

Reconstruction of Article 440 of Law Number 17 of 2023 Concerning Health Against the Crime of Forgetfulness by Medical Personnel or Health Workers that Result in Serious Injury to Patients Based on the Value of Justice

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ABSTRACT

This research aims to examine the normative weaknesses in the article and offer a more equitable legal reconstruction. Article 440 of the Health Law regulates criminal liability for medical personnel or health workers who are negligent to cause serious injury to patients. However, this regulation is considered not to have fully paid attention to the principles of proportionality and substantive justice, so that it has the potential to cause excessive criminalization for medical personnel who act in accordance with standard operating procedures (SOPs) but still face unexpected medical risks. This inequality has sparked concerns, both in terms of legal protection for medical personnel and patients' rights to justice. This research emphasizes the importance of legal reconstruction that not only contains elements of punishment, but also the principle of restorative justice. This approach proposes that in determining the element of forgetfulness, it is necessary to give in-depth consideration to the good intentions of medical personnel, the level of risk in medical actions, as well as the application of bioethical principles such as beneficence and non-maleficence. Thus, the crime of forgetfulness should not be solely measured

by the consequences caused, but must consider the medical process carried out, whether it is in accordance with professional standards or not. This reconstruction aims to ensure that the law is able to protect the dignity of the medical profession while ensuring the right of patients to get justice and redress in the event of negligence. As a result, this study recommends a revision of Article 440 of the Health Law by including elements of substantive justice-based assessment and medical ethical principles. Strengthening the mediation mechanism between patients and medical personnel before the criminal process is also suggested in order to create a fair settlement for both parties. Thus, health law is expected not only to be a tool of repression, but also to function as a corrective and preventive instrument that is in line with human values. This reconstruction is a strategic step in creating harmony between legal protection for health workers and the fulfillment of patients' rights. **Keywords:** Legal reconstruction, Article 440 of the Health Law, criminal acts of forgetfulness, medical ethics,

INTRODUCTION

Law Number 17 of 2023 concerning Health is a significant step in reforming the health system in Indonesia. However, Article 440 in

this law has caused debate because it regulates criminal sanctions for medical personnel who commit negligence to cause serious injury or death to patients. This provision raises concerns among medical personnel regarding the potential criminalization of medical practices that can affect the quality of health services. Article 440 paragraph (1) states that medical personnel who are negligent to cause patients to suffer serious injuries can be sentenced to a maximum of three years in prison or a fine of up to Rp250,000,000.00. Meanwhile, paragraph (2) states that if the negligence results in the death of the patient, then the criminal threat increases to a maximum of five years in prison or a fine of up to Rp500,000,000.00. This provision is considered not in line with the *lex specialis* paradigm of health law, because it equates medical negligence with a general criminal act¹.

The application of criminal sanctions in cases of medical negligence has the potential to have negative effects, such as defensive medicine, where medical personnel tend to avoid high-risk procedures even if necessary, in order to avoid lawsuits. This can have an impact on declining quality of health services and increasing medical costs. Moreover, this repressive approach does not consider the complexity and risks inherent in medical practice. Therefore, it is necessary to reconstruct Article 440 so that it better reflects the value of justice. An approach that emphasizes restorative justice mechanisms and alternative out-of-court dispute resolution is considered more appropriate for handling medical negligence cases. This is expected to provide balanced legal protection between patients and medical personnel, as well as encourage the improvement of the quality of health services without causing

excessive fear among medical personnel². The reconstruction of Article 440 based on the value of justice is expected to create a balance between the protection of patients' rights and legal protection for medical personnel in carrying out their profession. Thus, a fair and sustainable health system can be realized, and public trust in health services and law enforcement in the health sector can be increased.

Changes in regulations related to the Crime of Fornivation of medical personnel in Health Law No. 17 of 2023 compared to previous regulations.

This regulatory change shows that there are efforts to simplify and integrate various rules related to medical and health practices. However, the application of criminal sanctions in cases of medical negligence raises a debate about the balance between patient protection and legal protection for medical personnel. Some argue that this repressive approach does not take into account the complexity and risks inherent in medical practice, and can encourage the practice of "defensive medicine" that has the potential to reduce the quality of health services. Therefore, it is necessary to evaluate and reconstruct this provision to better reflect the value of justice and provide balanced protection for all parties involved³.

Problems in the implementation of Article 440 of the Health Law that have the potential to cause injustice for medical personnel.

The repressive approach in Article 440 has the potential to have negative effects, such as defensive medicine, where medical personnel tend to avoid high-risk procedures even if necessary, in order to avoid lawsuits. This can have an impact on declining quality

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of health services and increasing medical costs. In addition, the application of criminal sanctions without considering the inherent complexity and risks in medical practice can cause injustice to medical personnel who have tried to provide the best service in accordance with professional standards⁴. Therefore, it is necessary to evaluate and reconstruct Article 440 so that it better reflects the value of justice and provides balanced legal protection between patients and medical personnel. An approach that emphasizes restorative justice mechanisms and alternative out-of-court dispute resolution is considered more appropriate for handling medical negligence cases. This is expected to prevent unnecessary criminalization of medical personnel and ensure that law enforcement in the health sector remains fair and proportionate⁵.

The concept of justice in criminal law is relevant to regulations related to the Criminal Medical Negligence.

In criminal law, the concept of justice serves as a foundation to ensure that each individual is treated fairly and proportionately according to his or her actions. In the context of medical negligence, the application of criminal law must consider the balance between the protection of patients' rights and the protection of medical personnel in carrying out their profession. This is important so that the sanctions imposed not only provide a deterrent effect, but also reflect a sense of justice for all parties involved. As revealed in a study, "sanctions are imposed by medical professional organizations and authorized direct superiors, taking into account the ethical values and values of the profession"⁶.

In addition, the application of criminal sanctions in cases of medical negligence

must be adjusted to the development of science and the times. This is to ensure that criminal law not only provides legal certainty, but also benefits and justice for the community. As stated in another study, "criminal charges are only imposed if the act violates the law, and the form of the crime of forgetfulness needs to be adjusted to the development of science and the times".⁷ Based on the above phenomenon, the author took the title of the research Reconstruction of Article 440 of the Criminal Crime of Forbearance of Medical Personnel in the Health Law No. 17 of 2023 which is based on the value of justice.

PROBLEM FORMULATION

Are the provisions of Article 440 of the Criminal Crime of Fornivance of Medical Personnel Based on the Value of Justice

How is the Reconstruction of the Crime of Forgetfulness regulated in Law No. 17 of 2023 based on the Value of Justice.

RESEARCH OBJECTIVES

To analyze weaknesses in Article 440 of the Health Law No. 17 of 2023, especially in the application of criminal sanctions against medical personnel who commit negligence. This article has the potential to cause legal uncertainty because it does not distinguish between minor and severe negligence, and does not consider the medical risk factors inherent in every medical procedure. In addition, a more repressive legal approach in this article can encourage the practice of defensive medicine, where medical personnel become overly cautious to the point of being reluctant to take high-risk medical measures even though necessary.

To formulate the concept of reconstruction of Article 440 of the Health Law No. 17 of 2023 that is fairer for medical personnel, a more

⁴ Albertus D Soge Constitutional Law, Faculty of Law, Proclamation University 45 Journal of Law Caraka Justitia

⁵ Siswanto Pabidang, Teguh Prasetyo, Ahmad Jaeni, Budi Purnomo Criminal Responsibility of Medical Personnel or Health Workers According to Article 440

of Law Number 17 of 2023 concerning Health, Jurnal Cahaya Mandalika

⁶ Aria Chandra Gunawan, Dika Yudanto, Amir Junaidi Criminal Law Review of Criminal Acts of Forgetfulness in the Health or Medical Sector

proportionate approach and based on restorative justice is needed. The reconstruction of this article must distinguish between administrative, ethical, and criminal negligence, so that not all cases of medical negligence directly lead to criminalization. As a solution, the handling of medical negligence cases can prioritize mediation mechanisms, settlement through the Medical Discipline Honorary Council (MKDKI), or medical arbitration institutions, before entering the realm of criminal law.

RESEARCH BENEFITS

Theoretically, it contributes to the development of health law in Indonesia, especially in improving regulations related to the Criminal Negligence of medical personnel so that they are more based on justice and proportionality. By analyzing the weaknesses of Article 440 of the Health Law No. 17 of 2023 and formulating a fairer reconstruction concept, this research can be an academic reference and a basis for policymakers in drafting regulations that are more balanced between patient protection and medical personnel. In addition, this research can also enrich the study of legal science, especially in the fields of health law and criminal law, by offering new perspectives on restorative justice and non-repressive approaches in dealing with medical negligence.

Practically contributing to the development of health law in Indonesia by offering concrete solutions in revising and improving Article 440 of the Health Law No. 17 of 2023 to be fairer for medical personnel without overriding patient protection. By formulating a more proportionate concept of legal reconstruction, this research can be a guide for policymakers in designing more balanced regulations, as well as providing legal certainty for medical personnel in carrying out their duties.

LITERATURE REVIEW

⁸ <https://www.hukumonline.com/klinik/>
⁹ jurnal.unissula.ac.id

Criminal Law Theory in the Criminal Crime of Medical Forgetfulness

Forgetfulness, or negligence, in criminal law refers to a form of error that occurs due to a person's lack of care, resulting in unintended consequences. In contrast to intentionality (*dolus*), where the perpetrator consciously wants the consequences of his actions, forgetfulness occurs without any intention to cause these consequences. According to Fitri Wahyuni, negligence is a form of error that arises because the perpetrator does not meet the standards of behavior that have been determined by the law, and the negligence occurs because of the behavior of the person himself⁸.

Criminal law experts describe several elements that make up the crime of forgetfulness. Van Hamel, for example, states that forgetfulness contains two main conditions: first, not to hold a presumption as required by law; Second, not holding precautions as required by law⁹. Meanwhile, Hazewinkel-Suringa defines forgetfulness as a lack of anticipation of the consequences that may arise from an act¹⁰. In addition, Simons added that forgetfulness is characterized by a lack of prudence and an inability to anticipate the consequences of the actions committed. In the context of criminal law, the forgetfulness that can be accounted for is gross forgetfulness (*culpa lata*), where the lack of prudence is quite significant according to the size of the general person. In contrast, minor forgetfulness (*culpa levis*), measured by the standards of a very careful person, is generally not criminally accountable. The elements of the crime of forgetfulness include: (1) the existence of an unintentional act; (2) the consequences caused were not intended by the perpetrator; and (3) there is a causal relationship between the act and the effect that occurs. Moeljatno emphasized that in forgetfulness, the perpetrator does not heed the applicable prohibition, so that he is not careful in committing an act that objectively causes a

¹⁰ opac.fhukum.unpatti.ac.id

prohibited situation¹¹. Understanding the meaning and elements of the crime of forgetfulness is important in criminal law enforcement, especially in determining the liability of perpetrators who commit unintentional acts, but resulting in losses for other parties. By understanding these elements, law enforcement officials can assess whether an act can be categorized as a criminal act of forgetfulness and deserves criminal sanctions.

Medical negligence, or malpractice, is a crucial issue in the health world related to the actions or negligence of medical personnel that cause losses to patients. In the context of criminal law in Indonesia, gross negligence by health workers that results in serious injury or death to patients is subject to criminal sanctions. As stipulated in Article 84 of Law Number 36 of 2014 concerning Health Workers, health workers who commit gross negligence that results in serious injury to health service recipients can be sentenced to a maximum of three years in prison, and if it results in death, can be sentenced to a maximum of five years in prison¹². Juridical analysis of medical negligence emphasizes the importance of proving the elements of gross negligence. Gross negligence is defined as a lack of care that should be taken by medical personnel in providing health services, which results in the patient suffering serious injury or death. In this case, proof is needed that medical personnel do not meet the applicable professional standards, causing adverse consequences for patients¹³. A comparison of criminal regulations related to medical negligence shows a variation in approaches in different countries. In the

United States, for example, medical malpractice cases are generally resolved through formal litigation, where patients can file a civil lawsuit against medical personnel who are suspected of negligence. This process often involves high costs and a long time, but it provides clear legal protection for patients¹⁴. In contrast, Indonesia prioritizes a restorative justice approach in resolving medical disputes. Law Number 17 of 2023 concerning Health emphasizes the importance of mediation as a first step before taking the litigation route. This approach aims to maintain a good relationship between patients and medical personnel and reduce the burden on the courts. In addition, professional institutions such as the Honorary Council for Medical Ethics (MKEK) play a role in resolving disputes related to professional ethics¹⁵. This difference in approach reflects the legal system adopted by each country. The United States with the *common law* system tends to prioritize litigation and case precedent, while Indonesia with the *civil law system* emphasizes written regulations and non-litigation settlements. Understanding these differences is important for medical professionals and patients in dealing with medical malpractice cases in various jurisdictions.

In *Hospital Criminal Liability (For Negligence Committed by Medical Personnel)*", hospitals can be held criminally liable for negligence committed by medical personnel under its auspices and emphasize the importance of clear operational standards and procedures in hospitals to prevent negligence that is detrimental to patients¹⁶.

¹¹ : Rifka Ramadhani Pawewang, Olga A. Pangkerego, Berlian Manopo (2021), *"Because of Wrongdoing Causing Serious Injury as a Criminal Offense Based on Article 360 of the Criminal Code"*, Vol. IX No. 4 Pages 233-242

¹² Abdur Rokhim, Sri Endah Wahyuningsih (2023) "Criminal Liability Regulation for Health Workers Who Commit Medical Malpractice Reviewed from the Perspective of Law No. 36 of 2009 concerning Health and Law No. 36 of 2014 concerning Health Workers"

¹³ <https://www.hukumonline.com/berita/a/>

¹⁴ jurnal.syntaxliterate.co.id

¹⁵ Gibran febryano, Hudi Yusuf (2024), *"Legal System and Medical Dispute Resolution: Comparison of Indonesia with Other Countries"*, Vol : 1 No 9, p. 5025-5039.

¹⁶ Beni Satria, Redyanto Sidi Jambak (2023), *"Hospital Criminal Liability (For Negligence Committed by Medical Personnel)"* Dewa Publishing Publisher

Legal Protection of Doctors in Health Services Independent Doctor Practice, in analyzing the rights and obligations of doctors and patients in independent practice, he highlighted that doctors who run independent practice must have an official license and meet the administrative requirements set by law. In addition, dispute resolution between doctors and patients should be done through mediation before taking formal legal routes, in order to maintain good relations and minimize the potential for criminalization of the medical profession¹⁷. Corporate Criminal Liability in Employing Medical Personnel Without Permission, corporate criminal liability related to alleged criminal acts of employing medical personnel and health workers without permission in hospitals and examining the legal implications for hospitals that do not comply with medical personnel licensing regulations, which can have an impact on service quality and patient¹⁸safety. As well as Legal Aspects in the Implementation of Medical Practice Legal aspects in the implementation of medical practice based on Law No. 9 of 2004 concerning Medical Practice. He emphasized the importance of a deep understanding by medical professionals of the regulations governing medical practice to avoid potential violations of the law and ensure protection for patients¹⁹.

Dr. Irsyam Risdawati, M.Kes, in her various researches, emphasized the importance of implementing informed consent as a legal protection effort for medical personnel in carrying out medical practice. He highlighted that informed consent is a form of patient consent after getting complete information about the medical procedure to be performed, including the risks and benefits. With valid

informed consent, medical personnel can be protected from lawsuits related to alleged negligence or malpractice. in examining the legal aspects related to the hospital's responsibility for medical actions carried out by doctors. He emphasized that hospitals have legal responsibility for mistakes or negligence committed by their medical personnel, especially if there is a violation of applicable medical service standards. This shows the importance of the role of hospitals in ensuring that medical personnel comply with established procedures and standards to avoid legal risks. In the reconstruction of legal sanctions related to the unavailability of informed consent carried out by doctors, with a justice value-based approach. He proposed the need for a review of legal sanctions for medical personnel who do not comply with informed consent procedures, to better reflect the principles of justice for all parties involved²⁰.

The Concept of Justice in Law

Justice is one of the fundamental principles in law that aims to create balance in social life. In the philosophy of law, justice has been a major topic studied by many thinkers, including Aristotle, John Rawls, and Gustav Radbruch. Each of these philosophers provides a different perspective on justice, which then affects the modern legal system, including criminal law in Indonesia. Aristotle put forward a theory of justice which is divided into two main types, namely distributive justice and retributive justice. Distributive justice is concerned with the distribution of rights and obligations based on a certain proportion in society, while retributive justice focuses on providing rewards or punishments according to one's actions. In the context of criminal law,

¹⁷ Riski Darwaman¹, RedyantoSidi², Yasmirah Mandasari Saragih (2023), *"Legal Protection of Doctors in Health Services Practice of Independent Doctors"*, Vol. 7 No. 1 Pages 225 - 231

¹⁸ Redyanto SidiJambak, Beni Satria (2024), *"Legal Protection for Hospitals During Armed Conflict Based on International Humanitarian Law"*, 6th Congress of MHKI

¹⁹ Dr. Redyanto Sidi, S.H., M.H (2022) " *Aspects of the Implementation of the Law on Medical Practice Based on Law No. 9/2004 concerning Medical Practice*", Vol 4 No. 2 Pages 1-9

²⁰ Irsyam Risdawati. (2024). *Introduction to Health Law Navigating Legal and Ethical Challenges in Health Services*. PT Dewangga Energi Internasional Bekasi.

retributive justice is particularly relevant, as it refers to the principle that the offender must receive punishment commensurate with his or her guilt (Aristotle, *Nicomachean Ethics*).²¹

John Rawls, in his book *A Theory of Justice*, introduced the concept of justice as fairness. He developed two main principles of justice, namely the principle of equal freedom for all individuals and the principle of difference that allows for social inequality to the extent that it benefits the most disadvantaged groups. In criminal law, Rawls's view can be applied in the context of the protection of human rights, including the right to fair due process for every individual without discrimination (Rawls, 1971).²² Gustav Radbruch offers a legal theory that includes aspects of justice, legal certainty, and utility. He emphasized that good law should reflect a balance between the three aspects, and justice should be a major factor in legal interpretation. In criminal law in Indonesia, the principle of justice can be found in the principle of legality contained in Article 1 paragraph (1) of the Criminal Code, which states that a person can only be punished based on the law in force previously, as well as in the principle of proportionality in criminal sentencing²³. The principle of justice in Indonesian criminal law also includes the principle of equality before the law as stipulated in Article 27 paragraph (1) of the 1945 Constitution²⁴, as well as the right to a fair trial as guaranteed in Article 28D paragraph (1) of the 1945 Constitution. In addition, the Constitutional Court Decision No. 21/PUU-XII/2014 emphasizes the importance of proportionality in punishment so that there is no abuse of power by the state. Thus, criminal law in Indonesia aims to balance legal certainty with the

principle of substantive justice in order to protect human rights and social order²⁵.

Analysis of Article 440 in Health Law No. 17 of 2023

Article 440 in the Health Law No. 17 of 2023 contains transitional provisions that aim to bridge the transition from the previous health law to the new one. The main substance of this article is to ensure that all implementing regulations from the previous law remain in force as long as they do not conflict or have not been replaced by new regulations based on Health Law No. 17 of 2023. This is important to avoid legal vacuums that can interfere with the continuity of health services, as well as to provide adaptation time for health workers, health facilities, and other stakeholders²⁶. However, the implementation of Article 440 has the potential to cause problems, especially related to the unclear transition deadline. The absence of explicit provisions regarding the duration of the validity of the old rules can give rise to legal uncertainty. As a result, old rules that are not in accordance with the spirit of the new law can continue to be applied, hindering health system reform. In addition, there is a risk of insynchronization between the central and regional governments in adopting new regulations, given the decentralization in Indonesia's health system, which has the potential to create gaps in health services between regions²⁷. To overcome these problems, the government needs to immediately draft clear implementing regulations and provide a firm transition deadline. In addition, socialization and coordination between the central government, regions, and related parties must be strengthened so that the adaptation process runs effectively. With these measures, the new principles in Health Law No. 17 of

²¹ Aristoteles, *Nicomachean Ethics*.

²² John Rawls, *A Theory of Justice*, Harvard University Press, 1971.

²³ Gustav Radbruch, *Legal Injustice and Supra-Statutory Law*, 1946.

²⁴ Constitution of the Republic of Indonesia in 1945.

²⁵ Constitutional Court Decision No. 21/PUU-XII/2014.

²⁶ Health Law No. 17 of 2023.

²⁷ Ministry of Health of the Republic of Indonesia. "Explanation of Health Law No. 17 of 2023".

2023 can be applied consistently without disrupting the stability of the ongoing health system²⁸.

RESEARCH METHODS

This research uses a juridical normative method, which is a research approach that focuses on positive legal studies by analyzing the applicable legal norms related to the criminal act of Fornivance of medical personnel in Article 440 of the Health Law No. 17 of 2023. This approach is carried out by examining laws and regulations, legal doctrines, and principles of justice in criminal law and health law. In addition, this study will also compare previous regulations to see the development and legal implications of the changes in the rules regarding the Crime of Medical Negligence. The analysis will be carried out through a literature study by referring to legal literature, court decisions, and various expert opinions to produce recommendations based on the value of fairness and proportionality in health law. Data sources Legal literature, health law journals, and documents from medical professional organizations.

RESULTS AND DISCUSSION

Problems of Article 440 of the Health Law
Article 440 of Law Number 17 of 2023 concerning Health raises a debate related to the balance between criminal aspects and protection for medical personnel. This article regulates criminal sanctions for medical personnel or health workers who commit gross negligence that causes serious injury or death to patients. In particular, paragraph (1) states that gross negligence resulting in

serious injury is punishable by a maximum of three years in prison, while paragraph (2) states that if such negligence results in death, a maximum prison sentence of five years can be imposed²⁹. Some people consider that this provision is not in line with the paradigm of health law which should be *lex specialis*. The regulation of criminal sanctions for the negligence of medical personnel in Article 440 is considered to resemble the formulation of criminal acts in the general criminal law (*lex generalis*), thus raising concerns about the emergence of defensive medicine, where medical personnel tend to avoid risky actions in order to avoid³⁰ lawsuits.

From the point of view of the medical profession, this provision can cause insecurity in carrying out duties. Medical personnel may be concerned about possible criminal prosecution for possible negligence, even if they have made their best efforts to meet professional standards. This can have an impact on the decline in the quality of health services, as medical personnel may be reluctant to make high-risk decisions that are necessary for patient recovery³¹. In addition, the lack of involvement of health workers in the process of formulating this law adds to the concern. Many health workers feel that their aspirations and inputs are not well accommodated, so some provisions in the law are considered to be open to different interpretations and create confusion³².

From the perspective of legal experts, the regulation of criminal sanctions in Article 440 can cause legal uncertainty. This provision is considered to not provide clear limits on what is meant by "gross negligence",

²⁸ Health Law Article, "Implementation of Transitional Provisions in the Latest Health Law", 2023.

²⁹ Sherel Poluan, Max Sepang, Herlyanty Y. A. Bawole, (2021). The enforcement of criminal acts for health workers if they commit negligence against health service recipients according to Law Number 14 of 2014 concerning Manpower. *Journal of Lex Crimen*, Vol. X No. 3, 38-48.

³⁰ Albertus D Soge, (2023). Analysis of the Handling of Medical and Health Profession Errors in Law

Number 17 of 2023 concerning Health from the Perspective of Health Law. *Journal of Caraka Justitia Law*, Vol. 3 No. 2, 146-164

³¹ Muhammad Kamarulzaman Satria, Hudi Yusuf, (2024). The juridical analysis of the novelty of health worker protection is reviewed based on Law Number 17 of 2023. *Journal of Intellectual and Scholars of the Archipelago*, Vol. 1 No. 2, 2441-2452.

³² Chera Hawanti and Hisom. (2023, September 2). Event Review: KEDAI II "Exploring the Protection of Health and Medical Workers in the Health Law".

so it can give rise to various interpretations in its enforcement. In addition, this arrangement is also considered to ignore the principle of *lex specialis derogat legi generali*, where special law (health law) should override general law (criminal law) in specific matters³³. Furthermore, the merger of the Medical Counseling Institution and the Health Worker Council in this law also raises concerns regarding the disparity of authority, competence, and independence between the medical profession and the health worker profession. This can complicate the scope of supervision of the practice of doctors and dentists, which can ultimately have an impact on the protection of the public as recipients of health services³⁴. In addition, the elimination of mandatory spending in this law also creates uncertainty for the people and health resources. This is considered a step backwards in efforts to improve the quality of health services in Indonesia, because without a clear budget allocation, efforts to improve the quality and equity of health services can be hampered³⁵. Overall, the problem of Article 440 of the Health Law reflects an imbalance between the criminal aspect and the protection of medical personnel. Evaluation and revision of this provision is needed in order to create a fair balance between law enforcement and protection for medical personnel in carrying out their profession, so that the main objective of health services, namely the safety and welfare of patients, can be achieved without sacrificing the safety and comfort of medical personnel at work.

Reconstruction of Article 440 Based on the Value of Justice

³³ Albertus D Soge, (2023). Analysis of the Handling of Medical and Health Profession Errors in Law Number 17 of 2023 concerning Health from the Perspective of Health Law. *Journal of Caraka Justitia Law*, Vol. 3 No. 2, 146-164

³⁴ Constitutional Court of the Republic of Indonesia (2024, December 16). Doctors and Activists Question the Autonomy of the Medical Profession and Health Workers <https://www.mkri.id/>

Article 440 of the Indonesian Criminal Code (KUHP) regulates the crime of fraud. This article was formulated to protect the public from harmful acts, such as fraud that can cause material and immaterial losses. However, as the times develop, there is a need to re-evaluate this article to be more in line with the values of justice that are developing in society. One of the criticisms of Article 440 is its nature that focuses too much on the retributive aspect, namely giving sanctions to perpetrators without considering recovery for the victim. This approach is considered less in line with the modern paradigm in criminal law that has begun to accommodate conflict resolution based on restorative justice. Restorative justice emphasizes the recovery of victims' losses and the reintegration of perpetrators into society, not just the imposition of punishment³⁶. To achieve more comprehensive justice, it is necessary to reconstruct Article 440 by including a mechanism that allows victims to obtain effective compensation. Currently, compensation efforts for victims in criminal law enforcement are not fully based on the value of justice, because victims are often only involved as witnesses without getting proper compensation³⁷.

A fairer formulation alternative could include giving judges the authority to order the perpetrator to provide direct compensation to the victim as part of a criminal verdict. In addition, it is necessary to consider the application of additional penalties in the form of social work whose results can be used for the benefit of victims or the wider community. This approach not only provides a deterrent effect for the perpetrators, but also contributes positively to the recovery of

³⁵ Muhammad Kamarulzaman Satria, Hudi Yusuf, (2024). The juridical analysis of the novelty of health worker protection is reviewed based on Law Number 17 of 2023. *Journal of Intellectual and Scholars of the Archipelago*, Vol. 1 No. 2, 2441-2452.

³⁶ kepri.kemendiknas.go.id

³⁷ <https://repository.unissula.ac.id>

victims and the community. Changes to the article should also include adjustments to the principle of material legality, which not only relies on written regulations but also takes into account the values of justice that live in society. This is important to ensure that criminal law not only provides legal certainty but also reflects the sense of justice felt by the community³⁸.

In addition, there needs to be a clearer and more operational mechanism in determining whether an act is harmful or detrimental to the community, as well as who has the authority to determine it. This is important to avoid different interpretations and ensure consistency in the application of the law³⁹. It is also important to integrate a restorative justice approach in the criminal justice system, where judges are given the authority to prioritize justice over legal certainty. Factors such as the perpetrator's motives, social conditions, impact on the victim, and the value of justice in society must be considered in the sentence⁴⁰. By reconstructing Article 440 based on the value of justice, it is hoped that a criminal law system can be created that not only provides legal certainty but also fulfills a sense of justice for all parties involved, both victims and perpetrators. This is in line with the legal goal of achieving substantive justice that benefits the wider community.

CONCLUSIONS AND SUGGESTIONS

The weakness of Article 440 of the Criminal Code lies in its approach which is still predominantly retributive, where the main emphasis is on imposing punishment on the perpetrator without adequately considering rehabilitation for the victim. This provision does not fully reflect the principle of restorative justice that is now increasingly relevant in the modern legal system. As a result, victims of crimes often only serve as

witnesses, while their right to compensation or redress is not an integral part of the judicial process. This condition has the potential to ignore the main purpose of criminal law, which is to create a balance between legal certainty, justice, and utility. To overcome these weaknesses, the reconstruction of Article 440 needs to be carried out by adopting the principle of restorative justice. One form of fairer reconstruction is to give the judge the authority to order the perpetrator to pay compensation to the victim as part of a criminal verdict. In addition, this article can also be strengthened with additional penalties in the form of social work, where the proceeds are used for the benefit of the victim or the wider community. Thus, punishment not only serves as a tool of state revenge against the perpetrator, but also as a means to restore the victim's condition and repair social relations damaged by criminal acts. Through this reconstruction, Article 440 not only provides legal certainty, but also reflects the values of justice that live in society. This approach will strengthen the position of victims in the criminal justice system, as well as encourage perpetrators to take direct responsibility for the impact of their actions. Thus, criminal law is not only a means of enforcing the rules, but also an instrument to create social harmony and strengthen a sense of justice for all parties involved.

Suggestion

As a step forward in strengthening legal justice, the revision of Article 440 of the Criminal Code needs to be carried out by clarifying the element of negligence, especially related to criminal acts of malpractice involving medical personnel. The current provisions still do not specifically distinguish between errors that are purely negligence and intentional.

³⁸ Khairul Ikmal (2023, September 11). Expansion of the Principle of Formal Legality to the Principle of Material Legality in the National Criminal Code: Controversy and Its Existence.

³⁹ Siswanto. (2023). Reconstruction of Prison Criminal Regulations in the National Criminal Code Based on Justice Values. Repository of Sultan Agung Islamic University Semarang

⁴⁰ <https://kepri.kemenkum.go.id/berita-utama/>

Therefore, the revision of this article must detail the categories of negligence, including the level of error that can be categorized as a criminal offense. With this clarity, the legal process will be more objective and fair, so that medical personnel are not necessarily criminalized for actions that are actually carried out with good intentions according to professional standards, but lead to unexpected results.

In addition, it is important to strengthen the legal protection mechanism for medical personnel in carrying out their professional duties. This protection can be done by establishing a legal mechanism that prioritizes settlement through the Indonesian Medical Disciplinary Honorary Council (MKDKI) before the case is raised to the criminal realm. Thus, any alleged malpractice will first be reviewed by medical experts to determine whether there is a violation of professional standards or only an inevitable medical risk. This measure not only protects medical personnel from excessive criminalization, but also maintains public trust in the health profession, while ensuring justice for disadvantaged patients

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