetic production and distribution

The process of coaching and monitoring of the production and circulation of cosmetics, stipulated in article 29 of Law No 8 year 1999 on Consumer Protection (UUPK) with the aim to protect the interests of consumers from all adverse consequences caused distribution of goods and services. In addition to coaching, then in carrying out stewardship tasks other than the duties of the Government, also bestowed on the community, whether in the form of groups, individuals and non-governmental organizations (article 30 UUPK). With the coaching and supervision expected by the cosmetic business actors to participate in creating a healthy climate, the implementation of equipment and good production infrastructure, and the fulfillment of consumer rights.

The task of supervision on the facilities and infrastructure of the production and distribution of cosmetics by the Government in the framework of consumer protection involving POM, police, and local health agencies. The supervision of POM board as a form of legal protection consists of: a) supervision of Pre-Market supervision includes the field of certification and consumer information services, conducted before cosmetic products entered into the market; b) Post-market supervision of Post-market supervision is conducted by POM agency when cosmetic products have been circulating the market. But the supervision is not limited to the products in circulation only, facilities and the place of cosmetic manufacture also checked. Post-Market supervision itself is conducted by: examination of facilities and the place of cosmetic manufacture; and screening and taking outstanding cosmetic in the market.

2. Legal Protection of Cosmetics Consumers

a. Consumer rights and obligations

Consumer rights in article 4 of UUPK shall be protected namely: the right to comfort, security, and safety in consuming goods and/or services; The right to select goods and/or services and obtain such goods and/or services in accordance with the exchange rate and the promised conditions and warranties; The right to correct, clear, and honest information about the conditions and warranties of goods and/or services; The right to be heard and his complaint for goods and/or services used; The right to have the appropriate advocacy, protection and settlement efforts of the consumer protection dispute; The right to obtain coaching and consumer education; The right to be properly treated or served and honest and not discriminatory; The right to obtain compensation, indemnification and/or replacement, where the goods and/or services received are not in accordance with the Agreement or not as appropriate; Rights stipulated in the provisions of other legislation[3].

Besides the rights, the consumer also has the obligation to do as stated in article 5 UUPK, namely: Read or follow the instructions for information and usage procedures or utilization of goods and/or services, for safety and safety; In good faith in conducting purchases of goods and/or services; Pay in accordance with the agreed exchange rate; Follow the legal settlement efforts of a proper consumer protection dispute. In the provisions of article 2 UUPK there are 5 (five) Principles on legal protection for consumers namely the principle of benefits, principles of justice, principles of balance, principles of security and safety of consumers, and principles of legal certainty. With the five principles, there is a commitment to realize the objectives of legal protection for consumers as mandated in article 3 UUPK[4].

b. Qualification of events causing losses to consumers

The civil law principle postulated that whoever is detrimental to the other party, shall compensate the party who suffered the loss. Adverse acts may be born because: no agreement or agreements have been made (tort); And the deeds of the mere birth because of an act. Chapters 1365 civil law determines "every act that violates the laws and brings harm to others, obliging the person who raises the loss because of his mistake to compensate for the loss". In Article 1367 civil criminal Code is also regulated with respect to the act against the law "a person is not only responsible for the damages caused by his own actions, but also for the losses caused by those who become or caused by the goods...

c. Cosmetic consumer disputes

As stated in article 45 paragraph (1) UUPK, that is, every consumer who is injured can sue the perpetrator through the institution in charge of resolving the dispute, or through a trial in a public

[3] Samsul, I., 2004, *Perlindungan Konsumen, Kemungkinan Penerapan Tanggung Jawa Mutlak*, Universitas Indonesia, Jakarta

[4] Shofie, Y., 2002, *Pelaku Usaha, Konsumen, dan Tindak Pidana Korporasi*, Ghalia Indonesia, Jakarta

judicial environment. Article 45 paragraph (2), it is said that about the choice of a form of consumer dispute resolution based on the voluntary choice of the parties[5]. Settlement of disputes outside the courts is stated in article 47 UUPK, i.e. the settlement of consumer disputes outside the Court is held to achieve an agreement on the form and magnitude of damages and/or about certain measures to guarantee will not be resumed or will not reoccur the losses suffered by the consumer. Viewing section 45 paragraph (1) and section 47, consumer dispute resolution can be pursued by: completion of immediate indemnity demands, and settlement of indemnity claims through the Consumer Dispute Resolution Board (BPSK).

3. Accountability of Business Actors in the Cosmetics Sector

a. Rights and obligations and prohibition of business actors

In article 6 UUPK is governed by the rights of business actors, namely: the business is entitled to obtain payment in accordance with the conditions and the exchange rate of goods traded; Business actors are entitled to legal protection to avoid the bad faith of consumers; Business actors are entitled to defend themselves in the settlement of consumer disputes; The right to name rehabilitation if proven consumer losses are not caused by goods and/or services traded; Rights governed by the provisions of other legislation.

The obligations of business actors are regulated in article 7 UUPK, business actors have the obligation to always be responsible for any goods and/or services produced and trade them. Perpetrators of cosmetic business must fulfill its obligations as a business in accordance with article 7 letter d UUPK, i.e. business actors shall ensure the quality of goods produced and or traded and must meet the quality standards of goods applicable. Businesses do not produce or trade harmful cosmetic products solely to obtain substantial gains[6].

The prohibition to produce and trade harmful cosmetic products is also regulated in UUPK as contained in article 8, article 9-16, article 17. The articles explain that there are prohibitions: to emphasize the implementation of the obligations of business actors; to protect the public interest relating to the economy and national development, and the interests of individuals relating to the rights of consumers; to demonstrate the responsibility of business actors to create a healthy climate and to protect consumers from the possibility of harm to consumers and their property[7].

Further on article 16 of the Regulation of the Minister of Health of Republic of Indonesia number 1175/MENKES/PER/VIII/2010 concerning cosmetic production permit, perpetrators are prohibited from making/producing and distributing cosmetic products containing hazardous materials and or materials that do not comply with the provisions of legislation. Businesses are prohibited from advertising their products before obtaining the distribution permit as stated in article 30 of the decision of the head of the Indonesian Drug and Food Control agency HK. 00.05.4.1745 about Cosmetics[8].

b. Responsibility for businesses related to cosmetics

In UUPK the responsibilities of business actors are governed by article 19 through article 28. Article 19 UUPK governs the accountability of business actors and/or distributors in general, in order to compensate for damage, pollution, and/or loss of consumers due to the consumption of goods and/or services produced or traded[9]. Meanwhile, article 20 UUPK and article 21 UUPK regulate the burden of the responsibility of the business actors without closing the possibility for prosecutors to do proof. In article 22, it is determined that proof of error in criminal case is stipulated in article 19 of UUPK. Article 23 The UUPK declared that business actors who refuse or attempt to provide compensation to consumers, can be sued through the resolution of consumer disputes or submit to the judicial bodies in the consumer's position. The responsibility of article 24 paragraph (1) is the responsibility of the unlawful acts[10].

Mentioned in article 25 and article 26 of UUPK relating to after sales service by business actors on goods and/or services traded, in which case the business actors are obliged to be fully responsible for the warranty and/or the guarantee provided, as well as

[5] Susanto, H., 2008, *Hak-hak Konsumen Jika Dirugikan*, Ctk. Pertama, Visimedia, Jakarta
[6] Dewi, E,W., 2015, *Hukum Perlindungan Konsumen*, Graha Ilmu, Yogyakarta
[7] Sidabalok, J., 2014, *Hukum Perlindungan Konsumen di Indonesia*, Ctk Ketiga, PT Citra Aditya Bakti, Bandung
[8] Miru, A. dan Yodo, S., 2011, *Hukum Perlindungan Konsumen*, PT. Rajawali Pers, Jakarta
[9] Widjaja, G dan Yani, A., 2000, *Hukum Perlindungan Konsumen*, Jakarta, PT.Gramedia Pustaka Utama
[10] Toar, A,M., 1988, *Tanggung Jawab Produk, Sejarah dan Perkembangannya di Beberapa Negara*, Ujung Pandang: DKIH Belanda-Indonesia

the provider of spare parts or repairs. In article 27 There are a few things that liberate business people from responsibility for the losses suffered by consumers when: the goods proved to be not circulated or not intended to be circulated; defective goods arise at a later date; defects arising from the keeping of provisions concerning the qualification of goods; negligence caused by the consumer; the prosecution period of 4 years from the goods purchased or through the agreed period of time.

D. RESEARCH METHODS

The method used in this writing is through a statutory approach that is through a perspective by looking at the provisions or legislation relating to the issues to be researched. While the sociological approach is done by looking at the problem from the viewpoint of the implementation of legislation against the conduct of cosmetics that contain harmful substances that will have a negative impact on health Users.

E. ANALYSIS AND DISCUSSION

Consumer Legal Protection of Cosmetics Products and Circulation Containing prohibited substances

Law enforcement against the creation and trading of cosmetics can be done through administrative law enforcement and criminal law. Law enforcement administration has the scope of preventative and repressive. Supervision is part of the scope of a preventive administrative law enforcement, while the application of sanctions is a repressive law enforcement step, as it aims to stop the breach and terminate the violations that have been done.

Administrative sanctions are a follow-up of the supervisory results that have been done, so that administrative sanctions are part of repressive administrative law enforcement. Based on head of regulation BPOM number Hk. 00.05.1.23.3516 about the distribution permit of drug products, traditional medicines, cosmetics, dietary supplements, administration sanction that can be applied by BPOM against the violation of the manufacture and/or trade of cosmetics containing hazardous substances including: 3 (three) written warning times; Suspension of production and distribution activities; Suspension and/or cancellation of approval letter; Withdrawal of products from circulation and destruction. This is the case with the application of administrative sanctions against cosmetic advertisements in accordance with the regulation of the Head of BPOM Republic of Indonesia No. 1 of 2016 on the technical guidelines of advertising supervision is BPOM given to the owner of notification number in the form: written warning; ad termination orders; Withdrawal and/or destruction of advertising media include posters or flyers, leaflets, stickers, booklets, pamphlets, banners, banners, tyre cases and the like; advertising prohibitions; Suspension of production/distribution/importation of products that violate advertisements; and/or cancellation of notifications against products that violate ads.

The form of administrative response that can be prosecuted from business actors is regulated in article 60 UUPK ie the payment of the most compensation of Rp. 200,000,000.00 (two hundred million rupiah) against violations of the provisions of: negligence to pay damages to consumers (article 19 paragraph (2) and (3); Unqualified advertising (article 20); Negligence in providing spare parts (article 25); and omissions meet the warranty/warranty promised (section 26). Meanwhile, according to the health Law of article 198 "Any person who has no skill and authority to perform the practice of Farmasian as intended in article 108 is sentenced to fines of at most Rp. 100,000,000, 00 (one hundred million rupiah).

In the activities and/or efforts of the manufacture and circulation of cosmetics that do not obey the requirements of safety, benefit and quality, which can result in the loss of a person due to disruption of health, then to the error and/or negligence and violations of the laws and regulations in the cosmetic field, business actors may be subject to the application of sanctions according to prevailing legislation. In article 7 paragraph (2) of regulation of the head of BPOM No. Hk. 00.05.1.23.3516 on the distribution permit of drug products, traditional medicines, cosmetics, dietary supplements, determining "other than may be subject to administrative sanctions as intended in paragraph (1) can also be subject to criminal sanctions in accordance with the provisions of prevailing laws and regulations". This norm provides legal certainty for law enforcement that the deeds of producing and trading cosmetics containing prohibited/harmful substances may be subject to criminal sanctions in accordance with prevailing laws and regulations, namely:

a. Law number 36 year 2009 on health, especially:
   1) Article 196 of the Act that intentionally produces or circulates the preparation of pharmaceuticals and/or medical devices that do not meet the standards and/or safety

requirements, efficacy or usefulness, and quality as referred to in article 98 paragraph (2) and paragraph (3) are sentenced to imprisonment of maximum 10 (ten) years and a fine of at most Rp 1.000.000.000, 00 (one billion).

2) The perpetrator was in the meshes with article 197 Jo. 106 Health Law No. 36 year 2006 which reads: "Any person who intentionally produces or circulates a pharmacy and/or medical device that does not have a circulation permit as referred to in article 106 paragraph (1) is sentenced to imprisonment of 15 (fifteen) years and a fine of at most Rp. 1.5 billion (one billion five hundred million rupiah).

b. Law number 8 year 1999 on consumer protection, namely:

1. Article 62 paragraph (1), sentenced to imprisonment for a maximum of 5 (five) years or fines of at most Rp 2.000.000.000, 00 (two billion rupiah) for business actors who violate the provisions as referred to in article 8; Article 9; Article 10; Article 13 paragraph (2); Article 15; Article 17 paragraph (1) letter a, letter b, letter c, letter e and paragraph (2); and article 18.
2. Article 62 paragraph (2), sentenced to maximum 2 (two) years or fines of at most Rp 500,000,000.00 (five hundred million rupiah) for business actors who violate the provisions referred to in article (11); Article 12; Article 13 paragraph (1); Article 14; Article 16; and article 17 paragraph (1) Letter d and letter f.
3. Article 62 paragraph (3) against violations resulting in severe injury, severe illness, permanent disability, or death imposed by applicable criminal provisions.
4. Article 63. Against the criminal sanction as referred to in article 62, may be subject to additional penalties: forfeit certain goods; The decision announcement of judges; Indemnity payments; The termination of certain activities that cause consumer harm; The obligation to withdraw goods from circulation; or revocation of business licenses.

c. Article 386 paragraph (1) of the criminal Code described in the counterfeiting of the drug is: "Whoever sells, offers or submits food items, beverages or medicines he knows that they are duplicated, and hides it, is threatened with prison criminal At most 4 (four) years, "where using analogy, the pharmaceutical preparations are medicines, medicines, traditional medicines, and cosmetics as stipulated in the Health Law article 1 Letter 4.

CONCLUSION

From the entire data and analysis results of the authors, it can be concluded that:

1. Less alert consumer cosmetics using cosmetic products, making consumers less protected from the use of cosmetic products manufactured and circulated without regard to the safety factor, benefits and quality, which can harm for consumers.
2. To control the production and circulation of cosmetics containing prohibited/harmful substances that harm consumers, can be implemented by enforcing a selective licensing process, effective supervision, followed by law enforcement in accordance with the provisions of the legislation.

Law enforcement on the creation and circulation of cosmetics that contain prohibited/harmful substances that harm consumers can do through preventive and repressive administrative law and with/or through criminal law enforcement.

REFFERENCES

Biro Hukum dan Humas Kementerian kesehatan RI, Public *Warning Hati-hati! Kosmetika Mengandung Bahan Berbahaya*, 19 Desember 2014.

Dewi, E,W., 2015, *Hukum Perlindungan Konsumen*, Graha Ilmu, Yogyakarta

Etnawati, K., 2008, *Produk Kosmetik Instant Sebabkan Kanker*. Talkshow: Choose Your Cosmetics for Healthy and Beautiful Skin di Fakultas Kedokteran UGM Yogyakarta.

Hariyanto, D., 2009, *Memenangkan Persaingan Bisnis Produksi Farmasi Melalui Marketing Public Relation*, Jurnal Manajemen Pemasaran, Vol 4 No.1, April 2009. Surabaya, Univ. Petra.

Miru, A. dan Yodo, S., 2011, *Hukum Perlindungan Konsumen*, PT. Rajawali Pers, Jakarta

Pudjiastuti, L., 2013, *Prinsip Hukum Pengaturan Perizinan Kefarmasian*, Disertasi, FH UNAIR

Samsul, I., 2004, *Perlindungan Konsumen, Kemungkinan Penerapan Tanggung Jawa Mutlak*, Universitas Indonesia, Jakarta

Shofie, Y., 2002, *Pelaku Usaha, Konsumen, dan Tindak Pidana Korporasi*, Ghalia Indonesia, Jakarta

Sidabalok, J., 2014, *Hukum Perlindungan Konsumen di Indonesia*, Ctk Ketiga, PT Citra Aditya Bakti, Bandung

Susanto, H., 2008, *Hak-hak Konsumen Jika Dirugikan*, Ctk. Pertama, Visimedia, Jakarta

Toar, A,M., 1988, *Tanggung Jawab Produk, Sejarah dan Perkembangannya di Beberapa Negara*, Ujung Pandang: DKIH Belanda-Indonesia

Trianggono, R,I. dan Latifah, F., 2007, *Buku Pegangan Ilmu Pengetahuan Kosmetik*, Gramedia Pustaka, Jakarta

Widjaja, G dan Yani, A., 2000, *Hukum Perlindungan Konsumen*, Jakarta, PT.Gramedia Pustaka Utama

LEGAL PROCESSES FOR CHILDREN WHO DO CRIMINAL ACTION VIOLENCE

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ABSTRACT

Children are one of the assets to advance the nation. But the development of time to make the child's character more apprehensive. Not a few cases of children as perpetrators of crime in this era of globalization. Child delinquency rates increase from year to year due to several factors. In fact, since 2011 to 2015 there are a total of 6,147 children face to face with the law, this also includes children who commit violence. This study is to find out how the legal process for children who face the law as the perpetrator, especially in cases of violence. This study is a normative study focusing on legislation. Data are taken from books, internet, newspapers, research results, and interviews with legal experts such as police, prosecutors and judges. The result is that children who commit violence continue to be legally processed using special rules of the child. The punishment is given in consideration, whether the child uses the weapon and how the condition of the victim.

Keywords : Children, Criminal, Process, Violence.

A. INTRODUCTION

Indonesia is wrongone big nation. Forbuild a great nation of coursesmart society is neededand virtuous. Thereforeeducation and good mind alreadyshould have been applied early onthe children of the nation.Children are one of the assetsto advance the nation. Howeverthedevelopment of the era of makingincreasingly child characterscause for concern. Not a fewcaseschildren as criminalsin this globalization era. LevelIncreasing child's delinquencyincreasing year on yearcaused by several factors.Even known, since 2011until 2015 there were a total of 6,147 childrendealing with law (ABH).The most is in the year2014 namely as many as 2,208 children[1].

Several factors causedelinquency of the child so face to facewithlaws like lackthe attention of parents,circumstances that arerequires that children fulfillnecessities of life, or eventhe search for identity.Lack of attentionparents sometimes make children thirstyattention. This results in the childseek attention from other parties.But often that waychildren use in searchingattention is to domischief is not infrequently harmfulhimself and others inaround it. As well ascircumstances that cause childrenmust meet his needsbecame one of the reasonswhy the child is involved in somechild delinquency cases, like stealingfor example. Forced childrenmeet the needs of his life willaccustomed to justify everythingways to make a living,this is why many childrenwho work and beg atthe streets, evenstealing andpickpockets. In addition, the search for teakself which is the stage of beingteenagers are often the reasonthe occurrence of delinquency in children. For the sake ofprove his greatness, norarely children and teenagersincorporated into a groupwhich causes anxiety onPublic.

Several factors causemischief in the childoften makes children falltodeep. Absencewarning or decisive actiontowards children involved inSuch mischief will preciselymake children more and more involvedin mischief. Things like this canbring up the courage of children toinvolved in misbehaviorleads tocriminal acts. Mischiefchildren that bloom occur laterthis is a case of klitih. According toDIY Police Chief Brigadier General AhmadDofri, throughout 2016 it was recordedas many as 43 cases of klitih occurred inYogyakarta[2].

The reality of children who doviolent crime such as klitihis a very action sad, because basically the childis a generation that must beprotected and is one part of the successor to the nation that can advance this nation. According to Criminologist at Padjadjaran University, Yesmi Anwar, there are three things that arecause the child to take action violence,

[1]Suyono, "DIY Emergency Student Violence, Loss of Assets National Awakening ", accessed from www. jualkaosmuslimgaul.com/2016/12/diy- emergencies of student violence-loss-assets-awakening-country.html

[2]Gading Persada, "2016, Klitih Action Increases in Jogja", accessed from Berita.suaramerdeka.com/2016-aksi-klitih-di-jogjameningkat

namely hedonists, anomies, and imitation[3]. Hedonist causes children look at everything oriented to objects or matter. Another cause is anomy, which is is a gap between hope with reality. Reality what happens is economic conditions lacking parents while the child's expectations are related desire not to be harassed classified as high. The final cause is imitation. Imitation of yourself what is an imitation act seen and exemplified in its environment. If only follow such violence is considered as a venue for courage in circles student, it is not impossible imitation be the basis for children to act violence follows what is assessed challenging for him. Cases are developing now in the community about action violence whose perpetrators are children underage shows the existence error in the development process child at the moment. Child cases it is then brought into the realm legal and processed according to regulations applicable. As stated in Article 1 paragraph (3) of the Law No.11 of 2012 concerning the System Criminal Justice for Children, Children who Conflict with the Law hereinafter referred to as Child is a child who is 12 (twelve) years old years old, but not yet 18 (eighteen) years suspected commit a crime.

Before it's released Law No.11 of 2012 about the Child Justice System, child justice is set out in Law No.3 of 1997. In fact before, every child that commits criminal acts is subject to the same legal process with an adult legal process. But behind the facts that is, children are still children. However delusional that has been she did, a child forever has the right to be fulfilled by the country. From the womb until the child is 18 (eight twelve) years of child rights are rights human beings that must be fulfilled by parents, family, community, government and state. Fulfillment the right of the child for the child to grow and grow optimally avoided of acts of violence and discrimination. In the laws No. 35 of 2014 on Change of Law No. 23 years old 2002 On Child Protection, mentioned some child rights wrong one is Every Child has the right get an education and teaching in the framework personal development and level his intelligence is according to his interests and talent. In fact, there is The above law does not apply make the child the perpetrator the criminal gets his rights. In order to bear take responsibility for it, kid often get no rights aslisted on the law. Start the process laws that lasted until criminal prosecution by a judge usurp independence and rights child. There are several other ways that can be done other than criminal prosecution, such as execution converted. According to the Law No.11 of 2012 on Systems Child Criminal Justice Article 7 paragraph (1) expressed in all levels good checks on the level investigation, prosecution, and examination of child matters at The state court must try Diversi. The customization itself is a mechanism for switching solving things from the process criminal justice to outside proceedings criminal justice. The conditions are met The convert is the child of the perpetrator a criminal threatened with a crime jail under seven years. Requirement another thing to do is convert it is the son of a criminal is not a repetition of actions criminal, either kind of crime or not. There is Governing law about enforcing conversion should be able to provide protection for the child as the perpetrator crime. But the truth is there are still children as the perpetrator of the crime not a criminal who is not being treated in accordance with Law No.11 Year 2012 about the Justice System Child Criminal.

Just like a clumsy casethat took place in Sleman on the moonJanuary 2017 ago. Ahigh school studentis called the Grace of Putu Ramlanis a student of MAN gripinterrupted by a group of studentsafter school. When facing,Blessings of Putu Ramlan suddenlywas attacked by a group of studentsThe victim has finally fallenafter receiving a patrol dog fromone of the studentsblock it. How dare youa total of fourteen studentsthe person was later detained byPolice Sleman despite his ageis still a minor.It's a highlighta writer for a crimethose are all stillminors. But allperpetrator arrested and charged Article170 of the Penal Code on Robbery andEmergency Law No. 121951 about sharp weapons. Detentionand sanctions based on articlesThe Penal Code and the Lawto be able to providethe effect of abuse on the child as the perpetratoracts of violence. This is importantwithdrew with the No.11 of 2012 Law onChild Criminal Justice System Article 7paragraph (1) is stated in allthe level of examination is good at the levelinvestigation, prosecution, andexamination of child matters atThe state court must tryDiversion[4]. Based onthose thingsabove, then the author is interestedto do that researchpoured in the form of a thesistitled: Legal Process againstChild Criminal ActionViolence.

[3]Liputan6, "This is the Cause of Why Children Can Violence", accessed from liputan6.com/health/read/2308127/inidia-cause of child-violence

[4]Abdul Hamied, "SLEMAN VIOLENCE: There are Victims of Injury, Student Delinquency or Criminality?" mischief-student-or-criminal-injury786443

B. PROBLEM STATEMENT

The following statement of the problem from this research is:

1. Is the process of applying the lawa crime against a child whocommit a crimeviolence?
2. What factors make a childthe perpetrators of violence cantried in court?
3. What are the basic considerationsthe judge in complying with the verdictcriminal?

C. LITERATURE RIVIEW

Based on the statement of the problemwhich the author has stated inabove, this literature review is to answer the problemabove are:

1. To find out whetherapplication of criminal law againstchildren who commit actscriminal.
2. To find out what factorswhich makes the offender's child actviolence can be tried atcourt.
3. To know the considerationsjudge in giving sentence to a child who commits an actcriminal as well as the application of the law.

D. RESEARCH METHODS

A. Research Type

This research is which normative research research focuses on the norm positive in the form of propriety legislation. Regulation the law will associated with theories law and practice of implementation positive law concerning the problem with the process the law for children as perpetrators criminal act.

B. Data Sources In legal research normative, data used in the form of secondary data, consisting from :

1. Primary Legal Material:
   - Law Number 4 1979 about Child Welfare.
   - Law Number 35 In 2014 the above changes Law number 23 in 2002 about Child protection.
   - Law Number 11 2012 concerning Systems Criminal Justice for Children.
   - The Law Criminal law.
   - The Law Criminal Procedure Law.
2. Secondary Legal Material Secondary. legal material is legal material and legal opinion obtained from books, the internet, letters news, and research results.

C. Data Collection Methods

1. Literature Study
   Represents reading or study ingredients from the book used, fine primary ingredients, secondary ingredients, and also tertiary ingredients.
2. Interview
   Is a submission question to the interviewee regarding the object to be researched. Inside resource person this writing is Mr. Eko Mei Purwanto as the head women's service unit and Sleman district police officer, father Daniel K Sitorus as a prosecutor the child at the Prosecutor's Office Negeri Sleman, Ms. Ika Tinas, S.H, M.H as the judge at Sleman District Court.
3. Method of Analysis
   The method used in process and analyze data in this research is analysis qualitative, wherein researchers understanding and compiling data that has been collected, so obtained description of problems and circumstances under study. This research also uses Deductive thinking methods are is a conclusion starting with the general statement headed specifically with use reasoning.

E. ANALYSIS AND DISCUSSION

A. Definition of Criminal Acts

According to Prof. Moeljatno, SH, that the definition of a crime is a criminal offense is "an act that is prohibited by a statutory prohibition which is accompanied by threats (sanctions) in the form of certain crimes, for anyone who violates the prohibition." Based on this opinion it can be concluded that an action can be said to be a criminal act if the act committed by a person or a group of people violates a rule that is prohibited by the rule of law, if the act is criminal disputes will be accompanied by the threat of punishment (sanctions) if it is proven that a person or group of people is doing it.

1. Understanding Children as Actors

Child Crimes as perpetrators of crime according to KBBI are human beings who are still small as people who commit criminal acts (crime)[5]According to this understanding, children as criminal acts are human beings who are meet the aspects that can be said that he is still small and can do an act that

[5]Large Indonesian Dictionary, page 85

violates a rule that applies in society or that can be known as a crime.

2. Definition of Violence

The meaning of violence in the juridical sense is contained in Article 89 of the Criminal Code (KUHP), which states "violence is to make people faint or become powerless anymore". Limitation of understanding in each of these forms of violence follows the juridical limitations that is as in the sense according to the Criminal Code (KUHP). The following limits on violence:

a. It is called minor maltreatment if the persecution does not result in illness or obstruction to carry out work that is threatened with imprisonment for a maximum of three months (Article 352 of the Criminal Code).
b. Ordinary persecution, if there is an intentional act which causes pain or injury by receiving criminal threats maximum imprisonment of two years and eight months (Article 351 of the Criminal Code).
c. Whereas it is called severe maltreatment, if the said action is aimed at injuring others by receiving a maximum penalty of imprisonment of eight years (Article 354 of the Criminal Code) .

3. Definition of Klitih

Klitih is a kind of gang, team or group substitute for brawls that revolves around looking for prey from rival school students on quiet streets by riding a bicycle motorcycle. The target is school children who become enemies, from beatings to violence using blunt objects to sharp weapons. They perform the action at the school dispersal hours until the afternoon, and many even operate early in the morning until morning. Victims of child abuse are called klitih, while activities or his actions are called ngelitih. This violence always brings the injured so that in some cases there is a loss of life.[6]

4. Legal Process Against Children

The juvenile justice procedural law is a regulation that regulates that the abstract criminal law of the child be enforced concretely.

a. Investigation. Investigation in a child criminal case is the activity of a child investigator to look for and find an event that is considered or suspected to be a criminal offense committed child. Investigations are carried out by investigators who are determined based on the Decree of the Head of the Indonesian National Police or other officials appointed by the Head of the Indonesian National Police[7].
b. Arrest and Detention. Arrest and detention are also contained in the juvenile criminal procedural law. Article 30 of the Law on the Juvenile Criminal System reads: (1) The arrest of a child is carried out for the purpose of investigation for a maximum of 24 (twenty four) hours; (2) Children arrested must be placed in a special service room for children; (3) In the event that a special service room for children is not available in the area concerned, the child is entrusted to LPKS; (4) Arrests of children must be done humanely by taking into account the needs in accordance with their age; (5) Costs for children placed in LPKS are borne by the Ministry of Social Affairs. Whereas the detention of children must not be carried out against children who have obtained guarantees from parents or guardians and or institutions, that the child will not run away, will not eliminate or damage evidence, and will not repeat the crime. Child detention can only be carried out on condition that the child is 14 years old and is suspected of committing a crime with the threat of imprisonment of 7 years or more.
c. Prosecution. Prosecution in a child criminal procedure contains the definition of a child's public prosecutor's case to delegate the child's case to juvenile court with a request to be examined and decided by a juvenile judge in a juvenile trial. Public prosecutor is determined based on the decision of the Attorney General or other officials appointed by the Attorney General. The prosecutor is obliged to seek diversion no later than 7 days after receiving the case file from the investigator and the diversion must be carried out no later than 30 days. And if the diversion fails, the public prosecutor is obliged to deliver the minutes of the diversion and submit the case to the court by attaching a research report social.

[6]Andy Nugroho, "Klitih, Criminal Style in Jogja?", Accessed from http://www.cahyogya.com/2014/10/klitih-gayakriminalitas-jogja.html

[7]Nasir Djamil, Children Not to Be Punished: Notes on Discussion of the Law on the Criminal Justice System for Children (UU-SPPA), Sinar Grafika, Jakarta, page 155.

d. Trial. In the trial process children are tried in a special courtroom for children and the child's court waiting room is separated from the adult court waiting room. After the judge opens the trial and declares the hearing closed to the public, the child is called in along with the parent or guardian, advocate or other legal aid provider and community counselor.

5. Definition of Diversity

Diversity is a transfer of the settlement of cases of children suspected of committing certain criminal acts from the formal criminal process to the peaceful settlement between suspects / defendants / perpetrators criminal with victims facilitated by family and / orcommunity, Community Guidance for Children, Police, Prosecutor, Judge.10 In Article 7 of the Law on the Juvenile Justice System stated that: paragraph (1) "At the level of prosecution investigation and examination of children's cases in the District Court must be sought diversion ", paragraph (2)" Diversion as referred to in paragraph (1) carried out in the event of a criminal offense committed:

- Threatened with imprisonment of under 7 (seven) years in prison
- It is not a repeat of a criminal offense.

B. Legal process against a child

Committing Criminal Acts of ViolenceLegal process for children whobreaking the rules set inLaw No. 11 of 2012About the Criminal Justice SystemChildren who are in the judicial processstart with:

1. Investigation Process. Where is theinvestigation processhave a purpose to searchand gather evidenceconducted by officialsinvestigator to make lightor clearly a criminal offense that isused to searchwhile finding the suspector the perpetrators of the crime.
2. Arrest and Detention. Arrest of a childdone for the sake of24 hour long investigation.After arrest, detentionalso done for the sake ofinspection, with the intention thatthe suspect did not run away,eliminate evidence ornot repeat againhis actions.
3. Prosecution. Prosecution in the eventchild crime containsunderstanding of the prosecution's actionsGeneral child who bestowstake the child to courtwith a request thatexamined and decided by the judgechildren in child trials.In the process of prosecuting a beggargeneral has the task of acceptingand check case filesinvestigation from investigator,pre-prosecutionif there are deficiencies ininvestigation withpay attention to Article 110 paragraph (3)and (4), by giving instructionsin order to improverefinement of the investigator,provide an extensiondetention, make an arrestor further detention orchange prisoner status afterthe case was bestowed byinvestigator, make an indictment,deliver notificationsto the defendant aboutprovisions of the day and time of the casethe trial that was accompanied bysummons, good tothe defendant or the witness,to come to a trial that ispredetermined, doprosecution, closing the case for the sake oflegal interests, conveneother actions within the scope of the taskand responsibilities aspublic pentung according to the provisionsthis law, implementthe appointment of a judge.
4. The Judge. TrialExamination in courtchild basically donewith a single judge whocontained in Article 11 paragraph (1)juvenile court lawsby means of a closed hearing.It is intended that the trialcan be completed quicklyso that children do not lingerget related treatmentsanctions againstmischief that has beenhe does. The caseon trial with the judgesingle, is matterscriminal threatthe sentence is five years or tobelow and the proofeasy. If a threata prison sentence of above fiveyear and deepthe proof is difficult thenbased on Article 11 paragraph (2) of the juvenile court thenthe case was examined withpanel of judges.In takingdecision in juvenile court,the judge hasconsiderations that must be consideredthink about it first. Judgemust be able to sort aboutcriminal case committedby the child, does the child dotogether with hisfriend,whetherchildren carry weaponssharp, and as a resultbe inflicted.In other words the judge mustsensitive and patient in handlingchild case. The judge must be able tosee any regrets ornot in the child ascriminal offense beforemake adecision. other than thatthe judge must alsoconsider the falloutpunishment with purposesentencing. Decisionthe judge must make the futurechildren as criminalsbetter withoutleavingtraumatic for children ascriminal offender.

C. Factors That Make Children

Perpetrators of ViolenceTried in CourtAccording to Daniel K Sitorus,kids' case after allnon-compulsory settlement must be soughtligation. But not all childrenwho commit a crime canresolved

with versioning. Termsdiversion itself is threatened withimprisonment under 7 years, andis not a repeat of the acta crime committed by a child, goodacts of a kind or not of a kind.This means the case of children who don'teligible diversion willtransferred to court.

F. CONCLUSION

Based on the description and analysisin previous chapters, it canconclusions are drawn as an answerwhich is raised for the problems whichsubmitted in writinglaw / thesis, namely:

1. **Application of criminal law against** children who commit crimesin accordance with. Law Number 11 Year 2012about the Criminal Justice SystemSon, the Book of LawCriminal Law, and the Criminal Procedure Code.The law was madeguidelines for handling caseschild. Besides that in handlingchild cases, investigator sensitivity,public prosecutors and judges stronglyis required. Kid's Caseusing diversion roads.Although not eligiblediversion, the case of children can still bediversion is carried out if the victim andchildren as criminalsviolence has reachedagreement to make peace. Ifboth parties decideto make peace, then matterit was not continued in the realmlaw.
2. **If both parties don't** reach an agreement formake peace, then the public prosecutorwill examine the case.Then if the terms are versioned, i.e.child threatened with criminalimprisonment under 7 (seven) yearsprison, and not constituterepeat the crime, nofulfilled, then the case will bedelegated to court,so the child as the perpetratorviolent crime willprocessed at trial.

G. REFERENCES

Suyono, "DIY Emergency Student Violence, Loss of Assets National Awakening ", accessed from www.jualkaosmuslimgaul.com/2016/12/diy-emergencies of student violence-loss-assets-awakening-country.html

Gading Persada, "2016, Klitih Action Increases in Jogja", accessed from Berita.suaramerdeka.com/2016-aksi-klitih-di-jogjameningkat

Andy Nugroho, "Klitih, Criminal Style in Jogja?", Accessed from http://www.cahyogya.com/2014/10/klitih-gayakriminalitas-jogja.html

Nasir Djamil, Children Not to Be Punished: Notes on Discussion of the Law on the Criminal Justice System for Children (UU-SPPA), Sinar Grafika, Jakarta, page 155.

Abdul Hamied, "SLEMAN VIOLENCE: There are Victims of Injury, Student Delinquency or Criminality?" mischief-student-or-criminal-injury786443

Large Indonesian Dictionary, page 85\

Liputan6, "This is the Cause of Why Children Can Violence", accessed from liputan6.com/health/read/ 2308127/inidia-causeofchild-violence

CRIMINAL LAW ENFORCEMENT OVER PHARMACIST ERROR IN ADMINISTERING DRUGS TO PATIENTS

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ABSTRACT

Health is one of the elements of public welfare that must be realized in accordance with the ideals of the Indonesian people as mandated in the Pancasila and the Preamble of the 1945 Constitution of the Republic of Indonesia. Health service providers are referred to as Health Workers. One of the Health Workers who will be the focus of discussion in this study is the health workforce in the pharmaceutical field, where the health workforce in the pharmaceutical field is the Pharmacist. Pharmacists give medicines to patients as recipients of health services on prescriptions from doctors. However, Pharmacists in carrying out their profession may make mistakes, especially in carrying out the role of Pharmacists to provide drugs to patients on prescriptions given by doctors, which with these errors can result in harm to patients, for this reason there needs to be a discussion about how the element of possible errors can occur against Pharmacists, and how law enforcement for Pharmacists is wrong in giving drugs to patients, which will be discussed in this study. This journal has 2 (two) problem formulations, namely: 1) How can the possible element of medical error occur to the Pharmacist?; and 2) What about law enforcement for pharmacists who are wrong in giving drugs to patients?. The research method in this journal is juridical-normative legal research, with the support of secondary data. The legal materials used include: a) Primary legal materials: the Criminal Code, the Constitution of the Republic of Indonesia Year 1945, Law Number 36 of 2009 concerning Health, Law Number 36 of 2014 concerning Personnel Health, Government Regulation Number 32 of 1996 concerning Health Workers, Government Regulation Number 51 of 2009 concerning Pharmaceutical Work, Minister of Health Regulation Number 26 of 1981 concerning Pharmacy Management and Licensing, Minister of Health Regulation Number 73 of 2016 concerning Pharmaceutical Services Standards at Pharmacies, and Decree of the Minister of Health Number 1332 of 2002 concerning Amendments to Regulation of the Minister of Health Number 922 of 1993 concerning Provisions and Procedure for Granting Pharmacy Licenses; b) Secondary legal material: books and journals that discuss health law; 3) Tertiary legal material: Large Indonesian Dictionary (Kamus Besar Bahasa Indonesia).

Keywords: Pharmacists, Law Enforcement, Patients, Drugs.

A. INTRODUCTION

Health is one of the elements of public welfare that must be realized in accordance with the ideals of the Indonesian people as mandated in the Pancasila and the Opening of the Constitution of the Republic of Indonesia Year 1945. Welfare is the national goal of the Indonesian nation as stated in the Opening of the Constitution of the Republic of Indonesia Year 1945, namely: "protect all Indonesians and all Indonesian blood and promote public welfare, educate the nation's life and participate in carrying out world order based on independence, lasting peace and social justice." Health as one of Human Rights is regulated in Article 28H paragraph (1) of the Constitution of the Republic of Indonesia Year 1945, where the article reads: "Every person has the right to live in peace and well-being, to live, and to have a good and healthy environment and to have health services."

Health law regulates the rights and obligations of each service provider and service recipient, either as individuals (patients) or community groups.[1] The health service provider is called a Health Worker. Health Personnel is every person who devotes himself in the field of health and has knowledge and / or skills through education in the field of health which for certain types requires authority to conduct health efforts.[2] The definition of Health Workers is based on Article 1 point 6 of Law Number 36 of 2009 concerning Health, which states: "Health workers are

[1] Soekidjo Notoatmodjo, 2010, *Etika dan Hukum Kesehatan*, Rineka Cipta, Jakarta, page. 44.
[2] Harsono Njoto, *Perlindungan Hukum Terhadap Apoteker Dalam Melaksanakan Profesi*, Jurnal Transparansi Hukum Vol 2, No 1 (2019), page. 2.

everyone who devotes themselves in the health sector and has knowledge and / or skills through education in the health sector which for certain types of health. requires the authority to carry out health efforts." The legal basis for the authority of Health Workers in providing health services is regulated in Article 23 paragraph (1) of Law Number 36 of 2009 concerning Health, which reads: "Health workers are authorized to provide health services." Health Workers based on the Elucidation of Article 21 paragraph (1) of Law Number 36 of 2009 concerning Health, that: "Health workers can be grouped according to their expertise and qualifications, which include medical staff, pharmacy staff, nursing staff, public health workers and the environment , nutritionist, ten physical fitness, medical technical staff, and other health workers."

Implementation of health efforts must be carried out by health workers who are responsible, who have high ethics and morals, expertise, and authority that must be continuously improved through continuous education and training, certification, registration, licensing, as well as guidance, supervision, and monitoring so that the implementation of health efforts meets a sense of justice and humanity and is in accordance with the development of health science and technology.[3] All health care implementation activities carried out by health resources are always regulated by medical, legal and moral principles, politeness, decency.[4] Normatively, health workers in carrying out their professional duties, are obliged to remain cautious, comply with medical standards, carry out professional standards of expertise, and respect the rights of patients, where this is done in order to obtain legal protection for him.[5]

In order to the task of organizing health efforts can be carried out properly, based on Article 3 of Government Regulation Number 32 of 1996 concerning Health Workers, that: "Every health worker must have expertise and skills in accordance with the type and level of education of the patient as determined based on his diploma." The legal relationship between a patient and a hospital is a treatment agreement, which is an agreement between the hospital and the patient that the hospital provides a treatment room and there are nurses who will take action, as well as a medical service agreement, namely an agreement between the hospital and the patient that the medical staff the hospital will make every effort to cure patients through medical measures *(inspanningsverbintenis).*[6] Medication is very necessary for the patient's health, where the drug given to the patient is a medicine that is prescribed by a doctor, but not a doctor who mixes the medicine because it is not the authority of the doctor to make the drug so that it requires an authorized Health Worker to make the drug, namely Pharmacists as Health Workers pharmacy. Juridically the relationship between the doctor and the pharmacist is constructed as giving the power of attorney from the doctor to the pharmacist to carry out their duties and skills.[7]

One of the Health Workers who will be the focus of discussion in this research is health workers in the pharmaceutical field, where the health Workers in the pharmaceutical field are Pharmacists. In Article 21 paragraph (2) of Government Regulation Number 51 of 2009 concerning Pharmaceutical Work, it is explained that: "Pharmacists who are allowed to provide medicine are given." Pharmacists give medicines to patients as recipients of health services on prescriptions from doctors. However, Pharmacists in carrying out their profession may make mistakes, especially in carrying out the role of Pharmacists to provide drugs to patients on prescriptions given by doctors, which with these errors can result in harm to patients, for this reason there needs to be a discussion about how the element of possible errors can occur against Pharmacists, and how law enforcement for Pharmacists is wrong in giving drugs to patients, which will be discussed in this study.

B. PROBLEM STATEMENT

This research has the following Problem Formulation:

1. How can the possible element of medical error occur to the Pharmacist?
2. What about law enforcement for pharmacists who are wrong in giving drugs to patients?

C. LITERATURE REVIEW

Theories About Pharmacists

[3] *Ibid.*, page. 3.

[4] Wila Chandrawila Supriadi, 2001, *Hukum Kedokteran*, Manda Maju, Jakarta, page. 25.

[5] 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. 75.

[6] Suhardy Hetharia, *Aspek Tanggung Jawab Hukum Rumah Sakit Terhadap Pelayanan Medis*, Jurnal *Lex et Societatis*, Vol. I/No. 5/September/2013, page. 115.

[7] Ajusar, 2004, *Perlindungan Hukum Terhadap Pasien Dalam Pelayanan Obat Melalui Resep Dokter di Apotek,* Tesis, Program Studi Magister Kenotariatan Universitas Padjadjaran bandung, page. 74.

In Government Regulation Number 51 of 2009 Concerning Pharmaceutical Work that: "the obligations of pharmacists in pharmacies which are one of the pharmaceutical service facilities include: a. Implement pharmaceutical service standards; b. Submit and serve drugs to patients based on a doctor's prescription; c. Establish standard operating procedures that must be made in writing and continuously updated in accordance with scientific and technological developments in the pharmaceutical field and statutory provisions; d. Submit hard drugs, narcotics and psychotropic substances to the public on prescription from a doctor; e. Record all things related to pharmaceutical services; f. Following the paradigm of pharmaceutical services and the development of science and technology; g. Keeping medical and pharmaceutical secrets; and h. Carry out a program of quality control and cost control." Whereas based on Article 4 of Government Regulation Number 51 of 2009 Concerning Pharmaceutical Work, the responsibilities of pharmacists are: a. Protect patients and the public in terms of carrying out Pharmaceutical Work carried out by Pharmaceutical Workers; b. maintain and improve the quality of Pharmaceutical Work in accordance with the development of science and technology; and provide legal certainty for patients, the public, and Pharmaceutical Workers.

The requirements that must be met to become a Pharmacy Management Pharmacist based on the Minister of Health Regulation No. 922 / Menkes / Per / X / 1993 are:

a. The diploma has been registered with the Ministry of Health.
b. Have made an oath or promise as a Pharmacist.
c. Have a Work Permit (SIK) or an assignment letter from the Minister of Health.
d. Meet the physical and mental health requirements to carry out his duties as a Pharmacist.
e. Not working in a pharmaceutical company and not being a Managing Pharmacist at another pharmacy.

D. RESEARCH METHOD

The research method in this journal is juridical-normative legal research, with the support of secondary data. The legal materials used include: a) Primary legal materials: the Criminal Code, the Constitution of the Republic of Indonesia Year 1945, Law Number 36 of 2009 concerning Health, Law Number 36 of 2014 concerning Personnel Health, Government Regulation Number 32 of 1996 concerning Health Workers, Government Regulation Number 51 of 2009 concerning Pharmaceutical Work, Minister of Health Regulation Number 26 of 1981 concerning Pharmacy Management and Licensing, Minister of Health Regulation Number 73 of 2016 concerning Pharmaceutical Services Standards at Pharmacies, and Decree of the Minister of Health Number 1332 of 2002 concerning Amendments to Regulation of the Minister of Health Number 922 of 1993 concerning Provisions and Procedure for Granting Pharmacy Licenses; b) Secondary legal material: books and journals that discuss health law; 3) Tertiary legal material: Large Indonesian Dictionary (Kamus Besar Bahasa Indonesia).

E. ANALYSIS AND DISCUSSION

1. The Possible Element of Medical Error Occur to The Pharmacist

Health is a very important aspect of life because health is one of the human rights guaranteed in the 1945 Constitution of the Republic of Indonesia. Health based on Article 1 paragraph (1) of Law Number 36 of 2009 concerning health, which reads: "Health is a healthy state, both physically, mentally, spiritually and socially that allows everyone to live productively socially and economically". According to the World Health Organization (WHO), health is a prosperous state of body, soul and social that enables everyone to live productively socially and economically.[8] One of the health providers is Pharmacists as Pharmaceutical Health Workers.

Professional Pharmacists must have the same character traits as other professions: (1) carry out work that requires the basis of higher education, (2) work based on the development of standards in accordance with scientific progress, (3) work performed solely for the benefit of the community or humanity, (4) aware of the professional code of ethics and the authority of the judiciary in maintaining the quality of work, and (5) establishing good relations with professional associations / organizations authorized to enforce disciplinary norms in the internal environment of their members.[9] Pharmacists work in pharmacies, where pharmacies are a health

[8] Titon Slamet Kurnia, 2007, *Hak Atas Derajat Kesehatan Optimal Sebagai HAM di Indonesia*, Bandung, page. 54.
[9] Bambang Poernomo, 1977, *Hukum Kesehatan Pertumbuhan Hukum Eksepsional di Bidang Kesehatan*, Aditya Media, Yogyakarta, page. 239.

unit where sufferers take their medicine. There are two types of pharmacies, namely Hospital Pharmacy, namely pharmacies that only serve prescriptions from the hospital doctors concerned, General pharmacies, namely private pharmacies that not only serve personal prescriptions, but all prescription doctors, even serving home prescription paper sick if the hospital pharmacy by chance does not have the requested drug where the general pharmacy can also serve the sale of over-the-counter medicines and limited over-the-counter medicines which do not require a doctor's prescription.[10]

In organizing health services, there is a legal relationship between doctors and pharmacists, where the legal relationship is evident in the prescription of doctors to pharmacists. The definition of prescription based on Article 1 point 4 of the Minister of Health Regulation Number 73 of 2016 concerning Pharmaceutical Services Standards in Pharmacies, that: "Prescription is a written request from a doctor or dentist, to the pharmacist, both in paper and electronic form to provide and deliver medicines. for patients according to applicable regulations." This is a legal basis for pharmacists in carrying out their duties in health services.

Drugs according to the Large Indonesian Dictionary (Kamus Besar Bahasa Indonesia), is an ingredient to reduce, eliminate disease, or cure someone from an illness.[11] According to Law Number 36 of 2009 concerning Health Article 1 paragraph (8) drugs are "preparations or alloys of materials used to influence or investigate the physiological system or 21 (twenty one) pathological conditions in the context of establishing a diagnosis, prevention, cure, recovery, health improvement, and contraception." In general, the notion of medicine is all the single / mixed ingredients used by all beings for the inside and outside of the body to prevent, alleviate, and cure diseases. In addition to the general definition of medicine above, there is also the definition of medicine specifically. Here are some definitions of medicine specifically:[12]

a) New drugs: New drugs are drugs that contain substances (efficacious / non-efficacious), such as auxiliaries, solvents, fillers, layers or other components that are not yet known so that their efficacy and uses are unknown.
b) Essential medicines: Essential medicines are the drugs most needed for public health services and are listed in the National Essential Medicines List (Daftar Obat Esensial Nasional/DOEN) established by the Minister of Health of the Republic of Indonesia.
c) Generic drugs: Generic drugs are drugs with the official name specified in the FI for nutritious substances they contain.
d) Finished drugs: Finished drugs are medicines in a pure state or a mixture in the form of ointments, liquids, suppositories, capsules, pills, tablets, powders or other forms that are technically in accordance with FI or other official books stipulated by the government.
e) Patent drugs: Patent drugs are finished drugs with a trade name that is registered in the name of the authorized author and the drug is sold in the original packaging of the company that produced it.
f) Original medicine: Original medicine is medicine that is obtained directly from natural ingredients, processed simply based on experience and used in traditional medicine.
g) Traditional medicine: Traditional medicine is medicine that is obtained from natural ingredients, processed simply based on experience and used in traditional medicine.

Errors or omissions can occur in carrying out all kinds of professions, including professions related to health.[13] One element of the pharmacist's error in providing health services is when the pharmacist mixes and provides medication to patients on a prescription from a doctor. From the recipe there are some errors that can occur, which are in the form of: (a) Prescribing a drug, dosage, or route that was not actually intended; (b) Write vaguely / illegibly; (c) Writing the name of the drug using non-standardized abbreviations or nomenclature; (d) Write ambiguous drug instructions; (e) Prescribe a tablet that is available for more than one of the strengths of the drug; (f) Do not write down the route of administration for drugs that can be given with more than one route; (g) Does not include the signature of the recipe; and (h) Not mentioning the patient's body weight in children.[14] One of the mistakes of

[10] Hartono, 2008, *Manajemen Apotek*, Depot Informasi Obat, Jakarta Barat, page. 21.
[11] Hasan Alwi, 2007, *Kamus Besar Bahasa Indonesia*, Balai Pustaka, Jakarta, page. 126.
[12] Syamsuni, 2005, *Farmasetika Dasar dan Hitungan Farmasi*, Penerbit Buku Kedokteran, Jakarta, page. 47-48.
[13] Sartika Damopolii, *Tanggung Jawab Pidana Para Medis Terhadap Tindakan Malpraktek Menurut Undang-Undang Nomor 36 Tahun 2009 Tentang Kesehatan*, Jurnal *Lex Crimen*, Vol. VI, No. 6, Agustus 2017, page. 55.
[14] Wendi Muh. Fadhli, dkk., *Tanggungjawab Hukum Dokter dan Apoteker Dalam Pelayanan Resep*, Jurnal Media Farmasi Vol. 13 No. 1 Maret 2016, page. 76.

pharmacists that harm patients is in the case of misreading prescriptions, where the doctor has correctly prescribed drugs, but pharmacists are wrong in reading prescriptions, bearing in mind that there are several drug compositions that can be fairly similar but have different functions.[15]

In medical language, the error can be said in the form of medication error, where errors in reading the prescription in health law are included as medical negligence, where the medical negligence can harm both the patient and the pharmacist as a colleague of health workers who are given the power to prepare the written request.

Basically the pharmacist cannot exceed the authority to interpret what is instructed by the doctor. The pharmacist's prescription can be interpreted according to his authority, which is conducting an administrative, pharmacetic, and clinical assessment of the doctor's prescription. The confirmation that needs to be done by the pharmacist for the prescription service is according to the Minister of Health Regulation Number 26 of 1981 concerning Pharmacy Management and Licensing in Article 12 paragraphs (1), (3), and (4), as follows:

a) If the pharmacist considers that there is an error in the prescription or incorrect prescription writing, the pharmacist must notify the prescribing doctor.
b) If the pharmacist considers a prescription to be a dangerous error and is unable to contact the prescribing doctor, the delivery of the drug may be delayed.
c) If the recipe cannot be read clearly or incompletely, the pharmacist must ask the prescription author.

Likewise in the Decree of the Minister of Health Number 1332 of 2002 concerning Amendments to the Regulation of the Minister of Health Number 922 of 1993 concerning Provisions and Procedures for Granting a Pharmacy License, that the confirmation made is in the form of:

a) In the event that the patient is unable to redeem the medication written in the prescription, the Pharmacist is obliged to consult a doctor for a more appropriate drug selection (Article 15 paragraph 3).
b) If the pharmacist considers that there is an error in the prescription or incorrect prescription writing, the pharmacist must notify the prescribing doctor (Article 16 paragraph 1).

[15] Sidharta, 2000, *Hukum Perlindungan Konsumen*, Grasindo, Jakarta, page. 59.

2. Law Enforcement for Pharmacists Who Are Wrong in Giving Drugs To Patients

Criminal law enforcement against Pharmacists that harms the patient functions so that the patient's rights are met so that law enforcement will provide legal protection against the patient. The definition of legal protection is a protection given to legal subjects in the form of legal instruments both preventive and repressive, both written and unwritten. In other words, legal protection as a description of the function of law, namely the concept where the law can provide a justice, order, certainty, usefulness and peace.[16]

According to Philipus M. Hadjon in his book "Legal Protection for the Indonesian People" that legal protection in the Dutch-language legal literature is known as *"rechtbescherming van de burgers"*. There are two types of legal protection, namely preventive and repressive legal protection. Prefentives means protection that is given before a dispute occurs, meaning that this legal protection aims to prevent disputes, whereas conversely repressive protection aims to resolve disputes.[17] Health is very important in the survival of the community so that in the event of a crime in the health sector it will result in a direct loss to the community both materially and immaterially, so that the community cannot carry out their lives properly.

Wahid and M. Muhibin wrote that law enforcement can be carried out with legal action in the following order: 1) Warning warning to stop the violation and not to act again (trial); 2) Granting certain obligations (compensation, fines); 3) Elimination or exclusion (revocation of rights); and 4) Imposition of body witnesses (imprisonment, death sentence).[18]

Pharmacists in organizing health services in the pharmaceutical field must follow the standardization of services. The standardization of pharmaceutical services is required as an indicator or benchmark to assess the pharmacist's negligence in providing drugs. In general, the Pharmaceutical service standards include:[19]

[16] Badan Pembinaan Hukum Nasional, 2011, *Pengkajian Hukum Tentang Perlindungan Hukum Bagi Upaya Menjamin Kerukunan Umat Beragama*, Kementerian Hukum Dan Hak Asasi Manusia, Jakarta, page. 15.
[17] Philipus M. Hadjon, 1987, *Perlindungan Hukum Bagi Rakyat Indonesia*, Bina Ilmu, Surabaya, page. 25.
[18] Abdul Wahid, Moh Mubidin, 2009, *Etika Profesi Hukum*, Banyumedia Publishing, page. 151.
[19] Ariesto Marselino Saisab, *Perlindungan Hukum Bagi Pasien Akibat Apoteker Yang Lalai Dalam Memberikan Obat-*

a. The role of the Pharmacist is required to improve knowledge, skills and behavior in order to carry out direct interactions with patients. This form of interaction includes the provision of drug information and counseling to patients in need.
b. Pharmacists must understand and be aware of the possibility of medication errors in the service process and identify, prevent, and overcome drug related problems, pharmacoeconomic problems, and social pharmacy *(sociopharmacoeconomy).*

Pharmacists must always pay attention to the interests of patients in order to protect and protect the rights of patients. Likewise pharmacists must maintain and improve the quality of pharmaceutical work in accordance with the development of science and technology and provide legal certainty to patients and the community and the pharmaceutical staff themselves.[20] That is why the pharmacist in carrying out his rights and obligations must be in good faith and full of responsibility, where if the pharmacist is guilty of not fulfilling that obligation, it becomes a reason for him to be legally prosecuted to compensate for any losses incurred in connection with not fulfilling that obligation, meaning the pharmacist must be responsible legally responsible for errors or negligence in carrying out its obligations, where pharmacists who are negligent in giving drugs that have a negative impact on patients can be prosecuted based on unlawful acts.[21]

Compensation claims based on unlawful acts need not be preceded by an agreement between the producer (pharmacist) and the consumer (patient), so that claims for compensation can be made by each injured party, even though there has never been an agreement between the producer and the consumer. Thus a third party can sue for damages.[22] The claim for compensation is law enforcement in terms of civil law, while in terms of criminal law, law enforcement for the negligence of pharmacists in administering drugs to patients is regulated in the Criminal Code and Law Number 36 of 2014 concerning Health Workers. Errors or omissions in the field of criminal law committed by health workers, which in this case are pharmacists, are regulated in several articles in the Criminal Code, namely Article 263, 267, 294 paragraph (2), 299, 304, 322, 344, 347, 348, 349, 351, 359, 360, 361, 531 of the Criminal Code, while in Law Number 36 of 2014 concerning Health Workers, the provisions regarding criminal sanctions for negligence are regulated in Article 84, which reads:

a. Every health worker who commits gross negligence which results in a Health Service Recipient being seriously injured shall be sentenced to a maximum imprisonment of 3 (three) years.
b. If the gross negligence referred to in paragraph (1) results in death, each health worker is sentenced to a maximum imprisonment of 5 (five) years.

F. CONCLUSION

Based on the discussion above, the conclusions that can be delivered are as follows:

1) One element of the Pharmacist's error in providing health services that is detrimental to the patient is when the pharmacist concocts and provides medication to the patient on a prescription from a doctor, where the pharmacist's error is in the case of misreading the prescription given by the doctor, bearing in mind there are some drug compositions can be considered the same but the function is different, so the error in medical language is called medication error. Basically the pharmacist cannot exceed the authority to interpret what is instructed by the doctor, in order to minimize negligence by the pharmacist, the pharmacist must first confirm the doctor's prescription.
2) Enforcement of criminal law against Pharmacists that harms the patient functions so that the patient's rights are very fulfilled so that law enforcement will provide legal protection against the patient. Criminal law enforcement for mismanagement of drugs by pharmacists is regulated in the Criminal Code, namely Article 263, 267, 294 paragraph (2), 299, 304, 322, 344, 347, 348, 349, 351, 359 , 360, 361, 531 of the Criminal Code, and Article 84 of Law Number 36 of 2014 concerning Health Workers.

Obatan, Jurnal *Lex Et Societatis* Vol. VII/No. 2/Feb/2019, page. 146.

[20] Mirza N. R. Poli, *Kesalahan Pemberian Obat Dalam Perspektif Undang-Undang Nomor 8 Tahun 1999 Tentang Perlindungan Konsumen,* Jurnal *Lex Privatum* Vol. VI/No. 4/Jun/2018, page. 112.

[21] Ariesto Marselino Saisab, *Op.Cit.*, page. 146.

[22] Ahmadi Miru & Sutarman Yodo, 2005, *Hukum perlindungan Konsumen*, PT RajaGrafindo Persada, Jakarta, page. 125-130.

G. REFERENCES

Book

Abdul Wahid, Moh Mubidin, 2009, *Etika Profesi Hukum*, Banyumedia Publishing.

Ahmadi Miru & Sutarman Yodo, 2005, *Hukum perlindungan Konsumen*, PT RajaGrafindo Persada, Jakarta.

Badan Pembinaan Hukum Nasional, 2011, *Pengkajian Hukum Tentang Perlindungan Hukum Bagi Upaya Menjamin Kerukunan Umat Beragama*, Kementerian Hukum Dan Hak Asasi Manusia, Jakarta.

Bambang Poernomo, 1977, *Hukum Kesehatan Pertumbuhan Hukum Eksepsional di Bidang Kesehatan*, Aditya Media, Yogyakarta.

Hartono, 2008, *Manajemen Apotek*, Depot Informasi Obat, Jakarta Barat.

Hasan Alwi, 2007, *Kamus Besar Bahasa Indonesia*, Balai Pustaka, Jakarta.

Philipus M. Hadjon, 1987, *Perlindungan Hukum Bagi Rakyat Indonesia*, Bina Ilmu, Surabaya.

Sidharta, 2000, *Hukum Perlindungan Konsumen*, Grasindo, Jakarta.

Soekidjo Notoatmodjo, 2010, *Etika dan Hukum Kesehatan*, Rineka Cipta, Jakarta.

Syamsuni, 2005, *Farmasetika Dasar dan Hitungan Farmasi*, Penerbit Buku Kedokteran, Jakarta.

Titon Slamet Kurnia, 2007, *Hak Atas Derajat Kesehatan Optimal Sebagai HAM di Indonesia*, Bandung.

Wila Chandrawila Supriadi, 2001, *Hukum Kedokteran*, Manda Maju, Jakarta.

Journal and Legal Scientific Research

Ajusar, 2004, *Perlindungan Hukum Terhadap Pasien Dalam Pelayanan Obat Melalui Resep Dokter di Apotek*, Tesis, Program Studi Magister Kenotariatan Universitas Padjadjaran bandung.

Ariesto Marselino Saisab, *Perlindungan Hukum Bagi Pasien Akibat Apoteker Yang Lalai Dalam Memberikan Obat-Obatan*, Jurnal *Lex Et Societatis* Vol. VII/No. 2/Feb/2019.

Harsono Njoto, *Perlindungan Hukum Terhadap Apoteker Dalam Melaksanakan Profesi*, Jurnal Transparansi Hukum Vol 2, No 1 (2019).

Mirza N. R. Poli, *Kesalahan Pemberian Obat Dalam Perspektif Undang-Undang Nomor 8 Tahun 1999 Tentang Perlindungan Konsumen*, Jurnal *Lex Privatum* Vol. VI/No. 4/Jun/2018.

Mohamad Rizky Pontoh, *Penegakan Hukum Pidana Terhadap Resiko Medik Dan Malpraktek Dalam Pelaksanaan Tugas Dokter*, Jurnal *Lex Crimen* Vol. II/No. 7/November/2013.

Sartika Damopolii, *Tanggung Jawab Pidana Para Medis Terhadap Tindakan Malpraktek Menurut Undang-Undang Nomor 36 Tahun 2009 Tentang Kesehatan*, Jurnal *Lex Crimen*, Vol. VI, No. 6, Agustus 2017.

Suhardy Hetharia, *Aspek Tanggung Jawab Hukum Rumah Sakit Terhadap Pelayanan Medis*, Jurnal *Lex et Societatis*, Vol. I/No. 5/September/2013.

Wendi Muh. Fadhli, dkk., *Tanggungjawab Hukum Dokter dan Apoteker Dalam Pelayanan Resep*, Jurnal Media Farmasi Vol. 13 No. 1 Maret 2016.

Legislation

Criminal Code.

Indonesia, the Constitution of the Republic of Indonesia Year 1945.

_____, Law Number 36 of 2009 concerning Health.

_____, Law Number 36 of 2014 concerning Health Workers.

_____, Government Regulation Number 32 of 1996 concerning Health Workers.

_____, Government Regulation Number 51 of 2009 concerning Pharmaceutical Work.

_____, Minister of Health Regulation Number 26 of 1981 concerning Pharmacy Management and Licensing.

_____, Minister of Health Regulation Number 73 of 2016 concerning Pharmaceutical Services Standards at Pharmacies.

_____, Decree of the Minister of Health Number 1332 of 2002 concerning Amendments to the Minister of Health Regulation Number 922 of 1993 concerning Provisions and Procedures for Granting Pharmacy Licenses.

STATE RELATIONS, HUMAN RIGHTS, AND WELFARE: CRITICISM OF TRADE STANDARDIZATION GOODS AND SERVICES (CRITICAL ANALYSIS OF TRADE LAWS)

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ABSTRACT

Trade is the primary driver of development carried out to advance the general welfare as the goal of the country. The state as the executor of economic sovereignty is required to regulate the implementation of trade with due regard for human rights, including the right to obtain welfare. Law No. 7 of 2014 concerning Trade-in force currently contains immoral material, namely provisions regarding the standardization of goods and services, as well as provisions concerning criminal acts related to the standardization. For this reason, it is necessary for the politics of legal development to amend trade laws by not including norms of standardization obligations, and to eliminate criminal threats for trading activities.

Keywords: Trade; Standardization; Goods and Services; Welfare

A. INTRODUCTION

Every citizen has the right to develop themselves and try to improve their standard of living by carrying out business activities or economic activities that are following their respective abilities. Naturally, humans are equipped by God with the intelligence of their minds to maintain and develop their lives under the goals of life that have been determined by each human being. Therefore, each citizen has different abilities or expertise, so that his development to meet the needs of his life results in various professions.

The history of human development gives rise to the different fields of life whose purpose is to make it easier for humans to meet their needs, both physical and mental. These fields of life develop in harmony with the development of human-owned science. Various kinds of knowledge have been found and created by humans to make it easier to manage the environment and its resources to meet the needs of human life. One area related to human efforts to meet basic needs for life is the economic field.

The term economy comes from Greek origin, which is said to be 'oikosnamos' or 'oikonomia,' which means management of household affairs, specifically the provision and administration of income.[1] From this understanding, it can be interpreted that the core of the economy is a matter of household affairs. Important household matters, namely, regarding the needs of the household to meet the necessities of life for household members. Household needs are grouped into three types of needs, namely: primary needs, secondary needs, and tertiary needs. To meet all these needs, humans carry out economic activities with various types of economic ventures.

Economic activities are carried out by economic actors, both people, and companies, continuously, openly, in order to obtain profits.[2] Every citizen has the right to benefit both materially and immaterially from every economic activity he undertakes. These benefits will be used to develop themselves and their lives in order to achieve their life goals for prosperity and happiness.

The right to improve the standard of living of human beings should be protected and guaranteed for implementation by the state as part of human rights. This is a consequence of the formation of the state, which is the result of the existence of a community agreement, which states the agreement to live together in order to achieve common goals. In general, the purpose of the state, which is the vision of the state, is to create prosperity, prosperity, and happiness for its citizens (bonumpublicum, the common good, commonwealth).[3] Therefore, the state should provide legal protection and guarantees for its

[1] Komaruddin Satradipoera, *Sejarah Pemikiran Ekonomi: Suatu Pengantar Teori dan Kebijaksanaan Ekonomi*. (Bandung: Kappa-Sigma, 2001) p.4

[2] Sri Rejeki Hartono, *Hukum Ekonomi Indonesia*. (Malang: Bayumedia Publishing, 2007) p.40

[3] Compare: Deddy Ismatullah dan Asep A. Sahid Gatara, *Ilmu Negara Mutakhir; Kekuasaan, Masyarakat, Hukum, dan Agama*. (Bandung: Pustaka Attadbir, 2006) p. 79

citizens to strive to create prosperity, prosperity, and happiness in their lives.

The state, to realize its intended purpose, has the authority to determine the applicable law in its territory. Therefore, a constitution is determined as the highest law in a country that regulates the principles of state life. In general, the material constitution or constitution includes three fundamental things, namely:[4]

1. guarantees of human rights and citizens,
2. stipulation of state constitution of a fundamental nature,
3. there are division and limitation of constitutional tasks, which are also fundamental.

The guarantee of protection of human rights provided by the constitution must prevailindeed in the actions of the state. The state is taking action or policy, as well as in issuing laws and regulations, must pay attention to human rights. There must be no action by the state authorities or regulations issued by the state, which can reduce or violate human rights. If this happens, citizens have the right to file a lawsuit in court for acts of the state that violate human rights. Even so, if some laws and regulations are felt by citizens to reduce or violate human rights, then citizens have the right to submit a judicial review of legislation that violates these human rights.

The law is a product of the DPR as the holder of legislative powers, with the joint agreement of the President as the executive power holder. The material contained in the law contains rules to regulate the matters mandated by the constitution. Therefore, the material in the law must not conflict with the material regulated in the constitution. One of the primary materials in the constitution is the guarantee of protection of human rights. Therefore, the law cannot conflict with human rights. Laws that conflict with human rights can be said to be immoral. Regulations that are not good or are not true because they conflict with excellent and right values for humans. Immoral rules will undoubtedly harm human life. In order to avoid immoral laws, the law-making process must be carried out well. The law must have a strong philosophical foundation derived from the nation's ideology and noble values that live in society. The law must also be based on a strong sociological foundation so that its effectiveness will be sufficient.

The concept of Indonesian law in economic activities is in the context of achieving a just and prosperous society based on Pancasila, the Pancasila family economic concept, and the people's economic concept to defend the interests of the people.[5] development in the economic field is compiled and implemented to advance public welfare through the implementation of economic democracy with the principles of togetherness, fair efficiency, sustainable, environmentally friendly, independent, and by maintaining a balance of progress and national economic unity as mandated by the 1945 Constitution of the Republic of Indonesia.

From the perspective of national development, trade is the primary driver of the national economy. Indonesia's national trade reflects a series of economic activities carried out to realize public welfare and social justice for all Indonesian people. Trade activities are the primary driver of national economic development that provides support in increasing production, creating jobs, increasing exports and foreign exchange, leveling income, and strengthening the competitiveness of Domestic Products in the national interest. Indonesia's national trade as the prime mover of the economy is economic activity related to the transactions of goods and services carried out by business actors, both within the country and beyond national borders.

Considering the importance of trade for the national economy, it is necessary to legislate that it can realize the ideals of national development as stipulated in the 1945 Constitution of the Republic of Indonesia. One indicator of economic growth is the Gross Domestic Product (GDP). GDP is an indicator of economic welfare in a country and can be a reference to measure people's welfare as measured by the level of income (income). Then the more a country's exports increase, the people's income will also increase. However, in the current era of the open economy, at the same time, the flow of imports will also increase, which in measuring economic growth, increasing the value of imports will have an impact on GDP decline. Therefore, trade liberalization of a country, on the one hand, will encourage an increase in the value of trade, but on the other hand,it will affect the trade balance.

Increasingly open trade policies, as implemented by Indonesia today, have increased the risk of external shocks to the domestic economy, particularly

[4] Sri Sumantri, *Prosedur dan Sistem Perubahan Konstitusi*. (Bandung: Alumni, 1987) p.2

[5] Sri Rejeki Hartono.*Op. Cit*. p. 45-46.

to the welfare of the Indonesian people.[6] The current trade policy is regulated in Law Number 7 of 2014 concerning Trade. The regulation in this Act aims to enhance national economic growth and is based on the principles of national interest, legal certainty, fair and healthy, business security, accountable and transparent, independence, partnership, benefits, simplicity, togetherness, and environmentally friendly.

B. PROBLEM STATEMENT

Whether this law is following the mandate of the constitution, and whether the material content does not contain something immoral, is a question that needs to be known and analyzed from a legal perspective. That is the problem that will be discussed in this paper.

C. RESEARCH METHODS

In order to analyze the above problem, an approach will be used by analyzing the relationship between state authorities and human rights in the economic field, specifically related to trade in goods and services. For this reason, a doctrinal approach to theories and concepts about the state and human rights will be used, as well as a content analysis approach, by analyzing the contents of Law No. 7 of 2014 concerning Trade. The results of the analysis are outlined in writing in the form of a paper adapted to the writing format in the Scientific Journal.

D. ANALYSIS AND DISCUSSION

1. Relations between the State Authority and Human Rights in the Economic Field

If it is related to the role of the state in carrying out people's welfare, then the types of states can be divided into two types of countries, namely the classic welfare state and the modern welfare state. The classical welfare state, also known as the police state (polizeistaat), is a typical state whose only duty is to maintain public order or what is known as the "night watch state." Countries with the type of country as a night watchman, then the existence of the state only serves to maintain order and public security and maintain the safety of the country from attacks by other countries. In this type of country, the state does not intervene in carrying out community welfare, such as providing health services, education, and employment. Citizens determine their own needs for the welfare of the people themselves.[7]

The other type of welfare state is the modern welfare state or often referred to as the "prosperous state" (wohlfaartstaats, welvaar-staats, modern welfare state). Type of modern welfare state or referred to as "modern state." According to Piet Thoenes,[8] a welfare state is a country marked by progress towards a democratic welfare system that must be carried out by the government. The modern welfare state is characterized by the active role of the state in organizing public welfare (bestuurzorg), which also has a role in maintaining the order and security of citizens. The active role of the state in carrying out public welfare, among others, is carried out by providing public services in order to realize the goals of the state namely the prosperity and welfare of the people (bonumpublicum), not only for the welfare of individuals (bonumprivatum).[9]

The modern welfare state by E. Utrecht is referred to by using the term "modern rechtstaat" (modern law state). This type of country prioritizes the interests of all people, no longer refers to the teachings of Immanuel Kant regarding the prohibition for the state to interfere in public life and public welfare. The task of a country with a modern welfare state is comprehensive. The active involvement of the government in all aspects of social life brings a "enormeuitbow van de socialewetgevings" and a "enormegroei van het administratieverecht". The government as a public service is bestuurzorg, so that actions in carrying out activities to interfere in all lines or fields of social life are legal-legitimate.[10]

More concretely, the main objectives of the Welfare State are:[11]

1. Controlling and utilizing socioeconomic resources for the public benefit;
2. Ensuring the distribution of wealth fairly and equally;
3. Reducing poverty;

[6] Sulthon Sjahril Sabaruddin, Dampak Perdagangan Internasional Indonesia terhadap Kesejahteraan Masyarakat: Aplikasi *Structural Path Analysis*. in *Buletin Ekonomi Moneter dan Perbankan*, Vol. 17 (4) (2015). p. 432-456

[7] Look: Gde Pantja Asnawa dan Suprin Na'a, *Memahami Ilmu Negara dan Teori Negara. (*Bandung: PT. Refika Aditama, 2009) p. 119

[8] *Ibid*. p. 120

[9] Compare: Abu Daud Busroh. 2011. *Ilmu Negara*. Cetakan kedelapan. Jakarta: Bumi Aksara. p. 54.

[10] Look inside: E. Utrecht.1960. *Pengantar Hukum Administrasi Negara Indonesia*. Compare: Fakultas Hukum dan Pengetahuan Masyarakat Universitas Negeri Padjadjaran. p. 21-23

[11] Saut P. Panjaitan. 2010.Politik Pembangunan Hukum di Bidang Investasi Suatu Keniscayaan Konstitusi Ekonomi. Dalam *Jurnal Konstitusi*. Vol. 7(2). p. 47-65

4. Providing social insurance (education and health) for the poor;
5. Provide subsidies for essential social services for disadvantaged people;
6. Providing social protection for each citizen.

In the life of the state, the constitution is considered the highest level of the law, the purpose of the constitution is also to realize the highest goals, namely:[12] justice, order, and the realization of ideal values such as freedom or freedom, and shared prosperity (prosperity and welfare). The 1945 Constitution of the Republic of Indonesia post reforms contains more provisions on the economy and social welfare. Thus, it can be said that the 1945 Constitution of the Republic of Indonesia is not merely a political document, but also an economic document. The 1945 Constitution of the Republic of Indonesia is not only a political constitution but also an economic constitution.[13]

In Indonesia, the concept of welfare refers to the concept of social welfare development, which is a series of planned and institutional activities aimed at improving the standards and quality of human life.[14] Therefore, development cannot be ignored regarding human rights because the guarantee of human rights also determines the quality of human life. As a constitution that can be referred to as an economic constitution, the 1945 Constitution of the Republic of Indonesia also contains provisions concerning human rights in the economic field or economic rights. Provisions in Article 28H Paragraph (1) and Article 33 Paragraph (4) of the 1945 Constitution are key provisions concerning the stipulation of norms regarding welfare as human rights in the constitution. The articles read as follows:

- Article 28H Paragraph (1): "Everyone has the right to live in prosperity physically and mentally, to live, and to have a good and healthy environment and to have health services."
- Article 33 Paragraph (4): "The national economy shall be implemented based on economic democracy with the principles of togetherness, efficiency, justice, sustainability, environmental insight, independence, and by maintaining a balance of progress and national economic unity."

Government and state policies developed in the economic field must be based on the constitution. Two perspectives have developed in understanding the economic policies contained in the 1945 Constitution of the Republic of Indonesia, namely the idealist perspective and the pragmatic perspective.[15] The idealist perspective, which is anti-liberalism and anti-capitalism considers Indonesia's constitutional, economic system reflects the understanding of market socialism or social markets that cannot allow market mechanisms to run freely as possible without state control and intervention. On the other hand, the pragmatic perspective with the paradigm of liberalism or neoliberalism adheres to the free-market understanding as much as possible. This understanding tries to reduce as much as possible the burden of the state so that state intervention or interference in the economy of the community is very minimalist. The state is limited to its function as a regulator, and may not be directly involved in carrying out economic activities.

Both groups understand different economics in looking at the ideal policies that need to be applied in Indonesia's economic development. The idealist group starts from the founding fathers' ideas about the family principle that is anti-liberalism and capitalism, which is considered to benefit only individuals. While the pragmatic group because it sees the necessity to keep abreast of the times. Times have changed, no longer as imagined by the founding fathers. At the end, who is close to the policymaker, he will enjoy the consequences of a policy that is beneficial for his interests. Thus, the free market is ultimately just an illusion. Free market dynamics, however, need to be regulated, controlled and directed to the right path for the common good. Today, all economists hold the same view that the state must not sleep and allow the free market mechanism to move on its own without government intervention.

Welfare was born in a harmonious relationship between guaranteed freedom and the fulfillment of justice. In the relationship between freedom produced by democracy and justice produced by law, creativity will develop, and mutual respect for differences will develop. Democracy and law can be implemented well if state authority is used with due regard to the human rights of citizens. Values that are idealized in the collective life of humankind are the creation of freedom, justice, and prosperity. For this reason, a constitution as the fundamental law and the highest

[12] Jimly Asshiddiqie. 2010. *Konstitusi Ekonomi*. Jakarta: PT. Kompas Media Nusantara. p. 9
[13] *Ibid*. p. IX
[14] Saut P. Panjaitan. *Op. cit*.
[15] Jimly Asshiddiqie.*Op. cit.* p. 327.

law must be able to connect three domains, namely: state power, civil society, and the market economy.

State, civil society, and the market economy (market)[16] must have a balanced reciprocal relationship. The state in regulating, controlling and directing important matters in civil society must be aimed at progress and prosperity. Civil society must play a role in controlling and overseeing the running of the state government. The market also has a very vital position. Strong or weak market conditions will determine the strength and weakness of civil society in its relationship with the state. If the relationship between the three is lame, surely development efforts in realizing prosperity and prosperity will be hampered. The imbalance in the relationship between the three can lead to blocked freedom, which is contrary to human rights. Alternatively, freedom can occur without rules, justice also can not be realized, and welfare that does not increase.

Considering the importance of the balance of relations between the state, civil society, and the market, in every statutory regulation especially regarding the economy, it must pay attention to the relations of the three. The regulation must not contain provisions that would reduce freedom and be unjust. The constitution, as the highest law which contains provisions concerning human rights, must be used as a guideline, a source of reference or the highest reference in carrying out state activities, including in realizing prosperity and welfare.

2. Standardization of Trade in Goods and Services in the Perspective of Human Rights

Each country's economy must have a specific system that is different from other countries. According to SuharsonoSagir, the Indonesian economic system which is adopted as the foundation of development from time to time, is the Popular Economic System (SEK).[17] In this system, state sovereignty in the economy is in the hands of the people; thus, this popular economic idea is related to economic democracy. The goal of this system is the liberation of people's lives from poverty, ignorance, dependence, unfair treatment, environmental damage, and anxiety in looking to the future. Therefore, the national development policy must be in accordance with the principles of people's economy, which according to Suharsono, is reflected in the implementation of the triple track development principle, namely pro-poor, pro-job, and pro-growth.[18] In implementing these three principles, six benchmarks can be used to assess the success of the development process, namely:

a. People are free from poverty at a high rate of economic growth;
b. People are free from ignorance and are empowered to become productive human resources;
c. People are free from unemployment by working creatively and productively to increase their own and other people's incomes;
d. The state is free from dependence on foreign debt;
e. The country is free from foreign exchange shortages; and,
f. The country is free from damage to ecosystems so that development can be sustainable.

In general, all countries alike want to create conditions that are under the six benchmarks. Both countries that have a capitalist economic system and a socialist economic system both want to achieve the six benchmarks of the success of the development. In reality, today there are no countries that are purely capitalist or purely socialist, as illustrated in the extreme textbooks on the economic system.

Trade as the primary driver of development, will positively significantly affect the achievement of development success by the benchmarks above. Therefore, the state in regulating, controlling and directing trade activities should be under the implementation of the principles contained in the Popular Economy System. At this time, trade is regulated in Law Number 7 of 2014 concerning Trade. UU no. 7 of 2014 was born based on the consideration that the implementation of economic democracy carried out through trade activities is the primary driver in the development of the national economy that can provide support in increasing production and leveling income and strengthening the competitiveness of Domestic Products.

The Trade Law explicitly mentions the role of trade in the implementation of a populist economic system. This can be read in the preamble section in letter c which states: that the role of trade is crucial in enhancing economic development, but in its development it has not met the need to face the challenges of national development so that economic-

[16] The three are referred to by Jimly Asshiddiqie as "new trias politica" which must be distinguished, but it is impossible to separate them from one another.*Ibid*. p. 375.

[17] Suharsono Sagir. dkk. 2009. *Kapita Selekta Ekonomi Indonesia*. Jakarta: Prenada Media Group. p. 1.

[18] *Ibid.* p. 4.

political alignments are needed that more provide opportunities, support, and economic development of the people which includes cooperatives and micro, small and medium enterprises as the main pillars of national economic development.

Since Indonesia's independence on August 17, 1945, there has been no law governing trade as a whole. An equivalent legal product in the field of Trade is the Dutch colonial law BedrijfsreglementeringsOrdonnantie 1934, which regulates more business licensing. Various efforts have been made to compile and replace Ordinances Bedrijfsreglementerings1934 in the form of partial legislation in the field of Trade, such as the Law on Goods, the Law on Warehousing, the Law on the Trading of Goods Under Supervision, the Law on Warehouse Receipt System, and Law on Commodity Futures Trading. Therefore, it is necessary to establish a law that synchronizes all legislation in the field of Trade to achieve the goal of a just and prosperous society and in responding to the development of the current and future era of globalization. Regulations in this Law aim at increasing national economic growth and based on the principles of national interest, legal certainty, fair and healthy, business security, accountable and transparent, independence, partnership, benefit, simplicity, togetherness, and environmentally sound.

In-Law No. 7 of 2014, Trade is defined as the order of activities related to transactions of Goods and / or Services within the country and beyond national borders for the purpose of transferring the rights to the Goods and / or Services to obtain compensation or compensation. Trade activities include not only domestic trade, but also foreign trade, namely trade that transcends national boundaries.

Foreign trade is one of the important variables of economic growth in an economy; it is not surprising that all countries strive to encourage trade cooperation with the aim of encouraging economic growth. The existence of international trade gave rise to various international trade organizations. The first multilateral organization or institution prepared to deal with the issue of international trade was the International Trade Organization (ITO). However, ITO was less successful in dealing with disputes in international trade, and instead the General Agreement on Tariffs and Trade (GATT) was formed in 1947. The main mission GATT is to eliminate trade barriers by issuing regulations that must be obeyed by all participating member countries. After going through several rounds, GATT was changed to WTO (World Trade Organization) which officially began operating on January 1, 1995.

The WTO is a multilateral organization that regulates the course of world free trade. Free trade means the free flow of goods and services across national borders without being hindered by government interference, both in the form of tariffs and non-tariffs. This concept is based on the Classical Liberal theory which states that trade can be done best, resources can be allocated most efficiently, and the welfare of the people achieved the highest if all producers are allowed to produce the best goods or services that they can produce to be sold in an open free competition climate.[19]

According to Adam Smith,[20] a figure from Classical Liberal theory, it was explained that each economic actor, both consumer and producer, must be given the freedom to pursue their interests. Consumers are given the freedom to choose a combination of various kinds of goods and services that provide maximum satisfaction (utility maximization) according to taste and money they have. Likewise, producers are given the freedom to choose various inputs and technologies to be used in the production process to produce various types of goods and services that most benefit their business (profit maximization). Although both parties, namely consumers and producers, have conflicting interests, if the economy is left free according to the strength of market mechanisms without interference from the government, then a balance or equilibrium will be created.

Trade economic activity is regulated by the market, which, according to Adam Smith, is driven by what is called an invisible hand.[21] In the beginning, the Market was defined as a meeting place for consumers and producers. Nowadays, the market has developed to become far more complicated, integrating individuals and groups. The process of integration in the market is supported by what is called a price system.[22] Many advantages of this perfect competition market model, which is believed to bring the economy to a dynamic balance and provide optimal results.

According to Milton Fiedman in Capitalism and Freedom, the market system can effectively reduce

[19] Deliarnov. 2006. *Ekonomi Politik*. Jakarta: Penerbit Erlangga. p. 201
[20] *Ibid*. p. 30.
[21] *Ibid.* p. 29.
[22] *Ibid.*

racial and ethnic discrimination, because consumers will buy from anyone who offers goods at lower prices and better quality, not because of racial, ethnic or racial backgrounds. Religion of the seller.[23] From a moral standpoint, the free market economic system contains several positive things,[24] including:

1. A free-market economic system guarantees justice through ensuring the implementation of equal and fair treatment for all economic actors.
2. There are transparent and fair rules, and therefore they are fair.
3. The market provides optimal opportunities.
4. In terms of economic equality, at the first level, the market economy is far more able to guarantee economic growth.
5. The market also provides optimal opportunities for the realization of human freedom.

In the Market, each actor competes or competes with each other. With competition, everyone strives to find the best techniques for producing and delivering goods in the right amount, time, and quality to each consumer group. Thus, the market achieves three moral values:[25]

1. The market directs sellers and buyers to trade fairly, reasonably.
2. The market maximizes the benefits to sellers and buyers by directing them to allocate, use, and distribute their goods efficiently.
3. The market achieves all this while respecting the seller and buyer's rights to freedom.

In the standard trade model, a country will benefit from trade by specializing, producing, and exporting goods that have a comparative advantage.[26] Conversely, the country is better at reducing production and importing goods that do not have a comparative advantage. Further development in international trade, standardization of traded goods and services is imposed by the state to protect its interests.

Indonesia applies the standardization of trade in goods and services as regulated in Law no. 7 of 2014 by setting Indonesian National Standards (SNI). Article 57-59 regulates the standardization of goods, whereas standardization of services is regulated in Articles 60-64. In essence, each of the goods and services must meet the standards set for trading. The standardization of goods and services is strengthened by the existence of criminal threats for businesses that carry out trades that are not established standards. Article 113[27] regulates criminal threats for business actors who trade goods without SNI with a criminal threat that is a maximum imprisonment of 5 (five) years and / or a fine of up to Rp 5,000,000,000.00 (five billion rupiahs). Whereas Article 114[28] regulates criminal threats for business actors, who trade services without SNI.

Provisions on criminal threats for business actors who trade goods and or services that do not have SNI show that the Law raises new norms regarding the existence of criminal acts of trade. Based on the formulation, it is not criminal in Article 113 and Article 114 including formal types of criminal acts. When viewed from the objective, the purpose of standardization is to protect the security, safety, health, and the environment. Therefore, it is better if you want to incorporate norms of criminal offenses by formulating nonmaterial crimes. Namely acts that result in the threat of security, safety, health, and the environment.

The existence of standardization provisions and criminal threats in this Trade Act, in the opinion of the author, is contrary to human rights as stipulated in the 1945 Constitution of the Republic of Indonesia. The obligation to standardize goods and services in Article 57[29] and Article 60 Paragraph (1)[30] is contrary to the right to work as human rights regulated in Article 28D Paragraph (2) of the 1945 Constitution of the Republic of Indonesia. That is because, in the standardization of goods and services, it limits trade business actors in working or carrying out their work.

[23] *Ibid.*

[24] Marinus R. Manurung. 2008. Moral dan Etika dalam Dunia Bisnis Menjelang Pasar Bebas. in *Jurnal Manajemen & Bisnis Aliansi*.Vol. 3 (5). p. 1-6.

[25] *Ibid*

[26] Berg, H. Van Den. 2005.*Economic Growth and Development*, New York: Mc.Graw HillIrwin. p. 330.

[27] UU no. 7 of 2014 Article 113: Business Actors who trade goods in the country that do not meet the SNI that has been compulsorily applied or the technical requirements that have been compulsorily applied as referred to in Article 57 paragraph (2) shall be sentenced to a maximum imprisonment of 5 (five) years and / or criminal dendapaling at most Rp5,000,000,000.00 (five billion rupiah).

[28] UU no. 7 of 2014 Article 114: Service Providers who trade services within the country that do not meet the SNI, technical requirements, or qualifications that have been compulsorily applied as referred to in Article 60 paragraph (1) shall be convicted with a maximum imprisonment of 5 (five) years and / or a criminal fine of no more than Rp 5,000,000,000 (five billion rupiah).

[29] UU no. 7 of 2014 Article 57: Goods traded domestically must meet: a. SNI that has been enforced compulsorily; or technical requirements that have been enforced compulsorily

[30] UU no. 7 of 2014 Article 60 (1). Service Providers are prohibited from trading services in the country that do not meet SNI, technical requirements or qualifications that have been compulsorily applied

This restriction is not under the principles in the market mechanism that should give producers (sellers) and consumers (buyers) freedom in trade transactions. Standardization will also allow discrimination because sellers or buyers choose to compete with racial, ethnic or religious backgrounds.

Also, the existence of criminal threats related to trading in goods and services that do not have SNI as regulated in Article 113 and Article 114, according to the author, is also contrary to human rights. More dominant trading transactions are private law. So it should not be something that is the scope of private law, will be subject to a crime who is public law. This article concerning criminal threats, according to the author, contradicts the 1945 Constitution of the Republic of Indonesia NRI Article 28G Paragraph (1) which guarantees citizens with the right to a sense of security and protection from the threat of fear of acting or not doing something that is a human right. With the criminal threat in Articles 113 and 114, it results in a loss of security in doing work in the trade sector.

Based on what has been described previously, the authors conclude that Law No. 7 of 2014 concerning Trade contains immoral provisions because it is contrary to human rights that have been regulated in the constitution. Thus the Act also violates the principle of law because it contradicts the higher laws and regulations. Provisions which, according to the author, contain immoral contents, especially in Article 57, Article 60, Article 113 and Article 114. Concerning these articles, an application for material testing can be submitted with an application to be revoked or canceled.

3. Political Law of Trade in Creating People's Welfare

The development of standardization occurred due to a review in the industry, policy, and academics associated with the innovation system. Gradual studies in the development and dissemination of technology have led to broad analytical interests in inter-company relations, collaborative research and development activities, public and private sector research and development relationships, and as a determining factor in the innovation process. In this case, standards and making standards become an essential factor in technological development. In addition to the above, the development of standardization is also due to the standard being a problem that significantly affects the various public policies and public interests.[31]

Standard problems are always associated with product internationalization and trade relations. Standards are closely related to consumer interests, health, and safety, environmental protection and management for economists more concerned about how standardization affects the sellers and buyers of technology products in the market. Standards are a matter of "economic information," which is market dynamics related to the product information available to buyers. The essential thing in the standard economic literature deals with the issue of technological suitability.[32]

Based on the concept that trade is the primary driver of development, it is necessary to develop a political development of law in the field of trade which is based on the principle of democracy as a manifestation of a people's economy as stipulated in Article 33 of the 1945 Constitution of the Republic of Indonesia, which constitutes the philosophical normative basis of a people's economic system. Therefore in the economic activities of trade, regulations are needed that provide freedom for citizens to develop their potential in producing goods and services, which can provide maximum profits. What needs to be stressed is that in conducting trade activities must be carried out with the principles following the ideology of the nation.

The principles in the trade that can be regulated as a guideline for business actors are:[33]

1. The principle of autonomy;
2. The principle of honesty;
3. The principle of justice;
4. The principle of mutual benefit (mutual benefit principle);
5. The principle of moral integrity.

These principles need to be elaborated on in making every public policy in the trade sector. Related to standardization, mutual benefit principle needs to be considered, so that the interests of producers also need to be considered. There needs to be a balance of protection both for producers and for consumers. Standardization can be applied to protect the interests of consumers, but not to limit the freedom of producers in producing goods and services to be traded for profit.

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[31] Steven, M.Spifak & F Cecil Brenner. 2001.*Standardization Essential, Principle and Practice*,New York: Marcel Dekker Inc. p. 1

[32] *Ibid*. p. 4.

[33] Sonny Keraf.1998. *Etika Bisnis dan Relevansinya.* Yogyakarta: Kanisius. p. 74-79

The government implements various decisions regarding public policyunder existing economic and political institutions. A policy is called a public policy not because the policy has been enacted, or because the public implements the policy, but because the content of the policy itself concerns the bonum commune or public welfare.[34] Thus, the laws and regulations in the trade sector must also be directed to realize prosperity by democratic economic ideals as formulated in the country's constitution, the 1945 Constitution of the Republic of Indonesia. These licensed products must provide freedom for producers and consumers to choose products goods and services according to their wishes in meeting their needs for their welfare. There must be no prohibitions and criminal threats to economic activities between producers and consumers as long as the transaction does not result in losses that cause security or the safety of either party, and those activities also do not disturb the environment causing environmental damage.

The Trade Law must be able to guarantee the existence of justice for producers and consumers, without the threat of criminal acts in the form of formal criminal acts for either party. Nor should there be an element of discrimination, whether related to individual races, ethnicities, or religions. Changes in trade laws need to be made, primarily related to the obligation to standardize goods and services, and related to trade crime due to the standardization. Changes are made to encourage freedom, so that producers can innovate to create a variety of products that can be traded and can be enjoyed by consumers without causing things that harm security and safety.

E. CONCLUSION

The relationship between the state, human rights, and welfare is a relation of responsibility where the state is responsible for realizing the goals that have been determined together, namely the existence of public welfare. To achieve these goals, the state guarantees and protects the human rights of all its citizens. Welfare itself is a part of human rights guaranteed in the 1945 Constitution of the Republic of Indonesia as a form of economic sovereignty by implementing economic democracy through a populist economic system. Therefore, the state as the executor of sovereignty has the authority to create regulations in the laws and regulations that provide guarantees and legal protection for the implementation of the rights of citizens to achieve prosperity.

Concerning standardization in trade in goods and services regulated in Law no. 7 of 2014, changes need to be made because the standardization results in restrictions on producers' freedom to produce goods and services to be traded for profit. The law also raises norms of trade criminal offenses that are regulated as formal criminal acts that tend to violate human rights and contradict the higher laws, namely the 1945 Constitution of the Republic of Indonesia.

For this reason, changes to the law need to be made by not making standardization a limitation that is less productive in trading activities. Standardization can be applied solely to protect the security and safety of consumers, but it also needs to be considered in balance with the interests of producers. Also, need to be minimized the existence of norms of crime because in trading activities that need attention is the principle of mutual benefit (mutual benefit principle).

F. REFERENCES

Arifin, B., & Rachbini, D. J. (2001). *Ekonomi Politik dan Kebijakan Publik*. Jakarta: PT. Grafindo.

Asnawa, G. P., & Na'a, S. (2009). *Memahami Ilmu Negara dan Teori Negara*. Bandung: PT. Refika Aditama.

Asshiddiqie, J. (2010). *Konstitusi Ekonomi*. Jakarta: PT. Kompas Media Nusantara.

Berg, H. Van Den. (2005). *Economic Growth and Development*. New York: Mc.Graw HillIrwin.

Busroh, A. D. (2011). *Ilmu Negara*. Jakarta: Bumi Aksara.

Deliarnov. (2006). *Ekonomi Politik*. Jakarta: Penerbit Erlangga.

Hartono, S. R. (2007). *Hukum Ekonomi Indonesia*. Malang: Bayumedia Publishing.

Ismatullah, D., & Gatara, S. A. (2006). *Ilmu Negara Mutakhir; Kekuasaan, Masyarakat, Hukum, dan Agama*. Bandung: Pustaka Attadbir.

Keraf, S. (1998). *Etika Bisnis dan Relevansinya*. Yogyakarta: Kanisius.

Marinus, R. M. (2008). Moral dan Etika dalam Dunia Bisnis Menjelang Pasar Bebas. *Jurnal Manajemen & Bisnis Aliansi, 3*(5), 1–6.

Panjaitan, S. P. (2010). Politik Pembangunan Hukum di Bidang Investasi Suatu Keniscayaan Konstitusi Ekonomi. *Jurnal*

[34] Bustanul Arifin & Didik J. Rachbini.2001. Ekonomi Politik dan Kebijakan Publik. Jakarta: PT. Grafindo.

Konstitusi, *7*(2), 47–65.

Sabaruddin, S. S. (2015). Dampak Perdagangan Internasional Indonesia terhadap Kesejahteraan Masyarakat: Aplikasi Structural Path Analysis. *Buletin Ekonomi Moneter Dan Perbankan*, *17*(4), 432–456.

Satradipoera, K. (2001). *Sejarah Pemikiran Ekonomi: Suatu Pengantar Teori dan Kebijaksanaan Ekonomi*. Bandung: Kappa-Sigma.

Sri, S. (1987). *Prosedur dan Sistem Perubahan Konstitusi*. Bandung: Alumni.

Steven, M. S., & Brenner, F. C. (2001). *Standardization Essential, Principle and Practice*. New York: Marcel Dekker Inc.

Suharsono, S. et al. (2009). *Kapita Selekta Ekonomi Indonesia*. Jakarta: Prenada Media Group.

Utrecht, E. (1960). *Pengantar Hukum Administrasi Negara Indonesia*. Universitas Negeri Padjadjaran.

JUSTICE AND LEGAL CERTAINTY BENCHMARKS

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1. INTRODUCTION

In Indonesia, it can be said that the level of justice in law enforcement was still low. People argued that, in a court or law, justice was not implemented by law enforcers in resolving a case. Therefore, the quality of law was lost because its validity and originality could not be accounted for. People also argued that law only sided with upper class while lower class was not given importance. The justice orientation used for personal became a problem in law.[1] For example, a case that happened in Indonesia about an old woman from Banyumas named Minah who was sentenced to imprisonment for 1.5 months. She was imprisoned because she took 3 of her neighbor's cocoas. Grandma Minah's neighbor reported the case to the court, so the case was followed up by court apparatus. In this case, grandma Minah was illiterate and did not understand the law. Meanwhile, corruption cases committed by high officials in Indonesia who used the state money for their personal needs every day did not get legal enforcement, even the cases were not included in district courts. The cases were not handled further. One of the main reasons why corruption cases were not proceeded was that legal enforcers were bribed by the corruptors. The corruptors must be judged fairly. An example of punishment in this case is paying fine in the amount of money they had used.[2]

From the two cases, we can compare that grandma Minah who took only 3 cacaos was imprisoned for 1.5 months, while the corruptors in Indonesia who used state money for their personal needs did not get any punishment. We can conclude that legal justice in Indonesia was not implemented as it should in accordance with applicable provisions. One of the reasons was bribery between legal enforcers and the class with wealth and power in a country.

In the court, the plaintiff and the defendant have the same rights and obligations before the law. Therefore, the two have the same goal, namely to defend themselves before the court. Legal enforcers must give equal treatment in handling various cases that occur so that it does not cause an inequality between a party and the other.

The rights and obligations of the parties will be protected. Although they have the same rights before the law, namely to defend themselves before the law, the law must be implemented as it should and there is no privilege given to either party. A case must be resolved according to applicable laws and regulations. In resolving a case, the crucial base must be prioritized, namely justice. If justice is served, the law will not harm any party. The next base that must be fulfilled is legal certainty. If there is no legal certainty in law, people will never know whether a case can be resolved well and appropriately. People must be able to be the observer and the executor of legal justice and legal certainty in the course of law in Indonesia. Justice and legal certainty are the reflection of quality of law in a country. The better law enforcement by implementing justice and legal certainty, the better quality of law.

A country that has good law is a country that implements justice and legal certainty. Justice and legal certainty are useful to resolve a case in court. Court apparatus must implement the bases. In addition, court apparatus must also implement transparency of the course of court. If court apparatus implements transparency of the course of court, justice and legal certainty can run in a court in Indonesia.

Accountability of justice and legal certainty becomes a benchmark in law that can be used as a weight in resolving a case in court. If a court does not implement justice and legal certainty, it can be said that law fails to resolve a case in it. The case can be resolved in accordance with applicable laws to manifest public welfare regarding law in Indonesia.

2. FORMULATION OF PROBLEMS

What are the benchmarks in achieving justice and legal certainty in Indonesia?

[1] Faturochman Djamaludin Ancok, "*Dinamika Psikologis Penilaian Keadilan*", Jurnal Psikologi, No. 1, 2001, p. 58.

[2] Ummul Husna, "*Proses Penyelesaian Perkara Korupsi Kedalam Putusan Perdata (Studi Kasus Di Pengadilan Negeri Sragen)*", Jurisprudence, Vol. 4, No. 1, March 2014, p. 12.

3. DEFINITION OF LEGAL JUSTICE, CERTAINTY, AND BENEFIT

Some people interpret "law enforcement" as "a repressive action of law enforcers starting from arrest of criminals by forest rangers or policemen, investigation by state investigators, until decision by court." Such interpretation of law enforcement is correct, but it is narrow. Because if it is so, law enforcement only belongs to law enforcers. In the law on conservation, transport of wild animals must be covered by transport permit. If someone transports wild animals covered by valid wild animals and plants transport permit, it can be said that the person enforces the law because he/she practices legal provision. Therefore, a more appropriate definition of law enforcement is: "implementation of legal provisions in real life." According to Prof. Dr. Jimly Asshiddique, S.H., law enforcement is the process of enforcement or functioning of legal norms in real as a guide for behavior in traffic or legal relations in the life of society and nation. In law enforcement, there are 3 elements to be paid attention, namely: Legal Certainty (*Rechtssicherheit*), Justice (*Gerechtigkeit*), and Benefit (*Zweckmassigkeit*). Legal certainty is justiciable protection against arbitrary action. With the existence of legal certainty, society will be more orderly. How the law is should apply in concrete events. Law enforcement has to consider justice, but law is not always identical to justice because it is general and binds everyone. In law enforcement, people expect benefits. Law enforcement must not lead to public anxiety. The three elements above have to obtain attention proportionally from law enforcers in enforcing the law. Certainly, it is not easy. There will be many factors affecting law enforcers in enforcing the law.

Understand the essence of law enforcement on forestry criminal actors with an example of case that had happened. Hasan was a driver of inter-provincial bus who came from Lampung. When he stopped, he saw a child was selling a wildcat. The condition of the wildcat was not good, its feet were tied and brought in a plastic bag. Only its head was out of the plastic bag. Hasan knew that wildcat was one of wild animals protected by the law. Because he cared and pitied the wildcat, he bought it (trade and ownership of a protected wild animal took place). After that, he brought it (transport took place). After he reached Lampung Province, he voluntarily gave the wildcat to Natural Resource Conservation Agency of Lampung. Hasan's action fulfills the elements of forestry crime of Article 21 verse (2) letter a of Law No. 5 Years 1990 that everyone is prohibited to catch, hurt, kill, keep, own, take care, transport, and trade protected wild animals that are alive. Therefore, FOR LEGAL CERTAINTY, Hasan has to be arrested and given to investigators to be investigated, given to public prosecutor to be charged and prosecuted, and examined and decided by judge in court, or FOR JUSTICE, a policy is taken to not proceed Hasan's criminal case, or even FOR BENEFITS, gratitude is delivered to Hasan because he has saved a protected wild animal.

4. ANALYSIS

Law is the best and most useful thing for everything. According to Gustav Radbruch, a good law has to contain a definition that it can bring legal certainty, legal justice, and legal benefits. In life, the most important thing is justice. Similarly, in law, the most important thing is justice. Justice in broad sense means impartial and not taking sides with certain people. Justice in law is equality of rights and obligations in law. Rights in law can be called as an authority. Everyone has the same right, namely to get legal protection or defense in law. Every human has rights that have to be fulfilled. While the obligations of everyone are to obey and subject to law applicable in Indonesia, implement applicable regulations, and not violate the regulations. The rights and obligations have to be balanced and fulfilled to create justice. The implementation of justice is in an implementation of order in social life. The aspects of life have to be based on the principles contained in Pancasila, including the aspect of justice in law order in Indonesia, so law can prosper the people and the sustainability of law itself can be accounted for in the existing regulations. Legal justice is a principle that cannot be changed and applicable everywhere and every time. According to law of nature, justice has to give fairness that can give benefits and resolve various problems.[3]

Legal certainty is also an important thing in law. After legal justice is achieved, the next to be fulfilled is legal certainty. Without legal certainty, people will never know whether what they do is right or wrong. Furthermore, without legal certainty, it will cause various problems, including public anxiety. With legal certainty, people obtain protection against arbitrary actions of legal enforcers in performing their jobs in the society. Legal certainty becomes a

[3] Ibnu Artadi, "*Hukum: Antara Nilai-Nilai Kepastian, Kemanfaatan dan Keadilan*", Hukum dan Dinamika Masyarakat, October 2006, p. 68.

benchmark in the clarity of their rights and obligations in law. Legal certainty has to advance proving so the law can be accounted for.[4] Justice is prioritized over legal certainty. In current era, the law in Indonesia reverses justice and legal certainty, namely it prioritizes legal certainty over justice. The reason why justice must be prioritized is that justice has to be balanced for everyone, do not side with certain classes. After justice is fulfilled, legal certainty can be achieved as it should according to people's expectation in the life of nation and country. Judge is the honorable in court or the leader in the course of court in Indonesia. In performing his/her tasks and function, legal proceeding highly depends on the decision of judge. In court, judges have to uphold the law, enforce the truth, justice, and legal certainty. In each problem, judges have their own way in resolving it before the law. In court, judges can create new law in taking a decision called as jurisprudence. Judges can use jurisprudence if, in resolving a case, there is no solution based on the Law or other regulations. Judges must be able to be fair before the law because they decide a case in court. In taking decisions, judges must comply with the statutory regulations applicable in Indonesia, honest, and based on their conscience to achieve a fair and accountable decision. Therefore, judges' decisions must be acceptable by the people.

Justice and legal certainty are crucial to be implemented in life and law. Justice and legal certainty become important factors in the success of law. Indonesian people will trust the law in Indonesia if the law enforcers in Indonesia implement justice and legal certainty in resolving each case in law. The first implementation of justice and legal certainty is within ourselves. If the soul of justice and legal certainty is implanted within ourselves, we will be used to them in interaction in the society. Justice and certainty are crucial for ourselves and others. Justice and legal certainty are highly protected by Human Rights because justice for humans is the basic right and fundamental principle in life. The implementation of justice and legal certainty in law can be done in the course of law enforcement and proceeding. In enforcing the law applicable in the society in Indonesia, legal enforcers have to be based on justice and legal certainty. An example of implementation of justice and legal certainty in law is that in bringing street vendors in order, legal enforcers have to be fair. Namely, they have to bring the street vendors in order without considering whether they are rich or poor vendors. All of them must be put in order and routinely given socialization that selling things on sidewalk, which is meant for pedestrians, can cause traffic jam. In addition, the government must provide special area or special place for the street vendors to sell their goods. An example of legal certainty is enforcing regulations and organizing routine socializations regarding enforcement of regulations that are important for Indonesian people. Therefore, the people know whether their behaviors in social interaction conform to applicable statutory regulations or not. The people will get legal certainty regarding their behaviors.

The most important things in law are justice and legal certainty implemented in resolving a case in court. In resolving a case in court, it must be done transparently and there must be nothing concealed by legal enforcers in Indonesia, because if there is something concealed, it will cause awkwardness in the course of law. For example, corruption or bribery between legal enforcers and members of society. If the process of resolving a case is transparent and nothing is concealed, the course of trial of a case in court can continue in accordance with statutory regulations. The people can evaluate whether the process of resolving a case implements the principles of justice or not. Therefore, if justice is achieved, it will lead to legal certainty that does not harm or favor a certain party only. In resolving a case in court, justice and legal certainty become the most important factors for society welfare. Justice and legal certainty become a reflection for the society of the success of law in resolving a legal case. To improve justice and legal certainty in the society, it requires law enforcement. Law enforcement functions to measure the level of people's obedience towards the law in Indonesia. Law enforcement can be affected by the level of development of society. The higher level of development of society, the more advanced level of development of society regarding legal thinking because they understand more about the law existing in the society.[5] The development of law must pay attention to the order in law. Law must be able to balance between legal norms and the norms existing in the society. Balancing the law can also minimize the chance of legal violations in the society. The high level of crimes occurring in the society of Indonesia and weak legal enforcers become the things that

[4] Yohanes Suhardin, "*Peranan Hukum Dalam Mewujudkan Kesejahteraan Masyarakat*", Jurnal Hukum Pro Justitia, Vol. 25, No. 3, July 2007, p. 271.

[5] Sanyoto, "*Penegakan Hukum di Indonesia*", Jurnal Dinamika Hukum. Vol. 8, No. 3, September 2008, p. 1.

weaken the law.[6] People's minimum knowledge of the law existing in the society can cause legal violations. To overcome the possibility of accumulation of non-compliance with the law, attention towards the law must be improved. One of the ways to keep the people from violating the law is to impose fine on legal violations or punishment that can create deterrent effect on the violators. Indonesian people will obey the law if there are strict sanctions imposed in the society. The sanctions must be able to make the people aware of the importance of justice and legal certainty in law. The enforcement of justice and legal certainty must conform to the norms existing in the society, not solely implementing the formal process in law.[7] Law enforcement is a milestone in equalizing the law with the principles in the society. The equalization can be said to implement new law in accordance with the habits in the society. Therefore, the rules are acculturated to the habits in the society. Judge is one of the bodies in enforcing the law in court. Judges have to be able to enforce the law existing in the society based on the principles of Pancasila. In fact, people do not trust the judges in Indonesia, because the judges do not enforce the law based on justice, legal certainty, and benefits that can result in welfare of Indonesian people. In performing their duty in terms of justice and legal certainty, judges have to be able to equalize the rights and obligations in the law. Judges' decisions have to be to resolve cases and reflect social order.[8] Legal institutions have to have a vision to be an authoritative and independent judiciary institution in strengthening the position of justice and certainty in law.[9]

4. CLOSING

Justice and legal certainty in Indonesia cannot be put aside in the journey of legal enforcers in performing their legal function, namely to enforce the law so as to be accountable in court. The accountability of justice and legal certainty means the enforcement of the most basic elements in law to create welfare and to achieve the bright spot in law. Justice becomes the main element that has to be fulfilled and achieved in court. After justice in law is achieved, legal certainty has to be achieved as it should. Legal certainty becomes the final destination in legal process. After justice and legal certainty are achieved, the court of law will bring benefits that give positive impacts on the people. The positive impacts that will occur if justice and legal certainty are achieved include the people trusting the law, the fulfillment and protection of human rights in law, the achievement of the course of law in accordance with the statutory regulations, welfare and order in the society. According to the existing data, justice and legal certainty in Indonesia are still low. There are some factors affecting the condition, namely that some parties are not aware of the importance of justice and legal certainty in court. Various cases in the society reflecting justice and legal certainty are only few and do not conform to the goals of law or regulations applicable in Indonesia. Law must be able to lead people's rights and obligations to a better direction in the society.

[6] Zainab Ompu Jainah, "*Penegakan Hukum Dalam Masyarakat*", Journal of Development, Vol. 3, No. 2, August 2012, p. 165.

[7] Bambang Sutiyono, "*Mencari Format Ideal Keadilan Putusan dalam Putusan*", Jurnal Hukum, Vol. 17, No 2, April 2010, p. 222.

[8] Fence M Watu, "*Mewujudkan Kepastian Hukum, Keadilan dan Kemanfaatan Dalam Putusan Hakim di Peradilan Perdata*", Jurnal Dinamika Hukum, Vol. 12, No. 3, September 2012, p. 480-485.

[9] Zainal Arifin Hoesein, "*Lembaga Peradilan Dalam Perspektif Pembaruan Hukum*", Jurnal Media Hukum, Vol. 20, No. 1, June 2013, p. 19.

REFERENCES

Acemoglu, Daron & O Jackson, Matthew. "So*cial Norm and the Enforcement of Law*", Journal of the European Economic Association, European Economic Association, Volume 15, Number 2.

Arifin Hoesein, Zainal. (2013). "*Mewujudkan Peradilan Dalam Perspektif Pembaruan Hukum*", Jurnal Media Hukum, Volume 20, Number 1, 2013.

Ariman, Rasyid & Raghib, Fahmi. (2016). *Hukum Pidana*. Malang: Setara Press.

Artadi, Ibnu. (2006). "*Hukum: Antara Nilai-Nilai Kepastian, Kemanfaatan dan Keadilan*", Hukum dan Dinamika Masyarakat, 2006.

Braithwaite, John. (2002). "*Rules and Principles: A Theory of Legal Certainty*", Journal of Legal Philosophy, Volume 27.

Djamaludin Ancok, Faturochman. (2001). "*Dinamika Psikologis Penilaian Keadilan*", Jurnal Psikologi, Number 1, 2001.

Havers, Philip., Hewson, Barbara., Harlow, Carol., Edwards, Anthony. "*Advancing Access To Justice, Human, Rights and Rule of Law*", Justice Journal, Volume 9, Number 2.

Husna, Ummul. (2014). "*Proses Penyelesaian Perkara Korupsi Kedalam Putusan Perdata (Studi Kasus Di Pengadilan Negeri Sragen)*", Jurisprudence, Volume 4, Number 1, 2014.

M. Watu, Fence. (2012). "*Mewujudkan Kepastian Hukum, Keadilan dan Kemanfaatan Dalam Putusan Hakim di Peradilan Perdata*", Jurnal Dinamika Hukum, Volume 12, Number 3, 2012.

Muhtadi. (2013). "*Lembaga Negara: Makna, Kedudukan dan Relasi*", Jurnal Ilmu Hukum, Volume 7, Number 3, 2013.

Ompu Jainah, Zainab. (2012). "*Penegakan Hukum Dalam Masyarakat*", Journal of Development, Volume 3, Number 2, 2012.

Rahardjo, Satjipto. (2014). *Ilmu Hukum*. Bandung: PT Aditya Bakti.

Raharjo, Handri. (2016). *Sistem Hukum Indonesia*. Yogyakarta: Pustaka Yustisia.

Ravena, Dey & Kristian. (2017). *Kebijakan Kriminal*. Jakarta: PT Balebad Dedikasi.

Sudiro, Ahmad & Bram, Deni. (2013). *Hukum dan Keadilan: Aspek Nasional & Internasional*. Jakarta: PT Raja Grafindo Persada.

LEGAL ASPECTS OF PATIENT'S FAMILY RIGHTS AND FREEDOMS IN SHOOTING ON HOSPITAL SERVICES IN THE DIGITAL AGE

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ABSTRACT

Technology becomes a tool that is able to help most human needs. . The digital age has brought various good changes as a positive impact that can be used as well as possible. But at the same time, the digital age also brought many negative impacts, thus becoming a new challenge in human life in this digital age. The rise of the action of uploading videos or pictures about the condition of patients in the hospital by social media users, making it uncomfortable and disrupting services that can ultimately harm both parties for the patient's family and the hospital, making the central board PERSI (Association of Hospitals throughout Indonesia) issued a letter of appeal number 987 / IA / PP Persi / II / 2018. The provisions of the law and article contained in the picture of the prohibition on taking pictures that exist on the web of one of the hospitals can be said to be not all appropriate.

Keywords: Digital Age, Prohibition Of Recording, Hospitals

A. INTRODUCTION

The development of technology in the direction of all-digital is now increasingly rapid. In this digital era, humans in general have a new lifestyle that can not be separated from all-electronic devices. Technology becomes a tool that is able to help most human needs. Technology can be used by humans to make it easier to do any task and job. The important role of technology is what brought human civilization into the digital age. The digital age has brought various good changes as a positive impact that can be used as well as possible. But at the same time, the digital era also brought many negative impacts, thus becoming a new challenge in human life in this digital era. Challenges in the digital age have also entered into various fields such as politics, economics, social culture, defense, security, and information technology itself.[1] [2]

Capturing a momentum using photos or videos has become a habit of society today. Where communication devices are all equipped with recording devices such as photos, videos and sound. And with the sophistication of communication tools today, especially cellphones, the images, videos or sounds that are produced as supporting evidence of information that is easily spread by the public. Besides the camera, the internet has also become one of the features available on mobile phones as the most important tool for spreading the word. Especially at this time of the existence of web-based social media services or social networks such as Facebook, Instagram, Whats App, BBM and many others. Nowadays social media on the internet is a target to spread the news that they can and then spread it. So that people can spread information in one hand.

Social media is something that cannot be separated from our daily lives. Various moments, be it moments with friends or family, we capture in gadgets / mobile phones and finally uploaded on social media. Update information about our whereabouts and what we do is often done, especially for those of us in big cities. Social media also has advantages and disadvantages. The advantage is the information that we can easily convey or communicate with others. But the weakness is that there is still a lot of information available on social media, the news is not in accordance with the facts obtained and even tends to lie. This can be a violation of human rights if the false news concerns a person or a group or institution and can cause defamation. And that can also happen to hospitals.[3]

The rise of the action of uploading videos or pictures about the condition of patients in the hospital by social media users, making it uncomfortable and disrupting services that can ultimately harm both parties for the patient's family and the hospital, making the central board PERSI (Association of Hospitals throughout Indonesia) issued an appeal letter number 987 / IA / PP Persi / II / 2018. Through

[1] Wawan Setiawan, Era Digital dan Tantangannya, Seminar Nasional Pendidikan, Universitas Pendidikan Indonesia, 2017
[2]Bakti Nugroho, Samsuri, Pers berkualitas Masyarakat Cerdas, Cetakan Pertama, Maret, 2013.

[3] . M. E. Fuady, Fenomena Kejahatan melalui Internet di Indonesia, Mediator, vol. Vol. 6 No., no. 56, 2005

an appeal letter dated February 1, 2018 signed by Dr. Kuntjoro Adi Purjanto, MKes as chairman of the Persi, informed that the development of current technological information if wrong in its application could have detrimental effects on individuals and health care institutions.[4] [5]

Hospitals as health care workers who carry out health efforts for the community in accordance with their functions. To carry out health efforts, hospitals have an obligation to provide safe, anti-discriminatory health services and prioritize the interests of patients.[6] The hospital considers that it includes several laws that contain articles on the prohibition of taking pictures, namely Law No. 36 of 1999 concerning Telecommunications article 40, Law No. 29 of 2004 concerning medical practice articles 48 and 51 and Law No. 11 of 2008 concerning ITE article 27 . Article 48 of Law No. 29 of 2004 is used because this article contains that a doctor or dentist must keep a medical secret, the secret can only be opened for law enforcement officials or patient requests. While Article 51 also contains a doctor must keep a patient's secret even until the patient dies.[7] The use of article 27 of Law No. 11 of 2008 is because a person is prohibited from taking pictures in the hospital and distributed through an electronic information system that results in insult / defamation of the hospital.[8] While Law No. 8 of 2014 concerning copyright explains the provisions of creation. Provisions Portrait or photographs relating to the prohibition of shooting in hospitals are contained in article 12 that everyone is prohibited from photographing someone secretly without written consent from the person being photographed or his heirs.[9]

Advances in technology have led to changes in clinical practice, for example through the use of electronic medical records. One of the latest issues facing doctors is about how to deal with patients who record doctor conversations. The development of technology is ultimately like a double-edged sword. Nevertheless, technological progress will continue to occur and can not be unstoppable. Technological advances also affect all fields, including medicine. This effect is not only positive but can also be negative, for example the risk of prescribing errors in the electronic medical record system and the risk of medical errors if only relying on the results of digital ECG interpretations.

B. PROBLEM STATEMENT

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

1. Why shooting at hospital services is prohibited
2. How the rights and freedom of the patient's family in taking pictures at hospital services are not subject to legal sanctions.

C. LITERATURE REVIEW

The digital world not only offers great opportunities and benefits for the public and business interests. But it also provides challenges to all areas of life to improve quality and efficiency in life. The use of various technologies is indeed very easy for life, but even digital lifestyles will increasingly depend on the use of cellphones and computers. Whatever it is, we should be grateful that all this technology makes it easier, it's just that of course each use requires it to control and control it. Because if it is too excessive in using this technology we ourselves will be harmed, and maybe we can not maximize it. The development of technology is so fast that it permeates all lines of social life of society, it turns out not only to change the order of social life, culture of society but also political life.

Article contained in the prohibition of taking pictures as stated in Law No. 36 of 1999 concerning telecommunications article 40 that a person is prohibited from conducting wiretapping that is distributed through the telecommunications network. What is meant by tapping in the sentence contained in the article means that tapping here is a conversation / confidential information that is being channeled in telecommunications networks and equipment and then tapped and leaked to the public. For example, two people are having a conversation using a communication device and then someone deliberately installs the device on the telecommunications network and intercepts without the two persons

[4] CAIRUMI, Tinjauan Yuridis Terhadap Pemungutan Bea Perolehan Hak atas Tanah dan Bangunan (BPHTB) Dalam Transaksi Jual Beli Tanah dan Bangunan di Kota Tanjung Balai, CHAIRUMI 1, pp. 1 16,

[5] Nindy Nur Cahyanti, Pengambilan Gambar pada Layanan Rumah Sakit, Universitas Muhammadiyah Sidoarjo, 2018.

[6] H. D. Iswandari, P. Magister, H. Kesehatan, U. S. Semarang, and J. Tengah, Aspek Hukum Penyelenggaraan Praktik Kedokteran : Suatu Tinjauan Berdasarkan Undang- Undang NO. 9 / 2004 Tentang Praktik Kedokteran, vol. 9, no. 2, 2004

[7] Undang-Undang Republik Indonesia Nomor 29 Tahun 2004 Tentang Praktik Kedokteran, 2004

[8] Undang-Undang Republik Indonesia Nomor 11 Tahun 2008 Tentang Inforrmasi Dan Transaksi Elektronik, 2008.

[9] Undang Undang Republik Indonesia No 8 tahun 2014 tentang Hak Cipta, 2014.

knowing. This is different from recording or taking pictures on services and then spread through telecommunications networks. Because taking occurs at a place not on the telecommunications network.[10, 11, 12]

Whereas Law No. 29/2004 regarding the practice of medical articles 48 and 51 of Article 48 that must keep the secret of medicine confidential is a doctor or dentist. This means it does not apply to health workers or staff at the hospital if they are taken in the picture. If the secret is known by someone else, it could be the doctor who is negligent in maintaining the confidentiality of medicine. In Article 48 paragraph 2 it is also explained that medical secrets can be opened for the benefit of law enforcement. This means that a photo can be taken if someone is photographing the mistake of an action taken by a doctor and the portrait is as evidence used to report to the authorities. It is different if someone takes a portrait and then spread on social media. Article 51 (c) containing the doctor or dentist in carrying out medical practice must keep everything confidential about the patient, even after the patient has died. This article also contains secrets that must be guarded by doctors, not medical staff or other staff. So if the secret is leaked to others, the doctor may be negligent in keeping the patient's secret.[13]

Law No. 1 of 2008 concerning ITE article 27 of this Article concerning the prohibition of any person who intentionally and without the right to distribute and / or transmit and / or make access to Electronic Information and / or Electronic Documents that have contents that violate decency, gambling, insult / defamation, extortion or coercion. Every person who takes a picture and distributes it with a different purpose that is can be with a purpose in accordance with the article and there is also a purpose to reveal the truth. However, in Article 31 this interception or wiretapping can be carried out in the interests of law enforcement on the orders of the police or other law enforcers stipulated by law.

Thus, in accordance with Article 48 of Law No. 29 of 2004, shootings can be used as evidence to report an incident to a law enforcement officer. Law No. 8 of 2014 on copyright This law describes the conditions of creation. Provisions of Portraits or photographs relating to photography in this Act are contained in section 12 of the prohibition on the use of portraits distributed without the consent of the person who was photographed or its heirs for commercial use. applicable if the image is for personal documentation only or to inform the family. This analysis can bring to light some simulations that can be performed without the need for permission from the Hospital because it is not in accordance with law.[14]

Law No. 11 of 2008 on ITE Article 27, therefore, does not imply that photographs taken without the permission of the hospital are for personal use, or may be uploaded but should be without intent to insult or defame the hospital and its employees at the hospital whether it be doctors, nurses or other staff. On the other hand, shooting shall not be performed if the photograph taken, uploaded and distributed contains elements of contempt and profanity at the hospital or the entire hospital staff in accordance with article 27 of Law No. 11 of 2008.

Terminating the Services of PERSI Patients, (Indonesian Hospital Association) through its website, explains that not everyone is prohibited from photographing hospital services. All documentation of hospital activities must be licensed by the hospital. Photograph What should not be done is when the recording has touched the side of distrust in the hospital / health workers. The record that causes the patient's secret to be revealed to the public. Patients who record a little need to be responded as the party then to the hospital / the officer is questioned. And the hospital may stop the service to the patient. A hospital statement stopping services to patients may conflict with Law No. 44 of 2009 in article 29 concerning hospital obligations, that is, hospitals are required to provide safe, quality, antidiscriminatory and effective health services by prioritizing patient interests in accordance with hospital service standards. In addition, article 32 regulates the provision of patient rights, namely to obtain services without discrimination. If there is a hospital that stops treatment for patients, it means that the hospital has violated the patient's right to obtain services without discrimination. Hospitals that have been proven to neglect patients can be sued with civil sanctions. and administrative. The relationship of hospital service

[10] Undang Undang Republik Indonesia No 36 tahun 1999 tentang Telekom unikasi, pasal 40, 1999.
[11] H. Christianto, Tindakan Penyadapan ditinjau dari Perspektif Hukum Pidana, 2016
[12] A. Rachmad, Legalitas Penyadapan Dalam Proses Peradilan Pidana Di Indonesia, vol. 11, Juli- Desember, 2016.
[13] A. Dewi, Tanggung Jawab Hukum Dokter Dalam Menjaga Rahasia Kedokteran, Skripsi, 2017
[14] E. Puspitarani, M. Handono, and E. Wahjuni, Perlindungan Hukum Terhadap Potret Orang Lain yang Digunakan Promosi Oleh Fotografer Berdasarkan Undang-Undang No. 19 Tahun 2002 Tentang Hak Cipta, no. 19, p. 2,

responsibility to civil law is if the hospital does not provide services to a patient, the hospital is deemed to have not carried out its obligations or can be said to be a default, because it did not carry out its achievements in an agreement to treat patients until recovery. This action can be called an act against the law (onrechtsmatige dad). Such acts can be prosecuted by Article 1365 of the Civil Code which states that every act against the law that brings harm to others, obliges people because of the mistake of issuing the loss, compensating the loss.[15, 16 , 17 , 18]

Article 13 paragraph 3 of Law No. 44 of 2009 concerning Hospitals states that, health workers working in hospitals, in addition to working according to professional standards and ethics, health workers must also respect the rights of patients and prioritize patient safety. The right of patients in hospital services is to obtain services that are humane, fair and without discrimination. Hospitals that stop their services are considered to have violated the patient's right to obtain humane and non-discriminatory services. patient and prioritize patient interests. Therefore, if a hospital that does not meet the requirements in Article 13 paragraph 3 receives an administrative sanction in the form of not being given permission to establish, revoke or not be extended its operational permit. This administrative lawsuit can also be made after someone has been declared victorious in a civil suit against a hospital thathas been proven to neglect a patient and incur a loss to that patient. The filing of this administrative claim can be made in the State Administrative Court.

D. RESEARCH METHODS

Writing this research using normative research methods, normative research methods is an approach that is carried out theoretically by studying the legislation, theories and concepts relating to the problem to be the author of the study. Primary Legal Material used in this study uses normative law to place primary legal material in the form of statutory regulations related to the legal issues studied such as: Law no. 29 of 2004 concerning Medical Practice, Law no. 36 of 1999 concerning Telecommunications, Law no. 11 of 2008 concerning ITE, Law no. 28 of 2014 concerning Copyright, Law No. 44 of 2009 in article 29 concerning Hospitals and the Code of Civil law. Secondary legal materials used in the normative method are literature and other non-field observational materials such as journals about shooting at hospital services.

E. ANALYSIS AND DISCUSSION

The development of technology in the direction of all-digital is now increasingly rapid. In this digital era, humans in general have a new lifestyle that cannot be separated from all-electronic devices. Technology becomes a tool that is able to help most human needs. Technology can be used by humans to make it easier to do any task and job. The important role of technology is what brought human civilization into the digital age. The digital age has brought various good changes as a positive impact that can be used as well as possible. But at the same time, the digital era also brought many negative impacts, thus becoming a new challenge in human life in this digital era. Challenges in the digital age have also entered into various fields such as politics, economics, social culture, defense, security, and information technology itself. The digital age also makes the realm of people's privacy as if lost.

As a developing country, digital technology is able to drive various advances in Indonesia. In terms of infrastructure and laws governing activities on the internet, Indonesia is ready to live in the digital age. Indonesia's readiness in internet connections is now getting better in the 4G era with Information and Electronic Transactions (ITE). Indonesian people in general are enthusiastic about adopting digital life, mainly triggered by internet penetration and the use of smart phones which continues to increase every year. The internet-based digital world makes all the activities of its inhabitants become unlimited space and time. The legal umbrella to regulate all forms of activities such as the Information and Electronic Transactions Law (UU ITE) of 2008 continues to be improved. Personal data of the public needs to be given protection in cyberspace, so parties such as Google or Facebook who have personal data of users cannot use such big data carelessly.[19]

Social media is something that cannot be separated from our daily lives. Various moments, be

[15] T. PD-PERSI, Diskusi Interaktif Public Relation RS; Sabtu, 3 Februari 2018 dengan Topik : Rahasia Medis vs Keterbukaan Informasi: Dalam Perspektif Hukum, Etika dan Komunikasi, [Online]. Available:

[16] W. Wiriadinata, Dokter, pasien dan malpraktik, pp , Mimbar hukum volume 26 No 1, tahun 2014

[17] A. A. Barata, Dasar-dasar Pelayanan Prima , Elex Media Komputindo, 2003

[18] Undang-Undang Republik Indonesia Nomor 44 Tahun 2009 Tentang Rumah Sakit, 2009.

[19] Undang Undang Republik Indonesia No 19 tahun 2016 tentang Perubahan atas Undang Undang No 11 tahun 2008 tentang Informasi dan Transaksi elektronik, 2016.

it moments with friends or family, we capture in the gadget and uploaded on social media. Update information about our whereabouts and what we do is often done, especially for those of us in big cities. Hospitals as health services that carry out health efforts for the community. In accordance with its function to carry out health efforts, hospitals have an obligation to provide safe, anti-discriminatory health services and prioritize the interests of patients.

The rise of the action of uploading videos or pictures about the condition of patients in the hospital by social media users, making it uncomfortable and disrupting services that can ultimately harm both parties for the patient's family and the hospital, making the central board PERSI (Association of Hospitals throughout Indonesia) issued an appeal letter numbered 987 / IA / PP Persi / II / 2018. Through an appeal letter dated February 1, 2018 signed by Dr. Kuntjoro Adi Purjanto, MKes as chairman of the Persi, informed that the development of current technological information if wrong in its application could have detrimental effects on individuals and health care institutions.

The hospital considers that the inclusion of several laws includes articles about the prohibition of taking pictures, namely Law No. 36 of 1999 concerning Telecommunications Article 40. Law No. 29 of 2004 concerning the practice of medicine Articles 48 and 51. Article 48 of Law No. 29 years 2004 is used because this article contains that a doctor or dentist must keep medical secrets. The secret can only be opened for law enforcement officials or patient requests. While article 51 also includes a doctor who has to keep a patient's secret even until he dies. While Law 11/2008 on ITE article 27 is used because this article prohibits someone from taking pictures in a hospital and disseminating them through an electronic information system that results in insulting or defamation of the name of the hospital or a health worker. Law No. 8 of 2014 explains the conditions of creation. Provisions for portraits or photographs relating to shooting at hospitals are contained in article 12, which states that everyone is prohibited from photographing someone secretly without written consent from the person being photographed or his heirs.[20] [21]

Often someone records when a sick family or friend is taking medical treatment. Actions taken at the hospital such as cleaning the wound, inserting an IV, until being examined by a doctor were also recorded by their gadget. Not to mention if some cases are indeed from a recording uploaded by someone. As it had circulated on social media a video that was viral because there was an act carried out by a nurse to patients who were still under the influence of drugs. And the conversation snippets were uploaded on social media and spread everywhere. The video is too early to be evidence of what actually happened. But because it has been seen by many people, it will burden the party accused by public opinion. It is also often found that many parents record when medical personnel perform certain actions, for example recording cleansing wounds done by medical personnel on their sick children for reasons of personal documentation. But if the recording will interfere with the actions taken by the medical officer, the hospital or doctor can reprimand it or forbid it.

Not all photoshoots or recording images at the hospital are prohibited, for example patients may document the birth process of the child with the permission of the hospital or doctor. Even today many hospitals that facilitate the documentation process. What is not allowed is when the recording has touched the side of mistrust in the hospital or medical personnel and recordings that cause the patient's secrets to be revealed to the public. Moreover, there are patients who record medical actions performed by health workers. In this case the hospital may stop serving patients. The hospital may refuse to continue service to patients when:

1. The patient has committed acts of intimidation
2. Already there is physical action on the officer
3. Already disrupt trust

Hospitals or doctors also need patients or families to feel comfortable, but if it is excessive in the form of recordings that show distrust, the hospital or health workers can refuse or prohibit. For this reason, it is recommended that hospitals put up posts at various points that explain why recording the hospital environment is prohibited. The hospital should apply the principle that recording in the hospital environment is permissible, but it is limited and must be authorized by the hospital or medical staff. The hospital also will not be able to continuously monitor the visitors and patients' families in their daily lives. So the hospital will not know if at any time the

[20] M. Luthfie Hakim, PERSI, Rahasia Kedokteran VS Keterbukaan Informasi dalam Perspektif Hukum, Universitas Yarsi Jakarta, Februari 2018.
[21] Sintak Gunawan, PERSI, Keterbukaan Informasi dari Perspektif Etika, Universitas Yarsi Jakarta, Februari 2018.

patient's family will take pictures without the hospital's permission or health workers.

Citizens' rights to health services include the right to information and the right to self-determination. Health information can be public and private information. Health information that can be informed to the public consists of various forms and types. For example health information systems, forms and types of hospital services, service procedures, fees, health service facilities, cost systems, information on eradication of diseases, disease prevention programs, data on the development of infectious diseases, and so on. Information that is private is data and health conditions both stated in medical records and those known, seen or heard by health workers. But somehow the secrets of medicine can be opened for certain purposes, for example for research, educational activities and can also be used for patient safety, such as CCTV for infants' and transparent glass for elderly wards. In hospitals there are zoning where there are zones for private rooms (treatment rooms, operating rooms, intensive care rooms, etc.), semi-public zones (polyclinic rooms, pharmacy, etc.), and public zones (lobby, canteen, parking lots, etc.) for rules of taking or recording images or photos. But even in the public zone if a patient's family wants to take a photo or record and next to a hospital health worker, the photographer must ask the officer in advance if he is willing to be photographed. So that the rights and freedom of patients' families to take pictures in hospital services, are still limited by hospital rules. And the important thing is not to take pictures that are disseminated on social media that can cause harm or give a bad name to the hospital.

Actually, if the photos on the hospital's services illustrate that the hospital is of good service or the environment is clean, it will benefit the hospital itself if it is posted on social media. Because the photo is already part of the promotion of services from the hospital. For this reason, not all photos or images of hospital services taken by visitors or patients' families will harm the hospital or hospital staff. Therefore, it is better for hospitals to clearly prohibit visitors or patients' families from taking pictures on their hospital services by stating that it is prohibited to distribute photos on social media with the intention of discrediting or discrediting the hospital or its staff.

F. CONCLUSION

The provisions of the law and article contained in the picture prohibiting the rules of taking pictures that exist on the web of one of the hospitals can be said to be not all appropriate. A person may take pictures at the hospital for personal gain, or for proof purposes to report to the authorities regarding wrongdoing by hospital services. The hospital must not stop the treatment of the patient because the patient or the patient's family is taking pictures of the hospital's services. Because if the hospital is proven to stop the service it can be considered as neglecting the patient and may be subject to sanctions in the form of civil and administrative claims. The right and freedom of the patient's family to take pictures at the hospital service are still limited by hospital rules and the picture is not distributed on social media.

G. REFERENCES

Wawan Setiawan, Era Digital dan Tantangannya, Seminar Nasional Pendidikan, Universitas Pendidikan Indonesia, 2017.

Bakti Nugroho, Samsuri, Pers berkualitas Masyarakat Cerdas, Cetakan Pertama, Maret, 2013.

M. E. Fuady, Fenomena Kejahatan melalui Internet di Indonesia, Mediator, vol. Vol. 6 No., no. 56, 2005

CAIRUMI, Tinjauan Yuridis Terhadap Pemungutan Bea Perolehan Hak atas Tanah dan Bangunan (BPHTB) Dalam Transaksi Jual Beli Tanah dan Bangunan di Kota Tanjung Balai, CHAIRUMI 1, pp. 1 16,

Nindy Nur Cahyanti, Pengambilan Gambar pada Layanan Rumah Sakit, Universitas Muhammadiyah Sidoarjo, 2018.

H. D. Iswandari, P. Magister, H. Kesehatan, U. S. Semarang, and J. Tengah, Aspek Hukum Penyelenggaraan Praktik Kedokteran : Suatu Tinjauan Berdasarkan Undang- Undang NO. 9 / 2004 Tentang Praktik Kedokteran, vol. 9, no. 2, 2004

Undang-Undang Republik Indonesia Nomor 29 Tahun 2004 Tentang Praktik Kedokteran,

Undang-Undang Republik Indonesia Nomor 11 Tahun 2008 Tentang Inforrmasi Dan Transaksi Elektronik, 2008.

Undang Undang Republik Indonesia No 8 tahun 2014 tentang Hak Cipta, 2014.

Undang Undang Republik Indonesia No 36 tahun 1999 tentang Telekomunikasi, pasal 40, 1999.

H. Christianto, Tindakan Penyadapan ditinjau dari Perspektif Hukum Pidana, 2016

A. Rachmad, Legalitas Penyadapan Dalam Proses Peradilan Pidana Di Indonesia, vol. 11, Juli- Desember, 2016.

A. Dewi, Tanggung Jawab Hukum Dokter Dalam Menjaga Rahasia Kedokteran, Skripsi, 2017, pp. 3 4,

E. Puspitarani, M. Handono, and E. Wahjuni, Perlindungan Hukum Terhadap Potret Orang Lain yang Digunakan Promosi Oleh Fotografer Berdasarkan Undang-Undang No. 19 Tahun 2002 Tentang Hak Cipta, no. 19, p. 2,

T. PD-PERSI, Diskusi Interaktif Public Relation RS; Sabtu, 3 Februari 2018 dengan Topik : Rahasia Medis vs Keterbukaan Informasi: Dalam Perspektif Hukum, Etika dan Komunikasi, [Online]. Available:

W. Wiriadinata, Dokter, pasien dan malpraktik, pp , Mimbar hukum volume 26 No 1, tahun 2014

A. A. Barata, Dasar-dasar Pelayanan Prima , Elex Media Komputindo, 2003

Undang-Undang Republik Indonesia Nomor 44 Tahun 2009 Tentang Rumah Sakit, 2009.

Undang Undang Republik Indonesia No 19 tahun 2016 tentang Perubahan atas Undang Undang No 11 tahun 2008 tentang Informasi dan Transaksi elektronik, 2016.

M. Luthfie Hakim, PERSI, Rahasia Kedokteran VS Keterbukaan Informasi dalam Perspektif Hukum, Universitas Yarsi Jakarta, Februari 2018.

Sintak Gunawan, PERSI, Keterbukaan Informasi dari Perspektif Etika, Universitas Yarsi Jakarta, Februari 2018.

THE IMPORTANCE OF LEGAL POLITICS ON HOSPITAL BUSINESS

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ABSTRACT

Hospital is a health care facility that has a strategic role to accelerate the degree of public health of Indonesia. In the management of hospitals, both private and government, it is always growing to follow the demands of external environment and internal environment.The paradigm change of hospitals into business units, profit-oriented by putting aside social functions as a *core product* that must be run, it is necessary to be a philosophy to be ethical business hospital can be dipertanggung-jawabkan. Hospitals as a concept of business institutions, or the form of social institutions There are two different sides of interest, so that arise various cases that may be considered normal in hospitals.

The author analyzes the problem by analyzing the phenomenon that occurred in several hospitals in Indonesia from the library research in the form of prevailing legislation, the literature that discusses the ministry , the literature books, articles and other scientific works.

Keywords: Hospital, Binist Ethics, Political Law

A. Introduction

Facing the era of the 4.0 Industrial Revolution, the Indonesian State expenditure budget (APBN) Law draft in 2020 will be based on increasing human resources and social protection, in accordance with the ideals and objectives of Indonesia's development written in the opening of the Constitution 1945 paragraph four, namely protecting all the nation of Indonesia and all the blood in Indonesia and to promote the general welfare, educate the life of the nation, and participate World-order tillers based on independence, lasting peace and[1]social Justice. In order to strengthen the human capital, one of the efforts made to realize the success of Indonesia's development goals is the[2] Optimal health efforts that are convened in an integrated and thorough form of personal health efforts and public health efforts, so that the human resources of Indonesia healthy, intelligent have competence so as to be able to produce and increase a productivity.

Health is a state of prosperity from the body, soul, and social that enables each person to live socially, and economically productive lives, which must be realized through various health efforts in the series of health development in a comprehensive and integrated and supported by a national health system that has a party to the people, 1945 pursuant Health services, then in article 34 paragraph (3) is declared the state responsible for the provision of health care facilities and public service facilities are appropriate.

Health is one of the essential elements of basic human needs, in addition to clothing, food and board because it is very support in the activity of every human and [3]is a human right that must be realized in accordance with the ideals of Indonesian nation as referred to in Pancasila and the conception of the Constitution of the Republic of Indonesia 1945. This statement is also agreed in the general declaration of Human Rights issued by the United Nations (UN) on the tenth of November 1948, stating that: Everyone has the right to a sufficient level of life for the health and well-being of himself and his family, respect for rights and obligations, justice, gender, nondiscrimination and norms of religion. Each individual has the same right to gain access to health resources and everyone has the right to obtain safe, qualified, and affordable healthcare services.

The procurement of healthcare facilities becomes the obligation of the State stipulated in the law of the Republic of Indonesia number 36 year 2009 T. kesehataN that mention that one of the health facilities by the state is borne by the implementation is health facilities in the form of hospital based on the values of Pancasila based on the value of humanity, ethics and Professionalism, benefits, fairness, equality and anti-discrimination, equitable, protection and safety of patients, and has social functions and the presence of connectedness

[1] Pembukaan Undang-Undang Dasar Negara Kesatuan Republik Indonesia Tahun 1945, Alinea 4.

[2]Penjelasan Undang-Undang-Undang Nomor 36 Tahun 2009 tentang Kesehatan

[3] Ibid kesehatan

between service providers and patients as users (consumers), WHICH is governed by law legislation. 8 years 1999 about consumer protection.

The Indonesian Government is responsible for providing hospitals based on community needs. Hospital licensing is governed by the Government in regulation of the Minister of Health No. 147/MENKES/PER/I/2010 Year 2010 on Hospital licensing, Decree of the Minister of Health No. 2264/MENKES/SK/XI/2011 On the implementation of hospital licensing. The business implementation of private hospitals is entitled to be licensed to conduct the business of circumcision with the conditions under the foundation engaged in the social field, in the form of legal or limited liability company. The hospital provides health protection to the public to obtain health services in hospitals that are regulated in the Law of the Republic of Indonesia No. 44 Article 2 of the hospital LAW of 2009 about hospitals, which mentions that the hospital implementation is as social function.

Hospital is a health care facility that has a very strategic role in the effort to accelerate the degree of Indonesian public health. The government has been earnest and constantly striving to improve the quality of services, both adapted to the development of science and technology. The function of health service in the hospital in accordance with article 30 paragraph (1) is aimed at curing diseases and restoring the health of individuals and families. Health care in the hospital to put the patient's life-saving aid in comparison to other interests. The implementation of healthcare services is carried out responsibly, safely, in a quality and equitable and non-discriminatory, the government is highly responsible for healthcare, as well as ensuring the quality standards of health care. Therefore, it is very obvious that in the implementation of health services, the government cares deeply about the provisions that apply according to the law No. 36 year 2009 on health, thus the rights of citizens as recipients of health services (should) be protected.

The rapid development of technology in the medical world greatly affects the function of hospitals as a provider of healthcare services. The hospital as an institution of service providers must be able to respond to the demands that develop in the community in order to compete with other institutions of service. To win the competition, hospitals should be able to provide satisfaction to the patient for example by providing quality and optimal service, the competition to provide good service and quality causeThehospital R often experience a health service crisis, Some hospitals still have rejected the patient to get treatment because there is no cost, basically nobody wants to fall sick and hospitalized, desired is to be healthy. When a person falls ill, the decision to buy health services in the hospital according to his needs is in the hands of a physician, or in the place where the patient is medicated, Some doctors in serving the patient is incapable/poor still demanding a high medical service tariff, Kethics Doctors or hospitals do the determination of the rate is too high, it is clear that poor patients will be Similarly, if the price of medicine becomes increasingly expensive due to inefficiency of the drug production and distribution system, then the weak Economic community will be harmed, The professional devotion of hysicians transformed into a commercial profession business. This is due to the cost of education to get an expensive doctor degree, demanding the community to bear the costs and make the hospital as a service business center so there are some hospital square ignore the social function ofhospitals. The management of hospitals, both private and government, always develops following the demands of the environment, both external environment and internal environment. [4] The demands of the external environment are the demands that come from the *stakeholders* who require hospitals to provide quality healthcare services at an affordable cost, while the demands of internal ligation are demands that revolve around cost control by taking into account factors such as market mechanisms, economic behaviour, professional resources, and technological developments. Hospitals are obliged to carry out social functions, among others, by providing inadequate/poor patient care facilities, no upfront emergency services, free ambulance, disaster victim services and extraordinary events, or social service for humanitarian missions (PSL 29 para 1 letter F UU No. 40 year 2009 about hospitals). Hospitals in Indonesia are moving towards a management system based on the concept of business that leads to the market mechanism and the principle of efficiency. Hospital changes become more business-entity or seek the benefit of a philosophy to be ethical Dipertanggung-jawabkan. The micro-Economic theory states that the standard model of a corporate organization is for profit.

[4] AM Vianey Norpatiwi,"Aspek *Value Added* Rumah Sakit Sebagai Badan Layanan Umum." http://www.stieykpn.ac.id/images/artikel/Aspek%20Value%20Added%20Rumah%20Sakit.pdf, diunduh 10 Januari 2020

Therefore, to increase efficiency in business institutions for profit is done with various businesses, namely: (1) to keep the cost of production is at the level of mimimum; (2) Set the price above the unit cost; and (3) widening sales Meanwhile, the understanding of efficiency in non-profit organizations can mean how to produce products and achieve missions with the lowest production or operational cost possible. Therefore, in transforming the social institution into a business institution that has social function, the important question is whether there is a community that is harmed in obtaining health services.

Hospital responsibilities to patients in healthcare services is first located at the director of the hospital as a business performer. This is in accordance with the Law of the Republic of Indonesia number 8 year 1999 on consumer Protection. The application of the hospital liability doctrine makes the hospital can be held civil liability & Indemnity ' caused by the person under his command. (There is a legal relationship between the hospital and the patient.) All responsibility for the work of health workers is to be the hospital responsibilities where they work. Ethics, patients feel the right to be neglected by the hospital then the patient as a consumer can claim its right through the Court of Justice that is through public and outside courts with alternative dispute resolution such as mediation, conciliation, and arbitration.

To offend legal issues between patients, health workers and hospitals, topics discussed in patients to obtain optimal service while not getting the treatment and satisfactory service at the hospital is between the rights of the patient to obtain service and whatever the obligation of the health care provider includes the facilities of the services in the hospital. The basis of these rights and obligations is contained in a variety of regulations both international and national. However, considering the implementation of health services that sometimes still pose problems in the field, still there is a family of patients abandoned, if there is such a thing then do not be surprised kalua in a matter of months the hospital will lose the visit, then it is necessary the clarity of the rule of law (rights and obligations) between providers and users of health services, especially in this case is management of a good hospital is necessary because the management is not good will cause health services that are increasingly expensive or otherwise the hospital can not walk[5] and bankrupt the management of hospitals, both private and government, always develop following the demands of the environment, both external environment and internal environment. The demands of the external environment are the demands that come from the *stakeholders* who require hospitals to provide quality healthcare at an affordable cost, while the demands of internal ligation are demands that revolve around cost control by taking into account factors such as market mechanics, economical behaviour, professional resources, and technological developments.

The government makes the rules of the boundaries of the authority and the responsibility of ethics of health workers in The practice of functioning as a social function to serve the needs of the community, the management of health care in the hospital must be managed professionally and legally to ensure optimal service, inaccordance with the standard of profession, because every medical action carried out has a legal relationship between hospitals, doctors Legal aspects in Indonesia in the field of health that govern the rights and obligations of individuals, or society as the recipient of health care, on the other party the rights and obligations of health workers and health facilities as the provider of health services that bind each party in a therapeutic agreement and the provisions or regulations in the health sector has been implemented with Of various laws that are sectoral and applicable locally, regionally, nationally and internationalL. For example, among others Law No. 23 of 1992 which was replaced by Law No. 36 year 2009 concerning health, Law No. 25 of 2009 on public service, Law No. 44 year 2009 about hospitals, Law No. 29 year 2004 on medical practice, 18 years 2014 Law on health of the soul. Law No. 9 of 2014 about the clinic, and the Law No. 38 of 2014 on nursing.

This confirms that the legislation has an important role in Indonesian law enforcement, that all aspects of life in society, government and State must always be based on the law. To create a legal state required legal device to be used to regulate justice and balance in all areas of life and livelihood of the people through legislation by not overriding the function of jurisprudence, in order to really be able to create justice for the community, the content of the law itself should actually serve as a manifestation of values and sense of justice and the normative values of the community, Nor should it contradict its other

[5] The, *Health Management*, CET. 3, (Jakarta: PT. Gramedia Pustaka Utama, 2007), Pp. 127

legal substance such as health law. The emerging problem is the implementation of norms and legal norms that are contained in the various regulations, because the facts of the field are sometimes different from the ideal norms.

B. PROBLEM STATEMENT

Based on the description above, then this paper focus on the discussion concern of the analytical descriptive the Importance Of Legal Policy On The Business Of Hospitals

1. How is the hospital A social function in the implementation of the business of the ill ?
2. How does law enforcement be done for hospitals in the business of the ill businesses?

C. LITERATURE RIVIEW

The World Health Organization, the World Health Organization (WHO) sets about the understanding of hospitals is an integral part of a social and health Organization with the function of providing comprehensive services, healing of the disease (curative), and prevention of diseases (preventive) to the community, and also as a training center for health workers and medical research centers ".

The hospital is an integral part of a social and health Organization, providing comprehensive services, and is obliged to provide social services by conducting social functions in the health sector. Hospital institutions are responsible for the safety of patients with the social functioning of the hospital as a social institution, the hospital is confirmed to be moral responsibility, the ethics inherent to each hospital, the moral and ethical bonds of the hospital in assisting patients in particular who are less/incapable to fulfill the need for health care, hospitals are not legal entities in the form of limited liability for profit. In the law of the Republic of Indonesia Article 1Number 44 year 2009 about the hospital, mentioned that the hospital is a health care institution that organizes individual health services in a plenary that provides inpatient, outpatient, and emergency services. The emergency is the clinical condition of patients requiring immediate medical action for life saving and further disability prevention. Plenary health Services is a healthcare service that includes promotive, preventive, curative, and rehabilitative.

In addition to the main objectives to help patients, hospitals also have other objectives as follows:[6]as an organization that brings together organized medical personnel with a permanent medical facility aimed at organizing medical services, sustainable nursing care, diagnosis and treatment of disease patients; as a place where the sick people receive medical services and a place to conduct a clinical education for students Medicine, nurses and various other health care professionals; As a center for public health Services, education and medical research.

The theory of legal protection according to Satjipto Raharjo legal protection is to provide a pengayoman to the human rights that the other person harmed and the protection is given to the community so that they can enjoy all the rights that D given by law. According to Philipus M. Hadjon the protection of the law is a protection of dignity and respect, as well as recognition of human rights owned by the subject of law under the provisions of the Law of Mischief.

Law is a rule that ties everyone in society. The law provides protection for the Manusi.

i. Basic norms;
ii. Basic rules
iii. Provisions of the People's Consultative assembly
iv. The law
v. Government regulation in lieu of law;
vi. Government regulation
vii. Presidential regulation
viii. Local regulations
ix. Uncodified Legal Materials
x. Jurisprudence
xi. Treaty
xii. The current rules of the colonial period are still valid.

Legal responsibility according to Komalawati is, The doctor's legal responsibility is the doctor's attachment to the legal/civil provisions in carrying out his profession. The legal responsibility of the physician in the form of liability in the event of civil law. Civil liability can be based on two things: a tort-based lawsuit and a lawsuit based against the law.Terms of material, This mistake in this case that does not perform the achievement knows that the

[6] Azrul Azwar, *Introduction to Health Administration*, ed. 3, (Jakarta: Binarupa Aksara, 1996), p. 89.

deeds that resulted in the unimplementation of the accomplishment are detrimental to others. Negligence, in the negligence of the perpetration of a deed resulting in no achievement does not know that such adverse consequences will arise and formyl terms, the party carrying out the achievement is reminded to carry out its achievements. Not doing anything that should be done every person has the right to claim damages against health workers/health providers that caused the consequences of errors or omissions. The provisions on the procedure for filing a claim are in accordance with the provisions of the applicable law. These provisions are governed by article 1239 of the civil law. With regards to a person's lawsuit in terms of a few things to know:

1. Can only be directed to the parties in the Auteric Agreement/treatment agreement. For example: a physician with a patient in a personal practice, doctor and hospital in case the Doctor works in a private hospital
2. The obligation of proof in tort is charged to the plaintiff (in this case the patient) who sues the doctor/hospital tort due to not giving adequate service according to the profession standards so that the patient suffers losses. The obligation of proof is very difficult plaintiff because he is a layman who does not know the medical profession standards. These remedies are rarely used to settle medical disputes, more – more tort is very narrow and health efforts are often implemented in teams.

Law enforcement conducted for hospitals connected with the business of the hospital, Legal protection theory Politics in the sense of a salesman, commonly known in politics is practically understood as a way, a tool or strategy that a person or political party does in order to seize or defend power. Power becomes the main goal, so it is no wonder emerging understanding that politics is dirty, because it is done by justify all the important ways are power. In politics there is no eternal opponent or comrade, which exists is the interest of being made in order to seize or break power. Coaching and developing legal in the health field, aims to create order and legal certainty and facilitate development in the field of health. The desired legislation is a rule that can protect and ensure the public to obtain the health services expected and can protect health workers. Regulations that are enforced have a thorough legal aspect, so it can regulate the health services that are carried out by government hospitals and private hospitals. In the view of Philipus M. Hadjon, The context of the Indonesian legal state as the basis for establishing the foundation of State based on Pancasila should provide legal protection against citizens, the society in accordance with the values of Pancasila. The protection of the law based on Pancasila reflects the recognition and protection of the law against the Harkat and human dignity on the basis of the value of the Godhead, humanity, unity, consultative and social justice.

Politics of law (politic of law) is an Indonesian translation of the term Dutch law Rechtspolitiek, which is a form of two word recht and politiek. The term should not be confused with the term appearing behind, politiekrecht or political law, as both have different connotations. The last mentioned term relates to another term to replace the term of constitutional law. [7] As for the Dutch dictionary, the word politiek contains Artibeleid. The word toll step itself in Bahasa Indonesia means policy. [8]

Regulation of the Minister of Health of Republic of Indonesia No. 4 of 2018 concerning hospital obligations and patient's obligation was established by the Minister of Health of the Republic of Indonesia Nila Farid Moeloek in Jakarta on February 12, 2018. Regulation of the Minister of Health of Republic of Indonesia No. 4 of 2018 concerning hospital obligations and patient's obligations are imposed by Widodo Ekatjahjana, Director general of the Kemenkumham legislation, and placed on the State Gazette of the Republic of Indonesia year 2018 number 416 on March 28, 2018 in Jakarta, so that all people know it.

Consideration of Permenkes 4 years 2018 concerning hospital obligations and patient's obligations are:

a. That the actions undertaken by the hospital as the institution of healthcare providers with complex characteristics and organizations have a legal effect on patients who receive health care services, officers working in hospitals, and Surrounding communities.
b. That regulation of the Minister of Health No. 69 year 2014 about hospital obligations and patient's obligation is no longer suitable to the needs of hospitals and society.

[7] Sri Sumantri, Undang-undang Dasar 1945: Kedudukan dan Artinya dalamKehidupan Bernegara, dalam Jurnal Demokrasi dan HAM, Vol. 1, No. 4, September-November 2001, hal. 43.

[8] Miriam Budiardjo, Dasar-dasar Ilmu Politik, Cet. 17, (Jakarta: Gramedia, 1996), hal 8.

c. That based on the consideration as referred to in letter A and letter B and to enforce the provisions of article 29 paragraph (3) and article 31 paragraph (2) of Law No. 44 year 2009 concerning hospital, it is necessary to set up the health Minister's Regulation on Hospital obligations and patient obligations.

Legal basis of Permenkes 4 years 2018 concerning hospital liabilities and patient's obligations are:

a. Act No. 29 year 2004 on Medical Practice (State Gazette of the Republic of Indonesia year 2004 number 116, Supplement to State Gazette of the Republic of Indonesia number 4431);
b. Law No. 36 year 2009 on Health (State Gazette of the Republic of Indonesia year 2009 Number 144, Supplement to State Gazette of the Republic of Indonesia number 5063);
c. Act Number 44 year 2009 concerning Hospital (State Gazette of the Republic of Indonesia year 2009 number 153, Supplement to State Gazette of the Republic of Indonesia number 5072);
d. Law Number 23 of 2014 concerning local Government (State Gazette of the Republic of Indonesia year 2014 number 244, supplement to the Statute of the Republic of Indonesia number 5587) as amended several times, the last by Law No. 9 Year 2015 on the Second amendment to Law No. 23 of 2014 on Local Government (State Gazette of the Republic of Indonesia year 2015 number 58, Supplement to State Gazette of the Republic of Indonesia number 5679);
e. Law No. 36 year 2014 on Health Force (State Gazette of the Republic of Indonesia year 2014 number 298, Supplement to State Gazette of the Republic of Indonesia number 5607);
f. Government regulation number 47 year 2016 on Health Services Facility (State Gazette of the Republic of Indonesia year 2016 number 229, addition to State Gazette of the Republic of Indonesia number 5942);
g. Regulation of the Minister of Health No. 269/Menkes/Per/III/2008 concerning medical records;
h. Regulation of the Minister of Health No. 290/Menkes/Per/III/2008 concerning the approval of medical action;
i. Regulation of the Minister of Health No. 36 year 2012 on Medical Secrets (State Gazette of the Republic of Indonesia year 2012 number 915);
j. Regulation of the Minister of Health No. 64 year 2015 on organization and Governance of Ministry of Health (State Gazette of the Republic of Indonesia year 2015 number 1508);
k. Regulation of the Minister of Health No. 11 year 2017 on Patient Safety (State Gazette of the Republic of Indonesia year 2017 number 308);
l. Legal protection is a protection given to legal subjects in the form of both preventive and repressive legal devices, whether written or unwritten. In other words legal protection as an overview of the function of the law., which is the concept whereby the law can give a justice, order, certainty, benefit and peace.

The law of the hospital is the application of civil law, criminal law and the law of the State administration, then the scope of hospital responsibilities also encompasses civil liability, criminal liability and the State administrative responsibilities.

Business ethics is a system of value in principle, used as a reference for conducting business processes or commercial enterprises. Business ethics According to Muslich is a general ethical application that regulates business conduct, norms of morality into business reference and behavior. Assessment of business success is not only determined by the success of economic achievement. But the success is measured by the benchmark pradigma morality and ethical values especially in morality and ethics based on social and religious values

D. RESEARCH METHODS

This study uses the type of normative research, using the approach of the Law (s*tatute approach*) and the conceptual approach (*conceptual approach*). The writing techniques discussed by analyzing the phenomenon occurring in several hospitals in Indonesia are associated with the prevailing legislation and literature that discusses the problem of accommodations, data from library research , to explore literature books, articles and other scientificworks.

Data sources in writing can be classified as primary data and secondary Data, material of primary law, which is a legal material consisting of legislation

related to the object of the problem that will be researched that is from Law No. 44 year 2016 about health. Secondary legal materials are the results of scientific writings such as Theses, dissertations, journals, papers, legal materials relevant to this research i.e. textbooks (textbook), relevant research reports, legal principles, legal conceptions, views and legal doctrines, regulations and legal systems, statutory regulations and other documents closely related to the writing of influential jurists , primary law materials, In the form of an invitation law,

1. Law No. 44 year 2009 of
2. Law No. 36 year 2009 of Health
3. Law number 29 of 2004 about medicine.
4. ACT number 36 year 2009 about health.
5. Government Regulation No. 32 year 1996 about manpower.
6. Regulation of the Minister of Health No. 147/MENKES/PER/I/2010 Year 2010 on hospital licensing.
7. Decree of the Minister of Health number 2264/MENKES/SK/XI/2011 On the implementation of hospital licensing,
8. Regulation of the Minister of Health number 2052/MENKES/X/2011 Concerning the practice permit and implementation of medical practice.

E. ANALYSIS AND DISCUSSION

The analysis of the writing based on this normative law by using a of approch because that will be researched are various legal regulations that are the focus of this research. The legal materials that have been collected either primary, secondary, or tertiary data relating to being displayed logically, are systematized, then analyzed by using an analycal approach to identify with the applicable law to answer the problem of law that has been formulated in the problem formulation. The data collected in the analysis is qualitatively expressed in the form of a sitematis description by explaining the relationship between the different types of data, hereinafter all the data selected and processed analyzed descriptively so that in addition to describing and disclosing is expected to provide solutions to problems in this research.

1. **The hospital as a social function** its Implementation became the business of the hospital. In the era of globalization social function of the hospital has changed towards business or businesses, so also the hospital in Indonesia move towards management system based on the concept of business that leads to the market mechanism and the principle of efficiency. In this transitional period the question is, whether in anticipation of the market associated with the changes in epidemiologic patterns will there be parties that are harmed? Are there any ethical guidelines to follow? Nowadays, there is concern about the negative consequences of the hospital transition towards the business institution. Questions about whether there is political influence over this development need to be discussed to seek the effort to overcome it.

At this time, the hospital form in Indonesia is still unclear, whether based on the concept of the business entity, or the form of social institutions. In this unclear situation, it is natural that there are cases that may be considered normal in the hospital, but when it is discussed using business ethics or economic norms, these cases are irregularities.

History of hospital, it can be roughly divided into three periods, namely: The first period is ancient until around 1960, where the hospital is purely*for charity*. In this age the hospital is free of lawsuits, it can be said to be immune law. Because the money gained from his purpose contributions is specific to helping the sufferings of the sick man without expecting to receive anything in return. Natural minds still purely assume that the money received from donations is to help others who suffer from pain. At that time it was not in the patient's mind to prosecute the hospital or his doctor, if something happened unexpectedly. It is already accepted as a god-determined destiny. Having medication at government hospital does not pay, including the cure.

The second period in Indonesia began to change around 1965, where the private hospital had begun to get hard to donate donations from benefactors. The hospital began to suffer losses to cover its expenses, thus having to find a way out to be able to pay for it. Inevitably, the financial economy should be taken into account as well, so that the nature of hospitals from being socially is now beginning to move towards soial-economical. In this era the hospital managers had to be good at managing hospitals to be able to conduct a balance between social factors and economic factors. If the social factor is too stressed, then the hospital will go bankrupt. Instead. Conversely, if the economic

factors take precedence, then the function of the humanity in hospital management will be lost. The construction of a cross-subsidy was made by holding VIP rooms to support its thickness in the third grade (3).

The third period began in 1990 with the publication of Permenkes number 84 year 1990 which opened the opportunity to establish hospital by a limited liability company (PT). Thus, there are two (2) hospital groups that are: non-profit hospitals, and hospitals for profit.

DPR RI and the President of the Republic of Indonesia issued Law No. 36 year 2009 on health care governing health services. The enactment of law No. 8 year 1999 on consumer Protection, provides the opportunity for service users or goods to file claims/lawsuits against business actors in the event of a conflict between customers and businesses deemed to have violated its rights, late doing/not doing Loss for service users/goods, either property loss or injury or could be a death. This gives the meaning that the patient as a consumer of healthcare services can sue/Sue hospitals, doctors or other health workers in case of conflict.[9]

Today hospital paradigm Change guides the hospital to metamorphose into a business entity that has many strategic business unit oriented to profit by putting aside social functions as a core product that must Assigned. Environmental change will naturally drive the hospital into a multi-product organization, so it requires handling with the right management concept with a business-minded service unit but still promoting the service to the community.

2. **Hospital Business Management.,** Following the development of globalization will and technological advancement, people always strive to improve the quality of his life. It includes health qualities that are an important part of human life. In the present day health has been regarded as an investment. Various forms of health enhancement efforts are done by humans to continue to live and thrive.

The management of hospitals, both private and government, always develops following the demands of the environment, both external environment and internal environment. [10] The demands of the external environment are the demands that come from the *stakeholders* who require hospitals to provide quality healthcare services at an affordable cost, while the demands of internal ligation are demands that revolve around cost control by taking into account factors such as market mechanisms, economic behaviour, professional resources, and technological developments.

However, in practice, the Government hospital faced obstacles because there are two different sides of interest, namely on the one hand must provide health services that are affordable for the community. Good hospital management is expected to provide good service, without having to raise the cost of health. For example, nowadays, there are many hospitals that provide expensive health facilities and services as a result of investing in the field of housing and medicine. [10] Good hospital management is necessary because the management is not good will cause health services that are increasingly expensive or otherwise the hospital can not walk and go bankrupt.

The management of hospitals, both private and government, always develops following the demands of the environment, both the external environment and the internal environment demands from the external environment are the demands originating from the *stakeholders* who require hospitals to provide quality healthcare at an affordable cost, while the demands of internal Ligkungan is a demand that ranges from cost control by paying attention to Factors such as market mechanisms, economic behaviour, professional resources, and technological developments.

However, in practice, the government-owned hospital faced obstacles because there are two different sides of interest, namely on the one hand should provide affordable health services for the community

There are several reasons to improve hospital management skills:

a. Rapid development of medical science and technology,

[9] The tutic quarter Point, *Legal protection for patients*, Performance library, Jakarta 2010, p. 7

[10] AM Vianey Norpatiwi, "aspects of Value Added Hospital as General Service Agency" https://vdocuments.site/jeb-vol-1-no-1-maret-2007.html, downloaded on January 10, 2020.

b. Demand for communities is increasing and expanding.

Many of the current hospital owners/managers are still in view of production concept. In this view, RS leadership represents the owner's interest, as he was lifted and dismissed by the owner. Meanwhile, business orientation is currently no longer product oriented, but rather has been transformed into customer satisfaction process in manaorganization trying to fulfill the needs and form of fulfillment of customer satisfaction. Business orientation is also transformed into customer retention oriented where the organization seeks to maintain customer loyalty and maintaining transactions in long-term bonds

In relation to the amount of cost and quality of service, there are various important things to be considered in hospital business ethics: Good health services mean a proven cost-effective service, more expensive health services do not mean better, certain minimum service standards should be given to all patients of various classes, and efforts to control costs should always be evaluated in terms of its impact on patients. It is apparent that business ethics has a basic economic evaluation of cost-effectiveness that refers to the medical principles. Thus, business ethics in this case does not contradict the medical principle. Health care has properties that must be given in full, such as the introduction of antibiotics should be administered in doses that should not be reduced. Therefore, the patient should be regarded as a party with health care, including the overall package. In addition patients can be considered not well served if they do not get all the potential benefits of service. In selecting a therapy or diagnostic procedure The Doctor is expected to use appropriate evidence . According to Weber (2001) It is mentioned that as a general rule, the least expensive service should be given until there is evidence suggesting that more costly service provides meaningful results. Then, if there is a difference in costs that are getting bigger between one's handling and alternatives, then the greater the need for evidence of its benefits. In addition, the need to provide quality service at the lowest cost does not mean it should harm the importance and safety of the hospital staff. Pfor the poor, the provision of subsidies and resources for poor patients, hospitals should pay attention to various things, hospitals provide services for poor families as quality as for the rich, for subsidized patients, the cost factor should be considered because the subsidized people do not expect that the donated money will be used inefficiently by the hospital, the search for this financing source should be sought wisely. It would be irony to finance a poor family, the hospital itself would be a unhealthy financial might even have bankruptcy.

3. **Aspect Of Administrative Law.** The legal aspects of the administration of health services are found in some sectoral laws . In article 23 paragraph (3) of law No. 36 of 2009 on health mentions that in conducting health care, health care personnel must have permission from the government. Then in section 34 paragraph (2) of the same law mentions that the organizer of health care facilities is prohibited to employ health workers who do not have qualifications and permits do professional work. The permit also applies to the traditional health services as intended in article 60 paragraph (1) of Law No. 36 year 2009 on health. Administrative sanctions may be imposed on health workers and health care facilities that allegedly violate the provisions of the Law No. 36-2009 on health. The administrative sanctions are written in clause 188 paragraph (3) of written warning, revocation of temporary permits and/or permanent permits. Against the corporation, other than the revocation of business license, will be subject to revocation of legal entity status in accordance pasal201 paragraph (2) of Law No. 36 year 2009 of Health. The legal aspects of the administration in medical practice are listed in article 36 of law No. 29 year 2004 on medical practice. The article mentions that every physician and dentist who conducts medical practice in Indonesia must have a practice permit. The practice permit is the written evidence given by the government to doctors and dentists who will conduct medical practice after fulfilling the requirements. In addition to medical practice, nursing practice also has a legal aspect of administration. In article 19 of the Law No. 38 of 2014 on nursing mention that nurses who run nursing practices must have permission. This permission is provided in the form of SIPP or referred to by the name of the nurse's permit. Its administrative sanctions are the same, listed in article 58 of Law No. 38 of 2014 on nursing in the form of verbal strikes, written warnings, administrative fines and/or revocation

of permits. The legal aspect of the administration of health services conducted by the hospital Tercatum in article 13 paragraph (1) of law No. 44 year 2009 about the hospital. The article mentions that the medical personnel doing medical practice in the hospital must have a practice permit. Then to permit the hospital itself is listed in article 25 of the Law No. 44 of 2009 about the hospital which mentions that every hospital organizer is obliged to have a permit consisting of establishing permits and operational permits. Administrative sanctions for hospitals related to the permits, will be revoked if the

a. Expired.
b. No longer meets the requirements and standards
c. Proven violation of statutory regulations
d. On court order in order to law enforcement

4. **The aspects of civil law**. The aspect of civil law in health services between health workers and patients can be seen in a therapeutic transaction made by both sides.The meaning of a therapeutic transaction is a transaction (Treaty or Verbintenis) to determine the most appropriate treatment for the patient by a physician.

   Transactions are generally governed by the Code of Civil law (Het Burgerlijk Wetboek) hereinafter referred to as Kuhcivil, which for The validity of the transaction generally must fulfill the 4 (four) terms in article 1320 Kuhcivil, namely:

   a. The word agrees from those who bind themselves (toesteming van degene die zich verbinden);
   b. Proficiency to make an alliance
   c. On a certain matter (een bepaald onderwerp);
   d. Because of a halal cause (een geoorloofde oorzaak).

5. **The aspect of disciplinary law, the aspect of disciplinary law is contained in article 55 paragraph (1) of Law No. 29 of 2004 on medical Practice.** To enforce the discipline of doctors and dentists in conducting medical practice, the Honorary assembly of Indonesian medical discipline was formed. Then for the health professionals of doctors and dentists who are violating the discipline of the medical profession contained in the Code of Indonesian Medical Ethics (CODEKI), it will get disciplinary sanctions. Pursuant to clause 69 paragraph (3), disciplinary sanctions are dropped in the form of:

   a. Written warning;
   b. Recommendation of revocation of letter of registration or practice permit;
   c. The obligation to follow education or training in medical or dentistry education institutions.

6. **Aspects Of Criminal Law.** Criminal law is a part of public law, therefore the main pressure here is the public interest/community. According to Simons, criminal acts are human deeds that are threatened with criminal, which is against the law, done by mistake by the person who can be responsible.

   The element of error (Dolus) in the sense of a criminal act above is a deed that:

   a. Is contrary to the law (Wedderechtelijk);
   b. Consequently it can be imagined/there is an interview (Voorzienbaarheid);
   c. Consequently it can be avoided/there is an aspirant (Overmijdbaarheid);
   d. Can be accounted for/blame (Verwijtbaarheid)

7. **Dynamics of medical personnel relations, hospitals and patients in Indonesia,** A decrease in public confidence in medical personnel (especially doctors), the rise of lawsuits posed by the people of today is often identified with the failure of the doctor's healing efforts. On the other hand, the lack of understanding of the medical community (doctors, nurses, and hospitals) around the legal aspects of their profession is also the cause of medical disputes. Peace is an easy choice for victims or doctors, victims get compensation in the form of material, while doctors and hospitals do not need to worry about the publication of italics in the mass media. But this peaceful road that makes malpractice difficult to bring to justice, because as long as the victim tends to choose a peaceful path, we will never learn to deal with the problem of malpractice until complete. But the path of peace is not enough to make the doctors deterrent in making mistakes, because enough with money tens or hundreds of millions of rupiah, the affair can be completed. The amount of money is not a big problem for doctors or hospitals, but if the case is brought to court, doctors and hospitals will suffer serious effects when convicted.

   The inempowerment of patients receiving health services in the face of health care service providers is obviously detrimental to the interests

of society. The rise of cases caused harm to the patient, which led to the occurrence of medical malpractice. If there is a claim regarding the incident in the hospital, who should be prosecuted? Health personnel or hospital managers. How far is the hospital liable for the criminal? The patient as the one who needs help is in a weak position so that often does not have a favorable bargaining position for him. On the other hand, the healthcare provider is often unable to establish good communication with the patient or patient family, as a result of therapeutic transactions that should be able to go well into an unpleasant condition for the patient or the doctor or hospital

It takes a clear arrangement and regulation regarding the responsibilities of each profession involved in the treatment of the patient. In this case the patient should have a clear legal protection against negligence by the doctor or hospital . This can be prevented if the medical community (as well as the community) understands the limitations of their respective rights and responsibilities when providing or obtaining medical services.

The relationship that occurs between the patient and the doctor in Medical service is the relationship between the legal subject as a patient to the recipient of health care services and doctors as the subject of health care service providers, is a relationship that is not written and carried out silently in an atmosphere of mutual trust (confidential). In today's modern medical sciences the relationship is known as a "confirmed transaction" due to its voluntary and unwritten nature arising from the request and fulfillment in a natural relationship. Among patients and doctors there are rules or rules of civil law and fulfill the relationship of the rights and obligations of the parties, if not achieving the purpose of the therapeutic agreement, placing the patient as a party that must bear any consequences of medical action, either the physical loss of a disability or death or materil loss.

a. A doctor in carrying out his obligations to the patient always does not escape mistakes and errors that can lead to negative consequences of the patient. In this case it can arise as a result, among others; How a physician is considered a malpractice; What provision is used as a reference, whether the law of Health (law No. 23 years 1992 about health) or Law No. 29 of 2004 on medical Practice or law number 8 year 1999 about consumer protection or Civil Code.
b. The doctor has provided improper health services that violate the purpose of therapeutic contracts;
c. The patient suffers a loss due to the doctor's actions. In the case of tort, the three untus must be proven in advance of the therapeutic contracts submitted using the medical record.

Protection of Hukum against patients as consumers of healthcare services should essentially begin the therapeutic transaction is made, meaning the transaction/alliance on the basis of equality between the two parties. In addition, the interwoven communication between the two sides is also maintained, it is intended to minimize the occurrence of intentional actions (*intentional*) such as in a particular *misconduct* acts of omission (negligence), or an unwarranted incompetence/disbelief of the health care provider that resulted in the loss of the patient.

In Indonesian legislation, the relationship between medical personnel, hospitals and patients is regulated in some laws. Patient relations and medical personnel are seen in LAW No. 44 year 2009 about hospitals; UU No. 23 year 1992 and LAW No. 36 year 2009 on health; UU No. 29 year 2004 on medical practice; UU No. 8 year 1999 on consumer Protection. Patient relations and hospitals are seen in LAW No. 44 of 2009 about hospitals; UU No. 23 year 1992 and LAW No. 36 year 2009 on health; UU No. 8 Year 2009 on consumer protection. Meanwhile, medical personnel relations and hospitals are seen in LAW No. 44 year 2009 about hospitals; UU No. 23 year 1992 and LAW No. 36 year 2009 on health; UU No. 29 year 2004 on medical practice.

Law No. 29 of 2004 on medical practice is enacted to regulate medical practice with the aim of providing protection to patients, maintaining and improving the quality of medical services and providing legal certainty To the community, doctors and dentists. The medical practice ACT will not be able to be applied perfectly if the implementation rules have not been established.

Legal protection for hospitals, especially healthcare professionals, is very important to create a relationship between the medical profession and the patient, especially doctors and dentists who directly provide health services to the community. The community agreed that the

doctors ' deeds in carrying out their noble duties deserve legal protection until certain boundaries.

Protection is interpreted as the deed of giving assurance or security, tranquility, welfare and peace from protection to the protected against any harm or risk that threaten it. The protection of the law according to Phillipus Hadjon (1988:5) There are two forms, the first preventive legal protection means that the people were given the opportunity to declare his opinion before the government decision got a definitive form that aims to prevent disputes. Secondly, a repressive legal protection aimed at resolving disputes.

The absence of medical profession standards cause a sense of insecurity among doctors to run the profession/job. Instead, the patient felt that there was no guarantee of standard health care (Shofie, 2002:123). The legal relationship between patients with doctors, health workers and hospitals always poses a reciprocal right and obligation, the right of the Doctor is the obligation of the patient and the patient's right is a physician's obligation. With this understanding, it will lead to equal position among the parties. Supriadi (200:29) argues that the legal relationship between doctors and patients is what is known as Verbintenis. The basis of the Common Alliance is the agreement, but it can also be formed by law. In the event of a legal relationship between the two, it is almost all in the form of an alliance of Endeavors (Ispanningsverbintenis), meaning that the alliance is not based on the final outcome but the Alliance based on earnest effort (Yuliati, 2005:13)

8 Legal politics against the hospital business. Politics means the process of forming and division of power in the community which includes the process of making decisions in terms of State policy. Health politics has an understanding of science and art to fight for the degree of public health in one region through a constitutional system adopted in a region or country. To create an overall healthy community and environment. Health politics is an effort for community development in the field of health. Health is required by policies that can be directed or follow the will against political policy intervention. Expected by understanding health politics, communities and political actors understand that health is the primary commodore of the people to be able to progress and thrive.

Law can play its role as social control, The legal factors and legislation plays an important role in regulating the functions of hospital services to patients and society in carrying out its functions and also the law can act as a means of modifiers (social engineering) for hospitals in carrying out its service functions in accordance with national and international health and medical services standards that must be Accepted by the patient and the community as Hospital service users.

F. Conclusion

Etika Business gives a critical thinking or reflection about morality in economic and hospital business activities. Morality is always related to what man does, and business activity is one form of human activity. Business indeed should be judged from a moral point of view. Politics means the process of forming and division of power in the community which includes the process of making decisions in terms of State policy. Health politics has an understanding of science and art to fight for the degree of public health in one region through a constitutional system adopted in a region or country. To create an overall healthy community and environment. Health politics is an effort for community development in the field of health. Health is required by policies that can be directed or follow the will against political policy intervention. Expected by understanding health politics, communities and political actors understand that health is the primary commodore of the people to be able to progress and thrive. Coaching and developing legal in the health field, aims to create order and legal certainty and facilitate development in the field of health. The desired legislation is certainly a regulation that can guarantee and protect the community in obtaining expected health services and can protect health workers. These regulations should have a thorough and steady legal aspects that can govern the health services conducted by both the Government and the private sector. Law can play its role as social control, The legal factors and legislation plays an important role in regulating the functions of hospital services to patients and society in carrying out its functions and also the law can act as a means of modifiers (social engineering) for hospitals in carrying out its service functions in accordance with national and international health and medical services standards that must be Accepted by the patient and the community as Hospital service users.

G. REFERENCE

Adikusumo, Suparto. *Manajemen Rumah Sakit.* Cet. 5. Jakarta: Pustaka Sinar Harapan, 2003.

AM Vianey Norpatiwi,"Aspek *Value Added* Rumah Sakit Sebagai Badan Layanan Umum."http://www.stieykpn.ac.id/images/artikel/Aspek%20Value%20Added%20Rumah%20Sakit.pdf, diunduh 10 Januari 2020.

Aditama, Tjandra Yoga. *Manajemen Administrasi Rumah Sakit*. Ed. 2. Cet. 3.
Jakarta: UI-Press, 2006.

Alamsyah, Dedi. *Manajemen Pelayanan Kesehatan*. Yogyakarta: Nulia Medika, 2011.

Azwar, Azrul. *Pengantar Administrasi Kesehatan*. Ed. 3. Jakarta: Binarupa Aksara, 1996.

Budianto, Agus, Gwendolyn Inggrid Utama dan Arifzan Razak. *Aspek Jasa Pelayanan Kesehatan dalam Perspektif Perlindungan Pasien*. Cet. 1. Bandung: Karya Putra Darwati, 2010.

Budiarto, Agus. *Kedudukan Hukum dan Tanggung Jawab Pendiri Perseroan Terbatas*. Ed. 2. Cet. 2. Bandung: Ghalia Indonesia, 2009.

Fuady, Munir. *Perseroan Terbatas Paradigma Baru.* Cet. 1. Bandung: PT. Citra Aditya Bakti, 2003

Muhandis Natadiwirya, Etika Bisnis Islam , Jakarta: Granada Press, 2007.

Pembukaan Undang-Undang Dasar Negara Kesatuan Republik Indonesia Tahun 1945, Alinea 4.

Penjelasan Undang-Undang-Undang Nomor 36 Tahun 2009 tentang Kesehatan

Ronny Hanitijo Soemitro, *Metodelogi Penelitian Hukum dan Jurimetri*, Jakarta, Ghalia Indonesia,1990, hlm. 12.

Sri Mamuji, et al., op.cit., hal. 31.Universitas Indonesia

Sulastomo, *Manajemen Kesehatan*, cet. 3,
Jakarta: PT. Gramedia Pustaka Utama, 2007.

LEGAL PROTECTION OF DOCTORS TO EUTHANASIA TO PATIENTS IN THE PERSPECTIVE OF HUMAN RIGHTS

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ABSTRACT

Health services are Human Rights (HAM) that have been guaranteed in Article 28H paragraph (1) of Constitution of the Republic of Indonesia Year 1945, especially for Indonesian citizens. The fulfillment of health services for the community is the responsibility of the State represented by the government based on Article 28I paragraph (4) and Article 34 paragraph (3) of Constitution of the Republic of Indonesia Year 1945. Health Personnel based on Article 23 paragraph (1) of Law No. 36 of 2009 concerning Health, one of which is a Doctor with knowledge and / or skills through education in the field of health which he has the duty to provide services or health efforts to Patients, including one of them in medical measures in the form of euthanasia. However, it needs to be examined in this study regarding whether euthanasia is legalized or not according to the laws of the State of Indonesia considering the right to life is guaranteed in the Constitution of the Republic of Indonesia Year 1945, as well as the form of legal protection against doctors who carry out euthanasia in order to carry out professional responsibilities in providing medical treatment to their patients in the best interest. from patients and according to medical indications. This research has 2 (two) problem formulations as follows: 1) What is the legality of euthanasia in the perspective of Human Rights in Indonesia ?; 2) Can criminal liability be held for doctors who carry out euthanasia on the basis of medical services. The research method used in writing this journal is juridical-normative legal research, with secondary data, namely: 1) primary legal material: Constitution of the Republic of Indonesia Year 1945, the Criminal Code, the Declaration of Human Rights of the United Nations (UN), Law No. 39 of 1999 concerning Human Rights, Law No. 36 of 2009 concerning Health, Law No. 36 of 2014 concerning Health Workers; 2) secondary legal material: books, journals and thesis / legal scientific research relating to health law, especially euthanasia; 3) tertiary legal material which includes encyclopedias, and language dictionaries.

Keywords: Euthanasia, Doctor, Legal Protection, Human Rights.

A. INTRODUCTION

Health services are rights that must be fulfilled as human rights that have been recognized by the entire world community as formulated in the Declaration of Human Rights of the United Nations (UN) dated 10 November 1948 in Article 25 paragraph (1) which reads: "everyone has the right to a standard of living adequate for the health and well-being of himself and his family. " The provisions on human rights have been added specifically to the Second Amendment to the Constitution of the Republic of Indonesia Year 1945 which has detailed human rights as stipulated in Article 28 (28A to 28J). Therefore, according to Indonesian law, the guarantee of the acquisition of health services as a human right, especially for Indonesian citizens, has been guaranteed in Constitution of the Republic of Indonesia Year 1945, particularly in article 28H paragraph (1), which reads: "every person has the right to live in physical and spiritual prosperity, residing and getting a good and healthy living environment and the right to obtain health services". Therefore, based on the laws of the State of Indonesia, health is included as one of the most basic human rights and must be fulfilled, and based on its derivative laws, namely Article 4 of Law No. 36 of 2009 concerning Health, which reads: "Everyone has the right to health."

Fulfillment of Human Rights especially the fulfillment of health services for the community is the responsibility of the State, especially the government as a representation of the State where based on Article 28I paragraph (4) of Constitution of the Republic of Indonesia Year 1945 stipulates that: "Protection, promotion, enforcement and fulfillment of human rights is the responsibility the state, especially the government. "In addition, the provision of supporting facilities for health services also includes the responsibility of the State based on Article 34 paragraph (3) of Constitution of the Republic of Indonesia Year 1945, which reads: "The

State is responsible for the provision of adequate health services and public service facilities."

Health is a state of health, both physically, mentally, spiritually and socially that enables everyone to live more productively socially and economically in carrying out their lives in society.[1] Health is a human right and one of the elements of well-being that must be realized in accordance with the ideals of the Indonesian people as referred to in the Pancasila and the Opening of Constitution of the Republic of Indonesia Year 1945. The importance of legal aspects in health services aims to provide maximum health services to fulfill the basic rights of every human. Health law covers the legal components of the health sector that intersect with each other, namely medical / dental law, nursing law, clinical pharmacy law, hospital law, public health law, environmental health law and so on.[2] For this reason, the Laws and Regulations specifically regulating health are regulated regarding parties who can provide health services to patients, or can be referred to as Health Workers. Based on Article 23 paragraph (1) of Law No. 36 of 2009 concerning Health, which states as follows: "Health workers are authorized to provide health services." One of the Health Workers under Law No. 36 of 2014 concerning Health Workers whose focus was discussed in this study was the Doctor.

Based on Article 1 point 6 of Law No. 36 of 2009 concerning Health that what is meant by Health Personnel is "every person who devotes himself in the field of health and has knowledge and / or skills through education in health which for certain types requires authority to carry out health efforts." Concerning healing illness and recovery based on Article 63 paragraph (3) of Law No. 36 of 2009 concerning Health, which reads: "Control, treatment, and / or treatment can be done based on medical science and nursing or other ways that can be accounted for its usefulness and safety." Therefore, providing health services is the main task of Health Workers One of them is a doctor, where a doctor with knowledge and / or skills through education in the health sector has the authority to make health efforts, including one of them in the form of euthanasia medical treatment.

In the medical dictionary it is stated that euthanasia intentionally ends one's life by dying or taking lives peacefully and easily to end suffering. This understanding views that euthanasia is a preventive measure for suffering that is more severe than someone experiencing an accident or contracting an illness. Euthanasia is done because there is no other way that can help someone to get out of extraordinary suffering.[3] Until now there is still debate about whether euthanasia according to Indonesian law is legalized considering human rights, ending a person's right to life is a form of human rights violation in which the right to life for every Indonesian citizen is guaranteed in Constitution of the Republic of Indonesia Year 1945. However, it is a dilemma for doctors who commit euthanasia in the context of carrying out professional responsibilities in providing medical treatment to patients in the best interests of patients and in accordance with medical indications, so that in this legal research will specifically discuss the legality of euthanasia in the perspective of human rights in Indonesia, as well as juridical analysis of whether accountability criminal charges can be requested against doctors who carry out euthanasia on the basis of medical services.

B. PROBLEM STATEMENT

Problem statement in this study:

1. What is the legality of euthanasia in the perspective of human rights in Indonesia?
2. Whether a criminal liability can be appealed to a doctor who does euthanasia on the basis of medical services?

C. LITERATURE REVIEW

Euthanasia

The term euthanasia is etymologically derived from the Greek words eu and thanatos which means "good death" or "dying in a calm or happy state". In English it is often called Marc Killing, whereas according to the "American Encyclopedia includes ISSN euthanasia, the practice of ending life in others to give release from incurable sufferering". In the Netherlands it is stated that euthanasia is intentionally not making an effort (instinctive) to prolong a patient's life or intentionally not doing anything to shorten or end a patient's life, and all this is done specifically for the patient's own benefit.[4] Euthanasia

[1] Indonesia, Law No. 36 Year 2009 concerning Health, Article 1 paragraph (1).
[2] Amri Amir dan M. Yusuf Hanafiah, 2008, *Etika Kedokteran dan Hukum Kesehatan*, edisi 4, Penerbit Buku Kedokteran EGC, page. 5.
[3] Gunawandi, 2007, *Hukum Medik (medical Law)*, Fakultas Ilmu Kedokteran Universitas Indonesia, Jakarta, page. 246.
[4] Cecep Tribowo, 2014, *Etika & Hukum Kesehatan*, Nuha Medika, Yogyakarta, page. 200

means happy death or fast death without suffering. But then this understanding develops into the killing / termination of life because of mercy (mercy killing) and allow someone to die pleasantly (mercy death).[5] According to the understanding of forensic medicine, euthanasia is a form of killing, where a person is killed with the intention to end the suffering of the person.[6]

There are several reasons that justify the doctor's actions, including:[7]

a. There are actions taken deliberately to end one's life;
b. The action was carried out out of compassion, because the person's illness could not be cured;
c. The process of ending life by itself means also ending the suffering done without causing pain to the person suffering from it;
d. The termination of life is done at the request of the person himself or at the request of his family who feel burdened by a draining condition, energy, thoughts, feelings and finances.

D. RESEARCH METHODS

The research method used in writing this journal is juridical-normative legal research, with secondary data, namely: 1) primary legal material: Constitution of the Republic of Indonesia Year 1945, the Criminal Code, the Declaration of Human Rights of the United Nations (UN), Law No. 39 of 1999 concerning Human Rights, Law No. 36 of 2009 concerning Health, Law No. 36 of 2014 concerning Health Workers; 2) secondary legal material: books, journals and thesis / legal scientific research relating to health law, especially euthanasia; 3) tertiary legal material which includes encyclopedias, and language dictionaries.

E. ANALYSIS AND DISCUSSION

1. Legality of Euthanasia in The Perspective of Human Rights in Indonesia

In principle, the right to life is a human right for every human being that is a fundamental or fundamental right, where Constitution of the Republic of Indonesia Year 1945 as the Constitution of the State of Indonesia which protects the right to life is regulated in Article 28A of Constitution of the Republic of Indonesia Year 1945 which states that: “everyone has the right to live and has the right defend their lives and lives.” The right to life is one of the rights which cannot be reduced under any circumstances or referred to as non derogable rights. The right to life is guaranteed in Law No. 39 of 1999 concerning Human Rights, especially in Article 9 paragraph (1) of Law No. 39 of 1999 concerning Human Rights, which reads: "Everyone has the right to live, maintain life and improve his standard of living."

The term euthanasia is etymologically derived from the Greek words eu and thanatos which means "good death" or "dying in a calm or happy state". In English it is often called Marc Killing, whereas according to the "American Encyclopedia includes ISSN euthanasia, the practice of ending life in others to give release from incurable sufferering". In the Netherlands it is stated that euthanasia is intentionally not making an effort (instinctive) to prolong a patient's life or intentionally not doing anything to shorten or end a patient's life, and all this is done specifically for the patient's own benefit.[8] Euthanasia means happy death or fast death without suffering. But then this understanding develops into the killing / termination of life because of mercy (mercy killing) and allow someone to die pleasantly (mercy death).[9] According to the understanding of forensic medicine, euthanasia is a form of killing, where a person is killed with the intention to end the suffering of the person.[10]

As Haryadi cited, according to Kartono Muhammad, euthanasia can be grouped into 5 groups, namely:[11]

a. Passive euthanasia, accelerating death by refusing to give / take ordinary relief measures, or stop ongoing normal help.
b. Active euthanasia, taking active action, both directly and indirectly that results in death.
c. Voluntary euthanasia, accelerating death at the consent or request of the patient.
d. Euthanasia is not voluntary, accelerating death without the request or consent of the patient, often referred to as merey killing.
e. Nonvolountary euthanasia, accelerating death in accordance with the wishes of the patient

[5] M. Achadiat, 2007, *dinamika etika dan hukum kedokteran dalam tantangan zaman*, EGC, Jakarta, page. 189.
[6] Abdul Mun’im Idries, 1997, *Pedoman Ilmu Kedokteran Forensik*, Edisi Pertama Bina Rupa Aksara, Jakarta, page. 80.
[7] Cecep Triwibowo, *Op.Cit.*, page. 202.
[8] Cecep Tribowo, *Ibid.*, page. 200
[9] M. Achadiat, *Op.Cit.*, page. 189.
[10] Abdul Mun’im Idries, *Op.Cit.*, page. 80.
[11] Kartono Muhammad, 1992, *aspek hukum dan etika kedokteran Indonesia*, Grafiti, Jakarta, page. 19.

delivered by or through a third party, or by government decision.

There is a conflict between the right to live with euthanasia where euthanasia as a way to end the human right to live as one of the human rights guaranteed in Constitution of the Republic of Indonesia Year 1945. Criminal Code that can be imposed on anyone who takes the life of another person are regulated in several articles in the Criminal Code, where one of them is Article 344 of the Criminal Code which states that: "anyone who removes the soul of another person at the request of the person himself who is very strict and sincere, the person is convicted with imprisonment for eternity 12 years old". In addition, Articles 338, 340, 345 and 359 of the Criminal Code can also be linked to euthanasia issues. However, in the Criminal Code articles it still does not provide strict limits regarding the regulation of euthanasia so that legally it is based on criminal law in force in Indonesia, euthanasia has not been clearly regulated. However, euthanasia as a form of termination of a person's life in accordance with the elements in the articles mentioned above so that according to Indonesian law, euthanasia has not been legalized.

2. Liability to A Doctor Who Does Euthanasia Based on Medical Treatment

Health care is an obligation that must be fulfilled by parties who work as Health Workers, one of whom is a Doctor. Health services or in the law referred to health efforts are regulated in Article 1 paragraph (11) of Law No. 36 of 2009 concerning Health which reads: "health efforts are any activities 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 promotion, treatment of diseases, and health recovery by the government and / or society."

According to Mochtar Kusumaatmadja, an adequate understanding of law must not only view the law as a set of rules and principles governing human life in society, but must also include the institutions (institutions) and processes needed to realize the law in reality. The definition of legal protection is a protection given to legal subjects in the form of legal instruments both preventive and repressive, both written and unwritten. In other words, legal protection as an illustration of the function of law., Namely the concept where the law can provide a justice, order, certainty, usefulness and peace.[12] Medical Law is a part of Health Law with a scope that only covers the medical field, namely doctors and people under their control which includes criminal, civil and administrative law.[13]

Based on several articles in the Criminal Code as mentioned in the previous section, namely Article 344, 338, 340, 345 and 359 of the Criminal Code which basically states that the act of killing even though it is a request from the victim itself, is a criminal offense that must receive punishment in accordance with applicable laws and regulations. For any reason and anyone who takes the lives of others without rights, except by other parties justified by law must be considered a crime (based on articles 48, 49.50 and 51 of the Criminal Code). Meanwhile, all those who have a direct share, both those who do, who order to do, who participate in doing, who move and who help must be regarded as the party responsible (based on articles 55 and 56 of the Criminal Code). However, this cannot be equated with euthanasia, because the elements of Article 344 of the Criminal Code are not fully contained and contained in euthanasia. On the one hand the patient in this case asks the doctor to end his life, and the doctor helps realize the wishes of the patient. There are several reasons that justify the doctor's actions, including:[14]

a. There are actions taken deliberately to end one's life;
b. The action was carried out out of compassion, because the person's illness could not be cured;
c. The process of ending life by itself means also ending the suffering done without causing pain to the person suffering from it;
d. The termination of life is done at the request of the person himself or at the request of his family who feel burdened by a draining condition, energy, thoughts, feelings and finances.

In addition the court develops the basis of normative medical measures to punish or not punish a

[12] Badan Pembinaan Hukum Nasional, 2011, *Pengkajian Hukum Tentang Perlindungan Hukum Bagi Upaya Menjamin Kerukunan Umat Beragama*, Kementerian Hukum Dan Hak Asasi Manusia, Jakarta, page. 15.
[13] Desriza Ratman, 2013, *Aspek Hukum Informed consent dan Rekam Medis Dalam Transaksi Terapeutik*, Keni Media, Bandung, page. 15.
[14] Cecep Triwibowo, *Op.Cit.*, page. 202.

doctor who performs euthanasia, with the following measures:[15]

a. Concerning people suffering from diseases that can no longer be cured.
b. His suffering was so great that the pain was unbearable.
c. The culprit is the doctor who treats.
d. The patient has entered the final period of life.
e. The patient himself has repeatedly made requests very seriously to end his life.
f. There must be consultations with other expert doctors.

Based on some of the explanations above, euthanasia is a form of medical service provided by a doctor where as a medical service provided and as a humanitarian measure undertaken by a doctor, the doctor should not be held liable for this, except if euthanasia is performed by a doctor against the patient there are indications of malpractice carried out, then the Doctor can be held criminally liable. But of course both the patient and the patient's family have been notified in advance of euthanasia which will be carried out in the informed concent. Informed concent consists of two words, namely informed, which means that an explanation or information has been obtained and concent which means approval or giving permission. So the informed concent contains the meaning of an agreement given after receiving information. Thus the informed concent can be defined as the consent given by the patient and or his family on the basis of an explanation of the medical that will be done to him and the risks associated with it.[16] However, up to now there has not yet been established a Law and Regulations specifically regulating euthanasia as a legal umbrella and protection for Doctors, so that one form of legal protection given to Doctors in euthanasia is the formation of Legislation regarding euthanasia in order to provide a legal certainty for doctors in providing medical treatment to patients.

F. CONCLUSION

The conclusion of the discussion of the formulation of the problem in this legal research can be elaborated as follows:

1. The legal basis for euthanasia in Indonesian laws and regulations is Article 344, 338, 340, 345 and 359 of the Criminal Code in which euthanasia is equated with as a way to terminate the right of people to live and may be subject to criminal acts against anyone who takes the life of another person, so that euthanasia has not been legalized even though the Criminal Code still does not provide strict limits regarding the regulation of euthanasia.
2. Doctors should not be held liable for euthanasia as a form of medical service provided by doctors, unless there is an indication of malpractice. For this reason, the form of legal protection given to doctors in euthanasia is the establishment of legislation regarding euthanasia in order to provide a legal certainty for doctors in providing medical treatment to their patients.

G. REFERENCES

Book

Abdul Mun'im Idries, 1997, *Pedoman Ilmu Kedokteran Forensik*, Edisi Pertama Bina Rupa Aksara, Jakarta.

Amri Amir dan M. Yusuf Hanafiah, 2008, *Etika Kedokteran dan Hukum Kesehatan*, edisi 4, Penerbit Buku Kedokteran EGC.

Badan Pembinaan Hukum Nasional, 2011, *Pengkajian Hukum Tentang Perlindungan Hukum Bagi Upaya Menjamin Kerukunan Umat Beragama*, Kementerian Hukum Dan Hak Asasi Manusia, Jakarta.

Cecep Tribowo, 2014, *Etika & Hukum Kesehatan*, Nuha Medika, Yogyakarta.

Desriza Ratman, 2013, *Aspek Hukum Informed consent dan Rekam Medis Dalam Transaksi Terapeutik*, Keni Media, Bandung.

Gunawandi, 2007, *Hukum Medik (medical Law)*, Fakultas Ilmu Kedokteran Universitas Indonesia, Jakarta.

Kartono Muhammad, 1992, *aspek hukum dan etika kedokteran Indonesia*, Grafiti, Jakarta.

M. Achadiat, 2007, *dinamika etika dan hukum kedokteran dalam tantangan zaman*, EGC, Jakarta.

Ngesti Lestari, Masalah Malpraktek Etik, 2001, *Seminar Ilmiah Etika dan Hukum Kedokteran,* RSSA.

[15] Soekidjo Notoatmodjo,2010, *Etika dan Hukum Kesehatan*, Rieneka Citra, Jakarta, page. 258.

[16] Ngesti Lestari, Masalah Malpraktek Etik, 2001, *Seminar Ilmiah Etika dan Hukum Kedokteran,* RSSA, page. 6.

Soekidjo Notoatmodjo,2010, *Etika dan Hukum Kesehatan*, Rieneka Citra, Jakarta.

Legislation

United Nations Declaration of Human Rights (UN).

Criminal Code.

Indonesia, The constitution of The Republic of Indonesia Year 1945.

_____, Law No. 39 of 1999 concerning Human Rights.

_____, Law No. 36 of 2009 concerning Health.

_____, Law No. 36 of 2014 concerning Health Workers.

LEGALITY OF ELECTRONIC MEDICAL RECORDS AS A TOOL OF EVIDENCE ACCORDING TO THE LAW IN INDONESIA

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ABSTRACT

The development of technology in today's society is very fast, hence the utilization of information technology, media and communication has changed the behavior of people and human civilization globally. Technology development is not only done by public or private companies and the government is currently beginning to use service electronically. One of the effects in the field of law is the increasing number of electronic proof tools. This time every hospital should have been conducting a digital medical record, known as electronic record , in accordance with the development of the current era and the benefits that have been inflicted, but still many obstacles. A medical record as a file containing notes and documents on the identity of the patient, examination, treatment, actions and other services that have been provided to the patient is made by the physician and is a confidential file, can be organized using an electronic system. As stipulated in article 5 Constitutions information and electronic transaction , then electronic medical record is also a valid instrument of legal evidence and is an extension of the valid proof of equipment in accordance with the law of the civil proceedings applicable. It has also been arranged in article 15 Constitutions Company document's until the position of electronic medical record is a tool of additional evidence beyond the five tools of evidence regulated in the law of the event the data , the value of its proving power is free, is handed over to the judge.

Keywords: Rule of Law, Electronic Medical Record

INTRODUCTION

Background

Today's digital age every hospital should have been conducting a digital medical record, known as electronic record , but in fact the implementation of electronic Information and transactions law In the Indonesian hospital still not much, because of many obstacles, so that the implementation of electronic medical record in Indonesia has not developed, among others, the high initial costs, and the rule of law is still poorly understood.

Every time we come to the doctor or to the hospital, whether to do the examination or even to the needs of a medical action, then the action will be recorded. This registration is realized in the form of a document called medical record. Remembering medical records is a tool of evidence in the process of law enforcement, medical discipline and dentistry and the enforcement of medical ethics and ethics of Dentistry. Based on regulation of the Minister of Health No. 269/MENKES/PER/III/2008 concerning medical Record (here in after referred to as Permenkes No. 269/2008 (on medical record)

A medical record is a file that contains notes and documents about the patient's identity, examination, treatment of actions and other services that have been given to the patient. Note is a doctor's or dentist's record of any actions taken to patients in order to provide health services. The document is a record of certain physicians, dentists, and/or healthcare personnel, reports of supporting examinations, daily observation and treatment records and all recordings of both radiology photographs, imaging drawings, and electro diagnostic recordings.

Content conventional medical records or electronic record records are not different, which distinguishes: Electronic medical records using electronic methods for the collection, storage, processing and access of patient medical records that have been stored in a multimedia database management system compiled from Various medical data sources.

Important aspects of medical record maintenance are authentication and Confidential. On Conventional medical records: Authentication is done by identifying the signature of *the conventional medical record* maker, while Confidential is done by saving the file A conventional medical record in a special room that can only be entered by hospital personnel. While on Electronic medical record, authentication is

performed using a cryptographic technique known as the electronic signature name.[1]

Information Law and electronic transactions are not known to be electronic medical records, Information laws and electronic transactions only know: Electronic documents of any electronic information that is created, transmitted, transmitted, received or stored in the form of analog, digital, electromagnetic, Or the like, which can be seen, displayed and/or heard through a computer or electronic system, including but not limited to writing, sound, images, maps, designs, photographs or the like, letters, signs, numbers, access codes, symbols or perforations that have meaning or meaning or can be understood by the person who is able to understand it (article 1 paragraph (4)

According to PERMENKES 269 years 2008 on medical record Article 1 paragraph (1): Medical record is: A file containing records and documents about the patient's identity, examination, treatment, actions and other services that have been given to the patient. electronic records can be likened to electronic documents in electronic information and transaction law, therefor the implementation of electronic Records, must comply with or refer to electronic information and transaction laws such as:

Article 3 paragraph (3): Electronic information and/or electronic documents shall be valid when using the electronic system in accordance with the provisions stipulated in this law. Under These conditions , Electronic medical records shall be in accordance with the provisions stipulated in the law Electronic information and transactions.

Article 4: Provisions regarding electronic information and/or electronic documents as referred to in paragraph (1) shall not apply to: A. Letter under law must be made in written form B. The letter and its documents that are under the law must be made in the form of notarial deed or deed made by the deed official.[2]

Legal basis for electronic medical record maintenance:

Regulation of the Minister of Health no. 269/2008 on medical Record article 2: The medical record must be made in writing, complete and clear or electronically.

The conduct of medical records using electronic information technology is further regulated by individual regulations. (The rule to date does not exist). Law No. 29 of 2004 on medical Practice, explanation of Article 46 clause (3): "Health officer" means doctor or dentist or other health worker who provides direct service to the patient. If in the recording of medical records using electronic information technology, the obligation to be changed signatures can be replaced using personal identification number.

Law No. 11/2008 on electonic information and transactions,

Article 6: In the event that there are provisions other than those stipulated in article 5 paragraph (4) which require that a information must be written or original, electronic information and/or electronic documents are considered valid throughout the information contained therein can be accessed, displayed, guaranteed the integrity, and can be held accountable so as to describe a situation.[2]

Article 11: Electronic signatures have legal strength and legal consequences as long as they meet the following requirements: electronic Signatures creation data is related only to signatory; creation data Electronic signatures during the electronic signing process are only in the power of the signatory; Any changes to electronic signatures that occur after the signing time are known; any changes to Electronic information relating to such electronic signatures after the signing time may be known; there are certain ways used to identify who the signing is; and there are certain ways to demonstrate that the signatory has provided Agreement to the relevant electronic information.

Legal issues in the Implementation of Electronic Medical records: Until now there is no regulation governing electronic medical Record as mandated in article 2 paragraph (2) PMK 269 year 2008 about medical record. So there is no detailed description of how to conduct Electronic Medical records. The signature change by using the PIN on The recording of Electronic medical records as intended in law No 29/2004 on Medical Practice part explanation of Article 46 paragraph (3) is not legally justified, because the PIN cannot be used as proof of the

[1] Rano Indradi S, Keterkaitan Rekam Medis Elektronik dengan konsep pendokumentasian di dalam rekam medis, Pelatihan implementasi rekam medis elektronik terintegrasi menuju era rumah sakit digital, Solo, 2016

[2] Departemen Kesehatan Republik Indonesia, Departemen Kesehatan, Direktorat Jenderal Bina Pelayanan Medik, Pedoman Penyelenggaraan Pelayanan di Rumah Sakit, Departemen Kesehatan RI, Jakarta, 2008

authentication of the signers.On the other hand, the use of electronic medical records is no legal basis that regulates and details the introduction of electronic medical records. In article 2 PERMENKES No. 269/2008 on medical record that:

(1) A medical record must be made in writing, complete and clear or Electronic
(2) Conducting medical records using information technology [3,4]

Further regulated by individual regulations.
Under the aforementioned provisions, electronic medical record rules have not been established.
When the hospital decides to use an electronic medical record it will require a large fee. Because there is an initial investment cost, such as a fee for the purchase of software or software, hardware such as computers, scanners, printers; and training costs for both doctors and related personnel to operate electronic medical records and their use can run smoothly. Plus one of the benefits of medical records is as a tool of evidence in the process of law enforcement, medical discipline and dentistry, and the enforcement of medical ethics and ethics of Dentistry. This indicates that the medical record has a central position in medical services for both the profession and the benefit of the patient as well as the possibility of a medical document in case of conflicts of law in the Court of profession and/or district Court. In the judiciary, the medical record can be a defense and a written information on the existence of a well-executed profession, no negligence of the task and in accordance with the professional standards that have received the consent of the patient or family. The medical record file may also be used by the patient or the family over the law as a basis for lawsuits or prosecution in courts with prevailing legal ordinances.

PROBLEM STATEMENT

Writing That Be Staple Problems Is As Following

1. Characteristics of electronic medical records as electronic documents
2. Validity and strength of electronic medical record proving

Goal

1. To analyse the characteristics of electronic medical records associated with the understanding and elements of an electronic document.
2. To analyse the validity of the electronic medical record proving force in the civil litigation proceedings

RESEARCH METHODS

The legal research used is a study that provides or generates a systematic explanation of the legal norms governing a particular category, in that it recognizes the validity of the electronic medical record as well as the position and power Electronic medical records as a means of proof. This research is done by analyzing the relationship between existing legal norms.

Primary legal materials and secondary legal materials are rearized and classified. Then the legal materials are examined by a statutory and conceptual approach in order to obtain a description of the synchronization of all legal materials so as to facilitate the use of these legal materials for use in Analyze

In analyzing, the method used is the deductive method. In the sense that the way of thinking or logic that originated from a general knowledge, in this case is derived from the provisions of the legislation of the doctrine, as well as theories in the literature. Further these legal materials are in the formulation of problems that produce special answers. In this case, laws and regulations in the field of electronic medical records that are made in relation to the issue of recognizing the validity and strength of proof as a tool of evidence in the law of civil proceedings

LITERATURE REVIEW

Hospital

The hospital is governed in article 1 paragraph 1 of the hospital law, a health care institution that organizes individual health services in a plenary way to provide inpatient, outpatient, and emergency services. In addition, the understanding of hospitals is also regulated in article 1 paragraph 1 of regulation of the Minister of Health number 1045/MENKES/PER/X/2006 concerning hospital organization guidelines, hospital is an individual health services facility that provides hospitalization and outpatient providing short and long term health services consisting of; Observation, diagnostic, therapeutic, and rehabilitative for people who suffer from pain, injury, and childbirth. [5]

3 ibid
4 https://www.kompasiana.com/tammysiarif/5ca843b195760e053b3889f2/legalitas-rekam-medis-elektronik?page=all

5 Nasution, Bahder Johan, Hukum Kesehatan Pertanggungjawaban Dokter, Rineka Cipta, Jakarta, 2013.

Patients

Article 1 of the Law No. 29, 2004 about medical practice explaining the definition of the patient is everyone who is consulting their health problems to obtain the necessary health care either directly or indirectly Doctor or dentist.

Doctor

Constitutions No 29 year 2004 about the medical practice referred to by: Medical practice is a series of activities conducted by doctors and dentists to patients in conducting health efforts; Doctors and dentists are doctors, dentist specialists, and doctors who specialize in medical or medical education graduates both in and out of the country recognized by the Government of the Republic of Indonesia in accordance with the laws and regulations. The Conpentence certificate is a letter of recognition for the ability of a physician or dentist to conduct medical presciences throughout Indonesia after passing a competency test.

Medical Record

The medical record is written evidence or recorded about the process of service provided by doctors and other healthcare professionals to patients who are a reflection of the cooperation of more than one health worker to heal the patient. Proof of writing/recording is done after the examination of action and treatment so that can be accounted for. According to Hendrik, a medical record is interpreted as a caption or note either written or recorded about the identity, condition of the patient and any actions given including the treatment received by the patient. In more depth, the medical record has a broad meaning because in the record it has been reflected all information pertaining to a person who will be used as a basis in determining further action in the effort of service and Other medical measures provided to a person who comes in health care facilities. [6]

Electronic Medical Record

In the legislation, no one has expressly set out to know the electronic medical record. So there is no definition to know what is meant by electronic medical records in statutory regulations.

Article 2 regulation of the Minister of Health 'No. 269/Menkes/PER/III/2008 concerning The medical record only arranges that the medical record should be made in writing complete and clear or electronically. The conduct of medical records using electronic information technology is further regulated by individual regulations.

A medical record when associated with law number 19 of 2016 about the amendment to Law 1 year 2008 on information and Electronic transactions (hereinafter referred to as electronic information and transaction Law), may be categorized as document Electronic. Article 1 paragraph 4 information and electronic transactions Law explains that electronic documents are any electronic information that is created, transmitted, transmitted, received or stored in the form of analog, digital, electromagnetic, optical or similar, which can be viewed, displayed and/or heard through computer or electronic systems including But not limited to writing. Sounds, images, maps, designs, photographs or the like, letters, numeric signs, passcode . Law which has meaning or meaning or can be understood by people.

Electronic information itself is one or a collection of electronic data, including, but not limited to writings, voices, images, maps, designs, photographs, electronic data Interchange (EDI), electronic mail , telegram, telecopy or similar, letters, numeric signs, access codes, processed symbols that have meaning or can be understood by people who are able to understand it as set in Article 1 paragraph 1 Electronic information and Transaction Act.[7,8]

Primary legal Materials

By using the approach of law (of approach) then the authors use legislation as the material law Primer. According to the provisions of article 1 of Number 2 of Law No. 12 of 201 1, legislation is a written rule that contains the norm law which is binding in general and formed or stipulated by law State or authorized official through the procedures set forth in the per regulation of law's research legislation is reviewing electronic medical records. To study and answer the issue of law is based on:[9]

1. Law No.19 of 2016 concerning Amendment to law number 1 I year 2008 on Information and Electronic transactions (State Gazette of the Republic of Indonesia year 2016

6 Dahlan, Sofan, Hukum Kesehatan Rambu-Rambu Bagi Profesi Dokter, Badan Penerbit Universitas Diponegoro, Semarang, 2003

7 Seran, Marcel dan Ansa Maria Wahyu Setyowati, Dilema Etika dan Hukum dalam Pelayanan Medis, Mandar Maju, Bandung, 2010.

8 https://en.wikipedia.org/wiki/Electronic_health_record

9 Departemen Kesehatan Republik Indonesia Direktorat Jenderal Bina Pelayanan Medik, Pedoman Penyelenggaraan Dan Prosedur Rekam Medis Rumah Sakit Di Indonesia Revisi 11, Departemen Kesehatan RI, Jakarta, 2006

number251, addition of State Gazette of the Republic of Indonesia number 5952)
2. Law No. 36 year 2014 on Health Force (State Gazette of the Republic of Indonesia year 2014 number 298, addition to State Gazette of the Republic of Indonesa number 5607)
3. Law No. 44 year 2009 About hospitals (State Gazette of the Republic of Indonesia year 2009 number 153, addition to State Gazette of the Republic of Indonesia number 5072)
4. Law No. 11 year 2008 concerning information and electronic transactions (State Gazette of the Republic of Indonesia year 2008 number 58, addition of State Gazette of the Republic of Indonesia number 4843)
5. Law number 29 year 2004 concerning Medical Practice (State Gazette of the Republic of Indonesia year 2004 number 116, addition to State Gazette of the Republic of Indonesia number 443 L)
6. Act Number 23 year 1992 about Health (State Gazette of the Republic of Indonesia year 1992 number 100, addition to State Gazette of the Republic of Indonesia number 3495)
7. Burgerlijk Wetboek translation Subekti and Tjitrosudibio
8. Herzien Inlandsch Reglement (H.I. R) (1941-44) R. Soesilo translation
9. Government regulation Number 10 year 1966 about compulsory medical secret Save (State Gazette of the Republic of Indonesia year 1966 number 39, addition of State Gazette of the Republic of Indonesia number 3637)
10. Regulation of the Minister of Health No. 269/MENKES/PER/LLL/2008 on medical record
11. RegulationoftheMinisterofHealthNo90/Menkes/PER/ III/2008 on the approval of medical action
12. RegulationoftheMinisterofHealthNo1045/Menkes/PER/X/2006 concerning Hospital Organization guidelines in Ministry of Health
13. Regulation of the Minister of Health R1 number 434/MEN. KES/X/1983 on the enforcement of Indonesian medical Code of Ethics for doctors in Indonesia

Secondary legal materials

The secondary law material is obtained from law's books and law's journals related to electronic medical records and relating to the issue of Law this writing. The dictionary of law is used as the basis of understanding for some term law. As well as magazines, websites, mass media, seminar law as supporting material.[10]

Kinds of proof tools.

Pursuant to article 164 HR, section 284, and article 1866 BW, a variety of proof tools in the law of civil proceedings is : 1. Proof of writing tool, 2. Witness Evidence Tool, 3. Narrow-shortage, 4. Oath Recognition. In addition to the 5 (five) tools, in HIR there are still other evidence tools.That can be used by the judges, Local inspections. Expert description. Electronic medical record as a tool of evidence in the law of civil proceedings.

ANALYSIS AND DISCUSSION

Proving seeking and realizing formal truths

Civil justice proceedings. Truth is sought and embodied judge, quite a formyl truth. From the self and the bowels of the judge, not prosecuted beliefs. The parties may litigate the evidence based on lies and falsehoods, but such fact theoretically must be accepted by the judge to protect or defend the person's rights or the civil rights of the parties concerned. "

In the framework of such a proof system, if the defendant acknowledges the plaintiff's evidence, although it is lying and false, the judge must accept the truth by the conclusion that based on the confession, the defendant is considered and It is declared waive the right of the data on the terms of the matter. Order and the role of judges in the civil Law are same judges only limited to accepting and examining The things that are filed plaintiff and defendant. Therefore the truth is embodied in accordance with the basic reasons and facts posed by the parties during the proceedings. " So that judges are not allowed when taking the verdict without proof. The key to be rejected or applied to the lawsuit must be based on the evidence sourced from the facts submitted by the parties.

[10] Direktorat Bina Upaya Pelayanan Keperawatan dan KMKF Kementerian Kesehatan RI yang bekerja sama dengan Dewan Pimpinan Pusat Perhimpunan Professional Perekam Medis dan Informasi Kesehatan Indonesia, Pedoman Penyelenggaraan Rekam Medis dan Informasi Kesehatan di Rumah Sakit,Revisi 1, 2010.

Acknowledgement of end examination

In principle, case inspection is over when one of the parties. Provide a thorough acknowledgment of the subject matter. If the defendant acknowledgesand is rounded on the underlying material. Defendant, considered the disputed thing to have been completed, because with the acknowledgment it has ensured and settled the legal relationship that occurred between.The parties. Likewise, if the plaintiff confirms and acknowledges. The defendant's proposed objtion, it means that it is certain and proven Claims filed by the plaintiff is completely incorrect. Especially if approached from Passive teaching. Although the judge knows and believes the confession is lying or contrary to truth, the judge must accept that confession as fact and truth. Therefore, the judge must end the examination, because with the The acknowledgement is completely complete, subject matter, But not all confession ends the matter. There are several benchmarks such as

(1) Recognition provided without condition
(2) Not denying by silence
(3) Deny for no reason enough

Evidence of non-logical matters

Proving the matter according to the law in principle always contains relative uncertainty, so that the truth resulting from the provingsystem, is essentially the truth of relative, Therefore the evidence to be delivered does not contain logical, absolute and definite facts, but quite the fact that Containing the truths received by commonsense, meaning , the truth of the facts expressed in accordance with the truth according to public awareness. And the judge shall not insist on the logical and definite proof of the parties that are in thecase as proof is based on the science of certainty. Moreover, demanding an absolute evidence of l00%, is considered a false establishment. Whenever the process of proving by law in a case, always contained uncertainty or remote doubts(*remote doubtness*) Along with the development of the technology in the community, Utilization of information technology, media and communications have changed both, People's behaviour and human civilization globally. Utilization Technology is not only done by people or companies Private sector, but the government is currently beginning to fly the service electronically.

In principle, electronic information and/or electronic documents . The resulting print is a legitimate legal proof tool as set forth in the, Article 5 paragraph (1) of electronic information and transaction law. Electronic information and/or electronic documents, Authorized when using the electronic system in accordance with the provisions regulated by electronic information and trasactions laws,

Electronic signatures are also required in the implementation of Electronic medical records because in the procedure of organizing medical records as regulated. In article 5 PERMENKES 269/2008 on medical record, each record in the medical record must be made by the signature of a physician, dentist or health worker who provides health services directly. While the electronic signature has a hash value function that is very Assist in the instrument Identification of whether the electronic medical record has been Altered or not or who the parties have filled, changed, added, or access electronic medical records. Due to the form of medical record is susceptible to change without leaving a trace, in the sense of record content. The initial medical can be removed and replaced with a new one. But in the event of, Error in recording a conventional medical record can be done by scribble without eliminating any notes, Corrected and made by Paraf. This means that changes in the contents of the medical record should not be removed for traceability. It also needs to be a note in, Regulatory developments governing the electronic medical record.

CONCLUSION

1. The medical record as a file containing records and documents about the patient's identity, examination, treatment, actions and other services that have been provided to patients made by the doctor and is a confidential file, can be organized using electronic systems, electronic medical records have characteristics among others: simultaneous access from various places, can be seen from various approaches, more structured entry data, decision support system, simplify Data sharing, and can be multimedia. Electronic medical records are electronic documents as set forth in the Electronic Transactions and information laws.
2. As stipulated in article 5 of the electronic information and transactionLaw, the electronic medical record is also a valid instrument of legal proof and an extension of the legitimate evidence in accordance with the laws of the civil proceedings applicable. It has also been arranged in article 15 constitutions Company documents.

So that the position of the electronic medical record is a tool of additional evidence beyond the five tools of evidence governed by the law of Value collection event The power of the evidence is free, handed over to the judge.

REFERENCES

Rano Indradi S, Keterkaitan Rekam Medis Elektronik dengan konsep pendokumentasian di dalam rekam medis, Pelatihan implementasi rekam medis elektronik terintegrasi menuju era rumah sakit digital, Solo, 2016

Departemen Kesehatan Republik Indonesia, Departemen Kesehatan, Direktorat Jenderal Bina Pelayanan Medik, Pedoman Penyelenggaraan Pelayanan di Rumah Sakit, Departemen Kesehatan RI, Jakarta, 2008

https://www.kompasiana.com/tammysiarif/5ca843b195760e053b3889f2/legalitas-rekam-medis-elektronik? Page =all

Nasution, Bahder Johan, Hukum Kesehatan Pertanggungjawaban Dokter, Rineka Cipta, Jakarta, 2013.

Dahlan, Sofan, Hukum Kesehatan Rambu-Rambu Bagi Profesi Dokter, Badan Penerbit Universitas Diponegoro, Semarang, 2003

Seran, Marcel dan Ansa Maria Wahyu Setyowati, Dilema Etika dan Hukum dalam Pelayanan Medis, Mandar Maju, Bandung, 2010.

https://en.wikipedia.org/wiki/Electronic_health_record

Departemen Kesehatan Republik Indonesia Direktorat Jenderal Bina Pelayanan Medik, Pedoman Penyelenggaraan Dan Prosedur Rekam Medis Rumah Sakit Di Indonesia Revisi 11, Departemen Kesehatan RI, Jakarta, 2006

Direktorat Bina Upaya Pelayanan Keperawatan dan KMKF Kementerian Kesehatan RI yang bekerja sama dengan Dewan Pimpinan Pusat Perhimpunan Professional Perekam Medis dan Informasi Kesehatan Indonesia, Pedoman Penyelenggaraan Rekam Medis dan Informasi Kesehatan di Rumah Sakit,Revisi 1, 2010.

https://www.healthdataarchiver.com/tag/legacy-patient -data/

https://www.usfhealthonline.com/resources/key-concepts/what-are-electronic-medical-records-emr/

Undang-Undang Nomor 29 Tahun 2004 Tentang Praktek Kedokteran (Lembaran Negara Republik Indonesia Tahun 2004 Nomor 116, Tambahan Lembaran Negara Republik Indonesia Nomor 4431)

Fakhriah, Efa Laela, Bukti Elektronik Dalam Pembuktian Perdata, cetakan 2, Alumni, Bandung, 2011.

Hendrik, Etika & Hukum Kesehatan, Buku Kedokteran EGC, Jakarta, 201I, h.85

THE LAW ENFORCEMENT, RESOLVE, AND LEGAL PROTECTION MECHANISM AGAINST VICTIM AND CHILDREN OF BULLYING ACTOR IN INDONESIA

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ABSTRACT

Recently, bullying cases against children increased in Indonesia. Bullying behave experienced by children most often occurs at school. Many negative impacts experienced by the victims due to bullying if not handled properly. Efforts to deal with bullying cases in Indonesia are through the penal policy (criminal law) and non-penal policy (outside the non-penal law). The Indonesian government has been responsible for law enforcement to deal with bullying cases. One of ways provides protection for victim and children of bullying actor through Law Number 35 of 2014 concerning amendments to Law Number 23 of 2002 concerning Child Protection providing victim and child of bullying actor protection guarantees. As for Law Number 11 of 2012 concerning the Child Criminal Justice System regulates criminal offenses faced by children in Indonesia.

Keyword: Children, Bullying, Law Enforment

A. INTRODUCTION

Today there are many violent behaviors, in the form of physical actions that directly attack others. Violence can be interpreted as an act that is unpleasant or detrimental to others, both physically and psychologically. Violence is not only in the form of physical exploitation, but also psychological violence that needs to be watched out because it will cause trauma to the victims. The violence is known as bullying. Bullying is behavior towards someone to humiliate others. Bad habits that will certainly harm everyone if not immediately handled properly. This bullying is usually done to perceive himself stronger with the intention of endangering his physical, mental or emotional through harassment and assault.[1]

Bullying is a subtype of aggressive behavior, where a person or group repeatedly attacks, insults, and / or excludes people who are relatively powerless.[2] The majority of bullying is carried out in schools that focus on children and teenager. The act of bullying is carried out by anyone and anywhere. Besides being carried out in schools, bullying can occur in a kindergarten environment[3], working space[4,5], prison[6] ,and in an army environment.[7] As a country that has ratified the Convention on the Rights of the Child through Presidential Decree Number 36 of 1990, Indonesia legally and politically over all the provisions contained in the convention. One of the provisions is that Indonesia as a state party (stateparty) must provide periodic reports to the United Nations on the implementation of the contents of the Convention on the Rights of the Child. As a manifestation of the country's commitment, Indonesia has issued a Child Protection Law. Commitment to admission and protection of the rights to children has been guaranteed in the 1945 Constitution of the

[1] Ichsan Tanzil, Sambas Nandang, 2018, Penegakan hukum terhadap pelaku tindak pidana bullying berdasarkan undang-undang nomor 35 tahun 2014 perubahan atas undang-undang No.23 tahun 2002 tentang perlindungan anak jo. undang-undang nomor 11 tahun 2012 tentang sistem peradilan pidana anak, *Prosiding Ilmu Hukum*, Vol.4 No.1, pp.373-380.

[2] Salmivalli Christina, 2009, Bullying and the peer group; a review, Aggression and Violent Behavior, Vol.15,pp.112-120.

[3] Alsaker FD &Nagele C, 2008, Bullying in kindergarten and prevention, In W. Craig, & D. Pepler (Eds.), An Internasional Perspectiveon Understanding and Addressing Bullying, PREVNetSeries, Volume I (pp.230-252). PREVNet: Kingston, Canada

[4] Matthiesen SB &Einarsen S, 2010,Bullying in the workplace: definition, prevalence, antecedents and consequences, Internasional Journal of Organization Theory and Beharior, Vol.13 No.2, pp.202-248.

[5] Nathan A. Bowlingand Terry A. Beehr, 2006, Workplace harassment from the victim'sperspective: a theoretical model and meta-analysis, Journal of Applied Psychology, Vol.91 No.5, pp. 998-1012

[6] Catherine R, Southand Jane Wood, 2006, Bullying in Prisons: the Importance of Perceived Social Status, Prisonization and Moral Disengagement, Aggressive Behavior, Vol.32, pp.490-501

[7] Ostvik Kristina, RudminFloyd, 2001, Bullying and Hazing Among Norwegian Army Soldiers: Two Studies of Prevalence, Context, and Cognition, Military Psychology, Vol.13 No.1, pp.17-39.

Republic of Indonesia Article 28B paragraph (2) states that every child has the right to survival, growth and development and is entitled to protection from violence and discrimination.[8] Legislation relating to children has been widely published, but in its implementation in the field it still shows that there are various kinds of violence against children, including bullying.

The number of cases of bullying from year to year shows an alarming number. In Indonesia, Bullying cases in schools are ranked as the top of public complaints to the Indonesian Child Protection Commission (KPAI) from the education sector. Child protection case data in the Indonesian Child Protection Commission (KPAI) from 2011-2016 shows that victims of violence in schools (bullying) were 56 people (2011), 130 people (2012), 96 people (2013), 159 people (2014) , 154 people (2015) and 81 people (2016), while actor of violence in schools (bullying) were 48 people (2011), 66 people (2012), 63 people (2013), 67 people (2014), 93 people (2015)) and 93 people (2016).[9] Cases of bullying in schools are like the iceberg phenomenon, which is far more than what appears on the surface, because only a small number of reported cases. Every year there are always cases of bullying even every year the cases of bullying always change from year to year significantly. This shows the lack of education among educators about the dangers of bullying behavior.

Bullying behavior is formed in children through social learning processes or patterns that affect one another in their environment. Bullying behavior starts to be implanted at an early age so that there is a need for maximum efforts to prevent bullying from growing at home which then continues to school.[10] Most people become bullying actor because they have experiences as bullying victims, as a result of being victims, the actors has a desire for revenge for the actions they got.

From cases like this the behavior of bullying becomes a virus of anger and revenge begins, indirectly a person who will become a actor will wait for a time when they have power, control, and position when they later becomes a bully. The actor is usually someone with a low social status in the group.

Some people might argue that bullying behavior is trivial or even normal in every stage of human life. In fact, bullying is abnormal, unhealthy and socially unacceptable behavior. Things that are trivial if not resolved to the maximum and done repeatedly can eventually have serious and fatal effects. By allowing or accepting bullying behavior, we mean providing support to bullying actors, creating unhealthy social interactions that can hamper optimal development of one's potential.[11] The impact of bullying will prevent children from actualizing themselves because bullying behavior will not provide security and comfort, and will make bullying victims feel scared and intimidated, inferior, worthless, difficult to concentrate in learning, and unable to socialize with their environment.[12]

From the description above, bullying cases will have a negative impact on the victims if they are not handled properly. It is very necessary legal protection for the victims so that victims do not feel the negative effects resulting from bullying behavior. Preventive measures are also needed for someone not to carry out acts of bullying so that cases of bullying in Indonesia in the coming year will be reduced even if it does not recur. In this case the author will discuss law enforcement related to bullying cases in Indonesia, efforts to tackle bullying cases and efforts to protect the victims and children of bullying actor in Indonesia.

B. PROBLEM STATEMENT

The increasing number of bullying cases, especially those that occur to children and teenager, adorn many rows of news on printed and electronic media pages as evidence of the waning of human values in Indonesia. Bullying can happen anywhere and is done by anyone. Violence (bullying) most commonly experienced by children is physical violence in many forms and variations, then mental and sexual violence.

Violence (bullying) seems to have become an inseparable part of the lives of children in this competitive era. Thinking about the risks faced by children is needed and a solution must be found to break the chains of violence (bullying) that are interrelated without end. Various parties are

[8] Undang-Undang Republik Indonesia Tahun 1995 Pasal 28B
[9] KPAI, 2016, Data kasus berdasarkan klaster perlindungan anak tahun 2011-2016, Diakses pada 24 Desember 2019 dari https://www.bankdata.kpai.go.id/tabulasi-data/data-kasus-per-tahun/data-kasus-berdasarkan-klaster-perlindungan-anak-2011-2016
[10] Priyatna, A, 2010, Lets End Bullying: Memahami, Mencegah dan Mengatasi Bullying, Jakarta: PT.Elex Media Komputindo
[11] Wiyani, NA, 2012, Save Our Children from School Bullying. Jogjakarta: Ar-Ruzz Media.
[12] Sejiwa, 2008, Bullying: Mengatasi Kekerasan di Sekolah dan Lingkungan Sekitar Anak. Jakarta: PT Grasindo.

responsible for the children life being, because children have rights that must be fulfilled by the state. Real steps are needed to prevent violence (bullying) experienced by children. Bullying if not dealt with maximally will cause a negative impact on the psychological development of bullying victims.

Indonesia as a state of law has ratified the Convention on the Rights of the Child through Presidential Decree Number 36 of 1990 Indonesia legally and politically over all the provisions contained in the convention. Indonesia has issued a Child Protection Act. Commitment to admission and protection of the rights to children has been guaranteed in the 1945 Constitution of the Republic of Indonesia Article 28B paragraph (2) states that every child has the right to life being, growth and development and is entitled to protection from violence and discrimination.

From this description, it is necessary to discuss and / or study several issues, namely: **First**, how is law enforcement related to bullying cases in Indonesia, **Second**, how to deal with bullying in Indonesia, **Third**, how legal protection for victims and children of bullying actor in Indonesia.

C. LITERATUR REVIEW

Bullying comes from the English language, which is from bull, which means a bull itself likes to butting here and there. In Indonesian, etymologically bully means insult, a person who insult weak people. Bullying according to the National Human Rights Commission (Komnas Ham) is as a form of long-term physical and psychological violence committed by a person or group against someone who is unable to defend themselves from situations there is a desire to hurt or frighten people or make people depressed, traumatized, depressed and helpless.[13] Bullying divided into 4 (four) types based on the form of action:[14]

- **Physical Bullying**. Physical bullying is the most visible and most identifiable type of bullying among other forms of bullying, but the incidence of physical abuse accounts for less than one third of reported incidents of bullying. Types of physical oppression include beating, strangling, elbowing, punching, kicking, biting, crunching, clawing, and spitting on children who are bullied to painful positions, as well as damaging and destroying clothing and belongings of oppressed victims. The stronger and more mature the offender, the more dangerous this type of attack is, even if it is not intended to seriously injure.
- **Verbal Bullying**. Verbal violence is the most common form of bullying used by both girls and boys. Verbal violence is easy to do and can be whispered in the presence of adults and peers, without being detected. Verbal suppression can be in the form of nicknames, reproaches, slanders, cruel criticisms, insults, and statements of nuanced sexual solicitation or sexual harassment. In addition, verbal suppression can take the form of confiscation of snacks or belongings, harsh talking, intimidating e-mails, anonymous letters containing threats of violence, false accusations, and gossip.
- **Relational Bullying.** This type of bullying is most difficult to detect from the outside. Relational oppression is systematically weakening the self-esteem of victims of bullying through neglect, ignorance and exclusion. Relational oppression can be used to alienate or reject a friend or intentionally to damage friendship. This behavior can include hidden attitudes such as aggressive views, eye glances, sighs, and rough body language.
- **Cyber Bullying.** Cyber bullying is an activity using information and communication technology that is intentional, repetitive and constantly contains hostility carried out by individuals or groups with the aim to hurt the feelings of others (groups or individuals).

Cyber bullying can be categorized as verbal bullying because the perpetrators mock, insult, make fun of, denounce, spread rumors, and even threaten by using electronic media.[15] cruel to the victim, calling continuously without stopping but not talking (silent calls), making a website embarrassing victims, making videos that contain victims who are being humiliated and then distributed to the public.

The parties involved in bullying behavior are divided into 4 (four)

[13] Chakrawati, F, 2015, *Bullying Siapa Takut?*, Solo, Tiga Serangkai, Hlm 11

[14] Coloroso, B, 2007, *The Bully, The Bullied, and The Bystander*, New York: Harpercollins.

[15] Repp DA, 2016, Cyber-bullying sebagai suatu kejahatan teknologi informasi ditinjau dari undang-undang nomor 11 tahun 2008 tentang informasi dan transaksi elektronik, *Lex Privatum*, 4(7):61-68.

1. Bullies (Bullying actor) are those who physically and / or emotionally hurt others repeatedly.[16] Teenager who are identified as bullying actor often exhibit worse psychosocial functioning than bullying victims and students who are not involved in bullying behavior. Bullying actors also tend to show higher symptoms of depression than students who are not involved in bullying behavior and symptoms of depression that are lower than victims.[17]
2. Victim (bullying victim) is someone who is often the target of aggressive behavior, painful actions and shows little defense against the attacker. Bullying victim are usually new children in an environment, the youngest children in school, usually younger ones, sometimes feeling scared, avoiding their peers for, avoiding more severe pain, and find it difficult to ask for help.[18]
3. Bully-victims are those involved in aggressive behavior, but also aggressive behavior victim.[19] Bullying-victims show a higher level of verbal and physical aggressiveness compared to other children. Bullying victims also experience an increase in symptoms of depression, feeling sad and moody than others.[20]
4. Neutral is a party that is not involved in aggressive behavior or bullying.

In general, people do bullying because they feel depressed, threatened, humiliated, revenge and so on. The following factors cause bullying behavior among students:[21]

- Family factor. Bullying can happen to receive bullying, which may be done by someone in the family. Children who grow up in aggressive and abusive families will imitate these habits in their daily lives. Physical and verbal abuse by parents to children will be an example of bullying behavior.
- Personality factor. One of the biggest factors causing children to bullying is temperament. Tempramen is a characteristic or habit that is formed from an emotional response. Someone who is active and impulsive is more likely to apply bullying than someone who is passive or shy
- School factor. The level of supervision in schools determines how much and how often bullying occurs. The importance of supervision is carried out especially in the playground and field, because usually in both places bullying behavior is often carried out. Proper handling of the teacher or supervisor for bullying is important because bullying behavior that is not handled properly will cause the possibility of the behavior to repeat.

D. LITERATUR REVIEW

This research was conducted using normative juridical research methods. Namely library law research conducted by examining library materials or secondary data. Therefore library data that is used as primary data, is primary legal material in the form of norms or basic rules and regulations, and also use secondary legal materials such as research results and opinions of academics and legal experts.

This research was conducted by means of a study of positive legal rules and legal principles carried out by evaluating relevant legal principles (regulations). This evaluation research on positive law is done by evaluating the terms of conformity between one rule of law with other legal norms, or with the principles of law recognized in existing legal practice, which is carried out by examining literature materials or secondary data.

E. ANALYSIS AND DISCUSSION

1. Law Enforcement Related to Bullying Cases in Indonesia

Bullying as a new name to identify situations where there is abuse of power / authority committed by a person / group, basically not a new phenomenon that occurs in Indonesia. Article 28I paragraphs (1) and (2) of the 1945 Constitution of the Republic of Indonesia expressly contain fundamental rights for everyone. These rights are the right to life, the right not to be tortured, the right to freedom of thought and conscience, including the right to religion, the right

[16] Moutapp M, et al, (2004), Social Network Predictors of Bullying and Victimization. *Adolescence Journal.*Vol.39 No.154, pp. 315-336

[17] Totura CMW, 2003,*Bullying and victimization in middle school: The role of individual characteristics, family functioning, and school contexts*. University of South Florida

[18] Coloroso, B, 2007, *The Bully, The Bullied, and The Bystander*, New York: Harpercollins

[19] MoutappaMet al, 2004, Social network predictors of bullying and victimization. *Adolescence Journal.*Vol.39 No.154, pp.315-336

[20] Totura CMW, 2003,*Bullying and victimization in middle school: The role of individual characteristics, family functioning, and school contexts*. University of South Florida

[21] Susanti E, 2016, Kajian sosiologi hukum terhadap problematika bullying dalam dunia pendidikan, *Jurnal Keadilan Progresif*, Vol.7 No.1, pp.1-18.

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 a retroactive law. Everyone also has the right to be free from discriminatory treatment on any grounds and has the right to protection from discriminatory treatment. The protection, furtherance, enforcement and fulfillment of human rights are the responsibility of the state, especially the government.[22]

These stages are used to determine or formulate what acts of bullying can be prosecuted and what sanctions can be imposed. If the bullying action is still a mild action, it will be resolved non-lawfully or in a discussion. If the act of bullying is a serious act that can be categorized as a criminal act, then the action can be processed with legal channels and the child who commits the crime of bullying can only be sentenced to half of the applicable sentence.

The case of bullying itself has not been regulated in specific laws or regulations governing it, but it will take issue from the case. Because bullying cases are broad in nature, bullying can be included in cases of persecution, extortion, humiliation, oppression, etc. that have been regulated in the Criminal Code.

The acts of bullying that have been regulated in the Criminal Code are as follows:

- **Insult**
  - Article 310 reads "Whoever intentionally attacks a person's honor or reputation by accusing something, intending to make it known to the public, is threatened because of pollution with a maximum imprisonment of 9 (nine) months or a maximum fine of Rp. 4500.00 (four thousand five hundred rupiah) ".[23]
  - Article 315 reads "Any deliberate insult which is not a defacement or written defacement committed against a person, either publicly orally or in writing, or in front of the person himself orally or in action, or with a letter sent to him, is threatened because minor insults with imprisonment of no more than 4 (four) months 2 (two) weeks or a maximum fine of Rp. 4500.00 (four thousand five hundred rupiah) ".[24]
- **Persecution (Article 351)[25]**
  - Persecution is threatened with a maximum imprisonment of 2 years 8 months or a maximum fine of Rp. 4500.00 (four thousand five hundred rupiah).
  - If the act results in serious injuries, the guilty person will be subject to a maximum imprisonment of 5 (five) years.
  - Explotation and Threats

Exploitation and Threats

- Article 368 reads "Whoever has the intention to benefit themself or another person unlawfully, compels someone with violence or threat of violence, to give something of goods, wholly or partly belonging to that person or other person, or to make a debt or write off receivables, threatened with persecution, with a maximum imprisonment of 9 (nine) years ".[26]

  The Criminal Code only regulates bullying crimes committed by ordinary people who act as legal subjects and can be held responsible, whereas bullying crimes committed by children can be convicted based on specific laws namely Law Number 35 of 2014. Because children are a young nation's successors generation who need to get special protection when victims of crime, because the process in justice between adults and child offenders is different. Law No. 35 of 2014 states that "Protection of children is all activities to guarantee and protect children and their rights so that they can live, grow and develop, and participate optimally in accordance with human dignity and dignity, and receive protection from violence and discrimination."

Bullying is also regulated in Law Number 35 of 2014 concerning Child Protection:[27]

- Article 54 reads "Children in and within the school environment must be protected from acts of violence committed by teachers, school managers or their friends in the school concerned, or other educational institutions.
- Article 76A reads:
  - Everyone is prohibited from treating children in a discriminatory manner which results in the child experiencing losses, both material and moral, which hinders their social functioning.
  - Treat children with disabilities in a discriminatory manner.

[22] Undang-Undang Dasar Republik Indonesia Pasal 28I Angka 1.
[23] Kitab Undang-Undang Hukum Pidana Pasal 310
[24] Ibid,Pasal 315.
[25] Ibid,Pasal 351.
[26] Ibid, Pasal 368
[27] Undang-Undang Republik Indonesia Nomor 35 Tahun 2014 tentang Perubahan Atas Undang-Undang Nomor 23 Tahun 2002 tentang Perlindungan Anak

- Article 76C reads "Everyone is prohibited from placing, allowing, committing, committing, or participating in violence against children.
- Article 80 reads:
  Every person who violates the provisions referred to in Article 76C, shall be sentenced to a maximum imprisonment of 3 (three) years for 6 (six) months and / or a maximum fine of Rp. 72,000,000.00 (seventy-two million rupiah).
  - In this case the child as referred to in paragraph (1) is seriously injured, then the actor is sentenced to a maximum imprisonment of 5 (five) years and / or a maximum fine of Rp 100,000,000.00 (one hundred million rupiah).
  - In the case of a child as referred to in paragraph (2) dead, the actor is sentenced to a maximum imprisonment of 15 (fifteen) years and / or a maximum fine of Rp3,000,000,000.00 (three billion rupiah).
  - Punishment is added by one third of the provisions as referred to in paragraph (1), (2) and paragraph (3) if the parent is torturing

While the law about cyber bullying cases is regulated in law number 19 of 2016 concerning Information and Electronic Transactions:[28]

- Article 27 paragraph 3 reads "Everyone intentionally and without the right to distribute and / or transmit and / or make access to Electronic Information and / or Electronic Documents that have content of insult and / or mock good name.
- Article 27 paragraph 4 reads "Everyone intentionally and without the right to distribute and / or transmit and / or make access to Electronic Information and / or Electronic Documents that have contents of exploitation and / or threats.

2. Bullying Resolve

Bullying is categorized as a criminal offense, so the mitigation efforts are also no different from handling crime in general. Bullying prevention efforts can use a penal policy (criminal law) and non-penal policy (outside the criminal law). The penalties policy is used when a criminal act has occurred and through a legal process in court. Penal policy in tackling bullying can use the existing laws and regulations in the Criminal Code. While resolve efforts in a non-criminal manner are efforts to prevent bullying.

Efforts to prevent bullying can be carried out when the bullying has not occurred. The most effective effort to prevent bullying in children is the family environment. The family is the first stronghold because it has blood relations and is the closest person. The role of parents is very necessary to prevent bullying done by children. Parents must create a conducive family environment for healthy mental development for children with character education that is full of gentleness.

Parents themselves must get along with each other because it will be a real example for children. A child who is well educated will not disappoint his parents. Whereas children who are educated violently and parents who fight all day, the impact is that the child will bullying others and the child may become a victim of bullying who does not dare to report.

Family communication has a large role in preventing bullying behavior for children. Family communication is a major factor in bullying committed by children. Even though family communication is the main and first foundation to save children from this bullying behavior. The factor that causes bullying behavior in family communication is improper parenting style by parents to their children. Good parenting style is what can prevent children from bullying behavior.[29]

School is a place where bullying often occurs. Efforts to prevent bullying in the school environment include: providing information to students about bullying, efforts to control students' emotions; providing counseling services for students at school; the existence of socialization, provision of counseling about law, religious norms, moral cultivation; prepare students who are free from bullying, both as perpetrators and victims of bullying; foster empathy for students.

3. Legal Protection for Victims and Children of Bullying Actor

Legal protection against children is an attempt to create conditions in which children can exercise their rights and obligations. The state gives attention and protection to children as parents do to their children, so the handling of children who are in conflict with the law must also be done in the best interests of the child and adheres to the values of Pancasila.

[28] Undang-Undang Republik Indonesia Nomor 19 Tahun 2016 tentang Perubahan Atas Undang-Undang Nomor 11 Tahun 2008 tentang Perubahan atas Undang-Undang Nomor 11 Tahun 2008 tentang Informasi dan Transaksi Elektronik.

[29] Janitra PA, Prasanti D, 2017, Komunikasi keluarga dalam pencegahan perilaku bullying bagi anak, *Jurnal Ilmu Sosial Mamangan*, Vol.6 No.1, pp.23-33

Therefore, the provisions regarding the administration of justice for children are carried out specifically.[30]

There are two forms of protection for students from bullying: first, prevent bullying. Second, protection against bullying victims. In addition to the protection of students who are preventative in nature, there is also the protection of students who are of bullying victims.[31]

Overcoming the problem of bullying is inseparable from the government's role in implementing policies towards protecting students at school from bullying behavior contained in Law Number 35 of 2014 concerning amendments to Law Number 23 of 2002 concerning child protection. In Law Number 35 Year 2014 Article 54 states that children within and within the education unit must obtain protection from acts of physical, psychological, sexual and other crimes committed by educators, education personnel, fellow students and other parties.[32] Protection as referred to in paragraph (1) is carried out by educators, education personnel, government officials, and / or the public. Thus children as victims of bullying must receive legal protection.

Law of the Republic of Indonesia Number 11 Year 2012 Article 1 number 1 that a child is someone who is not yet 18 (eighteen) years old, including children in the womb.[33] Furthermore, a child as a victim according to Article 1 number 4 of the Law on the Criminal Justice System for Children, is a "child who is a crime victim, hereinafter referred to as a Victim Child is a child who is not yet 18 (eighteen) years of age who suffers physical, mental, and / or material loss caused by a criminal offense.[34] Whereas children as actors are children who are in conflict with the law, who are 12 (twelve) years old, but not yet 18 (eighteen) years old who are suspected of committing criminal offenses (Article 1 number 3 of the Law on the Criminal Justice System for Children).[35] As well as children who are witnesses of criminal acts (witness children) article 1 number 5 of the Law on the Juvenile Justice System.[36]

Special forms of government responsibility for children who are bullying victims provide rehabilitation, protection and legal assistance efforts contained in Law Number 23 of 2002 Article 64 Paragraph (3) jo. Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection, namely:[37] rehabilitation efforts both within the Institute and outside the Institute; efforts to protect from notification of identity through mass media and to avoid labeling; providing safety guarantees for victim witnesses and expert witnesses both physically, mentally and socially; provide accessibility to get information about case developments.

The Child Protection Act provides special protection guarantees for child victims of crime (acts of bullying) and children who are dealing with the law. Law Number 35 Year 2014 Article 59A, namely:[38] states that children in conflict with the law are included in the category of children who need special protection in the form of: prompt treatment, including treatment and / or physical rehabilitation, psychological, and social, as well as prevention of diseases and other health disorders; psychosocial assistance from treatment to recovery; providing social assistance for children from disadvantaged families; and providing protection and assistance during each court process.

The rights of children in conflict with the law are regulated in Law Number 11 of 2012 Article 3 concerning the Criminal Justice System for Children as follows:[39] humanely necessary by paying attention to needs according to their age; separated from adults; obtain legal assistance and other assistance effectively; carry out recreational activities; freedom from torture, punishment or other cruel, inhuman and degrading treatment; not sentenced to death sentence or life imprisonment; not be arrested, detained or imprisoned, except as a last resort and in the shortest amount of time; obtain an objective, impartial trial and trial before the court of children; the identity is not published; obtain assistance from parents / guardians and people trusted by children; get social advocacy; obtain a private life; obtain sensibility,

[30] Rocheti N, 2008, Model restorative justice sebagai alternative penanganan bagi anak delinkeun di Indonesia. *MMH*, Vol.37 No.4, pp.239
[31] Muhammad, 2009, Aspek perlindungan anak dalam tindak kekerasan (bullying) terhadap siswa korban kekerasan di sekolah (studi kasus di SMK Kabupaten Banyumas), *Jurnal Dinamika Hukum*, Vol.9 No.3, pp.230-236.
[32] Undang-Undang Republik Indonesia Nomor 35 Tahun 2014 Pasal 54
[33] Undang-Undang Republik Indonesia Nomor 11 Tahun 2012 Pasal 1 Angka 1
[34] *Ibid*, Pasal 1 Angka 4.
[35] *Ibid*, Pasal 1 Angka 3
[36] *Ibid*, Pasal 1 Angka 5
[37] Undang-Undang Republik Indonesia Nomor 35 Tahun 2014 Pasal 64
[38] *Ibid*, Pasal 59 A.
[39] Undang-Undang Republik Indonesia Nomor 11 Tahun 2012 Pasal 3

especially for children with disabilities; get an education; obtain health services; and obtain other rights in accordance with the provisions of the legislation

The right of children to obtain legal assistance in the Juvenile Justice System Law allows children involved in criminal offenses to obtain legal assistance without questioning the types of criminal acts committed

Have been done. Law Number 11 of 2012 concerning the Criminal Justice System for Children determines that children are entitled to legal assistance at every stage of the investigation, both in the investigation, investigation, guiding, and examination stages in the court.[40]

F. CONCLUSION

Bullying is a behavior towards someone to humiliate others and will harm everyone if it is not handled properly. Bullying behavior will have a psychological impact on the victims. Factors causing bullying in children include family factors, personality factors, and environmental factors. Efforts to combat bullying in Indonesia use a penal policy (criminal law) and a non-penal policy (excluding criminal law). Law Number 35 of 2014 concerning amendments to Law Number 23 of 2002 concerning Child Protection provides guarantees of protection for victims of bullying and child bullying. Furthermore, in Act Number 11 of 2012 concerning the Justice System for Child Protection to regulate criminal acts faced by children in Indonesia.

G. REFERENCES

Alsaker FD &Nagele C, 2008, Bullying in kindergarten and prevention, In W. Craig, & D. Pepler (Eds.), An Internasional Perspectiveon Understanding and Addressing Bullying, *PREVNetSeries*, Volume I (pp.230-252). PREVNet: Kingston, Canada.

Catherine R, Southand Jane Wood, 2006, Bullying in Prisons: the Importance of Perceived Social Status, Prisonization and Moral Disengagement, *Aggressive Behavior*, Vol.32, pp.490-501.

Chakrawati, F, 2015, *Bullying Siapa Takut?*, Solo, TigaSerangkai, Hlm 11.

Coloroso B, 2007, *The Bully, The Bullied, and The Bystander*, New York: Harpercollins

Ichsan Tanzil, Sambas Nandang, 2018, Penegakan hukum terhadap pelaku tindak pidana bullying berdasarkan undang-undang nomor 35 tahun 2014 perubahan atas undang-undang No.23 tahun 2002 tentang perlindungan anak jo. undang-undang nomor 11 tahun 2012 tentang sistem peradilan pidana anak, *Prosiding Ilmu Hukum*, Vol.4 No.1, pp. 373-380.

Janitra PA, Prasanti D, 2017, Komunikasi keluarga dalam pencegahan perilaku bullying bagi anak, *Jurnal Ilmu Sosial Mamangan*, Vol.6 No.1, pp.23-33.

Kitab Undang-Undang Hukum Pidana Pasal 310.

Kitab Undang-Undang Hukum Pidana Pasal 315.

Kitab Undang-Undang Hukum Pidana Pasal 351.

Kitab Undang-Undang Hukum Pidana Pasal 368.

KPAI, 2016, Data kasus berdasarkan klaster perlindungan anak tahun 2011-2016,Diakses pada 24 Desember 2019 dari https://www.bankdata.kpai.go.id/tabulasi-data/data-kasus-per-tahun/data-kasus-berdasarkan-klaster-perlindungan-anak-2011-2016.

Matthiesen SB &Einarsen S, 2010, Bullying in the workplace: definition, prevalence, antecedents and consequences, *Internasional Journal of Organization Theory and Beharior*, Vol.13 No.2, pp.202-248.

Moutappa M, et al, (2004), Social Network Predictors of Bullying and Victimization. *Adolescence Journal.*Vol.39 No.154, pp. 315-336.

Muhammad, 2009, Aspek perlindungan anak dalam tindak kekerasan (bullying) terhadap siswa korban kekerasan di sekolah (studi kasus di SMK Kabupaten Banyumas), *Jurnal Dinamika Hukum*, Vol.9 No.3, pp.230-236.

Nathan A. Bowlingand Terry A. Beehr, 2006, Workplace harassment from the victim'sperspective: a theoretical model and meta-analysis, *Journal of Applied Psychology*, Vol.91 No.5, pp. 998-1012.

Ostvik Kristina, Rudmin Floyd, 2001, Bullying and Hazing Among Norwegian Army Soldiers: Two Studies of Prevalence, Context, and Cognition, *MilitaryPsychology*, Vol.13 No.1, pp.17-39.

Priyatna A, 2010, *Lets End Bullying: Memahami, Mencegah dan Mengatasi Bullying*, Jakarta: PT.Elex Media Komputindo.

[40] Ibid.

Repp DA, 2016, Cyber-bullying sebagai suatu kejahatan teknologi informasi ditinjau dari undang-undang nomor 11 tahun 2008 tentang informasi dan transaksi elektronik, *Lex Privatum*, 4(7):61-68.

Rocheti N, 2008, Model restorative justice sebagai alternative penanganan bagi anak delinkeun di Indonesia. *MMH*, Vol.37 No.4, pp.239.

Salmivalli Christina, 2009, Bullying and the peergroup; a review, Aggression and Violent Behavior, Vol.15, pp.112-120.

Sejiwa, 2008, *Bullying: Mengatasi Kekerasan di Sekolah dan Lingkungan Sekitar Anak*. Jakarta: PT Grasindo.

Susanti E, 2016, Kajian sosiologi hukum terhadap problematika bullying dalam dunia pendidikan, *Jurnal Keadilan Progresif*, Vol.7 No.1, pp.1-18.

Totura CMW, 2003,*Bullying and victimization in middle school: The role of individual characteristics, family functioning, and school contexts*. University of South Florida.

Undang-Undang Dasar Republik Indonesia Pasal 28I Angka 1.

Undang-Undang Republik Indonesia Nomor 11 Tahun 2012 Pasal 1 Angka 1.

Undang-Undang Republik Indonesia Nomor 11 Tahun 2012Pasal 1 Angka 4.

Undang-Undang Republik Indonesia Nomor 11 Tahun 2012 Pasal 1 Angka 3.

Undang-Undang Republik Indonesia Nomor 11 Tahun 2012 Pasal 1 Angka 5.

Undang-Undang Republik Indonesia Nomor 11 Tahun 2012 Pasal 1 Angka 1.

Undang-Undang Republik Indonesia Nomor 11 Tahun 2012 Pasal 1 Angka 4.

Undang-Undang Republik Indonesia Nomor 11 Tahun 2012 Pasal 3.

Undang-Undang Republik Indonesia Nomor 19 Tahun 2016 tentang Perubahan Atas Undang-Undang Nomor 11 Tahun 2008 tentang Perubahan atas Undang-Undang Nomor 11 Tahun 2008 tentang Informasi dan Transaksi Elektronik.

Undang-Undang Republik Indonesia Nomor 35 Tahun 2014 Pasal 54.

Undang-Undang Republik Indonesia Nomor 35 Tahun 2014 Pasal 59 A.

Undang-Undang Republik Indonesia Nomor 35 Tahun 2014 Pasal 64.

Undang-Undang Republik Indonesia Nomor 35 Tahun 2014 tentang Perubahan Atas Undang-Undang Nomor 23 Tahun 2002 tentang Perlundungan Anak.

Undang-Undang Republik Indonesia Tahun 1995 Pasal 28B.

Wiyani, NA, 2012, *Save Our Children from School Bullying*. Jogjakarta: Ar-Ruzz Media.

APPLICATION OF LEGAL SANCTIONS ON REJECTION OF MANDATORY IMMUNIZATION AS A LAW-UPDATING EFFORTS TO INCREASE THE DEGREE OF COMMUNITY HEALTH IN INDONESIA

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The right to obtain immunization is protected by Law number 36 of 2009 concerning Health to prevent disease. Immunization rights for children are contained in: Article 130, the contents of which the government is obliged to provide complete immunization to every baby and child and Article 132 paragraph three states that every child has the right to obtain basic immunization following with applicable regulations to prevent the occurrence of diseases that can be avoided through immunization. Children are priceless assets both from a social, cultural, economic, political, legal perspective, as well as the perspective of the sustainability of a generation of families, ethnicities and nations. Therefore, children need to be protected from things that interfere with their growth and development. Child protection is an effort that aimed to prevent, rehabilitate, and embark the deceive children who experience acts of mistreatment, exploitation, and neglect to ensure the survival and development of children naturally, physically, mentally, and socially. One of the factors that influence children's growth and development is immunization. Neglected children are children who are not properly get their needs, whether physically, mentally, spiritually, or socially. Therefore, if children not get immunized, it could be categorized as child neglect. This is due to children not meeting their physical and mental needs, 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 schooling (Italy), Fines (Germany), and Deductions (Australia). In Indonesia, the refusal of immunization can be categorized as child neglect, so it can be subject to sanctions in accordance with Law No. 23 of 2002 concerning Child Protection article 77 and Law No. 35 of 2014 concerning child protection in articles 76 letters a and b and Article 77 letter b. The value of immunization is divided into three categories namely individual, social and benefits in supporting the national health system. Individually, if the child has been immunized, 80% -95% will be protected from malignant infectious diseases.

Keywords: Immunization, Child Protection, Child Abandonment, Legal Sanctions

A. INTRODUCTION

Immunization is an attempt to provoke or increase a person's immunity against a disease, so that if get exposed to the disease it will not developed in sickness or only experience a mild illness. Immunization is a program organized by the government to eradicate or suppress diseases that can be prevented by immunization. Children who have been immunized can be protected from a variety of dangerous diseases, those are tuberculosis, tetanus, hepatitis B, pertussis, measles, polio, inflammation of the lining of the brain, and pneumonia. With immunization it is hoped that children will avoid the disease above. [1] Impacts if immunization is not carried out, can cause Extraordinary Events and can even cause an Outbreak, if outbreak happens, it mean the treatment is unsuccessful.

Immunization rejection is caused by fear of side effects such as fever obtained after immunization. The controversy over the rejection and acceptance of vaccines is one of the causes of the outbreak of the disease. The widespread anti vaccine movement in the world is making diseases that no longer exist, re-emerge. Therefore, some countries try to fight it by applying strict rules on anyone who prevents children from getting vaccinated. For example in the country of Uganda, if a parent who has a toddler does not carry out a complete vaccination is threatened with imprisonment for six months. [2] What about in Indonesia? Until now there has been no strict application of the law, as in some countries an outbreak has occurred.

[1] Kementerian Kesehatan RI. Profil Kesehatan Indonesia Tahun 2015. Jakarta: Kementerian Kesehatan RI. 2016

[2] https://www.bbc.com.10/2017

The application of legal sanctions for violators is an important part of achieving a government program. The immunization program is included in public policy. As the definition of public policy is a decision made by the government or governmental institutions to overcome certain problems, to carry out certain activities or to achieve certain objectives relating to the interests and benefits of the people.[3] In Permenkes number 12 of 2017 concerning the implementation of immunization, the Immunization Program is an immunization that is required to someone as part of the community in order to protect the person concerned and the surrounding community from diseases that can be prevented by immunization.[4]

Provision of immunity (Immunization) is one of the health services that is basic health care to prevent and reduce infant mortality. The right to obtain immunization is protected by Law number 36 of 2009 about Health to prevent disease. Immunization rights for children are contained in: Article 130 that said the government obliged to provide complete immunization to every baby and child and Article 132 paragraph three states that every child has the right to obtain basic immunization in accordance with applicable regulations to prevent the occurrence of diseases that can be avoided through immunization.[5]

Based on the Law of the Republic of Indonesia number 23 of 2002 concerning child protection, concerning: Children's rights and obligations 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."[6]

The physical, mental, spiritual and social needs of children must be fulfilled so that children can grow and develop optimally according to their genetic potential. Optimal growth and development can be carried out optimally if the child is protected from things that could interfere in the process. Disruption of children's growth and development can be categorized as neglect of children (abandoned children are children who do not meet their natural, physical, mental, spiritual, or social needs).[7] Based on the research there is a significant relationship between basic immunization with the growth and development of infants.[8]

B. PROBLEM STATEMENT

Based on the background above, the authors make the formulation of the problem as follows:

1. Why do legal sanctions against mandatory immunization according to Indonesian laws need to be applied?
2. How to apply the legal sanctions for refusing mandatory immunization based on the applicable law in Indonesia?
3. What is meant by the application of statutory sanctions against compulsory immunization based on the applicable law in Indonesia?

C. LITERATURE REVIEW

Growth and development is the right of children, the most important in achieving appropriate genetic potential they have. The right to obtain immunization is protected by Law number 36 of 2009 concerning Health to prevent disease. Immunization rights for children are contained in: Article 130 which contains the government obliged to provide complete immunization to every baby and child and Article 132 paragraph three states that every child has the right to obtain basic immunization in accordance with applicable regulations to prevent the occurrence of diseases that can be avoided through immunization.[9]

In Chapter XA on Human Rights, Article 28A: "Everyone has the right to live and has the right to defend his life and lives." Article 28B paragraph 2: "Every child has the right to survival, growth and development as well as the right to protection from violence and discrimination." And Article 28J paragraph 1: "Everyone must respect the human rights of others in the orderly life of the community, nation and state."[1010]

The rules above explain that the right to life is a basic human right. Thus, immunization is the right of children to be able to live well, avoid preventable diseases and enjoy health as their human rights. In

[3] Syarif Budiman. Analisis Hubungan Antara Hukum Dan Kebijakan Publik: Studi Pembentukan Uu No. 14 Tahun 2008 . Jikh Vol. 11 No. 2 Juli 2017: 109 - 119

[4] Peraturan Menteri Kesehatan Republik Indonesia Nomor 12 Tahun 2017 Tentang Penyelenggaraan Imunisasi

[5] Undang Undang nomor 36 tahun 2009 tentang Kesehatan

[6] Undang-Undang Republik Indonesia nomor 23 tahun 2002 tentang perlindungan anak

[7] Undang-Undang No. 35 Tahun 2014 Pasal 1 ayat 6 tentang pembaruan perlindungan anak

[8] Melisa Citra K, Sefti R, Yolanda B. Hubungan Pemberian Imunisasi Dasar Dengan Tumbuh Kembang Pada Bayi (0 – 1 Tahun)Di Puskesmaskembes Kecamatan Tombulu Kabupaten Minahasa . Ejournal Keperawatan (E-Kp) Volume 4 Nomor 1, Februari 2016)

[9] Undang-Undang Republik Indonesia Nomor 36 Tahun 2009 Tentang Kesehatan

[10] Undang Undang Dasar 1945

our lives, aside from human rights we have, there are also other people's human rights. In conclusion the decision to give immunizations to children is not merely not only protect our human right, but also tother children.

In the case of applying the law to the refusal of compulsory immunization, there are several articles of the Act that can be used, namely:

1. Law No. 4 of 1979 concerning Child Welfare [11] article 9: "Parents are the first to be responsible for the realization of children's welfare both spiritually, physically and socially." Article 10 (1) "Parents who have been proven to neglect their responsibilities as referred to in Article 9, resulting in obstacles to the growth and development of a child, his fostering authority as a parent may be revoked of his child. In that case the person or body is appointed as guardian ". And article 11 (1): "Children's welfare efforts consist of efforts to foster, develop, prevent and rehabilitate."
2. Law No. 23 of 2002 concerning Child Protection [12] article 77: "Everyone who intentionally acts: a. discrimination against children which results in the child experiencing losses, both material and moral, thereby hampering his social functioning; or b. neglect of children which results in the child experiencing pain or suffering, whether physical, mental, or social, c. convicted with a maximum imprisonment of 5 (five) years and / or a maximum fine of Rp 100,000,000.00 (one hundred million rupiah). "Which is stated in Law No. 35 of 2014 Amendment to Law Number 23 of 2002 concerning Child Protection 16: 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 referred to in Article 76B, shall be sentenced to a maximum imprisonment of 5 (five) years and /or a maximum fine of Rp 100,000,000.00 (one hundred million rupiah). "According to health law expert Dr. M. Nasser SpKK, D.Law, the above article can be used for the application of the law against rejection of immunization[13]
3. Disease that can be prevented by immunization is a contagious disease and the immunity rate for this disease is low. Because of the high contagious nature of this Mandatory disease and if accompanied by low immunity immunity, due to refusing or not being immunized, the disease easily has the potential to become an outbreak and even become an epidemic, if the outbreak is not successful. In Law No. 4 Infectious Disease Outbreaks stated in Article 5 (1) Efforts to prevent outbreaks include: c. prevention and thickening; (In the explanation of the article it is said prevention and immunization are actions taken to provide protection to people who have not been ill, but have a risk of contracting the disease (concluded that these actions are immunized)), if there is a rejection / hinder / omission threatened by Article 14 (1) Anyone who intentionally blocks outbreaks of epidemics as stipulated in this Law, is threatened with imprisonment for 1 (one) year and / or a maximum fine of Rp 1,000,000 (one million rupiah) . (2) Anyone who, due to his negligence, obstructs the implementation of epidemics as regulated in this Law, is threatened with imprisonment for a maximum of 6 (six) months and / or a maximum fine of Rp. 500,000.- (five hundred thousand rupiah). (3) The criminal act referred to in paragraph (1) is a crime and the criminal act referred to in paragraph (2) is a violation.[14]
4. Which is stated in Law No. 35 of 2014 Amendment to Law Number 23 of 2002 Concerning Child Protection: Article 76B “Every person 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 referred to in Article 76B, shall be sentenced to a maximum imprisonment of 5 (five) years and / or a maximum fine of Rp 100,000,000.00 (one hundred million rupiah)."[15]

[11] Undang undang no 4 tahun 1979 tentang Kesejahteraan Anak

[12] Undang undang no 23 tahun 2002 tentang Perlindungan Anak

[13] dr. M. Nasser SpKK, D.Law. Pendapat Pakar Hukum Kesehatan. Wawancara 31-12-2018

[14] Undang undang no 4 Wabah Penyakit Menular

[15] Undang Undang no 35 tahun 2014 Perubahan Atas Undang-Undang Nomor 23 Tahun 2002 Tentang Perlindungan Anak

D. RESEARCH METHODS

The research method in this journal uses normative legal research, which mean, this research conducted by examining literature or secondary data only.[16] Normative legal research is legal research that places the law as a norm system. The norm system referred to is regarding the principles, norms, rules of the laws and regulations, court rulings, agreements and doctrines (teachings).[17]

The legal theories used in this study are:

1. Theory of Authority. The term authority theory is derived from the English translation from authority of theory, the term used in the Dutch language, namely, theorie van het gezag, while in the German language, theorie der autorität. The following is presented the concept of the authority theory of H.D Stout quoted by Ridwan HB. Authority is "the whole rules relating to the acquisition and use of governmental authority of legal subjects by the public in public legal relations".[18]
2. Theory of Protection. The term legal protection theory comes from English, namely, legal protection theory, whereas in Dutch it is called theorie van de wttelijke bescherming, and in German it is called theorie der rechtliche schutz. Schematically protection is: a place of refuge or things (actions) protect. Protecting is causing or causing protection. The meaning of protection includes: (1) putting oneself away from being seen, (2) hiding or (3) asking for help. The notion of protecting includes: (1) closing so as not to be seen or seen, (2) guarding, caring for, or maintaining, (3) saving or giving help.[19] Maria Theresia Geme defines legal protection as: "Relating to the actions of the state to do something by (applying state law exclusively) in order to provide certainty of the rights of a person or group of people"[20]
3. Rule of law theory. The theory of the rule of law, which in English, is called the state theory of law, whereas in the Dutch language, it is called the staat rechtstheorie consists of two syllables, which include: theory and the rule of law. Grammatical understanding of theory is:
   1. Opinions raised as information about an incident or phenomenon; or
   2. General principles and laws which form the basis of an art or science; or
   3. Opinions, ways and rules for doing something[21]

Bernhard Limbong put forward two definitions of two definitions of rule of law, which include:

> "Constitutional State in the formal mean (narrow / classic) and the Constitutional State in the material mean. Constitutional State in formal mean (narrow / classical) is a state whose work is only to guard against violations of peace and public interest, such as those stipulated in written law (the law), which is only responsible for protecting lives, objects, or passive citizens' rights, not interfering in the economy or preserving people's welfare because what applies in the economic field is the principle of laissez faire laiesizealler.
>
> The state in the material mean (broad or modern), that is, the country which is well known as the welfare state, is tasked with maintaining security in the broadest sense of the word namely social security organizing public welfare, based on legal principles that are true and fair so that rights rights of citizens are truly protected "[22].

Bintan R. Saragih presents the concept of the rule of law. He said the rule of law was

> "As a country where the actions of the government and its people are based on the law to prevent arbitrary actions on the part of

[16] Soerjono Soekanto dan Sri Mamuji, Penelitian Hukum Normatif, suatu tinjauan singkat. (Jakarta : Raja Grafindo Persada, 2010) , hlm. 13-14

[17] Mukti Fajar ND dan Yulianto Achmad, Dualisme penelitian hukum Normatif dan Hukum Empiris, (Yogyakarta : Pustaka Pelajar, 2010), hlm. 34

[18] Ridwan HR, hukum administrasi negara, (Jakarta : Raja Grafindo Persada, 2008) hlm. 110.

[19] Departemen Pendidikan kebudayaan, 1889, Op. Cit., hlm.526

[20] 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

[21] Departemen Pendidikan dan Kebudayaan. *Kamus Besar Bahasa Indonesia*, (Jakarta: Balai Pustaka, 1989), hlm. 932.)

[22] Bernhard Limbong. Pengadaan Tanah untuk Pembangunan Regulasi Kompensasi Penegakan hukum, (Jakarta: CV Rafi Maju Mandiri, 2001), hlm. 49

> the government and people's actions carried out according to their own will"[23]

In principle, legal theory is:

> "Opinions from experts who study that every action, whether carried out by government administrators or the people must be based on applicable laws and regulations. And it is not permissible to conduct vigilantism ".[24]

E. ANALYSIS AND DISCUSSION

1. Health Services

Law of the Republic of Indonesia no.36 of 2009, concerning health, article 1 number 1: health is a healthy condition, both physically, mentally, spiritually, and socially that shows people to live productively socially and economically. From this limitation, it is clear that the health aspect or healthy dimension is not only physical, mental, and social, but also one more aspect, namely economic (economically productive). To realize the degree of health that has these four aspects required health resources. Resources in the field of health according to this law are all forms of funds, personnel, medical supplies, pharmaceutical preparations and medical devices as well as health service facilities and technology that are used to carry out health efforts undertaken by the government, local government and or the community.[25]

Law of the Republic of Indonesia, article 1 number 7: health service facility is a tool and / or place used to provide health services, both promotive, preventive, curative and rehabilitative carried out by the government, regional government and / or the community. Article 1 number 11: health effort is every activity and / or series of activities carried out in an integrated, integrated and balanced manner to maintain and improve the degree of public health in the form of disease prevention, health promotion, treatment of diseases, and health recovery by the government and / or community .

Article 1 number 12: promotive health service is an activity and / or series of health service activities that prioritizes health promotion activities. Article 1 number 13: preventive health service is an activity to prevent a health problem / disease. Article 1 number 14: curative health service is an activity and / or series of treatment activities aimed at healing diseases, reducing patients due to illness, controlling disease, or controlling disability so that the quality of the patient can be maintained as optimal as possible.[26]

Article 1 number 12: promotive health service is an activity and / or series of health service activities that prioritizes health promotion activities. Article 1 number 13: preventive health service is an activity to prevent a health problem / disease. Article 1 number 14: curative health service is an activity and / or series of treatment activities aimed at healing diseases, reducing patients due to illness, controlling disease, or controlling disability so that the quality of the patient can be maintained as optimal as possible.

The right to health, as stipulated in law no.36 of 2009 concerning health. Article 4: Everyone has the right to health. Article 5 states in paragraph: a. Everyone has the same right to gain access to resources in the health sector. b. Everyone has the right to obtain safe, quality and affordable health services c. Every person has the right to be independent and have the responsibility to determine for themselves the health services they need. Article 6 states: everyone has the right to a healthy environment for attaining a degree of health.[27]

2. Child Protection

Children are in fact a priceless treasure both from the perspective of social, cultural, economic, political, legal, as well as the perspective of the sustainability of a generation of family, ethnicity and nation. The aspect from social perspective, children is the dignity of the family it depends on the attitudes and behavior of children to excel, and the culture of children is a treasure and wealth that must be preserved as well as a symbol of family fertility, from politics the child is the successor to the tribe, nation, and economy in terms of law, children have a position and strategic position before the law, not only as a successor and heir to the family but as part of legal subjects with all the fulfillment of the needs for children who get legal guarantees.[28]

John Lock said that children are still clean and sensitive to the stimuli coming from their environment. Children are also not the same as adults,

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[23] Pataniari Siahan, *Politik hukum Pembentukan Undang-Undang Pasca Amandemen UUD 1945*, (Jakarta: Konpress, 2012), hlm. 23

[24] Salim HS, Erlies SN. *Penerapan Teori Hukum Pada Penelitian Disertasi dan Tesis buku Ketiga*. (Depok: Rajawali Pers, 2018), hlm.4

[25] Hayriza Adnani, Buku ajar ilmu kesehatan masyarakat, Nuha medika, yogjakarta, oktober, 2011

[26] M.sofyan lubis,mengenal hak konsumen dan pasien, cetakan 1,pustaka yudistira, yogyakarta, 2009, hal 38

[27] Undang-Undang Republik Indonesia Nomor 36 Tahun 2009 Tentang Kesehatan)

[28] Emeliana Krisnawati. *Aspek Hukum Perlindungan Anak*, (CV. Utama, Bandung, 2005), hlm. 5

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 by the examples they receive from compelling rules.[29]

The definition of a child is regulated in Article 1 number 1 of Law 35 of 2014 concerning Protection of Children which reads as follows: "A child is someone who is not yet 18 (eighteen) years old, including children who are still in the womb" Each of the legislation regulate separately regarding child criteria. Children's criteria affect the legal position of children as legal subjects. In Indonesian law there is pluralism regarding age restrictions, which causes each legislation to regulate separately the criteria regarding children.[30]

Child protection is an effort aimed at preventing, rehabilitating,and empowering children who experience acts of mistreatment, exploitation, and neglect in order to ensure the survival and development of children naturally, physically, mentally, and socially.[31]

In relation to the issue of legal protection, the 1945 Constitution clearly states that the State provides protection to the poor and abandoned children. The problem of poverty is increasingly becoming a disease that continues to emerge in this country. The crime that happened to children in this country is the main factor caused by poverty, where this poverty factor has a major contribution in the act of neglect of children committed by biological parents. In principle, child protection is based on Law No. 35 of 2014 carried out based on the 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 involving children carried out by the government, society, legislative bodies and the judiciary, the interests of the child must be considered first.[32]

3. Child Abandonment

Neglected children are children whose parents neglecting their obligations so that the needs of children are not naturally fulfilled either spiritually, physically, or socially. The understanding of neglected children is stated in Law No. 35 of 2014 Article 1 paragraph 6 that: "Neglected children are children who do not meet their natural needs, whether physical, mental, spiritual, or social"[33]

The case of neglect carried out by biological parents to their children when viewed from the legal side is an act that belongs to a crime, because its obvious the victim's parents abandoned the child, and this act categorized as a criminal. Law no. 23 of 2002 concerning Child Protection. The laws governing child protection, namely Law No. 35 of 2014 and also the Criminal Code, are explained about the threat of imprisonment and fines. In Law No.35 of 2014 concerning child protection in articles 76 letters a and b and article 77 letter b concerning criminal provisions which states that: a. treat children in a discriminatory manner which results in the child experiencing losses, both material and moral, which hinders his social functioning. b. Everyone is prohibited from placing, allowing, involving, ordering to involve the child in situations of mistreatment and neglect. Article 77 letter b; c. Any person who violates the provisions referred to in Article 76B, is convicted with a criminal offense. Prison for a maximum of 5 (five) years and / or a maximum fine of Rp 100,000,000.00 (one hundred million rupiah) .[34]

4. Immunization and child development.

The benefits of immunization are not only felt by the government by decreasing morbidity and mortality from diseases that can be prevented by immunization, but also :

- **a.** For children. Prevent suffering caused by illness, and possible disability or death.
- **b.** For family. Eliminating anxiety and treatment psychology if the child is sick. Encourage the formation of a family if parents are sure they will have a comfortable childhood. This encourages the preparation of a planned family, to be healthy and have a certain quality.
- **c.** For the country. Improving the level of health creates a strong and resourceful nation to continue the country's development.[35]

Vaccine values are divided into three categories namely individual, social and benefits in supporting

[29] Irma S. Soemitro, *Aspek Hukum perlindungan Anak*. (Bumi Aksara. Jakarta, 1990). hlm. 19
[30] Darwan Prints, *Hukum Anak Indonesia,(* Bandung. PT. Citra Aditya Bakti, 2002), hlm 2
[31] Sholeh Soeady dan Zulkahir. *Dasar Hukum Perlindungan Anak.* (Jakarta Novindo Mandiri, 2001), hlm. 4
[32] Emeliana Krisnawati. *Aspek Hukum Perlindungan Anak,* (CV. Utama, Bandung, 2005), hlm. 5
[33] Emeliana Krisnawati. *Aspek Hukum Perlindungan Anak,* (CV. Utama, Bandung, 2005), hlm. 2
[34] Undang-Undang No. 35 Tahun 2014 tentang pembaruan perlindungan anak
[35] Proverawati, A dan Andhini C.S.D. 2010. Imunisasi dan Vaksinasi. Yogyakarta: Nuha Offset

the national health system. Individually, if the child has been vaccinated, 80% -95% will avoid a malignant infectious disease. The more infants / children who get vaccinated (judged by immunization coverage), the more visible the decrease in morbidity and mortality. In terms of supporting the national health system, immunization programs are very effective and efficient when given in a nationally wide range. Increasing the economic growth of a country would be better if the community is healthier so that the budget for curative / treatment can be diverted to other programs that need it. Invest in health for the welfare and improvement of children's quality in the future.[36]

5. Sanctions for refusing immunization in some countries.

Some countries in the world apply strict sanctions to their citizens who refuse compulsory immunization according to the country's rules and regulations. Keep in mind the importance of immunization in eradicating and suppressing diseases that can be prevented by immunization. The government of the country concerned applies strict regulations to combat anti-vaccine are:

1. Prison. Pakistan is one of the three countries in the world where polio is endemic. For years, the Pakistani government has been trying to eradicate polio but continues to face many obstacles, ranging from parental rejection, resistance from local militants and attacks on the polio vaccination team. For this reason, local authorities act decisively by arresting parents who deliberately keep their children away from vaccines.
2. School is prohibited. In Italy in year 2015 there were around 250 recorded measles cases. In 2016 the number increased to 840 cases and now throughout 2017 there has been an epidemic with 2,395 cases. Vaccination is a requirement for children who want to participate in Early Childhood Education. When the child will go to primary school and still not be vaccinated then his parents can be given a fine.
3. Fines. Germany also took similar steps. The new regulation parents failed to include their children in the programcompulsory vaccinations will be given fines of up to Rp 37 million. In addition, the child can also be expelled from his school specifically at the level of Early Childhood Education.
4. Cut allowances. In 2015 in Australia, it was estimated that more than 39,000 children under the age of 7 did not get the vaccine because their parents were anti-vaccine. Responding to the local government to cut allowances to around Rp 1.5 billion. If parents do not vaccinate children then the benefits will be revoked.

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 development in fulfilling legal subjects that need to be protected, in order to be able to grow according to their genetic potential.

F. CONCLUSION

Children are priceless assets both from a social, cultural, economic, political, legal perspective, as well as the perspective of the sustainability of a generation of families, ethnicities and nations. Children are individuals who are still clean and sensitive to the stimuli that come from their environment. Children are human beings who are bearers of rights, that is, everything that has rights and obligations is called a legal subject. Thus, children need to be protected against things that interfere with their growth and development. Child protection is an effort that aimed to prevent, rehabilitate, and embark the deceive children who experience acts of mistreatment, exploitation, and neglect to ensure the survival and development of children naturally, physically, mentally, and social.

One of the factors that influence children's growth and development is immunization. Neglected children are children who are not properly get their needs, whether physically, mentally, spiritually, or socially. The benefits of immunization are decreasing morbidity and mortality due to diseases that can be prevented by immunization. If not immunized, child neglect can be categorized. This is due to children not meeting their physical and mental needs because they can get sick due to diseases that can be prevented by immunization. This is in accordance with the Law on Child Protection No. 23 of 2002 and Law No.35 of 2014. Thus, immunization refusal can be threatened according to the aforementioned Law.

Abandonment of children (one of which rejects immunization) may be subject to sanctions in

[36] 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

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 their citizens who refuse compulsory immunization according to the country's rules and regulations, including Prison (Pakistan), Prohibited Schooling (Italy), Fines (Germany), and Deduction of Allowances (Australia).

G. 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 Puskesmaskembes Kecamatan Tombulu Kabupaten Minahasa . Ejournal Keperawatan (E-Kp) Volume 4 Nomor 1, Februari 2016

https://www.bbc.com.10/2017

https://news.detik.com.12/2017

dr. M. Nasser SpKK, D.Law. Pendapat Pakar Hukum Kesehatan. Wawancara 31-12-2018

RIGHT TO VOTE IN ELECTIONS FOR PEOPLE WITH PSYCHIATRIC DISORDERS

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ABSTRACT

The development of suffrage continues and it is not impossible that citizens who experience mental illness and retardation can obtain their voting rights. In certain conditions it is necessary to understand that not all mentally ill people are not allowed to choose even in Europe there are mental people who can vote. Outside the context that this mentally ill person is a person who is under control according to civil law, the constitution itself basically gives equal rights to people who have mental illness to choose. Even in the Election Law itself there are no explicit restrictions governing this matter. This means that mentally ill people also have the right to use their voting rights. Not all mentally ill people do not have the awareness to choose. Of course with a note there are certain conditions that are allowed to choose.

In the process, Feri hopes that there are special criteria for voters who have mental disorders (mental illness) such as having to choose when they are aware and with clear conditions. Do not let the granting of voting rights to citizens in certain conditions there will be opportunities to commit fraud in elections. Cheating is detrimental to the suffrage of people who have mental disorders because it is considered easy to be cheated.

Keywords: Right To Vote, People With Psychiatric Disorders

A. INTRODUCTION

People with psychiatric disorders (people with mental disabilities) are part of the community group with disabilities. This rule is stated clearly in Law No. 19 of 2011 concerning Ratification of the Convention on the Rights of Persons with Disabilities (Convention on the Rights of Persons with Disabilities), and Law No. 8 of 2016 concerning Persons with Disabilities. Under these two paying laws, true people with psychiatric disorders get guaranteed protection of their rights, including when there is a democratic party called the general election. One that is universally recognized is the right to participate in political life, including to be registered as a voter

It is the implementation of guarantees of rights that for many years have fought for various organizations and community groups, especially the right of persons with disabilities to vote. The advocacy is aimed at making the election organizer accommodate the rights of persons with disabilities."KPU registers people with mental disorders as the fulfillment of the rights of persons with mental disabilities who have been fighting for a long time and years," said Chairman of the Indonesian Healthy Soul Association.

The National Coalition for Disability Organizations encourages that the policy of registering persons with mental disabilities as voters in the 2019 Election must be continued, coupled with other efforts that can support people with mental disabilities to make the best use of their right to vote. Included in the efforts referred to psychological support, social and treatment, socialization, and education regarding political rights and knowledge about electoral.

There is an argument that underlies why people with mental disabilities must be protected by their political rights, especially the right to vote. Philosophically, people with mental disabilities are human beings who have equal human rights since birth. One of the human rights (HAM) referred to is political rights, specifically the right to vote - which in its fulfillment cannot be limited by the state, except based on court decisions or laws. To date there are no court rulings and laws prohibiting people with mental disabilities from exercising their right to vote in the 2019 elections.

Legally persons with mental disabilities include Indonesian citizens who have the same constitutional rights, so they must be respected, protected and fulfilled by the state. Article 28D paragraph (1) of the 1945 Constitution states that "Every person has the right to recognition, guarantee, protection, and certainty of law that is just and equal treatment before the law". This constitutional norm expressly prohibits

the distinction of treatment before the law, including in the case of regulating the right to vote. "In addition, there is no article in the Election Law that prohibits persons with disabilities, including persons with mental disabilities, from exercising their voting rights," said researcher of the Center for Law and Policy Studies (PSHK) Fajri Nursyamsi through his written statement

In Article 5 of Law No. 7 of 2017 concerning Elections mentioned that persons with disabilities who meet the requirements have the same opportunities as Voters, as candidates for DPR members, as candidates for DPD members, as candidates for President / Vice President, as candidates for DPRD members, and as Election Organizers'. Article 75 paragraph (2) of the Law on Persons with Disabilities regulates 'The Government and Regional Governments must guarantee the rights and opportunities for Persons with Disabilities to vote and be elected

if examined, the prohibition on persons with mental disabilities has been regulated in Article 57 paragraph (3) letter a of Law No. 8 of 2015 concerning Amendments to Law Number 1 of 2015 concerning Stipulation of Government Regulations in Lieu of Law No. 1 of 2014 concerning the Election of Governors, Regents and Mayors into Law. However, this provision was later declared contrary to the 1945 Constitution by the Constitutional Court based on decision No. 135 / PUU-XIII / 2015.

In the Law on Persons with Disabilities, this right is protected without exception. Article 75 paragraph (1) of the said Law states that the Government and regional governments must ensure that persons with disabilities can participate effectively and fully in political and public life and directly or through representation. Article 77 states that the government and regional government must guarantee the political rights of persons with disabilities by taking into account the diversity of disabilities in elections, the election of governors, regents / mayors, and the election of village heads or other names, including: (a) participating directly to participate in activities in elections, election of governor, regent / mayor, and election of village head or other name; (b) obtaining the right to be registered as a voter in the general election, election of the governor, regent / mayor, and election of village heads or other names.

Furthermore, Article 148 paragraph (1) of Law No. 36 of 2009 concerning Health states people with mental disorders have the same rights as citizens. Medically, a person's capacity to vote in an election is not determined by the diagnosis or symptoms experienced by the sufferer, but rather from cognitive abilities (ability to think). That is, people with mental disabilities such as schizophrenics, bipolar or severe depression do not automatically lose the capacity to make choices.

Admittedly, people with mental disabilities with severe cognitive dysfunction will affect their capacity, but cognitive function can still be improved by learning and training. Generally, people with mental disabilities are chronic and episodic (recurrent). If a recurring period occurs on election day, especially during the voting, it is certainly not possible to force him to come to the polling station to participate in voting. However, outside the episodic period, thoughts, attitudes, memories and behavior of sufferers still have the capacity to vote in elections.

"If the situation is not possible, not only people with mental disabilities, whoever can not use their voting rights," said Chairman of the Indonesian Psychosocial Rehabilitation Network, Irmansyah.

The obstacle to recovery of people with serious mental disabilities is not clinical treatment, but psychosocial factors faced by them. Many sufferers with symptoms that have disappeared or are minimal after receiving treatment, relapse again due to experiencing a variety of psychosocial stresses when he was in the midst of family and community.

Therefore to achieve optimal recovery, negative stigma from the community towards sufferers must be reduced by providing appropriate information about mental disorders, as well as with various policies that protect sufferers and that encourage community acceptance of people with mental disabilities.

Policies that prohibit people with mental disorders (ODGJ) from participating in elections are very contrary to what should be done. Sociologically, the development of Indonesian society, after the ratification of the Law on Persons with Disabilities has led to the formation of an inclusive environment. Various activities have involved persons with disabilities. Persons with mental disabilities are included in the variety of people with disabilities, so that all efforts to socialize and increase interaction of persons with disabilities with the community in general also involve people with mental disabilities.

Historically, the prohibition of the right to vote for persons with disabilities is not compatible with the development of human rights internationally. In 1966, the right to vote in the ICCPR (Convention on Civil and Political Rights) was still limited freely. In

its development, in 1996 the right to vote in the ICCPR was limited but carried out more stringently, namely by logical and objective criteria. Only in 2006, through the Convention on the Rights of Persons with Disabilities, changed the nature of restrictions or substitution to support (supportive) in the fulfillment of the rights of persons with disabilities

Then in 2013 the Human Rights Council stated that states parties must review the forms of exclusion or prohibition of political rights for persons with disabilities, and must take appropriate actions, including in terms of legislation that is changing or eliminating existing regulations, traditional policies and culture that breeds discrimination against people with disabilities. Therefore, the development of international human rights tends to guarantee political rights for persons with disabilities, including those with mental disabilities.

The National Coalition for Disability Organizations for the Implementation of the Law on Persons with Disabilities encourages the KPU to prepare additional policies that support people with mental disabilities to exercise their voting rights in coordination with the Ministry of Social Affairs, the Ministry of Health and Local Government to provide the necessary support and facilities, so that registered persons with mental disabilities can exercising their right to vote on voting day.

In addition, the KPU was asked not to use a doctor's certificate as a condition for anyone voters to exercise their voting rights, including persons with mental disabilities, based on the reasons stated above. Finally, the KPU should always disseminate and educate the public, the success teams of candidates for President and Vice President, Political Parties participating in the 2019 Election, internal KPU, KPUD and other election organizers related to the political rights of persons with disabilities, especially persons with mental disabilities.

B. PROBLEM STATEMENT

Based on the background description above, the problem formulation can be taken as follows:

1. What is the right to vote in elections?
2. What is a Brief Overview of Mentally Ill People?
3. Are Mental People Right to Vote in Elections?

C. LITERATURE RIVIEW

1. Justice Theory

Justice Theory from J. Rawls, he developed the basis of justice is that everyone has the same rights from their natural positions. Therefore, for justice to be achieved the structure of the political, economic and regulatory constitution regarding property rights must be the same for all people. Basically, the theory of justice to overcome two things, namely the difference and the principle of fair equality of opportunity. The essence of the difference principle is that social and economic differences must be regulated so as to provide high benefits for the least established.

The term social economic difference in the principle of difference leads to inequality in the prospect of a person to get the basic elements of welfare, income, authority. Whereas the principle of fair equality of opportunity for those who at least has the opportunity to achieve the prospects for the welfare of opinion and authority. Those who according to J. Rawls must be given special protection. Because according to him, the theory of justice[1]

2. Legal Certainty Theory

The doctrine of legal certainty comes from Juridical-Dogmatic teachings which are based on the flow of positivistic thought in the world of law, which tends to see law as something autonomous, independent, because for adherents of this thought, law is nothing but a collection of rules. Legal certainty is realized by the law by its nature which only makes a general rule of law. The general nature of the rule of law proves that the law does not aim to bring about justice or benefit, but solely for certainty[2].

The Legal Certainty Theory was developed by Rene Descrates, a philosopher from France. Des, cartes believes that a certainty of law can be obtained from the sanction method that is applied to legal subjects both individuals and legal entities that emphasize the process of orientation rather than the results of the implementation process. Certainty provides clarity in carrying out legal actions when implementing contracts in the form of achievements even when the contract is in default[3].

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[1] John Rawls, Teori Keadilan: Dasar-dasar Filsafat Politik Untuk mewujudkan Kesejahteraan Sosial Dalam Negara, (Yogyakarta; Pustaka Pelajar, 20060, hlm. Vi.

[2] Achmad Ali, *Menguak Tabir Hukum (Suatu Kajian Filosofis dan Sosiologis)*, (Jakarta: Toko Gunung Agung, 2002), hlm.82-83

[3] Mariotedja, 2013, "Teori Kepastian Dalam Perspektif Hukum", Mariotedja. blogspot.com, diakses tanggal 20 September 2018

According to Gustaf Radbruch the law has three objectives oriented objectives namely legal certainty, justice and usability. For law to be perfectly valid and guarantee legal certainty, three basic values are needed. These three elements must receive proportionally balanced attention. But in practice it is not always easy to work proportionally balanced between the three elements. Without legal certainty, people do not know what to do and eventually anxiety arises. But too much emphasis on legal certainty, too strict to obey the rule of law consequently rigid and will cause a sense of injustice[4].

D. RESEARCH METHODS

Jenis pendekatan yang digunakan dalam penelitian ini adalah pendekatan perundang-undangan (*statute approach*) dan pendekatan lapangan (*field approach*).

Pendekatan perundang-undangan (*statute approach*), dilakukan dengan menelaah undang-undang dan regulasi yang berkaitan dengan Pengangkatan Anak dan Perlindungan Anak, dengan tujuan akan diketahui tentang konsistensi dan kesesuaian suatu undang-undang dengan undang-undang lainnya, antara undang-undang dengan undang-undang dasar atau antara regulasi dengan undang-undang.[5]

E. ANALYSIS AND DISCUSSION

1. Election Rights

The General Election ("Election") you mean here is a means of popular sovereignty to elect members of the People's Legislative Assembly, members of the Regional Representative Council, the President and Vice President, and to elect members of the Regional People's Legislative Assembly, which is carried out directly, publicly, freely , confidential, honest and fair in the Unitary State of the Republic of Indonesia based on Pancasila and the 1945 Constitution as mentioned in Article 1 number 1 of the Election Law.

People who participate in elections are called voters. Voters are Indonesian citizens who have reached the age of 17 (seventeen) years or older, have been married, or have been married[6].

The requirement to be able to become a voter in an election (with the right to vote) is [7]:

a. Indonesian citizens;
b. Even 17 (seventeen) years of age or older on polling day; or
c. married or already married

Indonesian citizens are registered 1 (one) time by the Election Organizer in the Voter list. Indonesian citizens whose political rights have been revoked by the court do not have the right to vote[8]

Voters who are entitled to vote at the Polling Station ("TPS") include[9]:

a. The owner of an electronic identity card registered on the permanent voter list at the relevant polling station;
b. The owner of an electronic identity card that is registered on the additional voter list;
c. The owner of an electronic identity card that is not registered on the permanent voter list and additional voter list; and
d. Citizens who have the right to vote.

2. Brief Overview of the Mentally Ill

Defining mental illness is a mental disorder that affects mood, mindset, and general behavior. Someone called experiencing mental illness, if the symptoms experienced make it depressed and unable to carry out normal daily activities.

The characteristics of people who have mental illness can vary depending on the type. But in general, people who experience mental disorders can be identified from certain symptoms, such as a very drastic mood change from very sad to very happy or vice versa, feeling excessive fear, withdrawing from social life, often feeling very angry to like to do violence, and experiencing delusional.

Still sourced from the same article, there are many health conditions that can be categorized as mental illness. Each group can be further divided into more specific types, for example: anxiety disorders, personality disorders, psychological disorders, post-traumatic disorders, and dissociative disorders.

Meanwhile, in terms of law, according to the law-number-8-2016-2016 people who have mental disabilities or mental illness are included in the category of people with mental disabilities [10]

[4] Notohamidjojo, Soal-Soal Pokok Filsafat Hukum, Griya Media, Salatiga, 2011, hlm. 33.
[5] Peter Mahmud Marzuki, *Penelitian Hukum*, Prenada Media, Jakarta, 2005., hlm. 133
[6] Undang-Undang Dasar 1945
[7] Kitab Undang-Undang Hukum Perdata
[8] Undang-Undang Nomor 39 Tahun 1999 tentang Hak Asasi Manusia
[9] Undang-Undang Nomor 36 Tahun 2009 tentang Kesehatan
[10] Undang Nomor 19 Tahun 2011 tentang Pengesahan Convention On The Rights Of Persons With Disabilities (Konvensi Mengenai Hak-Hak Penyandang Disabilitas)

What is meant by persons with disabilities according to Article 1 number 1 of Law 8/2016 is that 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.

Then what is meant by "People with Mental Disabilities" is the disruption of the function of thought, emotions, and behavior, including[11]:

a. psychosocial disorders include schizophrenia, bipolar disorder, depression, anxiety, and personality disorders; and
b. developmental disabilities that affect the ability of social interactions including autism and hyperactivity

Pursuant to Article 433 of the Civil Code a person with mental illness or brain disease is said to be under authority, following the sound of the article: Every adult, who is always in a state of wits, brain pain or dark eyes must be put under authority, even if he is sometimes capable use his mind. An adult may also be put under authority because of his extravagance

3. Are Mental People Right to Vote in Elections?

Is entitled a person with a mental disability (mental illness) has the right to vote in elections based on legislation that governs the process of organizing elections. It was explained that it is necessary to understand that the 1945 Constitution guarantees everyone's right to recognition, guarantees, protection, and certainty of law that is fair and equal treatment before the law[12]

Besides Article 43 of Law no. 39 of 1999 concerning human rights regulates the right of citizens to participate in government, namely :

1. Every citizen has the right to be elected and to vote in elections based on equality of rights through direct, general, free, secret, honest and fair voting in accordance with statutory provisions
2. Every citizen has the right to participate in government directly or through the mediation of representatives who are chosen freely, in the manner prescribed in legislation.
3. Every citizen can be appointed in every government position.

In terms of other laws, Article 148 of Law no. 36 of 2009 ("Health Law") regulates:

1. People with mental disorders have the same rights as citizens.
2. Rights as referred to in paragraph (1) include equality of treatment in every aspect of life, unless the legislation states otherwise

Besides that, as a person with a mental disability, Article 13 of Law 8/2016 also regulates the political rights of persons with disabilities including:

1. Choose and be elected in public office;
2. Channeling political aspirations both written and oral;
3. Select political parties and / or individuals who are participants in the general election;
4. Form, become members, and / or administrators of community organizations and / or political parties;
5. Form and join organizations of persons with disabilities and to represent persons with disabilities at the local, national and international levels;
6. Participate actively in the electoral system at all stages and / or parts of the organization;
7. Obtain accessibility to the facilities and infrastructure for holding general elections, electing governors, regents / mayors, and electing village heads or other names; and
8. Get political education.

Even the Government and Local Governments must guarantee the rights and opportunities for people with disabilities to vote and be elected, regarding whether a person with a mental disability (mental illness) can vote in an election, as long as we search for legislation in the electoral field, there are no explicit prohibitions governing the prohibition of people with mental disabilities to vote in elections

F. CONCLUSION

That basically every citizen is guaranteed the right to be elected and to vote in elections including persons with mental disabilities.

Mental illness or mental illness and mental retardation are conditions where a person has a disability of intelligence or awareness. When viewed in the holding of elections, the phenomenon of voters with mental illness and retardation conditions becomes an interesting discourse in the development of elections. suffrage also continues to occur. In the past in European and American countries women

[11] Undang-Undang Nomor 8 Tahun 2016 tentang Penyandang Disabilitas
[12] Undang-Undang Nomor 7 Tahun 2017 tentang Pemilihan Umum

were restricted in their voting rights and then with the dynamics in the election process, women had the right to vote. Then in the 1970s and 1990s in America, people with disabilities were also restricted in their voting rights and now people with disabilities have the right to vote.

The development of suffrage continues and it is not impossible that citizens who experience mental illness and retardation can obtain their voting rights. In certain conditions it is necessary to understand that not all mentally ill people are not allowed to choose even in Europe there are mental people who can vote. Outside the context that this mentally ill person is a person who is under control according to civil law, the constitution itself basically gives equal rights to people who have mental illness to choose. Even in the Election Law itself there are no explicit restrictions governing this matter. This means that mentally ill people also have the right to use their voting rights. Not all mentally ill people do not have the awareness to choose. Of course with a note there are certain conditions that are allowed to choose.

In the process, Feri hopes that there are special criteria for voters who have mental disorders (mental illness) such as having to choose when they are aware and with clear conditions. Do not let the granting of voting rights to citizens in certain conditions there will be opportunities to commit fraud in elections. Cheating is detrimental to the suffrage of people who have mental disorders because it is considered easy to be cheated.

Persons with mental disabilities include Indonesian citizens who have the same constitutional rights. Chairperson of the Indonesian Healthy Soul Association, Yeni Rosa Damayanti said that the fulfillment of the rights of persons with mental disabilities has been championed for a long time and years. advocacy and approaches to the General Election Commission ("KPU") have been carried out to ensure the fulfillment of these rights. As part of the successful struggle of the disability movement, in 2014 the KPU began registering persons with mental disabilities as voters in the 2014 elections. Furthermore, based on Letter No. 1401 / PL.02.1-SD / 01 / KPU / XI / 2018, the KPU registers voters with mental disabilities. This KPU step is a tangible form of the realization of equal political rights guarantees for every citizen in accordance with the provisions in various Laws including Law 8/2016, Election Law, and the United Nations Convention on the Rights of Persons with Disabilities that have been ratified by Indonesia through the law invitations no. 19 of 2011 concerning Ratification of the Convention on the Rights on persons with Disabilities.

The National Coalition for Disability Organizations for the implementation of Law 8/2016 encourages the KPU to prepare additional policies that support people with mental disabilities to participate in exercising their voting rights in coordination with the Ministry of Social Affairs, the Ministry of Health and Local Government to provide the necessary support and facilities, so that persons with mental disabilities registered can use their right to vote on voting day.

In addition, the KPU was asked not to use a doctor's certificate as a condition for anyone voters to exercise their voting rights, including persons with mental disabilities, based on the reasons stated above. Finally, the KPU should always disseminate and educate the public, the success teams of candidates for President and Vice President, Political Parties participating in the 2019 Election, internal KPU, Regional KPU (KPUD) and other election organizers related to the political rights of persons with disabilities, especially people with mental disabilities

G. REFERENCES

Books :

Achmad Ali, *Menguak Tabir Hukum (Suatu Kajian Filosofis dan Sosiologis)*, Jakarta: Toko Gunung Agung, 2002.

John Rawls, Teori Keadilan: Dasar-dasar Filsafat Politik Untuk mewujudkan Kesejahteraan Sosial Dalam Negara, (Yogyakarta; Pustaka Pelajar, 2006.

Mariotedja, 2013, “Teori Kepastian Dalam Perspektif Hukum”, Mariotedja. blogspot.com, diakses tanggal 20 September 2018

Notohamidjojo, Soal-Soal Pokok Filsafat Hukum, Griya Media, Salatiga, 2011.

Peter Mahmud Marzuki, *Penelitian Hukum*, Prenada Media, Jakarta, 2005.

Legislation :

Undang-Undang Dasar 1945

Kitab Undang-Undang Hukum Perdata

Undang-Undang Nomor 39 Tahun 1999 tentang Hak Asasi Manusia

Undang-Undang Nomor 36 Tahun 2009 tentang Kesehatan

Undang Nomor 19 Tahun 2011 tentang Pengesahan Convention On The Rights Of Persons With Disabilities (Konvensi Mengenai Hak-Hak Penyandang Disabilitas)

Undang-Undang Nomor 8 Tahun 2016 tentang Penyandang Disabilitas

Undang-Undang Nomor 7 Tahun 2017 tentang Pemilihan Umum.

JURIDIS ANALYSIS OF CRIMINAL ACADEMIC MONEY POLITICS IN REGIONAL HEAD SELECTION (CASE STUDY IN BANGKA PROVINSI DISTRICT, BANGKA BELITUNG)

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ABSTRACT

The Law has regulated Money Politics actions which include criminal acts and there are also sanctions for the perpetrators listed in the Criminal Code and in Law Number 10 of 2016 concerning the Second Amendment to Law Number 1 of 2015 concerning Determination of Government Regulations in lieu of Law Number 1 of 2014 concerning Election of Governors, Regents and Mayors. The need for law enforcement in cases of Money Politics crime or Money Politics is enforced so that the selection of prospective leaders in accordance with the wishes of the people based on the view rather than performance and the positive side of the candidates is not due to monetary rewards

Keywords: Money Politics, Criminal, and Law Enforcement

1. INTRODUCTION

The Indonesian state is a rule of law which adheres to democratic ideology. According to **Jimly Asshiddiqie**, in a democratic country sovereignty is the highest power in the hands of the people[1]. Based on Article 2 paragraph 1 of the 1945 Constitution of the Republic of Indonesia which states that "sovereignty is at hand of the people and carried out according to the Constitution ". The sentence which states "sovereignty is in the hands of the people" means that the people have sovereignty, responsibility, rights and obligations that can democratically choose leaders who form a government to manage and serve all levels of society, and elect people's representatives who oversee the administration of the government[2]. In a democratic country, of course the participation of the people can be realized in one way, namely taking part in general elections. General elections commonly referred to as elections are a means of implementing people's sovereignty carried out directly, publicly, freely, secretly, honestly and fairly in the Unitary State of the Republic of Indonesia based on the 1945 Pancasila and the State Constitution of the Republic of Indonesia.[3] in a political party. The country that adheres to the ideology of democracy with ideas about people's participation is that the people have the right to determine and choose someone who will become a leader who will determine public policy.[4]

Based on the side of implementing democratic life, the Indonesian people have succeeded in forming democratic institutions and creating mechanisms for implementing democracy. The next stage that will be realized by the Indonesian people is to improve the quality of democracy so that in practice democracy is not only mechanical but also substantially really embodies the principle of popular sovereignty.[5]

In the period of transition to democracy as happened in Indonesia today there is still a lot of abuse of power carried out by people's representative institutions. In the case of democratic mechanisms the general election is far from perfect and has not guaranteed the establishment of a clean and authoritative government. The problem that is common in Indonesia today is the practice of money politics that occurs between legislators and candidates for regional heads.[6] The reality of democracy in Indonesia at this time has not yet been able to achieve the aspired democracy, as in the case of the implementation of regional head elections (post-conflict local election) democracy, especially from

[1] Irfan Fachruddin, *Pengawasan Peradilan Administrasi Terhadap Tindakan Pemerintah*, PT Alumni, Bandung, 2004, hlm. 96

[2] C. S. T. Kansil dkk, *Tindak Pidana Dalam Perundang-Undangan Nasional*, Jala Permata Aksara, Jakarta, 2009, hlm. 25.

[3] Irfan Fachruddin, *Op.Cit*, hlm. 26.

[4] Abdul Bari Azed dan Makmur Amir, *Pemilu dan Partai Politik Indonesia*, Pusat Studi Hukum Tata Negara Fakultas Hukum Universitas Indonesia, Depok, 2013, hlm. 15.

[5] Jimly Asshiddiqie, *Menuju Negara Hukum Yang Demokratis*, PT Bhuana Ilmu Populer, Jakarta, 2009, hlm 378.

[6] Amzulian Rifai, *Politik Uang Dalam Pemilihan Kepala Daerah*, Ghalia Indonesia, Jakarta, 2003, hlm. 21.

disputed election cases that are examined, tried and decided by the Constitutional Court (MK). Many cases occur so that shows that in the practice of post-conflict local election only displays the bodies of democracy, while the spirit of democracy is held hostage and sabotaged by various forms of violations, impartiality, money politics, and even intimidation.[7]

At the time before the general election, the candidates usually carry out campaigns such as putting up posters aimed at getting people to know him, giving promises to the people, for example, to repair roads or build a place of worship and so on, besides that what often happens in Indonesia today is the existence of Money Politics or Money Politics which is an act of giving material rewards or can also be interpreted as buying and selling votes in the political process and power and the act of distributing money both private and party property to influence votes voter.[8] Money Politics practices are rampant in the run up to general elections such as legislative elections, presidential elections, regional head elections (Pilkada) and village head elections (pilkades). Actions of Money Politics, including money which can be caught by law because Money Politics or Money Politics can be equated with bribes or bribes.

Clearly the Law has regulated Money Politics actions which include criminal acts and there are also sanctions for the perpetrators listed in the Criminal Code and in Law Number 10 of 2016 concerning the Second Amendment to Law Number 1 In 2015 concerning the Establishment of Government Regulations in lieu of Law No. 1 of 2014 concerning the Election of Governors, Regents and Mayors. The need for law enforcement in cases of Money Politics crime or Money Politics is enforced so that the election of prospective leaders in accordance with the wishes of the people based on the view rather than performance and the positive side of the candidates is not due to monetary rewards. As well, the need for strict law enforcement is applied to both criminal offenders

Money Politics consisting of both the recipient and the recipient of the money including the bribe or bribe.

Enforcement of criminal law against criminal acts of Money Politics is very necessary to be enforced in the political world. Crime of Money Politics in Bangka Belitung Islands Province, especially in Bangka Regency, is very rare. Enforcement of criminal law that occurs in the election of umuum regional heads in Bangka Regency has been carried out in accordance with applicable laws and regulations. As in 2012 there has been a criminal act of Money Politics committed by regional head candidates, namely candidates for Bangka Regency Regent. The candidate for the Bangka Regency Regent or Money Politics perpetrator is punished in accordance with the provisions of the applicable law at that time. The legal application of Money Politics in Bangka Regency has been very effective, but not all cases of Money Politics can be followed up to the realm of the Court because of the difficulty of finding evidence that meets the elements of Money Politics crime.[9]

2. RESEARCH METHODS

Research means searching again. In other words, research is a search effort that is very educational value, and trains to always be aware that in this world there are many that we do not know, and what we are trying to find, find, and know is still not absolute truth.[10]

The research method is a basic tool in the development of science and technology and art, where research aims to express the truth systematically, methodologically, and consistently.[11] . According to **Soerjono Soekanto**, legal research is a scientific activity based on certain methods, systems and thoughts, which aim to learn something or some symptoms of a particular law, by analyzing it. In addition, an in-depth examination of legal factors is held to then seek a solution to the problems that arise in the symptoms concerned.[12] This research uses research methods, as follows:

a. Types and Nature of Research
   Normative juridical research is research that examines the provisions of positive law (legislation). The research used is literature study (a material obtained from literature studies, books or journals).[13] The object of

[7] Janedjri M. Gaffar, *Politik Hukum Pemilu*, Konstitusi Pers, Jakarta, 2012, hlm. 10.
[8] La Jamaa La Sudirman, "*Hibah dan Money Politic Dalam Pemilu dan Pilkada Perspektif Sosiologi dan Politik Hukum*", Jurnal Fikratuna, Vol. 8 No. 2, 2016. hlm. 37.
[9] Wawancara dengan Agus Indra Irawan, KANIT TIPIKOR, tanggal 10 November 2017 di POLRES Bangka Provinsi Kepulauan Bangka Belitung.
[10] Amiruddin dan Zainal Askin, *Pengantar Metode Penelitian Hukum*, PT RajaGrafindo Persada, Jakarta, 2012, hlm. 19.
[11] Zainuddin Ali, *Metode Penelitian Hukum*, Sinar Grafika, Jakarta, 2010, hlm. 17.
[12] *Ibid*, hlm. 18.
[13] Zainuddin Ali, *Op.Cit*, hlm. 105.

the study in normative legal research combined according to the object of study was **Soerjono Soekanto** and **Sri Mamudji**, and the object of study according to **Soetandyo Wignjosoebroto**, which consisted of:

1) Research on legal principles;
2) Research on legal systematics;
3) Research on the level of legal synchronization;
4) Research on legal history;
5) Comparative legal research;
6) Research in the form of a positive legal inventory effort; and
7) Research in the form of legal discovery in conkrito.[14]

b. Approach Method

The approach is the beginning of the point of view and the frame of mind for conducting analysis, so that the conclusions can be accounted for. The approach used in legal research is the legislative approach, this must be done by researchers because legislation is the focal point of this research.[15] In this study also uses a case approach, namely the approach taken by conducting a study of cases relating to the issues faced which have become court decisions that have permanent legal force.[16]

c. Data collection technique

Data collection can be done in various settings, various sources, and various ways.[17] The technique of collecting data in normative legal research includes the material studied and analyzed such as primary, secondary and tertiary legal materials. The technique for reviewing and collecting all three legal materials is by using documentary studies. Documentary study is a study that examines various documents, both those relating to legislation and existing documents.[18]

d. Data source

In legal research, commonly known 2 (two) types of data, namely primary data and secondary data. If the primary data, then it can be called about determining the area and subject in detail.[19] The data source description can be explained as follows:

1) Primary Data, ie data obtained directly from the main source.[20] Primary data in legal research is data obtained mainly from the results of empirical research, namely research conducted directly in society.
2) Secondary Data

   As a secondary legal material which mainly includes official documents, books, research results tangible reports and so on.[21] The secondary data can be divided into:

   a) Primary Law Materials

      Which consists of legislation, juriprudensi, or court decisions (especially for research in the form of case studies) and international agreements (treaties).

   b) Secondary Legal Materials

      That is a legal material that can provide an explanation of primary legal materials that can be in the form of draft legislation, research results, textbooks, scientific journals, newspapers (newspapers), leaflets, leaflets, brochures, and internet news.

   c) Non-Secondary Materials (Tertiary Legal Materials)

      Tertiary legal materials are materials that provide instructions and explanations for primary legal materials and secondary legal materials, such as dictionaries (law), encyclopedias, handbooks, large Indonesian language dictionaries in the network (internet media), and Wikipedia free pages (internet) related, and others.[22]

e. Data analysis

Data analysis (analyzing), which describes data in the form of numbers, so that it is easy to read and give meaning if the data is

[14] Salim HS dan Erlies Septiana Nurbani, *Penerapan Teori Hukum Pada Penelitian Tesis dan Disertasi*, PT RajaGrafindo Persada, Jakarta, 2013, Hlm. 14.
[15] Mukti Fajar dan Yulianto Achmad, *Dualisme Penelitian Hukum Normatif dan Empiris*, Pustaka Pelajar, Yogyakarta, 2010, hlm. 185.
[16] Salim HS dan Erlies Septiana Nurbani, *Op.Cit*, hlm. 94.
[17] Sugiyono, *Metode Penelitian Pendidikan*, Alfabeta, Bandung, 2007, hlm. 193.
[18] Salim HS dan Erlies Septiana Nurbani, *Op.Cit*, hlm. 19.
[19] E. Saefulla Wiradipradja, *Penuntun Praktis Metode Penelitian dan Penulisan Karya Ilmiah Hukum*, Keni Media, Bandung, 2015, hlm. 41.
[20] Amiruddin dan Zainal Askin, *Op.Cit*, hlm.30.
[21] Amiruddin dan Zainal Askin, *Log.Cit.*
[22] Amiruddin dan Zainal Asikin, *Op.Cit*, hlm. 32.

quantitative. Whereas, if the data is qualitative, it is by deciphering data in the form of sentences that are good and correct so that they are easy to read and given meaning. The results of data analysis facilitate inductive conclusions and / or deductively. At the stage of data analysis in real terms the researchers' methodological abilities are tested because the stage of accuracy and outpouring of thinking power is needed optimally.[23] Analysis of the data used in this study is qualitative analysis, which is a method of analyzing data by explaining and describing the problems under study then analyzing the results of existing research in the field to be formulated in a conclusion.

3. PROBLEM FORMULATION

From the background stated above, the problems in this writing are:

a. What is the regulation about criminal sanctions against Money Politics crime?
b. What is the form of criminal law enforcement against Money Politics crime?

Based on the subject matter stated above, the research objectives are as follows:

a. Know the arrangements for criminal sanctions against Money Politics crimes.
b. Knowing the form of criminal law enforcement against Money Politics crime.

4. DISCUSSION

During the regional head general election in Bangka Regency, there was often a fraudulent act in the form of a violation committed by the perpetrator to manipulate the vote or influence the community to give his voting rights, which is a type of violation that often occurs in Bangka Regency which can be in the form of administrative violations and criminal violations of general elections. The administrative violations of the general elections referred to are violations of the provisions of the General Election Law which are not criminal provisions of general elections and against other provisions stipulated in the General Election Commission (KPU) regulations. Some examples of electoral administrative violations are the installation of campaign equipment such as posters, flags, banners, banners, etc. that are installed carelessly. Whereas, criminal election violations are violations of the criminal provisions of general elections which have been regulated in the Regional Head General Election Law (Pilkada), in which sanctions will be imposed in the form of sanctions in prison sentences and / or fines. An example is money politics (money politics). In Bangka Regency, the Bangka Belitung Islands Province from 2012 to 2017 in the case of reports of money politics in the Regional Head General Election, namely there are 2 (two) criminal acts of money politics (money politics).[24]

Table 3.1
Data on Alleged Violations in the Election of the Governor and Deputy Governor in Bangka Regency, Bangka Belitung Islands Province

No.	Alleged Violation in 2017	Amount
1	Findings of Violations	4
2	Stages of the Campaign Period and Calm Period	3
3	Stages of Logistics	1
4	Administration Stages	1
5	Not Violations / Not fulfilling requirements	3
6	Process of Sentra Gakkumdu	3

Source: General Election Supervisory Agency of the Bangka Belitung Islands Province

Normally sanctions are divided into two parts, consisting of rewards and penalties which are positive and negative sanctions. The forms of punishment that are common in criminal law are fines and confinement.[25] Regulations concerning criminal sanctions against criminal acts of money politics in the Regional Head General Election are regulated in Law Number 10 Year 2016 concerning the Second Amendment to Law Number 1 Year 2015 concerning the Establishment of Regulations

The Government Substitutes Law Number 1 Year 2014 concerning the Election of Governors, Regents and Mayors to become Laws. Whereas according to the qualifications of offenses can be described, namely as follows:[26]

[23] Abdulkadir Muhammad, *Hukum dan Penelitian Hukum*, Citra Aditya Bakti, Bandung, 2004, hlm. 91-92.

[24] Hasil Wawancara Dengan Bapak Subari Prima selaku Ba Sat Reskrim Unit III Tipikor di POLRES Bangka, tanggal 02 November 2018.

[25] Lawrence M. Friedman, *Op.Cit*, hlm. 101.

[26] Undang-Undang Nomor 10 Tahun 2016 tentang Pemilihan Gubernur Bupati dan Walikota.

Table 3.2
Delik Qualification

No	Pasal	Qualification Delegation	Sanction
1	187 A ayat (1)	Any person who intentionally commits an unlawful act promises or gives money or other material in return to Indonesian citizens either directly or indirectly to influence the Voters not to exercise their right to vote, use their right to vote in certain ways so that the vote becomes invalid, chooses a certain candidate, or does not choose a particular candidate as referred to in Article 73 paragraph (4)	Prison sentences of at least 36 (thirty six) months and no longer 72 (seventy two) months and a fine of at least Rp200 .000,000.00 (two hundred million rupiahs) and a maximum of Rp1,000,000,000.00 (one billion rupiah)
2	187 A paragraph (2)	The same criminal offense is applied to voters who intentionally commit unlawful acts to receive gifts or promises as referred to in paragraph (1)	
3	187 B	Members of Political Parties or joint members of Political Parties who deliberately commit illegal acts receive compensation in any form in the process of nominating the Governor and Deputy Governor, Regent and Deputy Regent, and Mayor and Deputy Mayor as referred to in Article 47 paragraph (1)	imprisonment for a minimum of 36 (thirty six) months and a maximum of 72 (seventy two) months and a fine of at least Rp.300,000,000.00 (three hundred million rupiahs) and a maximum of Rp1,000,000,000.00 (one billion rupiahs))
4	187 C	Any person or institution that is proven to intentionally commit an illegal act rewards the nomination process of the Governor and Deputy Governor, Regent and Deputy Regent, and the Mayor and Deputy Mayor, so that the candidate, elected candidate pair, or as Governor, Deputy Governor , Regent, Deputy Regent, Mayor or Deputy Mayor as referred to in Article 47 paragraph (5)	imprisonment for at least 24 (twenty four) months and imprisonment for a maximum of 60 (sixty) months and a fine of at least Rp.300,000,000.00 (three hundred million rupiahs) and a maximum of Rp1,000,000,000.00 (one billion rupiah).
5	187 D	Management of Election monitoring institutions that violates the prohibition provisions as referred to in Article 128	imprisonment for a minimum of 36 (thirty six) months and no longer than 72 (seventy two) months and a fine of at least Rp.36,000,000.00 (thirty six million rupiah) and a maximum of Rp. 72,000,000.00 (seventy two million rupiah).

Source: Law Number 10 of 2016 concerning Election of Governor Regents and Mayors

Based on Decision Number 197 / Pid.B / 2012 / PN.Sgt sanctions imposed on Suamdah Als Suam Binti (Alm.) Abdul Rahman as perpetrators of criminal acts of money politics, namely in accordance with the Law of the Republic of Indonesia Number 32 of 2004 as amended by the Law of the Republic of Indonesia Number 12 of 2008 concerning the Second Amendment to the Law of the Republic of Indonesia Number 32 Year 2004 concerning Regional Government, Law Number 48 of 2009 concerning Judicial Power, Law Number 49 of 2009 and Law Number 8 of 1981 concerning the Criminal Procedure

Code (KUHAP).[27] The law is used because it uses the principle of lex specialis derogate legi generalis, which means the principle of legal interpretation which states that the law is specific in overriding general law.[28]

Law enforcement as a process which is essentially the application of discretion which involves making decisions that are not strictly regulated by the rule of law, but which have an element of personal judgment. So the discretion is said to be between law and morals (ethics in the narrow sense).[29] According to **Soetjipto Rahardjo**, who stated that law enforcement is a social process that is not a closed process, but a process that involves the environment. Therefore, law enforcement will exchange actions with their environment which can be called as an exchange of actions with human, social, cultural, political and so on. So, law enforcement is influenced by various kinds of facts and conditions that occur in society.[30]

5. CONCLUSION

1. Regulations concerning criminal sanctions against criminal acts of money politics (money politics) have been stipulated in the Law. A legal sanction is given through actual application or through threats or promises. The means for delivering sanctions and the level of delivery realize a process which is referred to as law enforcement. The forms of punishment or sanctions contained in criminal law are fines and confinement. Regulations regarding criminal sanctions against criminal acts of money politics in Regional Head General Elections are regulated in Law Number 10 of 2016 concerning Second Amendment to Law Number 1 Year 2015 concerning Determination of Government Regulations Substituting Law Number 1 Year 2014 concerning the Election of Governors, Regents and Mayors into the Law and the Criminal Code (KUHP).
2. Enforcement of criminal laws against money politics committed by the police in Bangka Regency, Bangka Belitung Islands Province, namely that the police cooperate with other state institutions or institutions, which form a task force of the Integrated Law Enforcement Center (GAKKUMDU).) which consists of the General Election Supervisory Agency (BAWASLU) or the General Election Supervisory Committee (PANWASLU) and the Prosecutor's Office of the Republic of Indonesia. The three agencies jointly analyzed, filtered and determined that the report received contained an element of crime or not, and determined the crime could be said to be a violation or an administrative violation in the general election. In the process of resolving criminal cases to enforce criminal law related law enforcement officers, namely the Police, Prosecutors' Office, Courts and Correctional Institutions. The efforts made by the police in overcoming money politics are carried out through a reporting or audit mechanism from direct Regional Head Election (Pilkada) campaign funds, law enforcement, and through organizing voters by the voters themselves.

[27] Putusan Nomor 197/Pid.B/2012/PN.Sgt
[28] Zainal Asikin, *Pengantar Ilmu Hukum*, PT RajaGrafindo Persada, Jakarta, 2012, hlm. 1
[29] Titik Triwulan Tutik, *Pengantar Ilmu Hukum*, Prestasi Pustaka Pulbisher, Jakarta, 2006, hlm. 231
[30] *Ibid* , hlm. 232

6. REFERENCES

Book

Abdul Bari Azed and Makmur Amir, Indonesian Elections and Political Parties, Center for Constitutional Law Studies, Faculty of Law, University of Indonesia, Depok, 2013.

Abdulkadir Muhammad, Law and Legal Research, Citra Aditya Bakti, Bandung, 2004.

Amzulian Rifai, Money Politics in the Election of Regional Heads, Ghalia Indonesia, Jakarta, 2003.

Amiruddin and Zainal Askin, Introduction to Legal Research Methods, PT RajaGrafindo Persada, Jakarta, 2012.

C. S. T. Kansil et al., Crime in National Legislation, Jala Permata Aksara, Jakarta, 2009.

E. Saefulla Wiradipradja, Practical Guide to Research Methods and Writing of Legal Scientific Work, Keni Media, Bandung, 2015.

Frans Maramis, General and Written Criminal Law in Indonesia, PT RajaGrafindo Persada, Jakarta, 2013.

Irfan Fachruddin, Supervision of Administrative Courts Against Government Actions, PT Alumni, Bandung, 2004.

Janedjri M. Gaffar, Election Law Politics, Constitution Press, Jakarta, 2012.

Jimly Asshiddiqie, Towards a Democratic State of Law, PT Bhuana Ilmu Populer, Jakarta, 2009.

Mukti Fajar and Yulianto Achmad, Dualism in Normative and Empirical Law Research, Student Library, Yogyakarta, 2010.

Munir Fuady, Theory of Proof of Law, PT Citra Aditya Bakti, Bandung, 2012.

Salim HS and Erlies Septiana Nurbani, Application of Legal Theory in Thesis and Dissertation Research, PT RajaGrafindo Persada, Jakarta, 2013, p. 13.

Soerjono Soekanto, Factors Affecting Law Enforcement, PT RajaGrafindo Persada, Jakarta, 2011.

Sugiyono, Educational Research Methods, Alfabeta, Bandung, 2007.

Zainuddin Ali, Legal Research Method, Sinar Grafika, Jakarta, 2010.

Legislation

1945 Constitution.

Law Number 1 of 2015 concerning Determination of Government Regulations in lieu of Law Number 1 of 2014 concerning Election of Governor Regents and Mayors.

Law Number 10 Year 2016 concerning the Second Amendment to Law Number 1 Year 2015 concerning Determination of Government Regulations in lieu of Law Number 1 Year 2014 concerning Election of Governors, Regents and Mayors.

Book of the Criminal Code c. Journal La Jamaa La Sudirman, "Political Grants and Money in Elections and Elections in Sociology and Political Law Perspective", Fikratuna Journal, Vol. 8 No. 2, 2016.