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APPLICATION OF RESTORATIVE JUSTICE IN HEALTH CRIMES

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Abstract

Health sectors cover a wide range of criminal acts, including medical malpractice, circulation of illegal drug, pharmacy and prescription drug fraud, and hospital unprofessionalism. The Number of victims due to crimes in the health sector is far more than what it appears to be. An example of crimes within the health sector is medical malpractice. Malpractice is a bad practice. Restorative justice as a new approach offers a solution to criminal cases that focus more on recovery rather than vengeance. Therefore, the issue that needs to be discussed is whether health crimes equate to medical malpractice and how should the application of restorative justice be applied to criminal acts in health sectors. One of the main reasons to implement restorative justice is because the victim as the party who is most harmed and suffers is generally being abandoned in the criminal justice system. Attention and protection to victims is not sufficient to restore the suffering of victims. This study shows that health crimes do not equate to medical malpractice because as the name suggested medical malpractice entails a profession. However, criminal acts can be committed by anyone. The application of restorative justice should be applied to cases in health sectors that involve negligence and not cases based on intent. The application of restorative justice can be beneficial to perpetrators, victims, and society.

Keywords: Health Crime; Malpractice, Restorative Justice

Abstrak

Bidang kesehatan mencakup berbagai macam tindak pidana, antara lain malpraktek medis, peredaran obat ilegal, penipuan apotek dan obat resep, serta ketidakprofesionalan rumah sakit. Jumlah korban akibat kejahatan di bidang kesehatan jauh lebih banyak dari yang terlihat. Salah satu contoh kejahatan dalam bidang kesehatan adalah malpraktik medik. Malpraktik adalah praktik yang buruk. Keadilan restoratif sebagai pendekatan baru menawarkan solusi untuk kasus pidana yang lebih fokus pada pemulihan daripada balas dendam. Oleh karena itu, persoalan yang perlu dibahas adalah apakah kejahatan kesehatan dapat disamakan dengan malpraktek medis dan bagaimana seharusnya penerapan keadilan restoratif diterapkan pada tindak pidana di bidang kesehatan. Salah satu alasan utama penerapan restorative justice adalah karena korban sebagai pihak yang paling dirugikan dan menderita umumnya ditinggalkan dalam sistem peradilan pidana. Perhatian dan perlindungan kepada korban tidak cukup untuk memulihkan penderitaan korban. Kajian ini menunjukkan bahwa kejahatan kesehatan tidak sama dengan malpraktek medis karena seperti namanya malpraktik medis melibatkan profesi. Padahal, tindakan kriminal bisa dilakukan oleh siapa saja. Penerapan keadilan restoratif harus diterapkan pada kasus-kasus di bidang kesehatan yang melibatkan kelalaian dan bukan kasus yang berdasarkan kesengajaan. Penerapan keadilan restoratif dapat bermanfaat bagi pelaku, korban, dan masyarakat.

Kata kunci: Kejahatan Kesehatan, Malpraktik, Restorative Justice

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Introduction

Health crimes are one of the many types of criminal acts that occur yet are rarely known by the people in general, contrary to crimes such as murder or rape that almost every day would get media coverage, in electronic and/or another form of media. Health crimes can be observed as an iceberg, which on the surface looks small but, underneath is far bigger.

The crimes which are reported to the police and recorded by the police are designed as “crimes known to the police”. These statistics are an inadequate index of the true crime rate (Sutherland & Cressey, 1960).

Health crimes, especially malpractice is committed by a health professional for example doctors, nurses, midwives, etc. Besides health, professional medical malpractice can also be committed by hospitals, clinics, and even pharmacy companies. This type of criminal act can be done by, denying faults during errors in patient treatment, refusing to treat patients, counterfeiting drugs, giving expired medicine, etc.

Recent case of medical malpractice is a toddler in East Java who died from treatment. The clinic said that there were no errors, and it was performed according to the procedure. Another example happened in North Bintan, a 30-year-old woman has an infection after a cesarean section. Even her stomach has a hole and emits a foul smell. It is known that the woman was hospitalized for three days after the cesarean section. During her stay, the hospital never once check her surgery wound nor replace the bandage. Eventually, the patient complained of pain in her abdomen. It turned out that her stomach wall become wet and emitted a foul smell and even had a hole.

,The next case happened in Palembang. A husband and wife must accept the hard truth that their baby is dead due to a broken neck and skin peeled off after delivery. There is suspicion that this happened due to a midwife's error during the delivery process. This is not the first time that a baby died during the delivery process involving this midwife. The couple then, reports the midwives for medical malpractice to the authorities.

The case of medical malpractice started to become a mainstream discussion after the case of doctor Setyaningrum with Mrs. Rukmini Kartono as the patient happened at the beginning of 1981. Doctor Setyaningrum was found guilty of committing medical malpractice. However, the Supreme Court then, reverse the decision and found him not guilty of medical malpractice.

According to Saparinah Sadli, crime or criminal acts is a form of "deviant" behavior which always going to exist and is inherent in every form of society; no society would have no crime. This deviant behavior is a real threat especially to social norms that underlie societal life or social order; could cause social tension and; therefore can be a real and potential threat to ongoing order social (Arief, 1994).

Becker stated, deviance is not a quality of the act the person commits, but rather a consequence of the application by others of rules and sanctions to an

“offender”. The deviant is one to whom that label has successfully been applied; deviant behavior that people so label (**Beckers, 1963**).

the victim as the party who is most harmed and suffers is generally being abandoned in the criminal justice system. The care and protection given to the victim felt not yet adequate especially if the aim is to restore the victim's suffering. According to Arief Gosita: “The victims are those who suffer physically and mentally due to the actions of others, yet still must seek for the fulfillment of their own or other's interest that conflict with to the interests and human rights of the sufferer” (**Gosita, 1993**).

Cases of medical malpractice are often not registered with the Police, even if it is, the case eventually would just end through a Warrant Termination Investigation (SP3). The reason to stop the investigations is usually to bow down to the lack of evidence or worse the nonexistence of evidence, for the police to keep continue building their case. Another reason is due to the settlement made between the victim/victim's family with the perpetrator.

According to Rita Triana Budiarti (2004),

“It is very difficult to prove the fault of the doctor. In most cases, medical malpractice is solved through non-litigation settlement, due doctors don't want to damage their reputation from negative publicity, even though there is a possibility that the doctor does have a fault.”

The term medical malpractice cannot be found in the Criminal Code and Law on Medical Practice. Even in health sectors, it is more common to use the term medical dispute. According to Jayanti Nusye KI (2009), “malpractice ” is an inappropriate term, because it entails the presumption of guilt to the doctor/dentist. With the presumption of guilt means that it is open for certain parties with misguided intent to exploit that may cause damage to the health care system.”

The negative impact that comes with the retributive justice approach such as the inefficiency of law enforcement and the lack of proper attention for the victim of crimes, leads to the emergence of a more attentive approach, especially for the victim's sake, that is restorative justice approach.

The goal of the criminal justice process according to the restorative justice perspective is to hold offenders accountable for their actions and their consequences, that is how to restore the suffering of people whose rights have been violated (victims of crime) to the position before the offense was committed or the loss occurred, both material and immaterial aspects (**Yulia, 2010**). Contrary to the retributive paradigm, the restorative paradigm takes more appreciation toward the victim's interest in the solution for the crime (**Widiartana, 2009**).

Research Problems

Formulation of the problems that can be found are as follows: whether health crimes equate to medical malpractice? how application of restorative justice to acts of criminal health?

Research Methods

This paper uses juridical normative methodology. Law material is analyzed qualitatively with the results of the study come from the definition of law, theory of laws, and legal doctrines.

Discussion

Health Crimes and Medical Malpractice

Every people have their preference on how to approach a dispute. This preference is influenced by various factors, including desired goal, the credibility of the institution involved in the dispute, the relationship and closeness among conflicting parties, and the people's culture (**Sulistiyono, 2007**).

Medical malpractice has a wide range of impacts in the juridical sector, it relates to criminal, civil, and administrative law. In criminal law, it is related to the aspect of criminal acts such as fraud, forging doctor's notes, sexual harassment during medical care, and neglecting patients on purpose. In civil law, it relates to the issues of default, while in law administration it relates to licensing for example Registration Certificate of Doctor (Surat Tanda Registrasi/STR) (**Junaidi, 2011**).

Health law is a branch of legal studies that keeps developing as the day goes by. Other studies would show that it leads to more specific health laws such as medical law, hospital law, etc (**Yustina, 2012**).

There are several definitions of health law, including (**Ratman, 2014**):

1. HJ J. Leenen.

All provisions regarding health care and the application of civil law, criminal law, and administrative law, and that are based on the international guidelines, customary law, and jurisprudence regarding health care, autonomous law, science, and literature, which are the source of health law;

2. Van der Mijn

Laws that are directly related to health care, include civil law, criminal law, and state administrative law.

From a health perspective, malpractice is the mishandling of cases or health problems (including disease) by health professionals, that lead to negative impacts on the patient (**Notoatmojo, 2010**). According to Siska Elvandari, medical disputes that stem from patient safety incidents can be resolved through the judiciary in Indonesia as an implementation of the "*ultimum remedium*" principle. However, the application of criminal law in the event of an unexpected event, according to the criminal justice system in Indonesia, should be based on the "*primum remedium*" principle (**Elvandari, 2015**).

In health law, exist an adage of *volunti non fit injuria*. This adage is applied in operations that are likely to have serious consequences (**Guwandi, 1990**). However, it does not automatically liberate the doctor if the risk does occur. The definition of *volunti non fit injura*, indicates that the doctor has considered all the risks.

According to Munir Fuadi, medical malpractice is (**Fuady, 2005**):

"every medical action carried out by a doctor or people under their supervision, or health services provided to their patients, be it diagnosis, therapy and/or disease management which is carried out in violation of law, propriety, decency, and professional principles, be it intentionally or due to negligence that causes mishandling, pain, injury, disability, bodily harm, death, and other losses that makes doctors and nurses beheld responsible administratively, civilly and criminally."

According to Rusli Effendi, Hendrik's (2013) book stated that a medical act/action can be categorized as malpractice if it fulfills the following elements:

1. Contrary to the law;
2. Foreseeability;
3. Avoidable; and
4. reproachful.

Some malpractices are intentionally carried out by doctors, while some are due to negligence/culpa, although most of them are caused by negligence.

In the book: *The Law of Hospital and Health Care Administration* written by Arthur F. Southwick, as quoted by Ninik Mariyati, it is stated that 3 (three) theories state the source of a malpractice action, namely (**Mariyati, 1988**):

a. Breach of contract;

According to this theory, the source of malpractice is due to a breach of contract. This theory postulates that legally a doctor has no obligation to treat someone if there is no contractual relationship between the doctor and the patient. Based on this theory, the relationship between a doctor and a patient only occurs when a contract has been formed between these two parties. An example that can portray this theory is the case of *Child vs Weis*. A seven-month pregnant woman from Dallas (USA) is experiencing labor pains and bleeding while visiting another city. Then he went to the hospital's emergency room and was examined by a nurse. This nurse then called and told the case regarding the pregnant woman to the hospital doctor who suggested that the pregnant woman see her doctor in Dallas. One hour later the baby was born in the car, and twelve hours later the baby died. In this medical malpractice lawsuit, the court decided that the doctor in the other city was not responsible for the pregnant woman, because there was no contractual relationship between the two of them, so there was no breach of contract.

b. The theory of intentional action;

According to this theory, the basis for suing a doctor is an intentional tort, which results in a person being physically injured (assault and battery). Cases like this are rare and can be classified as criminal acts due to the element of intent. An example that can portray this theory is *Mohr vs Williams*. The patient agreed to surgery for removing the polyp from his right ear. After the anesthesia was

administered, the surgeon also found a polyp in his left ear, which the expert deemed more necessary for surgery. The surgeon eventually decided not to operate on his right ear but switched to his left ear without the patient's knowledge or consent. The court ruled that the surgeon's actions as assault and battery.

c. Negligence Theory;

According to this theory, the source of malpractice is negligence. An example that can portray this theory is a 12-year-old boy who broke his arm after participating in a competition at his school. He had to wait for 6 hours in the emergency room of a hospital in New York. Even though it was said that the doctor was very busy, the court decided it was a case of negligence (malpractice).

Restorative Justice on Health Crime

Restorative justice is an approach to dealing with criminal cases that focus on recovery, rather than punishment. Its development of this idea can be traced from the development of retributive, then restitutive, and eventually restorative justice. One of the desired impacts of its implementation is to prevent the undesired effects of applying criminal sanctions, especially to the perpetrator.

Based on the concept of restorative justice, the government isn't the only responsible party who has to deal with issues surrounding the crime, but it is also the responsibility of the community. Therefore, the concept of restorative justice is built on the understanding that crimes lead to harm, hence must be recovered. Looking at the historical development of restorative justice, it's not something completely new. It's just that the term restorative justice hasn't been used yet.

John Braithwaite believes that the regulation on restorative justice already existed way back in the 80s.

During the 1980s, there was also considerable restorative justice innovation in the regulation of corporate crime (Rees 1988; Braithwaite 1995b). Clifford Shearing's (1997, p. 12) historical analysis is more about governmentalities of post-Fordist capitalism than village moots: "Restorative justice seeks to extend the logic that has informed mediation beyond the settlement of business disputes to the resolution of individual conflicts that have traditionally been addressed within a retributive paradigm. In both a risk-oriented mentality of security [actuarialism] and a restorative conception of justice, violence loses its privileged status as a strategy to be deployed in the ordering of security." (Braithwaite, 2002).

The approach of restorative justice is widely believed to be in contrast with the approach of retributive justice in the context of crime prevention. This belief stems from the differing point of view these two approaches have. Proponents of retributive justice argue that the state's primary response to crime should be to punish criminals according to their actions (Duff, 2011). Based on this theory sentencing is believed to be a real/absolute consequence that must exist to give certain limitations for the perpetrators of criminal acts. Criminal sanctions are described as a means of giving suffering hence the officers can be declared a failure if this suffering is not felt by the convict. The classical teaching of this theory describes it as a doctrine of retaliation through *lex talionis* (Zulfa, 2009). LaFave believes that criminal law should aim to restore justice which is known as

restorative justice. Restorative justice is conceived as an approach in criminal law to resolve cases by involving criminals, victims, families of victims or perpetrators, and other related parties aimed to seek a fair solution by emphasizing restoration to its original state and not retaliation (**Hiariej, 2014**). Kay Harris, who quotes Braithwaite and Strang, provides two definitions of restorative justice. First, restorative justice as a concept of the process aims to bring together the parties involved in a crime to express the suffering they have experienced and determine what must be done to restore the situation. Second, restorative justice as a concept of value contains values that are different from ordinary justice because it focuses on recovery rather than punishment (**Hiariej, 2014**).

Some equate negligence with malpractice. They believe that medical errors are synonymous with professional negligence.

Many kinds of literature often refer to these two terms interchangeably as if they mean the same thing, even though most opinions say that malpractice is not always negligence, malpractice has a broader meaning than negligence. Because in addition to including the meaning of negligence, the term malpractice also includes actions that are carried out intentionally (intentional, *dolus*), to violate the law, while the meaning of negligence is more of being unintentional, careless, indifferent, uncaring meanwhile the consequences are not even part of the objectives of their actions (**Hatta, 2013**).

Identification of several characteristics/types of restorative justice programs or outcomes, including (**Prayitno, 2013**):

1. *Victim-offender mediation* (between perpetrator and victim);
2. *Conferencing* (to bring the parties together);
3. *Circles* (mutual support);
4. *Victim assistance*;
5. *Ex-offender assistance*;
6. *Restitution* (compensate/heal);
7. *Community service*.

Restorative justice with a different paradigm from the previous judiciary opens opportunities to provide a wider "space" for perpetrators and victims, in resolving disputes/conflicts that occur between the two.

In addition, the practice of Restorative Justice can also build and support a culture of practice for a better healthcare system. The threat of litigation may lead to the focus of doctors' practice not to improve the patient's health, but rather to protect them as much as possible from potential responsibility (in the context of criminal law) for malpractice of the treatment or care they provide. This practice is referred to by the Office of Technology Assessment (OTA) as defensive medicine and is defined as (**OTA, 1994**):

Defensive medicine occurs when doctors order tests, procedures, or visits, or avoid high-risk patients or procedures, primarily (but not necessarily solely) to reduce their exposure to malpractice liability. When physicians do extra tests or procedures primarily to reduce malpractice liability, they are practicing positive defensive medicine. When they avoid certain patients or procedures, they are practicing negative defensive medicine.

Grazia Mannozi further explains that defensive medicine practice can be divided into two categories, namely (**Mannozi, 2015**):

(a) negative defensive medicine (also termed avoidance behavior). This occurs when doctors refuse to treat seriously ill or highly problematic patients;

(b) positive defensive medicine (also called assurance behavior). This occurs when the doctors prescribe a great number of unnecessary tests or therapies or write down superfluous annotations in the patient's case history.

The most basic idea of achieving restorative justice is to provide a means for all parties involved in a crime and bring them together to reach an agreement on how best to resolve problems as a result of the crime. Here are some models that can be used in achieving restorative justice in medical malpractice, namely:

1. RESTORATIVE MEDICAL ERROR RESOLUTION (R-MER) MODEL

Jonathan Todres (2006) argued that the main component of the R-MER system is participatory, carried out through a forum where patients and healthcare providers will be allowed to have an open dialogue with each other. Through this forum, it is hoped that we will be able to provide a better understanding of what happened and what each party wants and/or needs. Then regarding the process to determine the aspect of fault, it will be accompanied by the participation of a third party, which serves as an impartial review and at the same time resolves the problem of imbalance in position between patients and health care providers. Apart from being a means of bringing patients together with health care providers involved in cases, the R-MER forum will also include an additional component, namely by making recommendations on changes in medical practice or a particular hospital or in general in the standard of care, so that the same case is expected to prevent the same issues in the future. Recommendations for change in practice in the world of health are also followed by a follow-up monitoring mechanism to ensure that the changes have been implemented. According to Jonathan, these components must be part of the R-MER system.

2. Adopting one of the Italian laws, namely The Sentencing Reform Act 67/2014

The proposal for this Bill was originally submitted by academics from the Catholic University of Milan. This law introduces a model known as victim-offender mediation (VOM) for conflicts arising from medical malpractice. In practice, a doctor who is charged with causing injury to another person through negligence may choose one of the following options:

- (a) through regular court;
- (b) through negotiated sentence (between the parties) provided for in Article 444 of the Criminal Procedure Code Italy;
- (c) through summary trial as provided for in Article 442 of the Criminal Procedure Code Italy;
- (d) through suspension of trial and probation as provided for in Article 168-bis of the Italian Criminal Code which was introduced in Law 67 of 2014.

In this case, the defendant must present his/her treatment program to the court (including VOM).

Conclusion

Crimes in the health sector are one of the types of crimes that quantitatively show an increase. These are related to many parties, including doctors, nurses, midwives, pharmacists, and other health workers. Health crime does not equate to malpractice because malpractice is related to bad practice or professional misconduct. So, in malpractice, there must be a link between the perpetrator and his profession. Meanwhile, health crime does not have to be related to the profession.

Suggestion

The application of restorative justice in health crimes can be carried out if it is related to or carried out by negligence/culpa. The settlement with restorative justice will bring goodness to the perpetrators and victims as well as the community because it will restore conditions similar to before the crime occurred. However, if the crimes involve intent, the application of restorative justice will not give a deterrent effect on the perpetrators. Therefore, in cases that are carried out intentionally/ *dolus*, it is more appropriate to apply criminal law hence the function of criminal law is not *ultimum remedium* as in negligence but with *premium remedium*.

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